EXPANDING CH.

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EX

EXPANDING THE COMMON HERITAGE

By: Elizabeth Mann Borgese 1978

EXPANDING THE COMMMON HERITAGE

The oceans are our great laboratory.

The Law of the Sea Conference, having to deal with a large number of key issues - food and fiber, metals and minerals, communications, science policy, environment, technology, multinational corporations, to name only a few - is a test case for the building of a new international order.

We are not concerned here with the problem of *timing*. The new ocean regime may become a reality in the 1980s, or during the first quarter of the next century. It is even conceivable that the Law of the Sea Conference will be only very partially successful and fail to realize the concepts it was mandated to enact. These concepts, however, are here to stay. Conceivably, they may be realized in other areas of international cooperation and return, from here, to the oceans. World order is one integral system. Where, in this system, the break-through will occur, no one can tell. But the Law of the Sea Conference has nursed and matured the new concepts: and the outlines of new forms are clearly discernible.

The basic principle, the motor force of the "marine revolution" is the concept of the common heritage of mankind. It cannot be stressed enough that the adoption of this principle by the XXV General Assembly as a norm of international law marked the beginning of a revolution in international relations. It has the potential to transform the relationship between poor and rich countries. It must and will become the basis of the new international economic order of which the Law of the Sea Convention must be an essential part.

It is rather surprising, therefore, that the Law of the Sea Conference itself has done so little about elaborating the concept of the common heritage and giving it a clear definition in legal and economic terms. For the outsider or newcomer to the law of the sea, it is difficult to conceptualize the precise meaning of this new concept which remains somewhat rhethorical and etherial. Yet the components of a definition are all in the present version of the Draft Convention, that is, the Informal Composite Negotiating Text, and one might use the components, drawn from four different Articles (136, 137, 140, and 145) to formulate a definition in two basic articles:

First Article

The Area and its resources are a Common Heritage of Mankind.

Second Article

For the purpose of this Convention "Common Heritage of Mankind" means that

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or person, natural or juridical, appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized.

2. The Area and its resources shall be managed for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of the developing countries as specifically provided for in this Part of the Convention.

3. The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or landlocked, without discrimination and without prejudice to the other provisions of this Part of the present Convention.

4. Necessary measures shall be taken in order to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area, in accordance with Part XII of the present Convention.

These paragraphs express the four legal and economic attributes of the Common Heritage concept as they have developed in discussions and writings since the concept was first proposed by Arvid Pardo in 1967. These attributes, more succinctly are:

- o non-appropriability;
- o shared management and benefit sharing by mankind as a whole;
- o use for peaceful purposes only;
- o conservation for future generations.

The Concept of the Common Heritage of Mankind, as embodied in the Declaration of Principles, applied to the *mineral resources of the seabed beyond national jurisdiction*. It is well known that, while in 1967, and still in 1970, these could be construed to include, not only manganese nodules but offshore oil worth billions of dollars, the concept has since been eroded by exorbitant claims by coastal States to sovereign rights over mineral resources in the outer continental margin, down to the abyssal plane, with ill-defined "elastic" boundaries, inviting further national expansion should technological and economic interests so suggest.

This, however, is one side of the story, and there is another side: For the *territorial shrinkage* of the Common Heritage concept might be compensated by the far more important *functional expansion* of the concept, given other political, economic, and ecological imperatives which equally act on the evolution of the law of the sea and on the Conference.

FUNCTIONAL EXPANSION OF THE CONCEPT

The first step in this expansion is from the nonliving resources of the international seabed area to the *living resources in international as well as in national ocean space*.

A signpost in this direction is a statement by the Delegation of the Holy See, *"Considerations on Certain Topics Examined by the Second Committee of the Conference on the Law of the Sea, Seventh Session: March 28-May 19, 1978."*

"The Contribution which the Holy See can make to the Conference does not consist of technical proposals", the statement reads, "but rather principles which may guarantee just and equitable solutions for the whole international community and, in the first line, the principle which is universally accepted, at least on the theoretical level, namely that the sea is 'the common heritage of mankind'." It should be noted that the statement says "the sea," not "the seabed beyond the limits of national jurisdiction."

"Moreover," the statement continues, "this view constitutes a part of a larger principle of 'the universal purpose of created things.' It is already applied by States on their territory, not as a restriction of their sovereignty, but as an exploitation or use of their natural resources which shall take into consideration the needs of the whole humanity and, above all, of States which are most deprived of them."

In particular the statement points out that while "the principle of delineation of maritime areas adjacent to the coast into economic zones entrusted to the coastal State is acceptable," on the contrary, "the strictly speaking appropriation of the living resources of these areas is not admissible because they do not constitute 'res nullius' but they represent goods which belong to the community of nations and, in addition, because the argument of contiguity which is invoked as a justification for such appropriation does not represent a sufficient basis for it."

The statement, though well received by many - especially African - developing countries as well as by socialist States - may not exactly turn the Conference around during the next session. It does represent a moral force and a conceptual break-through nevertheless. It lays the foundation for further elaboration of the concept that ocean space and all its resources are the common heritage of mankind - not only by the Holy See but by others as well. Notice has been given: the expansion of the concept is on the table.

