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NOTES

The Common Heritage of Mankind: An Assessment

by Mary Victoria White*

I. INTRODUCTION

The world in which we live is gradually becoming a close-knit community whose members increasingly depend on each other for economic security, and are accountable to each other as custodians of the world's environment.¹ Furthermore, a growing consensus maintains that the more advanced members of this community have a duty to help their developing neighbors make social and economic improvements. The spirit of this emerging world economic order is embodied in a principle, the "common heritage of mankind," which many see as a philosophical and legal tool for equitable redistribution of the world's wealth, including resources still untapped. This note assesses the potential utility of this principle for the achievement of this goal in light of its stormy political history.

Two multilateral treaties have incorporated the common heritage principle: the 1979 Moon Treaty² and the evolving Law of the Sea Treaty.³ This principle is conspicuously absent, however, from the 1959 Antarctic Treaty,⁴ which was supposed to embody similar goals. The story of these treaties, which govern remote areas replete with vast min-

* Case Western Reserve University School of Law, J.D. Candidate 1983. The author wishes to acknowledge that since the writing of this Note the United Nation Convention on the Law of the Sea has been completed, and signed by 117 nations. The United States has signed the Final Act, but not the Convention itself. United Nations Convention on the Law of the Sea, U.N. Doc. A/Conf.62/122/Corr. 3 (Nov. 23, 1982) and A/CONF.62/Corr.8 (Nov. 26, 1982); reprinted at 21 INT'L LEGAL MATERIALS 1261 (1982). A list of signatories to the Final Act and to the Convention appears at 21 INT'L LEGAL MATERIALS 1477 (1982).

¹ See Note, *Thaw in International Law? Rights in Antarctica under the Law of Common Spaces*, 87 YALE L.J. 804, 824 (1978).

² Moon Treaty, see *infra* note 217.

³ Draft Convention on the Law of the Sea, see *infra* note 238.

⁴ Antarctic Treaty, December 1, 1959, 12 U.S.T. 795, T.I.A.S. No. 4780 [hereinafter cited as Antarctic Treaty].

eral deposits,⁵ is the story of a political and economic world revolution aimed at securing the benefits of these resources for everyone. Because the successful distribution of wealth is inextricably linked with the principle's implementation, the development of the common heritage principle in these agreements is a major topic of this note. The scope of the principle as international law will be analyzed in light of its history. Finally, prospects for future application of the principle will be presented along with an analysis of the numerous political problems which must be overcome before the common heritage principle can be applied meaningfully as a tool for global resource management.

II. HISTORY

A. Early History (Pre-20th Century)

Until quite recently *mare liberum*, freedom of the seas, was accepted universally as an international legal principle.⁶ In the 15th century, gunpowder extended a coastal state's effective control of the sea only about three miles offshore. This left the ocean open to all.⁷ It was not until the

⁵ The deep seabed is known to contain massive deposits, on the scale of billions and trillions of tons, of manganese, nickel, copper, cobalt, aluminum, titanium, iron, vanadium, lead, cadmium, zirconium, gold and silver. See N. REMBE, *AFRICA AND THE INTERNATIONAL LAW OF THE SEA* 43-44 (1980), and Auburn, *The International Seabed Area*, 20 INT'L. & COMP. L.Q. 75-76 (1971). Antarctica's most promising resource is the krill inhabiting its waters; they are a good source of protein and are easy to harvest. Barnes, *The Emerging Antarctic Living Resources Convention*, 73 AM. SOC. INT'L. L. PROC. 272 (1979). Because of the delicate nature of the ecosystem, however, overfishing is a major concern. *Id.* at 273. Though mineral resources are known to occur on the mainland, lack of reliable data on their quality and quantity, combined with the forbidding climate, make exploitation economically impossible at present. See Burton, *New Stresses on the Antarctic Treaty: Toward International Legal Institutions Governing Antarctic Resources*, 65 VA. L. REV. 421, 433-434 (1979). The low grade of known coal deposits is discouraging in view of the enormous incentives required, and the general non-acceptance of coal as a substitute for oil. Griffith, *World Coal Production*, 240 SCIENTIFIC AMERICAN 38 (1979). Continental shelf deposits of oil and gas present the best current prospects for mineral development, but the weather and the size of Antarctic icebergs may make drilling impossible. See Dugger, *Exploiting Antarctic Mineral Resources: Technology, Economics, and the Environment*, 33 U. MIAMI L. REV. 315, 319-321 (1978); see also Burton, *supra*, at 435-436. A 1975 NASA study shows that the moon could be mined, using conventional techniques, for aluminum, silicon, iron, magnesium, and oxygen. While data are lacking on the effects of low gravity on workers, it appears that 90% of the materials needed to build an orbiting power station are available from the moon. Sadin, *The Moon Treaty: Should the United States Become a Party?*, 74 AM. SOC. INT'L. L. PROC. 153 (1980).

⁶ A. HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 4 (1981).

⁷ The famous treatise was written in 1609 by Grotius in response to limitations placed by Spain and Portugal on freedom of navigation in the New World, and to the needs of rising maritime powers. H. GROTIUS, *THE FREEDOM OF THE SEAS* (1916). See also, A. HOLLICK, *supra* note 6, at 5.

18th and 19th centuries that States began to establish limited territorial waters, generally only three nautical miles wide, and merely for fishing purposes.⁸ The concept of limited enclosure of oceans was not actually recognized until the 20th century.⁹

Early claims to Antarctica followed the general doctrine of discovery and occupation.¹⁰ Spain, Britain, France, Germany, Norway, Belgium, the United States, and what is now the U.S.S.R. all sent explorers to Antarctica between the 16th and 19th centuries.¹¹ Although some expeditions were more substantial than others, they all generally conveyed a sense of control over this region by the sponsoring nation,¹² in direct contrast to the *mare liberum* principle.

B. Early Modern History (1900 - 1960)

Between 1900 and 1940 nine countries actively explored Antarctica. Britain declared island possessions and set up governments;¹³ Chile, Argentina, Norway, Australia, France, Denmark, and New Zealand also asserted claims.¹⁴ The United States sponsored two expeditions led by Admiral Richard Byrd and established base camps and weather stations on the Ross Ice Shelf.¹⁵ Further, three cases decided by international tribunals between 1928 and 1932, holding that only "effective occupation"¹⁶ was needed to sustain a claim of sovereignty,¹⁷ gave many states incentive to assert such claims.

In 1930, a conference at The Hague addressed coastal States' needs

⁸ *Id.*

⁹ *Id.* See also S. CASEY, PRECEPT FOR BENTHIC EXPLORATION AND EXPLOITATION (1968).

¹⁰ Oxman, *The Antarctic Regime: An Introduction*, 33 U. MIAMI L. REV. 285, 288 (1978). A few claims were based on "contiguity" (extension southward of the outermost lines of longitude touching the claimant State to form a "sector"). For an excellent discussion of early efforts at discovery and occupation, see Pinto, *The International Community and Antarctica*, 33 U. MIAMI L. REV. 475, 476 (1978).

¹¹ Waldock, *Disputed Sovereignty in the Falkland Island Dependencies*, 25 BRIT. Y.B. INT'L L. 311, 319-320 (1948).

¹² See generally Waldock, *supra* note 11, and Pinto, *supra* note 10.

¹³ Waldock, *supra* note 11, at 327-28.

¹⁴ *Id.* at 333 and 338-39.

¹⁵ The expeditions took place in 1928 and 1940. *Id.* at 333-334. For an excellent account of Admiral Byrd's winter alone in a U.S. weather station on the Ross Ice Shelf in 1934, see R. BYRD, *ALONE* (1938).

¹⁶ *Islands of Palmas* (United States v. Netherlands), 2 R. INT'L Arb. Awards 831 (1928); reprinted in *Judicial Decisions*, 22 AM. J. INT'L L. 867 (1928); *Eastern Greenland*, 1931 P.C.I.J., ser. A/B, No. 53; and *Clipperton Island* (France v. Mexico), 2 R. INT'L Arb. Awards 1105 (1931). See Waldock, *supra* note 13, at 315.

¹⁷ According to Waldock, these three cases established that the test of effective occupation was whether the claimant had engaged in "effective activity . . . either internally or externally in relations with other states." This, not actual settlement, was now the "foundation of a title by occupation." *Id.* at 317.

for law governing the territorial sea. Though the members failed to settle on a width for territorial waters,¹⁸ they agreed that coastal States had sovereignty over their territorial seas.¹⁹ This concept of sovereignty was extended to the continental shelf in 1945 when President 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."²⁰ Numerous other coastal nations followed suit.²¹

At roughly the same time, Argentina and Chile claimed the Falkland Island Dependencies in Antarctica, where the British had already set up a government.²² In response to this and other disputes, the United States refused to recognize any claims to Antarctica, advancing a proposal in 1948 which would have vested control of the continent in the interested States, or in the alternative, set up a multiple condominium over the internationalized area.²³ These alternatives called for demilitarization and freedom of exploration.²⁴

While this proposal was under discussion, the United Nations International Law Commission was preparing to deal with continental shelf, territorial sea and high sea issues.²⁵ In 1957, this Commission formulated an "exploitability rule", whereby jurisdiction could be extended as far as a state could feasibly exploit the resources of the shelf, with no prescribed limits.²⁶

¹⁸ S. CASEY, *supra* note 9, at 12.

¹⁹ A. HOLLICK, *supra* note 6, at 5-6.

²⁰ "The Truman Proclamations", Proclamation 2667, 10 Fed. Reg. 12303 (1945); reprinted in A. HOLLICK, *supra* note 6, at Appendix 1, 391-393. The stated bases for the claim were contiguity of land mass and shelf, geological unity of minerals in both areas, need for the resources, availability of mining technology, and need to safeguard the continental shelf from exploitation by other States.

²¹ E.g., Mexico, 1945; Argentina, 1946; Chile, 1947; Peru, 1947; Costa Rica, 1949; and Korea, 1952. See G. WEISSBERG, RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND THE JAPANESE-KOREAN FISHING DISPUTE, Appendices A, E-I (1966). Chile, Peru, and Costa Rica also claimed "epicontinental" seas of 200 nautical miles. *Id.*, Appendices F, I, and G. Canada, Newfoundland, and the United Kingdom reacted negatively to these Proclamations, and the rest of the world was "officially noncommittal". A. HOLLICK, *supra* note 6, at 60-61.

²² Waldock, *supra* note 11, at 11.

²³ Hannessian, *The Antarctic Treaty, 1959*, 9 INT'L & COMP. L. Q. 436-438 (1960).

²⁴ *Id.* at 438-439.

²⁵ U.S. SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 95TH CONG., 2D SESS., THE THIRD U.N. LAW OF THE SEA CONFERENCE 5 (Comm. Print 1978). (Prepared by H.T. Franssen at the request of Hon. Howard W. Cannon, Chairman, Committee on Commerce, Science, and Transportation, and Warren G. Magnuson, Chairperson, National Ocean Policy Study) [hereinafter cited as THIRD SEA CONFERENCE].

²⁶ G.A. Res. 1105, 11 U.N. GAOR Supp. (No. 17A) at 54, U.N. Doc. A/3572(11). See also THIRD SEA CONFERENCE, *supra* note 25, at 5. See also S. Casey, *supra* note 9, at 22-23.

The controversy between Argentina, Britain, and Chile over Antarctic sovereignty in the Falkland Islands Dependencies came to a head in the 1956 *Antarctica Cases*.²⁷ With the commencement of the International Geophysical Year,²⁸ Argentina and Chile renewed their claims, fearing that the spirit of cooperation might blossom into a movement for internationalization of the continent.²⁹ Thus, when the United States proposed an international organization for the peaceful use of Antarctica, Chile vehemently denounced the proposed infringement on its "rights."³⁰

In the midst of this deadlock, delegates from 86 nations gathered in Geneva for the First United Nations Conference on the Law of the Sea (UNCLOS I).³¹ Despite obvious East-West political hostilities,³² the members produced four conventions including the Convention on the Continental Shelf.³³ This Convention extended coastal State jurisdiction over the adjacent seabed to a depth of 200 meters or more if exploitation was still possible, but only for the purpose of resource recovery.³⁴ Shortly

The Commission also concluded that coastal nations had sovereign rights to their continental shelves for resource exploitation; that the shelf extended out to a depth of 200 meters; and that contiguity justified jurisdiction of a State over its continental shelf.

