CHAPTER 2:
COMMON HERITAGE OF MANKIND - CONCEPT, ORIGIN AND ITS STATUS IN LAW OF THE SEA AND THE ANTARCTIC REGIME
2.1: Introduction

The world in which we live consists of a cluster of increasingly interdependent members. These members depend on each other for economic security, and are accountable to each other as custodians of the world’s environment. The isolated national interest perceptions of states and peoples have failed to promote international peace and security as well as the domestic well-being. There is a growing consensus among the members of world community that the world peace cannot be secured unless and until the gap between the rich and the poor or developed and developing countries is properly bridged. This imposes a duty on the advanced members of this community to help their developing neighbours in making social and economic improvements. The spirit of this emerging world economic order is put forward in the form of a principle called ‘Common Heritage of Mankind’.¹

The unequal distribution of the world’s natural resources, according to Judge Bedjaoui, has been the permanent feature of the whole of man’s history, which fuelled all conflicts. The conflict between the major powers for the conquest of raw materials, commodities, energy sources and commercial

markets gave rise to three successive solutions prior to the Second World War. Firstly, the institution of colonial empires, secondly, attempt to bring about new distributions of territory by the unsatisfied nations after First World War and thirdly, the World War. In the recent period of time with the advent of vast resources beyond the national jurisdiction, there has been an intensive search for the fourth solution. Consequently a new international economic order has been proposed together with the concept of CHM to meet the requirement of achieving universal solidarity.\(^2\) Thus concept of CHM is a politico-legal response to the world’s unequal distribution of resources.\(^3\)

The CHM is the brain-child of Ambassador Arvid Pardo, Malta’s representative to the United Nations. The concept came into picture on 17 August 1967, when the government of Malta submitted a memorandum to the Secretary General of United Nations stating that “time has come to declare the seabed and ocean floor a common heritage of mankind…”\(^4\) On 21 September


\(^4\) UN Secretary General, Doc. No. A/6695.
1967, Arvid Pardo explained the purpose of introducing this novel concept as being:

> to provide a solid basis for future worldwide cooperation …through the acceptance by the international community of a new principle of international law …that the seabed and ocean floor and their subsoil have special status as a common heritage of mankind and as such should be reserved exclusively for peaceful purposes and administered by an international authority for the benefit of all peoples …\(^5\)

On 1 November 1967, Arvid Pardo put forward the proposal in the First Committee of the General Assembly with an intent to get the assent of the delegates. Since then the concept has become a major topic of debate in the national and international forums. The object of this chapter is to look into the elements and philosophical underpinnings of the concept of CHM. The development of the concept under the law of the sea and Antarctic are discussed in detail with an objective of comparing it with the status of CHM in the governance of the moon and other celestial bodies.\(^6\)

\(^5\) UN General Assembly Resolution 2340 (XXII) of 18 December 1967.

\(^6\) The comparison of the status of CHM in these three fields is made in the last chapter together with the problems in drawing analogy from law of the sea and Antarctic in the application of the concept of CHM to the moon and other celestial bodies.
2.2: An Insight into the Concept

The concept of CHM is not susceptible to a precise definition. Meaning ranging from the enunciation of a social and political ideal, but without binding obligation, to a legal requirement that all benefit must accrue for all mankind has been accorded to the concept. It has been subjected to different interpretations by the developed and developing countries. This has been a thorn in the flesh in accepting the concept of CHM as a well-established principle of international law. Therefore the source and conceptualization of CHM has remained as a topic of scholarly debate. Some of the states have even expressed the view that the concept is neither realistic nor practical.

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10 UN Doc. A/7622 (1969) at p. 98.
However in support of his government’s proposal, Arvid Pardo has rightly pointed out that

I am well aware that the goal of my government may appear ambitious and that the concept of any environment being a common heritage of all peoples to be administered in common for the common good is somewhat alien to international law as it has developed over the centuries. Yet my government is convinced that introduction of this concept into international law and its eventual extension to other environments, the atmosphere for instance, is not only essential in order to deal effectively with mounting problems of universal concern, such as pollution, but also may be vital for the peaceful development of mankind and perhaps for its very survival.¹¹

CHM is totally a different concept of property rights. It carries sweeping and radical implications that challenge the traditional notion of resource acquisition and ownership. It is a functional and progressive principle that forms an alternative to the traditional ideas of exclusive ownership or of free

and unlimited access.\textsuperscript{12} The concept evolved due to the failure of the old doctrines in the modern period of time especially in the light of large-scale exploitation of the common resources.\textsuperscript{13} In general, CHM is something which belongs to everyone and shared jointly by all. The concept represents and reinforces a concern for and a commitment to the commons.\textsuperscript{14} Its underlying premise is that the resources outside the control of nations should be under a just and equitable system of management.\textsuperscript{15} Thus it supports a new kind of resource management keeping in mind the interests of all the people of the world. The model of resource management, which can best serve the common interest, is the crux of the concept.

CHM is a philosophical and legal tool for equitable distribution of world’s wealth especially those untapped resources which are in the unexplored


areas of the Universe. The roots of the concept can be seen in the classical political philosophy, economic thought and religious doctrine. CHM, being an ideal concept, overrides the isolated national interest perceptions. However this philosophical and idealistic nature of the concept of CHM has been a major hindrance in its development as a universally accepted principle of international law, though it was successful in withstanding the repeated assault by the developed states. The concept, despite having nearly four decades of history, is still in the developing stage. However we must keep in mind the fact that international law making involves a lengthy process and as such the concept may take some more time to become a part of universally accepted principles.

2.2.1: Concept of ‘Mankind’

Ever since Arvid Pardo’s proposal, the concept of CHM has come up quite frequently in various deliberations in and out of the United Nations. However the concept of mankind involved in the phrase was well known even before Pardo’s proposal. Earlier references to the term can be found in the

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Charter of United Nations,\textsuperscript{17} the Antarctic Treaty\textsuperscript{18} and the Treaty on the Non-Proliferation of Nuclear Weapons.\textsuperscript{19} Similarly in the field of outer space the General Assembly has used the term much before 1967 while recognizing ‘the common interest of mankind as a whole’ in furthering the peaceful uses of the outer space.\textsuperscript{20}

The term ‘mankind’ is a very wide term and includes all human beings wherever they may be found. It absorbs all peoples irrespective of flags, colours and banners.\textsuperscript{21} It includes both men and women. Stephen Gorove’s distinction between ‘mankind and ‘man’ needs a special mention here. According to him, the concept of ‘mankind’ refers to the collective body of people, where as the term ‘man’ stands for the individuals making up that body. He goes on to distinguish the rights of the mankind from the human rights. Human rights, as he states, are rights which individuals are entitled to on the basis of their belonging to the human race, where as the rights of the

\textsuperscript{17} Preamble to the Charter of the United Nations, 1945.
\textsuperscript{18} Preamble to the Antarctic Treaty, 1959.
\textsuperscript{19} Preamble to the Treaty on the Non-Proliferation of Nuclear Weapons, 1968.
\textsuperscript{20} UN General Assembly Resolution 1472 (XIV) of 12 December 1959.
mankind relate to the rights of the collective entity and would not be analogous with the rights of individuals making up that entity.\textsuperscript{22}

Concept of mankind is something new to the traditional international law because of two reasons. Firstly, it challenges a central concept of traditional international law, that being the concept of national sovereignty. A true concept of mankind overrides the national sovereignty and propagates the common good as the basic norm of a world legal order.\textsuperscript{23} Secondly, it has a special character of greater inclusiveness. Its ambit is wider than the utilitarian legal theories of David Hume\textsuperscript{24} and Jeremy Bentham.\textsuperscript{25} These utilitarian theories are directed towards the people within a state and they are not directed towards the people living in the world as a whole. Whereas the concept of mankind encompasses the states so as to include all the people of the world. One of the benefits of the concept of mankind is that it has helped the states in establishing a new form of international coexistence. The states have


\textsuperscript{24} Hume introduced the theory of utility through his popular moral theory.

\textsuperscript{25} According to Bentham the aim of the government should be ‘the greatest happiness of the greatest number’.
abandoned their natural rivalry for reasons of national aspirations or national pride to a greater extent in order to establish a harmonious system of international relations.\textsuperscript{26}

According to Rene-Jean Dupuy, “Mankind is in fact an open concept: it will become what men make of it”.\textsuperscript{27} However one should keep in mind that the concept should not be accorded with too wide interpretation so as to subject it to the danger of loosing its significance. Sometimes the term ‘mankind’ is used to represent not only present but also past and future generations.\textsuperscript{28} This vagueness has posed practical difficulty in accepting the phrase as a legal term.\textsuperscript{29} The fundamental practical difficulty is the problem of representation. If above mentioned interpretation is given to the term, then the representing authority must obtain some form of consent from all including the present, past and future generations, which is impracticable.


\textsuperscript{27} \textit{Supra} note 21, p. 353.

\textsuperscript{28} \textit{Ibid.}, 348 & 351.

\textsuperscript{29} \textit{Supra} note 22, p. 69.
Further, confining the meaning of ‘mankind’ to present generations will not solve the problem of representation. It is not possible for one state or group of states or an international organization to act as a spokesman or representative of mankind without some formal act of authorization or mandate involving such representation. If the property of mankind is considered to belong to all human beings, the disposition of such property requires the consent, either through the mechanism of representation or directly, from every one, which is again impossible.

Stephen Gorove says that even if the requirement of every person’s consent for representing mankind is replaced by every state’s consent, problem of representation will continue to exist. It is highly unlikely that all the states would come together to agree on a common representing body. In addition there might be some people living on the earth who for some reason would not be represented or whose consent could not be obtained.\(^{30}\) Therefore he concluded that “at the present time mankind, as a full-fledged legal entity, does not, as yet, exist simply because of the lack of an authority properly endowed with powers to act on its behalf”.\(^{31}\)

\(^{30}\) *Ibid.*

The concept of mankind, unlike Gorove’s opinion, is a distinct entity apart from and more than an aggregate of all the states. However, despite having limited personality in law, it lacks active legal capacity to exercise and enforce its rights. It is incapable of acting on its own under the international law and therefore it needs a mechanism or instrument to act for and on its behalf. Failure to evolve such a mechanism or instrument has been a matter of concern in the debates over CHM. Incapability to act on its own has also come in the way of mankind becoming a new subject of international law.

According to Gyula Gal, if the alleged subject of international law does not

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have the ability to enforce rights attributed to it, we cannot consider it as real subject of the international legal order.\textsuperscript{35}

But as Gorove rightly points out

More recently, the contours of a definite trend appeared to be emerging with an indication that the term “mankind”, particularly in the context of phrase “common heritage of mankind” has moved from the realm of an elusive notion, carrying philosophical, or moral connotations, into the domain of an emerging legal concept reflecting political and economic motivations.\textsuperscript{36}

Therefore, though mankind does not yet meet all the requirements for becoming a subject of international law, at present we are at the beginning of the process of assertion of mankind as a subject of public international law.

The above discussion shows that giving a very wide and strict interpretation to the term ‘mankind’ is unwarranted and impracticable. The problem of representation of human beings within the concept of mankind


\textsuperscript{36} \textit{Supra} note 7, p. 484.
narrow down the meaning of the concept. A logical solution to the problem is to have an organization which represents the great majority of the world population constituting mankind.\textsuperscript{37} The support to this solution can be derived from the municipal legal system. The government in the municipal system is the representative of the people within the territory of the state. However in the modern multi-party system, the government, in reality, is the representative of the majority’s will and certainly not the representative of will of all the people within the state.\textsuperscript{38} Similarly in the international level an organization representing the great majority of people in the world should be accepted as representative of mankind. At present the United Nations, being a near-universal\textsuperscript{39} organization is striving towards the goal of becoming the representative of mankind.

\textsuperscript{37} It may be noted that this solution is not strictly in conformity with the concept of CHM. However it is desirable in the light of the fact that representation of the mankind as a whole is impracticable.

\textsuperscript{38} The government is formed on the basis of the majority voting and not on the basis of the consensus of all people.

\textsuperscript{39} United Nations has the current membership of 191 states. Only a handful of states are outside the UN.
2.2.2: Common Heritage

The word ‘common’ refers to a thing which belongs to everyone, or which is shared jointly by all. Merriam - Webster Online Dictionary defines the word ‘common’ as ‘of or relating to a community at large’ or ‘belonging to or shared by two or more individuals or things or by all members of a group’. According to Word Reference Online Dictionary ‘common’ means ‘belonging to or participated in by a community as a whole; public’. If these definitions are used strictly, it would mean that all human beings who constitute mankind are entitled to a share in whatever belongs to mankind. This leads to the conclusion that one cannot dispose of the property belonging to mankind without the agreement of everyone else. Stephen Gorove says, “a general representation of the individuals by their state on the political level would not necessarily have to be regarded as endowing the state with authority to dispose of property belonging to all individuals within the state without their specific consent”. This would again bring forward the question of representation.

The word ‘heritage’ used in the CHM also brings up some additional questions. The term refers to some property or property interests which belongs

40 http://www.m-w.com/dictionary/common (Accessed on 30 October 2006, 5.45 pm)
41 http://www.wordreference.com/definition/common (Accessed on 30 October 2006, 5.48 pm)
42 Supra note 22, p. 73.
to a person or is reserved to him by reason of his birth. It is something that is passed from preceding generations.\textsuperscript{43} The Merriam - Webster Online Dictionary defines ‘heritage’ as ‘property that descends to a heir’. It also refers to heritage as ‘something transmitted by or acquired from a predecessor’.\textsuperscript{44} According to Christopher C. Joyner,

Clearly, the concept of “heritage” conveys the proposition that common areas should be regarded as inheritances transmitted down to heirs, or as estates which by birthright are passed down from ancestors to present and future generations. A CHM regime would therefore designate that region as an international patrimony, much the same as a piece of property or estate inherited by one generation from its predecessor.\textsuperscript{45}

If it is so, difficult questions to be addressed in the field of CHM are who are the predecessors of mankind? Did they possess any property right over CHM? and Who or what entity originally acquired the CHM and handed it down to people personally constituting mankind? Therefore Stephen Gorove again states that in order to have something handed down by way of heritage,

\textsuperscript{43} http://www.answers.com/topic/heritage

\textsuperscript{44} http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=heritage

the ancestors must have had property rights or interests in the object. Any other construction of such term would carry only philosophical, moral or other implications void of any legal connotation. As a result, the concept of CHM is elusive and undefined, and belongs to the realm of politics, philosophy or morality, and not law.46

The above discussion shows that the strict and literal interpretation of the components of the phrase ‘common heritage of mankind’ leads to absurdity and makes it an elusive and impracticable concept. However it is neither logical nor just to rely on such interpretation to put an end to the concept, which has got tremendous potentiality to govern the vast portion of unexplored resources on the basis of justice and fairness. It is true that the concept needs to be clarified with specific emphasis on its legal implications so as to strengthen its basis as a binding legal principle rather than mere political aspiration. But what is important to be noted is that, we must look into the concept of CHM in terms of the novel elements, which it propagates, rather than looking into the literal meaning of the terms used in naming the concept.