Its application to the Economic Zone would assure access of landlocked and geographically disadvantaged States to regional joint management systems, and thus would solve one of the thorniest, still outstanding, problems of the Conference. Applied to the international area, it would assure an international management system for the exploitation of a

Krill:

vast new resource, a multiple, in volume, of the total world fish catch, and that is the krill of the Southern Ocean, for the benefit of protein-deficient developing nations which, individually, lack the technology and the capital necessary for the massive exploitation and processing of this "unconventional" resource, bound, under the present system, to be exploited, and most likely overexploited, for the sole benefit of three or four rich, developed countries.

The krill of the Southern Ocean is the Common Heritage of Mankind.

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (1967) defines Outer Space as "the Common Province of Mankind," and the astronauts as the "envoys of mankind" to Outer Space. No treaty had ever used such language. But the concepts remained in the realm of the poetic. With the limits of outer space still undefined, and the economic potential of space technology as nebulous as the more remote stars, there appeared to be no urgent need to endow the poetic expression with a precise legal or economic content.

The "common province" of mankind is, nevertheless, one of the legitimate ancestors of the Common Heritage of Mankind. While technological evolution has advanced, revealing ever more clearly the economic potential of outer-space technology and its impact on development as well as on sovereignty and on international organization - making the Treaty of 1967 obsolete - the Common Heritage concept, nurtured by the oceans, is now returning to its ancestral home in Outer Space.

This is illustrated, e.g., by a remarkable statement by the Delegate of the Netherlands, Professor Willem Riphagen, during the recent meeting of the Committee on the Peaceful Use of Outer Space (A/AC.105/C.2/ SR 290, 23 March 1978). The Netherlands Delegation, Mr. Riphagen said, was of the opinion that the natural resources of the moon and other celestial bodies were the common heritage of mankind. That principle implied - he spelled out - that no State would have sovereignty, permanent or otherwise, over such resources *in situ*, and that the appropriation of such resources should not be subject to the rule of "first come, first served." From a more positive standpoint, he explained, that principle implied some form of international management in their exploitation.... The international management of the resources of the moon and other celestial bodies might take various forms, but the objective had already been agreed upon.

Whether the exploitation of the resources of the moon and other celestial bodies will ever become economical, is of course an open question. It may therefore be relatively

OVER

painless for States to declare them Common Heritage of Mankind. It is worth noting, however, that some States - especially among those most advanced in space technology - violently oppose the concept.

The Common Heritage concept, furthermore, is to be applied not only to the extra-terrestrial resources, but to the *products of space activity* in general. As Mr. Riphagen pointed out in the same statement, international practice has evolved in the direction of "application of the concept of the common heritage of mankind to the products of space activities. This means that the information gathered by satellites, e.g., on earth resources, on pollution, on weather, or on military activities, is Common Heritage.

EARTH RESOURCES

The Common Heritage status of the information on earth resources affects the status of these resources themselves. "Sensed" resources, providing the basis for international resource planning, will tend to become common heritage themselves. At the intergovernmental level, the expansion of the common heritage concept may well take this detour.

At the nongovernmental level, the conceptual route is more direct.

To realize their goal of a production system satisfying *basic human needs*, the authors of the *Bariloche Report* postulate a number of structural changes at the national and international level. The basic features of the postulated new order are those of a participatory self-management system (most closely approximated in Yugoslavia today) based on *social ownership* - the national equivalent of the common heritage concept. Their description, however, comes close enough to convey the concept.

"Ownership and the use of property and means of production play a key role in every society", they state. "What is the role of property in the world described in the /Bariloche/ model? It is clear that, in our context, the concept of property loses much of its meaning. The private ownership of land and the means of production do not exist, but, on the other hand, neither does the State own them as is currently the case in many centrally planned economies.

"The present-day concept of private ownership of the means of production should be replaced by the more universal concepts of the *use* and *management* of the means of production..."

This sampling of new thinking, from such diverse sources as the Law of the Sea, the Law of outer space, Catholic thinking, and Third-World aspirations, may be sufficient to indicate that the principle of the Common Heritage of Mankind is here to stay, and to expand.

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The concept of the common heritage of mankind does not conflict with the principle of national sovereignty over natural resources, affirmed in numerous U.N. declarations and resolutions. There is no going back on this principle. Rather, the Common Heritage principle *transcends* the principle of national sovereignty over natural resources, by *transforming the concept of sovereignty*, considering it functional rather than territorial (see RIO Report) and adding a *new dimension*: that of *participation*: Under the Bariloche as under the Catholic concept under the Law of the Sea as well as under Space law, resources in areas under national jurisdiction may be *used* and *managed* under national law, provided (1) the nation *participates in international resource planning*, i.e., in the making of decisions that affect its citizens;and (2) the State consents to *binding international dispute settlement* in case of a divergence between perceived national and wider affected interests.

Joint Mgmt. synonymous w/ "Planned"? NO

Management, for the benefit of society, or mankind, as a whole, with special regard to the needs of the needy ("basic needs" strategy) is an intrinsic part of the Common Heritage concept. The search for new forms of international resource management is on: an essential part of all socially and politically oriented world order studies, whether intergovernmental or nongovernmental.

International resource management is not to be construed as the operation of a centralized Super-State Super-Body, but as a decentralized, participatory system, based on the principle of *subsidiarity*: that is, resource management decisions are to be made at the *lowest possible level*: comprising only those affected by such decisions, whether at the subnational, national, regional or global level and including the public sector as well as the private sector, where it exists.

