THE COMMON HERITAGE OF MANKIND AND MINING: AN ANALYSIS OF THE LAW AS TO THE HIGH SEAS, OUTER SPACE, THE ANTARCTIC AND WORLD HERITAGE

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Introduction

In 1830, Andres Bello, the great poet, classical scholar and international jurist in the Grotian mold from South America, wrote that things which could not be held by any one nation without affecting the interests of other nations were of the nature of an "indivisable common patrimony", which only permitted a regulated "usufructus", that is, a limited and non-exclusive right of use[1]. These were international "spaces"[2]. The early beginnings of the contemporary concept of the "common heritage of mankind" were foreseen by Bello, involving some form of international regulation of the exercise of that "usufructus" in the wider interest. According to his view, there were areas of the planet which should be set apart in common for the use of all peoples, which were not capable of being subject to claims of state sovereignty or ownership, but which were subject to certain defined rights of common use. The term "common heritage of mankind", or as is sometimes now used, the "global commons", was of course not then part of English usage in this sense. But Bello's description is capable in general terms of applying to at least some of the areas that are now said to come within these terms and which are examined in this paper.

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[1] Lennox F Ballah, "The Universality of the 1982 UN Convention on the Law of the Sea: Common Heritage or Common Burden", in *International Legal Issues Arising Under the United Nations Decade of International Law*, Dr Najeeb-Al-Nauim and Richard Meese. (Eds), (1995), 343-344 and n 17 thereto. Bello's principal work in this context was *Principios de derecho internacional* (*Principles of International Jurisprudence*), (1832).

[2] There is a considerable body of legal opinion which offers different explanations for the legal basis of such international "spaces". Some have favoured the "*res nullius"* or *"terra nullius"* concept, belonging to no-one, at least until effective occupation is achieved by any one person or body. Others have taken a *"res extra commercium*" or *"res publica*" approach, belonging to everyone in common and available generally for the non-exclusive enjoyment of anybody. The approach of Bello goes beyond this and requires a regulated right of non-exclusive enjoyment in the wider interest. The "common heritage of mankind" concept may in turn go beyond the Bello view, at least in so far as it may require some international institutional arrangements to administer the consequent international regulations, and in so far as it usually requires some or all of any benefit flowing from the exercise of that form of enjoyment to be passed in some way to mankind as a whole. See Lennox F Ballah, op cit, citing M G Schmidt, *Common Heritage or Common Burden*?, (1990), 32.

Central to such a "usufructus" in these areas is now the question of the right to explore for minerals and to mine those minerals and for any associated purposes such as the construction and use of pipelines, an issue that did not arise in Bello's day. As will be seen from the four examples chosen for examination in this paper, being deep sea mining under the High Seas, mining on the Moon and other celestial objects, mining in the Antarctic and mining in World Heritage areas, somewhat different and controversial approaches have in more recent decades been taken on this issue of mining, even though as between these four areas there are other commonalities.

At the time that Bello wrote, his concept could only have been applied in practice to the High Seas, which at that time were limited to uses such as freedom of navigation, the laying of cables and the right to fish, and this only as a result of then emerging state practice and international law. For many centuries before that, it had generally been admitted that the oceans were possible subjects of national appropriation, and such claims did in fact occur[3]. This was despite the view of the famous lawyer and international expert, Hugo Grotius, who in the 17th century maintained that the sea was "res communes", that is, belonging to all people and not being capable of state ownership. He later relaxed the strictness of this view in relation to the waters of the sea adjacent to a maritime state when his earlier view was contradicted by others[4]. But it took several centuries before the maritime limits of states were to be defined, leaving a residue of seas that could be included in the common heritage of mankind.

By the 19th century, the claims to sovereign rights over the High Seas had given way to a more reasonable approach consistent with international comity. National jurisdiction over the seas had come to be accepted as being limited to the width of the territorial sea adjacent to the coast, although differences of views arose as to that precise width. Beyond that, the High Seas were regarded as free and common to all mankind, for navigation and innocent use. They were an international highway that could not be appropriated or subjected to exclusive state sovereignty or jurisdiction (apart from jurisdiction exercised over the state's own vessels and over pirates, foreign vessels committing certain offences and, in the case of war, a belligerent's right to stop and search suspected neutral vessels)[5] The scope for the later adoption into international law of concept of the common heritage of mankind in relation to the High Seas, consistently with the views of Bello, but subject to later seaward extensions of the limits of exclusive state rights, is obvious.

International law is now clear on the legal status of the High Seas, in that it recognises that these Seas beyond areas of national jurisdiction are part of the common heritage of

[3] Earl of Birkenhead, *International Law,* (6th ed, 1927), 101-102.

[4] Brian Opeskin, "The Law of the Sea", in *Public International Law*, Sam Blay, Ruszard Piotrowicz and B Martin Tsamenyi (Eds), (1997), 325; Jon M Van Dyke, "Sharing Ocean Resources – In a Time of Scarcity and Selfishness", in *Law of the Sea: The Common Heritage and Emerging Challenges*, Harry N Scheiber (Ed), (2000), 3.

[5] Earl of Birkenhead, op cit.

mankind. What has been more controversial has been the question of the right to mine under the High Seas. This was not a matter that international law had to address until recent advances in technology made such mining a distinct possibility. The initial approach was to extend the width of seas over which the littoral state had juridiction for purposes of resource exploitation. This occurred firstly by developing state practice in extending their exclusive control of the resources of the adjacent sea out to their continental shelves, and later by express international agreement to like effect. Under the terms of the Continental Shelf Convention of 1958, states acquired the exclusive right to authorise mining under the adjacent sea out to the limit of the continental shelf, a considerable extension of state jurisdiction[6]. But still no legal right was expressly accorded to any state or person to mine beyond that under the High Seas. It has been argued that no such right existed even at international customary law[7], and that the position in this regard only changed with the express provisions of the Law of the Sea Convention of 1982. As will be seen, although the High Seas have come to be treated as part of the common heritage of mankind, mining is now permitted under the High Seas beyond national jurisdiction by that latter Convention in accordance with the international regime established by that Convention[8] plus a later Agreement[9], as discussed below.

