

A NOTE ON SOME DIVERSE MEANINGS OF "THE COMMON HERITAGE OF MANKIND"

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I. THREE INTERPRETATIONS

A. THE PROBLEM

A number of writers on international law, including this author, have speculated on the customary international law status of General Assembly Resolutions as well as those of the United Nation's subsidiary organs and other international organizations in general. Moreover, a case law is currently evolving in decisions of the International Court of Justice¹ on this topic. This outpouring of ideas and publications has been greatly augmented by debates concerning the Declaration of Principles² and the Moratorium Resolution,³ as well as on Article 29 of the United Nations Charter of the Economic Rights and Duties of States.⁴ To participate in such a debate is not the purpose of the present article. This paper addresses itself to a largely implicit and camouflaged lexicographical discord on the meaning of the terms "common heritage of mankind" in Article 1 of the Declaration of Principles.⁵ While this task may seem to serve a more humble end than the broad determination of a law-making function, the prescriptive results of

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1. See Advisory Opinion in the Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa), 1971 I.C.J. 16 (Advisory Opinion of June 21) [hereinafter cited as The Namibia Case]; Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (Judgment of July 25); Western Sahara, 1975 I.C.J. 12 (Advisory Opinion of Jan. 3).

2. Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and The Subsoil Thereof, beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8097 (1970), reprinted in 10 I.L.M. 220 (1971) [hereinafter cited as the Declaration of Principles].

3. United Nations General Assembly Deep Seabed Mining Moratorium Resolution of December 15, 1969, G.A. Res. 2574D, 24 U.N. GAOR Supp. (No. 30) at 11, U.N. Doc. A/7630 (1969) [hereinafter cited as the Moratorium Resolution].

4. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974). See *infra* text accompanying note 18.

5. "The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction . . . are the common heritage of mankind." Declaration of Principles, *supra* note 2, art. 1.

The Declaration of Principles is frequently regarded as being in tandem with the

precisely determining the scope and content of the obligations cast, and of the rights assumed, may serve an equally essential, if less seductive, exercise. Indeed, the underlying premise of this paper is that, until the question of meaning is resolved, the act of prescription merely sows the dragon's teeth of a war of words.

B. THE WAR OF WORDS ("CET ANIMAL EST TRÈS MÉCHANT, QUAND ON L'ATTAQUE, IL SE DÉFEND")⁶

On December 9, 1982 a majority of the states participating in the decade and more of negotiations which culminated at the final ceremonies of the Third United Nations Conference on the Law of the Sea signed the United Nations Convention on the Law of the Sea (the Treaty).⁷ The United States refrained. Some states, including a number of those friendly to the United States (for example Australia, Brazil, Mexico and Nigeria) demanded that the United States not proceed to mine the deep ocean floor for manganese nodules.⁸ These comments, although perhaps disconcerting to the well-intentioned, do no more than mildly echo the excoriating remarks hurled at the 1980 Session of the Third United Nations Conference on the Law of the Sea (UNCLOS III) held in Geneva. At the Plenary Debate on "The USA Unilateral Seabed Mining Legislation," the United States was energetically denounced⁹ for enacting the Deep Seabed Hard Mineral Resources

Moratorium Resolution, *supra* note 3. The operative part of the Moratorium Resolution states that the General Assembly of the United Nations:

Declares that, pending the establishment of the aforementioned international regime:

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

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

6. P.K. THEODORE, *LA MENAGERIE* (1868). (This animal is very mean, when attacked, it defends itself.)

7. U.N. Doc. A/CONF. 62/122 (1982).

8. For example, Chief R.O.A. Akinjide Lan, A.G. of Nigeria and Chairman of the Nigerian Delegation to the United Nations Law of the Sea Conference at Montego Bay, Jamaica, December 8, 1982, stated:

No national legislation, no mini-treaty or no agreement entered into by the "reciprocating nations" under any nation's municipal mining laws would provide a good title as long as a global Convention exists under the United Nations Conference on the Law of the Sea adopted in accordance with its rules and procedures.

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9. See Statement in Plenary Debate on USA Unilateral Seabed Mining Legislation, Monday, July 28, 1980, at 1-2 (verbatim record taken from official LOS Conference tape). For example, Ambassador J. Alan Beesley, Q.C., denounced the U.S. legislation, at the

Act,¹⁰ which President Carter signed into law on June 28, 1980. Last December the United States was execrated for having firmly acted on its belated discovery that the seabed mining regime, which UNCLOS III has fabricated, seeks to establish an environment inimical to American resource interests, and for refusing to go further down the path of agreeing to accept a designated sacrificial role. Hence, this country is now censured for being, so its accusers allege, guilty of bad faith. The critics of the United States also charge this country with illegal conduct in breaking off negotiations for a treaty which had not been finally drafted.

The United States neither signed a treaty nor granted any irrevocable authority to another state or representative to sign a treaty binding her to accept, here and now, the UNCLOS III regime. What then, is the basis of this charge of bad faith and illegal conduct? It is derived from a number of spurious allegations, namely: (1) that participation in the Conference has created equities enuring in other states because of the belief that the United States would become a party to the treaty, whether or not

Third United Nations Conference on the Law of the Sea (UNCLOS III), Ninth Resumed Session, where he said, *inter alia*:

I wish to make quite clear what our position is, Mr. President. We regret this legislation. We deplore it. We consider it unnecessary, undesirable, unjustifiable and untimely. We consider it contrary to the concept of the common heritage of mankind, a concept quite possibly the greatest of any principle or ideal which will emerge from this Conference. We consider that it violates the fundamental principle, of which my Delegation had a large part in the establishment, to which the Conference is dedicated, namely the principle of consensus. We do not accept the validity of the arguments advanced in support of such legislation. We do not understand the rationale for the legislation, coming as it does so close to the end of this Conference, and we say this with the greatest of understanding for the country which has passed this legislation. We share the deep concern expressed by speakers representing the vast majority of humanity, certainly the vast majority of delegations represented at this Conference. . . . What we find particularly objectionable is that the Conference appears to be being told what to do on certain questions such as protection of investments. Surely there is a better approach and it's one that USA delegation above all has always followed—the attempt to negotiate in good faith to achieve equitable compromises.

Well, we are all here to negotiate in good faith and not on the basis of a dictate of a pre-judgment of the results specifically designed to override the outcome of our deliberations if they don't happen to agree with the preconditions laid down.

For a selection of some additional samples of this kind of denunciation voiced at that Plenary Debate, see Goldie, *A Selection of Books Reflecting Perspectives in the Seabed Mining Debate: Part I*, 15 INT'L LAW. 293, 298-300 (1981) [hereinafter cited as Goldie, *A Selection of Views: Part I*].

10. Pub. L. No. 96-283, 94 Stat. 553 (1980) (codified at 30 U.S.C. §§ 1401-1473)(Supp. V 1981).

her interests were adequately reflected in the final document; (2) that the great majority of states which have signed the treaty have pre-empted the exploitation of the minerals of the deep ocean floor so as to preclude a state not a member of the regime created under the Treaty from engaging in activities inconsistent with that regime's policies and prescriptions; and (3) an argument that has two aspects, one strong, the other weak, to the effect that the United States' vote in favor of the Resolution, approved by the United Nations General Assembly on December 17, 1970, entitled the Declaration of Principles Governing the Seabed and Subsoil Thereof Beyond the Limits of National Jurisdiction,¹¹ has a legally preclusive effect that prevents the United States from permitting deep seabed mining under its policies and laws. The key to both arguments is in that Declaration's Article 1 which asserts:

The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.¹²

The strong argument simply asserts that the manifesto of Article 1, "the common heritage of mankind," has become instant customary international law. It operates effectively to preclude all seabed mining activities outside the UNCLOS III regime "to be established." It also is said to invalidate all other possible treaty regimes on the subject. The weak argument, on the other hand, merely asserts that the United States' vote in favor of the Declaration of Principles carried the necessary implication, despite declarations to the contrary, that this country also accepted the then emerging Group of 77's¹³ interpretation of the "common heritage" principle.

1. "Instant Customary International Law"¹⁴

The strong argument for the preclusive effect of the manifesto contained in the common heritage formula contends

11. Declaration of Principles, *supra* note 2.

12. *Id.* art. 1.

13. This is the name standardly given to the caucus of developing countries operating on what they perceive to be their common interest in voting in the various institutions of the United Nations family. The designation itself would now appear to be an anachronism, since the number of caucus members has swollen from the original 77 to over 121 (at this reviewer's last count). The number is still growing.

14. For the coinage of this evocative and descriptive phrase see Cheng, *United Na-*

that international law has been changed by the General Assembly's lopsided votes¹⁵ in favor of the Moratorium and Declaration of Principles Resolutions, and through its continuing evolution towards the New International Economic Order¹⁶—the stated objective of which is to facilitate the transference of wealth and power to the developing world.¹⁷ A result of this change, so the contention runs, has been to invalidate the underlying property and contract institutions, doctrines, rules and concepts upon which private and state-owned deep seabed mining enterprises ground the legality, probable effectiveness and validity of their predictions and transactions.

In this context, Article 29 of the United Nations Charter of the Economic Rights and Duties of States is worth mentioning. It summarizes the attitude of the Group of 77 towards both the hard mineral resources of the deep ocean floor, and deep seabed mining by the American mining industry and its partners, in the following terms:

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

tions Resolution on Outer Space: "Instant International Customary Law"?, 5 INDIAN J. INT'L L. 23 (1965). For the relevance of voting support for the United Nations General Assembly resolutions to the formation of international law, see Goldie, *The North Sea Continental Shelf Case—A Ray of Hope for the International Court?*, 16 N.Y.L. FORUM 325, 342-49 (1970), and the authors cited therein as participants in the debate.

15. The vote on the Moratorium Resolution was 62 in favor, 28 against, 28 abstaining, and 8 absent. None of the major maritime states, it should be noted, voted in favor of the Moratorium Resolution. By contrast, the vote on the Declaration of Principles was 108 in favor, none against, 14 abstaining, none absent.

16. See, e.g., United Nations Charter of the Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974). See also International Development Strategy for the Second United Nations Development Decade, G.A. Res. 2626, 25 U.N. GAOR Supp. (No. 28) at 39, U.N. Doc. A/8028 (1970); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, 26 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974); Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, 22 U.N. GAOR Supp. (No. 1) at 5, U.N. Doc. A/9559 (1974); Development and International Economic Cooperation, G.A. Res. 3362, 27 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/10301 (1975); Preparation for an International Development Strategy for the Third United Nations Development Decade, G.A. Res. 33/193, 33 U.N. GAOR Supp. (No. 45) at 121, U.N. Doc. A/33/45 (1978). See also G.A. Res. 32/174, 32 U.N. GAOR Supp. (No. 45) at 107, U.N. Doc. A/32/45 (1977).