Until now, extensive technical and political work has been done with regard to only one *international resource management system*, and that is the International Seabed Authority. Though dealing with an economically somewhat marginal sector (the mining of the polymetallic nodules from the deep seafloor), this Authority thus will have a unique importance as a *model* for other international resource management systems which must necessarily be created to implement the Common Heritage principle as the basis of a new international economic order.

The establishment of an international resource managing system is without precedent in the history of international organization. It would be a break-through. It is not surprising, therefore, that the technical and political difficulties are enormous, and that the international community, acting through the U.N. Conference on the Law of the Sea, has not yet succeeded in solving the problems. The "glass," however, is as much half full as it is half empty, and one

should consider it a triumph - a break-through by itself - that the international community has gone as far as it has,

o in accepting, *by consensus*, the need of such a management system;

o in having done such a considerable and voluminous technical and political work in preparation for its realization.

The remaining fundamental issue is that of the structure of the production system.

On this point, unfortunately, the Conference got itself lured into a dead-end road, by constructing a system in which the international management sector has to *compete* with the private sector. We have dealt in a number of papers with the pitfalls of this approach. Suffice it to restate here that, given the economic and technological realities of today, it is impossible for the international management sector to get off the ground if the very limited capital and technological resources of the private sector are allowed to operate under what for all practical purposes amounts to a licensing system, and their production, while exhausting their capacity, satisfies the needs of their countries. There is, in that case, not only no financing and no technology available to the international managing system, but, worse than that, there is no economic raison d'être, no economic incentive to get it started. If the so-called "parallel system" really gets incorporated in the final Treaty, the unfortunate consequence would be that the Authority, while increasing its demands on the private sector and the industrial States, will on the one hand, not be able to benefit the developing countries, and, on the other, make life too difficult for the industrial States and their companies (a situation precisely profiling itself already during the present negotiations at the Conference). The consequence of this, in turn, will be that States, taking advantage of the inadequate definition of the boundaries of the Economic Zone and the continental margin, will extend their claims to national jurisdiction, conveniently to include sufficient mining sites so that mining operations can be carried out under U.S., French, and Mexican jurisdiction rather than under the jurisdiction of the International Seabed Authority.

There is, however, an alternative option before the Conference: One on which developing countries spent much time for preliminary studies, back during the time of preparation for the Conference, and which was then re-introduced by Nigeria in 1976 and elaborated by Austria in Ambassador Wolf's statement (*Note by the Secretariat*, 28 April 1977, Enclosure 6) and informal working papers.

This approach would be based on a *structured cooperation* between the private sector and the international management system, following the pattern, well accepted by Industry - a recent private meeting of the Consortia in Geneva looked at

this alternative with a quite open mind - of *equity joint ventures*: Any State or State-sponsored or -designated company would have *access* to the Area, under the condition that it form *a new Enterprise*, to which the Authority contributes at least half the capital investment (including the value of the nodules which are the common heritage of mankind) and appoints at least half the members of the Board of Governors (from developing and small industrialized countries), while the remaining capital is provided by the States or companies, who appoint also the remaining members of the Board of Governors, in proportion to their investment. Product, and profit, are divided in proportion to investment.

This approach would solve some of the thorniest problems still before the Conference: the problem of technology transfer, and that of financing the international resource management system. No other approach would provide such broad participation of developing countries in the management of the resources, and such broad financial participation by the Authority.

Whether the Law of the Sea Conference will or will not fall back on this solution, which is favored by very many countries, is an open question. Whether adopted or not, however, the *proposal is there*: it exists. And it may serve as a model for international systems in other areas: for the management of living resources: in particular, the harvesting of Antarctic krill; for the management of satellites (already foreshadowed by the INMARSAT Convention); for the management of energy.

At the same time, an *enterprise system* such as outlined here, could make a second major contribution to the building of a new international economic order. It could provide a model for *bringing TNEs into a structured relationship with the international community*. While incorporating applicable parts of the UNCTAD Code of Conduct, this would be a considerable step forward: incorporating also features of the proposed *European Companies* and responding to the need for a *democratization of decision-making, and representation, on the Board, of other than purely financial interests* (the Authority-appointed members from developing and small industrialized countries could include representatives of labor and of consumers).

Considered from this angle, the applicability of this model could be very wide: as wide as the range of TNEs - the wider, the better for the NIEO.

Another aspect of the common heritage principle is *revenue sharing*[1] and if the concept of the common heritage is to be extended

1) Some countries, especially among the industrialized ones, consider "revenue sharing" as an adequate interpretation of "benefit sharing," and "benefit sharing" as the only corollary of the common heritage concept. The majority of countries, however, interpret "common heritage" in the wider sense, attibuted to it in our definition above. "Benefit sharing" here includes benefits other than financial, such as sharing in management prerogatives and technology.

to other resources, so must revenue sharing. In *Partners in Tomorrow* ("The Age of Aquarius") attention was drawn to a series of recent proposals for an *international tax* based on use. One should add here that, during the Seventh Session of the Law of the Sea Conference, the Delegation of Nepal introduced its proposal for revenue sharing and the establishment of a Common Heritage Fund, in the form of a letter addressed to the President of the Conference. According to this proposal, the Fund's income would consist of (1) the revenues earmarked by the International Seabed Authority for the Fund; (2) the revenues due from the exclusive economic zones of States members; and (3) the revenues from the continental margin beyond the 200 mile limit of the EEZ. The biggest item would obviously be the second, that is, "a share of the net revenues from the mineral exploitation of the seabed and subsoil of the exclusive economic zone" as further specified in the proposal. This means, above all, an international tax on offshore oil, which would run into billions of dollars which should be collected from companies not included in the "enterprise system".