²⁷ *Antarctica Cases* (Gr. Brit. v. Argentina and Chile), 1956 I.C.J. Pleadings. In its application, Britain alleged that Argentina and Chile were infringing on British claims which were based on acts of British nationals between 1675 and 1853 and on continuous displays of sovereignty thereafter. The Falkland Islands are located about 300 miles east of Argentina and Chile, in the South Atlantic. The Falkland Islands Dependencies include the South Orkney, South Shetland, and South Sandwich Islands, South Georgia Island, Alexander Land, and portions of the Antarctic continent called Graham Land and Coats Land; 1956 I.C.J. Pleadings, at 450-451.

²⁸ Hambro, *Some Notes on the Future of the Antarctic Treaty Collaboration*, 68 Am. J. INT'L L. 217, 218-19 (1974). The participating States set up observation bases, exchanged observers, and assisted each other in emergencies.

²⁹ Hanesian, *supra* note 23, at 454-55. On February 18, 1958, Chile's Foreign Minister stated that his government "could only reject any proposal which might imply the internationalization of, or condominium over, any part of (Chile's) national territory, whether it be in the Antarctic, in America, or its insular possessions in the South Pacific." *Id.*, citing Chile, Ministry of Foreign Affairs, Admin. Bureau, Foreign Information and Cultural Relations Branch Circular No. 21, Santiago, Feb. 18, 1958.

³⁰ Hanesian, *supra* note 23, at 455-57.

³¹ A. HOLLICK, *supra* note 6, at 127.

³² African and Asian States were suspicious of the maritime policies of their former colonizers. *Id.* at 135.

³³ Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as Continental Shelf Convention]. For discussions of the other conventions adopted at the Conference, see THIRD SEA CONFERENCE, *supra* note 25, at 6-7, and A. HOLLICK, *supra* note 6, at 140-150.

³⁴ Continental Shelf Convention, *supra* note 33, at Articles 1-2. Pardo points out the ambiguity inherent in this language: "Under this concept a coastal state, as its technical capability develops, may extend its jurisdiction across the ocean floor up to the midway point between it and the coastal state opposite." As a result, "all the submerged lands of the world may become parts of the continental shelf by the very definition of the Convention."

after UNCLOS I the United States organized a conference on the peaceful uses of Antarctica. The group met 60 times between June 1958 and October 1959. Throughout this period Chile and Argentina remained adamant about their claims.³⁵

The 1959 Antarctic Treaty Conference began in earnest after 16 months of preliminary meetings.³⁶ Although Argentina and Chile continued to denounce internationalization, negotiations proceeded nonetheless,³⁷ and the Antarctic Treaty came into being on December 1, 1959.³⁸ It declared that Antarctica could be used only for peaceful purposes and provided for freedom of scientific investigation and access to all installations.³⁹ Significantly, the Treaty froze all existing claims, disallowed new ones, and forbade the assertion of sovereignty by virtue of activities taking place while the Treaty was in force.⁴⁰ References to natural resources were purposely excluded.⁴¹

At the close of the International Geophysical Year the U.N. noted the success of several fledgling satellite programs, affirming both "the common interest of mankind in outer space" and "the common aim that outer space should be used for peaceful purposes only."⁴² Consequently, it formed the ad hoc Committee on the Peaceful Uses of Outer Space (COPUOS) and instructed it to report on possible international programs and their legal implications.⁴³

C. *The U.N. Development Decade (1960 - 1970)*

During the next ten years, which the U.N. adopted as its "Development Decade," political conflicts, heretofore East-West, reoriented themselves to a North-South struggle between the Third World and the industrial States.

Pardo, *Whose Is The Bed Of The Sea?*, 62 AM. SOC. INT'L. L. PROC. 216 (1968).

³⁵ 38 DEPT. ST. BULL. 910-912 (June 1958). See Hannessian, *supra* note 23, at 462-63. The invitation was issued to Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, the Union of South Africa, the U.S.S.R., and the United Kingdom. All accepted. *Id.* at 457.

³⁶ Hannessian, *supra* note 23, at 463-64.

³⁷ The Parties, which had to meet the requirement of "substantial activity", were Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the U.S.S.R., the United Kingdom, and the United States. Introduction, *Development of Antarctica*, 73 AM. SOC. INT'L. L. PROC. 265 (1979).

³⁸ Antarctic Treaty, *supra* note 4.

³⁹ *Id.* at Preamble and Articles 1, 2, 3, 7 and 12.

⁴⁰ *Id.* at Article 4.

⁴¹ *Id.* See Hambro, *supra* note 28, at 221.

⁴² G.A. Res. 1348, 13 U.N. GAOR Supp. (No. 18) at 5, U.N. Doc. A/4090 (1958).

⁴³ *Id.* The members were Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Iran, Italy, Japan, Mexico, Poland, Sweden, the U.S.S.R., the United Kingdom, the United Arab Republic, and the United States.

COPUOS was active.⁴⁴ The Committee resolved that outer space and the celestial bodies were free for use by all countries, but only in accordance with international law.⁴⁵ Building on the "common interest" concept, COPUOS further declared that "the exploration and use of outer space should be *only* for the betterment of mankind" (emphasis added).⁴⁶ Another significant achievement was legal personality for private entities: the United States introduced a resolution extending the provision permitting States to conduct activities on the moon to private companies acting under the authority of their governments.⁴⁷

The culmination of the Committee's work was a "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,"⁴⁸ which stressed the "common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes."⁴⁹ The nine principles included: activities "for the benefit of and in the interests of all mankind"⁵⁰ with equal access for all States;⁵¹ no sovereignty;⁵² compliance with international law;⁵³ and special international status for astronauts as "envoys of mankind."⁵⁴ These principles guided all subsequent discussions of outer space resources.

The Development Decade also saw significant progress in the formulation of multilateral agreements. UNCLOS II began⁵⁵ where UNCLOS I left off with the problem of designating a width of territorial seas.⁵⁶ Overriding the objections of Britain, Japan and the United States, the Conference members declared a 12-mile contiguous zone, but pronounced no limits on shelf jurisdiction.⁵⁷ However, during the next six years African, Asian, and Latin American countries continued to claim territorial seas,

⁴⁴ N. REMBE, *supra* note 5, at 37.

⁴⁵ G.A. Res. 1721, 16 U.N. GAOR Supp. (No. 17) at 6, U.N. Doc. A/5100 (1961). The Resolution also provided that neither outer space nor celestial bodies were subject to appropriation.

⁴⁶ *Supra* note 45, at Preamble. Note also that "mankind as a whole" now reads "mankind".

⁴⁷ See Christol, *The Common Heritage of Mankind Provision in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 14 INT'L. LAW. 429, 436 (1980).

⁴⁸ G.A. Res. 1962, 18 U.N. GAOR Supp. (No. 15) at 15, U.N. Doc. A.5515 (1963).

⁴⁹ *Id.* at Preamble.

⁵⁰ *Id.* at Article 1.

⁵¹ *Id.* at Article 2.

⁵² *Id.* at Article 3.

⁵³ *Id.* at Article 4.

⁵⁴ *Id.* at Article 9.

⁵⁵ Convened by G.A. Res. 1307, 13 U.N. GAOR Supp. (No. 18) at 54, U.N. Doc. A/4090 (1958). The Conference lasted from March 17 through April 27, 1960. Eighty-eight nations participated. THIRD SEA CONFERENCE, *supra* note 25, at 8.

⁵⁶ A. HOLLICK, *supra* note 6, at 157-59.

⁵⁷ See Pardo, *supra* note 34; A. HOLLICK, *supra* note 6, at 157-59.

some being 200 miles wide.⁵⁸ Meanwhile, the growth of undersea technology prompted the U.N. Conference on Trade and Development (UNCTAD)⁵⁹ to study the use of deep seabed food and mineral resources for international development.⁶⁰

Members of UNCLOS also felt the need to articulate guidelines for use of the seabed. In July 1966, President Lyndon Johnson warned that the seabed, "the legacy of all human beings,"⁶¹ should be protected from unfettered harvesting.⁶² With this aim in mind, Malta's Ambassador Arvid Pardo announced on September 21, 1967, that the seabed and the ocean floor beyond the limits of national jurisdiction were the "common heritage of mankind."⁶³ Pardo explained his purpose in 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 a 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 . . . (emphasis added).⁶⁴

Pardo believed that world peace depended on the principle's extension to other areas as well.⁶⁵ The common heritage principle became the cornerstone of the contemporary law of the sea and a powerful source of inspiration for the increasingly vocal Group of 77, an alliance of developing countries.⁶⁶

Fearing that the new concept was a political Pandora's Box, the U.N. decided to refer it to the First Committee (political matters), rather than to the Second Committee (economics), where it normally would have

⁵⁸ A. HOLLICK, *supra* note 6, at 162.

⁵⁹ The UNCTAD program was formed in 1964 in response to the growing North-South political split, for the purpose of achieving massive transfers of technology to the underdeveloped States. *Id.* at 170-171.

⁶⁰ On December 6, 1966, the U.N. endorsed G.A. Res. 2172, 21 U.N. GAOR Supp. (No. 16) at 32, U.N. Doc. A/653 (1966), requesting a survey of mineral and food resources existing beyond the limits of national jurisdiction. 1 T. KRONMILLER, *THE LAWFULNESS OF DEEP SEABED MINING* 20 (1978).

⁶¹ N. REMBE, *supra* note 5, at 38.

⁶² President Johnson felt that unlimited unilateral use of seabed resources would only perpetuate the colonialism from which the developing countries were trying to emerge. *Id.*

⁶³ G.A. Res. 2340, 22 U.N. GAOR Supp. (No. 16) at 14, U.N. Doc. A/6716 (1967).

⁶⁴ Pardo, *supra* note 34, at 225-226.

⁶⁵ *Id.*

⁶⁶ N. REMBE, *supra* note 5, at 49-50, 56-57. Rembe notes that the common heritage principle is completely reconcilable with African traditions of common ownership and management. *Id.* at 53.

been sent.⁶⁷ The First Committee established a Seabed Committee⁶⁸ to study and report on the exploration, conservation and peaceful use of the deep seabed.⁶⁹ The Seabed Committee was made a standing committee in a 1968 resolution affirming the idea of exploitation of the seabed "for the benefit of mankind as a whole, taking into account the special interests and needs of the developing countries."⁷⁰ The Committee was directed to formulate a regime for seabed resource exploitation.⁷¹ The developed countries, which were disenchanted with the idea of an international regime,⁷² reacted unfavorably to this resolution and to its companion, Resolution 2754, which placed a moratorium on seabed mining pending establishment of the regime.⁷³

Aware that the next Conference would probably assume the task of reviewing the entire law of the sea,⁷⁴ the Seabed Committee organized and met several times in 1969.⁷⁵ These meetings accomplished little except to articulate the two sides of the seabed resources dispute. The Group of 77 believed an international exploitation regime was mandated by the common heritage principle,⁷⁶ while the developed countries would only accept a limited registry system with States controlling their own operations.⁷⁷

Three weeks after the Pardo Declaration, the 1967 Outer Space Treaty came into force.⁷⁸ Though it did not mention the new common heritage principle, it stated that exploration would be "the province of all mankind" and would be carried out "for the benefit and in the interest of

⁶⁷ 1 T. KRONMILLER, *supra* note 60, at 23 (1978). The author asserts that this decision paved the way to subsequent ideological disputes.