17. See, e.g., R. MEAGHER, AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER: A STUDY OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES, *passim* (1979), and the documents therein cited and presented.

(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.¹⁸

The two resolutions of the United Nations General Assembly (namely the Moratorium and Declaration of Principles Resolutions)¹⁹ have been declared to create customary international law here and now. Thus, the "Group of Legal Experts on the Question of Unilateral Legislation"²⁰ have asserted, in their Manifesto, that:

The principles set out in resolution 2749 (XXV) [Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction] 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 expressed, 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.

This custom has given rise to the new general principles of

18. Charter of the Economic Rights, *supra* note 16, art. 29.

19. See *supra* note 5.

20. The Group of Legal Experts consisted of Dr. Roberto Herrera Caceres (Honduras), Ambassador to Belgium, the Netherlands and the EEC, as Chairman, and the following members: Professor Madjid Bencheikh (Algeria), Professor of Law; Professor Mohamed Bennouna (Morocco), Dean of the Faculty of Law, Rabat; Dr. Jorge Castaneda (Mexico), Ambassador, member of the International Law Commission; Dr. S.P. Jagota (India), Ambassador, Under-Secretary and Legal Adviser to the Ministry of Foreign Affairs, member of the International Law Commission; Dr. Julio Cesar Lupinacci (Uruguay), Under-Secretary, Ministry of Foreign Affairs; Mr. Biram Ndiaye (Senegal), Professor of Law, University of Dakar; Dr. Frank X. Njenga (Kenya), Under-Secretary, member of the International Law Commission; Mr. C. Pinto (Sri Lanka), Ambassador to the Federal Republic of Germany, member of the International Law Commission; Mr. K. Rattray (Jamaica), Ambassador, Solicitor General, Attorney-General's Chambers; Dr. S. Sucharitkul (Thailand), Director General, Treaty and Legal Departments, Ministry of Foreign Affairs, member of the International Law Commission; Dr. Yasseen (United Arab Emirates), Counsellor, Permanent Mission at Geneva.

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.²¹

In support of the opposite thesis that the Declaration of Principles does not constitute international law, one should point out that the Declaration must be read both in light of the explanations of votes given to the First Committee of the General Assembly, and Judge Sir Robert Jennings' assertion that "seen in the light of these explanations the Declaration assumes a very different aspect from that reflected in the mere text of it."²² Indeed, far from having the legislative effect which, for example, the Group of Legal Experts claim for it in their Manifesto,²³ the Declaration of Principles has received neither a universal *opinio juris* nor the general support in state practice by the states most significantly interested or directly affected. It must also be emphasized that both of these two necessary conditions must be met before the regime contemplated in the Declaration of Principles can lawfully be said to have replaced the positive norms and established rights and privileges now guaranteed by the freedom of the seas. On this issue of the importance of practice, in addition to declarations evidencing *opinio juris sive necessitatis*, the International Court of Justice spoke unequivocally in the *North Sea Continental Shelf Cases*,²⁴ when it stated that:

21. 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 (annexed to the letter dated April 24, 1979 from the Chairman of the Group of 77 to the Chairman of the Third United Nations Conference on the Law of the Sea). Geneva, Eighth Session, Mar. 19 to Apr. 27, 1979 at 6, U.N. Doc. A/CONF. 62/77 (1979), 9 UNCLLOS III O.R. 8th Sess., Geneva, Mar. 19 to Apr. 27, 1979 at 80, U.N. Sales No. E.80V.6 (1980) [hereinafter cited as Manifesto]. See also ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, STUDY ON THE REVISED SINGLE NEGOTIATING TEXTS 10-11 (1976), where the following statement received agreement:

The only way which this concept [i.e., the status of the hard mineral resources of the deep ocean floor beyond the territorial jurisdiction of any state as "the common heritage of mankind"] can be translated into practice would be to treat the resources of the area as being under the joint undivided ownership of all nations. . . . If this is so, then the activities in the area have necessarily to be under [the] effective control of the international authority acting on behalf of the entire international community and activities by individual States or their nationals cannot be permitted except when doing so on behalf of the authority.

22. Jennings, *The United States Draft Treaty on the International Seabed Area: Basic Principles*, 20 INT'L & COMP. L.Q. 433, 435-36, 439 (1970).

23. See *supra* note 21.

24. *North Sea Continental Shelf Cases* (W. Ger. v. Den. & Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20).

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to evidence a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.²⁵

It should be noted, furthermore, that the Court rejected an argument that a principle of equidistance (Article 6 of the Continental Shelf Convention),²⁶ had become crystallized into a customary rule of international law through a combination of definitional refinement in the successive drafts of the International Law Commission, and the adoption of the Continental Shelf Convention by the 1958 United Nations Conference on the Law of the Sea.²⁷ The Court based this rejection on grounds of a lack of uniformity of state practice in this regard in the past and the probability of an equal lack of uniformity in the future because of the permissibility of making reservations with respect to Article 6 (and the other articles apart from Articles 1-3).²⁸

The *North Sea Continental Shelf Cases*, however, now provide only a rather early milestone on the road to an increasing acknowledgment of the role of the General Assembly, conferences called by it, and its subsidiary organs, in the formation of international law. (Space does not permit an analysis of the classification of that law — i.e., as custom, general principles of international law, etc.)²⁹ Apart from areas where the General Assembly is recognized as having a special competence, for example, in the regulation of its subsidiary organs, the Secretariat, or the territory of Namibia,³⁰ its resolutions may be consulted as indicating trends in opinion and, further, as betokening legal developments.

For example, in the *Western Sahara* case,³¹ the International Court of Justice concluded that the right of self-determination for non-self-governing territories had become a norm of international law. In reaching this conclusion it first looked to Article 1, paragraph 2 of the United Nations Charter which based the

25. *Id.* at 44. See also statements to a similar effect in *The Asylum Case* (Colum. v. Peru), 1950 I.C.J. 266, 277 (Judgment of Nov. 20); *The Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 9, at 28 (Judgment of Sept. 7).

26. Convention on the Continental Shelf, done April 29, 1958, [1964] 15 U.S.T. 471, 474, T.I.A.S. No. 5578, at 4, 499 U.N.T.S. 311, 312, 316 (effective June 10, 1964).

27. *Continental Shelf Cases*, 1969 I.C.J. at 38.

28. *Id.* at 38-39.

29. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38.

30. See *The Namibia Case*, *supra* note 1.

31. *Western Sahara*, 1975 I.C.J. 12 (Advisory Opinion of Jan. 3).

United Nations' purpose of developing friendly relations among nations "on respect for the principle of equal rights and self-determination of peoples . . ." ³² The Court then looked to the General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, ³³ and subsequent resolutions and declarations on the topic. In the *Fisheries Jurisdiction* case, ³⁴ the Court looked to conferences called by the General Assembly to underpin, in part, the concept of the "preferential rights of the coastal State in a special situation . . ." ³⁵

In the *Western Sahara* case, the Court could also support its thesis by reference to supporting state practice. ³⁶ Indeed, there would appear to have been a veritable race of imperial divestiture between those who spoke and voted in the General Assembly and those who had ruled the colonial territories and were rapidly transferring the powers of government to their former subjects. The almost universal divestiture of colonial power was also an important, if barely mentioned, element underpinning the Court's perspective in the *Western Sahara* case. ³⁷ That decision reflected the decisive state practice so essential for establishing the existence of a rule of customary international law. In addition, we should not lose sight of the fact that the resolutions, like the divestitures, were merely spelling out the modalities and carrying into fruition the obligations which states had assumed under the United Nations Charter.

The quality of consent, measured not only in terms of assenting votes, but also by practical performance and participation, remains an essential element. The stage has not been reached where parliamentary diplomacy can be used as a tool in the hands of large majorities of states in the General Assembly, and at con-

32. See also *The Namibia Case*, *supra* note 1, at 31.

33. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961).

34. *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3 (Judgment of July 25). For an early, discriminating and seminal view of the status, in international law, of resolutions of the General Assembly, see the separate opinion of Judge Lauterpacht in *Southwest Africa - Voting Procedure*, 1955 I.C.J. 67, 115 (Advisory Opinion of June 7).

35. *Id.* at 26.

36. Note, for example, the Court's comment: "State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States, particularly in favor of countries or territories in a situation of special dependence on coastal fisheries." *Id.* In reviewing "state practice" the Court looked, not only to resolutions and declarations at conferences, but also to agreements and arrangements in the North-East Atlantic and North-East Arctic. *Id.*

37. *Western Sahara*, 1975 I.C.J. at 29-35.

ferences, to impose repugnant obligations on dissenting minorities. This is especially true when such impositions effectively exclude the minorities' inputs into the prescriptive arena.³⁸ Nor may those majorities use their numbers to render minority states' interests meaningless.

In addition to these considerations, this writer has offered elsewhere an argument more specifically relevant to the issue of the status of the Declaration of Principles in terms of its failure to have crystallized into customary international law. It is as follows:

Have these resolutions crystallized into law? And would such a law make illegal any form of deep seabed mining beyond national jurisdiction outside the regime to be devised at UNCLOS III?

At the San Francisco Conference of 1945 which drafted the Charter of the United Nations,³⁹ a proposal was made which would have given the General Assembly power to declare international law. This was firmly rejected. But what would then be the status of such resolutions as those containing the declarations of the "common heritage"? There are two levels of effectiveness to be considered. First, resolutions of this kind, of themselves, cannot be self-executing. They are not legislation with immediately obligating effects. Some resolutions, however, such as that on decolonization, through both the widespread support they received and the speedy implementation of their goals in the practice of states, especially in practice of the former colonizing states, have become recognized as *customary* international law. On the other hand, when implementation by universal or near universal state practice is lacking, the relevant resolutions have merely the quality of the "policy directives" of say, the Irish and Indian Constitutions.

But such "policy directives" are not entirely ineffective. They do at least impose duties of respect and recognition by virtue of their moral force. A state acting against their terms should thoroughly consider its compelling reasons for so acting, especially if, while some states choose to ignore that directive, others are building up a state practice in its support. So far, there has been little, if any, state practice implementing the "common heritage" principle.

38. For a discussion of the important notion of the prescriptive arena in the formation of international obligations, see McDougal, Laswell, and Reisman, *The World Constitutive Process of Authoritative Division*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (C. Black & R. Falk eds. 1969).

