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Ideology and the Law of the Sea: The Challenge of the New International Economic Order

by *Boleslaw Adam Boczek**

I. INTRODUCTION

Over the past two decades, the law of the sea has been going through a period of transition brought about by rapid technological change, economic pressures, and, most importantly, ideological and political challenges from developing states. These "Third World" nations have been questioning several fundamental rules of traditional international law,¹ including the legal regime of the oceans, which historically has been based on the venerable principle of the freedom of the seas.² This international conflict focusing on the law of the sea is only one dimension of much wider confrontation between the affluent industrialized nations of the "North" and the less developed, destitute countries of the "South."³ The latter demand a radical restructuring of the economic power relationship between the two groups of states in the name of the "New Interna-

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1. In particular, Third World nations challenge the traditional doctrine that the norms of customary international law are automatically binding on new states. For example, such nations refuse to recognize the rule of international law that aliens ought to be treated according to a minimum international standard of justice. See, e.g., Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961). For an examination of the new states' attitudes toward international law see, e.g., R.P. ANAND, *NEW STATES AND INTERNATIONAL LAW* (1972); J. SYATAUW, *SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1961); McWhinney, *The New Countries and the "New" International Law*, 60 AM. J. INT'L L. 1 (1966); L. HENKIN, *HOW NATIONS BEHAVE* 119-34 (2d ed. 1979).

2. The principle of the freedom of the seas, a fundamental principle of the law of the sea, became universally recognized by the end of the 18th century. Under this principle, no state may validly subject any part of the high seas to its sovereignty. It was codified in Article 1 of the Geneva Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, and in Articles 87 and 89 of the recently signed United Nations Convention on the Law of the Sea, 7 October 1982, U.N. Doc. A/CONF. 62/122, reprinted in 21 INT'L LEGAL MATERIALS 1261, 1286-87 (1982) [hereinafter cited as Convention]. For the development of the principle of the freedom of the seas, see 1 D. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 1-20 (I.A. Shearer ed. 1982).

3. This confrontation crystallized with the first United Nations Conference on Trade and Development (UNCTAD I) in 1964 and continued at subsequent UNCTAD meetings. See generally H.K. JACOBSON, *NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM* 117-19, 253-55 (1979).

tional Economic Order" (NIEO).⁴ The ideology of the NIEO offers the developing countries an interpretation of the existing "old" international order, largely predicated on the principles of the Western ideology of economic liberalism, and rallies them in their struggle for a more equitable new international order.⁵

Because of the currently available and potentially exploitable resources of the oceans,⁶ the law of the sea has become one arena in which the traditional Western international order⁷ is being challenged by the ideology of the NIEO. Despite overlapping interests and crisscrossing coalitions, the recently concluded Third United Nations Conference on the Law of the Sea (UNCLOS III) was the central stage upon which these challenges have been most explicitly articulated.⁸ Communist ideology is not presently posing any major challenge to international law. Instead the ideology of the NIEO stands against the interests of both the United States and the Soviet Union, superpowers which possess virtually identical concerns in some areas of the law of the sea.⁹

This article discusses whether, and to what extent, the ideological challenges of the NIEO have had their impact on the existing and evolving rules of the international law of the sea. As the Convention on the Law of the Sea of 1982 is

4. The idea of a "New International Economic Order" (NIEO) was a byproduct of the developing countries' awareness of their economic inferiority in relation to the developed countries. The NIEO was comprehensively articulated in 1974 in the Declaration on the Establishment of a New International Economic Order, *infra* note 11; Programme of Action on the Establishment of a New International Economic Order, *infra* note 13; and the Charter of the Economic Rights and Duties of States, *infra* note 17. For the historical background of the NIEO, see generally R. MEAGHER, AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER: A STUDY OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES ch. 2 (1979).

5. The New International Economic Order has been discussed in all its aspects in literally thousands of books and articles. For a short English-language bibliography, see Saxena, *Select Bibliography on the New International Economic Order, 1960-78*, 20 INDIAN J. INT'L L. 125 (1980).

6. The developing countries are particularly interested in the manganese nodules, containing up to fifty percent manganese, with a high content of copper, nickel, cobalt, and other metals, found in large numbers on the ocean floor. It is estimated that in the Pacific Ocean alone there are 100-billion to 1.5-trillion tons of these nodules which accumulate at an estimated annual rate of 10 to 16-million tons. Cristol, *An International Seabed Authority*, in THE LAW OF THE SEA: ISSUES IN OCEAN RESOURCE MANAGEMENT, 172, 179 (D. Walsh ed. 1977). For an analysis of the economic value of the manganese nodules from the point of view of the developing countries, see D. LEIPZIGER & J. MUDGE, SEABED MINERAL RESOURCES AND THE ECONOMIC INTERESTS OF DEVELOPING COUNTRIES (1976).

7. Traditional Western international order refers to the economic superiority of the West and the system of international law developed by older Western nations.

8. The Third United Nations Conference on the Law of the Sea (UNCLOS III) opened in New York in 1973 for an organizational session. The substantive sessions were held between 1974 and 1982. The Conference adopted the Convention on the Law of the Sea at the 11th session held in New York between 8 March and 30 April 1982. See 29 U.N. CHRONICLE 12-15 (June 1982). The Convention was signed on December 10, 1982 at Montego Bay, Jamaica on behalf of 117 states. The Final Act, U.N. Doc. A/CONF.62/121, reprinted in 21 INT'L LEGAL MATERIALS 1245 (1982), contains a review of the origins and history of UNCLOS III.

9. For example, since both the United States and the Soviet Union are the largest naval powers, they have identical concerns in maximizing high seas freedoms and safeguarding unimpeded transit through international straits.

more or less reflective of the current state of the law, it will provide a major point of reference for the present inquiry. Following some preliminary considerations on the NIEO as a political ideology of the developing nations, the article addresses briefly the international legal aspects of the NIEO, embodied primarily in resolutions and other acts of international organizations. Proceeding to the implications of the NIEO for the evolving rules of the new law of the sea, the article focuses on various dimensions of two major issues: the expansion of the coastal state jurisdiction, both in offshore waters and the subjacent seabed, and the exploitation of the "common heritage of mankind" in the seabed beyond national jurisdiction. The article concludes with an appraisal of the ideological challenges in the law of the sea in terms of their contribution to the realization of a new equitable international economic order.

II. THE NIEO AS A POLITICAL IDEOLOGY

Political ideology, for the purposes of this article, may be defined as a more or less coherent body of images, ideas, and values, which critically interpret the existing societal order and offer political leaders a strategy of action for the attainment of a better, preferred order of things.¹⁰ In terms of this working definition, the phenomenon of the NIEO certainly may be considered the ideology of the developing world.

First, the NIEO offers an interpretation of the origin and state of the present international order. It finds the present system inequitable and unjust because "[t]he developing countries, which constitute 70 per cent of the world population, account for only 30 per cent of the world's income."¹¹ According to the NIEO ideology, this gap, which continues to widen, was established at a time when the great majority of the developing countries did not even exist as independent states. Moreover, the present international economic order is in conflict with current developments in international political and economic relations, such as the growing role of less developed countries as suppliers of energy and raw materials and the emergence of new economic power centers such as the Organization of Petroleum Exporting Countries (OPEC). Furthermore, the developing countries believe that they are playing a disproportionately minor role in the formulation and application of decisions that concern the whole international community. Second, the NIEO offers a set of principles on which a new

10. For some definitions of ideology, see *e.g.*, D. EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 289-91 (1965); La Palombara, *Decline of Ideology: A Dissent and Reinterpretation*, 60 AM. POL. SCI. REV. 5 (1966); Shils, *Ideology: The Concept and Function of Ideology*, 7 INT'L ENCYCLOPEDIA SOC. SCI. 66 (1968); Herz, *International Relations: Ideological Aspects*, 8 INT'L ENCYCLOPEDIA SOC. SCI. 69 (1968).

11. Declaration on the Establishment of a New International Economic Order, May 1, 1974, G.A. Res. 3201, 29 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9556 (1974), *reprinted in* 13 INT'L LEGAL MATERIALS 715 (1974) [hereinafter cited as NIEO Declaration].

and more just order ought to be founded¹² and a detailed and comprehensive program of action for the establishment of such an order.¹³

The NIEO exhibits other characteristics which distinguish an ideology from other types of comprehensive patterns of political thought, such as doctrines, platforms, or theories.¹⁴ First, its basic premises are explicitly formulated and promulgated in three fundamental acts: the Declaration on the Establishment of a NIEO,¹⁵ the Programme of Action,¹⁶ and the Charter of Economic Rights and Duties of States.¹⁷ To the developing world, these instruments represent an authoritative promulgation of the NIEO ideology. Second, the NIEO includes mutually reinforcing empirical and normative elements: it describes in critical terms the status of the existing order and proclaims how it should be transformed.¹⁸ Third, it is relatively comprehensive in scope and integrated around particular cognitive and moral beliefs, notably a belief in the existing inequality between the rich and the poor nations and an emphasis on the preminent value of real equality and justice among the members of international society.¹⁹ Fourth, as a political ideology the NIEO is associated with one or more corporate bodies, namely the United Nations and various agencies of the U.N. system, which serve as an institutional framework for the realization of the NIEO objectives.²⁰ It must be stressed that despite its name, the NIEO is not just an economic ideology. Instead, it is an international political ideology. The less developed countries not only demand a larger share of the planet's wealth but also insist on, and give priority to, control of international decision-making processes in the name of real sovereign equality of states.²¹ The implications of this emphasis on the control of multilateral decision-making were obvious at UNCLOS III where the composition, powers, and voting in the International Seabed Authority (ISA) were a major controversial issue between the indus-

12. *Id.* at para. 4 (listing the principles on which the NIEO ought to be founded).

13. See Programme of Action on the Establishment of a New International Economic Order, May 1, 1974, G.A. es. 3202, 29 U.N. GAOR, Supp. (No. 1) at 5, U.N. Doc. A/9556 (1974), reprinted in 13 INT'L LEGAL MATERIALS 720 (1974) [hereinafter cited as Programme of Action].

14. See Shils, *supra* note 10, at 66.

15. See NIEO Declaration, *supra* note 11.

16. See Programme of Action, *supra* note 13.

17. Charter of Economic Rights and Duties of States, Dec. 12, 1974, G.A. Res. 3281, 30 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1975) [hereinafter cited as Charter], reprinted in 14 INT'L LEGAL MATERIALS 251 (1975).

18. For example, the NIEO Declaration, *supra* note 11, in paragraph 1 refers to the gap between the developed and the developing countries, and then makes a normative statement on what ought to be done about it (principles of the NIEO).

19. See, e.g., the NIEO Declaration, *supra* note 11, para. 4(b)(C)(j).

20. NIEO Declaration, *supra* note 11, para. 6. "The United Nations as a universal organization should be capable of dealing with problems of international economic co-operation in a comprehensive manner and ensuring equally the interests of all countries. It must have an even greater role in the establishment of a new international economic order." *Id.*

21. *Id.* para. 4(c).

trialized West and the Group of 77.²² Finally, despite great economic and other differences that exist among the Third World nations, developing states have given priority to their common ideology even if adherence to it may run counter to their particular national interests. Even if national interests are followed, they are dressed in the garb of the ideological rhetoric of the NIEO.