⁶⁸ *Supra* note 63.

⁶⁹ *Id.* See A. HOLLICK, *supra* note 6, at 201.

⁷⁰ G.A. Res. 2467, 23 U.N. GAOR Supp. (No. 18) at 15-16, U.N. Doc. A/7218 (1968).

⁷¹ *Id.*

⁷² 1 T. KRONMILLER, *supra* note 60, at 26.

⁷³ G.A. Res. 2574, 24 U.N. GAOR Supp. (No. 30) at 10-11, U.N. Doc. A/7630 (1969). They argued that the principle of freedom of the seas should apply in the interim. 1 T. KRONMILLER, *supra* note 60, at 32. The less developed States felt that because a moratorium was necessary to preserve the "Common Heritage", the principle embodied a legal obligation not to mine the seabed. The developed States argued that this view was incompatible with the non-binding nature of U.N. resolutions. *Id.* at 31-32.

⁷⁴ 1 T. KRONMILLER, *supra* note 60, at 41.

⁷⁵ A. HOLLICK, *supra* note 6, at 220.

⁷⁶ Report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, 24 U.N. GAOR Supp. (No. 22) at 97, U.N. Doc. A/7622 (1969). See Gorove, *The Concept of "Common Heritage of Mankind": A Political, Moral or Legal Innovation?*, 9 SAN DIEGO L. REV. 390, 395 (1972).

⁷⁷ 61 DEPT. ST. BULL. 288 (Sept. 1969). See A. HOLLICK, *supra* note 6, at 215-216, 222.

⁷⁸ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, April 25, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 [hereinafter cited as Outer Space Treaty].

all countries."⁷⁹ In a provision borrowed from the Antarctic Treaty,⁸⁰ claims of sovereignty in outer space were outlawed.⁸¹ The Treaty followed the guidelines of the Declaration of Principles,⁸² including demilitarization.⁸³ Private entities were permitted to operate in outer space under the supervision of their home States.⁸⁴

American astronauts Armstrong and Aldrin walked on the moon in July 1969.⁸⁵ The arrival of moonrocks triggered a heightened awareness of the resource potential of outer space,⁸⁶ and attitudes similar to those expressed concerning seabed resources prompted Argentina and Poland to request that COPUOS consider possible international machinery for the exploitation of extraterrestrial resources.⁸⁷

D. Defining the "Common Heritage" (1970 - 1979)

1. 1970-1971—Attempts at Implementation

Initially the United States was willing to apply the common heritage principle to the deep seabed. In May 1970, the President proposed that all resources located beyond a depth of 200 meters be regarded as the common heritage of mankind, with the area extending to the edge of the continental margin held in trust by each adjacent coastal State.⁸⁸ Revenues from the trusteeship area would be apportioned between the trustee State and an international seabed resource authority, which would utilize its portion for "mankind", particularly in the developing countries.⁸⁹

The day after this proposal was submitted, a delegation of Latin American States met in Lima to discuss certain issues of the law of the sea. One of the results of this meeting was the "Declaration of the Latin American States on the Law of the Sea,"⁹⁰ and an accompanying resolu-

⁷⁹ *Id.* at Article 1.

⁸⁰ Christol, *supra* note 47, at 436.

⁸¹ Outer Space Treaty, *supra* note 78, at Article 2.

⁸² *Supra* note 48.

⁸³ Other principles recognized in the Treaty included absence of sovereignty, peaceful use, mutual assistance, sharing of information, liability for damages, and special international status for astronauts. Outer Space Treaty, *supra* note 78, at Articles 2-11.

⁸⁴ *Id.* at Article 6. See Christol, *supra* note 47, at 438.

⁸⁵ D. BIRNEY, *MODERN ASTRONOMY* 141 (1974).

⁸⁶ See Christol, *supra* note 47, at 431.

⁸⁷ U.N. Doc. A/AC.105/58, Annex 1, at 6-7, July 4, 1969; U.N. Doc. A/AC.105/C.2/L.66. See Christol, *An International Regime, Including Appropriate Procedures, for the Moon: Article 11, Paragraph 5 of the 1979 Moon Treaty*, PROC. OF 23RD COLLOQ. ON LAW OF OUTER SPACE 139, 140 (1980).

⁸⁸ 1 T. KRONMILLER, *supra* note 60, at 33; A. HOLLICK, *supra* note 6, at 231.

⁸⁹ Auburn, *supra* note 5, at 178.

⁹⁰ U.N. Doc. A/AC.138/28 (1970); reprinted in 10 INT'L LEGAL MATERIALS 207 [hereinafter cited as Lima Declaration].

tion on the deep seabed.⁹¹ The Declaration asserted the right of a coastal nation both to exploit the resources of the adjacent water and subsoil and to determine the extent of its sovereignty over them.⁹² The Resolution declared that the resources of the deep seabed "should be the common heritage of mankind" and advocated an international regime to assure that all mankind, especially the developing countries, would reap the benefits.⁹³

An even stronger statement emerged from the Third Conference of Non-Aligned Countries. Sixty-five African, Asian, and Latin American States and six national liberation organizations resolved that the developed world could no longer prosper at the expense of the developing countries.⁹⁴ The Conference members endorsed application of the common heritage principle to the resources of the deep seabed, supported the idea of an international resource regime, and urged that adverse effects on existing mineral markets in the Third World be minimized.⁹⁵ The convictions expressed at Lusaka and Lima characterized the stance of the Group of 77 at the upcoming UNCLOS III, a stance from which they would be unwilling to retreat.⁹⁶

At the same time, the Antarctic Consultative Parties had become concerned about danger to the Antarctic environment arising from human activity. As a result, they recommended that their scientific committee study the environmental impacts of human exploration in Antarc-

⁹¹ *Id.* at Annex; reprinted in 10 INT'L LEGAL MATERIALS 208 [hereinafter cited as Resolution 1].

⁹² Lima Declaration, *supra* note 90, at Articles 1, 2. The States were to make this determination "in accordance with reasonable criteria."

⁹³ Resolution 1, *supra* note 91, at Preamble.

⁹⁴ Third Conference of Non-Aligned Countries, Lusaka Declaration on Peace, Independence, Co-Operation and Democratisation of International Relations, U.N. Note Verbale NV/209 of November 12, 1970; reprinted in 10 INT'L LEGAL MATERIALS 215 [hereinafter cited as Lusaka Declaration]. The Parties declared that the technological revolution must no longer be the "monopoly of the rich . . . it is intolerable . . . for some to enjoy an untroubled and comfortable existence in exchange for the poverty and misfortune of others." The Declaration also expounded on the rights of the developing countries to active participation in international affairs, and to a stronger role in the U.N. Not surprisingly, the Declaration endorsed actions initiated on behalf of "mankind". *Id.* at Article 9.

⁹⁵ NAC/CONF.3/RES.11 (1970), reprinted in 10 INT'L LEGAL MATERIALS 219 (1970). The statement also provided that the resources were not subject to claims of sovereignty (par. 2), should only be used for peaceful purposes (par. 3), and should be used "for the benefit of mankind as a whole" (par. 4). *Id.* at Article 1, par. (1),(5).

⁹⁶ The African States' approach as reflected in the Lusaka Declaration has been influenced by their desire for rapid development and economic independence, for sovereignty over their own natural resources, and for a general reform of international law; by their general suspicion of "customary" legal concepts legitimizing colonialism; and by their efforts to nationalize their economies, particularly in relation to their resources. N. REMBE, *supra* note 5, at 3-27.

tica.⁹⁷ While this study was underway, the Seabed Committee was shaping principles to guide formation of policy on the deep seabed. These principles were embodied in Resolution 2749, which held the seabed and its resources to be the common heritage of mankind.⁹⁸ All exploration and exploitation would be governed by an international regime⁹⁹ and would be "carried out for the benefit of mankind as a whole . . . taking into particular consideration the interests and needs of the developing countries."¹⁰⁰ The regime itself would ensure "orderly and safe development and rational management of the area and its resources . . . and . . . equitable sharing by States in the benefits therefrom."¹⁰¹ The Resolution echoed many of the ideas expressed in the 1963 Declaration of Principles regarding outer space,¹⁰² but differed in three important respects: it emphasized the special needs of the developing countries,¹⁰³ provided for an international resource regime,¹⁰⁴ and embraced the common heritage principle.¹⁰⁵ However, it left unresolved three crucial issues: the limits of national jurisdiction of the ocean floor, the nature of the regime, and methods by which the developing countries were to be specially accommodated.¹⁰⁶

A companion resolution¹⁰⁷ addressed the concern of the Group of 77 about the impact of seabed mining on land mineral markets.¹⁰⁸ This resolution prompted a series of studies revealing potential damage to the economies of several mineral producers.¹⁰⁹ It was evident that careful management would be needed to keep the theory of common heritage from undermining the very development it was intended to promote.¹¹⁰

Argentina submitted the first concrete proposal for a lunar resource

⁹⁷ Recommendations of the Sixth Antarctic Treaty Consultative Meeting, Oct. 30, 1970, Recommendation VI-4(1974), 25 U.S.T. 266, T.I.A.S. No. 7796 (1970).

⁹⁸ G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8097 (1970).

⁹⁹ *Id.* at Articles 3 and 4.

¹⁰⁰ *Id.* at Article 7.

¹⁰¹ G.A. Res. 2749, *supra* note 98, at Article 9.

¹⁰² *See supra* notes 45, 80.

¹⁰³ G.A. Res. 2749, *supra* note 98, at Articles 7, 9, and 10.

¹⁰⁴ *Id.* at Articles 4, 9, and 11.

¹⁰⁵ *Id.* at Article 1.

¹⁰⁶ Alexander, *Future Regimes: A Survey of Proposals*, in 3 NEW DIRECTIONS IN THE LAW OF THE SEA 119 (R. Churchill ed. 1973).

¹⁰⁷ G.A. Res. 2750A, 25 U.N. GAOR Supp. (No. 28) at 25, U.N. Doc. A/8097 (1970).

¹⁰⁸ *See Lusaka Declaration, supra* note 94.

¹⁰⁹ N. REMBE, *supra* note 5, at 71. The studies revealed that:

"1) By 1985 seabed cobalt may be as high as half of the level of world output, and this may depress prices by two thirds of their current levels.

2) Manganese could meet 73% of the import requirements of the developed countries, and this would depress prices by half . . .

3) Nickel is the mainstay of the seabed mining industry; its production would total 18% of world demand by 1985, and this may depress prices. . ."

¹¹⁰ *Id.* at 71-72.

regime to the COPUOS Legal Subcommittee in 1970. This proposal provided that "the natural resources of the Moon and other celestial bodies shall be the common heritage of all mankind."¹¹¹ It defined "resources" as "all substances originating in the Moon and other celestial bodies."¹¹² Benefits accruing from the resources "would be made available to all peoples without discrimination of any kind."¹¹³ No action was taken on this draft.¹¹⁴ A Russian proposal in 1971 took the opposite approach, omitting any reference to the common heritage of mankind or resource regimes¹¹⁵ and stressing peaceful use of the moon in view of its importance in the "conquest of outer space."¹¹⁶

Three seabed proposals in 1971 gave life to the common heritage principle without reaching any consensus. A British proposal advocated guaranteed access to the seabed for all States, with such access regulated by an International Seabed Authority exercising loose control. Each State would receive an equitable share of the proceeds.¹¹⁷ Tanzania espoused a centralized regime without guaranteed access, the Authority having broad powers and exercising strict control over all seabed activities.¹¹⁸ Finally, the "Thirteen Power Proposal" set up "mankind" as a seabed manager with the authority to mine the seabed on "mankind's" behalf.¹¹⁹ There was, however, no consensus on the nature of the seabed regime, if indeed there would be any.¹²⁰

¹¹¹ U.N. Doc. A/AC.105/85, Annex II, p. 1-2 at Article I; *reprinted in* Current Documents, 9 J. SPACE L. 128 (1981) [hereinafter cited as Argentina Proposal]. *See* Christol, *supra* note 87, at 140.

