

Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict

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In December 1982, the United States and several other leading industrial powers declined to sign the United Nations Convention on the Law of the Sea. It is now possible that seabed mining will proceed under a reciprocating states regime based on unilateral legislation. This legislation has been justified on the basis of the principle of the freedom of the high seas. The Group of 77 has branded this legislation as being contrary to international law based on the principle of the common heritage of mankind. This article embodies an analysis of these competing claims.

INTRODUCTION: A CLASSIC CONFRONTATION BETWEEN FUNDAMENTAL PRINCIPLES

Freedom of the Seas versus Sovereignty

For centuries past, many of the principal features of the international law of the sea have been formed by the interplay between two opposing fundamental principles of international law, the principle of sovereignty and the principle of the freedom of the high seas. The ascendancy of one over the other during any particular historical period has tended to reflect the interests of the predominant powers of the day. Thus, the monopolist ambitions of the Iberian powers in the fifteenth and sixteenth centu-

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ries were mirrored in their attempts to establish a *mare clausum* over large parts of the seas, just as the United Provinces of the seventeenth century and Elizabeth's England recognized that their best interests lay in promoting the opposite doctrine of *mare liberum*.¹ That these dynamic forces are by no means exhausted is witnessed by the still continuing changes brought about in maritime boundaries in recent years. The days are not so far distant when the outer limit of the territorial sea could be taken to mark the boundary landward of which sovereignty held sway and enjoyed legal presumptions in its favor, while seawards, the presumptions favored the predominant principle of freedom of high seas. With the recent introduction of legal continental shelves and exclusive fishing zones, sovereignty made considerable inroads on the scope of the freedom of the seas *ratione materiae*. The exploration and exploitation of the natural resources of the continental shelf were to be henceforth the object of the sovereign rights of the coastal State. Similarly, the fishery resources of the exclusive fishery zone were to be the exclusive preserve of the coastal State. On the other hand, this seaward push of sovereignty did not affect the scope of the freedom of the seas *ratione loci* or alter the legal presumptions in its favor. With the even more recent acceptance of the concept of the exclusive economic zone (EEZ), the balance has swung more heavily in favor of the principle of sovereignty. Admittedly, the EEZ is a zone *sui generis* but the safeguards for the freedom of the high seas written into the new Convention on the Law of the Sea appear less than impressive when measured against the exclusive rights accorded to the coastal State.²

Freedom of the Seas versus Common Heritage of Mankind

While the principle of the freedom of the seas continues the traditional battle with its ancient adversary in these offshore zones, it now finds that it is also under attack right in the heart of its empire by a new pretender whose objective is to establish the fundamental principle that the seabed beyond the limits of national jurisdiction and the resources thereof are the common heritage of mankind. We are thus faced with the paradoxical position that, on one front, the principle of freedom of the seas is under attack by a principle of sovereignty motivated by the desire of coastal States to acquire exclusive rights in the fishery and min-

1. See Brown, *Maritime Zones: A Survey of Claims*, in 3 NEW DIRECTIONS IN THE LAW OF THE SEA 157-59 (1973).

2. United Nations Convention on the Law of the Sea, arts. 55-75, U.N. Doc. A/CONF.62/122 (1982) [hereinafter referred to as Convention].

eral resources of the offshore zones, while, on another front, the principle of the freedom of the seas is being advanced in defense of exclusive rights to exploit seabed resources and against the attempt to establish these resources as a new species of *res communis*, a common heritage of mankind.

The Need for a Reassessment

At first sight, the need for a paper on this subject at this time may not be self-evident. The status of the seabed and the regime governing seabed mining under international customary law have been considered in innumerable contributions to the literature and many of them have been published very recently. There are, nonetheless, two persuasive reasons for returning to this subject yet again.

The first reason arises from President Reagan's statement of July 9, 1982 that the United States would not sign the new Convention on the Law of the Sea adopted on April 30, 1982 at the close of the Eleventh Session of the Third United Nations Conference on the Law of the Sea (UNCLOS III).³ This decision would seem to confirm that, unless there is a quite unexpected re-opening of negotiations on the Convention, the present United States administration is now firmly committed to a policy of encouraging the further development of seabed mining outside the conventional framework. It may be assumed that the administration will wish to conclude a mini-treaty with like-minded States, under which their similarly drafted unilateral legislation would be coordinated on an international basis and mining licenses granted under such legislation would be reciprocally recognized.⁴ Whether the way forward for the United States is via such a mini-treaty or independently under its own national legislation, President Reagan's announcement also increases the likelihood that Mr. Tommy Koh, the president of UNCLOS III, will proceed with his reported intention⁵ to try to persuade the United Nations General Assembly to seek an advisory opinion from the International Court of Justice (ICJ) on the legality under international law of unilateral seabed mining legislation such as the United States

3. The Manchester Guardian Weekly, July 18, 1982, at 6, col. 1.

4. See Brown, *The Impact of Unilateral Legislation on the Future Legal Regime of Deep-Sea Mining*, 20 ARCHIV DES VOLKERRECHTS 145 (1982).

5. The Financial Times (London), May 4, 1982, at 4, col. 7.

Deep Seabed Hard Mineral Resources Act of 1980.⁶ Since the United States has consistently justified this legislation by reference to the principle of the freedom of the high seas, it seems appropriate to review the scope of this principle in relation to seabed mining.

The second reason for returning to this subject is that much of the recent writing on it exhibits a very low level of objectivity and appears to be designed to support *a priori* conclusions. The notion of the common heritage of mankind, like the more comprehensive plans to create a New International Economic Order (NIEO), has generated a great deal of emotion among international publicists and the objectivity which must underlie sound legal scholarship has been less in evidence than commitment to particular economic and political philosophies. It is probably not an exaggeration to suggest that some academics appear to have been affected by an insidious malaise which drives them inexorably towards certain pre-ordained conclusions. They feel a need to identify themselves with a particular policy position and to interpret the law accordingly. Very broadly, there is the "liberal" or "internationalist" school which favors the NIEO and the common heritage principle and supports the detailed common heritage regime incorporated in the new Convention on the Law of the Sea. In "internationalist" circles—and particularly among academics—it would appear that there is almost a stigma attached to any writer who is unfortunate enough to come to the conclusion that deep sea mining is still in law a high seas freedom. On the other side are the businessmen, their advisers and supporters in government and elsewhere, for whom it is an article of faith and a severe test of the "soundness" of a man that he should, at most, accept the common heritage doctrine with the utmost reluctance and a becoming skepticism. Allegiance to either of these faiths presents a considerable barrier to objectivity in analyzing the law. It can of course be objected that what is being criticized is simply the application in this field of a policy-oriented jurisprudence. If so, this may be thought to be another example of the risk run by adherents to this methodology of confusing community expectations with their own policy preferences.

The principal object of this paper is, therefore, to anticipate a possible advisory opinion from the ICJ by attempting to ascertain the present legal status of the deep seabed and the present legal regime governing the mining of seabed polymetallic nodules. In the course of this study, attention will be paid not only to the "freedom of the high seas" argument apparently favored by most

6. 30 U.S.C. § 1401 (Supp. V 1981).

of the potential mining States but also to alternative arguments and to the impact on them of the new doctrine of the common heritage of mankind. As will be seen, this is a question which leads the inquirer to consider some of the basic issues of contemporary international law and relations. On a technical level, it is bound up with questions of methodology and the debate over the sources of international law and the law-creating role of General Assembly resolutions. On a political level, it is concerned with opposing political and economic philosophies, with the struggle by the developing world to give reality to a NIEO and with the attempt to break the traditional mold of international relations by securing acceptance of what some regard as the emergent, dynamic principle of the common heritage of mankind.

Claims to exclusive rights over seabed resources are not of course a recent twentieth century phenomenon. The starting point for any inquiry into the present law must be a review of the rules of international law which evolved in earlier centuries in response to such claims, and a consideration of their possible applicability to the exploitation of polymetallic nodules on the deep seabed. The next section of this paper is accordingly concerned with the historical roots of claims to exclusive rights in seabed resources. It is followed by an analysis of the principle of the freedom of the high seas and its relevance to deep seabed mining. The next section is a review of developments since 1967, the year in which the United Nations became seriously concerned with this question, and an assessment of the effect of these developments on pre-existing law. Finally, conclusions are presented.

THE HISTORICAL ROOTS OF CLAIMS TO EXCLUSIVE RIGHTS IN SEABED RESOURCES

Juridical Basis of Early Claims

Much of the long-standing controversy in the literature over the question whether the seabed of the high seas shares the *res communis* status of the superjacent waters or has a separate *res nullius* status has been a by-product of the related question of determining the juridical basis of the exclusive rights which, for many centuries, coastal States have claimed to exploit particular sedentary fisheries or other seabed resources situated beyond the normal (territorial sea) limits of national jurisdiction. It is necessary to refer briefly to this controversy here because it raises ba-

sically the same question as that raised by the exclusive claims to deep sea mineral resources implied in the unilateral legislation recently adopted by five industrialized States.⁷ Moreover, at least one attempt has been made recently to justify a claim to exclusive rights in a manganese nodule site by reference to this earlier practice.⁸

Prior to 1970, when the General Assembly adopted the Declaration of Principles Governing the Seabed,⁹ two possible arguments were open to any government wishing to support the right of one of its nationals to exploit deep seabed minerals. First, it might contend that the right was one underlying freedom of the high seas. This viewpoint could be adopted by any State, irrespective of whether it regarded the seabed as being *res communis* or *res nullius*, assuming in the latter case that a title to the *res nullius* had not been acquired. As conceived at that time, the weakness of this argument was that the right so acquired would have the same non-exclusive character as the analogous right to dredge for fish in the high seas. As will be seen, a variation of this freedom of the high seas argument would permit the acquisition of exclusive rights.

