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THE COMMON HERITAGE OF MANKIND: IMPLICATIONS FOR THE LEGAL STATUS OF PROPERTY RIGHTS ON THE MOON AND CELESTIAL BODIES

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ABSTRACT

The concept of common heritage of mankind (CHM) cannot be understood in terms of the Roman law concepts, as it is of recent origin, a product of confluence of the various cultures of today's world. It stands for community property, for community benefit, and for the benefit of the posterity. Equity is the basis for its understanding. The Antarctica model of resource management pays scant regard for CHM. The UNCLOS 1982 model is perhaps more tolerable, though not the ideal. In view of the increasing commercialisation of outer space, it is time we reiterated the objectives of CHM in outer space and established a community perspective of sharing of common resources of outer space.

I. CHM - A PERCEPTION

The concept of Common Heritage of Mankind (CHM) is of nascent origin in international law. It refers to things that should belong to, be shared and benefited by all mankind, and that should be protected and preserved for the future generations for similar enjoyment. This concept is not necessarily comprehensible or explainable through the `ancient' Roman law concepts such as *res nullius*, and *res communis*, because the community awareness to common problems and of the `heritage' content of commonly sharable resources and amenities (`global commons') is of modern origin on the international plane. This apart, the concept of CHM represents the aspirations and expectations of the

overwhelming majority of the contemporary international community. To this majority, comprising mostly the developing countries, resources of the international spaces must be shared equitably taking into account the special needs of these countries. Equality is

not necessarily equity, nor is equality of opportunity or access necessarily equity, where such opportunity or access is meaningless without technological and economic capability to utilise it. Furthermore, expansion of international community to encompass the countries of the Third World also brought with it the rich cultural and civilizational heritage of the ancient communities of Asia and Africa where the concept of community property has a special meaning and special connotation in contradistinction to the Roman law variations of *res communis*.[1] This CHM, to the countries of the Third World, connotes a common pool of facilities and benefits owned by the community but managed in such a way that they are distributed equitably to all its members and that they are in essence preserved for the benefit of the future generations as well. The Hindu law, for instance, speaks of the joint family property in this sense, the common pool of property, of life, and of relations, contributed by each member of the extended family building on what was inherited from the past, with each member legally entitled to a floating share in the property (the exact share crystallising only at the time of legal partition), and with the seniormost managing the affairs for "the benefit of the estate", often in consultation with fellow elders of the family. The rights and obligations in respect of the property transcend generations. The concept of CHM in respect of sharable resources and amenities or global commons is here to stay. From the concept of world cultural heritage, to that of common heritage of resources and to that of common environmental heritage, the CHM is still evolving. President Bedjaoui of the International Court even talks about the technological heritage of mankind.[2]

II. THE 1967 SPACE TREATY

The legal aspects of the CHM started taking concrete shape in the context of the Antarctica, in view of its global relevance. Some of the elements of the concept of CHM in the context of outer space began to emerge with the Outer Space Treaty of 1967 through the UN Outer Space Declaration of 1963, represented by the term "province of all mankind", and the transposition of the Antarctica principles. However, conceived as it was against the background of the Cold War, the main concern of the 1963 Declaration and the 1967 Treaty was prevention and elimination of Big Power conflict from the realm of outer space. Also, at the time of adoption of these legal instruments, the awareness of the natural resources content of the `use' of outer space, was unclear. Yet the Third World countries did place on record of what order their expectations of equitable sharing of outer space benefits would be[3] The Big Powers no doubt looked at the treaty mainly as one of the arms control/disarmament measures between the two Blocs - as is clear from the depository clause of the treaty.

With space transportation and space industrialization becoming near-term realities, it is now time to re-examine the problems and prospects for an Outer Space Resource Management Regime.