46 Supra note 22, pp. 74 & 77.
2.3: The Elements of CHM

The elements of CHM vary in number, though not much in contents, according to the interpretation given by different scholars and delegates to the United Nations. It has the special merit of embodying the spirit of most of the other principles. The Brazilian delegate to the Seabed Committee was of the opinion that ‘common heritage’ implied two concepts, the first of which would amount to a denial of rights and the second to an assertion of rights. According to the first concept, ‘common heritage’ would mean that the area could not be subject either to sovereign claims in public law or to appropriation in private law; according to the second concept it would imply that all states should participate in the administration and regulation of the activities in the area, as well as in the benefits obtained from the exploration, use and exploitation of its resources.47

In 1970, the Chilean delegate stated that the concept of CHM is “an indivisible property with fruits that can be divided” among all states.48 The Yugoslavian delegate described three vital ingredients in the concept as “common wealth, common management, and common and just share of

benefits”. Gennady M. Danilenko says that CHM would fulfil three major goals: preventing the exploitation of common resources from being monopolized by industrially developed countries, guaranteeing the direct participation of developing countries in international management and exploitation of the resources and distributing the derived benefits primarily in the interests of the developing countries.

According to R. P. Anand,

the ‘principles of (a) inappropriability and indivisibility of the seabed beyond national jurisdiction; (b) international regulation of the exploration and exploitation activities of this common property; (c) equitable distribution of benefits among all countries irrespective of the geographical location of states; (d) freedom of access, use, and navigation; (e) use of the seabed only for peaceful purposes; and (f) international cooperation, were supposed to be subsumed in the generic term ‘common heritage of mankind’…”

However as mentioned in the previous chapter, we can enlist five major elements of the concept of CHM. These elements can be seen in the writings and presentations of the founding father, Arvid Pardo as well as in the provisions of the Law of the Sea Convention 1982. These elements are as follows.

(i) **Prohibition on Individual Appropriation**

The first element of the principle makes it clear that the resources designated as CHM cannot be appropriated by any individual State. They are also not subject to appropriation of any kind either public or private, national or corporate. The State cannot claim sovereignty over them because they remain with all of humanity. However this does not mean that the use of these resources is totally prohibited. These resources, being the subject of common interest, must be used only for the benefit of the mankind. No nation can be allowed to appropriate it for the individual benefit, as the resources therein are nature’s bounty. The main purpose of non-appropriation is to provide open access and free use to all in promotion of common interest.

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52 *Supra* note 45, p. 191.

(ii) International Management System

The second element, common management system, is much more important and complicated than the first element. Its importance lies in the fact that this element is the basis for achieving the third element, which is the crux of CHM. It is complicated because it involves the question of competent authority, which can manage the common resources effectively and represent the interest of the mankind. Unless and until this problem of representation of human beings within the concept of CHM is resolved, it would be difficult for any organization to act or exercise rights on behalf of the mankind as a whole.\(^{54}\)

An effective system of international management must consist of an authority representing mankind, which can independently carry on the task of exploration and exploitation of resources. Such an authority must also be strong enough to prevent any activity contravening the interests of mankind. National governments cannot manage common resources as sovereigns, but the government can act as representatives of mankind and participate in the management.\(^ {55}\)

\(^{54}\) Supra note 22, p. 72.

\(^{55}\) Supra note 45, p. 191.
(iii) Equitable Sharing of Benefits

There is no doubt that world peace in the modern period heavily depends on the economic factors. There is a need to bridge the gap between the developed and developing countries for the maintenance of international peace and security. Therefore, a growing trend of international community must always take into account the interests and needs of developing and poor countries in the exploitation of the resources.\textsuperscript{56} The CHM principle incorporates this factor as its third element. It speaks not only about the safe development of natural resources and their rational management but also about the ‘equitable sharing’ of the benefits derived from these resources. In fact the ultimate purpose of CHM is to bring to force such regimes, which are meant to redistribute the world’s wealth more equitably.\textsuperscript{57}

The term ‘benefits’ used here is not confined to monetary benefits; they encompass all benefits including those of technology.\textsuperscript{58} The Concept of CHM


\textsuperscript{57} Supra note 1, p. 536.

advocates for equitable sharing and not equal sharing. Equitable in general means ‘fair’ or ‘just’. It is giving every man his due or what he is entitled to. It is a proportional sharing based on the necessity and contribution in the derivation of the benefits. This principle of equitable sharing strikes a balance between the interests and needs of the developing countries and efforts of countries which have directly or indirectly contributed in the exploitation of the resources outside the national jurisdiction. Unfortunately, this principle of equitable sharing of benefits has met most serious resistance by the states. It is a classic example of general principles war with the everyday realities of the international system.\textsuperscript{59}

(iv) **Measures to Protect and Preserve the CHM for Future Generation**

The fourth element propagates the principle of sustainable development.\textsuperscript{60} As per Brundtland Report, the phrase covers the development that meets the needs of the present without compromising the ability of the


future generation to meet their own needs. The report also states that the principle of sustainable development has been accepted as a part of customary international law though its salient features have not been finalized by the international law jurists. The UN General Assembly has declared the right to sustainable development as an inalienable human right.\textsuperscript{61} Almost all municipal legal systems of the world also recognize this inalienable right. The Indian Apex Court has recognized sustainable development as a path that works for all peoples and for all generations, without which the life of coming generations will be in jeopardy.\textsuperscript{62}

The principle of intergenerational equity, which is an integral part of sustainable development, needs a special mention here. Intergenerational equity means the concern for the generations to come. The CHM resources are not only the property of the present generation but they also belong to the future generations. The present generation has no right to imperil the rights of the future generations over these resources. So necessary measures should be taken to protect the common resources. The present generation must act as the trustee of future and administer the common resources by keeping in mind the needs of future generations. According to Alexandre Kiss, “The very nature of the

\textsuperscript{61} Declaration on the Right to Development, 1986.

\textsuperscript{62} M.C. Mehta v. Union of India, 2002 (4) SCC 353.
common heritage seems to imply a form of trust under which the principal aims are rational use, good management, and transmission to future generations”.

So, this element envisions a rational system of resource management in order to save them from depletion and contamination. The principle also prohibits the activities damaging the environment of the areas designated as CHM. It is impossible to avail the resources to the future generation, unless and until the pollution is controlled and environmental protection is assured.

(v) **Peaceful Uses of Resources**

The final element of CHM seems to be simple but it involves greater practical difficulties. It says that the CHM resources must be used only for peaceful purposes. The fact that the term ‘peaceful uses’ is not defined precisely anywhere has resulted in the conflicting interpretations. The major question to be pondered is whether ‘peaceful uses’ means ‘non-military uses’ or ‘non-aggressive uses’? The detailed discussion into this question is made in chapter 4.

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63 *Supra* note 59.
2.4: CHM and *Res Communis*

The CHM is neither same as *res nullius* nor as *res communis*, although it includes some of the elements of the latter. In fact the principle of CHM seems almost similar to *res communis* regime, and therefore they are used interchangeably by some authors. But there is a substantial difference between the two. Arvid Pardo, while explaining the objective of his government, points out that CHM is a new principle of international law which is different from *res communis*. According to him the objective of his government has been as follows:

Preservation of the international character of the seabed and ocean floor and of the subsoil, underlying the high seas beyond the limits of national jurisdiction, not as a *res omnium communis*, usable for any convenient purpose and the resources of which are indiscriminately and competitively exploitable, but through the acceptance by the international community of the principle that these vast areas of our planet have a special status as a common heritage of mankind and, as

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such, should be reserved exclusively for peaceful purposes and administered by an international agency in the name and for the benefit of all peoples and of present and future generations.

It is, in other words, a new basic concept which we wish to introduce into international law. We have also suggested that the proposed international agency might assume responsibility for promoting and coordinating international action with regard to grave problems of universal concern concerning the marine environment as a whole.  

There is not much difficulty in demarcating the CHM from *res nullius*, because *res nullius* does not belong to anyone and may be appropriated by anybody. The two pre-requisites for the possession of *res nullius* are that the object should not previously belong to anyone, and it should remain under effective control of the first taker or occupier. *Res nullius* does not form the part of individual estate. However it could be appropriated to form the part of

individual estate. For example, a fish swimming in the sea is ‘res nullius’, but when it is caught, it becomes the property of the fisherman. Fish becomes the property of the first taker for two reasons. Firstly, the uncertainty of ownership could not otherwise be avoided. Secondly, the equity allows the first taker to derive benefit out of his labour and industry.68 Thus res nullius is something not already subject to national sovereignty but the states have right to assert national sovereignty over it.69

Alternatively, the res communis regime allows the use for community needs and enjoyment, and prohibits the claim of exclusive sovereign rights on the part of states. In other words res communis is something, which belongs to a group of persons and may be used by every member of the group subject to the principle of non-appropriation. Examples are the air, floating water, the sea and the shore. No one could own these things, but they could be used and enjoyed by everyone. There is no scope for sharing of the benefits. Those who

69 Supra note 64, p. 45.
make use of it receive the benefit, those who do not cannot complain.\textsuperscript{70} Under this approach, the users of the common space have no centralized political mechanism, which forces them to take account of the overall loss to the users caused by the overuse and degradation of the resources. Even though the principle of CHM borrows the idea of non-appropriation from \textit{res communis}, it goes a step further. It provides to humanity the right and duty to organize, rule and manage the resources or territory.\textsuperscript{71} Sharing responsibility and equitable allocation of benefits to all are striking features of CHM. While the \textit{res communis} regime allows freedom of access, exploration and exploitation, a common heritage regime strictly regulates exploration and exploitation. It also establishes a management mechanism for monitoring the activities and distributing the benefits.\textsuperscript{72}


In the words of Pardo “the principle of ‘common heritage’ went beyond that of res communis and the internationally accepted test of ‘reasonable use’. It implied something to be administered in common and thus contained the notion of trust and of trustees, although not necessarily that of property”. He also felt that the concept of indivisibility is inherent in the CHM. It also implied peaceful uses, since the military use would endanger the common property. The freedom of access and use, as well as the regulation of the use and the equitable distribution of benefits among those who possess an interest in the common property, though not directly participating in exploitation, are also within the ambit of the CHM. Finally the promise of reservation of the resources for future generation also forms the part of CHM. But these elements are missing in res communis. So CHM regime is certainly a development over res communis regime.

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73 Supra note 51.

2.5: Law of the Sea Antecedents

Since from the birth of human race, the seas have been a major source of food supply and a platform for human adventures in search of new lands. The spread of population across the world’s coastlines and the imperial powers’ hunger to explore and conquer the globe necessitated a body of law to regulate the wealth of the sea. Initially, law of the sea was as fluid as the waters it sought to regulate.\textsuperscript{75} The major developments in the field of Law of the Sea started only five to six centuries back.

During fifteenth century, states were in favour of appropriation of or at least an exercise of exclusive rights over large portion of the sea. It is evident from the partition of the sea between Spain and Portugal in the year 1493 and 1506. However with the decline of the influence of states favouring the concept of closed seas and with the rise of dominance of maritime powers, there was a gradual shift towards the concept of freedom of seas.\textsuperscript{76}


2.5.1: Freedom of the Seas

The principle of freedom of seas advocated by Hugo Grotius in his book ‘Mare Liberum’ has been accepted by the states for centuries. The freedom of the seas or the system of open waters meant that the oceans were available for all users and every state had the right to navigate and fish freely. Grotius denied that a state could exercise sovereignty over the ocean and predicated the right of all states to use it. The principle applied to all of the sea except a narrow belt of water along the coastlines called as territorial sea, which was under the sovereignty of the coastal state. The sovereignty over this narrow belt of water was granted for the protection of local fishing interests and for security of the coastal states. The principle had the Roman Law antecedents. Under the Roman law, the sea was considered as ‘commune omnium’ or ‘jus naturale’, that is, common property of all. But after the disintegration of the

77 Published in the year 1609.


79 The Digest of Justinian (529 A.D.) declared the sea as jus naturale, which is incapable of appropriation and its use is open freely to all men. See generally Percy Thomas Fenn, Jr., ‘Justinian and the Freedom of the Sea’, American Journal of International Law, Vol. 19, No. 4, October 1925, pp. 716 - 727. Roman Empire of the second century established early in its reign the doctrine of the common right of all men to a free use of the sea and it was codified in the sixth century.
Roman Empire, it had been lost and forgotten through the centuries. Grotius is said to have reawakened the principle.\(^{80}\)

Grotius put forward two propositions in support of his principle. First, “that which cannot be occupied, or which never has been occupied can not be the property of anyone, because all property has arisen from occupation”. Second, “that which has been so constituted by nature that although serving some one person it still suffices for the use of all other persons, is today and ought in perpetuity to remain in the same condition as when it was first created by nature”.\(^{81}\) He argued that “the sea is common to all, because it is so limitless that it can not become a possession of anyone, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries”.\(^{82}\) So according to him use of the oceans for fishing or for navigation by one did not preclude their use by others.\(^{83}\) Grotius was also of the view that


the liberty of the sea was a key aspect in the communications amongst peoples and nations.  

The Grotian work was attacked by Serafim de Freitas in his book ‘De iusto imperio Lusitanorum Asiatico’ published in 1625 and also by John Selden in ‘Mare Clausum’ published in 1636. Both the scholars endeavoured to prove that the sea was practically as capable of appropriation as territory. Freitas says that the vastness of the sea has never been an obstacle to the occupation of parts of it. According to him there is undeniable historical evidence that some nations have had exclusive rights over certain seas, such as the Venetians over the Adriatic Sea. Similarly Genoa followed the example of Venice in the Ligurian Sea, England became mistress of the undefined ‘British Seas’ and Denmark claimed sovereignty over the northern seas. Freitas goes on to state that, just as the air above our property can become ours by virtue of a quasi-


occupation, the water in the seas can also be the subject of individual rights.\textsuperscript{87} John Selden advocated the concept of closed sea as opposed to the freedom of seas. \textit{Mare Clausum} opposes public dominion over the waters unless one dares to affirm that the laws of friendship may overthrow private ownership.\textsuperscript{88}

The seventeenth century saw the widespread acceptance of the concept of the closed sea with the claims by England, Denmark, Spain, Portugal, Genoa, Tuscany, the Papacy, Turkey and Venice.\textsuperscript{89} But in the eighteenth century, the position changed completely. The claims over large areas of the sea faded away and the concept of freedom of seas ruled the eighteenth and nineteenth centuries.\textsuperscript{90} Throughout the nineteenth century the freedom of the high seas meant that the oceans constituted a common resource whereby all states had equal access. The objective behind this was that the states could promote their economic well being through transportation, navigation and

\textsuperscript{87} Monica Brito Vieira, ‘Mare Liberum vs. Mare Clausum: Grotious, Freitas and Selden’s Debate on Dominion Over the Seas’, \textit{Journal of the History of Ideas}, Vol. 64, No. 3, July 2003, pp. 361 - 377 at p. 373.  
[Also available at, http://muse.jhu.edu/journals/journals_of_the_history_of_ideas/v064/64.3vieira.pdf (Accessed on 06 July 2006, 11:39 am)]

\textsuperscript{88} \textit{Ibid.}, p. 366.

