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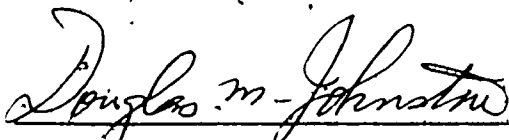
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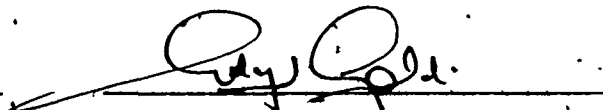
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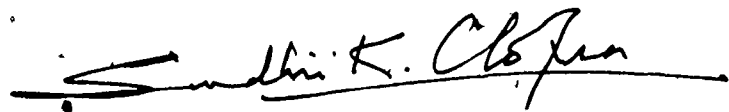
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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	iii
Abstract	xii
Abbreviations	xiii
Acknowledgements	xv

CHAPTER I - THE THEORIES OF SEABED AND SUB-SOIL: AN HISTORICAL SURVEY

	1
I:1 Res Nullius v. Res Communis	2
I:1:i Introduction	2
I:1:ii From Marcellianus to Justinian	2
I:1:iii The Doctrine of Res Nullius and Res Communis As Embodied in the Theories of Mare Liberum and of Mare Clausum	7
A. Mare Liberum	7
B. Mare Clausum	13
I:1:iv Views of Modern Jurists	17
I:1:v Conclusion	18
I:2 The Doctrine of the Continental Shelf	20
I:2:i Seabed and Sub-Soil Resources: Early Practices and Claims	20
I:2:ii The Truman Proclamation, The Doctrine of the Continental Shelf and State Practices	26
A. Truman's Proclamation: A Revisit	27
B. Jurisdiction and Control Versus Sovereignty	31
C. State Practices Pursuant to the Truman Proclamation	34
I:2:iii From Geneva Convention on the Continental Shelf to the UNCLOS-III	36
A. The Geneva Convention on the Continental Shelf	36

B.	The Doctrine of the Continental Shelf and UNCLOS-III	42
I:3	The Concept of the Common Heritage of Mankind .	47
I:3:i	Introduction	47
I:3:ii.	The Common Heritage of Mankind: A Moral, Jural or Functional Concept?	51
A.	The Concept of Mankind: Moral and Jural Meanings and Uses	51
B.	The Concept of the Common Heritage: Moral and Jural Meanings and Uses	53
C.	The "Common Heritage" as a Functional Concept	56
I:3:iii	Conclusion	62
	Footnotes to Chapter I'	64

CHAPTER II - THE COMMON HERITAGE OF THE DEEP-OCEAN BED
AND THE USES OF ANALOGY

II:1:i	The International Spaces and the Use of Analogy: An Introduction	81
II:1:ii	The Common Heritage of Deep Ocean Bed and Outer Space (including the Moon and Other Celestial Bodies)	85
A.	Problems of Delineation: An Analogy	86
B.	Area in Question: Outer Space Celestial Bodies and Deep Ocean Bed	95
I.	Inclusive Use	95
II.	Exclusive Use	99
C.	Resources in Question: Outer Space, Celestial Bodies and Deep Ocean Bed	107
I.	Inclusive Use	107
II.	Exclusive Use	113
D.	Base Values	118

I.	Peaceful Co-existence and Cooperation	118
II.	Disarmament	120
III.	Equitable Sharing	122
II:1:iii	The Common Heritage of the Deep Ocean Bed and Antarctica	124
A.	The Problems of Delimitation: An Analogy ..	124
B.	Area in Question: Deep Ocean Bed and Antarctica	135
I.	Inclusive Use	135
II.	Exclusive Use	139
C.	Resources in Question: Deep Ocean Bed and Antarctica	144
I.	Inclusive Use	144
II.	Exclusive Use	149
D.	Base Values	153
I.	Peaceful Co-existence and Cooperation	153
II.	Disarmament	154
III.	Equitable Sharing	157
II:2:i	The Uses of Analogy: An Introduction	160
II:2:ii	The "Common Heritage of Mankind", "Social Property" and "Common Property": An Analogy ..	164
II:2:iii	The "Common Heritage of Mankind" and "Common Interest": An Analogy	169
II:2:iv	Conclusions	173
	Footnotes to Chapter II	175
 <u>CHAPTER III - THE DEVELOPMENT OF PRINCIPLES OF THE</u> <u>REGIME OF DEEP OCEAN-BED AND DEEP OCEAN</u> <u>MINING - FROM 1968 - 1970</u>		191
III:1:i	The Ad-Hoc Seabed Committee 1968: Introduction	192

	<u>PAGE</u>
III:1:ii The Ad Hoc Seabed Committee: Discussion of Principles	194
III:1:iii Conclusions	201
III:2:i The Permanent Seabed Committee 1969: Introduction	202
III:2:ii The Permanent Seabed Committee 1969: Discussion of Principles	203
A. International Regime	204
B. International Machinery	213
III:2:iii Conclusions	214
III:3:i The Seabed Committee 1970: Introduction	215
III:3:ii The Seabed Committee 1970: Discussion of Principles	217
A. International Regime	218
B. International Machinery	220
III:3:iii Conclusions	224
Footnotes to Chapter III	226

<u>CHAPTER IV - THE DECLARATION OF PRINCIPLES: AN ANALYSIS</u>	234
IV:1 Introduction	235
IV:2 The Analysis of Hard Law	237
IV:2:i Seabed as Common Heritage of Mankind	237
IV:2:ii Use of Area for Peaceful Purposes	240
IV:2:iii Establishment of an International Regime and a Machinery	244
IV:2:iv Area Not Subject to Appropriation	246
IV:3 The Analysis of Soft Law	250
IV:3:i The Regime to be Established by a Treaty of "Universal Character Generally Agreed Upon".	252
IV:3:ii Promotion of Cooperation, Scientific Research, Pollution, Conservation and Respect for Rights of Other States	253

	<u>PAGE</u>
IV:3:iii Liability for Damages Caused to the Area	255
IV:3:iv Dispute Settlement	255
IV:4 Conclusion	257
Footnotes to Chapter IV	259

CHAPTER V - THE DEVELOPMENT OF PRINCIPLES OF THE REGIME
OF DEEP OCEAN-BED AND DEEP OCEAN MINING
FROM 1971 - 1973

V:1:i The Seabed Committee 1971: Introduction	264
V:1:ii The Seabed Committee 1971: Discussion of Principles	265
A. International Regime	265
B. International Machinery	268
V:1:iii Conclusion	273
V:2:i The Seabed Committee 1972: Introduction	273
V:2:ii The Seabed Committee 1972: Discussion of Principles	274
A. International Regime	274
B. International Machinery	277
V:2:iii Conclusion	282
V:3:i The Seabed Committee 1973: Introduction	283
V:3:ii The Seabed Committee 1973: Discussion of Principles	284
A. International Regime	284
B. International Machinery	287
V:3:iii Conclusion	289
Footnotes to Chapter V	292

CHAPTER VI - DEVELOPMENT OF PRINCIPLES: UNCLOS-III
(1973 to 1979)

VI:1 UNCLOS-III: Introduction	299
-------------------------------------	-----

	<u>PAGE</u>
VI:2 The Development of Principles Relating to Regime	301
A. Resource Policy	301
B. Equitable Sharing	302
C. Transfer of Technology	302
D. Revenue Sharing	306
E. System of Exploitation	308
VI:3 The Development of Principles Relating to Machinery	311
A. Organs of the Machinery	311
B. The Assembly and the Council: Functional Principles	312
C. Voting and Composition of the Council	314
D. Financing the Enterprise	317
E. Financial Arrangements for Exploitation ..	318
VI:4 Conclusion	320
Footnotes to Chapter VI	322
 <u>CHAPTER VII - THE SEABED AUTHORITY: STRUCTURE AND</u> <u>FUNCTIONS</u>	327
VII:1 The Seabed Authority: Introduction	328
VII:2 The Assembly: Structure and Functions	332
A. Structure of the Assembly	332
B. Functions of the Assembly	334
VII:3 The Council: Structure and Functions	336
A. Structure	336
B. Functions	341
VII:3:i The Economic Planning Commission: An Organ of the Council	343
A. Structure	343
B. Functions	344

VII:3:ii	The Legal and Technical Commission: An Organ of the Council	345
	A. Structure	345
	B. Functions	347
VII:4	The Secretariat: Structure and Function ..	348
	A. Structure	348
	B. Functions	350
VII:5	The Enterprise: Structure and Functions ...	350
	A. Structure	350
	B. Functions	352
VII:6	The Seabed Dispute Chamber: Structure and Functions	353
	A. Structure	353
	B. Functions	354
	Footnotes to Chapter VII	356

CHAPTER VIII - DEEP OCEAN MINING: PROPOSALS AND PERSPECTIVE 363

VIII:1	New World Order and the Law of the Sea	364
VIII:1:i	Setting	364
	A. Introduction	364
	B. Values	368
	C. Structure	370
	D. Problem Areas	373
	I. The Armament Race	373
	II. Population	374
	III. Food	375
	IV. Natural Resources and Energy	376
	V. Trade	377
	VI. Money	379

	<u>PAGE</u>
VIII:1:ii Proposals	380
A. U.N. Proposals	380
B. Private and Institutional Proposals ..	388
VIII:1:iii Appraisal	393
VIII:2 Deep Ocean Mining and the New World Order.	399
VIII:2:i History of Proposals	399
A. Proposals of the United Nations	399
B. Other Proposals	407
VIII:2:ii Description of Systems	409
A. Licensing System	409
B. Parallel System	410
C. Unitary Joint-Venture System	412
VIII:2:iii Evaluation of Systems	414
A. Criteria	414
I. — Licensing System	416
II. Parallel System	422
III. Unitary Joint Venture System ...	427
B. Ratings	432
VIII:2:iv Projections	435
A. Joint-Venture With or Without Modification	435
B. Probability in Case of Failure	437
Footnotes to Chapter VIII	442
<u>CHAPTER IX - CONCLUSIONS</u>	449

Bibliography 459

Appendices 480

Appendix A - Declaration of Principles Governing
The Sea-bed and the Ocean Floor, and
the Subsoil Thereof, Beyond the
Limits of National Jurisdiction 480

Appendix B - Resolutions Adopted on the Report
of the Ad Hoc Committee of the
Sixth Special Session 484

Appendix C - The Antarctic Treaty 489

Appendix D - Treaty on Principles Governing the
Activities of States in the
Exploration and Use of Outer Space,
Including the Moon and Other Celestial
Bodies 497

ABSTRACT

The Third United Nations Conference on the Law of the Sea (UNCLOS-III) is the first Conference to deal directly with a comprehensive body of ocean-related issues and at the same time, indirectly with almost all the crisis areas of today's world. It is an effort to redress the existing inequitable economic order of the world. The Third World, which sees UNCLOS-III as the only hope of securing justice, is struggling hard to reach an agreement of an exploitation system for seabed resources, which could help their poor and vulnerable economies grow.

The growing importance of the seabed mineral resources was first expressed in the year 1967. The U.N. General Assembly, thereafter, realizing the importance of the issue, established the Seabed Committee, to work on the problem. Then finding it difficult to resolve the issue at the Seabed Committee, the Third U.N. Conference on the Law of the Sea was convened in 1973. UNCLOS-III, in this period, dealt with all possible issues related to the seas, and it has succeeded in resolving most of these issues. This Conference has also succeeded in modelling the "common heritage" concept as a new international legal concept.

These years of UNCLOS-III have demonstrated that the pattern of the settlement of issues related to the deep ocean-bed and mining is likely to have an economic impact on two decades of this century as well as the next century. The process by which the exploitation system is developed and the system itself are likely to influence the new world order in four ways: by contributing to the concept of equitable redistribution between developed and developing countries; by supplying the world resource demand; by establishing an international management system; and by cultivating a new process of developing international law.

This thesis examines the prospects of the regime of deep ocean mining and the areas it will influence, by establishing a new precedent - a new kind of international management for international spaces.

ABBREVIATIONS

A. J. Int. L. - American Journal of International Law

Am. Soc. Int. L. Proc. - American Society of International Law Proceedings

Brit. Yearbook Int. L. - British Yearbook International Law

Brooklyn J. Int. L. - Brooklyn Journal of International Law

Colloquium L. Outer Space - Colloquium on the Law of Outer Space

Colum. J. Transnat. L. - Columbia Journal of Transnational Law

Colum. L. Rev. - Columbia Law Review

Conn. L. Rev. - Connecticut Law Review

Cornell Int. L. J. - Cornell International Law Journal

Cornell L. Q. - Cornell Law Quarterly

Denver J. Int. L. & Pol. - Denver Journal of International Law and Policy

Environ. Pol. & L. - Environmental Policy and Law

Harv. Int. L. J. - Harvard International Law Journal

Harv. L. Rev. - Harvard Law Review

Ind. J. Int. L. - Indian Journal of Internal Law

Int. & Comp. L. Q. - International and Comparative Law Quarterly

Int. Law - International Lawyer

I.L.M. - International Legal Materials

Int. Org. - International Organisation

J. Int. Law & Econ. - Journal of International Law & Economics

J. P.O.S. - Journal of Patent Society

J. Space L. - Journal of Space Law

L.N.T.S. - League of Nations Treaty Series
Man. L. J. - Manitoba Law Journal
Mich. L. Rev. - Michigan Law Review
Nat. Res. J. - Natural Resources Journal
Nat. Res. Law - Natural Resource Lawyer
Ocean Devel. & Int. L. - Ocean Development and International Law
Okla. L. Rev. - Oklahoma Law Review
Rutgers L. Rev. - Rutgers Law Review
San Diego L. Rev. - San Diego Law Review
Tex. Int. L. Forum - Texas International Law Forum
Tex. Int. L. J. - Texas International Law Journal
U. Miami L. Rev. - University of Miami Law Review
UNCLOS III - Third United Nations Conference on the Law of the Sea
U.N.T.S. - United Nations Treaty Series
Va. J. Int. L. - Virginia Journal of International Law
Van. J. Trans. L. - Vanderbilt Journal of Transnational Law
Yale L. J. - Yale Law Journal

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CHAPTER I.

THE THEORIES OF SEABED AND SUB-SOIL:

AN HISTORICAL SURVEY

I:1. Res Nullius v. Res Communis.¹

I:1:i. Introduction.

Since the beginning of the second century, the status of the sea has always been debateable. Yet, generally, two concepts of property law of the Roman Civil Law were applied to regulate and lay claims on sea, namely, res nullius and res communis. The concept of res nullius meant a thing which has had no owner, or which has been abandoned by its owner. Roman law further says, a thing abandoned by its owner is as much res nullius² as if it never belonged to anyone. The first possessor of such a thing becomes the owner; res nullius naturaliter fit primi occupantis. Hence the Roman Law meant that the thing (res), if placed in the nullius category, could be seized or enclosed by anyone, and the first possessor gets the ownership rights. By res communis,³ Roman Law meant those things such as light, air and sea which, though they can be enjoyed and used by everyone, cannot be exclusively and wholly appropriated.

I:1:ii. From Marcianus to Justinian.

The text of the jurist Marcianus, preserved in the Digest of Justinian, is the first formal pronouncement

on the legal status of the sea and on the right of men to use the sea and its products.⁴ The concept of the "freedom of the seas" or the Mare Liberum, was brought into being probably as early as the first or second century A.D.,⁵ by the jurist Marcianus. For the first time, Marcianus, in his text, refers to the sea and its coasts, and writes that they are common to all men.⁶ So it was from the classical legal thought of Greeks and Romans that a concept of the sea first emerged. The Greeks had no formal legal doctrine for the status of the sea, but they regarded it as free for the use of all men and its produce as available to all.⁷ Similarly, prior to the sixth century, the Romans had no codified law concerning the status of the sea, but did accept the doctrine of the common right of all men to enjoy free use of the sea and its produce.⁸ Ancient Roman jurists referred to "oceans, air and light" and classified them as res communis.⁹

Justinian's Digest, which is a compilation of the writings of Paul, Gaius and Ulpian, contains edicts relating to maritime commerce and navigation. "The Roman Law outside of the digest ~~by~~ the work of compilation undertaken by order of the Emperor Justinian, is as silent as the Greek law upon the subject of the status of the sea."¹⁰ Res communis, though present in Gaius, is in an underdeveloped form.¹¹ The things referred to by

Gaius are "incapable of becoming the object of private property, by natural law." They may be used by everyone under the ius gentium. "Gaius also seems to know a concept of res nullius Rumanii iuris of things which may be appropriated but which are for the time being without an owner," such as wild beasts, birds and fish.¹²

The Digest of Justinian in 529 A.D. produced the first codified law of the sea. A minor segment of the code classifies the sea as res communis, that is, falling among those things which are opened to the use of all men and owned by none. It is important to note that this is a distinct classification from that of res publica,¹³ which encompasses those things commonly used but owned by the state from that of res nullius which includes those things owned by none but subject to possession by appropriation.¹⁴ However, none of these writings refers to the actual status of the sea and seabed.

The conceptual analysis of the Roman property lawyers was initially regarded as more significant than the practices of the then maritime powers. The texts of the Institutes and Digest, which state the Roman law

doctrine regarding the sea, are but a concise little

body of law which states in unambiguous terms the position of Roman jurisprudence. This gets clear by the examination of the views of classical Roman jurists, which was rightly discussed by Justinian.

According to Justinian, Ulpian declares the sea to be open to everybody by nature: mari quod natura omnibus potest.¹⁵ Gro'tius, in his Mare Liberum, says

that Ulpian claimed, "Nature has made neither sun nor air nor waves private property, they are public gifts."

He further says that "they are by nature things open to the use of all."¹⁶ Celsus lays down the doctrine that

Maris communem usum omnibus Romanibus, utaeries, that is, the sea is like air and thus common to all men.¹⁷

Celsus further says, by drawing a sharp distinction between the shores of the sea and the sea itself, that "Roman people could occupy [shores] in such a way that their common use was not hampered, and the sea shall retain its primitive nature."¹⁸

Placentibus also agrees to the res communis status of the sea and says: "the sea [is] a thing so clearly common to all that it can not be the property of anyone save God."^{18a}

Johannes Faber also agrees with the freedom of the seas and says "that the sea has been left sui iuris, and remains in the primitive condition where all things were common."¹⁹

Paulus, according to Justinian, groups shores (litora)²⁰ with public places (loca publica),²¹ though he does not call the shore either public or common.²² Further Paulus avoided the expressions res communis and res publica, and said "the thing which belongs to no one is everybody's property by the law of nations ("nullius sunt, sed iure gentium omnibus vacant").²³ Justinian himself says that the sea is common to all by ius naturale and then Justinian further says that the use of the shore of the sea is public by the ius gentium just as that of the sea. And yet, when he says that the sea was common to all, he also refers to the shore.²⁴ Here it is interesting to note that Marcianus²⁵ also refers to the sea shore. Some of the Roman jurists who described sea as public, perhaps, never meant that the sea was State property;²⁶ instead, arguably, they meant the "things common to all" and not the subject of property to all.

To sum up, we find that Gaius described the sea as res nullius, asserting that it belonged to the first occupant.²⁷ A modern writer observes that "Gaius took no notice at all of the sea but treated fish as res nullius."²⁸ Still another writer comments that "Gaius had a leaning to inclusion under the class res nullius of everything which had not an individual owner or owners."²⁹ Celsus articulated the thesis of the free uses of the sea. Jus-

tinian, taking over his proposition, fabricated and enunciated in his Institutes the "classical assumption", maris communem usum omnibus hominibus; that is, that the sea and its shores rank among the things common to all and that the sea is open to public use and is nobody's property.³⁰ Apart from Celsus and Justinian, Marcianus, Paulus and Ulpian also observed that the "sea was not only owned by no one but, like the air, was incapable of appropriation, and thus res communis."³¹ The only supporter of the view of Gaius was, perhaps, Neratius, who "also treats it as a sort of res nullius."³²

I:1:iii. The Doctrines of res nullius and res communis as Embodied in the Theories of Mare Liberum and of Mare Clausum.

A. Mare Liberum.³³

The defence of the "freedom of the seas" is distinct from the classical concept of res communis. It is not a reproduction of the texts of Roman law which very briefly cover the issue of res communis as a small fragment of a larger scheme of law.

The concept of the freedom of the seas had been discussed long before the publication of Grotius' Mare Liberum, as has been noted. However, it is true

that Grotius' Mare Liberum, which was addressed to "the rulers and to the free and independent nations of Christendom," has been regarded as the most important of all, though, before the opening of the seventeenth century, Mare Liberum had its protagonists. This was considered to be of great importance because, by the time of Grotius, a great extension of commercial enterprise was taking place. This new development was well represented by Grotius' thesis. The recognised substance of the Grotian thesis was that the sea was free for all mankind. This was based on two main grounds: the law of nature and the necessity of the human community.

Grotius, in support of his arguments, validly says that:

As there are some things which every man enjoys in common with all other men, and as there are other things which are distinctly his and belong to no-one else, just so has nature willed that some of the things which she has created for the use of mankind remain common to all, and that others through the industry and labour of each man become his own.

34

He intends here that the product of nature can only become property of a man by way of intervention of a man's deed. His reasoning further was that as nature itself does not give a property to someone by itself, therefore property does not occur, unless by occupation. He further says that before occupation can take place, one must have

the right to occupy. He observes, here, that by nature all men have this right, equal from one to another. His intention here is to say that a thing which had not yet been occupied is common and open equally to all.

Grotius at another points says that:

All property is grounded upon occupation which requires that moveables shall be seized and immoveables shall be enclosed; whatever therefore cannot be seized or enclosed is incapable of being made a subject of property. The vagrant wakes of the ocean are thus necessarily free. The right of occupation, again rests upon the fact that most things become exhausted by promiscuous use and that appropriation consequently is the condition of their utility to human beings. But this is not the case with the sea; it can be exhausted neither by navigation nor by fishing that is to say in neither of the two ways in which it can be used.

35

The basis of these arguments as stated by Grotius is:

The law by which our case must be decided is not difficult to find seeing that it is the same among all nations, and it is easy to understand, seeing that it is innate in every individual and implanted in his mind...For it is a law derived from nature, the common mother of us all.

36

For this he takes a stand and says:

I shall base my argument on the following most specific unimpeachable axiom of the Law of Nations, called a primary or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it.

37.

Grotius then tries to derive two conclusions from his earlier reasonings and says "that which cannot be occupied, or which has never been occupied, cannot be the property of anyone, because all property has arisen from occupation" and "all that which has been so constituted by nature that although serving some one person it still suffices for the common use of all other persons, it is today and ought in perpetuity to remain in the same condition as when it was first created by nature."³⁸ Here Grotius seems to twist his logic by saying "if a thing is not yet occupied by someone", logically, it should still remain free for all to occupy, as all occupations have been made. Therefore it is still capable of occupation by the first man who effects his occupation on it, and the thing will become his property. But why Grotius said that if a thing which had not yet been occupied should remain free for all and therefore ceased to be capable of being occupied is unclear. Is it because of its communal character or utility? If it is, then, perhaps, all things which have communal character should not be capable of possession at all. This, to me, is certainly not the case. Modern international law does not support Grotius' assertion in this case. The only condition for occupation in modern international law is

that "the occupied territory must have been terra nullius and that the occupation must have been real or 'effective'." ³⁹

Now Grotius, in another argument, says that one can only naturally occupy something by a "Holding fast of a physical thing", and in order to be "able to hold fast, the thing must have limit." ⁴⁰ One cannot hold a limitless thing. Therefore one can occupy only a corporeal thing, a thing with a physical limit. And he further says that not all things have this kind of limit, for instance, "the air". ⁴¹ For Grotius, the sea is also a limitless thing. Its liquid nature cannot be occupied because "there is no part of the sea which can be walked upon." ⁴² And its limitless character makes it impossible to occupy it and therefore it cannot be possessed. In Grotius' own words,

But it is the nature of liquids to be limited by some thing close, and accordingly liquids cannot be possessed except by means of that whereby they are limited, as wines is possessed by means of a vessel, rivers by means of their banks. Therefore, an unlimited liquid is not to be possessed. But of such a character of the sea.

43.

So since the sea cannot be put into a container, Grotius concludes, the sea therefore cannot be possessed.

To conclude, according to Grotius, "neither a nation nor an individual can establish any right of private

ownership over the sea itself (except inlets of the sea) inasmuch as its occupation is not permissible either by nature or on grounds of public utility.⁴⁴ Nevertheless, Grotius recognised that a part of the sea can be possessed.⁴⁵ Grotius also conceded that a state may exercise the right of jurisdiction on a sea, but this right has nothing to do with the right of property.⁴⁶ He clarifies this, by quoting Cicero, and says that seas "seem to have been created by nature for common use" because they are "not susceptible of occupation and second that its common use is destined for all men."⁴⁷ He further goes on to say that sea is a "common property for common benefit" and it "is the common property of all"⁴⁸ and by this he meant "res communis".

It was the call of Grotius - "Arise, O nation unconquered on the sea, and fight boldly, not for your own liberty, but for that of the human race"⁴⁹ - which, perhaps, excited the British rulers and writers and led to the publication of Welwod's Abridgement of All Sea Laws in 1613. This was answered by Grotius some time later but his answer was not published for a long time.⁵⁰ Welwood's work was followed by the monumental work of John Selden, Mare Clausum.

B. Mare Clausum.

The publication of Mare Liberum in 1608 raised some anxieties in England, because England was claiming sovereignty over the British seas. The first reply to Mare Liberum came from William Welwood, a Scottish lawyer, though Welwood had already published a treatise on the sea laws of Scotland "which is believed to be the earliest regular work on maritime jurisprudence printed in Britain."⁵¹

Later in 1613, Welwood added a chapter, "Of the Community and Property of the Seas". This chapter was his reply to Mare Liberum. It is surprising to note here that although Mare Liberum was directed towards the rulers of Spain and Portugal, the immediate and most serious reaction came from England. Welwood in his Abridgement, attacked the Mare Liberum saying that it was a "ridiculous pretence" and "a very pretence; and so much the more to be suspected as a drift against our undoubted right and property of fishing on this side of the seas."⁵⁴ In De Dominio Maris Welwood took the position that a distinction should be drawn between the liberty of navigation and the liberty of fishing. The coastal sea, he argued, was subject to the jurisdiction of the neighbouring state, specially in matters related to fishing, but the waters beyond were open to all nations, without discrimination, for all uses. Welwood's position seems entirely consistent with the overall rationale of the

new law of the sea; a distant antecedent of the 12-mile exclusive fishing zone which emerged in customary international law in the 1960s, and even of the recent 200-mile exclusive economic zone.⁵⁵ However, Welwood's argument that the British Seas were the property of England; because God has given them to it for its own use, has drawn the retort that "if a private man, who has only respect for his private interests, has been granted by God the right to take advantage out of nature, why not also the ruler who has the interest of the community in his mind, and the capacity to protect and to conserve the sea for the use of the people?"⁵⁶ Perhaps, in his question, he overlooks the fact that the "community" to which Grotius refers is the world community and not the community of one single state. His vision of community, here, arguably, is too narrow, for he tries to confine the community to one state and ignores the fact that "Prince" of a state is not "Prince" of the world or world community.

Unlike Grotius, Welwood argued that the development of trade and transport on the sea had resulted in the necessity that the sea be divided, "a partition in like manner with the earth". Here Welwood derives support from the Roman law, as did Grotius. But in his "common to all"

concept of classical Roman law he overlooks that it was confined to Romans and was never intended to include all mankind.⁵⁷

John Selden's famous response to Grotius was far more voluminous than the work of the other writers. His Mare Clausum: Of the Dominion or Ownership of the Sea was written on the instigation of the then English King, as a theoretical reply to the Dutch protest, i.e. Mare Liberum. Like Grotius, Selden believed that occupation was an important element for possession but he argued that "the law of God, or the divine Oracles of Holy scripture do allow a private Dominion of the Sea,"⁵⁸ and he supports his argument by the practices of Roman law.

His arguments are mainly historical. He said, "a primitive Dominion of the Sea ... is founded upon such clear testimonies, out of the customs of so many famous Nations both ancient and Modern ... nothing now, I suppose, hinder's why wee may not determine, that the sea is capable of Dominion as well as the land, not only by the Law - Natural Permissive, but also by the Law both Civil and Common of divers Nations, and in many places almost according to the Intervient Law."⁵⁹ Selden also produced

the names and arguments of the same learned writers, as Grotius did, even better and more convincing. Selden claimed, assuming those ancient writers had the same view to that of Mare Liberum, "if a diligent survey be made of the laws and customs, the result would be "far otherwise" than the opinion of those writers. Selden devoted his first book of Mare Clausum to prove this point.

With regard to the nature of the sea as an obstacle to the possession of the sea, Selden referred to rivers and fountains, which are capable of being possessed and which, to him, are not essentially different in liquidity from the sea. For Selden, there were some inconsistencies in Grotius's theories, particularly he points out the admission of Grotius that a small part of the ocean can be possessed.⁶⁰ Selden used this admission to strengthen his arguments and asserted that if a small part of the sea can be possessed, in the same way larger parts can also be possessed.

Selden concludes his book one with the following statement:

...upon due consideration of all those particulars, which hitherto have been produced out of the customs of so many Ages and Nations, and as well out of the Civil as the Common or Intervenient Law of most nations, no man (I suppose) will question but that there remain's not either in the Divine, Natural, or of Nations,

anything which may so oppose the private Dominion thereof, that it can not be admitted by every kind of law, even the most approved; and so that any kind of Sea whatever may by any sort of law be capable of private Dominion.

61

Thus Selden concludes that the sea is res nullius.

I:1:iv. Views of Modern Jurists.

We find from the earlier discussions that the history of legal thought, right from classical Romanists to the end of the seventeenth century, is full of claims and counterclaims to prove the actual legal status of the sea, as res nullius or res communis. Later, in the eighteenth and nineteenth century, however, the thoughts were changed and were more settled on the doctrine of res communis, or freedom of the seas. Modern jurists also support the same view. Hall, a great English authority in this area, said "that the key to the development of the law is to be sought in the principle that maritime occupation in order to be valid must be effective."⁶² With this, Hall intends to differentiate between territorial waters and high seas for which he supports "freedom of seas". Fauchille has neatly summed up the correct doctrine: "The

high sea does not form part of the territory of any State. No State can have over it a right of ownership, sovereignty or jurisdiction. None can lawfully claim to dictate laws for the high seas.⁶³

For Oppenheim, the ocean is res communis, as the air, and is free for all, because "it is the possession of the entire world." However, for him, the coastal State, for its own self-preservation, should have "actual maritime sovereignty: over the inner enclosures of the coasts as well as all parts of the ocean bordering on the land."⁶⁴ This doctrine was further supported and confirmed as a legal principle of International Law in 1926 at the Vienna Conference of International Law.⁶⁵ Finally, the Geneva Conference of 1958⁶⁶ confirmed the doctrine of freedom of seas (res communis) by framing four elements which were to constitute this doctrine.

I:1:v. Conclusion.

The recent developments of UNCLOS III⁶⁷ have added new dimensions to this classical theory by way of dividing high seas into seabed of the high seas and super-adjacent waters. The res communis doctrine still continues to be applicable to superjacent waters of high seas but

it is no more applicable on the seabed and its subsoil. This distinction of two parts has given a new status to the seabed which is now known as the "common heritage of mankind". This area, though free for all, is now not free for exploration and exploitation, but shall be subject to the control of a new seabed regime to be formed. Though many participants at the Seabed Committee debates and even at UNCLOS III tried to bring in this old concept for seabed regulation,⁶⁸ however, it is observed that res communis is no more a fit concept for the seabed, and that the seabed needs to be regulated by a new, precise and more effective concept, which can demonstrate more clarity in its application of the seabed management. Though we find that the status of the seabed is very near to res communis, yet it is different and not exactly res communis, which for convenient understanding may be termed quasi res communis. This is so because of the addition of new elements to the status of the seabed, such as: common heritage or common interest or common property, which perhaps does not fit into the parameters of res communis. For convenience of understanding a close analogy can be drawn with res publica, but not according to the strict classical sense of res publica.⁶⁸

I:2 The Doctrine of Continental Shelf

I:2:i. Seabed and Subsoil Resources: Early Practices and Claims.

The claims to the continental shelf are not very old in practice, because such claims were asserted only after the realization of its special utility. Though some writers believe that such assertions were first made in the sixth century B.C.,⁶⁹ there were some who claimed that the seabed had been in use for sedentary fishing as early as 2000 years ago.⁷⁰ However, it is clear that in those cases authority was asserted only over the seabed and subsoil and not on the whole sea. No formal legal claim up to the end of the eighteenth century is known to exist. The earliest of such claims to exclusive control over the seabed resources (i.e., pearls and chanks fisheries) was the British Colonial Act of 1811, which asserted dominion over the Ceylon (now Sri Lanka) seabed far beyond the limits of the three mile territorial waters.⁷¹ The British Colonial Office, later made similar additional regulations for other parts of the sea.⁷² However, some similar and older practices of pearl and chank fishing were observed in the Persian Gulf, on which the world's richest oriental pearl fisheries were located,⁷³

The Cornwall Submarine Act of 1958 is, perhaps, best of all earlier regulations to cite because this clearly stated that the "minerals won from mines" which are "below the low water mark under the open sea, adjacent to but not being part of the country", are vested in the British Crown, "as part of the soil and territorial possessions of the Crown."⁷⁴ Sir John Patteson further clarifies it and says that "the property in the bed of the sea and not merely sovereignty and jurisdiction over it was vested in the Crown."⁷⁵ In one of his celebrated writings, Sir Cecil Hurst in 1923 asserted that the Gulf of Mannar and Palk's Bay would probably be claimed as part of the national territory and not part of the high seas. Further he contended that "the claim to the ownership of the pearl and chank beds in those gulfs will be based on long usage and uncontested enjoyment."⁷⁶

Fulton in 1911 differentiated between sedentary and other types of fisheries and wrote:

... sedentary animals connected with the bottom, such as oysters, pearl oysters, and coral, which are found in the shallow waters, as a rule and usually near the coast, have always been considered as on a different footing from fisheries or floating fish. They may be very valuable, are generally restricted in extent, and are looked upon rather as belonging to the soil or the bed of the sea rather than to the high sea itself. This is recognised in municipal law and international law also recognises in

certain cases a claim to such fisheries when they extend along the soil under the sea beyond the ordinary territorial limit...

77.

This view is also confirmed by Hurst.⁷⁸

The British government, addressing the "Conference for the Codification of International Law" in 1928, asserted that:

There are certain banks outside the three mile limit off the coasts of various British dependencies on which sedentary fisheries of oysters, pearls, chanks or bêches de mer on the sea bottom are practiced and which have by long usage come to be regarded as the subject of occupation and property.

79

This assertion was made simultaneously with the claim over the belt of territorial waters, with the clarification that although it did not lay claim to the high seas, the foregoing answer was not intended to exclude claims to the sedentary fisheries on the banks. The governments of India, Australia and New Zealand also expressed similar views.⁸⁰ Young points out that in the beginning such claims by the British were based on prescription, which were later changed to claims based on property-occupation and appropriation, because of the difficulty in establishing long historical usage.⁸¹

The early nineteenth century claim did not use the term "continental shelf" because it had not then been

invented. "The need to give a special name to the frame-like rim or margin of the continents with their long, sometimes narrow, sometimes wide but hardly ever completely failing shallow-water banks, was first (1887) felt by Hugh Robert Mill, and for that purpose, the notion continental shelf was used".⁸² Franklin observes that there were differences in opinions and also in the terminology used so far as the interference of such claims with the freedom of the seas was concerned. He further writes that there were differences in the extent of claims, because the knowledge of the seabed resources and particularly of subsoil resources was meager. Thus, in his opinion 19th century claims were modest.⁸³

The first claim during the 20th century to the continental shelf resources came from Portuguese Government in 1910. The year 1916 witnessed a claim of the "Imperial Russian Government, which informed other governments that she considered the uninhabited islands north of Siberia as an integral part of Russia because they were located on and formed a northward extension of the continental platform of Siberia." In 1924, the Russian Government reasserted the same claim.⁸⁴ Franklin, rightly, questions: "Does this Russian declaration of 1916, reasserted in 1924, represent an adumbration of the present continental shelf

doctrine?" According to him, it does not. He argues that "the Russian claim was to islands rather than to the resources of the seabed and subsoil of the continental shelf." He further says that "the basis for the claim was not the continental shelf theory but the sector theory."⁸⁵ He writes this to contradict the view of Mouton, for whom Russian claims were based on continental shelf theory.⁸⁶

Franklin further strengthens his argument by referring to Professor François, who in his report on the Law of the High Seas to the International Law Commission argues that:

The rights claimed by the Soviet Union in polar waters should ... be considered in relation to the theory of sectors ... The Soviet Government has not submitted any claims on the basis of the 'continental shelf' theory nor has it replied to the claims of other states.

87

Laktine, a Soviet writer, writing in 1930, subsequently elaborated the Soviet position and confirmed that the Soviet claim was based on the 'sector theory' and not on the 'continental shelf' theory.

The event which might be considered as an

expression of interest in the resources of the continental shelf occurred in 1918 in the United States. It was then that an American reported to the U.S. government that oil was present in the subsoil of the Gulf of Mexico. This, though not heard immediately, was later considered by the American government, reflection of which can be seen in the 1935 Copeland Bill. According to this bill;

...all the waters and submerged land adjacent to the coast of Alaska ... and lying within the limits of the continental shelf having a depth of water of 100 fathoms, more or less"

89

was to be within U.S. jurisdiction.

United Kingdom - Venezuela Treaty of 1942

The first claim by states on the seabed and subsoil and in clear terms of "continental shelf" doctrine appeared in state practice in the treaty of Venezuela and the United Kingdom, which delimited the seabed and subsoil of the Gulf of Paria, situated between Venezuela and the island of Trinidad.⁹⁰ Though the term, "continental shelf", was not used, there was reference to offshore installations for the drilling of petroleum and provisions assuring freedom of navigation.⁹¹ The treaty was only to be regarded as an annexation carried out by each of the two states concerned, and was based on the idea that the seabed

is a res nullius, subject to occupation. Thus we see that the evolution of the actual doctrine of continental shelf was embodied in this treaty. However, this was not as important as the later proclamation of the United States of 1945 of President Truman, which is rightly termed in the legal history of the sea laws as a "turning point".

I:2:ii. The Truman Proclamation, the Doctrine of Continental Shelf and the State Practices.

On September 28, 1945, United States President Harry S. Truman issued two proclamations, one involving mineral resources of the continental shelf⁹³ and the other affecting fishing rights,⁹⁴ thus establishing the real beginning of the continental shelf doctrine. The Truman Proclamation was a formidable document. It laid claim to a greater submarine area than any other claim in history and one which, in view of the advanced state of technology in the United States for the recovery of oil from underseas areas gave some prospects of extensive realization of these important resources. Moreover, the proclamation was important because it represented the first expression of a philosophy in regard to the continental shelf.

A. The Truman Proclamation: A Revisit.

The proclamation concerning the continental shelf begins with three introductory recitals declaring (i) a world wide demand for new sources of petroleum and other minerals; (ii) the existence of those needed resources under the continental shelf and the technological feasibility of their exploitation either now or in the near future; and (iii) the need for a recognised jurisdiction over these resources in the interest of their conservation and potential utilisation.⁹⁵ The fourth recital, from which the legal theory of the proclamation is extracted, reads:

The exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just.

96

This assertion is supported by four arguments:-

- (i) The effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore;
- (ii) The continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it;
- (iii) These resources frequently form a seaward extension of a pool or deposit lying within the territory; and
- (iv) Self-protection compels the coastal nation to keep close watch over the activities off its shores which are of the nature necessary for the utilization of these resources.

97

According to Waldock, the first of these arguments "in terms of law seems to be a contention that it is the

nearest coastal state which has the possibility of assuming an effective jurisdiction and therefore of making an "effective occupation" of the shelf." The second argument seems to be a geographical doctrine, the third appears to be a "partly specialised geographical doctrine and partly a claim to protect resources within the United States which might be tapped from the high seas." The last argument is based on self-protection and derives its doctrinal base from the concepts of contiguous zones and territorial waters.⁹⁸

Coming back to the first of these recitals, we find that the first recital contemplates the emerging world-wide need for new resources; that is, from the world community perspective. The second recital, like the first, also refers to the existence of needed resources and the availability of technology to exploit them. Implicitly, these conditions were in terms of world community perspectives rather than from the viewpoint of a single nation. The third, unlike the previous ones, enunciated a preference for jurisdiction over these resources, purporting a recognition by the world community of the right of the coastal state to the jurisdiction over continental shelf resources. The limits and extent of the jurisdiction area are left undefined, perhaps, for order of preferences

in conservation and prudent utilization of resources.⁹⁹

Following these recitals, the proclamation declares that:

Having concern for the urgency of conserving and prudently utilizing its resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but continuous to the coast of the United States as appertaining to the United States; subject to its jurisdiction and control. The character as high seas of the water above the continental shelf and the right to free and unimpeded navigation are in no way thus affected.

100

By this the United States declared as its policy that it regards the "natural resources of subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States,..." subject to its jurisdiction and control. In the opinion of Professor Waldock this amounts to "an attempted appropriation of the actual resources and to an assertion of jurisdiction over the seabed and subsoil of the shelf in respect of the resources." Further, in his opinion restriction of the claims to jurisdiction over resources rather than over the seabed itself may be because the submarine claims previously recognised under international law have been claims to exclusive rights in particular resources and the United States Proclamation may have been framed as an extension of the same principle.¹⁰¹ Thus it appears that Professor Waldock

~~believes~~ that the proclamation is based on 'customary international law'.

In Franklin's opinion it is not based on customary international law, but on what the law ought to be. He derives his opinion from the assertions of the proclamation which emphasized what is 'reasonable and just'. Though he argues that reasonableness and justice are recognised norms in international law, and their invocation in support of the United States is justified, he says, "it is surprising that the United States did not rely upon one or more of the sources of international law in addition to the general norms of reasonableness and justice." He argues that international custom could have been invoked in view of the long history of claims by coastal states to the seabed and subsoil resources referred to above.¹⁰² He rightly concludes with the opinion that "the failure to invoke any of the customary sources of international law in support of the 'is' leads to the conclusion" that the proclamation either (a) is "an expression of what the law in regard to the continental shelf would be if other states followed the lead of the United States thereby developing a customary international law of the continental shelf, or (b) an expression, as then, of what the law ought to be.

It is true that had such a precautionary approach

been followed, it would have avoided the future confusions, which came to light after the proclamations of some other states. Later claims, certainly, would have been both clearer and more moderate, had the United States based its proclamation on, or supported it with, customary international law.

B. Jurisdiction and Control Versus Sovereignty.

There has been controversy over the term used in the operative part of the Truman Proclamation which reads that the continental shelf contiguous to the coast of the United States shall be "subject to the jurisdiction and control" of the United States. Various views have been expressed by legal scholars as to whether "jurisdiction and control" is coextensive with "sovereignty".

Koretsky, a Soviet writer, commented that the term "jurisdiction and control" has been used carefully to avoid any possible accusation by unfriendly powers that the United States was trying to become a submarine imperialist." In his view, such attempts were generally, but not completely, successful.¹⁰⁵ Selak commented that the Proclamation was "desirous of claiming something less than full sovereignty" and in his opinion, therefore, claimed only the "natural resources" of the continental shelf and not the seabed and

subsoil itself. He further writes "the territorial limits of the United States are precisely the same as before September 28, 1945, namely, three marine miles seaward from the coast."¹⁰⁶ In his view, thus, "jurisdiction and control" was distinct from "sovereignty".

Young, an American scholar, expressing a similar view to that of Selak, wrote: "President Truman's Proclamation of 1945 made no claim on behalf of the United States to 'sovereignty', 'title' or 'ownership' of the continental shelf."¹⁰⁷ Sir Cecil Hurst, while commenting on this issue, at first agreed that "the text of the Proclamation does not purport to effect any extension of the sovereignty of the United States" but later he admitted that the difference between the "jurisdiction and control" and the "sovereignty" is so small that it is almost negligible, and it is nothing but the question of renaming a particular claim. For this he says:

One cannot read this Proclamation without feeling that within the area of its Continental Shelf, the United States is claiming rights which are as large as sovereignty... if the rights claimed over the Continental Shelf and its resources were called sovereignty, they would be no more extensive than what are claimed in the Proclamation.

Professor Waldock, another English authority, agrees with the later expression of Hurst, saying that

"the Proclamation looks very like an act of appropriation."¹⁰⁹

In the view of Judge Lauterpacht also, "the United States Proclamation was an assumption of sovereignty over the continental shelf. He wrote:

...while for reasons of its constitutional law and of attachment to consistency in its diplomatic practice the United States may have resorted to a terminology intended to dispel the appearance of assumption of sovereignty, it used words and assumed powers which in fact have no other result.

110

Lauterpacht further contends that sovereignty is an "established term of a clarity transcending that of 'control and jurisdiction'."¹¹¹ Vallat has concurred, saying that

"jurisdiction and control are tantamount to sovereignty."¹¹²

Hurst, writing in the same article, again slightly differed with his earlier conclusion that the 'jurisdiction and control' in the United States Proclamation were the same as 'sovereignty' and wrote:

Hitherto it has, I believe, been generally assumed that the limit of a State's sovereignty is a vertical straight line stretching upwards and downwards ad infinitum from the starting point. Was the Continental Shelf Policy intended to introduce a new system? A system under which the limits of a State's sovereignty would be a line which made a gigantic zigzag...?"

113

Whiteman agrees with this view of Hurst. In his view, past concepts were no longer adequate for contemporary conditions. She also holds the view that the term 'sovereignty' is the connotation of 'vertical ownership' and "absoluteness" resulting in exclusive and complete and

never partial rights. She further says that perhaps this was the reason for the hesitation of the United States to use the term 'sovereignty' in claiming the continental shelf or its resources.¹¹⁴

Thus we find that this new use of the term in regard to the continental shelf (i.e. jurisdiction and control) led to the establishment of a new doctrine of the continental shelf, which became more a part of customary international law in later years by way of state practices and finally became an established principle of international law, after it was endorsed by the world community at Geneva in the Convention of 1958.