The second argument was based on the practice of States, over many centuries, in claiming and securing recognition of exclusive rights in the sedentary fisheries of areas of the seabed beyond territorial sea limits. Unfortunately, although this is a question with a long history, it remains a disputed area of international law where doctrine tends by far to outweigh more reliable forms of evidence. Moreover, extensive though it is, the literature¹⁰ offers only limited assistance in determining the juridical basis of these exclusive rights. The earlier literature tended to concentrate on demonstrating that exclusive rights can and do exist and the more recent literature has tended to be little more than a rehearsal of the earlier arguments, illustrated by reference to the

7. For an analysis of the legislation adopted by the United States (1980), the Federal Republic of Germany (1980), the United Kingdom (1981), and France (1981), see Brown, *supra* note 4. The Soviet Union issued a similar decree on April 17, 1982. On June 28, 1982, the Italian Council of Ministers approved a bill on deep sea mining. See 8 ITALY AND THE LAW OF THE SEA NEWSLETTER 10 (July 1982).

8. See Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection and Protection of Investment, Deepsea Ventures, Inc., (filed with the U.S. Sec'y of State, Nov. 15, 1974); see also Opinion of the Law Offices of Northcutt Ely on International Law Applicable to Deepsea Mining, Nov. 14, 1974 (on file with author) [hereinafter cited as Northcutt Ely Opinion].

9. Declaration of Principles Governing the Seabed and the Ocean Floor, and Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 GAOR Supp. (No. 28) at 28, U.N. Doc. A/8028 (1970).

10. See, e.g., 2 T. KRONMILLER, THE LAWFULNESS OF DEEP SEA MINING 5-38 (1980).

same lists of a variety of commodities from Algerian sponges and Sri Lankan pearls to Irish oysters. For those seeking to investigate the possible applicability of the governing rules to the acquisition of exclusive title to deep seabed minerals, it would have been more helpful if an analysis had been provided of the constituent elements of state practice, with a view to establishing not simply the principle that exclusive rights may be acquired but the detailed conditions which had to be satisfied in order to acquire them.

The preponderant view in the literature is that the evidence supports the proposition that States acquired a "territorial title" to the areas of the seabed in question. The writer has fully considered this "territorial title" argument elsewhere¹¹ and it would be redundant to rehearse it here; nor would it be of practical assistance in the present context since, even if it could be shown to have supplied the juridical basis of these earlier rights, it could hardly be of service today to States seeking to establish exclusive rights. Any current claim to title over an area of the seabed would succeed only if it could be consolidated by the express or implied recognition or acquiescence of the generality of States.¹² Developments in the United Nations since 1967 have very clearly confirmed that no such support could be expected.¹³

If, however, the doctrinal wrangling over "prescription," "occupation" and "historical consolidation" as the favored "mode" of acquisition of title is left aside and the scope of the exclusive rights acquired in this earlier practice is reconsidered afresh, an alternative basis for exclusive rights may be identified.

Scope of Exclusive Rights in Earlier State Practice

Scope ratione loci

Without exception, these rights related to resources situated in shallow waters relatively near the coast. The areas concerned, certainly in the great majority of cases, were not only within what today is the legal and physical continental shelf; they were indeed situated within a few miles of the outer limit of the territorial sea.

Is the restricted nature of this locus legally relevant? The Law Offices of Northcutt Ely, in their opinion of November 15, 1974,

11. See E.D. BROWN, *THE LEGAL REGIME OF HYDROSPACE* 82-86 (1971).

12. *Id.*

13. See *infra* notes 100-06 and accompanying text.

submitted to Deepsea Ventures, Inc.,¹⁴ clearly did not think so. There the argument was advanced that, prior to the emergence of the legal concept of the continental shelf, the whole of the seabed lying seaward of the contemporary limits of national jurisdiction, the outer limit of the territorial sea, shared the same legal status. There was no need to distinguish, indeed no basis for distinguishing, between the offshore areas where these valuable seabed resources were exploited and the bed of the deep ocean, the exploitation of which was beyond contemplation at that time. Thus, the argument ran, there is no reason to confine the rules permitting acquisition of exclusive rights to the geographical areas of their origin; they are equally applicable in other areas sharing the same juridical status.

It is of course true that these early developments took place against a background of ignorance of the structure and geological/geomorphic nature of the different submarine areas. The fact remains, however, that the resources *were* near the coast and it would not seem extravagant to assume that this fact was significant, if not decisive, to both the coastal State's practice of exploiting the resource and the recognition of that State's exclusive right by other States. The process of claim, recognition of claim and emergence of legal rule in relation to this early practice is very similar to the corresponding process which resulted in the emergence of the legal concept of the continental shelf. This might suggest that the development of the law initiated in this early practice had come to final fruition in the legal concept of the continental shelf and that there is no foundation for contending that this practice is equally relevant in relation to the deep seabed situated beyond the continental margin at very considerable distances from coasts.

Scope ratione temporis

The temporal scope of the exclusive rights claimed in these resources was, it would appear, functionally determined. The exclusive right was desired only as long as resources continued to exist in economic quantities. For example, the coastal State would have no continuing interest in a submarine coal seam once it was mined out. Nor would exclusive rights in coral, sponges or pearls continue to be claimed if, for long-term environmental reasons, they ceased to exist as an economically feasible resource. This question is closely related to that of the juridical nature of the exclusive right. Whereas "territorial title" is appropriate or neces-

14. See Northcutt Ely Opinion, *supra* note 8.

sary if the intention or need is to have permanent exclusive rights over the seabed itself, it is not necessary in relation to exclusive resource rights. This is a relevant distinction because it draws attention to the fact that the conditions required to be satisfied for acquisition of "territorial title" are not necessarily those required to be satisfied for acquisition of exclusive rights in resources. What were the conditions for acquisition of exclusive resource rights? Reduced to their essentials, they were the actual assertion of exclusive rights and their recognition, express or implied, by other States. The precise elements of the assertion of exclusive rights varied from case to case but included a mixture of some or all of the following: regulation by domestic legislation; exclusion of foreigners; and guarding the area. These manifestations of state authority are of course identical to the display necessary to acquire a territorial title by occupation and it is hardly surprising therefore that the exclusive rights claimed were so characterized. The fact remains, however, that what was sought and recognized was in essence a right of usufruct—an exclusive right to exploit the particular resource in the particular area.

Scope ratione personae

Here again, reference must be made to the Northcutt Ely opinion, wherein a distinction was sought to be made between the acquisition of an exclusive right—which could be accomplished by a corporation—and the protection of the right on the international plane—which could be provided only by government.¹⁵

Perhaps it will suffice to say that this is clearly not the view of the United States government. In recognizing that United States corporations are free to mine the seabed, government spokesmen have consistently referred to deep seabed mining as constituting a high seas freedom under international law. It is the international person, the United States, which has the right under international law to enjoy this freedom in the person of its nationals. The true position is revealed if it is pointed out that the alleged right of the corporation could be abrogated at any time by its home government. The corporation has no right in international law separate from that of its state of nationality.

15. *Id.* at 32-43.

Scope *ratione materiae*

Finally, what was the scope *ratione materiae* of the exclusive rights claimed in this early practice? The list of resources is well known and includes coral, pearls, sponges and oysters. It did not, simply as a matter of fact, include polymetallic nodules, though there is little doubt that it would have, if such nodules had existed and been known to exist in marketable quantities in these marginal waters.

Conclusions

What conclusions may one legitimately draw from this analysis? Perhaps the following propositions are justifiable:

1. The exclusive rights recognized in this early practice related to resources situated near the coast of the claimant State.
2. The claim to these resources and its recognition were probably not unconnected with the element of nearness.
3. This practice came to final fruition in the legal concept of the continental shelf. Historically, it has no link with the deep seabed beyond the continental margin.
4. The fact that the duration of the exclusive right claimed is tied to the duration of the existence of the economic resource points to the fact that the right claimed is an exclusive usufruct and not a title to the seabed itself.
5. Only States may acquire such rights.
6. Historically, polymetallic nodules did not feature among the resources to which exclusive rights were claimed but there is no reason to doubt that, in principle, they could have been the object of a claim.
7. The exclusive right depended upon the two basic elements of practical manifestation of the intention to assert an exclusive right and its recognition, express or implied, by other States.
8. The overall conclusion must be therefore that there is evidence to show that, prior to the establishment of the legal concept of the continental shelf, States could acquire an exclusive usufruct of resources situated on the seabed of the continental margin by the practical, effective assertion of such claims, recognized by others. The realistic view is that such rights have now been subsumed under the concept of the legal conti-

mental shelf and the argument that they furnish a fruitful source of analogy for exclusive title to manganese nodules is strained.

Even if it were to be held that the analogy was valid and that exclusive rights to deep seabed resources could be acquired today in the same way, it would still be necessary for such rights to be recognized or at least acquiesced in by other States. It would seem to follow, given the opposition of the vast majority of States to the establishment of such exclusive rights, that there is no possibility at the present time for States to acquire exclusive mineral rights to deposits of manganese nodules on the basis of these rules.

The Northcutt Ely Argument

One possible way out of this impasse is suggested by the argument presented in the aforementioned Northcutt Ely opinion. Having argued that the exclusive right claimed in earlier state practice was "in the nature of a right to take specific resources, like a profit a prendre or usufruct," the opinion went on to assert that this exclusive right was enjoyed in the valid exercise of a freedom of the high seas.¹⁶

The argument is a brave but hardly convincing attempt to arrange a marriage of apparently incompatible partners. The objective was, of course, to show that the client was entitled to acquire an exclusive title to a particular deposit of deep seabed minerals. The first step in the argument was to prove that the present-day deep seabed beyond the present limits of national jurisdiction had the same status as the seabed beyond the earlier (territorial sea) limits of national jurisdiction in relation to which the earlier state practice had taken place. The argument was simply that, when this practice took place, there was one undifferentiated area of seabed underlying the high seas and there was no reason to doubt that the rules evidenced by this practice continued to have application in the whole of the remaining seabed underlying the high seas, despite the introduction of new maritime zones in the area of the continental margin.