The negotiations beginning in the 1960s and leading up to the adoption of the Law of the Sea Convention provided an opportunity for the elucidation of the concept of the common heritage of mankind. There had been no other in-depth debate on that concept up to that time. The notion of World Heritage areas, located within the boundaries of a particular state, but subject to a wider international interest, had still not emerged until the negotiation of the World Heritage Convention, adopted by UNESCO in 1972[10], and even then those areas were not expressed in the form of a part of the common heritage of mankind. Nor had much attention been given to the potential status of the Antarctic as being within the common heritage of mankind. The Antarctic Treaty had been finalised in 1959[11], freezing the sovereign claims of a number of states to various sectors of the

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[6] *Convention on the Continental Shelf*, adopted on 29 April 1958, see the *Seas and Submerged Lands Act* 1973 (Cth), Schedule 2 as it was prior to the *Maritime Legislation Amendment Act* 1994.

[7] Kenneth Kaoma Mwenda, "Deep Sea-Bed Mining under Customary International Law", (June 2000) 7(2) Murdoch University Electronic Journal of Law, www.murdoch.edu.au/elaw/issues/v7n2/mwenda72.html.

[8] Supra, 7-9.

[9] Supra, 9-10.

[10] *Convention for the Protection of the World Cultural and Natural Heritage*, adopted on 16 November 1972, see the schedule to the *World Heritage Properties Conservation Act* 1983 (Cth) before its recent repeal.

[11] *Antarctic Treaty*, adopted by the founding nations on 1 December 1959.

Antarctic, but leaving unsettled the exact legal status of the Antarctic[12]. Only the first Outer Space Treaty of 1967 had adopted an approach similar to the concept of the common heritage of mankind in relation to outer space and celestial bodies, but it was not expressed in those terms[13].

On 1 November 1967, Arvid Pardo of Malta spoke in the United Nations on the subject of the reservation of the sea bed and ocean floor beyond the limits of national jurisdiction exclusively for peaceful purposes. He addressed the question of the need for the use of the resources of the sea in the interests of all mankind. He spoke of "*the truly incalculable dangers for mankind as a whole were the seabed and ocean floor beyond present national jurisdiction to be progressively and competitively appropriated, exploited and used for military purposes by those who possess the required technology*". He also warned of the grave consequences that would flow from "*the competitive scramble for sovereign rights over the land underlying the world's seas and oceans, surpassing in magnitude and in its implications last century's colonial scramble for territory in Asia and Africa"*. In his view it would be an "*intolerable injustice*" to reserve "*the plurality of the world's resources for the exclusive benefit of less than a handful of nations*". He proposed new international provisions that would see such resources being declared the "common heritage of mankind"[14]. This language has now found its way into the United Nations system.

In this emerging global age, the logic behind Pardo's argument is now hard to refute. He made his comments at a time when historical forms of European colonialism were well and truly in retreat, and many third world nations had either achieved self-determination and independence, or were in the process of working towards that goal. By 1970, human beings had walked on the Moon, allowing many people on Earth to perceive, through pictures on TV and in the media, this planet as a small, fragile globe in the immensity of space. The world could be likened to a "*global village*"[15]. New developments in trade, science and technology were accelerating this process of globalisation. A concept which, not so long ago, would have seemed foreign and strange to most people due to the mental limitations imposed upon them by the prevailing concept of national sovereignty, was now within the conceptual grasp of most people with some knowledge of contemporary events. That there should at least be some areas of the planet which should be set aside for the benefit of all mankind into the future, and not just for the benefit of a particular state and its members to the exclusion of the rest of mankind, was an idea whose time had come.

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[12] Supra, 15-18.

[13] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies*, adopted on 19 December 1966.

[14] Lennox F Ballah, op cit, 340-341.

[15] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 per Wilson J at 248 (High Court of Australia).

But this has still left the difficulty of defining those areas which should fall within this category, and once having been so included, the difficulty of determining how they should be managed and preserved for the future. Included in this latter consideration is the question whether the global status of these areas was compatible with commercial resource development, and if so, under what kind of international regime. As will be seen, different approaches have been taken in these matters in the different kinds of areas that are part of the global commons, and these approaches are still in the process of evolution. In this regard, it should not be assumed that the concept of the common heritage of mankind has a fixed or static meaning.. Other areas of international interest do not strictly come within the contemporary concept of the common heritage of mankind at all, as national claims to sovereignty may still subsist consistently with the international status of the area. It is perhaps with this in mind that other writers have advocated a much wider concept than that described by Bello, capable of extending to a larger area of the planet than is at present recognised in international law, or even a concept capable of extending to the whole of the planet and its environs[16]. These wider views are not yet reflected in contemporary international law[17], and are not considered further in this paper.

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[16] Thus the Chinese scholar K'ang Yu-Wei, writing in the late 19th century, advocated a global public government with its own public territory, and with control over the seas beyond a certain distance from the coastal state as well as any undeveloped islands. Access to those public territories was to be subject to the payment of duties to that public government. More recent suggestions have been made to include new areas within the common heritage of mankind. Thus it has been proposed that the earth's atmosphere should be included in this category. Ultimately it can be argued that the whole earth should be treated in this manner, as one homeland for one human race. Thus the Persian nobleman and Prophet/founder of the Baha'i Faith, Baha'u'llah, writing in the second half of the 19th century, advocated the establishment of world peace and unity through a global system of government, the members of which would act as trustees for all mankind, and which would exercise control over all the resources of the planet. This view did not exclude a role for the existing states, which would still continue to co-exist in a global federation.