39. The Charter entered into force on Oct. 24, 1945.

There is a further consideration. Where states act, even if in order to implement a General Assembly Resolution, in a manner which invades the existing rights of other states and involves breaches of international law, further grave issues are raised. Today, for example, the seizure of a foreign flag ship, without lawful justification (that is, without the justification of a treaty, customary international law, right or privilege so to act), is a breach of the customary international law of the sea. It also involves a breach of the United Nations Charter (including Article 2, paragraph 4).⁴⁰ While, traditionally, customary international law could once have been created through acts which were originally unlawful if acquiesced in for a sufficiently long period, and on a sufficiently wide basis, it is doubtful whether the world community would today accept a legal principle based on acts in defiance of the United Nations Charter. It is to be doubted, furthermore, if the essential ingredient of *acquiescence* would be forthcoming. It should be noted, therefore, that a state practice seeking to implement the "common heritage" principle should not itself be steeped in initial illegality. This may well leave the establishment of that principle to the consent of the states concerned in a universal or nearly universal convention rather than through the high-handed unilateral and illegal acts of states seeking, through confrontation tactics, to establish what they claim (and mistakenly claim, it is insisted) to be a state practice leading to the creation of a proposed rule of customary international law.

It seems to me, therefore, that here and now we are in a situation of *stasis*. On the one hand, there is an imminent possibility of change; on the other, there is no body of law prohibiting deep seabed mining. Furthermore, many of the acts which might be taken to prevent such mining could themselves constitute serious breaches of international law—for example, infringement of the rights of the flag nation of a mining ship, breaches of the "rules of the road," and illegal searches and seizures.⁴¹

40. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

It seems unusual to this writer that the "Group of Legal Experts" would advocate the argument suggested in the text accompanying note 27 *supra*, an argument premised upon and supporting, or at least sympathizing with, conduct constituting such a palpable breach of the U.N. Charter.

41. Goldie, *Customary International Law and Deep Seabed Mining*, 6 SYR. J. INT'L L. & COM. 173, 180-82 (1979).

2. *Interpretation: a Matter of "Good Faith" and Alleged "Reliance" through "Participation"*

The proponents of the argument for the legislative effect of a General Assembly Resolution assert that the United States, by accepting the principle of the common heritage of mankind, participating in the negotiations of the Third United Nations Conference on the Law of the Sea, and especially, in the drafting of Articles 136 and 137 of the Treaty,⁴² has also accepted the Group of 77's interpretation of the phrase common heritage, rather than the interpretation expounded by American spokesmen and representatives at the Conference. The accusers argue that the imputed acceptance entitles them to charge any subsequent United States action in support or regulation of its domestic deep seabed mining industry as a breach of that international legislation. Their thesis is based on the premise that the only possible interpretation of the common heritage of mankind is that it operates preclusively on mining activities not licensed under the regime as instant customary international law, immediately binding on all the states of the world. Such an interpretation repeals the doctrine of the freedom of the high seas, at least insofar as it applies to the deep seabed and its resources, and dedicates the exclusive control of that seabed area to a centralized enclosure.⁴³

3. *Other Perspectives*

On the other hand, many other interpretations are possible, not all of which have the preclusive effect of the one put forward by the representatives of the Group of 77. Indeed, one other interpretation considers an inclusive open access customary regime to be as legitimate as the preclusive interpretation under the common heritage slogan. The open access interpretation, which has been reiterated by the United States representatives at every opportunity, asserts that, insofar as it reflects customary international law, common heritage means no more than the commonness of a common field wherein all may pasture their stock, or a

42. Article 136 states: "The Area [the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction] and its resources are the common heritage of mankind." U.N. Doc. A/CONF. 62/122 (1980). For the text of Article 137, see *infra* note 47.

43. For a discussion of enclosures in the context of the world's commons see *supra* notes 32-36 and accompanying text. See also Goldie, *A Modest Proposal for Preventing International Law from being a Burthen to the International Community and to Law Teachers*, 13 V.A. J. INT'L L. 331, 336-37 (1973) [hereinafter cited as Goldie, *Modest Proposal*].

common well wherefrom all may draw their water, or a common stream in which all may fish. Its commonness means that no state may assert exclusive, territorial sovereignty over any part of it.⁴⁴ This interpretation may be contrasted with the first position, that of the Group of 77. Spokesmen of that group argue that when the U.N. General Assembly agreed to the common heritage principle of Article 1 of the Declaration of Principles, a preclusive regime was thereby immediately established regarding deep seabed mining, and that, notwithstanding the prior legal position, the freedom of the high seas no longer applied to mining activities under the high seas and beyond the limits of national jurisdiction.

A third definition, that advocated by Ambassador Arvid Pardo, argues that the Declaration of Principles has prescribed an ideal of the centralized or international enclosure⁴⁵ of the high seas. This should apply to all of the resources of the oceans beyond the limits of national jurisdiction, not only to deep seabed mining. Pardo deplors the national enclosures of the oceans' commons by coastal states which the United Nations Convention on the Law of the Sea permits.⁴⁶

C. THE COMPETING INTERPRETATIONS

1. The Group of 77's Assertion of a Preclusive Effect

The Group of 77's position was succinctly stated by Ambassador Pinto to the Law of the Sea Workshop on December 11-14, 1978 at the University of Hawaii. He argued that the mineral resources of the deep seabed are currently *res publicae*. This he defined as follows:

This [the common heritage of mankind] means that those minerals cannot be freely mined. They are not there, so to speak, for the taking. The common heritage of mankind is the common property of mankind. The commonness of the "common heritage" is a commonness of ownership and benefit. The minerals are owned in common by your country and mine, and by all the rest as well. In their original locations these resources belong in undivided and indivisible share to your country and to mine, and to

44. See *infra* note 64 and accompanying text.

45. See *infra* notes 60-62 and accompanying text; see also Goldie, *Modest Proposal*, *supra* note 43, at 336-37.

46. Third United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261.

all the rest—to all mankind, in fact, whether organized as States or not. If you touch the nodules at the bottom of the sea, you touch my property. If you take them away, you take away my property.⁴⁷

He further explained this definition in terms of the interpretation, advocated by the Group of 77, of the common heritage principle, as effectively denying any right of access on the part of any person or state prior to the establishment of a world-wide treaty regime. He contended that:

It follows, therefore, that before you can mine the nodules and win them from the bottom of the sea, mankind must have consented to the method you have chosen. It is because all of us agreed eight years ago that this was the absolute, fundamental rule of the game, that this was in fact, the law, that we have engaged in for eight years in trying to decide what method or system of resource-taking shall have mankind's approval.⁴⁸

An additional argument has been propounded that Paragraph 1 of the General Assembly's Declaration of Principles has effectively dedicated the hard minerals of the deep seabeds to the world community's sole use as a whole and as having effectively denied private (or state enterprise) access, except by permission of the representatives of "all the peoples of the world."⁴⁹ In addi-

47. Pinto, *Statement*, in ALTERNATIVES IN DEEPSEA MINING 13 (S. Allen & J. Craven eds. 1979) [hereinafter cited as Pinto, *Statement*]. Article 137 of the Draft Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/L.78 (1981) [hereinafter cited as Draft Convention] formulates, as a Treaty-based agreement, not as a customary norm, the specifics of this view in the following terms:

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized.
2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.
3. No state or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

48. Pinto, *Statement*, *supra* note 47, at 13-14.

49. See Draft Convention, *supra* note 47, Art. 137. See also Statement of Mr. Pohl (El Salvador), 25 U.N. GAOR c.1 (1781st mtg.) at 3, U.N. Doc. A/C.1/PV.1975, at 2 (1970); see statement of Mr. Zegers (Chile), U.N. Doc. A/C.1/PV.1975, at 2 (1970), where Mr. Zegers

tion to representatives of the Group of 77 and of the Eastern European Bloc countries in the General Assembly, other leaders of opinion in the Second and Third Worlds have echoed this view; for example, the "Group of Legal Experts on the Question of Unilateral Legislation"⁵⁰ have contended that:

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

. . . .

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 as the sole representative of mankind and in conformity with the system determined by the international community.

. . . .

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 defense of the common heritage of mankind, and no purported diplomatic protection would carry any legal weight whatsoever.⁵¹

This interpretation that the common heritage of mankind has a preclusive effect on deep seabed mining, and the Group of 77's attack on the U.S. thesis regarding the right of her citizens to mine for manganese nodules, has been examined by Ambassador Pinto in terms of Roman Law doctrines and analogies. He declared that:

The legal status of the resources of deep seabed itself forbids mining under unilaterally developed individual or group regimes however well-intentioned, however efficient, however designed to fit in and coalesce with some future internationally agreed

said, *inter alia*: "Legally, we might contend that it is an indivisible property with fruits that can be divided. But politically and economically speaking, it means that all states, coastal or landlocked, will participate in the administration of the seabed beyond national jurisdiction and in the benefits derived from that region." See also statements of the representatives of Guyana, Peru, Venezuela, Malaysia, Libya, Nigeria, Yugoslavia, and Brazil *et al.*, U.N. Doc. A/C.1/PV.1788, at 2, 10, 13 (1970); U.N. Doc. A/C.1/PV.1786, at 2 (1970); U.N. Doc. A/C.1/PV.1780, at 2-3 (1970); U.N. Doc. A/C.1/PV.1784, at 7 (1970); and U.N. Doc. A/C.1/PV.1777, at 11 (1970).

50. See *supra* note 20.

51. See *supra* note 21.

regime. . . . [T]he "common heritage" of these resources . . . is more akin to property held in trust—held in trust for "mankind as a whole," for the public. It is therefore closest to "*res publicae*," the property of the people, to be administered by the people and for the people.⁵²

Much juridical analysis has gone into Ambassador Pinto's persuasive presentation, and into that of his colleagues, regarding their interpretation of the common heritage principle. By contrast, no commensurate explanation has convincingly vindicated their premises by justifying the legal validity of that interpretation, or of the claims deriving therefrom. The question of how that one view of the principle of the common heritage has come to supplant the freedom of the high seas and has transformed what was once the lawful exercise of an assured privilege into an unlawful act, remains unanswered.

2. *Freedom of the High Seas and Open Access to Common Goods*

Theodore Kronmiller⁵³ has supported the view advocated by the United States and other developed Western democracies as an application of the traditional doctrine of the freedom of the high seas. This is expressed in terms of a theory of common access to common goods. He has summarized this position in the following conclusory statement:

[U]nder international law, it is permissible for a State or private enterprise unilaterally to appropriate the resources of the seabed and subsoil beyond the limits of national jurisdiction. Deep seabed mining is clearly within the principle of the freedom of the seas and is consistent with rules of customary international law and relevant conventional law. All States are under a duty to respect the lawful exercise of the freedom to explore and exploit the resources of the deep seabed and subsoil.