Having thus purported to establish the transferability of the legal regime from its original locus to the deep seabed, the next

16. *Id.* at 28.

step was to interpret the evidence provided by the earlier practice by reference to legal concepts and principles which were as compatible as possible with the emerging common heritage regime, while still allowing for the acquisition of exclusive rights. To have viewed that practice in terms of the seabed being *res nullius* and the exclusive rights being in the nature of "territorial titles" acquired by prescription or occupation would have been to invite confrontation with the fundamental ban on the acquisition of sovereignty in the seabed which lies at the heart of the common heritage regime. It was thus much more advantageous to interpret the ambiguous state practice as reflecting the *res communis* nature of the seabed and as evidencing the establishment of a rule whereby exclusive rights in the nature of a usufruct could be acquired to the resources of the seabed. Here, then, was the basis for a marriage of convenience between the freedom of the high seas (to which normally the notion of exclusive titles is quite alien) and exclusive rights of exploitation. The way was then open to arguing that when this regime was applied to deep seabed mineral resources today, it would be seen that the right to acquire exclusive rights of exploitation was a valid exercise of a high seas freedom.

The argument has two major weaknesses. The first arises from the proposition that the regime established in relation to the seabed of the marginal seas is transferable to the deep seabed. As previously explained, this is a highly debatable proposition. A more serious weakness, however, is that the evidence does not bear out the contention that the acquisition of exclusive rights in the earlier practice was regarded, or could be regarded, as the exercise of a high seas freedom. On the contrary, such claims were accepted as recognized exceptions to the principle of the freedom of the seas in the same way as, in later times, the coastal State's sovereign rights in the resources of the continental shelf were accepted as exceptions to the regime of the high seas.

It is arguable that the Northcutt Ely opinion sought to prove too much by trying to marry the notion of exclusive usufruct to the freedom of the seas and that it would have been more profitable to have concentrated on a freedom-of-the-high-seas argument alone. This is in fact the route chosen by the principal industrialized States which have adopted unilateral legislation. They are at one in basing the legality of their enactments on the principle of the freedom of the high seas.¹⁷ It is necessary, therefore, to examine the nature of this principle rather more closely.

17. See Brown, *supra* note 4, at 148-50.

THE FREEDOM OF THE HIGH SEAS

Essential Character of the Principle

Despite recent encroachment upon it, the freedom of the high seas is still a fundamental principle of international law. The powerful presumption in favor of freedom of use of the high seas, one of the most important rules underlying the principle, was described by Professor Schwarzenberger in his Hague Lectures in 1955:

Under international customary law, the right of use of the high seas, the air space above them and the seabed may be exercised for any purposes not expressly prohibited by international law as, for instance, for sea and air navigation, fishing, laying of cables and pipelines, naval exercises and wartime operations.¹⁸

The doubt which existed at that time as to whether the right of use was of an absolute character has since been clearly resolved and it is now recognized that only a right of *reasonable* use exists.¹⁹

It follows from these characteristics of the freedom of the high seas that the principal questions to be considered are whether there is any rule of international law prohibiting deepsea mining as a freedom of the seas and, if there is no such general prohibitory rule, what is the effect on freedom of deep sea mining of the rule that this freedom must be exercised by all States with reasonable regard to the interests of other States in their exercise of freedom of the high seas?

18. Schwarzenberger, *The Fundamental Principles of International Law*, 87 RECUEIL DES COURS 195, 360 (1955).

19. This is confirmed by, *inter alia*, article 2 of the Geneva Convention on the High Seas, which provides that:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Convention on the High Seas, Apr. 29, 1958, art. 2, 13 U.S.T. 2312, 2314, T.I.A.S. 5200, 450 U.N.T.S. 82, 82.

Is There a Prohibitory Rule?

The most obvious candidate for this role is the rule prohibiting the appropriation of areas of the high seas.²⁰ This is by no means an absolute rule; and the more precise question is whether it extends to the type of "appropriation" involved in claims to exclusive rights of exploitation in specific deep seabed mining sites.

The first point to clarify is the nature of the appropriation typically involved in such a claim. The area of a seabed mine site will depend upon various physical variables but in this context it will suffice to provide a rough indication of the size of area involved by referring to the dimensions specified in UNCLOS resolution II governing preparatory investment in pioneer activities relating to polymetallic nodules.²¹ In terms of the resolution, "pioneer investors" may have single "pioneer areas" allocated to them. Such pioneer areas are not to exceed 150,000 square kilometers but fifty percent of this area (and possibly more) has to be relinquished to the international Area over an eight-year period. The ultimate private exploitation area in each site will therefore not exceed 75,000 square kilometers. According to one authoritative source, the pre-production stages of a pioneer venture would take about twenty-three years to complete, and full production would then run for about twenty to twenty-four years.²² The physical presence of the miner on the mine site would not present a significant threat to the freedom of the high seas, assuming of course that the area was chosen and operations conducted with reasonable regard for the interests of other users. The "fleet" of one or two mining ships, support vessels, bulk ore carriers and possibly spoil-dumping vessels would be of modest proportions. There would unquestionably be some environmental impact but, assuming again that the site was operated with reasonable regard for the interests of other users, it would probably not be disproportionate or long-lasting.²³ Likewise, the degree of control over the movements of third parties in the waters superjacent to the site would be of a very limited nature. Apart from protecting their exclusive rights in the site, miners would be chiefly concerned with the physical protection of their mining operations and safety at sea.

Thus the principal question is whether an operation conducted

20. *See id.*

21. Draft Final Act of the Third United Nations Conference on the Law of the Sea, Annex I, res. II, U.N. Doc. A/CONF.62/121 (1982).

22. J. NYHART, TOWARD DEEP OCEAN MINING IN THE NINETIES 30 (Mass. Inst. of Technology Rep. No. 82-1, 1982).

23. *See* R. FRANK, DEEP SEA MINING AND THE ENVIRONMENT (Am. Soc. of Int'l Law, Studies in Transnational Legal Policy No. 10, 1976).

in such an area, for such a time, with such a fleet and involving such an environmental impact and surface control is tantamount to the kind of appropriation of an area of the high seas which would fall within the scope of the prohibition. Prima facie, the answer would seem to be that it is not. The claim would be to a usufruct rather than to the seabed itself and would be for a limited period of time. Subject to its being kept within the bounds of reasonableness, both in terms of locus and conduct of operations, it would seem to be a legitimate use.

Nor is this tentative conclusion invalidated by a consideration of the proposition that an *exclusive* claim is necessarily contrary to the freedom of the high seas. It has been suggested that since exclusivity is a sine qua non of deepsea mining in economic terms, exclusive use is a reasonable use.²⁴ This is a persuasive argument. In determining whether a particular freedom is being exercised "with reasonable regard to the interests of other States in their exercise of the freedom of the high seas,"²⁵ one is concerned with questions of balance, proportionality, and equity. In this case, the elements to be balanced would be, on the one hand, the commercial necessity of the security of tenure which only exclusive use could ensure and, on the other hand, the damage suffered by other States as a result. In the context of the pre-1967 regime of the seabed, it is difficult to see that any significant damage would be suffered by other States, provided of course that the areas worked were well away from established shipping routes and fishing areas, that appropriate measures were adopted for the protection of the environment, and that surface operations were conducted in such a manner as not to create shipping hazards.

As was mentioned above, the prohibition of the exclusive appropriation of areas of the high seas is not in any event an absolute rule unless it is much more precisely defined. It is all a question of degree and, once again, of reasonableness and proportionality. It is true that the exercise of any use by state *A* involves an element of exclusivity in the sense that state *B* is thereby prevented from exercising that use at the same time and place. In most cases, however, such as navigation and fishing, the exclusion is virtually momentary. If navigation and fishing are at

24. Nyhart, *The Interplay of Law and Technology in Deep Seabed Mining Issues*, 15 VA. J. INT'L L. 827, 865 (1974-75).

25. Convention on the High Seas, *supra* note 19, art 2.

one end of the spectrum and seabed mining is at the other, intermediate cases are presented by the freedom to lay cables and pipelines, the freedom to construct artificial islands and other installations on the seabed, and the freedom to close off areas of the high seas for military maneuvers and weapons testing.

In short, if one descends from the level of generalized abstract rules to examine the particular rules actually operating in state practice, one finds an absence of any rule prohibiting seabed mining as a freedom of the seas. The only prohibition is against seabed mining unreasonably conducted.

It was stressed at the beginning of this section that the right of use of the high seas may be exercised for any purpose not expressly prohibited by international law. Thus, the onus of proof lies on those seeking to assert the existence of a prohibitory rule. There is no need to positively establish the existence of a right of use. This is not to say, of course, that it would not be useful to buttress the presumption in favor of freedom of use by adducing positive evidence that deep seabed mining is a recognized use. In fact, however, such evidence is scant.

