

THE NEED TO ELABORATE SUI GENERIC REGIME CONCERNING GEOSTATIONARY ORBIT

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on the Peaceful Uses of Outer Space

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SISTEMATIC

- I. SOME CONSIDERATIONS TO ELABORATE SUI GENERIS REGIME CONCERNING GEOSTATIONARY ORBIT (GSO)
- II. THEORETICAL BACKGROUND
- III. THE INFLUENCE OF ROMAN LAW TOWARD THE CONCEPT OF COMMON HERITAGE OF MANKIND (CHM) IN THE FRAMEWORK OF INTERNATIONAL LAW
- IV. BENCHMARKING ON REGULATORY MODEL CONCERNING COMMON HERITAGE OF MANKIND (CHM)
- V. PROSPECT FOR DEVELOPING SUI GENERIS REGIME CONCERNING GSO

I. SOME CONSIDERATIONS TO ELABORATE SUI GENERIC REGIME CONCERNING GSO

- A. Stagnation on the Agenda Item of GSO at the Legal Sub Committee of UNCOPUOS
- B. Taking into considerations on the Trends concerning the Utilization of Orbit-Spectrum Resources, particularly GSO
- C. The need for a more comprehensive approach on the utilization of GSO
- D. The need for a legal breakthrough on the Discussion concerning GSO

II. THEORETHICAL BACKGROUND

- A. The Concept of Res (Things) under Roman Law
- B. The division of Res Corporales
- C. Some requirements to acquire ownership
- D. The relation between the concept of Res toward the concept of State Jurisdiction
- E. The Legal Concepts of Sovereignty and Sovereign Rights under Roman Law

II.A. The Concepts of Res (Things) under Roman Law

1. Res Corporales:

“things which can be touched, or are perceptible to the senses”

2. Res Incorporales:

“things which can not be touched, so as those things which consist in right. Such things as the mind alone can perceive”

II.B. The Division of Res Corporales

1. Res Publicae:

“common property of the Roman people subject to government regulation. This include public roads, flowing river, lake, water, distribution conduct, etc”.

2. Res Divini Iuris:

are put under the protection of the Gods, include:

- Res Sacrae, mainly temples and objects use for worship;
- Res Religiosae, burial places which were sacred and could not subject to trade;
- Res Sanctae, e.g city walls.

3. Res Communis Omnium:

“ are available to all and can not be owned by any one not even by State, e.g. the air, the sea and the shore.

II.C. Legal Requirements to Acquire Ownership

1. There is an Effective Possession.
2. Legal acts (*iusta causa possessionis*) in the forms of:
 - purchase (*pro-emptore*);
 - Donation (*pro-donato*);
 - Occupation (*occupatio*).

II.D. The Relations between Res and the Concept of State Jurisdiction

1. “Res Nullius”

“the property of nobody. A things which has no owner, either because a former owner has finally abandoned it or because (in the Roman Law) it is not susceptible”.

“Res Nullius” may be subject appropriation via: effective occupation; the will expressed by the new owner to exercise ownership.

2. “Res Derelicta”

“abandoned property; property thrown away or forsaken by the owner, so as to become open to acquisition of the first taker or occupant”.

3. “Terra Nullius”

“is usually used for large places of land or island for which no owner was known or recognized. The concept has been alive for centuries and is still used”.

II.E. The Concepts of Roman Law concerning Sovereignty and Sovereign Rights)

1. Proprietas

Referring to exclusivity as reflected on the following formulation :

“it has, however, been a fairly easy matter to extend sovereignty only over a part of the sea without involving the rights of ownership, and I do not think that any hindrance is put in the way of this by the universal customary law of which I have spoken”.

2. Dominium

In the Book “Mare Liberum” it refers to:

“for nowadays sovereignty means a particular kind of proprietorship, such in fact that it absolutely excludes like possession by one else”.

III. THE INFLUENCE OF ROMAN LAW TOWARD CHM'S CONCEPTS UNDER EXISTING INTERNATIONAL LAW

- A. Some formulations on the Concept of CHM
(Common Heritage of Mankind)
- B. 2 (two) Interpretations on the Concept of
CHM
- C. Important International Instruments which
have some CHM's formulation

III.A. Some Formulations on the Concept of CHM

1. “An extension of the *res communis humanitatis* concept since it is open for inclusive use and denies exclusive use”.
2. CHM as a modern version of *res communis* which applies to another phenomenon namely a right to use a resource”.
3. There must be a sharing of benefit and values derived from it.