III. THE NIEO AND INTERNATIONAL LAW

A. *NIEO Challenges to Traditional International Law*

The developing countries' criticism of the existing international order as based on the laissez-faire ideology of economic liberalism is matched by their discontent with traditional international law, which reflects, in their view, the unjust economic and political reality.²³ As applied to economic relations, traditional international law assumed freedom of contract and formal equality before the law but it did not guarantee equality in bargaining power and equitable distribution of wealth and opportunity. Hence, the NIEO strategy has been to incorporate rules into the body of international law which would both "bring legal and material equality into greater concordance"²⁴ and to obligate rich nations to take into special consideration the needs and interests of developing nations. "Preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible" is one of the fundamental principles of the NIEO.²⁵ Under traditional international law, considerations of equity and natural justice are incompatible with a system of sovereign states in which justice means legal equality, reciprocity, and impartiality. Therefore, it is exactly these principles which are being questioned by the NIEO.²⁶

The NIEO strategy has been, first, to build up and expand the law of cooperation — the "international economic development law"²⁷ — into new fields such as, for example, transfer of technology, transnational corporations, and access to ocean resources. In addition, the NIEO strategy is to reinterpret the traditional principle of "equality" to mean not only legal equality but also equality of

22. See also *infra* text at notes 145 to 157.

23. For the sharpest denunciation of the traditional "oligarchic" and "plutocratic" international law, see M. BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 49-63 (1979). This is an English translation of the original French *POUR UN NOUVEL ORDRE ÉCONOMIQUE INTERNATIONAL* (1979).

24. W. LEVI, *LAW AND POLITICS IN THE INTERNATIONAL SOCIETY* 125 (1976).

25. NIEO Declaration, *supra* note 11, para. 4(n).

26. Whether it is possible to build a system of international law in which legal equality can be made compatible with material equity is another problem.

27. For early conceptualization of the "international economic development law" see B. RÖLING, *INTERNATIONAL LAW IN AN EXPANDED WORLD* (1960); W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 176-81 (1964). The idea is developed further in W. VERWEY, *ECONOMIC DEVELOPMENT, PEACE AND INTERNATIONAL LAW* (1972).

economic opportunity and human dignity. It is beyond the purview of this study to elaborate on all of the international law implications of the NIEO demands for equity. This theme, however, is developed in its application to specific issues of the NIEO challenges in the international law of the sea.²⁸ One caveat that must be made when discussing NIEO challenges to international law is that Third World countries do not reject Western international law as such. Quite the contrary, like the Soviet Union,²⁹ they endorse the basic principles of the law of coexistence, including the bulk of its rules delimiting national sovereign rights, such as equality of states and the consensual nature of international law. What underlies the split between the Western nations' and the developing world's approaches to international law are differences not of culture, but of economic and political interests.

B. *Converting NIEO Principles into International Legal Obligations*

The Declaration and the Programme of Action of 1974 and the Charter of 1975 are the most explicit and basic formulations of the NIEO ideology. They are the culmination of a long series of previous, less comprehensive international acts and declarations,³⁰ especially those adopted by the United Nations General Assembly, by the Group of 77 at the United Nations Conference on Trade and Development (UNCTAD), and by non-aligned nations conferences.³¹ As General Assembly "resolutions," the fundamental instruments that have shaped the NIEO ideology are only recommendatory in nature. Contrary to the position of the developing nations, they are not legally binding acts unless one assumes that they reflect otherwise existing customary international law.³² The latter possibil-

28. See Johnston, *The New Equity in the Law of the Sea*, 31 INT'L J. 79 (1976); Hossain, *Equitable Solutions in the International Law of the Sea: Some Problems*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 193 (K. Hossain ed. 1980).

29. See generally K. GRZYBOWSKI, *SOVIET PUBLIC INTERNATIONAL LAW: DOCTRINES AND DIPLOMATIC PRACTICE* (1970).

30. See, e.g., Resolution on Permanent Sovereignty over Natural Resources, December 14, 1962, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17), U.N. Doc. A/5217 (1963) reprinted in 2 INT'L LEGAL MATERIALS 223 (1963).

31. For a survey of the historical background of the NIEO, dating from the inter-war period, see R. MEAGER, *supra* note. 4.

32. The much discussed problem of the legal status of U.N. General Assembly resolutions is beyond the scope of this inquiry. The issue and especially the validity of the NIEO Declaration, *see supra* note 11, and the Charter, *see supra* note 17, were analyzed in the Arbitral Award of 19 January 1977 in the dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Company (TOPCO/CALASIATIC) v. The Government of the Libyan Arab Republic, Award on Merits, January 19, 1977 [hereinafter cited as TOPCO/CALASIATIC Award]. The English translation of the Award is reproduced in 17 INT'L LEGAL MATERIALS 1 (1978). The sole arbitrator, Professor Rene Jean Dupuy, followed the Western view. The case is discussed in von Mehren & Kourides, *International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476 (1981). The authors list a rich bibliography supporting the view that General Assembly resolutions are not legally binding. *Id.* at 524 n.177. Authors discussing the legal status of the U.N. General Assembly resolutions include

ity does not exist in the present case since the NIEO Declaration, although adopted without a vote, was accompanied by reservations expressed by thirty-eight delegations, and the vote on the 1975 Charter unambiguously shows a lack of general consensus.³³ Nevertheless, such resolutions may provide moral and political guidance for those states that supported them.³⁴ Moreover, if the resolutions are "repeated by and acquiesced in by sufficient numbers with sufficient frequency," they may be instrumental in the development of international law, eventually attaining the status of such law.³⁵ Even then, however, the legal value of such resolutions would vary considerably, depending on the type of resolution and the conditions attached to its adoption and its provisions.³⁶ As far as the Charter of Economic Rights and Duties of States is concerned, the U.N. General Assembly itself did not consider it as a first step toward the codification of international law — that is, an instrument formulating in writing the rules of customary international law.³⁷ In any case, the very fact that the three major NIEO Resolutions refer to a "new" international economic order seems to negate the claim that they are declaratory of existing law.³⁸ The recommendatory nature of these basic NIEO acts has important legal implications for the law of the sea since it means that the NIEO-inspired demands of the Group of 77 are not, or at least not yet, predicated on a firm and broad legal basis.

Although the ideas of the NIEO have been articulated primarily through resolutions of international organizations, which must be analyzed "as a political rather than as a legal declaration concerned with the ideological strategy of

Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, 137 RECUEIL DES COURS 419, 434-518 (1972); Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 97 (1955-56); J. CASTAÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* (1969); Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966).

33. Major industrialized countries, believing that the Charter discriminated against them, either voted against the Charter or abstained. Among the provisions rejected by the United States are: the way the Charter treats foreign investment, namely in terms which do not take into account the "minimum standard of justice" under international law, the endorsement of the concepts of producers' cartels and indexation of prices. See Statement of Sen. Charles Percy, U.S. Representative in the Second Committee of the U.N.G.A. explaining the U.S. position on the Charter in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 496-97 (A. Rovine ed. 1975).

34. Such is the opinion of Eric Suy, Under Secretary General and Legal Counsel of the United Nations who represents the view that General Assembly resolutions have no legally binding force for member states. See Suy, *Innovations in International Law-Making Processes*, in THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE 187, 190 (R. Macdonald, D. Johnston, & G. Morris eds. 1978).

35. R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 2 (1963).

36. TOPCO/CALASIATIC Award, *supra* note 32, reprinted in 17 INT'L LEGAL MATERIALS 1, 29 (1978).

37. TOPCO/CALASIATIC Award, *supra* note 32, reprinted in 17 INT'L LEGAL MATERIALS 1, 30 (1978).

38. See Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 6 (1975).

development,"³⁹ traditionally recognized sources of international law have also played a role in implementing the NIEO principles. A number of multilateral conventions, such as the Lome II Convention between the European Community and the African, Caribbean, and Pacific countries,⁴⁰ have also contributed to converting and implementing the NIEO principles into legally binding international obligations. Customary law has also played a role in this process. In the law of the sea, for example, the emergence of the Exclusive Economic Zone (EEZ),⁴¹ historically a product of the NIEO thinking, could for all practical purposes be considered a customary rule of international law⁴² since it has been adopted by a great majority of coastal states with the acquiescence of others, thereby becoming part of customary international law. The most noteworthy attempt to implement the ideology of the NIEO into a legally binding treaty, however, has been the codification and progressive development of the legal regime of the oceans, undertaken by the Third United Nations Conference on the Law of the Sea.

IV. EXPANSION OF THE COASTAL STATE JURISDICTION: THE EEZ

This section discusses the application of the international legal aspects of the NIEO to the law of the sea, the branch of public international law which, because of its ideological undertones, has become perhaps the most publicized and controversial. As articulated in the Declaration of 1974, the NIEO ideology proclaims an urgent need to establish a new legal order. This order is based primarily upon equity, sovereign equality, and independence and is designed to redress existing injustices and to eliminate the widening gap between the developed and the developing countries.⁴³ Except for stressing the need to pay particular attention to landlocked and island developing countries,⁴⁴ however, the Declaration does not explicitly deal with law of the sea issues.⁴⁵ The framers

39. TOPCO/CALASIATIC Award, *supra* note 32, reprinted in 17 INT'L LEGAL MATERIALS 1, 30 (1978).

40. Both the Final Act of the EEC-ACP Lome II Meeting of October 31, 1979 and the Convention are reprinted in 19 INT'L LEGAL MATERIALS 327, 341 (1980).

41. The "Exclusive Economic Zone" (EEZ) is an area beyond and adjacent to the territorial sea. Its width, including the territorial sea, is 200 nautical miles. The coastal state has sovereign rights for the purpose of exploring and exploiting natural resources as well as jurisdiction with regard to marine scientific research, establishment and use of artificial islands, and the protection and preservation of the marine environment. Convention, *supra* note 2, arts. 55, 56, 57. For the origins of the EEZ, see Nawaz, *The Emergence of Exclusive Economic Zone: Implications for a New Law of the Sea*, 16 INDIAN J. INT'L L. 471 (1976). See also *infra* notes 52-68 and accompanying text. For the introduction of the EEZ by the United States, see Proclamation 5030 of March 30, 1983, reprinted in 22 INT'L LEGAL MATERIALS 461 (1983).

42. *But see contra, e.g.,* Bernhardt, *Verfall und Neubildung von Wohnheitsrecht im Meeresvölkerrecht*, in RECHT ÜBER SEE [FESTSCHRIFT FÜR ROLF STÖDTER] 155 (H. Ipsen & K.H. Necker eds. 1979).

43. NIEO Declaration, *supra* note 11, Preamble.

44. *Id.*, para. 4(c).