[17] Despite the process of globalisation, it is still correct to say that the contemporary world order is still primarily based on so-called "sovereign" nation-states, those nation-states exercising substantial control on an individual basis over most of the land surface of the planet and its subsurface plus the airspace above it. But in an age of growing international interdependence, it is increasingly difficult to assert that whatever happens in any one part of the planet is solely the concern of any one state and of no concern to other states. There is a movement to expand the notion of the common heritage of mankind, as was evident recently in the Malta Declaration on the Oceans of 1997. It was therein declared that global wealth and welfare, including living, genetic and non-living resources and cultural and traditional knowledge, are our common heritage, and that there was both a right to share in the common heritage and a duty to conserve it and to contribute to its sustainable development. The world's oceans were referred to in the Declaration as only one example of this common heritage[17].

In the case of the negotiations leading up to the Law of the Sea Convention, the approach advocated by Pardo, and which was ultimately the approach adopted in the Convention, was to allow mining of the seabed and subsoil below the High Seas beyond national jurisdiction under a system of approvals issued by a new international body, expressed in terms which was designed to benefit mankind, and in particular those sections of mankind in developing states. This approach did not receive universal acceptance by the international community and has more recently been modified by further Agreement[18].

In the case of the Moon and other celestial bodies, the approach has been to prohibit commercial mining, except through a future international body, yet to be established. Again this approach has not received universal acceptance and is still subject to debate[19].

A somewhat similar approach has been taken in the Antarctic to prohibit commercial mining, but without any future option to mine under the authority of some new international body, again not without some controversy[20].

The approach in respect of World Heritage areas within the borders of particular states under the UNESCO World Heritage Convention has been to not expressly prohibit mining, but there is a question raised where mining and related activities would endanger the status of a particular World Heritage area. Again this has been contentious[21].

Pressures continue between those states as well as other related interests that wish to maintain unrestricted access to mineral resources wherever they may be located on or adjacent to the planet, under the prevailing global system of competitive, liberal capitalism, and other states, public and private interests that favour conservation and preservation of these global commons in the interests of all mankind, including for future generations, free of mining and other commercial resource development. There may be a variety of positions in between these two. A comparative study of the various kinds of areas considered in this article is therefore of value to consider what effect these competing pressures have so far had. This study begins with an examination of the position in relation to the High Seas, then the Moon and other celestial bodies, followed by the Antarctic and finally in World Heritage areas.

[18] Supra, 7-11.

[19] Supra,.11-15.

[20] Supra, 15-18.

[21] Supra, 18-21.

THE HIGH SEAS AND DEEP SEA MINING

The evolution in international law of specific limits upon the extent of state sovereign rights out over the adjacent seas has already been discussed above[22]. The 1958 Continental Shelf Convention allowed maritime states limited rights over their adjacent seas, but out to a considerable distance from their land, depending on the width of their continental shelf. This included the exploitation of the natural resources of or under those seas[23], including by way of constructing installations and other devices necessary for that exploitation[24]. The corresponding 1958 High Seas Convention defined the "High Seas" as all parts of the sea that were not included in the territorial sea or the internal waters of a state, but that latter Convention was expressed not to derogate from the limited rights conferred on maritime states over their contiguous zones and their continental shelves[25]. The latter Convention guaranteed freedom of navigation on the High Seas plus the non-exclusive right to fish in those Seas[26], but did not expressly deal with the question of deep-sea mining under the High Seas beyond national jurisdiction. As has already been noted, arguably there was no such right to mine at customary international law at that time[27].

This position changed with the adoption of the Law of the Sea Convention in 1982. Leading up to this event, the United Nations General Assembly adopted Resolution 2749 in 1970, declaring that: "*The seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction.....as well as the resources of the area, are the common heritage of mankind*" and "*shall not be the subject of appropriation by any means by states or persons*"[28]. This policy had by then achieved wide support, including from the USA. Speaking in 1966, President Lyndon B Johnson said:

> *"[U]nder no circumstances must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the*

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[22] Infra, 2-6.

[23] Article 2.

[24] Article 5.

[25] D W Greig, *International Law*, (2nd ed, 1976), 317.

[26] Ibid.

[27] See n 7.

[28] *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes*, United Nations, (1983), 44.

lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings"[29].

The 1970 Resolution called upon the existing ad-hoc United Nations Sea-Bed Committee to prepare for a future conference on the law of the sea. The Conference to this end was first convened in 1973.

Succeeding Presidents of the USA, Nixon, Ford and Carter, pursued a policy consistent with the 1970 General Assembly Resolution. However the policy began to change under the administration of President Reagan in the final stages of the negotiation of the draft Convention[30]. But despite this, the ideas of Arvid Pardo found their way into the Law of the Sea Convention as it was finally adopted, making the term "common heritage of mankind" part of common international usage and applicable at least to the area of the High Seas.

Under that Convention, an exclusive economic zone of up to 200 nautical miles in width is permitted adjacent to maritime states, carrying with it sovereign rights of exploration and exploitation of the resources of the sea within that zone, including mineral resources on or below the seabed[31]. In addition the provisions as to the continental shelf are basically retained from the previous Convention[32]. But beyond the exclusive economic zone and continental shelf, the existing provisions guaranteeing freedom of the High Seas are retained, free of any claim to state sovereignty[33]. Further, the sea–bed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction are declared to be the common heritage of mankind[34].

All rights in the resources of this latter area are vested in mankind as a whole, on whose behalf a new international body, known as the International Sea-bed Authority, and established by the Convention, is to act[35]. Minerals recovered from that area may only be alienated in accordance with Part XI of the Convention and the rules, regulations and procedures of that new Authority[36]. Activities in this area are to be carried out for the

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[29] Jon M Van Dyke, op cit, 4.

