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## Seabeds, Sovereignty And Objective Regimes

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# Seabeds, Sovereignty And Objective Regimes

Dennis W. Arrow

## **Abstract**

The United States and some of its major allies have been negotiating for some time concerning the establishment of an “alternative” seabed mining regime. Before confronting this issue, however, several threshold issues will be addressed. These will include descriptions of the nodule mining venture, the proposed UNCLOS regime to govern it, and the most recent developments in the U.S. backed “alternative” or reciprocating states” regime. After addressing the “objective regime” hypothesis, a strategy for avoiding potential U.S. estoppel to deny the validity of UNCLOS’ seabed mining regulations will be explored. Finally, possible scenarios for future seabed regulations and their attendant legislative and political ramifications will be explored.

# SEABEDS, SOVEREIGNTY AND OBJECTIVE REGIMES

Dennis W. Arrow\*

## INTRODUCTION

It is likely that the recovery of seabed<sup>1</sup> polymetallic nodules<sup>2</sup> is currently, like the capture of midoceanic fish,<sup>3</sup> a recognized freedom of the seas, open to all on a nonexclusive basis.<sup>4</sup> Nevertheless,

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1. The term, as used here, refers exclusively to the deep seabed beyond the limits of national jurisdiction, which includes both areas 350 miles or more seaward from the baseline, and those areas beyond the continental margin. See United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, art. 76, 21 I.L.M. 1261, 1285 (1982), reprinted in U.N. Doc. A/CONF.62/122 (1982), corrections, U.N. Doc. A/CONF.62/122/Corr.3 (1982); U.N. Doc. A/CONF.62/122/Corr.8 (1982) [hereinafter cited as UNCLOS].

2. The nodules are largely composed of manganese, iron, and silicon, and have traces of up to 25 additional minerals as well. See *infra* text accompanying notes 13-28 (description of nodules).

3. Free-swimming fish have been recognized as *res nullius* (the thing of no one), subject to ownership through capture, since shortly after Grotius' famous 1619 metaphor of the fisherman and the slave: "[W]hen the slave says: 'The sea is certainly common to all persons,' the fisherman agrees; but when the slave adds: 'Then what is found in the common sea is common property,' he rightly objects, saying: 'But what my net and hooks have taken, is absolutely my own.'" H. GROTIUS, MARE LIBERUM 29 (R. McGoffin trans. 1916). See also UNCLOS, *supra* note 1, art. 87(1)(e) (freedom of fishing); Convention on the High Seas, Apr. 28, 1958, art. 2(2), 13 U.S.T. 2312, 2314, T.I.A.S. No. 5200, 3450 U.N.T.S. 82, 84 (freedom of fishing) [hereinafter cited as High Seas Convention]; J. BRIERLY, THE LAW OF NATIONS 305 (H. Waldock 6th ed. 1963) (freedom of high seas); cf. *infra* text accompanying notes 48-52 (application of free seas principle to sea beds).

4. Since the seabed, however, is not a *terra nullius* (land of no one), it is not subject to any exclusive claims. Like the surface of the high seas, its use is open to all. See UNCLOS, *supra* note 1, arts. 89, 137(1); High Seas Convention, *supra* note 3, art. 2; Arrow, *The Proposed Regime for the Unilateral Exploitation of Deep Seabed Minerals by the United States*, 21 HARV. INT'L L.J. 337, 356-65 (1980) [hereinafter cited as Arrow, *The Proposed Regime*]. But cf. UNCLOS, *supra* note 1, arts. 136, 137(2), (3) (common heritage of mankind, preclusion of state claims of sovereignty, and rights in resources rested in mankind). The major qualification concerning the traditional freedom of nonexclusive use is the doctrine that all such freedoms must be exercised by all states with reasonable regard for the

the argument will undoubtedly be maintained by some that broad participation in the UNCLOS regime,<sup>5</sup> or some intrinsic characteristic of the treaty itself, will have rendered it, at some point in time, an "objective regime,"<sup>6</sup> capable of binding third-party nonsignatory states (probably including the United States) without their consent. The result of such a conclusion, of course, would be to legally preclude any seabed mining other than as authorized by UNCLOS.

While the "objective regime" contention would appear inconsistent with the *res inter alios acta* rule, now codified in the Vienna Convention on the Law of Treaties,<sup>7</sup> it cannot be summarily dismissed, both because of the purported "exceptions" contained in articles 35 and 38 of the Vienna Convention, and because numerous and qualified publicists have, over long periods of time, maintained the existence of various other exceptions to the *res inter alios acta* principle.<sup>8</sup> The suggested application to UNCLOS of an "objective regime" exception to the *res inter alios acta* rule, therefore, necessitates a fresh look at the purported exceptions and their criteria. Their applicability to UNCLOS' seabed mining provisions is particularly relevant because the United States and some of its major allies have been negotiating for some time concerning the establish-

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interests of other states in their exercises of their freedoms. See High Seas Convention, *supra* note 3, art. 2; M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 83, 85, 691-93 (1962); 1 L. OPPENHEIM, *INTERNATIONAL LAW* 585 (H. Lauterpacht 8th ed. 1955).

5. "UNCLOS," as used herein, refers not to the Third United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.62/121 (1982) [hereinafter cited as UNCLOS III], but rather to UNCLOS, *supra* note 1. See also Final Act of the Third United Nations Conference on the Law of the Sea, 21 I.L.M. 1245 (1982), reprinted in U.N. Doc A/CONF.62/121 (1982) [hereinafter cited as Final Act]. The United States-backed regime might ultimately provide a legal seabed mining framework for those nations, possibly including the United States, which fail to ratify UNCLOS and its "parallel system" seabed provisions. See generally *infra* notes 54-217.

6. An "objective regime," sometimes also referred to as a "law-making treaty," may be defined as a regime which, arguably by its nature may bind third-party nonratifying states without their consent.

7. Opened for signature May 23, 1969, 8 I.L.M. 679 (1969), reprinted in 63 AM. J. INT'L. L. 875 (1969) [hereinafter cited as Vienna Convention]. Article 34 of the Vienna Convention provides that: "A treaty does not create either obligations or rights for a third [s]tate without its consent." *Id.* art. 34, reprinted in 63 AM. J. INT'L L. at 886. The rule stated in article 34 may be used interchangeably with its antecedant maxim *pacta tertus nec nocent nec prosunt* (i.e. treaties between others do not create rights or duties for third states), or its more colloquial form *res inter alios acta* (i.e. things done between others do not create duties for non-parties). For simplicity, the principle will be referred to herein as the *res inter alios acta* rule.

8. See *infra* text accompanying notes 251-355.

ment of an "alternative" seabed mining regime.<sup>9</sup>

Before confronting this issue, however, several threshold issues will be addressed. These will include descriptions of the nodule mining venture, the proposed UNCLOS regime to govern it,<sup>10</sup> and the most recent developments<sup>11</sup> in the U.S. backed "alternative" or "reciprocating states"<sup>12</sup> regime. After addressing the "objective regime" hypothesis, a strategy for avoiding potential United States estoppel to deny the validity of UNCLOS' seabed mining regulations will be explored. Finally, possible scenarios for future seabed regulation and their attendant legislative and political ramifications will be explored.

## I. THE NODULES

### A. Discovery and Distribution

In 1872, Sir Wyville Thompson was commissioned by the British government to explore the world's oceans. In 1874, the expedition, aboard *H.M.S. Challenger*, discovered and retrieved some baseball-sized nodules from depths of 5000 to 20,000 feet.<sup>13</sup> Title to the nodules, then analogized to free-swimming fish, was

9. Cf. *infra* text accompanying notes 218-43, 457-67 ("alternative" seabed mining regime).

10. Concerning the nodules themselves, see, e.g., T. KRONMILLER, *THE LAWFULNESS OF SEABED MINING* 457 (1979); E. LUARD, *THE CONTROL OF THE SEABED* 16-20 (1976); J. MERO, *THE MINERAL RESOURCES OF THE SEA passim* (1965); A. POST, *DEEPSEA MINING AND THE LAW OF THE SEA* 1-56 (1983). Concerning the UN seabed regime, contained primarily in articles 133-91 of UNCLOS, *supra* note 1, and in *id.* Annexes 3 and 4, see, e.g., A. POST, *supra*, at 172-233; Arrow, *Prospective Impacts of the Draft Sea Convention*, 1 INT'L PROP. INV. J. 225, 247-51 (1983) [hereinafter cited as Arrow, *Prospective Impacts*].

11. For earlier developments in the regime, see Arrow, *The "Alternative" Seabed Mining Regime: 1981*, 5 FORDHAM INT'L L.J. 1, 1-28 (1981) [hereinafter cited as Arrow, *The "Alternative" Seabed*]; see also Nat'l Oceanic and Atmospheric Administration, Dep't of Com., *Further Regulations on Deep Seabed Mining*, 47 Fed. Reg. 5966-71 (1982), reprinted in 21 I.L.M. 867 (1982).

12. The "alternative" regime is sometimes referred to as a "reciprocating states" regime due to the reciprocal nature of license-recognition by the United States and its allies. While recognizing that no sovereign or exclusive claims to seabed tracts can be made as against the world, each of the "reciprocating" states would limit *their nationals'* right to mine by way of an exercise of *citizenship* jurisdiction, and would then recognize each others' licenses to their citizens. See Arrow, *The "Alternative" Seabed*, *supra* note 11, at 2 n.3. This approach would be effective even without sovereign or exclusive seabed claims provided, of course, that the reciprocating states maintained their technological monopoly. Concerning this prospect, see generally UNCLOS, *supra* note 1, arts. 144, 266-78, & Annex 3, art. 5 (transfer of technology); A. POST, *supra* note 10, at 24-31 (technology of nodule retrieval surface and transportation systems, and processing).

13. See, e.g., Walz, *The Deep Sea-Bed*, in MAJOR ISSUES IN THE LAW OF THE SEA 67, 69 (D. Larson ed. 1976).

never questioned,<sup>14</sup> and they were stored, unanalyzed, in the basement of the British Museum and the attic of the Natural History Museum in Washington.<sup>15</sup>

During the early part of this century, German, French, and United States oceanographic expeditions discovered further concentrations of nodules. In 1957, a sampling of nodules was taken in relatively shallow waters near Tahiti. Later that year, the Institute of Marine Research at the University of California conducted a preliminary mining-feasibility study, and established the valuable nature of the nodules' content.<sup>16</sup>

While the exact process by which the nodules are formed is uncertain, experts theorize that deep ocean vents eject mineral-rich material into the oceans. Ejected manganese ions then combine to form manganese dioxide, which precipitates, attracting other ejected metallic ions, including copper, cobalt, molybdenum and nickel,<sup>17</sup> as well as silicon, iron, aluminum, magnesium, titanium, barium, lead, strontium, zirconium, vanadium, and zinc (of this latter group, only titanium, and vanadium are considered viable for commercial exploitation at present). The electrical charges in the metals draw them to sedentary objects such as shark's teeth, whale bones, and clumps of various clays and muds. The metals then form around the nucleus much like a pearl.<sup>18</sup>

Some man-made objects have been found on the ocean floor encrusted with a marketable thickness of minerals.<sup>19</sup> The rate of deposit around organic cores has been measured at one ten-thousandth of a millimeter per thousand years,<sup>20</sup> but the total volume<sup>21</sup>

14. Goldie, *A General International Law Doctrine for Seabed Regimes*, 7 INT'L LAW. 796, 797 (1973).

15. Mero, *The Great Nodule Controversy*, in *LAW OF THE SEA: CARACAS AND BEYOND* 343 (1975) (F. Christy, Jr., T. Clingan, Jr., J. Gamble, Jr., H. Knight, & E. Miles eds. 1975) (proceedings of the Law of the Sea Institute Ninth Annual Conference, January 6-9, 1975).

16. See generally A. POST, *supra* note 10, at 19 (brief history of nodule discovery and mining technology development); Mero, *supra* note 15, at 343-44 (brief history of discovery of nodules and their valuable economic nature).

17. These four metals are generally of the greatest mining value and concentration. A. POST, *supra* note 10, at 14.

18. See generally, A. POST, *supra* note 10, at 11-14; Alexander, *Metal Rich Floor of Ocean Lures Modern Prospectors*, L.A. Times, Dec. 2, 1973, § 2, at 2, col. 2 (description of the formation of the nodules).

19. E. LUARD, *supra* note 10, at 16.

20. Alexander, *supra* note 18, at 1, col. 3.

21. While early estimates by Mero and others place the potential Pacific Ocean reserves alone at over 1.5 trillion tons, more recent estimates by the French AFERNOD consortium,

of nodules is sufficient that even current studies indicate that total nodule growth is faster than world consumption of the minerals involved.<sup>22</sup>

Most observers, including the four major mining consortia,<sup>23</sup> have long assumed that the "best" nodule deposits were located in the Clarion-Clipperton Fracture Zone in the mid-Pacific, south of a line between Mazatlan, Mexico and Hawaii. This assumption, however, has recently come into question. For example, Jane Frazer of the Scripps Institute of Oceanography has classified portions of even the Clarion-Clipperton region as "submarginal," containing "resources which would require a substantially higher price or a major cost-reducing advance in technology."<sup>24</sup> Nevertheless, some portions of the zone will almost certainly contain commercially recoverable nodules.

AFERNOD,<sup>25</sup> the French consortium, has also reportedly found high-grade and high density nodules in the South Pacific but, unfortunately, not in the same place. AFERNOD may also have discovered titanium-rich nodules with high concentrations of molybdenum and zinc within France's exclusive economic zone.<sup>26</sup> India has been prospecting within its own economic zone in the Indian Ocean, especially off the Andaman and Nicobar Islands, and reportedly plans to purchase more vessels from France, Denmark, and the Federal Republic of Germany to further pursue its explorations. Other promising areas, such as the Indian Ocean off the coast of Madagascar and the exclusive economic zone of Chile, remain largely unexplored.<sup>27</sup> Finally, the United States has discovered polymetallic sulfide crusts within its exclusive economic zone along the Gorda oceanic ridge off the coasts of California and

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see *infra* note 25, conservatively estimate the Pacific reserves at only about 100 billion tons. See A. Post, *supra* note 10, at viii.

22. *Id.* at 11.

23. The four major consortia are: Ocean Mining Associations (OMA), sometimes referred to as the "U.S. Steel Group"; Ocean Minerals Companies (OMCO), sometimes referred to as the "Lockheed Group"; Ocean Management, Inc. (OMI); and the Kennecott Group.

24. Frazer, *Resources in Seafloor Manganese Nodules*, in DEEPSEA MINING 41, 44, 58 (J. Kildow ed. 1980). But see A. HOLSER, MANGANESE NODULE RESOURCES AND MINE SITE AVAILABILITY (1976) (provisional staff study, U.S. Ocean Minerals Admin.) The value of a nodule deposit is judged by composition, density, and submarine geology.

25. AFERNOD is the acronym for *L'Association Francaise pour l'Etude et la Recherche des Nodules*.

26. See A. Post, *supra* note 10, at 23.

27. *Id.* at 15, 23.

Oregon. These crusts may have significant value and be more commercially accessible than the nodules themselves.<sup>28</sup>

### B. *Technology and Economics*

When it is recalled that transportation and processing costs may exceed 50% of total production expenditures,<sup>29</sup> the scope of the requisite investment necessary to harvest the nodules can be appreciated. A 1978 study by the Massachusetts Institute of Technology has estimated the start-up costs, in 1978 U.S. dollars, at about \$560 million, with annual production costs running at about \$250 million thereafter.<sup>30</sup> Recent industry studies suggest that these figures may be conservative.<sup>31</sup>

Further compounding the issue is the delicate supply-demand balance in the individual metals markets themselves. For example, deepsea mining could potentially provide up to 80% of the world's manganese needs, thereby further glutting the market and forcing prices down.<sup>32</sup> In the copper market, vast ore deposits are ready to go "on line" with an increase of just a few cents in price-per-pound.<sup>33</sup> However, such a price increase, or unforeseen technological breakthroughs, could trigger a switch to substitutes, such as aluminum, stainless steel, or plastics.<sup>34</sup>

The final economic uncertainty arises from the uncertainty of the nodules' quality and concentration discussed above.<sup>35</sup> Assuming the validity of the recent conservative AFERNOD findings,<sup>36</sup> Post has reasoned as follows:

28. See, e.g., Malakoff, *Polymetallic Sulfides—the Technological Challenge*, SEA TECH., Aug. 1982, at 23-28; see also U.S. DEPT. OF INTERIOR, CIRCULAR NO. 929, SYMPOSIUM PROCEEDINGS: A NATIONAL PROGRAM FOR THE ASSESSMENT AND DEVELOPMENT OF THE UNITED STATES EXCLUSIVE ECONOMIC ZONE 187, 203-04 (1984).

29. See generally A. POST, *supra* note 10, at 29-31; Kildow & Dar, *Introduction to an Unusual Resource Management Problem*, in DEEPSEA MINING 3, 28 (J. Kildow ed. 1980).

30. The M.I.T. economic model is discussed in Antrim & Sebenis, *Incentives for Ocean Mining Under the Convention*, in LAW OF THE SEA 79, 83-85 (B. Oxman, D. Caron & C. Budderi eds. 1983).

31. See A. POST, *supra* note 10, at 209-10; Gillis, *Exploration for and Exploitation of Deep Seabed Hard Mineral Resources: A Deep Seabed Mining Industry Perspective*, in PROCEEDINGS OF THE CONFERENCE ON DEEP SEABED MINING AND FREEDOMS OF THE SEAS 44, 45 (F. Chen ed. 1981) [hereinafter cited as PROCEEDINGS OF THE CONFERENCE].

32. See, e.g., A. POST, *supra* note 10, at 50-51.

33. ARTHUR D. LITTLE, INC., TECHNOLOGICAL AND ECONOMIC ASSESSMENT OF MANGANESE NODULE MINING AND PROCESSING 100 (Nov. 1979) (prepared for U.S. Dep't of the Interior, Off. of Minerals Pol'y & Research Analysis).

34. See A. POST, *supra* note 10, at 54.

35. See *supra* text accompanying notes 23-28.

36. See *supra* note 21.



It would seem . . . that there are enough nodules for 33,333 . . . nodule mining project years. Polymetallic nodules, however, occur only infrequently in concentrations that can be defined as economically feasible, i.e., 10 kg. per m<sup>2</sup> with combined ore content of 2.6% nickel, copper, and cobalt. In terms of sufficient concentration, according to AFERNOD, there are only an estimated 1 billion tons of nodules that are worthy of exploitation. With an efficiency rate of 20%, 200 million tons of nodules could be ultimately recovered, or enough for sixty-seven mining project years, or approximately six sites covering 50,000 km<sup>2</sup> of rough terrain each. There are already six private mining consortia. If there are no new operators (including international Authority ones) and if the above estimates are accurate, then each mining group would invest US \$1 billion or more to recover . . . 66,000 pounds of metal in 11 years.<sup>37</sup>

Of course, assuming the validity of the general industry perception that there are at least 400 mining project years' worth of recoverable nodules, the above figures would be quintupled. Assuming an 80% rate of recovery could technologically be achieved, *those* figures could be quadrupled. Should commercial production of nodules with less than a 2.6% combined content of nickel, copper, and cobalt become viable,<sup>38</sup> *those* figures again could be multiplied. In any case, probably the most reasonable conclusion to draw is that the economics of seabed mining are uncertain, a fact stressed by Ambassador Clingan in explaining the U.S. decision to refrain from signing UNCLOS.<sup>39</sup>

## II. THE UNCLOS SEABED REGIME

UNCLOS will enter into force for its parties<sup>40</sup> twelve months after the sixtieth ratification or accession has occurred.<sup>41</sup> United States commentary to the 1981 version of the proposed treaty<sup>42</sup> illuminated some of the faults perceived therein by the Reagan

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37. A. Post, *supra* note 10, at viii.

38. See, e.g., *id.* at 17.

39. See Statement by Ambassador Thomas Clingan at the Final Session of UNCLOS III, reprinted in LAW OF THE SEA INSTITUTE, REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 665-67 (1983) [hereinafter cited as Clingan Statement].

40. See UNCLOS, *supra* note 1, arts. 1(2), 306, 307, 311.

41. *Id.* art 308(1).

42. See Draft Convention on the Law of the Sea, U.N. Doc. A/Conf.62/L.78 (1981).

administration. On April 28, 1981, James Malone, then Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, commented before Congress on the Draft Convention's informal text<sup>43</sup> as follows:

(1) The draft convention places under burdensome international regulation the development of all of the resources of the seabed and subsoil beyond the limits of national jurisdiction . . . .

(2) [It would] establish a supranational mining company, called the Enterprise, which would benefit from significant discriminatory advantages relative to the companies of industrialized countries. . . . Moreover, [it] requires the United States and other nations to fund the initial capitalization of the Enterprise, in proportion to their contributions to the United Nations.

(3) [It] compels the sale of proprietary information and technology now largely in U.S. hands. . . .

(4) [It] limits the annual production of manganese nodules . . . for the first 20 years of production. . . .

(5) [It] creates a one-nation/one-vote international organization which is governed by an assembly and a 36-member executive council. In the council, the Soviet Union and its allies have three guaranteed seats, but the United States must compete with its allies for any representation. The assembly is characterized as the supreme organ [of the proposed International Seabed Authority] and the specific policy decisions of the council must conform to the general policies of the assembly.

(7) [It] imposes revenue-sharing obligations on seabed mining corporations which would substantially increase the cost of [sic] operations.

(8) It imposes an international revenue-sharing obligation on the production of hydrocarbons from the Continental Shelf beyond the 200 nautical mile limit. . . .

(9) [It] contains provisions concerning liberation movements, like the PLO, and their eligibility to obtain a share of the revenues of the Seabed Authority.

(10) [It] lacks any provisions for protecting investments made prior to entry into force of the Convention.<sup>44</sup>

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43. Draft Convention on the Law of the Sea, U.N. Doc. A/C.62/WP.10/Rev.3 (1980), reprinted in 19 I.L.M. 1131 (1980) (informal text) (predecessor to UNCLOS, *supra* note 1).

44. *Law of the Sea—Tenth Session: Hearings Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, reprinted in *Oceanography Miscellaneous—Part I: Hearings Before the Subcomm. on Oceanography of the House Comm. on*

Since many of these objections persist despite subsequent changes in the text,<sup>45</sup> and since a narrative summary of the Draft Convention's<sup>46</sup> provisions exists elsewhere in the literature,<sup>47</sup> this section of the Article will deal with the major objections raised by the United States on an issue-by-issue basis, detailing the changes between the Draft Convention and the final Convention where appropriate. Pursuant to this objective, six general objections may be identified and analyzed: the very existence of "common heritage" (i.e., nonfree enterprise) principles; the existence of a "parallel system" of exploitation (i.e., an International Enterprise); a general deterrent effect upon development; financial obligations on UNCLOS' ratifying states; potential revenue sharing with national liberation movements; and the possibility that future amendments to UNCLOS might become opposable to the United States without its consent. These objections, and the corresponding UNCLOS provisions, may now be examined in detail.

#### A. *Nonfree enterprise Principles*

Historically, after the demise of the closed seas (*mare clausam*) doctrine in the early seventeenth century,<sup>48</sup> the free seas (*mare liberum*) principle, which gave wide latitude to entrepreneurial ventures beyond the territorial seas, controlled the oceans. Pursuant to this customary legal norm, states were precluded from making sovereign high seas claims, permitted free access to the high seas for navigational, fishing, and other purposes,<sup>49</sup> and required to exercise these freedoms with reasonable regard for the interests of other

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*Merchant Marine and Fisheries*, 97th Cong., 1st Sess. 633, 634, 636-37 (1981) (statement of James L. Malone, Ass't Sec'y of State Designate for Oceans and Int'l Env'tl. and Sci. Aff.) (available on microfiche CIS 81, abstract no. H561-21, pt. 7 of 7) [hereinafter cited as 1981 Malone Statement].