C. State Practices Pursuant to the Truman Proclamation.

A number of other States followed suit with claims closely modelled on that of the United States, and among these were nine British-protected states in the Persian Gulf.¹¹⁵ In addition to these, the United Kingdom advanced claims to submarine areas of the Bahamas and certain other dependent territories on a somewhat different formula which extended their submarine boundaries to include the continental shelf contiguous to their coasts.¹¹⁶ Australia's claim, though modelled on the Truman Proclamation, also requires special reference, for it alone clearly men-

tioned sedentary fisheries amongst the natural resources of the sea-bed falling under its jurisdiction under the continental shelf doctrine. A number of Latin American states issued declarations asserting rights to the continental shelf and went far beyond the Truman Proclamation. The Mexican proclamation asserted control over the contiguous continental shelf, describing the shelf as bounded "by the 'isobath', that is, the line joining points at the same depth (200 metres)." ¹¹⁸ Ecuador first issued a decree in 1951 which was labeled as relating to territorial waters, but which proclaimed sovereignty over the continental shelf with a precise depth limit of 200 metres of superjacent waters marking the outer edge. ¹¹⁹ This was subsequently changed in 1952 to be even more precise and emphatic - width rather than superjacent depth was specified with complete sovereignty. Ecuador also joined Chile and Peru in the Declaration of Santiago, claiming sovereignty over 200 miles in the high seas and pledged collaboration for the protection of marine resources in the area. ¹²⁰ Other countries who followed the claims with a precise width limit of superjacent waters were Costa Rica, El Salvador, Honduras, Korea and Saudi Arabia.

Other significant proclamations emanated from Argentina and Israel. Argentina issued a decree "concerning

national sovereignty over epicontinental sea and the Argentine continental shelf." It declared the epicontinental sea and continental shelf to be "subject to the sovereign power of the nation." Simultaneously, it states that "for the purpose of free navigation, the character of the waters situated in the Argentine epicontinental sea and above the Argentine Continental shelf, remains unaffected by the present Declaration."¹²¹ Israel's claim is significant for two reasons: first, they did not use the term "continental shelf", despite its widespread use and instead used the term "submarine area". Second, their claim explicitly avoided a definition of delimitation of the submarine area in terms of a precise depth or width, and instead used the criterion of the depth of exploitability. Although the Israeli proclamation does not use the term "sovereignty", no doubt is left from the language, which states that the "territory of Israel is extended" to include the seabed and subsoil of the submarine area.¹²² This clarifies its intention to claim full sovereignty.

I:2:iii. From the Geneva Convention on the Continental Shelf to UNCLOS III.

A. The Geneva Convention on the Continental Shelf.

The United Nations Conference on the Law of the Sea, held at Geneva from February 24 to April 28, 1958,

adopted four conventions. The last of the four, that is, the Convention on the Continental Shelf¹²³ is being discussed here. This instrument follows very closely, not only as to substance but also as to form, the text of the corresponding Articles of the draft prepared by the International Law Commission on the law of the sea¹²⁴ in 1956. Here, for the purpose of the study on the continental shelf doctrine, the examination of the Convention is being restricted to three expressions, namely, the "continental shelf", the "natural resources" and the "rights accorded to coastal States with respect to submarine areas contiguous to its territory."

Continental Shelf.

The definition of Continental Shelf in Article 1 of the Convention reads:

"...the term continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

125

This definition was taken in toto from the 1956 draft of the International Law Commission except that by an additional clause the same definition was extended to include the

seabed and subsoil adjacent to the coasts of islands. The definition refers to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said area. This double standard clause of the definition, though it was also present in the draft of 1956 of the International Law Commission, was in a different shape in the earlier drafts of 1951 and 1953. The 1951 draft¹²⁶ of the Commission refers to "exploitability" only and the 1953 draft¹²⁷ changed to a precise depth of 200 metres. But as the claims of states were based on different criteria, it became necessary for the Commission as well as the Geneva Conference to define the continental shelf in terms broad enough to encompass most or all of the various claims which had been made, and more particularly because the Commission found that the varied use of the term "continental shelf" by geologists is in itself an obstacle to the adoption of the geological concept, as a basis for legal regulation of the problem.¹²⁸

The effect of the definition of the Geneva Convention on the Continental Shelf was for "exploitability" clause the necessary control was presumed to a depth of 200 metres, but for control beyond that point, technological competence was to be exhibited.¹²⁹ The first criterion of 200 metres was "derived from the geological concept of the

average shelf edge", though with an understanding that in particular cases the edge of the geological shelf may occur at different depths.¹³⁰ The exploitability clause was added taking care of the rapidly developing technology with an assumption that in the near future exploitability will go well beyond the 200 metre depth.

This open-ended definition attached to definite criterion of 200 metre-depth, resulted in a vague definition. In fact it meant that if a country had technology to obtain resources from greater depth, then it could claim exclusive control over the areas it can exploit, almost without limit. In other words, the line for the delimitation of the continental shelf was left open, to be determined by the state itself, according to its technological level. This created an absolute ambiguity, because the definition failed to provide a delimiting line on a precise criterion. In any case a "fixed" definition would have been better than a "flexible" definition.

Natural Resources.

The meaning of the expression "natural resources" is defined in paragraph 4 of Article 2 of the Convention, as follows:

The natural resources referred to in these articles consist of the mineral and other non-

living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the seabed or the subsoil.

Most of the non-living resources of the seabed and subsoil are mineral resources, but the words "and other non-living resources" were added so as to include the resources such as the shells of dead organisms. On the issue of living resources it was resolved on the "basis of considerations of legal principles and practical utility"¹³³ that it was the permanent intimate association of certain living organisms with the seabed which justified giving the coastal state exclusive rights in regard to such organisms. The words "living organisms belonging to sedentary species" did not cover "all the products of 'sedentary' fisheries". Thus the permanent association of some living resources with mineral resources of the seabed and subsoil was considered and the words "organisms ... in constant physical contact" were added so that both types of resources could be exploited jointly.

The Rights accorded to Coastal States with respect to Submarine Areas Contiguous to its Territory.

Article 2. paragraph 1 accorded "sovereign rights" to coastal states for their exercise on the contin-
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shelf. The Article reads:

The Coastal State exercises over the Continental Shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

133

In the first draft of the International Law Commission, the term "control and jurisdiction" was used which was, however, changed to "sovereign rights" in the second draft of 1953 and remained so in the final draft of 1956.¹³⁴ The question of the terminology of rights to be given to coastal states in regard to the continental shelf created an extremely difficult problem. This was so because certain states desired that rights with respect to the continental shelf should affect the legal status of the waters above the shelf and the airspace superjacent to waters. It was also because of such conditions that some States, including the United States, attempted to avoid the use of the terms "sovereign rights" or "sovereignty". Subsequently this demand was dropped, when it became evident that the legal status of the superjacent waters and overlying airspace would remain unaffected by the provisions of the Articles on the continental shelf.

The Geneva Convention on the Continental Shelf was an overall success. Professor Johnson, a member of the United Kingdom delegation to the conference, while admitting the success of the Conference was highly crit-

ical of many of the procedures followed and the preparations made for the conference.¹³⁶ Professor Jessup wrote, "There are expectations that the Convention on the Continental Shelf may prove to be the most tangible success of the Conference..."¹³⁷ Arthur Dean, Chairman of the U.S.

delegation to the Conference, commented that "the Convention on the Continental Shelf adopted at the Geneva Conference represents the first worldwide accord on the subject and is highly satisfactory."¹³⁸ This is true, despite the imprecise definition of the continental shelf, it was a great success, for it brought to a great extent uniformity in the law relating to seabed and subsoil.

B. The Doctrine of the Continental Shelf: UNCLOS III.

The 1967 address of Ambassador Pardo of Malta,¹³⁹ in the UN General Assembly, once again questioned the credibility of the Geneva Convention's doctrine of the continental shelf. Ambassador Pardo proposed the declaration of the deep ocean bed as the "common heritage of mankind", beyond the national jurisdiction, and this was subsequently endorsed by the U.N. General Assembly in 1970 in the form of Declaration of Principles.¹⁴⁰

He, then, pointed out the immediate need for a universally accepted doctrine on the continental shelf, which can clearly delimit the international seabed area or the area of the

"common heritage of mankind" from the area under the jurisdiction and control of coastal states.

The UNCLOS III, which has so far run for eight sessions, has produced four documents. The last of these, an Informal Composite Negotiating Text,¹⁴¹ was produced in July 1977, during the Sixth Session. This has, however, been revised and amended in parts in the Eighth Session. Part IV of the I.C.N.T., and the same part of I.C.N.T. (Rev.1)¹⁴² in Article 76 deals with the definition of the continental shelf. Yet this is not a final document, and in particular the question of delimiting the continental shelf is one of the unresolved problems. For the purpose of this study, the relevant provisions of I.C.N.T., different proposals made at the Seventh and Eighth Sessions, and the revised version of the continental shelf doctrine, are being discussed.

According to Article 76 of I.C.N.T. Rev.1 the definition of the continental shelf is as follows:

The continental shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

The remarkable change here is that the boundary of the continental shelf, heretofore in the existing law defined by the criteria of depth and exploitability, would now be delimited by reference to "distance" from the coast. In this changed definition there is complete absence of both the earlier elements, depth and exploitability. A new ingredient of distance replaced the earlier ones, for more precise definition. According to this, the continental shelf of a coastal state extends throughout the natural prolongation of its land territory to the outer edge of the continental margin. This is purely based on geophysical criteria, and not on the factors like technology level. This trend clearly indicates the acceptance and recognition of the interests of coastal states. Further according to I.C.N.T. in cases where the shelf does not extend beyond 200 miles, the outer limit shall be deemed to be fixed at 200 miles from the baselines. This is again near a new component in definition based on "distance" criteria. Despite the fact that there is a considerable departure from the old doctrine, and that this new definition is composed of constituents based on the need of the present-day world, it is not yet, sufficiently equipped to justify the demands of the "common heritage" doctrine.

In the Seventh Session of UNCLOS III, two new

proposals were pressed, with an intention to make it more clear and precise, which were subsequently reintroduced in amended forms in the Eighth Session. The Irish formula, brought in a new ingredient, a purely geomorphological or geological factor, according to which the international seabed area was suggested to be delineated by "reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1% of the shortest distance from such point to the foot of the continental shelf slopes; or, a line ... delineated ... by reference to fixed points not more than 60 nautical miles from the foot of the continental slope."144

Another proposition, that of the Soviet Union, presented in the Seventh Session of UNCLOS III, which was subsequently amended in the Eighth Session, eliminates any reference to thickness of sediment in determining the extent of the continental margin. According to this formula, in no case would jurisdiction over the continental shelf extend "further than 100 nautical miles from the outer limit of the 200 mile economic zone." The argument in favour of the Soviet formulation was that it is easier to apply and precise. Those opposing argued that it ignored the geological bases of the continental shelf doctrine. In the Eighth Session, Soviet proposals sugg-

ested that "the line of the outer limit of the continental shelf ... must be situated at a distance either not exceeding 100 nautical miles from the line on the sea-bed, corresponding to the outer limit of the 200-mile economic zone, or not exceeding 60 nautical miles from the 2500 metres isobath, which is a line connecting depths of 2500 metres." ¹⁴⁵
This new definition was a combination of the previous Soviet and Irish formulations.

However, neither of the two proposals was accepted and a new compromise formula suggested by Ambassador Andres Aguilar of Venezuela is the final outcome of the Eighth Session of UNCLOS III; yet, it is likely to be amended before it is finally accepted. According to this formulation, wherever "the continental margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured", it shall be delineated by "reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1% of the shortest distance from such point to the foot of the continental slope, or a line delineated by reference to fixed points not more than 60 nautical miles from the foot of the continental slope." So far the definition follows the formulation of the Irish proposal. The significant breakthrough is that the fixed points

drawn according to this criterion: "shall not exceed 350 miles from the base line from which the breadth of the territorial sea is measured, or, not... exceed 100 miles from the 2,500-metres isobath, which is the line connecting the depth of 2,500 metres."¹⁴⁶

The formulation which is the final outcome of the Eighth Session of UNCLOS III and, perhaps, with minor amendments, will be the product of UNCLOS III, is a precise and very comprehensive definition. This is indeed a breakthrough in the UNCLOS III diplomacy. This formulation for the first time eliminates the vagueness of the earlier definitions, by drawing a sharp delimiting line for delimitation of the national continental shelf from international continental shelf or deep sea-bed area, at 350 miles. The quality of this formulation is that it is precise and also based on geological criteria, which are considered as the bases of the doctrine of continental shelf.

I:3. The Concept of the Common Heritage of Mankind.

I:3:1. Introduction.

Although there was a rising concern in the United Nations about the world's oceans and the seabed of

the oceans, there was very little general awareness among the general public of the fact that the ocean floor which covers 70% of the world's area is the last, and potentially the greatest, earthly geographic frontier yet ungoverned.¹⁴⁷

This concern was well reflected in a UN General Assembly resolution in 1966, which recognised "the need for a greater knowledge of the oceans and of the opportunities available for utilisation of their resources, living and mineral". It further suggested that the "effective exploitation and development of these resources can raise the economic level of peoples throughout the world, and in particular of the developing countries".¹⁴⁸

It was again out of a similar concern that the U.S. President Johnson, in 1966, said:

Under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.

149

This concern was an outcome of rapidly increasing knowledge of marine science and ocean exploration technology. Countries both poor and rich were every day becoming more and more concerned due to this race of marine exploration technology. Their fear was that, if this race of ocean

exploration is left unchecked, it might result in a new type of colonial race, in this new gigantic storehouse of immense wealth. It was with this in mind that on August 17, 1967, the delegate of Malta, Ambassador Arvid Pardo, filed a note verbale, requesting the inclusion of a supplementary item on the Agenda of the Twenty-Second Session of the General Assembly. The Maltese Proposal was entitled:

Declaration and Treaty concerning the Reservation Exclusively for Peaceful Purposes of the Seabed and the Ocean Floor Underlying the Seas beyond the Limits of present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind.

150

On August 18, the following day, an explanatory memorandum was attached. In this document, Ambassador Pardo for the first time articulated the need for the designation of the "seabed and ocean floor beyond the limits of national jurisdiction" as the "common heritage of mankind." Subsequently, he elaborated the issues involved, on November 1, 1967, before the First Committee of the General Assembly, by his epoch-making speech.¹⁵¹ He drew the attention of the Assembly to the vast riches hidden on the deep floor of the world's oceans which the technological revolution was rapidly making accessible to exploration and exploitation, and which did not belong to any nation. He pointed to the danger that military competition might further complex the problem. He saw a race developing to carve up the no-man's-land of the ocean floor in a manner that would give rise

to acute conflict and pollution, and recalled the history of the African continent. Ambassador Pardo also explained that the old law of the sea, based on the sovereignty of coastal states over a narrow belt of ocean along the coasts, and on freedom of seas, was being eroded, and suggested that a new concept, the common heritage of mankind, take its place.¹⁵²

This statement of Ambassador Pardo came when some of the jurists were questioning the rush for international control. Expounders of this approach, though, recognised the existence of a possible legal problem with regard to submarine areas beyond the continental shelf, advocating delaying the establishment of a legal regime for those areas. Northcutt Ely, an American exponent of this view, surprisingly stated:

... until enough international competition and friction develops to justify the creation of some advance licensing system by the United Nations, recognition of the flag of the craft or other surface mechanism from which the exploration is controlled sufficiently identifies the jurisdiction which ought to have plenary control over the exploration and over the exploitation of the resources so discovered.

153

Ambassador Pardo, on this, rightly pointed out that the distinguished jurist did not envisage the possibility of attempts at competitive exploitation of the same mineral

or petroleum deposits. It was out of such a concern that Ambassador Pardo urged the UN General Assembly to declare the seabed and subsoil beyond the national jurisdiction as "common heritage of mankind."¹⁵⁴

I:3:ii. The Common Heritage of Mankind: A Moral Jural or Functional Concept?

A. The Concept of Mankind: Moral and Jural Meanings and Uses:

There have been innumerable instances of the use of the term "mankind" in both general and specialised literature. Thus one must first be clear as to the precise meaning of this phrase. Here the question is what is meant by "mankind"? One common meaning expressed in different dictionaries is "the totality of human beings or race or species."¹⁵⁵ As a concept, mankind should be distinguished from that of man in general, and it should not be mixed up with "res communis omnium"; because it focuses on man as an individual, not on the state as a human agency.¹⁵⁶ According to a view on this, "what human being meant to the law, including international law, is now represented by mankind in the new dimensions of human activity; the seabeds." Further, "due to the fact that most subjects of international law are communities, it is logical that they should decide to gather in

a major community, including them all." And, juridically, this is what "is called mankind, because community as a more complete expression, can only be reflected in mankind."¹⁵⁷

This concept, though a lex ferenda, has now abundant precedent in the form of UN documents. Increasing recognition of this new international legal personality has resulted in its application to the deep seabed, for the benefit of a new subject of law, "mankind". In other ways, by this we find that every such thing which is out of the jurisdiction of states shall be inherited in perpetual succession by "mankind", without modifying the status of the state as international subject. This perhaps passes the greatest juridical sense and adds new dimensions to customary international law.

Although, politically, "mankind" as subject based on humanity appears to be a myth, "this does not prevent it from being regarded as a subject of law", because it derives its guardian for safeguarding its interests from "states and gradually from international organisations."¹⁵⁸

B. The Common Heritage: Moral and Jural Meanings and Uses:

The term "common", means, according to one of the senses found in dictionaries, "belonging to all mankind," "alike or to a community" or "to be shared jointly by all". The term "heritage"¹⁵⁹ connotes that which has been or may be inherited or property interests which can be inherited. The phrase "common heritage of mankind" thus, due to its inexactness, is capable of different meanings. And thus different states have treated it in different categories according to their language and convenience.

For Chile, the concept meant "an undivisible property with fruits that can be divided" by all States participating in sea-bed resource management.¹⁶⁰ Yugoslavia traced three invigorating elements in it: "commonwealth, common management and common and just share of benefits."¹⁶¹ The Ukraine (U.S.S.R.) were of the view that so long as States existed "with different economic and social systems" and "different forms of ownership" it was almost "unrealistic" to attempt to administer a common ownership of the seabed.¹⁶² The Belgian representative explained that his government did not recognise the concept of common heritage of mankind, though his delegation could

easily have accepted the terms of "common property", "Commonwealth", or "international public domain", because, he explained, all these constitute the same basic idea. Nonetheless, he accepted that "common heritage of mankind" represents a "moral and political complex of great value."¹⁶³ Yet another view from the Soviet Union dismisses the "common heritage" and maintains that seabed is for the "common use" of all States and people, and further asserts that every state possesses a right of access to seabed resources in accordance with the principle of sovereign equality.¹⁶⁴

Though the "common heritage of mankind" concept does not appear to be precise in its meaning and use, it has nearly global acquiescence¹⁶⁵ which places it in the category of legal concept. By this the writer does not deny that it lacks the "moral" content, rather, in this case, arguably, it can be said that the common heritage concept, when coined, was more of a moral concept. Its gradual acceptance by the international community patterned it into a legal concept. Yet, for some it is still lex ferenda rather than lex lata.¹⁶⁶

However, Dr. Pardo, who elaborated this concept, later explained that he used the term "common heritage of mankind" rather than "common property of mankind" not because he had anything against property, and said:

I don't express any opinion as to the desirability or undesirability of this ancient institution - but I thought it was not wise to use the word property. ... Property is a form of power. Property as we have it from the ancient Romans implies the ius utendi et abutendi (right to use and misuse). Property implies and gives excessive emphasis to just one aspect: resource exploitation and benefit therefrom.

167

In his view the content of the common heritage of mankind should be "determined pragmatically in relation to felt international needs." He further points out that he visualises "no alternative" than to accept it "to avoid a most serious escalation of international tensions and conflicts." 168

Ambassador Pardo, nearly ten years after the coining of the term, clarified the objectives of the doctrine at Yaounde in 1979. He says now often "common heritage" is interpreted to mean "common property" or "common sovereignty". In his view this confusion arose because the "United Nations secretariat" thought fit to translate the words common heritage into French and Spanish as patrimoine commun and patrimonio comun respectively, 169. thus establishing a non-existent bond with Roman law and

modern property law of States. For him it never contained the "ownership" element because this leads to the right of division and disposal, whereas, he clarified that in his government's view, mankind as an "organised community of States" could administer and use the area and its resources but did not own them. This meaning for his concept he derives from African systems of land tenure and the Yugoslav social property concept.¹⁷⁰

C. The "Common Heritage" as a functional concept.

Functional aspects of this concept when examined from the view-point of its operational force, can be categorised in two classes "value based" and "policy oriented" though these all have both the ingredients in them, but they are dominated by either of the two. These are, generally, split up in five functional themes. They are: (i) the areas designated as common heritage shall not be appropriated; (ii) the use of the area and resources which fall under common heritage shall be carried out by a common management system; (iii) there shall be active and equitable sharing of benefits derived from the exploitation of the common heritage area and resources; (iv) the area shall be used exclusively for peaceful purposes; (v) the area shall be reserved for future generations and used in a manner to conserve the area for future generations,

which will continue to use it in perpetual succession.¹⁷¹

Each of these themes will now be discussed separately to examine its operative force and the basis of its functionality.

I. The area and resources termed as common heritage cannot be appropriated.

This theme is value dominated. The value here is the "non-appropriation" of the area and its resources. The theory of non-appropriation means that the area and its resources shall not be annexed by way of sovereign rights or quasi-sovereign rights or even under the concept of freedom of high seas. This raises an obligation on the part of the world community not to annex and appropriate, which is common to all. The policy behind this value is that the area can be used jointly or by way of the common system, for mankind. Where mankind shall continue to use the area and resources for mankind, but still not own it, it develops a new concept of "functional ownership,"¹⁷² thus formulating a policy in which it prohibits the exercise of various kinds of rights unless otherwise permitted by international law,¹⁷³ the area shall vest in mankind as a whole, in present and future generations, for the enjoyment and use of the area and its resources functional - but not ownership - rights would be granted.

II. The use of the area and its resources which fall under common heritage shall be carried out by a common

management system.

This is a policy-oriented functional aspect of the concept. This policy is inseparable from the concept for it gives the framework of achieving the objectives of the concept by way of a national strategy. It is here that the evolution of an international machinery takes place. Management is essential, for without it, exploitation would be chaotic, due to uncontrolled rush of those members of the international community who, by accident, are the only ones equipped with needed technology.

Mrs Borgese calls for the establishment of this common management system, deriving a close analogy from the Convention for the Preservation and Protection of Fur Seals of 1911.¹⁷⁴ She says that the principle of management of the living resources of the high seas (fur seals) should be transferred to nonliving resources "just like living resources were declared common property resources, and that access, development, conservation and profits were to be controlled by the community for the common good of mankind."¹⁷⁵

III There shall be active and equitable sharing of benefits derived from the exploitation of the common heritage area and its resources.

The aspect now in question is value-dominated,

the value being equality, which in this context is the value of equitable sharing. Not a new concept of value in law or international law, but still of great significance here for its application to a new area, which so far believed more in exclusive enjoyment rather than inclusive enjoyment. The concept, borrowed from socialist philosophy, tries to amalgamate two opposite economic sharing theories, in an effort to prepare a new blend for the benefit of mankind. The value in this concept, when applied to the common heritage area and resources, gives a new system of sharing on an equitable basis, thus ultimately demanding a policy for its active application. This equitable sharing, of course, does not restrict itself to financial benefits, and it goes far beyond to the "benefits derived from the shared management and shared technology by way of transfer of technology."¹⁷⁶ Perhaps this concept can best provide an equitable international order.

IV. The area shall be used exclusively for peaceful purposes.

Here the aspect is dominated by a value very important and wide in its application - peace. Peace, for mankind, is as essential as food and other basic living materials. It is a very wide term, but here it is important to prevent the conversion of seas into "national lakes"¹⁷⁷ and avoid friction at the international level. The scope of peace here does not end at the avoidance of seabed

related concepts but it goes far further and tries to convert the area of "common heritage" into a complete frictionless area - an area of universal cooperation.

The policy behind it is to introduce complete disarmament in this area. Though apparently not realistic, still, a positive step in this direction can be seen in the Eighteen Nation Disarmament Agreement,¹⁷⁸ which prohibits the emplacement of nuclear and other weapons of man's distribution on the ocean floor. This, though a partial success, is a good beginning in the policy of achieving complete disarmament on the international ocean floor. The writer does not mean that achieving the policy of peaceful use of deep ocean bed is not without challenges, but the assertion here is that policy has achieved something.¹⁷⁹ Of course, complete realisation of a policy of reservation and use exclusively for peaceful purposes is still an issue of tomorrow. But an active involvement of the international community in this aspect is a big force, which cannot be deprived of its demand of "peace" at ocean-bed in times to come.

V. Reservation of the area for future generations.

This aspect, the last, is value-dominated, and the value is that the area of common heritage shall be

reserved for future generations in a way that it continues to pass on to the future generations. This means that it shall be an indivisible whole, which shall be the "common heritage of mankind" in perpetual succession, i.e. never to be changed in nature.

In order to be used by future generations, certainly it needs to be preserved from damages and its ecology needs to be conserved, so that it continues useworthy in future too. Here, we find that again a policy is needed, so that the area reserved can be effectively used by generations of tomorrow and so on. The view that oceans are indeterminately susceptible to accommodate any use and abuse no more holds good. The marine environment by nature is delicate, its zoological and botanical species cannot persist enough to affray the ever-increasing pollution rate. Danger to the flora and fauna of the pelagic world needs to be averted by way of a proper framework based on scientific means.

Efforts in this direction prior to UNCLOS III were negligible, save for the Convention on the Prevention of Marine Pollution by Dumping, and the Convention Preventing Pollution from Ships.¹⁸⁰ Perhaps this is a vital

ingredient of the common heritage concept so as to keep the area worthy of continued beneficial use.

I:3:iii. Conclusion.

The sea-bed and the ocean floor constitute nearly three-quarters of the land area of our planet. Existing international law of the sea not only allows but encourages the appropriation of this vast area by the few who are technically equipped with exploration and exploitation science. The resources on the sea-bed are great, equally vast as on the land. The ocean bed is vital from the strategic viewpoint also. Thus it can easily be used for both economic and military purposes. And by economic use, some countries might use their "technical competence to establish near unbreakable world dominance through predominant control over the seabed and the ocean floor."¹⁸¹

The concept of the "common heritage of mankind" is the only viable solution to avert the probable misuse of the ocean floor. Now, a well-established legal concept, is Article 126 of the Informal Composite Negotiating Text, reading: "The area and its resources are the common heritage of mankind."¹⁸² So far, international law of the sea has responded well to adjust to the rapidly changing

demands of the new world. The world community desires to reconcile the yawning gap of rich and poor, or developed and developing, as expressed in this new revolutionary concept. If successful in its objectives, the lex ferenda of today will make the world a better place for generations to come.

FOOTNOTES TO CHAPTER I

1. For meaning and explanation of the terms res nullius and res communis, see W.W. Buckland, A Text Book of Roman Law from Augustus to Justinian (1921), p.184; Frank D. Moore, The Cyclopedic Law Dictionary (1940) p.965; Potsic Cunnim, Institutes of Justinian: A Manual of Civil Law (2d ed., 1865) p.81 & 84; W.A. Hunter, A Systematic and Historical Exposition of Roman Law (1876) p.112 & 164, E. Paste, Gaius' "Institutes of Roman Law" (1904) p.127 & 160; Percy T. Fenn, The Origin of the Rights of Fisheries in Territorial Waters (1926) p.13; Douglas M. Johnston, The International Law of Fisheries, A Framework for Policy-Oriented Inquiries (1965) p.303-4; C. John Columbus, The International Law of the Sea, (6th ed. 1967); F.V. Grocia Amador, The Exploitation and Conservation of the Resources of the Sea (1959) p.18-19.
2. Buckland, ibid., p.184; Moore, ibid., p.965.
3. Ibid.
4. Fenn, supra note 1, p.3. See also Percy T. Fenn, "Justinian and the Freedom of Seas," 19 Am. J. Int. L. (1925) p.176.
5. For more historical detail see ibid.
6. Fenn, supra note 1, p.3.
7. Fenn, ibid., p.8.
8. Ibid., p.3.
9. Ibid., p.9; Paste, supra note 1, p.127.
10. Fenn, ibid., p.11.
11. Paste, supra note 1, p.162-163; Fenn, ibid., p.15.
12. Fenn, ibid., p.15.
13. In Roman Civil Law Res publica means the property of the state. See Moore, supra note 1, p.965; Fenn, ibid., p.13; Cermin, supra note 1, p.80; Hunter, supra note 1, p.45; Buckland, supra note 1, p.184.

14. "...Marcian and Justinian made the sea shore common, Celsus made it public, at any rate where the land behind was public. Paul avoided either expression and said: nullius sunt sed iure gentium maribus vacant. Neratius treated it as a sort of res nullius, though admitting, that if a building thereon came down, the acquisition will cease. For Marcian, while the litus was common, it was not iuris gentium like the sea itself." Buckland, supra note 1, p.186; Johnston, supra note 1, p.304 n.4.
15. Columbus, supra note 1, p.62 n.3; Fenn, supra note 1, p.22; Johnston, ibid., p.303; Amador, supra note 1, p.14.
16. Hugo Grotius, The Freedom of the Seas (1916) p.28.
17. Columbus, supra note 1, p.66; Fenn, supra note 1, p.22; Amador, supra note 1, p.14; Johnston, supra note 1, p.303.
18. Grotius, supra note 15, p.34; Buckland, supra note 1, p.186.
- 18a. Grotius, ibid.
19. Grotius, ibid., p.34.
20. Litora means of the shore or goods of the shore. See D.D. Simpson, Cassell's New English-Latin, Latin-English Dictionary (1968) p.348; Fenn, supra note 1, p.22.
21. Loca publica means region of public.. For loca see Simpson, ibid., p.349 (third meaning of locus which refers to loca); for publica, ibid., p.486; Moore, supra note 1, p.965 for comment on loca publica; Fenn, ibid., p.22.
22. Fenn, ibid., p.22. Quoted by Fenn from Justinian's Digest, which refers to Paulus saying: nullius sunt, sed iure gentium aeminibus vacant ... litora et loca publica in modern cedant.
23. Buckland, supra note 1, p.186; Quoted from Justinian's Digest, Book XVIII, Title 1, Fragment 51. For English Translation see: S.P. Scott, Corpus Iuris Civilis Vol. 3 (1973) p.17.
23. Fenn, supra note 1, p.22, n.8. Justinian said: litorum quoque usus publicus iuris gentium set, sicut ipsius maris ... proprietates autem eorum potest intelligi nullius esse, sed eiusdem iuris esse, cuius et

mare et quae subiacent mari, terra vel harena.
Here Justinian has made publicus a synonym for communis, though according to Fenn he differentiates elsewhere between the two.

25. Fenn, ibid., p.22, says: Quadam naturali ... et per hoc litora maris.
26. Columbus, supra note 1, p.62.
27. Amador, supra note 1, p.14. Here Amador asserted that Gaius described the sea as res nullius, but Amador has given no reference to support his view. Johnston, supra note 1, p.304, rightly points out this. Further we find that Paste (supra note 1, p.127) in "Institutes of Roman Law by Gaius" gives a contrary view and says "that the ocean, air and light are res communis. But here also it is not clear that the view was of Gaius or Paste himself.
28. Johnston, supra note 1, p.304, writes that "due to his use of terminology, however, it is not clear whether he meant by this merely that the fish were not in fact owned by anyone or that de iure they could not by their nature be appropriated.
29. Buckland, supra note 1, p.186.
30. Johnston, supra note 1, p.303.
31. Johnston, supra note 1, p.303-4.
32. Buckland, supra note 1, p.186.
33. Hugo Grotius, Mare Liberum, originally published in 1608, written in 1604. English translation by Ralph van Deman Mogoffin under the title Freedom of the Seas (1916). It has original Latin on left and English translation on right side.
34. Grotius, ibid., p.2.
35. Quoted by Columbus, supra note 1, p.62-3.
36. Grotius, supra note 33, p.5 of preface.
37. Ibid., p.7.

38. Ibid., p.27.
39. Hill Norman, Claims to Territory in International Law and Relations (1945) p.146.
40. Herbert F. Wright, Some Less Known Works of Hugo Grotius (1928) p.183.
41. Grotius, supra note 33, p.28.
42. Wright, supra note 33, p.184.
43. Quoted by Wright, ibid, p.183.
44. Grotius, supra note 33, pp.36-7.
45. Ibid., p.57.
46. Wright, supra note 40, p.205.
47. Grotius, supra note 33, p.28.
48. Ibid., p.29.
49. Ibid., p.73.
50. An English translation of the answer can be found in Wright, supra note 40.
51. Thomas W. Fulton, The Sovereignty of the Sea (1911) p.352.
52. Fenn, supra note 1, p.174.
53. William Welwood, An Abridgement of All Sea Law (1972) p.61-72 (ch. 27). This book was originally published in 1613.
54. Fenn, ibid, pp. 61-62.
55. Douglas M. Johnston, "The Scottish Tradition in International Law," (unpublished paper).
56. Welwood, supra note 53, pp.62-3. He questioned that: "...shall not the prince be acknowledged, at least with the good which that sea conserved by him, offers so directly to him?"; Hasjim Dajlal, The Limits of Territorial Waters in International Law (1977), pp. 79-80.
57. Welwood, ibid., pp.67-68.

58. John Selden, Mare Clausum, published by special command in 1935 in Latin. English translation by Marchamont Needham under the title, Of the Dominion, or Ownership of the Sea (1652). Reprinted in 1972.
59. Ibid., p.122; Fenn, supra note 1, pp.185-186.
60. Grotius, supra note 33, p.57. Grotius here admits that a small part of the sea can be possessed.
61. Selden, supra note 58, pp. 178-9.
62. Columbus, supra note 1, pp. 61-62.
63. As quoted ibid., pp. 62 and 189.
64. L. Oppenheim, International Law: A Treatise, Vol I, pp. 305-309.
65. Colombos, supra note 1, p.65.
66. 45 U.N.T.S. 82.
67. Third United Nations Conference on the Law of the Sea, hereinafter cited as UNCLOS - III.
68. S. Oda, Law of the Sea in Our Time - 1: New Developments, 1966-75 (1977) see generally. For a more detailed study see Reports of the Seabed Committee, in particular Legal Sub-Committee Reports from 1968-1973.
69. For discussion of historical developments in the law of the sea, see Fulton, supra note 51; Francois, "Second Report on the Regime of the High Seas," 2 Year Book of International Law Commission (1951) p.75 (Original in French: for English translation see UN Doc. A/CN.4/42).
70. Ibid.
71. Carl M. Franklin, The Law of the Sea: Some Recent Developments. (1959-60) p.30.
72. Fulton, supra note 51, p.697; Franklin, ibid., p.30.
73. See generally Francois, supra note 69.

74. Cecil J.B. Hurst, "Whose is the Bed of the Sea?"
4 Brit. Y.B. Int. L. (1923-24) p.34; Franklin, supra
note 71, p.32.
75. Hurst, ibid., pp. 34-36.
76. Ibid., pp. 40-41.
77. Fulton, supra note 51, pp. 696-697..
78. Hurst, op. cit., pp.40-41. According to Hurst,
"the pearl and chank fisheries in the Gulf of Mannas
were claimed from early times by the successive
Portuguese, Dutch and British masters of the neigh-
bouring territory, and there can be little doubt that
a good title to ownership of these beds can be made
out, based on long-continued occupation."
79. Stefan A. Riesenfeld, Protection of Coastal Fisheries
under International Law (1971) p.166.
80. Ibid. See also Franklin, supra note 71, p.33.
81. Richard Young, "Sedentary Fisheries and Conservation
on the Continental Shelf," 55 Am. J. Int. L. (1961) p.359.
82. M.W. Mouton, The Continental Shelf (1952) p.6. Quoted
by Mouton from Dr. Otto Kummelin, Handbuch der Ozean-
ographie (1907).
83. Franklin, supra note 71, p.33-34.
84. Ibid., p.35.
85. Ibid., p.36.
86. Franklin, ibid., p.36, n.126; see also UN Doc.
A/C.N.4/38,5 (1950).
87. Franklin, ibid., p.35; see also UN Doc.A/CN.4/17,
34 (1950).
88. W. Laktine, "Rights Over the Arctic," 24 Am. J. Int. L.
(1930) pp. 703-8; for a criticism of the sector theory
see Carl M. Franklin and Virgil M. McIntock, "The
Territorial Claims of Nations in the Arctic: An App-
raisal," 5 Okla L. Rev. (1952) p.37. Under the sector
theory the Soviet Union claimed a pie-shaped area
northward to the North Pole from the outward limits
of her territory.

89. L. Larry Leonard, International Regulation of Fisheries (1944) p. 134; Franklin, supra note 71, p.37.
90. 205 L.N.T.S. 121, Great Britain and Northern Ireland and Venezuela; Treaty relating to the Submarine areas of the Gulf; F.A. Vallat, "The Continental Shelf," 23 Brit. Y.B. Int. L. (1946), p.333; Franklin, ibid pp. 37-38.
91. 205 L.N.T.S. 121, ibid. pp.124 and 126 (Article 6&7).
92. Vallat, supra note 90, p.333.
93. Presidential Proclamation No 2667, 28 Sept./1945, 10 Federal Register 12303; reproduced in 40 Am. J. Int. L. (1946) Supp. 45-8; B. Macchasney, Recent Developments in the Law of the Sea, International Law Situation and Documents (1956) p.140.
94. Ibid 10 Federal Register 12304; Macchesney, ibid., p.410.
95. For a detailed discussion on these recitals see, C.H.M. Waldock, "The Legal Basis of Claims to the Continental Shelf," 36 The Grotius Society (1951) p.123-4; Cecil J.B. Hurst, "The Continental Shelf," 34 The Grotius Society (1949) p. 153; Franklin, supra note 71, pp. 38-39.
96. Truman Proclamation, cited supra note 93.
97. Ibid.
98. Waldock, supra note 95, p.124; Franklin, supra note 71, p.42-3.
99. Franklin, ibid., p.39.
100. Truman Proclamation, cited supra note 93.
101. Waldock, supra note 95, p.125.
102. Franklin, supra note 71, p. 40.
103. Ibid.
104. Majorie M. Whiteman, "Conference on the Law of the Sea: Convention on the Continental Shelf," 52 Am. J. Int. L. (1953) p.629 at 636.
105. As quoted by Franklin, supra note 71, p.44.

106. C.B. Selak, "Recent Developments in High Seas Fisheries Jurisdiction Under the President's Proclamation of 1945," 44 Am. J. Int. L. (1950) p.680.
107. Richard Young, "Recent Developments with respect to the Continental Shelf," 42 Am. J. Int. L. (1948) p.843 at 850. Young related the language of the Truman Proclamation to the century-old Guano islands and said that "at the discretion of the President of the United States he considered it as appertaining to the United States."
108. Hurst, supra note 95, p.149.
109. Waldock, supra note 95, p.128.
110. H. Lauterpacht, "Sovereignty Over Submarine Areas," 24 Brit. Y.B. Int. L. (1950) pp. 413-414.
111. Lauterpacht, ibid., at pp. 389 and 392.
112. Vallat, supra note 90, p.336.
113. Hurst, supra note 95, p.149.
114. Whiteman, supra note 104, p.629 at 636.
115. Macchesney, supra note 93, pp. 489-90.
116. The Order in Council for British Guiana, 1959, which is typical of all claims, provides: "2. The boundaries of the colony of British Guiana are hereby extended to include the area of the continental shelf being the seabed and its subsoil which lies beneath the high seas contiguous to the territorial waters of British Guiana. 3. Nothing in this order shall be deemed to affect the character as high seas of any waters above the said area of the continental shelf." [Macchesney, ibid., p.490]. See also Mouton, supra note 82, pp.257-259.
117. There was a confusion over the issue that the proclamation issued on 10 Sept. 1958 by Australia did not refer to sedentary fisheries. It reads: "... Australia has sovereign rights over the seabed and subsoil of (a) continental shelf contiguous to any part of its coasts..." [Macchesney, ibid., p.442.]

Non specification of a precise limit in the Australian proclamation was puzzling in view of the fact that con-

temporaneously with the publication of the two proclamations an Act was passed by the Australian Parliament amending the Pearl Fisheries Act of 1952. This Act did define the continental shelf of Australia as "to a depth of not more than 100 fathoms." [D.P. O'Connell, "Sedentary Fisheries and the Australian Continental Shelf," 49 Am. J. Int. L. (1955) p.186, note 11; L.F.E. Goldie, "Australian Continental Shelf Legislation and Proclamations," 3 Int. & Comp. L.Q. (1954) p. 535; D.P. O'Connell, "Problems of Australian Coastal Jurisdiction," 34 Brit. Y.B. Int. L. (1958)-p. 199.]

118. U.S. Naval War College International Law Documents 1948-49 (1950) p.185.
119. MacChesney, supra note 93, p.456.
120. U.S. Naval War College, supra note 118, pp. 188-192; MacChesney, ibid., p.264.
121. U.S. Naval War College, ibid., p.187; MacChesney, ibid., p.441. Franklin, supra note 71, p.58. The Argentine Republic Presidential Decree 11 Oct. 1946, said that "the United States had issued a declaration asserting sovereignty over the peripheral epicontinental seas and continental shelves." This statement is clearly in error, as a careful reading of the Truman Proclamation will show. Yet, the Decree indicates that Argentina was considering the United States claim to "jurisdiction and control" as being equivalent to a claim of "sovereignty".
122. MacChesney, ibid., p.475... See Proclamation of 3rd Aug. 1952, provision 1 and Submarine Area Laws Provision 1(a); Waldeck, supra note 95, p.115; Franklin, ibid., p.58.
123. 499 U.N.T.S. 312; 15 United States Treaties and Other International Agreements (1964) Part I, No. 5578, p.471-75; 52 Am. J. Int. L. (1958) p.585; U.N. Doc. A/CONF.13/55. In the final vote the Convention was adopted by 53 votes in favour, 3 against, with 23 abstentions.
124. The study of the "Continental Shelf" was first undertaken by the International Law Commission as part of

- the general topic of the "Regime of the High Seas." The first draft was prepared in 1951, which was submitted to the governments involved. Subsequently a second draft was prepared in 1953, on the basis of comments of government. This was again changed in 1956 before its submission to the UN General Assembly. For detailed discussion see Amador, supra note 1, pp. 108-116. For 1956 draft see: GAOR, 11th Session, Supp. No. 9 (A/3159). The 1951 draft is in the report covering the work of 1951 [UN Doc. A/1858, pp. 23-25]. The 1953 draft is in the report covering the work of the fifth session of 1956 [UN Doc. A/24 pp. 13-17.].
125. Supra note 123, Article 1 of the Convention on the Continental Shelf.
 126. Supra note 124. For comments see: Whiteman, supra note 104, p.629; Amador, supra note 1, p.109; MacChesney, supra note 93, p.19; J.A.G. Gutteridge, "The Regime of the Continental Shelf," 44 The Grotius Society (1958) p.77. Though a third element of "adjacency" was present in definition, it is not referred to in the text because it was common and a constant element in all definitions.
 127. Supra, note 124.
 128. The most exact geological definition of the term is probably that adopted by the International Committee on the Nomenclature of Ocean Bottom Features, which is as follows: "The zone around the continent, extending from the low waterline to a depth at which there is marked increase of slope to greater depth. Where this increase occurs, the term shelf edge is appropriate. Conventionally, its edge is taken at two hundred metres, but instances are known where the increase of slope occurs at more than two hundred feet or less than sixty five fathoms." [Gutteridge, supra note 126, pp. 79-78.] This definition shows that the geological definition was itself quite unclear and uncertain.
 129. Arthur H. Dean, "The Geneva Conference on the Law of the Sea: What was Accomplished," 52 Am. J. Int. L. (1958) p. 607 at 620.
 130. Philip C. Jessup, "The Geneva Conference on the Law of the Sea: A Study in International Law Making," 52 Am. J. Int. L. (1958) pp. 733-734.

131. Supra note 123.

132. Whiteman, supra note 104, p. 629 at 636-9; Jessup, supra note 130, p.733 at 726.

133. Supra note 123, Article 2, para. 1.

134. Supra, note 124; for a comment see Amador, supra note 1, p. 117 and Whiteman, supra note 104, 629 at 635.

135. Whiteman, ibid., p.336.

136. D.H.N. Johnson, "The Preparation of the 1958 Geneva Conference on the Law of the Sea," 8 Int. & Comp. L. Q. (1950) p.122 at 143.

137. Philip C. Jessup, "The United Nations Conference on the Law of the Sea," 159 Colum. L. Rev. (1959) p.234 at 251; Jessup, supra note 130, p.730.

138. Dean, supra note 129, p. 607 at 619.

139. UN Doc. A/6695 (1967).

140. UN General Assembly Res. 2749 (XXV) 25 GAOR, Supp. 28 at 24; UN Doc. A/8028 (1970).

141. UN Doc. A/CONF.62/WP 10, 15 July, 1977 (I.C.N.T.).

142. Revision 1, I.C.N.T., A/CONF 62/W.P. 10/Rev. 1, 25 April 1979.

143. I.C.N.T., Article 76.

144. Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)" 73 Am. J. Int. L. (1979) p.1 at 19.