To this it should be added that, in international law, there is no reason why this activity may not be supported by domestic legislation which does not purport to claim sovereignty or sovereign rights over, or ownership of, areas of the deep seabed and subsoil or otherwise to exclude nationals of nonconsenting States.⁵⁴

52. Pinto, *Statement*, *supra* note 47, at 14-15.

53. T. KRONMILLER, *THE LAWFULNESS OF DEEP SEABED MINING* (1980).

54. *Id.* at 521.

After a thorough review of both the Declaration of Principles and the Moratorium Resolution, with reference to the emergence of the thesis that seabed hard minerals beyond the territorial jurisdiction of any state are the common heritage of mankind, he argues that, while acceptance of the doctrine is widespread, if not universal, it remains without specific content or applicability. Indeed, he argues that all states should have access to the exploration and exploitation of the minerals of the ocean floor,⁵⁵ and that this concept will remain valid under customary law until it is replaced by a universally accepted treaty. Exceptions to the current customary regime may come into being, however, through more particular treaties among the parties, the transnational operations of appropriately drafted domestic legislation creating reciprocal regimes, and proposals to the participating states by the Third United Nations Conference on the Law of the Sea.

The supporters of open access and freedom of the high seas argue that, short of universal acceptance, the regime prescribed in the U.N. Treaty on the Law of the Sea necessarily remains a special treaty regime operating only among the parties to it.⁵⁶ This last point too frequently appears to have been forgotten, perhaps largely due to the enthusiastic rhetoric of those who wish to establish a new universal regime which would oust the present customary law system. Their especial target for demolition appears to be the freedom of the high seas, and the rights, liberties and privileges, including free and equal access to the oceans' resources, which flow therefrom.

The premise of the argument that the Declaration of Principles does not constitute an instant and preclusive rule of international law⁵⁷ is the surely unobjectionable proposition that, on the basis of the sovereign equality and independence of states, a state should not be held to be bound by an international instrument to which it is not a consenting party. If such an instrument reflects

55. REPORT OF THE INTERNATIONAL LAW ASSOCIATION, 54TH CONFERENCE, THE HAGUE 824 (1970). Indeed, Kronmiller points out that this is an example of actions taken "not only within the U.N., but also outside it, to affirm and to give content to the notion of the common heritage of mankind." He argues that this exemplifies, and testifies, to the historical fact that the "common heritage existed independently of the General Principles Resolution." KRONMILLER, *supra* note 53, at 238-39.

56. On this issue, which has become only too facily blurred in debate, see the important discussion by Jennings, *supra* note 22 at 435-36.

57. See *supra* notes 22-24 and accompanying text.

agreement between a number of states, it still necessarily remains *res inter alios acta* amongst all others. A vitally interested non-signatory state may not be deprived of its existing fundamental rights and freedoms without its consent and without due attention being paid to its right to determine its own destiny.

In the meantime, exceptions to the current customary order may attain legal status between the parties by more particular treaty regimes, or by the transnational operation of appropriately drafted reciprocating domestic legal systems, or by adherence to the regime to be established under the Treaty which was signed at Montego Bay in December 1982. That treaty culminated the long, arduous work of the Third United Nations Conference on the Law of the Sea, but it still awaits a sufficient number of adherences before it can enter into force among a minimum number of parties to it.

One final point: The United States' position, reflected in the Deep Seabed Hard Minerals Resources Act of 1980,⁵⁸ advocates open access and an escrow fund for all. This could arguably be said to be tinged with Professor John Rawls' "second principle of justice" because while it envisages an inequality of access to exploitable resources, it seeks to give the greatest tangible benefits to the most disadvantaged.⁵⁹

3. *Ambassador Arvid Pardo—"Centralized Enclosure"*

A third interpretation of the common heritage principle is that of Ambassador Arvid Pardo, who is regarded as the progenitor⁶⁰ of this phrase in the law of the sea context. In his critical review of the law of the sea negotiations, he wrote:

The objective of the Maltese proposal was to replace the principle of freedom of the seas by the principle of common heritage of mankind in order to preserve the greater part of ocean space as a commons accessible to the international community. The commons of the high seas, however, would be no longer open to the whims of the users and exploiters; it would be internationally administered. International administration of the commons and management of its resources for the common good

58. See *supra* note 10.

59. For a critical discussion of the application of Professor John Rawls' principles and prescriptions of justice to the international arena, see S. HOFFMAN, *DUTIES BEYOND BORDERS* 154-58 (1981).

60. See, Pardo, *Whose is the Bed of the Sea?*, 62 *PROC. AM. SOC'Y INT'L L.* 216 (1968).

distinguished the principle of common heritage from the traditional principle of the high seas as *res communis*.⁶¹

He added the explanation that:

[I]n the Maltese view the common heritage concept has five basic implications. First, the common heritage of mankind could not be appropriated; it was open to use by the international community but was not owned by the international community. Second, it required a system of management in which all users have a right to share. Third, it implied an active sharing of benefits, not only financial but also benefits derived from shared management and transfer of technology, thus radically transforming the conventional relationships between states and traditional concepts of development aid. Fourth, the concept of common heritage implied reservation for peaceful purposes, insofar as politically achievable, and, fifth, it implied reservation for further generations, and thus had environmental implications.

For Malta the principle of common heritage was conceptually joined with the idea of functional sovereignty, as distinguished from the traditional concept of territorial sovereignty.⁶²

While Pardo sees the common heritage as a guiding principle for the negotiation of a new regime to replace the current customary rule of the freedom of the high seas, Ambassador Pinto argues that it has already been established as a general international law norm created by the fiat of the United Nations General Assembly⁶³ to govern deep seabed mining operations.

Ambassador Pardo interprets the common heritage as a proposal to be negotiated with the object of setting up a treaty regime supplanting the customary rule of the freedom of the high seas, limited to deep seabed mining but including all uses which rely on the traditional customary international law doctrine. He advocates a completely new blueprint for the law governing mankind's use of the resources of the high seas beyond the limits of the resource jurisdiction of any state. He espouses the complete

61. Pardo, *Law of the Sea Conference—What Went Wrong*, in *MANAGING OCEAN RESOURCES: A PRIMER* 137, 139 (Friedheim ed. 1979) [hereinafter cited as Friedheim].

62. *Id.* at 141.

63. For a critical comment on the use of the Third United Nations Conference on the Law of the Sea (UNCLOS III) as a vehicle for world socialism, especially in relation to deep seabed mining, see Goldie, *A Selection of Books Reflecting Perspectives in the Seabed Mining Debate: Part II*, 15 *INT'L LAW* 445, 451-69, & 469-97 (1981) [hereinafter cited as Goldie, *A Selection of Views: Part II*]. Part I of the selection was published in 15 *INT'L LAW* 293 (1981), see *supra* note 9.

replacement of the regime of the freedom of the high seas by a regime of equitable management. He is also concerned that the concentration of his ideal of the common heritage upon deep seabed mining alone signals the probable loss of an historic opportunity for mankind.

D. AN ANIMADVERSION ON "ENCLOSURES"

Emphasis can be given to the distinction between common access to a common resource and exclusive management, in the name of the public benefit, by reiterating this writer's comments of a decade and more ago:

On all hands people uncritically accept as true the lightsome remark that freedom of the high seas serves the interests of the Great States and therefore the restriction of that freedom must inevitably provide a vital lifeline for the lesser and poorer nations. True it is all that states, great and small, individually seek to increase, to the maximum degree, their own exclusive uses of the common seas' resources. In such enterprises the richer and more assertive might well be seen as benefiting more from their common heritage than the poorer or more modest. In such a free-for-all many states cause their jurisdictions to creep, and leap, seaward in an enclosure movement. But I have yet to find the enclosure of a manor's commons which profited its yeomanry. For I am told by a wor[ldly]-wise [sic] London friend that all private Acts of Enclosure are introduced into the Parliament by Members who are drawn from the village squirearchy. These landed gentlemen carry through their bills either on their own behalf or to assist friends placed in a similar standing in the agricultural interests of their counties. Is the situation among nations so different? Like great magnates, great states could live well upon abundant resources which a seaward enclosure movement would add to their present wealth. Small states, by contrast would, with only rare and perhaps bizarre exceptions, be entitled to more meagre patches of the commons. Lastly, landlocked states would suffer the fates of cottagers who previously owned no land of their own but could wring sustenance from the village common, but who, after an enclosure, become landless save for their little garden plots, and so must find masters in order to stay alive and feed their families.

Should the seas become enclosed, may not ships be forced to pay tolls and transit fees along routes which formerly were free? And may not fishermen become merely rent-paying tenants and

licensees as if states held the divided fields of the formerly common oceans in fee? The costs, which these tolls and rents would add to all commodities drawn from or moved across the sea, would inevitably fall, like infamous excise taxes, most heavily upon the poorest and those least likely to reap an equivalent benefit from being able to impose similar charges in their turn. The smaller states would thus be excluded from the major benefits of an enclosure of the oceans, but they would still bear a disproportionate share of the higher costs and prices which would result from the engrossment of the oceanic commons into the exclusive patrimonies of coastal states.⁶⁴

II. THE PRACTICAL CONSEQUENCES OF INTERPRETATION-SELECTION

The negotiating significance of asserting the customary law status of the Group of 77's definition of the mineral resources of the deep ocean bed as the common heritage of mankind and, in Ambassador Pinto's terms, as *res publicae*, is that countries with a seabed mining technology are thereby precluded from bargaining for diplomatic concessions as a *quid pro quo* for their acceptance of Article 137 of the Treaty⁶⁵ and all the other provisions predicated upon it. Indeed, it is the possibility of thus reversing the bargaining postures of the negotiating parties, so that the industrialized democracies can be represented as seeking, rather than granting, concessions which explains the vehemence of the Group of 77's spokesmen in advancing their quite baroque argument.