45. See, e.g., *infra* note 116; text accompanying notes 132-51, 189-94.

46. See *supra* note 42.

47. Arrow, *Prospective Impacts*, *supra* note 10, *passim*.

48. During this historical period, and possibly to some extent at the present time, the territorial seas were limited to three miles, the distance which cannon shots could effectively control. See, e.g., Walker, *Territorial Waters: the Cannon Shot Rule*, 1945 BRIT. Y.B. INT'L L. 210, 213-22; see also *infra* text accompanying notes 406-09 (United States presents High Seas position and the UNCLOS straits provisions).

49. The breadth of permissive, nonexclusive uses is a necessary result of the "absence of presumed limitations" approach, later recognized, *inter alia*, in *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10, at 19 (Judgment of Sept. 7), and in the High Seas Convention, *supra* note 3, art. 2.

states wishing to do the same.<sup>50</sup> That the same principles were historically perceived as applicable to seabeds beyond the territorial sea is evidenced, *inter alia*, by the fact that all exclusive claims to such areas (prior to the universal recognition of continental shelf rights in the early 1950's) have been specially justified by reference to adjacency and historic rights.<sup>51</sup> The "freedom of the seabeds" approach finds further support in the 1955 Report of the International Law Commission,<sup>52</sup> which commented that

[t]he list of freedoms of the high seas contained in [article 2 of the then-proposed Convention on the High Seas] . . . is not restrictive; the Commission has merely specified four of the main freedoms. It is aware of the fact that there are other freedoms, such as the freedom to explore or exploit the subsoil of the high seas and the freedom to engage in scientific research therein.<sup>53</sup>

On August 17, 1967, Ambassador Arvid Pardo of Malta, citing the economic value of the nodules and what were then perceived to be commercially exploitable gold and silver-rich muds and brines on the Red Sea floor, first proposed in a speech to the Political Committee of the United Nations General Assembly that the seabed beyond the limits of national jurisdiction be deemed the "common heritage of mankind."<sup>54</sup> At the beginning of the 24th General Assembly session in 1969, Ceylon (Sri Lanka) proposed the "common heritage" principle to the Assembly.<sup>55</sup> The Assembly reached consensus on the preclusion of sovereign claims<sup>56</sup> (which were probably already prohibited in any case<sup>57</sup>), but failed to reach agreement on the common heritage designation<sup>58</sup> due to the strenuous objections of the western maritime powers and the Soviet bloc.<sup>59</sup> The develop-

50. See, e.g., M. McDUGAL & W. BURKE, *supra* note 4, at 83 n.185, 85, 691-93, 758.

51. See Arrow, *The Customary Norm Process and the Deep Seabed*, 9 OCEAN DEV. & INT'L L. 1, 13-15 (1981) [hereinafter cited as Arrow, *Customary Norm*]; Arrow, *The Proposed Regime*, *supra* note 4, at 357-58.

52. [1955] 1 Y.B. Int'l L. Comm'n 3, U.N. Doc. A/CN.4/SER.A/1955.

53. *Id.*

54. U.N. Doc. A/6695, at 2 (1967).

55. See 24 U.N. GAOR C.1 (1673d mtg.) at 21-22, U.N. Doc. A/C.1/PV.1673 (1969).

56. See 1969 Report of the Legal Sub-Committee of the Sea-Bed Committee, 24 U.N. GAOR Supp. (No. 22) paras. 86, 88, 91, 96, U.N. Doc. A/7622 (1962) [hereinafter cited as 1969 Sea-Bed Committee Report].

57. See *supra* text accompanying note 51.

58. See 1969 Sea-Bed Committee Report, *supra* note 56, para. 88.

59. The United States' objections may be found in U.N. Doc. A/AC.138/SC.I/SR.1-4, at 11 (1971). The Soviet Union maintained that the "seamless" nature of international law,

ing states responded that December by forcing the so-called "Moratorium Resolution"<sup>60</sup> through the General Assembly by a 62-28 vote, with 28 states abstaining and 8 not voting. This resolution, which purported to destroy the seabed mining freedom, was rejected by the major powers and many others as the declaration of a mere "paper majority."<sup>61</sup> In fact, the 62 positive votes did not even constitute a majority. The resolution has undoubtedly had no effect on the development of customary international law.<sup>62</sup> Nevertheless, the stage for ideological confrontation was set.

One year later, the confrontation was papered over by the General Assembly, which, by a vote of 108-0, with 14 abstentions,<sup>63</sup> passed a resolution entitled *Declaration of Principles Governing The Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction*<sup>64</sup> (Declaration of Principles). The Declaration of Principles contains five major principles relevant for the purposes of this article: first, it applies the "common heritage" label to both the seabed area and its resources;<sup>65</sup> second, it contains a general prohibition of sovereign claims to or appropriation of the seabed,<sup>66</sup> but not its resources;<sup>67</sup> third, it precludes resource claims inconsistent with an international regime to be established, which is to be of a "universal character, generally agreed upon";<sup>68</sup> fourth, it specifies that the "common heritage"

reflected in the freedom of the seas doctrine, obviated the need to create a new legal regime. *Id.* at 26-27. Japan contended that seabed mineral recovery was not prohibited by customary international law, and that the "common heritage" designation might obfuscate that point. *Id.* at 29.

60. G.A. Res. 2574, 24 U.N. GAOR Supp. (No. 30) at 10, U.N. Doc. A/7630 (1969), reprinted in 9 I.L.M. 422 (1970).

61. See 24 U.N. GAOR Supp. (No. 30) at 6-11, Doc. A/PV.1833 (prov. ed. 1969).

62. See, e.g., Arrow, *The Proposed Regime*, *supra* note 4, at 368-77.

63. 25 U.N. GAOR (1933d plen. mtg.) at 19, U.N. Doc. A/P.V.1933 (1970). The United States voted in favor; the Soviet Union abstained. *Id.* at 20.

64. G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8028 (1971) [hereinafter cited as Declaration of Principles].

65. *Id.* para. 1.

66. *Id.* para. 2.

67. *Id.* It is especially noteworthy that while the Declaration of Principles recalled G.A. Res. 2467, 23 U.N. GAOR Supp. (No. 18) at 15, U.N. Doc. A/Res. 2467 (1969), reprinted in 8 I.L.M. 201, 205 (1969) (providing that the seabed should be used for the benefit of mankind as a whole and for peaceful purposes), it did not recall the Moratorium Resolution. See Declaration of Principles, *supra* note 64, preamble. Had it attempted such a preclusion, opposition similar to that encountered by the Moratorium Resolution one year previously would have been highly likely. See *supra* text accompanying notes 60-62.

68. Declaration of Principles, *supra* note 64, paras. 3, 4, 9. See also *infra* note 225.

principle requires that exploitation be carried out "for the benefit of mankind as a whole, . . . taking into particular consideration the interests and needs of the developing countries";<sup>69</sup> and fifth, it precludes resource claims inconsistent with the common heritage "principles of this Declaration."<sup>70</sup>

Given the stridency of the subsequent United States reaffirmations of its free-enterprise principles, two observations concerning its support for the Declaration of Principles may be made. First, the resolution was presented as a political, rather than a legal document. In a lengthy statement to the First Committee, Galindo-Pohl, Chairman of the Legal Sub-Committee, explained that the draft "is not and is not intended to be a provisional regime governing the exploitation of the seabed. . . . [The draft] was accepted by all parties independent of the positions they may have taken on the problems of maritime law."<sup>71</sup>

Second, although the text *did* require that particular consideration be given to "the interests and needs of the developing countries"<sup>72</sup>, the nature of that consideration, and all other manifestations of the common heritage principle, were left unclear. Thus, the United States was able to later maintain (especially in light of the wildly divergent interpretations of the common heritage principle advanced from the time of its adoption to the current date<sup>73</sup>) that the Declaration was essentially an agreement to agree:

[T]he United States supported (by affirmative vote) the United Nations General Assembly Resolution 2749 (XXV) declaring *inter alia* the principle that the mineral resources of the deep seabed are the common heritage of mankind, with the expectation that this principle would be legally defined under the terms of a comprehensive international Law of the Sea Treaty yet to be agreed upon.<sup>74</sup>

69. Declaration of Principles, *supra* note 64, paras. 7, 9.

70. *Id.* para. 3.

71. 25 U.N. GAOR C.1 (1781st mtg.) at 3, U.N. Doc. A/C.1/PV.1781 (1970) (emphasis added). Numerous delegations also echoed similar sentiments in statements explaining their votes. See, e.g., 25 U.N. GAOR C.1 (1799th mtg.) at 6, 32, U.N. Doc. A/C.1/PV.1799 (1970); 25 U.N. GAOR C.1 (1777th mtg.) at 27, U.N. Doc. A/C.1/PV.1777 (1970).

72. Declaration of Principles, *supra* note 64, para. 7.

73. Some of these are summarized in Arrow, *The Customary Norm*, *supra* note 51, at 28-38. See also Shingleton, *UNCLOS III and the Struggle for Law: the Elusive Customary Law of Seabed Mining*, 13 OCEAN DEV. AND INT'L L. 33, 55 (1983).

74. Deep Seabed Hard Mineral Resources Act, Pub. L. No. 96-283, § 2(a)(7), 94 Stat. 553 (1980) (codified at 30 U.S.C. § 1401(a)(7) (Supp. IV 1980)), *reprinted in* 19 I.L.M. 1003

Steven Gorove made an even broader argument in 1972:

[T]he reference to the rather elusive and undefined concept of "common heritage of mankind," no matter how well motivated, in a legally binding document would be unfortunate unless it is realized from the outset that it carries no clear juridical connotation but belongs to the realm of politics, philosophy, or morality, and not law. This is not to say that philosophers, politicians, or moralists would necessarily be in a better position to give a rational explanation of the meaning of the phrase.<sup>75</sup>

Nevertheless, from a contemporary perspective, it may be conceded that, to the extent that UNCLOS has or will develop international cognizability, the legal meaning of the common heritage principle has been defined by the detail of UNCLOS' seabed mining provisions.<sup>76</sup> That detail prompted several members of the new Reagan delegation<sup>77</sup> to wear Adam Smith neckties during the first part of the 1981 Geneva negotiating session. It is that detail which will now be more particularly addressed.

### B. *The "Parallel System" of Exploitation*

The ideological deadlock concerning the system of seabed exploitation became excruciatingly evident at the Second Negotiating Session of UNCLOS III in 1974, when four inconsistent drafts were

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(1980) [hereinafter cited as U.S. Act]. See also Statement by Ambassador Elliot L. Richardson, Special Representative of the President for the Law of the Sea Conference to the Plenary Meeting (Sept. 15, 1978), reprinted in *Deep Seabed Hard Mineral Resources Act: Hearings and Markup on H.R. 2759 Before the Subcomms. on International Economic Policy and Trade and on International Organizations of the House Comm. Foreign Affairs*, 96th Cong., 2d Sess. 19-21 (1980) (explaining the United States support); T. KRONMILLER, *supra* note 10, at 39, 40.

75. Gorove, *The Concept of "Common Heritage of Mankind": A Political, Moral, or Legal Innovation?*, 9 SAN DIEGO L. REV. 390, 402 (1972).

76. Interestingly, this conclusion is the functional equivalent of the approach proposed by Belgium in 1969. In Sea-Bed Committee discussions, the Belgian delegate referred to the common heritage concept as a neologism, which means different things to different people. Rather than using this inherently ambiguous term, he proposed that agreement be reached on specific issues on an item-by-item basis. See U.N. Doc. A/AC.138/SC.1/SR.12-29, at 16 (1969). The Canadian delegate agreed. *Id.* at 18.

77. Concerning the delegate shuffling which occurred during the weekend of March 8, 1981, see Wertenbaker, *A Reporter at Large: The Law of the Sea—I*, NEW YORKER, Aug. 1, 1983, at 41-45 [hereinafter cited as Wertenbaker—I]; N.Y. Times, Mar. 9, 1981, at A1, col. 1. See also Ratiner, *The Costs of American Rigidity*, in *LAW OF THE SEA* 27, 28-33 (B. Oxman, D. Caron & C. Budderi eds. 1983).

introduced concerning that issue.<sup>78</sup> Although initially proposing a system in which all exploitation was to be carried on by states or their nationals, at the Third (Geneva) Negotiating Session in the spring of 1975, the United States offered a compromise, proposing a parallel system of joint ventures between the proposed International Seabed Authority (ISA) and state or private contracting parties. The compromise provided that the half of the area to be reserved to the Enterprise be exploited by it in conjunction with states or their nationals on the most favorable economic and technological terms commercially available. With respect to the nonreserved areas, over which the ISA would exercise only licensing authority, the specific licensing provisions of the treaty would control.<sup>79</sup> This compromise was ultimately rejected by the developing states.<sup>80</sup>

To break the resultant stalemate<sup>81</sup> during the Fourth (New York) Negotiating Session of April 1976, then-Secretary of State Henry Kissinger proposed a parallel system of exploitation<sup>82</sup> with guaranteed access for United States nationals, in return for United States guarantees that appropriate technology and financing would be made available to the Enterprise.<sup>83</sup> This, of course, is more or less<sup>84</sup> what finally resulted—though the developing states rejected

78. See U.N. Doc. A/CONF.62/C.1/L.3, at 6, 7 (1974); cf. Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1, 7-12 (1975) (discussing four alternatives for the exploitation system).

79. U.S. Delegation Report, The Third U.N. Conference on the Law of the Sea, Geneva, Mar. 17-May 9, 1975, at 4 (1975); cf. Stevenson & Oxman, *supra* note 78, 766-67 (discussing conciliatory efforts).

80. Stevenson & Oxman, *supra* note 78, at 767.

81. That the ideological differences were deep, and that the issue was unlikely to go away, was evidenced by the release of the notorious "Engo Draft." See Report by Mr. Paul Bamela Engo, Chairman of the First Committee on the Work of the Committee at the Fifth Session of the Conference, Sept. 6, 1976, reprinted in U.N. Doc. A/CONF.62/L.16 (1976).

82. This system would allow both the ISA, through an "Enterprise" division, and state or private parties to exploit the seabed area, in contrast to the "unitary" system whereby the Enterprise—with or without participation by states or private contractors—would have the exclusive right to exploit.

83. See Speech by Henry A. Kissinger Delivered to the Foreign Policy Association, N.Y., N.Y. (Apr. 8, 1976) (entitled *The Law of the Sea: A Test of International Cooperation*).

84. The "parallel system" is described generally in UNCLOS, *supra* note 1, arts. 153(2), (3), (6). As to whether guaranteed access is assured to United States nationals, see *infra* text accompanying notes 117-54. Regarding financing of the Enterprise, see *infra* text accompanying notes 80-89, 181-88. Concerning transfer of technology, see *infra* text accompanying notes 162-65. Concerning the specifics of licensing and functioning of the Enterprise, see,



this plan in 1976,<sup>85</sup> and the specifics of the final UNCLOS version are now unacceptable to the United States.<sup>86</sup>

The "parallel system" (permitting both private and international development) finally adopted by UNCLOS<sup>87</sup> requires each private<sup>88</sup> applicant to submit a proposed work plan<sup>89</sup> delimiting a tract of sufficient value to permit *two* mining operations, and to specify the coordinates dividing the tract into two sections of approximately equal commercial value. Within 45 to 90 days of receiving this information, the ISA is required to designate the half to be reserved for international exploitation by the Enterprise.<sup>90</sup> The Enterprise then has the discretion to exploit it, maintain it in reserve, or assign it to a developing state or developing state nationals for exploitation.<sup>91</sup>

Upon approval of the work plan by the ISA,<sup>92</sup> the applicant is granted exclusive exploitation rights to the nonreserved portion of the tract.<sup>93</sup> Title to the nodules passes upon their recovery in conformity with the terms of UNCLOS,<sup>94</sup> and contractual rights established pursuant to it may not be modified without the consent of

e.g., UNCLOS, *supra* note 1, arts. 150-55, 162(2)(e), (k), 170 & Annexes 3, 4; Arrow, *Prospective Impacts*, *supra* note 10, at 247-50; *infra* text accompanying notes 88-100.

85. See U.N. Doc. A/CONF.62/C.1/W.R.5/Add.1 (1976).

86. See, e.g., Statement of United States Ambassador James Malone at the Plenary Session of UNCLOS III (Apr. 30, 1982), *reprinted in* LAW OF THE SEA INSTITUTE, *supra* note 39, at 549, 596 [hereinafter cited as Malone Statement—Apr. 1982]; cf. Malone, *Who Needs the Sea Treaty*, 54 FOREIGN POL'Y 44 (1984).

87. UNCLOS, *supra* note 1, art. 153(2). Article 153 provides that activities in the area shall be carried out as prescribed in paragraph 3:

(a) by the Enterprise, and

(b) in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III.

*Id.*

88. See *id.* art. 153(2)(b).

89. The nature of the required work plan is described in UNCLOS, *supra* note 1, art. 153(3) & Annex 3, arts. 3, 5, 6.

90. *Id.* Annex 3, art. 8.

91. *Id.* Annex 3, arts. 3(2), 9.

92. See *id.* arts. 153(3), 162(2)(j); *infra* text accompanying notes 122-23.

93. UNCLOS, *supra* note 1, Annex 3, arts. 3(4)(c), 16.

94. *Id.* Annex 3, art. 1.

both parties.<sup>95</sup> The duration of a diligently pursued<sup>96</sup> contractual exploitation right is indefinite.<sup>97</sup> The right, upon ISA approval<sup>98</sup> and if the UNCLOS "antimonopoly" provisions will not be violated,<sup>99</sup> may be transferred to another qualified applicant which accepts all prior contractual obligations. Applicants (whether applying for initial licensing or license transferral) are considered qualified if they either are a State Party or are sponsored by a State Party and if they follow the procedures and meet the various qualification standards of UNCLOS.<sup>100</sup> Since the particulars of the qualifying standards lie at the heart of the United States' position that the UNCLOS regime deters rather than promotes seabed development, these provisions will now be more specifically examined.

### C. *Deterring Development*

In a statement made to an UNCLOS plenary session on April 30, 1982, Ambassador James Malone, then Special Representative of the President for the Law of the Sea, articulated the United States' position on the UNCLOS seabed-mining framework as follows:

First, we believe the seabed mining provisions would deter the development of deep seabed mineral resources. Economic development of these resources is in the interest of all countries. In a world in which rational economic development is so critical, particularly for developing countries, the treaty would create yet another barrier to such development. It would deny the play of basic economic forces in the market place.

Second, while there have been improvements to assure access to deep seabed minerals for existing miners, we do not believe that the seabed articles would provide the assured access

95. *Id.* arts. 153(6), 155(5) & Annex 3, arts. 16, 19(2). *But see, e.g., id.* arts. 153(4), (5), 160(2)(m), 162(2)(a)-(u), 185, 187(b), (c) & Annex 3, art. 18 (provisions concerning suspension or termination for breach of UNCLOS obligations).

96. The performance requirements are specified in *id.* Annex 3, art. 17(2)(c).

97. *See id.* Annex 3, art. 17(2)(b)(iii).

98. UNCLOS presumably delegates this power to the Council component of the ISA, *see id.* art. 162(1), (2)(o)(ii). *But see id.* art. 160(2)(f)(ii). Nevertheless, it remains unclear whether this decision is to be effected by a three-fourths affirmative vote, pursuant to UNCLOS, *supra* note 1, art. 162(1), (2)(a), or by the more lenient voting provisions of article 162(2)(j), *id.* art. 162(2)(j). *Cf. infra* text accompanying notes 122-23.

99. *Id.* Annex 3, art. 20. For a discussion of the "antimonopoly" provisions, *id.* Annex 3, art. 6(3)(c), *see infra* text accompanying notes 152-61.

100. UNCLOS, *supra* note 1, Annex 3, art. 4(1), (3). If an applicant has more than one nationality, however, as in the case of a partnership or consortium, all state parties involved are required to sponsor the application. *Id.*

for qualified future miners that is necessary to promote the economic development of these resources. . . .

Third, the decision-making process in the deep seabed regime does not give a proportionate voice to those countries most affected by the decisions and, thus, would not fairly reflect and effectively protect their interests.

. . . .  
Finally, the deep seabed regime . . . creat[es] precedents that are not appropriate. . . . [These include] mandatory transfer of technology and . . . production limitations, [which] are also key problems for the US Congress.<sup>101</sup>

The UNCLOS regime's potential deterrent effect upon development is derivative of a number of its aspects, including: the miners' financial obligations to the ISA; the lack of guaranteed access to potential miners resulting from UNCLOS' voting structure, production controls, and "antimonopoly" provisions; and required transfer of technology. These issues will now be examined in turn.

### 1. Licensing Fees

The financial obligations to the ISA of miners in the prospecting and development phase are not severe. A one-time fee, initially<sup>102</sup> fixed at U.S.\$500,000, is imposed to cover the administrative costs of processing the application, approving the work plan, and issuing the contract.<sup>103</sup> From the date the contract enters into force, an annual fixed fee of U.S.\$1,000,000 is payable.<sup>104</sup> This fee, however, would not be likely to have a significant deterrent effect since the average costs for the initial research and development phase have run in excess of U.S.\$30,000,000. Expenses in the subsequent "prototype" or "demonstration" phase are likely to approach an additional U.S.\$100,000,000, and total pre-production expenses have been variously estimated at between U.S.\$560,000,000 and U.S.\$750,000,000.<sup>105</sup>

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101. Malone Statement, Apr. 1982, *supra* note 86, at 594, 596-97. *See also* Clingan Statement, *supra* note 39, at 666 (summary of United States position).

102. This fee is adjustable in either direction based on actual license-processing costs. UNCLOS, *supra* note 1, Annex 3, art. 13(2).

103. *Id.*

104. *Id.* Annex 3, art. 13(3).

105. *See generally* A. Post, *supra* note 10, at 19, 20 (detailing the various dollar amounts).

Miners' financial obligations to the ISA during the commercial recovery phase are substantially more significant. From the date of commencement of commercial production, the contractor is required to pay either a production charge<sup>106</sup> or the annual fixed fee,<sup>107</sup> whichever is greater. Within a year thereafter, contractors are required to elect whether to make their financial contributions to the ISA by paying a production charge only, or by paying a combination of the production charge and a share of net proceeds.<sup>108</sup> The ISA's share of the attributable net proceeds (pursuant to the "combination" fee system) is contingent upon the level of net proceeds realized. During the first period of commercial production,<sup>109</sup> the ISA share is 35% of the first 10% of net proceeds, 42.5% of the second 10%, and 50% of any net proceeds representing a return on investment which is 20% or greater. During the second period of commercial production,<sup>110</sup> the ISA shares are

106. See *infra* text accompanying note 108.

107. See *supra* text accompanying note 104.

108. UNCLOS, *supra* note 1, Annex 3, art. 13(4).

If a contractor decides to pay a production charge only, it is fixed at 5% of the market value of the metals produced for the first ten years of commercial production, and 12% thereafter. *Id.* Annex 3, art. 13(5). If the contractor elects to pay the "combination" fee, the production charge is fixed at 2% of the market value of the metals for the "first period of commercial production." *Id.* Annex 3, art. 13(6). This term is defined in UNCLOS:

The first period of commercial production shall commence in the first accounting year of commercial production and terminate in the accounting year in which the contractor's development costs with interest on the unrecovered portion thereof are fully recovered by his cash surplus, as follows: In the first accounting year during which development costs are incurred, unrecovered development costs shall equal the development costs less cash surplus in that year. In each subsequent accounting year, unrecovered development costs shall equal the unrecovered development costs at the end of the preceding accounting year, plus interest thereon at the rate of 10 per cent per annum, plus development costs incurred in the current accounting year and less contractor's cash surplus in the current accounting year. The accounting year in which unrecovered development costs become zero for the first time shall be the accounting year in which the contractor's development costs with interest on the unrecovered portion thereof are fully recovered by his cash surplus. The contractor's cash surplus in any accounting year shall be his gross proceeds less his operating costs and less his payments to the Authority under subparagraph (c).

*Id.* Annex 3, art. 13(6)(d)(i). Four percent is paid thereafter, *id.* Annex 3, art. 13(6)(a), unless, during the subsequent period, return on investment in any accounting year falls below 15% as a result of the payment of the production charge, in which case the two percent figure would revert for that accounting year. *Id.* Annex 3, art. 13(6).

