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FROM THE COMMON HERITAGE OF MANKIND TO COMMERCIALIZATION AND BACK AGAIN ?

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ABSTRACT

The principle common heritage of mankind was a great idea from the 60s to 80s. This principle has expressed in the first place the interests of developing countries. This principle was the first effort to improve the situation of developing countries in international treaties. The political and economic changes of 90s, including market-oriented approaches affecting the implementation part XI of the UN Convention on the Law of the Sea in the Agreement of 1994 .

As for the outer space these political and economic changes are expressed in the Declaration of 1996. This Declaration marks the end of the North-South debate on forced cooperation and transfer of resources. The developed countries will not grant financial benefit and technology to developing countries directly. But Space powers must not forget to integrate the developing countries into space exploration. The Declaration of 1996 provides in general the solution of relations between developed and developing countries. On the other hand, the question is the actual implementation of Declaration of 1996. Another question is the impact of these

principles on the common heritage of mankind in connection with the Moon and the other celestial bodies.

THE BASIC PRINCIPLES OF THE COMMON HERITAGE OF MANKIND

The idea of the common heritage of mankind (CHM) was expressed in connection with the sea bed beyond the national jurisdiction of the state in the UN Convention on the Law of the Sea of 1982 and in the Moon agreement of 1979.

There were especially developing states which emphasize this idea. There was in the first of place an equitable sharing of the natural resources taking into special consideration the interests and needs of developing countries.

There are the same and the different elements in both treaties. The Moon Agreement and the Convention on the Law of the Sea (LOS) do not provide for the clear content of CHM. The CHM is expressed in various provisions of both treaties. There are different opinions of the experts on this point. Similar provisions¹⁾ for the sea bed and the Moon are :

- 1) non-national appropriation of the sea bed and the Moon (art. 137 of the LOS Convention, art. 11 par. 2 of the Moon Agreement),
- 2) use of the sea bed and the Moon exclusively for peaceful purposes (art. 141 of the LOS Agreement),

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3) an equitable sharing by all states in the benefits derived from the resources of the sea and the Moon, whereby the interest and needs of the developing countries (art.160, par.2f of the LOS Convention, art.11,par.7 d of the Moon Agreement),

4) rational management of the resources of sea bed and the Moon (art. 150 b of the LOS Convention,art.11,par.7b of the Moon Agreement),

5) the protection of the environment of the sea bed and the Moon (art.145,147 of the LOS Convention,art.7 of the Moon Agreement).

There are some differences between both spaces. The provisions of the LOS Convention are more detailed than ones in the Moon Agreement. According to the LOS Convention is created specialized organization (Sea bed Authority). The Moon Agreement does not contain provision on a special organization or other body. States parties of the Moon Agreement undertake to established an international regime including appropriate procedures in the future. The LOS Convention also includes transfer technology provision (art.145). There is no provision in this question in the Moon agreement.

The difference is also in formulation of an equitable sharing by all states parties in the benefits derived from resources of the Moon and the sea bed. Both treaties take into account the interests of the developing countries. But according to the Moon Agreement a special consideration shall be given to the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon (art.11 par.7d,of the Moon Agreement).

The difference is also in scientific investigation. The Moon agreement provides for freedom of scientific investigation, the scientific investigation according to the LOS Convention is the part of the CHM.

THE COMMON HERITAGE OF MANKIND IN 90 S

As for the sea bed, the 1994 Agreement on the implementation of part XI of the LOS Convention has brought some changes.

The very important in this Agreement is the confirmation, that Area (sea bed) and its resources are the common heritage of mankind. The Agreement of 1994 provides for more advantageous provisions for developed countries than for developing ones. This Agreement takes into account the political and economic changes, including market - orientated approaches in 90 s.

As for the Moon, there is not any activity in this celestial body in 90 s. The provisions of the Moon agreement have not been changed or developed to the present time.

But we can take into account the changed rules concerning the sea bed and also the Declaration on international cooperation in the exploration and the use of outer space in benefit of all states, taking into particular account the needs of developing countries of 1996.

The Declaration regulates relation between developed and developing countries. According to the Declaration, the developed countries, "must not forget to integrate the developing countries into space exploration. However, this does not intend to force cooperation

but instead focusses on an already broadly developed net of space cooperation, bilaterally or through international activities like the UN space applications programme" 2). The developing countries interested in space activities have now higher incentives "to put their energies in a by own efforts well-prepared, demand pull, instead of waiting for a politically induced technology push" 3).