145. Oxman, ibid., at p.20. Soviet Proposal (Seventh Session): "Where the Continental margin does not extend beyond the confined of the 200 miles economic zone, the edge of the continental shelf will lie along the outer limit of the economic zone. 2. In cases where the edge of the continental margin extends less than 100 miles beyond the outer limit of the 200-mile economic zone, the continental shelf of the coastal state will be determined on the scientifically sound geological and geomorphological data. If such data are not available, the outer edge of the Contin-

ental Shelf will be determined in accordance with paragraph 3(b) of the Irish amendment ("not more than 60 nautical miles from the foot of the continental slope") on the understanding, however, that the edge of the continental shelf shall not under any circumstances be fixed at more than 100 miles beyond the outer limit of the 200-mile economic zone. 3. Where the continental margin extends beyond the 100-mile strip adjacent to the 200-mile economic zone, the edge of the continental shelf will be fixed at a distance of 100 miles from the outer limit of the economic zone." For the Soviet proposal in Eighth Session of UNCLOS III, see proceedings of the Negotiating Group - 6, 18 April 1979. cf: Irish proposal. ibid.

146. UN Doc. A/CONF 62/L.33, 26 April 1979 (Eighth Session, Geneva, 19th March to 27th April 1979.)
147. "Panel Discussion on: Whose is the Bed of the Sea?" 62 Am. Soc. Int. L. (1968) p.215 (Hereinafter cited as "panel discussion").
148. 21 GAOR, UN General Assembly Res. 2172 (XXI), 6th Dec., 1966. For a study on potentials of ocean space see Elisabeth Mann Borgese, The Drama of the Oceans (1975); Hugh M. Bowen, "Human Capability in Water," 4 Marine Technology Society (1968) p.265.
149. Statement of President Lyndon B. Johnson on July 13, 1966, at the Commissioning of the Research Ship Oceanography, Vol II Public Papers of the Presidents: Lyndon B. Johnson 1966 (1967); see also statement of the U.S. Representative to U.N.O., Arthur J. Goldberg, "U.S. Calls for UN Committee To Develop Principles for Cooperative Exploration and Use of Ocean Floor", 57 The Department of State Bulletin (1967) p.723; and Clark M. Eichelberger, "The UN and the Bed of the Sea," 6 San Diego L. Rev. (1969) p.339.
150. 22 GAOR, UN Doc. A/6695.
151. 22 GAOR, First Committee, UN Doc. A/C.1/P.V. 1515-1516, Nov. 1, 1967.
152. Ibid.
153. Ely Northcutt, "The Laws Governing Exploration of the Minerals Beneath the Sea," 2 Marine Technology Society

- (1966) p. 337 at 378; A. Pardo's speech, supra note 151 at p.9 (Ambassador Pardo quoted and commented upon Ely's statement); Also see, Ely, 53 Proceedings of the I.L.A. (1969) pp. 212-6.
154. Supra note 151, p.9.
155. Vol 4, M The Oxford English Dictionary, 13 Volumes (1961) p. 127 defines mankind as "human beings in general"; Webster's Third New International Dictionary Unabridged (1971) p.1376, says that mankind is the "totality of human beings or beings"; Black's Law Dictionary, 3rd ed. (1933) refers to mankind as a "race or species of human beings". The theme of these expressions can be summed up by saying that mankind means "the aggregate of all human beings".
156. Aldo Armando Cocca, "Mankind as a New Legal Subject: A New Juridical Dimension Recognised by the United Nations," 13 Colloquium L. Outer Space (1971) p.211 at 212-3; Cocca clearly differentiates between "omnium" and "mankind" and suggests that the word "humanitas" used in res communis humanitas is more close and almost the same as mankind. By this he attempts to establish that "mankind" has a specific meaning which is wide enough to be applied to the totality of human beings. For more comprehensive discussion see Stephen Grove, "The Concept of Common Heritage of Mankind: A Political, Moral or Legal Innovation," 9 San Diego L. Rev. (1971-72) p.390 at 392.
157. Cocca, ibid., p.214.
158. Ricardo Maqueda, "Something more about Humanity as a Subject of Law," 13 Colloquium L. Outer Space (1971) p.215 at 217.
159. Oxford Dictionary, supra note 155, Vol II 'C', p.688 (1st meaning, sense (a)); Webster's Dictionary, supra note 155, p.458; Black's Law Dictionary, supra note 155. It does not refer to word "common" exclusively, but on the term "Common Right" it means as "appertaining to and enjoyed by all equally in common."
160. U.N. Doc. A/C.1/PV.1755, at 12 (1970).
161. UN Doc. A/C.1P.V. 1784, at 28 (1970); see also Jovan Djardjevic, "The Social Property of Mankind," Ed. Elisabeth Mahn Borgese, Pacem in Maribus (1972).

162. U.N. Doc A/C.1/P.V. 1602 at 53 (1970).
163. U.N. Doc A/C.1/PV1788 at 24 (1970).
164. M.I. Lazarne, "Scientific-Technological Progress and the Search for Legal Regulation of Possible Seabed Uses," 3 Ocean Devel. & Int. L. (1975) p.75 at 78-85; E.E. Joyner, "Towards a Legal Regime for the International Seabed: The Soviet Union's Evolving Perspective," 15 Va. J. Int. L. (1961) p.871 at 872-879.
165. Every new concept, before it gets recognition as a legal concept, has to get recognition of the subjects directly or indirectly, before it can be applicable on those subjects. On this Maquenda, rightly, comments by saying "If we appeal to the help of the History of Law and go back to its origins, we shall be able to see that protests has been the primary notion" to every new arrival of concepts. He derives his arguments from the primitive law of marital relations and observes that during the evolution of law relating to marital status it was objected, protested, but gradually new values and new concepts were accepted, resulting in the formation of new law. He uses this analogy with "common heritage" and says it is foreign to the present society, therefore it is being protested, but its gradual acceptance will give it the shape of a legal concept. [supra note 158, p.217.]
166. R.P. Arnold, "The Common Heritage of Mankind as a Legal Concept," 9 Int. L. (1975) p. 153.
167. Borgese, supra note 161, pp. 161-2.
168. Arvid Pardo, "An International Regime for Sea-Bed: Developing Law or Developing Anarchy," 5 Tex. Int. L. Forum (1969) p. 204 at 211.
169. Arvid Pardo, "Ocean Management and Development", Pacem in Maribus, Yaounde (Jan 1979) unpublished paper. Ambassador Pinto, while explaining and commenting on the "common heritage" concept in Dec. 1978, said: "The minerals of the deep seabed, which are beyond national jurisdiction, have been declared to be the common heritage of mankind. This means that those

minerals cannot be freely mined. They are not there, so to speak, for the taking. The common heritage of mankind is a common property of mankind. The commonness of the common heritage is a commonness of ownership and benefit. The minerals are owned in common by your country and mine, and by all the rest as well. In their original location, these resources belong in undivided and indivisible share, to your country and to mine, and to all the rest ... to all mankind, in fact, whether organized as States or not. If you touch the nodules at the bottom of the sea, you touch my property. If you take them away, you take away my property." [C.W. Pinto, "Simplification as a Strategy for Facilitating Agreement: A Statement," Proceedings of Workshop : Alternatives in Deep Sea Mining (1978), unpublished.]

Perhaps, when Pardo referred to the misinterpretation of the "common heritage" concept as "common property", he intended to answer the view of C.W. Pinto, Chairman of Committee I of UNCLOS III.

170. Pardo, ibid; on the concept of "social property", see Djardjevic, supra note 161.
171. Elisabeth Mann Borgese and Arvid Pardo, New International Economic Order and the Law of the Sea (IOI, Occasional Papers 4) p. 10.
172. Ibid.
173. Arvid Pardo, Foreword, 14 San Diego L. Rev. (1977) p.156.
174. For the text of the Convention see Charles I Evans, comp., Vol I Treaties And Other International Agreements of the United States of America (1775-1947) p.804.
175. Elisabeth Mann Borgese, "Towards an International Regime," 5 Tex. Int. L. Forum (1969) p.218 at 224.
176. Borgese and Pardo, supra note 171, p. 10.
177. Pardo, Panel Discussion, supra note 147, p.216 at 223; Caliborne Pell, ibid p.236.
178. 10 I.L.M. (1971) p.145.
179. On the military significance of the deep sea-bed to the naval powers, see M.W. Janis, Sea Powers and the Law of the Sea (1976) p. 145.

180. For Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (1972) and the International Convention for the Prevention of pollution from Ships (1974) see M. Nordquist & R. Churchill, eds., New Direction in the Law of the Sea (1975) p.331 and 454.

181. Pardo, Panel Discussion, supra note 147, p.216 at 228.

182. UN Doc. A/CONF.62/W.P. 10, 5th July 1977 (I.C.N.T.) Article 136.

CHAPTER II

THE COMMON HERITAGE OF THE DEEP-OCEAN BED

AND THE USES OF ANALOGY

II:1:i International Spaces and the Use of Analogy:
An Introduction

The legal concepts applicable to the ocean floor, air space and outer space and the polar regions are concerned with particular types of geographic areas. They all take into account the special physical characteristics of the area in question, the limited forms of human activity beyond national jurisdiction that can be engaged in, and the advanced technology required to carry on such activities. Although maritime law has been evolving for centuries, the law relating to the deep ocean bed is relatively new. This sector of the law of the sea is, then, contemporary with the development of air and space law and the law of polar regions.

Legal developments in all three areas are directly related to the recent developments in technology which have made all these areas more accessible in the present-day world.¹ Obviously, the growth of technology has generated new perplexities for mankind. The issues at stake have been numerous, involving peace, security, sovereignty, economic exploitation and exploration, strategic uses and resource management in the common interest of mankind. The present technology has placed us at a point where now we realise:

the necessity of the elaboration of further common rules. A generally accepted concrete delimitation of national spaces and international spaces, ... the maintenance of the balance of power in international spaces, the establishment of new international institutions... necessity of adopting a multilateral treaty on international spaces.

2.

A scholar as early as 1959 envisaged that "agreement on space ... could set a pattern for multilateral cooperation in other space activities." He further pointed out that "through their partnership in airspace nations can learn the ways of meaningful cooperation on earth."³ This goal of cooperation was again stressed through the Outer Space Treaty of 1967 which says, "State parties ... shall be guided by the principle of cooperation and mutual assistance."⁴ The central concept behind all this is the principle of universality, or that of "common interest". As noted in the previous chapter, the latest version of this fundamental principle is that of the common heritage.

We find the development of similar concepts in polar spaces and particularly in Antarctica, rather than the Arctic. The Arctic is an area consisting of an ocean basin, predominantly ice-covered, surrounded by the land

masses of Canada, Alaska and Eurasia. The Arctic is a strategic area and the Arctic basin will 'serve as a 'no-man's-land' in any future wars."⁵ As for the Antarctic, British Prime Minister MacMillan, during his 1958 visit to Australia, stressed the need for the internationalisation of that polar region.⁶ In the Antarctic, too, we find an element common to that of outer space and ocean bed areas, that is, the common interest of mankind.⁷

For the purpose of this study only Antarctica will be discussed, because the Arctic is generally a frozen sea and not a land mass, and thus its legal status is more akin to the legal status of the high seas. Further, it does not, at present, present any significant problem except the question of its use exclusively for peaceful purposes. Antarctica, however, due to its increased substantial value in the recent past, has become a question of considerable controversy. Thus it needs to be examined, for the possible applicability of concepts of universal nature for its conservation, management and use in the interests of mankind.

The purpose of this study is to locate and

examine the universality of the new emerging concepts of international law. The analogy between the concept of the common heritage of mankind, as embodied in the present developing law of the deep ocean bed, and that of common interest in outer space and Antarctic will give us a more vivid illustration of the potential utility of the concept of the "common heritage of mankind" for governing the areas of these international spaces. Certainly, as Jenks has observed, "it will not suffice for us to approach the problem from the angle of any particular political or economic system, cultural outlook, or legal tradition."⁸ We have to approach the common heritage issue with a clear view of present day technology and its future role in the harmonization of conflicting interests.

If we examine the three international spaces currently under discussion, we find that there are several issues which are similar and need the same basic conceptual approach for resolving the problems in question, though it is conceded that these areas also are different in several important respects. Yet we find at least one factor common to these spaces; the need for fabricating an international regime based either on the concept of "common heritage of mankind" or on a close analogy. This arises from the need to promote the use of certain values,

which are cherished by modern society. It is the building up of a new transnational legal order which shall be composed of universally accepted, morally high and functionally sound jural principles, viz peaceful use, co-operation, common benefit, sharing of proceeds, and as far as possible global management.

The establishment of the international regimes of the high seas, Antarctica, and outer space has created a basic distinction between national spaces and international spaces in modern international law. This is in contrast to the laws of territorial waters, national sovereignty on land and national air space. The law of international spaces is based on a system for allocating exclusive and inclusive authority over each area and its resources.⁹ Accordingly, each area poses problems of delimitation and raises questions about the priorities of the various base values involved. In the first part of this chapter a comparison is drawn between the deep ocean bed and outer space and then the deep ocean bed and Antarctica.

II:1:ii The Common Heritage of Deep Ocean Bed and Outer Space (including the Moon and other Celestial Bodies).

A. The Problems of Delineation: An Analogy.

The orbiting of the first satellite in 1957 was internationally recognised as man's initial penetration of "outer space". At this time the existing concepts of sovereignty, as expressed in international conventions, referred only to a state's rights in its "air space".

This indicated the necessity for developing a body of laws to accommodate activities in the regions beyond. The development of such a body of laws has generated considerable discussion among jurists concerning the distinctions between air space and outer space. The regions superjacent to the earth's surface have been classified by scientists according to their various physical characteristics. However, "the legal profession has provided no comparable system of identification."¹⁰

In the past various boundary proposals have been made - some were based on maximum height attainable by aircraft, some based on geophysical or astronomical constants, and some others argued for the establishment of a multiple number of boundaries or zones.¹¹ Another approach relates the proposals to the aerial conventions. For some the use of such words as "air" or "atmosphere" in those conventions has functioned as a criterion for allocating sovereignty.¹² We thus find that with the

continuous development of technology the limits of national air spaces have been receding upwards. The factor of science and technology advancement is vital and it creates new problem areas for juristic consideration in revisiting the existing laws.

The technological factor holds good for the law relating to submarine areas also. Until recently one of the criteria for the delimitation of the ocean-bed was "exploitability"¹³ that is, technological competence. However, the declaration of the deep ocean-bed to be the common heritage of mankind necessitated the need of freezing ever-creeping limits of jurisdiction, on which UNCLOS III is still working. Similarly, as the deep ocean bed has been divided into international ocean-bed and national continental shelf based on geological criteria, air space and outer space are also now divided by some jurists on the basis of the physical characters of the air and outer spaces. This change in trend is, evidently, due to the never-ending progress of science and technology. It is therefore recommended that the rationale of delimitation of international spaces should be based on physical characteristics rather than on technological factors. This new approach is also viable as a functional criterion of delimitation.

For the first time the extent of national airspace was indicated in the Paris Convention of 1919 on Aerial Navigation. According to Article 1 of the Convention, every state has "complete and exclusive sovereignty over the air space above its territory." Thus the territorial sovereignty of every state extended to its superjacent air space. The Paris Convention further recognised the territorial sovereignty of the subjacent state over the air space above all national areas including both land territory and territorial waters: "For the purpose of the present Convention, the territory of a State shall be understood as including the national territory ... and the territorial waters adjacent thereto."¹⁴

This practice was subsequently adopted by the Soviet Union in the Soviet Air Law Code of 1935. Article 1 of the Code reads: "the Soviet Union has complete and exclusive sovereignty over the airspace above its territory."¹⁵ Similarly the United States Civil Aviation Act of 1938 states that "the United States has complete and exclusive sovereignty over the air space above her territory."¹⁶ This practice was later adopted as a rule by the Chicago Convention of 1944 on International Civil Aviation. Article 1 of this Convention states: "The Contracting

States recognize that every state has complete and exclusive sovereignty over the air space above its territory." Further, in Article 2 the Convention provides: "...the territory of a state shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty...of such State."¹⁷ Thus, finally, a rule that sovereignty of the subjacent state extends to the air space above the surface of all the national areas was established. It was further reaffirmed in the Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone. This has been again reasserted in UNCLOS III.¹⁸

It is important here to note that outer space is superjacent to both national air space and international air space. National air space as discussed above is subject to sovereignty, whereas the international air spaces above high seas and polar regions have a similar legal status to that of high seas and not the legal status of deep ocean bed.¹⁹

The legal status of outer space is more like the legal status of the deep ocean bed. The delimitation of outer space and air space involves the delimitation of national air space and outer space and international air space and outer space. Article 2 of the Outer Space Treaty prohibits sovereignty over

outer space, in contrast to the Convention on International Civil Aviation,²⁰ although it is in conformity with the recognition of the freedom of aviation in international air space above the Antarctic and high seas. The Outer Space Treaty recognises the freedom of exploration in outer space,²¹ but does not delineate outer space and air space. The necessity of the delimitation of air space and outer space was emphasized in 1970 in the U.N. General Assembly Resolution No. 2733. This requested the Committee on the Peaceful Uses of Outer Space to formulate a definition of outer space,²² because delimitation of outer space from air space depends on the definition of outer space.

The interests of the subjacent states, in claiming high limits of national air space is similar to that of the Coastal States in claiming extensive areas of seabed under the regime of continental shelf. Interests of coastal states in deep ocean beds are based on security considerations as well as economic exploitation, whereas the interests of states in securing higher limits of national air space are motivated by security considerations only. In contrast to this, the interests of the international community require low limits of national air space. According to Jenks, this conflict of interests

is vital in the determination of the limits of national air space and outer space. He says that "a sharp divergence of view concerning both the principle and its application must be expected between those for whom the primary consideration is to secure the greatest possible measure of freedom in space and those for whom the primary consideration is to secure a maximum of national control for security or other reasons."²³

Jessup and Taubenfeld are of the opinion that the "...exosphere ... is the limit to which it is possible to fly instrumentalities deriving their support from the movement of air (or gas) molecules, for example balloons and traditional aircraft. Such a limit might extend no more than 25 miles above the earth ... It is, however, below that at which satellites can orbit for extended periods due to the insistent pull of gravity and the drag induced by the atmosphere."²⁴ The lowest orbiting height of spacecraft is 90 miles and the upper flight height of aircraft is 25 miles, thus, the limit of outerspace shall be between 25 and 90 miles. According to physical characteristics air space changes its constituent character in the ionosphere, that is, at the height of 50 miles, and goes on up to 400 miles. Thus scientifically outer space begins from 50 miles (80km.).²⁵

The harmonization of the abovementioned two factors of delimitation is discussed by McDougall, Lasswell and Vlasic; according to them, "the extension of national sovereignty to very high altitudes ... would grievously interfere with all uses of space, ... a temporary upper boundary could be set high enough to provide reasonable protection for traditional air space uses..."²⁶ They are further of the view that the criterion of delimitation has to be such as to reconcile the interests of an international regime of outer space and the national regimes.

Here we once again find that it is the functional factors which determine the airspace or outer space limit. They are likely to increase the limit with the development of science and technology. This is quite similar to the exploitability criterion of delimitation of the continental shelf of the Geneva Convention on the Continental Shelf. But, as it was considered necessary to have a precise and definite criterion for continental shelf delimitation, it is also considered necessary for outer space. A scholar gives two reasons for a precise and definite delimitation: "... the imminent use of the space shuttle, which will provide a vehicle for use in outer space... the second is the claim of equatorial states

to sovereignty over the geostationary orbit."²⁷ Another view supports functional for the definition of outer space and says: "Of the several boundaries between air space and outer space as proposed by the advocates of spatial scientific approach, the most outstanding and the widely accepted one is that the upper limit of air space lies at the altitude where aerodynamic lift is exceeded by centrifugal force (at about 84 kilometres above the surface of the earth) and that the lower limit of outer space lies at the lowest altitude at which satellites can be maintained in orbit around the earth (at about 90 kilometres above the surface of the earth)."²⁸

In the delimitation of the boundary both between outer space and national air space and between the deep ocean bed and continental shelf it is necessary to choose between the "physical characteristics" and "functional" criteria. On the issue of delimitation of the deep ocean bed and continental shelf, previously both criteria were applied, but due to the rapid expansion of technological capability it became increasingly difficult to apply the "functional" criterion ("exploitability"). Thus, UNCLOS III is still negotiating to change it to a criterion based on physical characteristics.²⁹

Similarly, on the issue of delimitation in cosmic spaces, there had been a tendency of jurists to delineate outer space from air space on the basis of the "functional" criterion. But recent trends show that, interpretation of the "functional" criterion is based on physical characteristics - that is, the altitude where the gravitational pull of earth ends, and where spacecraft can orbit around the earth. Now, we find that when jurists examine the question of delimitation of outer space and air space, they often look to the need for such delimitation and subsequently base their arguments on the increasing activities of mankind in outer space, professing that outer space should be used for the common benefit or interest of mankind, as is the case with the deep ocean bed.

The celestial bodies have been dealt with in a somewhat different manner in the Outer Space Treaty. The entire space beyond the airspace of earth is generally considered as outer space, including the land masses of celestial bodies. The Outer Space Treaty, Article IV, says: "The Moon and other celestial bodies shall be used by all State Parties ... exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and

the conduct of military manoeuvres on celestial bodies shall be forbidden." But in the same article, the Treaty, discussing outer space including celestial bodies, says: "State parties ... undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, .. or station such weapons in outer space in any manner."³⁰ It is clear from these that in outer space two distinct regimes have been created, one deals comprehensively with outer space including other celestial bodies, the other deals with the regimes of celestial bodies only. Here the bodies are delineated from the rest of outer space. These special conditions are akin to the conditions in the regime of the deep ocean bed.

B. Area in Question: Outer Space Celestial Bodies and Deep Ocean Bed.

I. Inclusive Use.

The outer space, including celestial bodies, according to the Outer Space Treaty shall be free for inclusive use by all state parties. According to Article 1: "Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and ... there shall be free access to all areas of celestial bodies."³¹ The Treaty further emphasises that scientific

exploration shall be an inclusive use.

Further, to discourage and prohibit the possibility of exclusive use, the Treaty says: "Outer space including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation or by any other means."³²

The special considerations for celestial bodies as discussed earlier form a separate regime for them. Therefore, the limits of use which shall be "inclusive" by its nature shall resemble the regimes of earth's international spaces. According to Professor Cheng "each planet or star that possess an atmosphere ... has its own airspace, each airspace being coextensive with the corresponding atmosphere. Outer space and interstellar space means space between the innumerable planets and stars, beyond their respective atmospheres where these exist."³³ Evidently, it is clear that for the purpose of the use, the area has been divided and the "air space of celestial bodies" has been categorized with the celestial bodies.

The concept of inclusive use in outer space was first encouraged by the United States when on

13 January 1958 the United States suggested the establishment of an international regime in the cosmic spaces.

This was followed by the Soviet Union on 15 March 1958, when she suggested the elaboration of the principles concerning the regime of outer space. Both states rejected the idea of sovereignty in outer space, thus establishing the freedom of use, or inclusive use. The rejection of sovereignty was the rejection of the claims of exclusive use.³⁴

International law recognises the inclusive competence of states in order to secure an equitable public order in space. McDougal, Lasswell and Vlasic are of the opinion that, "all the traditional, technical requirements have been met for establishing a customary prescription that access to, and the use and enjoyment of, outer space are the inclusive rights of all people on the basis of complete equality." They further say: "Just as no single state has ever been able to dispose of the effective power permanently to close the vast expanses of oceans to other states' ... so also it would appear that no single state will be able soon, if ever, to impose upon other states its own comprehensive, exclusive public order in the domain of space and that the

cooperation of the many different states will be required for the most productive exploitation of the new resources."³⁵

Inclusive use and competence is necessary "because of our concern with the interplay between authority and control, on the one hand, and the surrounding facts of the social context on the other."³⁶ By way of inclusive participation, use, and authorized control on competence, the intention is to establish and develop a mechanism of community-wide participation and control in decision. This community-wide participation is now a well-established principle, and is already in practice at international governmental organisations, regional groupings of states, parties, pressure groups and private associations. The structure of the future international seabed authority is also based on this principle, and there is a close analogy in the process adopted for decision-making in regard to seabed and outer space, although a separate machinery for outer space regime is yet to develop.

The object of inclusive use is to cultivate the opportunity for sharing and shaping of the possible uses. This thus leads to the establishment of a required

public order in international spaces. This is evident in both the outer space and the international seabed. Such types of inclusive use permit participants to achieve their inclusive objects by way of special "interaction structures". On this Professor McDougal is of the opinion "that inclusive situations embrace enterprisory activities - continuing operations - whose structures of administration are responsible to the whole community."³⁷

II. Exclusive Use.

Customary international law recognises absolute freedom of use in outer space and on celestial bodies. Although it is to be exercised as an inclusive use, it also raises the issue of exclusive use. Although space craft which moves around in outer space is entitled to do so as a right derived from "inclusive use", the exclusivity of the jurisdiction of the state in which the craft is registered is almost unchallengeable. This exclusive jurisdiction of a state over its space craft extends also to the area in which it is operating once it is fixed in orbit. Thus it gives to the owner state a right to exclusive use of the area and to the exclusive operation of the space craft. This rule is derived from the fundamental legal status of space craft, stations and celestial bodies.

Although Article II of the Outer Space Treaty prohibits the exercise of exclusive territorial jurisdiction, Article VII states: "A State Party ... on whose registry an object is launched into outer space ... shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, is not affected by their presence in outer space or on a celestial body or by their return to the earth..."³⁸ This gives the right of exclusive use of space craft and on any construction made in outer space or on a celestial body, to the state of registration of the space craft or the state which constructed such a station. Thus we find that although exclusive or sovereign rights in terms of territory are denied in the Treaty, exclusive rights of use of its own property and the area covered by such property have been granted.

In Article XII, the Treaty states: "All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of the other State Parties to the Treaty on a basis of reciprocity..."³⁹ The use of the word "reciprocity" again in a practical sense gives an exclusive right of the use of the area and spacecraft to the state of owner-

ship. If a state does not observe the "reciprocity" principle, the use shall be completely exclusive. According to one view, though no state can claim territorial jurisdiction in outer space and on celestial bodies, "every state is entitled to exercise jurisdiction over its space craft and space stations in outer space and on celestial bodies."⁴⁰

Even in the absence of territorial jurisdiction in outer space and on celestial bodies, under Article VII of the Outer Space Treaty, every state becomes entitled to exercise the right of exclusive jurisdiction over its space craft and space stations, and thus ultimately its right of exclusive use of the area and spacecraft and space station is confirmed. This exclusive jurisdiction over space stations and space craft is applicable both on celestial bodies and in outer space. According to one opinion, "this regime of exclusive flag jurisdiction guarantees the freedom of the cosmic spaces. Every state is entitled to exercise the right of the free use of the cosmic spaces through exclusive jurisdiction over its space craft and space stations in outer space and on celestial bodies."⁴¹

The right of exclusive use of the area on the celestial bodies was first explicitly referred to in 1962

in the Draft Code of Rules on the Exploration and Uses of Outer Space elaborated by an expert group of the David Davies Memorial Institute. It states that "Stations on celestial bodies should as soon as practicable be placed under the supervision of the United Nations, provided that (a) a state which establishes or permits its nationals to establish a manned station may exercise jurisdiction over all persons in the station and in the area around it over which movement is necessary for the maintenance and use of the station, ..." ⁴² The Brussels Conference of the Institute of International Law in 1963 also provided a similar provision in its resolution which states: "Subject to any subsequent international agreement, persons using, and occurrences at, any space installation are subject to the jurisdiction of the State having established the installation." ⁴³ It becomes clear from these two assertions that the right of exclusive use will lie with the state using the area.

Here it is interesting to note that the status of the area being used by states on celestial bodies or in outer space shall be subject to the jurisdiction of the state for exclusive use of the area, but not subject to sovereign rights. Here we can trace a striking resemblance with the legal status of the continental shelf

subject to jurisdiction and control of adjacent states. The adjacent state on its continental shelf, beyond territorial limits, has the right to exclusive use by way of jurisdiction and control, but not sovereignty. Similarly the right of exclusive use has been accepted for outer space and celestial bodies. Now, another interesting issue common to both is the common participation in the profits or benefits derived from the international spaces. The exploitation of the continental shelf beyond 200 miles is taxable and the profit accrued from such continental shelf is to be used for the whole of mankind or shall be common to the whole of mankind. Similarly, the Outer Space Treaty in Article 11 states: "State parties ... conducting activities in outer space, including the Moon and other celestial bodies, agree to inform the Secretary General of the United Nations as well as the public and the international scientific community ... of the nature, conduct, locations and results of such activities..."⁴⁴ Here a common element of the benefit of mankind and sharing of the outcome of such explorations and exploitations is indicated.

The concept of territorial sovereignty and exclusive use overlap the characterisation of stations on celestial bodies. Considering the terra firma nature

of celestial bodies, the right of exclusive use to the stations on celestial bodies may result in the exercise of some effective control by the state owning such station over a certain area around its stations.. This is a similar situation to that of a ship or station operating for exploration and exploitation of the resources on the deep ocean floor, which is a common heritage of mankind. The status of the ship and the security zone around it shall also be subject to the exclusive control and use of the state owning that ship.⁴⁵

The next issue, and one of the most important involved in the outer space, is remote sensing by satellite. The right of exclusive use of the international area covered by the satellite lies with the state of registration. But what is questionable here is that the information collected by the satellites in outer space by way of exclusive use of the area and satellite should remain under the exclusive jurisdiction of the state of registration for its exclusive use. This question comes up in the light of remote sensing of adjacent and belligerent states. A state by such remote sensing may cause severe damage to the economy and strategic uses of other states. By way of exclusive use of such information a state may gain leverage over other states.. The Universal Declaration of Human Rights, in Article 19, states that "every

one has the right to "seek, receive and impart information and ideas through any media and regardless of frontiers."⁴⁶ This certainly questions the right of exclusive use of the data or information collected by satellites during their exercise of the right of exclusive use of the area and station.⁴⁷

On the principle of exclusive use or jurisdiction over the area and space stations, Jessup and Taubenfeld apply the analogy of ship and aircraft to the determination of the nationality of spacecraft. They are of the opinion that, "of jurisdiction over the spacecraft proper and acts committed on board ... analogies from air law and the law of the sea ... may prove helpful ... nationality would clearly follow registration, as in the case of ships."⁴⁸ McDougal, Lasswell and Vlasic are of the view that "unreasonable interference with the freedom of each state to determine, for itself the conditions under which it will confer nationality to spacecraft, or allowing other states to question and deny such conferments, could effectively preclude many territorial communities from engaging in space activities and is therefore contrary to the common interest."⁴⁹ According to them, international law does not impose any requirement upon states for determining nationality of spacecraft and stations.

However, the same authors agree that the nationality determines authority over the spacecraft, stations and the area involved for their exclusive use in outer space and on celestial bodies. They say: "Claims with respect to the application of authority to spacecraft and events aboard spacecraft when they are in the common domain of space will presumably, as we have already observed, closely parallel comparable claims made by states with respect to ships and on aircraft over the high seas."⁵⁰ Cheng refers to such a control on exclusive control as quasi-territorial jurisdiction.⁵¹ Nevertheless, the quasi-territorial jurisdiction does not amount to rights of sovereignty, but it is only the right for exclusive use of the space station, and areas involved.

Brownlie agrees with the necessity of the establishment of security zones around space stations on celestial bodies. According to his views, "although States may not exert territorial sovereignty in outer space, the concept of exploration and use will give rise to settlement and the assumption of certain possessory rights, for example, over landing zones and safety zones round the installations."⁵² Such a jurisdiction will result in granting the right of exclusive use in his opinion.

According to McDougal, Lasswell and Vlasic, "interests in use are exclusive where they uniquely pertain to one participant in the world community" and they further hold the view that "access to a context of interaction internal to one participant is under the unilateral control of that participant." In this, the general community, by way of a constitutive process "allocates authority to a state to act unilaterally, with a minimum of review by others." It is "appropriate for the individual state to pursue its own interpretation even in application to instrumentalities of other states." But they withhold their opinion on the entitlement of a state to maximise its special interests. And on this they say that "an exclusive competence is allocated on the assumption that it is in the common interest of the whole community to have various decisions managed unilaterally."⁵³

C. Resources in Question: Outer Space, Celestial Bodies and Deep Ocean Bed.

I Inclusive Use.

Article 1 of the Outer Space Treaty provides for the freedom of exploration and use of outer space and celestial bodies. "Outer Space, including the moon and other celestial bodies, shall be free for exploration and use by all states...." Here, it is made clear that outer

space and celestial bodies shall be free for inclusive use (i.e. exploration and use) but the exploitation of resources is not mentioned at all. On the contrary, the Treaty, in the same article, states: "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interest of all countries ... and shall be the province of all mankind." This intention is further clarified in Article II, which states: "Outer space, including moon and other celestial bodies, is not subject to national appropriation..."⁵⁴ Gyula Gal does not agree with this interpretation and says that: "It results from the res omnium character that such stuffs of cosmic origin can be appropriated by the exploiting state without acquiring sovereignty over the given celestial body." He draws the analogy between the status of the reserves of outer space and celestial bodies with that of the fish of the high seas and not with the present status of the resources of the deep ocean bed. However, he accepts that "when it becomes necessary by technical progress, the particulars about the exploration may be regulated by an international treaty, with due consideration to the common interest of mankind."⁵⁵

Gal supports his argument by referring to the

Outer Space Treaty: "The moon and other celestial bodies shall be free for exploration and use by all states," and says that "for the purpose of scientific research all states may exploit any material which is separable and transportable." He further says that the "prohibition of national appropriation in the Treaty does not mean the exclusion of the (civil law) property in such objects, but only refers to the vindication of exclusive rights which would amount to sovereignty over the celestial bodies or parts thereof." He further holds that the "objects which can be deviated from their orbits ... could be the subjects of exploration - in the framework of the free use of outer space."⁵⁶

Jenks questions: "What is the exact connotation of the expression 'by all states', of the terms 'exploration' and 'use', and of the expression 'on a basis of equality'?" In his opinion, neither the Declaration of Principles nor the Outer Space Treaty contains any "specific provision relating to any exploitation of space resources which may become possible..." He further says that these terms and expressions only refer to freedom of use by all. On the prohibition of "national appropriation" he is of the opinion that it be "regarded as applying to outer space and celestial bodies as such, rather than their resources."⁵⁷

McDougal, Lasswell and Vlasic begin their inquiry into the inclusive uses with a view that "certain types of minerals might be made sharable upon one celestial body, but non-sharable upon another, depending upon various features of the context and especially upon quantities of the mineral available on the different bodies." Further they hold the view that "the same mineral might be made sharable at one period of time but nonsharable at another, ... depending upon ... fluctuations of demand." They then go on to an analysis of the importance of minerals and say that "a resource might be regarded as strategic ... when various factors in the context make access to that resource essential to important future activities upon the celestial bodies where it is located."⁵⁸

On the capability of nation states or participants, McDougal, Lasswell and Vlasic compare the situation of the resources of space, with the resources of the high seas and polar regions. Most national states, with the exception of very small or underdeveloped states, are competent for the exploration and exploitation of the resources in those areas, whereas in outer space the competence to indulge in such exploitation is limited at present to only two states. Nevertheless, we still find that the demand for inclusive access has been accepted,

though there was no equal pressure and competence of states in exploration and exploitation capacities in outer space. Such an outcome, in the opinion of the authors, is because "participants realistically recognise their interdependencies, identify their common interests, and assert all their specific claims with a promise of reciprocity."⁵⁹ This perhaps is so due to the objectivity of attaining a minimum or optimum world order; which encourages inclusivity.

The fact that no single state has been able to control the whole domain of ocean resources has been a vital factor in the demand for, and establishment of, the concept of inclusive use. The expectation of violence in recent history has been a further factor favouring inclusive use. Exclusive use often results in boundary disputes, and ultimately serious conflicts of interest. McDougal, Lasswell and Vlasic on this further add that "the fact that noncompetitive and nonconsumable strategies have been possible because of the physical characteristics of these resources has been ... an important factor in the promotion of decisions recognising inclusive claims."⁶⁰

The importance of national resources has led to a careful use of terminology in the Outer Space Treaty.

This Treaty refers to the terms "exploration" and "use", together or sometimes either. It is interesting to note that Articles I and IX of the Treaty speak about "exploration" only, whereas in all other articles they use the expression "exploration and use of outer space including celestial bodies." Perhaps this is done purposely. Whenever the term "exploration" is used alone, the Treaty refers to natural resources of the celestial bodies. This is done because it is necessary to give the inclusive right of exploration in order to deepen knowledge of their character, chemical composition and possible uses. It is the "scientific exploration" without which there can be no possible use of the resources of celestial bodies.

The scientific exploration of natural resources of the Moon, which is provided for by the Treaty in Article IV, "exclusively for peaceful purposes" is being carried out by the Soviet Union and the United States, of the samples of moon soil. Further in conformity with the spirit of the Treaty, the two parties regularly pass over a certain quantity of the soil to different states for tests.

The term "use", when applied to natural resources of celestial bodies, creates more perplexities. However,

in one of the expressions the term "use" may mean that the samples of their natural resources will be used for purposes beyond the framework of scientific exploration, that is, profit will be made from the resources explored and studied. This may also mean, for example, "on the spot production of some extremely important materials and substances necessary for the expansion of activities on celestial bodies to get profit."⁶¹ The use of such resources for the purpose of scientific research and of providing assistance in building such bases or carrying out such activities, has to be for inclusive use, otherwise the interests of such research might be seriously jeopardised.

II Exclusive Use.

In the absence of territorial jurisdiction in the cosmic spaces, every state is entitled to exercise exclusive jurisdiction over its space craft and space stations in outer space and on celestial bodies. Article VIII of the Treaty of Outer Space confirms this: "A State.... shall retain jurisdiction and control over such object ... while in outer space or on a celestial body. This exclusive jurisdiction becomes questionable in certain circumstances, such as, in case of "establishing and operating permanent space colonies to construct solar energy conducting satellites,"⁶² which will be transmitted

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to earth, particularly when it is likely that such activities will be naturally funded. Estrade, commenting on this issue, while considering the energy as a resource, says:

In the first place it is to be hoped that any projects for installing energy plants on the Moon and in space should be in agreement with the spirit of cooperation of Art. I of the Treaty of January 27th 1967, even though putting these projects into practice may require exclusive rights of utilization of lunar areas.

63

The next question which emerges out of the establishment of energy plants on the Moon or in outer space is, that when the Moon or outer space cannot be appropriated, will the plants working with exclusive jurisdiction on an area have an exclusive right to use the energy resource? Another question which is of far more importance is whether the energy generated and transmitted by a space station constructed on the moon, from the resources of the Moon, should be used exclusively by the state having jurisdiction over the craft or station. A state is entitled to jurisdiction of craft under the Treaty, but were a space station constructed using the resources of the Moon, some jurists might term this "appropriation" or resources" or "economic exploitation of resources".

Tennen writes that as a solution to energy

problems it is proposed to build a "colony in space at a location at right angles to the earth and the moon...the primary function of the colony would be to construct the solar satellite crafts. The materials for the construction of both the satellites and colony would be mined from the moon and asteroids. This is because the moon contains materials that can readily be used for construction."⁶⁴ He bases his argument on Article I of the Treaty, which recognises "the right of states to construct facilities and installations on the moon and other celestial bodies." Here will it not be right to question that by allowing a state the right to exclusive control and use over an area, the Outer Space Treaty sanctions national sovereignty without naming it as such?"

Another question revolves around the meaning to be given to the phrase "on a basis of equality". Markov is of the opinion that this phrase should not be construed to mean that all states have an equal right to the use of particular areas, at least not after the area is being used by another state.⁶⁵ Jenks agrees with Markov, and writes that "the phrase should not require technically advanced states to provide less developed states with the technological information or economic resources necessary

to conduct activities in the particular areas of space^{65a} without compensation!" Vassilevskaya expresses the same view, saying that "it is possible to come to the conclusion that the scientific exploration of natural resources of celestial bodies as well as their further use for different purposes are not prohibited by the Treaty of 1967."⁶⁶

The views of various authors vary according to their background, though they do not deny that the resources are free for inclusive use, they certainly argue in favour of some type of exclusivity or protection for the states who shall be carrying out such activities. There is freedom for "use" and "exploration", but "exploitation" has not been referred to anywhere in the treaty. Thus this freedom is a right for inclusive use, but without interference with others, that is, others shall also continue to enjoy the right of inclusive use. A consideration for non-interference with others means, though not expressly, a right for exclusive use and enjoyment. A very close analogy is found in the resources of the high seas, but the resources of the deep ocean bed are on a different platform.

The resources of the deep ocean-bed are the common heritage of mankind and are subject to "equitable sharing".

There is no comparable provision in the Outer Space Treaty of 1967, which only says that the "exploration and use of outer space, including the moon and other celestial bodies, shall be carried out in the interests and for the benefit of all mankind." However, Article X of the Draft Moon Treaty states that the natural resources of the Moon are the "common heritage of all mankind."⁶⁷ If this Treaty is concluded, the status of the resources of the Moon at present, and in future of other celestial bodies, shall also be of the same legal status as that of the resources of the deep ocean bed. It is quite clear from such types of development that there is a strong tendency in the present-day negotiations related to international spaces and resources to declare them as a common pot, that is, the common heritage of mankind.

If we examine carefully, we find that in such a case rights of an exclusive as well as inclusive nature are nearly eliminated. A common heritage of mankind can not be used exclusively or inclusively, because exclusiveness gives a type of jurisdiction to one participant. The inclusive use gives a right of use to all those who want and are capable of exploring and exploiting the area designated for such use. Whereas, if we examine the "common heritage of mankind" concept, it means that the area shall

be jointly explored and exploited by a commonly governed institution, and shall lead to equitable sharing, although separate types of regimes and rules and regulations in a comprehensive treaty are required for proper management of these areas.

D. Base Values.⁶⁸

I. Peaceful Coexistence and Cooperation.

The basic value behind such a treaty for outer space or for the deep ocean bed is peace through cooperation, so as to minimise the possibility of friction due to conflicting exclusive interests. In the present century we find a tendency in international negotiations and agreements to encourage the peaceful atmosphere by cooperation and by avoiding exercise of exclusive claims in international areas.

The Outer Space Treaty in Article I states: "There shall be freedom of scientific investigation ... and States shall facilitate and encourage international cooperation in such investigations." Then again in Article III; a similar assertion is made that "States ... shall carry on activities ... in accordance with international law, including the Charter of the United Nations, in the interests of maintaining international peace and security ..

and promoting international cooperation and understanding."⁶⁹

Similarly, the I.C.N.T. in a preambular assertion says that: "the codification and progressive development of the law of the sea ... in the present convention will contribute to the maintenance of international peace and security in accordance with the purposes and principles of United Nations..." Then in Article 138, while referring to the general conduct of states in relation to the international area, again says that "the general conduct of states shall be in accordance ... with the rules of international law ... in the interests of maintaining peace and security and promoting international cooperation and mutual understanding."⁷⁰

Peace is being stressed in both areas as a basic value because it is a necessary ingredient for development policy and existence of the world community. This is taken as a part of policy, because no policy can achieve its objective without the peaceful coexistence of the world community. The social, scientific, and economic development of the world community needs a minimum legal order to help development policies. If measures to prevent conflict or reduce friction are not taken by framing provisions for peaceful coexistence, or for the mainten-

ance of peace, the whole policy will collapse, due to conflicting interests. We find a striking resemblance in both of the international areas the dominance of this value - the peaceful cooperation and coexistence of the world community.

II Disarmament.

The disarmament of international areas is another step in securing and maintaining peace. Therefore, a policy to establish disarmament is necessary for achieving the goal. The goal being community benefit, policy has to have a basic value which can eliminate the possibility of destructive conflict. It is in this spirit that the Outer Space Treaty in Article IV prohibits military activities on celestial bodies: "The moon and other celestial bodies shall be used by all states ... exclusively for peaceful purposes." The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden." The same article for outer space as a whole speaks to the prohibition of placement "in orbit around the earth of any objects carrying nuclear weapons or any other kinds of weapons of mass destruction" and on stationing of such weapons in outer space in any other manner.⁷¹

Similarly, the U.N. General Assembly, in Resolution # 2602 (XXIV) of '1969' stated that "prevention of a nuclear arms race on the sea-bed and the ocean floor serves the interests of maintaining world peace, reducing international tensions and strengthening friendly relations among states." Further, the "prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea bed ... and in the subsoil thereof would constitute a step towards ... the exclusion" of this area "from the arms race".⁷²

The interests of the free exploration of the cosmic spaces require special restrictions on the use of force in outer space and on celestial bodies. The scope of such restrictions constitutes a controversial problem of international law, which provides for the distinction of permitted and prohibited activities in cosmic spheres. Jenks, on this expresses his view that "the use of space instrumentalities as a measure of missile launch detection for warning purposes may be regarded as consistent with the exclusive dedication of space to peaceful and scientific purposes."⁷³

McDougal, Lasswell and Vlasic, while expressing

their views on reconnaissance in cosmic spaces write:
"it will not be easy to distinguish in each case with appropriate precision between impermissible and permissible coercion, aggression and self defense ... Thus, while many may regard space reconnaissance as a vital measure of self-defense against a surprise attack, others may construe the same activity as a preparation for aggression."⁷⁴

Although it is difficult to determine what exactly will constitute a complete or required disarmament, it can be advised that persual of such values for the success of a policy in achieving its object is necessary.

III Equitable Sharing:

So far the deliberations in the United Nations have made it clear that outer space and celestial bodies must be used for the benefit of all mankind, and that such benefits must be made available to resource and non-resource nations alike. There seems to be a general consensus that the benefits derived from space must be distributed as widely as possible. The "principle of equity has been called upon to support the claims of many nations that activities in space be as extensive and as permissive as possible and that exclusive uses be held to a fundam-

ental minimum." Further, in addition to these general principles, others such as pacta sunt servanda, the right to international peace and security, the right of self-preservation, and sovereignty under the law - are related to each other."⁷⁵ They are significant because in the past they have demonstrated the shaping of international order.