The *travaux préparatoires* of article 2 of the 1958 Convention on the High Seas are frequently cited in support of the legitimacy of such a use. While it is true that passages in the International Law Commission's (ILC) reports do support this view, it has to be said that the passages in question are unreasoned and very much obiter dictum. All that the ILC said in its 1955 report was that "[i]t is aware that there are other freedoms, such as freedom to explore or exploit the subsoil of the high seas" ²⁶ Moreover, in its 1956 report it added simply that:

The Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas. It considered that apart from the case of the exploitation or exploration of the soil or subsoil of a continental shelf—a case dealt with separately in section III below—such exploitation has not yet assumed sufficient practical importance to justify special regulation. ²⁷

Tentative Conclusion

Taking into consideration the review of earlier state practice, the analysis of the principle of the freedom of the high seas and the evidence provided by the reports of the ILC, the most reasonable, if still somewhat tentative, conclusion would seem to be that

26. Report of the International Law Commission to the General Assembly, 10 U.N. GAOR Supp. (No. 9) at 2, U.N. Doc. 2934 (1955), reprinted in [1955] 2 Y.B. INT'L L. COMM'N 21, U.N. Doc. A/CN.4/SER.A/1955/Add.1.

27. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR Supp. (No. 9) at 24, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. INT'L L. COMM'N 278, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

seabed mining conducted with reasonable regard to the interests of other States in exercising their freedoms of the high seas is a legitimate use of the high seas. The next question is whether that position has been changed as a result of developments in the United Nations and elsewhere since 1967.

THE EFFECT OF DEVELOPMENTS SINCE 1967

The Maltese Initiative

On August 17, 1967, Malta addressed a *note verbale* to the Secretary General of the United Nations requesting the inclusion in the General Assembly's agenda of the following item: "Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."²⁸

The following passages were included in the supporting memorandum:

3. It is, therefore, considered that the time has come to declare the sea-bed and the ocean floor a common heritage of mankind and that immediate steps should be taken to draft a treaty embodying, *inter alia*, the following principles:

(a) The sea-bed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction, are not subject to national appropriation in any manner whatsoever;

.....

(c) The use of the sea-bed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and their economic exploitation shall be undertaken with the aim of safeguarding the interests of mankind. The net financial benefits derived from the use and exploitation of the sea-bed and of the ocean floor shall be used primarily to promote the development of poor countries.²⁹

The question to be considered is the extent to which this initiative and the instruments to which it ultimately gave rise have affected the law as it was prior to August 17, 1967. The principal fruits of Ambassador Pardo's initiative are the series of General Assembly resolutions on this subject and the Convention and associated resolutions adopted by UNCLOS III on April 30, 1982.

General Assembly Resolutions

While it is true that the germinal ideas reflected in the Maltese

28. 22 U.N. GAOR Annex 1 (Agenda Item 92) at 1, U.N. Doc. A/6695 (1967).

29. *Id.*

note verbale were incorporated in General Assembly resolutions regularly over the years,³⁰ with two exceptions, these ideas were not appreciably developed in those resolutions. The notion of the "common heritage of mankind," the prohibition of national appropriation and the commitment to benefit poor countries remained at their original high level of abstraction and generality except in the so-called Moratorium Resolution³¹ and the Declaration of Principles Resolution.³² It will suffice, therefore, to consider the effect of these two resolutions alone.

The Legal Effect of General Assembly Resolutions

The general rule is quite clear and has been stated as follows by Judge Lauterpacht in his separate opinion in the *South West Africa—Voting Procedure* case:

Although decisions of the General Assembly are endowed with full legal effect in some spheres of the activity of the United Nations and with limited legal effect in other spheres, it may be said, by way of a broad generalization, that they are not legally binding upon the Members of the United Nations. In some matters—such as the election of the Secretary-General, election of members of the Economic and Social Council and of some members of the Trusteeship Council, the adoption of rules of procedure, admission to, suspension from and termination of membership, and approval of the budget and the apportionment of expenses—the full legal effects of the Resolutions of the General Assembly are undeniable. But, in general, they are in the nature of recommendations and it is in the nature of recommendations that, although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them.³³

Those seeking to bestow greater law-creating powers on the General Assembly frequently resort to selective quotation from the Memorandum of the United Nations Office of Legal Affairs on the Use of the Terms "Declaration and Recommendation".³⁴ Read out of context, paragraph three of the memorandum does indeed appear to assist their cause in stating that: "In United Nations practice, a 'declaration' is a formal and solemn instrument, suita-

30. See, e.g., G.A. Res. 2340, 22 U.N. GAOR Supp. (No. 16) at 14, U.N. Doc. A/6964 (1967); G.A. Res. 2467, 23 U.N. GAOR Supp. (No. 18) at 15, U.N. Doc. A/7477 (1968); G.A. Res. 2574, 24 U.N. GAOR Supp. (No. 30) at 10-11, U.N. Doc. A/7834 (1969); G.A. Res. 2881, 26 U.N. GAOR Supp. (No. 29) at 38, U.N. Doc. A/8623 (1971); G.A. Res. 3029, 27 U.N. GAOR Supp. (No. 30) at 21-22, U.N. Doc. A/8949 (1972); G.A. Res. 3067, 28 U.N. GAOR Supp. (No. 30) at 13, U.N. Doc. A/9278 (1973); G.A. Res. 3334, 29 U.N. GAOR Supp. (No. 31) at 10, U.N. Doc. A/L.747 (1974); G.A. Res. 3483, 30 U.N. GAOR Supp. (No. 34) at 9, U.N. Doc. A/L.782 (1975); G.A. Res. 31/63, 31 U.N. GAOR Supp. (No. 39) at 23, U.N. Doc. A/31/L.4 (1976).

31. G.A. Res. 2574, 24 GAOR Supp. (No. 30) at 11, U.N. Doc. A/7834 (1969) [hereinafter referred to as Moratorium Resolution].

32. See *supra* note 9.

33. *South West Africa—Voting Procedure*, 1955 I.C.J. 67, 115.

34. 18 U.N. ECOSOC, U.N. Doc. E/CN.4/L.610 (1962).

ble for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration on Human Rights. A recommendation is less formal.”³⁵ However, paragraph four puts rather a different gloss on the matter:

Apart from the distinction just indicated, there is probably no difference between a “recommendation” or a “declaration” in United Nations practice as far as strict legal principle is concerned. A “declaration” or a “recommendation” is adopted by resolution of a United Nations organ. As such it cannot be made binding upon Member States, in the sense that a treaty or convention is binding upon the parties to it, purely by the device of terming it a “declaration” rather than a “recommendation.” However, in view of the greater solemnity and significance of a “declaration,” it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.³⁶

There are two main points to note from this quotation. Negatively, General Assembly resolutions, irrespective of nomenclature, do not create binding legal rules except in the limited category of cases referred to in the above passage from Judge Lauterpacht’s opinion. Positively, however, the adoption of the resolution *may* constitute part of a wider process through which binding rules are created. The memorandum speaks of the declaration gradually maturing into rules of customary law binding upon States and it may well be that a particular declaration will reflect and give precise formulation to an *opinio juris* which has been maturing in the international community. Alternatively, a declaration may act as a catalyst and, by “impart[ing] . . . a strong expectation that Members of the international community will abide by it,”³⁷ encourage the development of rules of customary law. Again, the wider process of law creation, of which the adoption of the declaration is part, may take an alternative form. A number of States might enter into a treaty or other consensual arrangement committing them to recognize the binding effect of the terms of a declaration; or individual States might bind themselves to observance of its terms through unilateral acts.

In all such cases, however, the text of the declaration and the act of its adoption provide little more than the inert material. It is the additional catalyst provided by (1) state practice before, dur-

35. *Id.* para. 3.

36. *Id.* para. 4.

37. *Id.*

ing and following the adoption of the resolution, or (2) a related consensual engagement, or (3) a unilateral act, which creates the binding legal rule. This is not to deny that the form, the degree of precision and the proportionate vote by which a declaration is adopted are without influence. Clearly, if the resolution is called a "declaration" rather than a "recommendation" or "resolution"; if it purports to be a declaration of "legal principles"; if it is formulated in precise, treaty-like form; if it is adopted unanimously or by a very substantial majority, including the States principally concerned with its subject matter, all these strong, formative factors will lend weight to "the strong expectation that Members of the international community will abide by it."³⁸ They will doubtlessly influence state practice in the matter. But the operation of the law-creating process is still necessary to complete the act of creating a binding rule.

Does regular repetition of similar resolutions or frequent recitation of a resolution affect its capacity to create binding legal rules? If one is considering the legal effect of the resolution as such, it is difficult to differ from Professor MacGibbon's conclusion that "[h]owever many times a recommendation is multiplied it is still at the end of the day a recommendation and not a binding legal obligation."³⁹ On the other hand, it is obvious that a series of resolutions adopted by large majorities may well have a greater impact on state behavior than a single resolution. Even here, however, it would be advisable to ponder Professor MacGibbon's perceptive comment that: "It is by no means obvious whether the twentieth or thirtieth resolution in any series should be viewed as adding to the strength (quite apart from the legal weight) of the call for action or rather as drawing attention to the ineffectuality of the predecessor in the series."⁴⁰

38. *Id.*

39. MacGibbon, *Means for the Identification of International Law. General Assembly Resolutions: Custom, Practice and Mistaken Identity*, in *INTERNATIONAL LAW: TEACHING AND PRACTICE* 10, 17 (B. Cheng ed. 1982).

40. *Id.* at 16 n.24. Judge Lauterpacht's above-mentioned separate opinion is frequently cited on this subject and, as will be seen, it has apparently influenced the attitude of the United States Government. However, in seeking guidance from this opinion, one has to proceed with great caution. Practically everything which was said about the legal effect of General Assembly recommendations referred to those addressed to South Africa by the General Assembly, acting in a supervisory capacity in relation to the South West Africa Mandate. In one passage, for example, Judge Lauterpacht expressed the view that

Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship. An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point

Summing up, then, it is the writer's view that General Assembly resolutions on the legal regime of seabed mining, singly or in series and irrespective of nomenclature or voting figures, do not in themselves, as a matter of law, create binding legal rules. On the other hand, they may well constitute an important part of a broader law-creating process in the several ways described above, and in this context, their various characteristics may be significant. Accordingly, the objective of the following analysis of the key General Assembly resolutions is to examine them in the broader context in order to determine whether, taken with evidence of related state practice, they have created binding legal rules.

