CONTINUING PATTERNS OF INEQUALITY
BETWEEN NORTH AND SOUTH IN OUTER SPACE

By
Edythe E. WEEKS*

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ABSTRACT

In this article, Edythe E. Weeks, a Ph.D. Candidate at Northern
Arizona University, sheds light on the formulation of a discourse coali-
tion centered around the call for re-drafting outer space law. In signif-
ificant ways this deployment of discourse and use of regimes of rep-}
resentation replicates the discourse on development. Borrowing from
Escobar's (1995) critique of development discourse, Weeks applies
Escobar's framework by using key concepts and the method of decon-
structing discourse, to the field of outer space "development". Weeks'
elucidates the similarity of process between past development scenarios
and outer space development. Similar to the development discourse,
the outer space discourse hinges upon cultural dominance. It is also built
upon the marginalization and disqualification of non-Western knowledge
systems about property ownership. If this exercise of cultural dominance
is successful - in calling for a re-drafting of outer space law in a free
market direction - it is likely to establish global structures serving to
increase the inequity gap between North and South. This exercise of
power will inevitably produce conflict. This case demonstrates how the
process of international law catching up to current political moods, is
silent. Therefore, it produces new structures, with little or no resistance
- initially.

* Northern Arizona University - Political Science Department - Flagstaff, AZ 86001 ee@dana.ucc.nau.edu
"... their words are softer than oil, yet they are drawn swords"

(Psalms 55.22)

INTRODUCTION

By applying a postmodern/poststructural analysis, and the method of deconstruction to the current discourse on outer space development, this essay shines light onto a phenomenon currently being established. Once the legal, political and economic structures are set in place, they will aid a new system of built-in inequities of wealth and power between North and South - thereby widening the inequity gap for centuries yet to come. I make the assumption herein that power on a global hierarchical scale exists. The nature of this power structure has changed at different points in time. Today, power in terms of "spacefaringness" (nations with the means and technology to "explore" and "develop" outer space territories) is concentrated within certain "developed" nations (the North). This paper does not point to capitalism per se, as the cause for the widening inequity gap between North and South within the context of outer space development. Rather, it is a certain form of capitalism - oligarchic capitalism that sets structures into place to insure that only a few entities are able to benefit from profit making ventures. Like Escobar (1995), I focus on the deployment of the discourse through practices. Specifically, I intend to show how discourse has a purpose - adile from exercising the freedom to speak. It has strategic political purposes, which if effective, will result in the implementation of certain practices. For example, international law, changes in international law, or space law. The process underway to reinterpret the Common Heritage of Mankind principle within the Outer Space Treaty of 1967 is problematic for several reasons: 1) the original intent of the Outer Space Treaty will be erased through the use of what Escobar referred to as discourse deployment and regimes of representation 2) the selection and use of certain concepts and assumptions is arbitrary, culturally and historically specific, and amount to a form of dominance dictated by marginalization and disqualification of non-Western theories of property ownership 3) this process excludes alternative regimes of representation and alternative practices and 4) this unilateral change in international law will inevitably create conflict.

A BLOSSOMING OUTER SPACE INDUSTRY

It is only a matter of time before the various policies and legislative initiatives currently in place (Cordes and Hertzfeld, 1997; Ferrandon, 1997; and Uwe, 1997) are able to work their magic - stimulating private market competition to encourage the creation of an advanced space transportation industry. Assuming that such an industry does "take off," similar to the airline industry, we could witness the birth of a new era in space travel, tourism, exploration and ultimately development. Structures, determining what this "development" will look like, are currently being constructed. In other words, international laws and economic, political, social and cognitive structures are in the process of being constructed. They will no: somehow arise on their own accord. The creation process is so subtle that most people are unaware of what is taking place. I imagine this has been the case throughout history when structural arrangements are in the process of being formed. For instance, institutions such as colonialism, slavery, "modernization" and "development" took decades to establish. Where were the effective critical voices while these structures were being created? Where are they now, while outer space is being "developed"?

THE CURRENT STATUS OF OUTER SPACE LAW

such activities exclusively (Steinhardt, 1997: 337). Steinhardt (1997) notes that there is a more skeptical perspective regarding these bodies of law and principles, which views the body of space law as an "aspiration rather than recognizably law-like" (Steinhardt, 1997: 337).

The Outer Space Treaty

The Outer Space Treaty of 1967 - brainchild of the United Nations - was the first effort towards regulating activities occurring in outer space. This treaty established several principles of international law, therefore, it is considered the most important treaty in the field of space law. Moreover, it incorporates the principles of peaceful use of outer space, cooperation between space faring nations and the extension of the rule of law into outer space; it is also "considered the cornerstone of international space law and the progenitor of the legal theories which found fruition in the four agreements following it" (Berkeley, 1997: 3). In addition, as Cook explains:

The Outer Space Treaty provides several overarching principles meant to guide space exploration and exploitation: outer space should be reserved for peaceful purposes; international law applies to space activities; space should be free for exploration and use by all States; and space is not subject to national appropriation. This latter principle is the Common Heritage idea, albeit in slightly different language; it represents the extension of the envisioned new world order into the final frontier. Declaring outer space and the celestial bodies therein a res communs was intended to forestall any possibility of Earth-style colonialism being extended into outer space (1999: 72).

More specifically, the Preamble of the Outer Space Treaty opens with the following language:

Inspired by the great prospects opening up before mankind as a result of man's entry into space, Recognizing the common interest of all mankind (emphasis added) in the progress of the exploration and use of outer space for peaceful purposes, Believing that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development... (emphasis added).

Article I of the Outer Space Treaty specifies the three principles relevant to exploitation of the moon and other outer space resources:

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development (emphasis added) and shall be the province of all mankind (emphasis added). Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies (emphasis added). There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international cooperation in such investigation.

Article II of the Outer Space Treaty states:

"Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty (emphasis added), by means of use or occupation, or by any other means."