Not only would such a tax assure the automaticity of transfers that development strategy has been striving for during the last two decades: it also would create a more workable financial balance within the international resource management system itself: i.e., the capital-intensive, costly, and, at the beginning probably deficit-prone operations of the International Seabed Authority could be financed, largely, by a small part of the huge profits of the oil industry: There would indeed be nothing extraordinary in such a method, already widely applied at the national or corporate level: Companies, engaged both in oil production and in metal mining commonly finance the deficits arising from the metal mining operations during this period of crisis on the metal market, from the huge profits they make on oil production.

What was to be pointed out here in particular, however, is that an international taxation scheme would be a direct consequence, an intrinsic part, of the expansion of the concept of Common Heritage.

In 1971, the Delegation of Malta introduced in the U.N. Committee on the Peaceful Uses of the Seabed, an *Ocean Space Draft Treaty* which, based on the concept that the oceans as a whole, and all their resources are the common heritage of mankind, provided for a system of management for all marine resources and all major uses of the oceans. Had the international community chosen this path, apparently more complex, many solutions would instead have become easier. For the Maltese model would have *internalized* many functions and thus could have created a more self-sufficient, more nearly closed system, not demanding too many immediate changes outside.

It became clear immediately, however, that the Maltese proposal was way ahead of its time. The international community chose a more limited approach, providing a system of management only for *one* of the marine resources, viz., the minerals of the deep seabed. In trying to establish this system, however, the international community, first through the Seabed Committee, then through the Conference, became ever more acutely aware of the interaction of all uses and the need to deal with the oceans as a whole. This, however, was now far more complicated, since many functions had been *externalized*, entailing changes *outside* the new system, and thus the necessity of restructuring much of the United Nations system.

While providing, to some extent, a code of conduct for the other major uses of the oceans - the management of living resources, navigation, scientific research, environmental protection, the transfer of technology - the emerging Draft Convention reveals an awareness that this is not enough and makes repeated reference to, and demands on, "the competent international institutions." In some cases, these "competent institutions" already exist: COFI (FAO) for the living resources; IOC (UNESCO) for scientific research; IMCO for navigation; UNEP, for the protection of the environment. In other cases - transfer of technology, regional fisheries management - they will have to be created. In any case it is clear that the existing organization will have to be *restructured* to be able to assume the new required functions; and that restructured and newly established institutions must be *co-ordinated or integrated at the policy-making level*, providing for a forum where problems arising from the uses of the oceans can be discussed by States *in their interaction* and including not only their *technical* but also their *political* dimensions. A possible model for the kind of *integrative machinery* needed was proposed in *The New International Economic Order and the Law of the Sea* (Occasional Paper No. V, Malta: Malta University Press, 1976).

During the Seventh Session, the Delegation of Portugal tabled a rather complex resolution, co-sponsored by 17 other Delegations from developed, developing and socialist States, to give the necessary official impetus to this process which, more or less informally, is already in course.

"Considering that the implementation of the Convention on the Law of the Sea calls for an active and increased role of the appropriate international organization with competence in ocean affairs...." the Resolution states, "Recognizing that further strengthening of these organizations and increased cooperation among them are required, so as to allow Member States to benefit fully from the expanded opportunities for economic and social progress offered by the new ocean regime...." the Resolution calls on member States, on the Secretary General, the Specialized Agencies and other organizations of the United Nations, to take the necessary steps to achieve the needed restructuring and integration.

In this, the structure of the new International Seabed Authority being the first to be established to meet the new requirements, is very likely to influence the restructuring of the other organizations, in the sense that also the others, to discharge their new responsibilities in ocean space, must become *operational*, that is, they must directly *manage resources*, engage in scientific research, etc. Besides their traditional, policy-making and executive organs, they will have to comprise an *operational arm*, analogous to the Enterprise system of the Seabed Authority. They also will have to establish organs for *dispute settlement* at a certain level, in response to provisions already included in the Draft Convention.

This restructuring and integrating of the marine-oriented part of the U.N. system inserts itself into the broad trend to "restructure the U.N. system", which it is bound to influence and direct.

The proposed system, or "functional federation of international basic organizations" is in fact a "module" system, to which other "modules" can be added as needed.

One "module" could be provided by the Outer-Space sector.

A number of U.N. agencies, organizations, and commissions, as well as other intergovernmental, regional and nongovernmental organizations are presently engaged in outer-space activities. The U.N. Committee on the Peaceful Uses of Outer Space has the mandate to coordinate these activities, which are regulated by a number of legal instruments, the most important of which is the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. The Treaty, which provides a code of conduct, does not provide for any kind of machinery for decision-making, nor - as already pointed out - does it take any account of the *economic* and *development potential* of outer-space technology. As this potential becomes more obvious and the Common Heritage principle is applied to outer space and outer-space activities and resources, it will become necessary to create machinery through which all nations can share in policy making as well as in the management of programs and technologies.