\textsuperscript{89} \textit{Supra} note 76.

\textsuperscript{90} \textit{Ibid.}, p. 225.
exploitation of natural resources.\textsuperscript{91} R. P. Anand points out that the freedom of seas was accepted not because of Europe became convinced of the argument of Grotius, but because it became necessary and useful in the wake of industrial revolution. The needs and demands of the industrial revolution - surplus capital, new markets for European goods, demands for raw materials - led to the vast expansion of Europe and acceptance of the freedom of the seas.\textsuperscript{92} J.S. Reeves, while acknowledging the work of Grotius, says that it was the merit of Grotius that he furnished the philosophical and juristic basis for the regulated freedom of the seas based upon the fundamental idea that the seas, being common to all, were a universal highway of commerce.\textsuperscript{93}

\textbf{2.5.2: Assertion of State Sovereignty}

The twentieth century saw revolutionary development in the field of technology. The world community soon noticed that the oceans are not only the source of living resources but also the treasure of wealthy non-living resources. However the technological breakthroughs in the ability to explore and exploit the living and non-living resources of the sea posed the threat of massive


\textsuperscript{92} \textit{Supra} note 86, p. 450.

\textsuperscript{93} \textit{Supra} note 78, p. 538.
exploration and exploitation of the resources near the coasts of other states.\textsuperscript{94} 
This has resulted in the need to protect the coastal resources. So with the development of the technology to explore and exploit the living and non-living resources of the sea, the states started asserting sovereignty over greater parts of the sea.

The concept of unlimited freedom of the seas was challenged and its scope was narrowed down.\textsuperscript{95} In 1950, Professor Gidel said,

The expression ‘freedom of the high seas’ is in reality a purely negative, worn-out concept, nothing more; it has no meaning for us, except as the anti-thesis of another, a positive concept, which has long since disappeared. The idea of the freedom of the high seas, is paradoxically, a survival of the idea - long since dead - that the high seas are subject to dominion and sovereignty, just like any territorial dominion.\textsuperscript{96}

The ‘freedom’, which was once the hallmark of the law of the sea, has been over shadowed by the claims of the coastal states to exclusive rights in


more and more of the sea for more and more purposes.\textsuperscript{97} The first serious blow for change in the law of the sea came from the United States in the from of Truman Proclamation, 1945. The increasing need of new sources of energy compelled United States to think in terms of the exploration and exploitation of the oil, gas and other energy sources available outside its territorial sea. On 28 September 1945, President Harry S. Truman proclaimed that “the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States … appertain to the United States” and are “subject to its jurisdiction and control”.\textsuperscript{98} This has instigated other coastal states\textsuperscript{99} to follow the U. S. practice making a way for instant customary international law.\textsuperscript{100} The states sovereign right over the continental shelf thus became a new exception to the principle of freedom of the seas.

However, despite the coastal states acquisition of exclusive rights to the mineral resources of the continental shelf, the water above the continental


\textsuperscript{99} Mexico, Argentina, Chile, Peru, Costa Rica and Korea made similar claims soon after the Truman Proclamation.

\textsuperscript{100} Supra note 97, p. 49.
shelf, outside the territorial sea,\textsuperscript{101} remained high seas. Between 1945 and 1958, the coastal states made a series of claims for wide fishing zones as well as wide territorial sea. There was lot of confusion about the legal validity of the claims made by coastal states which were ranging between 5, 6, 12 and 200 miles.\textsuperscript{102}

\section*{2.5.3: UN Conferences on Law of the Sea}

The growing confusion in the Law of the Sea was noticed by the United Nations right from its inception. The technical developments and their economic and social repercussions gave birth to new needs and interests as far as the exploitation and conservation of the resources of the sea are concerned. The traditional concepts and principles of the international law of the sea were found insufficient to fulfill these new needs and protect the interests.\textsuperscript{103} In 1958, United Nations made the first concrete attempt to codify law by holding

\textsuperscript{101} Territorial sea was subject to three-mile limit.


The Conference was a success in many areas on Law of the Sea. Though the important issue of breadth of the territorial waters was not solved, the Conference was successful in indicating the method of constructing the outer limits of the territorial sea. The right to innocent passage of the foreign vessels, which was well accepted by the states, was recognized explicitly. The fishing rights and the need for conservation of living resources of the high seas were also addressed. But the extent of the regulation of the fishing rights in territorial waters remained unresolved. The coastal states sovereign rights to resources in the continental shelf and its ancillary rights in the contiguous zone are reaffirmed.

The four conventions resulted from UNCLOS - I are still in force, although in many respects they have been superseded by the 1982 Convention


105 Article 6, Convention on the Territorial Sea and the Contiguous Zone, 1958 - The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

on the Law of the Sea. The matters which are not stipulated under 1982 Convention, and the states which are not parties to 1982 Convention and have signed the 1958 conventions are still governed by the 1958 conventions.\textsuperscript{107}

The unresolved question of the breadth of the territorial sea prompted the Second United Nations Conference on Law of the Sea (UNCLOS - II) in the year 1960. But it did not result in any agreement. A draft resolution was agreed to request the UN General Assembly to convene, at a future date, another United Nations Conference to address the problem of breadth.

The Third United Nations Conference on Law of the Sea began in the year 1973 and lasted over nine years. Finally in the year 1982, a comprehensive convention governing the sea resulted from nine years deliberations. The Convention recognized different zones in the sea\textsuperscript{108} and fixed the limits of each zone. The rights of the states in various zones of the sea are also clarified. The Grotian concept of freedom of the seas was recognized in the governance of the


\textsuperscript{108} Territorial sea, contiguous zone, exclusive economic zone, continental shelf (which are subject to the sovereignty of states) and the high sea (which is free to all).
high seas.\textsuperscript{109} The Convention explicitly prohibited claims of sovereignty over the high seas,\textsuperscript{110} and also urged for the reservation of the high seas for peaceful purposes.\textsuperscript{111} The most striking feature of the UNCLOS - III was the debate over Pardo’s concept of CHM. The roots of the concept became strong when the concept found a place in the 1982 Convention. N. S. Rembe pointed out that the common heritage principle became the cornerstone of the contemporary

\textsuperscript{109} Article 87, Law of the Sea Convention, 1982 - Freedom of the high seas

(1) The high seas are open to all States, whether coastal or land-locked.

Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

(2) These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

\textsuperscript{110} Article 89, Law of the Sea Convention, 1982.

\textsuperscript{111} Article 88, Ibid.
law of the sea and a powerful source of inspiration for the increasingly vocal Group of 77, an alliance of developing countries.112

2.5.4: CHM as a Principle Governing the Area113

The sovereign rights of the coastal states over the resources found in the territorial waters, in the seabed under the territorial waters and in their subsoil, and in the continental shelf are well recognized under the international law of the sea. But as one moves beyond these limits of national jurisdiction, only general principles of international law govern the exploration and exploitation of the resources found in the seabed and subsoil of the high seas.114 International lawyers had strong differences on the status of the seabed and subsoil underlying the seas beyond the limits of territorial waters. On the one hand some believed that the seabed underlying the seas beyond territorial


113 ‘Area’ means the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. (Article 1 (1), UN Convention on Law of the Sea, 1982)

114 The major resource found in the seabed and subsoil is manganese nodules. It consists of minerals of high economic interest such as manganese, cobalt, copper and nickel. [http://www.answers.com/topic/manganese-nodule (Accessed on 22 August 2006, 10:23am)]

115 Supra note 51, p. 177.
waters as *res communis*, common property of all nations, and thus incapable of individual appropriation. On the other hand, others regarded seabed as *res nullius*, which is not yet been acquired, but capable of acquisition by a sovereign. There was also a group of people who distinguished between the status of seabed and its subsoil. According to them the seabed itself is *res communis*, while its subsoil could, in certain circumstances, be *res nullius*. The confusion became more prominent in the recent years with the rejection of both the theories.  

It was also realized that some of the basic assumptions of the doctrine of freedom of sea are incorrect. Grotius was under a wrong belief that the resources of the sea, whether living or non-living are inexhaustible. With the tremendous development in technology, it became evident that the resources of the sea are exhaustible. Further the mineral resources may be more easily exhausted, as they do not possess the capacity to reproduce themselves.  

This has made it clear that the traditional doctrine of freedom of sea cannot be applied in the governance of the Area.

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116 *Supra* note 11, p. 217.

The four conventions entered in the year 1958 did not address the issue of governance of the Area. So law governing the exploration and exploitation of the resources of the Area was uncertain. In late 1960’s, Louis Henkin rightly remarked that “no one knows what the law is”.¹¹⁸ The uncertainties about the extent of national jurisdiction and the legal regime of the Area on the one hand and the temptation on the part of the advanced nations to find and exploit vast resources with the help of their developed technology on the other hand, pointed out the possibility of a serious international conflict. The rapid scientific and technical progress in reaching great depths of the sea brought forward the real danger of division of the whole seabed and subsoil under high seas.¹¹⁹ In the meantime, the U.S. Commission on Marine Science, Engineering and Resources made it clear in its report that:

Unless a new international framework is devised which removes legal uncertainty from mineral resources exploration and exploitation in every area of seabed and its subsoil, some venturesome governments and


private entrepreneurs will act to create *faits accomplis* that will be difficult to undo, even though they adversely affect the interests of the United States and the international community.\(^{120}\)

There was also a fear of repetition of the history of colonization with all its disastrous consequences. U.S. President, Lyndon Baines Johnson’s remarks reflect this fear, when he said:

> Under no circumstances must we ever allow the prospect 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 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.\(^{121}\)

By this time the ‘Third World’, consisting of the developing countries, had started to raise its voice in the international level. The ‘Third World’ countries developed loose forms of political and economic cooperation to


strengthen their voice in the international organizations.¹²² In the light of the longstanding uncertainty in the law governing the seabed and ocean floor, Malta came out with the novel concept of CHM in 1967. On 1 November 1967, speaking in the First Committee of the General Assembly, Malta’s Ambassador Arvid Pardo asserted that “current international law encourages the appropriation of this vast area by those who have the technical competence to exploit it”. He also stated that the consequence of competitive scramble for sovereign rights over the seabed could be very grave: at the very least a dramatic escalation of the arms race and sharply increasing world tensions, caused also by the intolerable injustice that would reserve the plurality of the world’s resources for the exclusive benefit of less than a handful of nations. The strong would get stronger, the rich richer, and among the rich themselves there would arise an increasing and insuperable differentiation between two or three and the remainder. Between the very few dominant powers, suspicions and tensions would reach unprecedented levels. Traditional activities on the high seas would be curtailed and, at the same time, the world would face the growing danger of permanent damage to the marine

¹²² Supra note 97, p. 52.
environment through radioactive and other pollution: this is a virtually inevitable consequence of the present situation.\textsuperscript{123}

Pardo emphasized the need for the creation of an effective international regime for the seabed and ocean floor beyond the national jurisdiction. Urge for the acceptance of that Area as CHM has reflected throughout his speech.\textsuperscript{124}

However Pardo’s brain-child met with serious criticism in the initial years, especially by the developed states. In 1967, the United States Ambassador Goldberg expressed the view that it is too early to take any final decision on Pardo’s proposals for a comprehensive legal regime to govern the deep ocean floor.\textsuperscript{125} Most of the members of UN felt that a comprehensive study is required to solve the problem, and therefore a study group or a committee should be appointed to look into the problem.\textsuperscript{126} General Assembly, responding to the general feeling, adopted Resolution 2340\textsuperscript{127} and created an Ad Hoc Committee to study the Peaceful Uses of the Seabed and the Ocean


\textsuperscript{126} See generally U.N. Doc. A/C.1/PV.1525 (10 November 1967)

\textsuperscript{127} Supra note 5.
Floor beyond the Limits of National Jurisdiction. The resolution also recognized the mankind’s common interest in the seabed and the ocean floor.

The Ad Hoc Committee held three sessions during 1968 and established two working groups, one concerned with economic and technical aspects and the other with the legal aspects. The final report of the sessions reflected emerging conflicts of interests but indicated the failure of the Ad Hoc Committee to reach agreement on a statement of principles with respect to the seabed. The general opinion that the problems relating to the seabed should be more thoroughly studied and discussed before any agreement could be arrived, continued to prevail during this period. This instigated the General Assembly

128 For example, Soviet Union was of the opinion that undue haste could lead either to some states imposing their will and their position on other states or to the adoption of hasty and insufficiently thought-out solutions whose consequences might have a negative influence on the development of international cooperation in the field of the exploration and use of the sea-bed. Both of those situations, of course, would be undesirable, if not intolerable. [U. N. Doc. A/C.1/PV.1592 (31 October 1968) pp. 3 - 5]
to adopt four resolutions, 2467 A - D,\textsuperscript{129} dealing with various issues relating to the seabed.\textsuperscript{130}

Meanwhile, the debate over the concept of CHM continued more intensively. The developing countries’ views in favour of the concept were strongly countered by the developed countries. Japan put forth the opinion that the inclusion of the concept of common heritage, which was subject to various interpretations, “in a statement of general principles might give rise to unnecessary confusion in the establishment of a legal regime applicable to the Area, and would therefore be undesirable”.\textsuperscript{131} The Soviet Union and other

\textsuperscript{129} UN General Assembly Resolutions 2467 A - D (XXIII) of 21 December 1968.

\textsuperscript{130} Resolution 2467 A gave permanent status to the Ad Hoc Committee by establishing Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction. The Committee was instructed to study the elaboration of the legal principles and norms which would promote international co-operation in the exploration and use of the seabed and the ocean floor, and the subsoil thereof. Resolution 2467 B urged the member states to take appropriate safeguards against the dangers of pollution and other hazardous and harmful effects that might arise from the exploration and exploitation of the resources of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction. The Resolution 2467 C requested the Secretary General to undertake a study in relation to the establishment of an appropriate international machinery for the promotion of the exploration and exploitation of the resources of the Area and the use of those resources in the interests of mankind. Resolution 2467 D endorsed the concept of International Decade of Ocean Exploration.

countries of the Soviet bloc objected to the establishment of a special legal status for the seabed beyond the national jurisdiction based on the concept of the CHM because the concept, according to them, ran counter to existing norms and principles. According to them the concept “appeared to have been evolved with a view to preventing the appropriation of the ocean floor by certain states, but it was neither realistic nor practical”.\textsuperscript{132} Canada had reservations about the use of the phrase CHM because it was of the opinion that the concept “had no legal content and was unknown in international law. Its inclusion in a declaration of principles could have far-reaching implications, whose precise nature was as yet unknown”.\textsuperscript{133}

On the other hand the developing states strongly advocated the concept of CHM. The Indian representative said that the concept “symbolizes the hopes and needs of the developing countries, which can legitimately expect to share in the benefits to be obtained from the exploitation of the resources. These benefits would help to dissipate the harsh inequalities between the developed and the developing countries”.\textsuperscript{134} The Brazilian delegate was of the view that

“this key concept should provide the cornerstone for a legal regime for the area and, in particular, for the exploration, use and exploitation of its resources”.\textsuperscript{135}

In response to the criticisms that the concept was unknown in international law, Arvid Pardo was of the view that

the principles on which the new regime was to be based could not be sought in traditional doctrines of international law; they must be new, equitable and moral…. The concept that any area was to be administered in common for common good was somewhat alien to existing international law. Nevertheless, its introduction as the basis of international law on the seabed and ocean floor was essential, not only for the development of that environment, but also for the peaceful development of the world.\textsuperscript{136}

The Norwegian Ambassador, Hambro, speaking in support of Pardo, said that

the problems with which we are confronted are novel and the solutions we must offer in this area in order to establish international justice and maintain international peace can hardly be found in the bookshelves of


international law libraries. We must not be afraid of new concepts or of new terms to explain them. New words are needed for new concepts.