¹¹² Argentina Proposal, *supra* note 111, at Article 2.

¹¹³ *Id.* at Article 4.

¹¹⁴ Bond, *The Moon Treaty: Should the United States Become a Party?*, 74 AM. SOC. INT'L L. PROC. 157 (1980).

¹¹⁵ Union of Soviet Socialist Republics: Proposed Treaty Request to the U.N. General Assembly, June 4, 1971, U.N. Doc. A/8391; *reprinted in* Current Documents, 9 J. SPACE L. 129 (1981) [hereinafter cited as Russian Draft Treaty]. *See also* Bond, *supra* note 114, at 157.

Christol comments on the absence of a regime proposal: "This absence was consistent with the failure of the Soviet proposal to follow the Argentinian lead respecting the distribution of benefits to be derived from the exploitation of Moon Resources. Undoubtedly the decision (not) to advance a plan for an international organization to implement either or both of the proposed . . . regimes was intentional." Christol, *supra* note 87, at 141.

¹¹⁶ Russian Draft Treaty, *supra* note 115, at Article 2.

¹¹⁷ Report of the Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction, 26 U.N. GAOR Supp. (No. 20), U.N. Doc. A/8420 and Annex I (1971); *reprinted in* 1 T. KRONMILLER, *supra* note 60, at 45-46.

¹¹⁸ Report of the Committee, *supra* note 117, at 19 and Annex I. *See* 1 T. KRONMILLER, *supra* note 60, at 47-48.

¹¹⁹ Report of the Committee, *supra* note 117, at 21 and Annex I. *See* 1 T. KRONMILLER, *supra* note 60, at 48-49.

¹²⁰ *Id.* at 49.

2. 1972-1974—Developing States Take a Stand

The spring of 1972 was a time of progress in outer space law. The Convention on International Liability for Damage Caused by Space Objects¹²¹ recognized the need for international legislation governing inevitable accidents involving objects launched into space.¹²² In this progressive spirit,¹²³ the United States submitted a proposal to the Legal Subcommittee¹²⁴ providing for freedom of scientific research,¹²⁵ freedom from interference on the lunar surface,¹²⁶ and State control of its own personnel and equipment.¹²⁷ The Draft defined "celestial body" as the moon and other extraterrestrial bodies and their orbits¹²⁸ and declared that "the natural resources of the moon and other celestial bodies *shall* be the common heritage of mankind (emphasis added)."¹²⁹ Significantly, the Draft proposed to allow States Parties to appropriate and use the resources to support their outer space activities.¹³⁰ Furthermore, it was the natural resources, and not the extraterrestrial objects from which they came, which would be given common heritage status at some time in the future.¹³¹

The Draft Treaty Relating to the Moon, completed in May 1972,¹³² was a major accomplishment in outer space law. While it acknowledged that the moon played a critical role in the exploration, rather than the "conquest,"¹³³ of outer space,¹³⁴ it did not specifically apply the common heritage principle.¹³⁵ Instead, it stated that exploitation of the moon would be "the province of all mankind" and would be "carried out for the benefit of and in the interests of all countries, irrespective of their degree

¹²¹ G.A. Res. 2777, 26 U.N. GAOR Supp. (No. 29) at 25, U.N. Doc. A/8528, Annex (1971).

¹²² *Id.* at Preamble. The Convention imposed strict liability for damage caused either on earth or to an aircraft in flight (Article 2) and liability based on fault for damage caused elsewhere (Article 3).

¹²³ Bond, *supra* note 114, at 157-158. The United States felt that the Russian Draft Treaty represented a step backward, and submitted its proposal in response to what it perceived as a need for more forwardlooking legal machinery.

¹²⁴ United States: Draft Proposals Submitted to Legal Subcommittee, U.N. Doc. A/AC.101, Annex I (1972) [hereinafter cited as U.S. Draft Moon Proposal].

¹²⁵ *Id.* at Article 3.

¹²⁶ *Id.* at Article 5.

¹²⁷ *Id.* at Article 9.

¹²⁸ *Id.* at Article 4.

¹²⁹ *Id.* at Article 8.

¹³⁰ *Id.* at Article 8, par. 2.

¹³¹ *Cf.* G.A. Res. 2749, *supra* note 98. There, the relevant provision declared that the common heritage principle applied to both the seabed and its resources. *See also* Christol, *supra* note 47, at 457.

¹³² U.N. Doc. A/AC.105/101 (1972) [hereinafter cited as Draft Moon Treaty].

¹³³ *See* Russian Draft Treaty, *supra* note 115, at Preamble.

¹³⁴ Draft Moon Treaty, *supra* note 132, at Preamble.

¹³⁵ Argentina Proposal, *supra* note 111, at Article 1.

of economic or scientific development."¹³⁶ The Draft followed the general spirit of the Declaration of Principles and the earlier drafts.¹³⁷

Antarctic negotiations saw developments of similar significance in 1972. At the Seventh Consultative Meeting the Parties addressed the long-tabled issue of mineral resources.¹³⁸ Growing discomfort over the economic¹³⁹ and environmental implications of human activity in Antarctica prompted a recommendation "reaffirming that it is in the interest of all mankind that the Antarctic Treaty area be used exclusively for peaceful purposes." The Parties urged a study of the effects of such activity.¹⁴⁰

The United States attempted to amend the Draft Moon Treaty in 1973 to provide for an international resource exploitation regime at the time when exploitation became feasible.¹⁴¹ The amendment also provided that the resources, once extracted, would become the property of the State that removed them.¹⁴² Although this was not immediately acceptable to the Subcommittee,¹⁴³ these additions were instrumental in shaping the next Draft, and in effecting the compromise that finally made the Moon Treaty a reality.

The long-awaited organizational session of UNCLOS III¹⁴⁴ convened in the wake of a powerful policy statement by the Organization of African Unity (OAU) in July of 1973. The OAU Declaration on the Issues of the Law of the Sea advocated an International Seabed Authority with "strong and comprehensive powers" including jurisdiction over the entire deep seabed area.¹⁴⁵

Before commencement of the first substantive session of UNCLOS III, the developing countries asserted themselves twice more. The Kampala Declaration¹⁴⁶ demanded that UNCLOS consider the needs of

¹³⁶ *Id.* at Article 4.

¹³⁷ *Cf.* G.A. Res. 1962, *supra* note 48; Argentina Proposal, *supra* note 111; Russian Draft Treaty, *supra* note 115; and U.S. Draft Moon Proposal, *supra* note 124.

¹³⁸ Dugger, *supra* note 5, at 316.

¹³⁹ Hambro, *supra* note 28, at 221-222.

¹⁴⁰ Recommendation VII-6, 7th Antarctic Consultative Meeting; *reprinted in* Hambro, *supra* note 28, at 222.

¹⁴¹ U.N. Doc. A/AC.105/115, Annex I (1973) at 32-34; *reprinted in* Current Documents, 9 J. SPACE L. 145-147 (1981).

¹⁴² *Id.* See Bond, *supra* note 114, at 159.

¹⁴³ The Subcommittee accepted six minor textual revisions. U.N. Doc. A/AC.105/115 (1973) at 5-7; *reprinted in* Current Documents, 9 J. SPACE L. 147-148 (1981).

¹⁴⁴ The First Session, an organizational meeting, took place in New York on December 3-15, 1973. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1 (1975).

¹⁴⁵ Declaration of the Organization of African Unity on the Issues of the Law of the Sea, U.N. Doc. A/CONF.62/63, OAU Doc. CM/RES.289 (XIX) (1973) [hereinafter cited as OAU Declaration], at Article 22(a).

¹⁴⁶ The Conference was held in Uganda, a land-locked State. U.N. Doc. A/CONF.62/64 (1974) [hereinafter cited as Kampala Declaration].

landlocked and geographically disadvantaged States.¹⁴⁷ In May 1974, the U.N. adopted a Declaration on Establishment of a New International Economic Order (NIEO) which sought to close the gap between industrial and developing countries through interdependence and cooperation.¹⁴⁸ The U.N. also undertook to give the developing countries an increased role in international decision-making and better access to modern technology.¹⁴⁹ As the new basis for world economic relations, the NIEO Declaration and its principles pervaded the emerging Law of the Sea and became an integral part of a global economic revolution.¹⁵⁰

Not surprisingly, the Second Session of UNCLOS III ran afoul of this political upheaval.¹⁵¹ Charged with formulating a seabed mining regime, the First Committee was able to do no more than clarify the divergent views of the various "special interest" blocs.¹⁵² The developing countries generally favored a strong Authority with wide jurisdiction and sweeping management powers.¹⁵³ On the other hand, the developed countries envisioned, at most, a licensing and registry agency with minimal control over States' activities in the seabed area.¹⁵⁴ This stance disturbed the Group of 77, whose mining operations were largely controlled by large industrial corporations.¹⁵⁵ These positions were, for the moment, irreconcilable.

In contrast, the atmosphere at the outer space resource negotiations was more cooperative. The U.S.S.R. surprisingly endorsed a natural re-

¹⁴⁷ *Id.* at Article 4.

¹⁴⁸ G.A. Res. 3201, U.N. GAOR, Sixth Special Session, Supp. (No.1), U.N. Doc. A/9551 (1974); reprinted in Official Documents, 68 AM. J. INT'L L. 798 (1974) [hereinafter cited as NIEO]. The new order was to be based on "equity, sovereign equality, interdependence, common interest, and cooperation among all states, irrespective of their economic and social systems." *Id.* at Preamble.

¹⁴⁹ G.A. Res. 3201, *supra* note 148, at Article 6.

¹⁵⁰ Rembe suggests that the new Law of the Sea has in fact been approached as part of the New International Economic Order. N. REMBE, *supra* note 5, at 45. For a discussion of the deep seabed mining issue in the context of NIEO, see Juda, *Deep Seabed Mining and the New International Economic Order*, in COLLECTED PAPERS FROM CURRENT ISSUES IN THE LAW OF THE SEA (Joyner ed. 1979).

¹⁵¹ Schroeder, *The Law and the Sea: An Introductory Comment*, 8 CASE W. RES. J. INT'L L. 5, 27 (1976).

¹⁵² These groups, which played a lively role in the negotiating sessions, included the "Group of 77" (the developing countries, now numbering over 120), the European Economic Community, the landlocked and geographically disadvantaged States, and the coastal States. Stevenson and Oxman, *The Third United Nations Conference on the Law of Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1, 5 (1975).

¹⁵³ N. REMBE, *supra* note 5, at 60. The African States felt that a Seabed Authority exercising exclusive jurisdiction throughout the Area would best serve the interests of the developing countries.

¹⁵⁴ *Id.* at 60-61.

¹⁵⁵ *Id.* These countries are particularly sensitive regarding control over resources originating in their territories. See NIEO, *supra* note 148, at Article 6(e).

source regime based on "common use by all states,"¹⁵⁶ and space law advanced a step.¹⁵⁷

3. 1975-1978: Resource Regimes Take Shape

In preparation for the Third Session of UNCLOS III, First Committee Chairman Paul Engo coalesced the many ideas that were exchanged at the brief Second Session¹⁵⁸ in an Informal Single Negotiating Text (SNT).¹⁵⁹ This text formed the basis for negotiations at both the Third and Fourth Sessions.¹⁶⁰ The Parties were more cooperative than at the prior session, although no treaties or drafts were adopted.¹⁶¹

Ideas on a lunar regime began converging in 1975. The U.S.S.R., the German Democratic Republic and Poland agreed on the need for international legal machinery at some future time.¹⁶² A number of other States felt that such a regime was necessary to ensure equitable distribution of the benefits resulting from exploration, but were not yet prepared to consider an international Authority such as the one under negotiation at UNCLOS III.¹⁶³

Rising OPEC prices prompted the Antarctic Consultative Parties to focus on mineral resources at their 1975 session.¹⁶⁴ They agreed to report the following year on possible mineral recovery in Antarctica,¹⁶⁵ and to exercise restraint in their current operations in the meantime.¹⁶⁶ The in-

¹⁵⁶ Christol, *supra* note 87, citing U.N. Doc. A/AC.105/C.2/SR. (1974) at 8.