109. See *supra* note 108.

110. "The second period of commercial production shall commence in the accounting year following the termination of the first period of commercial production and shall continue until the end of the contract." UNCLOS, *supra* note 1, Annex 3, art. 13(6)(d)(ii).

40%, 50%, and 70%, respectively.<sup>111</sup> These obligations to the ISA during the commercial recovery stage could significantly deter mining, due to the inherently speculative nature of the venture, and to the fact that economic profitability over a twenty-year projected life-span has been generally estimated at between 8½% and 15%, *before* any potential ISA contributions are considered.

## 2. Guaranteed Access

Lack of guaranteed access to the nodules has also been suggested to have a potentially serious deterrent effect upon seabed investors and miners. While the UNCLOS access and licensing system is complex, the primary provisions which affect this issue concern the voting and governance system of the ISA, production controls, and “antimonopoly” requirements related to licensing.

While the ISA Assembly, composed of all ISA members on a one-nation, one-vote basis,<sup>112</sup> is designated the “supreme” ISA organ,<sup>113</sup> its powers are narrowly limited by specific UNCLOS guidelines,<sup>114</sup> and by the requirement, in many cases, of a recommendation from the Council prior to Assembly action.<sup>115</sup> The election of the thirty-six Council members, while delegated to the Assembly, is to be conducted in accordance with an elaborate seat-allocation formula.<sup>116</sup> As a result of this formula, the Soviet bloc could expect

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111. *Id.* Annex 3, art. 13(6)(c).

112. *Id.* art. 159(1), (6).

113. *Id.* art. 160(1).

114. For examples of this type of discretion limitation, see *id.* art. 160(2)(a), (e), (g), (m).

115. See, e.g., *id.* art. 160(1), (2)(b), (c), (f), (h).

116. Concerning the evolution of this formula at the final UNCLOS session, see Wertebaker, *A Reporter at Large: The Law of the Sea—II*, NEW YORKER, Aug. 8, 1983, at 56, 58-60 [hereinafter cited as Wertebaker—II]

First, four members are to be elected from the group of states which has either consumed more than two percent of world consumption, or imported more than two percent of world imports. UNCLOS, *supra* note 1, art. 161(1)(a). In any case, the selection is to include at least one Eastern European (Socialist) state, and the largest consumer state (the United States, if it were to ratify UNCLOS). *Id.* Second, four states are to be selected from the group having the largest investments in seabed mining (either directly or through their nationals), including at least one Eastern European (Socialist) state. *Id.* art. 161(1)(b). Third, four members are to be elected from the group of major exporters of the metals involved. *Id.* art. 161(c). This includes at least two developing states whose exports of such metals have a substantial effect on their economies. *Id.* Fourth, six developing states are to be chosen with special reference to population, geographic disadvantage, metal imports, potential production, and relative degree of poverty. *Id.* art. 161(1)(d). Finally, the remaining 18 seats are to be filled on the basis of geographic distribution, including at least one state from each region

to get at least three seats;<sup>117</sup> the United States would be guaranteed a "consumer"<sup>118</sup> seat; Canada would almost certainly occupy an "exporter"<sup>119</sup> seat; other western powers would fill the remaining two "consumer"<sup>120</sup> seats and probably two or three "geographic distribution"<sup>121</sup> seats; with the developing states likely occupying the remaining twenty-three or twenty-four seats. While it would appear that this voting configuration could preclude secure seabed access by United States nationals, it must be noted that a work plan approved by the Legal and Technical Commission<sup>122</sup> is deemed approved "unless the Council disapproves it by consensus among its members excluding any State or States making the application or sponsoring the applicant."<sup>123</sup> Thus, while guaranteed access might not materialize for other reasons, the ISA voting procedures present no inherent, insurmountable obstacle to it.

UNCLOS incorporates a system of production controls which has also been suggested to exert a significant deterrent effect on development. During an "interim period,"<sup>124</sup> a production ceiling, keyed to the production of nickel, is established.<sup>125</sup> Some such

recognized by the United Nations. *Id.* art. 161(1)(e). The five UN-recognized geographic regions are: Africa, Asia, Eastern European (Socialist), Latin America, Western Europe and Others (this last group includes the United States, Canada, Australia and Japan). *Id.*

117. The Soviet bloc is guaranteed a "consumer" seat, *id.* art. 161(1)(a), an "investor" seat, *id.* art. 161(1)(e), and a "geographic distribution" seat, *id.* art. 161(1)(c).

118. For the relevant treaty provision, see *id.* art. 161(1)(a).

119. For the relevant treaty provision, see *id.* art. 161(1)(c).

120. For the relevant treaty provision, see *id.* art. 161(1)(a).

121. For the relevant treaty provision, see *id.* art. 161(1)(e).

122. This 15 member subordinate Council organ will be selected by a three-fourths vote of the Council, and will base its recommendations exclusively on the criteria provided in UNCLOS, *supra* note 1, Annex 3. See *id.* arts. 161(8)(c), 163(2), 165(1), 2(b). See also *id.* Annex 3, arts. 4-8, 10, 14, 17 (procedure and rules concerning applicants for production authorizations). The 9 or 10 seats likely to be held by western powers should be sufficient to prevent "unacceptable" persons from being selected to membership in the Legal and Technical Commission. For the relevant treaty provision, see *id.* art. 161(1).

123. *Id.* art. 162(2)(i), (j).

124. An "interim period" may be generally defined as including the five years prior to commercial production and the first twenty years thereof, unless the Review Conference is concluded at an earlier date. See *id.* art. 151(3). The Review Conference provisions are contained in article 155. *Id.* art. 155. For a discussion of such provisions, see *infra* text accompanying notes 211-17.

125. See UNCLOS, *supra* note 1, art. 151(4). Assuming the existence of reasonable increases in consumption, the nickel ceiling will be the sum of: (1) the difference between the trend line values for nickel consumption for the year prior to the earliest commercial production and the year prior to the beginning of the interim period, and (2) 60% of the difference between the trend line values for nickel consumption for the year in which the

system was perceived necessary in order to avoid both severe disruption of the economies of the metal exporting states and to preclude precipitous drops in metal prices (which might be the ultimate deterrent to *continued* mining). From the standpoint of the United States and other consuming countries, the formula finally adopted has been described as "without bite,"<sup>126</sup> and further analyzed not as an "attack on free enterprise . . . [but rather as] a trade agreement between the United States and Canada—that is, between the largest consumer of nickel and the largest producer of it."<sup>127</sup>

The cumulative production ceiling, however, is not the only production limitation. UNCLOS' provisions also reserve to the Enterprise, for its initial production, the first 38,000 tons of nickel from the total available to be produced.<sup>128</sup> The deterrent effect of this provision depends upon the total quantity of nodules available for exploitation. If the AFERNOD estimates<sup>129</sup> are correct, then the total 200,000,000 tons of nodules commercially recoverable could be expected to produce only about two million tons of nickel in twenty years,<sup>130</sup> or about 100,000 tons a year. Reservation to the Enterprise of the first 38,000 tons under these conditions might well inhibit private sector recovery. Should the more optimistic estimates of supply<sup>131</sup> prove accurate, the deterrent effect of the reservation would correspondingly be diminished.

In concluding the access issue, it must be noted that the Final Act<sup>132</sup> of UNCLOS III appends a resolution<sup>133</sup> (Resolution II), agreed to at the 1982 Eleventh (New York) Negotiating Session,

production authorization is being sought and the year prior to the earliest commercial production. *Id.* art. 151(4)(a), (b). The ceiling for the other metals likely to be produced "should" not be higher than those which would have been produced had the maximum permissible level of nickel been produced. *Id.* art. 151(7).

126. See Wertebaker—II, *supra* note 116, at 73 (quoting Leigh Ratiner, Chief Deputy to United States Ambassador Malone).

127. *Id.*

128. UNCLOS, *supra* note 1, art. 151(5).

129. See *supra* note 21.

130. The average nickel content of the nodules examined thus far is 0.6% to 1.36%. See A. Post, *supra* note 10, at 16.

131. See, e.g., R. ECKERT, *THE ENCLOSURE OF OCEAN RESOURCES* 215 (1979); T. KRONMILLER, *supra* note 10, at 457; Alexander, *supra* note 18, at 1, col. 2; Hawkins, *Reaffirming Freedom of the Seas*, FREEMAN, Mar. 1982, at 182.

132. See *supra* note 5.

133. Final Act, *supra* note 5, annex 1, Resolution II [hereinafter cited as Resolution II].

which provides a modicum of guaranteed access to "pioneer" investors.<sup>134</sup> Pursuant to Resolution II, any signatory state may apply to the Preparatory Commission<sup>135</sup> on behalf of itself, its nationals, or entities controlled thereby, for registration as a pioneer investor.<sup>136</sup>

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134. *See id.* para. 6. "Pioneer investors" include France, India, Japan, and the USSR, or state enterprises thereof, provided that said states or their enterprises have invested at least 30 million 1982 U.S. dollars in pioneer activities prior to January 1, 1983, and provided that no less than 10% of that amount was expended in the location, survey, and evaluation of the area sought to be reserved by them. *Id.* para. (1)(a)(i). The major consortia, *supra* note 23, also qualify for pioneer investor status, provided that the certifying state or states sign UNCLOS, and provided further that they meet the minimum investment requirement described above. Any developing state, state enterprise, or national (or national which is effectively controlled by the state), may qualify for pioneer status provided that it meets the minimum investment requirements by January 1, 1985. Resolution II, *supra* note 133, para. (1)(a)(iii). *See* Sea-Bed Mineral Resource Development: Recent Activities of the International Economic and Social Affairs of the United Nations, U.N. Doc. ST/ESA/107 (1980); U.N. Doc. ST/ESA/107/Add.1 (1982), *cited in* Resolution II, *supra* note 133, para. 1(a)(ii). Concerning the nature of state sponsorship of private mining organizations and consortia, UNCLOS, *supra* note 1, Annex 3, art. 4(3), provides that:

Each applicant shall be sponsored by the State Party of which it is a national unless the applicant has more than one nationality, as in the case of a partnership or consortium . . . , in which event all States Parties involved shall sponsor the application, or unless the applicant is effectively controlled by another State Party or its nationals, in which event both States Parties shall sponsor the application.

*Id.* UNCLOS further requires that private developers either possess the nationality of, or are effectively controlled by, states parties. *Id.* art. 153 (2)(b). In the regular (i.e. nonpioneer) licensing phase, however, the major consortia could, if they so chose, qualify pursuant to the UNCLOS regime despite U.S. nonparticipation therein. OMA, 50% of which is held by U.S. corporations, could, for example, qualify by substituting corporate for partnership form, and incorporating in, for example, Belgium or Italy. OMCO could do the same by incorporating in the Netherlands. OMI could reincorporate in Canada, Japan, or the Federal Republic of Germany (were it to ratify), and the Kennecott group, controlled by the United Kingdom, could qualify under UNCLOS' "effective control" provisions (again, assuming United Kingdom ratification of UNCLOS).

However, during the *pioneer* licensing phase, such action is precluded pursuant to Resolution II, *supra* note 133, para. 8(c), which provides that no plan shall be approved, in the case of private pioneer investors, "unless *all* the States whose natural or juridical persons comprise those entities are Parties to the Convention." *Id.* (emphasis added). Although a potential loophole might be found even here due to the absence of an "effective control" provision (such a loophole could be exploited most effectively through the creation of foreign subsidiaries), none of the major U.S. participants has yet exhibited much enthusiasm about operating under the UNCLOS regime. *But cf.* Resolution II, *supra* note 133, para. 10 (does not literally preclude the above result).

Resolution II is to have the same legal effect as if it were incorporated within the text of UNCLOS itself. *Id.* para. 13; Final Act, *supra* note 5, para. 42.

135. *See generally* Final Act, *supra* note 5, annex 1, Resolution I (establishing the Preparatory Commission) [hereinafter cited as Resolution I]; *infra* text accompanying notes 441-56, 462 (discussing the Preparatory Commission).

136. Resolution II, *supra* note 133, para. 2.



Applicants are required to apply for one pioneer area only,<sup>137</sup> of 150,000 square kilometers or less,<sup>138</sup> which need not be a single contiguous area, and which is of sufficient size and value to permit two mining operations.<sup>139</sup> Within forty-five days of receiving appropriate documentation, the Preparatory Commission is required to designate the half to be reserved to the Enterprise (or developing states),<sup>140</sup> with the remainder allocated to the investor as a pioneer area.<sup>141</sup> Within six months of certification of the pioneer applicant's area by the Preparatory Commission (provided that UNCLOS is in force),<sup>142</sup> pioneer investors are required to apply to the ISA for work plan approval, which the ISA is directed to grant if the plan comports with the normal licensing requirements of UNCLOS, Annex III.<sup>143</sup> The otherwise apposite production control,<sup>144</sup> antimonopoly,<sup>145</sup> and transfer of technology<sup>146</sup> requirements still obtain,<sup>147</sup> and pioneer-status applicants are required to pay an initial U.S.\$250,000 application fee to the Preparatory Commission, another U.S.\$250,000 when the work plan is submitted, and an annual fixed fee of U.S.\$1,000,000 commencing with the date on which the pioneer area is allocated by the ISA.<sup>148</sup> Having guaranteed pioneer investors access to one mine site, however, Resolution II requires the investor to relinquish at least 50% of its area to revert back to unreserved status prior to production.<sup>149</sup>

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137. *Id.* para. 4.

138. *Id.* para. 1(e).

139. *Id.* para. 3(a).

140. *Id.* para. 3(b). *But see supra* text accompanying notes 90-91 (regular, i.e. non-pioneer, licensing provisions).

141. Resolution II, *supra* note 133, paras. 3(b), 6. The parties are required to resolve conflicting pioneer applications by binding arbitration, if necessary, evaluating the time, quality, continuity, and cost of the pioneer activities involved. *Id.* para. 5. The Preparatory Commission is required to register the investor's pioneer status upon certification of the requisite investment by the applying or sponsoring state or states and upon its finding that such application comports with all other requirements of Resolution II, provided that all area conflicts are resolved by December 1, 1984. *Id.* paras. 2, 5(c). Concerning the nature of the requisite investment, see *supra* note 134.

142. *See supra* text accompanying note 41.

143. Resolution II, *supra* note 133, para. 8.

144. *See supra* text accompanying notes 124-28.

145. *See infra* text accompanying notes 153-61.

146. *See infra* text accompanying notes 162-75.

147. *See* Resolution II, *supra* note 133, paras. 9, 12(a), 15.

148. *Id.* para. 7.

149. *Id.* para. 1(e). Twenty percent of the pioneer area is to revert back by the end of the third year after allocation; an additional 10% two years thereafter; and the final 20% "or

The inducement to development created by Resolution II's "guaranteed access" provisions has not been significant thus far. While only the four major consortia<sup>150</sup> are qualified to apply for pioneer status by virtue of the terms of Resolution II,<sup>151</sup> none of them has yet applied or is likely to do so.

The final potential deterrent to seabed mining development arises from UNCLOS' "antimonopoly" provisions. These provisions preclude a state or its nationals from exploiting nonreserved<sup>152</sup> tracts which collectively exceed "30 per cent of a circular area of 400,000 square kilometres surrounding the centre of either part of the area covered by the proposed plan of work . . . [or] which, taken together, constitute 2 per cent of the total sea-bed area which is not reserved or disapproved for exploitation."<sup>153</sup> For purposes of applying the antimonopoly provisions, work plans are to be counted on a *pro rata* basis among the sponsoring states.<sup>154</sup>

Compounding the problems of the direct geographical limitations, Annex 3 of UNCLOS provides that where selection among applicants is required because of production limitations,<sup>155</sup> selection criteria are to include "the need to enhance opportunities for all States Parties, irrespective of their social and economic systems . . . so as to avoid discrimination against any State *or system*, to participate in activities in the Area and to prevent monopolization of those activities."<sup>156</sup> This provision, coupled with the ability of the Enterprise to apply in its own right for licensing in any part of the Area,<sup>157</sup> presents a twofold problem. The ISA is provided with grounds for refusing production authorizations to United States

such larger amount as would exceed the exploitation area decided upon by the Authority in its rules, regulations, and procedures" three years thereafter, but in no case after the date of the award of a production authorization. *Id.*

150. *See supra* note 23.

151. Resolution II, *supra* note 133, para. 1(a)(ii); *see also supra* note 134.

152. *See supra* text accompanying notes 90-91.

153. UNCLOS, *supra* note 1, Annex 3, art. 6(3)(c). Nonreserved areas may be disapproved for exploitation by a three-fourths vote of the Council, *id.* art. 161(8)(c), where there is substantial evidence indicating a risk of "serious harm to the marine environment." *Id.* art. 162(2)(x). *See also id.* arts. 161(8)(c), 165(2)(d) (concerning Council decisions on questions of substance, and the Legal and Technical Commission's preparation of environmental impact assessments).

154. *Id.* Annex 3, art. 4.

155. *See supra* text accompanying notes 124-30.

156. UNCLOS, *supra* note 1, Annex 3, art. 7(5) (emphasis added).

157. *See supra* text accompanying note 91.

miners (or, for that matter, miners whose nationality was of states with similar "systems"<sup>158</sup>) and could also call into force Enterprise priority rights pursuant to the production ceilings described above.<sup>159</sup> Moreover, by precluding monopolist behavior by nationals of a state (or states with similar "systems"), the antimonopoly provisions could encourage effective monopolization by the Enterprise.<sup>160</sup>

All this has prompted the President's Special Representative to UNCLOS III to include in his list of objections to UNCLOS "[t]he limit on the number of mining operations which could be conducted by any one country, thus potentially limiting our ability to supply U.S. consumption needs from the seabed."<sup>161</sup> While the actual deterrent effect of the antimonopoly provisions on mining cannot be foretold with certainty prior to their interpretation by the ISA Council, their expansive language has likely already contributed to second thoughts among potential investors.

### 3. Transfer-of-Technology Requirements

As has been indicated, the essence of the amorphous principle that the seabeds are the "common heritage of mankind"<sup>162</sup> may be found in the detail of UNCLOS<sup>163</sup>—to the extent that it has or will develop international legal cognizability. The UNCLOS requirement that license grantees transfer their seabed mining technology to the Enterprise<sup>164</sup> and developing state applicants<sup>165</sup> on "fair and reasonable commercial terms and conditions"<sup>166</sup> is another pro-

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158. See *supra* text accompanying note 156.

159. See A. Post, *supra* note 10, at 205. For a discussion of the production ceilings, see *supra* text accompanying notes 124-49.

160. See A. Post, *supra* note 10, at 205.

161. Statement of Ambassador James Malone, Special Representative of the President for the Third United Nations Conference on the Law of the Sea, before the House Merchant Marine and Fisheries Committee (Feb. 23, 1982), reprinted in LAW OF THE SEA INSTITUTE, *supra* note 39, at 556, 557 [hereinafter cited as Malone Statement—Feb. 1982].

162. See *supra* text accompanying notes 55-75.

163. See *supra* text accompanying note 76.

164. See UNCLOS, *supra* note 1, Annex 3, art. 5(3)(a). Technology, not generally available on reasonable terms, which the licensee does not wish, or is not legally entitled, to transfer may not be used in carrying out its activities in exploring or exploiting the seabed area. *Id.* Annex 3, art. 5(3)(b).

165. See *id.* Annex 3, art. 5(3)(e).

166. *Id.* Annex 3, art. 5(3)(a).

fication of the "common heritage" principle.<sup>167</sup> The requirement only applies if the Enterprise finds that it is unable to obtain the same or equally efficient technology on the open market on fair and reasonable terms.<sup>168</sup> Whether a proposed licensee's terms and conditions are "fair and reasonable" is subject to binding arbitration at the insistence of either party.<sup>169</sup>

While most seabed mining technology is already commercially available,<sup>170</sup> the general industry perception is that *requiring* the transfer, on terms not under the developer's control, is an unreasonable demand on those whose time, energy, and expense have created it. Moreover, such required transfers could diminish the competitive edge of developers of new and more efficient technology, reducing the inducement to further technological advancement, and producing a concomitant levelling effect on the industry as a whole.<sup>171</sup> Even should the prospective sale of newly developed technology on "fair and reasonable terms" and the miner's increased profitability resulting from maximized technological efficiency furnish ample motivation for future research and development, compulsory transfer on terms outside the developer's control has contributed incrementally to the industry perception concerning the unattractiveness of the UNCLOS regime.

Finally, from a national (as opposed to a mining industry) perspective, it must be noted that at least some seabed mining technology is capable of diversion to military uses.<sup>172</sup> While UNCLOS contains provisions which purport to prohibit transfer of acquired technology to third states or their nationals,<sup>173</sup> such limitations do not bind the Enterprise,<sup>174</sup> and would practically be unen-

167. See *id.* arts. 140(1), 144, 150(d), 266-278 & Annex 3, arts. 4(6)(d), 5 (other amplifications of the "common heritage" principle in the context of technology transfer).

168. *Id.* Annex 3, art. 5(3)(a).

169. *Id.* Annex 3, art. 5(4).

170. Wertenbaker—II, *supra* note 116, at 77; see generally A. Post, *supra* note 10, at 22-23 (discussing nodule mining uncertainties).

171. See, e.g., Marshall, *Law of the Sea and the New U.S. Oceans Policy*, 55 N.Y. ST. BAR J. 8, 12 (1983).

172. In 1975, for example, the Hughes-built Glomar Explorer demonstrated that, in addition to its potential for nodule-mining, it was capable of recovering at least part of a Soviet nuclear-powered submarine from the deep ocean floor. See N.Y. Times, Mar. 19, 1975, at A1, col. 8.

173. See, e.g., UNCLOS, *supra* note 1, art. 267 & Annex 3, art. 5(3)(e).

174. *Id.* Annex 3, arts. 5(3)(d), 14(3).

forceable in light of the numerous inspection, verification, and on-ship training requirements contained therein.<sup>175</sup>

#### D. *Financial Obligations of States Parties*

While the financial obligations imposed by UNCLOS on seabed miners are extensive,<sup>176</sup> those obligations imposed on states parties are even more significant. Initially, the administrative ISA budget,<sup>177</sup> taken as a whole, is to be assessed "based upon the scale used for the regular budget of the United Nations<sup>178</sup> until the Authority shall have sufficient income from other sources to meet its administrative expenses."<sup>179</sup> At this point it should be noted that no payments from the Enterprise will be made to the ISA until the Enterprise has become self-supporting, a period not to exceed ten years from the date of commencement of commercial produc-

175. See, e.g., *id.* arts. 188, 215, 278 & Annex 3, arts. 5(2), 15.

176. See *supra* text accompanying notes 102-11.

177. Concerning the *amount* of the budget, UNCLOS, *supra* note 1, arts. 161(8)(c), 162(2)(r), authorizes the Council, with three-fourths vote, to *submit* the proposed annual I.S.A. budget to the Assembly for its approval. *Id.* The Assembly is granted the "powers and functions" to "consider and approve [by a two-thirds vote] the proposed annual budget of the Authority submitted by the Council." *Id.* arts. 159(8), 160(2)(h). While the legal consequences of a budgetary Assembly-Council deadlock are not resolved with specificity, the "power and functions" language of UNCLOS, *supra* note 1, art. 160(2) (emphasis added), the wording of articles 160(2)(h) and 162(2)(r) themselves, *id.* arts. 160(2)(h), 162(2)(r), and the description of council "power" contained in article 162(1), *id.* art. 162(1), would seem to grant the Council a controlling influence in this matter. This last provision specifies that:

The Council is the executive organ of the Authority. The Council shall have the power to establish, in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.

*Id.* Finally, it must be noted that, absent a Council recommendation, the Assembly has no power to pass a budget on its own, and that, consequently, no money could thereby be spent. See generally UNCLOS, *supra* note 1, art. 172 (concerning the annual budget of the Authority); *supra* text accompanying notes 114-15 (limits on powers of ISA Assembly). Concerning the ability of the United States and its allies to affect the Council budgetary vote, see *supra* text accompanying notes 116-22.