45. The Charter, *supra* note 17, art. 29, however, reaffirms the "common heritage of mankind" nature of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the Area, according to the principles adopted by the General Assembly Resolution of 17 December 1970, *infra* note 84.

of the Declaration did not integrate the oceans into their comprehensive NIEO policy framework. Marine policy issues were perhaps too specialized and possibly too controversial even within the Group of 77 to be specifically mentioned in the NIEO manifesto.⁴⁶

Nevertheless, most of the Declaration's principles have significant implications for the management of the oceans and the law of the sea. Most prominent among the NIEO principles is that of "preferential and non-reciprocal treatment for developing countries."⁴⁷ More than fifty variations of the phrase "special interests and needs of developing countries" are reiterated in various contexts of the Convention of 1982,⁴⁸ which makes an attempt to apply a fundamental

46. For reasons of this neglect, see Borgese, *The New International Economic Order and the Law of the Sea*, in *THE LAW OF THE SEA: ISSUES IN OCEAN RESOURCE MANAGEMENT* 82, 83-84 (D. Walsh ed. 1977) [hereinafter cited as Borgese, *New International Economic Order*]. For a discussion of the various aspects of the relationship between the NIEO and the law of the sea, see *LAW OF THE SEA: CARACAS AND BEYOND* (R. Anand ed. 1978); Borgese, *supra*; Borgese, *The New International Economic Order and the Law of the Sea*, 14 *SAN DIEGO L. REV.* 584 (1977); Borgese, *De nieuwe internationale economische orde en het zeerecht*, 30 *INTERNATIONALE SPECTATOR* 707 (1976); Borfmann, *Neue Weltwirtschaftsordnung und internationales Seerecht*, in *DIE NEUE WELTWIRTSCHAFTSORDNUNG* 131 (D. Keschull ed. 1977); Daudi, *Notas sobre el nuevo orden económico internacional y el derecho del mar*, in *ESTUDIOS DE DERECHO INTERNACIONAL [HOMENAJE AL PROFESOR MIAJA DE LA MUELA]* 651 (1979); Costache Ciubotaru, *Dreptul marii si exigentele noii ordini economice si politice mondiale*, in *CATRE O NOVA ORDINE INTERNATIONALĂ* 460 (N. Ecobescu ed. 1976) [Roumania]; Djalal, *The Developing Countries and the Law of the Sea Conference*, 15 *COLUM. J. WORLD BUS.* 22 (1980); Gulland, *Developing Countries and the New Law of the Sea*, 22 *OCEANUS* 36 (1979); *LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER* (K. Hossain ed. 1980), (especially Part III which includes contributions by Koh, Paolillo, Oda, Faundez, Caminos, and Hossain); Juda, *UNCLOS III and the New International Economic Order*, 7 *OCEAN DEV. INT'L L.* 221 (1979); Lynch, *The Law of the Sea and the Developing Countries: Cornucopia or Catastrophe?*, in *THE LAW OF THE SEA: ISSUES IN OCEAN RESOURCE MANAGEMENT* 117 (D. Walsh ed. 1977); Manley, *Developing Nation Imperatives for a New Law of the Sea: UNCLOS I and III as Stages in the International Policy Process*, 7 *OCEAN DEV. INT'L L.* 9 (1979); Mehrish, *The Role of the Third World in the Law of the Sea Negotiations*, 28 *FOREIGN AFF. REP.* 31 (1979); Mesloub, *Troisième Conférence sur le Droit de la Mer et le Nouvel Ordre Economique International: Considérations Générales*, 15 *REV. ALGÉR. SCI. JUR. ECON. POL.* 292 (1978); Mottis, *The New International Economic Order in the New Law of the Sea*, in *THE NEW INTERNATIONAL ECONOMIC ORDER* 175 (K. Sauvart & H. Hasenpflug eds. 1977); Ogley, *The Law of the Sea Draft Convention and the New International Economic Order*, 5 *MARINE POLICY* 240 (1981); A. PARDO & E. BORGESE, *THE NEW INTERNATIONAL ECONOMIC ORDER AND THE LAW OF THE SEA* (1975); Rangel, *A Carte Internacional de Justiça e o direito do mar*, 71 *REV. FAC. DIR. UNIV. SÃO PAULO* 239 (1976); SEERECHTSKONFERENZ UND DRITTE WELT (A. Studier ed. 1980); Szekely, *El derecho del mar y la Carta de Derechos y Deberes Económicos de los Estados*, in *DERECHO ECONÓMICO INTERNACIONAL* 340 (J. Castañeda ed. 1976); Vitzthum, *Neue Weltwirtschaftsordnung und neue Weltmeeresordnung: Innere Widersprüche bei zwei Ansätzen zu sektoralen Weltordnungen*, 33 *EUROPA. ARCHIV.* 455 (1978) [English version in 19 *L. & S.* 7 (1979)]; Vitzthum, *The Search for Sectoral World Orders — Parallels between Attempts to Build Maritime and Economic World Orders*, in *ASPEKTE DER SEERECHTSENTWICKLUNG* 273 (W. Vitzthum ed. 1980); Vitzthum, *Peaceful Change through International Lawmaking: As Exemplified by the Third United Nations Conference on the Law of the Sea*, 23 *L. & S.* 7 (1981). For further bibliographic references, see Morris & Ferreira, *Latin America, Africa, and the Third United Nations Conference on the Law of the Sea: Annotated Bibliography*, 9 *OCEAN DEV. INT'L L.* 101 (1981).

47. NIEO Declaration, *supra* note 11, para. 4(n).

48. Convention, *supra* note 2, Preamble; art. 61(3) (conservation of the living resources of the EEZ); art. 62(2)(3)(4)(a) (utilization of the living resources of the EEZ); art. 69 (right of land-locked states); art. 70 (right of states with special geographical characteristics); art. 82(3)(4) (payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles); art. 119 (conservation of the

principle of the NIEO to a vital part of international law. This NIEO principle is discussed first in regard to the NIEO-motivated emergence of extended fisheries jurisdiction.

A. *Challenges to the Existing Order*

By the time that the demands of the developing countries for a NIEO were comprehensively articulated in the 1974 Declaration, and the UNCLOS III convened in Caracas in 1974 for its first substantive session, important areas of the law of the sea and, in particular, the coastal jurisdiction, had already been affected by the growing conflict between the industrialized maritime nations and the countries of the "South." Consistent with their criticism of the laissez-faire ideology of traditional international law, Third World countries challenged its corollary, the principle of the freedom of the seas, as developed by the more powerful and now technologically superior maritime states.⁴⁹ As claimed by Third World spokesmen, the principle of the freedom of the seas, along with the corresponding rule of a narrow territorial sea jurisdiction of the coastal state,⁵⁰

living resources of the high seas); art. 140(1)(2) (activities in the "Area" for the benefit of mankind); art. 143(2)(b) (marine scientific research); art. 144 (transfer of deep seabed technology); art. 148 (participation of developing states in activities in the Area); art. 151(4) (production policies); art. 152 (exercise of power by the Authority); art. 155(2) (review conference); art. 160(2)(j)(k) (powers and functions of the Assembly); art. 161(1)(c)(d)(e); art. 161(2)(b) (composition, procedure, and voting in the Council); art. 164(2)(b) (Economic Planning Commission); art. 202 (scientific and technical assistance to developing states in protecting and preserving the marine environment); art. 203 (preferential treatment for developing states in the area of protecting and preserving the marine environment); art. 207(4) (pollution from land-based sources); art. 244(2) (publication and dissemination of marine scientific information and knowledge); arts. 266(2), 268(d), 269(a), 271 to 276 (development and transfer of marine technology). *See also* Convention, *supra* note 2, Annex III (basic conditions of prospecting, exploration, and exploitation); art. 5(3)(e) (transfer of deep seabed technology); art. 8 (reservation of sites); art. 9 (activities in reserved sites); art. 13 (financial terms of contracts); Annex IV (Statute of the Enterprise); art. 12(3)(b)(ii).

49. All major maritime states, particularly Great Britain, contributed to the development of the principle of the freedom of the sea. For a historical review of this principle, see 1 D. O'CONNELL, *supra* note 2, at 1-20.

50. Until the time the First United Nations Conference on the Law of the Sea convened in Geneva in 1958, most coastal states claimed only a three mile territorial sea. More and more countries, however, especially those of the Third World, claimed more, usually twelve or more miles. There was no definitive rule in international law concerning the width of the territorial sea. By the time UNCLOS III met in Caracas in 1974 there had developed a consensus that a twelve mile maximum would be the rule. This limit was adopted in the Convention (art. 3). For a detailed historical analysis see 1 D. O'CONNELL, *supra* note 2, at 124-69.

The rule of a narrow territorial sea jurisdiction of the coastal state was legitimized in the 1958 Geneva Law of the Sea Conventions. These four conventions were, in general, a codification of the existing customary law of the sea. *See* Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (By implication, Article 24(2) of this Convention limited the territorial sea to not more than twelve miles, the allowable width of the contiguous zone.); Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285. The fourth convention, the Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as Convention on the Continental shelf], dealt with a relatively recent problem.

benefitted only developed nations. It allowed developed nations to exercise influence throughout the oceans and to exploit and deplete marine resources off the coasts of developing countries by means of distant-water fishing fleets.⁵¹ Such exploitation led to the expansion of coastal waters jurisdiction initiated some thirty-five years ago by Latin American countries, especially those with long coast lines.⁵² Their example was subsequently followed by many nations of Africa and Asia and finally was adopted in various legal forms by virtually all nations, including the United States.⁵³ It is beyond the scope of this article to deal at length with the trend toward wider territorial seas or with the history of the "enclosure" movement⁵⁴ in the form of 200 mile "fishery zones," "patrimonial sea,"⁵⁵ or the EEZ.⁵⁶ The following discussion is limited to the ideological implications of the emergence of the EEZ with particular emphasis on the regulation of this issue in the Convention of 1982.

From the perspective of a Latin American country with long coast lines, the extension of coastal jurisdiction may be consistent with the NIEO because it was directed against fishing, research, and other "encroachments" of developed countries which engaged in such activities far from their own shores. In this sense, extended coastal jurisdiction was a logical extension of various resolutions of the U.N. General Assembly proclaiming the right of peoples and nations to establish permanent sovereignty over their natural wealth and resources.⁵⁷ Along this line of reasoning, Mexican President Echeverría Alvarez stated at UNCLOS III that "the law of the sea formulated by the Conference could be a powerful instrument which would enable the third world to achieve permanent

51. In 1972, about sixty per cent of the world catch was taken by developed countries. While nearly all of the non-local catch was taken by fishermen from developed countries, about a third was caught off the coast of developing countries. See Gulland, *World Fisheries and Fish Stocks*, 1 MARINE POLICY 179, 179-89 (1977).

52. Latin American claims are described in F. ORREGO VICUÑA, *LOS FONDOS MARINOS Y OCEANICOS: JURISDICCION NACIONAL Y REGIMEN INTERNACIONAL* 65-96 (1976). For a convenient review, see A. HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 67-95 (1981).

53. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331, *reprinted in* 15 INT'L LEGAL MATERIALS 634 (1976).

54. The term "enclosure" refers to the extension of coastal states' jurisdiction over natural resources 200 miles seawards, thereby enclosing the sea. See R. ECKERT, *THE ENCLOSURE OF OCEAN RESOURCES: ECONOMICS AND THE LAW OF THE SEA* (1979).

55. "Fishery Zones" are zones proclaimed only for purposes of exclusive jurisdiction over fisheries. See 1 D. O'CONNELL, *supra* note 2, at 510-51. "Patrimonial Sea" is a concept developed by the Caribbean and Central American states, virtually synonymous with the EEZ. See A. HOLLICK, *supra* note 52, at 252.