Recently, the United Nations Committee on Outer Space in the Draft Moon Treaty has recommended the declaration of the moon as the "common heritage of all mankind."⁷⁶ Perhaps, the seabed's status as "common heritage of mankind" acted as a directive, in the adoption of this principle for the moon too. The application of these principles to the emerging regimes of outer space and celestial bodies will strengthen the fundamental principles applicable to the use and exploration of outer space. Their presence and influence on present and future space law principles will lead to more specificity and precision. Predominantly, their practice will influence and contribute soundly in the establishment of a new world order in space, which shall, perhaps, be another regime of international space, parallel to the regime of the deep ocean bed.⁷⁷

II:1:iii. The Common Heritage of the Deep Ocean Bed and Antarctica.

A. The Problems of Delimitation: An Analogy.

At the beginning of the present century, national activities were followed by several territorial claims to certain sectors of Antarctica. Britain was the first to announce her claim on Graham Land by a Letter Patent of 21 July 1908, empowering the Governor of the Falkland Islands to administer the Antarctic territory on behalf of the British Crown. This was followed by another Letter Patent of 28 March 1917 developing regulations for determination of the territorial limits claimed by Britain in the Antarctic.⁷⁸ New Zealand claimed the Ross Dependency by an Order in Council on 30 July 1923, delimiting the relevant Antarctic sector.⁷⁹ Australia claimed Wilkes Land and Victoria Land, bisected by the French Antarctic Sector, by an Order in Council on 7 February 1933.⁸⁰ France claimed Adelie Land, between the two Australian sectors by a decree of 1 April 1938.⁸¹ France guaranteed the British right to fly over its sector, and consequently the British recognised the French sector claim.⁸²

Norway claimed Maud Land by a decree of 14 January 1939.⁸³ This was supported by both the French and British, "presumably in exchange for recognition of the

British Commonwealth's much larger claims."⁸⁴ However, these reciprocal recognitions gave rise to protests by the Soviet Union and the United States, who refused to accept any territorial claim to Antarctica.⁸⁵ On 6 December 1940 Chile claimed a part of the British sector. This claim included "all lands, islands, islets, reefs, glaciers, already known or to be discovered and their respective territorial waters in the sector."⁸⁶ Argentina, last of all, claimed a sector, including parts of both the British and Chilean sectors, on 12 November 1940.⁸⁷ This decree referred to an Argentinian note of 14 September 1927 to the Director of the Universal Postal Union, according to which "The Argentine territorial jurisdiction extends in fact and in right over the continental area, the territorial sea and the islands of Tierra del Fuego and to the polar lands not yet delimited."⁸⁸

These conflicting ~~claims~~ of Chile and Argentina were resolved by a Treaty in March 1941 which stated: "(1) that a South American Antarctic exists; and (2) that the only countries with exclusive rights of sovereignty over it are Chile and Argentina."⁸⁹ The conflict of three sector claims was filed in the Registry of the International Court of Justice by the Government of the United Kingdom on 4 May 1955, instituting proceedings

against Argentina and Chile by two separate applications. However, the Chilean Government on 15 July 1955 rejected the jurisdiction of the International Court of Justice in this dispute and stated: "My Government will confine itself on this occasion to stating that ... it is not open to the International Court of Justice to exercise jurisdiction in this case." Argentina followed Chile on 1 August 1955 and stated: "By this present note, my Government reaffirms its refusal in most express way with regard to the jurisdiction of this Court and with regard to any possibility that it should be seised as such to deal with this case."⁹⁰ The International Court, stating the absence of its jurisdiction, ordered the removal of these cases from the list on 16 March 1956.⁹¹

These claims to portions or sectors in Antarctica have been based on discovery, on occupation, on performance of administrative acts including issuing decrees or orders, setting up of post offices, on prior claims even without discovery; continuity, contiguity or the "sector principle" or a combination of these bases.⁹² "Discovery was relied upon in the British claims and was followed by the Australian, French and Norwegian claims, and to some extent by the Russian claims for rights to there "interests".⁹³ The United States rejected these

claims on the pretext of "effective occupation" and stated that they did not recognise such claims "unless the discovery [was] followed by an actual settlement of discovered territory."⁹⁴ However, Soviet jurists rejected the validity of the principle of "effective occupation". Molodtsov maintains that the theory of effective occupation "is a result of the Berlin Conference of 1885, which dealt with questions connected with the plundering division of Africa by imperialist states."⁹⁵

Several states, including the United States and the Soviet Union, have refused to recognise any claim to territorial sovereignty in Antarctica. Both have protested against the French and the Norwegian sector claims. Therefore the assertion of sector claims⁹⁶ by seven states and rejection by several others is a distinctive factor in the history of Antarctic delimitation.

It was under these circumstances that, on 22 August 1948, the United States approached the governments of Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom with a suggestion that a solution for the territorial problem of Antarctica be discussed. They proposed that the most effective solution might be achieved "through agreement on some

form of internationalization."⁹⁷ The proposal did not receive a positive response as none of the claimant countries was prepared to relinquish its sovereignty. This was followed by a reply from the Geographical Society of the Soviet Union on 10 February, 1949, stating that "no decision on the question of the regime of the Antarctic without the participation of the Soviet Union can have legal force, and the U.S.S.R. has every reason not to recognise any solution."⁹⁸ This declaration had no legal effect since it came from a body with no diplomatic capacity.

The Soviet Union, on 8 June 1950, circulated a memorandum in which it stated that "... the Soviet cannot recognise as lawful any decision taken without its participation." They claimed their interests were based on the following factors: "(a) the expedition of Bellingshausen and Lazarev; (b) the U.S.S.R. participation in whaling activities; and (c) the scientific importance of Antarctica and the need to conduct activities there, as meteorological observations obtained there are also of importance to the northern hemisphere."⁹⁹ Although no response was given to this memorandum, the importance of the political and military situation still remained. The participation of the United States and the U.S.S.R. changed this situation radically, by

giving a unitary outlook to Antarctica and, geopolitically, it was considered as a whole. This was in fact the beginning of the internationalization of Antarctica.

In 1956, India made a formal proposal for inclusion on the agenda of the eleventh session of the General Assembly of an item entitled "The Peaceful Utilisation of Antarctica." In its explanatory statement, it was stated that "Antarctica, a region covering 6 million square miles of territory, is of considerable strategic, climatic and geophysical significance for the world as a whole."¹⁰⁰ However, due to the lack of response from claimant states, India itself withdrew the proposal. In 1958 India again raised the question of Antarctica in the thirteenth regular session of the UN General Assembly, showing her interest and that of many other countries in the meteorological aspects and also expressing concern over the possible world tensions.¹⁰¹ However, on the issue of sovereignty in Antarctica, Prime Minister Nehru while addressing the Indian Parliament clarified India's position and said:

Broadly speaking, we are not challenging anybody's rights there. There are certain countries which, according to them, have certain rights there. We are not challenging them. But it has become important more specially because of the possible experimentation of atomic weapons and the like, that the matter should be considered by the UN and not be left in a chaotic state - various countries trying to grab the area.

Again this item was withdrawn from the agenda of the General Assembly, in view of the fact that the United States had already called for an Antarctic Conference.

The Antarctica Conference was thus convened at Washington, on the initiative of the United States, with membership restricted to the participants of I.G.Y. It concluded the Antarctic Treaty on December 1, 1959.¹⁰³ Although it has often been considered that the solution was sought outside the United Nations, which was side-stepped, this perhaps is not true as the meeting was "regional" within the scope of the United Nations. In the view of India, "the Antarctic Treaty ... is based on principles to which India ... subscribes." India certainly expressed that she would "favour full internationalisation of Antarctica."¹⁰⁴ Mouton, while agreeing on this, commented: "In Antarctica Treaty, we find a rare combination of pious wishes fulfilled."¹⁰⁵

The international delimitation of Antarctica was first carried out by the Treaty of 1959. Article II of the Treaty defines the territorial limits of the Antarctic area: "The provisions of the present shall apply to the area south of 60° South Latitude..."¹⁰⁶ Thus

the area covered by this provision is the entire Antarctic continent, including all its shelves. The legal status of the subsoil and airspace above the continent is the same as that of the Antarctic. However, the admissibility of territorial claims to Antarctic land territory is not satisfactorily regulated by this treaty. Article IV(i) of the Antarctic Treaty "excludes the problem of the admissibility of previously asserted territorial claims from the regulation." ¹⁰⁷ Article IV(ii) of the Treaty only prohibits subsequent territorial claims. Therefore, its situation around the South Pole and natural conditions which do not admit effective occupation demonstrate through customary international law the lack of territorial sovereignty over Antarctica.

This raises the question as to whether in the absence of territorial sovereignty over Antarctica, the continent and the islands have territorial seas. ¹⁰⁸ According to Article 1(1) of the Convention on the Territorial Sea and Contiguous Zone, the sovereignty of a state extends, beyond its land territory, to the territorial sea. The ICNT/Revision I in Article 2 also states "the sovereignty of a coastal state extends beyond its land territory and internal waters..." Thus the regime of the territorial sea, being an extension of

national land territory, is not applicable on Antarctic waters, it being a non-sovereign area. Similarly the regime of the contiguous zone also does not apply to Antarctic seas. The Treaty, in Article VI, confirms this by stating: "nothing in the present treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any state under international law with regard to the high seas within that area."¹⁰⁹

The Antarctic continent without ice would be much smaller, and a considerable portion of West Antarctica would be sea. Mouton expresses his view that there is no problem including Antarctic land above sea level in the "area" covered by the treaty, and that land below sea level which is covered by solid is included in the treaty. For him, the status of ice shelves, which are attached to land and float on water, is questionable, but for the fact that they are expressly made part of the "area" in Article VI of the Treaty.¹¹⁰ Beyond the ice shelves is a belt of drifting ice called pack-ice which surrounds Antarctica for hundreds of miles. Since the treaty expressly includes only the shelves in the "area" of Antarctica, it is assumed that the pack ice is excluded.¹¹¹

According to Article VI of the Antarctic Treaty,

it does not apply to high seas and it does not interfere with the traditional freedom of the seas. The effect of this Article is therefore to create two legal regimes in the area south of 60° Latitude. One regime exists in the "area", the Antarctic territory assimilated to land where measures of a military nature as well as nuclear explosions are prohibited.¹¹² The other is in the Antarctic Ocean, where the general regime of the high seas determines the legal norms.¹¹³ It was left uncertain, according to Taubenfeld, due to existing controversies over the breadth of the territorial seas.

The regime of the continental shelf does not apply to the Antarctic area. According to the Geneva Convention on the Continental Shelf and the ICNT/Rev 1, the coastal state can exercise sovereign rights for the purposes of exploration and exploitation over the continental shelf.¹¹⁵ Therefore, according to Kish, "the absence of territorial sovereignty over Antarctica precludes the regime of the continental shelf in the Antarctic."¹¹⁶ Similarly the international regime of the deep seabed applies to the seabed and subsoil of Antarctic seas. According to ICNT/Rev 1, the international "area" includes the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.¹¹⁷

Absence of territorial sovereignty over Antarctica and application of the status of high seas to Antarctic seas means that Antarctic seabed and subsoil form a part of the international seabed "area".

However, the pending question of territorial claims, which were already, as it were, frozen, by Article IV of the Treaty: "Nothing contained in the present Treaty shall be interpreted as ... a renunciation by any Contracting Party of previously asserted rights of claims to territorial sovereignty in Antarctica ..." questions the validity of the arguments raised in favour of the status of the Antarctic continental shelf or seabed as free of territorial sovereignty rights.¹¹⁸ On the contrary, after the signing of the Antarctic Treaty Argentina, Australia and New Zealand have enacted legislation permitting the executive to extend the exclusive economic zone of its Antarctic claims to two hundred miles, under the pretext that it is an enlargement of existing claims. This is clearly in contradiction of the provisions of Article IV of the Treaty.¹¹⁹

In another scenario, assuming that Antarctica is an international regime itself of land mass, and a regime is authorised to exercise its jurisdictional powers for conservation and management of this area

and its resources. It is quite likely that such a regime will demand functional jurisdictional zones to help manage and conserve the regime. Therefore, such a condition will once again raise the question of delimitation of the high seas of Antarctica from the Antarctica regime. Two further issues are thus raised: how to determine the continental shelf from the actual geological prolongation of land mass or from the ice shelves. The inclusion of the ice shelves in the Antarctica "area" will conceive serious problems for delimitation also, because it will not be in conformity with the geological basis of the concept of the continental shelf.¹²⁰

B. Area in Question: Antarctica and the Deep Ocean Bed.

I Inclusive Use.

The issue of the area in question needs to be considered against the background of historical claims laid to the high seas and to various sectors of Antarctica. Except for the claims made between the eleventh and sixteenth centuries,¹²¹ the high seas, including the deep seabed, had always been free for use by all. On the contrary, Antarctica, ever since the declaration of claims on various sectors, has never been made open to the world for inclusive use. The Antarctic Treaty

is a step towards declaration of this area as free for "inclusive use" but limited membership of the Treaty signatory group prevents global participation in inclusive use, although it is conceded that the Treaty encourages the inclusive participation of all signatories to the Treaty. However, the fact that the Treaty was concluded among 12 nations, of which five states had no territorial claims in the area, is a good precedent to begin with, for the complete internationalisation of the area.

Acceptance by the seven claimant states of the interests of five other states is a clear indication of the readiness (though not complete) of the claimant states to accept the principle of inclusive use. Another fact, namely that the treaty was concluded without global participation or through the forum of the United Nations arguably indicates that the interested states were keen for an immediate solution to the problem and therefore were reluctant to increase membership to global level. Withdrawal of the claims of India and others to participation in the Antarctic negotiations was not a withdrawal of the interests of the rest of the world, but was done with an intention of helping the proceedings to reach completion in the minimum time.

It is to be noted that even after the conclusion of the Treaty, an Indian writer expressing the Indian standpoint wrote "India would favour full internationalisation of Antarctica."¹²²

The abovementioned sector claims comprise the major area of the Antarctic continent, although a considerable area has not been claimed by any state. The unclaimed area is therefore indisputably open for inclusive use but only of the signatories of the Antarctic Treaty. In the absence of the Treaty, the area would have been open for the whole of mankind.¹²³

The United States and Soviet Union never recognised any claim to sovereignty in Antarctica, in spite of the fact that these two carried out the major part of antarctic exploration. Therefore, joint American-Soviet "opposition to Antarctic sector claims indicates the failure of territorial sovereignty to Antarctica in customary international law." Three other contracting parties to the Treaty, Japan, Belgium and South Africa opposed sector claims. Similarly, the four acceding parties, Poland, Czechoslovakia, Denmark and Holland oppose sector claims.¹²⁴ The tendency to renounce territorial claims thus indicates gradual elimination of sector claims and furthers the principle of inclusive use.

An actual problem could be created if a non-signatory country were to be engaged in the region and affect the Treaty objectives. It is obvious that if third parties observe the provisions of the Treaty, no problem will be created. However, in case of activities being undertaken in the area not in conformity with the Treaty, contracting parties would have to analyse the measures or steps to be taken against the non-contracting state: Article VIII of the Treaty has a provision for accession, and allows a third party inclined to engage in activity in the area to accede to the Treaty. Article X, specifically providing for such a problem, states that the contracting parties will "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 principles or purposes of the present Treaty."¹²⁵

To conclude, a tendency for inclusive use of the Antarctic area is increasing, and this area may be regarded as of the nature of res communis omnium. The seabed has been accepted as the common heritage of mankind, but Antarctica has no such status. The seabed, by virtue of this status, is not free for inclusive use but is to be managed and used jointly, whereas Antarctica is

free for exclusive use to all contracting parties. Other parties may join the Treaty to participate actively in the inclusive use of the area. The development of a regime is common to both the international spaces. However, the seabed regime is being formed in the ongoing UNCLOS III, with very comprehensive provisions for use of the area, whilst Antarctica has yet to develop such an elaborated body. It is to be noted, however, that Antarctic Consultative Meetings are working as a legislative body to formulate a better and more comprehensive regime for Antarctica.¹²⁶

II Exclusive Use.

The states with sector claims have not protested against foreign stations and expeditions in their claimed Antarctic sectors. Many states who are party to the Treaty are operating such stations and expeditions in sectors of other states. Moreover, non-contracting states are also engaging in such activities, without previous permission, or subsequent approval by the sector claimant state. This practice of states indicates the absence of sovereignty or territorial jurisdiction in Antarctica. The United States, in conformity with the provisions of Article II of the Antarctic Treaty, "have established the Amundsen-Scott Station on and around the South Pole," thus covering the area of all seven sectors:

The United States "have exercised exclusive jurisdiction over this station and none of the seven sector claimant states has even attempted to exercise territorial jurisdiction over it. Therefore, "in the absence of territorial jurisdiction, the state owning such a station or carrying out expeditions is entitled to exercise its jurisdiction for exclusive use of the area covered by its stations or expedition activities."¹²⁷ Under the geophysical and climatic conditions in Antarctica it is not possible to exercise permanent and effective control. The extent of control over the area being used for stations or expeditions does not qualify the requirements of territorial jurisdiction, and therefore it is only a privilege to exercise exclusive control and jurisdiction for the period in which the activities are being carried out. This exclusive control or jurisdiction automatically ceases, with the termination of activities in that area.

For the protection of the stations and the activities being carried out by them, it is necessary to provide them with a security zone. This is in contrast to the freedom of Antarctica, which requires that the area for such security zones should be limited. Therefore, although a security zone is permitted, it has to be limited according to the requirements of the station

or activity. Authority to use this limited area, though it creates rights of exclusive use, does not imply that the state will develop territorial rights.

This situation is very close in analogy to the submerged installations and ships operating on the seabed. Article 5 of the Declaration of Principles of 1970 declares that: "The area shall be open to use ... by the states..." and imposes a restriction on determination of the extent of rights to be granted for the use of the area. The Declaration on this in Article 14 says: "Every state shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities, or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international regime."¹²⁸

The establishment of installations on the deep seabed necessitates the exercise of exclusive jurisdiction and control over the area covered by such installations or activities. Further, such installations for their security require a security zone around them. Revision 1 of the ICNT clarifies the legal status of such installations and safety zones, in Articles 259 and 260

respectively. According to Article 259 the legal status of "installations or equipment... shall not have the status of islands or possess their own territorial sea." Article 260 permits "safety zones of a reasonable width not exceeding a distance of 500 metres." And the same article further provides that "All states shall ensure that such safety zones are respected by their vessels."¹²⁹ These provisions, apparently, allow the state owning such installations to exercise exclusive jurisdiction and control over the area covered by such activities for the purpose of such area. Thus the rights acquired by a state for activities on the seabed are similar to the rights acquired by states engaged in various activities in Antarctica.

At Canberra, on 24 July, 1961, the first Antarctic Treaty Consultative Meeting unanimously approved Recommendation No.1-9 which states "Governments [will] adopt all adequate measures to protect tombs, buildings or objects of historic interest from damage and destruction."

¹³⁰ The rights derived from this recommendation permit the states to exercise exclusive control and jurisdiction over the area covered by its historic sites, to preserve and protect them. Later, at Santiago on 18 November 1966, the fourth Antarctic Treaty Consultative Meeting formulated a new regulation according to which "the Government of a

country in which a tourist or other non-scientific expedition is being organised" shall be required to "furnish notice of the expedition as soon as possible through diplomatic channels to any other Government whose station the expedition plans to visit." This provision manifests the authority of the state whose station the expedition plans to visit to refuse the facility of expedition to visitors. Article 3 of the same recommendation further states that "Such permission be withheld unless reasonable assurances are given [for] compliance with the provisions of the Treaty, the Recommendations then effective and the conditions applicable at stations to be visited."¹³¹ This provision once again demonstrates the right of exclusive jurisdiction and control over the area under the control of the state owning a station.



C. Resources in Question: Deep Ocean-Bed and Antarctica
Inclusive Use:

The problem of resource exploitation in the present Antarctic Treaty region has not been dealt with. The basic problem with resource exploitation is that it raises the question of territorial sovereignty. The Antarctic Treaty had been successful in dealing with the issue of scientific research in the area, because it did not involve the issue of title. However, Antarctic resources are on a different footing, mineral, petroleum and living resources involve the issue of title. Different views have been expressed by different people. Dr. Robert E. Hughes, U.S. representative to the 8th Antarctica Treaty Consultative Meeting on 12 June 1975, clarified the U.S. stand:

"Those countries who do not recognize claims to sovereignty would surely have to assert the right to commence mineral resource activities at their will...Those who have made claims to sovereignty would contest that view."¹³²

Although in his statement Dr. Hughes only refers to minerals, this could cover all the resources of Antarctica. Arguably, he intends to clarify that in the absence of sovereignty, resource exploitation is possible, save for the Treaty prohibitions. He indicated that the resources can be exploited inclusively by the states involved.

Prof. Jenks in 1958, before the conclusion of the



Antarctic Treaty, while commenting on mineral resources, suggested an inclusive system of resource exploitation and wrote:

"This may make it less difficult than it might otherwise be to secure agreement upon arrangements requiring anyone seeking to prospect for or exploit mineral deposits in the Antarctica continent to hold a concession, lease, or license issued under an international scheme. Such a scheme might take any one of a number of forms...[i.e.] title to mineral deposits in Antarctica [to be] vested in the United Nations or some appropriately constituted special international body...Still another possibility would be that, the question of title being similarly reserved, certain designated states, or more generally states exercising authority at any particular time in any part of the Antarctica continent, would be regarded as mineral authorities entitled to issue prospecting licences and concessions, leases or licences for the extraction of minerals...Conditions for the issue of concessions, leases and licences and conditions to be complied with by those holding them, would be reasonably uniform and would be based on international rules."133

Evidently Jenks suggests that in all the possibilities, inclusive participation of claimant states is necessary and when he recommends "uniform conditions based on international rules", presumably he contemplates that an international regime be created based on the principle of inclusive participation and according to the needs of the special nature of Antarctic continent. Even though the problem of resource exploitation has increased substantially in these twenty years, the theory of Jenks still holds good. The new scientific and technological

know-how has acquainted us with the vast potential resources of Antarctica.¹³⁴ Although Antarctic Treaty does not deal with mineral resources, they have been constantly a subject of concern in the Antarctica Treaty Consultative Meetings since the seventh consultative meeting was held in 1972.¹³⁵

The U.S. Antarctic policy which was favouring an "international approach" earlier, gradually changed to "free access and non-preferential rules applicable to all countries and nations for any possible development of resources in the future". This change in the U.S. policy, evidently is due to insecurity of oil supply, particularly when the U.S. imports 51% of its oil consumption.¹³⁶ Involvement of non-claimed states in the Treaty and the length of their connection with the Antarctica now qualifies them to assert that their interests in the area are now vested. The tendency on the part of non-claimant states to stress for internationalization or free access raises two questions: (1) internationalization of Antarctica including its resources will lead to the formation of an international regime which shall be closer to the regime of deep ocean bed with common heritage of mankind status; (2) "free access", will be limited to the contracting parties and thus entitling them to go in for inclusive use by way of inclusive competence and participation.

Alexander, while examining the viability of internationalization of the Antarctica and replying to a proposal for "assimilation of all or part of the Antarctic Treaty area

[in the] sea-bed authority", writes: "the incorporation of Antarctica into the common heritage concept at UNCLOS-III could result in the collapse of those negotiations."¹³⁷ Perhaps this is correct as some of the Antarctica Treaty members may withdraw from the UNCLOS-III negotiations. However, if we examine the concept of internationalization, and its possible applicability to Antarctica, we find that internationalization will mean the conversion of present Antarctica to the common heritage status. The common heritage status is not likely to permit either inclusive or exclusive enjoyment of the resources. The right of control in such a case will vest with mankind as a whole. Although this approach is good and serves the whole of mankind, it is not feasible until the reconciliation of sovereignty claims of some states in sectors of Antarctica.

The latest U.S. policy of "free access" is similar to that of an earlier suggestion of joint Antarctica. For the success of "free access" policy participation in Antarctica resource exploitation will have to be restricted to the contracting parties of the treaty. These contracting parties can form an organization with limited membership. Such proposals have earlier been termed by Jessup and Taubenfeld as a "condominium" and Alexander, writing in 1978 termed it as "Joint Antarctica Sovereignty" in his "recommended approach" for Antarctica resource solution. This is perhaps the most apt approach for inclusive competence and is more feasible under the present circumstances, when claimant states are not prepared to relinquish their sovereignty claims. However, the

use of the word "sovereignty" by Alexander in his term "Joint Antarctic Sovereignty" will create a new kind of sovereignty, particularly when existing claims of sovereignty have not been recognized by some contracting parties and several non-treaty states.

Acceptance of the terms of "Joint Antarctica Sovereignty" by Claimant states will thus mean that they are parting with some amount of sovereignty, which will be transferred to non-claimant contracting parties, who do not at all believe in any type of sovereignty in Antarctica. Therefore, careful examination of this term means that such a terminology will perhaps never be acceptable to any of the contracting parties. Another complication which perhaps the word "sovereignty" might precipitate is that creation of any kind of "sovereignty" in Antarctica will qualify it to have a territorial sea,¹³⁸ and thus also other functional zones including a continental shelf subject to the jurisdiction and control of "Joint Antarctica Sovereignty". These might perpetuate serious impediments in the way of the functioning of seabed regime and thus lead to rejection of such a concept for Antarctica by the rest of the world. Therefore, although inclusive use is a viable solution at present, it should not be coupled with the addition of new sovereignty rights, irrespective of the fact that such sovereignty rights shall be exercisable inclusively. Inclusive participation among contracting parties at present is recommended with a view that it does not create any new type

of claims and thus with the time under the changing world public opinion and needs, will keep a room open for complete internationalization of Antarctica.

Exclusive Use:

The Antarctica Treaty has no provision for commercial activity in regard to resources. Competence of contracting parties for exclusive use or access to resources will once again raise the question of sovereignty. The United States is of the view that mineral resource activities would fall within the peaceful purposes permitted in accordance with Article I of the Treaty. However, according to a contrary view:

"Any action aimed at commercial exploitation of mineral resources would be contrary to the purposes and objectives of the Treaty and therefore should be considered a violation of the Treaty if undertaken before the consent of all consultative parties."¹³⁹

Perhaps, it is correct to point out that in the absence of specific provisions in the Treaty exclusive enjoyment of Antarctica resources is not viable. Existing international law does not provide any easy solution to territorial disputes in the Antarctica. The question of claims was not resolved in the Antarctica Treaty and nor has it "freezed" them as is often asserted.¹⁴⁰ Article IV (1) of the Antarctica Treaty clearly says that the Treaty shall not be interpreted as: "a renunciation by any contracting party of previously asserted rights of claims to territorial sovereignty in Antarctica."¹⁴¹

Careful consideration of this Article and other provisions of the Treaty reveals that the rights of exclusive access to resources of the claimant states were neither seized nor frozen. Rather it will be apt to suggest that the rights of exclusive access were suspended temporarily and left open for future discussion.

The subject of Antarctica living resources was raised in 1975 by Norway at the Eighth Consultative Meeting held in Oslo. However, in 1975, the Meeting could not go beyond the agreement that the "Consultative Parties would broach the subject and would assume their special responsibilities on the preservation of such resources".¹⁴² This issue was again considered in 1977 at London at the Ninth Consultative Meeting of the Antarctica Treaty, which adopted recommendation IX-2. This recommendation in Part-III, Establishment of a Definitive Conservation Regime, provision 3(a) again clarified that "the provisions of Article IV of the Antarctica Treaty shall not be affected by the regime."¹⁴³ This trend in discussions clearly indicates that the claimant states in contracting parties are not yet prepared to concede their right of exclusive access; and the title of Part III of Recommendation IX-2 only deals with the conservation and not exploitation of the living resources. In 1978 the Second Special Consultative Meeting of the Antarctica Treaty held discussions in three stages,¹⁴⁴ on the draft convention of the Antarctica living resources. However, the issue of living resource exploitation was not

discussed, and still remains a problem of the future.

The subject of exploration and exploitation of mineral resources was for the first time discussed in the Sixth Consultative Meeting in 1970 held in Tokyo. The issue was reconsidered at the Seventh and Eighth Consultative Meetings in 1972 at Wellington and in 1975 at Oslo respectively. At the Eighth Consultative Meeting a significant decision recommending "moratorium until final conclusions [are] reached and a regime or decisions [are] adopted", was approved. The Ninth Consultative Meeting held in London in 1977, contracting parties reiterated "the active and responsible role of the Consultative Parties in approaching the question of protecting the unique Antarctica environment and its dependent ecosystems without hurting the interests of mankind". And they added that the "principles of Article IV of the Antarctica Treaty with respect to claims to territorial sovereignty should be protected". However, Consultative Parties agreed that at the Tenth Consultative Meeting in Washington in 1979, "they will give their preferential attention to the question of mineral exploration and exploitation".¹⁴⁵

A comparative analysis of exclusive competence of the states in regard to resources in Antarctica and deep sea-bed reveals that states do not have any exclusive competence for the exploitation of the resources of sea-bed. Whereas, for Antarctica we find a tendency towards inclusive access for resource exploitation, although the claimant states have yet to

agree for surrendering their so called "frozen" or "suspended" exclusive competence. However, it can be noticed that with the passage of time and increasing complexity of resource exploitation, the attitude of state parties is shifting from the claims of exclusive access to inclusive access. Law of the sea-bed, which now embodies the principle of the "Common Heritage, has developed after passing through numerous phases such as exclusive claims, and inclusive use, and now finally reached the situation of mature law. The Antarctic regime as compared to sea-bed is relatively new so far as its historical development is concerned. Arguably, it can be presumed that under the changed situation, the desire of mankind as a whole, Antarctica might also adopt the "Common Heritage" principle or any other term in close analogy to it. I base this argument on the pretext that almost every law or legal principle is in a continuous process of change, by way of varied interpretations, which keeps on changing according to the need of the then society. In the past, society was considered to be restricted to a group of people or subjects of a state, today the term society is interpreted in a broader perspective and it means the whole of mankind. The changing needs of mankind and their attitude towards a particular law or norm determined at the time whether a particular law or norm is a lex lata or lex ferenda. Therefore, tomorrow the lex lata of today might become lex ferenda. Therefore, I conclude that the evolving norms of inclusive competence, will soon become lex lata, however, their continued change towards internationalization is expected in the years to come.

D. Base Values

I. Peaceful Co-existence and Co-operation

The Antarctica Treaty was concluded to regulate the activities of various powers which until then were unregulated and were threatening to the "maintenance of minimum order".¹⁴⁶ Antarctica Treaty in Article II while recommending the co-operation in the area states that the "freedom of scientific investigation in Antarctica and co-operation toward that end, as applied during the International Geophysical Year, shall continue... Further in Article III it states, "in order to promote international co-operation in scientific investigation in Antarctica...the Contracting Parties agree that to the greatest extent feasible and practicable: (a) information regarding plans for scientific programs in Antarctica shall be exchanged to permit maximum economy and efficiency of operations; (b) scientific personnel shall be exchanged in Antarctica between expeditions and stations; (c) scientific observations and results from Antarctica shall be exchanged and made freely available."¹⁴⁷

In a preambular assertion Contracting Parties state "that a treaty ensuring the use of Antarctica for peaceful purposes only and continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations. Similarly, I.C.N.T. says that: "the codification and progressive development of the law of the sea in the present convention will contribute

to the maintenance of international peace and security in accordance with the purposes and principles of the United Nations."¹⁴⁸

Peace through co-operation is being stressed in both the areas. Co-operation is a necessary element for the success of any policy. Peace in the area has been secured by way of eliminating conflicting interests and encouraging co-operation; this policy based on co-operation helps in peaceful co-existence.

II. Disarmament

The Antarctic Treaty clearly prohibits military use of Antarctica. The international regime established by this Treaty is based on the freedom of scientific investigation and co-operation, on this Article I (1) provides that "Antarctica shall be used for peaceful purposes only". The principle of free scientific investigation requires that Antarctica should only be used for peaceful purposes. The success of this policy depends on how effectively Antarctica is demilitarized. To further this object, activities in polar stations and expeditions in Antarctica have to be in conformity with this requirement. Article I (1) of the Treaty prohibits military activities in the area and says: "These shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying

out of military manouvers, as well as the testing of any type of weapon."¹⁴⁹ However, Article I (2) of the Treaty permits military personnel and equipment to be used for peaceful purposes. The activities thus permitted are thus in conformity with the provisions of the Treaty. Further, with a view to keep check and control over the activities of military personnel Article VII (5) (c) of the Treaty provides: "Each Contracting Party shall,...inform the other Contracting Parties, and...shall give them notice in advance, of...(c) any military personnel or equipment intended to be introduced by it into Antarctica..."¹⁵⁰

First time nuclear test ban was established in Antarctica through the Antarctica Treaty which, in Article V (1) provides that "any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited."¹⁵¹ The prohibition of nuclear explosions and pollution covers Antarctica continent and air space.

The validity of the peaceful activities of military personnel and equipment and prohibition of nuclear explosions and pollution is, however, limited to Antarctica continent and air space because Article VI of the Antarctica Treaty provides that Antarctica seas shall be governed by regime of the high seas. Article VI states: "Nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights of any State under international law with regard

to the high seas within that area."¹⁵² Thus military manouvers, conventional weapon tests and any other military measures are permitted in the areas of Antarctica seas, because the Convention on the High Seas does not prohibit military activities on the high seas. However, controversy exists on whether or not Antarctica seas are covered by the provisions of Article V (1) of the Antarctica Treaty. According to Kish, Article V (1) covers Antarctic Seas also for nuclear test ban and pollution, but it does not cover other activities of military personnel.¹⁵³ Taking the example of France, who is a party to the Antarctica Treaty, but not a party to Nuclear Test Ban Treaty of 1953, and in the light of Article IV of the Antarctica Treaty which accords the same status to Antarctica seas as that of high seas, in the view of the author, the Antarctica seas are not covered by the nuclear test ban provision of the Antarctica Treaty, and they are not applicable on the countries which are not a party to Nuclear Test Ban Treaty.

Jenks considering demilitarization of Antarctica as the fundamental precept writes: "An agreement for the continued demilitarization of Antarctica coupled with mutual warning arrangements as a safeguard against any violation thereof would be an essential element in any such international regime."¹⁵⁴ Hanessian clarifies the terminology used in the Treaty and says: "although no clear definition of the term peaceful purposes...is given, the intention of the signatories was that it should include all activity not clearly identified

155
as military". For Oxman, Antarctica is a political preserve and a political laboratory, a "result of an earlier 'Spirit of Camp David',...the first armed central agreement of its kind since World War II...to isolate Antarctica from the military rivalries between the West and the Soviet Bloc; the continent [thus] became a 'preserve' in the arms race."¹⁵⁶ The Antarctica Treaty is in close analogy to the sea-bed on the issue of disarmament, though the Antarctica Treaty took the lead on disarmament. This was followed by the Treaty on the "Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and Ocean Floor and Subsoil Theory" on 11 Feb. 1971.¹⁵⁷ Although this treaty does not amount to complete demilitarization, it is a considerable restraint on military activities and a good base to begin with, for achieving total demilitarization on sea-bed.

III. Equitable Sharing:

The Antarctica land mass is known to contain substantial quantities of oil, gas, coal, iron, copper, uranium and other minerals. These resources are yet to be exploited. Resource exploitation in Antarctica raises the question of equitable sharing: So far neither the Antarctica Treaty nor the regulations made by the Antarctic Consultative Meetings explicitly referred to resource exploitation problems. This issue has become more complicated in the light of the current movement of "new international economic order". Ambassador

Pinto has rightly a question on this, "Can Antarctica, constituting one-tenth of the surface of the world, be excluded from this movement toward a more just, equitable and secure world order?" Perhaps not, because Antarctica sovereignty claims are generally not acceptable to most of the countries in the world and also because it includes an area over which no sovereignty has ever been claimed. A solution to Antarctica resource problem "must be acceptable both to the international community with its diverse interests and to the Antarctica Treaty parties".¹⁵⁸

Present provisions of Article IX (1) of the Antarctica Treaty confers exclusive right to the Consultative Parties for decision making and acceptance of new members to the Antarctica Treaty.¹⁵⁹ Similarly, the right to police and control all areas of Antarctica lies with the Consultative Parties, including the unclaimed area.¹⁶⁰ The treaty being binding only on the parties, it does not become binding on the overwhelming majority of states in the world community; particularly when world community has not, so far, accepted the provisions of the Treaty, in any form. However, the solution to this problem must be one which satisfies both the generality of states as well as ~~states~~ who claim special rights.

Non-acceptance of the present Antarctica Treaty by developing countries indicates that they desire world-wide participation and look towards it from wider community perspective rather than narrow special interests of thirteen.

Consultative Parties. According to a view "it is doubtful that the international community would be willing to confer a central role on so unrepresentative...body". Complete exclusion of the countries of Asia, Africa and the Middle East will virtually make this regime a group of interested countries only.¹⁶¹

Thus, Antarctica has yet to develop a system of equitable sharing at the international level which will be acceptable to the majority of the nations; although at present deliberations among the Consultative Parties indicate the acceptance of this principle, but restricted representation in negotiations prevent them from their universal acceptance. In comparison with the sea-bed we find that the basic notion of "Common Heritage of Mankind" ensures a system of equitable sharing on the sea-bed among the nation states of the world. This aspect of Antarctica yet needs to be developed so as to become an acceptable international legal norm.

II:2:i The Uses of Analogy: An Introduction

This part deals with the comparison of three concepts, namely: "The common heritage of mankind"; the concept of "social property" including the concept of "common property"; and the concept of "common interest". These three basic concepts have been chosen for the reason that some of the leading contemporary jurists frequently route their arguments through these concepts while dealing with the problem of the status of deep ocean bed and its resources.

The concept of the "common heritage of mankind" since its coinage and first application to international seabed area in 1967, has been subject to various interpretations. And often, it has been interpreted in different ways by various states and jurists according to their political and juridical backgrounds. This had lead us to the question, what is the precise meaning of the concept of common heritage of mankind? It is, conceded this term is not very clear. It carries, certainly, a hidden notion in it. A notion which is free from the traditional thoughts of political or juridical innovations, and which tends to develop harmony in the world community by the peaceful use of the deep ocean bed and reservation of the area for the benefit of all mankind of today and future generations to come.

It is very much acceptable that his concept be put to more vivid interpretation, so as to avoid confusion and make it more readily acceptable to world community as a precise legal term, but it is recommended that we take into account the basic hidden normative idea in this concept, which perhaps was not clarified by the creation of this concept in 1967, when it was presented before the U.N. General Assembly. Pardo recently, after nearly ten years of coinage of this concept, explained what he actually meant by this concept. But, perhaps, his present elaboration of the meaning of the "common heritage" concept is more an answer to various interpretations with which he does not agree, than his original idea of 1967. Thus Pardo's present elaboration of this notion can perhaps, be aptly termed as his reaction to various views presented in these ten years; which, perhaps, does not fit into the novelty he envisioned in 1967 while presenting this concept to the world community.

Ambassador Pinto of Sri Lanka, has interpreted the "common heritage of mankind" concept also as to mean "common property", though with certain reservations.¹⁶² Yugoslavia has advanced the concept of "social property" and its definition for the interpretation of the "common heritage" concept.¹⁶³ However, objection of other socialist states to the application of "common property" or "social property" concepts to the seabed always have been that this concept is applicable only within socialist society; not to an international community,

half of which is based on non-socialist principles.¹⁶⁴ Some of the American jurists have preferred to use the term "common interest" for use of the oceanic resources.¹⁶⁵ Basically all of these concepts have a common goal, but it is very much likely that the terminology used, if not carefully examined, might lead to abuse of the "common heritage" concept. It is feared, because of the tendency in juristic interpretation, to employ the tools available in the original legal systems, through which genises of that particular concept have taken place. This practice often ignores the hidden norm which was intended for a particular term or concept at a particular time and derives its interpretation from the ancient usage of that particular term or concept. In 1970 Borgese rightly pointed out that "the common heritage of mankind is a new principle in international law, and must therefore be defined in terms of lex ferenda (new law) rather than in terms of lex lata (existing law). What sense, then, can there be in the objection? If the concept lacks legal content, it is up to the present generation of international lawyers to give it such content."¹⁶⁶ Though in these nine years the concept has now become an international legal principle, yet the legal content of precise meaning remains to be accorded to it.

By this the writer does not intend to suggest that a meaning accorded to this term today must confirm, hold good or be acceptable in the centuries to come to the future

generations. Such a concern grows out of the view that no law is perfect in itself for all times, particularly in a rapidly changing society like ours. Therefore, it (law) must be left open for future generations to review the validity of a particular term or concept in terms of the need of their time.

The intention here is to suggest that, though freedom of interpretation of this term be left open for future generations, a systematic and binding democratic process be evolved for the interpretation of this concept. So that while leaving the authority of reinterpretation with future generations, a check is imposed to prevent possible misuse of this novel notion.

The meaning accorded to the "common heritage" concept must be one to lay down a process of reconciliation of diversified conflicting interests of various geopolitical regions of the world. It is only possible, perhaps, by approaching the problem of interpretation of this concept by rational thinking and more vivid interpretation of the terms being cannotted for the meaning of the "common heritage" concept. Before we accord or recommend a particular term or concept as a precise meaning of this concept, it will be suggestive to look into the background, origin and meaning and usage of these terms. It is recommended because a fairer view of the background of other terms will help us reveal the possible future misinterpretations of these terms; and thus might help us avoid conceivable future chaos on terms like "property" and "ownership".

II :2:ii The Common Heritage of Mankind, Social Property and Common Property: An Analogy

The terms "social property" and "social ownership" are frequently used in Socialist literature. They have given a specific meaning to these terms, so as to avoid their misinterpretation. In Socialist theory in general, the owner of the means of production is the state as the embodiment of society which means, the proletarian class. This ownership is the foundation of the power of this class which is the power of the state. However, Yugoslav theory of "social property or ownership" is the only one which broke with the general socialistic interpretation of "social property or ownership".^{166a} According to Yugoslav definition social property "does not belong to anyone but to society in general, [i.e.] in essence to no one and to everyone at the same time. There is no single [state or institution] that can claim that it legally represents the owners of the property. Those who work with these resources can benefit from the results of the use of these assets. However, they can only increase the resource overall and not decrease them."¹⁶⁷ Professor Djordjevic further clarifies these concepts and says that "the term social property has a negative meaning; it indicates the negation of the right to ownership to each and all. It prohibits the monopoly by power of the means of production and produce of labour.... This social character of property itself implies a higher degree, a more

real and more direct socialization of working relationships and the division of productive work. It further implies the establishment of work's self management, active self-determination of the producer in the process of production and distribution and in the management of other common social affairs."168

The term social property means, "the means of production in global sense...is a semantic and ambivalent concept, insufficiently defined as to its substance. The term social does not mean appertaining to society in the sense of a new abstraction that in the existing historical circumstances is vested in a single powerful holder of ownership rights, the state." Therefore it is an error, theoretically, to identify state ownership with social property. The social property does not mean collective or group property...the property of enterprise, nor is it a synonym for the collective property of the people or for some form of social ownership or shareholding."169

Here, the basic meaning of the term "social" when used with the term property, itself adds a new sense, a new norm, and thus changes the basic meaning and concept of the term property. The word "property" loses the legal meaning associated with the establishment of private property and maintained in relation to all forms of collective property, including state property. Thus "theoretical and indicative clarification is essential if the science of property and society

is to be gradually freed from the mythology of private property and from the dogmatism of state property and of legal property formalism in general. 170

The term social property is a new historical phenomenon. It has no other interpretation than the one accorded to it by the Yugoslav's socialist philosophy.

As the Yugoslavs attach a specific meaning to this term, which can not be interpreted in any other way than the one accorded to it, there is the least possibility of its misinterpretation, in terms of juristic interpretation, which generally follows the precedents in clarifying the hidden senses in concepts.

In the term "common property" a group of people or community, with its total membership or its legal representatives, decide on the utilization of the property and on the distribution of fruits. Common ownership is thus an extension of private property. It is basically the private property of several people who agree to use and benefit from the shared property, retaining the freedom to take their individual shares out. This concept has abundant precedents to give it a specific meaning, as referred to above. This term is universal in its origin and is readily traceable in primitive society. Marx, while emphasizing its universal origin in primitive society, and replying to those who believed its origin lay only in Slavic or Russian tradition, wrote:

"A ridiculous presumption has latterly got abroad that common property in its primitive form is specifically a Slavonian, or even exclusively Russian form. It is the primitive form that we can prove to have existed amongst Romans, Teutons, and Celts, and even to this day we find numerous examples, ruins though they be, in India. A more exhaustive study of Asiatic, and especially of Indian forms of common property, would show how from the different forms of primitive common property, different forms of its dissolution have been developed. Thus, for instance, the various original types of Roman and Teutonic private property are deducible from different forms of Indian common property."¹⁷¹

The very fact that "common property" concept has a universal history of its particular meaning and use in which it has been provided with the classical-legal meaning of the term "property", that is, private property which accords to this term "the right to the possession, use or disposal of anything,"¹⁷² make it unacceptable for its application as meaning of "common heritage" concept.

Ambassador Pinto, when he said that "the common heritage of mankind is the common property of mankind", perhaps had a suspicion in his mind that this meaning might be misused in future by state parties by way of deriving the right of "disposal" and "withdrawal" from the common property,¹⁷³ which might lead to the division of the seabed in the long run. And, perhaps, for this reason Pinto clarified that resources of the seabed which are common heritage of mankind are to be considered

as "undivided and indivisible" whole.¹⁷⁴ To some extent, certainly, Ambassador Pinto's clarification removes the possibility of the division of the common heritage area. But the question of the right of disposal is still not completely answered by this clarification.