It was a bold bid. If, under customary international law, those countries' enterprises are already precluded from mining, then they can be called upon to make concessions to gain that privilege under the Treaty. If, on the other hand, customary international law remains unchanged, then Article 137 of the Treaty reflects a desideratum of the countries which lack deepsea mining technology but which are determined to participate in its conduct no less than in its advantages. Article 137's definition of the common heritage, under such circumstances, would have to be paid for by reciprocal concessions to the technologically advanced countries in the all-important areas of technology transfer, access,

64. Goldie, *Modest Proposal*, *supra* note 43, at 336-37.

65. *See supra* note 47.

representation and taxation. Here again, hesitancy and reluctant consent have prevented the United States and the other Western democracies from pressing their just and lawful claims for the due recognition and respect for their currently existing rights under the customary international law doctrine of the freedom of the high seas.⁶⁶

To the extent that the 1982 Convention on the Law of the Sea would abridge the existing customary international law rights of acquisition over seabed resources, it is important to be clear-headed about the consequences of accepting that abridgment with neither adequate safeguards nor an appropriate *quid pro quo*. This would be tantamount to the expropriation of valuable United States interests, expectations and claims. Accordingly, it is incumbent on the United States to realize clearly the expropriatory aspects of the Treaty's present provisions. These are presently contrary to the mandate contained in the Deep Seabed Hard Mineral Resources Act of 1980.⁶⁷ In passing the Act, Congress intended that any international agreement to which the United States might become a party should provide, in part: (1) assured and non-discriminatory access to the deep seabed hard mineral resources; (2) security of tenure to U.S. citizens whose rights have accrued prior to the Treaty's entry into force with respect to the United States; (3) continued exploration and recovery activities on the part of U.S. citizens to the maximum extent practicable consistent with the Treaty; and (4) protection of interim investment.⁶⁸

In addition to these four stipulations, which constitute a Congressional instruction to the Department of State and to the U.S. Delegation, the Act puts all states participating in the Conference on notice of the conditions precedent for the United States' satisfaction with the Treaty. Yet, these clearly expressed directives would appear to have been more honored in the breach than the observance, as far as the existing seabed mining provisions of the Law of the Sea Treaty are concerned. In contrast with Congress' policy directives regarding the content of the Convention,

66. See Friedheim, Arvid Pardo, *the Law of the Sea Conference, and the Future of the Oceans*, in *MANAGING OCEAN RESOURCES: A PRIMER* 137, 149 (Friedheim ed. 1979). For a discussion of this contribution to the Law of the Sea Debate, see Goldie, *A Selection of Views: Part II*, *supra* note 63, at 494-96.

67. 30 U.S.C. § 1401 (1976 & Supp. V 1981).

68. 30 U.S.C. § 1401(b).

the present Treaty testifies to the Conference's objective, especially in the seabed mining context, of shackling the United States' technology to the chariot wheels of the triumphant New International Economic Order.

III. THE UNITED STATES' EXPLANATIONS OF ITS VOTE FOR THE DECLARATION OF PRINCIPLES

A. A GENERAL OBSERVATION

Judge Sir Robert Jennings asserted that one state cannot be bound by another's interpretation of an instrument such as the Declaration of Principles, and that each state's own explanation of the vote it gave in the First Committee of the General Assembly, as well as of its contemporary or relevant statements as to its understanding, should provide the measure of its assumption of obligations, if any, stemming from the Declaration.⁶⁹ Therefore, such explanations, statements and avowals by key officials of the United States should be reviewed. In the meantime, the following extracts will show that, while acceptance of the common heritage formula is widespread, if not universal, it remains without the specific agreed-upon content or applicability which Ambassador Pinto and his colleagues seek to give it. Indeed, one can equally justify the proposition that what the doctrine may indicate is a right of access by all states to the exploration and exploitation of the minerals of the ocean.

Before reviewing the specific and diverse statements made by the representatives of the states voting in the General Assembly, reference should be made to Ambassador Amersinghe's comment on the lack of consensus in the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction. He wrote, in a letter to the Chairman of the First Committee of the General Assembly:

As a result of these consultations, a draft Declaration has emerged which, in my opinion, reflects the highest degree of agreement attainable at the present time. It does not, however, represent a consensus of all the members of the Committee.^{69a}

69. See *supra* note 22 and accompanying text.

69a. See Letter dated 24 November 1970 from the Chairman of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction addressed to the Chairman of the First Committee, U.N. Doc. A/C.1/L.542 (November 25, 1970) (issued in mimeographed form only), reproduced in the Appendix.

These words are especially significant because of their author's special eminence, qualifications, and objectivity.

Furthermore, the diversity of the explanations which the delegates gave for their votes in the General Assembly testifies to the fact that no one interpretation was generally accepted at the time of the vote. This is underscored by the fact that the term "common heritage" was left undefined in the Declaration. The meaning which Ambassador Pinto⁷⁰ and the Group of Legal Experts⁷¹ now seek to consecrate cannot be regarded as founded in any kind of general consensus such as they seek to attribute to the vote taken on the General Principles Resolution. Indeed, far from having the legislative effect which the Group of Legal Experts claim in their Manifesto,⁷² the meaning of common heritage has to date received neither a universal *opinio juris*, nor general support in state practice. Both of these two necessary conditions must be shown to exist before the regime contemplated in the Declaration of Principles can validly be said to have replaced the existing positive norms, established rights, immunities, and privileges which are guaranteed by the freedom of the seas. While two contradictory theories of common heritage (contrast the analogy of the common well from which all may freely draw their water with the *res publicae* definition) are equally inchoate, neither can be claimed to define the law here and now. On the other hand, if some generally accepted customary rule supports one, but not the other, then that one should be preferred. Clearly, the freedom of the high seas, which still prevails, justifies the common well analogy and excludes the *res publicae* definition. On this basis, then, the common well definition, not the Pinto definition, should have been insisted upon as the preferred starting point of negotiations.

B. THE UNITED STATES UNDERSTANDING OF THE SIGNIFICANCE OF ITS AFFIRMATIVE VOTE FOR THE 1970 DECLARATION OF PRINCIPLES AND OF RELATED RESOLUTIONS

1. The Diplomatic Rather than Legislative Quality of the Declaration of Principles

When the Declaration of Principles Resolution was being

70. See *supra* notes 13, 47 and accompanying text.

71. See *supra* note 20.

72. See *supra* note 21 and the accompanying text. See also *supra* note 49.

reviewed in the First Committee of the United Nations General Assembly prior to its presentation to the Plenary of the General Assembly, the United States, which had taken a leading part in the negotiation of the compromise formula which the Seabeds Committee had finally agreed upon, stated to the world its understanding that the Declaration was of a diplomatic and compromissory nature:

One of the most difficult aspects of reaching agreement on a declaration of principles was the need, recognized by all who participated in the work, to avoid prejudicing the positions of States regarding resolution 2574D (XXIV). A careful study of the declaration as a whole, particularly the third paragraph of the preamble and operative paragraphs 3 through 6, shows that due to the goodwill and skill of all our colleagues this has been accomplished satisfactorily.⁷³

2. *Preservation of the Freedom of the High Seas*

President Nixon, in his Oceans Policy Statement of May 23, 1970, stressed the continuing right of the states engaging in the negotiations for a seabed mining regime to continue exercising the freedom of the high seas. He pointed out:

I do not, however, believe that it is either necessary or desirable to try to halt exploration and exploitation of the sea-beds beyond a depth of 200 meters during the negotiating period.

Accordingly, I call on all other nations to join the United States in an interim policy. . . . The régime should accordingly include due protection for the integrity of investments made in the interim period.⁷⁴

Even in the early days of the negotiations there was little consensus regarding the meaning of the common heritage. Thus, in 1971 the staff of the United States Senate Committee on Interior and Insular Affairs, in *The Law of the Sea Crisis* observed:

Late last year the General Assembly adopted a "Declaration of Legal Principles" (Resolution 2749 (XXV) of December 17, 1970). It included these words:

73. 25 U.N. GAOR c.I (1799th mtg.) at 11, U.N. Doc. A/C.1/PV.1799 (1970).

74. Statement by President Nixon on the Oceans Policy of the United States, May 23, 1970. U.N. Doc. A/AC.138/22. See also *Oceanography Miscellaneous: Hearing Before the Subcommittee on Oceanography of the U.S. House of Representatives Comm. On Merchant Marine and Fisheries on Deep Seabed Hard Mineral Resources Act*, 92d Cong., 2d Sess., 25-26 (1972).

The seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the *area*), as well as the resources of the area, are the common heritage of mankind.

This idea of common heritage was said to be the base of a future Law-of-the-Sea Convention and to lay the foundation for the control of the international seabeds area. While the delegates at Geneva this summer frequently included in their presentations a reference to "common heritage," there was no agreement on the meaning of the concept.⁷⁵

Without a universally accepted treaty definition or the development, by widespread state practice, of a customary norm replacing the freedom of the high seas, the freedom of access inherent in freedom of the high seas remains the norm.

3. *The Moratorium Resolution's Failure to be Accepted as Legally Obligatory*

References to the Moratorium Resolution's failure to achieve a general consensus, although it did receive sufficient affirmative votes to qualify as having been approved by the General Assembly, is significant. Had it reflected consensus, it would have justified arguments leading to the conclusion that, by agreement, the doctrine of the freedom of the high seas no longer applied to the minerals of the deep ocean floor beyond the jurisdiction of any state.

(a) The Special Subcommittee on the Outer Continental Shelf stated, in its *Report on the Outer Continental Shelf to the United States Senate Committee on Interior and Insular Affairs*, that:

The United States also opposed the Moratorium Resolution, which declared a moratorium on all exploitation of the seabed resources pending the establishment of an international deepsea regime.

....

With regard to an interim policy, the President suggested that all permits for exploration and exploitation be issued subject to the international regime to be agreed upon, with a portion

75. STAFF OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92d Cong., 1st Sess., REPORT ON THE LAW OF THE SEA CRISIS 6 (Comm. Print 1971).

of the revenues from interim exploitation to be paid to an appropriate international development agency.⁷⁶

(b) Charles N. Brower, Esq., Acting Legal Adviser, Department of State, and Acting Chairman, Inter-Agency Task Force on the Law of the Sea wrote the following in a letter to Mrs. Leonor K. Sullivan, Chairperson, United States House of Representatives Merchant Marine and Fisheries Committee, and informed her of the failure, in the U.N. General Assembly, of further initiatives regarding the reiteration of the Moratorium Resolution:

One other significant development at this General Assembly, fortunately in keeping with the spirit that dominated the negotiation of the Conference Resolution, was the fact that no new resolution calling for a moratorium on deep seabed activities was introduced. . . . [We] believe that the avoidance of a renewed and divisive debate on this subject was related to the general attempts to ensure the best possible atmosphere as we enter the final stage of preparatory work this year. Needless to say, our own opposition to the moratorium remains unchanged.⁷⁷

(c) John R. Stevenson, Esq., Chairman, Inter-Agency Law of the Sea Task Force and Legal Adviser, Department of State, stated in a letter to the Honorable Henry M. Jackson, Chairman, United States Senate Committee on Interior and Insular Affairs, dated May 19, 1972:

As you know, at the 24th General Assembly in 1969, a resolution commonly known as the "Moratorium Resolution" was passed despite significant "no" votes and abstentions. The Resolution purports to prohibit exploitation of the resources of the area of seabed and ocean floor, and the subsoil thereof,

76. SPECIAL SUBCOMM. ON THE OUTER CONTINENTAL SHELF, 91st Cong., 2d Sess., REPORT ON THE OUTER CONTINENTAL SHELF TO THE COMM. ON INTERIOR AND INSULAR AFFAIRS 4, 24 (Comm. Print 1970).