One could imagine *a periodic Outer-Space Conference or Assembly* (every three, two, or one year/s/), which might either consist of all member States or, if the model of a functional federation of international organizations were to be followed, of *representatives of all the international organizations active in outer space*. (Which, in turn, are composed of States). The Committee on the Peaceful Uses of Outer Space might serve as an Executive Council, or the Conference itself might elect an Executive Council which would supersede the Committee on the Peaceful

Uses of Outer Space and would be chosen on a strictly regional basis, ensuring equitable representation of all parts of the world. 2) Obviously there would have to be some kind of common *Secretariat* which might well be provided by the U.N. Secretariat. Such an *International Outer-Space Authority* would have to have an *operational arm*, although it may be difficult, at this stage to say whether it would be more functional to create it *ex novo*, following the pattern of the Seabed Authority, or whether the operational arm should be even more *decentralized*, utilizing existing operational organizations such as INTELSAT, INTERSPUTNIK, INMARSAT, ESO, which, in this case, would have to be brought under the policy of the Authority.

Supposing there were six or seven such "modules" or "world economic communities" (in the meaning given to the word "communities" by "the European Economic Communities") dealing with oceans, outer space, energy, food, mineral resources, science and technology, international trade - the whole system could be drawn together in a restructured ECOSOC, which might be composed of Delegations from these various module Conferences or Assemblies.

This might be looking a bit too far - and too logically - into the future. History will fumble along its own way: far less logical, far less straightforward.

The expansion of the concept of the Common Heritage of Mankind, however, is in course. If it is indeed to be the basis of a New International Economic Order, its legal and economic content has certain corollaries. To explore, however, tentatively, what these might be with regard to (1) international resource management; (2) TNEs; (3) international taxation; and (4) the structure of international organization, has been the purpose of this position paper.

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2) The principle of regional representation, which is becoming increasingly important in the United Nations system, ought to be elaborated and refined. The four "regions" - Asia, Africa, Latin America and "Western Europe and others", are clearly inadequate as a basis for equitable regional representation. The concept of "region" has many meanings and is nowhere clearly defined. As a basis of equitable representation, the *15 regions established in the Leontief Report* might offer a fair, balanced, and workable solution: e.g. in a Council of 36 members, at least two members would have to be chosen from each of these 15 regions, while six might be chosen at large, to have more flexibility.

EXPANDING THE COMMMON HERITAGE

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We are not concerned here with the problem of *timing*. The new ocean regime may become a reality in the 1980s, or during the first quarter of the next century. It is even conceivable that the Law of the Sea Conference will be only very partially successful and fail to realize the concepts it was mandated to enact. These concepts, however, are here to stay. Conceivably, they may be realized in other areas of international cooperation and return, from here, to the oceans. World order is one integral system. Where, in this system, the break-through will occur, no one can tell. But the Law of the Sea Conference has nursed and matured the new concepts: and the outlines of new forms are clearly discernible.

The basic principle, the motor force of the "marine revolution" is the concept of the common heritage of mankind. It cannot be stressed enough that the adoption of this principle by the XXV General Assembly as a norm of international law marked the beginning of a revolution in international relations. It has the potential to transform the relationship between poor and rich countries. It must and will become the basis of the new international economic order of which the Law of the Sea Convention must be an essential part.

It is rather surprising, therefore, that the Law of the Sea Conference itself has done so little about elaborating the concept of the common heritage and giving it a clear definition in legal and economic terms. For the outsider or newcomer to the law of the sea, it is difficult to conceptualize the precise meaning of this new concept which remains somewhat rhethorical and etherial. Yet the components of a definition are all in the present version of the Draft Convention, that is, the Informal Composite Negotiating Text, and one might use the components, drawn from four different Articles (136, 137, 140, and 145) to formulate a definition in two basic articles:

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The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (1967) defines Outer Space as "the Common Province of Mankind," and the astronauts as the "envoys of mankind" to Outer Space. No treaty had ever used such language. But the concepts remained in the realm of the poetic. With the limits of outer space still undefined, and the economic potential of space technology as nebulous as the more remote stars, there appeared to be no urgent need to endow the poetic expression with a precise legal or economic content.

The "common province" of mankind is, nevertheless, one of the legitimate ancestors of the Common Heritage of Mankind. While technological evolution has advanced, revealing ever more clearly the economic potential of outer-space technology and its impact on development as well as on sovereignty and on international organization - making the Treaty of 1967 obsolete - the Common Heritage concept, nurtured by the oceans, is now returning to its ancestral home in Outer Space.

This is illustrated, e.g., by a remarkable statement by the Delegate of the Netherlands, Professor Willem Riphagen, during the recent meeting of the Committee on the Peaceful Use of Outer Space (A/AC.105/C.2/ SR 290, 23 March 1978). The Netherlands Delegation, Mr. Riphagen said, was of the opinion that the natural resources of the moon and other celestial bodies were the common heritage of mankind. That principle implied - he spelled out - that no State would have sovereignty, permanent or otherwise, over such resources *in situ*, and that the appropriation of such resources should not be subject to the rule of "first come, first served." From a more positive standpoint, he explained, that principle implied some form of international management in their exploitation.... The international management of the resources of the moon and other celestial bodies might take various forms, but the objective had already been agreed upon.