The Moratorium Resolution

The first of the two key resolutions, the Moratorium Resolution,⁴¹ was adopted by a vote of 62 to 28, with 28 abstentions.⁴² Given the number and importance of States opposing the resolution or abstaining in the vote, the adoption of this resolution underlines the fact that approximately half of the States in the United Nations were not prepared to give their support to the following declaration embodied in the resolution:

is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organisation is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organisation, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.

1955 I.C.J. 67, 120. This may well be true in relation to recommendations on South Africa's responsibilities as an administering State but it is almost certainly not true in relation to recommendations generally. Indeed, it is difficult to find any dictum in the opinion which is clearly of general application. It is no doubt true generally that a recommendation "is . . . a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly," *id.*, and that it would be wrong to treat General Assembly resolutions "as nominal, insignificant and having no claim to influence the conduct of the Members." *Id.* at 122. That, however, does not take us very far.

41. See Moratorium Resolution, *supra* note 31, at 11.

42. The votes against the resolution included: Australia, Canada, France, Japan, the Netherlands, Norway, the Soviet Union, the United Kingdom and the United States.

[P]ending the establishment of the aforementioned international regime:

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

(b) No claim to any part of that area or its resources shall be recognized.⁴³

The attitude of governments opposed to the Moratorium Resolution is reflected in the following statement by Mr. Stevenson, legal adviser of the United States State Department:

The Resolution is recommendatory and not obligatory. The United States is, therefore, not legally bound by it. The United States is, however required to give good faith consideration to the Resolution in determining its policies.

Article 2, paragraph 2 of the Charter states that "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter." With the exception of certain expressly delineated areas such as membership and the budget, however, the General Assembly is not empowered to make decisions which impose obligations upon Members. The Moratorium Resolution does not fall within one of the special areas in which the General Assembly is empowered to make binding decisions, but rather within the mandate of Articles 10 and 13 that permits the General Assembly to discuss a matter within the scope of the Charter and make recommendations. There is extensive authority that such a resolution cannot impose upon a Member a legal obligation to implement it.

The United States considers the recommendation contained in the Moratorium Resolution an important statement to be given weight in the determination of United States policy. The United States is not, however, obligated to implement the recommendations and has made clear its opposition to the concept.⁴⁴

It must be concluded that, particularly for the twenty-eight States voting against it, the Moratorium Resolution neither created binding rules immediately nor provided a significant basis for the future development of such rules. At the very most, it could be said that States were simply required to give weight in the determination of their national policies to the "important statement" contained in this recommendation of the majority in the General Assembly.

The Declaration of Principles Resolution

The Declaration of Principles Resolution was adopted by a vote of 108 to none, with 14 abstentions.⁴⁵ Moreover, the draft adopted by the First Committee of the General Assembly was itself the result of a majority vote (90 to none, with 11 abstentions) rather

43. Moratorium Resolution, *supra* note 31, at 11.

44. *Hearings Before the Senate Special Subcomm. on the Outer Continental Shelf*, 91st Cong., 2d Sess. 210 (1969) (statement of J. Stevenson, U.S. State Dep't).

45. *Supra* note 9.

than of a consensus.⁴⁶ It was hardly surprising, therefore, that the Bulgarian delegation to the First Committee stated that: "the presentation by this Committee of a document on which many delegations have serious reservations and objections, and which is not the result from a consensus, will neither facilitate our work nor contribute to the solution of the problem."⁴⁷

The Soviet delegation, in announcing that it too would abstain from the vote in the First Committee, also stressed that approval by the General Assembly of this draft cannot impose legal consequences on States, since such decisions are merely of a recommendatory character.⁴⁸

The majority, even of those States voting in favor of the Declaration, were equally careful to limit its significance. The United Kingdom delegation expressed two general reservations:

First, like any other resolution of the General Assembly, the draft resolution has in itself no binding force. Secondly and arising from this, must be regarded as a whole and interpreted as a whole; as a whole, it has no dispositive effect until we have agreement on an international régime and, as part of that agreement, we have a clear, precise and internationally accepted definition of the area to which the régime is to apply. My delegation entirely endorses the view expressed by other delegations that it is not the purpose of the draft declaration of principles to establish an interim régime for the sea-bed.⁴⁹

Mr. Galindo Pohl, a Salvadoran delegate who played an important role in the preparatory work which preceded the adoption of the Declaration, confirmed that it was clearly understood in informal negotiations that it was not intended that the Declaration should provide a provisional regime pending the conclusion of a definitive conventional regime.⁵⁰

Perhaps the most accurate description of the Declaration was given by Sir Laurence McIntyre, of Australia, when he expressed his country's understanding of the principles as "general guidelines for the establishment of a regime for the sea-bed and an earnest of the desire of the great majority of members to have a regime; but we would not see them as having any binding or

46. 25 U.N. GAOR C.1 (1798th mtg.) at 7, U.N. Doc. A/C.1/PV.1798 (1970).

47. 25 U.N. GAOR C.1 (1799th mtg.) at 6, U.N. Doc. A/C.1/PV.1799 (1970).

48. 25 U.N. GAOR C.1 (1798th mtg.) at 6, U.N. Doc. A/C.1/PV.1798 (1970).

49. 25 U.N. GAOR C.1 (1799th mtg.) at 1, para. 4, U.N. Doc. A/C.1/PV.1799 (1970).

50. 25 U.N. GAOR C.1 (1781st mtg.) at 2, para. 2, U.N. Doc. A/C.1/PV.1781 (1970).

mandatory effect upon States in the meantime.”⁵¹

Sir Laurence went on to make it clear that the Declaration

should not prejudice or restrict the scope of matters that in fact can be determined effectively only through the negotiation of an international agreement or agreements at a conference on questions of the law of the sea and the sea-bed. A declaration of principles cannot be used as a substitute for the decisions that will ultimately emerge from such a conference.⁵²

Similar statements were made by, *inter alia*, Canada,⁵³ Norway,⁵⁴ and Peru.⁵⁵

Comments on the status of the concept of the common heritage of mankind also indicate the limited effect of the Declaration of Principles. Thus, the Byelorussian delegate rejected it as a legal principle:

Speaking of legal principles, we should like to stress that, as in the past, the Byelorussian delegation cannot support the concept that the sea-bed and ocean floor beyond the limits of national jurisdiction, and their resources, are the common heritage of mankind in the sense of being a form of collective property of all countries. This idea does not take into account the objective situation in today's world, where there are States having different social systems and different systems of ownership. Such a concept, as was evident in the work of the sea-bed Committee, makes more difficult the working out and adoption of legal principles consonant with the interests of all States.⁵⁶

The Canadian delegation also did not regard the concept as a legal principle at this stage:

We agree also that the resources of the area should be considered to be the common heritage of mankind, although at this stage we view this not so much as a legal principle but rather as a concept to which the international community can give specific legal meaning and upon which it can construct the machinery and the rules of international law which will together comprise the legal regime for the area . . . beyond national jurisdiction.⁵⁷

Speaking in the General Assembly on December 17, 1970, the late Mr. Amerasinghe, the President of UNCLOS III, said: “The

51. 25 U.N. GAOR C.1 (177th mtg.) at 7, para. 49, U.N. Doc. A/C.1/PV.1777 (1970).

52. *Id.* para. 50.

53. 25 U.N. GAOR C.1 (1779th mtg.) at 3, para. 14, U.N. Doc. A/C.1/PV.1779 (1970) (“balanced and comprehensive enough to serve as the foundations and framework for an international regime”).

54. 25 U.N. GAOR C.1 (1774th mtg.) at 5, para. 40, U.N. Doc. A/C.1/PV.1774 (1970) (the principles are “indications . . . of the rules and the provisions of international law. . . . To make them applicable and enforceable . . . we shall [later] have to hammer out detailed legal provisions”).

55. 25 U.N. GAOR C.1 (1777th mtg.) at 5, para. 29, U.N. Doc. A/C.1/PV.1777 (1970) (“only a basis for the preparation of a regime and must not be interpreted as an interim regime”).

56. 25 U.N. GAOR C.1 (1780th mtg.) at 11, para. 108, U.N. Doc. A/C.1/PV.1780 (1970).

57. 25 U.N. GAOR C.1 (1779th mtg.) at 2, para. 6, U.N. Doc. A/C.1/PV.1779 (1970).

Declaration cannot claim the binding force of a treaty internationally negotiated and accepted, but it is a definite step in that direction and . . . it has—if I may adapt the words of Walt Whitman—that fervent element of moral authority that is more binding than treaties.”⁵⁸ Echoing this assessment, the most reasonable conclusion would seem to be that, *at the time of the adoption of the Declaration of Principles*, the concept of the common heritage of mankind could not properly be regarded as a legal principle but embodied guidelines which the community of States had undertaken a moral commitment to follow in good faith in the elaboration of a legal regime for the area beyond the limits of national jurisdiction.

On the other hand, the Declaration of Principles is a much more important instrument than the Moratorium Resolution, in the sense that it clearly has a number of features which give it the potential to constitute a significant part of a wider law-creating process. It has the “formality” and “solemnity” of a Declaration, arguably enunciating “principles of great and lasting importance”;⁵⁹ it purports to be a declaration of principles and the principles “solemnly declared” in its operative paragraphs are formulated in relatively precise, treaty-like language. Although incapable of creating binding legal rules in itself, as a General Assembly resolution, it does therefore nonetheless provide an eminently suitable basis for the generation of legally binding rules through a broader process. Before a final judgment can be made on its longer-term impact, therefore, it is necessary to examine related evidence in subsequent state practice in order to determine whether a rule of customary international law has grown out of it, or whether States have become bound by consensual agreements or unilateral acts formulated by reference to it.