77. *Hearings on H.R. 9 & H.R. 7732 ("Deep Seabed Hard Minerals") Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 8 (1973) (letter from Charles N. Brower, Esq., Acting Legal Adviser, Department of State and Acting Chairman, Inter-Agency Task Force on the Law of the Sea, to Mrs. Leonor K. Sullivan, Chairperson, U.S. House of Representatives Merchant Marine and Fisheries Comm., May 16, 1973). See also *id.* at 25 (statement of Hon. Charles N. Brower) and *Hearings ("Status Report on the Law of the Sea Conference") Before the Subcomm. on Minerals, Materials and Fuels of U.S. Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 21, at 23 (1973) (letter by Hon. Charles N. Brower to Hon. Henry M. Jackson, Chairman, U.S. Senate Comm. on Interior and Insular Affairs, March 1, 1973).

beyond the limits of national jurisdiction, pending the establishment of an internationally agreed regime for the area. The United States is not legally bound by this Resolution, although it is required to give good faith consideration to the Resolution in determining its policies.

In his May 23, 1970 Oceans Policy Statement, President Nixon indicated that it is neither necessary nor desirable to try to halt exploration and exploitation of the seabeds beyond a depth of 200 meters during the negotiating process. He also called on other nations to join the U.S. in an interim policy and suggested that all permits for exploration and exploitation of the seabeds beyond 200 meters be issued subject to the international regime to be agreed upon. He stated that the regime should include due protection for the integrity of investments made in the interim period.⁷⁸

(d) Again, in a statement entitled "Oceanography Miscellaneous: Geneva U.N. Seabed Committee" dated September 26, 1972, before the Subcommittee on Oceanography of the United States House of Representatives Committee on Merchant Marine and Fisheries, Mr. Stevenson observed that:

One issue that we had feared would be very disruptive and prevent constructive work last summer fortunately did not prove to be as difficult as might have been anticipated. The delegation of Kuwait had, at the end of the spring session, introduced a moratorium resolution prohibiting activities with a view to exploitation of the deep seabed beyond national jurisdiction until the establishment of an international regime. Consideration was postponed until the summer session. However, at the summer session, this issue was not extensively discussed until very late in the session. The Kuwait delegation did not press for adoption or a vote on the issue, and was content to have its proposal included in the report of the committee. It will of course be before us in the General Assembly, and I think it is prudent to anticipate that action may be taken on this proposal at the General Assembly.

Of course, the General Assembly took similar action in 1969, and UNCTAD took similar action just this spring. We continue

78. *Hearings on S.2801 ("Development of Hard Mineral Resources of Deep Seabed") Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 2d Sess. 74-75 (1972) (letter from John R. Stevenson, Chairman, Inter-Agency Law of the Sea Task Force, and Legal Adviser, Department of State, to Senator Henry M. Jackson, May 19, 1972).

to take the position that such a resolution is legally ineffective and disruptive of our progress in achieving an international regime, which is the only permanent solution to be envisaged in this area.

With respect to this issue, we again had to answer the argument of a number of countries that the declaration of principles regarding the seabed adopted in 1970 without any dissenting vote by the General Assembly, somehow implied, in light of the common heritage principle, that there could not be any exploitation until an international regime had been adopted. We of course continued to state—and we were supported in this by a number of other countries—that common heritage does not mean common property.⁷⁹

Later in the same Hearings, Mr. Ratiner added this further gloss to Mr. Stevenson's remarks regarding the relevant General Assembly resolutions on a moratorium and on legal principles (including the common heritage clause):

The original United Nations General Assembly principles were the product of a great deal of compromise, and accordingly there is considerable ambiguity in those principles, an ambiguity which cannot easily be carried over into a treaty which will govern large commercial investment. It is simply too ambiguous, so that the negotiation now taking place is an attempt to define what those principles really mean in treaty language, and the principles themselves can only be seen as guidelines. I think most delegations in the Seabeds Committee working group understand that that is the case. And, indeed, I think the work product of Subcommittee I's working group reflects the fact that many principles were changed in the course of the negotiations and new texts were produced which, in important respects, do not directly reflect what some delegations thought the principles meant when they were adopted by the General Assembly.⁸⁰

C. *SUBSEQUENT STATEMENTS REFLECTING THE CONTINUED UNITED STATES UNDERSTANDING OF THE COMMON HERITAGE*

In addition to finding states' understandings of the meaning of the term common heritage in their explanations of the votes

79. *Hearings Before the Subcomm. on Oceanography on "Oceanography Miscellaneous" of the Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 237, 242 (1972) (statement by John R. Stevenson, Esq., et al., to the Subcomm. on Oceanography of the House of Representatives Comm. on Merchant Marine and Fisheries).

80. *Id.* at 250.

they gave in the General Assembly,⁸¹ evidence of their perceptions is also available in their subsequent statements. Such statements shed light on the established and continuing meanings which were given at the time of the vote or signature. These subsequent facts, statements, and conduct are relevant only in a subordinate capacity, however. They do not establish an authoritative meaning, but they may be significant to corroborate and explain the intentions, understandings, points of view and premises of policy affirmed at the date of the vote. An analogy is found in the international law theory of the critical date.⁸² Thus, in the *Island of Palmas Case*,⁸³ Judge Huber stated:

The events falling between the Treaty of Paris, December 10, 1898, and the rise of the present dispute in 1906, cannot in themselves serve to indicate the legal situation of the island at the critical moment when the cession of the Philippines by Spain took place. They are however indirectly of a certain interest, owing to the light they might throw on the period immediately preceding.⁸⁴

Again, in his separate opinion in the *Minquiers and Ecrehos Case*, Judge Basdevant considered the critical date of that case to be October 24, 1360, the date of the Treaty of Brétigny or Calais.⁸⁵ He considered that as a result of the Treaty's separation of English from Continental or French Normandy, dealings by each country in connection with the Minquiers and Ecrehos islets and reefs should be regarded as detailed applications of the division made in 1360 and thus further explaining it. It was on this basis that facts after 1360 right up to the date of the *Compromis* (December 29, 1950) were admitted.⁸⁶ These later events should not be regarded as having independent probative value; their function is merely to resolve issues of detail and to elaborate further upon the meaning of the Treaty. Similarly, subsequent explanatory pronouncements further the original and continuing

81. See, Jennings, *supra* note 56 and accompanying text.

82. For a conspectus of this doctrine, see Goldie, *The Critical Date*, 12 INT'L & COMP. L.Q. 1251 (1963). For a discussion of the problem of subsequent facts, see *id.* at 1254-55.

83. *The Island of Palmas Case* (U.S. v. Neth.), Hague Ct. Rep. 2d (Scott) 83 (Perm. Ct. Arb. 1928).

84. *Id.* at 125.

85. *The Minquiers and Ecrehos Case*, 1953 I.C.J. 4, 76-84 (Order of January 29, 1953) (separate opinion of Judge Basdevant).

86. *Id.* at 83-84.

understanding of the United States regarding its vote in favor of the common heritage clause of the Declaration of Principles.

A selection of such elucidatory glosses by leading United States spokesmen with respect to the freedom of access (and so, by necessary implication, to the Declaration of Principles and the Moratorium Resolution) follows:

(1) Statement by Secretary of State Kissinger at the Hotel Pierre, New York City on Thursday, April 8, 1976, before the Foreign Policy Association, the United States Council of the International Chamber of Commerce and the United Nations Association of the United States of America:

The conference has not yet approached agreement on the issue of the deep seabeds because it has confronted serious philosophical disagreements. Some have argued that commercial exploration unrestrained by international treaty would be in the best interests of the United States. In fact this country is many years ahead of any other in the technology of deep sea mining, and we are in all respects prepared to protect our interests. If the deep seabeds are not subject to international agreement the United States can and will proceed to explore and mine on its own.⁸⁷

....

What the United States *cannot* accept is that the right of access to seabed minerals be limited exclusively to an international authority or be so severely restricted as effectively to deny access to the firms of any individual nation, including our own. We are gratified to note an increasing awareness of the need to avoid such extreme positions and to move now to a genuine accommodation that would permit reasonable assurances to all states and their nationals that their access to resources will not be denied.⁸⁸

(2) Remarks of Secretary of State Kissinger at a reception at the United States Mission for the Heads of Delegations attending the Fifth Session of the Third United Nations Law of the Sea Conference, New York, New York, September 1, 1976:

With respect to the deep seabeds, we face two realities. One is that developed countries—a few developed countries at this moment—alone possess the technology with which to exploit the

87. Kissinger, *The Law of the Sea: A Test of International Cooperation*, in FOREIGN POLICY ASSOCIATION, PRESENTATION OF THE HONORABLE HENRY A. KISSINGER 3, 14 (1976).

88. *Id.* at 15.

seabeds—why don't I use a more happy word?—to mine the seabeds.

On the other hand, there is the concept that the deep seabeds represent the common heritage of mankind and, therefore, there is a certain conflict between the realities of the capabilities of certain countries and the theoretical conviction of many other countries.

From the point of view of those who possess the technology, many of the proposals that have already been made represent very significant concessions in the sense that they represent self-imposed restrictions on what would otherwise be an unrestricted freedom of action.

From the point of view of many of the developing countries some of these concessions, in view of their convictions, are not considered concessions at all but tend to be taken for granted.⁸⁹

(3) Statement in 1980 by Ambassador Elliot L. Richardson, then the United States President's Special Representative for the Third United Nations Conference on the Law of the Sea, to Sanford H. Winston, Vice-President, National Association of Manufacturers Communications Department and member of the United States Delegation to the Conference in 1978 and 1979, in an interview:

Richardson: There is nothing in international law to prevent anyone from exploring or exploiting deep seabed resources as an exercise of high seas freedoms. Only by ratifying a treaty in force would a government agree to limit the exercise of those rights. But it is no secret that our view of what is and is not permissible under international law is shared by precious few other governments. Witness the repeated and strong statements on the subject made at the Law of the Sea Conference and elsewhere by spokesmen for the Group of 77, now representing some 120 countries of the 158 that participate in the conference.