He also suggested that the term common heritage of mankind points to something valuable, referring to the past as well as to the present and future, emphasizing that those areas and the riches contained therein with their possibilities and problems, have been passed on to the present international community as a heritage of mankind and for common benefit as a whole, not to any individual nation or group of nations.137

The above discussion clearly shows that the dilemma over the status of the CHM continued and in fact became a serious matter of debate in the international deliberations. However by this time the concept had gained so much significance that there was no doubt about the fact that it cannot be dismissed as meaningless and empty phrase. Samuel A. Bleicher remarks that the persistent reiteration of the phrase and repeated confirmation of the principle in the General Assembly resolutions indicates that it embodies a view

of the community which has some continuity, rather than an ephemeral accident of General Assembly politics.\textsuperscript{138}

**Resolution 2574 D:**\textsuperscript{139}

The General Assembly adopted one of its most controversial resolutions in the year 1969. The Resolution 2574 D, popularly known as ‘moratorium resolution’, was adopted despite the vigorous opposition from technologically advanced countries. The Resolution recognized the essence of international regime including appropriate international machinery. It also emphasised on the importance of preventing the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction from actions and uses which might be detrimental to the common interests of mankind. It declared that, pending the establishment of the aforementioned international regime:

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;


\textsuperscript{139} UN General Assembly Resolution 2574 D (XXIV) of 15 December 1969.
(b) No claim to any part of the Area or its resources shall be recognized.

This resolution was the result of the fear expressed by some of the states that the rapid technological developments might result in the exploitation of resources to such an extent that very little of the resources would be left when the negotiation for the establishment of international regime begins. Such an exploitation is prejudicial to the joint interests of humanity as a whole.

The Indian representative, speaking in support of the resolution, stated it would be ironic, if the already opulent communities of the world were left with unchartered freedom to exploit the riches of this new environment. This may tragically lead to the economically backward majority of the world to discard the path of reasoned accommodation as unsuccessful and to take more aggressive measures. Therefore, it is of supreme importance to take into account the interests, needs and aspirations of the developing countries.

If man has a stake in the Area, if the developing countries could benefit from its wealth, then surely no exploitation of the Area should take place which is not within the context of the new principles and norms to be

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developed, and which does not fall within the ambit of a regime which would ensure an equitable management of the resources of the seabed and the effective participation of the developing countries in it.\textsuperscript{141}

The representative of Trinidad and Tobago was of the opinion that the failure to take this tentative, precautionary step to protect our common heritage from the grasp of the technologically advanced may well produce results inimical to the long-term interests of mankind.\textsuperscript{142}

While most of the developing countries advocated strongly in favour of the resolution, the technologically advanced countries opposed it equally strong. They were of the opinion that there is no rule of international law under which their freedom to explore and exploit the resources of seabed could be restrained.\textsuperscript{143} There was a common view among the developed countries that the resolution would result in a race to expand the limits of national jurisdiction in order to remove the activities of exploration and exploitation from the scope of the prohibition contained in the resolution with the objective of rendering

\textsuperscript{141} Supra note 134, p. 28.


them legitimate.\footnote{144}{U.N. Doc. A/C.I/PV.1708, (2 December 1969) p. 52, U.N. Doc. A/C.I/PV.1709, (2 December 1969) pp. 31 & 76.} They also shared a view that the Seabed Committee should not prohibit the seabed exploration and exploitation, and the development of technology which would result in self defeating the objective of the Committee. The Committee must only regulate the exploration and exploitation, and should ensure that such activities do not prejudice the interests of other states.

The moratorium resolution reflected the hope of the developing countries to persuade the technologically advanced countries to refrain from developing their technology further until an agreement was reached about the legal regime of the seabed. They emphasized on an early agreement on the future regime. By asserting that the seabed is CHM, they wanted an assurance that they would receive fair share in the benefits derived from its exploration and exploitation. However the technologically advanced countries were not prepared to wait until the Seabed Committee could reach an agreement, and therefore they declared that they were not bound by the Resolution.\footnote{145}{Supra note 51, pp. 194 & 195.}
The developed states continued to develop their deep-sea mining technology irrespective of the moratorium resolution.\textsuperscript{146} This became serious concern among the developing nations. During the 1972 sessions of the Seabed Committee they strongly protested that the solemnly adopted resolutions of the General Assembly could not be ignored lightly on the ground that they were not formally binding.\textsuperscript{147} While rebutting the arguments of the developed states that only exploratory and experimental activities are carried on, the developing countries felt that the experiments being made constituted the first part of exploitation process. This was evident from the fact that large commercial companies were spending huge sums of money, which they wouldn’t do just for the sake of theoretical knowledge.\textsuperscript{148} The fear of active mining of the resources of the deep seabed before the establishment of any conventional international regime was deeply rooted in the minds of the developing

\textsuperscript{146} In 1970, the US Deep Sea Ventures Inc. carried on its operations to recover manganese nodules in the Atlantic Ocean. At the same time Japan tested its engineering design to carry on deep ocean mining in the Pacific.


countries. They, therefore, wanted formal assurances from all states connected with such activities that no commercial exploitation of the resources of the seabed beyond the limits of national jurisdiction would be undertaken before the establishment of an international regime.

In 1970, the Third Conference of Non-Aligned Countries came out with a stronger statement in support of the concept of CHM. It was resolved in the Conference that the developed world could no longer prosper at the expense of developing countries. The Conference members endorsed application of the concept of CHM to the resources of the deep seabed and supported the idea of an international resource regime.

**Resolution 2749 (XXV):**

The Seabed Committee resumed the work on the development of a set of legal principles for the exploration and exploitation of the seabed in March

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151 Participated by sixty-five African, Asian and Latin American states and six national liberation organizations.

152 UN General Assembly Resolution 2749 (XXV) of 17 December 1970.
1970. The Legal Sub-Committee of the Seabed Committee held a series of formal and informal meetings from March to August 1970, but could not reach any final agreement on the principles. The Chairman of the Seabed Committee, C.F. Amerasinghe of Ceylon, continued the informal consultations and through his strenuous efforts, an agreed draft resolution was prepared and referred to the Seabed Committee on 23 November 1970. A resolution on general principles was passed by the First Committee and recommendation was also made to the General Assembly. Consequently on 17 December 1970 the General Assembly unanimously adopted the Resolution 2749 (XXV) entitled “Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction”.

The Resolution affirmed that there is an area of seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined. It solemnly declared that the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction as well as its resources are the CHM. Thus it became the first Resolution to incorporate the concept of CHM. Quite interestingly, having declared that the Area and its resources are CHM, the Resolution goes on to elaborate on different elements of CHM separately. It states that the Area should not be subject to appropriation by any means by states or persons and
should be kept outside the ambit of national sovereignty. It advocated that all activities in the Area must be governed by the international regime to be established. The Area was declared to be used exclusively for peaceful purposes and the states were declared to be governed by principles and rules of international law in their activities in the Area. The principles of benefit of mankind, international cooperation in marine scientific research, prevention of pollution and contamination, and other hazards to the marine environment and the protection and conservation of the natural resources of the Area were also advocated by the Resolution. The Resolution also made it clear that its provisions are not applicable to the waters superjacent to the Area and airspace above those waters.

This declaration was adopted after a great deal of controversy. It was the result of compromise between the developed and developing states. C.F. Amerasinghe remarked that the Resolution reflected the highest degree of agreement attainable at that time.\(^{153}\) Though the Resolution laid down some important principles on the basis of which a legal regime for the deep seabed was to be created, it contained some provisions which are vague and controversial. The Resolution failed to fix the limits of the area of the seabed beyond the national jurisdiction. Despite declaring the Area and its resources as

CHM, the Resolution was uncertain as to the definition of the term. It is reflected in other provisions of the Resolution, which unnecessarily reiterate most of the elements of CHM. In 1972, commenting on the attitude of the developed states towards the concept of CHM, R. P. Anand remarked that “it is meaningless phrase according to most of the developed countries, and unless they accept it, the real meaning of it - and unless their behavior reflects their acceptance - we have no alternative but to go on talking about philosophy and principles”.

This shows that though the Resolution was able to uphold the existence of the concept of CHM, it failed to provide legal bindingness to it. Further it advocates the exploration and exploitation of the Area for the benefit of mankind, but again fails to explain how it could be done.

The Resolution on the General Principles had its own merits and significance, which cannot be underestimated. It produced a compromise declaration, which was considered by most states as a necessary prerequisite to any treaty. It laid down some of the rules which formed the basis of the law

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155 Legal status of the General Assembly resolutions is discussed in the next chapter.

governing the Area. The concept of CHM has obtained some added weightage as a result of its incorporation in the General Principles. The acceptance of the Resolution by great majority of the states provided the necessary *opinio juris* for the emergence of new customary international law.\(^{157}\) The Resolution also showed that the old law, customary as well as conventional, governing the Area has been replaced by new rules and new law. The old notions of *res nullius* and *res communis* and the doctrine of freedom of the sea have become outmoded in relation to the Area. They have been replaced by CHM and other general principles adopted by the Resolution. As rightly pointed out by R. P. Anand, “although the exact limits and scope of those principles have not been fixed, they do provide general guidelines around which law could be developed”.\(^{158}\)

The importance of the Resolution can also be seen in its reiteration in the Charter of Economic Rights and Duties of States.\(^{159}\) The Charter was a major step in the direction of New International Economic Order. It states that the economic, political and other relations among states must be governed by the principle of mutual and equitable benefit.\(^{160}\) As the deep-sea mining was

\(^{157}\) *Supra* note 119, p. 752.

\(^{158}\) *Supra* note 51, p. 231.

\(^{159}\) UN General Assembly Resolution 3281 (XXIX) of 12 December 1974.

\(^{160}\) Chapter 1 of the Charter of Economic Rights and Duties of States.
considered as an inalienable part of New International Economic Order, Chapter III of the Charter was devoted to the question of the international seabed Area and the exploitation of its resources. The Charter, speaking in line with the Resolution 2749 (XXV),\textsuperscript{161} clearly states 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 CHM. The exploration of the Area and exploitation of its resources must be carried out exclusively for peaceful purposes and the benefits derived therefrom must be shared equitably by all states. The Charter also advocates for the establishment of an international regime with an effective enforcement mechanism to govern the Area and its resources.\textsuperscript{162} An obligation is also imposed upon the states to prevent damage to the environment of the areas beyond the limits of national jurisdiction.\textsuperscript{163} The adoption of the Charter with the affirmative votes of socialist states constituted a positive step towards the transformation of the CHM into a principle of customary international law.

\textsuperscript{161} Supra note 152.

\textsuperscript{162} Article 29 of the Charter of Economic Rights and Duties of States.

\textsuperscript{163} Article 30, Ibid.
Proposals for the Establishment of International Machinery:

Although the agreed ‘General Principles’ advocated the establishment of an international regime and appropriate machinery for the exploration and exploitation of the Area, it did not resolve the difficult problems associated with the nature of the machinery, its powers and functions. So the proposals for the establishment of international machinery were made to the Seabed Committee during the 25th and the 26th sessions of the General Assembly. Though the governance of the CHM was recognized by all states, there was a divergence of opinion as to the nature of the authority to be established. On the one hand, the developed states wanted weak international machinery with only authority to issue licenses for exploration and exploitation of the Area, and on the other hand, the developing states wanted strong international machinery. The developed countries were of the opinion that it is advisable to maximize the benefits that would accrue to the international community and also stressed on the importance of participation of all states in the exploration and exploitation of the Area. In order to secure free access to the Area and its resources with out any restriction, the developed countries wanted to minimize

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the role, powers and functions of the Authority, in particular its power of policy and decision making.\textsuperscript{165}

In 1971, the United Kingdom submitted a proposal for the exploration and exploitation of the deep seabed under the licenses issued by the proposed international authority based on the ‘quota system’.\textsuperscript{166} It suggested allocation of a specified quota to each state with a view to provide fair and equitable share of licenses to all the states. A state was to be free to apply for licenses in any part of the area within the quota allocated to it. United Kingdom proposal also contained provision for pooling of the quotas by the states to apply for licenses and exploiting the resources of the Area. According to UK Government this system provides time to the developing countries to build up their own capability for managing the exploitation of the Area or to join with others in building up such a capability.

Drafts of other developed countries such as United States, Soviet Union, France etc also propagated weak international machinery exercising loose control over exploration and exploitation of the Area. These proposals of

\textsuperscript{165} Supra note 12, p. 298.

technologically advanced countries were totally unacceptable to the developing countries. The developing countries were of the opinion that the weak machinery with only the power of licensing, registration of claims and dissemination of information is utterly inadequate to protect the interests of most states.\textsuperscript{167}

The developing countries continued their support for a strong international seabed authority with full international legal personality and wide functions and powers. The delegate of Iraq said that “a purely mercantilist laissez faire system of licenses could not be reconciled with the concept of common heritage of mankind”.\textsuperscript{168} The Indian representative was of the opinion that “only through international machinery with broad scope and functions could the provisions of the Declaration, which embodied political decisions by the international community, be given effect”.\textsuperscript{169}

Tanzania submitted a Draft Convention on International Seabed Authority before Sub-Committee I of the Seabed Committee advocating strong international machinery empowered, \textit{inter alia},

(1) to explore and exploit the seabed resources by means of its own facilities, equipment and services or such as were acquired by it;

(2) to issue licenses to contracting parties, individually or in groups, or to persons natural or juridical, subject to such terms and conditions, including the payment of appropriate fees and other charges, as the Authority might determine;

(3) to distribute equitably raw materials and other benefits;

(4) to take measures designated to minimize and eliminate fluctuation of prices of land minerals and raw materials;

(5) to foster exchange of scientific and technical information; and

(6) to promote and encourage the exchange and training of scientists and experts.  

Thus the developing countries wanted the international seabed area to be held in trust by the proposed Seabed Authority and developed as a common resource. They desired the Authority to carryout deep seabed mining on behalf

of the international community as a whole in order that they could be assured of real participation. Weak Authority, according to them, would facilitate the developed countries to create a monopoly for them, which is highly undesirable in the interests of mankind as a whole.\textsuperscript{171}

**United Nations Convention on Law of the Sea 1982:**\textsuperscript{172}

The difference of opinion between the developed and developing states on different issues relating to the regime governing the Area continued during the Third United Nations Conference held in between 1973 and 1982. In fact the convening of the Conference itself was strongly opposed by the developed states. But General Assembly at its 25\textsuperscript{th} Session called for the Third United Nations Conference on the Law of the Sea to begin in 1973.\textsuperscript{173} Almost for the first time in the history the international society came together to agree on a large part of international law of the sea. The nine years of deliberation under the Third United Nations Conference, which resulted in the 1982 Convention on Law of the Sea, settled most of the issues that looked unsolvable in the

\textsuperscript{171} Supra note 164, p. 7.