[30] Ibid, 3-6.

[31] *Law of the Sea Convention*, Part V.

[32] Ibid, Part VI.

[33] Ibid, Part VII.

[34] Article 136.

[35] Section 4 of Part XI.

[36] Article 137.

benefit of mankind as a whole[37], with a view to fostering the healthy development of the world's economy and the balanced growth of international trade, and also to promote international cooperation for the over-all development of all countries, especially developing countries[38]. The new Authority must ensure the equitable sharing of the benefits derived from activities in this area by making payments to states, taking into consideration the particular needs of developing states[39]. Developed states are required to transfer deep-sea mining technology to both the new Authority and to developing states in order to promote the equitable sharing of benefits derived from this area[40]. Detailed provisions on this matter are contained in Section 3 of Part XI and in Annex III to the Convention for commercial mineral production.

Another new international body, known as the Enterprise, is established by the Convention to control and also to engage in mining activities in this area, either alone or in conjunction with state parties or their own enterprises or with private entities[41]. The Statute of the Enterprise is set out in Annex IV to the Convention.

Freedom of the High Seas includes the right to lay submarine cables and pipelines[42].

The provisions of Part XI have been controversial, particularly as they favour developing countries over developed countries, the latter being more likely to have the knowledge and technology for deep sea mining. As a result, a number of developed countries did not sign the Convention (including USA and the UK). Other countries did not ratify it. Some of these countries adopted interim measures of mutual recognition of national licences for activities in the deep sea bed, thus threatening to undermine the Convention.

This lead to further negotiations for a supplementary agreement to the Convention. Subsequently, an Agreement relating to the implementation of Part XI of the Convention, otherwise known as the "Boat Paper Agreement", was adopted in 1994, and is expressed to be read as being part of the Convention[43]. This Agreement provides for state-parties to implement Part XI in accordance with the Agreement, including in the Annex thereto. Under that Annex, the commencement of the Enterprise is delayed, with a greater voice being given in the new Authority to states active in deep sea mining activities,

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[37] Article 140.

[38] Article 150.

[39] Articles 140 and 160.

[40] Article 144.

[41] Articles 153 and 170.

[42] Article 87.1 (c).

[43] *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, adopted on 28 July 1994.

compulsory transfer of mining technology is abolished and various other changes made to improve the financial viability of deep sea commercial mining under Part XI. The Agreement tries to strike a balance between the commercial interests of private capitalists investing in deep sea mining activities and their governments, and the wider interests of mankind as a whole. Subject to the terms of the Agreement, the concept of the common heritage of mankind in relation to the High Seas is left in tact.

Australia ratified both the Law of the Sea Convention and this Agreement in 1994[44]. Most other industrial countries have now either ratified the Convention and Agreement, or are in the process of doing so. This has opened the way for a workable deep sea international law mining regime. The Convention itself received the last ratification necessary for its commencement in 1993, allowing the Convention to commence on 16 November 1994[45]. A sufficient number of countries have now also ratified the Agreement, thus allowing it to commence in 1996 in conjunction with the Convention. The USA has yet to ratify either the Convention or the Agreement.

There remains a number of issues yet to be satisfactorily resolved. One of the most important issues is whether it is still possible to lawfully engage in deep sea mining activities in and under the High Seas outside of state jurisdiction other than under the Law of the Sea Convention. On one view this is still an option for states which are not a party to the Convention. But the correctness of this view in law is open to doubt.[46]. As most states are now parties to the Convention, this is only likely to be an issue for developed countries like the USA. The latter country did have provisional membership under the Convention pending Senate approval to ratification, but this expired in 1998. The Clinton Administration recommended ratification of both the Convention and the Agreement, but as at the beginning of 2001, Senate approval had not been obtained[47], the matter presumably being put in limbo under the new Bush Administration.

Another issue of concern is that some countries have ratifed the Convention but not the Agreement.

But leaving aside these issues, there is now in place a working international regime under an international authority that allows controlled deep sea mining by private interests in an area comprising part of the common heritage of mankind. While some may argue that these two elements are not compatible, and some may go further and argue that the whole scheme is designed to foster resource development rather than conservation, the practical reality is that a compromise had to be worked out between competing interests to make

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[44] *Australian Yearbook of International Law* for 1996, vol 17, 385-396.

[45] See the *Law of the Sea Convention*, article 308.1.

[46] See n 7.

[47] *Oceans and the Law of the Sea: Status – UNCLOS and the Agreement on Part XI*, updated to 24 January 2001, www.un.org/Depts/los/los94st.htm.

the regime workable. Whether it is the best regime possible in the interests of all mankind is a matter for debate.

THE MOON AND OTHER CELESTIAL BODIES

The development of rocket science during and after World War II and the subsequent space race between USA and USSR, gave rise to the necessity to lay down international rules for the use of space and celestial bodies. In 1958, the United Nations established the Committee on the Peaceful Uses of Outer Space (COPUS). In 1961, the General Assembly of the United Nations passed Resolution 1721, unanimously recording that international law applied in outer space and to its celestial bodies. Those bodies were to be "*free for exploration and use by all states in conformity with international law and are not subject to national appropriation*"[48]. As a product of the Committee's work and that Resolution, in 1963 the General Assembly unanimously passed an Outer Space Declaration[49]. Then followed an elaboration within the United Nations system of five general multilateral treaties which incorporated and developed concepts included in this Declaration.

Of primary importance in the present context was the first of these treaties, being the Treaty on Outer Space State Activities of 1967[50]. While this Treaty does not specifically use the terms "common heritage of mankind" or "global commons", it is clear that it incorporates the same kind of conceptual thinking in its text. The Preamble to that Treaty recites, inter alia, that all mankind has a common interest in the progress of the exploration and use of outer space for peaceful purposes, and that that exploration and use should be carried out for the benefit of all peoples. Article 1 contains provisions in similar terms[51].