Pardo objected to any such interpretation which brings in the element of property or ownership in the "common heritage concept". In his view the term "common heritage of mankind" was carefully phrased so as to avoid the elements of property or ownership,¹⁷⁵ because the term "property" or "ownership" always, in the juristic sense, carry the right of disposal with them. He clarifies that by "common heritage of mankind" he means "the absence of property and sovereignty" rights.¹⁷⁶

The fear that the use of terms property or ownership might lead to a complete right of use or misuse is, perhaps, justified. This apprehension is further justifiable, if we examine the author's definition of these terms - "the right to use or deal with some given subject in a manner or to an extent, which, though it is not unlimited is infinite."¹⁷⁷

The question now is why the "social property" concept is more readily acceptable and not the "common property" as an alternate or specific meaning to the "common heritage of mankind" concept? Arguably, the answer is the "common property" concept has a specific meaning in precedence, in the forms of

ancient universal usages, according to which the management is left to the individual user.¹⁷⁸ This was possible in an environment of abundance. In an environment of scarcity and overdeveloped technology, it is not tenable as the "commons" is threatened with exhaustion and pollution. Hence the "common heritage" concept which implies indivisible management is in complete contrast to the "common property" concept as in the latter management is left to the individual user. Social property concept which is a new phenomenon, and which has no other precedence of its meaning than the one given to it by the Yugoslav socialist philosophy, reduces the possibility of its misuse by way of its misinterpretation. The very reason that it carries a specific and precise notion the principle of non-ownership coupled with management — qualifies it for applying it to "common heritage" concept as a synonym. This is because it clarifies the hidden sense of "common heritage" concept.

II:2:iii The "Common Heritage of Mankind" and "Common Interest"

The concept of "common interest" was first applied to the law of the sea by Professor McDougal. He, in emphasizing the exclusive interests of coastal states and inclusive interests of coastal and non-coastal states, wrote:

It is reasonably clear that all states which border upon the oceans have a common interest in those traditional exclusive

assertions of control in nearby areas which permit a state both to protect its territorial base and organized social life from too easy invasion or attack from the sea and to take advantage of any unique proximity it may have to the riches of the seabed and marine life. It is no less clear that each state, whether coastal or not, has an interest in the fullest possible access, either for itself or for others on its behalf, to all the inclusive uses of the ocean, such as navigation, fishing, cable-laying, and so on, for the richest possible production of values. From this mutual interest of all states in all types of uses, it follows that each state has an interest in an accommodation of such uses, when they conflict, which will yield both an adequate protection to exclusive claims and yet the greatest possible access to inclusive uses. The net total of inclusive uses available for sharing among all states is directly dependent, further, upon the restriction of exclusive claims to the minimum reasonably necessary to the protection of common interest. 179

McDougal, while applying his concept of "common interest", encompasses all the activities in the sea as a whole. But since 1967, after the application of "common heritage" concept, the sea was explicitly divided into seabed submerged land and superjacent waters. The concept of common heritage was made applicable to seabed only. Although the concept of "common interest" in its literal sense is applicable to seabed and can be used for interpretation of the "common heritage of mankind" concept, it can not be said to have complete representative expression, i.e., as a synonym of the "common heritage" concept.

Perhaps the most rational argument is that the

"common interest" concept, like other concepts,¹⁷⁵ had been accorded a specific meaning by using it to express a particular set of interests, i.e., common inclusive and common exclusive interests. Neither of these two expressions is synonymous with the "common heritage of mankind" concept; The claim of exclusive interest means the claim of a state in adjacent sea up to certain limits, according to functional zones in question. The "common exclusive interests" are restricted to the benefit of coastal states and thus can not be said to have a true universal character in their application.

Common inclusive interests are different in nature from exclusive interests. In this the seas are open to both coastal and non-coastal states and this open access to all states is guaranteed, with an intention of benefit to all mankind - the concept by this acquires an international character. The concept of "common inclusive interests", though it theoretically allows all states to use and enjoy the resources of the oceans without interference with others, practically fails to help and satisfy the poor developing countries who do not possess the means on their own to use and enjoy the oceanic resources. This concept suits the industrialized states, who can easily go and plunder the whole oceanic wealth, without any resistance or competition from developing countries. Further this concept when applied to oceans, provides a free pot to all, devoid of any systematic management system - a common pot which can only be enjoyed and

used by technological superior states. Thus though the term common inclusive interest assures all mankind of equal participation rights in exploitation of resources, fails miserably in the absence of a common management system to justify the basic norm of "benefit to all mankind", as envisioned through the "common heritage of mankind" concept.

This ~~concept~~ holds good under the principle of the freedom of high seas, that is, it holds good only in the superjacent waters of the high seas but not in the seabed because the status of the seabed is different from the status of the superjacent waters. Seabed is not free for unregulated use and enjoyment of its resources to all - it is for the benefit of all by way of a system which ensures benefit to all by common management. And as "common interest" concept is in contrast to common management system and works on the principle of "free access" to all, it benefits only a small part of mankind and mankind as a whole. Further, seabed can not be used by anyone unless the one in question is a true representative of mankind and has been authorized by mankind as a whole to use and exploit on behalf of mankind. It is here that the question of joint-control and management comes in - unless seabed is managed and exploited by a system of joint-management and control, its resources can not be made open for shared use. Here shared use, which is one of the objects of the "common heritage" concept means the shared use of the proceeds of exploitation, which is obtained after joint-control and management.

At the most the "common interest" term can be used to express, in its literal sense, an element of the "common heritage" principle, that is, the seabed has been declared the "common heritage of mankind" in the common interest of mankind. But it is to be noted that if its application to the seabed's common heritage principle is based on or is coupled with the terms inclusive and exclusive interests or either of the two, it will altogether change the basic notion of the "common heritage" doctrine.

II:2:iv Conclusions

The "common heritage of mankind" doctrine is built upon the logic of the benefit of all mankind as a whole. The very fact that mankind as a whole can not be served unless the doctrine is founded on such principles which provide for equitable sharing by way of joint management, necessitates its interpretation in new terms. The older concepts, such as "common property" and "common interest" because they carry with them elaborate explanations and because those expressions do not fit into the sense of "common heritage" principle, requires adoption of such connotations or terms which are best suitable for its practical application.

Perhaps, the correct spirit as discussed earlier is the "common heritage" belongs to all mankind, it is for the benefit of all mankind by way of shared use or enjoyment of its

exploited proceeds. The "shared use" is permissible only after the common heritage has been jointly exploited by a system of common management. It will reduce the possibility of inappropriate appropriation, i.e., it will prevent the misuse of the common wealth of the common heritage of mankind by negation of "property" or "ownership" rights and common management system.

The sense of the concept of social ownership or property or rather non-ownership is, perhaps, the best to serve the needs of the "common heritage" doctrine. This concept, according to Borgese, "is developing all over the world and of which the 'common heritage of mankind' concept in the oceans is a first tangible example." She concludes that the "concept of common heritage of mankind...is the same thing as social property."¹⁸¹ To sum up, the "common heritage" carries with it a negative value of property rights and a notion of common management and control by democratic process, where this joint body will act as a trustee of mankind of today and of generations to come.

FOOTNOTES FOR CHAPTER II

1. On the development of Air Law according to technological progress See: John C. Cooper, Exploration in Aerospace Law (ed. Vlasic, 1968), pp. 3-9. On the development of the law of Antarctica, see generally Peter A. Bernhardt, "Sovereignty in Antarctica" 5 Calif. Western Int. L.J. (1974-75): p. 230.
2. John Kish, The Law of International Space (1973), p. 3.
3. Victor L. Anuso, "Is space the New Peace and Abundance?" in Colla, Outer Space (1959), p. 5.
4. Treaty on Principles Governing the Activities of State in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 610 U.N.T.S. 2205, Art. I, at 203 (hereafter cited as Outer Space Treaty).
5. Paul W. Frazier, comment on Antarctica: Current National Interests and Legal Realities, by John Herreson Jr., 52 Am. Soc. Int. L. Proc. (1958): p. 164.
6. Sydney Morning Herald, Feb. 12, 1958, cited by John Herreson, "Antarctica: Current National Interests and Legal Realities" 52 Am. Soc. Int. L. Proc. (1958): p. 163.
7. The Antarctic Treaty, December 1, 1959, Washington. See, preamble which reads: "Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord." 402 U.N.T.S., 72 (hereafter cited as Antarctic Treaty).
8. C. Wilfred Jenks, The Common Law of Mankind (1958), p. 80.
9. The terms "exclusive use and inclusive use" are used in the same sense as used by McDougal and Burke to whom an indebtedness is acknowledged. Myres S. McDougal and William T. Burke, "Crisis in the Law of the Sea: Community Perspectives Verses National Egoism", 67 Yale J. (1958): p. 539.

According to McDougal and Burke, an exclusive claim means "a claim to authority over an area or over specified activities which other states cannot share with the claimant state. By such a claim, the claimant state commonly asserts a competence to apply its authority to

all persons in an area or engaged in certain specified activities, irrespective of the nationality of the person. Examples may be noted in the claims coastal states made to control over "internal waters" and territorial sea". p. 539.

By an inclusive claim is meant a claim to authority over an area or over specified activities which the claimant state can, by some accommodation to avoid physical interference in use, share with another (the category of authority state A gets, state B can also get). By such a claim, the claimant state commonly asserts a competence to apply its authority only to its own nationals, concedes a comparable authority with respect to the area or activities to other states with respect to their nationals and demands that other states reciprocally refrain from the exercise of authority over its nationals and their activities in the area. Examples may be noted in the claims states make to navigation and fishing on the "high seas". *Ibid.*, p. 539. Also see McDougal and Burke, "The Community Interests In a Narrow Territorial Sea: Inclusive Verses Exclusive Competence Over the Oceans", 45 Cornell L.Q. (1959-6): p. 171.

10. Jerome Morenoff, World Peace Through Space Law (1967), pp. 151-57.

The two main systems of terminology have been used by physical scientists to describe the different regions of the terrestrial atmosphere, they are variations in both temperature and electron density with respect to changes in altitude.

On this basis these thermal contrasts atmosphere have been divided into five gaseous layers:

"1. The first of these layers, the Troposphere, extends upwards from the surface of the earth to approximately 17 kilometers (7 miles). It is a region of convective disturbances and cloud formations and is characterized by a steadily decreasing temperature with an increase in altitude....Temperature varies from 15°C to -55°C.

2. The second layer, the Stratosphere, represents the atmospheric region from 11 kilometers to approximately 30 kilometers (7-19 miles). It is characterized by an almost constant temperature of -55°C for all altitudes and by the absence of strong turbulence and cloud formation. Although the Stratosphere is often treated as dynamically distinct from the Troposphere, it has been regarded as a region of essentially similar physical character...the gaseous proportions are about the same in both regions.

3. The third layer, the Mesosphere, is situated approxi-

mately between 30 and 80 kilometers (19-50 miles). It is characterized by an increase in temperature with altitude up to about 45 kilometers due to absorption of solar radiation by ozone, the maintenance of a constant temperature between 45 and 55 kilometers, and a decreasing temperature in its upper extremity. The representative temperatures in three regions are -55°C , $+20^{\circ}\text{C}$ and -75°C respectively...Once again apart from ozone and water vapour the composition of the Mesosphere corresponds to the average for the atmosphere.

4. The fourth layer, the Ionosphere, extends from 80 kilometers to approximately 640 kilometers (50-400 miles) above the surface of the earth. In this region the lower atmosphere controlling such as carbon dioxide ozone and specially water vapour, which by absorption, exchange and radiation of heat, maintain thermodynamic equilibrium, are lacking. In this region temperature is steadily increasing and believed to be approximately $2,200^{\circ}\text{C}$. This is an electrically charged region created by the bombardment of the sun's ultraviolet radiation upon the upper atmosphere...The Ionosphere makes possible all long-distance radio communication using high frequency waves since it reflects the signals back to earth, preventing them from being lost in space.

5. The fifth layer, the Exosphere, consists of the area beyond the Ionosphere. This region is supposedly characterized by a uniform temperature of approximately $2,200^{\circ}\text{C}$. In the Exosphere in which the density of the gaseous atmosphere is even less than in the Ionosphere, there are no collisions between randomly moving molecules unless they happen to return to the lower levels of the atmosphere or escape into outer space because gravitational pull of the earth is not strong enough to hold them.

11. For a comprehensive discussion of the various boundary proposals and their limitations, see Myres S. McDougal, Harold O. Lasswell, and Ivan A. Vlasic, Law and Public Order in Space, (1963), pp. 323-349.
12. John C. Hogan, "Legal Terminology for the Upper Regions of the Atmosphere and for the Space Beyond the Atmosphere", SI Am. J. Int. L. (1957); p. 362.
13. 499 U.N.T.S. 205; Art. 1: Geneva Convention on Continental Shelf, 1958.
14. 11 L.N.T.S. 174, No. 297: Convention on Aerial Navigation, Paris, 13 October 1919.
15. Soviet Union: Air Code, 1935, Quoted by Kish, supra n. 2, p. 40.

16. United States: Civil Aeronautics Act, 1938 (Marjorie M. Whiteman: Digest of International Law, Vol. 9, p. 310).
17. Convention on International Civil Aviation, Article 1 & 2, Chicago, 7 December 1944: 39 Am. J. Int. L. (1945), Suppl. p. 111; 16 U.N.T.S. 295.
18. 516 U.N.T.S. 205: Article 2 of the Geneva Convention on Territorial Sea reads: "The sovereignty of a coastal state extends to the air space over the territorial sea..."; Informal Composite Negotiating Text, U.N. DOC. A/CONF. 62/ WP. 10, 15 July 1977, Art. 2.
19. Article 2(4) of the Convention on High Seas (45 U.N.T.S. 82) provides for the freedom of aviation above the high seas: "Freedom of the high seas...compromises...freedom to fly over the sea". This rule has been reaffirmed in UNCLOS III, Article 87 of Informal Composite Negotiating Text (U.N. DOC. A/CONF. 62/ WP. 10, 15 July 1977): 1. "The high seas are open to all States...Freedom of high seas...compromises...(b) freedom of over-flight".

Similarly, the international regime of Antarctica extends to its superjacent air space. Article IV of the Antarctic Treaty (See supra n. 7 Antarctic Treaty) says the provisions of the Treaty shall apply to the area south of 60° South latitude..., but not prejudicing the regime of the high seas within that area." Therefore the air space above Antarctic land territories and ice shelves is subject to the regime of Antarctica. Further Article VII (4) of the Antarctic Treaty provides for the right of aerial observation above Antarctica: "Aerial observation may be carried out at any time over any or all areas of Antarctica..." (See, Kish, supra n. 2, pp. 40-41 for detailed discussion on delimitation of International Air Space).

20. Outer Space Treaty, supra n. 4; Article 1 & 2 of the Convention on International Civil Aviation, supra n. 17.
21. Antarctic Treaty, Article 2(4), supra n. 7; Convention on High Seas, Article VII (4), supra n. 19; Outer Space Treaty, Article 1, supra n. 4.
22. For U.N. General Assembly Res. No. 2733 (XXV), 16 Dec. 1970 See: Dusan J. Djonovich, Comp. & ed., United Nations Resolutions, Series I, Vol. n13, p. 235 (Hereafter cited as U.N. Resolutions).
23. C. Wilfred Jenks, Space Law (1955), p. 191.
24. Philip C. Jessup and Howard J. Taubenfeld, Controls for Outer Space and the Antarctic Analogy (1959), p. 208.

25. See, supra n. 10, Ionosphere and Exosphere.
26. 26 McDougal et al., supra n. 11, p. 349, 356.
27. Stanley B. Rosenfield, "The Need to Distinguish Air Space from Outer Space" 20 Colloquium L. Outer Space (1978): p. 61.
28. Peter P.C. Hanappel, "Definition of Outer Space and Outer Space Activities", 20 Colloquium L. Outer Space (1978): p. 53 at 54.
29. See, supra, Chapter I, section II, p.
30. Outer Space Treaty, supra n. 4, Art. 4.
31. Ibid., Article 1.
32. Ibid., Article 2.
33. Bin Cheng, "International Law and High Altitude Flights: Ballons, Rockets and Man-Made Satellites", 6 Int. & Comp. L.Q. (1957): p. 487 at 491.
34. Jenks, supra n. 23, pp. 44-45.
35. McDougal, et al., supra n. 11, pp. 227 and 237-238.
36. Ibid., p. 151.
37. Ibid., pp. 151-142.
38. Outer Space Treaty, supra n. 4., Art. II and III.
39. Ibid., Article XII.
40. Kish, supra n. 2, pp. 129-130.
41. Ibid., p. 131.
42. David Davies Institute, Draft Code of Rules on the Exploration and Use of Outer Space, Article 3(5), Current Problems in Space Law, London, 1966, p. 128 (cited by Kish, ibid., p. 132).
43. Institute of International Law, Brussels Resolution, 1963, Current Problems in Space Law, London, 1966, pp. 134-36, (cited by Kish, ibid., p. 133).
44. Outer Space Treaty, supra n. 4, Art. XI.
45. Cf. Kish, supra n. 2, p. 134.

46. U.N.G.A.R. No. 217 (III), U.N. DOC. A/810 at 71 (1948), See U.N. Resolutions, supra n. 22, Series I, Vol. II, p. 135; Also see, U.N.G.A.R. No. 2200 (XXI A), 21 G.A.O.R., Supp. (No. 16) 52; U.N. DOC. A/63/6 (1966) for International Covenant on Civil and Political Rights. U.N. Resolutions, ibid., Vol. 9; p. 165.
47. For detailed discussion on the right to use the data and information collected by remote sensing see, Hamilton DeSaussure, "Remote Sensing by Satellite: What Future for an International Regime?", 71 Am. J. Int. L. (1977): p. 707; Also see Toshio Kosuge, "Remote Sensing and International Law", 20 Colloquium L. Outer Space (1978): p. 316.
48. Jessup and Taubenfeld, supra, n. 24, p. 248-249.
49. McDougal, et al., supra n. 11, pp. 555-556.
50. Ibid., p. 661.
51. Bin-Cheng, "The Extra-Territorial Application of International Law", 18 Current Legal Problems (1965): p. 132 at 141-42.
52. Ian Brownlie, "The Maintenance of International Peace and Security in Outer Space", 40 Brit. Yearbook Int. L. (1966): pp. 112-13.
53. McDougal, et al., supra n. 11, pp. 154-156.
54. Outer Space Treaty, supra n. 4, Article I & II.
55. Gyula Gal, Space Law (1969), p. 200.
56. Ibid., pp. 200-201.
57. Jenks, supra, n. 23, pp. 196 and 275.
58. McDougal, et al., supra n. 11, p. 779.
59. Ibid., p. 794.
60. Ibid., p. 796.
61. E.G. Vassilerskaya, "Notions of 'Exploration' and 'Use' of Natural Resources of Celestial Bodies", 20 Colloquium L. Outer Space (1978): p. 473 at 474.
62. Ernst Fasan, "Utilization of Energy from Space - Some Legal Questions", 18 Colloquium L. Outer Space (1976): p. 2.

63. Sebastian Estrade, "The Utilization of Space As a Source of Energy for the Earth", 18 Colloquium L. Outer Space (1976): p. 7 at 11.
64. Leslie I. Tennen, "International Law and the Use of Outer Space for the Production of Solar Power", 20 Colloquium L. Outer Space (1978): pp. 456-457.
65. Marco G. Markov, "Space Resources and the Scope of Prohibition in Article II of the 1967 Treaty", 13 Colloquium L. Outer Space (1970): p. 81; Van Krier, "The Legal Status of Geostationary Orbit", 18 Colloquium L. Outer Space (1976): p. 17 at 29; Fasan, supra n. 62, p. 3.
- 65A. Jenks, supra n. 23, p. 197.
66. E.G. Vassileus Kaya, supra n. 61, p. 473.
67. Report of the Committee on Peaceful Uses of Outer Space: 28 GAOR, Supp. 20, U.N. DOC. A/9020 (1973) Text of the Draft Moon Treaty.
68. "Professor Harold Lasswell and Myres McDougal have developed a value system for law, a 'value' being 'a desired event'." Policy is defined as the "projected programme of goal values and practices; the policy process is the formulation promulgation, and application of identifications, demands, and expectations concerning the future interpersonal relations of the self". They describe value categories as goal variables, which are power, enlightenment, wealth, well-being, respect, skill, rectitude, and affection. Lasswell and McDougal view law as a power value with formal authority to make decisions and effect control over their execution. Human dignity assumes primary role. A democratic distribution of values is fostered through their widest sharing. Since usage makes such significant impact on the meanings and objectives technical legal rules, they should be minimized. Nor do rules guarantee legal certainty or ensure that social objectives are fulfilled. Therefore, Lasswell and McDougal propose a deemphasis of rules, with stress on policy. They say that the terminology should be interpreted and defined in terms of the democratic objectives of life, and functional thinking should be substituted for conceptual reasoning. The role of legal doctrine then becoming that of promoting policy objectives."

This approach is being followed in the present discussion, for analyzing "base values" which are the basis of present policy formulation for Outer Space and Deep Ocean-Bed.

For this approach, See; Harold D. Lasswell and Myres S. McDougal, "Legal Education and Public Policy", 52 Yale L.J. (1943); p. 203 at 212 and Ervin H. Pollock, Jurisprudence (1979), p. 846; Also see generally Myres McDougal, "The Comparative Study of Law for Policy Purposes: Value Classification as an Instrument of Democratic World Order", 61 Yale L. J., (1952): p. 915..

69. Outer Space Treaty, supra n. 4., Article I & III.
70. I.C.N.T., supra n. 19, Article 138 and Preamble Para. 2.
71. Outer Space Treaty, supra n. 4, Article IV.
72. U.N.G.A.R. No. 2602 (XXIV), GAOR, DOC. A/7902, 16 December 1969.
73. Jenks, supra n. 23, p. 46.
74. McDougal, et al, supra n. 11, pp. 443-445.
75. Carl Q. Christol, The International Law of Outer Space: 55 U.S. Naval War College International Law Studies (1962); pp. 238-239.
76. Draft Moon Treaty, supra n. 67, Article IX.
77. It is expected that the generalization of legal principles will lead to a better community of nations and people. See and Cf. Rudolf B. Schlesinger, "Research on the General Principles of Law Recognized by Civilized Nations", 51 Am. J. Int. L. (1957): p. 734 at 753; Cf. Wolfgang Friedmann, "The Uses of 'General Principles' in the Development of International Law", 57 Am. J. Int. L. (1963): p. 279.
78. U.S. Naval War College: International Law Documents 1948-49. (1950) pp. 231 and 233; Later Patent, 21 July 1908 (Falkland Island Gazette 1st Sept. 1908).
79. Order in Council, 30 July 1923 (New Zealand Gazette, 14 August 1923, p. 365), ibid., pp. 234, 235.
80. Order in Council, 7 February 1933 (Commonwealth Gazette, 16 March 1933, p. 365), ibid.; pp. 236.
81. France: Decree on Antarctica, 1 April 1938, ibid., p. 230.
82. J. Deniel, "Conflict of Sovereignities in the Antarctica", 3 Yearbook of World Affairs (1949): p. 241 at 244; Kish supra n. 2., p. 29.

83. Norway: Decree, 14 January 1939, supra n. 78, pp. 239, 243.
84. Daniel, supra n. 82, p. 244; Kish, supra n. 2, p. 29.
85. Daniel, ibid., p. 245; G.H. Hackworth, Digest of International Law, Vol. 1 (19), p. 399; supra n. 78; p. 238.

"In 1924, Secretary of State Hughes, following the notification of the transfer of Ross Dependency to New Zealand, refused to recognize it, pointing out that the 'so-called dependency had no fixed population'. When France annexed Adelie Land, the American Secretary of State pointed out: 'far as my government is aware, Admiral Dumont d'Ussville did not even land on the coast claimed for France by him, nor has any French citizen visited the area.' [Hackworth, ibid., p. 453, 399; Daniel, ibid., p. 245.]

This attitude was further reasserted in 1946 by the then Acting Secretary of State:

"The United States Government has not recognized any claims of any other nations in the Antarctica and has reserved all rights which it may have in those area. On the other hand the United States has never formally asserted any claims..." [16 Department of State Bulliten, p. 30; supra n. 78, p. 243].

For Soviet attitude see Peter A. Toma, "Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctica", 50 Am. J. Int. L. (1956), p. 611.

86. Chile: Decree December 6, 1940, supra n. 78, p. 224; Robert D. Hayton, "The 'American' Antarctic", 50 Am. J. Int. L. (1956): p. 583 at 586.
87. Supra n. 78, p. 220.
88. Supra n. 78, p. 218; Hayten, supra n. 86, p. 587, Kish, supra n. 2, p. 29.
89. Hayon, supra n. 86, p. 586 (quoted by Hayton).
90. I.C.J. Pleadings, 'Antarctica Cases' (United Kingdom v. Argentina; United Kingdom v. Chile) 1955, pp. 38, 75.
91. I.C.J. Reports, Antarctica Cases (United Kingdom v. Argentina United Kingdom v. Chile) 1956, pp. 13-17.
92. Jessup and Taubenfeld, supra n. 24, p. 140.

- On the "sector theory" see, M.W. Mouton, "The International Regime of Polar Regions", 107 Recueil Des Cours (1962): p. 238 at 243; J.S. Reeves, "Antarctic Sectors", 33 Am. J. Int. L. (1939): pp. 519-521; On 'discovery' see, C.H.M. Waldock, "Disputed Sovereignty in the Falkland Islands", 25 Brit. Yearbook Int. L. (1948): p. 311 at 314; Philip C. Jessup, "Sovereignty in Antarctica", 41 Am. J. Int. L. (1947): pp. 117-119 On "occupation" see, Daniel, supra n. 82, p. 241 at 248; Toma, supra n. 85, p. 616.
93. On "interest theory" see, W. Lakhtine, "Rights Over the Arctic", 24 Am. J. Int. L. (1930): p. 703; Toma, supra n. 85, p. 611; Jessup, ibid., p. 117-119; Myres S. McDougal, "Law and Power", 46 Am. J. Int. L. (1952): p. 102 at 109.
 94. Jessup and Taubenfeld, supra n. 24, p. 141. Quoted from the statement of the Secretary of State Mr. Charles E. Hughes [2 U.S. Foreign Relations (1939): pp. 519-520].
 95. Toma, supra n. 85, at 617; However, the United States have some records of the claim of semi-formal nature, see, Jessup and Taubenfeld, ibid., pp. 153-154.
 96. Robert D. Hayton, "Polar Problems and International Law", 52- Am. J. Int. L. (1958) p. 746.
 97. Supra n. 78, pp. 244-245.
 98. Toma, supra n. 85, p. 620.
 99. Toma, ibid., p. 624.
 100. U.N. DOC. A/3118/Add. 2, 17 Oct. 1956.
 101. U.N. DOC. A/3852, 15 July 1958.
 102. The Hindustan Times, May 16, 1958.
 103. "The question of participants in the conference on Antarctica engendered considerable controversy. While countries like Soviet Union and Japan favoured widest possible participation, Australia supported a limited number. The United States, the host country, took the position that the number of the participants should be kept to the minimum of twelve states, for even that number may prove difficult in the actual drafting of the treaty provisions. Some countries felt that due to her expressed and well-known interest in Antarctica and the proposals made by her to the United Nations, India should also be included among the participants. Others expressed a fear that in case India was asked to join

the Soviet Union might lose the opportunity to press for the inclusion of one or more of its satellites. Whatever the case may be, the exclusion of India from the conference caused concern among the uncommitted countries. The conference was limited eventually to those twelve countries which participated in the Antarctic program for the International Geophysical Year". [K. Ahluwalia, *The Antarctic Treaty: Should India Become a Party to It?*, 1 Indian J. Int. L. (1960-61); p. 473 at 474-75]. This included seven claimant states and five others (the U.S., the U.S.S.R., Belgium, South Africa and Japan).

104. Ahluwalia, ibid., p. 483.
105. Mouton, supra n. 2, p. 32.
106. Antarctic Treaty, supra n. 7, Article VI.
107. Kish, supra n. 2, p. 32.
108. Kish, ibid., p. 33.
109. Geneva Convention on Territorial Sea and Contiguous Zone, supra n. 18, Article VI; I.C.N.T./Revision 1, U.N. DOC. A/CONF. 62/ WP. 10/Rev. 1, 28 April 1979, Article 2; Antarctic Treaty supra n. 7, Article II & VI.
110. Mouton, supra n. 92, p. 195.
111. J.P. Bernhardt, "Sovereignty in Antarctica", 5 Calif. W. Int. L.J. (1975): p. 297 at 308.
112. Nuclear Test Ban Treaty. Done at Moscow, 5 August 1963, 480 U.N.T.S. 43.
113. Frank Pallone, "Resource Exploitation: The Threat to the Legal Regime of Antarctica", 8 Man. L.J. (1977-78): p. 597 at 601 and 10 Conn. L. Rev. (1977-78): p. 401 at 406.
114. Pallone, ibid., quoted from H. Thaubenfeld, "A Treaty for Antarctica", 531 Int. Concilian (Jan. 1961): p. 243 at 283-84.
115. Geneva Convention on the Continental Shelf, supra n. 13, Article 2(1); I.C.N.T./Rev. 1, supra n. 109, Art. 77.
116. Kish, supra n. 2.
117. I.C.N.T./Rev. 1; supra n. 109, Article 2(1).
118. Antarctic Treaty, supra n. 7, Article IV 1(a).

119. Fernando Zegars Santa Cruz, "El Sistema Antartico y la Utilizacion de los Recursos", 33 U. Miami L. Rev. (Dec. 1978): p. 426 at 461. According to Article IV (2): "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. No new claim or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force." Chile was the only country who claimed 200 miles exclusive economic zone before the Antarctic Treaty was signed in 1959.
120. Cf. Mouton, supra n. 92, p. 195.
121. "In the North, both Denmark and Sweden calimed sovereignty over the Baltic, the Danish pretension...later extend to all the northern seas between Norway, Iceland and Greeland...In the South, Venice attributed to herself the sovereignty of the Adriatic, whilst Genoa and Pisa claimed the Ligurian Sea". [C.J. Columbus, The International Law of the Sea, 6th Re. Ed., (1967), pp. 48-49.]
122. Ahluwalia, supra n. 103, p. 483.
123. Antarctic Treaty, supra n. 7, Article IV (2) (Unclaimed is from 150° longitude to 90° Laditude),
124. Kish, supra n. 2, p. 72; Robert D. Hayten, "The Antarctic Settlement of 1959", 54 Am. J. Int. L. (1960): p. 349 at 354-358.
125. Mouton, supra n. 92, p. 257; Guyer, infra n. 126, p. 223; Antarctic Treaty, supra 7, Article XII & X.
126. Roberto E. Guyer, "The Antarctic System" 139 Recuel Des Cours (II/1973): p. 151 at 184.
127. Kish, supra n. 2, p. 117.
128. U.N. General Assembly Res. 2749 (XXV), 17 December 1970, Article 5 and 14.
129. I.C.N.T./Rev. 1, supra n. 109, Article 259 and 260.
130. Quoted by Kish, supra n. 2, p. 124.
131. Ibid., pp. 125-126.
132. Quoted by Pallone, supra n. 113, p. 605.
133. Jenks, supra n. 23, pp. 377-378.

134. John A. Dugger, "Exploiting Antarctic Mineral Resources - Technology, Economics and the Environment", 33 U. Miami L. Rev. (1978, December): p. 315 at 335.
135. Pallone, supra n. 113, p. 604.
136. Frank C. Alexander Jr., "Legal Aspects: Exploitation of Antarctic Resources: A Recommended Approach to the Antarctic Resource Problem", 33 U. Miami L. Rev. (1978 Dec.): p. 371 at 406.
137. Ibid., pp. 410.
138. Cf. I.C.N.T./Rev. 1, supra n. 109, Article.
139. Pallone, supra n. 113, p. 604.
140. Cruz, supra n. 119, p. 427 at 453.
141. Antarctic Treaty, supra n. 7, Article IV (1).
142. Cruz, supra n. 119, p. 463.
143. Part III of the Recommendation IX-2 is reproduced in Cruz, ibid., p. 463-468, note 78.
144. First Canberra, in January; Second Buenos Aires, in July; and informal consultations in Washington D.C., in September 1978. [Cruz, ibid., p. 465.]
145. Cruz, ibid., p. 469.
146. McDougal, Lasswell and Vlasic, supra n. ; p. 799.
147. Antarctic Treaty, supra n. 7, Article II & III.
148. Antarctic Treaty, ibid., preamble; I.C.N.T., supra n. 19, preamble.
149. Antarctic Treaty, ibid., Article I.
150. Ibid., Article VII (5) (c).
151. Ibid., Article V (1).
152. Ibid., Article IV.
153. Kish, supra n. 2., p. 176.
154. Jenks, supra n. 8, p. 380.
155. Harressian, supra n. , p. 468.

156. Bernard H. Oxman, "The Antarctic Regime: An Introduction"; 33 U. Miami L. Rev. (1978): p. 285 at 287.
157. 480 U.N.T.S. 43.
158. M.C.W., "The International Community and Antarctica", 33 U. Miami L. Rev. (1978): p. 475 at 478.
159. Antarctic Treaty, supra n. 7, Article IX (1).
160. Ibid., Article X.
161. Pinto, supra n. 158, p. 483.
162. C.W. Pinto, "Simplification as a Strategy for Facilitating Agreement: A Statement", Proceedings of the Law of the Sea Institute's Workshop: Alternatives in Deep Ocean Mining (1978), Unpublished; Also see Chile's statement, supra Chapter I, p. 53.

Ambassador Pinto says "that...minerals [of the seabed] can not be freely mined. They are not there, to speak, for the taking. The common heritage of mankind is the common property of mankind...In their original location, these resources belong in undivided and undivisible, to your country and to mine, and to all the rest...to all mankind." [Ibid.]
163. Supra, Chapter I, p. 53 (Statement of Yugoslavia).
164. Elisabeth Mann Borgese, "The Ocean Regime", Vol. 1, No. 5 A Center Occasional Paper (1968): p. 5.
165. Myres S. McDougal and William T. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea (1962), pp. 51-56.
166. Elisabeth Mann Borgese, "Introduction", Legal Foundations of the Ocean Regime: Pocom in Maribus (1970), p. 7.
167. Elisabeth Mann Borgese and Ichok Adizes, eds., Self-Management: New Dimensions to Democracy, Alternatives for a New Society (1975), p. 21.
168. Jovan Djordjevic, "The Social Property of Mankind", supra n. 166, pp. 303-304.
169. Djordjevic, ibid., p. 303; Mrs. Borgese distinguishes between four types of properties:

Private property means one's right to utilize, within legal constraints, one's property and benefit from the fruits of this utilization.

Communal ownership means that the community, or the participative system, its total membership or its legal representatives decide on the utilization of the property and on the distribution of the fruits. Communal ownership is thus an extension of private property. It is basically the private property of several people who agree on how to use and benefit from the shared property, retaining the freedom to take their individual shares out.

State ownership is communal ownership on a larger scale where society is represented by the state the way the community is represented by elected representatives, however, members of the community do not have the right to pull out their share - a departure from private property. Thus, state ownership, while related to the private ownership concept, is not an extension of it.

The Social Ownership concept is a total departure from any extension of private property. Resources which are social property do not belong to anyone but to society in general, which means in essence to no one and to everyone at the same time. There is no single institution that can claim that it legally represents the owners of the property. Those who work with these resources can benefit from the results of the use of those assets. However, they can only increase the resources overall and not decrease them. [Supra n. 167, pp. 20-21].

170. Djordyevic, ibid., p. 305.
171. Karl Marx, edited by Fredrick Engles, Capital (1906), p. 89.
172. Oxford English Dictionary (1961), Vol. VIII, p. 1471, meaning 1.
173. Pinto, supra n. 162.
174. Ibid.
175. Arvid Pardo, "Ocean Management and Development", Pacem in Maribus, Younde (1979)
176. Ibid.

177. Austen, Jurisprudence (1879), Vol. 1, p. 382.
178. This was possible in an environment of abundance. In an environment of scarcity and overdeveloped technology.
179. McDougal and Burke, supra n. 165, p. 52.
180. Common Property or Common Ownership.
181. Borgese, supra n. 167, p. 116.

CHAPTER III

THE DEVELOPMENT OF PRINCIPLES OF THE REGIME

OF DEEP OCEAN-BED AND DEEP OCEAN MINING -

FROM 1968-1970

III:1:i. The Ad Hoc Seabed Committee 1968: Introduction

The year 1967 was the beginning of the evolution of the new law of the sea. On August 17, 1967, Arvid Pardo, Maltese Ambassador to the United Nations, requested the inclusion of a new item concerning the development of the deep ocean floor¹ for peaceful purposes. This was followed by a long and detailed statement² on November 1, 1967, given before Committee I of the United Nations. In this statement Ambassador Pardo proposed that the General Assembly should adopt at that session a resolution embodying the following concepts: (i) the deep ocean floor is the common heritage of mankind and should be used for peaceful purposes and for the exclusive benefit of mankind as a whole; (ii) claims to sovereignty over the area should be frozen until a clear definition of continental shelf had been formulated; and (iii) a body should be established to consider the security, economic and other implications of the establishment of an international regime, to draft a comprehensive treaty to safeguard the international character of the area and to provide for the establishment of an international agency.³

The First Committee of the General Assembly held discussions from November 8 to 16 on the abovementioned issues. The proposal for the establishment of the above-

mentioned body received general support.⁴ However, the United States favoured a "Committee on the Ocean" which would assist the General Assembly in promoting long-term international cooperation in marine science.⁵ The Soviet Union was of the opinion that the creation of another new United Nations body might duplicate the existing organizations for the reason that the Secretariat and other existing international organisations had been dealing with the problems of the sea, and advised that I.O.C. be more effectively utilised.⁶ The UNESCO observer was also of negative view towards the establishment of a body in the United Nations.⁷

The December 18, 1967, the UN General Assembly unanimously adopted resolution # 2340 (XXII)⁸ "Examination of the question of the reservation exclusively for peaceful purposes of the seabed ... in the interests of mankind."⁸ It:

1. Provided for the establishment of an Ad Hoc Committee to study the peaceful uses of the seabed and ocean floor beyond the limits of national jurisdiction of 35 nations,⁹ and
2. Requested the Ad Hoc Seabed Committee to prepare a study which would include, (i) a survey of the past and present activities of the United Nations, the specialised agencies, the International Atomic Energy Agency,

and other intergovernmental bodies with regard to the seabed and ocean floor, and of existing international agreements, (ii) an account of scientific, technical, economic, legal and other aspects of it, (iii) an indication regarding practical means to promote international cooperation in the exploration, conservation and use of the seabed and the ocean floor and their resources.

III:1:ii. The Ad Hoc Seabed Committee 1968: Discussion of Principles.

The Ad Hoc Committee held three sessions. The first two were held at United Nations Headquarters, the first from 18-27 March and the second from 17 June to 9 July 1968. The third session was held at Rio de Janeiro, Brazil, from 19-30 August 1968. At the first session, the Ad Hoc Committee established two working groups of the whole, one to deal with the economic and technical aspects and the other with legal aspects. The Committee retained for itself discussion of the remaining matters, that is, consideration of the scientific and other aspects of the item, and an indication regarding practical means to promote international cooperation in the exploration, conservation and use of the ocean floor and the subsoil thereof.¹⁰

The Legal Working Group tried to identify and

list some of the legal problems which arose from the subjects studied. They are as follows: "legal status of the seabed and the ocean floor, and the subsoil thereof; reservation of the seabed and ocean floor and the subsoil thereof underlying the high seas ... exclusively for peaceful purposes; use of the resources of the seabed and ocean and the subsoil thereof ... in the interest of mankind, freedom of scientific research and exploration of the seabed and ocean floor and subsoil thereof ... beyond the limits of present national jurisdiction; the question of reasonable regard to the interests of other states in their exercise of the freedom of the high seas; and the question of pollution and other hazards."¹¹

The Legal Working Group which started its discussion with the summary of the views of member states¹² and a study prepared by the Secretariat of the legal aspects,¹³ soon realised that several issues were not clearly defined. Yet there was similarity in the views regarding the issues involved.

I Legal Status of the Seabed and Ocean Floor.

A large number of members, on the issue of the legal status of the seabed and ocean floor, agreed that the area beyond the limits of national jurisdiction was susceptible of appropriation and that states could not

exercise sovereignty over such an area. Some members were of the view that there was a distinction between non-appropriation of the seabed and ocean-floor and the exploitation of these areas and that such exploitation would not serve as a basis for claims to sovereignty. Reference was also made to the concept of res nullius and res communis and some expressed the view that the concept of res communis might be applicable, whereas others were of the view that neither concept would be helpful in this context.¹⁴ In another view it was emphasised that the seabed and ocean floor beyond the limits of present national jurisdiction should be regarded as having special legal status as the common heritage of mankind. A number of members were of the view that states' nationals should conduct their activities in the area in accordance with the principles of international law, including the Charter of the United Nations.¹⁵

Further, it was generally felt that many problems related to the seabed and ocean floor were not adequately dealt with in the existing international law and it was also felt that legal principles on the activities of states in the exploration and use of the area should be developed in the interests of mankind as a whole. Some delegates also felt that an international regime should be established under the auspices of the United Nations.¹⁶

II Reservation of Seabed and Ocean Floor for Peaceful Purposes.

Another legal issue identified was the reservation of the seabed and the ocean floor and subsoil thereof, beyond the limits of present national jurisdiction, exclusively for peaceful purposes. A very large number of members were of the opinion that the area should be reserved exclusively for peaceful purposes in the interest of international peace and security, the promotion of international cooperation and understanding, and in order to ensure the orderly development of a regime for this area. Further, in the debates it was suggested that all states may use the area beyond the limits of the territorial waters, for peaceful purposes.¹⁷ With this another assertion was that the area beyond the present national jurisdiction should not be used by any state or states for any military purposes whatsoever.¹⁸ There was also support for the view that weapons of mass destruction should not be placed on the seabed or ocean floor or the subsoil thereof beyond the limits of present national jurisdiction.¹⁸

The suggestion was made that the "Ad Hoc Committee should recommend the adoption by the General Assembly of a declaration stating that the exploration and use of the seabed and ocean floor and the subsoil thereof, beyond the limits of present national jurisdiction, ... shall

be used exclusively for peaceful purposes, for the benefit of all countries, particularly the developing countries.²⁰ There was also a suggestion that Eighteen-Nation Disarmament Committee (hereafter referred to as ENDC) should take up the question of arms limitation on the seabed and ocean floor and subsoil thereof to prevent the use of this new environment for the emplacement of weapons of mass destruction.²¹ Another suggestion was to request the ENDC to treat it as a matter of urgency,²² whereas other members were opposed to the consideration of this subject by the ENDC and suggested that it should remain on the Agenda of the General Assembly.²³ So, although the issue was recognised, there were different views on the question of how and in what manner it could be accepted and implemented.²⁴

III Use of the Ocean Floor in the Interests of Mankind.

States were in agreement that the use of the resources of the seabed and ocean floor should be in the interests of mankind,²⁵ but they suggested that the question of how these interests could be best served needs further study.²⁶ Some members expressed the view that there could be no peaceful or national exploitation of the natural resources unless there was exploitation in the interests of all mankind. It was also suggested that the only possibility which appeared to have no serious

drawbacks was an international solution to the problem. They further said that such a solution must be equitable, feasible and acceptable and promote orderly, peaceful and efficient exploitation. Simultaneously some members expressed the view that there should be a declaration to the effect that such areas should be exploited for the common benefit and administered and controlled by a competent body.²⁷

Further, the view was expressed that there was no rule in existing international law prohibiting any one from exploiting the ocean floor. With respect to freedom of exploitation and non-discrimination, the view was expressed that a fair application of these principles would require taking into account the special needs of developing countries.²⁸ A suggestion was made that the special rights and interests of coastal states regarding the conservation and exploration of those resources should be taken into account. Several delegations emphasised that the interests of landlocked countries in participating in the exploration and exploitation of the sea-bed and the ocean floor beyond the limits of present national jurisdiction should be safeguarded.²⁹

IV Freedom of Scientific Research.

On the issue of the "freedom of scientific

research and exploration of the ocean floor beyond the limits of present national jurisdiction", some members emphasised the view that there should be freedom of scientific research and exploration.³⁰ On this the view was expressed that the results of such exploration and activities should be made available to all countries without discrimination and that international scientific co-operation should be promoted. France pointed out the distinction between exploration and pure science.³¹ Some members expressed the view that scientific exploration should not serve as a basis for claims to exploitation. Reference was also made to the utility of the proposal for a "Decade of Ocean Exploration".³²

V Reasonable Regard for Other States Carrying Out Seabed Activities.

Fifth, several members were of the view that any activity on the seabed and ocean floor and the subsoil thereof, beyond the limits of present national jurisdiction, should be carried out with reasonable regard to the interests of other states in their exercise of the freedom of the high seas, as recognised by the provisions and practice of the law of the sea. An express reference was made to Article 2 of the Convention on the High Seas.³³

Concern was also expressed about the question of the resources of the high seas. The view was advanced by some delegations that it might be reasonable, in exceptional cases, to grant coastal states some special rights for the conservation and regulation of the fisheries of the coastal areas, thus safeguarding the means of livelihood of such nations from the effects of commercial exploitation.³⁴

VI Pollution.

On pollution, members stated that activities concerning the exploitation of the resources of the area should be carried out in accordance with the rules and regulations concerning the prevention of pollution, radio-active contamination and conservation of the living resources of the sea.³⁵ The view was expressed that, in a future international legal regime, provision would have to be made concerning responsibility and liability for damage.³⁶

III:1:iii Conclusion

Several countries supported the formulation of a declaration of legal principles, and no country raised any objection. India with the support of the developing countries presented its draft declaration of legal prin-

ciples³⁷ and simultaneously the United States, with the understanding of "Western Europe and Others", submitted a draft resolution containing statement of principle.³⁸ There was no time to discuss these two draft proposals. However, these two drafts constituted the basis for further discussions. The third Law of the Sea Conference was proposed by Libya and Iceland.³⁹

III:2:i The Permanent Seabed Committee 1969: Introduction.