III. THE UNCLOS III MODEL

Although it was Ambassador Cocca of Argentina who first used the CHM concept in the context of outer space resources, the immediate concern of the international community was the need for insulation of the international sea areas from Big Power

conflicts and prevention of `sea-grabbing' by the technologically advanced countries. Hence the Pardo proposal of 1967 to proclaim the international seabed area and its resources "beyond the existing national jurisdiction" to be the CHM, which triggered the Third United Nations negotiations on the law of the sea (UNCLOS III). Pardoes dream, however, floundered at the altar of state sovereignty. As the law of the sea debates progressed, first the CHM's area and resources shrank with the international community recognizing the coastal states' claims for jurisdiction over vast expanses of the adjacent sea areas under the concepts of the Exclusive Economic Zone and the Continental Shelf, making the adjective "existing" preceding "national jurisdiction" redundant. The second, more sustained, onslaught of state sovereignty over the CHM came from the developed countries to whom the CHM meant the institutionalisation of the `menace' of international socialism (read communism), proliferation of international bureaucracy, and threat to their technological superiority - in short it was an anathema to everything the Western capitalist ideology stood for. The more powerful of these countries by their threat of boycott forced substantial compromises on the concept of CHM, as reflected in the 1982 Convention of the Law of the Sea. As if this was not enough, the new Reagan Administration in the United States retracted from a host of `gentleman's agreements', stormed out forcing further watering down of the institutional and operational aspects of the CHM.[4] Even the 1982 version of these aspects in fact amounted to merely a few breadcrums thrown at the Third World;[5] but the 1994 version represents a further sell out with new concepts leading to doing away with transfer of technology, which means little prospects for the great international CHM experiment to materialise into reality.

The UNCLOS III unfolded through three broad phases, namely (1) the adoption of the CHM Declaration in 1970, (2) initial divergence of views on whether an international machinery was necessary to manage the CHM, or whether the attempt at such a machinery was premature, leading finally to a broad agreement in principle on the need for an international machinery; and (3) operational aspects of the international machinery for the international seabed area.

The second phase of the negotiations revealed state positions varying between three standpoints, namely (a) that there was no need for an international machinery or that it was too premature at that point in time; (b) that there was an urgent need for it in order to pre-empt potential conflicts and to ensure equitable distribution of all potential benefits from the CHM, and (c) that it was desirable to implement the idea of international machinery first in response to the actual needs of seabed exploitation. From this flowed a further set of three main questions:[6] (i) Who should explore and exploit the resources of the international seabed area? (ii) What should be the *modus operandi* to control and regulate exploration and exploitation activities in the area? (iii) What resources and activities should be covered by the projected regime? Of these, the first question provoked two extreme views at the outset; one, that the international machinery should not engage in sea-bed exploration and exploitation activities; and the other, that the international machinery should have the exclusive right to engage in such activities representing the CHM. From the first view emerged a projected compromise view that the international machinery participate in sea-bed exploration and exploitation alongside states and their national entities, according to its financial and technical capability. And the second view softened into another compromise position that the international

machinery be given an option to participate in the seabed mining activities either directly or "in such other manner as it may from time to time determine" (which phrase opened the door for direct participation by states or state-sponsored entities under licences). Many countries of the Third World forcefully argued against the international machinery to be a mere licence-issuing body. Mexico asserted that there was nothing to justify a "system of operating permits which would assign to the legitimate owner the role of a mere spectator".[7] The Iraqi delegate even argued that "a purely mercantilist *lassez faire* system of licences" could not be reconciled with the concept of the CHM.[8] To Sri Lanka, the "ability" of the international machinery to carry out mining operations on its own represented "the highest expression of its control role as the administrator of the common heritage of mankind".[9] It would appear that the second compromise view (i.e. the fourth view) underlies the UNCLOS Convention 1982.

The divergence of views on the *modus operandi* to control the mining activities closely followed the divergence of positions on who should conduct the mining activities. The developing countries such as India proposed an International Sea-bed Authority with an Assembly of plenary powers and a small executive organ called the Council responsible to the former, and a seabed corporation with a legal personality of its own to operate as a business organisation within the general policies of the Assembly.