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[48] D W Grieg, op cit, 361.

[49] *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, in *United Nations Treaties and Principles on Outer Space*, United Nations, (1999), 30-31.

[50] See n 13.

[51] Article 1 provides-

> "1.*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, and shall be the province of all mankind.*
> *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 the basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.*

Article II prohibits national appropriation of Outer Space[52].

Speaking at the twenty-first session of the General Assembly on this Treaty, the Italian delegate, Mr Vinci, said:

> "*For the first time in the history of mankind, all countries, and in the first instance the two world powers of the day, are not searching for new territorial conquests or for the expansion of their sovereign rights. On the contrary, they aim only at scientific and technological conquests in the new continents of outer space, which become not the province of single powers, but the province of mankind as a whole. For the first time in the wake of our first space explorations, national, religious and ideological concepts are put aside, and in their place the ideas of peace and the unity of all men, regardless of their religion, creed or colour, are solemnly affirmed."*[53].

However this Treaty did not deal specifically with the commercial development of the mineral resources on celestial bodies. There was no express agreement on an international legal framework to cover such resource development, although arguably the wording of the Treaty can be interpreted as implying a ban on such development if carried on for the benefit of any one nation or individual. Most countries, including Australia and the USA, have ratified this Treaty.

A period of extensive negotiations followed the making of this Treaty, galvanised by the return of Moon rocks to Earth as a result of the Moon landing. Eventually in 1979 the United Nations Committee agreed to the text of a supplementary Agreement on activities on the Moon and other Celestial Bodies[54]. That Agreement entered into force in 1984. However only a minority of member-states of the United Nations have so far ratified this Agreement, including Australia. This does not include the USA. Article 4 of this Agreement again contains wording that invokes concepts consistent with that of the common heritage of mankind[55], while Article 11 specifically adopts that language in relation to the Moon (and other celestial bodies in the Solar System)[56].

> *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.".*

[52] Article II provides-

> "*Outer space, including the Moon and other celestial bodies, is not subject to national appropiation, by claim of sovereignty, by means of use or occupation, or by any other means.".*

[53] *United Nations Treaties and Principles on Outer Space*, op cit, 68.

[54] *The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, in *United Nations Treaties and Principles on Outer Space*, op cit, 22-29.

[55] Article 4 provides-

"1. *The exploration and use of the Moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Due regard shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations. 2. State parties shall be guided by the principle of cooperation and mutual assistance in all their activities concerning the exploration and use of the Moon. International cooperation in pursuance of this Agreement should be as wide as possible and may take place on a multilateral basis, on a bilateral basis or through international intergovernmental organisations.".*

[56] Article 11 provides-

"*1. The Moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement, in particular in paragraph 5 of this Article.*

2. The Moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.

3. Neither the surface nor the subsurface of the Moon, nor any part thereof or natural resouces in place, shall become the property of any State, international intergovernmental or non-governmental organisation, national organisation or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the Moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the Moon or any area thereof. The foregoing provisions are without prejudice to the international regime referred to in paragraph 5 of this article.

4.State parties have a right to the exploration and use of the Moon, without discrimination of any kind, on the basis of equality and in accordance with international law and the terms of this Agreement.

5. State parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the Moon as such exploitation is about to become feasible. This provision shall be implemented in accordance with article 18 of this Agreement.

6. In order to facilitate the establishment of the international regime referred to in paragraph 5 of this article, State parties shall inform the Secretary-General of the United Nations as well as the public and the international scientific

Under Article 1, references to the Moon in this Agreement are to include other celestial bodies in the Solar System other than the Earth.

Article 6 of this Agreement guarantees freedom of scientific investigation, including the right to take samples.

An international regime is required to be established by this supplementary Agreement to govern the exploitation of the natural resources of these celestial bodies in the Solar System. As yet, no such international regime has been established, unlike the position under the Law of the Sea Convention[57]. Article 18 of the supplementary Agreement provides for the state parties to meet 10 years after it entered into force, in order to consider the revision of that Agreement, including by way of negotiating the creation of the required international regime. That date passed in 1994 with no attempt to commence the negotiations.

In the meantime, interest in the exploitation of the natural resouces of the Moon has steadily increased, corresponding with improvements in technology under a variety of space programs. Commercial mining of the Moon and possibly other celestial bodies is becoming a distinct possibility some time in the future. It is perhaps regretable, but not perhaps altogether surprising, therefore, that the USA and some other developed nations involved in the development of space technology, acting in their own perceived self interests, have not supported the extension of the "common heritage of mankind" concept to outer space.

While no sovereign state claims have yet been made to the Moon and other celestial bodies, and no actual mining on these bodies has yet occured other than by way of taking

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community, to the greatest extent feasible and practicable, of any natural resources they may discover on the Moon.

7. The main purpose of the international regime to be established shall include:
(a) The orderly and safe development of the natural resouces of the Moon;

(b) The rational management of those resources;

(c) The expansion of opportunities in the use of those resources;

(d) An equitable sharing by all State parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon, shall be given special consideration.

8. All the activities with respect to the natural resources of the Moon shall be carried out in a manner compatible with the purposes specified in paragraph 7 of this article and the provisions of article 6, paragraph 2, of this Agreement.".

[57] Infra, 8.

samples, there is a real risk in the future that this concept could be undermined by a new form of national colonialism in the race to take advantage of the available resources. Any future national claim to exclusively mine or authorise the mining of all or any part of these celestial bodies must be tantamount to a claim to a form of national sovereign rights. It is an issue that demands international resolution, and should not be left to a few technologically advanced claimant states, acting in defiance of the rest of the international community and the international rule of law, with all the risks that that entails. In this age of international interdependence there can be no further justification for the adoption by any country of the "might is right" theory in such an important matter.