56. The evolution of the concept of the EEZ is described in W. EXTAVOUR, *THE EXCLUSIVE ECONOMIC ZONE: A STUDY OF THE EVOLUTION AND PROGRESSIVE DEVELOPMENT OF THE INTERNATIONAL LAW OF THE SEA* (1979). See also Hollick, *The Origins of 200-Mile Offshore Zones*, 71 AM. J. INT'L L. 494 (1977).

57. See, e.g., Resolution on Permanent Sovereignty over Natural Resources, para. 1, December 14, 1962, G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) at 9, U.N. Doc. A/5207 (1963), *reprinted in* 2 INT'L LEGAL MATERIALS 223 (1963).

and effective sovereignty over its natural resources, and which, indirectly, would make for a more democratic and juster [sic] international division of labor."⁵⁸

What has been noted above with respect to the Third World's attitude toward "Western" international law in general is equally true of the law of the sea as a whole. That is, although questioning in their view of the "outlived" functions of the freedom of the seas, developing countries do not pose a wholesale challenge to the traditional law of the oceans. On the contrary, they wholeheartedly uphold those rules of traditional law which grant them legal protection for their growing nationalistic interests in navigation, resource exploitation, and other uses of the sea. As stated by the Argentinian delegate at UNCLOS III, "[n]ot all the norms of the old law were anachronistic. What needed to be changed basically was the philosophy and values of the legal order."⁵⁹

B. *Differing National Interests among the Developing Nations*

The geographical circumstances of the enclosure movement are not necessarily favorable to the developing world, as will be discussed below in more detail. Hence, on more sober calculation by the Third World, expansion of coastal jurisdiction should have remained outside the ideological conflict between the rich and the poor countries. Instead, the Latin Americans' struggle to assert their claims against the United States was perceived by the majority of Third World countries, especially those with long coast lines, as part of an ideological struggle against neo-colonialism and imperialism and for a redistribution of the world's resources. This ideological bias was encouraged by the skillful leadership of the Latin Americans, who succeeded in combining the sensitive and symbolic issue of the international regime of the "common heritage of mankind"⁶⁰ with claims for extended coastal jurisdiction.⁶¹ Since developed countries initially opposed the concept of the EEZ,⁶² many developing countries, some of them lacking ade-

58. 1 UNCLOS III Off. Rec. 195, 198 (1975).

59. *Id.* at 73.

60. The concept of the "common heritage of mankind," eventually adopted in Article 136 of the Convention as the principal basis for the regulation of deep sea mining, originated in the proposal submitted to the U.N. General Assembly by Maltese Ambassador Arvid Pardo. Under Pardo's proposal, the seabed and its resources would not be subject to national appropriation, would be reserved exclusively for peaceful purposes, and would be managed in common for the benefit of mankind, taking into consideration the interests and needs of the developing countries. See discussion *infra* § VI. See also A. PARDO, *THE COMMON HERITAGE: SELECTED PAPERS ON OCEANS AND WORLD ORDER 1967-1975* (1975). For a more recent discussion, see, e.g., Van Dyke & Yuen, "Common Heritage" v. "Freedom" of the High Seas: Which Governs the Seabed?, 19 SAN DIEGO L. REV. 493 (1982); Saffo, *The Common Heritage of Mankind: Has the General Assembly Created a Law to Govern Seabed Mining?*, 53 TULANE L. REV. 492 (1979); Borgese, *Law of the Sea: The Next Phase*, 4 THIRD WORLD Q. 698 (1982); see generally Larschan & Brennan, *The Common Heritage of Mankind Principle in International Law*, 21 COLUM. J. TRANSNAT'L L. 305 (1983).

61. See A. Hollick, *supra* note 52, at 171. See also Pohl, *Latin America's Influence and Role in the Third Conference on the Law of the Sea*, 7 OCEAN DEV. INT'L L. 65 (1979).

62. In 1974, the Soviet Union, the United Kingdom, and United States accepted the demands of the developing countries to include the concept of the EEZ in the Convention. See A. HOLLICK, *supra* note 52, at 286. For the adoption of the EEZ by the United States, see *supra* note 41.

quate expertise in marine affairs, simplistically believed that the EEZ idea must necessarily be in their interests. Thus, by the time of the Caracas session in 1974, the 200 mile exclusive economic zone had become a major component in the rallying cry of the Group of 77.⁶³ African countries with long coast lines, which greatly contributed to articulating the EEZ concept, were lured by the prospect of the potential wealth of their respective zones. Even those developing states characterized as landlocked or geographically disadvantaged states (LL-GDS), which were becoming increasingly aware of the adverse effects of the EEZ for their own development, reluctantly followed the ideological trend to avoid charges of being in the service of the rich countries. The Group of 77's rejection of the narrow coastal jurisdiction and its members' perception of the 200 mile zone as a pillar of a more equitable legal order of the oceans is illustrated by the following statement of the Tanzanian delegate at UNCLOS III:

Freedom of the seas had ceased to serve the interests of international justice. It had become a catch word and an excuse for a few countries to exploit ruthlessly the resources of the sea, to terrorize the world and to destroy the marine environment. That type of freedom belonged to the old order and had outlived its time.⁶⁴

Due to the LL-GDS' increasing awareness and assertiveness of their own particular interests, however, the clear-cut ideological North-South division on the extended coastal jurisdiction issue could not be maintained. The LL-GDS, including both developed and developing countries, had already proposed in Caracas that they be granted the right to participate in the exploration and exploitation of the economic zones of neighboring coastal states "on an equal and non-discriminatory basis."⁶⁵ If applied to poor beneficiaries, the idea is entirely consistent with the NIEO principle of equitable treatment of all nations. Nonetheless, it was rejected by the developing coastal states as derogating from their sovereignty over natural resources.⁶⁶ With mounting pressure from the

63. The concept of the 200 mile EEZ as such was considered at the 1972 Yaounde Regional Seminar on the Law of the Sea and was formulated at Caracas in the African Draft Articles on the EEZ. U.N. Doc. A/CONF. 62/C.2/L.82, in 3 UNCLOS III Off. Rec. 240 (1975). The African states' role at UNCLOS III is reviewed in N. REMBE, *AFRICA AND THE INTERNATIONAL LAW OF THE SEA: A STUDY OF THE CONTRIBUTION OF THE AFRICAN STATES TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA* (1980).

64. 1 UNCLOS III Off. Rec. 93, 93 (1975) (comments of Mr. Warioba). Cf. Anand, "Tyranny" of the Freedom of the Seas Doctrine, 12 INT'L STUDIES 416 (1973) for the characterization of the doctrine of the freedom of the seas as "tyrannical." But even this author from a country that has much to win from the EEZ admits that "some nagging questions . . . still remain to be solved." Anand, *Winds of Change in the Law of the Sea*, in *LAW OF THE SEA: CARACAS AND BEYOND* (R. Anand ed. 1978).

65. 3 UNCLOS III Off. Rec. 216, 216 (1975). Cf. similar previous unsuccessful attempts by Uganda and Zambia to establish economic zones on a regional or subregional basis. U.N. Doc. A/AC 138/89, P.C., No. 9; A/AC.138/SC.II/L.41 (1973).

66. A. HOLLICK, *supra* note 52, at 295.

large group of the LL-GDS, non-discriminatory access to the resources of the EEZ became one of the most controversial issues at the Conference, severely undermining the ideologically based solidarity of the Group of 77.⁶⁷ The Draft Convention falls short of the expectations of the LL-GDS even though some concessions were made in their favor.⁶⁸

C. *Compatibility of the EEZ and NIEO Ideology*

The creation of the EEZ represents a serious reduction in the size of the international area of the "common heritage of mankind," removing from it almost one third of the ocean space and 80 per cent of fish stocks (let alone the resources of the continental shelf).⁶⁹ Furthermore, pure geography favors, on total balance, the developed rather than developing countries. Data reveal that twenty-five countries will gain control of 76 per cent of the world EEZ.⁷⁰ Thirteen of these countries are developed, the most fortunate winners among them being Australia, Canada, France, Japan, New Zealand, Norway, Portugal, South Africa, the Soviet Union, and the United States. These thirteen developed nations acquire 48 per cent of the 76 per cent of the EEZ controlled by the twenty-five countries, whereas the twelve lucky developing nations (some of them not the least developed but "threshold" nations) will gain only 28 per cent.⁷¹ On balance, therefore, 46 per cent of the enclosed ocean area will go to the rich countries, which represent only 25 per cent of the world's total population, whereas 54 per cent of such area will go to the poor countries, which account for 75 per cent of the world's population.⁷² Although some developing countries, such as Mauritania and Namibia, are gaining rich fishing resources, many least developed states, and especially the geographically disadvantaged and landlocked ones, will receive little or no benefits.⁷³ Most will not be able to utilize their zones until they develop an appropriate technological infrastructure to manage their offshore resources.⁷⁴ The facts of geography show, therefore, that the redistribution of fishing jurisdiction through the medium of the EEZ will only aggravate the inequities which this ideology purports to rectify.

67. *See id.* at 294-95.

68. *See infra* notes 75 to 77 and accompanying text.

69. Bulajic, *Legal Aspects of a New International Economic Order*, in *LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER* 52 (K. Hossain ed. 1980).

70. *See* Nepal's Memorandum Relating to the Establishment of a Common Heritage Fund. U.N. Doc. A/CONF. 62/65, May 8, 1978, in 9 UNCLoS III Off. Rec. 175, at 176 [hereinafter cited as Nepal's Memorandum]. *See infra* text accompanying note 100. *See also* 1 D. O'CONNELL, *supra* note 2, at 552 n.1.

71. Nepal's Memorandum, *supra* note 70.

72. Johnston, *supra* note 28, at 88; Bulajic, *supra* note 69, at 52-63, *citing* data from THE TRILATERAL COMMISSION, *A NEW REGIME FOR THE OCEANS* 5-6 (1977).

73. Bulajic, *supra* note 69, at 52.

74. B. BOCZEK, *THE TRANSFER OF MARINE TECHNOLOGY TO DEVELOPING NATIONS IN INTERNATIONAL LAW* 45 (1982).

There is little among the EEZ provisions of the Convention that compensates the least developed countries for the adversities of geography or realistically takes into account their special interests and needs. The LL-GDS do have right of access to neighboring EEZ,⁷⁵ but only to any surplus and only under equitable bilateral, subregional, and regional agreements with coastal states.⁷⁶ In practice, the chances of any surplus are not strong. The example of Africa demonstrates the plight of the disadvantaged states. Fourteen out of twenty-one developing landlocked states are located there, next to their equally destitute but geographically more fortunate neighbors. Under such circumstances, it will be very difficult for these nations to agree on access to surplus fishing. A least developed coastal state will be more likely to maximize the return from its EEZ by entering into agreements with distant-water fishing countries than by concluding a surplus agreement with a landlocked country. Moreover, before embarking on the exploitation of another country's EEZ under a surplus agreement, a landlocked country will first have to develop its own scientific and technological capability for ocean fishing.⁷⁷

For developing coastal states with potential fishery resources, the development of appropriate fisheries technology will be crucial if they are to take advantage of the benefits accruing from the institution of the EEZ.⁷⁸ In this regard, the Convention provides that one of the conditions that a coastal developing state may impose upon nationals of other states fishing in its zone under a surplus agreement may relate to requirements for training personnel and transfer of technology, including enhancement of the coastal state's capabilities of undertaking fisheries research.⁷⁹

In sum, despite certain rather meager concessions provided in the UNCLOS III Convention for the less fortunate members of the Group of 77, the overall balance resulting from the introduction of the EEZ will still weigh in favor of the developed countries. The leading members of the Group of 77 who enjoy the benefit of their favorable geographical position paid lip service to the principles of the NIEO, using them only for their particular self-interests. The rhetoric of an internationalist ideology proved to be a smoke screen to conceal motivations springing from nationalism, which still remains the most powerful ideology of the present day international system.