¹⁵⁷ *Id.* at Preamble.

¹⁵⁸ Chairman Engo's text consists of "ideas drawn from my personal impression of what could provide a consensus, bearing in mind the nature and historic significance of the Conference in general and the First Committee in particular. I was compelled in some instances to look outside and beyond the unproductive debates that had dominated (the second) session, especially considering the climate of distrust and acrimony between opposing sides." United Nations, Third Conference on the Law of the Sea, Fifth Session, New York, 2 August-17 Sept. 1976, A/CONF.62/L.16, 12 Sept. 1976, Report by Mr. Paul Bamela Engo, Chairman of the First Committee, on the work of the Committee at the Fifth Session of the Conference; reprinted in 6 NEW DIRECTIONS IN THE LAW OF THE SEA 681 (1977).

¹⁵⁹ U.N. Doc. A/CONF.62/WP.8/Parts I, II, & III (6 & 7 May 1975); SD.Gp./2d. Session/No.1/Rev.5 (1975) [hereinafter cited as SNT]; reprinted in 6 NEW DIRECTIONS IN THE LAW OF THE SEA 582 (1977).

¹⁶⁰ See, Note by the President of the Conference, Revised Single Negotiating Text, Doc. A/CONF.62/WP.8/Rev.1 (1976); reprinted in 6 NEW DIRECTIONS IN THE LAW OF THE SEA 582 (1977).

¹⁶¹ Schroeder, *supra* note 151, at 34.

¹⁶² See Christol, *supra* note 87, at 144.

¹⁶³ The States were India, Chile, Romania, Pakistan, and Japan. They focused on the regime rather than the formation of an international organization involving the use of appropriate procedures. *Id.* at 145.

¹⁶⁴ Dugger, *supra* note 5, at 316.

¹⁶⁵ *Id.*

¹⁶⁶ While the Consultative Parties failed to agree on a moratorium on exploitation, they

investigators concluded that more information was needed on the appropriate technology before any proposals could feasibly be made.¹⁶⁷

At the Fourth Session of UNCLOS III the First Committee produced a Revised Single Negotiating Text (RSNT)¹⁶⁸ based on all informal group discussions.¹⁶⁹ An annex on prospecting¹⁷⁰ resolved the controversy as to the Authority's scope of power¹⁷¹ by vesting the right to seabed resources in "mankind as a whole".¹⁷² The International Seabed Authority would select mining applicants and exercise broad administrative powers.¹⁷³ The Enterprise, the Authority's business arm, would carry on the Authority's activities on the seabed under its direction and in pursuance of its goals.¹⁷⁴ Article 3 stated that "the Area and its resources are the common heritage of mankind."¹⁷⁵

By the end of the Fourth Session it was clear that only three major issues required further attention: the structure and function of the Authority, the conditions that would govern exploitation of seabed resources, and ways to avert deleterious effects on developing States' economies.¹⁷⁶ The Fifth Session inherited these issues and funnelled them to the First Committee.¹⁷⁷ The Committee's discussions of the ill-received SNT and RSNT identified the pivotal issue: should the regime (1) guarantee States Parties permanent access to the Area, (2) allow the Authority to permit access subject to certain conditions, or (3) phase out States' activities in favor of those of the Authority?¹⁷⁸ In a major concession, the United States stated it would accept an arrangement whereby the Enter-

adopted the United States delegate's suggestion that they exercise "restraint while seeking timely and agreed solutions." Burton, *supra* note 5, at 448, citing T. Sellin, *Report of the United States Delegation to the Eighth Antarctic Treaty Consultative Meeting* (12 Dec. 1975).

¹⁶⁷ Dugger, *supra* note 5, at 316.

¹⁶⁸ U.N. Doc. A/CONF.62/WP.8/Rev. 1 (1976); reprinted in 6 *NEW DIRECTIONS IN THE LAW OF THE SEA* 582 (1977) [hereinafter cited as RSNT].

¹⁶⁹ *Id.* at Articles 3 and 4.

¹⁷⁰ *Id.* at Annex I, p. 596.

¹⁷¹ *Id.* at Article 9, p. 583.

¹⁷² *Id.* at Annex I, Article 1, p. 596.

¹⁷³ *Id.* at Annex I, Articles 7(e) and 8, p. 596.

¹⁷⁴ *Id.* at Annex I, Article 12. Under this Article the Authority could determine duration of seabed activities, categories of minerals which could be mined, production matters, and distribution of benefits.

¹⁷⁵ *Id.* at Article 3, p. 586. Other articles provide that the Area is not subject to claims of sovereignty, *id.* at Article 4, p. 586, and may be used only for peaceful purposes, *id.* at Article 8, p. 586.

¹⁷⁶ United Nations, Third Conference on the Law of the Sea, Fifth Session, New York, Note by the President of the Conference (Aug. 2, 1976); reprinted in 6 *NEW DIRECTIONS IN THE LAW OF THE SEA* 681-682 (1977).

¹⁷⁷ *Id.* at 675-676.

¹⁷⁸ *Id.* at 685.

prise would commence mining operations concurrently with those of States and private parties, but only on the condition that the States would operate on equal footing with the Enterprise.¹⁷⁹ Clearly, the previously irreconcilable points of view were beginning to converge.¹⁸⁰ The further success of the Conference mandated choice of one of these alternatives.

Outer space negotiations in 1976 were also hampered by a deadlock on the issue of resource exploitation.¹⁸¹ Italy and several other States submitted proposals for lunar resource regimes in which the legal machinery would be set up prior to exploitation.¹⁸² Conversely, the Soviet Union joined other States to urge that no regime be formulated until exploitation was feasible, with membership being strictly limited.¹⁸³ The resulting impasse halted all negotiations for the next two years.¹⁸⁴

Concern for the Antarctic environment prompted the Consultative Parties to agree at their Ninth Meeting on an immediate moratorium on all resource recovery.¹⁸⁵ They recommended a "future regime" to protect the ecosystem,¹⁸⁶ cautioning that any actions taken regarding mineral resources "should not prejudice the interests of all mankind in Antarctica."¹⁸⁷ Elements of the common heritage doctrine had clearly begun to influence Antarctic policymaking.

In the spring and summer of 1977 the UNCLOS delegation drafted the Informal Composite Negotiating Text (ICNT).¹⁸⁸ Though it provided a solid basis for discussion, the ICNT failed to address crucial questions of the Authority's competency, locus of power, and resource management

¹⁷⁹ *Id.* at 686.

¹⁸⁰ The importance of the United States' concession cannot be overemphasized. Earlier, the industrial States had refused to accept any sort of Authority. Now, all factions "accept(ed) roles by both the Enterprise and private companies. The disagreement (lay) in their respective roles and it is here that the impasse focuses." *Id.* at 688.

¹⁸¹ Christol, *supra* note 87, at 145.

¹⁸² U.N. Doc. PUOS/C.2(XV)WG.I/Working Paper 2; U.N. Doc. A/AC.105/171, Annex I, p. 2 (May 1976). The other States were Argentina, Brazil, Chile, Indonesia, Mexico, Nigeria, Romania, Sierra Leone, and Venezuela; see Christol, *supra* note 87, at 145.

¹⁸³ Christol, *supra* note 87, at 144, citing U.N. Doc. A/AC.105/C.2/SR.246 (Aug. 3, 1976).

¹⁸⁴ Christol, *supra* note 87, at 146.

¹⁸⁵ Report of the Ninth Consultative Meeting, Sept. 16-Oct. 7, 1977, Recommendation IX-1: Antarctic Mineral Resources; reprinted in 33 U. MIAMI L. REV. 523 (1978). Other concerns included the inevitable international discord and possible interference with scientific investigations.

¹⁸⁶ *Id.* It should be noted that at this time the developed countries also favored a future regime, in some form, for exploitation of lunar resources. See Christol, *supra* note 87, at 144.

¹⁸⁷ Recommendation IX-1, *supra* note 185, at Section 4(iv).

¹⁸⁸ U.N. Doc. A/CONF.62/WP.10 (July 15, 1977); reprinted in 16 INT'L LEGAL MATERIALS 1108 (1977) [hereinafter cited as ICNT].

functions.¹⁸⁹ Opinion on the first two questions was still sharply split between the developed countries and the Group of 77, which advocated a strong Authority.¹⁹⁰ There was some consensus on management, but the essentially political impasse remained.¹⁹¹ A text on exploration and exploitation drafted at the Seventh Session resolved some of these problems.¹⁹² Amended Article 151 ensured participation of States in all seabed activities while leaving organization and control largely to the Authority.¹⁹³ This provision struck the needed balance between guaranteed access and strong international control, and outlined a detailed procedure for the transfer of technology to the developing countries.¹⁹⁴

Unfortunately, the compromise on State access to the seabed gave rise to another obstacle: the developed countries feared the overwhelming voting power of the Group of 77 in the Assembly, the Authority's governing body.¹⁹⁵ Hence, at the Resumed Seventh Session, the industrial States demanded detailed provisions, hoping to solidify as many issues as possible to avoid being outvoted later.¹⁹⁶ The Group of 77 preferred vague principles whose later interpretation would require votes in which they were certain to prevail.¹⁹⁷

In April 1978, Austria submitted a working paper to COPUOS which ended a two-year standstill in outer space negotiations. Article 11 of the draft Agreement Governing the Activities of States on the Moon and Other Celestial Bodies formulated the common heritage principle in a way acceptable to all Parties: "For the purposes of this Agreement, the moon and its natural resources *shall* be considered the common heritage of mankind, which finds its expression in the relevant portions of this Agreement and in particular in paragraph 5 of this Article."¹⁹⁸ Pursuant to paragraph 5, the Parties would undertake to formulate a regime governing exploitation at such time as it became feasible.¹⁹⁹ Strict limitation

¹⁸⁹ Byrum, *An International Seabed Authority: The Impossible Dream?*, 10 CASE W. RES. J. INT'L L. 629-631 (1978).

¹⁹⁰ *Id.* at 638-640, figs. 4 and 5.

¹⁹¹ *Id.* at 656, 657. The various blocs were more concerned with advancing their political ideologies than with formulating a workable plan on which the Authority could function.

¹⁹² U.N. Doc.NG.1/10/Rev.1, Annex A, Article 151, 10 UNCLoS Off. Rcrds. 25 (1978).

¹⁹³ Explanatory Memorandum by the Chairman Concerning Doc. NG 1/10/Rev. 1, 10 UNCLoS Off. Rcrds. 19 (1978).

¹⁹⁴ *Id.* at 292.

¹⁹⁵ Explanatory Memorandum by the Chairman, *supra* note 193, at 297.

¹⁹⁶ Reports of the Committee and Negotiating Groups on Negotiations at the Resumed Seventh Session, U.N. Doc.A/CONF.62/RCNG/1, 10 UNCLoS Off. Rcrds. 13 (1978).

¹⁹⁷ *Id.*

¹⁹⁸ U.N. Doc.A/AC.105/218, Annex I, p. 210 (1978); *reprinted in* Current Documents, 9 J. SPACE L. 148 (1981) [hereinafter cited as Austrian Draft].