\textsuperscript{172} Herein after referred to as ‘the 1982 Convention’.

\textsuperscript{173} UN General Assembly Resolution 2750 (XXV) of 17 December 1970.
beginning. The two issues that are relevant here are the status of the Area and the nature of the Authority.

(a) **Issue of Status of the Area:**

Based on the UNCLOS III proposal, the 1982 Convention, placed the resources of the continental margin and those of the deep seabed under separate regimes. While confirming the coastal states’ jurisdiction over most of the continental margin, the Convention placed the remaining area of the seabed under an International Seabed Authority. The 1982 Convention expressly declared the Area and its resources as CHM. In addition it declared some other principles governing the Area, which form the part of the CHM principle. Article 137 prohibits the claim or exercise of sovereignty or sovereign rights over any part of the Area or its resources. The prohibition is extended to the appropriation of any part thereof. It vested all rights in the resources of the

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Area in mankind. The alienation of the mineral resources can only be done in accordance with the relevant provisions of the Convention and the rules, regulations and procedures of the Authority.

The Convention stipulates that the general conduct of states in relation to the Area must be in accordance with the provisions of Part XI, the principles embodied in the Charter of United Nations and other rules of international law in the interests of maintaining peace and security and promoting international cooperation and mutual understanding.\textsuperscript{177} A responsibility is imposed on the states and international organizations to ensure that activities in the Area are carried out in conformity with Part XI. The failure to comply with this responsibility results in imposition of liability on the states or international organizations as the case may be.\textsuperscript{178} The activities in the Area must be carried out for the benefit of mankind as a whole. The Authority is required to provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through an appropriate mechanism on a non-discriminatory basis. In doing so, special importance must be given to the interests and needs of developing states and of peoples who have not attained

\textsuperscript{177} Article 138, \textit{Ibid}.

\textsuperscript{178} Article 139, \textit{Ibid}. 
full independence or other self-governing status.\textsuperscript{179} This preferential treatment is meant to give the developing states a \textit{de facto} equal status with the industrialized countries in a field, which would otherwise be dominated by the latter. Under the 1982 Convention the Area is also declared to be used exclusively for peaceful purposes.\textsuperscript{180} The activities in the Area must ensure the effective protection of the marine environment from harmful effects.\textsuperscript{181}

The Convention also recognizes the need for the development of resources of the Area. The activities in the Area must be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the overall development of all countries, especially developing states. The activities must ensure the orderly, safe and rational management of the resources of the Area. The activities are to be conducted effectively and unnecessary waste should be avoided.\textsuperscript{182} The 1982 Convention also provides for ceiling on the production of commodities from resources available in the

\textsuperscript{179} Article 140, \textit{Ibid.}

\textsuperscript{180} Article 141, \textit{Ibid.}

\textsuperscript{181} Article 145, \textit{Ibid.}

\textsuperscript{182} Article 150, \textit{Ibid.}
Area with a view to promote sustainable development.\(^{183}\) In addition the Authority must comply with the conditions for prospecting, exploring and exploiting the Area stipulated under Annex III of the 1982 Convention.

(b) **Issue of Nature of the Authority:**

The issue of nature of the Authority (Strong v. Weak Authority) continued to be a subject of hot debate during the UNCLOS III.\(^{184}\) The 1982 Convention settled the conflict by favouring the establishment of strong Seabed Authority.\(^{185}\) Under the 1982 Convention, the Authority has to organize and control activities in the Area and administer the resources of the Area.\(^{186}\) It must avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area. However special consideration for developing states is expressly permitted by the 1982 Convention.\(^{187}\) The Convention empowers the Authority to organize, carryout and control the activities in the Area on behalf of the mankind as a whole. The

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\(^{183}\) Article 151, *Ibid*.


\(^{186}\) Article 157, *Ibid*.

\(^{187}\) Article 152, *Ibid*. 
Authority has the right to take measures necessary to ensure the compliance of the provisions relating to the exploration and exploitation of the Area.  

The Seabed Authority is made to consist of three principal organs, an Assembly, a Council and a Secretariat. In addition, the Convention provides for the establishment of the ‘Enterprise’, the organ through which the Seabed Authority carries out the function of exploration and exploitation of the resources of the Area. The necessary subsidiary organs can also be established under the provisions of the Convention. The Authority exercises its powers and functions through the principal organs and the Enterprise.

Under the 1982 Convention, the Assembly, consisting of all the members of the Authority, is the supreme organ of the Authority. Other principal organs are made accountable to the Assembly. The rules, regulations and procedures on equitable sharing of financial and other economic benefits derived from activities in the Area are approved by the Assembly upon the recommendation of the Council. The special interests and needs of the developing states and peoples who have not attained full independence or other self governing status has to be taken into consideration in approving such rules,

188 Article 153, Ibid.
189 Article 158, Ibid.
regulations and procedures. The rules, regulations and procedures relating to the exploration and exploitation of the Area must also be approved by the Assembly. It is also empowered under the Convention to initiate studies and make recommendations for the purpose of promoting international cooperation concerning activities in the Area and encouraging the progressive development of international law relating thereto and its codification.¹⁹⁰

The Council, being the executive organ of the Authority, has the function of supervising and coordinating the implementation of the provisions of Part XI and all questions and matters within the competence of the Authority. The cases of non-compliance are brought to the attention of the Assembly by the Council. The Council may institute proceedings on behalf of the Authority before the Seabed Disputes Chamber in cases of non-compliance. It also exercises control over activities in the Area. The Council is empowered to issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of the activities in the Area. In case the risk of serious harm to the marine environment becomes evident, the Council may disapprove areas for exploitation by contractors or the Enterprise. The Council’s work is facilitated...

¹⁹⁰ Article 160, Ibid.
by two specialized organs, Economic Planning Commission and Legal and Technical Commission.\textsuperscript{191}

The Secretariat consists of Secretary - General and other staff as required by the Authority. The Secretary - General is the Chief administrative officer of the Authority.\textsuperscript{192} On matters within the competence of the Authority, he is empowered to make suitable arrangements for consultation and cooperation with international and non-governmental organizations recognized by the Economic and Social Council of the United Nations.\textsuperscript{193}

The 1982 Convention empowers the Authority to carry on the activities in the Area directly, and for this purpose the Convention provides for the establishment of the Enterprise as an organ of the Authority. The Enterprise carries on the activities of exploration and exploitation of the Area as well as transporting, processing and marketing of minerals recovered from the Area. The Enterprise has to act in accordance with the 1982 Convention and the rules, regulations and procedures of the Authority as well as the general policies established by the Assembly. Enterprise is also subject to the directives and control of the Council. Under the Convention, it is entitled to receive the

\textsuperscript{191} Articles 163, 164 & 165, \textit{Ibid.}

\textsuperscript{192} Article 166, \textit{Ibid.}

\textsuperscript{193} Article 169, \textit{Ibid.}
funds and technology required to carry out its functions. The structure, financing and operation of the Enterprise are elaborately discussed in Annex IV of the 1982 Convention.

The 1982 Convention favoured strong International Authority with power to carry on activities by its own. This was made with an intention to prevent the grabbing of the resources of the Area by few states. The 1982 Convention thus provided for a parallel system, which recognized the right of States Parties to the Convention and their enterprises to conduct activities in the Area parallel with the Enterprise of the Authority. It tried to balance the rights between the Authority and the developing countries in association with the Authority on the one hand and developed countries and their public or private entities on the other. So it is evident from the above discussion that the 1982 Convention envisaged a very comprehensive and systematic scheme of CHM. It intended to provide a basis for organizing all States Parties,

194 Article 170, Ibid.
196 Supra note 67, p. 215.
197 Ibid., p. 252.
especially the developing countries, in the exploration and exploitation of resources of the Area.\textsuperscript{198}

**The United States Objections:**

United States actively participated in the UNCLOS III negotiations until 1980, when the Draft Convention was prepared. But its perspective changed from one of altruistic globalism to the “me-first selfishness” along with the change in its administration.\textsuperscript{199} United States changed its attitude at a time when consensus on most aspects of Law of the Sea seemed to have been reached after prolonged negotiations, bargaining and revisions of negotiating texts. The newly elected United States government under President Ronald Reagan put the whole process of negotiations in disarray by its surprise announcement on 8 March 1981 that the 1980 Draft Treaty has to be reviewed thoroughly by the United States government before deciding any policy towards it. This was the result of agitation made by some leading and

\textsuperscript{198} \textit{Supra} note 195.

influential American mining companies challenging the provisions relating to financial guarantees and transfer of technology contained in the Draft. 200

The private enterprises contended that the financial guarantees enumerated in the Draft Treaty were too heavy when compared to the profits available. They opposed the transfer of technology for the obvious reason that they were not ready to part with the advantage they have over others in deriving profits. Having invested large sums of money, they expected good return. 201 In addition, many economists in the United States believed that the United States must protect its technology for maintaining a stable economy. 202

On 29 January 1982, President Reagan announced that the United States would indeed return to the negotiating table and try to achieve an acceptable

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200 The Draft Convention contained provisions to the effect that the potential miners must make financial payments at the rate of one million US dollar annual fee, beginning with the exploration stage when an area was registered by a miner. The Draft also had provisions for the compulsory transfer of mining technology from the commercial enterprises to the Seabed Authority as a condition precedent for awarding the mining rights. These provisions also found place in the final version of the 1982 Convention.


202 Ibid., p. 61.
Treaty. He also clarified that most of the provisions of the Draft Convention are acceptable and consistent with United States interests but the provisions relating to seabed-mining regime requires changes. In the opinion of the United States the small countries were given undue authority under the Draft Convention, which has undermined the interests of the developed states. The legal regime created by the Draft was unacceptable to the United States as it would, in the opinion of the United States, effectively pre-empt private investment in deep seabed mining. The regime of production control arrangements was also opposed by the United States along with the system of financial payments and transfer of technology. In addition the “Review Conference” provision enumerated in the Draft was opposed as it had the effect of allowing the Convention amendments to enter into effect without express approval of the United States.

United States suggested amendments to more than half of the seabed provisions of Part XI. With the failure to arrive at consensus, United States along with Israel, Turkey and Venezuela voted against the Convention. However the Convention was accepted with 130 states voting in favour of it. The minimum number of ratification required for coming into force of the

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204 Supra note 164, p. 10.
Convention was achieved on 16 November 1993 and as per its provisions the Convention came into force on 16 November 1994, that is, one year after receiving minimum number of ratifications.\textsuperscript{205}

The Soviet bloc, Japan and France, who were absent during voting, later decided to sign the Convention. However some other absentees including West Germany, United Kingdom and Italy continued to oppose the Convention along side the United States. This gave a serious blow to the so-called ‘comprehensive Constitution of the Oceans’. The United States, despite opposing Part XI, agreed with the view that large part of the Convention, having been accepted by a vast majority of States, had become part of customary international law even before its formal ratification and was supposed to be binding on signatories and non-signatories alike. Thus it accepted most part of the Convention except Part XI along with Annex III and IV. But the United States failed to sign the Convention because of the fact that

\textsuperscript{205} According to Article 308 of the Convention, the Convention was to come into force one year after its ratification or accession by sixty states.
the Convention was made a ‘package deal’ and as such there was no scope for reservations in the Convention.  

Keeping in view the national interest, the United States President Reagan asserted that deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore and, when the market permits, exploit those resources.

The opposition of some of the developed states to the Convention resulted in the establishment of interim seabed mining regime before the coming into force of the Convention. The developed countries such as United States, Germany, United Kingdom, France, Soviet Union and Japan established this interim regime by enacting unilateral legislation to license their nationals to mine the deep seabed mineral resources. However the insecurity over the legal foundation for investment in deep seabed mining was there since

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206 The President of the Conference, Tommy Koh, made this issue clear by stating that ...the Convention does not provide for reservations. It is therefore not possible for States to pick what they like and disregard what they do not like. In international law as in domestic law, rights and duties go hand in hand. It is, therefore, legally impermissible to claim rights under the Convention without being willing to assume the correlative duties. U.N. Doc. No. SEA/MB/1/Rev.1 (6 December 1982) p. 6.
everyone knew that it would be of questionable legal validity as it counters the concept of CHM enshrined under the Convention.\textsuperscript{207}

**The 1994 Agreement:**

The refusal of biggest maritime powers to accept the Convention was seriously threatening to compromise the authority of the Convention regime. So a need for the change in the regime to satisfy the United States became eminent. In July 1990, the UN Secretary - General, Javier Perez de Ceullar, took initiative to convene informal consultations aimed at achieving universal participation in the 1982 Convention. A series of informal consultations convened between 1990 and 1994 resulted in the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on Law of the Sea.\textsuperscript{208} It came into force on 28 July 1996 with the effect of modifying Part XI and Annex III and IV of the 1982 Convention in order to meet many of the concerns of the developed states in particular the United States.

The 1994 Agreement made huge quantum of changes in Part XI of the 1982 Convention with a view to make sure that the big brother, the United States, is satisfied. The Annex to the 1994 Agreement starts by stating that the

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\textsuperscript{207} Supra note 164, pp. 14 & 15.

\textsuperscript{208} Agreement was adopted on 28 July 1994. Herein after referred to as ‘the 1994 Agreement’.
principle of cost-effectiveness must govern the activities of the Authority.\textsuperscript{209} One of the controversial issues that is, relating to decision making in the International Seabed Authority was solved by the 1994 Agreement. The United States and other industrialized countries acquired adequate say in the decision making. The United States is guaranteed a seat in the Council in perpetuity. The decision making structure of the Council was changed to ensure that the industrialized states acting together can block decisions in the Council. The financial decisions are made subject to the consensus of major contributors. The Assembly is also prevented from acting without Council’s recommendations.\textsuperscript{210}

The Annex eliminated the Review Conference provisions enumerated under Article 155 paragraph 1, 3 and 4 of the 1982 Convention. It made the review to be subject to normal procedures for amendment set forth in the Convention.\textsuperscript{211} This means that the amendments to the regime cannot be adopted over United States objections. The provisions relating to mandatory transfer of technology were dropped. These provisions were replaced by the

\textsuperscript{209} Section 1 of the Annex to the 1994 Agreement.

\textsuperscript{210} Section 3, \textit{Ibid.}

\textsuperscript{211} Section 4, \textit{Ibid.}
provisions for transfer of technology on fair and reasonable commercial terms and conditions.\textsuperscript{212}

The provision relating to the limitation on production from seabed resources was dropped. The activities in the Area were made subject to the provisions of the General Agreement on Tariffs and Trade (GATT) and related agreements. Any subsidization of seabed mining inconsistent with the GATT was prohibited.\textsuperscript{213} The developed countries were conferred with the power to influence the decision on the policy of the Authority of assisting developing countries.\textsuperscript{214} The provision for the payment of huge annual fees by the miners prior to commercial production was eliminated. It was substituted by the provision for payment of fair fee determined by the Council.\textsuperscript{215} The Enterprise was restructured and was made subject to same requirements as other commercial enterprises. The requirements on the part of the parties to fund the Enterprise and provide technology to it was also eliminated.