V. THE CONTINENTAL SHELF

Like the EEZ, the developing countries' position on the resources of the continental shelf was determined more by geography and national interest than

75. Convention, *supra* note 2, arts. 62, 69, 70.

76. *Id.*

77. The plight of the poor landlocked and geographically disadvantaged states is analyzed in Alexander, *The "Disadvantaged" States and the Law of the Sea*, 5 MARINE POLICY 185 (1981).

78. See B. BOCZEK, *supra* note 74, at 44-45.

79. Convention, *supra* note 2, art. 62(4)(j). See also B. BOCZEK, *supra* note 74, at 44-45.

by the ideology of the NIEO. The trend to extend the coastal state's jurisdiction was, however, initiated by the United States in 1945 by the Truman Proclamation on the Continental Shelf. The Proclamation asserted U.S. jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf contiguous to the United States, without affecting the legal status of the superjacent waters and the high seas.⁸⁰ For the purposes of the Proclamation, the continental shelf was defined as that part of the seabed and subsoil adjacent to the coast over which the sea is not more than 100 fathoms (600 feet or about 200 meters) in depth.⁸¹ Many other countries followed the United States' initiative, and, by the time of the First U.N. Conference on the Law of the Sea, the concept of the continental shelf as interpreted by the Truman Proclamation had become part of customary international law of the sea.⁸² This trend was codified in the Geneva Convention on the Continental Shelf, which accepted the depth of 200 meters as the limit "to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said area."⁸³

The U.N. General Assembly Resolution of 1970 on the "common heritage of mankind"⁸⁴ denied the extravagant implications of this "exploitability criterion" of the 1958 Convention, according to which all submarine areas could theoretically be divided among the coastal states at the deepest trenches.⁸⁵ Nevertheless, the principle that the continental shelf was the "natural prolongation" of the coastal state's land territory was adopted at UNCLOS III by broad-margin states, including developing ones, as an argument for the coastal state's jurisdiction to the outer edge of the continental margin.⁸⁶

The "common heritage" idea of Arvid Pardo, embodied in the Declaration of 1970 and once so enthusiastically acclaimed by the Group of 77, was disregarded at UNCLOS III by the broad-margin members of the Group.⁸⁷ The Declaration of 1970 provided that the seabed and its resources beyond the limits of national jurisdiction were the "common heritage of mankind." As such, the seabed was not subject to appropriation by any state and was to be managed by an interna-

80. See Truman's Presidential Proclamation No. 2667, 3 C.F.R., 1943-48 Comp., p. 67, *reprinted in* 59 Stat. 884.

81. White House Press Release, September 28, 1945, 13 DEP'T ST. BULL. No. 327, at 484-85 (1945) *reprinted in* M. Whiteman, 4 DIGEST OF INTERNATIONAL LAW 757-58 (1965).

82. I D. O'CONNELL, *supra* note 2, at 475-76.

83. Convention on the Continental Shelf, *supra* note 50, art. 1. This clause is known as the "exploitability criterion."

84. Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, December 17, 1970, G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 28) at 24, U.N. Doc. A/8028 (1971), *reprinted in* 10 INT'L LEGAL MATERIALS 220 (1971) [hereinafter cited as Declaration of Principles].

85. For the possibility of such an interpretation see, e.g., Oda, *Proposals for Revising the Convention on the Continental Shelf*, 7 COLUM. J. TRANSNAT'L L. 1, 9 (1978).

86. See Ogley, *supra* note 46, at 242-43.

87. A. HOLLICK, *supra* note 52, at 295.

tional regime for the benefit of mankind as a whole, with equitable sharing of resources, "taking into particular consideration the interest and needs of the developing countries, whether landlocked or coastal."⁸⁸ Unfortunately, the geographical scope of the common heritage was severely limited at UNCLOS III. Broad-margin states, including some members of the Group of 77,⁸⁹ insisted on exclusive jurisdiction over the entire continental margin,⁹⁰ disregarding the preferences of less developed and disadvantaged states for a shelf limit of 200 miles.⁹¹ The controversy over the sharing of the spoils to be carved from the originally conceived area of the common heritage of mankind was among the most disputed at UNCLOS III.⁹² The compromise definition eventually adopted basically follows the expansive interpretation. This definition eliminates a sizeable portion of the common heritage since virtually all known offshore oil and gas deposits are found in the continental margin.⁹³

Under the Convention's compromise, the continental shelf extends either to a distance of 200 nautical miles, if the outer edge of the continental margin does not reach that distance, or, if the outer edge extends beyond 200 miles, the continental shelf comprises the whole margin. The coastal state may not claim, however, more than 350 miles, except in the case of submarine elevations beyond that distance that are natural components of the continental margin. In such a case, the coastal state jurisdiction shall not extend to points beyond 2,500 meters depth.⁹⁴ There is no provision in the Convention for a sharing with the developing countries of the currently exploitable rich oil and gas resources of the continental shelf within the 200 mile zone. Lip service is paid to the principles of the NIEO by a provision requiring the coastal states to share with the international community the benefits derived from the exploitation of the shelf beyond 200 miles.⁹⁵ Annual payments to the International Seabed Authority are to begin

88. Declaration of Principles, *supra* note 84, para. 9.

89. Among countries claiming jurisdiction over the seabed and subsoil as far as the edge of the continental margin are: Bangladesh, Burma, Guyana, India, Kampuchea, Pakistan, Seychelles, South Yemen, and Sri Lanka. I D. O'CONNELL, *supra* note 2, at 498 n.165.

90. Continental margin is the whole area of the submerged portion of the continental crust. It includes the "continental shelf" (as used by geophysical science), the "continental slope," and the "continental rise" which reaches the abyssal plain (usually between 1,500 and 5,000 meters of water). *Id.* at 443-44.

91. A. HOLLIICK, *supra* note 52, at 344.

92. The continental shelf debate at UNCLOS III is summarized in A. HOLLIICK, *supra* note 52, at 294-96, 307-08, 327-28, 344-45.

93. Nepal's Memorandum, *supra* note 70, at 176; Swing, *Who Will Own the Oceans?*, 54 FOR. AFF. 527, at 531 (1976).

94. Convention, *supra* note 2, art. 76. The margin extends beyond 200 miles off the coasts of such developed countries as Australia, Canada, France, Iceland, Ireland, New Zealand, Norway, Spain, the Soviet Union, the United Kingdom, and the United States and the coasts of some thirty developing countries including Argentina, Brazil, Ecuador, India, Indonesia, Kenya, Madagascar, Maldives, Mozambique, Nigeria, Pakistan, Somalia, Sri Lanka, and Tanzania.

95. *Id.* at art. 82.

after the first five years of production, starting with one per cent of the value or volume of production from a site, and rising to seven per cent in the twelfth and subsequent years.⁹⁶ A developing state is also subject to such payments unless it is a net importer of a mineral resource produced in its continental shelf.⁹⁷ All payments are distributed by the ISA on the basis of equitable sharing criteria, taking into account the interests and needs of developing states, particularly the least developed and the landlocked among them.⁹⁸

These modest sharing provisions, restricted basically to an area of the continental margin which will hardly be commercially exploitable in the near future,⁹⁹ again demonstrate that the leading developing coastal states supported the ideas of the NIEO only to the extent that they served their particular national interests. This inconsistent and hypocritical attitude is evidenced by the developing coastal states' rejection of Nepal's 1978 proposal on the establishment of a Common Heritage Fund. This proposal provided for equitable and graduated sharing of benefits derived not only from the mineral exploitation of the continental margin beyond 200 miles, but also those resulting from exploitation within the 200 mile economic zone.¹⁰⁰ Unfortunately, this proposal, which would have made real progress in applying the NIEO principles in the law of the sea, came too late in the Conference. Furthermore, the proposal bore a politically awkward similarity to the United States' unpopular "trusteeship zone" idea of 1970.¹⁰¹ The "trusteeship zone" called for both the renunciation of national claims to seabed resources beyond the depth of 200 meters and the establishment beyond this point of an international regime to govern the exploitation of seabed resources for the benefit of the international community.¹⁰²

The general conclusion to be drawn from the emergence of the expanded coastal jurisdiction was expressed by Tommy T.B. Koh of Singapore, President of UNCLOS III, who, risking unpopularity with some of his colleagues in the Group of 77, stated that:

far from promoting [the objective of the NIEO to narrow the existing gap between the rich and poor nations], the new Law of the Sea

96. *Id.*

97. *Id.*

98. *Id.*

99. Swing, *supra* note 93, at 536.

100. Nepal's Memorandum, *supra* note 70. Two years later, in 1980, Peru appeared to support this proposal if the obligation were to be limited to rich countries, but later gave up the idea. Ogley, *supra* note 46, at 243, citing John J. Logue's reference to U.N. Co. A/CONF. 62/W.S/6, April 4, 1980, in Logue, *Moment of Choice: Will the Third World Fight for the Common Heritage Proposal?* (The Common Heritage Institute of Villanova University, August 1980), at 2.

101. The proposal was unpopular with the developing countries because it originated with the United States which the developing countries perceive as "imperialistic." Moreover, the proposal's use of the term "trusteeship" was ideologically objectionable to developing countries because of its "colonial" connotations. Swing, *supra* note 93, at 535.

102. For a discussion of this proposal see A. HOLLICK, *supra* note 52, at 231.

Treaty is likely to widen the gap. . . . The great majority of the developing countries, especially the landlocked countries, the least developed countries, will gain little or nothing . . . instead of building a more progressive and equitable world order for the oceans the Treaty appears to have the very paradoxical effect of bringing new and greater wealth to the rich nations of the North and a very inequitable and . . . undesirable consequence for the many miserable poor countries of Asia and Africa.¹⁰³

Thus the challenge of creating a legal basis for an equitable redistribution of a major portion of the oceans' resources is still facing the international community, now further compounded by the aggravation of the previously existing inequalities.

VI. SEABED MINING

The extension of the coastal jurisdiction at the expense of the "outlived" principle of the freedom of the seas has by now become an accomplished fact. However, the remaining major challenge in the law of the sea, the NIEO call for the "common heritage" of the deep seabed to be exploited for the benefit of all mankind, while taking into special consideration the interests and needs of developing nations, is only a part of the UNCLOS III Convention of the Law of the Sea¹⁰⁴ which was not signed by the United States and some other industrialized nations because of its provisions on the regime of the deep sea mining.¹⁰⁵ This article does not deal at length with the international legal aspects of deep seabed mining, including the complex negotiations at UNCLOS III which produced the Convention's lengthy provisions on the legal status of the "Area"¹⁰⁶ and the basic conditions of its exploration and exploitation.¹⁰⁷ Instead, this article limits itself to brief comments on links that exist between the NIEO ideology and some more important aspects of the seabed mining provisions of the Convention of 1982.