If, in the end, we are unable to negotiate the kind of seabed regime we believe necessary to assure access, we will certainly support the rights of U.S. citizens as we interpret them in international law. Just as certain is the fact that mining in the absence of a treaty will produce challenge and conflict, at a minimum in the legal and political forums available to the great majority of countries that hold seabed resources to be inviolable.

89. Press Release USUN-90 (76) (Aug. 13, 1976).

I firmly believe the stability afforded by a universally acclaimed, equitable seabed mining regime is worth the pursuit.⁹⁰

(4) In addition to statements made by key individuals in the Executive Branch of the Government with authority to reflect the United States' position, the Congress too has gone on record with its "findings and purposes", "intent" and instructions. It has unequivocally defined its position, *inter alia*, in the following affirmances:

- (a) "*Findings and Purposes*"
 (i) "Findings"

....

(7) on December 17, 1970, the United States supported (by affirmative vote) the United Nations General Assembly Resolution 2749 (XXV) declaring *inter alia* the principle that the mineral resources of the deep seabed are the common heritage of mankind, with the expectation that this principle would be legally defined under the terms of a comprehensive international Law of the Sea Treaty yet to be agreed upon:

....

(12) it is the legal opinion of the United States that exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas subject to a duty of reasonable regard to the interests of other states in their exercise of those and other freedoms of the high seas subject to a duty of reasonable regard to the interests of other states in their exercise of those and other freedoms recognized by general principles of international law.⁹¹

- (ii) "Purposes"

....

(2) pending the ratification by, and entering into force with respect to, the United States of such a Treaty, to provide for establishment of an international revenue-sharing fund the proceeds of which shall be used for sharing with the international community pursuant to such Treaty;

(3) to establish, pending the ratification by, and entering into force with respect to, the United States of such a Treaty, an interim program to regulate the exploration for and commercial recovery of hard mineral resources of the deep seabed by United States citizens;⁹²

90. *Elliot L. Richardson on Deep Seabed Mining*, ENTERPRISE 18, 19 (Feb. 1980).

91. 30 U.S.C. § 1401(a).

92. 30 U.S.C. § 1401(b).

(b) *"Intent" and instructions*

It is the intent of Congress—

(1) that any international agreement to which the United States becomes a party should, in addition to promoting other national oceans objectives—

(A) provide assured and nondiscriminatory access, under reasonable terms and conditions, to the hard mineral resources of the deep seabed for United States citizens, and

(B) provide security of tenure by recognizing the rights of United States citizens who have undertaken exploration or commercial recovery under title I before such agreement enters into force with respect to the United States to continue their operations under terms, conditions, and restrictions which do not impose significant new economic burdens upon such citizens with respect to such operations with the effect of preventing the continuation of such operations on a viable economic basis;

(2) that the extent to which any such international agreement conforms to the provisions of paragraph (1) should be determined by the totality of the provisions of such agreement, including, but not limited to, the practical implications for the security of investments of any discretionary powers granted to an international regulatory body, the structures and decisionmaking procedures of such body, the availability of impartial and effective procedures for the settlement of disputes, and any features that tend to discriminate against exploration and commercial recovery activities undertaken by United States citizens⁹³

D. *EXPRESSIONS OF UNDERSTANDING BY SOME NON-U.S. DELEGATIONS AND EMINENT PERSONS*

(1) With regard to the Moratorium Resolution, the British Delegation explained its vote in the following terms, *inter alia*: "We do not believe that the General Assembly can or should by its recommendations purport to modify existing international law."⁹⁴

(2) The Soviet Union, in the same forum, expressed the view that: "[T]he operative part [of the Moratorium Resolution] is so phrased that it can be interpreted as infringing the freedom of the open seas sanctioned by international law."⁹⁵

93. 30 U.S.C. § 1441.

94. 24 U.N. GAOR c.1 (1709th mtg.) at 9, U.N. Doc. A/C.1/PV.1709 (1969).

95. *Id.* at 17.

(3) Mr. Amerasinghe, then the President of the Conference, and a leader of the Group of 77, stated the following (and typically accurate) understanding of the Declaration of Principles:

The Declaration cannot claim the binding force of a treaty internationally negotiated and accepted, but it is a definite step in that direction and no less than the other two Declarations that have been adopted at this session, it has—if I may adapt the words of Walt Whitman—that fervent element of moral authority that is more binding than treaties. . . . [W]e may assign varying degrees of significance and validity to the Declaration, but we can all agree that its conspicuous merit is its daring originality and that its real virtue is its moral force.⁹⁶

(4) In the First Committee of the General Assembly, Mr. Galindo Pohl, Chairman of the Legal Subcommittee of the Seabeds Committee, and a very prominent member of the Group of 77's delegation, clearly viewed the Declaration of Principles as not qualifying as "instant customary international law."⁹⁷ He pointed out that:

[T]hat draft is not and is not intended to be a provisional régime governing the exploitation of the seabed. Thus we must recognize that this understanding loomed large in all our negotiations; it was accepted by all parties independent of the positions they may have taken on the problems of maritime law. Therefore, the declaration is a first step toward that régime, but it is not yet the régime.⁹⁸

(5) The United Kingdom Delegation explained its affirmative vote on the Declaration of Principles in terms of what it characterized as a general reservation which it couched in the following clear terms:

[L]ike any other resolution of the General Assembly, the draft declaration has in itself no binding force. Secondly and arising from this, it 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.⁹⁹

(6) The Soviet Union, following its enduring policy of strongly disapproving of any presumption of any attribution of legislative

96. 25 U.N. GAOR c.1, (1933d mtg.) at 21, U.N. Doc. A/PV.1933 (1970).

97. See *supra* note 14 and accompanying text.

98. 25 U.N. GAOR c.1 (1781st mtg.) at 3, U.N. Doc. A/C.1/PV. 1781 (1970).

99. 25 U.N. GAOR c.1 (1799th mtg.) at 1, U.N. Doc. A/C.1/PV. 1799 (1970).

competence to the General Assembly of the United Nations, pointed out: "Needless to say, adoption of the declaration by the General Assembly cannot create legal consequences for States in view of the well-known fact that decisions of the General Assembly have simply the force of recommendations."¹⁰⁰

(7) Ambassador Galindo Pohl, who had a key role in the negotiations and drafting of the Declaration of Principles Resolution, explained, in the First Committee of the General Assembly when the Resolution was being reviewed there prior to presentation to the Plenary, the compromissory result of negotiations which led to the favorable reception of the common heritage of mankind formula in the General Assembly, as follows:

Nor does the draft declaration endorse or undermine the so-called moratorium that was the subject of a General Assembly resolution at its twenty-fourth session. In the course of the negotiations, conflicting interests were reconciled in the sense that the declaration of principles would be neither of two things: either a provisional régime or a restatement of the moratorium. On these points the draft declaration reflects a clear desire to be neutral.¹⁰¹

E. A RETROSPECTIVE REVIEW

(1) Theodore Kronmiller, in his book *The Lawfulness of Deep Seabed Mining*, reinforces the foregoing isolated statements by reporting more generally on the voting on the Declaration of Principles Resolution:

Clearly, views expressed concerning the meaning of the common heritage of mankind evidenced a wide disparity of opinions. It bears repeating that, although other operative provisions of the General Principles Resolution gave further content to the concept, these provisions were also the subjects of greatly differing interpretations. Following adoption of the Resolution, other efforts were made to define the concept, but as will be seen below, most of the gaps could not be bridged.¹⁰²

(2) Finally, the *Ad Hoc* Committee itself reported in 1968, on the divergent positions of its members:

A very large number of members expressed the view that the

100. 25 U.N. GAOR c.1 (1798th mtg.) at 6, U.N. Doc. A/C.1/PV.1798 (1970).

101. 25 U.N. GAOR c.1 (1781th mtg.) at 3, U.N. Doc. A/C.1/PV.1781 (1970).

102. KRONMILLER, *supra* note 53, at 266.

area beyond the limits of present national jurisdiction was not susceptible of appropriation and that States could not exercise national sovereignty over such an area. Other members noted that there was a distinction between non-appropriation of the sea-bed and ocean floor beyond the limits of present national jurisdiction and the exploitation of these areas.¹⁰³

IV. CONCLUSION

An important question remains: If the varying definitions of the common heritage of mankind principle differ so fundamentally, and if the United States had, over the years, unswervingly adhered to the common pasture or common well analogy, how can so many representatives of such a large number of countries have ignored the reiterated statements by responsible American representatives whose utterances were made both in the course of the treaty-making process and in major policy pronouncements about it? The answer may, sadly, be in the Delegation's conscientious pursuit of the ultimate chimera of the Conference, the "Yesable Proposition."¹⁰⁴ (By a "yesable proposition"—which he did not clearly define—Professor Fisher, its author, would appear to have meant a concrete proposal which would at least minimally satisfy the offeror while inducing his *vis-à-vis* to abandon his rejectionist posture and accept the offer.) Can such a proposition, especially in the multi-faceted context of the Third United Nations Conference on the Law of the Sea, be found which could satisfy all sides? A brief outline of that sort of discussion now can be put forward. The underlying assumption of this prescription is that negotiators will always prefer to formulate their claims in clear and precise language, that they will always seek compromise rather than confrontation, and that a proposition can always be found which could satisfy all sides. This assumption is a common professional myopia of lawyers, and has been cogently commented upon by the late Judge Charles de Visscher:

The man of law is naturally liable to misunderstand the character of political tensions and the conflicts to which they give rise. He is inclined to see in them only "the object of litigation"; to cast in terms of legal dialectic what is in the highest degree of refractory to reasoning, to reduce to order what is

103. Report of the *Ad Hoc* Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction at 44, U.N. Doc. A/7230 (1968).

104. R. FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* (1969) (Chapter II is entitled *Give Them a Yesable Proposition*).

essentially unbridled dynamism, in a word to depoliticize what is undiluted politics. . . . The most serious tensions are obviously those where the stake is a new distribution of elements constituting the relative power of states such as territory . . . [and] raw materials. Here reason vainly searches for a criterion, coming to a dead stop before the historical individuality of the State.¹⁰⁵

Indeed an analysis of the history of the *United States Draft for a United Nations Convention on the International Seabed Area*¹⁰⁶ illustrates some of the difficulties involved with the yesable proposition. In that draft document the United States made an offer which at the time was thought by its sponsors to be highly "yesable" by the Group of 77. No doubt, had the American diplomacy been different, it might have been "yessed." But, because the package put forward was seen by the Soviet Bloc and the Group of 77 merely as America's first bid, it was given a barely polite reception. Those groups, in fact, were enabled to appraise it as inviting forceful or claiming tactics. So now, sadly, that well-intended draft is a dead letter.¹⁰⁷

The result of the mode of its presentation and of the advocacy of this generous, honest and potentially effective document, had a further deleterious effect. In the subsequent, long drawn-out negotiations at the Third United Nations Conference on the Law of the Sea, the United States was forced into a defensive, even a self-justificatory, if not self-deprecatory, posture after its draft was unveiled, as if that offer were a dishonest claim to pre-empt the world's resources on behalf of its own nationals. This characterization was far from the truth. The draft's proponents envisaged it as the proposal of a disinterested ideal. It offered the blueprint for an organization which was intended to develop a sharing of wealth, an organ of international cooperation capable of augmenting developmental aid, and a needed enhancement of the revenues of the United Nations. Far from masking a grab at resources, the

105. C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 79 (Corbett trans. 1968).

106. United States Draft of U.N. Convention on International Seabed Areas, 9 I.L.M. 1046 (1970) [hereinafter cited as United States Draft].