¹⁹⁹ Austrian Draft, *supra* note 198, at Article 1, pars. 1 and 5. The purposes of this regime, embodied in paragraph 7, included safe development and rational management of

of the principle to the subject matter of the Moon Treaty precluded its application as law in deep seabed negotiations, where it was already the focus of numerous political problems.²⁰⁰ Furthermore, delaying common heritage application spared the Parties the ordeal of formulating the necessary regime, a task in which UNCLOS was already mired.²⁰¹ Even the U.S.S.R., a major opponent of the common heritage principle,²⁰² accepted the Austrian draft. The U.S. warned, however, that it would support an international program only to the extent that it advanced American interests and did not limit the "fundamental rights" of self-defense and information retrieval.²⁰³ Despite this and other resistance, the Draft was a major step in implementation of the common heritage principle.

4. 1979: The Principle Becomes Law

The Informal Composite Negotiating Text (ICNT) was revised at the Eighth Session of UNCLOS III²⁰⁴ to assure: 1) cooperation between the Authority and States Parties in transfer of technology to the Enterprise and to the developing countries,²⁰⁵ 2) effective participation by the developing countries,²⁰⁶ 3) safe development and rational management policies,²⁰⁷ and 4) technological assistance from the industrial States.²⁰⁸ Despite these substantial achievements, a major conflict arose when the Group of 77 attempted to declare seabed mining legislation on the national level illegal.²⁰⁹ The U.S. maintained that since no principle of inter-

resources, expansion of exploitation opportunities, and equitable sharing in the benefits accruing from use of the resources.

²⁰⁰ See *supra* note 151 and following textual discussion.

²⁰¹ *Id.*

²⁰² The U.S.S.R. vehemently opposed the principle, calling it vague and unnecessary. See Bond, *supra* note 114, at 158. That State has, however, been virtually alone in its criticism of the principle as part of the Moon Treaty. *Id.* Ironically, the U.S.S.R. had voiced no objection to inclusion of "province of mankind" in the 1967 Outer Space Treaty. See Christol, *supra* note 47, at 458.

²⁰³ White House Press Release, June 30, 1978—U.S. Presidential Decision Memorandum 37. (—) WEEKLY Comp. Pres. Doc. (—) (June 30, 1978).

²⁰⁴ U.N. Doc. A/CONF.62/WP.10/Rev.1 (April 28, 1979) [hereinafter cited as ICNT Revision 1].

²⁰⁵ *Id.* at Article 144. See United Nations, Third Conference on the Law of the Sea, Eighth Session, 19 March-27 April 1979, A/CONF.62/WP.10/Rev.1, 28 April 1979, Explanatory Memorandum by the President of the Conference; reprinted in 10 NEW DIRECTIONS IN THE LAW OF THE SEA 134 (1980).

²⁰⁶ ICNT Revision 1, *supra* note 204, at Article 148.

²⁰⁷ *Id.* at Article 150.

²⁰⁸ *Id.* at Article 274.

²⁰⁹ Statement by the Chairman of the Group of 77, 11 UNCLOS Official Records, U.N. Sales No. E.80.V.6. (1980). Chairman Carias (Honduras) stated that, insofar as Resolution 2749 "was widely regarded as the expression of existing international law" regarding seabed mining, national legislation authorizing seabed mining was illegal and would not create

national law barred enactment of domestic laws, such laws were valid, especially in view of the long lead times expected.²¹⁰

In 1979 COPUOS produced a draft agreement on the moon and other celestial bodies²¹¹ based on the Austrian draft of 1978.²¹² Article 11, slightly modified, declared the natural resources of the moon and other celestial bodies the "common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 of this Article."²¹³ That paragraph, as in the Austrian draft, provided for establishment of a resource regime once exploitation became possible.²¹⁴ Paragraph 7 significantly provided that benefits would be shared by States Parties with consideration not only for the developing countries' need, but also for "the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon."²¹⁵ States were thus given incentive to engage in resource development.²¹⁶ This draft, with only minor revisions, became the Moon Treaty. It was adopted by the General Assembly in December 1979²¹⁷ only because the U.S.S.R. accepted the common heritage principle in its confined form,²¹⁸ the regime issue was postponed,²¹⁹ and the prohibition against property rights applied only to the celestial bodies and not to substances extracted from them.²²⁰

The Moon Treaty presented a new situation in international law: a principle not yet established as law in the forum of its origin (the Law of the Sea negotiations) had attained legal status by adoption in another treaty.²²¹ Furthermore, the common heritage principle was incorporated

rights recognized by the international community. See Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)*, 74 AM. J. INT'L L. 1, 8 (1980).

²¹⁰ 11 UNCLOS *Official Records* 4, U.N. Sales No. E.80.V.6 (1980).

²¹¹ Draft Treaty Relating to the Moon, 34 U.N. GAOR Supp. (No. 20), U.N. Doc. A/23/20 (1979); reprinted in 7 J. SPACE L. 165 (1979) [hereinafter cited as Draft Moon Treaty].

²¹² Austrian Draft, *supra* note 198.

²¹³ Draft Moon Treaty, *supra* note 211, at Article 11, par. 1.

²¹⁴ *Id.* at Article 11, par. 5.

²¹⁵ *Id.* at Article 11, par. 7.

²¹⁶ Christol, *supra* note 87, at 447. See *infra* note 244.

²¹⁷ G.A. Res. 34/68, 34 U.N. GAOR Supp. (No.46) at 77, U.N. Doc. A/34/664 (1979) [hereinafter cited as Moon Treaty].

²¹⁸ Lay, *Space Law: A New Proposal*, 8 J. SPACE L. 41, 43 (1980).

²¹⁹ Christol states: "(I)f there had not been a provision for the future regime and for the identification of the required machinery, the identification of the regime's purposes (as outlined in Article 11, par. 7) would have been unsatisfactory." Christol, *supra* note 87, at 148.

²²⁰ See Christol, *supra* note 47, at 470-471.

²²¹ Lay, *supra* note 218, at 43. See Statement by Ambassador Richard W. Petree in the U.N. General Assembly Special Political Committee on the Report of the U.N. Outer Space Committee and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Nov. 1, 1979; reprinted in 9 J. SPACE L. 162 (1981).

without prejudice to its application in any other agreement. It is ironic that one of the States that contributed heavily to the development of this unusual treaty, the United States, has consistently refused to sign it.²²²

As the decade closed, the Antarctic resources issue was caught in "politics of uncertainty".²²³ Without hard evidence of significant mineral deposits, and without the needed technology, the question of common heritage status for the resources remained moot. Lurking in the background, however, was the certainty that if vast resources were shown to exist in Antarctica, States not parties to the Antarctic Treaty would urge application of the doctrine.²²⁴ The next decade thus saw the common heritage principle incorporated into outer space law and firmly but uncomfortably entrenched in the evolving law of the sea. Many of its major underpinnings were also evident in the international law of Antarctica.

E. 1980 - Present: The United States Backs Away

By the end of 1979 it was clear that exploitation of the moon and the seabed would be governed by international regimes. In light of this certainty, the United States Government began to take stock of its policies on resource acquisition. In April 1980 the Section of International Law of the American Bar Association recommended that the U.S. sign the Moon Treaty with the clear understanding that²²⁵ the common heritage principle was to be strictly limited to application in the Moon Treaty.²²⁶ The ABA Section on Natural Resources was even more cautious. It felt acceptance of the common heritage doctrine in the Moon Treaty would hurt Antarctic and deep seabed negotiations, and might constrain the U.S. to accept resource regimes not necessarily in its interest.²²⁷ A recommendation issued jointly by both Sections in May 1981²²⁸ reflected these concerns and emphasized the future applicability of the doctrine and its application only to resources in place.²²⁹ Though the Treaty included no moratorium provision, the Recommendation stated that none was "in-

²²² TREATIES IN FORCE, DEPT. ST. PUB. 9136 (1980).

²²³ G. Pontecorvo, Remarks, *Development of Antarctica*, 73 AM. SOC. INT'L L. PROC. 266-267 (1969).

²²⁴ *Id.* at 266.

²²⁵ American Bar Assoc. Report to the House of Delegates Section of International Law, Recommendation (April 18, 1980), *reprinted in* Current Documents, 8 J. SPACE L. 76 (1980) [hereinafter cited as ABA Recommendation].

²²⁶ *Id.* at par. (c).

²²⁷ Christol, *The American Bar Association and the 1979 Moon Treaty: The Search for a Position*, 9 J. SPACE L. 77, 82-83 (1981).

²²⁸ American Bar Association Report to the House of Delegates (May 1981); *reprinted in* 9 J. SPACE L. 90 (1981) [hereinafter cited as ABA Report].

²²⁹ *Id.* at par. (c), (d). *Cf.* ABA Recommendation, *supra* note 225 (natural resources "in place").

tended or required."²³⁰ Finally, the paper warned that good faith bargaining requirements did not obligate the U.S. to accept any particular regime.²³¹

Congress took a stance on the deep seabed resource issue on June 28, 1980 by enacting the Deep Seabed Hard Mineral Resources Act²³² as an interim measure to facilitate mining operations pending conclusion of the Law of the Sea Treaty.²³³ The Act provided for licensing and certification of parties wishing to mine, and required that all international agreements guarantee U.S. citizens access to the seabed.²³⁴ The Act was purportedly based on the premise that immediate exploitation would further the purposes of the evolving treaty, yet it asserted that seabed mining was a freedom of the high seas.²³⁵ At the Ninth Session of UNCLOS III, the Group of 77 expressed outrage at this Act.²³⁶ The U.S. prevented a heated debate only by assuring that mining would not commence before 1988.²³⁷

The Ninth Session's major achievement was the Draft Convention on the Law of the Sea, which declared that the seabed and its resources were the common heritage of mankind.²³⁸ The Authority would consist of a supreme Assembly of all Authority members,²³⁹ a subordinate Council charged with finances,²⁴⁰ and an Enterprise which would mine the seabed under the Council's direction.²⁴¹ The debate on State access was resolved by a provision setting up a "parallel system" wherein States and private entities would have opportunities equal to those of the Enterprise.²⁴²

The work left for the Tenth Session included setting up a Prepara-

²³⁰ ABA Report, *supra* note 228, at par. (e).

²³¹ *Id.* at par. (f).

²³² *Act of June 28, 1980*, Pub. L. No. 96-283, 94 Stat. 553 (1980); *reprinted in* 19 INT'L LEGAL MATERIALS 1003 (1980).

²³³ *Id.* at Sec. 2, par. 16.

²³⁴ *Id.* at Title I, and Title II Sec. 201.

²³⁵ *Id.* at Sec. 2, par. 5 and 12.

²³⁶ Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session* (1980), 75 AM. J. INT'L L. 211, 212 (1980).

²³⁷ Oxman, *supra* note 236.

²³⁸ 14 UNCLOS Official Records, U.N. Doc.A/CONF.62/WP.10/Rev. 3 (27 Aug. 1980); *reprinted in* 11 NEW DIRECTIONS IN THE LAW OF THE SEA 1 (1981) [hereinafter cited as Draft Convention on the Law of the Sea, with page cite to 11 NEW DIRECTIONS IN THE LAW OF THE SEA]. The Draft was based on a revision of the ICNT produced at earlier meetings of the Ninth Session; ICNT/Rev.2, U.N. Doc. A/CONF.62/WP.10/Rev.2 (1980). *See id.* at Article 136 at 70.

²³⁹ *Id.* at Articles 159-160, at 82-84.

²⁴⁰ *Id.* at Articles 161-162, at 85-89.

²⁴¹ *Id.* at Annex IV, "Statute of the Enterprise," Article 1, par. 1, at 172.

²⁴² *See* Oxman, *supra* note 236, at 213-214. Each State or private applicant would propose two sites, the revenues from one of which would be reserved for the developing countries. Revenues from the "non-reserved" site would be distributed in part to the mining State.

tory Commission to establish the Authority and write its rules and regulations.²⁴³ The developing countries disliked the idea of interim measures, but the developed countries felt the Commission was needed for predictability.²⁴⁴ The U.S. not only reserved its position on this issue, but also refused to discuss any substantive issues during the entire Session.²⁴⁵ The reason for this move became clear in April 1981 when the State Department announced its intention to conduct an exhaustive policy review in light of key national interests such as security.²⁴⁶ The study would target "burdensome" restraints on seabed mining, mandatory funding of the Enterprise, and lack of incentive for investors.²⁴⁷ The review was completed in January 1982 with the decision to return to the negotiations, but with a tougher stance on the seabed mining issue.²⁴⁸

As of this writing, the United States has not signed the Moon Treaty.