The developing countries themselves have to be active, but developed countries should assist in the activity of the developing ones.

The idea of the Declaration of 1996 concerning the more active developing countries could be used in general for the CHM in connection with the Moon.

THE FUTURE OF THE COMMON HERITAGE OF MANKIND

The CHM principle has been confirmed in the agreement of 1994 in connection with seabed. As for the Moon, the Moon Agreement has come into force in 1984. However, there are little state parties and no space power has ratified to the present time. On the other hand there is no activity in the Moon in these days. So other states will have enough time for ratifying the Moon Agreement.

The CHM in connection with the Moon depends on the future development. However, the CHM principle should remain in the regime of the Moon.

I can not agree with some authors who speak about failure of the CHM. I can not also agree with the opinion that the Moon agreement "should be thrown on the garbage

heap of history" 4) and that the Moon should be opened to the principle first come, first serve.

It is necessary to emphasize, that the CHM consists of several provisions (see above). Several of these provisions are very important for the future use in the benefit of all mankind (non national appropriation, rational management of resources, the protection of environment, peaceful use).

However, the most disputable point is the implementation and content of the equitable sharing principle. This principle is included in the both treaties (the LOS Convention and the Moon Agreement) in general.

Very important in the CHM is the non-appropriation principle. The Moon Agreement explicitly prohibits not only national appropriation, but also the property rights to the Moon and its natural resources in place (art.11 par.3 of the Moon Agreement). There is the danger that the Moon and its resources would be the object of private property claims in non-existence of the Moon Agreement.

As for outer space the principle of non appropriation is also included in the Outer space treaty of 1967 (art.II). The prohibition of private appropriation could be interpreted "through the terms by use, or by other means in art.II of the Outer space treaty of 1967. Thus art.II of the Outer space treaty prohibits both the exercise of sovereignty over outer space (including the Moon and) and also the creation of titles to property in private law" 5). However this prohibition is the matter of interpretation. This prohibition does not explicitly lay down in the Outer space treaty.

The Outer space treaty does

not solve the problem of the natural resources of the Moon, too. According to this Treaty every state or private person may appropriate natural resources without limitation.

But according to the CHM regime, the exploitation of the natural resources of the Moon will be implemented in compliance with the regime of the Moon. This regime will be established in the future, as such exploitation is about to become feasible (art.11, par.5 of the Moon Agreement).

As for the sea bed, the importance of the CHM is in the approval and regulation of activities in the phase of prospecting and exploration of the sea bed. The international regime for the Moon could regulate the activity on and in the Moon similarly.

The CHM also plays an important role in the protection of environment. The Moon Agreement provides for the more detailed provisions in this sense than the Outer space treaty. The protection of environment is important in all phases of the exploration and use.

The abolition of the CHM could lead to uncontrolled use of the natural resources of the the Moon and other celestial bodies by private persons. It may lead to harmful contamination and to the unrational use of natural resources.

CONCLUSION

The CHM principle may bring the benefit to the whole mankind. This idea of the 20 th century may be beneficial in 21 st century. The CHM could serve as one of the modalities resolving the global problems of the world . The need of solidarity

is expressed in the UN Millennium Declaration of the September 8 2000 ⁶⁾.

According to this Declaration : "global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most".

Nowadays, a commercial exploitation of the natural resources of the sea bed is not carried out. The exploitation of the Moon is not feasible , now.

However in the future the principle of equitable sharing of benefits derived from the sea bed and maybe of the Moon may solve some problems. It will depend on the willingness of especially developed countries.

REFERENCES

- 1) J. Ondřej, The Common heritage of Mankind in Internationale Law, Právník 6/1990, p.530-546
- 2) M. Benko, K. U. Schrogl, The UN Committee on the Peaceful Uses of Outer Space: Adoption of a Declaration on "Space Benefits" and Other Recent Developments, ZLW German Journal of Air and Space Law, 2/1997, p.232
- 3) Supra note 2, p.233
- 4) J. W. Benson, Space Resources: First Come First Served, IISL 1998, p.48
- 5) K. H. Bockstiegl, P. M. Kramer, I. Polley, Patent Protection for the Operation of Telecommunication Satellite Systems in Outer Space ?. ZLW, 2/1998, p.173
- 6) 55/2. United Nations Millennium Declaration