The concepts, as emphasized above, which are contained in the Preamble, Article I and Article II, are explicit, clear-cut and straightforward. These concepts form the basis of the Common Heritage Doctrine as applied to outer space. According to the Outer Space Treaty, therefore, "outer space should be considered not as res nullius, but as res communes" (Cook, 1999: 20). Moreover, Article 6 underlines the treaty's incorporation of customary international law and the United Nations Charter, by specifically stating that:

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State party to the treaty.

The Common Heritage of Mankind Principle

Most definitions of the Common Heritage of Mankind principle (hereinafter referred to as the CHM principle) contains five key elements: 1) the area at issue is not subject to appropriation; 2) all countries must share in management of the resources; 3) there must be an
actual sharing of the benefits which stem from the exploitation of resources derived from the area at issue; 4) the area must be dedicated solely for peaceful purposes; and 5) the area must be preserved for future generations (Heim, 1990: 827). The CHM principle appears in both the Moon Treaty and in the Convention on the Law of the Sea. While not as specifically stated within the Outer Space Treaty nevertheless it forbids any exercise or claim of property rights in outer space. The Moon Treaty strictly forbids any appropriation of outer space resources, rather than treating outer space as the common property of all nations. The Common Heritage questions raised by the Outer Space Treaty become much more specific, and much more problematic, in the Moon Treaty. The Moon Treaty is said to "reemphasize the basic provisions contained in the Outer Space Treaty" and to be the "most recent attempt to address new problems in outer space law" (Husby, 1994: 367). For instance, Article 11, Paragraph 1 of the Moon Treaty reads as follows:

1. The moon and its natural resources are the CHM (emphasis added), which finds its expression in the provisions of this Agreement, in particular in paragraph 5 of this article.

The Moon Treaty goes further by defining the Common Heritage concept in more detail and by imposing specific obligations on the parties engaged in the exploration and/or exploitation of outer space. Unlike the indirect reference to the Common Heritage doctrine in the Outer Space Treaty, the Moon Treaty explicitly designates the moon and its natural resources as part of the CHM. This is the main reason that the Moon Treaty is much more controversial than the Outer Space Treaty and has not gained widespread acceptance (Heim, 1990). The seven countries who have ratified the Moon Treaty do not possess the technology needed for outer space exploration (Heim, 1990). Outer space, the moon, and other celestial bodies are considered to be beyond national appropriation by any nation in accordance with these international treaties. However, today many are beginning to deploy the argument that this line of thinking is no longer applicable, since the outer space industry is becoming commercialized and privatized on a global scale. The Outer Space Treaty of 1967 and its progeny, including the Moon Treaty (1979) have undergone recent challenges due to the CHM Principle clause contained therein, which states that any outer space discoveries including property or celestial bodies shall be shared by the international community. The CHM doctrine was derived from the Roman law concept, res communis, which states that certain property shall be treated as community property - it cannot be owned by any person(s), states, any other entity or combination of entities. This concept is at the heart of the laws and treaties governing activities involving the Antarctica, the high seas, deep seabed, and outer space.

The Current "Debate"

The Common Heritage of Mankind doctrine has been the subject of controversy in several arenas: outer space, the high seas and the Antarctica. This doctrine is viewed as problematic to developed countries because it is viewed as "demanding a forced transfer of benefits in the name of equity and the legal uncertainty" (Cook, 1999) - regarding property rights and technology transfer. Nearly all of the industrialized nations have come to oppose the CHM principle, while developing countries have generally aligned with it and with the treaties incorporating this doctrine (Cook, 1999). According to the literature on this issue, the North's interpretation of the CHM principle, is quite different from the South's interpretation. The discussion on the differing interpretations has left a trail within the literature, which is mostly one-sided (See generally, Berdey, 1997; Keefe, 1995; Twibell, 1997; Hoffstadt, 1994; and Husby, 1994). Essentially all of the discourse on the "debate" (usually only the pro-reinterpretation of space law position is argued) ultimately argues or concludes that that outer space development, as a potential new capitalist industry, will never develop without financial incentives and private business competition. This debate within the literature, only mentions or imagines what opposing voices would argue. Usually these suppositions are pitted within the text of argument in such a way that they cannot be respected or taken seriously. In essence, most argue that investors will not invest in the industry if profits are substantially cut down by the mandatory sharing with the rest of the world.

One theorist (Rana, 1994) argues that the global community needs to do something today in order to prevent the exploitation of common resources from being monopolized by developed nations, since only the developed nations have the necessary technology and finances, to develop outer space resources. He argues in an attempt to "revalue" existing international space law by establishing a significant role for the CHM principle in outer space activities. Rana reiterates that outer space is the "province of all mankind", and points out that "alternative CHM interpretations advanced by the developed and the developing nations are, at best, self-serving, and at worst, forbidden by international law. His view is that international outer space law should continue to go unquestioned, and calls for a view of the CHM principle which will "avoid the semantic disputes common to the Moon Treaty and the Law of the Sea Convention". Most importantly, the CHM interpretation elucidated by Rana (1994) is described as being "free of the social and economic biases of the developed and the developing nations' current CHM positions".
Other than Rana’s (1994) position, the discourse on outer space development is replete with the assumption that developed nations object to a literal interpretation of the CHM principle, and believe it discourages development of resources. Most assert that the states with the technology to exploit resources should determine what is equitable, and they assert that developing nations want the CHM principle to be allowed to provide collective ownership rights. The reluctance of most developed countries to embrace the CHM stems from the failure of the doctrine, to account for the human need to be rewarded for one’s efforts (Keeffe, 1995). This line of thinking assumes that the Common Heritage doctrine should be treated as the functional equivalent of a means of re-distributing property, wealth, and technology derived from the res communis territory (Reynolds, 1992). Instead of acknowledging that the developing nations’ position might be legitimate, their position is treated as proof of backwardness which can only be solved through increased understanding of the principles of economic rationality.