III. STATUS OF THE COMMON HERITAGE OF MANKIND PRINCIPLE IN INTERNATIONAL LAW

This section considers the extent to which the common heritage principle has attained international legal significance. International law is premised on the presumption that binding rules are expressions of the free will of States. The corollary rule is that restrictions on their independence cannot be presumed binding on them.²⁴⁹ Indeed, the critical inquiry in a situation where no specific rule has been articulated is how a State defined its obligation to act under the circumstances. A rule set forth in a treaty may, for example, become binding on non-parties by op-

²⁴³ *Id.* at 211-212.

²⁴⁴ 81 DEPT. STATE BULL. 49-50 (1981).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ The Group of 77 expects the current session to see completion of the Convention. Alvaro de Soto, new Chairman of the Group, stated: "If it is not possible to reach agreement with all states, the Group of 77 wishes to proceed to the adoption of a convention." He made this statement in response to a 43-page proposal released by the United States, containing demands for concessions which De Soto hopes will be withdrawn.

In the meantime, the U.S. has concluded a treaty with France, Britain and West Germany whereby sites selected by private companies of all four States will be recognized. Tommy Koh, President of the Conference, has persuaded France to exercise restraint, but feels the treaty will fail because investors will balk in the face of the more heavily supported Convention on the Law of the Sea.

The greatest obstacle to the success of the Convention is the meaninglessness of the common heritage provisions without the cooperation of the United States. The U.S. wishes to abolish the limits the Convention seeks to set on the amount of minerals that could be extracted from the seabed, an attitude which antagonizes the Group of 77. *N.Y. Times*, March 9, 1982, at 6, col. 1.

²⁴⁹ *Case of the S.S. "Lotus"*, 1927 P.C.I.J., Ser. A, No. 10.

eration of international custom.²⁵⁰

At present the common heritage principle is incorporated in only one treaty in force (the Moon Treaty) and in one U.N. General Assembly Resolution. Only the former is binding in international law. Furthermore, the Moon Treaty strictly limits the principle to the scope and purposes of that Treaty, and contemplates its application only when exploitation of extraterrestrial resources is about to become feasible. It cannot fairly be argued that the common heritage principle has ripened into law by means of the traditional processes of custom and assent of civilized nations, and its history is so plagued with disagreement that generalized assent cannot be inferred.²⁵¹

The sheer volume of resolutions, draft and effective agreements, and other materials indicates nevertheless that the common heritage of mankind is entrenched in contemporary international affairs, and that at least some aspects of the doctrine have attained legal status.²⁵² Furthermore, there is a clear and pressing need for global resource management, one of the elements of common heritage, especially since technology has outdistanced international law in these areas.²⁵³ The common heritage principle

²⁵⁰ *United Kingdom v. Norway*, 1951 I.C.J. 116.

²⁵¹ See Note, *Soviet Legal Approach to Space Law Issues at the United Nations*, 3 LOYOLA INT'L & COMP. L. ANN. 99, 101 (1980). The United States considers international custom "potentially the most important source of law with regard to space activities." Soviets, however, maintain that treaties are the primary source of space law. The U.S.S.R. has, in fact, attacked international custom as a tool of the "capitalist" nations. INTERNATIONAL SPACE LAW 75-76 (A. Piradov ed. 1976).

²⁵² E.g., peaceful use, disarmament, cooperation, common usage and international management.

²⁵³ Christol, *supra* note 47, at 448-449: "It is abundantly evident that in today's world the most powerful cannot proceed as they may wish without consulting the outlooks of other States. A too heavy reliance on certain national-interest policies may be counterproductive and regrettably myopic in the presence of the need for all States to share in the effective management of world affairs. This includes the formation of world regimes . . . designed to serve the needs, wants, interests, and values of mankind at large." See also Hambro, *supra* note 28, at 221. The need for international resource management is made even clearer by the recent crisis in the Falkland Islands, the "gateway to Antarctica." This battle between Britain and Argentina is only the most recent in a long series of power plays involving Argentina, Chile, and Britain; see, e.g., *Antarctica Cases*, *supra* note 27 and accompanying text. Clearly the violence will escalate and spread south to the Antarctic if the sovereignty disputes are left unresolved. See N.Y. TIMES, Apr. 9, 1982, §2, at 27. Indeed, only Antarctica's current lack of strategic value saves it from appropriation by some states State as a military base. Remarks by Jonathan I. Charney, *Development of Antarctica*, 73 AM. SOC. INT'L L. PROC. 268 (1979).

In 1979 Ambassador Richard Petree stated, regarding the Draft Moon Treaty: "(W)e cannot fail to note the concerns expressed by members of the Outer Space Committee lest outer space become yet another area where man makes war . . . While the (U.N. Charter) predates man's entry into space, its principles and provisions, including those relating to the permissible and impermissible uses of force, are as valid for outer space as they are for our

could be useful as a basis for global sharing of scarce resources. This section therefore assesses the principle's scope in the international law of remote areas containing valuable natural resources.

Arvid Pardo, who first announced the principle, identifies its three central concepts: 1) absence of private property rights, i.e. the right to use resources but not to own them; 2) international management of all uses of the common heritage; and 3) sharing of benefits derived from such use.²⁵⁴ Management may include environmental protection, preservation of resources for future generations, and equitable sharing of benefits among all states (Pardo's third element). The concept of management is to be implemented through an international regime allowing both the exploring States and "other States" to reap the benefits.²⁵⁵ At present the treaties and subsequent actions constituting the law of outer space, the deep seabed, and Antarctica embody the ideas of absence of sovereignty, international sharing of various benefits, and international regimes for management of natural resources. It is therefore difficult to avoid the conclusion that the common heritage principle applies to all three areas.

A. *Absence of Sovereignty*

The right of mankind regarding areas and resources with common heritage of mankind status is one of title. Once ownership has vested in "mankind", no State can assert sovereignty in derogation of that right.²⁵⁶

Under the Law of the Sea Treaty, the Authority will be charged with protecting the rights and interests of mankind. Such protection is arguably impossible if all States are not parties to the treaties implementing the principle.²⁵⁷ Moreover, the Moon Treaty extended the common heritage provision to persons as well as States, because the industrial States wished to allow private entities to mine the moon. Thus, while both States and nongovernmental entities may acquire proprietary rights in lu-

seas, land or air. We welcome the international community's reaffirmation in the Moon Treaty of this essential point." Statement by Ambassador Richard Petree in the U.N. General Assembly Special Political Committee on the Report of the U.N. Outer Space Committee and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Nov. 1, 1979; *reprinted in* 9 J. SPACE L. 162 (1972).

See also Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil Thereof, 23 U.S.T. 701, T.I.A.S. No. 7737, 480 U.N.T.S. 43 (1972).

²⁵⁴ E. BORGHESI, "Preface to the Emerging Ocean Regime," in *PACEM IN MARIBUS* 161-162 (1971).

²⁵⁵ Christol, *supra* note 227, at 78.

²⁵⁶ N. REMBE, *supra* note 5, at 54. For an excellent discussion of the semantic and conceptual problems surrounding "mankind", *see* Gorove, *supra* note 76, at 393-394.

²⁵⁷ Gorove, *supra* note 76, at 395.

nar resources no longer in place,²⁵⁸ the prohibition against sovereignty over resources not yet extracted applies equally to States and individual persons.²⁵⁹

The Third World maintains that Antarctica is not amenable to sovereignty, asserting that the existing claims have no place in a world community recognizing the need for international, rather than unilateral, approaches to resource problems.²⁶⁰ While the Antarctic Treaty has preserved the claims for reconsideration in 1989, it is likely that their validity will be questioned seriously, particularly by the United States, which recognizes no such claims. The Consultative Parties themselves have implied, in their Recommendations on Antarctic Mineral Resources, that the claims are subordinate at least in part to the rights of mankind.²⁶¹ The idea of sovereignty in Antarctica is clearly being replaced by notions more in keeping with the doctrine of common heritage.

B. International Management

It is generally recognized that an international regime is needed to put the common heritage principle into effect. Such regimes have been under discussion since 1968.²⁶² The Antarctic Convention on Mineral Resources recites the need for "suitable machinery".²⁶³ The Moon Treaty provides for a future resource regime. The UNCLOS III delegation has been working on a seabed mining regime for seven years, impeded at times by the complex social and political forces at play in negotiations of this type.²⁶⁴ The common heritage principle has as its ultimate purpose the effectuation of such regimes, which are meant to redistribute the world's wealth more equitably.²⁶⁵

²⁵⁸ See Christol, *supra* note 47, at 429.

²⁵⁹ Moon Treaty, *supra* note 217, at Article 11, par. 3: "Neither the surface nor the subsurface of the moon, nor any part thereof or the natural resources in place, shall become the property of any State . . . or of any natural person (emphasis added)."

²⁶⁰ Pinto, *The International Community and Antarctica*, 33 U. MIAMI L. REV. 475, 477 (1978): "There is a growing body of opinion holding that claims of sovereignty based on such origins have no place in the world today. The contemporary world community . . . views its problems at the global level and strives to arrive at rational solutions."

²⁶¹ Final Report of the Eleventh Antarctic Treaty Consultative Meeting, Recommendation XI-1 (Antarctic Mineral Resources), Doc. ANT/XI/34/Rev.4 (1981). Paragraph 5(d) states that "the Consultative Parties, in dealing with the question of mineral resources in Antarctica, should not prejudice the interests of all mankind in Antarctica."

²⁶² See Christol, *supra* note 87, at 140-141.

²⁶³ *Supra* note 261.

²⁶⁴ See Christol, *supra* note 87, for an excellent discussion of the "social complex forces" impacting on groups of States attempting to form international regimes "uniting the desires and expectations of all contingents."

²⁶⁵ Christol states: "In its ultimate sense the (common heritage) principle provides guidance in effecting an orderly and equitable distribution of resources so that a measure of

Actual application of the common heritage principle and its associated regime seems to depend on feasibility of exploitation. The Moon Treaty delays application until such time as exploitation is about to become feasible. The Draft Convention on the Law of the Sea, on the other hand, states that the Area and its resources "are the common heritage of mankind;" this is not surprising, as the technology needed to mine the seabed is presently available.

The current level of activity in Antarctica has likewise pointed out the need for orderly regulation of resource recovery in Antarctica. The Consultative Parties deemed the formulation of a resource regime an urgent matter at their Eleventh Meeting,²⁶⁶ after extensive study of environmental impacts of resource exploitation on the delicate Antarctic environment. The international management element of the common heritage principle is as evident in Antarctic policy as it is in negotiations on the use of lunar and seabed resources.

C. *Sharing of Benefits*

The treaties and conventions relating to the moon, the seabed, and Antarctica all contain provisions for sharing of the benefits derived from each area. The Law of the Sea Treaty will contain provisions for deep seabed mining and distribution of the proceeds. The Moon Treaty mandates a scheme for the mining of lunar resources when the necessary technology exists. The current body of law on Antarctica includes provision for mutual cooperation and sharing of information, and a recent recommendation calls for a resource regime which takes the interests of all States into account.²⁶⁷ Though the Consultative Parties are to have "special responsibility" for managing the regime,²⁶⁸ "mankind" undeniably has a stake in the benefits accruing from the natural resources of Antarctica.

While the common heritage principle is explicitly incorporated in the international law of sea and space, and arguably extends to Antarctica, its effectiveness as a tool for global resource management has been questioned on numerous grounds. The next section discusses the problems presented by the principle in its application to the three areas, particularly Antarctica.