THE ANTARCTIC

The Antarctic is the last remaining Continent to be settled by humans, and then only by isolated settlements set up for exploration and research in the twentieth century. Seven states, including Australia, presently have sovereign territorial claims to the landmass of the Antarctic. In some cases they are overlapping claims. The claims leave about one fifth of the Continent unclaimed. Australia has the largest area of land under claim[58]. These claims have not since been extinguished by international agreement, but have merely been frozen during the period of the Antarctic Treaty entered into in 1959[59].

Further, the Antarctic Treaty was initially only a Treaty between a small number of interested states, being all the seven claimant states[60] plus Belgium, Japan, South Africa, USSR (now Russia) and USA. The Treaty allows other states which are members of the United Nations to accede to it[61], and a considerable number of states have done so. But the right of acceding states to participate under the Treaty in meetings as a "contracting party" only continues during such times as they demonstrate an interest in the Antarctic by conducting substantial research activity there[62]. Non-consultative parties have been invited to meetings under the Treaty, but they have less rights than consultative parties and, in particular, they have no role in the decision making process. All parties to the Treaty are bound to carry out its provisions and to uphold its purpose and principles.

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[58] Sir Arthur Watts, *International Law and the Antarctic Treaty System*, (1992), Chapt 5; Keith Suter, *Antarctica*, (1991), 15-17; Christopher C Joyner, *Antarctica and the Law of the Sea*, (1992), Chapt 3.

[59] *Antarctic Treaty*, article 4, see Sir Arthur Watts, op cit, 302.

[60] Argentina, Australia, Chile, France, New Zealand, Norway and the UK.

[61] Article 13.

[62] Article 9.2.

These existing claims to national sovereignty over much of the Antarctic, plus the lack of universality in the application of the Antarctic Treaty provisions, make it difficult to include the Antarctic in the concept of the global commons, a concept which by its very nature suggests universal, or at least near universal, adherence and support. But there are elements of the Antarctic Treaty system, plus in subsequent international arrangements applying to the Antarctic, that are suggestive of a limited global commons type of approach. Thus the Preamble to the 1959 Treaty states that it is in the interests of all mankind that the Antarctic should continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord. This is in turn reflected in the wording of Article 1 of the Treaty. No further sovereign claims are permitted[63]. The primary purpose of this Treaty is to facilitate and encourage scientific investigation and cooperation[64], and not for exclusively national purposes. In addition, the Treaty, in its geographic application, picks up the international law of the sea, including the High Seas regime, in that it applies to the whole area south of 60 degrees south latitude, including areas of sea and the ice shelves beyond the landmass of the Antarctic[65].

The Antarctic Treaty does not specifically ban commercial resource exploitation, but as will be seen below, activities relating to mineral resources are now prohibited other than for scientific research, and other activities are subject to strict environmental controls. The Treaty has since been supplemented by several other international agreements which include this prohibition and these controls[66]. Together, these international agreements and arrangements provide a form of international protection and international legal coverage that goes a considerable way towards applying the concept of the common heritage of mankind to the Antarctic, even if not so expressly provided. A full application of that concept would, at a minimum, require the extinguishment of all national claims, with the substitution of a more universal regime of administration and control.

In relation to mining in the Antarctic, as a result of the deliberations of the Special Consultative meeting under the Antarctic Treaty from 1982 to 1988, the Antarctic

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[63] Article 4.

[64] Articles 2, 3, 8 and 9.1.

[65] Article 6. A discussion of some difficulties resulting from the overlap of *the Antarctic Treaty* and the *Law of the Sea Convention* is found in Davor Vidas, "Emerging Law of the Sea Issues in the Antarctic Marine Area: A Heritage for the New Century?", (2000) 31 ODIL 197 at 210-216.

[66] *Convention for the Conservation of Antarctic Seals*, 1972, *Convention on the Conservation of Antarctic Marine Living Resources*, 1980, *Protocol on Environmental Protection to the Antarctic Treaty*, 1991.

Mineral Convention was adopted in 1988[67]. This Convention was a compromise between the various consulting parties to the 1959 Treaty, which by that time had reached 18 in number, the majority being non-claimant states. The Convention was designed to allow mineral exploration and mining under new institutional arrangements of some complexity. During the negotiations for this new Convention, opposition began to increase to mining in the Antarctic, both within the United Nations and from various outside environmental groups. It is not necessary in this paper to go into the detail of the 1988 Convention or the opposition to it, as it never came into force. This is because it was a necessary condition of that Convention that all claimant states should be parties to it[68]. By 1989, it had become apparent that this would not happen. An impasse had developed to its implementation once Australia had announced its decision not to sign, followed quickly by France. The USA and the UK took an opposite view, but most other consultative parties rallied to support Australia, thus ensuring that the new Convention was dead.

It may be of some significance that the new Convention was not expressed in terms of managing the resources of the Antarctic as if it was a part of the common heritage of mankind. This included a failure to specify in that Convention where the revenues from Antarctic mining were to go. By comparison, the Law of the Sea Convention contains detailed provisions designed to benefit mankind, even with the modifications contained in the supplementary Agreement thereto.

The impasse over this new Convention gave momentum to a new set of proposals for a more comprehensive set of environmental protections for the Antarctic, leading to the adoption of the Protocol on Antarctic Environmental Protection of 1991[69]. That Protocol provides, inter alia, that "*any activity relating to mineral resources, other than scientific research, shall be prohibited*"[70]. It required the 26 consultative parties to ratify it for it to come into force[71]. This has now occured, with the Protocol commencing on 14 January 1998. As a result, there is now virtually no prospect of commercial mineral development taking place in the Antarctic for at least the next 50 years as provided in the Protocol, and possibly for longer.