178. The United States currently finances about 25% of the UN Budget, *Percentage Scales of Assessment for United Nations Budget and Net Contributions Payable for 1980 and 1981 and 1982*, 1980 U.N.Y.B. 1216; the USSR, about 11%, *id.*; Japan, about 9%, *id.* at 1215; and the Federal Republic of Germany, about 8%, *id.*

179. UNCLOS, *supra* note 1, art. 160(2)(e). The "other sources" alluded to in UNCLOS include, most particularly, seabed licensing fees, Enterprise earnings, ISA loans, and voluntary contributions. See *id.* art. 171(b)-(f). Concerning the likelihood of extensive voluntary contributions being made, see A. Post, *supra* note 10, at 220.

tion.<sup>180</sup> Thus, the United States could reasonably be expected to provide 25% of the ISA budget for up to fifteen years or more from the date at which it might choose to ratify UNCLOS.

The Enterprise, moreover, is to be provided with the funds necessary to explore and exploit one mine site (variously estimated to be at least U.S.\$1 billion or more)<sup>181</sup> and to transport, process, and market the minerals recovered therefrom<sup>182</sup> (perhaps another U.S.\$500 million).<sup>183</sup> All states which are party to UNCLOS are required to make half of these funds available to the Enterprise—again proportional to the scale of the regular U.N. budget assessments—in the form of irrevocable, nonnegotiable, noninterest bearing promissory notes, and to guarantee Enterprise loans for the other half in accordance with the same proportional scale.<sup>184</sup> Repayment of the guaranteed interest-bearing loans is to take priority over the interest-free loans, the latter of which shall be repaid

in accordance with a schedule adopted by the Assembly, upon the recommendation of the Council (by three-fourth vote<sup>185</sup>), and the advice of the [Enterprise Governing] Board<sup>186</sup> . . . , which shall take into account the paramount importance of ensuring the effective functioning of the Enterprise and, in particular, ensuring its financial independence.<sup>187</sup>

Thus, should the United States decide to ratify UNCLOS, its total contributions to the ISA would include about 25% of the indeterminate ISA budget, interest-free loans guaranteeing perhaps as much as U.S.\$300 million to help put the Enterprise in operation, commercial debt guarantees in a roughly equivalent amount, and possibly additional domestic tax credits on profits repatriated to United States operators in order to avoid double taxation—all this in order to create an institution whose primary purpose would be competition with and regulation of United States seabed mining

180. UNCLOS, *supra* note 1, Annex 4, art. 10(1), (3).

181. *See supra* text accompanying notes 29-31.

182. UNCLOS, *supra* note 1, Annex 4, art. 11(3)(a).

183. *See A. Posr, supra* note 10, at 29.

184. UNCLOS, *supra* note 1, Annex 4, art. 11(3)(b), (d)(i).

185. *Id.* art. 161(8)(c).

186. The Governing Board is to be elected by the Assembly, upon Council nomination by three-fourths vote, and is to have the power to approve the annual budget of the Enterprise. *See id.* arts. 160(2)(c), 161(8)(b), 162(2)(c) & Annex 4, art. 6(i).

187. *Id.* Annex 4, art. 11(3)(f).

seabed mining interests.<sup>188</sup> Should the United States choose not to become a party, it is questionable whether, and to what extent, other states would be willing to pick up the additional 25% left uncovered by United States contributions. Whether United States financial institutions would be willing to underwrite loans—even with “paper” debt guarantees from third-party states (whose repayment schedule is contingent on profits being returned and the approval of the ISA Council)—is even more speculative.

### E. *Potential Revenue Sharing With National Liberation Movements*

One of the most significant and continuing controversies has concerned UNCLOS' provisions permitting revenue sharing from seabed activities (as well as from continental shelf exploitation past 200 nautical miles from the baseline<sup>189</sup>) with developing states “and peoples who have not attained full independence or other self-governing status.”<sup>190</sup> These provisions, which could be invoked to assist in the financing of revolutions by “national liberation movements,”<sup>191</sup> have long been a cornerstone to United States' objections to UNCLOS.<sup>192</sup> As a consequence, the final UNCLOS draft contains textual changes which require any such revenue sharing to be pursuant to rules, regulations, and procedures approved by consensus by the Council<sup>193</sup> (in which the United States would have a

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188. Moreover, if the sum of the above-described contributions is insufficient to finance one mining site, Enterprise administrative expenses, and mineral transportation, processing, and marketing fees, the one nation-one vote Assembly (although there is a consensus requirement here) is empowered to “adopt . . . measures for dealing with this shortfall, taking into account the obligations of States Parties . . . and any recommendations of the Preparatory Commission.” *Id.* Annex 4, art. 11(3)(c).

189. *Id.* arts. 76, 82, 140 & Annex 2.

190. *Id.* arts. 160(2)(f)(i), 162(2)(o)(i).

191. Organizations which have participated as observers at UNCLOS III, and which are permitted to sign UNCLOS in their observer capacity, include the PLO, the African National Congress and the Pan Africanist Congress of Anzania(South Africa), the African National Council and the Patriotic Front (Zimbabwe), the African Party for the Independence of Guinea and Cape Verde Islands (PAIGC), the Seychelles People's United Party (SPUP), and the South-West African People's Organization (SWAPO). See Final Act, *supra* note 5, annex 1, appendix. The first three of these organizations and SWAPO signed the Final Act, *supra* note 5, on December 10, 1982. See 21 I.L.M. 1477, 1477 (1982).

192. See, e.g., Malone Statement-Feb. 1982, *supra* note 161, at 556; Statement by President Reagan (Jan. 29, 1982), *reprinted in* LAW OF THE SEA INSTITUTE, *supra* note 39, at 554-55 [hereinafter cited as Reagan Statement]; *supra* text accompanying note 44.

193. See UNCLOS, *supra* note 1, arts. 161(8)(d), 162(2)(o)(i).

guaranteed seat provided it ratified UNCLOS<sup>194</sup>). As a result, this objection to the UNCLOS regime is no longer seriously maintained.

*F. Subsequent Amendments to UNCLOS Binding the United States Without Its Consent*

That subsequent amendments to UNCLOS may bind the United States without its consent has been strongly objected to by the United States. This objection restates both the United States dualist<sup>195</sup> attitude towards international law (by virtue of which it refuses to be bound by international legal norms to which it has not consented) and its unwillingness to delegate its sovereign prerogatives to any state or quasi-legislative group of states in the future. As a result of its dualist viewpoint, the United States will apply customary international norms as its own internal law only when consistent with the latest expression of its own domestic law.<sup>196</sup> Treaty obligations will be enforced internally only when there is no inconsistent superceding statute.<sup>197</sup> The dualist attitude, however, does not prohibit the United States from becoming bound (from the standpoint of international law) by treaty modifications which it did not support and in which it did not acquiesce, provided that it

194. *See supra* text accompanying note 118.

195. A dualist system perceives the domestic and international legal systems as distinct, not always applying as internal law obligations arising from international law. By virtue of the application of this approach, maximum sovereignty is maintained. By way of contrast, a monist system perceives domestic and international legal principles as an integral whole, applying the latter as a "higher" order of norm in case of conflict. *See* G. VON GLAHN, *LAW AMONG NATIONS* 9-13 (1st ed. 1965). Of course, from the *international* legal perspective, domestic law does not constitute a defense to a breach of international legal obligations. *See, e.g.*, N. LEACH, C. OLIVER & J. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM* 25 (1st ed. 1973). Nevertheless, international law also recognizes that active, continuous, and effective protest may render an emerging customary norm nonbinding on a protesting state. *See, e.g.*, *Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116, 131 (Judgment of Dec. 18) (due to Norway's active and continuous protest, a generally recognized three-mile limit on the territorial sea was held not binding). For a practical defense of this principle, see Arrow, *The Customary Norm*, *supra* note 51, at 4-9. *Cf. infra* note 254 (discussing purported exceptions to the rule that a treaty does not create either rights or obligations for a third state without its consent).

196. *See, e.g.*, *Shroeder v. Bissell*, 5 F.2d 838 (D. Conn. 1925); *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 3 comment j (1965).

197. *See* U.S. CONST. art. VI; *Head Money Cases*, 112 U.S. 580, 599 (1884); CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION* 490 (1973).



had ratified a treaty which permitted such amendments to enter into force for all parties by a less-than-unanimous vote in quasi-legislative fashion. This, maintains the United States, is exactly what UNCLOS permits.

Initially, for purposes of this analysis, UNCLOS' regular amendment provisions must be severed from its "review conference" amendment provisions. Careful examination of UNCLOS' cross-referential provisions reveals that all regular amendments are either subject to consensus or only binding upon states ratifying them, although amendments made at the "review conference" may indeed become binding on nonacceding states parties without their consent.

Amendments to UNCLOS' non-seabed provisions may be proposed by any state party at any time more than ten years after of UNCLOS' entry into force.<sup>198</sup> Upon receiving a timely proposal, the ISA Secretary-General is directed to circulate it to all states parties.<sup>199</sup> If, within twelve months thereafter, one-half or more of the states parties favor a conference to consider it, such a conference shall be convened.<sup>200</sup> Amendments adopted by such conferences are subject to ratification,<sup>201</sup> and are to take effect "*for the States Parties ratifying or acceding to them* on the thirtieth day following . . . ratification . . . by two-thirds of the States Parties or by 60 States Parties, whichever is greater."<sup>202</sup> Other states parties may also subsequently ratify or accede to the amendment.<sup>203</sup> Such amendments may also be adopted by consensus without the calling of a conference.<sup>204</sup>

Amendments to UNCLOS' seabed provisions, including amendments to the Seabeds Disputes Chamber provisions,<sup>205</sup> are subject to initial Council approval<sup>206</sup> *by consensus*,<sup>207</sup> and subse-

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198. UNCLOS, *supra* note 1, art. 312(1).

199. *Id.*

200. *Id.*

201. *Id.* art. 315(2).

202. *Id.* art. 316(1) (emphasis added).

203. *Id.* art. 316(3).

204. *Id.* art. 313.

205. *See id.* Annex 6, arts. 35-40.

206. *Id.* art. 314(1).

207. *Id.* art. 161(8)(d). Some ambiguity remains, however, concerning amendments to the Seabeds Disputes Chamber provisions contained in UNCLOS, *supra* note 1, Annex 6, arts. 35-40. These provisions are not within "Part XI," which encompasses the Seabeds Dispute Chamber provisions contained in UNCLOS, *supra* note 1, arts 183-191. The latter, however,

quent Assembly approval by a two-thirds vote.<sup>208</sup> While such amendments are to take effect for all states parties one year after ratification by three-fourths of them,<sup>209</sup> the antecedent consensus requirement for Council approval would give the United States (or any state represented on the Council) the ability to ensure that it would not become bound without its consent.<sup>210</sup>

The "review conference" amendment provision, however, present a substantially different scenario. UNCLOS provides that:

Fifteen years from 1 January of the year in which the earliest commercial production commences . . . , the Assembly shall convene a conference for the review of those provisions of this Part and the relevant Annexes which govern the system of exploration and exploitation of the resources of the [seabed] Area . . . .<sup>211</sup> If, five years after its commencement, the Review Conference has not reached agreement on the system of exploration and exploitation of the resources of the Area, it may decide during the ensuing 12 months, by a three-fourths majority of the States Parties, to adopt and submit to the States Parties for ratification . . . such amendments changing or modifying the systems as it determines necessary and appropriate. *Such amendments shall enter into force for all States Parties 12 months after . . . ratification . . . by three fourths of the States Parties.*<sup>212</sup>

While this quasi-legislative system would not be permitted to effect preexistent contractual rights,<sup>213</sup> the possibility that United States sovereignty and potentially strategic interests might be legally fettered by a three-fourths vote of UNCLOS' participants caused Ambassador Malone to testify before a House Committee that:

The draft treaty now permits two-thirds [now three-fourths] of the States parties acting at the review conference to adopt

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appears to incorporate the former by reference. *See id.* arts. 314, 316(1), (5) & Annex 6, art. 41(2) (creates the potential ambiguity).

208. *Id.* arts. 159(8), 314(1).

209. *Id.* art. 316(5).

210. Amendments to provisions regarding the Law of the Sea Tribunal are subject to consensus requirements similar to those described above. *See id.* Annex 6, art. 41(1).

211. *Id.* art. 155(1).

212. *Id.* art. 155(4) (emphasis added).

213. *Id.* art. 155(5).

amendments to Part IX [the seabeds component] of the treaty which would be binding on all States parties without regard to their concurrence. It has been argued that a State which objects to an amendment has the option to withdraw<sup>[214]</sup> from the treaty if the amendment is imposed without [its] consent. This proposal is obviously not acceptable when dealing with major economic interests of countries which have invested significant capital in the development of seabed mining in an international treaty regime.<sup>215</sup>

While review conference amendments may not impair established contractual rights,<sup>216</sup> they could well impose even more restrictive conditions on United States nationals' seabed mining participation. Since such amendments would not likely come into force until the year 2010 or thereafter, the vigor of the United States objection must be evaluated not only in strategic and economic terms, but also in terms of principle—specifically, the United States' long-standing position that it will not permit itself to become part of a quasi-legislative process by which its sovereignty could be impaired by a majority—even a three-fourths majority—of the nations of the world.<sup>217</sup>

### III. THE "ALTERNATIVE" SEABED MINING REGIME

The "alternative" seabed mining regime is currently being negotiated pursuant to United States,<sup>218</sup> United Kingdom,<sup>219</sup> French,<sup>220</sup> West German,<sup>221</sup> and Japanese<sup>222</sup> domestic enabling leg-

214. *See id.* art. 317 (permitting prospective denunciation upon one year's written notice to the United Nations' Secretary-General).

215. Malone Statement—Feb. 1982, *supra* note 161, at 560.

216. UNCLOS, *supra* note 1, art. 155(5).

217. *See, e.g.*, Malone Statement—Apr. 1982, *supra* note 86, at 596; Reagan Statement, *supra* note 192, at 555; *supra* text accompanying note 161.

218. *See* U.S. Act, 30 U.S.C. §§ 1402 (b)(3), 1428(f) (Supp. IV 1980).

219. *See* Deep Sea Mining (Temporary Provisions) Act, 1981, ch. 53, § 3(1), *reprinted in* 20 I.L.M. 1218, 1220 (1981) [hereinafter cited as U.K. Act].

220. *See* Loi no. 81-1135 du 23 décembre 1981, Sur l'exploration des ressources minérales des grands fonds marins, 1981 Journal Officiel de la République Française [J.O.] 3499-500, 1982 Dalloz-Sirey Législation [D.S.L.] 11-12 (Fr.), *reprinted in* 21 I.L.M. 808 (1982) [hereinafter cited as French Act].

221. Act of Interim Regulation of Deep Seabed Mining, § 14, 1980 Bundesgesetzblatt, Teil 1 [BGBl] I 1457 (W. Ger.), *reprinted in* 20 I.L.M. 393, 396 (1981) [hereinafter cited as West German Act]; *see also* Act to Amend the Interim Regulation, 1982 BGBl I 136 (W. Ger.), *reprinted in* 21 I.L.M. 832 (1982).

222. Law on Interim Measures for Deep Seabed Mining of July 1982, ch. 4, art. 29 (Japan), *reprinted in* 22 I.L.M. 102 (1983) [hereinafter cited as Japanese Act]. The recent evolution of the "alternative" seabed mining regime is described in Cohen, *International*

islation. The regime provides a legal framework for states which may wish either to exploit seabed minerals outside the UNCLOS regime, or to resolve conflicting claims to specified seabed areas on an interim basis, pursuant to UNCLOS' conditions precedent to applying for pioneer investor status.<sup>223</sup> The status of this regime as an "alternative" to the UNCLOS approach remains tentative, since the enabling legislation enacted by all participating states specifies the "interim" character of the regime, pending the adoption of a general international regime which is universally agreed upon. Should such a regime emerge, the "alternative" regime would merely have served as a conflict-resolution mechanism, resolving inter-party disputes concerning the equities of the various seabed claims.<sup>224</sup> Should a universal<sup>225</sup> regime not emerge through UNCLOS, however, the alternative regime could serve as a legal framework for the reciprocating<sup>226</sup> states to exercise their freedoms of the seas<sup>227</sup> without conflict between the parties.<sup>228</sup>

On September 15, 1981, pursuant to section 2(b) of the United States' Deep Seabed Hard Mineral Resources Act (Seabed Mining Act),<sup>229</sup> the Office of Ocean Minerals and Energy of the National Oceanic and Atmospheric Administration [NOAA] promulgated regulations<sup>230</sup> affecting

*Cooperation on Seabed Mining*, in LAW OF THE SEA 101, 104-08 (B. Oxman, D. Caron & C. Budderi eds. 1983).

223. See Resolution II, *supra* note 135, para. 5.

224. The UNCLOS criteria are specified in Resolution II, *supra* note 133, para. 5(d). See also *supra* note 141 (enumerating the criteria); *infra* note 240 (Four-Power Agreement criteria for applicant selection).

225. See Declaration of Principles, *supra* note 160, para. 9. Ambassador Pinto of Sri Lanka stated at the 1978 Law of the Sea Institute Workshop:

And we did agree that this treaty [to be established] shall be "of a universal character," and that it should be agreed upon by the community in general, not by a handful of states, or even by a substantial number of them. The words of the Declaration of Principles . . . are there to prove it.

Statement of Ambassador M.C.W. Pinto to the 1978 Law of the Sea Institute (Dec. 11, 1978), reprinted in *Alternatives in Deepsea Mining*, 1978 LAW OF THE SEA INST. WORKSHOP PROCEEDINGS, 13, 14 (S. Allen & J. Craven eds. 1979). See also *supra* text accompanying note 68 (preclusion of claims which are inconsistent with the international regime).

226. See *supra* note 12; see also U.S. Act, 30 U.S.C. § 1428 (Supp. IV 1980).

227. See *supra* text accompanying notes 48-52.

228. This is by virtue of mutual and reciprocal recognition of licenses issued by each to its nationals.

229. U.S. Act, 30 U.S.C. § 1413(a)(2)(A) (Supp. IV 1980).

230. Deep Sea Mining Regulations for Exploration Licenses, 15 C.F.R. part 970 (1981), reprinted in 20 I.L.M. 1233-58 (1981); see also 46 Fed. Reg. 45,890-95 (1981), reprinted in 20 I.L.M. 1228-33 (1981) (supplementary information including summary of comments and responses).

United States citizens<sup>231</sup> wishing to participate in the *exploration*<sup>232</sup> phase of the seabed mining venture.<sup>233</sup> The four major consortia involving United States participants<sup>234</sup> had already filed exploration license applications with NOAA, but final approval had been withheld pending domestic conflict resolution. By the late summer of 1983, however, the domestic conflicts had been resolved and new area coordinates were submitted to NOAA during October. Internationally, these consortia, along with AFERNOD<sup>235</sup> and the DOMA group,<sup>236</sup> had also signed arbitration agreements by August, and the international conflicts had generally been resolved by the signing of informal settlement agreements as of early 1984. While a formal conflict resolution agreement between the United States, United Kingdom, France, and the Federal Republic of Germany entered into force on September 2, 1982,<sup>237</sup> to provide for the contingency of nonagreement by the mining consortia involved, its terms initially provided only for conflict identification<sup>238</sup> among pioneer investors, permitting six months for the parties to agree to binding arbitration<sup>239</sup> before mandatory arbitration<sup>240</sup> could be invoked. Consistent with the voluntary

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231. That citizenship and not territoriality is the basis for jurisdiction is made amply clear by sections 2 and 3 of the U.S. Act, 30 U.S.C. § 1402(a) (Supp. IV 1980). Concerning the cognizability and potential application of the jurisdictional assertion, see Arrow, *The "Alternative" Seabed*, *supra* note 11, at 2 n.3.

232. "Exploration" is defined in the U.S. Act, 30 U.S.C. § 1403(5) (Supp. IV 1980), to include:

(A) any at-sea observation and evaluation activity which has, as its objective, the establishment and documentation of—

(i) the nature, shape, concentration, location, and tenor of a hard mineral resource; and

(ii) the environmental, technical, and other appropriate factors which must be taken into account to achieve commercial recovery; and

(B) the taking from the deep seabed of such quantities of any hard mineral resources as are necessary for the design, fabrication, and testing of equipment which is intended to be used in the commercial recovery and processing of such resource.

*Id.*

233. These regulations are examined in detail in Arrow, *The "Alternative" Seabed*, *supra* note 11, at 3-24.

234. *See supra* note 23.

235. *See supra* note 25.

236. DOMA is the acronym for the Deep Ocean Minerals Association, which is a Japanese mining group.

237. Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed, Sept. 2, 1982, 21 I.L.M. 950 (1982) [hereinafter cited as Four-Power Agreement].

238. *Id.* para. 1.

239. *Id.* sched., pt. II, para. 9(2).

240. *Id.* The criteria for applicant selection pursuant to the Four-Power Agreement are similar to those specified by UNCLOS in its treatment of pioneer investor applications. *See* Resolution II, *supra* note 133, para. 5(d); *see also supra* note 141 (enumerating the criteria).

arbitration proceedings recommended by this Four-Power Agreement, the governments have not been called upon to intervene, though they are still meeting to ensure the preservation of the arbitration-directed agreements which have thus far been concluded.

On October 6, 1983, the Environmental Protection Agency held hearings concerning the issuance of a general permit<sup>241</sup> relating to discharge by vessels subject to the United States Seabed Mining Act.<sup>242</sup> Following issuance of this permit, draft environmental impact statements concerning the terms, conditions, and restrictions on nodule recovery, required by the Seabed Mining Act, were promulgated on May 18, 1974. Final environmental impact statements and exploration licenses are expected to be ready by about August or September, 1984.

Simultaneously, NOAA has been working on draft regulations concerning the *commercial recovery* phase. The current expectation is that the draft regulations will be published by the late summer of 1984, and the final regulations for the issuance of recovery permits before 1985. This would allow ample time for permit issuance prior to the January 1, 1988 start-up date for commercial recovery contemplated by the United States<sup>243</sup> and the other three powers' domestic legislation.

#### IV. THE LEGAL STATUS OF THE SEABEDS: 1984

Legal as well as economic and political factors must obviously be considered in evaluating the relative merits of the potentially competing seabed regimes. The requisite legal analysis necessitates consideration of customary international law antecedent to the signing of UNCLOS and the Final Act of UNCLOS III on December 10, 1982; the potential effect of UNCLOS as an "objective regime"; and any acts of the United States or its allies which might estop them from denying the opposability to them of UNCLOS' seabed mining provisions. These issues will now be addressed in turn.

##### A. Antecedent Custom

As has been indicated, the freedom of the seas principle, permitting nonexclusive use of the oceans and ocean floor<sup>244</sup> past the territorial seas of coastal states, reigned supreme for well over 350 years.<sup>245</sup> Even the general

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241. This permit is required by the Clean Water Act, 33 U.S.C. § 1342 (1976), and its accompanying regulations, 40 C.F.R. 122.28 (1983).

242. U.S. Act, 30 U.S.C. § 1401 (Supp. IV 1980).

243. *Id.* § 1412(c)(1)(D).

agreement on the designation of the seabeds as the "common heritage of mankind" in 1970<sup>246</sup> was likely without binding legal effect, due to its ambiguity,<sup>247</sup> the lack of states' *opinio juris* regarding it,<sup>248</sup> and its inconsistent invocation in subsequent state practice.<sup>249</sup> Thus, prior to the coalescing of the specific requirements of the common heritage principle in UNCLOS, it is likely that the seabeds, the minerals thereon, the superjacent water column, and surface of the sea (beyond the limits of national jurisdiction) remained free to use and exploit by all on a nonexclusive basis, subject to the norm that such freedoms be exercised with reasonable regard for the interests of other states wishing to do the same.<sup>250</sup>

### B. Debunking the Myth of the "Objective Regime"

Given the long-standing nature of the *res inter alios acta* rule<sup>251</sup> and the sound foundation of this rule in general historical notions of state sovereignty,<sup>252</sup> a legitimate threshold question may be addressed as to whether any exceptions exist thereto at all. The Statute of the International Court of Justice, for example, in describing the sources of international law, refers to "international conventions, whether general or particular, establishing rules *expressly recognized by the contesting States*."<sup>253</sup> The Vienna Convention on the Law of Treaties, moreover, provides that "a treaty does not create either obligations or rights for a third state *without its consent*."<sup>254</sup>

244. See *supra* text accompanying notes 51-52.

245. See generally Arrow, *The Customary Norm*, *supra* note 51, at 2-21; Arrow, *The Proposed Regime*, *supra* note 4, at 352-68; *supra* note 3; *supra* text accompanying notes 48-50 (discussion of the free seas principle).