The reasoning goes that for the developed countries, res communis should be (universally) interpreted to permit possession of a property right when a person has added the value of his labor to the property. This ideological concern is rooted in Lockean theory of property rights. There is also the “rational” economic motive - to recover the costs invested and return a profit to finance future activities (Cook, 1999) – which is often proffered as the bottom line. Typically, the CHM principle is viewed as a “tax on success” suffered by countries possessing the technical and financial capability to exploit resources in the deep ocean or in outer space, thereby diminishing profits and discouraging the development of CHM territories (Cook, 1999). Those objecting to the CHM interpretation argue that to sacrifice economic “efficiency” in the name of “equity”, as the Common Heritage doctrine apparently requires, constitutes a form of “socialist internationalism” (Benko and Schrogl, 1997). This sticky point over the different ideological interpretations of the CHM doctrine is essentially treated as though it is a conflict between capitalist versus socialist of entitlement to ownership and property rights (Husby, 1994; Cook, 1999).

**APPLYING ESCOBAR’S (1995) THEORETICAL FRAMEWORK TO OUTER SPACE DEVELOPMENT**

The causes of inequity gaps between North and South are usually hidden or seemingly invisible while the creation process is taking place. As an historical pattern, typically, it is only after power has been exercised, and power structures have been put into place, that theorists and critics are able to start complaining about situations which have transpired. This paper extends Escobar’s insights into postcolonial “development” situations over into the realm of outer space discourse, and it spotlights an active example of discourse deployment (Escobar, 1995) in midflight as it is occurring in the area of outer space development. Escobar seems to wrestle with the issue of who has power, and critiques Said’s Orientalism by using Homi Bhabha’s quote “there is always in Said, the suggestion that colonial power is possessed entirely by the colonizer, given its intentionality and unidirectionality” (Escobar, 1995: 11 citing Bhabha, 1990: 77). Yet, in analyzing Sikkink’s (1991) differentiation between her institutional-interpretive method from “discourse and power” approaches, he argues that a “history of ideas” approach “pays attention to the internal dynamics of the social generation of ideas in ways that [the study of discursive formations] sometimes overlooks (thus giving the impression that development models are just ‘imposed on’ the Third World, not produced from the inside as well)” (Escobar, 1995: 228).

Escobar (1995: 228) further points out that the “history of ideas” approach “tends to ignore the systematic effects of discourse production, which in important ways shapes what counts as ideas in the first place”. The study of the case of outer space law, provides a uniquely clear view on this point. It elucidates the nature of power – at least the type of power which derives from discourse production. More specifically, we are able to see that the issue is not whether discourse production produces systematic effects, nor is it whether discourse production infects the internal thought mechanisms through the bottom of hierarchical global structures. What the outer space law case demonstrates is that discourse production mechanisms are allowed to have power and to exercise power in the form of instituting concrete practices because when the wheels are set in motion, they usually go unchallenged, until well after new structures have been institutionalized.

**Deconstructing the Outer Space Discourse**

Economic rationality is seductive. Many have contributed to this literature by making the point that since outer space development has shifted to the private sector, space law must change in order to be consistent with free market principles (See generally, Berkley, 1997; Keeffe, 1995; Twibell, 1997; Hoffstadt, 1994; and Husby, 1994). This rhetoric is often backed by supporting arguments that only those who have worked hard, contributed much or risked something should be entitled to share in the profits. In other words, the dominating voice within the outer space literature argues that developing nations have their hands out demanding for a share in the profits of outer space.
without contributing anything. These overlapping assumptions seem to make sense, until we deconstruct them. Once we do we can see that, as always, there was a bargain for exchange in the international treaty negotiations resulting in the Outer Space Treaty, the Moon Treaty and the three other treaties which make up space law. As with the Law of the Sea Treaty conventions, in the making of the space law treaties, the developing nations signed over their rights to outer space and agreed to have the territory be viewed as a commons area. This was the agreement in order that developed nations might have free reign over outer space. Similarly, this type of agreement was reached with respect to the high seas. In exchange for this agreement, the developed nations agreed to share the benefits derived from outer space exploration with the developing nations.

Instead of an attitude of willingness to listen to contrasting views, there exists an attempt to discredit and to dominant views that are inconsistent with the free market perspective. A discourse coalition has deployed discourse in order to annihilate opposing viewpoints before they even begin to immerge. This is done through what Escobar refers to as regimes of representation. These processes rely on existing stereotypes, connotations, social constructions and binary dualisms such as: developing nations are backward and too traditional to be deserving of the benefits of “science”. As Said (1981, 1997) put it, “no interpretation is without precedents or without some connection to other interpretations” (at 163).

**Deployment of Discourse as a Political Strategy: The Battle for Outer Space**

One example of the representations put forth by the discourse coalition formed to promote the ideology that space law needs to be changed to a free market direction is found within Berkeley’s article. Berkeley (1997: 2, 10) argues that “the current public law regime in outer space retards private activity in space” and that the primary assumption is being that “these treaties block development”. In support of this argument, Berkeley explains that the field of space law was the product of the space race between the Soviet Union and the United States, as evidenced by the language contained within the key instruments which were negotiated mainly by the United Nations General Assembly and its Special Committee on the Peaceful Uses of Outer Space? Berkeley (1997: 2) puts forth the rationale that the original intent of outer space law was to regulate and determine liability for actions taken by governments or their agents in outer space – primarily to prevent or deter them from “secretly militarizing outer space”. Berkley further argues that:

Space law as it is contained within “Conventions, Agreements and United Nations General Assembly Resolutions were not designed to foster utilization and exploitation of space resources, or to encourage private entities to harvest solar system resources and make them available to Earth. Instead, the United Nations General Assembly’s deliberative process balanced the fears and security needs of the superpowers (emphasis added) and their alliances against the anti-colonial feelings and economic fears (emphasis added) of the Non-aligned Movement.” (Berkeley, 1997: 2).

