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# The Third United Nations Conference on the Law of the Sea and the New International Economic Order

JOHN GAMBLE, JR.\*

## I. INTRODUCTION

Most of the scholarly attention concerning the New International Economic Order (NIEO) has focused on the political, economic or ethical aspects of this movement. This focus does not detract from the importance of the NIEO since the NIEO, like most aspects of international relations, must occur within a context using a set of procedures affected by international law. International law, for various reasons, may be neutral or even hostile toward the NIEO. Most of the principles of international law were formulated by a few developed countries; the developing countries, until very recently, participated minimally in the development and implementation of international law. Thus, in many respects, international law is conservative and conflicts with the aspirations expressed in the NIEO.<sup>1</sup>

There are many ways to observe the tenuous link between international law and the NIEO. One point of departure is the Charter of Economic Rights and Duties of States adopted by the United Nations General Assembly in December, 1974.<sup>2</sup> Some attention will be given to this Charter, but it is merely a UN Resolution and consequently of little *legal* significance. The NIEO and the jurisprudence of international law successfully interact in the area of the law of the sea, for the law of the sea has developed contemporaneously with the NIEO.

In the half century during which the law of the sea conferences took place, the NIEO evolved from playing no role in 1930 to being

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1. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437 (1981).

2. The General Assembly adopted the Charter on December 12, 1974, by a vote of 120 in favor, 6 against, with 10 abstentions. For the text of the Charter, see 12 U.N. MONTHLY CHRON. 108 (Jan. 1975).

a major force behind the conference in 1973-1983. Many of the successes and failures of the NIEO are mirrored in actions taken by the Third United Nations Conference on the Law of the Sea (UNCLOS III). Roughly speaking, the beginning of the "modern" era in the law of the sea began in 1967 with Ambassador Pardo's (Malta) speech<sup>3</sup> to the General Assembly calling for a treaty prohibiting militarization of the seabed beyond national jurisdictions and permitting use of the resources found there for mankind as a whole.<sup>4</sup> The forces of the NIEO were clearly at work here, and many of these same goals were dealt with in the draft treaty produced by UNCLOS III. But it must be acknowledged that the adverse reaction of some developed states, most notably the United States, gives an indication of what may become of the NIEO when concrete action is proposed.

The development of the law of the sea, especially over the last two decades, provides insight into the NIEO and the degree to which it may enter the mainstream of international law. Although UNCLOS III is the first comprehensive forum on the law of the sea, it is of particular importance because developing countries achieved a degree of unity in supporting the NIEO. Thus, the lessons learned from the experiences in the law of the sea may be helpful to the NIEO as it develops in other areas.

## II. THE CONTEXT OF THE NIEO AND INTERNATIONAL LAW

Before examining UNCLOS III more closely, a very basic question must be answered: How do the NIEO and international law interact? Two examples, one dealing with the "common heritage" of the ocean floor, and the other dealing with the Charter of Economic Rights and Duties of States, will help illustrate the interaction.

Before UNCLOS III convened, a rallying cry heard in the UN was the "Common Heritage of Mankind": "The sea-bed and the 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."<sup>5</sup>

Since the idea of the common heritage of mankind became a

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3. 22 U.N. GAOR Annex I (Agenda Item 92) at 1, U.N. Doc. A/6695 (1965).

4. For a good discussion, see E. GOLD, MARITIME TRANSPORT 310-13 (1981).

5. Brown, *The 1973 Conference on the Law of the Sea: The Consequences of Failure to Agree*, in THE LAW OF THE SEA: A NEW GENEVA CONFERENCE 1, 16 (L. Alexander ed. 1972).

principal vehicle for the NIEO, it is instructive to see how various states reacted to the early assertion of the common heritage doctrine. Belgium presented a typically Western view. It was patronizing but generally sympathetic to the idea of the common heritage: "What's in a name? My delegation has always recognized that the concept of a common heritage, without having any clear juridical significance, nevertheless represents a whole moral and political complex of great value."<sup>6</sup> Canada expressed a similar idea stating that the common heritage doctrine was not yet a legal principle, but merely a concept on which law might be built.<sup>7</sup>