III.B. 2 (two) different Interpretations on the Concept of CHM

1. As Common Property

“refer to a thing which by consensus of opinion of mankind are forever exempt from national ownership on account of their susceptibility to universal use”

2. As Common Interest

a. *Speculative Common Interest*

Requires a wide sharing mechanism

b. *Practical Common Interest*

Depends on political will in the implementation of such sharing.

III.C. Some Important International Legal Instruments which contain the formulation of CHM

1. UNGA Resolution no 1962 of 1963
2. Space Treaty 1967
3. UNGA Declaration no 2749 (XXV) of 1970 on Principles Governing the Seabed and Ocean Floor
4. ILA Montreal Conference 1982
5. The Antarctic Treaty of 1959
6. UNCLOS III
7. Moon Agreement 1979

IV. BENCHMARKING OF MODEL REGULATION CONCERNING CHM

- A. Model Regulation on CHM concerning Antarctic and its Natural Resources
- B. Model Regulation on CHM under International Law of the Sea
- C. Model Regulation on CHM for the development of International Regime concerning Area and Natural Resources on the Moon

IV. A. Model Regulation of CHM on the Antarctic and Its Natural Resources

1. **The Antarctic Treaty of 1959**
Swears by the interest of all mankind.
2. **The Draft Antarctic Minerals Treaty of 1988**
 - a. Mainly envisages a licensing regime for prospecting exploration and development (i.e exploitation activities).
 - b. Provide for policy and standards for environment impact assessment of the Antarctic and associated ecosystem, and atmospheric, terrestrial or marine environment of the global or regional climate or weather patterns.
 - c. The institutional mechanism envisages include the Antarctic mineral resources commission to be assisted by a scientific, technical and environmental advisory committee.
 - d. Defines the rights of the operators and the powers of the treaty organs and provides for a disputes settlement mechanism.

IV.B. Model Regulation of CHM under International Law of the Sea

1. UNGA Declaration no 2749 (XXV) on Principles Governing the Sea Bed and Ocean Floor;
2. The Third United Nations Convention on the Law of the Sea;
3. The Objectives of Establishing an International Regime concerning the International Sea Bed Area;
4. Some Objections to the Idea of Establishing International regime for International Sea Bed Area (US, UK, France);
5. Interpretation on the Concept of CHM and its possible Implementation on the Law of the Sea (Malta).

IV.B.1. UNGA Declaration no 2749 (XXV) 1970 on Principles Governing the Sea Bed and Ocean Floor

- ▣ “The sea bed and ocean floor, and the subsoil thereof, beyond the limit of national jurisdictionas well as the resources of the area , are the CHM”;
- ▣ “The area shall not be subject to appropriation by any means, by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any parts thereof”;
- ▣ “neither States nor persons, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its natural resources incompatible with the international regime to be established and the principles of this declaration”;
- ▣ “all activities regarding exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established”.

IV.B.2. The Third United Nations Convention on the Law of the Sea of 1982

- ▣ Article 136 on legal status of the area and its resources as CHM;
- ▣ Article 140 on the benefit of mankind;
- ▣ Article 141 on the use of the area exclusively for peaceful purposes;
- ▣ Article 144 on transfer of technology;
- ▣ Article 145 on the protection of the marine environment.

IV.B.3. The Objectives of Establishing an International Legal Regime concerning the International Sea Bed Area

- ▣ Distribution of the financial and economic benefits derived from the financial and economic parties to the convention on non-discriminatory basis;
- ▣ The development of the resources of the area;
- ▣ The promotion of just and stable prices remunerative to producers and fair to consumers from mineral produced both from the resources of the area and from other resources;
- ▣ Production limitation , in order to prevent possible harm to land-based producers of the same mineral;
- ▣ Encouragement of transfer of technology.

IV.B.4. Some Objections to the Idea of Establishing International Regime for the International Sea Bed Area

▣ Ideological Objection

- It would restrict economic freedom in ways inconsistent with the free market principle;
- The CHM concept as applied by developing countries within the context of the convention provides nations which would otherwise play no role in sea-bed development with an equal say in governing the sea-bed and permits them to profit undeservedly from western exploration and exploitation of the area;
- Accepting the convention would have the precedential effect of legitimizing the NIEO.