107. For Cassandra-like forebodings in this regard, see Goldie, *The United States Draft for a United Nations Convention on the International Seabed Area—A "Polite Conversation,"* 65 AM. J. INT'L L. 123 (1971) (Proceedings of the American Society of International Law at its Sixty-fifth Annual Meeting) [hereinafter cited as Goldie, *United States Draft*].

draft could only have been established at the expense of diminishing the economic advantages of the United States' own nationals and enterprises. Indeed, the fate of this testimony of American goodwill poignantly and concretely reinforces Dr. Herman Kahn's criticism of Professor Fisher's book, where the former said, in part:

In those situations in which there is not sufficient mutual interest to strike an acceptable bargain, the net thrust of Mr. Fisher's insights is likely to give excessive and rather effective ammunition to those urging concession and compromise. That is, in many ways Mr. Fisher's recommendations can be used to generate psychological pressures, arguments, and even misleadingly seductive and seemingly neutral observations that are actually recommendations for making concessions and compromises—or even more important, creating the conditions for such concession and compromise. For this reason politicians, the humanists, idealists, utopians and the amateur citizens are going to find this book more sweepingly persuasive than many of the ideologically committed or even some of the relatively hard-headed and tough-minded (in the William James sense) bargainers.¹⁰⁸

In following up this perceptive comment, it may be observed that the experiences of the Western European and Other Group¹⁰⁹ in the Third United Nations Conference on the Law of the Sea are represented in the sketch on the dust jacket of Fisher's book. He shows two fencers, one in the lunge, the other in the *en garde* posture. The former's attention is distracted by a carrot on the latter's rapier. (The yesable proposition?) But what if our lunging duelist rejects the Fisher horoscopy of his reaction and, instead, remembers elementary economics lessons about satisfaction deferred? If he does not allow himself to be tempted or deflected by one

108. FISHER, *supra* note 104, reviewed by H. Kahn, N.Y. Times, Nov. 9, 1969, § 7 (book reviews), at 72-73.

109. The "Western European and Other Group" is one of five political caucus groups in the General Assembly. These groups have semi-official recognition, especially in the terms of memberships at committees and bureaux. (Thus the bureaux are always five in number to accomodate each Group.) The Other Groups are: The Eastern European Group, the Asian Group, the African Group, and the Latin American Group. The term "Other" of the "Western European and Other Group" is intended to indicate the membership of such countries as the United States, Canada, Australia, New Zealand, etc. which caucus with the Western European nations but which, obviously, are not geographically part of that divided continent.

carrot, how many more may be the reward of aggressive behavior?¹¹⁰ Furthermore, what if his intention is not to formulate specific demands in terms of a legal dialectic and as objects of litigation but to create a situation of unbridled dynamism in order to bring about "a new distribution of elements constituting the relative power of states such as . . . raw materials,"¹¹¹ or to achieve, in the language of the champions of the New International Economic Order, "the transference of wealth and power to the countries of the developing world?"¹¹²

As a result of its misconception of many of the premises of negotiation in a revolutionary, dynamic situation, the Fisher "yesable proposition" has proved to be a way of losing, not gaining, diplomatic goals. By heightening expectations and placing a premium, in fact, although not in intention, on encouraging those who claim to try upping the ante, the proposition offers self-defeating advice. The "yesable proposition" can thus be seen as creating dilemmas for the original offeror. It can also provide a potent means of straining international friendships, through misunderstandings and future claims, as the Law of the Sea negotiations also testify. Indeed, the United States' good natured and well-intended search for a "yesable proposition" at the Third United Nations Conference on the Law of the Sea has led to much of the hesitant and tentative "yes, but . . ." diplomacy which was an unhappy characteristic of the U.S. Delegation's bargaining with the more tough-minded representatives at the Conference. Our diplomats were looking for the precisely formulated compromissory solutions of the man of law in a context of unbridled dynamism. In such an arena, the contention will always be, as it always has been, between competing ideologies. It continually states contests in which one contender's approach is that of the relative will power of states, while the man of law is under the disadvantage of seeking to formulate a logical, equitable, and legalistic distribution of resources. The basic error of the U.S. Delegation has been to mistake for legal, and therefore rationally arguable differences, what in reality are "questions of power and tests of one's nerves and strength."¹¹³

110. In large part it was the expectations for that diplomatic scenario that led to this writer's skepticism back in 1971. See Goldie, *United States Draft*, *supra* note 107, at 123-33.

111. See DE VISSCHER, *supra* note 105 and the accompanying text.

112. See *e.g.*, R. MEAGHER, *supra* note 17, *passim*.

113. DE VISSCHER, *supra* note 105, at 79.

Befogged and bedevilled by its earnest search for that ever-receding will-o'-the-wisp, the U.S. Delegation seemed to give an intended appearance of divided counsels and of bewildered complaisance. Such a manifestation of good-natured indecision may well have encouraged determined supporters of the *res publicae* definition of the common heritage into believing that their campaign to dissuade the United States from its earlier support of the common well or common pasture definition was on the brink of victory. Unhappily, the closer the Delegation appeared to be shuffling towards an acceptance of the *res publicae* interpretation, the more the gulf widened between what it and what Congress and the White House could accept. The Congress and the President increasingly insisted upon the stipulations set forth in Section 201 of the Deep Seabed Hard Mineral Resources Act of 1980, or equivalent policies. The 1980 Act, for example, expresses the intention of Congress that any agreement to which the United States might become a party should provide for the enjoyment by U.S. citizens and enterprises of: (1) the right of assured and non-discriminatory access to the deep seabed hard minerals resources;¹¹⁴ (2) security of tenure when their rights have accrued prior to the Treaty's entry into force with respect to the United States;¹¹⁵ (3) the privilege of continued exploration and recovery activities to the maximum extent practicable¹¹⁶ consistent with the Treaty; and (4) the protection of their interim investment.¹¹⁷

Despite possible mystification due to the Delegation's fruitless but sincere pursuit of the yesable proposition, the final arbiters of policy and authoritative speakers for the United States hewed unswervingly to the interpretation of the common heritage of mankind which this country had when the long trail of negotiating began. Unhappily, however, the Delegation's chimerical pursuit of the Fisher Prescription appeared to encourage some Group of 77 representatives to entertain overly sanguine under-estimations of the United States' firm adherence to its often repeated declarations. Thus the impossible quest tended to blur, while it never cancelled, the reality of this country's commitment to her original position. The diplomacy which led to this

114. 30 U.S.C. § 1441(1)(A).

115. 30 U.S.C. § 1441(1)(B).

116. 30 U.S.C. § 1442.

117. 30 U.S.C. § 1443.

obfuscation can be contrasted with the approach which Talleyrand, that master of equivocation, credited the Duke of Wellington with and identified as the basis of the latter's great success at the Congress of Vienna:

He [the Duke of Wellington] never indulged in that parade of mystification which is generally employed by Ambassadors: watchfulness, prudence and experience of human nature were the only means he employed; and it is not surprising that, by the use of these simple agencies, he acquired great influence.¹¹⁸

118. GRONOW, *THE REMINISCENCES AND RECOLLECTIONS OF CAPTAIN GRONOW* 374 (Raymond ed. 1964), *quoted in* 1 E. LONGFORD, *WELLINGTON, THE YEARS OF THE SWORD* 382 (1969).

APPENDIX

Letter dated 24 November 1970 from the Chairman of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction addressed to the Chairman of the First Committee*

QUESTION OF THE RESERVATION EXCLUSIVELY FOR PEACEFUL PURPOSES OF THE SEA-BED AND THE OCEAN FLOOR, AND THE SUBSOIL THEREOF, UNDERLYING THE HIGH SEAS BEYOND THE LIMITS OF PRESENT NATIONAL JURISDICTION, AND THE USE OF THEIR RESOURCES IN THE INTERESTS OF MANKIND: REPORT OF THE COMMITTEE ON THE PEACEFUL USES OF THE SEA-BED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION.

As you know, the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction was unable at its sessions in 1970 to report agreement on a declaration of principles for presentation to the General Assembly at its twenty-fifth session in accordance with operative paragraph 4 of resolution 2574 B (XXIV). After consulting and obtaining the concurrence of the Chairman of the Legal Sub-Committee, His Excellency Ambassador Galindo Pohl of El Salvador, and members of the Committee, I undertook informal consultations with members of the Committee in an effort to prepare a draft Declaration that would command general support.

As a result of these consultations, a draft Declaration has emerged which, in my opinion, reflects the highest degree of agreement attainable at the present time. It does not, however, represent a consensus of all the members of the Committee.

Having taken into consideration the views of the members of the Committee, I now have the honour to bring to your attention the text annexed hereto, which represents a compromise commanding wide support among the members of the Committee.

* U.N. Doc. A/c.1/L. 542 (November 25, 1970) (issued in mimeographed form only).

Some delegations expressed their reservations as to the substance of the draft Declaration and the aforementioned procedure, and urged that, considering the lack of a consensus among members of the Committee on the draft Declaration, consultations be continued with a view to reaching wider agreement on the text.

I should be grateful if you would kindly circulate this letter and the attached text as a document of the First Committee for the information of its members.

(Signed) H.S. AMERASINGHE
Chairman
Committee on the Peaceful Uses of the
Sea-Bed and the Ocean Floor beyond the
Limits of National Jurisdiction