There have been innumerable statements made since 1970 on the status of the Declaration of Principles and more particularly on that of the common heritage principle. It will suffice, however, to examine a number of the more important instruments and statements which reflect the attitudes of the two main schools of thought: that of the Group of 77 that the common heritage principle is now part of international law, and that of some of the lead-

58. 25 U.N. GAOR (1933d mtg.) at 21, para. 245, U.N. Doc. A/PV.1933 (1970).

59. Memorandum on the Use of the Terms “Declaration and Recommendation,” *supra* note 34.

ing industrialized States that it will not attain that status until it is incorporated in an acceptable convention.

It would be fair to say that, although many of the leading members of the Group of 77 acknowledged in 1970 that the Declaration of Principles was not legally binding and did not create an interim regime for seabed mining, their present view is that the Declaration, together with other General Assembly resolutions, statements made in the course of UNCLOS III negotiations and the work of other international institutions and conferences, provides clear evidence that the common heritage principle is binding upon all States as a matter of customary international law. Four instruments illustrate this point of view: (1) the Charter of Economic Rights and Duties of States;⁶⁰ (2) a resolution adopted by the United Nations Conference on Trade and Development (UNCTAD) Board on September 17, 1978 on "The Exploitation of the Seabed beyond the Limits of National Jurisdiction";⁶¹ (3) a statement declaring the position of the Group of 77 on unilateral legislation affecting the resources of the deep seabed, made in the Plenary of UNCLOS III on September 15, 1978 by a representative of Fiji on behalf of the Group of 77;⁶² and (4) a letter dated April 23, 1979 from the Group of Legal Experts on the Question of Unilateral Legislation to the Chairman of the Group of 77.⁶³

The Charter of Economic Rights and Duties of States, 1974

The Charter⁶⁴ was adopted by the General Assembly on December 12, 1974 and had as its fundamental purpose the promotion of "the establishment of the new international economic order [NIEO], based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems."⁶⁵ There is no doubt that the intention of the General Assembly was "to establish or improve norms of universal application"⁶⁶ and that the Charter was viewed as "the first step in the codification and development of the matter."⁶⁷ This intention does not, however, alter the fact that the Charter was adopted as a part of a General Assembly resolution. It is in this context that article 29 of the

60. 29 U.N. GAOR (2315th plen. mtg.) at 100, U.N. Doc. A/3281 (1974), *reprinted in* 14 INT'L LEGAL MATERIALS 251 (1975).

61. 18 UNCTAD C.1, U.N. Doc. TD/B/SC.1/L.2 (1978).

62. 9 UNCLOS III 103-04 (109th plen. mtg.) (1979).

63. 11 UNCLOS III 80, U.N. Doc. A/CONF.62/77 (1980).

64. *See supra* note 60.

65. *Id.* at 252 (Preamble of Charter).

66. *Id.* at 251 (Preamble of Resolution).

67. *Id.* at 252.

Charter has to be appreciated. Article 29, part of chapter III on "Common responsibilities towards the international community," provides that:

The sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area, are the common heritage of mankind. On the basis of the principles adopted by the General Assembly in resolution 2749 (XXV) of 17 December 1970, all States shall ensure that the exploration of the area and exploitation of its resources are carried out exclusively for peaceful purposes and that the benefits derived therefrom are shared equitably by all States, taking into account the particular interests and needs of developing countries; an international regime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon.⁶⁸

Article 29 contains the only reference to this question in the Charter and although, as will be seen, UNCTAD has continued to take an interest in seabed mining, it cannot be said that this aspect of the NIEO has been significantly developed by UNCLOS III. An examination of the voting figures serves to underline that the Charter has little evidentiary value in relation to the legal regime of seabed mining.⁶⁹

The UNCTAD Resolution of September 17, 1978

The resolution on "The Exploitation of the Seabed beyond the Limits of National Jurisdiction" adopted by the Trade and Development Board of UNCTAD on September 17, 1978⁷⁰ originated in a draft submitted by Colombia on behalf of the Group of 77.⁷¹ The Preamble to the resolution made reference to the Moratorium Resolution and the Declaration of Principles and to the consideration "that any unilateral actions designed to carry on the exploitation of the area, before a Convention on the Law of the Sea is adopted, would violate the aforementioned resolutions of the General Assembly . . ."⁷² The operative paragraphs went on, *inter alia*, to call upon all States to refrain from adopting unilateral

68. *Id.* at 260.

69. *Id.* at 265. The following six States voted against the adoption of the resolution: Belgium, Denmark, Federal Republic of Germany, Luxembourg, United Kingdom and United States. The ten countries abstaining were Austria, Canada, France, Ireland, Israel, Italy, Japan, Netherlands, Norway and Spain. The Second Committee of the General Assembly adopted article 29 by 113 votes to none, with 17 abstentions. *Id.*

70. *See supra* note 61.

71. *Id.* at 1.

72. *Id.* at 2.

legislation pending the conclusion of the UNCLOS negotiations;⁷³ to reiterate "that any unilateral actions in contravention of the pertinent resolutions of the General Assembly would not be recognized by the international community and would be invalid according to international law";⁷⁴ and to stress "that States which might undertake such unilateral actions would have to assume the responsibility for their consequences both on the outcome of [UNCLOS III] and on negotiations on commodities related to the exploitation of mineral resources from the sea-bed."⁷⁵

Although adopted by a large majority (65 to 8, with 12 abstentions), the evidentiary value of this resolution is again blighted by the fact that a significant number of powerful industrialized States voted against its adoption.⁷⁶ The United States representative, speaking on behalf of the dissenters, reaffirmed their view that deep seabed mining legislation was lawful. The final passage of his statement is typical of innumerable official statements made since that time, in placing emphasis on (1) the interim nature of the legislation and (2) the need to ensure continuity of investment pending ratification and entry into force of a generally acceptable Convention.⁷⁷

Group of 77 Statements

Two of the clearest statements of the position of the Group of 77 are to be found in a speech made by its chairman in the UNCLOS Plenary on September 15, 1978 and a letter addressed to the said chairman by a group of legal experts. Since the latter is more detailed and comprehensive, attention will be concentrated on its arguments first, before turning to comment briefly on the earlier statement.

Letter dated April 23, 1979 from the Group of Legal Experts on the Question of Unilateral Legislation to the Chairman of the Group of 77⁷⁸

The Group of Legal Experts was established to express in the most precise form possible the Group of 77's repeatedly-declared "clear legal conviction concerning the binding nature of the principles set out in" the 1970 Declaration of Principles and its posi-

73. *Id.* at 2, para. 1.

74. *Id.* at 2, para. 2.

75. *Id.* at 2, para. 3.

76. The dissenters included the Federal Republic of Germany, France, Japan, United Kingdom and the United States. *Id.*

77. *Id.*

78. 9 UNCLOS III 81 (1979).

tion on interim unilateral legislation.⁷⁹ The twelve-member group included no fewer than five members of the International Law Commission.⁸⁰ The letter, which was circulated in UNCLOS III at the request of the Chairman of the Group of 77, can be taken as a precise statement of the considered legal opinion of some of the leading international lawyers drawn from all regions of the developing world. It is therefore deserving of careful analysis.

The Group's "basic points" are presented under six headings.

"Development of the international law of the sea"

In this section, the Group opens by stating that "[n]either the Convention on the High Seas, signed in 1958, nor general international law includes among the freedoms of the high seas the exploration and exploitation of the mineral resources of the sea-bed and the ocean floor beyond the limits of national jurisdiction."⁸¹ Without supporting analysis such a bald statement is virtually worthless. It makes no attempt to refute, and indeed betrays no awareness of the existence of, the argument that any activity which is not expressly prohibited by international law is a permitted freedom of the high seas.

The Group then reviews the history of the United Nations' concern with this subject but, it must be said, in a highly biased fashion. For example, in referring to the Moratorium Resolution and UNCTAD Resolution 52 of May 19, 1972, no indication at all is given of the clear statements of opposition or reservation of positions made by the principal western industrialized States. Similarly, it hardly suffices to refer, without supporting argument, to the "mandatory principles" incorporated in the 1970 Declaration of Principles.

"The binding nature of the fundamental principles governing the area"

This second section of the letter deserves quotation in full:

The principles set out in the Declaration contained in resolution 2749 (XXV) are legally binding principles which were proclaimed in this Declaration and upheld by the affirmative vote of 108 States. It should be added that a number of the few States (14) which abstained on that occasion, although without formulating any objection, subsequently ex-

79. *Id.*

80. *Id.*

81. *Id.* (footnote omitted).

pressed, either explicitly or implicitly, their support for those principles, as did other States members of the international community, thus recognizing by their attitude the force of international custom as expressed in resolution 2749 (XXV).

This custom has given rise to new general principles of public international law which are the basis or legal foundation of any substantive norms regulating the exploration of the area of the sea-bed and the ocean floor and the subsoil thereof and the exploitation of their resources.⁸²

It is, to put it mildly, more than a little misleading to describe the States abstaining from voting on the Declaration of Principles as having done so "without formulating any objection"⁸³ and as having subsequently expressed their support for those principles. As has already been shown, the leading industrialized States have been consistently careful since 1970 to place on record their view that the Declaration has not led to the establishment of new rules of international law.