246. See *supra* text accompanying notes 63-70.

247. See *supra* text accompanying notes 73-75.

248. See Arrow, *The Customary Norm*, *supra* note 51, at 24-26; *supra* text accompanying note 71.

249. See, e.g., Arrow, *The Customary Norm*, *supra* note 51, at 28-38.

250. See *supra* note 4.

251. This rule provides that treaty obligations have no effect on states not parties thereto. See *supra* text accompanying note 7.

252. See, e.g., S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10, at 19 (Judgment of Sept. 7).

253. I.C.J. STAT. art. 38(1)(a) (emphasis added).

254. Vienna Convention, *supra* note 7, art. 34, *reprinted in* 63 AM. J. INT'L L. at 886. (emphasis added). See also S. ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* 224-25 (1970) (guide to legislative history of article 34). The so-called "exceptions" to this principle contained in articles 35 and 38 of the Vienna Convention, *supra* note 7, are not really exceptions at all. Article 35 specifically requires that a state, in writing, expressly agree to be bound to any purported obligation. Vienna Convention, *supra* note 7, art. 35, *reprinted in* 63 AM. J. INT'L L. at 886; see also S. ROSENNE, *supra*, at 226-27 (guide to legislative history of article 35). Article 38, recognizing the possibility that

International cases have also given broad support to the *res inter alios acta* principle as an integral component of state sovereignty. In the *Upper Silesia* case, the Permanent Court of International Justice (P.C.I.J.) stated that "[a] treaty only creates law as between states which are parties to it; in case of doubt no rights can be deduced from it in favor of third states."<sup>255</sup> Concerning attempts to bind third-party states to obligations without their consent, the international courts have taken an equally strident position. In the *River Oder* case, the P.C.I.J. refused to bind Poland to provisions of the Barcelona Convention, which it had not ratified.<sup>256</sup> In the case of the *Free Zones of Upper Savoy and the District of Gex*, the P.C.I.J. held that "[a]rticle 435 of the Treaty of Versailles is not binding upon Switzerland, which is not a Party to the Treaty, *except to the extent to which that country accepted it.*"<sup>257</sup> In the *North Sea Continental Shelf* cases,<sup>258</sup> the International Court of Justice [I.C.J.] stated that "when a number of States . . . have drawn up a convention specifically providing for a particular method by which the intention to become bound . . . is to be manifested . . . it is not lightly to be presumed that a State which has not carried out these formalities . . . has nevertheless somehow become bound in another way."<sup>259</sup> The United States<sup>260</sup> and the Soviet Union<sup>261</sup> have taken similar positions.

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a treaty-specified norm may simply codify custom, subjects the norm to the protest principle in any case. Vienna Convention, *supra* note 7, art. 38, *reprinted in* 63 AM. J. INT'L L. at 887; *see, e.g.*, Fisheries Jurisdiction (U.K. v. Ir.), 1973 I.C.J. 3, 10-14 (Judgment of Feb. 2); J. BRIERLY, *OUTLOOK FOR INTERNATIONAL LAW* 99 (1944); M. SORENSEN, *MANUAL OF PUBLIC INTERNATIONAL LAW* 137 (1976); G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 128-30 (W. Butler trans. 1974); MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 BRIT. Y.B. INT'L L. 293, 309-14 (1953). *See also supra* note 195 (discussing view of international law and the protest principle).

255. (Ger. v. Pol.), 1926 P.C.I.J., ser. A, No. 7, at 29 (Judgment of May 25).

256. (U.K. v. Pol.), 1929 P.C.I.J., ser. A, No. 23, at 20, 22 (Judgment of Sept. 10).

257. (Fr. v. Switz.), 1932 P.C.I.J., ser. A/B, No. 46, at 141 (Judgment of June 7) (emphasis added).

258. (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 4 (Judgment of Feb. 20).

259. *Id.* at 25-26.

260. *See* U.S. CONST. art. II, § 2, cl. 2. In the specific context of recent developments in ocean law, *see, e.g.*, Reagan Statement, *supra* note 192, at 555. Theodore Kronmiller, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs, testified before a Senate subcommittee on September 15, 1982 that: "The exercise by the United States of rights and freedoms under international law can be limited only with our consent. This point holds true with regard both to our right to mine the seabed and to our right to navigate under, on or over the world's oceans, including international straits. We have those rights today, we are proceeding with their exercise, and we intend to maintain them." *Law of the Sea Negotiations: Hearing before the Subcomm. on Arms Control, Oceans, International Operations, and Environment of the Senate Comm. on Foreign Relations*, 97th Cong., 2d Sess. 8 (1982) (available on microfiche CIS 83, abstract no. S381-15, pt. 1 of 2).

261. *See, e.g.*, G. TUNKIN, *supra* note 254, at 128-30; Tunkin, *International Law, the*



Although scholarly opinion exists to the contrary, many publicists have expressed skepticism concerning the existence of any exceptions to the *res inter alios acta* rule. Verzijl, for example, wrote:

There is no solid ground for assuming that the general conviction that the effect of treaties is . . . confined to the parties has ceased to be valid in later periods, or that a contrary conviction prevails at the present time, despite isolated voices which are sometimes heard in favour of the law-creating effect of multilateral conventions . . . .<sup>262</sup>

Brownlie, though recognizing that treaties may provide *evidence* of custom,<sup>263</sup> has asserted that "there is no clear and dogmatic distinction between 'lawmaking' treaties and others,"<sup>264</sup> and, in his discussion of the *types* of treaties which, by their nature, purport to be "lawmaking," is careful to limit the effects of even such treaties to the parties.<sup>265</sup>

Kelsen notes that it is the function of *all* treaties to "make law" between the parties, and has referred to the term "law-making treaty" as a pleonasm.<sup>266</sup>

Wolfgang Friedmann, while recognizing that discordant voices have been heard, has written that: "The principle imperfection of the international law-making treaty, as distinct from legislation proper, derives from the principle of national sovereignty. A treaty must rest on the *consent* of all the parties."<sup>267</sup> Sorensen further supported this view by drawing an analogy to contract law,

*Contemporary and Classic*, in *ESSAYS ON INTERNATIONAL LAW IN HONOR OF KRISHNA RAO* 48, 56 (M. Nawaz ed. 1976). Professor Tunkin, a prominent Soviet jurist, diplomat, and scholar, has often been cited as the leading Soviet authority on international law. See, e.g., C. VON GLAHN, *supra* note 195, at 14 n.5. See also J. HILDEBRAND, *SOVIET INTERNATIONAL LAW* 26-41 (1968); J. TRISKA & R. SLUSSER, *THE THEORY, LAW, AND POLICY OF SOVIET TREATIES* 40-41 (1962).

262. 6 J. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 277 (1973).

263. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 12-13 (2d ed. 1973). See also I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 76, 77 (1973); Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 *BRIT. Y.B. INT'L L.* 275 (1965-1966).

264. I. BROWNLIE, *supra* note 263, at 13.

265. *Id.* at 12.

266. H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 456-57 (R. Tucker 2d ed. 1967).

267. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 124 (1964) (emphasis added). See also *S.S. Lotus (Fr. v. Turk.)*, 1927 *P.C.I.J.*, ser. A, No. 10, at 18, 19 (Judgment of Sept. 7).

recognizing the necessity of a coincidence of the wills of the parties.<sup>268</sup>

Nevertheless, both the Vienna Convention<sup>269</sup> and the writings of several publicists<sup>270</sup> have asserted the existence of several possible "exceptions" to the *res inter alios acta* principle, relying on either the quantity or quality of support which a particular treaty enjoys, or characteristics intrinsic to the particular treaty itself. These purported exceptions may be classified into several (sometimes overlapping) categories, including exceptions based upon: the concurrence of treaty provisions with customary international law; the intent of a treaty to create obligations for a third state and the third state's acceptance thereof; the creation by treaty of a servitude on territory by its former sovereign or in part by the servient state itself; the adherence in a treaty regime of all the "great powers"; and, the intrinsically "constitutive" or "quasi-legislative" character of a particular treaty in question. These categories will now be examined to ascertain whether any of the purported exceptions are really exceptions at all, and if they are, the extent to which they are legally cognizable as limitations upon sovereignty as a matter of customary international law. The conclusions drawn from this analysis will then be applied to determine the prospective impact on UNCLOS' seabed provisions on nonsignatory states.

At this juncture, one critical threshold observation must be made. The *res inter alios acta* rule, of course, constitutes a reaffirmation and preservation of historically prevalent notions of sovereignty. As recognized by the P.C.I.J. in the S.S. *Lotus*<sup>271</sup> case, the process of customary international limitation on states' sovereignty "leaves them . . . a wide measure of discretion which is only limited in certain cases by *prohibitive* rules."<sup>272</sup> Thus, if there *are* any limitations on state sovereignty not based upon consent,<sup>273</sup> such

268. See M. SORENSEN, *supra* note 254, at 15, 17, 124.

269. See *Supra* note 7.

270. See *infra* text accompanying notes 271-355.

271. (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10 (Judgment of Sept. 7).

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

273. This does not include limitations arising pursuant to the *jus cogens* doctrine, which is clearly inapplicable here. In order to constitute *jus cogens*, or a peremptory norm of international law, the asserted norm must enjoy a high degree of acquiescence and be moral or humanitarian in character. See, e.g., Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 59 (1966); see generally Onuf & Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 DEN. J. INT'L L. & POL. 187 (1974) (examining the question, "what is the source of peremptory norms?"). Such peremptory norms include piracy, slave trade, genocide, and war crimes. See, e.g., High Seas

exceptions to the *res inter alios acta* rule would need to be affirmatively established as norms of customary international law, with the party seeking to establish the exception bearing the burden of proving that the four requirements necessary to the establishment of such a norm had been met.<sup>274</sup> Moreover, in attempting to establish the *opinio juris*<sup>275</sup> requirement of custom, forebearances by a state to pursue certain activities, cited to evidence its recognition of the "law-making" character of a treaty establishing such prohibitions upon it must be carefully examined *to determine whether a narrower ground for explaining that state's behavior may be found*. For example, a state's forbearance from action forbidden by a treaty which it has not ratified might alternatively be explained by either its incapacity to act, or by its perception that the action not taken was precluded by *customary* international law. Only if the state's forbearance can be shown to arise from a perception by the forbearing state that the *treaty* prohibition had achieved "law-making" or "objective regime" status as such (*erga omnes*) could evidence supporting the existence of an "objective regime" exception to the *res inter alios acta* rule be found. This article maintains that no such evidence may be found and, moreover, that any purported exceptions, to the extent of their validity, are ultimately based upon consent.

### 1. Concurrent Custom

#### Article 38 of the Vienna Convention on the Law of Treaties<sup>276</sup>

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Convention, *supra* note 3, arts. 13, 14, 15; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1961); Universal Declaration of Human Rights, G.A. Res. 217(a), U.N. Doc. A/810 (1948). See generally Judgment of the International Military Tribunal, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411 (1948), reprinted in 41 AM. J. INT'L L. 172 (1947). The principles and judgment of the International Military Tribunal were unanimously affirmed by the United Nations General Assembly, G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946). That deep seabed nodule recovery violates no *jus cogens* principle is maintained, *inter alia*, in Arrow, *The Proposed Regime*, *supra* note 4, at 382-84.

274. The four-part test for the establishment of a new prohibitory customary norm includes a quantitative element (there must be a general practice among states of refraining from specified activity), a psychological element, commonly referred to as *opinio juris* (the forbearance must be undertaken in the belief that the forbearance is legally required), a qualitative element (the forbearance must be adhered to, *inter alia*, by the "specially affected states"), and a temporal element (where a new prohibitory custom is asserted to have developed quickly, the state practice must have been "extensive and virtually uniform"). Arrow, *The Customary Norm*, *supra* note 51, at 2-4 (citations omitted).

275. See *supra* note 274.

276. *Supra* note 7, art. 38.

provides that “[n]othing in Articles 34 to 37 [which articulate the *res inter alios acta* rule] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”<sup>277</sup> This principle was formally recognized by the International Law Commission over a generation ago when it reported that:

A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have . . . conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other states.<sup>278</sup>

Both publicists<sup>279</sup> and the I.C.J.<sup>280</sup> have also given support to this quite reasonable premise. Nevertheless, due to the viability of the protest principle,<sup>281</sup> custom is ultimately founded on consent, and therefore does not constitute a true exception to the *res inter alios acta* rule.<sup>282</sup> Many of the precedents widely thought to support the existence of exceptions to the rule are easily explicable within the perimeters of the concurrent custom approach.

The United Nations Charter is often cited as an example of an “objective regime” in that it purports to create new rights and obligations for nonratifying states without their consent.<sup>283</sup> While some have questioned its authority to do so as *ultra vires*,<sup>284</sup> its

277. *Id.* For a synopsis of the legislative history of article 38, see S. ROSENNE, *supra* note 254, at 236-37.

278. Report of the International Law Commission of the General Assembly, 5 U.N. GAOR Supp. (No. 12) at 4, U.N. Doc. A/CN.4/SER.A/1950/Add.1, reprinted in 1950 Y.B. INT'L L. COMM'N 364, 368.

279. See, e.g., A. McNAIR, *THE LAW OF TREATIES* 255 (1961); R. ROXBURGH, *INTERNATIONAL CONVENTIONS AND THIRD STATES* 51-60, 112 (1917); I. SINCLAIR, *supra* note 263, at 76-77; M. SORENSEN, *supra* note 254, at 154-55, 295; Baxter, *supra* note 263, *passim*.

280. See generally *North Sea Continental Shelf*, (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 4, 32-41 (Judgment of Feb. 20).

281. See, e.g., MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115, 131-32 (1957); MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 BRIT. Y.B. INT'L L. 293 *passim* (1953); Tunkin, *Co-Existence and International Law*, 95 *Recueil des Cours* 3, 13 (1958).

282. See *supra* text accompanying note 278.

283. See, e.g., J. BRIERLY, *THE LAW OF NATIONS* 327 (6th ed. 1963). In this regard, see U.N. CHARTER arts. 2(4), 2(6), 2(7), 4, 32, 35(2), 39, 41, 42, 50, 51. See generally L. GOODRICH & E. HAMBRO, *THE CHARTER OF THE UNITED NATIONS* (1949).

284. See, e.g., J. VERZIJL, *supra* note 262, at 279. See generally H. KELSEN, *THE LAW OF THE UNITED NATIONS* 791-805 (1950) (discussing right of self-defense and article 51).

ability to bind nonratifying states has been partially affirmed (at least by way of *dictum*) in the *Reparations*,<sup>285</sup> case in which the I.C.J. obliquely referred to the "objective regime" approach as a partial justification for its holding.<sup>286</sup> In fact, a narrower and more tenable basis for the holding exists. The issue in the *Reparations* case was whether the United Nations had standing to sue members or non-members for injuries to either the United Nations directly or to its agents. It is submitted that the *capacity* issue, rather than being contingent on the Charter's status as an "objective regime," has more to do with the capacity of states to invest the U.N. with agency authority, much like that enjoyed by the other international composite bodies.<sup>287</sup> None would argue that this latter group of organizations necessarily possesses "objective regime" status, but all have enjoyed international capacity for some purposes. Moreover, as early as 1927, the P.C.I.J. recognized that a "breach of an engagement involves an obligation to make reparation,"<sup>288</sup> as a principle of *customary* international law.<sup>289</sup> That this customary norm was not limited to contractual delicts is evidenced, *inter alia*, by the *Trail Smelter*<sup>290</sup> Case, in which damages were awarded to the United States on the basis of sulphur dioxide pollution from a Canadian smelter.

These precedents furnish ample basis for the decision in the *Reparations* case without the necessity of invoking the Charter as an "objective regime." Furthermore, the primary Charter obligations for nonmembers<sup>291</sup> were probably *already* part of the corpus of customary international law at the time the Charter was signed, due to their universal acceptance by the close of World War II<sup>292</sup> and to the belated but widespread accession to the approach articu-

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285. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Advisory Opinion of Apr. 11).

286. *Id.* at 185.

287. *See, e.g.*, Final Act, *supra* note 1, annex.

288. *Chorzow Factory (Jurisdiction)* (Ger. v. Pol.), 1927 P.C.I.J., ser. A, No. 9, at 21 (Judgment of July 26).

289. *Id.*

290. (U.S. v. Can.) 3 R. Int'l Arb. Awards 1905 (1941).

291. These obligations relate to abstaining from the threat or use of force against the territorial integrity and political independence of states, U.N. CHARTER art. 2, para. 4, and the obligation to peacefully settle disputes, *id.* art. 33.

292. *See, e.g.*, M. SORENSEN, *supra* note 254, at 219.

lated by the General Treaty for the Renunciation of War.<sup>293</sup> In any case, by about 1960, the rules of the United Nations Charter had certainly come to represent norms of customary international law,<sup>294</sup> so its binding force is not contingent on its status as an "objective regime."

Other examples cited in favor of the "objective regime" exception to the *res inter alios acta* rule may also be more narrowly interpreted by reference to the concurrent custom approach. The Nuclear Test Ban Treaty<sup>295</sup> has now acquired universal acceptance, and therefore owes any binding effect it may have on nonratifying states to its status as a customary norm.<sup>296</sup> The same may be said of both the Vienna Convention<sup>297</sup> and the Outer Space Treaty.<sup>298</sup>

293. General Treaty for Renunciation of War as an Instrument of National Policy, *opened for signature* Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57 (entered into force for the United States July 24, 1929); *see also* M. SORENSEN, *supra* note 254, at 219.

294. *See* Giraud, *Modification et terminaison des traites collectifs*, 49 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 5, 19 (1961).

295. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, United States-United Kingdom-U.S.S.R., 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43, *reprinted in* 57 AM. J. INT'L L. 1026 (1963).

296. *See, e.g.*, K. HOLLOWAY, MODERN TRENDS IN TREATY LAW 596 (1967).

297. *See* Vienna Convention, *supra* note 7. Both the general practice of the world community and the United States, prior to ratification, recognized the Vienna Convention as "the authoritative guide to current treaty law and practice." Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT'L L. 541, 553-54 (1983) (quoting 5 Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971) (letter of Dep't of State submitting Vienna Convention to the President of the United States)); *see, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 47 (Advisory Opinion of June 21).

298. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205, *reprinted in* 6 I.L.M. 386 (1967). The Outer Space Treaty was ratified by all the major space powers, as well as by such diverse states as Brazil, Ecuador, Fiji, the Democratic Republic of Germany, the Federal Republic of Germany, Libya, Saudi Arabia, South Africa, and Zambia. By 1982, it had been ratified by 76 states. Although articles 3 to 13 of the Treaty purport to bind only states parties, articles 1 and 2 (mandating freedom of exploration, sovereign equality, and precluding sovereign claims), purport to bind all states and reflect principles theretofore universally agreed upon. Its comprehensive force is therefore resultant of its status as custom, not its status as an "objective regime." *See* Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962, 18 U.N. GAOR (1280th plen. mtg.), U.N. Doc. A/C.1/L. 331(1963), *reprinted in* 3 I.L.M. 157 (1964); 58 AM. J. INT'L L. 477 (1964). *See generally* H. LAY & H. TAUBENFELD, THE LAW RELATED TO ACTIVITIES OF MAN IN SPACE 66-87 (1970).

The treaties establishing the neutrality of Switzerland,<sup>299</sup> Belgium,<sup>300</sup> Austria,<sup>301</sup> Luxembourg,<sup>302</sup> and the Aaland Islands<sup>303</sup> are also cited as having created "objective regimes."<sup>304</sup> However, due to the universal acceptance of the neutral status of all the above states (except Belgium, whose status as a neutralized state was terminated following World War I<sup>305</sup>), it is submitted that the "neutralization"

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299. See Final Act of the Congress of Vienna, June 9, 1815, art. 84, 2 Martens Nouveau Recueil 379, 419 (1814-15). This Act was confirmed by the Declaration of Paris of Nov. 20, 1815, in which Austria, France, Great Britain, Prussia, and Russia guaranteed Switzerland's territorial integrity and neutrality in perpetuity. See 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 345 (1963). This stipulation was later ratified by article 102(9) of the Swiss Constitution, reprinted in 3 A. PEASLEE, CONSTITUTIONS OF NATIONS 932, 959 (rev. 3d ed. 1968).

300. At the London Conference of 1831, it was first decided that Belgium should become an independent and neutralized state. See, e.g., J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 81 (7th ed. 1972). This arrangement was confirmed by the Treaty of London, Apr. 19, 1839, 16 Martens Nouveau Recueil 788, 790 (1830-39), which severed Belgium from Holland, and by virtue of which Austria, France, Great Britain, and Russia (but not Holland) guaranteed its neutrality. *Id.* See Ion, *Treaties of Neutrality*, 13 MICH. L. REV. 368, 369 (1915). Belgian neutrality was violated by Germany in 1914, and was effectively terminated by King Albert's statement to the Belgian Parliament on November 22, 1918: "Belgium, victorious and freed from the neutrality that was imposed upon her by states which have been shaken to their foundations by the war, will enjoy complete independence. Belgium, reestablished in all its rights, will rule its destinies according to its aspirations and in full sovereignty." See C. FENWICK, INTERNATIONAL LAW 91 n.4 (2d. ed. 1934). Belgium's fully renewed sovereignty was later confirmed by the Treaty of Versailles. See generally D. THOMAS, THE GUARANTEE OF BELGIAN INDEPENDENCE AND NEUTRALITY IN EUROPEAN DIPLOMACY, 1830's-1930's (1984).

301. Austria was neutralized pursuant to its agreement with the Soviet Union on April 15, 1955. See generally Verdross, *Austria's Permanent Neutrality and the United Nations Organization*, 50 AM. J. INT'L L. 61 (1956); Note, *Austria's Permanent Neutrality*, 50 AM. J. INT'L L. 418 (1956). The Soviet-Austrian agreement was recognized by the United States in December 1955, and by the other great powers and other states shortly thereafter. Dep't of State Release No. 680 (Dec. 6, 1955), quoted in 1 M. WHITEMAN, *supra* note 299, at 344; see also J. STARKE, *supra* note 300, at 133.

302. Luxembourg's neutrality was guaranteed by Austria, France, Great Britain, Prussia, and Russia (and recognized by Belgium, itself a neutral state), in the Treaty of London, May 11, 1867, 18 Martens Nouveau Recueil 445 (1st ser. 1873).

303. The Aaland Islands were declared to be under Finnish Sovereignty, but demilitarized, by the Convention Relating to the Non-Fortification and Neutralization of the Aaland Islands, Oct. 20, 1921, 9 L.N.T.S. 211, reprinted in 17 AM. J. INT'L L. Sup. 1 (1923). For a description of the circumstances leading to the recognition of the islands, see Gregory, *The Neutralization of the Aaland Islands*, 17 AM. J. INT'L L. 63, 69-70 (1923); Note, *The Aaland Islands Question*, 15 AM. J. INT'L L. 268, 269 (1921).

304. See, e.g., J. BRIERLY, *supra* note 283, at 326-27; A. McNAIR, *supra* note 279, at 256, 260; McNair, *The Function and Differing Legal Character of Treaties*, 11 BRIT. Y.B. INT'L L. 113, 114 (1930).

305. See *supra* note 300.

precedents are also more narrowly explicable at least on the basis of regional<sup>306</sup> (and likely on the basis of universal) customary international law.<sup>307</sup> Moreover, the “servitude” rationale<sup>308</sup> also furnishes a narrower *ratio decidendi* for explaining the general recognition of the obligations of neutrality treaties.<sup>309</sup> Their binding impact upon nonratifying states is, therefore, not contingent on their status as “objective regimes.”