Whether the exploitation of the resources of the moon and other celestial bodies will ever become economical, is of course an open question. It may therefore be relatively

painless for States to declare them Common Heritage of Mankind. It is worth noting, however, that some States - especially among those most advanced in space technology - violently oppose the concept.

The Common Heritage concept, furthermore, is to be applied not only to the extra-terrestrial resources, but to the *products of space activity* in general. As Mr. Riphagen pointed out in the same statement, international practice has evolved in the direction of "application of the concept of the common heritage of mankind to the products of space activities. This means that the information gathered by satellites, e.g., on earth resources, on pollution, on weather, or on military activities, is Common Heritage.

The Common Heritage status of the information on earth resources affects the status of these resources themselves. "Sensed" resources, providing the basis for international resource planning, will tend to become common heritage themselves. At the intergovernmental level, the expansion of the common heritage concept may well take this detour.

At the nongovernmental level, the conceptual route is more direct.

To realize their goal of a production system satisfying *basic human needs*, the authors of the *Bariloche Report* postulate a number of structural changes at the national and international level. The basic features of the postulated new order are those of a participatory self-management system (most closely approximated in Yugoslavia today) based on *social ownership* - the national equivalent of the common heritage concept. Their description, however, comes close enough to convey the concept.

"Ownership and the use of property and means of production play a key role in every society", they state. "What is the role of property in the world described in the /Bariloche/ model? It is clear that, in our context, the concept of property loses much of its meaning. The private ownership of land and the means of production do not exist, but, on the other hand, neither does the State own them as is currently the case in many centrally planned economies.

"The present-day concept of private ownership of the means of production should be replaced by the more universal concepts of the *use* and *management* of the means of production..."

This sampling of new thinking, from such diverse sources as the Law of the Sea, the Law of outer space, Catholic thinking, and Third-World aspirations, may be sufficient to indicate that the principle of the Common Heritage of Mankind is here to stay, and to expand.

The concept of the common heritage of mankind does not conflict with the principle of national sovereignty over natural resources, affirmed in numerous U.N. declarations and resolutions. There is no going back on this principle. Rather, the Common Heritage principle *transcends* the principle of national sovereignty over natural resources, by *transforming the concept of sovereignty*, considering it functional rather than territorial (see RIO Report) and adding a *new dimension*: that of *participation*: Under the Bariloche as under the Catholic concept under the Law of the Sea as well as under Space law, resources in areas under national jurisdiction may be *used* and *managed* under national law, provided (1) the nation *participates in international resourc planning*, i.e., in the making of decisions that affect its citizens;and (2) the State consents to *binding international dispute settlement* in case of a divergence between perceived national and wider affected interests.

Management, for the benefit of society, or mankind, as a whole, with special regard to the needs of the needy ("basic needs" strategy) is an intrinsic part of the Common Heritage concept. The search for new forms of international resource management is on: an essential part of all socially and politically oriented world order studies, whether intergovernmental or nongovernmental.

International resource management is not to be construed as the operation of a centralized Super-State Super-Body, but as a decentralized, participatory system,based on the principle of *subsidiarity*: that is, resource management decisions are to be made at the *lowest possible level*: comprising only those affected by such decisions, whether at the subnational, national, regional or global level and including the public sector as well as the private sector, where it exists.

Until now, extensive technical and political work has been done with regard to only one *international resource management system*, and that is the International Seabed Authority. Though dealing with an economically somewhat marginal sector (the mining of the polymetallic nodules from the deep seafloor), this Authority thus will have a unique importance as a *model* for other international resource management systems which must necessarily be created to implement the Common Heritage principle as the basis of a new international economic order.

The establishment of an international resource managing system is without precedent in the history of international organization. It would be a break-through. It is not surprising, therefore, that the technical and political difficulties are enormous, and that the international community, acting through the U.N. Conference on the Law of the Sea, has not yet succeeded in solving the problems. The "glass," however, is as much half full as it is half empty, and one

should consider it a triumph - a break-through by itself - that the international community has gone as far as it has,

o in accepting, *by consensus*, the need of such a management system;

o in having done such a considerable and voluminous technical and political work in preparation for its realization.

The remaining fundamental issue is that of the structure of the production system.

On this point, unfortunately, the Conference got itself lured into a dead-end road, by constructing a system in which the international management sector has to *compete* with the private sector. We have dealt in a number of papers with the pitfalls of this approach. Suffice it to restate here that, given the economic and technological realities of today, it is impossible for the international management sector to get off the ground if the very limited capital and technological resources of the private sector are allowed to operate under what for all practical purposes amounts to a licensing system, and their production, while exhausting their capacity, satisfies the needs of their countries. There is, in that case, not only no financing and no technology available to the international managing system, but, worse than that, there is no economic raison d'être, no economic incentive to get it started. If the so-called "parallel system" really gets incorporated in the final Treaty, the unfortunate consequence would be that the Authority, while increasing its demands on the private sector and the industrial States, will on the one hand, not be able to benefit the developing countries, and, on the other, make life too difficult for the industrial States and their companies (a situation precisely profiling itself already during the present negotiations at the Conference). The consequence of this, in turn, will be that States, taking advantage of the inadequate definition of the boundaries of the Economic Zone and the continental margin, will extend their claims to national jurisdiction, conveniently to include sufficient mining sites so that mining operations can be carried out under U.S., French, and Mexican jurisdiction rather than under the jurisdiction of the International Seabed Authority.