It is to be expected that the most enthusiastic supporters of the common heritage doctrine are the less developed countries (LDCs), since they were the doctrine's principal architects. There were important differences in the degree to which LDC representatives attempted to ascribe international legal bases to the doctrine. For example, the representative from Barbados stated:

It is obvious that the international community is in the beginning stages of a revolution in relation to the entire body of international law covering the marine environment. Like all the best revolutions, this one is about justice. Not even the most purblind paternalist in the rich industrial nations of the world would deny that the law of the sea has evolved along lines which have very little to do with the concept of international democracy. I am not pointing the finger of blame; I am merely stating facts. A number of the so-called "doctrines" which exist today are little more than reflections of old power balances which are totally irrelevant to the realities of the seventh decade of the twentieth century.<sup>8</sup>

In interpreting the doctrine, the delegate from Chile acknowledged that the common heritage doctrine was a "new and revolutionary concept in international law and policy."<sup>9</sup> It is significant that some of those who advocated the doctrine were uneasy about ascribing legal bases to the concept. For example, the Chilean statement is softened by the insertion of the word "policy." The most extreme assertion of a legal foundation of the common heritage doctrine was made by the representative from Guyana, who said that common heritage was a "preemptory norm of international law" that

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6. Brown, *supra* note 5, at 16-17.

7. *Id.* at 18.

8. *Id.* at 17.

9. *Id.*

must be obeyed by all.<sup>10</sup>

Some of the most strident criticisms of the legal bases of the common heritage principle came from Eastern European representatives. The Byelorussian delegate commented:

Speaking of legal principles, we should like to stress that, as in the past, the Byelorussian delegation cannot support the concept that the seabed and ocean floor beyond the limits of national jurisdiction and the resources thereof are the common heritage of mankind—in other words, a kind of collective property of all countries. That concept does not take into account the objective realities of the contemporary world, in which there are states having different social systems and different property regimes.<sup>11</sup>

Bulgaria echoed these sentiments but also injected an East/West dimension: “[T]he concept of a common heritage could in practice become a mere legal and institutional cover for powerful interests and was likely in any case to lead to confusion.”<sup>12</sup>

These statements illustrate the nature of the conflict between international law and the NIEO. The West maintains that, while the NIEO (as represented by the common heritage doctrine) may be right and just, it has little to do with international law. The West views the common heritage doctrine not as a legal principle, but as a set of “agreed [upon] moral and political guidelines.”<sup>13</sup> This is in vivid contrast to the view of LDCs. Speaking in 1968, Ambassador Pardo explained that justifications for the NIEO:

could not be sought in traditional doctrines of international law; they must be new, equitable and moral . . . . The concept that any area was to be administered in common for common good was somewhat alien to existing international law. Nevertheless, its introduction as the basis of international law on the seabed and ocean floor was essential, not only for the development of that environment, but also for the peaceful development of the world.<sup>14</sup>

Another example of the interaction between the NIEO and international law (and one unrelated to the law of the sea) can be found in the Charter of Economic Rights and Duties of States adopted by

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10. *Id.*

11. *Id.* at 17-18.

12. Yankov (Bulgaria), AD HOC SEA-BED COMMITTEE, A/A.C. 138/S.C. I/SR. 9, 24 Mar. 1969, at 96.

13. Brown, *supra* note 5, at 23.

14. A. PARDO, AD HOC COMMITTEE ON SEA-BED, A/A.C. 135/W.G. I/SR. 3, 3 Sept. 1968, at 52.

the UN General Assembly on December 12, 1974, by a vote of 120 for, 6 against, with 10 abstentions.<sup>15</sup> The beginning of the Charter reads: "Declaring that it is the fundamental purpose of this Charter to promote the establishment of the new international economic order, based on equity, sovereign equality, interdependence, common interest and cooperation among States, irrespective of their economic and social systems."<sup>16</sup>