The law-creating capacity of General Assembly resolutions in general and the potential law-generating capacity of the Declaration of Principles have already been considered. It is, therefore, unnecessary to comment further on the claim that the Declaration and the subsequent expressions of support for its principles have generated new "international custom" and that this custom "has given rise to new general principles of public international law."⁸⁴

"Normative relationship of the principles applicable to the area"

The Group here asserts that all of the principles contained in the Declaration of Principles

form a normative unity that is indivisible and applicable to the area. This normative unity consolidates the applicable principles laid down in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁸⁵

Comment on this passage is difficult in the absence of further elaboration. No one would deny that the principles of the Declaration form part of an indivisible unity. This is another way of saying that the principle of the common heritage of mankind is the sum total of all the more particular principles incorporated in the Declaration. Such a proposition does not, however, have any bearing on the legal force of these principles.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 81-82.

“Legal status of the area”

This section opens with the following statement:

The customary principle of the freedom of the high seas is not an absolute principle; it does not apply to the exploitation of the sea-bed and ocean floors beyond national jurisdiction, because the exploitation thereof was beyond the capacity of States at the time when that principle came into being.⁸⁶

Once again, this argument reflects an inadequate understanding of the nature of the principle of freedom of the high seas. It suggests that a closed list of freedoms existed at some time in the past and that positive evidence is required to prove that a new use has subsequently been added to that list. In reality the onus lies on those seeking to establish that a particular use is prohibited. The scope of freedom of the high seas is not static or frozen at any point of time.

The Group then goes on to argue as follows:

But even on the assumption that this customary principle would be applicable to this exploitation, it would certainly have ceased to be applicable in consequence of the Declaration of Principles of 1970, not only because the Declaration is a resolution adopted by the General Assembly but also because it is an event reflecting a conviction incompatible with *opinio juris sive necessitatis* indispensable to the operation of the principle as an international custom in the exploitation of the sea-bed or ocean floor beyond national jurisdiction.⁸⁷

Here too, we encounter a novel view of the law-creating processes of international law. The Group's case can be restated as follows:

1. Assume that seabed mining was a high seas freedom under customary international law.
2. Its status as a high seas freedom has now been terminated as a consequence of the adoption of the Declaration of Principles because:
 - (i) the Declaration is a resolution adopted by the General Assembly;
 - (ii) the adoption of the Declaration extinguishes one of the essential constituent elements (*opinio juris*) of the rule of customary law that seabed mining is a high seas freedom.

In other words, the contention is that the rights of a number of powerful industrialized States established in customary international law may be extinguished without their consent—indeed

^{86.} *Id.* at 82.

^{87.} *Id.*

over their protests—by a General Assembly resolution. Once again the onus has been misplaced. It lies upon those seeking to deprive States of rights enjoyed under customary international law to prove that, as a result of the operation of recognized law-creating processes, a new rule of international law, binding upon such States, has been created, extinguishing their rights. This onus has certainly not been discharged in this letter.

Finally, in this section, the Group argues that:

There is an obvious difference in legal status as regards the superjacent waters of the area and as regards the sea-bed, subsoil and resources of the area.

Whereas the legal status of the superjacent waters is that of *res communis*, the legal status of the sea-bed, subsoil and resources thereof is that of an indivisible and inalienable common heritage of mankind⁸⁸

It will suffice to say that this proposition assumes what has to be proved and the remainder of the paragraph offers no convincing proof.

“The legal principles applicable to the area and unilateral acts or limited agreements for its exploration and exploitation”

This section of the letter too deserves quotation *in extenso*, representing as it does the firmly held opinion of the Group of 77 developing States:

The principles of law laid down in resolution 2749 (XXV) form the basis of any international regime applicable to the area and its resources.

All activities connected with the exploration and exploitation of the area and other related activities will be governed by the international regime to be established by the conclusion of an international treaty that is generally acceptable and includes appropriate international machinery for implementing the principles of law referred to.

Consequently, any unilateral act or mini-treaty is unlawful in that it violates these principles, for the legal regime, whether provisional or definitive, can only be established with the consent of the international community. . . .

The adoption of unilateral measures, draft legislation and limited agreements would merely be an event without international legal effect and hence incapable of being invoked vis-a-vis the international community.

The great majority of States would not admit the validity of such legislation, nor could such legislation constitute valid grounds for any juridical claim to explore or exploit the area. Furthermore, if such unilateral legislation or mini-treaty should be put into operation, the international responsibility of the States concerned would be engaged in respect of damage caused by such activities incompatible with the principles applicable in the area.

It should be stressed that no investor would have any legal guarantee for his investments in such activities, for he would likewise be subject to individual or collective action by the other States in defence of the com-

88. *Id.*

mon heritage of mankind, and no purported diplomatic protection would carry any legal weight whatsoever.⁸⁹

In light of the above comments on earlier sections of the letter, it is not necessary to comment further on the legal arguments implicit in these several propositions beyond saying that none of them is soundly based in law. These assertions stand or fall with the principal arguments on the legal regime of seabed mining.

"Rule of Law"

In the final sections of the letter, the Group alleges that the conclusion of a mini-treaty or the adoption of unilateral legislation and any attempt to carry them into effect would be inconsistent with the principles of good faith in the conduct of negotiations at international plenipotentiary conferences like UNCLOS III. Given the protracted duration of the Conference, the declared interim nature of the unilateral legislation and the reservation of position made by the States concerned, this is clearly not a tenable proposition.

Speech of Chairman of Group of 77, September 15, 1978⁹⁰

Mr. Nandan's speech covers much the same ground as the letter from the Group of Legal Experts and is open to much the same criticism. It is interesting to see what response it evoked from spokesmen for the principal industrialized States.

Perhaps the clearest and most concise statement of a position shared by the principal industrialized States was contained in the French representative's contribution, when he said:

[L]egally speaking, the argument put forward by the spokesman for the Group of 77 to the effect that unilateral exploitation of the sea-bed was unlawful was not valid. It should be clearly understood that no Government could be bound under international law unless it agreed to be so bound in a treaty, and that in no case could a Government be bound by a legal rule which others sought to impose on it. France had never agreed to any limitations on the freedoms of the sea in so far as they related to the exploitation of the sea-bed apart from those limitations which it might have accepted by treaty or within the framework of the development of international customary law. There were no provisions in existing international positive law which prohibited the reasonable exploitation of the sea-bed on an individual basis.⁹¹

89. *Id.*

90. 9 UNCLOS III 103 (1979).

91. *Id.* at 106, para. 43.

Similar statements were made by representatives of Belgium,⁹² the Federal Republic of Germany,⁹³ Italy,⁹⁴ the United Kingdom⁹⁵ and the United States.⁹⁶ Japan, though stating that it had “no plan at present for national legislation regarding the exploitation of the sea-bed,” nevertheless went on record as believing that “the unilateral legislation which some countries intended to adopt in no way contradicted the concept of the common heritage of man embodied in General Assembly resolution 2749 (XXV),” and that “the question of the legality of such measures . . . could not be raised as long as no convention had been concluded.”⁹⁷

The Significance of the “Practice” of the Group of 77

The purpose of the above review of key documents reflecting the “practice” of the Group of 77 is to provide a basis for assessing the extent to which that practice had contributed to the development into binding rules of law of the principles enunciated in the Declaration of Principles.

What this practice signifies is that some 119 States recognize the principles enunciated in the Declaration as now being part of international law and regard the adoption and application of unilateral interim legislation as being in breach of binding rules of international law. It is true that the figure of 119 States may be regarded as somewhat misleading if it is analyzed in terms of size, population, wealth and contribution to the United Nations budget, but it still represents a remarkable proportion of the international community. More important, however, is the legal basis of the contention that their practice has transformed the non-binding principles of the Declaration of Principles into rules of international law, despite the opposition of a group of large, densely populated, highly industrialized, wealthy States which together contribute nearly half of the United Nations budget.⁹⁸ With due respect to the opinion expressed by the Group of 77’s Group of Legal Experts, there is no foundation for the proposition that the Declaration of Principles and related practice provide evidence of the creation of generally applicable rules of international law. As has been seen, the Declaration itself has no law-creating status;

92. *Id.* at 107, para. 53.

93. *Id.* at 106, paras. 45-46.

94. *Id.* at 107, paras. 51-52.

95. *Id.* at 107-08, paras. 60-61.

96. *Id.* at 104-05, paras. 27-29.

97. *Id.* at 107, para. 54.

98. For example, in 1979 the Federal Republic of Germany (7.70%), France (5.82%), Italy (3.38%), the United Kingdom (4.52%), and the United States (25%) funded 46.42% of the United Nations budget. 32 U.N.Y.B. 1039-40 (1981).

nor, taken with the related practice, does it enable us to say that it evidences the *opinio juris generalis* which constitutes a vital ingredient of a new rule of customary international law. Nor can it be said that this overall corpus of evidence is tantamount to a consensual engagement creating binding rules of international law of universal validity. In truth, it indicates only that a large number of developing States share the same view of the law.

Practice of the Industrialized States

Recapitulating, the industrialized States voted in favor of the Declaration of Principles but made it clear both in concurrent statements and consistently during the UNCLOS III debate that they did not regard the Declaration as constituting an interim legal regime and would continue to regard seabed mining as a high seas freedom until the principles were transformed into an acceptable convention.