103. Koh, *The International Seabed and the Third UN Law of the Sea Conference: Some NIEO Issues*, reprinted in *LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER* 164 (K. Hossain ed. 1980). Many other analysts agree with this conclusion. See, e.g., Borgese, *New International Economic Order*, *supra* note 46, at 99; Lynch, *supra* note 46, at 127; Vitzthum, *The Search for Sectoral World Orders*, *supra* note 46, at 284-85. Cf. Nepal's Memorandum, *supra* note 70.

104. See *supra* note 8.

105. 21 INT'L LEGAL MATERIALS 1477 (1982).

106. The "Area" is a legal term of the Convention, meaning the "seabed and ocean floor and subsoil thereof, beyond the limit of national jurisdiction." Convention, *supra* note 2, art. 1, para. 1(1). It is commonly known as the deep seabed.

107. Convention, *supra* note 2, Part XI. The Area (arts. 133 to 199) and Annexes III (Basic Conditions of Prospecting, Exploration and Exploitation) and IV (Statute of the Enterprise). The deep seabed issue has produced an enormous amount of writing. For a bibliography of books on this subject, see Goldie, *A Selection of Books Reflecting Perspectives in the Seabed Mining Debate*, 15 INT'L LAW. 293 (Pt. I), 445 (Pt. II) (1981). Among the more recent studies, see, e.g., Brewer, *Deep Seabed Mining: Can an Acceptable Regime Ever Be Found?*, 11 OCEAN DEV. INT'L L. 25 (1982); Evriades, *The Third World's Approach to the*

A. *Ideological Conflict*

Quite apart from the North-South conflict, the issues of who has the right to explore and exploit the deep seabed and under what conditions such a right may be exercised are serious challenges to international law themselves, resulting from advances in technology which allow the mining of deep seabed manganese nodules rich in copper, nickel, cobalt, manganese, and other metals.¹⁰⁸ It so happens, however, that the two major doctrinal approaches to the progressive development of international law in this area are the conflicting ideologies of the North and South: economic liberalism and the NIEO, respectively. The first considers the deep seabed resources to be *res nullius* available, by virtue of the freedom of the seas, for appropriation by any nation capable of mining them. The second regards them as *res communis*, a "common heritage of mankind," to be shared by all irrespective of their technological capabilities.¹⁰⁹ In view of the high stakes perceived by the developing countries to be involved in deep seabed mining and the unclear legal status of resources beyond any nation's jurisdiction, it is not surprising that the seabed issue has had great attraction for the Group of 77 as an ideal vehicle for implementing the principles of the NIEO.

Prior to the NIEO Declaration of 1974 and the Caracas session of the same year, the major landmarks in the developing countries' campaign for a regime of the deep seabed were the Maltese proposal articulated in Pardo's address at the United Nations General Assembly in 1967,¹¹⁰ the "Moratorium" Resolution of 1969 calling upon all states to refrain from seabed exploitation prior to the establishment of an international regime,¹¹¹ and the "Common Heritage" Deep

Deep Seabed, 11 OCEAN DEV. INT'L L. 201 (1982); Post, *United Nations Involvement in Ocean Mining*, 10 OCEAN DEV. INT'L L. 275 (1982). For a convenient review of UNCLOS III debates on this and other issues through the 10th session (1981) see Oxman & Stevenson, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1 (1974); Oxman & Stevenson, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1 (1975); Oxman & Stevenson, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AM. J. INT'L L. 763 (1975); Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions*, 71 AM. J. INT'L L. 247 (1977); Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT'L L. 57 (1978); Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)*, 73 AM. J. INT'L L. 1 (1979); Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)*, 74 AM. J. INT'L L. 1 (1980); Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 AM. J. INT'L L. 211 (1981); Oxman, *The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)*, 76 AM. J. INT'L L. 1 (1982). Results of each UNCLOS III session through 1980 are conveniently digested in A. HOLLICK, *supra* note 52, at 284-349.

108. See *supra* note 6.

109. For further discussion of the concepts *res nullius* and *res communis*, see I D. O'CONNELL, *supra* note 2, at 452-58.

110. U.N. Doc. A/6695 and A/C.1/PV.1515 (1967). See *supra* note 60.

111. Resolution of December 15, 1969, G.A. Res. 2574 D-XXIV, 24 U.N. GAOR, Supp. (No. 30) at 11, U.N. Doc. A/7630 (1970), reprinted in 9 INT'L LEGAL MATERIALS 422 (1970).

Seabed Declaration of 1970.¹¹² Unfortunately, and in violation of Pardo's conception, the substance of the common heritage was severely reduced by the exclusion of the most valuable and currently exploitable areas of the continental shelf and margin. As noted above, major coastal nations, including some leading members of the Group of 77, did not hesitate to "nationalize" portions of the "common heritage" adjacent to their submerged coast lines, thus reducing by about thirty per cent (and perhaps eliminating altogether) any benefits that, according to Pardo's idea and the 1970 Declaration, might equitably accrue to mankind as a whole.¹¹³

By the time that UNCLOS III convened at Caracas in 1974, Pardo's concept of the indivisibility of the international area of the common heritage was dead, and it was taken for granted that the "Area" would include only the abyssal seabed with its polymetallic nodules, but not the offshore oil and gas and possibly other resources of the continental margin.¹¹⁴ With the extended coastal jurisdiction a reality, and beneficial to only selected developing countries, the Group of 77 concentrated on the political and ideological aspects of the seabed issue.¹¹⁵ This issue became a test case for the NIEO which could serve as a precedent in other possible future NIEO areas of North-South negotiations.¹¹⁶

B. Generally Accepted Principles

Although implementation of the international legal regime of the seabed remains an open challenge, there seems to be general consensus on a number of

112. Declaration of Principles, *supra* note 84. The "Common Heritage" Deep Seabed Declaration of 1970 basically restated Pardo's proposal.

113. See *supra* text accompanying notes 87 to 102.

114. See *supra* discussion in § V. For the possibility of sharing benefits from the exploitation of the continental margin beyond 200 miles, see *supra* text accompanying notes 95 to 98.

115. The link between UNCLOS III and the NIEO was acknowledged by, among others, F.B. Engo of Cameroon (Chairman of the First Committee) when he stated that the NIEO Declaration of 1974, *supra* note 11, was of "not inconsiderable interest in dealing with the seabed issue." U.N. Doc. A/CONF. 62/C.1/L.16 (1975). See generally, Friedheim & Dutch, *The International Seabed Resources Agency Negotiations and the New International Economic Order*, 31 INT'L ORGANIZATION 247, 352 (1977); Juda, *supra* note 46, at 248.

116. The exploitation of the Antarctic resources is one potential subject of North-South negotiations. See Note, *Thaw in International Law? Rights in Antarctica under the Law of Common Spaces*, 87 YALE L.J. 804 (1978); Lagoni, *Antarctica's Mineral Resources in International Law*, 39 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (1979); Joyner, *Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas*, 18 SAN DIEGO L. REV. 415 (1981). It is interesting to note that at the 37th Session of the U.N. General Assembly in 1982, Malaysia's Prime Minister Mahathir, while commenting on the Law of the Sea Convention, noted that

there remained land areas which have neither natives nor settlers. As there was no one to inherit those territories — the largest of which was Antarctica — if the claims of the metropolitan Powers were given up the United Nations should get involved Those uninhabited lands belonged to the international community and countries now claiming them should give up their claims. Either they could be administered by the United Nations or else the countries now claiming the lands could act as trustees for the world.

19 U.N. CHRONICLE 18 (Dec. 1982).

principles which should govern seabed mining. These principles demonstrate the impact of the NIEO on the emerging law of the sea. Moreover, they are likely to endure irrespective of perhaps the only temporary objections of some industrialized countries concerning the implementation of the deep seabed regime set up by the Convention.

1. The Common Heritage of Mankind

Apart from differences in the interpretation of the concept of "common heritage of mankind," which are due to the conflict between the *res nullius* and the *res communis* legal philosophies, the principle that the minerals on the deep seabed are a part of such heritage, to be exploited for the benefit of mankind as a whole and to be shared equitably by all, has been accepted as the basis of the deep seabed regime. This fundamental rule of the "Area" provisions of the Draft Convention¹¹⁷ is explicitly recognized by the unilateral national deep seabed legislation enacted in the United States, which declares as one of its purposes the encouragement of the conclusion of a law of the sea convention "which will give legal definition to the principle that the hard mineral resources of the deep seabed are the common heritage of mankind."¹¹⁸ However, both U.S. legislation and the subsequently enacted similar laws of the Federal Republic of Germany,¹¹⁹ France,¹²⁰ Japan,¹²¹ the Soviet Union,¹²² and the United Kingdom,¹²³

117. Convention, *supra* note 2, art. 140.

118. Deep Seabed Hard Mineral Resources Act, U.S. Pub. L. 96-283, 30 U.S.C. 1401 § 2(b)(1) (1980), reprinted in 19 INT'L LEGAL MATERIALS 1003, 1004 (1980) [hereinafter cited as U.S. Deep Seabed Hard Mineral Resources Act]; U.S. Department of Commerce N.O.A.A. Regulations, 15 C.F.R. § 970 (1983). On this Act, see ARROW, *The Proposed Regime for the Unilateral Exploitation of Deep Seabed Mineral Resources by the United States*, 21 HARV. INT'L L.J. 337 (1980); ARROW, *The Alternative Seabed Mining Regime: 1981*, 5 FORDHAM INT'L L.J. 1 (1982) [hereinafter cited as ARROW, *Alternative Seabed Mining*]; BROWN, *The Impact of Unilateral Legislation on the Future Legal Regime of Deep-Sea Mining*, 20 ARCHIV DES VÖLKERRECHTS 145 (1982); MOLITOR, *The U.S. Deep Seabed Mining Regulations: The Legal Basis for an Alternative Regime*, 19 SAN DIEGO L. REV. 599 (1982).

119. Gesetz zur vorläufigen Regelung des Tiefseebergbaus, 16 Aug. 1980, Bundesgesetzblatt, Teil 1 (BGB1) 9080, No. 50 (Aug. 22, 1980) 1457, as amended 12 Feb. 1982, BGB1 No. 5 (Feb. 17, 1982) 136. For an English translation of this Act of Interim Regulation of Deep Seabed Mining, and amendments, see 20 INT'L LEGAL MATERIALS 393 (1981) and 21 INT'L LEGAL MATERIALS 832 (1982) [hereinafter cited as Fed. Rep. of Germany: Act of Interim Regulations]. For a comparison of this Act with the U.S. legislation, see BROWN, *supra* note 118; CARON, *Deep Seabed Mining: A Comparative Study of U.S. and West German Municipal Legislation*, 5 MARINE POLICY 4 (1981).

120. For the translation of the French Law No. 81-1135 of 23 December 1981 on the exploration and exploitation of the mineral resources of the deep seabed, see Law on the Exploration and Exploitation of Mineral Resources of the Deep Seabed, 21 INT'L LEGAL MATERIALS 808 (1982) [hereinafter cited as France: Law No. 81-1135]. The official French text appears in 1981 J.O. 3499-3500.