For these and other reasons, many publicists have concluded that the concurrent custom principle is the *only* “exception” to the *res inter alios acta* rule, but, as has been indicated, it is not an exception at all.<sup>310</sup> In its deliberations leading to the drafting of the Vienna Convention, for example, the International Law Commission, after examining the cited precedents and others, concluded that

[i]n none of these cases . . . can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty<sup>[311]</sup> as binding customary law. In short,

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306. The cognizability of regional custom can be traced as far back as the ancient Greek city-states. J. STARKE, *STUDIES IN INTERNATIONAL LAW* 103 (1965). During the early twentieth century, the concept of “particular” international law, or rules of conduct recognized as binding among only certain groups of states, gained formal and widespread support. See A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 223-36 (1971). The concept of regionalism, a natural response to shared values and problems, was given formal international cognizance in *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276-78 (Judgment of Nov. 20) (not proved in case). In that case, the ICJ recognized that Latin American countries followed rules of international law concerning political asylum which differed significantly from those norms commanding general acceptance elsewhere in the world. *Id.* at 276-78 (not proved), 295 (Alvarez, J., dissenting), 316-18 (Read, J., dissenting). That the cited neutralization precedents may constitute such custom, due to their long usage and regional (European) nature, is supported by, e.g., 1 J. WESTLAKE, *TRAITE DE DROIT INTERNATIONAL* 30 (2d ed. 1924), and by application of the four-part customary norm test alluded to above. See *supra* note 274.

307. See, e.g., J. STARKE, *supra* note 300, at 135 (“Switzerland’s status as a permanent neutral remains a fundamental principle of international law.”). It may also be noted here that the neutrality of Luxembourg has been continuously recognized for over a hundred years, and that that of Austria has been respected since its declaration in 1955.

308. For a discussion of the scope of this rationale, see *infra* text accompanying notes 334-52.

309. See *infra* text accompanying notes 335-46.

310. See *supra* text accompanying note 277.

311. This issue is considered more fully pursuant to the “intent and acceptance” rubric. See *infra* text accompanying notes 318-34.



for these States the source of the binding force of the rules is custom, not the treaty.<sup>312</sup>

For this reason, the Commission refrained from including any provisions dealing separately with "objective regimes."<sup>313</sup>

While it has been suggested that, since 140 states signed UNCLOS on December 10, 1982,<sup>314</sup> and several more have signed thereafter, the treaty may soon achieve customary legal status,<sup>315</sup> it must be recalled that signature is quite different from ratification and that, to constitute a binding customary regime, UNCLOS will need ratification,<sup>316</sup> *inter alia*, by the "specially affected states."<sup>317</sup>

## 2. Intent and Acceptance

The other purported exception to the *res inter alios acta* rule recognized by the Vienna Convention is stated as follows: "An obligation arises for a third state from a provision of a treaty if the parties *intend* the provision to be the means of establishing the obligation and the third state *expressly accepts* that obligation *in writing*."<sup>318</sup> While the Vienna Convention's writing requirement is new, the underlying premise of the "intent and acceptance" rationale is not. Brownlie, for example, recognized that, prior to the Vienna Convention, international law permitted third-party non-ratifying states to become bound by treaty obligations provided that their conduct evidenced an intent to "accept the provisions of multilateral conventions as representing general international law."<sup>319</sup> Evidence of such intent, however, must be conclusive.<sup>320</sup>

311. This issue is considered more fully pursuant to the "intent and acceptance" rubric. See *infra* text accompanying notes 318-34.

312. [1966] 2 Y.B. INT'L L. COMM'N 231 (commentary to article 34).

313. *Id.* See L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 634 (1980) [hereinafter cited as L. HENKIN]; Lee, *supra* note 297, at 565.

314. See 21 I.L.M. 1477 (1982) (list of states).

315. See, e.g., Macrae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 CAL. W. INT'L L.J. 181, 212 (1983).

316. UNCLOS, *supra* note 1, art. 306.

317. See *supra* note 274.

318. Vienna Convention, *supra* note 7, art. 35 (emphasis added). A synthesis of the drafting history of this provision is contained in S. ROSENNE, *supra* note 254, at 226-27.

319. I. BROWNLIE, *supra* note 263, at 12-13. Accession, where permitted, is the surest means of accomplishing this result. See, e.g., J. VERZIJL, *supra* note 262, at 278.

320. I. BROWNLIE, *supra* note 263, at 11-12. Brownlie cites *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266 (Judgment of Nov. 20), in which the ICJ demanded evidence of a "consistent and uniform" practice. *Id.* at 277.

The basis of this obligation for the third state to be bound to the "intent and acceptance" principle is not the treaty itself, but rather the collateral consent to or acquiescence in the obligation.<sup>321</sup> Thus, like the "concurrent custom" approach, "intent and acceptance" is not a true exception to state sovereignty reflected by the *res inter alios acta* principle.

Pursuant to such an intent approach, several other precedents cited to support the existence of an "objective regime" exception may be more narrowly explained.

While strong evidence exists that the humanitarian obligations articulated by the Hague Convention IV of 1907<sup>322</sup> were already mandated by customary international law<sup>323</sup> (and thus their binding force on nonratifiers was due to "concurrent custom," not "intent and acceptance"), it must be noted that the convention contained a so-called "general participation clause," which limited the effect of the annexed regulations to parties to the Convention itself.<sup>324</sup> While Germany, a nonratifier, attempted to exculpate itself from these humanitarian obligations in 1914,<sup>325</sup> other nonratifying states accepted and applied them, partly out of *opinio juris*,<sup>326</sup> partly out of self-interest, and partly out of true humanitarian concerns. For the latter group of states, "intent and acceptance" is surely a more narrow supportable basis for any subsequent obligation to be bound than is the hypothesis of the "objective regime."

A similar observation may be made concerning the obligations imposed by the four Geneva Conventions of 1949.<sup>327</sup> Like the

321. J. SINCLAIR, *supra* note 263, at 78.

322. Hague Convention Respecting the Law and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (1907) [hereinafter cited as Hague Convention IV].

323. See, e.g., G. VON GLAHN, *supra* note 261, at 543-44. Since the Hague rules had become custom by 1939, obligations of nonratifiers after that date would clearly be explicable pursuant to the concurrent custom approach. See NUREMBERG JUDGMENTS, 13 ANN. DIG. NO. 92 *passim* (1946); S. BAILEY, PROHIBITIONS AND CONSTRAINTS IN WAR 59 (1972); I. BROWNLIE, *supra* note 263, at 12; J. SCOTT, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 100 (3d ed. 1918).

324. Hague Convention IV, *supra* note 322, arts. 1-2.

325. See G. VON GLAHN, *supra* note 261, at 544.

326. See *supra* note 274.

327. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, T.I.A.S. 3365, 75 U.N.T.S. 386; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, T.I.A.S. No. 3364, 75 U.N.T.S. 236; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3219, T.I.A.S.

Hague Convention of 1907,<sup>328</sup> all four 1949 conventions provide:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall further be bound by the Convention in relation to the said Power, *if the latter accepts and applies the provisions thereof.*<sup>329</sup>

While authority exists to support the proposition that the particulars of all four 1949 conventions have now achieved the status of customary international law<sup>330</sup> (in which case, again, their binding force for nonratifying states would be concurrent custom, not the treaty), were this not the case,<sup>331</sup> recognition of their binding effect on specifically consenting states would still be appropriate under the "intent and acceptance" approach.

The "intent and acceptance" approach, however, is of little utility when applied to seabed law. Since the UNCLOS regime creates arguable navigational benefits as well as seabed exploitation burdens for the United States and its industrialized allies,<sup>332</sup> it would make little sense for any of these countries to specifically accept its burdens in writing<sup>333</sup> without ratifying UNCLOS as a whole, so as to avail themselves of whatever benefits might be available thereunder.

### 3. Servitude Creation

Pursuant to the servitude creation approach, treaty nonratifiers may enjoy benefits<sup>334</sup> or incur burdens<sup>335</sup> by virtue of treaty

No. 3363, 75 U.N.T.S. 116; Geneva Convention of July 27th, 1929, for the Relief of the Wounded and Sick in Armies in the Field, Aug. 12, 1949, 6 U.S.T. 3115, T.I.A.S. No. 3362, 75 U.N.T.S. 62 [hereinafter cited as 1949 Geneva Conventions].

328. See *supra* text accompanying note 324. See also Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 82, 47 Stat. 2021, 2059, T.S. No. 846, 118 L.N.T.S. 343.

329. 1949 Geneva Conventions, *supra* note 227, art. 2 (common to all four conventions) (emphasis added).

330. See, e.g., Umozurike, *The Geneva Conventions and Africa*, 7 E. AFR. L.J. 225 (1971).

331. See generally G. VON GLAHN, *supra* note 261, at 545.

332. See, e.g., Arrow, *Prospective Impacts*, *supra* note 10, at 229, 232, 243, 246.

333. See Vienna Convention, *supra* note 7, art. 35.

334. See Vienna Convention, *supra* note 7, art. 36(1). Article 36(1) provides:

A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to third State, or to a group of

provisions in which sovereigns over particular territories create permanent servitudes on these territories, in most cases for the benefit of all. This possibility, analogous to the "covenant running with the land" approach generally recognized by the common law,<sup>336</sup> is not controversial, and explains the recognition of rights of passage through the Suez,<sup>337</sup> Panama,<sup>338</sup> and Kiel<sup>339</sup> canals by states which had not ratified their constitutive instruments. The servitude creation approach would also explain the binding effect of the

States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

*Id.*

335. A nonratifying state could only incur legally cognizable *burdens* when a successor state obtains title to territory upon which a servitude had been validly imposed, or when a successor state attempts to contest a prior valid, fully-executed boundary disposition. See generally A. McNAIR, *supra* note 279, at 256; D. O'CONNELL, *THE LAW OF STATE SUCCESSION* 16-17, 49-54 (1956).

336. See, e.g., W. BURBY, *HANDBOOK OF THE LAW OF REAL PROPERTY* 317-18 (3d ed. 1965). A similarity to third-party beneficiary contracts may also be observed. See, e.g., A. CORBIN, *CORBIN ON CONTRACTS* 723-28, 731-35 (1952).

337. While Egypt itself did not sign the Convention of Constantinople on October 29, 1888, which guaranteed nondiscriminatory access to the Suez Canal, the Convention was signed by the United Kingdom, Turkey, and France, which all had potential claims to Egypt's ambiguous sovereignty at that time. See generally R. ALBRECHT-CARRIE, *A DIPLOMATIC HISTORY OF EUROPE SINCE THE CONGRESS OF VIENNA* 110-11, 188 (rev. ed. 1973); J. KINROSS, *THE OTTOMAN CENTURIES* 468-546 (1977); J. MAJOR, *CIVILIZATION IN THE WESTERN WORLD, 1715 TO THE PRESENT* 345 (1966). (Description of the ambiguity surrounding sovereignty over Egypt in the nineteenth century). Their signing of the Convention established a servitude of nondiscriminatory passage on the Suez Canal analogous to a "covenant running with the land." See *supra* note 336 and accompanying text.

338. See Isthmian Canal Convention, Nov. 18, 1903, 31 Martens Nouveau Recueil 599 (2d ser. 1904) (which is subject to similar analysis as the Suez issue, without the ambiguities pertaining to sovereignty); Treaty between the United Kingdom and the United States of America relative to the establishment of a communication by Ship Canal between the Atlantic and Pacific Oceans, Nov. 18, 1901, 30 Martens Nouveau Recueil 631 (2d ser. 1903).

339. See *S.S. Wimbledon* (Merits), 1923 P.C.I.J., ser. A, No. 1, at 22 (Judgment of June 28). The P.C.I.J. stated that, pursuant to article 380 of the Versailles Treaty, the Kiel Canal was intended to become an international waterway for the benefit of all the nations of the world. Although it may be argued that the court's holding, insofar as it affects the instant issue of third-party rights and duties, was *obiter dicta* (since all the parties in that case had ratified the Versailles Treaty), it is interesting to note the indirect support provided by the Court to the "servitude" theory: "Whether the German government is bound by virtue of a servitude or by virtue of a contractual obligation . . . the fact remains that Germany has to submit to an important limitation of the exercise of . . . sovereign rights . . . over the Kiel Canal." *S.S. Wimbledon*, 1923 P.C.I.J. at 24. Cf. A. McNAIR, *supra* note 304, at 101, 114. The canal precedents may alternatively be reconciled with sovereignty and consent by reference to the "concurrent custom" and "intent and acceptance" theories described above. See *supra* text accompanying notes 276-317, 318-33.

nondiscriminatory passage requirements through the Suez Canal on Egypt, a nonratifier of 1888 Convention of Constantinople.<sup>340</sup> The I.C.J. has recognized the lasting effect of such servitudes.<sup>341</sup> For example, in *International Status of South-West Africa*,<sup>342</sup> the I.C.J. examined the issue of whether the status of the League of Nations-mandated territories survived the death of the League, and concluded that

[t]heir *raison d'être* and original object remain. Since their fulfillment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.<sup>343</sup>

It should be noted that Judge McNair's opinion, in which he based his conclusion not on the servitude-creating nature of the Mandate, but on its status as an "objective" regime,<sup>344</sup> was rejected by a majority of the Court.

Finally, it may be noted that the neutralization precedents, previously explained pursuant to the "concurrent custom" approach,<sup>345</sup> are explicable by the "servitude" theory as well. Whiteman defines a neutralized state as

[one] whose independence and integrity are for all time guaranteed by an international convention of the powers, *under the condition that such state binds itself never to take up arms against any other state except for defense against attack, and never to enter into such international obligations as could indirectly involve it in war.*<sup>346</sup>

The reciprocal nature of the obligations entered into upon neutralization supports the conclusion that, for sufficient consideration, the

340. See *supra* note 337.

341. Concerning this issue, see generally Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Advisory Opinion of June 21).

342. 1950 I.C.J. 128 (Advisory Opinion of July 11). Concerning other servitude precedents, see generally McNair, *So-Called State Servitudes*, 6 BRIT. Y.B. INT'L L. 111 (1925).

343. *International Status of South-West Africa*, 1950 I.C.J. at 133.

344. *Id.* at 146, 153-55.

345. See *supra* text accompanying notes 299-307.

346. 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 342 (1963) (emphasis added); see also C. FENWICK, *supra* note 300, at 89; J. STARKE, *supra* note 300, at 133-34.

neutralized state has participated in the imposition of a servitude on itself.

The servitude creation approach, however, is inapplicable to deep seabed mining. Since title to the nodules is severable from title to the seabed<sup>347</sup> and the Declaration of Principles only appends the "common heritage" designation to the seabed,<sup>348</sup> even were the appellation sufficiently specific in content to have customary legal status, no state or group of states would currently have valid title to the nodules (which are still legally *res nullius*<sup>349</sup>). Consequently, no state or group of states has the legal right to impose a servitude upon them. The same conclusion holds true for the seabed itself, since, as a *res communis*, it is not subject to ownership, alienation, or encumbrance by any state or states.<sup>350</sup> Such an encumbrance, however, could collectively be imposed if the specific provisions<sup>351</sup> of UNCLOS achieve the status of customary international law.<sup>352</sup>

#### 4. The "Great Powers" Hypothesis

It has also been suggested that when the leading powers enter into a treaty or series of treaties embodying a certain rule of law, a principle of universally binding international law results.<sup>353</sup> Pollock, for example, stated in 1902 that

[t]here is no doubt that, when all or most of the Great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among States which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected, in the absence of prompt and effective dissent by some Power of the first rank, to become part of the universally received law of nations within a moderate time.<sup>354</sup>

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347. Arrow, *The Customary Norm*, *supra* note 51, at 16-21.

348. *See supra* note 64.

349. *See supra* text accompanying notes 244-50.

350. *See supra* text accompanying notes 48-75; Arrow *The Customary Norm*, *supra* note 51, at 12-16.

351. For a discussion of these provisions, see *supra* text accompanying notes 102-217.

352. For a discussion of the prospects, see *infra* text accompanying notes 439-56.

353. *See, e.g.*, Macrae, *supra* note 315, at 198, 212. Macrae cites, *inter alia*, John Bassett Moore as a relatively recent expositor of this position. *Id.* at 198 n.91, 212 n.153 (citing J.B. MOORE, *Progress of International Law in the Century*, in *THE COLLECTED PAPERS OF JOHN BASSETT MOORE* 439, 445, 448-49 (1944)).

354. Pollack, *The Sources of International Law*, 18 *LAW Q. REV.* 418, 418-19 (1902).

While this statement may have expressed the state of the law as late as the early twentieth century, it has been superceded by the newly emergent principle concerning the sovereign equality of states reflected, *inter alia*, by article 2(1) of the United Nations Charter. This is not to say, however, that treaties entered into by the great powers may not have a powerful political impact, or that such treaties may not acquire a customary legal character with sufficient *acquiescence* by other states to establish a "general practice, recognized as binding."<sup>355</sup> Finally, this hypothesis, even if currently valid, could have no impact on seabed law, since many of the great powers are among the most reluctant participants in the UNCLOS seabed regime—if they choose to participate at all.

### 5. Antarctica

The Antarctic Treaty<sup>356</sup> provides a complex precedent due to several persistent ambiguities concerning, *inter alia*: the true intent and capacity of the treaty's framers; whether it exerts any force upon nonratifying states at all, and, if so, whether such force would be the result of the treaty's status as an "objective regime," its status as custom, its intent to bind third-parties and their acquiescence therein, or its establishment of a servitude on the continent. In short, every purported "exception" to the *res inter alios acta* rule described above (or, for that matter, no exception at all) may be applied with somewhat inconclusive result. Since the Antarctic Treaty, however, is the most recent and commonly proffered "objective regime" precedent, it cannot be ignored.<sup>357</sup> In analyzing this precedent, however, it is important to recall that those who suggest the existence of an "objective regime" exception to state sovereignty

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355. See I.C.J. STAT. art. 38(1)(b); A. McNAIR, *supra* note 279, at 259. It has been suggested that participation by the "specially affected states" (which, coincidentally, includes most of the "great powers") in the Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71, (entered into force June 23, 1961), has rendered it an "objective regime," binding *erga omnes*. Because of the significance and complexity of the legal issues surrounding this treaty it will be considered separately. See *infra* text accompanying notes 356-88.

356. Antarctic Treaty, *supra* note 355.

357. An exhaustive and definitive disposition of this precedent is manifestly beyond the scope of this work.

bear the burden of its proof, pursuant to the *Lotus* principle<sup>358</sup> and the four part customary norm test described above.<sup>359</sup>

The Antarctic Treaty contains such noncontroversial provisions as a reservation of the continent for peaceful purposes,<sup>360</sup> prohibition of nuclear explosions and the disposal of radioactive wastes,<sup>361</sup> scientific cooperation,<sup>362</sup> and a disclaimer of intent to affect the status of its high seas.<sup>363</sup> Article 4 provides that the treaty is not to be interpreted as effecting the renunciation of pre-existing claims. It purports to establish that no acts occurring while the treaty is in force "shall constitute a basis" for asserting new or enlarged claims to the continent.<sup>364</sup> The treaty grants to parties complete freedom of access to Antarctica,<sup>365</sup> but contains no provision permitting free access to other continents. It provides for periodic consultations between parties<sup>366</sup> and recognized consultative states,<sup>367</sup> and provides criteria by which the parties may recognize the consultative status of other states.<sup>368</sup> Article 10 provides that

358. See *supra* note 252.

359. See *supra* note 274.

360. Antarctic Treaty, *supra* note 355, art. 1.

361. *Id.* art. 5.

362. *Id.* art. 3.

363. *Id.* art. 6.

364. *Id.* art. 4. The intent and impact of this provision, which Ambassador Hambro has characterized as its "most important" article, has given rise to the greatest continuing controversy. See Hambro, *Some Notes on the Future of the Antarctic Treaty Collaboration*, 68 AM. J. INT'L L. 217, 219 (1974); Note, *A Sometime World of Man: Legal Rights in the Ross Dependency*, 65 AM. J. INT'L L. 578, 579 (1971).

365. Antarctic Treaty, *supra* note 355, art. 7.

366. *Id.* art. 9(1). Such meetings have occurred at intervals of approximately two years.

367. See *infra* text accompanying notes 368, 371. While a number of states have acceded, the granting of consultative rights has been most restrictive. It was only after 16 years that the first new Consultative Party (Poland) was admitted, following the opening of its Arctowski Base in 1977. See generally, F. AUBURN, *ANTARCTIC LAW AND POLITICS* 153 (1982). The Federal Republic of Germany has subsequently been permitted to accede with Consultative Party status pursuant to the establishment of its new base near Berkner Island, see *id.* at 81, 293, and the Democratic Republic of Germany and the People's Republic of China have evidenced an intention to do the same. See *id.* at 293. In the early 1960's, the Netherlands contemplated engaging in unilateral expeditions so as to be able to demand Consultative Party status, but elected to pursue joint expeditions with Belgium (a party) in 1964 through 1967 instead. See *id.* at 152.

368. See Antarctic Treaty, *supra* note 355, art. 9(2). Article 9(2) provides for the recognition of such status when an acceding state "demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific expedition." *Id.*



"[e]ach of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that *no one* engages in any activity in Antarctica contrary to the principle or purposes of the present Treaty."<sup>369</sup> The treaty permits accession by any United Nations member,<sup>370</sup> but permits extension of consultative status only upon unanimous consent.<sup>371</sup> The treaty is subject to review after thirty years.<sup>372</sup>

It has been suggested that the Treaty text, most particularly articles 4(2)<sup>373</sup> and 10,<sup>374</sup> evidence the intent of its framers to establish an "objective regime."<sup>375</sup> As has been observed, however, article 4 is much better at specifying what it does not mean than what it does mean.<sup>376</sup> Although the language of article 4 could be interpreted as purporting to bind nonparties, its meaning must be qualified by other treaty provisions rendering all resultant obligations binding only on its parties upon ratification.<sup>377</sup> Moreover, the ambiguity of the language of article 4(2) permits the interpretation that no new claims shall be asserted *by the parties* while the treaty is in force. As Auburn has suggested, article 4 was intended to insure that the treaty was *not* to be interpreted as attempting to create an "objective regime," even assuming the cognizability of such regimes by customary international law.<sup>378</sup> Concerning the recommendations contemplated by article 10, Auburn maintains that

[a]ttempts to persuade third parties to observe recommendations in reliance on Article X would [also] have a very weak basis both

369. *Id.* art. 10 (emphasis added).

370. *Id.* art. 13.

371. *See id.* arts. 9(2), 12.

372. *Id.* art. 12(2).

373. Article 4(2) reads:

No acts or activities taking place while the present Treaty is in force *shall constitute* a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of any existing claim, to territorial sovereignty in Antarctica *shall be asserted* while the present Treaty is in force.

*Id.* art. 4(2) (emphasis added).

374. *See supra* text accompanying note 369.

375. *See, e.g., Antarctic Treaty: Hearing Before the Senate Comm. on Foreign Relations*, 86th Cong., 2d Sess. 42-43 (1960) (statement of Mr. Phleger, U.S. Dep't of State).

376. *See, e.g., id.* at 13, *cited in Note, supra* note 364, at 579 n.12.

377. *See, e.g., Antarctic Treaty, supra* note 355, arts. 12, 13.

378. F. AUBURN, *supra* note 367, at 117-18. Auburn vigorously disputes the cognizability of such regimes. *Id.*

in general international law and on Treaty practice. It is the view of the Consultative Parties that effective recommendations do not bind existing and new Contracting Parties without their specific acceptance. Once it is admitted that such parties to the Treaty are not bound by measures which are in force, it is difficult to assert that third parties should be under any greater obligation.<sup>379</sup>

Nor does the text of article 10 evidence an intent to bind third parties. The invocation of the "principles and purposes" language within that article suggests that the parties themselves were unsure of their authority.<sup>380</sup> The parties have made no attempt to prevent the entry of nongovernmental groups and tourists: measures taken have related exclusively to visits to stations. Moreover, there has been neither a general agreement nor indication of a desire to prevent expeditions by third parties.<sup>381</sup> That this attitude is consistent with the drafters' general intent is further supported by the very cautious statements made by delegates at the 1959 Antarctic Conference. The United Kingdom's representative, Sir Ester Dening, pointed out, for the benefit of states questioning the treaty's quasi-legislative appearance, that "it is, in fact, to be almost entirely a self-denying ordinance on the part of signatories, who will derive from it virtually no privileges but only obligations."<sup>382</sup> Ambassador Scilingo of Argentina also noted that "[t]his conference . . . has not been convened to institute regimes or to create structures. It is not its mission to change or alter anything."<sup>383</sup> Moreover, it must be noted that the absence of administration over the continent as a whole is a feature of the purported "regime" which persists to the present day.<sup>384</sup>

379. *Id.* at 120 (citation omitted); *see also id.* at 166.