These emphasized phrases are loaded with assumptions, buzz words capable of triggering storehouses of pictorials laden with social constructions, stereotypes, “legitimizing narratives” (Appiah, 1997), and subtle unspoken support for arguments. In other words, borrowing from Escobar (1995) this segment of text demonstrates that the process of discourse deployment is much like the dropping of a missile in order to exercise power over a conflict. The outcome of this exercise of power, is to get those reading the literature in this field to accept this ideology as truth and therefore to be mentally positioned to automatically reject alternative viewpoints. There is nothing explicitly written in the text which states that the Cold War paranoia is now over, or that Third World nations are making demands that they do not deserve. Yet, it is difficult for the reader not to go away without imaging these scenarios. Of course, the bottom line is to sell the argument that existing outer space law is ill equipped to service the needs of the bourgeoning field of commercialized outer space activity. This is the power of regimes of representation. In this example, they carry the power to subtly convince the reader that existing space law is now obsolete. Since this is carried out primarily through non-explicit means, the reader believes s/he is drawing their own conclusions about this issue. Berkeley (1997: 23) specifically sets forth, the following:

Because of its genesis in Cold War Superpower considerations of national security and the neutralization of any potential advantage that the adversary might gain, space law has a variety of substantial flaws that hobble private initiatives by businesses or individuals. Although there is a good deal of “slack” in the current body of five major treaties governing space law due to the inherent inability of a large body of States to agree upon principles that might confer advantage on adversaries or rivals, the treaties still impose substantial limitations on private enterprise in space.
In its role as principal space power and expert, the United States has begun innovatively using its domestic law to fill in the gaps left by some of the purposeful vagueness of the treaties. However, it has already or will soon reach the limit of innovation before its activities begin to threaten its trading partners and rivals for the exploitation of space resources.

The second example of discourse utilizing this line of argument—that a new era of space commercialization has ushered in the need to change the existing obsolete space law—is put forth by Hoffstadt (1994: 45-46). He argues that:

The moon possesses minerals, which could help supply the earth with limitless energy, if only they could be reached (emphasis added). Because governments have relinquished their role as leaders in the space industry, private enterprise has taken their place. However, lunar missions require enormous amounts of capital, which require investors, who demand among other things, a stable legal environment (emphasis added).

Until now, the Moon Treaty's provisions, especially its language declaring the minerals of the moon the "CHM." (emphasis added) have been too ambiguous to create a stable legal environment. Proposing a regime which clarifies this amorphous concept (emphasis added) would create the necessary stability. In creating the regime, both the interests of private enterprise and the developing countries who control the international legal environment must be addressed (emphasis added).

The proposed regime accounts for both of these concerns and can be adopted either by the 49th General Assembly or by other means. If it is accepted, investors will find comfort instead of uncertainty (emphasis added) in the skies. With such incentives to invest, private industry will be able to raise capital (emphasis added) and commence lunar mining missions. If successful, the Moon Treaty might be a model for future treaties so that the moon is not the final frontier, but only the first.

More specifically, summing up the points and assumptions as emphasized above, Hoffstadt (1994) treats obtaining outer space energy and minerals as being the privileged issue. For him, these issues take precedence over issues such as inevitable international conflict due to politically forced reinterpretation of the CHM principle. Also, Hoffstadt's statements reveal that he also privileges the obtaining of outer space energy and minerals over the rights of developing nations, which were agreed upon and solidified through legally binding treaties. This is not explicitly stated. But it is the message that is found between the lines of the text. Der Derian and Shapiro (1989: 4) refer to this as pointing to the space between "the intertexts constructed between knowledge and power in international relations, between the margins and the body of international theory, between textual politics and world politics, and most significantly for the issue of war and peace - between indigenes and aliens." They also explain that this "approach taken can be loosely constructed as postmodern and poststructural, in the sense of [the] organizing strategy is to deconstruct or denaturalize through detailed interpretation the inherited language, concepts, and texts that have constituted privileged discourses in international relations" (Der Derian and Shapiro, 1993: 4).

In taking this approach, I hope to disturb the habit of thinking that a unilateral change in space law is in order, without more consideration being given to other considerations. Hence, I am alienating language that would otherwise be taken for granted as truth and I am exposing hidden oppositional categorical hierarchies. A textual analysis reveals another assumption—that a private enterprise is guaranteed to blossom, and investors are guaranteed to invest in commercial outer space venture, if only the international community would dispense with or willfully agreed to ignore the "amorphous concept" of the CHM principle. This represents an exercise of power in the form of discourse deployment, especially when you consider that this argument is held out until the very end—in the conclusion. Prior to presenting his bottom line conclusion, Hoffstadt (1994) does three things in this article which have the effect of setting missiles.