▣ Practical Objection

- The licensing process could become politicized;
- The Convention's decision making process imposes unnecessary regulations, bureaucracy and risk;
- Production ceiling (limitation);
- The provision for mandatory transfer of technology (it could never be fair to private contractor).

IV.B.5. Interpretation on the Concept of CHM and Its possible Implementation on the Law of the Sea

- ▣ Areas and resources of the CHM can not be appropriated, it can be used but not owned;
- ▣ The use CHM requires a system of management in which all users must shares;
- ▣ It implies an active sharing of benefit, including not only financial and transfer of technology;
- ▣ The principles of CHM implies eventual reservation for peaceful program;
- ▣ It implies transmission of the heritage substantially unimpaired to future generation.

IV.C. Model Regulation of CHM for Developing of International Regime concerning Area and Natural Resources on the Moon

1. Regulation under the Moon Agreement of 1979
2. Some Objections to certain Provisions under the Moon Agreement of 1979
3. Some Thoughts of Developed Countries toward an Effective International Regime

IV.C.1. Some Provisions under the Moon Agreement of 1979

- ▣ Article 11 (1): “The Moon and its natural resources are the CHM.....”
- ▣ Article 11 (2): “ The Moon is not subject to national appropriation.....”
- ▣ Article 11 (3) : “ neither the surface nor the sub-surface of the Moon nor any part thereof or natural resources in place, shall become property of any State, international inter governmental organization, non-governmental organization, national organization, non-governmental entity or of any natural persons.
- ▣ Article 11 (5) : “ states parties to this agreement hereby undertake to establish an international regime including appropriate procedures to govern the exploitation of natural resources of the Moon as such exploitation is about to become feasible. This provision shall be implemented in accordance with article 18 of this agreement”
- ▣ Article 11 (7) :
The main purpose of the international regime to be established shall include: the orderly and safe development of the natural resources of the Moon; the rational management of such resource; the expansion the opportunities in the use of those resources; an equitable sharing by all states parties in the benefit derived from the resources.

IV.C.2. Some Objections towards certain Provisions of the Moon Agreement of 1979

- ▣ The Moon Agreement's CHM regime would serve as substantial disincentive to development;
- ▣ The notions of orderly development and equitable sharing , were seen as imposing substantial tax on lunar development for the benefit of nations who put nothing at risk;
- ▣ The Moon Agreement imposes as a moratorium on exploitation.

IV.C.3. Some Thoughts of Developed Countries for an Effective International Regime

- ❑ It provides standard and procedures for filing application of certain property rights;
- ❑ It determines the scope of rights to be awarded based on such applications;
- ❑ It provides some kind of incentives and preference to the early applicants (pioneer preferences);
- ❑ It encourages competition by discouraging private or public monopoly;
- ❑ It provides a system and mechanism to protect personal property;
- ❑ It provides some limited authority to the country of the legitimate licensee to enforce health or safety and environmental laws, to impose taxes, and to protect intellectual property;
- ❑ It provides a dispute resolution mechanism or a provision for reciprocal recognition of judicial decisions.

V. THE PROSPECTS FOR ELABORATING REGULATIONS CONCERNING SUI GENERIC REGIME OF GSO

- A. Characteristics
- B. The Objectives
- C. Improving the Management System
- D. The Elaborations on the Principles of Sui Generic Regime concerning the Utilization of GSO

V.A. Characteristics

- ▣ The character of Comprehensive Regulations ;
- ▣ Applies Internationally ;
- ▣ Creating a Supra-National Regulations equipped with Law Enforcement Mechanism;
- ▣ Will be implemented by utilizing existing Institutions through effective cooperation mechanism;
- ▣ Showing some flexibilities and able to anticipate and accommodate future development ;
- ▣ Environmentally oriented and guaranteeing sustainable development.

V.B. The Objectives

- ▣ Guaranteeing equitable access to all countries , particularly countries with specific geographical situations ;
- ▣ Guaranteeing fair and orderly utilization ;
- ▣ Guaranteeing sustainable utilization ;
- ▣ Guaranteeing the rights of Legitimate Users;
- ▣ Guaranteeing Rational and Efficient Utilization;
- ▣ Regulating Access Procedures ;
- ▣ Preventing Abuse of Registration Procedures and Acquiring Rights ;
- ▣ Preventing Interference which may Endanger the interests of Legitimate Users .