A Belgian proposal submitted on 23 October with the support of 29 member nations⁴⁰ suggested in United Nations General Assembly that a permanent committee be established. This proposal was later supported by many more members and finally on November 11, 1968, was a 66-nation proposal.⁴¹ Pursuant to this and with the addition of the Report of the Ad Hoc Seabed Committee,⁴² the General Assembly adopted Resolution #2467A (XXVIII) on December 21, 1968, by 112-0 with 7 abstentions.⁴³ This resolution concerned the establishment of a Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction. Thus the Seabed Committee, established pursuant to this resolution, was composed of the 42 member states.⁴⁴

This resolution instructed the committee: (i)

to study the elaboration of the legal principles which would promote international cooperation in the exploration and use of the deep ocean floor and to ensure the exploitation of their resources for the benefit of mankind; (ii) to study the ways and means of promoting the exploitation and use of resources of this area, taking into account the foreseeable development of technology and the economic implications of such exploitation; (iii) to prevent marine pollution; (iv) to study the question of reservation exclusively for peaceful purposes of the seabed and ocean floor.⁴⁵

III:2:ii. The Permanent Seabed Committee 1969: Discussion of Principles.

The Seabed Committee held three sessions at United Nations Headquarters in New York on February 6-7, March 10-28, and August 11-29, 1969. Several draft proposals were submitted at the first session, though there were no basic differences among the various draft proposals. It was extremely difficult, however, to effect a compromise among them. The Chairman of the Committee, therefore, having held several informal discussions during the first session and later in February, submitted his own proposal on the organisation of work.⁴⁶ According to this, the Legal Subcommittee was to study the elaboration

of legal principles in the context of appropriate provisions of Resolution 2467A (XXIII): 'A' (i) legal status of the 'area', (ii) applicability of international law, including the UN Charter, (iii) the reservation of the 'area' exclusively for peaceful purposes, (iv) use of the resources for the benefit of mankind as a whole, irrespective of the geographical location of States, taking into account the special interests and needs of developing countries, (v) freedom of scientific research and exploration, (vi) reasonable regard to the interests of other states, (vii) questions of pollution and other hazards, and obligations and liability of states involved with exploration, use and exploitation, (viii) other questions.⁴⁷

'B' Further, the Economic and Technical Subcommittee apart from economic and technical aspects was entrusted with the task of studying the report of the Secretary General on the question of establishing in due time appropriate international machinery for the promotion of the exploration and exploitation of the resources of the seabed and the ocean floor beyond the limits of national jurisdiction and the use of these resources in the interest of mankind.⁴⁸

A. International Regime

Thus the issue over legal principles which originated in the two drafts of principles from the group of 'Western Europe and Others' and from the group of devel-

oping countries submitted in the previous year, was discussed in the Legal Subcommittee in the second session. After general debates in the subcommittee during the second session, an Informal Drafting Group⁴⁹ was formed for consultations and drafting legal principles, which met in June-July, 1969, to draft its report.⁵⁰ This report was the basis of further discussions in the third session of the Legal Subcommittee of legal principles identified earlier. The discussion on the principles was as follows.

1. Legal Status of the Seabed and Ocean Floor.

There was agreement that the deep ocean floor should not be subject to national appropriation and that no state shall exercise or claim sovereignty or sovereign rights. Some delegates were of the view that this was not sufficiently comprehensive and they suggested that after sovereign rights, the words "or jurisdiction, or grant exclusive rights" should be added. Some states suggested that the seabed and ocean and the subsoil thereof beyond the limits of national jurisdiction are the common heritage of mankind. Others believed that this concept should not be included in the declaration as it was contrary to existing norms and principles of international law. It was also stated that it was devoid of legal content and that its discussion was not practically

useful. Another view was that it was also open to various interpretations and that it could not be understood until its implications were spelled out. But simultaneously it was also pointed out that, before their adoption, all legal concepts are devoid of legal content and that therefore that argument was irrelevant. Proponents of this concept held that the concept of "common heritage of mankind" implied an international machinery for the regulation and management of the area and its resources.⁵¹ There was also no agreement as to the inclusion in the draft of a statement that no-one may acquire property rights over any part of the area by use, occupation or any other means. The overall concept of "common heritage of mankind" was widely supported, but not acceptable to all.

It was, however, pointed out that acceptance of the non-appropriation principle would be of no practical value if it were linked with an unqualified concept of freedom of exploration and exploitation, since it would only benefit the very few countries which have the capacity to exploit the seabed resources, without due compensation to the international community as a whole and developing countries in particular.

2. Applicability of International Law, Including the United Nations Charter.

Some delegates emphasised that international law, including the Charter of the United Nations, is applicable to the activities of states on the seabed. It was also stated that international law by its scope was considerably broader than concrete norms applicable to the regulation of activities of states in any individual area. There was, however, no agreement as to the extent to which the rules of existing international law should be applied, nor as to whether any rules of existing international law apply to economic activities in the exploration and exploitation of the area.

The Informal Drafting Group after considering the various formulations and elements contained in them finally came out with the following formulation:

All activities in this area shall be carried out in accordance with international law, including the Charter of the United Nations, and the principles of this declaration as well as the legal principles and norms to be internationally agreed upon for the exploration, use and exploitation of the area.

53

The discussion centred upon this formulation. While some delegations expressed their readiness to

accept this formulation, other delegations doubted its adequacy. Some of the delegations who doubted argued that a distinction should be drawn between the norms applicable to the area and those applicable to the activities undertaken in the area.⁵⁴

3. Reservation Exclusively for Peaceful Purposes.

A common denominator emerged to the extent that an acceptable declaration would contain the idea that "the seabed and ocean floor shall be reserved exclusively for peaceful purposes." There was, however, no agreement on the nature of the geographic limits of application or to the scope of the "prohibition of activities."⁵⁵

4. Use of the Resources for the Benefit of Mankind as a Whole, Irrespective of the Geographical Location of States, Taking Into Account the Special Interests and Needs of Developing Countries.

The view was emphasised by certain countries that the Committee had been entrusted with the task of studying the establishment of an international legal regime for the seabed beyond the limits of national jurisdiction, and that task implied in itself the use and exploitation of the area by all, without discrimination. Thus an argument seemed to have emerged on the "need for the establishment of a regime" as well as on the "use of

the resources for the benefit of mankind taking into account the special interests and needs of the developing countries." The qualification of the regime remained to be agreed upon as well as the scope of its applicability. It was agreed that the regime should be legally binding. Whether the regime should apply to area or only to resources was a matter left for future settlement.

It was widely acknowledged that a balanced and coherent declaration of principles should recognise that landlocked states ought to be placed on an equal footing with coastal states. A view was also expressed that the exploration, use and exploitation of the seabed should not endanger the legitimate interests of coastal states, particularly of developing countries which do not dispose of adequate means to protect these interests.⁵⁶

5. Freedom of Scientific Research and Exploration.

The principle of scientific research was acceptable in general. The suggestion that the freedom of scientific research in this area should be assured to all without discrimination and that states should promote international cooperation in the conduct of scientific research and that there should be no interference with

such research carried out with the intention of open publication, was able to command agreement, but on the understanding that it would be required to distinguish between scientific research and commercial exploitation. One of the formulations suggested that an element, "making the results of research available" was also necessary. No agreement was reached on the possible obligations regarding communication of results, and prior communication of research programmes. There was, also, no agreement that such research should not be the basis for claims in future exploration. On this issue, some delegations pointed out that the principle of the freedom of scientific research does not itself give the exclusive right of economic exploitation of the resources of the area or provide basis for freedom of economic exploration or exploitation. There was a suggestion regarding strengthening the research capability of developing countries, but the issue was left for further consideration.⁵⁷

6. Reasonable Regard for the Interests of States in their Exercise of Freedom of the High Seas.

There were two main elements in the different formulations presented before the Informal Drafting Group, namely: (i) reasonable regard for the interests of all States; (ii) non-infringement of the freedoms of the high seas, and no unjustifiable interference with the exer-

cise of such freedoms. These were mentioned in connection with Article 6 of the Geneva Convention on Fishing and Conservation of Living Resources of the High Seas.⁵⁸ These elements received the general support of the delegates, although some of them stated that a closer consideration of the elements was necessary before legal principles were formulated. Further, there was general acceptance of the necessity for the "adoption of appropriate safeguards against the dangers of pollution."

7. Questions of Pollution and Other Hazards, and Obligations and Liability of States in the Exploration, Use and Exploitation...

The main discussion was on the issue of damage caused by activities in the area, undertaken without appropriate safeguards which should entail liability. On this the view was expressed that the complex nature of the issue requires considerable study. Suggestions were made that, pending the elaboration of a precise or detailed provision, the principle of liability for damage be formulated in general terms. Other delegations suggested that since damages caused by activities in the area could not only affect the property of the operator or other individuals but also the common interest of mankind, as well as the economy of the nearest coastal state, due consideration should be given to the question of criminal

responsibility for damages caused by such activities. Another important factor was the "right of coastal states to take appropriate measures to protect their shores and coastal waters against pollution which will occur outside their national jurisdiction." Some delegations expressed the possibility that the measures taken by the coastal state may result in the exercise of jurisdiction in an area beyond the limit of national jurisdiction and violate the principles of the freedom of the high seas. Other delegations were of the view that such an element is necessary to combat and control pollution that has occurred in the marine environment, whereas others still were of the view that such measures would not constitute a violation of the principles of the high seas. These issues were, however, left unresolved.⁵⁹

8. Other Questions.

A reference was made to a proposed principle that "there is an area of the seabed and ocean floor and subsoil thereof, which lies beyond the limits of national jurisdiction." It was pointed out that this proposed principle appeared to have general support and that being a far-reaching proposal it should be recorded as being agreed. On this the view was expressed that it was not necessary to state in a declaration of prin-

ciples a fact which has obviously been accepted, since the Committee was studying the elaboration of legal principles precisely for that area. State responsibility and boundary settlement were also discussed but left for further discussion.⁶⁰

B. Study for the Establishment of an International Machinery for the Promotion of the Exploration and Exploitation of the Resources of the Area.

The issue of international machinery, which originated on the basis of the joint proposal of the developing countries in 1968 was adopted by the United Nations General Assembly in Resolution #2467C (XXIII) of December 21, 1968. The Secretary General was requested by way of this resolution to undertake a study on the establishment of appropriate international machinery for the promotion of exploration and resources in the interest of mankind. The Secretary-General in response to this submitted his Report to the Subcommittee in June 1969.⁶¹ This was referred to the Legal Subcommittee by the Committee Chairman. However, the Legal Subcommittee, which was busy discussing legal principles, did not have sufficient time to discuss the matter of international machinery. Then, the Economic and Technical Subcommittee took over discussion of the legal aspects of the international machinery.

The Report of the Secretary on Machinery suggested several possibilities on powers and functions of the international machinery, such as: (i) registration, (ii) granting letters of authorization or licensing, (iii) operation by an international organisation; and (iv) resolution or settlement of the conflicts.⁶² In the Third Session the Economic and Technical Subcommittee took up the general problems of international machinery, including economic and technical aspects. Since the report of the Secretary-General had been prepared only recently, most delegations, with the exception of the United States, were not ready to express definitive views. Thus the discussion focussed on whether the machinery would constitute a "registry office" where the claims for exploitation would merely be recorded, or a more powerful "licensing agency". The nations of "Western Europe and Others" were busy in the study of the report. The United States took a more positive attitude, pointing out that the difference between "registry office" and "licensing agency" was not so great as generally considered.

III:2:iii. Conclusion.

Few states supported the exploitation by

an international organisation itself. It seems that the United States was very reluctant to give broad discretionary powers in granting licenses to license-issuing organs because of its fear that exploitation by its own enterprises would be seriously restricted by an international organisation, in which the developing nations could inevitably have a great majority, whereas the developing states supported the view that international machinery should be a licensing organ competent to grant or refuse licences.

III:3:i. The Seabed Committee 1970: Introduction.

The General Assembly of the United Nations in 1969 passed four resolutions on the basis of the Seabed Committee Report and their discussion in the First Committee of the United Nations. Before discussing the debates of the Seabed Committee of 1970 it is necessary to understand the deliberations of the General Assembly of the 24th Session and the developments and discussion of the First Committee.⁶⁴ Malta submitted a draft resolution on 31st October, asserting that customary international law on the definition of the continental shelf was inconclusive and since it was necessary to preserve the deep ocean floor from encroachment inconsistent with the common interest of mankind, the

Secretary General would be requested to ascertain the views of member states on the desirability of convening " a Conference particularly for the purpose of arriving at clear, precise and internationally acceptable definition of the area of the deep ocean floor,"⁶⁵ thus adding a new dimension to the seabed issue. Several amendments were proposed,⁶⁶ and finally it was adopted by the General Assembly by 65 votes to 12, with 30 abstentions⁶⁷ in the Plenary Meeting on 15 December. This resolution added the issue of desirability of convening a conference on the law of the sea to review particularly the regimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing, conservation of the living resources of the high seas, in order to clarify the definition of the area of the seabed and ocean floor beyond the limits of national jurisdiction.

Another resolution⁶⁸ concerning the further continuation of the work of the Seabed Committee was adopted at the Plenary Meeting 109-0, with one abstention. This directed the Seabed Committee to expedite its work of preparing comprehensive and balanced legal principles for submission at the next session of the General Assembly. A joint draft declaration of 48 nations,⁶³ re-

requesting the Secretary General to conduct studies concerning the international machinery, was adopted at the Plenary Meeting, 100-0, with 11 abstentions.⁷⁰ The last of the series, and most important of these, was a resolution concerning a moratorium on exploitation of the ocean floor. This was an outcome of several draft proposals⁷¹ requesting all states to refrain from exploration and exploitation of the ocean floor of the area pending the establishment of an international regime. This resolution⁷² was adopted 62-28 with 28 abstentions.⁷³

III:3:ii. The Seabed Committee 1970 : Discussion of Principles.

The Seabed Committee in 1970 held two sessions at New York from 2-26 March and at Geneva 3-28 August. The Legal Subcommittee began its work with the consideration of legal principles on the basis of the Synthesis⁷⁴ prepared by the Legal Subcommittee in 1969. Ceylon, with other nations, placed a 15-nation⁷⁵ proposal on legal principles. Being afraid that this 15-nation proposal, the only formal proposal, would distort the meetings, and in order to provide a balance, Norway submitted a counter-proposal⁷⁶ on 24th March, but these two draft proposals were not the subject of extensive

discussion. Norway later revised its draft proposal.⁷⁷

A. International Regime

On the suggestion of the Chairman of the Legal Subcommittee, an Informal Working Group was established. No progress was made in formal and informal meetings on legal principles, at the time that the Informal Working Group was attempting to prepare its own draft on legal principles. Thus as there was no progress, the Chairman of the Subcommittee submitted a letter to the Chairman of the Seabed Committee,⁷⁸ informing him of this fact. On the other hand, the Informal Working Group, with Bodawi as rapporteur, completed its task the same day and reported directly to the main Committee.

The Legal Subcommittee held several informal consultations before the second session. On this a view was expressed by a number of delegations that the procedures of informal consultations adopted by the Subcommittee were not conducive to progress. This view was expressed by nonparticipants. On the other hand, the view was expressed by some other delegations that the informal procedure had in fact succeeded in enlarging the area of agreement. Thus in this confused state of uncertainty a proposal was made that informal consultations should be held during the twenty-fifth session

of the General Assembly, to be followed by formal meeting of the Committee to consider and adopt a draft declaration of principles, for submission to the General Assembly.

A text was finally prepared by the Chairman of the Seabed Committee on a draft declaration of principles.⁷⁹ This text did not represent the consensus of the Seabed Committee as such, but was the product of the Chairman's diligent efforts. This was followed by Malta, who introduced a 36-nation proposal,⁸⁰ later joined by a further 10 nations. This draft declaration was intended to incorporate the draft declaration of principles expressed in the letter of the Chairman of the Seabed Committee. The draft resolution was adopted in Plenary Meeting, 108-0, with 14 abstentions,⁸¹ thus for the first time establishing principles for the deep ocean floor.⁸² The principles can be summarised as:

"The seabed and ocean floor, and the subsoil thereof; beyond the limits of national jurisdiction, as well as the resources of the area, are the Common heritage of mankind. The area shall not be subject to appropriation by any means by states or persons and no state shall claim or exercise sovereignty or sovereign rights over any part thereof. And that an international regime shall be established to govern and regulate the area.

B. International Machinery

A report was submitted by the Secretary General, pursuant to the General Assembly Resolution to the Seabed Committee, entitled Study on International Machinery.⁸⁴ The report had three parts: Part I, Views Expressed by Member States on International Machinery; Part II, Various Types of International Machinery; and Part III, International Machinery Having Jurisdiction over the Peaceful uses of the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, including the Power to Regulate, Coordinate, Supervise and Control All Activities relating to the Exploration and Exploitation of their Resources. In addition to this, working papers were presented by the United States,⁸⁵ United Kingdom⁸⁶ and France.⁸⁷ The main Committee held discussions on the machinery structure, with reference to the three working papers, but with main concentration on the Secretary General's Study.

The Study On International Machinery, in Part III, suggested four types of machinery: (a) international machinery for exchange of information and preparation of studies; (b) international machinery with intermediate powers; (c) international machinery

for registration and licensing, and (d) international machinery having comprehensive powers.

All four types of machinery were considered and for the first type it was suggested that, although international machinery for exchange of information and preparation of studies did represent an essential stage of development, such arrangements would not be adequate since they would not provide practical organisation or effective administration of the area beyond the limits of national jurisdiction. It was further pointed out that such functions were either already being performed or would be one of the functions of the international machinery.

The second type of machinery suggested, with intermediate powers, was also regarded as inadequate by various delegations. It was said that the tasks to be performed by such machinery could be carried out by existing bodies and an intermediate organisation or a mere registration body with limited scope and competence would not only be unacceptable to most states but would not reflect the basic concept that the area and its resources were the common heritage of mankind.

Some nations expressed support for the es-

establishment of international machinery competent to issue licences and to collect royalties and fees, and used the committee to concentrate on such type of machinery. Differing views were expressed in this context. Various delegations were of the view that this should be only one of the possible functions of the machinery with comprehensive powers.

The report on the international machinery having comprehensive powers was prepared in the light of the fact that Resolution # 2574C (XXIV) was adopted with the strong support of the developing countries, with a specific request for a machinery having comprehensive powers. According to this report, nature of functions and powers of international machinery can be summed up as follows: (a) relating to the exploration and exploitation of resources; (b) concerning peaceful uses of the seabed other than the exploration and exploitation of resources; (c) concerning standards which would apply to all peaceful uses.⁸⁸

First, the functions of the international machinery relating to the exploration and exploitation of resources were described as: licensing, direct exploitation, the sale of price fluctuations, collection of fees and royalties, and training programmes. All mineral

resources except minerals in solution in sea water were included. In the discussion questions were raised on the type of entities which would be allowed to participate in the mineral exploration. Several suggestions, such as licences to states, to states engaged in joint enterprises, to international, state or private enterprises, or to individuals, came in. Further, various types of operating rights were suggested, such as for scientific research and other activities. Various procedures for granting licences were also seen and discussed, such as, on a first-come-first-served basis, the drawing of lots, grants on the basis of the merits of the applicants, and competitive bidding. For the direct exploitation, it was suggested that machinery might arrange for other bodies to perform this operation on its behalf by a system of service contracts, or by way of joint ventures with them. On the issue of the role of machinery on price fluctuations, the Re-port expected machinery to play a positive role.⁸⁹

Second, the issue of peaceful use of the seabed other than exploration and exploitation of resources was noted. The view was expressed that international machinery might include among its activities responsibility for laying, maintenance and protection of submarine cables and pipelines. It was indicated that

the scientific research might be placed under the jurisdiction of the machinery, so that it would become dependent on the machinery for observance of various conditions, such as prior communication of research programmes and publication of scientific data and results.⁹⁰

Last, on the issue of standards which would apply to all peaceful uses, the following were suggested: prevention of pollution, protection of living resources, safety of life, and property, conflicting uses of seabed and superjacent waters, and liability. The issue of liability, being complex, was only discussed under a few heads in general terms, and their possible solutions insofar as the international machinery was concerned was mentioned. A suggestion was made that the machinery might be empowered to determine the quantum of compensation to be paid in the event that one operator caused or received damages as a result of the activities of an other.⁹¹

6 III:3:iii. Conclusion.

A Resolution #2750C (XXV) on enlarging the membership of the Seabed Committee and the convening

of the Third Conference on the Law of the Sea was adopted by the General Assembly 109-7, with 6 abstentions.⁹² This resolution was originally initiated in an American-Dominican proposal⁹³ which was later followed and amended by several other proposals,⁹⁴ stressing varying degrees of need for convening the Third Conference on the Law of the Sea. Thus the resolution enlarged the Seabed Committee by 44 on geographical grounds and decided to convene, in 1973, a Conference on the Law of the Sea which would deal with the establishment of an international regime, including international machinery for the area and the resources of the deep ocean floor, a precise definition of the area, and other related issues.

FOOTNOTES TO CHAPTER III

1. 22, G.A.O.R. UN Doc. Z/6695. 18 August 1967.
(Title: "Declaration and Treaty concerning the reservation exclusively for peaceful purposes of the seabed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interest of mankind.")
2. 22, G.A.O.R. 1 UN A/C.1/PV. 1515 and 1516 (First Committee 1515 and 1516 Meeting).
3. Ibid.
4. 22, G.A.O.R., 1 UN A/C.1/PV. 1524 to 1530 (Records of meetings from 1524 to 1530 contain the general debate on the issue, "Examination of the Seabed and the ocean floor, and subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind.") The Soviet Union, Canada and Italy regarded that the declaration of any legal principles would be premature.
5. 22, G.A.O.R., 1 UN A/C.1/PV. 1524 (para 38). Statement by Ambassador Goldberg of the United States.
6. 22, G.A.O.R., 1 UN A/C.1/OV. 1525 (para 36-37). Statement by Ambassador Mendelevich of the Soviet Union.
7. 22, G.A.O.R., 1 UN A/C.1/PV 1527 (para 10). Statement by Mr. Vanchover, observer of UNESCO.
8. UN General Assembly Res. 2340 (XXII): 22, G.A.O.R., Annexes, Agenda item 96, Doc. A/6834 (This was adopted on the report of the First Committee, UN. Doc. Z/6964, on 8 Dec. 1967, with 93-0 and 1 abstention.)
9. The following 35 states were the members of the Ad Hoc Seabed Committee:
 - a) Africa: Kenya, Liberia, Libya, Senegal, Somalia, Tanzania, United Arab Republic.
 - b) Asia: Ceylon, India, Japan, Pakistan, Thailand.
 - c) Eastern Europe: Bulgaria, Czechoslovakia, Poland, Romania, U.S.S.R., Yugoslavia.
 - d) Latin America: Argentina, Brazil, Chile, Ecuador, El Salvador, Peru.
 - e) Western Europe and Others: Australia, Austria, Belgium, Canada, France, Iceland, Italy, Malta, Norway, UK and USA.

10. 23, G.A.O.R., UN Doc. A/7230, Report of the Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.
11. Ibid. See, Annex II, Report of the Legal Working Group; UN Doc. Z/ZC.135/19 and Add. 1 & 2, A Study prepared by the Secretariat on Legal Aspects of the Question of the Reservation Exclusively for Peaceful Purposes... in the Interest of Mankind.
12. UN Doc. A/AC.135/12.
13. UN Doc. A/AC.135/19; UN Doc. A/AC.135/19 Add. 1&2.
14. Shigeru Oda, The Law of the Sea in Our Time - II The United Nations Seabed Committee 1968-1973 (1977); p.19.
15. Supra note 10, see generally Annex II, para 13-16.
16. Ibid., para 18-19.
17. UN Doc. A/AC.135/25 (U.S. Proposal).
18. UN Doc. A/AC.135/27 (Tanzanian Proposal).
19. Supra note 10, paras 20-23.
20. UN Doc. A/AC.135/21 (Indian Proposal).
21. UN Doc. A/AC.135/20 (U.S.S.R. Draft); UN Doc. A/AC.135/26 (Tanzanian Draft).
22. UN Doc. A/AC.135/24 (U.S. Draft).
23. Supra note 10, paras 24-30.
24. 23, G.A.O.R., UN Doc. A/7230, Annex III, p.53 (Revised Working Paper presented by Belgium).
25. Supra note 10, paras 31-35, pp.46-47.
26. Supra note 17.
27. "Norway suggested the necessity of an international body to regulate exploitation and Belgium considered a plan for the establishment of an international body to grant concessions for exploitation. Canada and Austria stated that a new regime should be considered and Iceland suggested the regulation of exploitation

under the auspices of the United Nations. The Developing Countries in Africa, Asia and Latin America stressed a pressing need for a new regime or international mechanism." (Oda, supra note 14, pp. 20-21.)

28. UN Doc. A/AC.135/21 (Indian Proposal).
29. 23, G.A.O.R., UN Doc. A/7230, Annex III, p.62. A Working Paper on the Draft Declaration of General Principles proposed by Argentina, Brazil, Ceylon, Chile, Ecuador, El Salvador, India, Kenya, Liberia, Libya, Pakistan, Peru, Thailand, U.A.R., and the United Republic of Tanzania..
30. Oda, supra note 14, p.21. Soviet Union strongly urged the necessity of scientific research and international cooperation therein.
31. Ibid. France pointed out the difference between purely scientific research and that connected with the exploitation of resources. The exact language of the French suggestion is not available in records, it being a verbal suggestion.
32. 23, G.A.O.R., UN Doc. A/7230, Annex III, p.61. (United States: Draft Resolution on the international decade of ocean exploration).
33. UN Doc. A/AC.135/25 (United States Draft Resolution); supra note 29 (Working Paper on draft declaration by Argentina and 14 other countries).
34. United States draft resolution, ibid para 6(a).
35. UN Doc. A/AC.135/31 (Iceland: proposed draft resolution); UN Doc. A/AC.135/24 (United States: proposed draft resolution).
36. Supra note 29.
37. UN Doc. A/AC.135/21; UN Doc. A/AC.135/36 (A Proposal by all member states of Africa, Asia, Latin America and Japan).
38. UN Doc. A/AC.135/31 (A Proposal by Australia, Austria, Belgium, Canada, France, Iceland, Italy, Japan, Norway, Poland and U.K.).
39. UN Doc. A/AC.135/31 (supra note 35).

40. 23, G.A.O.R., UN Doc.A/C.1/4.425.
41. 23, G.A.O.R., UN Doc. A/C.1/4.425/Rev. 1.
42. 23, G.A.O.R., UN Doc. A/7230.
43. UN General Assembly Res. 2467A (XXVII) of Dec 21, 1968 (Soviet Union and Hungary abstained, but Bulgaria, Czechoslovakia, Poland and Romania voted in favour of it. This was discussed and voted on in First Committee before it was placed in plenary - see UN Doc. A/7477; Report of the First Committee; UN Doc.A/PV.1752).
44. Member States of the Permanent Seabed Committee:
Africa (11) Cameroon, Kenya, Liberia, Libya, Madagascar, U.A.R.
Asia (7) Bulgaria, Czechoslovakia, Poland, Romania, U.S.S.R., Yugoslavia.
Latin America (8) Argentina, Brazil, Chile, El Salvador, Mexico, Peru, Trinidad and Tobago.
Western Europe and Others (11) Australia, Austria, Belgium, Canada, France, Iceland, Italy, Malta, Norway, U.K and U.S.A.
The membership of the Committee was increased by 7.
45. UN General Assembly Res. 2467A (XXVIII) of 21 Dec. 1968.
46. UN Doc.A/AC.138/8.
47. UN Doc.A/AC.138/SC.1/3.
48. UN Doc.A/AC.138/12 and Add 1, June. 1968.
49. The Informal Drafting Group was composed of: Brazil, India, Libya, Norway, the Soviet Union and United States.
50. UN Doc.A/AC.138/SC.1/4 (Report of the Informal Drafting Group).
51. See generally: UN Doc. A/AC.138/SC.1/3 (ibid); UN Doc. A/AC.138/18 (Report of the Legal Subcommittee); UN Doc.A/AC.138/12 and Corr. 1 and Add. 1 and Add. 1/Corr 1 (Report of the Secretary General, pursuant to Resolution 2467C (XXIII)).

52. Ibid.
53. UN Doc.A/AC.138/SC, para 18.
54. Supra note 51, see generally.
55. Ibid.
56. Ibid.
57. Ibid.
58. 559 U.N.T.S. 285, Geneva Convention on Fishing and Conservation of Living Resources of the High Seas.
59. Supra note 51, see generally.
60. Ibid.
61. UN Doc. A/AC.138/12 and Add.1.
62. Ibid.
63. 24, G.A.O.R., UN Doc. A/7622, Supplement No. 22 (Report of the Economic and Technical Subcommittee of the Report of the Seabed Committee 1969), Chapter IV, pp.70-78; Oda, supra note 14, pp. 74-80, Shigeru Oda, The Law of the Sea in Our Time - I New developments 1966-75, pp. 70-72.
64. UN Doc. A/C.1/PV. 1673-1683, 1708 - 1710, and 1714 & 1715. Malaysia on Nov 4, 1969, proposed that the views of the UN Legal Counsel be sought on the problem vesting jurisdiction over the deep ocean floor in the United Nations itself (UN Doc. A/C.1/PV 1683). Norway, apparently, expressing the viewpoint of "Western Europe and Others," made a statement in opposition to this suggestion. The Secretary General on this placed the resolution adopted by the First Committee without discussion (A/PV.1835) for vote in the General Assembly.
65. UN Doc.A/C.1/L.473.
66. (i) Jamaica and Trinidad-Tobago, UN Doc.A/C.1/L.475.
(ii) Malta with West European Countries, UN Doc. A/C.1/L.473/Rev.1.
(iii) Cyprus, UN Doc. A/C.1/L.476 and Rev. 1.
(iv) Barbados, Brazil, Guyana, India, Jamaica, Kuwait, Libya, Mauritania, Sierra-Leone, Tanzania and Trinidad-Tobago, UN Doc.A/C.1/L.475/Rev. 1, it was later joined by Bolivia and Togo.

- (v) Revised Maltese Draft, UN Doc.A/C.1/L.473/Rev 2.
 - (vi) Congo, UN Doc.A/C.1/L.481.
 - (vii) Maltese Draft with addition of Madagascar, Morocco, Sudan and Swaziland, UN Doc. A/C.1/L.743 Rev. 3.
 - (viii) 17 Nations amendments of Jamaica and others, UN Doc.A/C.1/L.475/Rev 3.
67. Japan, the United States, the States of Eastern Europe and Others and Japan were among the opposing countries; UN General Assembly Res. #2574A (XXIV) of 15 Dec. 1969.
68. UN General Assembly Res. #2574B (XXIV) of 15 Dec., 1969.
69. UN Doc.A/C.1/L.477 (A joint proposal by: 20 nations from Africa, 13:from Asia, 14 from Latin America and 1 from Eastern Europe) UN Doc.A/C.1/L.479 [An amendment proposed by Afghanistan, making reference to the equal interests of the landlocked countries].
70. UN General Assembly Res #2574C (XXIV) of 15 Dec 1969.
71. (i) Uruguay, UN Doc.A/C.1/L.478.
(ii) Six-nation Draft Resolution (Ceylon, Ecuador, Guatemala, Kuwait, Mauritania, Mexico) UN Doc. A/C.1/L.480. This was later joined by Ghana, Guyana and Peru, UN Doc.A/C.1/L.480/Rev. 1.
72. UN General Assembly Res.#2574D (XXIV) of 15 Dec. 1969.
73. Voting: In favour: Africa 22, Asia 15, Eastern Europe 1 (Yugoslavia) Latin America 22, Western Europe and others 2 (Finland and Sweden). Against: Africa 2, Asia 2 (Japan and Mongolia), Eastern Europe 7, Western Europe and Others 17. Abstained: Africa 12, Asia 11, Eastern Europe 1 (Romania), Latin America 2 (Cuba and El Salvador), Western Europe and Others 2 (Greece and Spain).
74. UN Doc.A/AC.138/SC.1/SR . 30-35.
75. UN Doc.A/AC.138/SC.1/L.2 (Brazil, Cameroon, Ceylon, Chile, India, Kenya, Kuwait, Libya, Madagascar, Sierra Leone, Sudan, Tanzania, Thailand, Trinidad and Tobago and Yugoslavia).
76. UN Doc.A/AC.138/SC.1/L.4.

77. UN Doc.A/AC.138/SC.1/L.4/Rev. 1.
78. UN Doc.A/AC.138/SC.1/10.
79. UN Doc. A/C.1/L.582.
80. UN Doc. A/C.1/L.544 (36-nation, Maltese Proposal).
81. UN General Assembly Res. #2749 (XXV) of 17 Dec. 1970, "Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil thereof beyond the limits of National Jurisdiction).
82. For a detailed discussion of the Declaration of Principles see infra, Chapter IV, An Analysis of the Declaration of Principles 1970.
83. Supra note 81.
84. UN Doc.A/AC.138/23,
85. UN Doc. A/AC.138/25,
86. UN Doc.A/AC.138/26.
87. UN Doc. A/AC.138/27.
88. UN Doc.A/AC.138/23, Part III; 25, G.A.O.R. Supplement No 21 (A/8021), Part III, "Consideration of the Report of the Secretary General on International Machinery," para 39-66.
89. Ibid., Part III, para 76-105.
90. Ibid., Part III, para 106-117.
91. Ibid., Part III, para 118-140.
92. UN General Assembly Res. #2750 (XXV) of 17 Dec. 1970 (Opposing countries included Bulgaria, Byelorussia, Czechoslovakia, Hungary, Poland, Ukraine and U.S.S.R., Burma, Cuba, Mongolia; Romania and Saudi Arabia abstained).
93. UN Doc. A/C.1/L.536/Rev. 1.
94. (i) Brazil and Trinidad-Tobago, UN Doc. A/C.1/L.539.
(ii) Guyana, Indonesia, Jamaica, Kenya, Peru, Ecuador and Sierra Leone, UN Doc. A/C.1/L.545/Rev. 1.

- (iii) Norway UN Doc.A/C.1/L.554/Rev. 1.
- (iv) Australia, Japan, Netherlands, New Zealand, U.K. and Belgium UN Doc.A/C.1/L.554.
- (v) Malta, UN Doc.2/C.1/L.555 and L.564.
- (vi) Canada UN Doc.A/C.1/L.556.
- (vii) Ghana, Norway, Pakistan, Singapore and Sweden UN Doc.A/C.1/L.557.
- (viii) 9-nation Revised Draft UN Doc.A/C.1/L.545/Rev 2. (Ecuador, Guyana, Haiti, Indonesia, Jamaica, Kenya, Peru, Sierra-Leone and Tunisia).
- (ix) 25-nation Draft Resolution UN Doc.A/C.1/L.562.
- (x) Amendments proposed by UK and Netherlands to 25-nation Draft, UN Doc. A/C.1/L.565.
- (xi) Japan UN Doc. A/C.1/L.565.
- (xii) Other Revisions UN Docs A/C.1/L.563/Rev 1, A/C.1/L.539/Rev 2.

CHAPTER IV-

THE DECLARATION OF PRINCIPLES: AN ANALYSIS

IV:1. Introduction

A landmark was established in the legal history of the law of the sea, on 17 December 1970, by adoption of the resolution entitled, "Declaration of Principles Governing The Seabed And the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction."¹ The historic significance of this resolution in the evolutionary process of the law of the sea is that, for the first time, the world community reached an agreement to lay down basic principles for governing the activities in ocean space and floor. It was after three years of exhaustive debates that the Seabed Committee succeeded in fabricating a structure on which future negotiations of the law of the sea could be based - giving a firm and new direction to the law of the sea negotiations. This Declaration had a double role to play: (a) it was to be the base for future discussions of the Seabed Committee, which was to prepare an agenda and elaborate related issues for the Third Law of the Sea Conference; and to be the legal norms and code of conduct for the states during the interim period of evolution of an international regime of ocean space. This was, thus, the beginning of the establishment of a new legal order for seas, based on new revolutionary concepts.

The Declaration was accepted by 108 to none with 14 abstentions.² This was the first major break-through since the genesis of the new concept of the "common heritage of mankind

in establishing widely accepted legal norms for ocean space - certainly adding new dimensions to classical concepts of sea regulation. The Resolution, like other legal instruments, has both merits and demerits. However, undoubtedly, it is a unique document, an outcome of the diplomatic as well as legal expertise of Ambassador Amerasinghe.³ It tries to satisfy all states and interest groups, resulting inevitably in some degree of vagueness and ambiguity. This remarkable⁴ compromise of conflicting interests, packaged with diplomatic skill, is an ingenious effort to reconcile different ideologies. Yet its legal, as distinguished from its political, significance needs to be examined in the light of existing political stands and needs of the present day world.

A fair examination of the Resolution would require a clear understanding of the circumstances prevailing in the Seabed Committee debates and also of the variety of prevailing jurisdictional claims.⁵ A true analysis also requires the consideration of the different interest groups in conflict such as the developing countries as a whole, the landlocked countries as a whole, the developing coastal states, the developing landlocked states, the developed landlocked states and the developed coastal states. The Declaration is an outcome of political compromise, incorporating both generally accepted legal norms and evolving norms of conduct. The document is, therefore, a blend of "hard law" and "soft law" or in more classical language a combination of lex lata and lex ferenda.

IV:2. The Analysis of Hard Law

Juridically, the core of the Declaration consists of four legal principles: (i) the seabed under high seas and its resources shall be treated as "the common heritage of mankind"; (ii) the area shall be used exclusively for peaceful purposes; (iii) an international regime should be established applying to the area and its resources and including international machinery; and (iv) the area shall not be subject to appropriation., and no state shall claim or exercise sovereignty or sovereign rights over the area. These all need a separate analysis.

IV.2:i. Seabed under the high seas and its resources shall be treated as the "common heritage of mankind".⁶

The declaration of the seabed as the "common heritage of mankind" simultaneously formulates two norms: First that the seabed beyond the limits of national jurisdiction attains the new status of the common heritage of mankind. Second, the regime of the high seas has for the first time been divided explicitly into the "regime of deep ocean bed". Although historical evidences dating back to 1923,⁷ were claiming seabed of the continental shelf and thus separated the legal status of the superjacent water over the continental shelf from the continental shelf itself, no international practice ever

referred to the division of the high seas into two separate regimes: (i) of seabed and (ii) superjacent waters of the high seas. A review of the Geneva Convention of the Continental Shelf and the Geneva Convention on High Seas will further substantiate this argument. According to the Geneva Convention on the High Seas "the term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a state".⁸ This definition nowhere differentiates between the seabed of the high seas and the superjacent waters of the high seas. The Geneva Convention on Continental Shelf explicitly says "the term 'continental shelf' is [to be] used as referring...to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea".⁹

The division of the seabed is welcome for its benefits to mankind; it is a good beginning, provided it ends well. The motivation behind such a concept is to accord a special status to an area, hitherto, not referred to in any international document, which holds the vast treasures which had been so far unexploited and inaccessible. The proposal came in the wake of time, when seabed mining technology is almost ripe enough to permit this new and unique exploitation. The concept has laid down a new norm before the beginning of the actual exploitation of deep ocean bed resources, this is to restrain few and benefit all.

It was unclear until 1970 as to how if at all these various freedoms would apply to the seabed area. The new status thus accorded to the seabed reserves it for the use of all mankind. Simultaneously, freedom of the high seas has not been affected, by expressly stating that nothing in the

Declaration shall affect: "the legal status of the waters superjacent to the area or that of the air space above those waters".¹⁰

However, this principle will need further elaboration with the new scientific advancements. Recent biotechnological developments indicate that uranium farming is feasible on the seabed.¹¹ This farming is to be carried out by deposition of uranium spread on some species of plants. These plants, in the deep ocean bed, do not fall into the category of sedentary fish and there is no provision even in I.C.N.T./Rev. 1 to meet such a contingency. The definition of the term "resources" in I.C.N.T./Rev. 1, Art. 133 only covers up solid, liquid or gaseous substances.¹² Perhaps this definition is not broad enough to include plants and deposits on plants. Though the definition refers to minerals "occurring on the surface of the seabed or at depths of less than three meters beneath the surface;...or at depths of more than three meters from the surface",¹³ it fails to refer to mineral deposits on plants.

These plants which are in direct contact with the deep ocean bed might keep the uranium deposits on them away from the seabed. Thus non inclusion of such plant species might in the future perpetuate complexities on the issue of determining the actual status of such mineral deposits on plants.

The principle of common heritage establishes a norm to institutionalize the resources lying in the international area. This institutionalization is coupled with the management of common heritage resources by mankind, as a trustee of mankind itself. This connotes the enjoyment of the resources by mankind as a whole without having owned them. This principle rests on the rationale of equitable sharing. It is an effort to restrain a few technologically advanced countries from appropriation of this unlimited wealth. And it is an effort to bridge the gap of the rich and poor nations.

This concept is the "core" of the Declaration and of utmost importance. Its first ever global acceptance is an indication of the changing world opinion - more precisely, the world's desire to get together for common benefit. This also, indicates the recognition of the formation of a truly international regime - a regime of supranational character.

IV:2:ii The area shall be used exclusively for peaceful purposes.¹⁴

The reservation of the seabed exclusively for peaceful

purposes is indeed a significant achievement in itself; not only acceptance of this provision but strong endorsement to such a provision indicates a considerable shift in the super-power approach towards the seabed. This shift can be seen in the "Treaty On Prohibition of Nuclear Weapons On Seabed and Ocean Floor".¹⁵ It was even before the Declaration was adopted by the ~~United~~ Nations that the Eighteen-Nation Disarmament Conference commenced its work of demilitarization of the deep ocean bed. In 1969 the Soviet Union and the United States, both submitted their proposals for a draft treaty on demilitarization of the seabed. The Soviet Union proposed that "the use for military purposes of the seabed and the ocean floor and the subsoil thereof beyond the twelve-mile maritime zone of Coastal States [shall be] prohibited...It is prohibited to place on the seabed and the ocean floor and the subsoil thereof objects with nuclear weapons or any other types of weapons of mass destruction, and to set up military bases, structures, installations, fortifications and other objects of a military nature."¹⁶

The United States proposal was somewhat different. According to the U.S. proposal "[e]ach State Party to [the] Treaty [was] to undertake not to implant or emplace fixed nuclear weapons or other weapons of mass destruction or associated fixed launching platforms on, within or beneath the seabed and ocean floor beyond a narrow band [3-miles], adjacent to the coast of any state."¹⁷

These proposals are considerably different from each other. The Soviet Union, recommended complete prohibition of military activities including nuclear weapons and other weapons of mass destruction, along with all types of military bases, structures, installations, fortifications and other objects of a military nature. However, the United States proposal was only for the prohibition on emplacement of fixed nuclear weapons or the weapons of mass destruction or associated fixed launching platforms. It is significant to note that the Soviet Union proposed a complete ban on military activities and emplacements of all types of weapons. And the U.S. only refers to the prohibition of nuclear and other weapons of mass destruction; that too, of fixed nature. No comparable condition was laid down by the Russians, instead they referred to all types of structures. The U.S. proposal reflects its reluctance to accept complete demilitarization on the seabed. This difference is also clearly marked in the titles of these two proposals in which the Soviet Union proposed "prohibition for military purposes" and the United States proposed prohibition only on the "emplacement of nuclear weapons".

The joint "U.S.-U.S.S.R. Draft Treaty on Prohibiting Emplacement of Nuclear Weapons on Seabed and Ocean Floor",¹⁸ however, changed two earlier positions. The same position with a minor change was placed in the "Treaty on Prohibiting Emplacement of Nuclear Weapons On Seabed and Ocean Floor".

According to this Treaty "[t]he State Parties...undertake not to emplant or emplace on the seabed and the ocean floor and the subsoil thereof beyond the outerlimit of the seabed zone...any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons."¹⁹ This provision is a compromise of two earlier proposals. In this the U.S. stand of restricting the Treaty to nuclear weapons and other weapons of mass destruction is restored, thus avoiding complete demilitarization. And the Soviet Union's stand of prohibiting all types of structures is kept, thus not accepting the U.S. position to restrict the Treaty only up to fixed structures or installations.

The concluding time of the Treaty reflects that Dr. Pardo's proposal to declare the seabed and ocean floor as common heritage of mankind and its reservation for peaceful purposes, generated enough activities. The declaration of Principles Resolution and the Treaty on the Prohibition of Nuclear Weapons came almost together. The simultaneous acceptance of such a cause in two different forums is an achievement in itself. However, it is regreted that despite efforts by the Soviet Union complete demilitarization could not be implemented.

This principle of the reservation of the area

exclusively for peaceful purposes has been expressed in two different ways in the Declaration.²⁰ According to the principle five the "area shall be open to use exclusively for peaceful purposes".²¹ Whereas the principle eight reads:²² "[t]he area shall be reserved exclusively for peaceful purposes". Perhaps, the intention in the earlier assertion is to permit the use of the area so long as it is in conformity with the principles and the regime to be established. The later assertion connotes a negative notion prohibiting the use of the area except for peaceful purposes. The Declaration, here attempts to clarify that the area shall be reserved exclusively for peaceful purposes. It, inter alia, refers to the measures taken and measures to be taken by way of international agreements for the exclusion of seabed and subsoil from arms race. It will be, perhaps, right to comment here that this principle was accepted because it did not interfere with the activities of superpowers in superjacent waters and further because use of the deep ocean floor was not very significant for their military activities. Thus reservation of the seabed only for peaceful purposes is nothing more than a commitment of a significant kind.