Although the avowed purpose of the Charter was to give an advantage to LDCs, the vote suggests that it was acceptable to the vast majority of states.<sup>17</sup> But there are certain aspects of the Charter, notably article 2.2(c), which cause grave concern among international legal scholars in the West. Article 2.2(c) provides:

To nationalize, expropriate or transfer ownership of foreign property in which appropriate compensation *should* be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic laws of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.<sup>18</sup>

A recent article by Professor Weston explains some of the major problems with the Charter.<sup>19</sup> For example, article 2 "omits mention of the public purpose doctrine, i.e., the contention that foreign property rights and interests cannot be 'taken' except for reasons of public necessity or utility."<sup>20</sup> A strong argument can be made that article 2.2(c) really discriminates against foreign property, which would fly in the face of international commercial law. Of all aspects of article 2, perhaps the most disturbing is the use of the word "should" with regard to compensation for property seized. Overall, the Charter seems to run contrary to basic international law which in some cases might otherwise work to the advantage of the LDCs.

A reasonable conclusion from these two illustrations is that

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15. 12 U.N. MONTHLY CHRON. 108 (Jan. 1975).

16. *Id.*

17. *Id.* Preamble (b).

18. *Id.* at 111 (emphasis added).

19. Weston, *supra* note 1.

20. *Id.* at 439. See, e.g., B. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 24-25 (1959).

conflicts exist between the aspirations of the NIEO and traditional international law. Some conflict is attributable to the continued desire of the "haves" to perpetuate a scheme ensuring their dominance. Another source of conflict is from those who support the LDCs, but feel that law and politics are not interchangeable and that stretching international law too far to encompass such causes will not help the LDCs. A detailed look at UNCLOS III will help to bring these issues into sharper focus.

### III. THE CONVENTION TEXT ADOPTED BY UNCLOS III

On April 30, 1982, UNCLOS III adopted the text of a new comprehensive law of the sea treaty by a vote of 130 to 4 (with 25 abstentions).<sup>21</sup> The hurdles of signature and ratification remain, along with U.S. resistance, but this document provides a good example of the international forces advocating the NIEO.

The text is massive, with 320 articles and 9 annexes. Thus, this article will only classify some of the treaty's textual material as it bears on the NIEO. While it is acknowledged that substantial disagreement may exist as to what falls under the rubric of the NIEO, the intent here is only to provide an overview for the way a major international conference approached these issues. A careful reading of the treaty text suggests five categories into which material dealing with the NIEO might be placed with the categories corresponding to the means by which the NIEO might be advanced by the treaty:

1. General appeals based on the moral right of the cause, but not mandating specific action;
2. Provisions that penalize the more technologically advanced states;
3. Provisions that give special preferences to developing states;
4. Special privileges for certain subcategories of developing states; and,
5. Provisions providing for the transfer of technology from developed to developing countries.

#### A. *Moral Appeals*

The cynic may question whether moral appeals represent any victory for the NIEO. They carry no sanctions and fail even to list specific *desired* courses of action. A good example of the ideological

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21. 19 U.N. MONTHLY CHRON. 6 (June 1982).

tightrope that must be walked in dealing with the NIEO is in the preamble to the Convention:

*Bearing in mind* that the achievement of such goals will contribute to the realization of a just and equitable international economic order which would take into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.<sup>22</sup>

It is not surprising that the interests of humanity as a whole are to be considered with special attention paid to LDCs. However, there is some question whether this general expression provides for specific action.

There are many general statements about the NIEO in that portion of the Convention (Part XI) dealing with the area beyond national jurisdiction. In parallel fashion to the wording of the preamble, the "[a]ctivities in the Area shall . . . be carried out . . . for the over-all development of all countries, especially developing countries . . . ."<sup>23</sup> Further, a review conference was proposed to assess the first fifteen years of operation of the treaty regime, and to determine whether the goals of the NIEO were being achieved: "The Review Conference shall ensure the maintenance of the principle of the common heritage of mankind, the international regime designed to ensure equitable exploitation of the resources of the Area for the benefit of all countries, especially the developing States . . . ."<sup>24</sup>