\textsuperscript{212} Section 5, \textit{Ibid.}
\textsuperscript{213} Section 6, \textit{Ibid.}
\textsuperscript{214} Section 7, \textit{Ibid.}
\textsuperscript{215} Section 8, \textit{Ibid.}
Status of the CHM in Law of the Sea after the 1994 Agreement:

It is clear from the above discussion that the concept of CHM still governs the activities in the Area. However, the term has lost its original meaning and substance due to the deathblow given to it by the 1994 Agreement. The sole purpose of making the United States a party to the 1982 Convention resulted in sacrificing the lustre and soul of the concept of CHM. The 1994 Agreement assured the big powers that they can continue their play in the hunt for more and more resources much against the interests of the developing countries. The strong international authority to manage the resources is one of the important elements of CHM, as it has the impact on the implementation of all the other elements of CHM. However the 1994 Agreement curtailed vast majority of the powers of the Authority guaranteed under the 1982 Convention. The 1994 Agreement weakened the Authority to such an extent that it will be a mere spectator in the large-scale exploration and exploitation of the resources of the Area by the technologically developed states.

The fact that the developed states are empowered to bloc the decision, especially in the financial matters, will be a major hurdle in the equitable sharing of the benefits. The dropping of the provisions relating to mandatory
transfer of technology makes it clear that the Area will only be exploited by the technologically advanced states. The developing countries cannot even dream of such exploitation in the near future as they do not possess the requisite technology. This makes the developing countries to be devoid of their right of equal access to the resources of the Area. As R. P. Anand points out “The deep seabed will now be exploited on commercial terms, irrespective of the needs and interests of the weaker members of the international community”.216 Thus the developed countries succeeded in giving a fascinating burial to the concept of CHM in its application to the Area. In toto, the 1982 Convention has lost its original intent of protecting the interests of the developing countries in the Area due to the sweeping changes made by the 1994 Agreement.217

Quite interestingly, despite sacrificing the substance of the concept of CHM in its application to the Area, the purpose of doing so is not achieved till date. United States is yet to become a party to the 1982 Convention.218 The 1982 Convention and the 1994 Agreement are rotting before the US Senate

216 Supra note 164, pp. 17 & 18.
218 United States has signed the Convention in 1994, but still not ratified it.
Committee on Foreign Relations for getting its assent.\textsuperscript{219} So in effect, the 1994 Agreement gave a dual blow to the developing countries. On the one hand it axed the basis of the CHM and on the other hand it failed to fulfil the long-standing desire of making the United States a party to the 1982 Convention. The subsequent adoption of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area\textsuperscript{220} seems to be of no use in the protection of the interests of the developing states in the exploration and exploitation of the Area. So the dream of Arvid Pardo to use the resources of the Area as CHM remains uncherished.

\textbf{2.6: The Antarctic Regime and CHM}

Antarctic being the southernmost continent embraces the South Pole with permanent ice and snow. Nobody lives permanently in the Antarctic owing to its appalling weather.\textsuperscript{221} It has a very limited vegetation\textsuperscript{222} due to the


\textsuperscript{220} U.N. Doc. ISBA/6/A/18, (04 October 2000).

\textsuperscript{221} http://www.asoc.org/general/ats.htm (Accessed on 08 August 2006, 4:46 pm)

\textsuperscript{222} The plant life is limited to mosses and liverworts. The flora of the continent largely consists of lichens, bryophytes, algae and fungi. Antarctic hair grass and Antarctic pearlwort are the only two species of flowering plants found in the Antarctic.
combination of freezing temperature, poor soil quality, lack of moisture and lack of sunlight. Marine animals found in the Antarctic are fur seals, blue whales, krill fishes and penguins.\textsuperscript{223} There are also assumptions as to the existence of good quantum of commercially profitable non-living resources.\textsuperscript{224} As the Antarctic is said to be the part of super-continent called Gondwanaland, which also contained Africa, Latin America, India and Australia, it is assumed that all the minerals found in these countries could also be found in the Antarctic.\textsuperscript{225} However the presence of significant amount of economically viable resources in the Antarctic is not proved till date. The experts are of the opinion that much more research must be done before asserting the existence of minerals in the Antarctic, and there is no certainty that minerals will ever be found in commercially exploitable quantity.\textsuperscript{226}

\textsuperscript{223} http://www.idlewords.com/2006/03/ruling_antarctica.htm (Accessed on 09 August 2006, 1:11 pm)

\textsuperscript{224} The traces of minerals such as iron, copper, lead, molybdenum, manganese, uranium and chromium have been detected in the Antarctic Peninsula region.


2.6.1: Claim of Sovereignty over the Antarctic

The expeditions to the Antarctic mounted significantly in the twentieth century with the depletion of whaling areas in the North Pole region. The whaling in the Antarctic resulted in the first territorial claim by the United Kingdom on 21 July 1908. Following the British claims, several others have put forward their national claims to portions of the Antarctic on the basis of discovery, occupation, prior claims even without discovery, performance of administrative acts including issuing decrees or orders, printing postage stamps and setting up post offices, or continuity or on the basis of some combination of these grounds.

The British claim on the territory was based on discovery, on formal acts of taking possession, on maintenance of several stations and on the exercise of acts of sovereignty. The British state acts in the Dependencies included whaling licenses, survey of the area, promulgation of ordinances regarding

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227 On 21 July 1908, Great Britain issued Letters Patent which as amended on 28 March 1917 claimed all islands and territory between 20° and 50° W. below the fiftieth parallel south latitude, and all islands and territory between 50° and 80° W. below the fifty-eighth parallel south latitude. This territory is known as Falkland Islands Dependencies.

their administration by the Falkland Islands’ Government, visits by officials, the issuance of postage stamps and the operation of post offices and telegraphs and radio stations, protests of the activities in the area of nationals of all other states, issuance of maps defining the claims, and similar activities.\textsuperscript{229}

On 30 July 1923, New Zealand administration under the British Government claimed authority over Ross Dependency.\textsuperscript{230} Approximately a year later\textsuperscript{231} France claimed Adelie Land on the basis of discoveries of Dumont d’Urville made in 1840. Australians participated in many Antarctic expeditions, especially between 1911 and 1931, but made no formal claims over the territory until 1933. On 7 February 1933, the Colonial Government of Australia claimed the Antarctic territory between 160\(^\circ\) E. to 142\(^\circ\) 2’ W. and 136\(^\circ\) 11’ W. to 44\(^\circ\) 38’ E.\textsuperscript{233} With the establishment of Australian Antarctic Territory, almost two-thirds of the Antarctic continent became subject to British Empire. In 1928, Norway claimed Bouvet Island and in 1931 Peter I Island.\textsuperscript{234} It

\begin{itemize}
\item\textsuperscript{229} *Ibid.*, pp. 144 & 145.
\item\textsuperscript{230} Area from 150\(^\circ\) W. to 160\(^\circ\) E.
\item\textsuperscript{231} On 27 March 1924.
\item\textsuperscript{232} Area from 142\(^\circ\) 2’ E. to 136\(^\circ\) 11’ E.
\item\textsuperscript{233} Area is called Australian Antarctic Territory.
\item\textsuperscript{234} Area from 68\(^\circ\) 50’ S. to 90\(^\circ\) 35’ W.
\end{itemize}
enacted laws concerning both these islands. On 14 January 1939, Norwegian Government again proclaimed its sovereignty over Dronning Maud Land.235

During the Second World War the British withdrew from their Antarctic stations for few years. Chile and Argentina took this opportunity to claim sovereignty over the areas which were within the British Antarctic territory. On 6 November 1940, Chile claimed the sector between 53⁰ W. and 90⁰ W. as a part of its territory. Argentina advanced its claim in 1943 over the Antarctic territory from 25⁰ W. to 74⁰ W. Both the countries denied the validity of claims based on discovery alone, insisting that effective occupation is necessary for the claim of sovereignty. They relied on proximity and contiguity, and both trace their rights historically to succession to the rights received by Spain under the Papal Bull Inter Caetera of 4 May 1493, and the Treaty of Tordesillas to all lands west of the forty-sixth meridian and, presumably, extending to the Pole.236 Argentina and Chile argued that they succeeded to the colonial rights of Spain at the time of breakup with Spain.237

235 Area from 44⁰ 38’ E. to 20⁰ W.

236 Though there was no dispute about Spanish claims for several hundred years, the actual existence of the Antarctic itself was then unknown.

237 Supra note 228, pp. 145 - 148.
Apart from these seven prominent asserters of sovereignty, some other states have also put forward their rights over the Antarctic. Germany maintained a claim to the Antarctic between 1939 and 1945.\textsuperscript{238} The Union of South Africa has claimed sovereignty over some Sub-Antarctic region in 1948. However the two Super-powers have never claimed sovereignty over the Antarctic. Moreover, they also refused to recognize the claims of other nations in the Antarctic.\textsuperscript{239} There are also examples of conflict between the states due to their overlapping claims on different parts of the Antarctic.\textsuperscript{240}

\textsuperscript{238} The area covered 20° E. to 10° W.

\textsuperscript{239} Supra note 228, pp. 153 - 159.

\textsuperscript{240} The overlapping claims of Britain, Chile and Argentina resulted in dispute between them. During the Second World War British and Argentine navies successively removed claim plaques left by the other party. In 1947, the visit of Argentine naval units to Antarctic was protested by local British officials alleging the violation of British territory. But Argentina refused to accept the protest. By the end of 1948, fear of physical clash in the area was so great that all the three agreed to forego sending warships South of 60° S. except for normal relief expeditions. But the conflict continued and in February 1952, the Argentine navy forcefully prevented British meteorological party from landing in the Antarctic. In 1953, a British magistrate dismantled the huts built by Argentine and Chilean parties in the Deception Island and arrested two Argentines found there, alleging infringement of the sovereignty of Great Britain. But Argentina and Chile responded by putting forward their claim to the territory. Consequent to these conflicts, the United Kingdom filed petition before the International Court of Justice against Argentina and Chile in 1948 and 1955. But as both Argentina and Chile refused to admit the Court’s jurisdiction insisting that sovereignty is so clear that no third party may
2.6.2: The Antarctic Treaty System - Traces of the Concept of CHM

The concept that certain property could be commonly owned by the international community was first raised by T. W. Balch in 1910 in relation to the Antarctic. According to him the Antarctic “should become the common possession of all members of the family of nations.” However the claim of sovereignty by the states over the Antarctic prevented the development of the concept as well as the establishment of the legal regime governing the Antarctic based on the concept.

The need for the establishment of the international regime for the Antarctic came into limelight soon after the Second World War. The scientific activity undertaken by twelve states during the International Geophysical

judge this domestic question, the International Court of Justice ordered for the removal of the cases from the list. *Antarctica Cases, United Kingdom v. Argentina* and *United Kingdom v. Chile* (1956 ICJ Reports, p. 12)


242 Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, Union of South Africa, United Kingdom, USSR and United States. [http://www.infoplease.com/ce6/world/A0856635.html (Accessed on 19 August 2006, 1:17p.m)]
Year\textsuperscript{243} formed the basis for cooperation in the establishment of Antarctic regime. The controversy over the territorial claims was put aside and the scientists worked together in the Antarctic, without being affected by the political differences. This spirit of scientific cooperation was continued and imbibed into the legal field resulting in the Antarctic Treaty 1959.\textsuperscript{244} The Treaty became \textit{Magna Carta} in the governance of the Antarctic. The provisions of the Treaty are supplemented by the subsequent area specific Agreements.\textsuperscript{245}

The Antarctic Treaty and the related agreements are together called the Antarctic Treaty System.\textsuperscript{246} The treaty-based principles and rules are complemented by many rules of general and conventional international law that apply to the Antarctic.\textsuperscript{247} The concept of CHM is not expressly stipulated in

\begin{flushleft}
\textsuperscript{243} 1 July 1957 to 31 December 1958.  \\
\textsuperscript{244} The Treaty came into force on 23 June 1961.  \\
\textsuperscript{245} They include,  \\
* Agreed Measures for the Conservation of Antarctic Fauna and Flora, 1964.  \\
* Convention for the Conservation of Antarctic Seals, 1972.  \\
* Protocol on Environmental Protection to the Antarctic Treaty, 1991.  \\
\textsuperscript{246} Supra note 221.  \\
\end{flushleft}
any of these agreements. However we can find some of the elements of CHM in the Antarctic Treaty System.

(a) Peaceful Uses of the Antarctic

The conflicting claims of different states over the Antarctic were threatening to disturb the world order after the Second World War. It necessitated a regime of demilitarization and freedom of exploration. On 15 July 1958, Indian Ambassador Lall requested that the question of Antarctica be placed on the Agenda of the Thirteenth Assembly of the United Nations, since the area is coming to have practical significance to the welfare and progress of all nations and in view of the fact that many countries including India are particularly interested in the meteorological aspects and implications of all that happens in Antarctica, it would be appropriate and timely now for all nations to agree and affirm that the area will be utilized entirely for peaceful purposes and for the welfare of the whole world.²⁴⁸

The Antarctic Treaty expressly declares that the Antarctic should be used only for peaceful purposes. The Treaty prohibits any measures of a military nature including the carrying out of military manoeuvres, testing of

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²⁴⁸ Supra note 228, p. 174.
weapons as well as the establishment of the military bases and fortifications.\textsuperscript{249} However the use of military personnel and equipment for scientific research or for any other peaceful purpose is permitted.\textsuperscript{250}

The Treaty specifically prohibits the use of the Antarctic as a nuclear weapons testing ground. It also prohibits the disposal of radioactive waste materials in the Antarctic.\textsuperscript{251} Article VII provides for a unique inspection system with a view to promote the objectives and ensure the observance of the Treaty provisions, especially the provision against the military uses. The Contracting Parties are empowered to designate their nationals as observers to carry out the inspection.\textsuperscript{252} A complete freedom of access at any time to any or all areas of the Antarctic is guaranteed to the observers.\textsuperscript{253} This freedom of access extends to all stations, installations and equipment within those areas and all ships and aircraft at points of discharging or embarking cargoes or personnel in the Antarctic.\textsuperscript{254}

\textsuperscript{249} Article I (1) of the Antarctic Treaty 1959.

\textsuperscript{250} Article I (2), \textit{Ibid}.

\textsuperscript{251} Article V (1), \textit{Ibid}.

\textsuperscript{252} Article VII (1), \textit{Ibid}.

\textsuperscript{253} Article VII (2), \textit{Ibid}.