380. *Id.* at 119-20. Moreover, article 10 requires that the efforts of each Contracting Party (undertaken to insure compliance by all contrary to the Treaty's "principles or purposes") be "consistent with the Charter of the United Nations," Antarctica Treaty, *supra* note 355, art. 10, which itself does not authorize the binding impact of regional arrangements on nonparties. *See, e.g.,* F. AUBURN, *supra* note 367, at 117.

381. F. AUBURN, *supra* note 367, at 129. *But see supra* note 367; *infra* note 385.

382. Conference on Antarctica (Washington), Doc. No. 15, at 1-4 (Oct. 15, 1959) [hereinafter cited as Antarctic Conference Papers], *cited in* Hayton, *The Antarctic Settlement of 1959*, 54 AM. J. INT'L L. 349, 356 n.25 (1960).

383. Antarctic Conference Papers, *supra* note 382, at 1-2, *cited in* Hayton, *supra* note 382, at 355 n.24.

384. Nor could there be any effective administration in the continent as a whole (pursuant to the Treaty) concerning such vital issues as economics or resource exploitation.

Neither the text nor the application of the Antarctic Treaty evidences either an unambiguous intent to bind third parties or a general forbearance by states to act, based on their perception that the Treaty is an "objective regime." For this reason, it is unlikely that the Treaty in any way binds nonratifying states.

It may be argued, however, that the Antarctic Treaty has become binding as custom. It is true that there has never been any concerted effort by a significant group to oppose it.<sup>385</sup> Nevertheless, even if whatever "regime" has been established by the treaty has now achieved customary legal status,<sup>386</sup> such a conclusion would in no way support the existence of an exception to the *res inter alios acta* rule. The same may be said, of course, about any Antarctic

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Such issues, of course, are not dealt with at all within the four corners of the Treaty. See, e.g., Hambro, *supra* note 364, at 221. Concerning subsequent recommendations of the consultative parties, see *supra* text accompanying note 379. Concerning the likelihood of protest to such a potential regime, see *infra* note 386. Moreover, any attempt by the Consultative Parties to license mineral exploitation would likely constitute an attempt to exercise sovereignty in violation of article 4 of the Treaty itself. See Hambro, *supra* note 364, at 223.

385. F. AUBURN, *supra* note 373, at 293. However, claimstaking has occurred even after the Treaty entered into force. See J. HENDERSON, *ONE FOOT ON THE POLE* 59 (1962). An unauthorized expedition was conducted by the Italians on King George Island in 1976. F. AUBURN, *supra* note 367, at 116. Moreover, when Brazil announced plans for an unauthorized expedition in 1972, the Consultative Parties were unsure of any basis on which it could be stopped. See *id.* at 128. While Brazil and Italy later acceded to the Treaty, its perception (by then nonratifiers) as *opinio juris* remains unclear. See *supra* note 274. But cf. K. HOLLOWAY, *supra* note 296, at 592-96. Holloway appears to take the position that some portions of the Treaty have not only coalesced into binding customary norms, but perhaps *jus cogens* as well. *Id.* Cf. *supra* note 273. (discussing *jus cogens* doctrine).

386. In addition to the sovereign claims based upon discovery and exploration deferred but not renounced in 1959 by Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, the U.S.S.R., the United Kingdom, and the United States (original ratifiers of the Antarctic Treaty), and similar potential claims deferred but not renounced by Germany and Poland by virtue of their subsequent accessions, sector theory claims have been advanced by Argentina, Brazil, Chile, and potentially, by Uruguay, all of which, similarly, have been deferred but not renounced. Excellent succinct histories of the "discovery and exploration" claims may be found in F. AUBURN, *supra* note 367, at 1-3; R. HUNTFORD, *SCOTT AND AMUNDSEN* 4-11 (1979); Hayton, *supra* note 382, at 350-54; Scott, *Arctic Exploration and International Law*, 3 AM. J. INT'L L. 928, 929-39 (1909). Descriptions of the Antarctic sector claims may be found in F. AUBURN, *supra* note 367, at 17-38, 59, 67, 73, 105. Auburn notes that, as a matter of theoretical geography, similar claims could be made by Brazil, Costa Rica, Ecuador, Guatemala, Nicaragua, Panama, Peru, and Uruguay. *Id.* at 24. African and Asian States may also be able to make such claims. The derivation of the "sector theory" is explored in H. KUSHNER, *CONFLICT ON THE NORTHWEST COAST* 32-33 (1975). Concerning the likelihood of protest to any arguably emergent Antarctic customary regime by the International seabed Authority, the Group of 77, oil producing states, or others, see, e.g., F. AUBURN, *supra* note 367, at 293.

Treaty force based on the "intent and acceptance"<sup>387</sup> or "servitude"<sup>388</sup> theories described above.

## 6. UNCLOS

Given the historical and contemporary notions of sovereignty evidenced by state practice, the inability of *any* treaty to establish an "objective regime" binding *erga omnes* should now be established. While UNCLOS, in many respects, represents a codification of prior customary international law,<sup>389</sup> and in some cases, a progressive development now probably on its way to establishing new customary norms,<sup>390</sup> this cannot be said of UNCLOS' seabed regime. This is due, *inter alia*, to its conflict with longstanding notions of the freedoms of the seas,<sup>391</sup> the absence of widespread

387. See *supra* text accompanying notes 318-33. The application of this theory to the Antarctic Treaty is impossible due to the unanimous consent requirements found in articles 12 and 13. See Antarctic Treaty, *supra* note 355, arts. 12, 13. Cf. *supra* text accompanying notes 367-71 (consultative status).

388. See *supra* text accompanying notes 334-52. It has been suggested that the servitude theory might be applied, provided that the parties to the Antarctic Treaty collectively possessed sovereignty over the continent at the time of its entry into force in 1961. Certainly, precedent exists that relatively minimal incidents of occupation and administration by the Antarctic powers might suffice to perfect any inchoate title acquired upon discovery, see, e.g., *Island of Palmas (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829, 846 (1928), due to the "[a]retic and inaccessible character" of the region involved. See, e.g., *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J., ser. A/B, No. 53, at 22, 50-51 (Judgment of Apr. 5). Certainly, Antarctica meets these criteria, as it has no land vertebrates, no trees, and all three flowering plants are recent and marginal invaders. G. LLANO, *THE TERRESTRIAL LIFE OF THE ANTARCTIC* 3 (1962). The temperatures of even the most favored coastal areas of the Antarctic Peninsula are only above freezing for about four months of the year. CENT. INTELLIGENCE AGENCY, *POLAR REGIONS ATLAS* 37 (1979). Nevertheless, because sovereignty over the continent is disputed between the Antarctic powers themselves, it can hardly be maintained that a servitude-based regime exists binding third-party nonratifying states. F. AUBURN, *supra* note 367, at 118. By way of distinction, Danish claims in Greenland had gone uncontested for over 500 years. *Eastern Greenland*, 1933 P.C.I.J. at 46. This same fact also distinguishes the Spitzbergen precedent, see, e.g., *Lansing, A Unique International Problem*, 11 AM. J. INT'L L. 763 (1917), because one state, Norway, had recognized territorial therein. See, e.g., *Hambro*, *supra* note 364, at 224. Finally, the absence of an intent to create a permanent servitude is evidenced by article 4(1) of the Treaty itself, which disclaims an intent by the parties to renounce any preexistent claims. See Antarctic Treaty, *supra* note 355, art. 4(1).

389. See generally *Arrow, Prospective Impacts*, *supra* note 10, *passim*.

390. The recognition given by UNCLOS to the exclusive economic zone is especially noteworthy in this respect. See UNCLOS, *supra* note 1, arts. 55-75. But see, e.g., McDougal, *Some Comments, in PROCEEDINGS OF THE CONFERENCE*, *supra* note 31, at 79.

391. See *supra* text accompanying notes 244-50.

ratification, and the active and continual protest of many of the "specifically affected states."<sup>392</sup>

UNCLOS itself also contains provisions which indicate that it is not intended to attempt to create an "objective regime." It is subject to both ratification<sup>393</sup> and denunciation.<sup>394</sup> In its article dealing with its relation to other treaties and conventions, UNCLOS provides that "[t]his Convention shall prevail, *as between States Parties*, over the Geneva Conventions on the Law of the Sea of 29 April 1958."<sup>395</sup> Concerning state declarations made at the UNCLOS adoption ceremony in Montego Bay, Lee has written that the various statements "are in keeping with a plausible presumption that the Convention was not intended to provide rights [and presumably, *a fortiori*, duties] for third states. Virtually all states participated in the conference, and the Convention was drafted and negotiated with a view to *obtaining adherence by all states*."<sup>396</sup>

UNCLOS, as a result, is unlikely ever to be recognized as an "objective regime," except by way of *obiter dicta* in a future decision which will undoubtedly be more narrowly explicable based on UNCLOS' prospective status as customary international law.

### C. Estoppel

The prospective effect of UNCLOS' seabed provisions as a new "objective regime" is consequently nil,<sup>397</sup> and the effect of such provisions as future international custom is speculative at best.<sup>398</sup> Nevertheless, the question remains as to whether the United States may become bound by those provisions, due to its signature to the UNCLOS III Final Act, or to any subsequent express acquiescence in UNCLOS' terms. Alternatively, due to the "package" nature of the UNCLOS III negotiations<sup>399</sup> and the "package deal" explicit in

392. See *supra* text accompanying notes 218-43.

393. UNCLOS, *supra* note 1, art. 306.

394. *Id.* art. 317.

395. *Id.* art. 311 (emphasis added).

396. Lee, *supra* note 297, at 548; see also Marshall, *supra* note 171, at 9. See generally Lee, *supra* note 297, at 549-51; *infra* note 399.

397. See *supra* text accompanying notes 244-96.

398. See generally *supra* note 274; *supra* text accompanying notes 389-92; *infra* note 404; *infra* text accompanying notes 439-67.

399. Third United Nations Conference on the Law of the Sea, Rules of Procedure, 31 U.N. GAOR Supp (No. 12) at 18, U.N. Doc. A/CONF.62/30/Rev. 2 (1976). Ambassador Arias-Schreiber of Peru, speaking for the Group of 77, stated to the 183d Plenary Meeting on September 22, 1982, that:

text of UNCLOS itself,<sup>400</sup> might the United States be estopped from denying the seabeds provisions' validity if it attempted to exercise navigational or non-seabed resource rights available pursuant to UNCLOS but not pursuant to customary international law? These questions raise complex and overlapping issues which require detailed exploration.

### 1. Estoppel by Signature or Preliminary Consent

While some commentary supporting a broader principle exists, article 18 of the Vienna Convention<sup>401</sup> resolves this issue as follows:

A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- a) *it has signed the treaty* or has exchanged instruments constituting the treaty subject to ratification, acceptance, or approval until it shall have made its intention clear not to become a party to the treaty; or
- b) *it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.*<sup>402</sup>

For purposes of clarity, paragraph (a) of article 18 will be referred to as the "estoppel by signature" provision, and paragraph (b) will be referred to as its "estoppel by preliminary consent" component. Even assuming that article 18 states a customary international norm, the United States would not be estopped from contesting UNCLOS' provisions by virtue of its signature to any instrument. The United States, while signing the UNCLOS III Final Act<sup>403</sup>

The "package deal" approach ruled out any selective application of the Convention. . . . [N]o State or group of States could lawfully claim rights . . . by reference to individual provisions of the Convention unless that State or group of States were themselves parties to the Convention. States which decided to become parties to the Convention would likewise be under no obligation to apply its provisions vis-a-vis States that were not parties.

UNCLOS III, Summary Record of the 183d Plenary Meeting, U.N. Doc. A/CONF.62/SR.183, at 3-4 (prov. ed. 1982). He reiterated this position at Montego Bay on Dec. 6, 1982, and was specifically supported by the representatives of Canada, Cameroon, Tanzania, Indonesia, Iran, and the Union of Soviet Socialist Republics. Lee, *supra* note 297, at 547 n.18.

400. UNCLOS, *supra* note 1, art. 309. *But see id.* art. 310.

401. *Supra* note 7.

402. Vienna Convention, *supra* note 7, art. 18 (emphasis added).

403. *Supra* note 1.

(which merely affirmed the nature and dates of the negotiations and the authenticity of the finally adopted UNCLOS text), did not sign UNCLOS itself.<sup>404</sup> The estoppel by signature provision, therefore, is irrelevant to the United States.

While Carter administration spokesmen had expressed the hope and expectation that a satisfactory text would result from the Tenth (Geneva/New York) Negotiating Session in 1981, this would undoubtedly fall short of the express consent to be bound (by a treaty whose terms had not as yet been fixed) required by the "estoppel by preliminary consent" paragraph. Nevertheless, pursuant to his March 10, 1983 proclamation of an exclusive economic zone for the United States, President Reagan also presented the following statement as United States policy towards ocean law, assuming future United States nonparticipation in the UNCLOS regime:

First, the United States is prepared to act in accordance with the balance of interests relating to the traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the right of other states in waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

Second, the United States will exercise and assert its navigational and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests that is reflected in the convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.<sup>405</sup>

This statement, and the policy it represents, may have significant ramifications for any potential future United States estoppel to deny the validity of various UNCLOS provisions. For purposes of the "estoppel by preliminary consent" approach, the statement falls

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404. Twenty-two of the other 139 states signing the Final Act on September 10, 1982 did not sign UNCLOS at that time, including Belgium, Ecuador, the Federal Republic of Germany, Israel, Italy, Japan, Jordan, Libya, Peru, Spain, the United Kingdom, Venezuela, and Zaire. See 21 I.L.M. 1477 (1982).

405. 19 WEEKLY COMP. PRES. DOCS. 383 (Mar. 14, 1983) [hereinafter cited as 1983 Reagan statement].

short of preliminary consent to UNCLOS as a whole, being limited to navigational and coastal state jurisdictional rights. Even concerning those rights, the statement is couched in reciprocal terms. Moreover, the reference to "high seas," near the end of the quoted portion, creates another ambiguity, since the United States (along with about two dozen other states) persists in claiming a three-mile territorial sea.<sup>406</sup> Thus, the United States might contend that it was not estopped from denying the validity of UNCLOS' critical<sup>407</sup> straits provisions,<sup>408</sup> since the President's statement does not specifically acquiesce in their removal from high seas status.<sup>409</sup>

## 2. Estoppel by Assertion of UNCLOS-Based Rights

If the United States attempted to assert non-customary UNCLOS-based rights, but denied its concomitant "trade-offs" or duties, a broader estoppel argument with wider equitable—and possibly legal—appeal might apply. The estoppel concept is recognized by international courts<sup>410</sup> as a "general principle of law recognized by civilized nations."<sup>411</sup> While this particular political reflection of the estoppel principle has not as yet been specifically

406. Dep't of State, Office of the Geographer, Summary of Coastal State Claims (Nov. 15, 1982) (mimeo) (updating LIMITS IN THE SEAS NO. 36: NATIONAL CLAIMS TO MARITIME JURISDICTIONS (4th rev. ed. 1981)), cited in Lee, *supra* note 297, at 551 n.37. These states, including, *inter alia*, the United States, the United Kingdom, the Netherlands, the Federal Republic of Germany, and Australia, are likely to constitute several of the "specially affected states." See generally *supra* note 274.

407. With UNCLOS' attempted shift from the three mile territorial sea, see *supra* note 48, to 12 miles, see UNCLOS, *supra* note 1, art. 3, approximately 116 straits, including Gibraltar, Molucca, Singapore, Hormuz, and Tiran, would no longer be wide enough to permit a strip of high seas to run down the middle. As Ambassador Richardson has noted: "[T]he legal right to overfly a strait could be gained only with coastal state consent . . . and surface vessels would be subject to varying assertions of coastal-state regulatory power." Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFF. 902, 905 (1980).

408. UNCLOS' straits regime is contained in UNCLOS, *supra* note 1, arts. 34-45, and is discussed further in Arrow, *Prospective Impacts*, *supra* note 10, at 243, 244, and *infra* text accompanying notes 414-18, 481-84.

409. Regarding the effect of protest against such a result by the specially affected states enumerated in *supra* note 406, see *supra* notes 195, 254, 274. For a synopsis of the antecedent customary norms assuring free passage through international straits, see Lee, *supra* note 297, at 555-56. See generally *supra* text accompanying notes 337, 340, concerning international canals.

410. See, e.g., *Chorzow Factory (Merits) (Ger. v. Pol.)*, 1928 P.C.I.J., ser. A, No. 17 (Judgment of Sept. 13).

411. I.C.J. STAT. art. 38(1)(c).



applied, there is a manifest inequity in attempting to have the "quid without the quo."<sup>412</sup> This, moreover, was the essence on UNCLOS III's "package deal" approach<sup>413</sup>—an approach of which the United States was well aware when it extracted coastal state jurisdictional limitations and arguable flag state navigational benefits during UNCLOS III's ten-year negotiating duration.

Such an estoppel can be avoided through careful analysis by the United States of the state of customary international law prior to UNCLOS, and by asserting rights only pursuant thereto, or to rights specifically enjoyed *vis-a-vis* a particular state pursuant to bilateral or multilateral agreements.

The United States position concerning UNCLOS-defined navigational rights is that such rights existed prior to UNCLOS anyway.<sup>414</sup> This conclusion, with a caveat regarding prior ambiguity as to the nature of "innocent passage,"<sup>415</sup> is probably correct. The developing state perspective is antithetical, and suggests that straits and archipelagic sea lanes passage present examples of UNCLOS navigational provisions' greater permissiveness than the norms of antecedent customary international law.<sup>416</sup> However, broad straits passage rights were recognized in both the *Corfu Channel*<sup>417</sup> case and the 1958 Convention on the Territorial Sea and the Contiguous

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412. See generally Lee, *supra* note 297, at 566.

413. See *supra* note 399.

414. See, e.g., Lee, *supra* note 297, at 542 n.3.

415. Article 14 of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 1610, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964), provided generally that passage was innocent so long as it was not prejudicial to the peace, good order, and security of the coastal state, and otherwise legal. *Id.* art. 14. Prior customary law was not completely clear concerning the precise ramifications of this approach, and coastal states have occasionally exploited the ambiguity of these criteria to deny passage based on its purpose, destination, cargo, or flag. See M. McDougal & W. Burke, *supra* note 4, at 231; Arrow, *Prospective Impacts*, *supra* note 10, at 243. Moreover, although article 24 of the Convention on Territorial Sea and the Contiguous Zone, *supra*, at least impliedly guarantees a right of innocent passage to warships, *id.* art. 24, this right has not been universally recognized. See, e.g., Pirtle, *Transit Rights and U.S. Security Interests: The "Straits debate" Re-Visited*, 5 OCEAN DEV. & INT'L L. 477, 481-82 (1978). The UNCLOS regime is more specific concerning the criteria for "innocence," and specifically permits passage by warships and plans through straits and by warships through the territorial sea. UNCLOS, *supra* note 1, arts. 17, 19, 24, 29, 30, 37-39.

416. See, e.g., U.N. Doc. A/CONF. 62/PV. 193, at 23-25 (1983) (statement of Ambassador Tommy Koh, President of UNCLOS III, made in closing the Conference on December 10, 1982).

417. (U.K. v. Alb.), 1949 I.C.J. 4 (Order of July 31).

Zone,<sup>418</sup> and the concept of "archipelagic waters" was unknown to customary international law prior to UNCLOS.<sup>419</sup>

Concerning resource jurisdiction, a different initial inquiry must be invoked. If the protest principle may shield the industrialized powers from the application of "common heritage" principles to the seabed and its resources,<sup>420</sup> may it not also shield coastal states from UNCLOS' jurisdictional limitations?<sup>421</sup> An affirmative answer would permit coastal state sovereign claims to 500, 1000, or 2000 miles, effectively placing all of the seabeds' resources within coastal state jurisdiction.

The answer, of course, lies in the freedom of the seas doctrine itself which, though its radiation has waned with increased acceptance of coastal state jurisdictional claims, has yet to reach the point of total invisibility. President Reagan's position, refusing to acquiesce in the restriction of high seas freedoms, may be justified by reference to this doctrine, as would a refusal to acquiesce in the further nationalization of more area formerly possessing high seas status. The perpetuation of an alternative seabed mining approach is yet another reflection of United States protest over the piecemeal desiccation of the freedoms of the seas. Nevertheless, the United States has itself participated therein by declaring its own 200 mile exclusive economic zone. To that extent, the United States would be estopped from denying the validity of any such zone proclaimed by a state which reciprocally recognizes that of the United States.<sup>422</sup>

#### D. Satisfaction of "Common Heritage" Requirements

As has been indicated, the specific reflections of the "common heritage" principle<sup>423</sup> contained in the detail of UNCLOS have not achieved cognizability as customary international law.<sup>424</sup> Nevertheless, whatever particulars are specified by the Declaration of Princi-

418. *Supra* note 415.

419. *See* UNCLOS, *supra* note 1, arts. 46-54. Such waters would have been high seas past the three mile limit, unless the archipelagic state would have been permitted to draw straight baselines in accord with the principles set forth in *Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116, 28-32 (Judgment of Dec. 18).

420. *See, e.g., supra* notes 195, 254.

421. UNCLOS, *supra* note 1, arts. 3, 57, 76.

422. Concerning the jurisdictional possibilities, see *infra* text accompanying note 427.

423. *See generally supra* text accompanying notes 59-76.

424. *See supra* text accompanying notes 314-17.

ples<sup>425</sup> have probably achieved such status as a result, *inter alia* of the unanimous adoption of the Declaration in 1970. Two such particulars are relevant for purposes of seabed mineral exploitation other than as is protected by UNCLOS: the preclusion of sovereign claims;<sup>426</sup> and the requirement that exploitation be carried out "for the benefit of mankind as a whole, . . . taking into particular consideration the interests and needs of developing countries."<sup>427</sup> Clearly, all the reciprocating states meet the former criterion, since they base their mining legislation on citizenship and not territorial jurisdiction.<sup>428</sup> Concerning the second criterion, the United States, United Kingdom, France, and Federal Republic of Germany all provide for deepsea mining funds,<sup>429</sup> with various methods of disbursement<sup>430</sup> to attempt accommodation of the "special consideration" provisions described above.<sup>431</sup> Japan, while maintaining some flexibility for future administrative regulation by MITI,<sup>432</sup> does not establish a revenue sharing fund, apparently in the belief either that the "common heritage" principle (even in its broadest possible application) does not reflect an extant customary norm, or that seabed mineral exploitation is *ipso facto* for the benefit of all

425. See *supra* note 64.

426. See *supra* text accompanying note 66; see also *supra* text accompanying notes 55-57.

427. Declaration of Principles, *supra* note 64, paras. 7, 9.

428. See U.S. Act, 30 U.S.C. § 1402 (Supp. IV 1980); Japanese Act ch. 4, art. 2 reprinted in 22 I.L.M. 102 (1983); U.K. Act, 1981, ch. 53, § 3(1), (2), reprinted in 20 I.L.M. 1218, 1220 (1981); West German Act, § 3, BCB1 I 1457 (W. Ger.).

429. The United States, United Kingdom, and West German Acts effectively impose a tax of 0.75% of the value of the recovered metals. U.S. Act, 26 U.S.C. §§ 4995, 4997 (Supp. IV 1980); 30 U.S.C. § 1472 (Supp. IV 1980); U.K. Act, 1981, ch. 53, § 9(1)(b), reprinted in 20 I.L.M. 1218, 1222 (1981); West German Act, § 12, 1980 BCB1 I 1457 (W. Ger.). The French tax is 3.75%. French Act, art. 12, 1981 J.O. 3499, 1982 D.S.L. 12.