But this does not mean that there is no dissatisfaction with the present Antarctic regime. Proposals continue to be made for the creation of a 'world park' or 'wilderness area' in the Antarctic, or even that it be expressly made a part of the global commons. So far

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[67] *Convention on the Regulation of Antarctic Mineral Resource Activities*, 1988, see Sir Arthur Watts, op cit, 344-403.
[68] Article 62.

[69] *Protocol on Environmental Protection to the Antarctic Treaty* of 1991, otherwise called the "Madrid Protocol", see Sir Arthur Watts, op cit, 404-450.

[70] Article 7.

[71] Article 22.

little has been done to implement any of these suggestions[72]. There continues to be concern about the current legal status of the Antarctic, given that the present international agreements place a central role on a limited number of consultative parties to the 1959 Treaty , thus denying those agreements the status of fully multilateral agreements of universal application[73].

On the scientific side, there are also increasing global concerns about the depletion of the ozone layer in the southern regions and also with global warming and its potential impact on the Antarctic and its pack ice, concerns which will ensure that the Antarctic remains on the global agenda.

But the claimant states have so far shown no willingness to surrender their sovereign claims in favour of some new regime of universal application. Thus the Australian Government announced in 1999 that Australia would take steps to define the limits of the continental shelf off Australian Antarctic Territory for the purposes of the Law of the Sea Convention, including presumably the deep sea mining provisions of that Convention, while at the same time stating that this did not indicate any weakening of the Government's support for the 1991 Protocol[74]. The matter continues to be controversial, but the immediate threat of mining in the Antarctic has abated.

WORLD HERITAGE AREAS

The controversy engendered by the building of the Aswan High Dam on the River Nile in Egypt, resulting in the threatened flooding of several sites of great cultural antiquity and value, and the resultant international rescue efforts, plus international concerns with the flooding of Venice and with the condition of Borobodur in Java, caused a focus to be concentrated on the many other cultural sites in the world located within national boundaries which were regarded as being of interest and concern to the wider international community. The traditional view, arising from the concept of national sovereignty, was that matters and things occuring or located solely within state boundaries were only the concern and responsibility of that state. There was no legal right at international law for other states to intrude into matters of purely domestic concern, a principle enshrined in the United Nations Charter of 1945[75]. But clearly in the

[72] Keith Suter, op cit, 159-180; Christopher C Joyner, *Governing the Frozen Continent*, (1998); Raymah Hussain, "The Antarctic: Common Heritage of Mankind?", also Eric Suy, "Antartica: Common Heritage of Mankind", both in *The Antarctic Environment and International Law*, Joe Verhoeven, Phillipe Sands and Maxwell Bruce (Eds), (1992), at 89 and 93 respectively.

[73] Sir Arthur Watts, op cit, 291-298.

[74] *Australian Yearbook of International Law* for 1999, vol 20, 414-415.

[75] Article 2.7, the "domestic jurisdiction"clause.

context of an emerging "global village", in matters or things of clear international significance, the wider international community has a legitimate interest. The question posed after Aswan was whether there should be legal parameters within which that wider interest could legally be expressed and acted upon without excessively infringing national sovereign rights and sensitivities.

It was UNESCO that took the initiative at that time to call for an international conference to discuss this question of cultural sites of great value located within national boundaries, with a view to framing an international agreement. Subsequently at the United Nations Conference on the Human Environment, held at Stockholm in 1972, the text of the World Heritage Convention was framed and then adopted at the General Conference of UNESCO in the same year[76]. It was expressed to be applicable to sites of world natural heritage as well as of world cultural heritage. For the first time, a legal interest was vested in all nations, and as a result in all mankind, as to matters and things which were previously only of domestic national concern.

The Convention endeavours to protect and conserve sites of cultural and natural heritage that are of "outstanding universal value"[77] and which are located within national boundaries. The Convention recites that it fully respects the sovereignty of the state on whose territory the world heritage site is situated, but it also recognises that such heritage constitutes a "world heritage", for the protection of which it is the duty of the international community as a whole to cooperate and assist[78]. Certain obligations are imposed on state-parties within which these sites are situated to give help in the identification, protection, conservation and presentation of those sites and not to take deliberate measures which might damage directly or indirectly those sites[79]. A World Heritage List is set up by the Convention, and sites nominated by state parties can be listed on that List by the World Heritage Committee.

The term "world heritage" was deliberately used in the Convention in preference to the "common heritage", in deference to the sovereign rights of states which wished to retain ultimate control over world heritage sites within their boundaries. The drafting of the Convention was finely balanced between the objective of not imposing excessive burdens on state parties, and the objective of providing an international regime for the protection of those sites of wider legitimate interest to the world community. Thus while properties qualify for world heritage status without being listed on the World Heritage List, such listing requires the consent of the state party in which the property is located as well as

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[76] *Convention on the Protection of the World Cultural and Natural Heritage*, see n 12, and note the Preamble to that Convention.

[77] Article 2.

[78] Articles 6 and 7.

[79] Article 6.2-3.

the approval of the World Heritage Committee[80]. Most of the obligations placed on state parties under the Convention are expressed in conservative language to placate national sensitivies. A "List of World Heritage in Danger"is also maintained under the Convention for listed properties for which major operations are necessary and for which assistance has been requested[81], but it is left up to the international community through UNESCO to provide the assistance. Ultimate control always remains with the state party in which the site is located, even if the site is on the World Heritage List.