\textsuperscript{254} Article VII (3), \textit{Ibid}.
Each Contracting Party is obligated under the Treaty to inform the other Contracting Parties and to give them advance notice of all expeditions to and within the Antarctic on the part of its ships or nationals and all expeditions to the Antarctic organised in or proceeding from its territory, all stations in the Antarctic occupied by its nationals and any military personnel or equipment intended to be introduced by it into the Antarctic in order to support the scientific investigation.\(^\text{255}\)

The Treaty also provides for the meeting of the Contracting Parties at suitable intervals\(^\text{256}\) for the purpose of exchanging information, consulting together on matters of common interest pertaining to the Antarctic, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty. It includes making recommendations on measures regarding the use of the Antarctic for peaceful purposes only.\(^\text{257}\)

Quite significantly, there does not appear to have been any major breach of international consensus to keep the continent free of nuclear tests and major weaponry. Thus the Antarctic has the credit of becoming the first disarmed

\(^{255}\) Article VII (5), *Ibid*.

\(^{256}\) Meetings are called ‘Antarctic Treaty Consultative Meetings’.

\(^{257}\) Article IX (1) (a) of the Antarctic Treaty 1959.
According to Edvard Hambro the wide range of Treaty provisions have succeeded in making the Antarctic a continent of peace and cooperation. Apart from the Treaty, the subsequent agreements forming part of the Antarctic Treaty System also make reference to peaceful uses of the Antarctic.

(b) No New Claim of Sovereignty over the Antarctic

The above mentioned seven states, which have made territorial claims to the sectors of the Antarctic were not prepared to give up their claims at the time the Treaty was being negotiated. The differences in political opinions reflected in the diplomatic negotiations carried on during 1948 to 1959. Therefore recognizing the need for a balanced approach, the Antarctic Treaty did not


abrogate the already existed claims but it prohibited new claims as well as enlargement of an existing claim.\footnote{Article IV of the Antarctic Treaty 1959.} In effect, the Treaty made no attempt to settle the issue of conflicting territorial claims in the Antarctic, but it had only frozen the legal \textit{status quo}.\footnote{Supra note 261, p. 470.} To date, none of the above seven has renounced its claim, and United States and Russia maintain the right to lay claims.\footnote{Supra note 221.} However these claims have not come in the way of the peaceful conduct of scientific activities by any state.

The Treaty expressly guarantees the freedom of scientific investigation in the Antarctic to all states. The sprit of cooperation applied during the International Geophysical Year was continued subject to the provisions of the Antarctic treaty.\footnote{Article II of the Antarctic Treaty 1959.} The Antarctic treaty is often cited as a model of international cooperation.\footnote{Wei-chin Lee, ‘China and Antarctica’, \textit{Asian Survey}, Vol. XXX, No. 6, June 1990, pp. 576 - 586 at p. 576.} In order to facilitate the international cooperation in scientific investigation in the Antarctic, the Treaty calls for the exchange of information regarding plans for scientific programs and scientific personnel in the Antarctic. It also provides for free exchange of scientific observations and
results from the Antarctic. The subsequent agreements forming part of the Antarctic Treaty System also support the regime of sovereignty established by the Treaty.

(c) Conservation of the Antarctic and its Resources

The Treaty recognizes the interest of all mankind in the Antarctic. The activities of the states in the Antarctic must be carried out by keeping in mind the interests of others. It was recognized that the Antarctic, being an ideal place for scientific research, needs to be kept clean and unpolluted. The Treaty does not contain the provisions to govern activities of resource management and development. However the need for the protection of the living and non-living resource in the Antarctic was regularly considered in the Antarctic Treaty Consultative Meetings held under the provisions of Article IX. It has resulted in other related agreements for the protection and conservation of the Antarctic and its resources.

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267 Article III of the Antarctic Treaty 1959.
269 Preamble of the Antarctic Treaty 1959.
270 http://www.state.gov/g/oes/ocns/9570.htm (Accessed on 22 August 2006, 8:10 pm)
(i) **Agreed Measures for the Conservation of Antarctic Fauna and Flora, 1964**

In 1964, recognizing the importance of the Antarctic Fauna and Flora, Agreed Measures for their Conservation was entered. It prohibits the killing, wounding, capturing or molesting of any native mammal or native bird except in accordance with a permit.\(^\text{271}\) The states are obligated to take appropriate measures to minimize harmful interference with the normal living conditions of any native mammal or bird within the Antarctic. It was also agreed that the states must take all reasonable steps towards the alleviation of pollution of the waters adjacent to the coast and ice shelves.\(^\text{272}\) Special protection is accorded to the area designated as ‘Specially Protected Area’ by the Agreed Measures.\(^\text{273}\) The Participating Governments must prevent the introduction of non-indigenous species of animal and plant, as well as the accidental introduction of parasites and diseases.\(^\text{274}\) However the provisions of these Agreed Measures are exempted from application in cases of extreme emergency involving possible loss of human life or involving the safety of ships or aircraft.\(^\text{275}\)

\(^{271}\) Article VI of Agreed Measures for the Conservation of Antarctic Fauna and Flora, 1964.

\(^{272}\) Article VII, *Ibid*.

\(^{273}\) Article VIII, *Ibid*.

\(^{274}\) Article IX, *Ibid*.

\(^{275}\) Article V, *Ibid*. 

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These Agreed Measures, like any other recommendations of Antarctic Treaty Consultative Meetings, must be approved by all the Governments of the Consultative Parties in order to be legally effective. Since one of the Consultative Parties, Federal Republic of Germany, did not give its assent, the Agreed Measures do not form part of the regime of the Antarctic in the strict legal sense. However it is now beyond doubt that these Agreed Measures are considered as basic guidelines for the Consultative Parties in the protection of ecology and environment of the continent.

(ii) Convention for the Conservation of Antarctic Seals, 1972

The need for the conservation of the Antarctic seals was felt in 1972, owing to its large-scale commercial exploitation. It resulted in the Convention for the Conservation of Antarctic Seals, 1972. The Convention recognized the immediate need for the regulation of harvesting. It prohibits killing or capturing of certain species of seals that are in the danger of extinction.

The Annex to the Convention specifies wide range of measures, which the Contracting Parties are obligated to adopt for the conservation of the

276 The Convention was signed on 9 June 1972 and it came into effect on 11 March 1978.

Antarctic seals.\textsuperscript{278} It provides for permissible catch, open and closed season for sealing, sealing zones and seal reserves. The Convention, however, allows the killing or capturing of seals in limited numbers to provide indispensable food for men or dogs, to provide for scientific research or to provide specimens for museums, educational or cultural institutions. Such killing is permitted subject to special permits.\textsuperscript{279} The Contracting Parties must also exchange information about all seals killed or captured by their nationals and vessels flying their flags.\textsuperscript{280} This requirement was intended to serve as a check on killing seals.

(iii) \textbf{Convention on the Conservation of Antarctic Marine Living Resources, 1980}

During 1970’s, it was recognized that krill is the backbone of the Antarctic marine life, as most of the Antarctic fish, birds, seals, whales etc. depend upon it for food. The increased harvest of krill by some nations\textsuperscript{281} became a matter of serious concern during the Ninth Atlantic Treaty Consultative Meeting, held at London in 1977. So the establishment of a regime for conservation and rational management of all species in the Antarctic

\textsuperscript{278} Article 3, \textit{Ibid.}
\textsuperscript{279} Article 4, \textit{Ibid.}
\textsuperscript{280} Article 5, \textit{Ibid.}
\textsuperscript{281} Soviet Union, Japan, Poland, West Germany, Chile, Taiwan etc. See \textit{Supra} note 247, p. 847.
was recommended in the Meeting.282 Consequently, Convention on the Conservation of Antarctic Marine Living Resources was adopted on 20 May 1980.283 It has the credit of being a path-breaking example of the ecosystem approach to resource conservation and management,284 since it adopts the modern multi species ecosystem approach as against the traditional approach of regulating exploitation of a species or groups of species.

It lays down three inter-related principles of conservation, which must be observed while harvesting and carrying out other associated activities in the Antarctic. The first principle is focused on the prevention of decrease in size of any harvested population to levels below those which ensure its stable recruitment. The size should not be allowed to fall below a level close to that which ensures the greatest net annual increment. The second principle speaks about the maintenance of the ecological relationships between harvested, dependent and related populations of the Antarctic marine living resources as


283 The Convention entered into force on 7 April 1982.

well as the restoration of depleted populations to the level of their stable recruitment. The third principle states that the changes or risk of changes in the marine ecosystem which could not be potentially reversible over two or three decades must be prevented. For the purpose of sustained conservation of the Antarctic marine living resources the parties must take into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes.  

In order to give effect to its objectives and principles, the Convention has established the Commission for the Conservation of Antarctic Marine Living Resources. The Scientific Committee for the Conservation of Antarctic Marine Living Resources, being the consultative body, facilitates the Commission’s work. The Commission is also empowered to establish the Secretariat consisting of Executive Secretary and other staff. The members of the Commission are obligated to provide information about their harvesting activities and steps taken by them to implement the conservation measures.

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286 Article VII, Ibid.
287 Article XIV, Ibid.
288 Article XVII, Ibid.
adopted by the Commission. The Convention also provides for a system of observation and inspection to promote the objective and ensure observance of the provisions of the Convention. The Contracting Parties are obligated to cooperate with each other to ensure the effective implementation of the system of observation and inspection.

(iv) **Convention on the Regulation of Antarctic Mineral Resource Activities, 1988.**

In the Eleventh Antarctic Treaty Consultative Meeting held in 1981, the Consultative Parties recommended for the conclusion of a regime on Antarctic mineral resources as a matter of urgency. The Parties wanted the negotiations on the regime to begin even before accurate assessment of the continent’s exploitable resources is made. The subsequent negotiations resulted in the Convention on the Regulation of Antarctic Mineral Resource Activities. The Convention recognized that the regulation of the Antarctic mineral resource activities is necessary in the interest of international community as a whole.

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and as such it prohibited the Antarctic mineral activities outside the provisions of the Convention.\textsuperscript{293} Any Antarctic mineral resource activity that adversely affects the Antarctic environment and associated ecosystem is prohibited under the Convention.\textsuperscript{294}

The Convention obligates the persons or agency undertaking any Antarctic mineral resource activity to take necessary and timely response action, including prevention, containment, clean up and removal measures, if the activity results in or threatens to result in damage to the Antarctic environment or dependent or associated ecosystem.\textsuperscript{295} The Convention also imposes strict liability for any damage caused to the Antarctic environment or dependent or associated ecosystems arising from the Antarctic mineral resource activities.\textsuperscript{296} Any decision about the Antarctic mineral resource activities must be made by taking into account the need to respect other established uses of the Antarctic.\textsuperscript{297} The Convention stipulates that the area designated as a Specially

\textsuperscript{293} Article 3 of the Convention on the Regulation of Antarctic Mineral Resource Activities.

\textsuperscript{294} Article 4, \textit{Ibid}.

\textsuperscript{295} Article 8(1), \textit{Ibid}.

\textsuperscript{296} Article 8(2), \textit{Ibid}.

\textsuperscript{297} Article 15, \textit{Ibid}.
Protected Area or a Site of Special Scientific Interest under Article IX (1) of the Antarctic Treaty must not be subjected to mineral resource activities.298

Provisions are also made for the establishment of several bodies for the purpose of implementation of the Convention. It includes establishment of the Antarctic Mineral Resource Commission, Advisory Committee, Regulatory Committee and Secretariat.299 The Convention also contains wide range of provisions regarding prospecting,300 exploration301 and development302 of the Antarctic mineral resources. However these wide range of provisions merely remained in text as the Convention did not come into force due to its failure to acquire minimum number of ratification.303 There was a large-scale difference of opinion on the Convention between the claimants and non-claimants as well as between Consultative Parties and Non-Consultative Parties.304 The major

298 Article 13, Ibid.

299 Chapter II, Ibid.

300 Chapter III, Ibid.

301 Chapter IV, Ibid.

302 Chapter V, Ibid.

303 http://www.esteri.it/eng/4_27_54_27.asp (Accessed on 22 August 2006, 8:25 pm)

problem of the Convention was that of insufficient safeguards against the degradation of the Antarctic environment. So subsequently the Protocol on Environmental Protection to the Antarctic Treaty prohibited all activities relating to the Antarctic mineral resources sparing the scientific research.

(v) Protocol on Environmental Protection to the Antarctic Treaty, 1991

The need to strengthen the Antarctic Treaty System, especially in the field of protection of the Antarctic environment and dependent and associated ecosystem, spur up in the late 1980s. Three major accidents in the Antarctic during early 1989 have increased concern about the protection of the Antarctic environment. It resulted in the signing of the Protocol on Environmental Protection to the Antarctic Treaty on 4 October 1991. The Protocol, together with its annexes, is considered as the most comprehensive multilateral document ever adopted on the international protection of the

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305 Ibid., pp. 147 - 150.

306 In January 1989, the Argentine resupply ship, the Bahia Paraiso, ran aground on submerged rocks in the Bismarck strait resulting in huge oil spill. In February 1989, the British resupply vessel, H. M. S. Endurance, hit an iceberg near Deception Island and in the same month Peruvian vessel, BIC Humboldt, ran aground in Fildes Bay, King George Islands.


environment.\textsuperscript{309} It recognizes that the interest of mankind requires the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems.\textsuperscript{310}

The Protocol promotes respect for and protection of the Antarctic environment through the adoption of concrete measures, highlighting the responsibility of the Consultative Parties to ensure that all activities undertaken conform to the Antarctic Treaty. In order to fulfill this objective, the Protocol calls for:

* the designation of the Antarctic as a natural reserve, devoted to peace and science;\textsuperscript{311}

* the consideration of protection of the Antarctic environment as a fundamental factor in planning and conduct of all activities in the Antarctic;\textsuperscript{312}


\textsuperscript{310} Preamble to the Protocol on Environmental Protection to the Antarctic Treaty, 1991.

\textsuperscript{311} Article 2, \textit{Ibid}.

\textsuperscript{312} Article 3, \textit{Ibid}.
* the cooperation of the Parties in such planning and conduct of activities in the Antarctic;\textsuperscript{313}

* the prohibition of any activity relating to mineral resources except scientific research;\textsuperscript{314}

* the conduct of environmental impact assessment before carrying on any activity in the Antarctic.\textsuperscript{315}

The ban imposed by the Protocol on any activity relating to mineral resources other than scientific research is for 50 years as Article 25 of the Protocol opens the option to renew the ban after 50 years from the date of entry into force of the Protocol. The provision was a compromise between those advocating a permanent ban on mineral resource activities and those supporting the regime established by the Convention on the Regulation of Antarctic Mineral Resource Activities 1988.\textsuperscript{316} This means that the problem of the

\textsuperscript{313} Article 6, \textit{Ibid.}.

\textsuperscript{314} Article 7, \textit{Ibid.}.

\textsuperscript{315} Article 8, \textit{Ibid.}.

Antarctic mineral resource activities has merely been postponed rather than resolved completely.

The Protocol entrusts the Antarctic Treaty Consultative Meetings to define the general policy for the comprehensive protection of the Antarctic environment and dependent and associated ecosystems, and also to adopt measures for the implementation of the Protocol in accordance with Article IX of the Antarctic Treaty. The Committee for Environmental Protection is established as sole permanent body of the Protocol. The Committee advises and formulates recommendations to the Parties in connection with the implementation of the Protocol, including the operation of its annexes.