The third question, what seabed resources and activities should be covered by the emerging international regime, proved to be equally controversial. Should the international seabed regime concern itself with all the non-living resources of the seabed, or only with the polymetallic manganese nodules? Should it regulate all activities on the international seabed area or only mining-related activities? What was the impact of the principle of non-appropriation on the commercial interests in the recovery and marketing of the resources? It was finally agreed that the regime should only deal with mining-related activities. The principle of non-appropriation led to a distinction between "resources" *in situ* (all non-living resources) and "minerals" (i.e., "resources, when recovered from the Area"). While the resources were not subject to alienation, the minerals could be alienated and rights over them acquired by states or natural or juridical persons according to the regulations laid down under the convention or by the International Seabed Authority.

Differences of views, in the third phase of the UNCLOS III, then focussed on the basic conditions of seabed operations.[10] In other words, if the basic conditions were spelt out in great detail defining clearly the scope of the discretionary power of the Authority and the rights and duties of participants in the seabed activities with a disputes settlement mechanism, doctrinnaire debates would become merely academic. The result was Part XI of the Convention, with Annexes supplemented by the PREPCOM decisions and the 1994 agreement. Despite the onslaughts dealt by these "supplements" on the concept of CHM, there is no doubt that the CHM principles contained in Articles 136 to 149 of the Convention will provide guidance in the interpretation of the whole Part XI.

IV. THE ANTARCTICA MODEL

The draft Antarctica Minerals Treaty of 1988 has proved to be controversial despite the fact that it, like the Antarctica Treaty of 1959, swears by "the interest of all mankind". The questions whether it was

legitimate for the Antarctica Treaty parties to institute a mineral exploitation regime in the interest of all mankind, yet ignoring the claims of the United Nations to participate in the negotiations, or whether such a regime was compatible with the Antarctica Treaty of 1959 or the Law of the Sea Convention of 1982, may be relevant *per se,* but they need not arrest us here. The draft treaty, now shelved for 50 years since 1991, mainly envisages a licensing regime for "prospecting", "exploration" and "development" (i.e. exploitation) activities. The draft treaty defines "mineral resources" to mean "all non-living natural non-renewable resources, including fossil fuels, metallic and non-metallic minerals". The draft seeks to provide for policies and standards for environment impact assessment of the Antarctic and associated ecosystems, and atmospheric, terrestrial or marine environment, and of the global or regional climate or weather patterns. The institutional mechanisms envisaged include the Antarctica Mineral Resources Commission to be assisted by a Scientific, Technical and Environmental Advisory Committee, with the Commission empowered to establish an Antarctic Mineral Resources Regulatory Committee for each area identified for purposes of resource management. The draft treaty defines the rights of the operators and the powers of the treaty organs and provides for a disputes settlement mechanism.

V. CHM AND THE MOON TREATY

The drafting history of the Moon Agreement, 1979, has been well documented elsewhere.[11] Suffice it to note here that the treaty as finally adopted represents the consensus that while the moon, other celestial bodies and their resources constitute the CHM, the concept finds expression not only in the provisions of the treaty, but also in the international regime to be established when exploitation of the natural resources of these celestial bodies is about to become feasible. In fact, Article 11 of the Moon Treaty 1979 does three different things: (a) It anticipates the eventual establishment of an international regime for exploitation of the outer space natural resources; (b) It postulates four broad principles to which the new regime shall accord with.

Is the concept of CHM applicable in outer space without a future resource management regime? The answer seems to be in the affirmative for two reasons. First, a principle of international law may exist independent of any linkage with an international organisation.[12] Second, Article 11(1) of the treaty clarifies that the CHM encompasses not only the resources but the celestial bodies themselves and that the future resource management regime would only govern the exploitation of the natural resources of these bodies.