IV:2:iii An international regime shall be established applying to the area and its resources and including an international machinery.²³

The Declaration in the preamble stresses the need

for the formation of an international regime for the regulation and management of the resources of the area. This need had been emphasized after acceptance by all that the existing legal regime of the high seas, does not provide adequate rules and regulations to govern the de novo status of the seabed and subsoil thereof. The acceptance of the need for the formation of an international regime is an achievement in itself for the whole of mankind. This regime, which is designated to regulate the whole ocean bed for the benefit of future as well as present generations; could be seen as intended to place on the international machinery a responsibility similar to that of a trustee. The regime has been accorded a very significant role in this changing world. It has to establish a new type of international, political as well as economic order. This departure from the present day world practices can truly be termed as the beginning of a new era in international co-operation. The regime to be established is a completely new departure, quite independent of the traditional principles governing existing international organizations. The very acceptance of this principle can rightly be said to envisage a supernational organization, perhaps a government of mankind. Though the Declaration does not explicitly provide for universal membership in the regime, the fact that it is to be created by a "treaty of universal character" connotes and reveals that the regime shall have universal membership. And this principle of universal membership is clearly embodied in the Informal Composite Negotiating Text/Rev. 1 which states:

"[a]ll State Parties are ipso facto members of the Authority" and "[t]he Assembly shall consist of all the members of the Authority."²⁴ The governmental functions are to be performed by this Authority through its sub-organs, the Council and the Enterprise,²⁵ which shall be responsible to carry out policy formulations of the Authority.

IV:2:iv The area shall not be subject to appropriation... and no state shall claim or exercise sovereignty rights over the area.²⁶

The last of the core principles is the product of three considerations: (i) the need to prevent national jurisdictional claims from touching the mineral nodules beyond limits of national jurisdictions; (ii) the need to discourage sovereignty claims beyond a narrow territorial sea; and (iii) the need to counter-balance the trend towards exclusion of sovereign or quasi-sovereign rights, of coastal states not only to the continental shelf, but also extended zones of superjacent waters.

The first purpose in this principle, presumably, was to discourage the past state practices of unreasonable extensions of coastal state jurisdictions in high seas areas. The need was realized due to the past example of Latin American states, some of which extended their territorial jurisdiction to 200-miles, in the wake of the United States

promulgation of coastal jurisdiction over its continental shelf. It is significant to note that the United States extended its jurisdiction on the seabed only, for keeping the shelf resource within its exclusive control. Whereas, several of the Latin American claimants proclaimed complete sovereignty. Consequently, this led to a kind of race among coastal states for the expansion of territorial or quasi-territorial claims. The Declaration, under this principle attempts to put a check on such expansionist claims. This principle was thus intended to rest upon a future compromise between coastal states with large claims and coastal states with narrow claims and might be viewed today as an intermediate step towards securing such a compromise. This principle does not refer to any particular limit or limits but merely tries to establish that the area beyond national jurisdiction shall not be appropriated. The intention of the principle is clear that all of the international area shall remain out of the reach of further expansionist claims. What the Declaration really accomplished then, was a prohibition against the dividing up of the oceans among coastal states.

Less directly, another intention of this principle was to discourage the sovereignty (i.e., territorial sea) claims beyond narrow limits. To some extent this principle has been successful. We do not find many examples of further expansion of sovereignty claims beyond 12-mile limits after the 1970 Declaration.²⁷ As already discussed above, the

principle's motive was to freeze the jurisdictional position as it was, during the negotiations for a future treaty. Partially it succeeded in its motive. The Chinese assertion is a good example of the success of this principle. The Chinese in 1971, asserted in their usual polemical style that "the current international struggle with regard to rights over the seas and oceans was in essence a struggle between aggression and resistance, between plunder and conservation, between foreign legemoney and independence, a struggle of Asian, African and Latin American countries in defence of their national rights and interests and their sovereignty against the legitimacy of the super powers."²⁸ Further, they said, "it was within each country's sovereignty to decide the extent of its rights over territorial seas...all coastal states had the right to dispose of the national resources in their coastal seas and the seabed and subsoil thereof, so as to promote the well-being of their people and the development of their economic interests."²⁹

Perhaps; this statement given in support of the Latin Americans and others with wide territorial jurisdiction indicates a shift in Chinese ocean policy. Such a change in Chinese approach is further justified for two reasons: (i) Chinese intention to "persuade the developing countries that she was really one of them",³⁰ and (ii) need for China to secure more oil reserves on its continental shelf³¹ including

Pohai Bay and the vitalest of all, the need to secure their claims on Pohai Bay, which "is about 300 miles long, 180 miles wide and approximately 45 miles across the entrance".³²

Hungdah Chiu expressing his doubts over Chinese claim of Pohai Bay writes: "[u]nder international law, a fundamental question arises whether a particular body of water forming an indentation of a state's coast and described as a bay or otherwise may be claimed by that state as its inland waters."³³

The Chinese need for fuller control is justified by Park³⁴ and Chiu - "[t]here can be little doubt that Pohai Bay is vital to the security of [Peoples Republic of China]. Access to its waters would permit an attack supported by naval forces against any part of an area within gigantic circle from Manchurian industrial centers to the hearts of the North China plain. It would have been extremely difficult, if not impossible, for the Western Powers to bring the rulers of the Ch'ing Dynasty to their knees in the nineteenth century without the use of Pohai Bay."³⁵ The 45-mile entrance of the Bay can not wholly be covered from both sides under the present 12-mile territorial jurisdiction, it leaves 21-miles passage in the middle and several square miles in the middle of the Pohai Bay, if it is not accepted by the world as internal waters. This can, however, be easily covered under an extended jurisdiction by closing the entrance of the Bay.

However, Chinese effort to gain support of developing countries by supporting their wider claims did not meet the

expected results. "The indicator of China's success in persuading the developing nations that she was their trustworthy potential confident, was the fact that she was excluded from the private caucuses of the 'Group of 77', the informal body in which developing nation policy and strategy is coordinated."³⁶

Thirdly, the last of the intentions of this principle was to limit extensions of special functional zones in superjacent waters, that is, the zones of exclusive economic and fisheries jurisdiction and at 200-miles along with the continental shelf limits. It is evident from the records³⁷ that in the post-Declaration decade no major claims have come up, extending their jurisdictions beyond 200-miles. However, the claims of the 200-mile economic and fisheries zone have come up from countries which did not have any such jurisdictional claims, prior to the principle's resolution.

Thus, to sum up, this principle was nearly a complete success in discouraging states from unreasonable extension of their jurisdictional and territorial claims.

IV: 3 The Analysis of Soft Law

The Declaration apart from establishing "hard law" establishes some principles which can be classified as "soft law". These principles are new and developing and therefore,

can perhaps be grouped under lex ferenda. These principles for the first time highlight the desire of the world community to narrow down differences by adoption of a few new norms. The best example can be seen in this principle - an international regime shall be established by a treaty of universal character. These "soft law" principles were laid down to be observed during the course of Seabed Committee's remaining period and the UNCLOS-III. It was suggested that these principles should be the base of further negotiations and formulation of the new law of the sea. However, it is likely that acceptance and observance of these new principles in the law of the sea negotiations might make them ripe enough to be applied to other areas of international law. These have been grouped under the following four headings: (i) an international regime shall be established by a treaty of universal character, generally agreed upon; (ii) states shall promote international co-operation in such things as scientific research, conservation of ocean resources, rights of other states and pollution prevention; (iii) activities of the states causing damage to the sea shall entail liability; and (iv) the disputes relating to activities in the area shall be resolved according to the U.N. Charter and the procedure to be established in international regime.

IV:3:i An international regime shall be established by a treaty of universal character, generally agreed upon.³⁸

This principle has emerged as a new appliance for reaching agreements on vital issues in international law and relations. It is the first time that the world community agreed on this principle that "the treaty shall be universal character and generally agreed upon", nature. It is an absolute departure from the past and present practices of the United Nations treaty procedures. Generally the treaty to be accepted by the United Nations requires two-thirds support, the precondition for seabed regime treaty is "a treaty of universal character, generally agreed upon". Here, generally agreed upon has not been defined or elaborated, thus it develops ambiguity to what will be the exact limit of 'generally agreed upon'. This issue still remains open for further discussion and elaboration.

However, this emerging principle is an outcome of compromise between developing and developed countries. It came in an effort to reconcile the conflicting interests of two groups, by way of give and take.. Both the developing and developed countries conceded some of their interests and also secured a few. The developing countries secured the rights for equitable sharing in the benefits to be derived from the area and simultaneously conceded their superiority of numerical majority in influencing the future agreement. Developed countries had to concede and agree for the establish-

ment of an international regime and equitable sharing of the benefits of resources. The gain for developed countries was no less important, because all that was to be formed and decided for seabed activities could no longer be imposed on them, as the treaty has to be of universal character and generally agreed upon in nature.

IV:3:ii States shall promote international co-operation in such things as scientific research, conservation of ocean resources, rights of other states and pollution prevention.³⁹

First, the Resolution has made an effort to evolve principles for co-operation among states, in various diversified areas. These tend to be more of a code of conduct than legal norms. The Declaration, while referring to scientific research, means that states carrying out research activities shall help and provide such scientific information to other states who do not possess the capability to carry out such research. This is an effort to help developing states to develop their own scientific background. Further, it is important, for the reason that scientific knowledge acquired by developed states from the coastal zones of developing states, shall also be available to the state concerned, for its own benefit.⁴⁰

Second, another significant aspect is of the conservation of natural resources of the area and prevention of the natural flora and fauna from the possible damages. The

Declaration while emphasizing co-operation, seeks for the development of co-operation among states, so that the natural resources are conserved for their better equitable use by mankind. This co-operation is, particularly, sought from the states who are extensively indulged in fishing, transportation and other activities in the sea or ocean bed.⁴¹

Third, the Declaration emphasizes the need for co-operation by states, and affirms that states shall pay due regard to the rights and legitimate interests of the coastal states, in the region where such activities are being carried out. This provision seems to be vague, for it asserts that states carrying out such activities shall pay due regard to all such other states whose interests are likely to be jeopardized. The intention of the principle is to eliminate, to the maximum possible limit, the possibility of conflicting claims. However, the vagueness lies in the difficulty to locate and recognize the states and their number, having interests in the area of activity. It is not workable unless the enigma of jurisdictional claims is resolved. If any such provision has to exist then it will perhaps be necessary for its proper implementation that a comprehensive document be prepared, explicitly showing the areas of interests of different states. It is suggested, for the reason of the existence of several conflicting territories and jurisdictional claims, which are a catastrophe in the way of success of this principle.⁴²

IV:3:iii Activities of the states causing damage to the area shall entail liability.⁴³

The principle, when, connotes liability for causing damages, establishes a new and good practice. However, the practicability of such a norm is questionable particularly in the absence of effective methods to determine the amount of damage caused and that whether or not a damage has been caused. A justice in the absence of the means and tools to determine the right or wrong is, perhaps, an illusion. The damages to be covered under this provision have to be borne out of the activities in the area. And in the absence of clear definition of the "activities in the area", it is difficult to ascertain that which damage has actually been caused by "activities in the area". It is however conceded that in certain cases through agreements, damages can be ascertained and realized. Yet, viability of the principle, in the absence of adequate scientific backgrounds is doubtful. Such a concept is likely to create more confusion than the justice can render to mankind.

IV:3:iv Disputes relating to activities in the area shall be resolved according to the United Nations Charter and the procedure to be established in the international regime.⁴⁴

Through this Declaration lays down the procedure to be adopted in the case of a disputes relating to activities in the area and its resources. State parties, by this principle, agree

to resort to the provisions of Article 33 of the United Nations Charter, i.e. "the parties to any dispute, enquiry, mediation, conciliation, arbitration, shall...seek a solution by negotiation, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice"⁴⁵ or failing all of these means "the Security Council shall call upon the parties to settle their disputes by such means."⁴⁶ These measures are suggested in case of a dispute during the period of the evolution of an international regime. The Declaration further asserts that after establishment of the regime, disputes shall be settled according to the provisions laid down for dispute settlement in the international regime.

Thus the Declaration recognizes the need of a separate dispute settlement body within the regime. This suggestion proposed by the United States, has been well integrated in the Declaration. This provision clarifies the procedure to be adopted in the interim period and also reflects the possible procedures to be adopted by the future seabed dispute settlement body. The acceptance of this principle clarifies the need of a separate seabed dispute settlement body and also reflects the intention of states that they do not wish to put such disputes under the direct jurisdiction of International Court of Justice. Perhaps this expression is an outcome of the need of a more effective dispute settlement body which is more familiar with the seabed activities, than the International Court of Justice.

IV:4 Conclusions

The almost unanimous endorsement of the Declaration of Principle was a big achievement in itself. After three years of strenuous negotiations which had gone into the formulation of the principles, at least some clear and positive results in the shape of legal norms and evolving code of conduct are visible. Some of the provisions are new and reflect the changing world opinion for a new public order of concerns, such provisions are clear and have been accepted by all. Yet, some of the provisions are vague and ambiguous, and do not lead to any positive conclusion. Mainly these provisions are those on which world community was bitterly divided. Thus in an effort to reconcile the interests of all state parties and reach a settlement, different phrases have been repeatedly used in different provisions. The device of re-interpreting particular phrases was the only alternative to satisfy the specific conflicting interest of each state. The Declaration principle needs to be evaluated with a view that some "core issues" have been accepted and not because "what issues" have been accepted.

It will perhaps be right to mention that the document needs to be viewed as a base for future negotiations as its motive was and the need not be look upon as a final instrument of principles. However the drawbacks in the Declaration

which are temporary and for the interim period only should not underrate the significance of such a unique document. Last but not the least, this document is a giant leap of mankind, for certainly it is a document which is likely to give direction for the establishment of a new economic and political world order.

FOOTNOTES TO CHAPTER IV

1. U.N. General Assembly Resolution 2749 (XXV), December 17, 1970; Nordquist, et al, New Directions in the Law of the Sea: Documents (1970), Vol. II, pp. 740-41.
2. U.N. General Assembly Resolution 2749 (XXV), December 17, 1970; Shigeru Oda, The Law of the Sea in Our Time - 1: New Developments, 1966-1975, (1977), p. 80; Evan Luard, The Control of the Seabed (1977), p. 139; Stang, infra n. 3, at 576.
3. David P. Stang, "The Donnybrook Fair of the Oceans", 9 San Diego L. Rev. (1971-72); p. 569 at 576; Oda, ibid, p. 79.
4. This was the first time that the world community agreed to accept the concept of "common heritage of mankind" and equitable sharing, giving a new direction to the law of the sea. In effect the language used is a compromise between two bitterly opposing interests and ideologies, yet it represents something that would be applied as the foundation for the new law of the sea.
5. After Truman's proclamations some of the Latin American states, namely; Argentina, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Panama, Peru and Uruguay as well as Sira Leone extended either their territorial jurisdiction or some other kind of function zone with the claim of sovereignty rights up to 200-miles. These developments were a sort of counter action to the United States' continental shelf concept and were basically instigated by it. The variety of formulations employed in these claims introduced new uncertainties in the field of maritime jurisdiction. See Shigeru Oda, The International Law of the Ocean Development: Basic Documents (1977), Ch. Breadth of Maritime Jurisdiction, part IV A.2; Gracia F.W. Amedor, The Exploitation and Conservation of the Resources of the Sea (1959), p.
6. Declaration of Principles, supra n. 1, Principle 1.
7. Cecil J.B. Hurst, "Whose is the Bed of the Sea?" 4 Brit. Yearbook of Int. L. (1923-24): See generally

8. Geneva Convention on the High Seas (1958), 450 U.N.T.S. 82, Article 1.
9. Geneva Convention on the Continental Shelf (1958), 499 U.N.T.S. 205, Article 1.
10. Declaration of Principles, supra n. 1, Principle 13.
11. Elisabeth Mann Borgese, "Mining Seabed Minerals: The Law of the Sea and New International Economic Order", Unpublished Paper (1979).
12. Informal Composite Negotiating Text/Rev. 1, U.N. DOC. A/CONF. 62/WP. 10/Rev. 1, 28 April, 1979.
13. I.C.N.T., ibid., Article 133.
14. Declaration of Principles, supra n. 1, Principle 8.
15. United Nations: Treaty on Prohibition of Nuclear Weapons on Seabed and Ocean Floor, 10 ILM (1971): p. 145 (Treaty concluded on 7 Dec. 1970).
16. U.S.S.R. Proposal on Prohibiting Use of Seabed and Ocean Floor for Military Purposes, 8 ILM 1969: p. 659; Article 1.
17. The United States Proposal on Prohibiting Emplacement of Nuclear Weapons on the Seabed and Ocean Floor, 8 ILM (1969), p. 667, Article 1.
18. U.S. - U.S.S.R. Draft Treaty on Prohibiting Emplacement of Nuclear Weapons on the Seabed and Ocean Floor, 9 ILM (1970): p. 392.
19. Supra n. 15, Article I (2).
20. Declaration of Principles, supra n. 1, Cf. Principle 5 and 8.
21. Ibid., Principle 5.
22. Ibid., Principle 8.
23. Ibid., Principle 9.
24. I.C.N.T., supra n. 12, Articles 156 (1) and 159 (1).
25. I.C.N.T., ibid., Articles 162 and 170.
26. Declaration of Principles, supra n. 1, Principle 2.

27. Argentina (1946), Chile (1947), Peru (1947), Costa Rica (1948), Panama (1946), El Salvador (1950), Ecuador (1952, the sea zone was established by a joint declaration by Peru, Chile and Ecuador on 18 Aug. 1952), Nicaragua (1950), Honduras (1950) as well as Sierra Leon and Korea (1952) declared their sovereign or quasi-sovereign rights up to 200-mile in sea. These claims are not clearly indicated in most of the tables, however a comparison of the documents and books reveal that no such claims have been asserted between 1970 to 1975 (data incomplete after 1975). The documents and books to be compared and considered, altogether, to avoid confusion of some incomplete and contradictory entries in tables: Gerard J. Manyone, The United Nations, International Law, and The Bed of the Seas (1972); pp. 9-11; U.N. Laws and Regulations on the Regime of the High Seas, Vol. 1, U.N. Doc. ST/LEG/SER. B/1 and Add. 1, 1956 and Supplement; U.N. Laws and Regulations on the Regime of the High Seas, Vol. 1, U.N. Doc. ST/LEG/SER. B/8, 1959; U.N. General Assembly Survey of National Legislation Concerning the Seabed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction, U.N. Doc. A/AC. 135/11 and A/AC. 135/11/Add 1, 13 Aug. 1968; P.D. Barabolya, et al, Manual of International Maritime Law, Part I, (1968), pp. 30-37; Aaron L. Shalowitz, Share and Sea Boundries (1962), pp. 389-391; Table of Claims of Nations to Breadth of Territorial Sea, Prepared by the Secretary General of the United Nations, U.N. Doc. A/CONF. 19/4, 8 Feb. 1960; Limits in the Seas No. 36: National Claims to Maritime Jurisdictions (Dec. 1975), pp. 3 to 15.
28. U.N. Doc. A/AC. 138/SR 72 at 11, 8 and 10; Quoted by Stang, supra n. 3, pp. 581-82.
29. U.N. Doc. A/AC. 138/SR 72 at 8 and 10; Stang, ibid., p. 82.
30. Stang, supra n. 3, p. 381.
31. Choo-ho Park, Continental Shelf Issues in the Yellow Sea and the East China Sea (1972) pp. 23-26.
32. Tao Cheng, "The Law of the Sea", eds. Hungdad Chiu and Shao-Chuan Leng, Law in Chinese Foreign Policy: Communist China & Selected Problems of International Law (1972), p. 88.
33. Chiu and Leng, ibid., p. 88.
34. Park, supra n. 31, p. 23.
35. Chiu and Leng, supra n. 32, p. 89.

36. Stang, supra n. 3, p. 582.
37. See, documents, listed in note 27.
38. Declaration of Principles, supra n. 1, Principle 9.
39. Ibid., Principles 10, 11 and 12.
40. Ibid., Principle 10.
41. Ibid., Principle 11.
42. Ibid., Principle 12.
43. Ibid., Principle 14.
44. Ibid., Principle 15.
45. Leland M. Goodrich; The United Nations, (1959), Appendix I
Charter of the United Nations, p. 359, Article 33(1).
46. Goodrich, ibid., p. 359, Article 33(2).

CHAPTER V

THE DEVELOPMENT OF PRINCIPLES OF THE REGIME OF
DEEP OCEAN-BED AND DEEP OCEAN MINING

FROM 1971-1973

V:1:i The Seabed Committee 1971: Introduction

The Seabed Committee-1971 composed of 36 members¹ held two sessions at Geneva, first from March 12 to 26 and second from July 19 to August 27. In the first session following an agreement on organization of work, three Sub-Committees were formed. Evidently, it became necessary due to the enlarged area of negotiations, which was no longer confined to seabed and ocean floor, and because the Committee was to cover all the possible aspects of marine activities the following areas were allocated to Sub-Committee I.

"To prepare draft treaty articles embodying the international regime - including an international machinery - for the area and the resources of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, taking into account the equitable sharing by all States in the benefits to be derived therefrom, whether coastal or landlocked, on the basis of the Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, economic implications resulting from the exploitation of the resources of the area... as well as the particular needs and problems of landlocked countries."2

Sub-Committee I, one of the three Sub-Committees of the whole set-up in accordance with an agreement reached on the organization of work of the Seabed Committee, was further requested to consider the issues referred to above with the addition of the "issue of the precise definition of the area of

the seabed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction". The Sub-Committee I held two series of meetings in Geneva, in March and in July/August. During this period a number of delegations presented drafts and working papers regarding proposals for an international seabed regime. With this reference was also made to the proposals made in 1970.

V:2:ii The Seabed Committee 1971: Discussion of Principles

A. International Regime

Discussion on general principles of the regime, though it was accepted that it be based on the Declaration of Principles, the issues were further identified under the following heads: (i) scope and nature of the international regime; (ii) the instrument by which the regime should be established; (iii) the question of the precise definition of the area; (iv) orderly development of the marine environment; (v) relationship between the international regime and the rights of coastal states; and (vi) the international regime and the question of the freedom of the high seas and the traditional use of the sea.

1. On the scope and nature of the international regime, the issues raised included the question of the range of activities to be regulated by the international regime. It was questioned that whether all uses of the seabed beyond the

national jurisdiction are to be included in the sphere of regimes activities or only the activities related to the exploration and exploitation of the resources of the area. This was followed by questioning the degree of control to be accorded to the regime and machinery over the various activities appertaining to the seabed area. Views were expressed both in favour of and against a strong control over the activities to be conducted in the area. Some delegations stressed that a seabed resource management system is inevitable, for achieving the objectives set forth in the Declaration of Principles.³

2. On the instrument by which the regime should be established, there was consensus that in accordance with the principle established in the Declaration of Principle the international regime should be established by an international treaty of a universal character, generally agreed upon.⁴

3. On the question of the precise definition of the area a general agreement emerged that the definition should be construed, taking into account "the interests of coastal states and their rights under existing international law and the interest of the international community as a whole". Different proposals were put forward, suggesting distance criterion, a combination of both the depth and distance, geomorphological criteria of the continental margin alone or in combination with the distance criterion, or all such criteria existing in the practice of customary international law. Most of those

who suggested the distance criterion referred to 200-miles as a reasonable limit. A significant number of other delegations favoured significantly narrower limits, varying from 40-miles to 100-miles. Many in favour of the depth criterion referred to the 200 meters isobath while others referred to the varying degree of depth up to 2500 meters. The trusteeship zone concept proposed by the United States in 1970 did not gain much support.⁵

4. A number of delegations on the orderly development of the marine environment were in favour of establishing a reserve area within the international seabed area.⁶

5. On the issue of the relationship between the international regime and the rights of coastal states, it was stressed that coastal state rights be preserved. Some coastal states were of the view that appropriate provisions be made to safeguard their interests through prior consultation with and notification to the coastal state of the activities to be carried out in the area adjacent to their maritime jurisdiction.⁷

6. On the question of the international regime and the question of the freedom of the high seas and the traditional uses of the sea, reference was also made to scientific research in the area. An agreement emerged that conflicting uses should be avoided and any dispute arising out of such a conflict would be settled by peaceful means.⁸

B. International Machinery

The delegates on the issue of the international machinery were of the view that, it, as an integral part of the regime should have a wide range of tasks so as to be able to effectively implement the provisions of the regime. The discussion was concentrated on the following issues: (i) scope and powers of the international machinery; (ii) organs of the international machinery; (iii) relationship of the international machinery to the U.N. system; (iv) the international machinery and regional agreements; and (v) transitional agreements. The discussions were based on the proposals submitted to the Committee in 1970 along with the new proposals put forward by Tanzania,⁹ Poland,¹⁰ the Soviet Union,¹¹ the United Kingdom,¹² 13-Latin American States,¹³ Malta,¹⁴ 7-Landlocked and Shelf Locked States,¹⁵, Canada,¹⁶ a 32-nation draft by India and others,¹⁷ and Japan.¹⁸ Some of these proposals are being discussed here to show their views on the structure and functional aspects of machinery.

1. The United States (1970 proposal) proposed for a "strong international machinery with important regulatory powers; means to enhance the capability of developing countries to participate directly in seabed resource development; the power to issue licenses to States and enterprises sponsored by States for resource exploration and exploitation...: and procedures for compulsory settlement of disputes."¹⁹ A British view

expressed that the only way of giving practical expression to the principle of common heritage in the seabed is to ensure that all state parties to the convention have fair access to the area for the exploration and exploitation of its resources. They further suggested that the international regime should provide for the equitable allocation by the Authority to states of licences for the exploration and exploitation of the resources of the area. To ensure that such a system was fair in practice as well as in theory, they recommended that each state party should be entitled to a specific quota to ensure that an appropriate proportion of the area shall be made available to each state. They argued that such a system will also act as a check on industrialized states, because they will not be able to explore and exploit beyond the area allotted to them.²⁰

The French proposal of 1970,²¹ which was also considered, recommended the establishment of a regime for exploration and exploitation. The regime, the French proposed, showed to be such so as to ensure equitable and effective operation of the resources of the area. The word "effective" implies [here] that [the regime] has no complex structure producing expenditure and delays but manages its resources rationally through the administrator's impartiality and competence".²² The French proposal like the earlier ones also recommended the licensing system - "[s]tates shall be allotted, for a given period of time, areas within which they grant licences themselves". It is to be noted here that by suggesting such a structure the French,

envisioned an Authority, with no complex structures.

Tanzania proposed the establishment of an Authority to be based on the principles of centralized and democratically structured regime. They emphasized that by "democratically structured and centralized regime" all member states will be entitled to participate in the exploration and exploitation of seabed resources and will be able to share "effectively" and "equitably" in such activities. They viewed an international machinery with comprehensive powers. A machinery which can cover all the possible activities of the area, suggestion also included, for the regulation of prices and distribution of raw materials by the Authority itself. They submitted that an international machinery with such powers will help eliminate or reduce the adverse effects on the developing economies of land-based producer developing countries.²⁴

The main aim of Poland's paper was to suggest the "concept of developing organization whose structure, functions and powers should be adopted to real needs". They suggested, "accordingly the international machinery should be set up in two stages. In the first stage the organization's subsidiary bodies should be limited in number and its secretariate should be small. The transition to the next state would be linked with the attainment of the commercial exploitation of the mineral resources of the area permitting the organization to be self-supporting."²⁵ Poland stressed the need for the organization

to be based on the "principle of universality and consequently should be open to all states."²⁶

Malta submitted a comprehensive draft of ocean space treaty, composed of 205 articles. This draft dealt with the issues involved both in the international seabed area and the national seabed area. It suggested for the contribution by coastal to the international ocean space institution a portion of the revenue obtained from the exploitation of natural resources from the national ocean space. According to this draft the system proposed for exploitation of the international ocean space resources, was recommended, to be a licensing system.²⁷

A 13-nation draft by Chile and others was significant for suggesting a system in which mankind, in the capacity of owner, would participate directly in the administration and management of the area and the exploitation of its resources. This proposal recommended to give effect to the suggested system - "a body should be created which would itself, as the agent of mankind, undertake direct scientific investigation and the exploration of the area and the exploitation of its resources on behalf of all mankind."²⁸ The proposal added that "it would be therefore more in consonance with the principle of the common heritage for such a body in the early stages to enter into joint ventures, production sharing and profit-sharing arrangements with other entities, public or private,

national or international rather than to grant or issue licences to such entities".²⁹ They said "the concept of a licensing or concession system is in [their] view inconsistent with the principle of the common heritage."³⁰

Afghanistan, Austria, Belgium, Hungary, Nepal, the Netherlands and Singapore by a joint working paper suggested a consideration of some specific points namely: limits of international authority, facilities for landlocked states, and special interests of developing countries. the emphasis was laid through this working paper for the creation of some special provision to safeguard the interests of geographically disadvantaged countries.³¹

The developing countries, on the issue of international machinery, opposed the idea that machinery should be a licence granting organ for exploitation perhaps because they envisioned that the licencing idea of developed countries would benefit only those who possess the required technology for exploitation. The developing countries favoured that the machinery should be entrusted with strong and comprehensive powers. They were of the view that the machinery should include the powers of direct exploitation. The developed countries opposed this view and suggested that direct exploitation by the Authority would only enlarge the machinery and its expenses. The United Kingdom suggested that each state be entitled to an equitable allocation of exploitation licence and it could further grant sub-licence

to their own private enterprises. Thus the debate ended without any compromise on the structural and functional issues of international machinery. In the last stages of the debates a joint working paper by Australia and Jamaica suggested a tentative programme for the 1972 discussions.³²

V:1:iii Conclusion

The report of the Seabed Committee was submitted to the First Committee of the U.N. General Assembly. There was no significant development in the First Committee, except, the addition of China to the membership of the Seabed Committee. In the Plenary Meeting, Norway proposed the addition of four others in the Seabed Committee on the basis of seats increased in Asia. This proposal was adopted by the General Assembly, 128 to 0, with no absentions; thus clearing the way for the 1972 Seabed Committee deliberations.

V:2:i The Seabed Committee 1972: Introduction

The Seabed Committee of 1970 composed of 91 members, held two sessions, first at New York from 28th February to 30th, March and second at Geneva from 17 July to 18 August. The Main Committee adopted its programme on the basis of a working paper presented by Australia and Jamaica.³⁵ According to this work was divided into two parts: (1). status, scope and basic provisions of the regime based on the Declaration of Principles;³⁶

and (2) status, scope, function and powers of the international machinery. This second part was to include: organs of the international machinery, including composition, procedures and dispute settlement; rules and practices relating to activities for the exploration, exploitation and management of the resources of the area, as well as those relating to the preservation of the marine environment and scientific research, including technical assistance to developing countries; the equitable sharing in the benefits to be derived from the area, bearing in mind the special needs and interests of developing countries, whether landlocked or coastal; the economic considerations and implications, relating to the exploitation of the resources of the area, including their processing and marketing; the particular needs and problem of landlocked countries; and relationship of the international machinery to the United Nations system.

V:2:ii The Seabed Committee 1972: Discussion of Principles

A. International Regime

1. On the issue of international regime there were different views in respect to the implications of the Declaration of Principles. A common view was that the term "status of the regime" meant the legal nature of the regime. On this many pointed out that the Declaration of Principles required that the regime "shall be established by an international treaty of a universal character, generally agreed upon".³⁷ They

stressed the fact that the treaty should be of a universal character. In regard to the power to be conferred by the treaty on the international authority, there were divergent views. Some delegations supported the view that the international authority should exercise sovereignty over the area and its resources on behalf of the international community and as a consequence of the fact that the area is the common heritage of mankind. Others were of the view that the treaty should not confer sovereignty. They were of the opinion that a more appropriate term will be jurisdiction. Further, a view was expressed that even jurisdiction should not be conferred upon the international authority, so that not to give legal grounds to it to consider seabed as owned or possessed by it.³⁸

2. The term "scope of the regime" was interpreted to mean the area of its application and the activities it should cover. Discussion on this point revealed three elements namely: the area to be covered by the regime; the resources to be covered by the regime; then in regard to the area and its resources to be covered by the regime. On the first element some delegations argued that a close link existed between the boundary that would be drawn and the regime to be established. These delegations were further of the view that the international area should be as extensive as possible.³⁹

On the second element i.e., resources to be covered by the regime, many delegations felt that the regime should apply

only to the seabed and its resources and argued that this would be in accordance with the Declaration of Principles. A view was also expressed that the regime should have powers in regard to all ocean space. On this, objection was raised by a number of speakers that such a step will not be in conformity with Principle 13(a) of the Declaration of Principles. There was also divergence in views on the resources of the seabed to be covered by the regime. Some were of the view that the regime should cover both non-living as well as living resources, whereas some were of the view that only non-living should be covered by the regime.⁴⁰

On the third element, it was noted that the Declaration of Principles states that all activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the regime. Some delegates were of the view that this wording is imprecise and that further clarification is necessary. On this argument was made that, though, the primary objective of the regime was limited to the exploration and orderly exploitation of the mineral resources of the area, this objective could be effectively achieved only if an international machinery were created with competence and powers for the maintenance of the territorial and jurisdictional integrity and the harmonization of the uses of the area. It was further argued that the regime should have power to deal with scientific research and pollution not merely concerning or derived from seabed activities, but also

in ocean space as a whole, together with the power to deal with the use of potentially dangerous technology for the marine environment.⁴¹

3. On the third of the concepts, i.e., the basic provisions of the regime, some delegations pointed out that the purpose of the Declaration of Principles could not be achieved if the principles were to be simply repeated. There was an agreement that while some principles could form the basis of the future treaty, other principles were more in the nature of guidelines for the purpose of drafting a treaty.⁴²

B. International Machinery

1. It was considered that the international machinery should be the executive and administrative arm of the regime. Many delegates were of the view that the machinery should be strong and with clearly defined powers, as set out in the Declaration of Principles, so as to achieve the primary purpose of the regime, the equitable sharing by states in the benefits derived from the exploitation of the area. However, others felt that the international machinery should have only those functions which are necessary for the regulation of industrial exploration and exploitation of the seabed and its subsóil. Some delegations considered that the machinery should have international and legal personality and explained that by this they mean that machinery should have, inter alia, power to conclude agreements, to own

dispose of property, and to conclude contracts.⁴⁴

Further, there was a common view that the machinery should consist of at least two kinds of organs. They suggested that there should be an Assembly, or plenary body, where all members of state parties would be represented. There seemed to be an agreement on the issue of vote, that every member state shall have one vote. But no agreement could be reached on the issue of how decisions could be reached. The second organ proposed was a Council, or an executive body.

There were widespread differences in regard to the fundamental aspects of the Council, such as the number of members, the interest that should be represented therein, and the manner in which the Council should be composed including decision making process.⁴⁵ There were different proposals suggesting the membership between 18 to 35 states. On the issue of voting it was noted that each state should have one vote, but again there was no agreement on voting procedure, i.e., whether or not decisions should be taken by simple majority or a greater majority or by consensus. A view was expressed that on matters of substance decisions should be taken by consensus.⁴⁶

It was stated by many that an administrative service or a secretariat be formed. Suggestions were also made for establishing procedures for dispute settlement by formation of a tribunal or by assigning this function to the International Court of Justice, but there was no agreement on the final shape of such procedures. A suggestion was made

to form a corporation or enterprise as part of the machinery which could participate in joint venture. This proposal was made in contrast to the proposal of a licencing system.⁴⁷

Suggestions were made for the creation of an Enterprise to carry out all the technical, industrial and commercial activities concerning the exploration of the area and the exploitation of its resources. Some other suggestions were for the establishment of an Economic and Technical Commission, with a responsibility for the actual conduct of operations in the area. Another suggestion for consideration was the creation of "an operations commission, a ruler and recommended practices commission and a boundary review commission. A suggestion was made for the establishment of a distribution agency and a stabilization board to deal with distribution of benefits and stabilization of prices, respectively."⁴⁸

On the question of whether or not the machinery should be empowered to conduct direct exploration and exploitation, itself, a variety of views were expressed. Some states were of the view that the machinery should be responsible mainly for issuing licences to states, whereas others contended that the machinery alone should have power to explore and exploit the resources of the international seabed area. They suggested that such a direct exploitation can be carried out by entering into contracts with states or other bodies by way of joint ventures. However, there were a few who suggested that a

practical solution to the problem is a mixed system - joint-venture (direct exploitation) as well as licensing. It is to be noted that some of those who favoured direct exploitation by machinery, conceded that in at least the initial stages licensing would be necessary.⁴⁹

2. Rules and practices relating to activities for exploration, exploitation and management of the resources of the area.

Several delegations suggested that the treaty should be kept flexible so as to allow for the formulation of rules and practices. However, it was pointed out that the treaty should define the general parameters of the system of control for exploration and exploitation and that rules and practices can be established according to necessity. Some delegations envisioned that it will raise questions concerning the scope of the regime and machinery. However, the question was left open for further discussions.⁵⁰

3. The equitable sharing in the benefits to be derived from the area, bearing in mind the special interests and needs of developing countries, whether coastal or landlocked.

The discussions on this aspect were held in reference to the Declaration of Principles, with a unanimous view that the "regime to be established should ensure the equitable sharing by states in the benefits derived from exploration and exploitation of the resources."⁵¹ These discussions were

further held in the light of the Secretary General's study entitled, "Possible Methods and Criteria for the Sharing by International Community of Proceeds and other Benefits Derived from the Exploitation of the Resources of the Area Beyond the Limits of National Jurisdiction".⁵² However, in this the view was expressed that it would be difficult to formulate meaningful, detailed views on the distribution of benefits in the absence of more precise data relating to the international area and its resources."⁵³

A significant point was raised which clarified that the "term 'benefit' comprised more than financial benefits, or revenues. [It was contended] that the term encompassed, inter alia, access to raw materials and access to scientific information. The question of the provision of training and the transfer of technology was also raised under this general heading...It was argued, in addition, that revenues should not be distributed in the form of aid, but directly as of right as their share of the common heritage to participating states for use as they deemed desirable."⁵⁴

On the question of the criteria to be followed for the distribution of benefits, a fairly wide opinion was expressed that it should be able to satisfy the needs and interests of developing countries and that they deserved special consideration. Arguments were made that the "total revenues should be divided in the first instance into two portions, one for the developing countries and one for the developed countries, and that the

portion for the developing countries should be a substantial one." Besides this, views were put forward for the use of "combined criteria of population and per capita income; another view was that the distribution should be according to the inverse ratio of contributions to the United Nations itself. This was coupled with a suggestion that the basis of distribution of benefits adopted for any period of time should be reviewed once every five years to permit adjustment in the light of changing circumstances."⁵⁵

V:2:iii Conclusion

In the 27th session of the General Assembly agenda item 36, "Reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea" was referred to the First Committee of the United Nations. The First Committee held 13 meetings from the 27 November to 11 December⁵⁶ to consider the report of the 1972 Seabed Committee.⁵⁷ A 5-nation proposal (Algeria, Brazil, Oman, Peru, Senegal)⁵⁸ suggested that the conference be called in 1974. Ecuador and Peru⁵⁹ suggested the acceptance of an invitation from the Government of Chile to hold the conference at Santiago. This was followed by a 45-nation proposal (Australia, Canada, Norway and Sweden, in addition to the countries in Africa, Asia and

Latin America),⁶⁰ which with the addition of three more countries, became a 48-nation proposal, suggested the convening of the conference at Santiago in the Spring of 1974. However, the 5-nation proposal, the proposal of Ecuador and Peru along with a Maltese proposal which suggested that the conference be concluded by December 1975,⁶¹ were withdrawn.

Subsequently the 48-nation proposal was adopted unanimously on 11 December along with the report of the First Committee on agenda item 36.⁶² This was finally submitted to plenary meeting on 18 December. At the Plenary Meeting the draft resolutions submitted by the First Committee were adopted as General Assembly resolution 3029 (XXVII), thus approving the continuation of the Seabed Committee's work in 1973, and requesting that the Seabed Committee hold two sessions. Along with this the resolution requested that the Secretary General convene the first session of the Third Law of the Sea Conference in New York.⁶³

V:3:i The Seabed Committee - 1973: Introduction

The Seabed Committee 1973 held two sessions first, at New York from 5 March to 6 April of five weeks duration and the second at Geneva from 2 July to 24 August of eight weeks duration. The membership of the Committee remained the same as in 1972, i.e., of 91.⁶⁴ At the beginning of its first session the Committee discussed certain proposals and suggestions of the

Chairman regarding the organization of work. However the consensus favoured the existing set-up of Sub-Committees should continue, and that the Committee should itself exercise overall political guidance and later the final decisions in the matters related to the co-ordination of work of the Sub-Committees. Accordingly, a revised version of the Chairman's proposal and suggestions provided the basis for the allocation of items. Sub-Committee I continued its proceedings, according to the earlier organization of work, established in 1971.⁶⁵ The discussions in the Sub-Committee were based on various proposals submitted between 1971 to 1972 and a few new proposals submitted to it in 1973 by Turkey,⁶⁶ Italy,⁶⁷ Greece⁶⁸ and the Soviet Union.⁶⁹ Apart from these a report prepared by the Secretary-General entitled "Seabed Mineral Resources - Recent Developments: Progress Report"⁷⁰ was also submitted to Sub-Committee I, for its consideration. The areas and issues allocated to Sub-Committee I in 1973 are: nature and characteristics of the regime; international machinery, its structure, functions and powers; economic implications, equitable sharing of benefits bearing in mind the special interests and needs of the developing countries, whether coastal or landlocked; definition and limits of the area; use of area exclusively for peaceful purposes.⁷¹

V:3:ii The Seabed Committee 1973: Discussion of Principles
A. International Regime

The 1973 discussions were mainly concentrated on pre-

paring a text of draft articles. This draft identified the areas to be covered under the regime under the following 20 subjects: "the common heritage of mankind, activities regarding exploration and exploitation; non-appropriation or claim or exercise of sovereignty or sovereign rights, or of rights incompatible with the treaty rights, and the non-recognition of any such claims or exercise of rights; use of the area by all states without discrimination; general conduct in the area and in relation to the area; benefit of mankind as a whole; preservation of the area exclusively for peaceful purposes; who may exploit the area; general norms regarding exploitation; scientific research; transfer of technology; protection of the marine environment; protection of human life; due regard to the rights of coastal states; legal status of waters superjacent to the area; responsibility to ensure observance of the international regime and liability for damages; access to and from the area archaeological and historical objects; and settlement of disputes."⁷² All of these areas were further construed in different forms according to agreement or disagreement on the language involved. Sub-Committee in its report⁷³ submitted to the Seabed Committee the texts illustrating areas of agreement and disagreement on the issue of international regime. In some cases three to four alternative, elaborate definitions were provided due to disagreements in the Working Group.

The draft text was twice read by the Chairman of the Working Group. Although in the second reading the Working

Group attempted to reduce the number of conflicting areas, which were placed in square brackets, by suggesting alternatives, the text verbally remained the same. For instance the title "United Nations Convention on the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction" had "United Nations" and the whole title in brackets.⁷⁴ The title of Part I had three alternatives in brackets, i.e., "Basic, or Fundamental or General Principles".

A significant move in the first session of the 1973 Seabed Committee was the introduction of a draft recommendation on 19 March by the United States,⁷⁵ suggesting a provisional regime. The idea was not to create an interim regime but to create a provisional regime. The move came from the United States due to strong pressure at home from private firms.⁷⁶ This draft recommendation as orally revised was adopted by Sub-Committee I.⁷⁷ By this the Secretary-General was requested to describe examples of precedents of provisional application of multilateral treaties, especially treaties which have established international organizations or regimes".⁷⁸

Another significant development in 1973 was the discussion of the proposal put forward by Greece in the previous session, on "archaeological and historical treasures of the deep ocean floor".⁷⁹ This was replied to by a proposal from Turkey,⁸⁰ suggesting that the archaeological and historical treasures discovered beyond national jurisdictions shall

constitute a part of the common heritage of mankind, and shall be protected by the international regime. According to this proposal, the state of origin shall have the right to purchase the treasure from the international regime. However, the proposal suggested that in case the said state does not wish to purchase the treasure, the international regime shall have a right to sell it, or keep it in a museum belonging to an international regime or to the United Nations. This proposal emphasized more according to the common heritage nature of the treasures. This proposal was submitted for the granting of stronger powers, than those envisaged in the proposal of Greece for international regime in regard to treasures found or discovered in the sea.

B. International Machinery ;

Similar to discussions for other parts, discussion on international machinery also concentrated on preparing a text of draft articles. This draft indentified the areas to be covered under the international machinery under the following subjects: "establishment of an international machinery; * nature of the Authority; * status of the Authority; * operation of vessels and emplacement of installations by the Authority; * installations and other facilities for the exploration of the area and the exploitation of its resources; * privileges and immunities; * relationships with other organizations; * fundamental principles of the functioning of the Authority; * purposes of the Authority; *

the Assembly; powers and functions of the Assembly; the Council; powers and functions of the Council; the system of settlement of disputes (including the Tribunal); the Enterprise; the Operations Commission; the Permanent Board; the Management and Development Commission; the International Seabed Operations Organization; the Exploration and Production Agency; the Exploitation Commission; the Secretariat;* the Rules and Recommended Practices Commission;* the Planning/Price Stabilization Commission;* the Scientific and Technological Commission;* the Legal Commission;* the International Seabed Boundary Review Commission;* the Inspection and Conservation Commission;* and miscellaneous provisions*.⁸¹ Drafts on these topics were read in the Working Group, however, the second reading of these could not be completed. Thus the report of the Working Group on International Regime and Machinery was drafted⁸² without completion of the second reading. The provisions marked with an asterisk are those for which second reading was completed. Many subjects including even those which received second reading were put into text with several alternatives: the sections in square brackets indicate the areas on which it was not practicable to include all the views in the text.