With respect to the setting of the missiles, first, at the beginning of the article, the author quotes a line from Act 2, Scene 2 of William Shakespeare's, Romeo and Juliet: "O! I swear not by the moon, the inconstant moon (emphasis added), That monthly changes in her circled orb, Lest that thy love prove likewise variable" (Hoffstadt, 1994: 1). Immediately following this quote Hoffstadt (1994: 1) states that "for centuries, poets and playwrights have used the moon as a source of inspiration and as a symbol of romance" (emphasis added). At first glance I thought "this has nothing to do with his argument"—that the global trend towards space commercialization authorizes a change in space law. However, after re-reading and deconstructing the article I began to view the use of the Shakespearean quote as a discourse strategy, one with a very powerful psychological effect. On one hand, it serves to credit the author as a "learned" scholar, and as being one who is familiar with the "great" books or with classic literature. On the other hand, it sets the stage for poising the reader's mind to discount "romantic" notions about
the outer space. After all, for Hoffstadt, the commercialization of outer
space development is the only stance that is sensible. What’s wrong with
this? Absolutely nothing. Instead, it serves as a good example of how
the literature speaks of the reluctance of most developed countries to
embrace the CHM stemming from the failure of the doctrine to account
for the human need to be rewarded for one’s efforts (Keeffe, 1995). And,
it treats the Common Heritage doctrine as the functional equivalent of a
means of re-distributing property, wealth, and technology derived from
the res communis (Reynolds, 1992). Instead of acknowledging that the
developing nations’ position might be legitimate, their position is treated
as a backwardness issue. As the reasoning goes, developed countries
interpret res communis as permitting possession of a property right
when a person has added the value of his labor to the property. This
ideological concern is rooted in Lockean theory of property rights but
there is also the immediate economic motive to recover the costs invested
and return a profit to finance future activities. For the countries possessing
the technical and financial capability to exploit resources in the deep
ocean or in outer space, mandatory benefit-sharing is viewed as a
"penalty on success" - diminishing profits and discouraging the develop-
ment of Common Heritage resources. The negative effects of the
Common Heritage doctrine are not restricted to the developed countries.
Those objecting to this interpretation argue that to sacrifice economic
efficiency in the name of equity, as the Common Heritage doctrine
apparently requires, constitutes a form of "socialist internationalism"
(Benko and Schrogl, 1997). This sticky point over the different ide-
ological interpretations of the CHM doctrine is essentially treated as though
it is a conflict between capitalist versus socialist of entitlement to own-
ship and property rights. The goals of the developing nations are framed
in terms of "equity"; whereas, the developed nations treat the pivotal
issue as one of "efficiency" in terms of a cost benefit analysis. Stone’s
(1997) political reasoning approach sheds light on the issue of whether
distinct paradigms actually exist. Based upon this type of rationale, I
argue that what is going on between the pages of outer space discourse
and the "debate" are "policy decisions or policy analysis exercises" driven
and fueled by "partisan political motives" and/or purposes (Stone,
1997: 375). Further borrowing from Stone’s approach, I argue justifying
concepts such as "equity" and "efficiency" are no more that human
constructed categories. This argument is meant to spotlight the second
missile planted within Hoffstadt’s argument. In building his argument,
Hoffstadt (1994: 4) treats as "fact" the following bit of information:

Although commercial entities have both the governmental sup-
port and the technology to make exploitation of the moon’s
resources a reality, they currently have as much chance of

actually reaching the moon as the poets who dream about it.
Any company planning to mine lunar minerals will require
enormous amounts of capital from investors. Before making
the massive capital investments needed to exploit the moon, pri-
ivate investors will insist on three conditions. First, they need the
potential to earn profits. Second, in such a technology-based
industry, they need to make an attractive return on their research
and development investment. Finally, and most crucially they
require a stable legal environment (both actual and perceived).

This sounds logical. However, it is only logical according to one
mode of thinking - economic rationality. It completely shuts out any
alternative interpretations, insights or perspectives. This is an impor-
tant point to note because most international policy makers revere economic
rationality. Therefore, it seems highly likely that this line of thinking and
discourse deployment will be perceived as the most "reasonable" or the
most sensible view. Due to the way discourse production and the
psychological, social, political, legal and economic forces are structured,
power and policy decisions are most likely to be rigged to slant in favor
of this exampled "power-knowledge nexus" Said (1979). This serves as
an example of how subtle an exercise of power can be - muscles get
flexed and very few people are cognizant of what happened. The third
strategy that Hoffstadt (1994) deploys is to provide certain points per-
taining to developing countries and to use certain concepts, which serve
to perpetuate pervasive existing social constructions and stereotypes.
In building his argument, Hoffstadt (1994: 35) uses the concept "Agenda
Items - Re-Distribution of Wealth," to explain his position that "develop-
ing countries want the developed nations to assist them financially in
their efforts to catch up."
For example, Hofstad (1994: 29) puts forth a section entitled "The Power of the Developing Countries" he continues to build his argument by making a series of points. He sets forth the following:

The developing countries as a group in the United Nations wield tremendous power. Wherever a system operates on a one-nation, one-vote system, the superior numbers of the developing countries have permitted them to prevail. Their influence has been felt in many areas of international law in the past few decades (Hofstad, 1994: 34).

The ability of this group of nations to so strongly alter these major international treaties illustrates that the developing countries are a force to be reckoned with - as well as understood (Hofstad, 1994: 34).

Many of the developing countries were colonies of the developed nations before World War II. When they gained their independence in the 1950s and 1960s, they found themselves at an extreme disadvantage in competing with the more established nations. In the early 1970s, the countries banded together with the purpose of removing this "disequilibrium" and created many documents proclaiming their new economic theory (Hofstad, 1994: 34).

The developing countries point to their status as colonies in many documents. In the Declaration on Establishment of a New Economic Order, they state that "[the gaps between the developed and the developing countries continues to widen in an[ int[ernational] system which was established at a time when most of the developing countries did not even exist as independent states . . . ."]10 (emphasis added by Hofstad, 1994: 35). In these documents, the developed nations (emphasis added) expressed their twin goals (emphasis added): (1) "the transference of wealth and power to the developing world,"11 and (2) "preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic cooperation whenever possible."12

There is a tension here. On one hand, Hofstad sets forth points to illustrate his assumption that the developing nations have been successful (perhaps too successful, for him) in asserting "their agenda". On the other hand, as set forth immediately above, Hofstad explicitly states (1994: 35) that it was actually the developed nations who expressed their goals to be transferring wealth and power to the developing nations and granting preferential treatment during the course of various negotiations. The idea that the strategic use of semantics occurs in the field of politics is not novel. For instance, with the context of the concept of the CMH principle, Buecking (1979) explains that "concealing or exaggerating facts, is as old as time or language itself. Being a vehicle for social communication, language always contains elements capable of intensifying feelings and emotions" (1979: 15). What is novel about the argument posed here is that I link this notion to the spotlight reality that treaty conventions and declarations which establish space law and the law of the sea are products of their time. This essay provides a detailed witness to the process through which issues of international law are parented by political and economic structures. Specifically those in place at the time certain treaties, declarations, policies or conventions are agreed upon. The points set forth in this essay elucidate a point made by Zang (1991: 761), "[ internacional law often lags behind changes in the underlying political and economic order it reflects." This seems to imply that international law is always in the process of catching up to hierarchical structural arrangements indicative of the most current political and economic structures. The specific form of international law, which we refer to as space law, is in the mist of this process. It is currently tilted in a CMH mode, however this status is in the process of being changed. It is foreseeable that space law will be reinterpreted and rewritten in order that a free trade direction may prevail. This is exactly what has already occurred, in an analogous situation - the Law of the Sea Treaty negotiations.