### B. Provisions that Penalize Technology

If one accepts the general view that the NIEO must be advanced, an approach would be to penalize those countries with a technological edge, thereby neutralizing some of the advantages they enjoy. Transit passage through straits is one example of a "technology penalty." The Convention provides that "foreign ships, including marine scientific research and hydrographic ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits."<sup>25</sup> Since it is largely the developed states that traverse straits and many developing states border straits, this can be viewed as an attempt to control the technology possessed by

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22. U.N. Convention on the Law of the Sea and Resolutions I-IV, II U.N. GAOR Supp. 82-30296, U.N. Doc. A/Conf. 62/122 (1982) (emphasis in original) [hereinafter cited as U.N. Convention].

23. *Id.* art. 150.

24. *Id.* art. 155.

25. *Id.* art. 40.



the wealthier countries, the exploitative potential of which is feared by the LDCs.<sup>26</sup>

The Convention reached an interesting set of compromises concerning rights to the seafloor adjacent to a state but at a distance beyond 200 nautical miles from the coast. Keeping in mind that the developed states almost exclusively possess the technology to conduct such operations, the Draft Convention states:

The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 percent of the value or volume of production at the site. The rate shall increase by 1 percent for each subsequent year until the twelfth year and shall remain at 7 percent thereafter.<sup>27</sup>

Both examples illustrate the attempt to extract some concessions from those who have the technology to exploit the seabed. Such provisions may inhibit the use of those technologies which, in the case of the second example, would mean that no contribution would be made. But both provisions are much less stringent than they might have been.

### C. *Providing Economic Preference for LDCs*

While there is a thin line between "taxing" technology and providing a special economic advantage to developing states, the latter approach is more common in the Draft Convention. One of the clearest examples of giving an economic preference to the LDCs is seen in the provisions triggered when a state cannot harvest all the fish in its 200-mile exclusive economic zone. When a state does not have this capacity, it shall "give other States access to the surplus . . . having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein."<sup>28</sup> The intent of the drafters is made clearer, as one of the specific criteria for granting access to excess catch is "the nutritional needs of the population of the respective States."<sup>29</sup>

It is not surprising that pollution control is one area in which special economic advantages would be demanded by the LDCs. What

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26. Alexander, *The Ocean Enclosure Movement: Inventory and Prospect*, 20 SAN DIEGO L. REV. 561, 587-88 (1983).

27. U.N. Convention, *supra* note 22, at art. 82.2.

28. *Id.* art. 62.2.

29. *Id.* art. 70.3(d).

is surprising is the degree to which the Convention states the case explicitly:

*Preferential treatment for developing States.* Developing States shall, for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects be granted preference by international organizations in:

- (a) the allocation of appropriate funds and technical assistance; and
- (b) the utilization of their specialized services.<sup>30</sup>

#### *D. Special Treatment for Certain Categories of LDCs*

Since the economies of some developing countries are heavily dependent on income from land extracted minerals, the economic effects of sophisticated seabed mining could be disastrous to them. Thus, this group of LDCs is singled out for special treatment:

Upon the recommendation of the Council on the basis of advice from the Economic Planning Commission, the Assembly shall establish a system of compensation or take other measures of economic adjustment assistance including co-operation with specialized agencies and other international organizations to assist developing countries which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area.<sup>31</sup>

Similar concern was *not* expressed for the economies of developed countries. Such provisions are not limited to the Area. With regard to the continental shelf beyond 200 nautical miles, developing states may, under certain circumstances, be exempt from the tax which must be paid: "A developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource."<sup>32</sup> The fact that the diversity of LDCs was accommodated shows a certain maturity among NIEO proponents.

#### *E. Transfer of Technology*

A hallmark of the NIEO is the feeling that LDCs do not want charity. Instead, they prefer to be given the tools and the training in

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30. *Id.* art. 203.

31. *Id.* art. 151.10.

32. *Id.* art. 82.3.

order to modernize and develop themselves. This goal is reflected in many provisions of the Convention that deal with technology transfer.