A state party may well be able to resist further listing on the endangered List of an already listed site within its territory, such as occured recently with Kakadu National Park, located in the Northern Territory of Australia, where that site coexisted with a uranium rich province in which mining had already occurred and where further mining was proposed[82]. But even if on the endangered List, there is not much that the rest of the international community can do if that danger is exacerbated by action of the state concerned or with its sanction. Witness the recent events in Afghanistan and the destruction of the large and ancient Buddhist statues in caves. The main risk to the state party in default is that of adverse international publicity and criticism. There is no express means in the Convention of enforcing compliance by the state concerned, even if in default. The Convention relies heavily on international cooperation and goodwill for its effectiveness, plus the force of world opinion. Needless to say, international politics plays a big part in the decision-making of the World Heritage Committee.

There is no express prohibition on all mining within a world heritage site, even for listed properties, and it is questionable whether such a general prohibition is to be implied from the Convention. It may well be that certain types of mining activities could potentially result in breach of the Convention by the state party responsible, particularly if the property is on the endangered List or if the mining would endanger the listing status[83], but again there are the problems of enforcement. It is understood that this issue is to be debated further within the organs provided for under the World Heritage Convention at forthcoming meetings.

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[80] Article 11.3.

[81] Article 11.4. See David J Haigh, "World Heritage – Principle and Practice: A Case for Change", (2000) 17 EPLJ 199.

[82] *In Depth Debate on Kakadu National Park – Extraordinary Session of UNESCO's World Heritage Committee*, www.unesco.org/whc/news/news0712.htm. Note that the major shareholder in the Jabiluka mine in Kakadu, which mine had previously been approved for mining, recently announced a 10 year moratorium on mining at that site, but apparently more because of lack of traditional Aboriginal landowner consent than because of World Heritage listing; www.agriterra.org/~wise/uranium/upjab.html.

[83] Article 11.4 sets out a number of activities which can constitute a threat of serious and specific dangers to listed sites such as to warrant further listing on the endangered List, and this clearly can include large scale mining projects.

Given all these limitations, it is clear that world heritage properties do not qualify as part of the common heritage of mankind as that latter term is generally now understood. Such properties remain subject to national sovereign rights, qualified only by certain limited international obligations, plus any domestic limitations that the state concerned chooses to impose upon itself, usually by domestic legislation[84]. It is still fair to say, however, that the Convention goes some way in recognising that world heritage properties are not solely a matter for the state concerned, but are a legitimate matter of concern for the whole international community, that is, for all humanity, including for future generations. Given the existing limitations of the present World Order, this is perhaps as much as can be expected for the time being. There is no doubt that the Convention has caused a reappraissal of national responsibilities for important sites within their borders, and that there is much state sensitivity about international opinion on such matters as a result. World heritage listing is generally highly valued. Seen in this light, it can be argued that the status of such world heritage areas is in fact not that dissimilar to the status of areas now expressed to be within the common heritage of mankind.

CONCLUSIONS

The measures referred to in this paper, extending the concept of the "common heritage of mankind" to some areas of the planet or to the outer space surrounding it, and other measures referred to in this paper which, while not expressly using that conceptual terminology, seek to give a somewhat similar status to other areas of the planet, should be seen within the contemporary context of the evolution of the world towards a global society. This is a society in which states are still a necessary part, but one in which inter-state and non-governmental interaction, cooperation and mutual resolution across national boundaries are becoming increasingly important, giving rise to ever increasing levels of international interdependence. This is a movement which is increasingly transcending the limitations of state sovereignty in the wider interests of mankind as a whole. This is an evolutionary process which states as well as international and national mining corporations have to come to terms with. It is one which can be expected to develop further in the future as the pressures and problems facing the global community grow in seriousness, complexity and range, and as states are increasingly found to be incapable of adequately addressing on an individual basis the great global issues of the day. The movement in this direction may not be consistent or uniform, and will often need to be worked out on a case-by-case basis. But overall, the general direction is now clear.

As part of this evolutionary process, the contending pressures of private commercial development versus conservation and environmental protection will continue to be a central theme, just as much as the ongoing debate between issues of sovereign state rights versus the wider interests of mankind as a whole. These two contending pressures cannot be separated. Also of relevance is the ongoing debate between developed states seeking

[84] In Australia, see now the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth).

to maintain their existing privileges and economic advantages, and developing states seeking a new and more equitable global economic order.

Issues of possible commercial resource development in areas of the common heritage of mankind, and also in other areas which have a similar status or which are the subject of advocacy to have that status, are part of this ongoing movement and debate. So far this has resulted in different approaches in different areas, as indicated in the analysis in this paper. But the position is not static, and further changes are to be anticipated. Obviously the modern world is reliant on commercial resource development, but the parameters within which this can occur have yet to be finalised and will continue to be balanced against other global, national and individual priorities.

The concept of the common heritage of mankind is one that is here to stay. But it is not a fixed concept, but an idea that is capable of being expressed in different ways through different international institutional arrangements with different consequences. It is not necessarily incompatible with controlled commercial resource development, a matter that must be resolved in each case. Where such development is to be permitted, a reconciliation must be achieved between the financial interests of private developers and financiers on the one hand, and the wider interests of mankind on the other, that is, if development is to become a practical reality. If there is no such reconciliation, the likely results are that no such development will in fact take place, or that the permissive regime might be replaced by an express ban on such commercial development. If such development is to take place, there is a need for a clear, comprehensive and practical resolution that allows commercial resource development to proceed, expressed with legal force and applicable for a reasonably long period of years. Whatever the form of the resolution, it should have binding legal effect on all states and other international actors, otherwise there is a clear danger that the international rule of law could be subverted and be replaced by dissentient state action, confrontation and disunity.

Ultimately there is a need for a more effective and universal means of global enforcement of any international regime for areas within the common heritage of mankind, or areas akin thereto, in order to protect and conserve those areas, accompanied either by a clear and universally enforceable ban on commercial resource development in those areas, or, if such development is to be allowed in those areas, by clear and universally enforceable conditions within which that development may reasonably and realistically take place.

In the case of the four types of areas considered in this paper, such a clear and universally binding resolution is still absent.