V.C. Improving the Management System

- ▣ Through Frequency Sharing and Co-Location in accordance with Technological Development;
- ▣ Implementing certain Steps to prevent bureaucratic congestion;
- ▣ Developing a kind of “satellite slot market”;
- ▣ Implementing a kind of Auction System on certain Frequencies;
- ▣ Applying a kind of Global Spectrum Segmentation Plan;
- ▣ Simplifying and Improving Registration Procedures ;
- ▣ Formulating Rights and Obligations of Registered Users.

V.D. Elaboration of Sui Generic Principles on the Utilization of GSO

1. Equitable Access
2. Freedom of Use
3. Non-Appropriation
4. Exclusively for Peaceful Purposes

V.D.1. Equitable Access

▣ **Definition :**

- “just, fair and right in consideration of the facts and circumstances of the individual case” (Black’s Law Dictionary);
- “Fair, Just, valid in equity” (Oxford Handy Dictionary);

▣ **Status :**

Recognized as one of General Principle of International Law together with other principles such as: “good faith”, “state responsibility”, “liability for damages”, “estoppels”, etc. As widely recognized General Principles of Law is a Source of International Law .

▣ **Interpretation :**

Previously the principle of “equitable access” was implemented based on “first come, first served”, but at the later stage complemented by other principles which able to accommodate subsequent users through “allotment plan”, “simplified improved procedures”, “multilateral planning meeting”.

V.D.1. Equitable Access (Continued)

▣ **Criteria:**

- The balance between the interest of “first user” and “subsequent user”;
- The ability to get an access (both technical and financial);
- Taking into considerations the interest of developing countries and countries with specific geographical situations;
- Developing technology for optimizing the utilization;
- Non-discrimination and guaranteeing future access

▣ **Legal Parameters**

- Provide opportunity to first user without hampering the same rights of subsequent users (on a non-permanent basis);
- Proportional and not excessive in accordance with the real needs of applicant ;
- Non-discrimination ;
- Taking into account specific conditions of each country (geographical condition, financial condition, technical conditions, the needs, etc);
- The opportunity that each country at least may secure one slot.

V.D.2. Freedom of Use

▣ **The kinds of Freedoms:**

- freedom of exploration and use;
- freedom to get access;
- freedom of scientific investigation;

▣ **Some limitations to Freedoms:**

- without discrimination and on equal basis;
- shall be exclusively for peaceful purposes;
- shall be for the benefit and in the interest of all countries;
- shall promote cooperation among countries;
- shall be subject to international law, including Charter of the United Nations.

▣ **Freedom of Use in the contexts of utilizing Orbit-Spectrum Resources :**

- it may not create any permanent use to certain orbit-spectrum on an exclusive basis;
- it may not violate the legitimate rights of other users;
- it may not prevent a subsequent user to get access to orbit-spectrum resource;
- it may not create environmental harm.

V.D.3. Non-Appropriation

▣ **Basic Understandings**

The utilization of orbit-spectrum resources may not in any way converted into ownership.

▣ **Interpretations :**

- appropriation is generally considered to be the taking of property for exclusive use with a sense of permanence;
- the use of orbit-spectrum resource shall not be converted into ownership;
- the occupation of certain orbital slot shall not be converted into ownership;
- orbit-spectrum can not be used exclusively;
- orbit spectrum can not be used on permanent basis.

▣ **Non-Appropriation Principle and the Utilization of Orbit-Spectrum Resources :**

- orbit-spectrum shall not be made subject to national sovereignty;
- the use of orbit-spectrum shall not be converted into exclusive ownership;
- the occupation of certain orbit-spectrum shall not be used exclusively;
- orbit-spectrum shall not be used on permanent basis.

V.D.4. Exclusively for Peaceful Purposes

▣ Definition

- “disposed or inclined to peace; aiming at or making for peace; friendly; amicable” (Oxford English Dictionary);
- “peaceful characterized by peace; belonging to state of peace; not violating or infringing peace” (Oxford Handy Dictionary).

▣ Interpretation :

- “all military uses are permitted and lawful as long as they remain non-aggressive “ (USA);
- “peaceful meant non-military, and in that consequence all military activities can be deemed as non-peaceful and possibly illegal” (ex-Uni Sovyet).