The Protocol provides for a system of inspection by the observers to promote the protection of the Antarctic environment. The Parties are duty bound to provide for prompt and effective response action in cases of environmental emergencies arising out of any activity carried on in the Antarctic.

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318 Article 11, Ibid.
319 Article 12, Ibid.
320 Article 14, Ibid.
Antarctic.\textsuperscript{321} The steps taken by the Parties to implement the Protocol must also be reported annually.\textsuperscript{322}

The five annexes to the Protocol lay down tough and mandatory regulations for Environmental Impact Assessment,\textsuperscript{323} conservation of the Antarctic fauna and flora,\textsuperscript{324} waste disposal and waste management,\textsuperscript{325} prevention of marine pollution,\textsuperscript{326} and area protection and management.\textsuperscript{327} In addition, a sixth annex regarding liability arising from environmental emergencies is adopted in the 28\textsuperscript{th} Meeting of the Consultative Parties held in Stockholm from 6 - 17 June 2005.\textsuperscript{328}

In furtherance of the Antarctic treaty System, the Antarctic Treaty Parties have also adopted several guidelines for the protection of the Antarctic environment. These guidelines are intended to ensure that the Antarctic wildlife

\textsuperscript{321} Article 15, \textit{Ibid.}
\textsuperscript{322} Article 17, \textit{Ibid.}
\textsuperscript{323} Annex I, \textit{Ibid.}
\textsuperscript{324} Annex II, \textit{Ibid.}
\textsuperscript{325} Annex III, \textit{Ibid.}
\textsuperscript{326} Annex IV, \textit{Ibid.}
\textsuperscript{327} Annex V, \textit{Ibid.}
\textsuperscript{328} \textit{Supra} note 303.
and vegetation are not harmed, protected areas and research programs are respected, and activities are conducted with a high regard for safety.  

However a major drawback of the Protocol, as pointed out by Shirley V. Scott, lies in its failure to incorporate precautionary principle in the protection of the Antarctic environment. Its incorporation would be of added significance especially in the light of rapid increase in the Antarctic tourism, which carries the threat of introducing or translocating alien species or diseases to the Antarctic. Various consultative parties were also aware of the fact that the Protocol fails to provide for the regulation of the Antarctic tourism adequately. But their proposal at the sixteenth and seventeenth Antarctic Treaty Consultative Meetings in 1991 and 1992 for the incorporation of a separate annex on tourism to the Protocol failed as consensus could not be reached on it. Finally a non-legally binding approach was accepted at the eighteenth

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331 In 1990 - 91 approximately 4,800 tourists visited the Antarctic. It increased to 19,500 in 2003 - 04.

Antarctic Treaty Consultative Meeting in 1994 by the adoption of Recommendation XVIII - 1. The Recommendation includes both guidelines for visitors to the Antarctic and guidelines for the organizers of non-governmental expeditions.\(^{333}\)

### 2.6.3: The Antarctic Regime Falls Short of CHM

The Antarctic regime is the product of compromise between the interests of those states that claim sovereignty in the Antarctic and the interests of other states that neither claim sovereignty nor recognize such claims. Although it is clear that elements of the concept of CHM have greatly influenced the Antarctic policy making, the Antarctic regime, *in toto*, falls short of CHM because of following reasons.

- Firstly, the status of the Antarctic hangs in a delicate balance with seven nations claiming sovereignty over parts of the continent.\(^{334}\) Unfortunately, the Antarctic Treaty System provides for the maintenance of *status quo*. It only prohibits new claims without abrogating the already existed claims.

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\(^{334}\) http://www.unu.edu/unupress/unupbooks/uu15oe/uu15oe0u.htm (Accessed on 25 August 2006, 7:54pm)
Though many scholars and states\textsuperscript{335} have argued that these claims are based on the misapplication of various theories of acquisition, they continue to exist under the protection of the Antarctic Treaty.\textsuperscript{336} The existence of such sovereign claims counters the very basis of the concept of CHM. Therefore the Antarctic cannot be considered as part of CHM so long as such claims exist.

➢ Secondly, the Antarctic regime does not provide for an International Authority representing the mankind in the management of the Antarctic and its resources. The Antarctic Treaty adopted minimalist approach to institution creation due to the reluctance on the part of Australia, Argentina and Chile to accept any form of permanent administrative authority.\textsuperscript{337} Although the Commission for the Conservation of Antarctic Marine Living Resources and Committee for Environmental Protection are established

\textsuperscript{335} The two Superpowers are also in the list of states, which oppose the sovereign claims over the Antarctic. See generally Robert D. Hayton, ‘The “American” Antarctic’, \textit{American Journal of International Law}, Vol. 50, No. 3, July 1956, pp. 583 - 610 at p. 591 and Peter A. Toma, ‘Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic’, \textit{American Journal of International Law}, Vol. 50, No. 3, July 1956, pp. 611 - 626.

\textsuperscript{336} \textit{Supra} note 70, p. 164.

under the subsequent conventions, they are devoid of the authority to represent the interest of mankind. Further, the Antarctic Minerals Resources Commission stipulated under the Convention on the Regulation of Antarctic Mineral Resource Activities did not even come into existence. Thus the Antarctic regime fails to comply with the requirement of international management system.

➢ Thirdly, the so-called crux of the CHM, system of benefit sharing, is missing in the Antarctic regime. The regime fails to recognize the importance of the distribution of the Antarctic wealth in the common interest. Any system of management, which is devoid of the element of benefit sharing, can never be equated with the concept of CHM.

For these three fundamental reasons the Antarctic regime fails to qualify the test of CHM. In addition, the absence of any provision regarding technology transfer has been an obstacle in the realization of freedom of access and scientific investigation by the developing countries. Since only few states possess the technology to conduct scientific research in the Antarctic, most countries are defacto prohibited from exercising their freedom.\footnote{338} This has also

prevented the developing countries from participating in the Antarctic Treaty System, as Article IX (2) of the Antarctic Treaty puts forth the conducting of ‘substantial scientific research’ as a prerequisite for becoming a Consultative Party to the Antarctic Treaty System.\footnote{Ibid.}

There are arguments both for and against the application of the concept of CHM to the Antarctic in the future.\footnote{See generally Mark W. Janis and John E. Noyes, \textit{Cases and Commentary on International Law}, (St. Paul Minn.: West Group, 1997) pp. 515 - 523.} The Third World is strongly of the view that the Antarctic is not amenable to sovereignty and the existing claims have no place in a world community, which recognizes the need for international approaches to the resource problems.\footnote{\textit{Supra} note 1, p. 536.} Therefore the notion of sovereignty requires to be replaced by the notions that are in conformity with CHM.

An early example of the awakening interest of the Third World can be cited in the call of SriLankan Ambassador Pinto in 1977 for subjecting the living and non-living resources of the Antarctic to a management regime to secure optimum benefit for mankind as a whole and particularly for the developing countries in accordance with appropriate global arrangements and
within the framework of the New International Economic Order. In September 1982, the Malaysian Prime Minister, speaking about the Antarctic, stated that “those uninhabited lands belong to the international community. The countries claiming them must give them up so that either the United Nations administer these lands or the present occupants act as trustees for the nations of the world”.

While criticizing the existing Antarctic regime, Sudhir K. Chopra, remarks that “this is not an ideal regime from the perspective of the vast majority of States, for it does not fulfill the dream of a true ‘commons regime’. At best, this is a regional regime serving the interests of a select few.” Edvard Hambro also supports the Third World view by stating that one of the possible solution to the problems of the Antarctic “is to declare the continent the common heritage of mankind and to establish the same kind of authority

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344 Supra note 70, p. 172.
that is envisaged for the seabed and the ocean floor”.\textsuperscript{345} The legal writers like Rajmah Hussain\textsuperscript{346} and Eric Suy\textsuperscript{347} share similar opinions.

However the vested interests of the states already claiming sovereignty over the Antarctic have come in the way of accepting the Third World proposition in the governance of the Antarctic.\textsuperscript{348} As the application of the CHM to the Antarctic directly contravenes the interests of the Antarctic Treaty Consultative Parties, they have vigorously resisted efforts in the UN General Assembly sessions that might have produced such a result.\textsuperscript{349} Most striking feature of such resistance has been the solidarity shown by the Treaty Parties in

\begin{itemize}
\item\textsuperscript{345} \textit{Supra} note 259, p. 225.
\item\textsuperscript{348} \textit{Supra} note 247, p. 857.
\end{itemize}
defense of the Antarctic Treaty System. All of them for their own reasons believed that the system provides best arrangement for Antarctica.\(^{350}\)

In 1976, the Antarctic Treaty Consultative Parties have revealed their dissatisfaction towards a CHM regime in the Antarctic by successfully putting pressure on the United Nations Environmental Program (UNEP) and Food and Agricultural Organization (FAO) to abandon their proposed massive program for the development of the Antarctic Ocean resources for the benefit of the world. The deliberations in the Antarctic Treaty Consultative Meetings have also been influenced by the politics of the claimants.\(^{351}\) As they never wanted to give up their claims and share the benefits derived from the Antarctic, recommendations for the application of the CHM to the Antarctic were not made in the meetings.

In the 79\(^{th}\) Annual Meeting of American Society of International Law, William R. Mansfield stated that

It is not only possible to develop a regime for effective mineral resources management in Antarctica without settling the sovereignty

\(^{350}\) *Supra* note 342.

issue, but it must be done without resolving that issue. There is no prospect of its being settled. It is for this reason that there is no real possibility of Antarctica or its resources being established as part of common heritage of mankind.\footnote{Supra note 226, p. 61.}

He supplemented his argument by putting forward the view that analogy cannot be drawn from the outer space and the deep seabed because they were not subject to sovereignty claim. But the Antarctic has been a subject of substantial human activities as well as sovereignty claims for 75 years or more. Therefore the CHM concept is not applicable to the Antarctic.\footnote{Ibid.} Sudhir K. Chopra expressed similar view by stating, “though CHM is a good concept, it is not applicable to Antarctica because of existing conflicting claims. No such claims exist in outer space or on the high seas. Antarctica needs a new concept of global sharing”.\footnote{Sudhir K. Chopra, (Remarks), ‘Who has the Right of Exploitation, and the Right to Prevent Exploitation, of the Minerals in Antarctica?’, American Society of International Law - Proceedings of the 79\textsuperscript{th} Annual Meeting, 25 - 27 April 1985, Published in 1987, pp. 69 - 70 at p. 70.}

Roland Rich, while distinguishing the regime of outer space and deep seabed from the Antarctic, asserts that
unlike outer space, Antarctica is a continent and therefore subject to territorial sovereignty. Unlike the deep seabed territorial claims, dating from the beginning of the century, have been made and continue to be asserted and acted upon. Indeed if there was an area of the world analogous to Antarctica it would be Greenland over which Denmark was held to have a valid territorial claim. The “common heritage” concept cannot readily be applied to Antarctica by way of legal analogy.\(^{355}\)

He goes on to state that the state practices also do not link the interests of developing countries to the Antarctic and its resources because of the fact that the assertion of Third World interest in the Antarctic has been occasional, timid and haphazard.\(^{356}\) Further those who oppose the application of CHM to the Antarctic also state that the sovereign claims over the Antarctic cannot be dismissed because of the strong public opinion in the claimant countries. According to Robert D. Hayton “intense feeling in some nations, particularly Chile and Argentina, will not permit governments to slight the territorial issue”\(^{357}\).

\(^{355}\) Supra note 291, p. 714.

\(^{356}\) Ibid.

However these views are not acceptable in the modern world, which depends on the international cooperation and mutual coexistence. The assertion of sovereignty over the Antarctic did not result in major conflict owing to the fact that not much is known about the existence of commercially profitable mineral deposits in the Antarctic. Once they are discovered, conflict is bound to occur. The fact that few states have maintained territorial claims over the Antarctic from long period of time should not be considered as a valid ground for legalizing such claims. We must keep in mind that such claims are not recognized by other states. Some states have also opposed the claim of sovereignty over the Antarctic, which is evident from the fact that they have consistently refrained from seeking the consent of territorial claimants to undertake activities in the claimed areas. Moreover when such activities were protested by the claimants alleging infringement of their sovereignty, the non-claimants have refused to accept the protest.

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358 United States, Russia, Japan, Belgium, Poland etc. assert the principle of open use as opposed to the principle of territorial sovereignty over the Antarctic.

Further the view that the public opinion in the claimant countries would not permit the claimants from renouncing their claims is too vague. If at all we take into consideration the public opinion, the opinion of the non-claimant states, especially the Third World, would represent the larger interest when compared to the public opinion of the not even handful of claimant states. As we all know that the smaller interest must always give way to the larger interest, importance must be given to the public opinion of the non-claimant states rather than to that of claimant states.

Undoubtedly, the developing countries have a stake in the Antarctic and its resources. However the Antarctic Treaty System has failed to recognize the interest of the developing countries in the Antarctic. The failure can be attributed to the absence of the provisions regarding the international management system, benefit sharing and abrogation of sovereign claims. So there is a need to reformulate the Antarctic regime in line with the concept of CHM, which shall include the abrogation of sovereign claims over the Antarctic as its first step.

2.7: Chapter Conclusion

CHM, being a noble concept, propagates the idea of protection of the interests of all the people of the world on equal footing. As discussed above,
the concept incorporates several important principles and as such it encompasses the *Res Communis* regime. Almost all the states of the world have recognized the concept in one or the other occasion by accepting or adhering to General Assembly resolutions or treaties containing provisions relating to CHM. But as the elements of the concept are not clearly defined, the states have used it to their own advantage by giving different meaning to the concept. Further the application of the concept to different areas has run into practical difficulties due to the differences in the opinions of the states. The debate over the concept shows the differences between the developed and the developing states in sharing the global resources. While the developing countries strenuously urged for the application of CHM in the governance of global commons, the developed countries opposed it with equal strength. As the developed countries are unwilling to part with the benefits derived from common resources, they always opposed the concept by stating that the concept is illusive and belongs to the realm of politics, philosophy or morality and not law.

The concept of CHM has its origin in the Law of the Sea, owing to the need for the protection of vast resources of the deep seabed and its subsoil from unlimited exploitation with the help of developed technology. Nearly two decades of deliberation between 1967 and 1982 was almost successful in
bringing the concept of CHM into the realm of law. The specific incorporation of the concept in the Law of the Sea Convention 1982 provided a breath of relief to the Third World countries. But again with the United States objections and consequent 1994 Agreement Relating to the Implementation of Part XI of the Law of the Sea Convention, the Third World’s effort to strengthen the concept went in vain. For the reasons discussed above, the 1994 Agreement axed the very basis of CHM and made it a bird without wings in the governance of seabed and subsoil.

The concept of CHM has also influenced the Antarctic policymaking. However the Antarctic regime falls short of CHM despite possessing some of the elements of CHM. The disagreement between the claimant and non-claimant countries over the future application of CHM to the Antarctic has also made the legal status of the Antarctic uncertain.