The Law of the Sea case is a testament to how political mood swings effect the drafting, reinterpretation, and the agreement or disagreement of terms contained within international treaty agreements. In that case, The U.S., as the world’s leading maritime nation, and due to concerns regarding environmental stewardship, overflight, navigational freedoms and interstate commerce issues, had more of a stake in the solidification of the treaty than any other nation. Since the 1950s the U.S. played a role as one of the leaders in the United Nations Convention on the Law of the Sea. However, during the Reagan Administration, the U.S. became the laggard who refused to sign; this was primarily due to free market principles and refusal to turn over seabed mining rights to an international agency Morell, 1992). Then, in 1994 the U.S. forced a renegotiation of the economic aspects of the treaty in a free-trade direction wherein a new regime was created which did not require companies to transfer their technology to a common international public enterprise. The treaty has been redrafted to allow U.S. companies to purchase deep seabed plots on a first-come first-
served basis (Galdorisi and Vienna, 1997). Most of the nations of the world have signed and ratified the treaty, including the United States. Once the terms were redrafted, in 1994 Clinton went ahead the signed the treaty. International law = Politics. And political climates change, so does international law.

Similarly, space law arose out of a different political mood – one that is drastically different from the one that predominates today. Therefore, we should expect to see a shift in space law to match the current global political hierarchy. One indicator that change is in the works is the 1996/1997 session of the UN General Assembly which resulted in the adoption of Resolution 51/122, by consensus. This Declaration is said to “finalize the agenda item which has become known as “Space Benefits’ in the UN/COSPAR Legal Subcommittee” (Benko & Schrogel, 1997). It is also said to “provide an authoritative interpretation of the cooperation principle in Article 1 of the Outer Space Treaty and should thereby put an end to North-South confrontation over the question of shaping the international order for space activities” (Benko & Schrogel, 1997). There are several clauses of the Declaration which support my prediction. For example, as summarized by Benko & Schrogel (1997: 142),

Paragraph 1 states: The space powers must not forget to integrate the developing countries into space exploration. However, this para. does not intend to force cooperation but instead focuses on an already broadly developed net of space cooperation.

Paragraph 4 indicates that: Effectiveness as a basic principle for international cooperation, thus providing an instrument for countering unrealistic demands (e.g. for the creation of a World Space Organization).

Paragraph 5 enumerates: The fields of international cooperation and makes clear again what efficiency means.

A third example of discourse deployed by this discourse coalition is Keele (1995: 370), who argues:

The current regime of outer space law is flawed (emphasis added) because it fails to adequately accommodate the interests of those persons and groups who will be investing their time and resources in the exploration and development of outer space (emphasis added). Space exploration and the exploitation of the resources found on celestial bodies will be an exorbitant undertaking for those who first venture beyond earth’s atmosphere. In today’s economy, in order for an investment of that magnitude to occur, the end result must have an enormously lucrative potential (emphasis added) with signs of stability and growth. The existing corpus juris spatialis prohibits sovereignty and ownership over outer space, limiting if not eliminating stability in outer space investments both for potential resource extractors and for settlers. Space Law currently also lacks a sufficiently well defined regime to adequately inform investors of how resources extracted from celestial bodies will be regulated and divided.

This argument is packed with several very interesting assumptions. For example, Keele (1995) makes the claim that “outer space law is flawed”. The suggestion here is that space law must simply be changed – perhaps even unilaterally, if necessary. This ignores the fact that treaties are like contracts. The signatories sit down and negotiate the terms and then if all parties agree to the terms contained therein, then they sign. Thereby they are agreeing to be legally bound by the terms of that agreement. Many are arguing that space law simply needs to be changed. This demonstrates the existence of a hierarchical power structure between North and South within the area of space law. This includes: international law, international relations, politics, economics and social acceptance mechanisms. In other words, there is the built-in assumption that treaties are made to be broken, but only if the breaching nations have power. This way breaches can be pre-justified through the mechanisms of power and discourse deployment.

This process carries the power to shape the ideologies and mental directions of the “agents” who will ultimately inform themselves of the situation by reading the literature on the topic, and then make decisions, based upon what they believe to be an objective analysis. It cannot be truly objective because the knowledge making process and products are inherently rigged-up to shape thinking processes in targeted directions. Deconstructing Keele’s (1995) argument further reveals a deeper layer of hidden bias. The statement that space law “fails to adequately accommodate the interests of those persons and groups who will be investing their time and resources in the exploration and development of outer space” assumes that only “those persons and groups who will be investing their time and resources” should be compensated. Therefore, it further implicitly assumes that developing nations are not to be included within this category. Again, this ignores that the treaty negotiation process involved a bargain for exchange. Upon the signing of the 5 space treaties, the developed nations agreed to certain terms, in exchange for the developing nations agreeing to certain terms.
In the Law of the Sea Treaty negotiations a similar forgetting occurred. The First United Nations Conference on the Law of the Sea occurred in 1958, and by the end of the 1970s, the Carter administration appeared ready to sign the treaty (Churchill and Lowe, 1983). The most interesting implication of this case, is the great forgetting that has occurred in the midst of the extended negotiation process of over forty years. Once the developing nations were "committed to make fundamental compromises, such as allowing the maintenance of transit passage regime through international straits to offset extension of the territorial sea to a maximum breadth of twelve nautical miles in order to appease both the U.S. and the Soviet Union" (Galdorisi and Vienna, 1997), they fell into an inferior bargaining position due to the passage of time and a great forgetting. Initially, the compromise was to get the developing nations to agree to international maintenance and control of territorial waters basically for the benefit of overflight and navigational freedoms to the benefit of the U.S. and the Soviet Union. Initially the acknowledged exchange involved the developing nations to allow such freedoms to the developed nations in exchange for technology transfers and a percentage of royalties for deep sea bed mining and extraction. However, through the passage of time as reflected in the literature, the developing nations were painted as undeserving beggars who were demanding technology transfers and royalties percentage on the basis of their irrational interpretation of the CHM doctrine. What I call the great forgetting involves the underlying tone contained within the Law of the Sea literature which does not acknowledge what the developing nations gave up during the process of these negotiations.