The Authority, the entity that will manage the deep seabed, provides for a massive transfer of technology both to the developing states and to the Enterprise, the organ of the Authority that will actually engage in mining:

The Authority shall take measures in accordance with this Convention:

. . . .

- (b) to promote and encourage the transfer to developing States of such technology and scientific knowledge so that all States Parties benefit therefrom.

To this end the Authority and States Parties shall co-operate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States Parties may benefit therefrom. In particular they shall initiate and promote:

[P]rogrammes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, *inter alia*, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;

[M]easures directed toward the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area.<sup>33</sup>

Similar provisions exist with respect to the preservation and protection of the marine environment.<sup>34</sup> Perhaps a less likely place to find technology transfer provisions is Part XIII of the Draft Convention dealing with Marine Scientific Research. Certain provisions in this section interfere with scientists' ability to conduct research:

For this purpose, States, both individually and in co-operation with other States, and with competent international organizations, shall actively promote the flow of scientific data and information

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33. *Id.* art. 144.1, 144.2.

34. *Id.* art. 202.

and the transfer of knowledge resulting from marine scientific research, especially to developing States, as well as the strengthening of the autonomous marine scientific research capabilities of developing States through, *inter alia*, programmes to provide adequate education and training of their technical and scientific personnel.<sup>35</sup>

It is not surprising that marine scientists do not object so much to the spirit of such provisions but rather to the ways in which they may be interpreted. Scientists are understandably sensitive about research results being disseminated piecemeal, prematurely or taken out of context, all of which are possible given the various interpretations of these provisions.

An entire section of the Draft Convention is devoted to the Development and Transfer of Marine Technology (Part XIV). The introduction for this section declares:

States shall promote the development of the marine scientific and technological capacity of States which may need and request technical assistance in this field, particularly developing States, including land-locked and geographically disadvantaged States, with regard to the exploration, exploitation, conservation and management of marine resources, the protection and preservation of the marine environment, marine scientific research and other activities in the marine environment compatible with this convention, with a view to accelerating the social and economic development of the developing States.<sup>36</sup>

There are various ways in which these general provisions might be implemented. States are required to promote "the acquisition, evaluation and dissemination of marine technological knowledge and facilitate access to such information and data."<sup>37</sup> States are also required to "establish programmes of technical co-operation."<sup>38</sup> It is open to question how thorough and genuine such measures would be, as it may be possible to follow the letter of such articles and still do nothing significant in the transfer of technology.

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35. *Id.* art. 244.2.

36. *Id.* art. 266.2.

37. *Id.* art. 268(a).

38. *Id.* art. 269(a).

#### IV. THE FATE OF THE UNCLOS III DOCUMENT AND THE NIEO

While the impression may be that all the problems attendant with drafting the treaty have been resolved and that signature, ratification and entry into force will come easily, substantial obstacles still remain. Although the Conference voted to accept the treaty on April 30, 1982, it is uncertain how many states will sign and ultimately ratify the document.<sup>39</sup>

The voting breakdown suggests a "have/have not" split on ratification. Of the 21 states voting against or abstaining, very few are developing states, even though this group is the overwhelming preponderance at the Conference.<sup>40</sup>

The United States' objections were more significant than forecast and appear to be irreconcilable, at least as long as there is no change in the Administration in Washington, D.C. The UN reported the reason for the U.S. vote in this way:

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39. The Convention requires 60 ratifications (or accessions) to enter into force. *Id.* art. 308.1.

Voting on Acceptance of the Treaty: *In Favor:* Afghanistan, Algeria, Angola, Argentina, Australia, Austria, Bahamas, Bahrain, Barbados, Benin, Bhután, Bolivia, Botswana, Brazil, Burma, Burundi, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Cuba, Cyprus, Democratic Kampuchea, People's Democratic Republic of Korea, Democratic Yemen, Denmark, Djibouti, Dominican Republic, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Gabon, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Kuwait, Lao People's Democratic Republic, Lebanon, Lesotho, Libya, Liechtenstein, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Morocco, Mozambique, Namibia (Council for), Nepal, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Qatar, Republic of Korea, Romania, Rwanda, Saint Lucia, Saint Vincent, Samoa, San Marino, São Tomé e Príncipe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Togo, Trinidad and Tobago, Tunisia, Uganda, United Arab Emirates, United Republic of Cameroon, United Republic of Tanzania, Upper Volta, Uruguay, Viet-Nam, Yemen, Yugoslavia, Zaire, Zambia, and Zimbabwe.