There is, however, an alternative option before the Conference: One on which developing countries spent much time for preliminary studies, back during the time of preparation for the Conference, and which was then re-introduced by Nigeria in 1976 and elaborated by Austria in Ambassador Wolf's statement (*Note by the Secretariat*, 28 April 1977, Enclosure 6) and informal working papers.

This approach would be based on a *structured cooperation* between the private sector and the international management system, following the pattern, well accepted by Industry - a recent private meeting of the Consortia in Geneva looked at

this alternative with a quite open mind - of *equity joint ventures*: Any State or State-sponsored or -designated company would have *access* to the Area, under the condition that it form *a new Enterprise*, to which the Authority contributes at least half the capital investment (including the value of the nodules which are the common heritage of mankind) and appoints at least half the members of the Board of Governors (from developing and small industrialized countries), while the remaining capital is provided by the States or companies, who appoint also the remaining members of the Board of Governors, in proportion to their investment. Product, and profit, are divided in proportion to investment.

This approach would solve some of the thorniest problems still before the Conference: the problem of technology transfer, and that of financing the international resource management system. No other approach would provide such broad participation of developing countries in the management of the resources, and such broad financial participation by the Authority.

Whether the Law of the Sea Conference will or will not fall back on this solution, which is favored by very many countries, is an open question. Whether adopted or not, however, the *proposal is there*: it exists. And it may serve as a model for international systems in other areas: for the management of living resources: in particular, the harvesting of Antarctic krill; for the management of satellites (already foreshadowed by the INMARSAT Convention); for the management of energy.

At the same time, an *enterprise system* such as outlined here, could make a second major contribution to the building of a new international economic order. It could provide a model for *bringing TNEs into a structured relationship with the international community*. While incorporating applicable parts of the UNCTAD Code of Conduct, this would be a considerable step forward: incorporating also features of the proposed *European Companies* and responding to the need for a *democratization of decision-making, and representation, on the Board, of other than purely financial interests* (the Authority-appointed members from developing and small industrialized countries could include representatives of labor and of consumers).

Considered from this angle, the applicability of this model could be very wide: as wide as the range of TNEs - the wider, the better for the NIEO.

Another aspect of the common heritage principle is *revenue sharing*[1]) and if the concept of the common heritage is to be extended

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1) Some countries, especially among the industrialized ones, consider "revenue sharing" as an adequate interpretation of "benefit sharing," and "benefit sharing" as the only corollary of the common heritage concept. The majority of countries, however, interpret "common heritage" in the wider sense, attibuted to it in our

to other resources, so must revenue sharing. In *Partners in Tomorrow* ("The Age of Aquarius") attention was drawn to a series of recent proposals for an *international tax* based on use. One should add here that, during the Seventh Session of the Law of the Sea Conference, the Delegation of Nepal introduced its proposal for revenue sharing and the establishment of a Common Heritage Fund, in the form of a letter addressed to the President of the Conference. According to this proposal, the Fund's income would consist of (1) the revenues earmarked by the International Seabed Authority for the Fund; (2) the revenues due from the exclusive economic zones of States members; and (3) the revenues from the continental margin beyond the 200 mile limit of the EEZ. The biggest item would obviously be the second, that is, "a share of the net revenues from the mineral exploitation of the seabed and subsoil of the exclusive economic zone" as further specified in the proposal. This means, above all, an international tax on offshore oil, which would run into billions of dollars which should be collected from companies not included in the "enterprise system".

Not only would such a tax assure the automaticity of transfers that development strategy has been striving for during the last two decades: it also would create a more workable financial balance within the international resource management system itself: i.e., the capital-intensive, costly, and, at the beginning probably deficit-prone operations of the International Seabed Authority could be financed, largely, by a small part of the huge profits of the oil industry: There would indeed be nothing extraordinary in such a method, already widely applied at the national or corporate level: Companies, engaged both in oil production and in metal mining commonly finance the deficits arising from the metal mining operations during this period of crisis on the metal market, from the huge profits they make on oil production.

What was to be pointed out here in particular, however, is that an international taxation scheme would be a direct consequence, an intrinsic part, of the expansion of the concept of Common Heritage.

In 1971, the Delegation of Malta introduced in the U.N. Committee on the Peaceful Uses of the Seabed, an *Ocean Space Draft Treaty* which, based on the concept that the oceans as a whole, and all their resources are the common heritage of mankind, provided for a system of management for all marine resources and all major uses of the oceans. Had the international community chosen this path, apparently more complex, many solutions would instead have become easier. For the Maltese model would have *internalized* many functions and thus could have created a more self-sufficient, more nearly closed system, not demanding too many immediate changes outside.

It became clear immediately, however, that the Maltese proposal was way ahead of its time. The international community chose a more limited approach, providing a system of management only for *one* of the marine resources, viz., the minerals of the deep seabed. In trying to establish this system, however, the international community, first through the Seabed Committee, then through the Conference, became ever more acutely aware of the interaction of all uses and the need to deal with the oceans as a whole. This, however, was now far more complicated, since many functions had been *externalized*, entailing changes *outside* the new system, and thus the necessity of restructuring much of the United Nations system.