There are, however, various other aspects of the industrialized states' practice which remain to be considered. The first is that there is a consistent theme running through Conference statements made by the four principal industrialized States to the effect that they remain committed to the conclusion and entry into force of a Convention on the law of the sea which will give legal precision to the principle that the mineral resources of the deep seabed are the common heritage of mankind. For example, responding to the statement of the Group of 77's position made in Plenary on September 15, 1978,⁹⁹ the British representative said:

As far as the Conference was concerned, interim legislation pending a successful convention would simply aim, as a piece of domestic house-keeping, to regulate entry into the new field in order to ensure orderly progress and the essential continuity of investment needed to develop the new technology. Progress must not be held up, for it was in the interests of the world's consumers of minerals, which included not only the United Kingdom but most developing countries. Interim legislation would be no more than a temporary umbrella which would in no way jeopardize the results of the Conference if it continued to do its work The Government of the United Kingdom remained fully committed to the successful conclusion of a comprehensive and generally acceptable convention as soon as it could be achieved.¹⁰⁰

Paradoxically, the same commitment to the achievement of a comprehensive conventional regime based on the principle of the common heritage of mankind is reflected in the unilateral legisla-

99. See *supra* note 90 and accompanying text.

100. 9 UNCLOS III 107-08 (1979).

tion now adopted by five States and in a number of official statements made about the relationship of the legislation to the Declaration of Principles and the Convention on the Law of the Sea. A full analysis of the legislation adopted by the United States, the Federal Republic of Germany, the United Kingdom and France will be found elsewhere¹⁰¹ and here it will suffice to comment briefly on three common aspects of the legislation: its alleged interim character, its alleged compatibility with the emerging UNCLOS regime and its embodiment of certain common heritage elements.

The principal justification offered for the adoption of these statutes so late in the UNCLOS proceedings was that the work of the mining consortia had reached a critical stage, at which it was necessary to make a crucial decision whether or not to proceed to the next stage, which would involve very large investments. Legislation was therefore needed to ensure continuity of investment at a high level and the retention by the consortia of specialized teams working on their pilot projects. It was, however, reiterated that the legislation was only interim and designed to provide a secure legal basis for investment only until a convention entered into force. The aforementioned passage quoted from the British statement of September 15, 1978¹⁰² is typical of many such assurances.

As further proof of their positive attitude to the achievement of a conventional regime based on the common heritage doctrine, industrialized States have stressed *ab initio* that their unilateral legislation is designed to be compatible with the emerging UNCLOS regime. For example, it was claimed during the passage of the British Act through Parliament that: "[t]he Bill is consistent with the proposals developed at the Conference. It has been specifically designed to be compatible with an internationally agreed regime, as envisaged in the draft convention."¹⁰³

Similarly, Mr. Richardson informed the UNCLOS plenary that:

The United States Government had . . . worked with the Congress in framing legislation compatible with the primary goal of the Conference, namely, the negotiation of a comprehensive law of the sea convention [T]hat legislation was fundamentally consonant with the aims of the Conference, which it could be hoped would adopt an international sea-bed regime well before exploitation could be begun under the terms of national legislation.¹⁰⁴

Admittedly, national legislation falls short of UNCLOS provisions in areas such as site-banking, anti-monopoly provisions,

101. See, e.g., Brown, *supra* note 4.

102. See *supra* text accompanying note 100.

103. PARL. DEB., H.C. 58 (Special Standing Committee, Second Sitting) (June 2, 1981).

104. 9 UNCLOS III 104-05 (1979).

production controls and transfer of technology.¹⁰⁵ The fact remains, however, that it does include some common heritage elements. The legislation is intended to be interim; it makes provision for the imposition of levies on mining licensees and the establishment of revenue-sharing funds. It is compatible with the Convention regime at least in the sense that provision could be made by delegated legislation under it for such matters as site-banking¹⁰⁶ and transfer of technology, though there is no evidence of any such intention at present.

What, then, is the significance of this practice of the industrialized States? Have they, by their support for the Declaration of Principles, their reiterated expressions of commitment to the objective of creating a conventional regime based upon the common heritage principle, and their assurance of the interim nature of their unilateral legislation and of its compatibility with the emerging conventional regime, contributed to the transformation of the common heritage principle into binding rules of international law? The obstacle in the way of any such conclusion is that all such governmental actions and statements have invariably been accompanied by clear reservations to the effect that, pending the acceptance by them of a conventional regime giving precision to the common heritage principle, they regard deep sea mining as a freedom of the high seas.

On the other hand, there are grounds for questioning whether this practice has left the freedom of deep sea mining in its pristine, pre-1967 position. There may be room for a more modest conclusion—that the industrialized States which have adopted unilateral legislation are bound to exercise the freedom of deep sea mining not only with reasonable regard to the interests of other States in their exercise of freedom of the high seas, but also in accordance with *the fundamental principle* of the common heritage of mankind. The argument would start from the premises that although the Declaration of Principles¹⁰⁷ incorporates and develops the fundamental principle of the common heritage of mankind, it is only one of many possible models whereby the fundamental principle could be developed into more detailed norms and that this particular model is not binding in law. If the truth of

105. See Brown, *supra* note 4, at 159, 161-62, 170.

106. See *id.* at 160.

107. See *supra* note 9.

this premise is not self-evident, it will become readily apparent when the history of the UNCLOS negotiations is recalled. Over the years, the Conference considered a number of quite different models to give detailed effect in the Convention to the principle of the common heritage of mankind. Any one of them, had it eventually emerged as the preferred model for incorporation in Part XI of the Convention, would have been regarded as the legitimate concretization of the fundamental principle.

Having established the distinction between the fundamental principle itself and any particular development of it, the next step in the argument is that the above review of the state practice of the industrialized States suggests that they have accepted the fundamental principle, but not its detailed development in either the Declaration of Principles or the Convention on the Law of the Sea. It would then be necessary to consider what limitations on the freedom of deep sea mining are imposed by this acceptance of the fundamental principle. Arguably, the answer is that the industrialized States would be bound by the most basic of the principles enunciated in the Declaration of Principles and accepted by them in practice. They would, for example, be bound by paragraph two of the Declaration, forbidding appropriation or claims to sovereignty or the exercise of sovereign rights over the Area. They would likewise be bound by paragraph seven, which provides that the exploration of the Area and the exploitation of its resources must be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing countries. However, these obligations are stated at a very high level of abstraction and leave considerable scope for interpretation by States concerned. It is thus possible to contend that the unilateral legislation of industrialized States is not inconsistent with these principles: they do not involve any appropriation of, or assertion of sovereign rights over, the area, and their provisions for revenue-sharing do take into account the interests and needs of developing countries. On the other hand, pending elaboration and acceptance of a precise conventional regime, paragraphs four and nine of the Declaration of Principles (envisaging the establishment of an international regime and appropriate international machinery) would not affect the interim right of the industrialized States to continue to exercise the high seas freedom of seabed mining, subject only to observance of the basic rules referred to above.

Thus, the practice of industrialized States indicates that what they have accepted is a fundamental principle which is open to elaboration in countless different ways (in relation, for example,

to production controls, transfer of technology, financial arrangements and representation in institutions); that they have not yet accepted a moratorium on seabed mining pending the elaboration and acceptance of such a detailed regime; and that their unilateral legislation is designed to reflect their acceptance that the exercise of the high seas freedom of seabed mining is now limited by the basic norms stated above.

Clearly, this whole argument rests on shaky foundations since, to survive, it has to surmount the obstacle presented by the insistence over the years by the industrialized powers that seabed mining would remain a high seas freedom until they accepted an alternative conventional regime. Moreover, even if valid, the argument is of dubious worth. What it would prove would simply be that the industrialized States were bound, negatively, not to appropriate or make sovereign claims to the area—which they have no wish to do—and, positively, to take into particular consideration the interests and needs of developing countries. As has been seen, the statutory provisions on revenue-sharing can be considered as having given some effect to this obligation. Closer inspection of these provisions shows, however, that the funds are clearly intended to have a short life and it is by no means clear if, or how, on winding up, they will be distributed for the benefit of the developing States.¹⁰⁸

CONCLUSIONS

The following conclusions are presented on the present status of the deep seabed and the present legal regime governing the exploitation of its mineral resources:

1. Prior to the establishment of the legal concept of the continental shelf, States could acquire an exclusive usufruct of resources situated on the continental margin beyond the territorial sea limit by the practical, effective assertion of such claims, recognized by others.
2. Such rights have now been subsumed under the concept of the continental shelf and the argument that they furnish a fruitful source of analogy for exclusive title to manganese nodules is strained. In any event, the opposition of the vast ma-

108. See Brown, *supra* note 4, at 164-170.

- majority of States would today deny a claimant the recognition or acquiescence necessary to support a claim made on this basis.
3. The evidence does not bear out the argument advanced in the Northcutt Ely opinion that exclusive rights acquired in earlier State practice were enjoyed in the exercise of a freedom of the high seas. Nonetheless, the separate argument that exclusive rights in deep seabed resources may be acquired today in the exercise of a high seas freedom deserves close examination.
 4. The right of users of the high seas may be exercised for any purpose not expressly prohibited by international law. No rule of international law prohibits the acquisition of an exclusive usufruct of a seabed mining site. Subject to its being kept within the bounds of reasonableness, both in terms of locus and conduct of operations, such rights may be acquired in the exercise of a high seas freedom.
 5. General Assembly resolutions on the legal regime of seabed mining, singly or in series and irrespective of nomenclature or voting figures, do not in themselves, as a matter of law, create binding legal rules. They may, however, constitute part of a broader law-creating process.
 6. The Moratorium Resolution neither created binding rules immediately nor provided a significant basis for the future development of such rules. Similarly, the Declaration of Principles Resolution did not create binding rules, but did provide a significant basis for the generation of legally binding rules through a broader law-creating process.
 7. The practice of Group of 77 indicates that at least 119 States recognize the principles enunciated in the Declaration of Principles as part of international law. Nonetheless, the Declaration and the related practice of the Group of 77 does not provide evidence of the creation of generally applicable rules of international law.
 8. The practice of industrialized States has not contributed significantly to the transformation of the common heritage principle into binding rules of international law. At most, it has modified the conditions subject to which States may exercise the freedom of deep sea mining. It must now be exercised in accordance with the basic rules underlying the fundamental principle of the common heritage of mankind. In practice, however, any such obligations would be of very limited scope.