121. Japan: Law on Interim Measures for Deep Seabed Mining, July 20, 1982, reprinted in 22 INT'L LEGAL MATERIALS 102 (1983) [hereinafter cited as Japan: Law].

122. For the Soviet Union, see the translation of the Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources, in 21 INT'L LEGAL MATERIALS 551 (1982) [hereinafter cited as Soviet Union: Edict].

123. U.K. Deep Sea Mining (Temporary Provisions) (28 July 1981), 20 INT'L LEGAL MATERIALS 1217 (1981) [hereinafter cited as United Kingdom: Deep Sea Mining Act 1981].

have only an interim character and will be in force pending entry for the respective country of the Convention. In any case, exploitation cannot start before January 1, 1988.¹²⁴ The laws of the Federal Republic of Germany, the Soviet Union, the United Kingdom, and the United States provide for special funds to be created from part of the proceeds received from the exploitation, to be transferred to the ISA for sharing with the international community.¹²⁵ These unilateral enactments, however, were condemned at UNCLOS III by the developing countries¹²⁶ as prejudicing negotiations and in conflict with the Moratorium Resolution of 1969¹²⁷ and the Declaration of Principles Governing the Seabed of 1970.¹²⁸

2. Methods of Exploiting the Seabed

The idea of a "parallel system" of exploitation,¹²⁹ along with the principle that the International Seabed Authority should exercise some measure of control over the private and national track of the system, has been endorsed by both developing and industrialized nations, including the United States. What is controversial is the extent of the ISA's control over the access to and conditions of seabed exploitation by private and state contractors. Although the parallel

124. U.S. Deep Seabed Hard Mineral Resources Act, *supra* note 118, § 102(c)(D); Fed. Rep. of Germany: Act of Interim Regulations, *supra* note 119, § 7; France: Law No. 81-1135, *supra* note 120; United Kingdom: Deep Sea Mining Act 1981, *supra* note 123, § 2(4); Soviet Union: Edict, *supra* note 122, para. 6. *Cf.* Japan: Law, *supra* note 121, art. 43.

125. U.S. Deep Seabed Hard Mineral Resources Act, *supra* note 118, 30 U.S.C. § 1, para. 1(b)(2) and § 103; Fed. Rep. of Germany: Act of Interim Regulations, *supra* note 119, § 13; United Kingdom: Deep Sea Mining Act 1981, *supra* note 120, § 10; Soviet Union: Edict, *supra* note 122, paras. 18 and 19.

126. *See* Letter from the Chairman of the Group of 77, M. Carias (Honduras) to the President of UNCLOS III, (Oct. 10, 1979) (protesting any unilateral legislation on seabed mining). U.N. Doc. A/CONF.62/94, *reprinted in* 12 UNCLOS III Off. Rec. 112-13 (1980). *See also* Oxman, *The Third United Nations Conference on the Law of the Sea: the Seventh Session (1978)*, 73 AM. J. INT'L L. 1, 30-38 (1978). *See also* Arrow, *Proposed Regime*, *supra* note 118; Arrow, *Alternative Seabed Mining*, *supra* note 118; Brown, *supra* note 118; Molitor, *supra* note 118; Comment, *Law of the Sea: Unilateral Licensing of Seabed Mining*, 23 HARV. INT'L L.J. 155 (1982); Vicuña, *National Laws on Seabed Exploitation: Problems of International Law*, 13 LAW. AM. 139 (1981); Martin, *Deep-Sea Mining Between Convention and National Legislation*, 10 OCEAN DEV. INT'L L. 175 (1981); Caron, *Municipal Legislation for Exploitation of the Deep Seabed*, 9 OCEAN DEV. INT'L L. 259 (1980). The so-called "reciprocating agreement" concluded among the Federal Republic of Germany, France, the United Kingdom, and the United States, designed to make appropriate provisions for avoiding overlaps in seabed mining claims, is only an interim arrangement and emphasizes that it is without prejudice to the decisions of its parties with respect to the UNCLOS III Convention. *See* France-Federal Republic of Germany-United Kingdom-United States: Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed, done at Washington and entered into force September 2, 1982, *reprinted in* 21 INT'L LEGAL MATERIALS 950 (1982).

127. *See supra* note 111.

128. *See supra* note 84.

129. Convention, *supra* note 2, art. 153(2) and Annex III, art. 8. Under the parallel system of exploitation, all activities in the "Area" would be under the control of the ISA, which would be authorized to mine the seabed through an organ called "the Enterprise." *See* Lee, *The Enterprise: Operational Aspects and Implications*, 15 COLUM. J. WORLD BUS. 62 (1980).

exploitation system under the Convention still falls short of the developing countries' expectations, and is unacceptable to the United States,¹³⁰ it nevertheless reflects some major concerns of the NIEO ideology, such as preferential treatment for developing countries,¹³¹ regulation and supervision of transnational corporations,¹³² and promoting the transfer of technology to developing countries.¹³³ With respect to the last principle, the Convention includes provisions governing the transfer of deep seabed mining technology which are among the reasons for the United States' refusal to sign the Convention. The Group of 77 tied the problem of deep seabed technology transfer to the right of access to the Area, the result being that technologically advanced countries were forced to make certain concessions. Under the Convention, a mining contractor must undertake to make available the required technology "on fair and reasonable commercial terms and conditions" not only to the ISA's Enterprise but also to the developing country that applies for a contract to exploit a site reserved to the Enterprise.¹³⁴ This idea was objected to by the United States.¹³⁵

The resolution of the technology transfer dilemma is crucial for any meaningful participation of the developing countries in seabed mining.¹³⁶ In the early stages of operations, it would be only the very few technologically more advanced "threshold" countries, such as Brazil, India, and Mexico, that would directly participate in seabed mining. The great majority of the developing world could take part only indirectly through involvement in the activities of the Enterprise and various training programs in seabed marine science and technology.¹³⁷

130. The United States does, in principle, accept the parallel system, but believes that its present form discriminates in favor of the ISA. See Statement by Ambassador J.L. Malone, Special Representative of the President of the United States at an informal meeting, at UNCLOS III, August 13, 1981, at 4. One of the reasons why the United States did not sign the Convention was its concern that the Convention did not assure that qualified American applicants would receive contracts to mine. For the position of the United States and other U.S. concerns in this matter, see Approaches to Major Problems, Part XI of the Draft Convention on the Law of the Sea, Feb. 24, 1982, Conference paper at the 11th session [hereinafter cited as Approaches to Major Problems]; and Statement by Amb. Malone, *supra*. See also, e.g., Larson, *The United States Position on the Deep Seabed*, 3 SUFFOLK TRANSNAT'L L.J. 1 (1979).

131. NIEO Declaration, *supra* note 11, para. 4(n).

132. *Id.* para. 4(g).

133. *Id.* para. 4(p).

134. Convention, *supra* note 2, art. 144 and Annex III, art. 5.

135. The United States is against mandatory transfer of technology. In its view, technology is private property and not subject to governmental control. In addition, the United States believes that subscribing to a legal obligation to transfer marine technology to developing countries could serve as a dangerous precedent for other types of technology. B. BOCZEK, *supra* note 74, at 42.

136. Two basic kinds of technology are a continuous line bucket scooping the manganese nodules from the seabed and a dredge device with hydraulic-suction or compressed air-lift pushing system, which bring the nodules through a pipe to the mining ship. See B. BOCZEK, *supra* note 74, at 5.

137. Article 148 of the Convention calls for the promotion of effective participation of developing states in activities in the Area, but benefits from such participation would not be immediately available to the countries involved. Convention, *supra* note 2, art. 148.

3. Production Control

Perhaps the clearest impact of the NIEO upon the Convention rules governing the Area is in the complex provisions dealing with quantitative limits on the production of seabed minerals. These limits are designed to protect developing land-based producer countries against overabundant world mineral supplies which would reduce prices and result in lower export earnings.¹³⁸ Concerned about the availability of vital strategic minerals and the precedential impact of production control "cartels" which might spill over to other commodities, the United States strongly questions this NIEO-inspired part of the deep seabed provisions.¹³⁹

Closely related to production control is the issue of the ISA's participation in commodity conferences and agreements. The ISA's goal through such participation would be to stabilize world markets for raw materials and commodities in favor of the interests of the developing countries which are producing them.¹⁴⁰ In particular, there has been controversy as to whether the ISA may become a party to the UNCTAD-conceived Integrated Program of Commodities (IPC)¹⁴¹ with respect to copper and manganese. As viewed by the ideology of economic liberalism, agreements of this kind are "cartelization" and disregard consumers' interests.¹⁴² Under the Convention, the ISA may participate in any commodity conferences and agreements dealing with the commodities produced from the minerals derived from the Area and may implement production controls resulting from them.¹⁴³ The United States' concern was that the ISA might exercise substantial influence over activities which occurred within the United States. Moreover, since the agreements would be designed to protect developing countries' land-based producers, the ISA might advocate controls which discriminated against seabed mining in favor of land-based mining.¹⁴⁴

138. *Id.*, arts. 150(g), 151(4). Cf. Declaration of Principles, *supra* note 84, Preamble; NIEO Declaration, *supra* note 11, para. 4(j); and Programme of Action, *supra* note 13, para. 1(d). For further discussion see Juda, *supra* note 46, at 237-43; Ogle, *supra* note 46, at 245-46; Post, *United Nations Involvement in Ocean Mining*, in ASPEKTE DER SEERECHTSENTWICKLUNG, 194, 194-200 (W. Vitzthum ed. 1980).

139. At the 11th UNCLOS III session the United States proposed to raise or abolish the quantitative limitations or link them to a steep and long drop of land-based metals. *U.S. Is Returning to Sea Treaty Talks*, N.Y. Times, March 5, 1982, at 3, col. 1.

140. Programme of Action, *supra* note 13, para. 5(l)(1)(c); Charter, *supra* note 17, art. 5.

141. See Juda, *supra* note 46, at 237-38; Ogle, *supra* note 46, at 247-48. The IPC is an UNCTAD-sponsored program designed to protect the developing countries from the adverse effect of fluctuation of prices of their exports. See UNCTAD, Draft Agreement Establishing the Common Fund for Commodities, 5 June 1980, U.N. Doc. TD/IPC/CONF/L.15, reprinted in 19 INT'L LEGAL MATERIALS 896 (1980).

142. See generally Juda, *supra* note 46, at 237-38.

143. Convention, *supra* note 2, art. 151, para. 1(a), (b).

144. Approaches to Major Problems, *supra* note 130, at 31.

4. Political Control

As a political ideology, the NIEO espouses a restructuring of international institutions and decision-making processes on the basis of the "sovereign equality" of states and "full and equal" participation of the developing countries.¹⁴⁵ In this sense, the very creation of an "International Sea-Bed Authority" by means of negotiations with the full participation of the developing states is already an achievement for the NIEO.