Most of the nations of the world were disappointed by the United States' policy which took the position that it would accept the overflight and navigation rights, without accepting the negotiated positions, written and agreed upon by the Nixon and Carter administrations relating to deep seabed mining (Nordquist and Park, 1983). Commenters have related the view that the failure of the United States to sign the treaty may have called the leadership of the U.S. into question. This is especially important with respect to the stance of environmental stewardship that the U.S. has taken. This concerns the management of fisheries in the high seas and in exclusive economic zones, costal and flag state jurisdiction over vessels for the purpose of preventing environmental disasters, the general ocean environmental obligations of the States, the right to conduct ocean science research; and the creation of a system for managing the exploitation of deep seabed minerals (Galdorisi & Vienna, 1997). The rejection of the Convention by the U.S. has also been viewed, as promoting the belief that unilateralism is a viable policy alternative when backed by military force. This sort of resentment could breed conflict. The same sort of forgetting is occurring in the process of calling for a "reinterpretation" of space law.

Another point that needs to be made regarding Keefe's argument, which is representative of the literature on outer space development, is that it acts as if it is supportive of capitalism and capitalist ventures. By deconstructing this line of argument we can see that it is only supportive of oligarchic capitalism. For instance, Keefe (1995: 370) argues that "[i]n today's economy, in order for an investment of that magnitude to occur, the end result must have an enormously lucrative potential with signs of stability and growth" and that "[t]he existing corpus juris spatialis prohibits sovereignty and ownership over outer space, limiting if not eliminating stability in outer space investments both for potential resource extractors and for settlers". This line of thinking serves to promote "the rich-get-richer legacy of turn-of-the-century primitive capitalism" (Gates, 1998: xi). In other words, the concept of ownership within this called-for scenario, would belong to only a few. The call for reinterpreting outer space law, is the call to re-establish historical patterns of ownership wherein only a privileged few will be able to claim the rights associated with outer space development. Further borrowing from Gates (1998: xiii) today's form of global capitalism appears to be on the verge of "winner take all economies, in which capitalism squeezes out rather than welcomes in the majority of people who are not capitalists in the sense of being successful entrepreneurs". Gates predicts that "unless capitalism is made to reward the majority, then the majority will turn against it" (1998: xiii). To reiterate, this situation will ultimately result in conflict.

By way of a fourth example, Risley (1998) makes several similar points in support of his argument that outer space law has to be changed. Some of these points are as follows:

The legitimate authority of outer space activities must change the space law to encourage the exploration of space, and to protect the interests of the explorers (emphasis added). The day when we either regulate the use of outer space or allow it to develop a "Wild West" character is fast approaching. With the exploration and near certainty that humans can live on the Moon, Mars, and the moons of Saturn and Jupiter, people are going to see the many benefits of colonizing these worlds. With vast riches that await us in the Near Earth Asteroid Belt, it is not going to be long before thoughtful entrepreneurs like Jim Benson (emphasis added) will build rockets and set probes to gather those riches. If we want to impact that colonization, the time to do so is now.
Since development of space may reveal resources well beyond those available on Earth, it is important to encourage private individuals and organizations to explore the heavens.

Although a viable and lucrative space industry exists, only a minute fraction of the industry's potential is reached as a result of uncertainty created by space law. The United Nations wrote the space law's prohibition of national claims to celestial bodies so that nations can build facilities in space and on celestial bodies and retain control and jurisdiction over objects and personnel sent to outer space, "including objects landed or constructed on a celestial body." As interest in exploiting material in outer space grows, the legislative authority governing activities in outer space, the explorers, or independent nations should develop rules of conduct and business standards for those engaged in exploration and development of outer space (emphasis added).

The better argument is that outer space should be a free enterprise zone (emphasis added), allowing those who claim property to own and develop it (emphasis added). As Mr. Jim Benson, Chairman of the Space Development Corporation, has said:

Space is a place and not a government program (emphasis added). A precedent to help establish property rights in space is needed. I believe the best possibility for a credible ownership (emphasis added) claim is to accomplish an unsubsidized, profitable commercial resource assessment (emphasis added) mission to a small planetary body like an asteroid, put privately financed scientific instruments on the surface of the planetary body and claim ownership. I believe such a claim can only be made to the public in general. I believe no entity currently has standing in space, and the only widely ratified space treaty, the Outer Space Treaty, has no mention of property rights. The widely unpopular and unratified Moon Agreement has no relevance. Publicly owned companies provide the ability for all shareholders to have a "stake" in the issue of property rights in space.

Risley (1998: 15) also states that "the Space Treaty is wrong. Free Enterprise must rule activities in outer space", and that:

As the federal government takes steps to encourage exploration and development of space, more entrepreneurs like Mr. Jim Benson will pursue projects to exploit materials in outer space (emphasis added). As was true with Marco Polo, Christopher Columbus, and the other explorers, the promises of opportunities in outer space are good motives to encourage efforts to learn more about the heavens. It is important for the law to say clearly whether individuals can take objects found in space for themselves.