*Against:* Israel, Turkey, United States, and Venezuela.

*Abstaining:* Belgium, Bulgaria, Byelorussian SSR, Czechoslovakia, German Democratic Republic, Federal Republic of Germany, Hungary, Italy, Luxembourg, Mongolia, Netherlands, Poland, Spain, Thailand, Ukrainian SSR, USSR, and United Kingdom. (Not Participating: Albania, Ecuador, Holy See, and Liberia.)

*Absent:* Antigua and Barbuda, Belize, Comoros, Dominica, Equatorial Guinea, Gambia, Kiribati, Maldives, Nauru, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

40. 19 U.N. MONTHLY CHRON. 6, 13 (June 1982).

James L. Malone (United States), explaining his negative vote, noted that three months ago President Reagan had reaffirmed United States commitment to the multilateral treaty process for reaching agreement on the world's oceans. Within the context of an overall acceptable treaty, he had also noted that the many provisions of the Draft Convention concerning navigation, overflight, the continental shelf, marine research and the environment and other areas were basically constructive and in the interest of the international community.

President Reagan had also said, Mr. Malone noted, that the United States had serious problems with elements of the deep seabed mining provisions and would seek changes to meet six broad objectives that would make the treaty acceptable to the United States. Those include the failure to provide assured access to seabed minerals, lack of proportionate voice in decision-making for countries most affected, the provision for amending the convention, the creation of precedents that were "not appropriate," and the barrier which the Convention would set up in the development of sea-bed resources by play of basic economic forces in the market place.<sup>41</sup>

A sizeable group of states abstained from voting, including most of the European Economic Community and Eastern European States. Some of the statements made by representatives of the abstaining states bear on the NIEO issues. A representative of the Belgian delegation said that she was concerned about "equitable representation for countries such as Belgium in the organs of the projected International Sea-Bed Authority" as well as "realistic provisions for the transfer of technology."<sup>42</sup> Ambassador Bos of the Netherlands expressed a similar sentiment, stating that "[w]ithout the participation of the major countries, the elaborate sea-bed system would not function as envisioned."<sup>43</sup>

It is clear that the NIEO is an important part of the difficulty now faced by the Convention. After the conference ended, additional information surfaced concerning the position of the United States. Representative John Breaux, a leading Congressional opponent of the treaty, stated: "We have seen no willingness on the part of developing country delegates to seriously negotiate U.S. proposals. In fact, other than a half-baked proposal for so called grandfather

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41. *Id.* at 16.

42. *Id.* at 17.

43. *Id.* at 18.

protections, this negotiating session produced no new text."<sup>44</sup>

Professor H. Gary Knight of Louisiana State University stated that the text did nothing but "inhibit the creation of value" by people "who have neither the energy nor will to get something for themselves." According to Knight, the LDCs are asserting a "right to steal."<sup>45</sup> It must be emphasized that Knight's is a minority position supported neither by most governments nor the UN. In fact, Bernardo Zuleta, UN Under Secretary General, broke from his typical diplomatic posture and said that the United States was the "principal antagonist" to the treaty and that it was unfair for the U.S. to claim advantages from certain parts of the treaty while rejecting other parts.<sup>46</sup>

Since the conference approved the treaty, more light has been shed on the U.S. position. In September, 1982, the U.S., the United Kingdom, France and the Federal Republic of Germany signed an Interim Agreement on Deep Sea-Bed Mining.<sup>47</sup> Regardless of the real intent of the four parties, this action created the impression that leading developed states are preparing to proceed with exploitation of the deep seabed independent of the treaty. Furthermore, the decision of President Reagan on July 9, 1982, that the U.S. "will sign the final act of the Conference as an indication that we have participated" but *without* signing the treaty dashed all hopes that the U.S., at least in the immediate future, will participate in the treaty.<sup>48</sup>