The NIEO model of an international body governed by the one-state, one-vote rule and endowed with decision-making power in all important matters, or at least sharing that power with a subordinate council whose composition it would be free to determine, could not materialize in the face of strong opposition from the industrialized countries. The protracted bargaining over the "hard-core" issue of the powers, composition, and voting procedure of the ISA's executive organ, the Council, is well known and need not be described here in detail.¹⁴⁶ One thing, however, is already clear: the powers and the decision-making system in the ISA will depart in significant respects from its NIEO model.¹⁴⁷ The composition, powers, and voting system of the Council are the result of a compromise between the Group of 77 and the Western industrialized countries which has already succeeded in blunting the edge of the NIEO ideology. First, the most important substantive decisions, such as those concerning access to the seabed, cannot be made without the Council's consent.¹⁴⁸ Second, despite provisions allocating seats to various categories of developing states,¹⁴⁹ only half of the

145. NIEO Declaration, *supra* note 11, para. 4(a), (c); Charter, *supra* note 17, art. 10. Because the developing countries represent a majority in global international organizations, they obviously wanted to bestow upon the one-member, one-vote ISA, as much crucial decision-making power as possible. On the other hand, the industrialized countries wanted to shift that power to the thirty-six member Council, Charter, *supra* note 17, art. 161, in which they would be adequately represented and would counter-balance the Assembly. The result was an uneasy compromise reluctantly accepted by the Group of 77 and rejected by the United States.

146. See, e.g., Sreenivasa Rao, *Structure and Powers of the International Seabed Authority*, in *LAW OF THE SEA: CARACAS AND BEYOND* 277 (R. Anand ed. 1978); Adede, *The Group of 77 and the Establishment of the International Sea-Bed Authority*, 7 *OCEAN DEV. INT'L L.* 31 (1979); Richardson, *Decision-Making in the International Seabed Authority*, 5 *MARINE POLICY* 256 (1981); Borgese, *The Role of the International Seabed Authority in the 1980's*, 18 *SAN DIEGO L. REV.* 395 (1981).

147. This point is stressed in Ogleby, *supra* note 46, at 248.

148. Convention, *supra* note 2, art. 162.

149. Among the thirty-six members of the Council to be elected for four years by the Assembly are "four members from among States Parties which on the basis of production in areas under their jurisdiction are major net exporters of the categories of minerals to be derived from the Area, including at least two developing States whose exports of such minerals have a substantial bearing upon their economies." Convention, *supra* note 2, art. 161, para. 1(c); "six members from among developing States Parties, representing special interests. The special interests to be represented shall include those of the States with large populations, States which are land-locked or geographically disadvantaged, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals and least developed States." *Id.*, art. 161, para. 1(d).

thirty-six members of the Council are to be elected according to the "equitable geographical distribution" criteria.¹⁵⁰ Furthermore, the interests of seabed mining states and their nationals¹⁵¹ and major consumer and importing nations are also represented on the Council.¹⁵² Third, the complex four-tier structure of voting in the Council¹⁵³ provides for a simple majority only in procedural matters. In substantive matters, however, the voting system requires two-third, three-quarters, and "consensus" voting, according to the degree of importance. "Consensus," defined as the "absence of any formal objection,"¹⁵⁴ would apply to such matters as measures to protect land-based producers, recommendations of rules on the equitable sharing of benefits derived from seabed mining, and adoption of amendments to Part XI (the Area).¹⁵⁵ This uneasy consensus compromise, amounting to a virtual veto formula, is the very opposite of majoritarianism, which is the preferred voting system according to the ideas of the NIEO. Nor did it prove satisfactory to the United States, which believes that the consensus voting system could be used to block decisions necessary for the efficient operation of the mining regime.¹⁵⁶ Despite provisions on conciliation designed to mitigate any possible veto in the Council,¹⁵⁷ the chances of a deadlock are strong. This means that some of the most important substantive issues may not be settled in the Convention but will have to be resolved in difficult negotiations after its entry into force.

This survey of the emerging international law governing the seabed and its resources demonstrates the strong influence of the NIEO ideology. The task of

150. Eighteen members of the Council are elected "according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this subparagraph. For this purpose, the geographical regions shall be Africa, Asia, Eastern Europe (Socialist), Latin America and Western Europe and Others." *Id.*, art. 161, para. 1(e).

151. Four members of the Council are to be elected from among the eight states "which have the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals, including at least one State from the Eastern European (Socialist) region." *Id.*, art. 161, para. 1(b).

152. Four members of the Council are to be elected from among those states which "during the last five years for which statistics are available, have either consumed more than two per cent of total world consumption or have had net imports of more than two per cent of total world imports of the commodities produced from the categories of minerals to be derived from the Area, and in any case one State from the Eastern European (Socialist) region, as well as the largest consumer." *Id.*, art. 161, para. 1(a). The "largest consumer" clause was added at the 11th Session in April 1982 to meet the concern of the United States, now such a consumer, to ensure it a guaranteed seat. United Nations Press Release SEA/1954, 22 (April 30, 1982). This concession by the Group of 77 did not satisfy the United States, however, which considers it to be fundamentally important that other highly industrialized western countries be guaranteed seats in the Council. See Approaches to Major Problems, *supra* note 130, at 5.

153. Convention, *supra* note 2, art. 161(8).

154. *Id.*, art. 161(8)(e).

155. *Id.*, art. 161(8)(d).

156. Approaches to Major Problems, *supra* note 130, at 6.

157. Convention, *supra* note 2, art. 161(7)(e).

progressively developing international legal institutions and concepts in the law of the sea has been stimulated by the ideas of the NIEO. Yet despite the obvious links between the NIEO and the proposed legal regime of the deep seabed, it is also clear that the NIEO principles have not been and cannot be fully implemented when the perceived interests and needs of the two major groups of unions are antagonistic. Any realistic response to this challenge must be based on compromises acceptable to both sides. Unfortunately, this compromise has not yet been obtained.

VII. CONCLUSIONS

The major challenges to the law of the sea today are linked to the reaction of the developing countries to selected institutions and rules of traditional international law which the developing countries consider to be inequitable and biased in favor of the developed world. Hence, the challenges to the law of the sea have become part and parcel of the overall North-South conflict and the Third World campaign to restructure the international system according to the NIEO ideology. The principles of the NIEO are articulated in resolutions of the United Nations General Assembly of 1974. These resolutions are only political and moral declarations concerned with the ideological strategy of the developing countries and which, at least in the Western view, do not provide a firm legal basis for a new law of the sea.

The first of the challenges to the law of the sea, launched even before the official promulgation of the NIEO principles, was directed against the traditional and allegedly "outlived" principle of the freedom of the seas. This principle is perceived by the Third World as a tool of neocolonialism in the hands of the technologically advanced countries of the North. Although extension of coastal jurisdiction and the eventual emergence of the Exclusive Economic Zone benefit only a small number of select developing countries, and on total balance favor the developed world, this system nevertheless has been endorsed by the Group of 77 as more equitable than a system governed by traditional international legal principles. As a result, it was "legitimized" in the Convention. The institution of the EEZ was skillfully elevated by leading coastal state members of the Group, against the belated better judgment of poor landlocked and geographically disadvantaged states, to the status of a pillar of a new law of the sea. The extension of coastal jurisdiction was just as much a result of nationalism as it was a result of the internationalist ideology of the NIEO, whose rhetoric really only served to cloak national self-interest. National interests, determined primarily by geography, have also been the major determinant in the evolution of the extension of the coastal states' jurisdiction to large areas of the continental margin, which was also endorsed in the Convention of 1982.

The proliferation of all kinds of claims to extended coastal jurisdiction creates

potential dangers and challenges to international rule of law. The multiplicity of overlapping and increasing tensions and conflicting claims based upon diverse and unclear legal grounds is bound to result in disputes, increasing tensions, and threats to international peace. Conflicts are also likely to erupt if coastal developing countries apply discriminatory administrative measures to foreign vessels in their EEZ or exclude foreign research activities there. Although freedom of navigation in the EEZ seems to be guaranteed, a coastal state may nevertheless question the right to such freedom of foreign naval ships in its zone.¹⁵⁸ There exists a danger that some developing coastal states may be tempted to expand the scope of their sovereign rights in a legally unprecedented marine environment of an "almost full" sovereignty over the EEZ. In short, the danger is that the EEZ may *de facto*, or even *de jure*, be assimilated in a territorial sea. The extravagant claims of "territorialist" states in Latin America and Africa to a territorial sea beyond twelve miles, and up to 200 miles, are perhaps an indication of a dangerous trend in the law of the sea. Whether the twelve mile rule adopted at UNCLOS III¹⁵⁹ will deter attempts to convert economic zones into territorial seas remains to be seen.¹⁶⁰

One paradoxical result of the extension of coastal jurisdiction has been that, instead of contributing to a more equitable distribution of the planet's resources and wealth in accordance with the ideology of the NIEO with which it is associated, it has actually compounded the existing inequities and perhaps even contributed to creating new classes of haves and have-nots among the Third World countries. The meager provisions of the 1982 Convention regarding EEZ surplus sharing and payments to the ISA from the continental margin beyond 200 miles are not an adequate response to the challenge of inequitable access to ocean resources. Realistically speaking, what could today be equitably shared has been "nationalized" and what is to be shared of the otherwise reduced "common heritage" remains a matter of rather remote and doubtful future. The danger is that after the treaty goes into effect, the least developed and disadvantaged states, being dissatisfied with the lack of adequate compensatory mechanisms, may again raise the issue of a satisfactory adjustment of their claims in the name of a more equitable international economic order.

The other major challenge in the law of the sea today is the need to agree on an international regime governing the "common heritage of mankind," that is,

158. At UNCLOS III, developing countries repeatedly raised the issue of the need to restrict such freedom. A. HOLLICK, *supra* note 52, at 337. Legislation enabling the government to order restrictions on navigation of foreign shipping in the EEZ exists in at least four countries including India, Pakistan, Mauritania, and Guyana. See Smith, *Trends in National Marine Claims*, 32 PROF. GEOGRAPHER 216 (1980).

159. Convention, *supra* note 2, art. 3.

160. It is optimistically claimed by some that UNCLOS III has had a positive influence on national behavior because it has driven most states toward the EEZ or fisheries zone approach rather than the "territorialist" claims. See, e.g., Camimos, *Aspects of NIEO in the Third U.N. Conference on the Law of the Sea: Exclusive Economic Zone and the Continental Shelf*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 189, 192 (K. Hossain ed. 1980).

the seabed beyond national jurisdiction. It is this issue that has become the symbol of the ideological North-South split and the reason for the failure to secure, thus far, the United States' participation in the 1982 Convention on the Law of the Sea. Even now, however, it is reasonable to conclude that the NIEO ideology has made an impact on the international law of the sea governing the exploration and exploitation of the deep seabed. The NIEO ideological imprint is clearly seen in the very idea of the "common heritage," the production controls in the interests of developing countries, and the creation of the International Seabed Authority, a unique international organization with powers to regulate activities in the international "Area." Yet, as discussed above, the NIEO principles cannot be fully applied in this novel field of the law of the sea. A compromise between the vested interests of the industrialized nations, which significantly include not only the laissez-faire Western democracies but also the centrally-planned "socialist" Soviet Union, and the developing world is necessary to create a viable deep seabed regime.

Finally, although the NIEO ideology has precipitated profound changes in the law of the sea, it has not significantly contributed to the realization of a more equitable international economic order. There is a dilemma between the internationalist claims of developing countries for equity in the law of the sea and their continued and even stronger insistence on national sovereignty and independence. How to solve this dilemma remains the fundamental problem not only of the law of the sea, but also of international law in general.