While providing, to some extent, a code of conduct for the other major uses of the oceans - the management of living resources, navigation, scientific research, environmental protection, the transfer of technology - the emerging Draft Convention reveals an awareness that this is not enough and makes repeated reference to, and demands on, "the competent international institutions." In some cases, these "competent institutions" already exist: COFI (FAO) for the living resources; IOC (UNESCO) for scientific research; IMCO for navigation; UNEP, for the protection of the environment. In other cases - transfer of technology, regional fisheries management - they will have to be created. In any case it is clear that the existing organization will have to be *restructured* to be able to assume the new required functions; and that restructured and newly established institutions must be *co-ordinated or integrated at the policy-making level*, providing for a forum where problems arising from the uses of the oceans can be discussed by States *in their interaction* and including not only their *technical* but also their *political* dimensions. A possible model for the kind of *integrative machinery* needed was proposed in *The New International Economic Order and the Law of the Sea* (Occasional Paper No. V, Malta: Malta University Press, 1976).

During the Seventh Session, the Delegation of Portugal tabled a rather complex resolution, co-sponsored by 17 other Delegations from developed, developing and socialist States, to give the necessary official impetus to this process which, more or less informally, is already in course.

"Considering that the implementation of the Convention on the Law of the Sea calls for an active and increased role of the appropriate international organization with competence in ocean affairs...." the Resolution states, "Recognizing that further strengthening of these organizations and increased cooperation among them are required, so as to allow Member States to benefit fully from the expanded opportunities for economic and social progress offered by the new ocean regime...." the Resolution calls on member States, on the Secretary General, the Specialized Agencies and other organizations of the United Nations, to take the necessary steps to achieve the needed restructuring and integration.

In this, the structure of the new International Seabed Authority being the first to be established to meet the new requirements, is very likely to influence the restructuring of the other organizations, in the sense that also the others, to discharge their new responsibilities in ocean space, must become *operational*, that is, they must directly *manage resources*, engage in scientific research, etc. Besides their traditional, policy-making and executive organs, they will have to comprise an *operational arm*, analogous to the Enterprise system of the Seabed Authority. They also will have to establish organs for *dispute settlement* at a certain level, in response to provisions already included in the Draft Convention.

This restructuring and integrating of the marine-oriented part of the U.N. system inserts itself into the broad trend to "restructure the U.N. system", which it is bound to influence and direct.

The proposed system, or "functional federation of international basic organizations" is in fact a "module" system, to which other "modules" can be added as needed.

One "module" could be provided by the Outer-Space sector.

A number of U.N. agencies, organizations, and commissions, as well as other intergovernmental, regional and nongovernmental organizations are presently engaged in outer-space activities. The U.N. Committee on the Peaceful Uses of Outer Space has the mandate to coordinate these activities, which are regulated by a number of legal instruments, the most important of which is the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. The Treaty, which provides a code of conduct, does not provide for any kind of machinery for decision-making, nor - as already pointed out - does it take any account of the *economic* and *development potential* of outer-space technology. As this potential becomes more obvious and the Common Heritage principle is applied to outer space and outer-space activities and resources, it will become necessary to create machinery through which all nations can share in policy making as well as in the management of programs and technologies.

One could imagine *a periodic Outer-Space Conference or Assembly* (every three, two, or one year/s/), which might either consist of all member States or, if the model of a functional federation of international organizations were to be followed, of *representatives of all the international organizations active in outer space*. (Which, in turn, are composed of States). The Committee on the Peaceful Uses of Outer Space might serve as an Executive Council, or the Conference itself might elect an Executive Council which would supersede the Committee on the Peaceful

Uses of Outer Space and would be chosen on a strictly regional basis, ensuring equitable representation of all parts of the world. 2) Obviously there would have to be some kind of common *Secretariat* which might well be provided by the U.N. Secretariat. Such an *International Outer-Space Authority* would have to have an *operational arm*, although it may be difficult, at this stage to say whether it would be more functional to create it *ex novo*, following the pattern of the Seabed Authority, or whether the operational arm should be even more *decentralized*, utilizing existing operational organizations such as INTELSAT, INTERSPUTNIK, INMARSAT, ESO, which, in this case, would have to be brought under the policy of the Authority.

Supposing there were six or seven such "modules" or "world economic communities" (in the meaning given to the word "communities" by "the European Economic Communities") dealing with oceans, outer space, energy, food, mineral resources, science and technology, international trade - the whole system could be drawn together in a restructured ECOSOC, which might be composed of Delegations from these various module Conferences or Assemblies.

This might be looking a bit too far - and too logically - into the future. History will fumble along its own way: far less logical, far less straightforward.

The expansion of the concept of the Common Heritage of Mankind, however, is in course. If it is indeed to be the basis of a New International Economic Order, its legal and economic content has certain corollaries. To explore, however, tentatively, what these might be with regard to (1) international resource management; (2) TNEs; (3) international taxation; and (4) the structure of international organization, has been the purpose of this position paper.

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2) The principle of regional representation, which is becoming increasingly important in the United Nations system, ought to be elaborated and refined. The four "regions" - Asia, Africa, Latin America and "Western Europe and others", are clearly inadequate as a basis for equitable regional representation. The concept of "region" has many meanings and is nowhere clearly defined. As a basis of equitable representation, the *15 regions established in the Leontief Report* might offer a fair, balanced, and workable solution: e.g. in a Council of 36 members, at least two members would have to be chosen from each of these