The moon treaty identifies "the natural resources" of the celestial bodies for exploitation. The natural resources *in situ* would be part of CHM and inappropriable. However, the Article 11(5) regime could provide for their recovery and alienability of rights in them. The treaty clarifies that the activities to be dealt with by the future regime to be agreed upon pursuant to Article 11(5) would relate to the exploitation of these natural resources. The future Article 11(5) regime will not deal with other uses of the celestial bodies, as other uses are not "natural resources" of the celestial bodies. Use of one of the celestial bodies as a stop-over or a further launching pad, or use of samples of substances from these bodies for scientific research purposes, will not amount to an activity relating to exploitation of the natural resources.[13]

While it is pragmatic to expect that

conceptually, the Article 11(5) regime will fall in line with the international seabed regime under the UNCLOS 1982, the former must, for its validity and legitimacy, embody provisions for fulfilment of the four CHM objectives laid down in Article 11(7), namely:

a) the orderly and safe development of the outer space resources;

b) their rational management;

c) expansion of opportunities in the use of these resources; and

d) equitable sharing of benefits derived from these resources.

Evidently, both the environmental and safety concerns as well as the equitable sharing of opportunities and benefits are underscored by Article 11(7), on equitable sharing of benefits two points may be noted: One, "benefits" are not necessarily confined to monetary benefits; they encompass all benefits of space resource exploitation, including those of technology. Two, equitable sharing should take into account both the special interests and needs of the developing countries, as well as the efforts of those countries which have contributed to the exploration of the celestial bodies.

In order to ensure these Article 11(7) objectives as against the ever-increasing commercialisation of outer space, a mere licensing body will not do. There is a need for an International Space Resource Management Authority with close linkage with the United Nations. One of the objectives of this agency should be to associate and encourage all interested states in space resource activities. Such a space resource regime would also need simultaneous strengthening of the space liability regime, the Registration Convention, the Rescue and Return of Astronauts convention, the intellectual property regime, exchange of information, transfer of space technology, and so on. Indeed, there is a need for international financing of space resource endeavours as well.

Will the Space Powers rise above their short term, narrow, Shylockian view of profits, and meet the challenge of the next millennium with magnanimity, compassion and camaraderie to the whole of international community?

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3. See Kartha, note 1, pp. 9 ff.

4. For more on this, see R.P. Anand, "UN Convention on the Law of the Sea and the United States", IJIL, vol. 24 (1984), p. 153.

5. For this view, see V.S. Mani, "The United Nations, Law of the Sea and the Developing Countries", in M.S. Rajan, et al (ed.), The Non-Aligned and the United Nations (New Delhi, 1987), p. 56.

6. See V.S. Mani, "Resources of the Seabed Beyond National Jurisdiction : Who Shall Exploit and How?", IJIL, vol. 14 (1974), p. 245.

7. UN Sea-bed Committee's Working Group Document, U.N. Doc. A/AC. 138/94/Add.), reprinted in Doc. A/9021, vol. II, Article 9(c), cited in Mani, note 6, p. 248, fn. 24.

8. See UN Doc. A/AC.138/SC.1/SR. 40, p. 116.

9. See UN Doc. A/AC.138/SC.1/SR. 43, p. 154.

10. V.S. Mani, "Basic Conditions for Sea-bed Operations", International Studies (New Delhi), vol. 15 (1976), p. 321. The debates had also led to studies of economic implications of seabed products on landbased economies. See Vathsala Mani, "Exploitation of Seabed Minerals : Some Economic Issues", India Quarterly (New Delhi), (1979), p. 54.

11. See, e.g., Carl Q. Christol, The Modern International Law of Outer Space (Elmsford, N.Y., 1982), pp. 246-341.

12. Nicaragua Case, ICJ Reports 1986, p. 14 at p. 105, where the ICJ held that the right of self-defence is a customary law right, despite the organisational linkage provided in Article 51 of the UN Charter and exists independently of the latter.

13. See also Kartha, note 1.