There are indications that it was not just the NIEO provision which caused the U.S. and other countries not to support the treaty. It is true that the so-called "Green Book," prepared by the U.S. Department of State in advance of the last session of the Conference, points out many changes desired by the U.S., some of which bear directly on the NIEO issues.<sup>49</sup> It should be remembered that the U.S., notwithstanding Representative Breaux's objections, was successful in obtaining certain changes. In addition, many of the United States' objections had nothing to do with the NIEO. An overall assessment is difficult; the issues pertaining to the NIEO were an important component of the U.S. decision, but they were not the only issues. Remembering that this was the most complex international

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44. 24 OCEAN SCI. NEWS 1 (No. 18, 1982).

45. *Id.* at 2.

46. 24 OCEAN SCI. NEWS 2 (No. 35, 1982).

47. *Id.*

48. 24 OCEAN SCI. NEWS 1 (No. 27, 1982).

49. 24 OCEAN SCI. NEWS 2 (No. 11, 1982).

negotiation ever attempted, the task was arduous even without the complicating factor of the high aspirations of the Third World.

## V. CONCLUSION

The Third UN Conference on the Law of the Sea is significant for a number of reasons. Not only is it the most significant treaty-writing exercise in history, but it is the first major multilateral conference to take place since the NIEO became a salient issue in international law and politics. The substance of the NIEO is strong and those states favoring the NIEO perspective have the power needed to bring those issues to the fore.

Perhaps it would have been easier if the NIEO had come of age in a less demanding international legal forum. For example, one can imagine the 1968-1969 Vienna Conference on the Law of Treaties as an example where the NIEO might have been able to succeed in making certain changes in the Vienna Convention on the Law of Treaties. On the other hand, it may be argued that the Vienna Convention did not significantly advance the goals of the NIEO. This is not true with UNCLOS III where one finds dozens of important economic issues and the control of trillions of dollars of resources at stake.

It is possible to draw some conclusions about how one might expect the aspirations and goals of the NIEO to manifest themselves in conventional international law. The general assertion of the moral right of the NIEO's cause, along the lines of that expressed in many UN General Assembly resolutions, will be prevalent in future conventional international law, gradually swaying international public opinion and eventually changing international law. Conversely, it is possible that these general assertions might be substituted by substantive actions. It is probable that provisions which penalize those states with advanced technology will become the rare exception as states use more positive techniques, such as those found in the Draft Convention, which provide preferential treatment for LDCs.

The fact that specific provisions in the text acknowledge that special treatment may be needed for some LDCs is significant. This was highlighted in UNCLOS III by the fact that certain developing states are land-based producers of the minerals that will be mined from the deep seabed. Thus, states that are both developing *and* land-based producers deserve special protection. Perhaps those portions of the treaty which deal with transfer of technology portend the



incorporation of the NIEO into conventional international law. It is clear that many LDCs prefer this approach. Some developed states have been supportive of such provisions both on general moral grounds and in exchange for resources and rights. But there are potential difficulties in implementing many of these provisions. Often, only the barest outline of a course of action is provided. Developed countries that wish to emasculate the technology transfer articles can do so.

It is important to note that the United States' decision not to sign the treaty was only partly based on objections to the NIEO. Some of the changes proposed by the U.S. are based on such objections, but, to cite one example, the proposed changes suggest no changes to the section dealing with the transfer of marine technology. The safe assumption is that NIEO issues *contributed* to the U.S. position in what was already a very complex negotiation.

Regardless of the righteousness of its cause, the NIEO is still an adolescent in terms of international law. In the law of the sea, the NIEO encountered the most difficulty with the issues surrounding the deep seabed, but substantial gains were made in areas in which far greater economic and technological payoffs were possible, e.g., scientific research, fisheries, and the continental shelf beyond 200 miles. However, in its youthful enthusiasm, the NIEO may have sacrificed important long-term gains for short-term expediency.