430. The United States establishes a trust fund, which may be made available to the I.S.A. should the United States ratify UNCLOS before June 28, 1990. If no such ratification occurs, the fund "shall be available for such purposes as Congress may hereafter provide by law." U.S. Act, 30 U.S.C. § 1472(d), (e) (Supp. IV 1980). The approach of the United Kingdom is to permit its Secretary of State to transfer funds to the I.S.A., provided that it has ratified UNCLOS by July 28, 1991. U.K. Act, 1981, ch. 53, § 10, reprinted in 20 I.L.M. 1218, 1222-23. The West German approach also permits transfer of its trust fund to the I.S.A. upon its ratification of UNCLOS, but mandates its investment for foreign aid purposes in the interim. West German act, § 13, 1980 BCB1 I 1457 (W. Ger.). Although article 12 of the French Act, art. 12, 1981 J.O. 3499, 1982 D.S.L. 12, does not specify the use of it fund, a subsequent finance act adopts the approach of creating a special fund for aid to developing states. 1982 Finance Act, art. 50 1981 J.O. 3539.

431. See *supra* text accompanying note 427.

432. See Japanese Act, ch. 4, art. 33; *supra* note 222.

and the developing states in particular, and that no revenue sharing is therefore required.<sup>433</sup> Lest this characterization seem comparatively cavalier, it must be noted that, due to the tentative nature of revenue sharing in the United States' and United Kingdom's legislation, the same effective result could obtain pursuant to either of their regimes as well.<sup>434</sup>

Japan, of course, is not alone in maintaining that deep seabed mining is *ipso facto* for the common good, irrespective of the absence of revenue sharing. Robert Goldwin points out that

[t]he underlying theme first was enunciated by Arvid Pardo, the Maltese delegate to the United Nations in 1967.<sup>435</sup> Ambassador Pardo was the first in the United Nations to use the phrase "common heritage of mankind" to describe the deep seas, and he is the one who described the task as a race between the "good for one" (meaning the nation-state acting in its own selfish interest) and "the common good" (meaning the United Nations and other international organizations).

But why should we, the United States, and other exemplars of the democratic-capitalist system, agree to such a distinction? It should be made clear to the rest of the world as it is (or should be) to us that what justifies encouragement to private enterprises is that all of society benefits.<sup>436</sup>

To say the least, however, the "trickle down" theory is less-than-universally accepted. Moreover, it is likely that it is less—at least to most of the Declaration of Principles' proponents—than they thought they were requiring by stipulating that seabed mineral exploitation be carried out "for the benefit of mankind as a whole, *taking into particular consideration the interests and needs of the developing countries.*"<sup>437</sup> Pursuant to this requirement, the French and West German approaches are the likeliest to pass international legal muster; the United States' and United Kingdom's approaches somewhat less likely; and the Japanese approach, unlikely at this point.<sup>438</sup>

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433. Japanese Act, ch. 4, art. 1.

434. See *supra* note 430.

435. See *supra* note 54.

436. Goldwin, *Locke and the Law of the Sea*, 71 COMMENTARY 46, 49 (1983).

437. For the text of the Declaration, see Declaration of Principles, *supra* note 64, at 24.

438. Cf. *supra* notes 429, 430 (United States, United Kingdom, French and West German approaches). All this assumes again, of course, that any international adjudicative body could become seized of an appropriate international dispute. See *infra* text accompanying note 459.

## IV. POTENTIAL SCENARIOS

## A. Scenarios for UNCLOS

One hundred and seventeen states signed UNCLOS at Montego Bay on December 10, 1982 and several more have signed it since then.<sup>439</sup> Although comparatively few states have ratified it thus far, UNCLOS will come into force for its parties 12 months after the sixtieth ratification has been deposited with the Secretary-General of the United Nations.<sup>440</sup> In the meanwhile, the UNCLOS III Final Act<sup>441</sup> establishes<sup>442</sup> a Preparatory Commission for the I.S.A. and for the International Tribunal for the Law of the Sea,<sup>443</sup> which is to be composed of the states which sign or accede to UNCLOS. The Commission is empowered, *inter alia*, to select its chairman and other officers,<sup>444</sup> prepare and suggest the first Assembly and Council agenda,<sup>445</sup> prepare draft rules of procedure,<sup>446</sup> and to make recommendations generally.<sup>447</sup> In addition, the Commission is to exercise the powers necessary to effectuate the regime for the protection of pioneer investors,<sup>448</sup> and is authorized to create commissions on the Enterprise<sup>449</sup> and on the effect of seabed mining on land-based mineral producing states.<sup>450</sup> The Commission's expenses are to be paid from the regular U.N. budget,<sup>451</sup> and the Commission is given the capacity necessary to achieve its mandates and goals.<sup>452</sup> Final Act signatories and national liberation movements may participate in Commission activities as observers.<sup>453</sup>

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439. See, e.g., 21 I.L.M. 1477 (1982).

440. UNCLOS, *supra* note 1, arts. 308(1), 319(1).

441. See *supra* note 1.

442. Resolution I, *supra* note 135.

443. UNCLOS, *supra* note 1, Annex 6.

444. Resolution I, *supra* note 135, para. 3.

445. *Id.* para. 5(a).

446. *Id.* para. 5(b).

447. *Id.* para. 5(c)-(e), (i), 10.

448. *Id.* para. 8. Concerning the Pioneer Investment Protection regime, see Resolution II, *supra* note 133 *passim*, discussed in *supra* text accompanying notes 132-51.

449. Resolution I, *supra* note 135, para. 8. Paragraph 8 allows this Commission to "take all measures necessary for the early entry into effective operation of the Enterprise." *Id.* For a discussion of the Enterprise, see *supra* text accompanying notes 78-91.

450. Resolution I, *supra* note 135, para. 9.

451. This is subject to General Assembly approval. *Id.* para. 14.

452. *Id.* para. 6.

453. *Id.* para. 2.

The Preparatory Commission came into effect on December 10, 1982, the date of the fiftieth signature to the UNCLOS Final Act.<sup>454</sup> It first assembled on March 15, 1983, selected Joseph Y. Warioba of Tanzania as its President, and began a process, likely to take several years, of implementing the seabed mining provisions of UNCLOS.<sup>455</sup>

It is contemplated that the Preparatory Commission will be composed largely of legal and technical experts, and it is expected to meet frequently during the years while UNCLOS is being ratified to create the machinery of the I.S.A. If quick ratification of UNCLOS is procured (only sixty ratifiers are needed to bring it into force *inter se*<sup>456</sup>), the I.S.A. could open for business by 1990, with seabed mining commencing by about 1992.

### B. Scenarios for the "Alternative" Seabed Regime

As has been indicated, the Reagan Administration has decided, if necessary, to "go it alone" in the area of ocean law, thereby avoiding the strictures of the UNCLOS regime.<sup>457</sup> In addition to pursuance of its "alternative" seabed regime, the Administration continues to pursue bilateral arrangements, particularly with regard to its navigational interests in straits.<sup>458</sup> Politically (and legally<sup>459</sup>), the future of the "alternative" regime, as such,<sup>460</sup> is un-

454. *Id.* para. 1.

455. *See, e.g.*, Marshall, *supra* note 171, at 8.

456. UNCLOS, *supra* note 1, art. 308.

457. *See generally supra* text accompanying notes 44-243. A description of the evolution of Reagan Administration policy can be found in Wertenbaker—II, *supra* note 116, at 69-80.

458. *See* Marshall, *supra* note 171, at 10.

459. *But see supra* notes 195, 254, 274 (concerning the effect of protest by a "specially affected state" against a newly emergent customary norm). Although the United States could validly (if not in good faith) invoke its Connally Reservation, *reprinted in* L. HENKIN, *supra* note 313, at 862, so as to preclude the jurisdiction of the I.C.J. over the legal issues in a contentious case involving the United States, *see* Certain Norwegian Loans (*Fr. v. Nor.*), 1957 I.C.J. 9 (Judgment of July 6), such issues could likely be raised by the General Assembly pursuant to the Court's power to grant advisory opinions. *See* U.N. CHARTER art. 96; *see generally* D. PRATAP, *THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT* 55-226 (1972) (advisory proceedings institution, jurisdiction, and procedure). Although there may be circumstances in which the Court would decline such jurisdiction, it has held in Peace Treaties with Bulgaria, Hungary, and Romania, 1950 I.C.J. 65, 72 (Advisory Opinion of Mar. 30 and July 18), that, in principle, such requests should not be refused. *Id.* *See also* Certain Expenses of the United Nations, 1962 I.C.J. 151, 155 (Advisory Opinion of July 20); D. PRATAP, *supra*, at 146-51 (duty of the Court as a judicial organ and discretionary power to grant advisory opinion). Concerning the nonbinding character of such opinions, *see id.* at 227-34; *cf.* I.C.J. STAT. art. 59.

clear, since two of the potentially reciprocating states—France and Japan—have already signed (and may well ratify) UNCLOS. While neither the United Kingdom nor the Federal Republic of Germany has signed or ratified UNCLOS, there are powerful inducements for them to do so.<sup>461</sup> Moreover, both continue to hedge their bets by participating as observers in the work of the Preparatory Commission.<sup>462</sup> Should these “specially affected states”<sup>463</sup> choose to ratify UNCLOS, their ratification would significantly enhance UNCLOS’ prospects for subsequent recognition as customary international law.<sup>464</sup> In addition, such ratification carries concomitant obligations to finance the Enterprise pursuant to the terms of UNCLOS,<sup>465</sup> and to terminate their recognition of non-UNCLOS-granted licenses pursuant to the terms of their own domestic legislation.<sup>466</sup> Their ratification, therefore, would also enhance the possibility of international conflict over mining areas, increasing the possibility of international litigation, and decreasing the security of investments by United States miners and investors. Political instability, of course, could perpetuate the insecurity of investment problem, even assuming the strength of the United States’ legal position.<sup>467</sup>

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460. See *supra* text accompanying notes 218-23.

461. Although both governments share many philosophical reservations concerning UNCLOS with the United States, the United Kingdom would benefit from the certainty provided by UNCLOS’ outer continental shelf provisions, and the Federal Republic of Germany would be the seat of the Law of the Sea Tribunal should it choose to ratify. See generally UNCLOS, *supra* note 1, art. 76 & Annexes 2, 6.

462. See generally *supra* notes 414-27.

463. See *supra* note 274.

464. It has been noted that the states abstaining or voting “no” on the UNCLOS final text contributed about 60% of the United Nations’ total budget. See, e.g., Marshall, *supra* note 171, at 8, 12. While some of these states have subsequently chosen to sign the treaty, absence of general ratification or acceptance of its provisions, or such inaction by the “specially affected states,” would, of course, be dispositive concerning the treaty’s status as custom.

465. See *supra* text accompanying notes 176-88.

466. See French Act, art. 1, 1981 J.O. 3499, 1982 D.S.L. 11; Japanese Act, ch. 4, art 43; U.K. Act, 1981, ch. 53, § 18(3),(4), reprinted in 20 I.L.M. 1218, 1226 (1981); West German Act, § 5(1), 1980 BGBI I 1457 (W. Ger.); see also U.S. Act, 30 U.S.C. § 1442 (Supp. IV 1982) (effect of international agreement).

467. For arguments supporting the legal position of the United States, see, e.g., Arrow, *The Customary Norm*, *supra* note 51, at 1-38; Arrow, *The Proposed Regime*, *supra* note 4, at 350-94; *supra* notes 195, 254, 274, 431. Accord McDougal, *supra* note 390, at 79, 83. Contra Biggs, *Deep Seabed Mining and Unilateral Legislation*, 8 OCEAN DEV. & INT’L L. 223 (1980); Carias, *Seabed Mining in the Informal 1980 Draft Convention on the Law of the Sea*, in PROCEEDINGS OF THE CONFERENCE, *supra* note 31, at 37.

### C. Benefits and Detriments of Unilateralism

The primary benefit to the United States of pursuing an alternative (i.e., non-UNCLOS) oceans policy lies, of course, in avoiding both its seabed regulatory approach, and obligations to financially support the International Seabed Authority to the extent of about 25% of its annual budget for at least fifteen years.<sup>468</sup> Moreover, the United States would be required, directly or indirectly, to provide financial assistance to the International Enterprise which could potentially cost up to U.S.\$500 million or more.<sup>469</sup>

The refusal of the United States and its allies to participate in the UNCLOS regime may have a deterrent effect on other states' ratification, because the financial obligation to put the Enterprise in business would devolve on those states which chose to ratify. UNCLOS requires revenue sharing from continental shelf resources recovered by a coastal state more than 200 nautical miles from its coast<sup>470</sup>—an obligation which, according to some estimates, has been placed as high as U.S.\$3.5 billion annually for the United States.<sup>471</sup>

Perhaps of greatest importance (at least to the Reagan Administration) are the advantages of pure principle: the negation of collectivist principles' application to about half the surface of the earth, and the preservation of the United States' sovereignty against prospective encroachment by a quasi-legislative assembly of states at the UNCLOS review conference in about the year 2010.<sup>472</sup>

A permanent end to "creeping" coastal state jurisdiction would certainly be one of the primary benefits of adherence to the UNCLOS regime. UNCLOS clearly limits the territorial sea jurisdiction of a coastal state to twelve nautical miles,<sup>473</sup> and while arguments have been made that the 1958 Convention on the Terri-

468. See *supra* text accompanying notes 177-80.

469. See *supra* text accompanying notes 182-87.

470. UNCLOS, *supra* note 1, art. 82(1)(2).

471. See Marshall, *supra* note 171, at 10. Of course, such continental shelf claims might not be internationally cognizable at all pursuant to the criteria established by article 1 of the 1958 Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 473, T.I.A.S. No. 5578, 499 U.N.T.S. 311, 312 (entered into force June 10, 1964). See generally, North Sea Continental Shelf (W. Ger. v. Den.), 1969 I.C.J. 3 (Judgment of Feb. 20); Wertebaker—II, *supra* note 116, at 57-58.

472. See *supra* text accompanying notes 48-217.

473. UNCLOS, *supra* note 1, art. 3.



torial Sea and Contiguous Zone,<sup>474</sup> by implication, does the same, state practice has not been consistent with this interpretation.<sup>475</sup> The International Court of Justice has not helped to resolve the creeping jurisdiction problem, since it based its decision in the 1974 *Fisheries Jurisdiction*<sup>476</sup> case on a United Kingdom-Iceland treaty, not on customary international law.<sup>477</sup>

While the United States and others have maintained their protest to the existence of territorial seas beyond the three-mile limit,<sup>478</sup> a permanent political solution is certainly preferable to multitudinous bilateral arrangements, or to the use of military force. Absent United States participation in UNCLOS, creeping coastal state jurisdictional assertions would likely take the form of expanded claims to territorial seas, or to broader rights in the economic zone, including the right to prevent military<sup>479</sup> or research<sup>480</sup> uses of such zones.

Coastal states might also attempt to impose vessel standards more rigorous than IMCO standards (which are considered the maximum required pursuant to UNCLOS) for territorial sea or economic zone passage.<sup>481</sup> For example, at the Eleventh Negotiating Session of UNCLOS III in 1982, Gabon proposed that warships be precluded from entering the territorial sea without notice to or permission of the coastal state, and Spain presented four proposals demanding more rigorous pollution control requirements in straits. Such claims, as well as exponentially increased coastal state jurisdictional claims, could well proliferate absent United States participation in the UNCLOS regime.

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474. Apr. 29, 1958, art. 24(2), 15 U.S.T. 1606, 1612, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as Convention on the Territorial Sea].

475. See generally II G.R. CHURCHILL, M. NORDQUIST, & S. LAY, *NEW DIRECTIONS IN THE LAW OF THE SEA* 835-54 (1977).

476. (U.K. v. Ice.), 1974 I.C.J. 3 (Judgment of July 25).

477. *Id.*

478. See *supra* text accompanying notes 405-06.

479. Alexander, Cameron & Nixon, *The Costs of Failure at the Third Law of the Sea Conference*, 9 J. MAR. L. & COMM. 1, 18 (1977). See also *supra* note 415 (ambiguities in right to passage).

480. Grolin, *The Future of the Law of the Sea—Consequences of a Non-Treaty or Non-Universal Treaty Situation*, 13 OCEAN DEV. & INT'L L. 1, 11 (1983). Cf. UNCLOS, *supra* note 1, arts. 244-264, 297, discussed in Arrow, *Prospective Impacts*, *supra* note 10, at 236-38. Of course, the United States might forcibly resist such claims based on the 1958 High Seas Convention, *supra* note 3, art. 2.

481. Grolin, *supra* note 480, at 11.

A further detriment of unilateralism by the United States relates to its navigational interest in straits. While the United States position that customary international law requires free passage through straits is strong,<sup>482</sup> and UNCLOS' provisions may not unconditionally guarantee such passage,<sup>483</sup> the general international perception of the UNCLOS and prior straits regimes may be as important as their substance. Moreover, many straits are now defended by sophisticated military hardware,<sup>484</sup> thus potentially rendering it difficult for the United States to successfully protest strait transit restrictions, even by force.

A third detriment of unilateralism relates to possible United States inability to claim increased jurisdictional rights<sup>485</sup> available pursuant to UNCLOS but not to customary international law. According to studies made by the Office of the Geographer of the United States and others, the United States was the largest single beneficiary of territorial and resource jurisdiction under UNCLOS' provisions.<sup>486</sup> While the United States has already claimed a 200-mile economic zone, claims to a 12-mile territorial sea, a 24-mile contiguous zone,<sup>487</sup> and, most likely, a continental shelf extending all the way to the continental margin<sup>488</sup> could not be made by the United States without estopping it from denying the validity of similar claims by others. Moreover, as has been suggested, if the United States were to assert the most extensive jurisdiction permitted by UNCLOS, it could find itself estopped from denying the validity of the rest of the "package."<sup>489</sup>

482. See *supra* text accompanying notes 407-09, 414-18.

483. Professor McDougal, for example, has stated that: "I've read the document carefully, from end to end, and I can't find the guarantee there. In fact, I find the opposite, that the coastal state is given all kinds of competencies over passage that it never had before." McDougal, *supra* note 390, at 81. See also Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48, 67-75 (1980). *Contra* Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 90-110 (1980).

484. Hazlett, *Strait Shooting*, U.S. NAVAL INST. PROCEEDINGS, June, 1982, at 70, 71. See generally Pirtle, *supra* note 415, *passim* (transit rights through international straits).

485. See *supra* text accompanying notes 410-22.

486. Wertebaker—I, *supra* note 77, at 45.

487. Compare UNCLOS, *supra* note 1, art. 33(2) ("contiguous zone may not extend beyond 24 nautical miles from the baselines") with Convention on the Territorial Sea, *supra* note 415, art. 24(2) ("contiguous zone may not extend beyond twelve miles from the baseline").

488. Compare Convention on the Continental Shelf, *supra* note 471, art. 1 (defining continental shelf) with UNCLOS, *supra* note 1, art. 76(1) (defining continental shelf).

489. See *supra* text accompanying notes 410-22.

A further detriment of unilateralism (which may, from some perspectives, be perceived as a benefit<sup>490</sup>) concerns the absence of a system of courts for prompt and sure adjudication of oceanic jurisdictional and navigational claims.<sup>491</sup> A correlative problem would arise from the lack of certainty of title to recovered nodules provided by the UNCLOS regime.<sup>492</sup> Although the United States' legal position concerning freedom of the seabeds is strong, it is limited by the principle that exclusive claims to particular seabed tracts cannot be asserted without violating the prohibition on sovereign claims articulated, *inter alia*, by the 1958 Convention on the High Seas.<sup>493</sup> The result of the United States' inability to assert exclusive seabed claims other than as reciprocally recognized through the tentative "alternative" regime<sup>494</sup> could produce deterrent effects on seabed miners, and more importantly, their investors. As Robert Goldwin has noted,

Although the fisheries analogy<sup>495</sup> has superficial appeal, as Elliot Richardson pointed out in a speech to the American Mining Congress last year, because deep sea bed nodules can't swim, and sea bed miners aren't fisherman, miners must have an exclusive legal right to a suitable ore body before they undertake the large, long-term investments necessary to recover and process [them].<sup>496</sup>

Moreover, the principal financial institutions which underwrite seabed mining have indicated that they would not finance further technological development of actual mining operations without a satisfactory sea treaty, and that they did not consider the reciprocating states regime to be a viable alternative.<sup>497</sup> This problem,

490. *But see* Wertenbaker—I, *supra* note 77, at 40 (quoting former U.S. Representative Paul McClosky's contention that the certainty afforded by these provisions alone outweighs the value of the seabed minerals likely to be recovered by the United States).

491. *See* UNCLOS, *supra* note 1, art. 76(8) & Annexes 2, 6.

492. *Id.* Annex 3, art. 1; *see generally* Arrow, *The Proposed Regime*, *supra* note 4, at 405-06.

493. High Seas Convention, *supra* note 3, art. 2. *See also* Arrow, *The Customary Norm*, *supra* note 51, at 12-16 (principle that the deep seabed is subject to the use and enjoyment of all).

494. *See supra* text accompanying notes 218-43.

495. *See supra* text accompanying note 3.

496. Goldwin, *supra* note 436, at 47. *See also* Arrow, *The Proposed Regime*, *supra* note 4, at 406-07 (importance of exclusive exploitation rights).

497. COMPTROLLER GEN. OF THE U.S., IMPEDIMENTS TO UNITED STATES INVOLVEMENT IN DEEP OCEAN MINING CAN BE OVERCOME 3 (1982), *cited in* Grolin, *supra* note 480, at 22.

combined with the uncertainty of seabed mining economic returns,<sup>498</sup> could well prove of dispositive importance in financing United States nationals' mining ventures—absent the United States' participation in the UNCLOS regime.

The final detriment of unilateralism concerns the general issue of perceived United States concern for international distributive justice and good faith.<sup>499</sup> Along these lines, Wertebaker has questioned the general ability of other states to negotiate in good faith with the United States, if the United States turns its back on an agreement negotiated over ten years and four presidential administrations.<sup>500</sup> More specifically, Ambassador Keith Brennan of Australia has remarked that

[t]he new law is a better law than the old law it replaces—or than the absence of any law at all, which it also replaces in many areas . . . . The old law of the sea began to break up because of its inherent inequity. Beyond three miles, it was “first come, first serve,” and wealthy countries could sail thousands of miles after a resource, while poorer countries could not—though they were just as free to. Some people were not getting a fair share even of fish off their own coasts. Peru was as free to fish off Russia as Russia was to fish off Peru, but somehow it never did. The new law is a fairer one than what previously applied. Morally, it is vastly superior.<sup>501</sup>

Along similar lines, Judge Philip Jessup has observed that

[t]he theme of Grotius that the common interest of mankind in the great oceans must prevail over the selfish mercantile interests of a few . . . is a foundation of all international law. To oppose a modern restatement of the law of the sea in order to promote newly found mercantile interests at the risk of prejudicing other common interests in the seas . . . is to invite anarchic disregard of all international law.<sup>502</sup>

498. See *supra* text accompanying notes 32-39.

499. This topic has been addressed in some detail in Arrow, *Prospective Impacts*, *supra* note 10, at 251-53; Arrow, *The “Alternative” Seabed*, *supra* note 11, at 27-33; Arrow, *The Proposed Regime*, *supra* note 4, at 413-14.

500. Wertebaker—I, *supra* note 77, at 45.

501. *Id.* at 40.

502. Jessup, *Introductory Remarks*, in PROCEEDINGS OF THE CONFERENCE, *supra* note 31, at viii. See generally, Oxman, *The Two Conferences*, in LAW OF THE SEA 127, 134-40 (1983) (impact of post-World War II development on the continued viability of the Grotian freedom of the sea approach).

Thus, while the economic costs of UNCLOS to the United States are severe, the moral and political costs of nonparticipation may be equally weighty. Unfortunately, at this point, the UNCLOS III negotiations are over, the text has now been finalized, and the battle lines now drawn. The confrontation scenario, for the moment, is therefore likely to continue to play itself out.