IV. CURRENT IMPLICATIONS OF THE COMMON HERITAGE OF MANKIND

The common heritage principle, of which resource management is an

global fairness can be realized." Christol, *supra* note 47, at 454.

²⁶⁶ *Supra* note 261, at par. 2.

²⁶⁷ *Id.* at par. 6.

²⁶⁸ *Id.* at pars. 5(a), 6 and 7(V).

integral part, appears on its face to be a useful legal device for development through global resource management. Carl Christol suggests that the common heritage of mankind "will become a firmly established principle of the international law of the sea."²⁶⁹ The principle will also encourage the cooperation necessary to form space-based communications systems which will be instrumental in unifying the world community.²⁷⁰ Moreover, as a guide for distribution of various types of tangible and intangible wealth, the principle is well-suited to the needs of capitalist systems for access and orderly exploitation, and of the developing countries for fair disbursement of benefits.²⁷¹ Because Antarctica is a potential source of vast mineral wealth, the common heritage principle could be used to effectively guide its exploitation and development.²⁷² Despite its promise, however, many obstacles must be surmounted before the principle is accepted as an international framework for resource management.

A. *Problems to Be Surmounted*

Though it purports to encourage rational exploitation, the common heritage doctrine severely restricts mineral-gathering activity. Some industrial States have argued that such exploitation will not occur unless there is incentive to mine in the face of tight international regulation and forced sharing of benefits, which they fear will render mining unprofitable.²⁷³ It is for this reason that the United States has displayed a "definitional fetish" at both UNCLOS and COPUOS.²⁷⁴ In addition, the United States fears that a moratorium is implied in the Moon Treaty by virtue of the Moratorium Resolution adopted at UNCLOS III.²⁷⁵ While the language of the Moon Treaty removes extracted resources from the prohibi-

²⁶⁹ Christol, *supra* note 47, at 450-451.

²⁷⁰ Lay, *supra* note 218, at 41. The Secretary of Italy at the U.N. says of the current trends in outer space: "(H)umanity seems to aim at a form of colonialization of the space closest to our planet, in order to deepen its investigation of the earth, to increase the contribution of space research to the economy, . . . to safeguard the balance of nature, and to amplify—through an ever fuller flow of communications—experiences which are already common to a very large number of people, enabling them to feel more closely linked to a unique destiny in the 'global village' Earth."

²⁷¹ Christol, *supra* note 47, at 475.

²⁷² Pinto, *supra* note 10, at 478.

²⁷³ Christol, *supra* note 47, at 475.

²⁷⁴ See Christol, *supra* note 87, at 479; see also Rosenfield, *The Moon Treaty: The United States Should Not Become a Party*, 74 AM. SOC. INT'L L. PROC. 162, 163-164 (1980).

²⁷⁵ *Id.* at 162. The U.S. fears that the Group of 77, which believes the Moratorium Resolution placed legal obligations on States not to mine the seabed, will seek to extend this policy to outer space. While there is no basis in the Moon Treaty for such a concern, a policy statement "by the largest bloc of countries in the world" presents what some observers see as a clear threat.

tion against ownership, the U.S. is still reluctant to sign the Treaty.²⁷⁶ Despite this fear, many U.S. experts feel that the strength of the U.S.'s bargaining position and its technical expertise in outer space will ensure protection of private investors' interests, thus ensuring incentive.²⁷⁷

The most intractable problems concern the common heritage principle's application to Antarctica. Efforts to extend the principle to Antarctica may be opposed by States which view internationalization as a threat to their "sovereignty". Antarctica is the source of tense political conflicts among claimants which have the power to block a resolution internationalizing Antarctica even partially.²⁷⁸ Further, if Antarctica's resources turn out to be economically attractive, the developing countries will express interest in a share of the proceeds.²⁷⁹ They are in fact guaranteed such benefits under the Antarctic Mineral Resources Recommendation. In any case, the world's desire to exploit Antarctic minerals at some future time will clash with the need to maintain the hard-won spirit of cooperation and trust that made the Antarctic Treaty possible.²⁸⁰

B. Solutions

The U.S.'s concern about implied moratoriums in the Moon Treaty reflects a general fear of international arrangements in which the U.S. can be overwhelmed by the voting power of large blocs like the Group of 77. Such a fear caused the U.S. to withdraw from the Law of the Sea negotiations in 1981.²⁸¹ While some sort of international lunar resource authority is inevitable,²⁸² the "ganging up" effect could be lessened by joint ven-

²⁷⁶ Christol, *supra* note 47, at 476-477.

²⁷⁷ See, e.g., Remarks by Delbert D. Smith, *The Moon Treaty: Should The United States Become A Party?*, 74 AM. SOC. INT'L L. PROC. 167, 169-170 (1980): "The basic U.S. position (is) that the Moon Treaty constitutes a framework and incentive for the exploitation of the moon, not an impediment. (Outer space negotiations were) totally different from those characteristic of the Law of the Sea process, if for no other reason than . . . that access to the moon is limited to a very few nations while access to the sea . . . is available to almost all nations. Given the history of policy support by the U.S. Government for the private sector's involvement in the commercial exploitation of outer space and given the bargaining position of the (U.S.) as a space power, it seems . . . the perceived threat to private sector interests is overrated and constitutes only a minimal threat."

²⁷⁸ See Oxman, *The Antarctic Regime: An Introduction*, 33 U. MIAMI L. REV. 285, 289 (1978).

²⁷⁹ Charney, Remarks, *Development of Antarctica*, 73 AM. SOC. INT'L. L. PROC. 269 (1979).

²⁸⁰ Hambro, *supra* note 28, at 224.

²⁸¹ See *supra* note 244.

²⁸² Article 11, par. 3 of the Moon Treaty refers only to "international intergovernmental organizations", in addition to States Parties, as those who cannot assert sovereignty over the surface and subsurface; therefore "it should not be inferred that the use of a suitable international organization . . . was to be excluded." Christol, *supra* note 87, at 144.

tures involving groups of countries.²⁸³

With regard to Antarctica, it is probable that its resources will attain common heritage status at the time the sovereignty claims are reviewed. The majority of countries reject these claims and advocate international mechanisms for resource exploitation in remote regions. It is also evident that an interim solution is needed, as human activity in Antarctica must be controlled to prevent damage to the environment.

Any interim proposals must take into consideration the needs of the claimant and non-claimant States parties to the Antarctic Treaty, as well as non-parties.²⁸⁴ While the interests of mankind are given priority under the Antarctic Mineral Resources Recommendation, the Treaty has protected the sovereignty claims pending review. The critical issue will be the balancing of these interests.

One possible approach is negotiation of a new treaty within the UNCLOS forum. Unfortunately, this process would take too long to be worth the trouble.²⁸⁵ The International Court of Justice could make a ruling on sovereignty, but not all concerned States would follow it.²⁸⁶ Under a joint sovereignty or "condominium" approach,²⁸⁷ the Consultative Parties would share joint sovereignty while recognizing the interests of other States. This system, though practical, would require the claimants to relinquish their claims, and would be perceived by the Group of 77 as yet another form of sovereignty claim.²⁸⁸

Several variations on the joint sovereignty approach have been proposed. Under "Joint Antarctic Resource Jurisdiction" (JARJ),²⁸⁹ shelf areas found to contain substantial mineral deposits would be partitioned and opened for bidding, with the Consultative parties collecting rent. Any State could become a Consultative Party by simple accession.²⁹⁰ Claimants could maintain their claims under this plan, while non-claimants and

²⁸³ Sadin, *supra* note 5, at 155: "It is quite probable that, because of the tremendous amount of research effort needed, the learning process while conducted by individual nations at first, would later be pursued by groups of nations."

²⁸⁴ Alexander, *A Recommended Approach to the Antarctic Resource Problem*, 33 U. MIAMI L. REV. 371, 404 (1978). The claimants, whose claims are generally unrecognized, may feel pressured to reduce their claims to secure proprietary rights. Non-claimant States, which recognize no claims to Antarctica, will favor freedom of access in view of rising oil prices. States not parties to the Antarctic Treaty will attack any arrangement benefitting only the Consultative Parties, but are likely to favor an international solution providing for sharing of benefits from resource exploitation.

²⁸⁵ *Id.* at 409-410.

²⁸⁶ *Id.* at 413.

²⁸⁷ Auburn suggests that a condominium already exists on the Ross Dependency between the United States and New Zealand. F. AUBURN, *THE ROSS DEPENDENCY* 82 (1972).

²⁸⁸ Alexander, *supra* note 284, at 414-416.

²⁸⁹ *Id.* at 417.

²⁹⁰ *Id.* at 417-421.

non-Parties could benefit from the rent (the latter by acceding to the Treaty).²⁹¹

Burton suggests a system based on the idea of an "Antarctic Community" emphasizing the common interests underlying the diverse claims.²⁹² Interested Parties would bargain for benefits including mining opportunities and profit-sharing. While this plan benefits Parties, it rejects any suggestion of benefit-sharing with non-Parties²⁹³ save voluntary contributions to world development organizations.²⁹⁴ This plan is not likely to please the developing countries who are not Parties.

Under a "limited multilateral" approach,²⁹⁵ a limited group of interested States would draft a convention allowing collective exploitation by the Parties only; or alternatively, an international organization would permit Parties to police activities of their nationals in Antarctica. In either case, non-parties would play little or no role.²⁹⁶ Such a plan is even more certain than the Antarctic Community approach to "stimulate the anxieties" of the Group of 77.

In view of the importance of international development under the New International Economic Order the "common heritage" model proposed by Joyner should be given preference.²⁹⁷ The developing countries as a group have become a force to be reckoned with during the past decade. Their exclusion from decisions as important as the disposition of a continent is, in view of their growing power, impossible today.

V. CONCLUSION

The negotiating histories of the Moon, Antarctica, and Law of the Sea Treaties reveal the principle of the "common heritage of mankind" in three distinct phases of implementation. It is firmly entrenched in the developing law of the sea, where it covers both the International Seabed Area and its resources, and provides for an international regime to implement the principle. It is articulated in limited form in the Moon Treaty, where it will apply to celestial bodies but not to resources extracted from them, when exploitation becomes feasible. It has not yet been formally extended to Antarctica, though certain elements—international manage-

²⁹¹ *Id.* at 419-421.

²⁹² Burton, *supra* note 5, at 472-477.

²⁹³ *Id.* at 508.

²⁹⁴ *Id.* at 510.

²⁹⁵ Charney, *supra* note 279, at 270.

²⁹⁶ *Id.* at 270-271.

²⁹⁷ For an excellent discussion of the legal justifications for a more international approach to resource management in Antarctica, see Joyner, *Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas*, in *COLLECTED PAPERS FROM CURRENT ISSUES IN THE LAW OF THE SEA* (C. Joyner ed. 1979).

ment and sharing of benefits—have long been part of the relevant agreements. Application of the principle to the resources of Antarctica awaits two events: settlement of outstanding claims of sovereignty, and concrete proof of economically significant resources. Meanwhile, an interim regime may be necessary to ensure efficient exploitation and environmental protection. The most realistic approach would be to adopt a regime modelled on the idea of common heritage.

Recent moon and seabed negotiations have evidenced States' willingness to address the practicalities of resource recovery and management. Unfortunately, the United States has only recently returned to UNCLOS, and refuses to sign the Moon Treaty. The U.S.'s cooperation is essential to the success of the common heritage principle, as few other States have the expertise necessary to commence mining operations in any of the three areas, and one goal of the principle is to encourage exploitation. Thus, the key to the success of the common heritage principle's implementation is achievement of the proper balance between the needs of the developing countries and those of the industrial nations which will carry the initial burden of setting up operations and providing the necessary technology. The goal of negotiations on all fronts in the next decade should be to achieve this balance, as it will also be crucial to the resolution of the resource question in Antarctica.