The reader walks away after reading the text, believing that they themselves are drawing conclusions based upon "facts" or "truth". When in reality, the reader has been the receiver of conclusion seedlings which have been planted deep within the fertile ground of their psyches, fertilized by pervasive social constructions and naturalized belief systems that are linked to developing countries. Within the realm of policy analysis and planning, Fischer and Forester (1993) provide several concepts useful in explaining my interpretation of what is going on within the area of outer space development. The explain that "social constructs do not 'float' in the world; they can be tied to specific institutions and actors". They also explain that if a discourse is "successful - that is to say, if many people use it to conceptualize the world - it will solidify into an institution, sometimes as organizational practices" (Fischer and Forester, 1993: 46). They also point out that "[d]iscourse formation takes place on many different levels and in many different localities. In politics we deal with mixes of elements drawn from various discourses. As in the case of the effort to change space law, a 'discourse coalition is thus the ensemble of a set of story lines, the actors that utter these story lines, all organized around a discourse'. A discourse coalition approach suggests that politics is a process in which "different actors from various backgrounds form specific coalitions around specific story lines. I accept their rationale that "story lines" are being used as the medium through which actors try to 'impose their view of reality on others', suggest certain social positions and practices, and criticize alternative social arrangements" (Fischer and Forester, 1993: 47). In other words, the North's interpretation of the CHM principle is being privileged. In terms of what might be done towards solving the problem posed herein, arguments involving the general interpretation of the Common Heritage of Mankind principle might be applied to the outer space example. For example, the field of Critical Legal Studies offers the perspective that international legal thought [still] perceives "indigenous peoples as subjects of the 'exclusive domestic jurisdiction of the settler state regimes that invaded their territories and established hegemony during prior colonial era'" (Slijivic, 1997/1998: 16). Perhaps raising the consciousness regarding alternative perspectives of property ownership would improve the process of space law improvement. In addition, Vaughan (1996) argues that there are several interpretations of 'property', and he demonstrated that each interpretation has a rich history.

CONCLUSION
Ultimately, the issue of reinterpretting space law will be determined within the context of policymaking circles. Therefore, in terms of proposed solutions, it makes sense to look to solutions proffered within the policy analysis literature. Perhaps, one solution might be to reconstruct how policy planning and practice is perceived. For example, those making the decision on this issue could consider substituting the economic efficiency model with more of an "argumentative practices" - which Fischer and Forster (1993) define as an approach that "assumes that we [North and South] can influence each other, and that knowledge cannot be preformed. Taking this approach would mean going through a process of articulation of all perspectives on property ownership. Fischer and Forster (1993) further explain that this approach "places an emphasis on the learning process, the knowledge nexus and recognizing differences and then communicating across those differences".

This examination and deconstruction of outer space discourse has interesting implications for the study of development. Especially the way in which well-established practices and patterns of believing, thinking, behaving, and writing (creating discourse) are continuing. This has been a historical pattern - the creation dominant forms of "sociocultural and economic production of the Third World" (Escobar, 1995: 11). One form of power, the one Escobar calls discourse and apparatus, has made a certain perception of the Third World concrete. This apparatus has served as a tool to lubricate acceptance of certain unequal relationships between North and South. Furthermore, well-established binary dualisms are at work operating behind the scenes helping to perpetuate the acceptance of inequity gaps. For example, the belief that developing nations are backwards and lack the ability to develop to the same extent as the West because their lack of rugged individualism or lack of Protestant work ethic, or lack of economic savvy. These psychological processes, including the way in which identities are constructed, involve what Escobar calls regimes of representation.

In conclusion, the concept of capitalism has tremendous untapped potential. The same is true for outer space development. The thought of mankind being able to discover other planets on which to live, or tapping into a new source of abundant resources is exciting. And, it is something that I believe humans should strive to achieve. My concern is with the replay of the ugly parts of history. Outer space development is a prime candidate for a reenactment of the "wild west" or "scramble for Africa" scenarios, wherein an exclusive few are able to create property and land rights - in perpetuity. Rights otherwise belonging to mankind. These sorts of scenarios have always served as a breeding ground for conflict.

NOTES

1 The Outer Space Treaty has been ratified by approximately 98 states, whereas the Moon Treaty has been ratified by only 7 nations. Kurt Anderson Bacu, Property Rights in Outer Space, Journal of Air Law and Commerce 58, 1041 (1993).


3 Id.

4 Id.

5 Id.

6 The Outer Space Treaty, as ratified by approximately 98 states, whereas the Moon Treaty has been ratified by only 7 nations. Kurt Anderson Bacu, "Property Rights in Outer Space," 58 Journal of Air Law and Commerce 1041 (1993).


8 Berkeley (1997:23) explains that the "majority of space related litigation has occurred in the United States," and that therefore "there is an unplanned component to the innovations occurring in United States domestic law pertaining to outer space. Here in note 132, he sets forth a list of "the most important precedent" in the field.

9 Hoffstadt at note 172 quotes Rahn in stating "[The developing nations seek to] effect the transfer of wealth ... from the industrialized countries to the developing countries." Grier C. Rahn, "From Ice to Ether: The Adoption of a Regime to Govern Resource Exploitation in Outer Space, NW Journal of International Law and Business 7 1986, 727.

10 In footnote 169 of Hoffstadt's article he states that "The developing countries point to their status as colonies in many documents. In the Declaration on Establishment of a New Economic Order, they state that "[the] gap between the developed and the developing countries continues to widen in all international systems which was established at a time when most of the developing countries did not exist as independent States...... Likewise, the 1982 LOS Convention makes reference to prior colonial status. Original LOS supra note 86, at art. 160, paras. 2-86 referring to "other people who have not attained full independence of their self-governing status" (emphasis added, by Hoffstadt).

12 Hofstede cites The Declaration on Establishment of a New Economic Order dated May 9, 1974, 134 L.M. 715, 716. He also notes that the Law of the Sea Treaty Convention of 1982 also refers to prior colonial status between developed and developing nations – Article 160, Paragraph 20(b).


BIBLIOGRAPHY


Benko, Marietta and Schrogf, Kai-Uwe. “History and impact of the 1996 UN Declaration of ‘Space Benefits.’” Space Policy. 13 May 1998, 139.


Risley, Lawrence L. "An Examination of the Need to Amend Space Law to Protect the Private Explorer in Outer Space." Western State University Law Review 26 (1998), 47.