The Soviet proposal⁸³ suggested a draft preamble to a treaty on the use of the seabed for peaceful purposes. By this the Soviet Union suggested that a separate treaty could be concluded on the use of the seabed for peaceful purposes - it

specifically referred to the Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Seabed. On submission of this proposed preamble a view was expressed that "consideration of the preamble was outside the mandate of the Working Group; however, a few delegates took a contrary view".⁸⁴ Owing to the lack of time the Working Group could not complete its discussion of the issue and no alternative texts were presented.

The Italian proposal submitted draft articles concerning the composition of the Council⁸⁵ and the preliminary draft articles concerning the basic principles of the regime of the international seabed area.⁸⁶ The former is a revised version of the draft introduced by Italy in 1972.⁸⁷ The proposal suggested the following: Of the total 36 members, 16 designated members shall have the following division, 8 members to be designated on the basis of "Gross National Product" scale, 7 on the basis of their particular role as coastal states and 1 for having its status as a landlocked state. The proposal, further, suggested a three-quarters majority for decision on substantive matters. It also included a suggestion for the granting of "non-exclusive" prospecting licences, "exclusive" exploration and exploitation licences.

V:3:iii Conclusion

In the 28th Session of the General Assembly, agenda item 40, "Reservation exclusively for peaceful purposes of the

seabed and the ocean floor, and subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea: report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction" was considered by the First Committee of the United Nations. The report adopted by the Seabed Committee was submitted in six volumes.⁸⁸ The First Committee held discussions from 15 to 26 October and on 5 and 6 November.⁸⁹ A 14-nation draft resolution concerning the convening of the Third Law of the Sea Conference was submitted by Kenya, Mauritius, Tanzania, Uganda, (Africa); Iran (Asia); Chile, Columbia, Mexico (Latin America); Australia, Canada, Iceland, Malta, New Zealand, Norway, Sweden (Western Europe and others).⁹⁰ This was subsequently joined by 11 more countries as sponsoring nations: Guinea, Ivory Coast, Liberia (Africa); Pakistan, United Arab Emirates (Asia); Jamaica, Trinidad and Tobago, Venezuela (Latin America); Australia, Ireland, the Netherlands (Western Europe and others).⁹¹ Thus this resolution after two revisions was finally adopted by the First Committee.⁹²

This draft proposal concerning the convening of the Third Conference on the Law of the Sea was adopted in Plenary Meeting by 117 to 0, with 10 absentions, as Resolution 3067, (XXVIII).⁹³ Eastern European states abstained from voting. The resolution stated that "the mandate of the Conference shall

be to adopt a convention dealing with all matters relating to the law of the sea,...and bearing in mind that the problems of the ocean space are closely interrelated and need to be considered as a whole".⁹⁴ Thus the way was finally opened for the Third Law of the Sea Conference.

FOOTNOTES TO CHAPTER V

1. The Seabed Committee enlarged as per the U.N. General Assembly Resolution 2750 C (XXV), 17 Dec. 1970.
Africa (25): Algeria, Cameroon, Democratic Republic of the Congo (later Zaire), Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Nigeria, Peoples' Republic of the Congo, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Tunisia, United Arab Republic (later Egypt).
Asia (17): Afghanistan, Ceylon (later Sri Lanka), Cyprus, India, Indonesia, Iran, Iraq, Japan, Kuwait, Lebanon, Malaysia, Nepal, Pakistan, Philippines, Singapore, Thailand, Yemen.
Latin America (16): Argentina, Bolivia, Brazil, Chile, Columbia, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Mexico, Panama, Peru, Trinidad-Tobago, Uruguay, Venezuela.
Eastern Europe (9): Bulgaria, Byelorussia, Czechoslovakia, Hungary, Poland, Romania, Ukraine, U.S.S.R., Yugoslavia.
Western Europe and Others (18): Australia, Austria, Belgium, Canada, Denmark, France, Greece, Iceland, Italy, Sweden, Turkey, U.K., U.S.A.
2. 26 GAOR, U.N. DOC. A/8421, Supplement No. 21, p. 5.
3. Ibid., p. 24, para. 60.
4. Ibid., p. 24, para. 61.
5. Ibid., p. 24, para. 62.
6. Ibid., p. 25, para. 65.
7. Ibid., p. 25, para. 66.
8. Ibid., p. 25, para. 67.
9. U.N. DOC. A/AC 138/33 (Tanzania).
10. U.N. DOC. A/AC 138/44 and Add. 1 (Poland).
11. U.N. DOC. A/AC 138/43 (Soviet Union).
12. U.N. DOC. A/AC 138/46 (United Kingdom).

13. U.N. DOC. A/AC 138/49 (Chile, Columbia, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Mexico, Panama, Peru, Trinidad and Tobago, Uruguay and Venezuela).
14. U.N. DOC. A/AC 138/53 (Malta).
15. U.N. DOC A/AC 138/55 (Afghanistan, Austria, Belgium, Hungary, Nepal, the Netherland; and Singapore).
16. U.N. DOC. A/AC 138/52 and Add. 1 (Canada and Norway) and U.N. DOC. A/AC 138/59 (Canada).
17. U.N. DOC A/AC 138/58 (Afghanistan, Algeria, Cameroon, Ceylon, Democratic Republic of the Congo, Ethiopia, Gabon, Ghana, India, Indonesia, Iran, Iraq, Ivory Coast, Kenya, Kuwait, Liberia, Libya, Madagascar, Malaysia, Mauritania, Mauritius, Morocco, Nigeria, Philippines, Singapore, Somalia, Sudan, Tunsunia, United Arab Republic, United Republic of Tanzania, Yeman and Yugoslavia).
18. U.N. DOC A/AC 138/63 (Japan).
19. U.N. DOC. A/AC 138/25 (U.S.A.).
20. U.N. DOC. A/AC. 138/46 (U.K.).
21. U.N. DOC. A/AC 138/27 (France).
22. Supra n. 2, p. 19.
23. Supra n. 21, p. 3.
24. U.N. DOC. A/AC 138/33 (Tanzania).
25. U.N. DOC. A/AC 138/44 (Poland); Quotations from supra n. 2, p. 20.
26. Ibid.
27. U.N. DOC. A/AC 138/53 (Malta).
28. U.N. DOC A/AC 138/49 (Chile and others); Quotations from supra n. 2, p. 21.
29. Ibid.
30. Ibid.
31. U.N. DOC. A/AC 138/55 (Proposal by 7-landlocked and shelf-locked countries).

32. U.N. DOC. A/AC.138/SC.1/L.8 (Joint working paper by Australia and Jamaica).
33. U.N. General Assembly Res. 2881 (XXVI), December 1971 (the resolution on adding new members to the Seabed Committee).
34. The Seabed Committee 1972 included the following 91 members:
Africa (26): Algeria, Cameroon, Egypt, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Nigeria, People's Republic of the Congo, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Tunisia, Zaire, Zambia.
Asia (18): Afghanistan, Ceylon (later Sri Lanka), China, Cyprus, India, Indonesia, Iran, Iraq, Japan, Kuwait, Lebanon, Malaysia, Nepal, Pakistan, Philippines, Singapore, Thailand, Yemen.
Eastern Europe (9): Bulgaria, Byelorussia, Czechoslovakia, Hungary, Poland, Romania, Ukraine, U.S.S.R., Yugoslavia.
Latin America (17): Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Mexico, Nicaragua, Panama, Peru, Trinidad-Tobago, Uruguay, Venezuela.
Western Europe and Others (20): Australia, Austria, Belgium, Canada, Denmark, Fiji, Finland, France, Greece, Iceland, Italy, Malta, Netherlands, New Zealand, Norway, Spain, Sweden, Turkey, U.K., U.S.A.
35. Supra, n. 32.
36. U.N. General Assembly Res. 2479 (XXV), 17 Dec. 1970.
37. Ibid., Principle 9.
38. 27 GAOR, U.N. DOC. A/8721, p. 19, para. 55 to 57.
39. Ibid., pp. 19 to 21, para. 58 to 66.
40. Ibid., p. 21.
41. Ibid., p. 21.
42. Ibid., pp. 21-22, para. 67 to 69.
43. 27 GAOR, U.N. DOC. A/8721, p. 24.
44. Ibid., p. 24, para. 84.
45. Ibid., p. 24, para. 85.
46. Ibid., p. 25, para. 86.
47. Ibid., p. 25, para. 87.

48. Ibid., p. 25, para. 88-89.
49. Ibid., p. 26, para. 90-94.
50. Ibid., p. 26, para. 98-103.
51. Ibid., p. 27, para. 104.
52. U.N. DOC. A/AF 138/38 and Corr. 1.
53. Supra n. 36, p. 28, para. 105.
54. Ibid., p. 28, para. 106.
55. Ibid., p. 28, para. 107.
56. U.N. DOC. A/C.1/PV 1903-1909, 1911-1915.
57. 27 GAOR, U.N. DOC. A/8721.
58. U.N. DOC. A/C.1/L.621.
59. U.N. DOC. A/C.1/L.622.
60. U.N. DOC. A/C.1/L.634.
61. U.N. DOC. A/C.1/L.635.
62. 27 GAOR, U.N. DOC. A/8949.
63. U.N. General Assembly Res. 3029 (XXVII), 18 December, 1972.
64. For membership of the Committee in 1923 see, supra n. 34; and 28 GAOR, U.N. DOC. A/9021, Supplement No. 21, Vol. 1, p. 10, para. 42.
65. See, V:1:i and note 2 to Chapter V.
66. U.N. DOC. A/AC 138/SC.I/L.21.
67. U.N. DOC. A/AC 138/SC.I/L.24 (Draft Articles concerning the composition of the Council); U.N. DOC. A/AC 138/SC.I/L.26 (Preliminary draft articles concerning the basic principles of the regime of the international area of the seabed and the subsoil thereof and regulations for granting and administration of licences for the exploration and exploitation of minerals).
68. U.N. DOC. A/AC 138/SC.1/L.25 (Draft articles on Archaeological and historical treasures on the seabed and ocean floor beyond the limits of national jurisdiction).

69. U.N. DOC. A/AC 138/SC.I/L.28 (Preamble to a treaty on the use of the seabed for peaceful purposes).
70. U.N. DOC. A/AC 138/90.
71. 28 GAOR, U.N. DOC. A/9021, Supplement No. 21, Vol. ii, p. 32.
72. 28 GAOR, U.N. DOC. A/9021, Supplement No. 21, Vol. I, p. 21.
73. U.N. DOC. A/AC 138/94/Add. 1; also in Annex I to U.N. Doc. A/9021, Supplement No. 21, Vol. I, p. 39 to 69.
74. Ibid., p. 51.
75. U.N. DOC. A/AC 138/SC.I/L.20.
76. Shigeru Oda, The Law of the Sea in Our Time - 11: The United Nations Seabed Committee 1968-1973 (1977), p. 237.
77. U.N. DOC. A/AC 138/SC.I/L.20.
78. Oda, supra n. 76, p. 237.
79. Supra n. 68.
80. U.N. DOC. A/AC 138/SC.I/L.21.
81. Supra n. 72, p. 21-22.
82. U.N. DOC. A/AC 138/94/Add. 1.
83. U.N. DOC. A/AC 138/SC.I/L.28.
84. Supra n. 72, p. 22, para. 44.
85. U.N. DOC. A/AC 138/SC.I/L.24.
86. U.N. DOC. A/AC 138/SC.I/L.26.
87. U.N. DOC. A/A 138/SC.I/L.15.
88. 28 GAOR, U.N. DOC. A/9021.
89. U.N. DOC A/C.1/P.V. 1924-1933, 193601937, 1939, 1946, 1948.
90. U.N. DOC. A/C.1/L.647.
91. U.N. DOC. A/C.1/L.647/Rev. 1.

92. U.N. DOC. A/C.1/L.647/Rev. 2.

93. U.N. General Assembly Res. 3069 (XXVII), Dec. 1973.

94. . Ibid., Provision 3.

CHAPTER VI

DEVELOPMENT OF PRINCIPLES: UNCLOS-III

(1973 to 79)

VI:1 UNCLOS-III: Introduction

The Third United Nations Conference on the Law of the Sea began on 3 December 1973 with an opening speech by the Secretary-General of the United Nations. He drew attention to the importance of the conference:

"at a time when a dominant concern of the United Nations was to close the gap between developing and developed countries, which had rightly been a major theme in the discussions in the preparatory stage and was a major concern of the Conference. It was essential to emphasize that the Conference would proceed on the basis of the General Assembly resolution 2749 (XXV), namely, that the seabed beyond national jurisdiction was the common heritage of all mankind. The fact in itself made the Conference unique; for the first time in history the representatives of States would be engaged in translating that vital concept into reality."

In meeting these needs, the resources of the seas and oceans would be of major importance. But those resources it was pointed out, are finite: the belief that they were limitless was a very dangerous delusion. In the words of the eminent explorer and scientist Thor Heyerdahl:

"To neglect the ocean is to neglect two-thirds of our planet. To destroy the ocean is to kill our planet. A dead planet serves no nation. Energy, food, minerals, transport and trade, recreational activities and the evils of pollution were all matters which [are] involved in the development of international law concerning the seas and oceans. The essential purpose of the Conference is to establish a viable agreed legal basis for international co-operation without conflict and in the interest of mankind."¹

With this in mind the Conference proceeded with its work in 1973. The First Session, however, was devoted to the establishment of rules of procedure and formation of Committees.² Similar to earlier Sub-Committees of the Seabed Committee, three committees were formed with specified areas allocated to them. Committee I of the Conference was entrusted with the task to build a new international regime and an international machinery for deep ocean mining.

In the Second Session, held at Caracas between June and August 1974, substantive discussions on the international regime and machinery³ were begun in Committee I, based on the draft articles prepared by its predecessor, - Sub-Committee I of the Seabed Committee, and a few working papers presented to it in the Second Session.⁴ Committee I continued its discussions on establishing an international regime and machinery in the Third Session at Geneva. A few new proposals were introduced in this session on the structure and composition of the Council,⁵ which were considered along with the earlier proposals. At the end of the Third Session Committee I produced a draft Informal Single Negotiating Text (I.S.N.T.), Part I,⁶ and thus begun the structuring of the Draft Treaty. Most of the Fourth Session discussions were held in Plenary meetings, and devoted to the revision of I.S.N.T. and production of the Revised Single Negotiating Text (R.S.N.T.).⁷ At the Fifth and Sixth Sessions, Committee I devoted its efforts to revising the R.S.N.T.,⁸ as a result of which, the Informal Composite Negotiating Text⁹ (I.C.N.T.) was produced at the end of the Sixth Session.

At the Seventh and Eighth Sessions efforts were continued to narrow the remaining areas of disagreement. As a result of this, at the end of the Eighth Session, the first revised version of the Informal Composite Negotiating Text (I.C.N.T., Rev. 1) was released.¹⁰

Over this period UNCLOS-III has either developed new principles or enlarged and elaborated the existing ones. This period is noticeable for lexterous development of principles related to the international regime and machinery, by way of unprecedented conference diplomacy. This Conference is a part of the great efforts being made throughout the United Nations system to establish a new international economic order. These principles are not only to design a new international order of oceans but they have a lot more to contribute - to change the old order, which is no longer capable of meeting the world's economic needs. The purpose of these principles is not only to provide a rational system of ocean resource management and exploitation, but also to establish an equitable international order, - designed to narrow the yawning gap between the rich and poor nations of the world.

VI:2 The Development of Principles Relating to Regime

A.. Resource Policy

The I.S.N.T. on the activities in the area stated that

activities in the area would be undertaken in a manner so as to: "(a) [f]oster the healthy development of the world economy and a balanced growth in international trade; (b) ~~avoid or~~ minimize any adverse effects on the revenues and economies of the developing countries, resulting from a substantial decline in their export earnings from minerals and other raw materials originating in their territory which are also derived from the sea".¹¹ The R.S.N.T. subsequently extended this provision by adding a new ingredient to the first part of the I.S.N.T. provision; the changed provision thus reads: "activities in the area [would] be undertaken in such a manner [so] as to foster the healthy development of the world economy and a balanced growth in international trade, and to promote international co-operation for the overall development of all countries, especially of developing countries".¹²

This underlined portion which was an addition to the earlier provision was added in the context of the new international economic order. Perhaps, this addition is to prevent developing countries from the possible harms which are likely to be caused to their developing economies. The R.S.N.T. gives particular emphasis to the needs and interests of developing countries. This provision was enlarged upon in the R.S.N.T., which stresses the need to "expand opportunities for all [s]tate [p]arties to participate in the development of the resources of the [a]rea and increase availability of resources to meet world demand".¹³

This new addition is a reflection of the changing opinion of

the Conference. It is seen in retrospect as a new international economic order demand. This provision, however, was considerably elaborated upon in I.C.N.T., which further specifies the terms for the national development of all states with particular emphasis on the development of developing countries.¹⁴ I.C.N.T./Rev. 1, though reflecting an adjustment of these provisions, is almost a reproduction of the I.C.N.T. provision.¹⁵

The language in the last two documents is quite similar, and in contrast to the I.S.N.T. and the R.S.N.T. provisions. In the later documents, policy is stated in more mandatory terms. I.C.N.T.¹⁶ and I.C.N.T./Rev. 1¹⁷ expressly refer to policies related to the transfer of technology and protection of landlocked and geographically disadvantaged states. R.S.N.T. differs from I.S.N.T. by providing for protection against substantial declines in mineral export earnings of developing countries caused by seabed production. It imposed a production limit on nickel production in the first 20 years,¹⁸ and specified that nickel production will not exceed the cumulative growth segment of the nickel market. This provision, though it exists in I.C.N.T. also, is in a modified form - the interim production limit after the first seven years has been lowered to 60% of the cumulative growth segment of the world nickel market.¹⁹ I.C.N.T./Rev. 1 increases the interim period to 25 years, however, and the computing of the period will begin five years prior to the year in which the earliest commercial production begins.²⁰ Both I.C.N.T.²¹

and I.C.N.T./Rev. 1²² in contrast to earlier drafts establish a system for compensation to developing countries who suffer adverse effects on their export earnings or their economies.

B. Equitable Sharing

An anti-monopoly provision was first introduced in the R.S.N.T. which recommends "equitable sharing and distribution of financial and other economic benefits among the [s]tate [p]arties from the activities in the [a]rea".²³ No comparable provision is found in the I.S.N.T. The I.C.N.T., however, amended the R.S.N.T. version and provided that prevention of monopolization is a resource policy objective. If accepted, the anti-monopoly provision as principle - "the enhancing of opportunities for all [s]tate [p]arties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the [a]rea and preventing monopolization of the exploration and exploitation of the resources of the area".²⁴ The same provision is reproduced in the I.C.N.T./Rev. 1.

C. Transfer of Technology

The I.S.N.T. on transfer of technology provides that:

The Authority and through it state parties to [t]he Convention [would] take necessary measures for promoting the transfer of technology and scientific knowledge relating

to the activities in the [a]rea so that all [s]tates benefit therefrom. In particular they [would] promote:

(a) Programmes for the promotion of transfer of technology to developing countries with regard to activities in the [a]rea, including, inter alia, facilitating the access to patented and non-patented technology, under just and reasonable conditions;

(b) Measures directed towards the acceleration of domestic technology of developing countries and the opening of opportunities to personnel from developing countries for training in marine science and technology and their full participation in activities in the [a]rea.²⁶

This provision, though not substantially changed, was amended in R.S.N.T.²⁷ The words "shall take necessary measures" were replaced by "shall co-operate" and the words "Authority and through it state parties" were replaced by "Authority and state parties". Thus it was to encourage transfer of technology as co-operation and not as mandatory provision. Further, words "patented and non-patented" were replaced by the words "relevant technology". Though it does not, apparently, reflect a substantial change, it was certainly changed to reduce the wide range covered under the I.S.N.T. provision. What will constitute the relevant technology was thus left open as a question.

However, this provision was substantially changed in the I.C.N.T. which provides:

"The Authority [would] take measures in accordance with this Convention:

(a) to acquire technology and scientific knowledge relating to activities in the Area; and

(b) to promote and encourage the transfer of such technology and scientific knowledge so that all states benefit therefrom."²⁸

The I.C.N.T./Rev. 1 does not change these provisions of I.C.N.T. but adds that for the transfer of technology and scientific knowledge relating to activities in the area the Authority and state parties would co-operate so that the Enterprise and all state parties may benefit.²⁹ After this the I.C.N.T./Revision also adds the earlier provisions of the R.S.N.T. in a slightly modified language. This provides the Authority with a stronger definition and wider role. It also enables the Authority to obtain required seabed from prospective applicants and contractors.

D. Revenue Sharing

The powers to decide on the policy of revenue sharing, in the I.S.N.T. lie with the Assembly and the Authority. The provision reads:

"[The] powers and the function of the Assembly would include:...(x) Adoption of criteria, rules, regulations and procedures, for the equitable sharing of the benefits derived from the Area and its resources, taking into special account the interests and needs of the developing countries, whether coastal or landlocked."³⁰

This provision was reproduced in the R.S.N.T.,³¹ however, the I.C.N.T. changes its contents as well as it was placed as a mandatory provision under the functions of the Authority.³² This was apart from a provision placed under the powers and functions of the Assembly.³³ The provision read:

"The Authority shall establish a system for the equitable sharing of benefits derived from the Area, taking into special consideration the interests and needs of the developing countries and peoples, particularly the landlocked and geographically disadvantaged among them, and countries which have not attained full independence or other self-governing status."³⁴

This was a new addition to the earlier principles and added a mandatory provision on the sharing of benefits with developing countries, with particular emphasis on landlocked and geographically disadvantaged states and the countries that have not attained full independence or other self-governing status. This provision, however, has been dropped from the I.C.N.T./Rev.; and the power to decide on revenue sharing has been left within the powers and functions of the Assembly,³⁵ as it was in the I.S.N.T. and the R.S.N.T. However, the language is changed to suit the functions of the Assembly. The new provision reads: the Assembly shall have the power for the equitable sharing of financial and other economic benefits derived from activities in the [a]rea, taking into particular consideration the interests and the needs of the developing countries and peoples who have not attained full independence

or other self-governing status.³⁶ In this new provision the words "and people who have not attained full independence or other self-governing status" have been added to the earlier I.C.N.T. provision.³⁷ This indicates that although the provision has been changed from the mandatory position, to one of the new elements (which were added in the I.C.N.T. mandatory provision) of states which have not attained full independence has been accepted as a new principle. The words "landlocked and geographically disadvantaged states" have been dropped in I.C.N.T./Rev. 1; that is, the special emphasis added for them in the I.C.N.T. mandatory provision has been withdrawn even from the provision now existing under the powers and functions of the Assembly.

E. System of Exploitation

On the system of exploitation, the I.S.N.T. provided for a parallel system. According to the I.S.N.T. provision:

1. The Activities in the Area shall be conducted directly by the Authority.
2. The Authority may, if it considers it appropriate, and within the limits it may determine, carry out activities in the Area or any stage thereof through States Parties to this Convention, ... by entering into service contracts or joint-ventures or any other such form of association which ensures this direct and effective control of all times over such activities.
3. In entering into such joint-ventures...the

Authority may decide on the available data to reserve certain portions of the mining sites for its own further exploitation.³⁸

The I.S.N.T. provision clearly established a joint-venture system - a system in which both the Authority and the Assembly along with state parties would go for exploitation. However, this provision by stating, "if [Authority] considers it appropriate, ...carry out activities in the Area",³⁹ gives decisions to the Authority. By this provision, the Authority was empowered to decide that whether or not it should enter into joint-venture or any other system. The same article also reserves for the Authority the power to decide that where exploitation should take place and which area be reserved for the Authority's exclusive use in future.⁴⁰

This provision was substantially changed in the R.S.N.T. According to the changed provision "activities in the Area [would] be conducted directly by the Authority and in association with the Authority and under the control...by State Parties..."⁴¹ In this provision no mention is made about the power of the Authority to decide for such joint-venture or any other type of contract. The provision simply says in "association with", i.e., the Authority in association with state parties will carry out the exploitation activities. Apart from this the words, "service contact or joint venture" were deleted in the R.S.N.T. provision, thus leaving the mode of

association completely open. The earlier provision of I.S.N.T. empowering the Authority to reserve particular site for its own exploitation was also deleted. In effect the now R.S.N.T. provision was weak and less precise than its predecessor provision and it substantially reduced the powers of the Authority. It established a perfect parallel system with the Authority on one side and state and private entities on the other. In contrast to the I.S.N.T. provision was given limited in the R.S.N.T. for refusing to contract. On the other hand the R.S.N.T. provided security for the contractor.⁴²

The I.C.N.T.'s provision for exploitation is not very different from the R.S.N.T.'s provision except that the words "activities in the area shall be directly conducted by the Authority" have been replaced by "Activities in the area shall be carried out on the Authority's behalf by the Enterprise".⁴³ This provision is not a substantial departure from the previous provisions. This provision indicates "additional discretionary powers given to the Authority to encourage and perhaps require perspective contractors to transfer technology and to contract directly with the Enterprise".⁴⁴ The I.C.N.T., further, provides for a parallel system with dual nomination to be made upon application for contract to explore and exploit. Where no conflict of area sought exists, negotiations to conclude a contract with a qualified applicant are mandatory and the scope of negotiation is limited.⁴⁵ The I.C.N.T./Rev. 1 has reproduced the same provision without any significant change.⁴⁶

VI:3 The Development of Principles Relating to Machinery

A. Organs of the Machinery

The I.S.N.T. establishes an Assembly, a Council, a Tribunal, an Enterprise and a Secretariate as the principal organs of the Authority with a provision that subsidiary organs may be established according to necessity.⁴⁷ However, the R.S.N.T. changed the position by dropping the Enterprise from the position of principle organs. Thus according to the R.S.N.T. an Assembly, a Council, a Tribunal and a Secretariat are the principal organs of the Authority.⁴⁸ The Enterprise in the R.S.N.T. is defined as "the organ through which the Authority [would] directly carry out activities in the area."⁴⁹ The R.S.N.T. also provides that "such subsidiary organs which may be found necessary may be established." The R.S.N.T., however, by addition of a new provision limits the functions of different organs according to the separate provisions laid down for each organ.⁵¹ However, provisions related to the Council both in the I.S.N.T. and R.S.N.T, establish two subsidiary organs of the Council.⁵²

The I.C.N.T. brought a substantial change in the position of principal organs by dropping the Tribunal. According to the I.C.N.T. only three organs are principal organs of the Authority - an Assembly, a Council and a Secretariate.⁵³ The position of the Enterprise is the same as it was in the R.S.N.T.⁵⁴ According to the I.C.N.T. the Tribunal will not be an organ of

the Authority. Rather it would be a panel of the Law of the Sea Tribunal.⁵⁵ For the dispute settlement related to the seabed and the Authority, the I.C.N.T. by a new provision establishes a new system. In this a Seabed Dispute Chamber is established, which will be a part of the Tribunal and not of the Authority.⁵⁶ It is clear here that the Law of the Sea Tribunal, though being established by the same Convention, will enjoy a separate status quite independent of the Authority. For the disputes related to seabed and the Authority, the Statute of Tribunal and the main text of the Convention, both establish a Seabed Dispute Chamber of the Law of the Sea Tribunal.⁵⁷ The I.C.N.T./Rev. 1 has not changed the position of the R.S.N.T. and it has reproduced the same provisions.⁵⁸

B. The Assembly and the Council: Functional Principles

The provisions relating to the Assembly, are substantially the same in the I.S.N.T. and the R.S.N.T.⁵⁹ According to both of these provisions the Assembly is the supreme organ of the Authority, with the power to prescribe general policies and to entrust organs with those powers which are not provided in the text. In both the texts the Assembly has the power to elect most of the members of the organs, including the Council. It also has the final say in financial matters after they have been recommended by the Council.

The I.C.N.T. has not changed the general provisions

except that power of the Assembly to "prescribe" general policies has been changed to the power to "establish" general policies.⁶⁰ A major departure in the I.C.N.T. is a provision which entrusts the Assembly with the power to adopt the rules, regulations and procedures provisionally adopted by the Council.⁶¹ The I.C.N.T. gives a larger role to the Assembly in the budget process.⁶² This text also empowers the Assembly to deal with all such subjects which are not specifically entrusted to any organ.⁶³ These provisions remain unchanged in the I.C.N.T./Rev. 1.⁶⁴

On the Council the I.S.N.T. provides:

"The Council [would] be the executive organ of the Authority. It would exercise the powers and perform the functions entrusted to it by this Convention. In exercising such powers and performing such functions the Council [would] act in a manner consistent with general guidelines and policy directions laid down by the Assembly."⁶⁵

The R.S.N.T. provision differs from the I.S.N.T. and provides:

"The Council, as the executive organ of the Authority, [would] have the power to prescribe the specific policies to be pursued by the Authority on any question or matters within the competence of the Authority and in a manner consistent with the general policies prescribed by the Assembly."⁶⁶

The change here is the Council prescribes specific policies, makes recommendations to the Assembly, and adopts rules, regulations and procedures.⁶⁷ The I.C.N.T. is the same

substantially, and restores the power related to "specific policies", except for a minor change, that is, in the R.S.N.T. the Council "prescribes" specific policies and in the I.C.N.T. the Council has been given the power to "establish" specific policies.⁶⁸ According to the I.C.N.T. the decisions of the Council on rules, regulations and procedures are subject to the final approval of the Assembly.⁶⁹

C. Voting and Composition of the Council

The I.S.N.T. provided for a Council of 36 members elected by the Assembly. Twenty-four of these were to be elected in accordance with the principle of equitable geographical representation and 12 with a view to representation of special interests. These were further divided as follows:

- (a) Six members with substantial investment in, or possessing advanced technology which is being used for the exploration of the area and exploitation of its resources and members which are major importers of the landbased minerals which are also produced from the resources of the area.
- (b) Six members from among the developing countries, one being drawn from each of the following categories: (i) States which are exporters of the landbased minerals which may also be produced from the resources of the area; (ii) States which are importers of the minerals (developing); (iii) States with large populations; (iv) Landlocked States; (v) Geographically Disadvantaged States; and (vi) Least developed countries.
- (c) Twenty-four members in accordance with the principle of equitable geographical representation. For this purpose the

geographical regions shall be Africa, Asia, Eastern Europe (Socialist), Latin America and Western Europe and others.⁷⁰

Decisions on important questions shall be made by a two-thirds plus one majority of the members present and voting. Other questions require a majority of members present and voting.⁷¹

These provisions reappear in toto in the R.S.N.T.⁷²

However a substantial change occurs in the I.C.N.T. provisions.

Though the I.C.N.T. also provides for a Council of 36 members to be elected by the Authority, it differs in the division.

The division according to the I.C.N.T. is as follows:

- (a) four members from among countries which have made the greatest contributions to the exploration for, and the exploitation of, the resources of the Area, as demonstrated by substantial investments or advanced technology in relation to resources of the Area, including at least one State from the Eastern (Socialist) European region.
- (b) four members from among countries which are major importers of the categories of minerals to be derived from the Area, including at least one State from the Eastern (Socialist) European region.
- (c) four members from among countries which on the basis of production in areas under their jurisdiction are major exporters of the categories of minerals to be derived from the Area, including at least two developing countries.
- (d) six members from among developing countries, representing special interests. The special interests to be represented shall include those of States with large populations, States which are landlocked or geographically disadvantaged, States which are major importers

of the categories of minerals to be derived from the Area, and least developed countries.

- (e) eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this subparagraph. For this purpose the geographical regions shall be Africa, Asia, Eastern Europe (Socialist), Latin America and Western Europe and others.⁷³

All decisions on questions of substance shall be taken by a three-fourths majority of the members present and voting, provided that such majority includes a majority of the members participating in that session.⁷⁴

The division in I.C.N.T. can be broadly divided into two parts; members with the "interests" and members according to geographical distribution. The number of countries with the greatest contribution and high seabed technology has been reduced from six to four. However, this loss has been compensated by four members from among the major importers. But developed, perhaps loose two members in the geographical representation back to the same ratio as it was in the R.S.N.T. However, this provision secures one more membership seat for the Eastern European (Socialist) countries. In all the I.C.N.T. provision is an improvement over R.S.N.T., for it gives more precision to the type of representation.

The provision on the voting pattern on the issues of

substance has also been changed considerably. Now in contrast to the earlier requirement of two-thirds plus one, three-fourths majority of those present and voting is necessary. The I.C.N.T./Rev. 1, also follows the same pattern of voting on matters of substance.⁷⁵ This new text follows the same system of representation as it was in the I.C.N.T. There is no substantial change in the I.C.N.T./Rev. 1. The only minor change which appears in the I.C.N.T./Rev. 1 is that determination of the four major importing states will be done on the basis of consumption in the last five years by them.⁷⁶

D. Financing the Enterprise

The I.S.N.T. by way of a general provision provides for financing the Enterprise. The same provision provides for general financing of the Authority. The provision is split up into two parts: expenses of the Authority and system of financing the Authority. According to the I.S.N.T.:

1. Expenses of the Authority comprise:
 - (a) Administrative expenses, which shall include costs of the staff of the Authority, costs of meetings, and expenditure on account of the functioning of the organs of the Authority;
 - (b) Expenses not included in the foregoing, incurred by the Authority in carrying out the functions entrusted to it under this Convention; and
 - (c) The expenditure of the Enterprise, to the extent that it cannot be met out of the Enterprise's own revenues and other receipts.

2. The expenses referred to in paragraph 1 of this article shall be met to an extent to be determined by the Assembly on the recommendation of the Council, but of the General Fund, the balance of such expenses to be met out of contributions by members of the Authority in accordance with a scale of assessment adopted by the Assembly.⁷⁷

This provision had a specific mention of the Enterprise's financing. The R.S.N.T. has reproduced the whole provision but for the specific part of the Enterprise, which was dropped.⁷⁸ The R.S.N.T. provision is more general than the I.S.N.T. provision, and it only permits alternate methods of obtaining funds in addition to Assembly appropriation.⁷⁹ Similarly I.S.N.T., the R.S.N.T. also empowers the Assembly to assess contributions from members of the Authority, based on a given scale of assessments.

The I.C.N.T. has reproduced this general provision,⁸⁰ however, a specific provision for financing the Enterprise appear in the Statute of the Enterprise.⁸¹ This new provision in the I.C.N.T. assures the Enterprise of government guaranteed loans and the receipt of funds from contractual relationships between the Enterprise and other entities. And that the Enterprise's assets include charges to enable the Enterprise to come into early operation.⁸² The I.C.N.T./Rev. 1 has reproduced the same provisions for financing of the Enterprise.⁸³

E. Financial Arrangements for Exploitation

The I.S.N.T. does not refer to financial arrangements

in the Text, a lone mention of "financial arrangements" is traceable in Annex I of the I.S.N.T.,⁸⁴ however, this mention is not elaborated and left for further development. The R.S.N.T., alike, the I.S.N.T. is also silent on "financial arrangements". However, alternative tentative texts are attached to the Text in a Special Appendix attached to the Annex III of the R.S.N.T. Part I.⁸⁵ These alternate suggestions refer to general principles only, such as: "to ensure optimum revenues for the Authority; to provide financial incentives, where necessary, to attract investments and technology into exploration and exploitation of the [A]rea; to provide for equality of treatment and comparable financial obligations on the part of all States and other entities which obtain contracts."⁸⁶

The I.C.N.T. remains the same to that of the R.S.N.T. alternates, so far as the general principles are concerned. The provisions in the I.C.N.T. appear in Annex II under the provision entitled "financial terms of contracts", however, with a note that it is a preliminary draft and further work needs to be done on this subject.⁸⁷ This is comparatively an elaborated version of the earlier proposals and general principles. According to this preliminary draft charges to a contractor are imposed for filing the application, for the annual right to mine, for the annual right to exploit, for a royalty, and for a profit share. However, the amount of such charges is left blank for further elaboration and decision.⁸⁸

The S.C.N.T./Rev. 1 develops the earlier provision, though, the general principles remain unchanged.⁸⁹ This Text provides for a fee of \$500,000 for the administrative cost of processing an application for a contract of exploration and exploitation.⁹⁰ A contractor is required to pay an annual fixed fee of \$1 million from the date of contract. However, if the production charge is greater than this amount, he will have to pay the production charge; i.e., he will be required to pay, either of the and whichever is greater.⁹¹ The details of the determination of production charge and another alternative "mixed system", i.e., a combination of production charge plus a share of net proceeds, have also been provided in the same provision. And the contractor has the option to choose any one of two either "production charge" alone or the "mixed system".⁹²

VI:4 Conclusions

Even after these six years of UNCLOS-III, several issues and minute details have not been completely developed or they have not reached the level of precision. These four Texts are a considerable improvement over the earlier reviews of the Seabed Committee Texts. All of these Texts indicate a considerable amount of development. The principle provisions have been continuously elaborated upon and every new Text added to their comprehensiveness and precision. The principles, at this stage of I.C.N.T./Rev. 1, appear in a unique fashion. They

have now almost reached the stage of maturity. They now very well demonstrate the wide range of agreements in the Conference.

The basic principles have not been changed very much, though, their position or language is sometimes changes. Some of the provisions have grown a lot with very accurate details. To sum up the UNCLOS-III, deliberations, so far, have contributed a lot to international law making, and developing a new international organizational system.

5

CHAPTER VI FOOTNOTES

1. Third United Nations Conference on the Law of the Sea, Official Records, Volume I, Summary of Meetings, First Session: New York, 3-15 December 1973; Second Session: Caracas, 20 June, August 1974, p. 3 (1st meeting, statement by the Secretary-General).
2. Ibid., pp. 16-47 and 52-58 (from 6th to 17th, 19th and 20th Plenary meetings).
3. Third United Nations Conference on the Law of the Sea, Official Records, Volume II, Summary Records of Meetings, Second Session: Caracas, 20 June - 29 August 1974, pp. 3-43 (from 1st to 8th meeting of Committee I).
4. Draft Articles prepared by the Sub-Committee I of the Seabed Committee, U.N. DOC. A/CONF. 62/C.1/L.3; United States of America: working paper on the economic effects of deep seabed exploitation, U.N. DOC. A/CONF. 62/C.1/L.5; United States of America: draft appendix to the Law of the Sea Treaty concerning mineral resource development in the international seabed area; U.N. DOC. A/CONF. 62/C.1/L.6; Text on conditions of exploration and exploitation prepared by the Group of Seventy-Seven, U.N. DOC. A/CONF. 62/C.1/L.7; Belgium, Denmark, France, Germany (Federal Republic of), Italy, Luxembourg, The Netherlands, United Kingdom of Great Britain and Northern Ireland; working paper, U.N. DOC. A/CONF. 62/C.1/L.8; Japan; working paper on conditions of exploration and exploitation, U.N. DOC. A/CONF. 62/C.1/L.9; Chile; working paper on the economic implications for the developing countries of the exploration of the seabed beyond the limits of national jurisdiction, U.N. DOC. A/CONF. 62/C.1/L.11; Third United Nations Conference on the Law of the Sea, Official Records, Volume IV, Summary Records of Meetings, Third Session: Geneva, 17 March - 9 May 1975.
5. Union of Socialist Soviet Republics: working document on the basic provisions of the rules and conditions governing the evaluation and exploitation of the mineral resources of the seabed - provisions which should form an integral part of the Law of the Sea Convention, U.N. DOC. A/CONF. 62/C.1/L.12; Czechoslovakia: draft article, U.N. DOC. A/CONF. 62/C.1/L.13; and 14.
6. U.N. DOC. A/CONF. 62/WP. 8/Part I (Informal Single Negotiating Text, hereafter cited as I.S.N.T.).

7. U.N. DOC. A/CONF. 62/WP.8/Rev. 1/Part I (Revised Single Negotiating Text, hereafter cited as R.S.N.T.); for summary of discussions of the Fourth Session, See, Third United Nations Conference on the Law of the Sea, Official Records, Volume V, Summary Records of Meetings, Fourth Session: New York, 15 March - 7 May 1976.
8. Third United Nations Conference on the Law of the Sea, Official Records, Volume VI, Fifth Session: New York, 2 August - 17 September 1976, pp. 53-84 (from 28th meeting to 37th meeting of the Committee I); Third United Nations Conference on the Law of the Sea, Official Records, Volume VII, Sixth Session: New York, 23 May - 15 July 1977, pp. 31-34 (from 38th meeting of the Committee I to 40th meeting).
9. Third United Nations Conference on the Law of the Sea, Official Records, Volume VIII, Informal Composite Negotiating Text (U.N. DOC. A/CONF. 62/WP. 10 and Add. 1, hereafter cited as I.C.N.T.).
10. Informal Composite Negotiating Text/Revision 1. U.N. DOC. A/CONF. 62/WP. 10/Rev. 1, 28 April 1979 (hereafter cited as I.C.N.T./Rev. 1).
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12. R.S.N.T./Part I, Article 9(1).
13. R.S.N.T./Part I, Article 9(2) and (3).
14. I.C.N.T., Article 150 1(a) to (g) including A and B of (g).
15. I.C.N.T./Rev. 1, Article 150(a) to (g).
16. I.C.N.T., Article 150 2 (a) to (g) including A and B of (g).
17. I.C.N.T./Rev. 1, Article 150.
18. R.S.N.T./Part I, Article 9(3) (ii).
19. I.C.N.T., Article 150(1) (g) (B) (i).
20. I.C.N.T./Rev. 1, Article 151(2) (a).
21. I.C.N.T., Article 150(1) (g) (D).
22. I.C.N.T./Rev. 1, Article 151(4).
23. R.S.N.T./Part I, Article 9(6) and Annex I (to Part I), para. 8(e) (Discussion otherwise differed).
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32. I.C.N.T., Article 151(9).
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36. I.C.N.T./Rev. 1, Article 160(j).
37. Supra, n. 35.
38. I.S.N.T./Part I, Article 22 (1) (2) and (4).
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44. Jonathan I. Charney, "United States Interests in a Convention on the Law of the Sea: The Case for Continued Efforts", 11 Vand. J. Tran. L. (1968): p. 39 at 72.
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52. I.S.N.T./Part I, Article 20 and R.S.N.T./Part I, Article 29.
53. I.C.N.T., Article 156(1).
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55. I.C.N.T., Annex V.
56. I.C.N.T., Article 187.
57. I.C.N.T., Article 187 and Annex V, Article 15.
58. I.C.N.T./Rev. 1, Article 158, 186 and Annex V, Article 14.
59. I.S.N.T./Part I, Articles 24, 25 and 26; and R.S.N.T./Part I, Articles 24, 25 and 26.
60. I.C.N.T., Article 158(1).
61. I.C.N.T., Article 158(2) (xvi).
62. I.C.N.T., Article 158(2) (vi) to (ix).
63. I.C.N.T., Article 158(1).
64. I.C.N.T./Rev. 1, Article 160(1), (2) (n) and (2) (e) to (g).
65. I.S.N.T./Part I, Article 28.
66. R.S.N.T./Part I, Article 28(1).
67. R.S.N.T./Part I, Article 28.
68. I.C.N.T., Article 160(1).
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80. I.C.N.T., Article 72.
81. I.C.N.T., Annex III, para. 10.
82. I.C.N.T., Annex III, para. 10(a), (i) to (vi).
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85. R.S.N.T./Part I, Annex III, Special Appendix (d) (i).
86. R.S.N.T./Part I, Annex III, Special Appendix (d) (ii).
87. I.C.N.T., Annex II, para. 7(a) and note to the title of para. 7.
88. I.C.N.T., Annex II, para. 7(c) (i) and (ii), and (d) (i) and (ii).
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90. I.C.N.T./Rev. 1, Annex II, Article 12(2).
91. I.C.N.T./Rev. 1, Annex II, Article 12(3).
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CHAPTER VII

THE SEABED AUTHORITY: STRUCTURES AND FUNCTIONS

VII:1 The Seabed Authority: Introduction

The Third United Nations Conference on the Law of the Sea is an unparalleled landmark in the history of mankind. It is a turning point in the history of international organizations too. Never before in our memoirs, have we found such a massive whole hearted effort by the world as a whole, to design a transnational organization for the management and regulation of the resources of the deep ocean bed. The Conference's genesis lies in the notion of the creation of an International Seabed Authority for the exploration and exploitation of the resources belonging to the area denoted as "common heritage of mankind".

It is with this in mind that the delegates began their deliberations in 1973 to structure the Seabed Authority. The six years of exhaustive efforts produced four unprecedented documents. These documents which are the outcome of eight successive sessions of the Conference display the patience, co-operation and the diplomatic skills of all those who contributed to the preparation of those comprehensive texts. Although each document has been subject to criticism so far as the Seabed Authority part was concerned, the documents do not fail in their merit for continuously narrowing the points of disagreement. Records of the Seabed Committee years indicate that almost all the issues were disputed. The very

success of the Conference in relation to Seabed Authority lies in the fact that now, after nearly six years of efforts, we have achieved something which can be termed as a substantial achievement.

The first of these documents was an outcome of the Third Session of the Conference in 1975 and was termed the Informal Single Negotiating Text (ISNT).¹ This was subsequently reviewed in 1976 at the Fourth Session of the Conference and termed the Revised Single Negotiating Text (RSNT).² It was further changed in 1977 at the Sixth Session of the Conference and termed the Informal Composite Negotiating Text (ICNT).³ The last of these was revised in 1979 at the Eighth Session and termed the Informal Composite Negotiating Text Revision 1.⁴ The formulation of the provisions relating to the Authority have been made and changed according to the draft documents submitted to the Seabed Committee⁵ and the views expressed by the delegates at the Conference.⁶

The Informal Composite Negotiating Text establishes the International Seabed Authority, in which all state parties shall ipso facto be members.⁷ The Authority is the organization through which all state parties will organize and control activities in the area. This control particularly is to be exercised with a view of administering the resources of the area.⁸ The principal organs of the Authority established by this draft convention are an Assembly, a Council and a Secretariat.⁹

The Enterprise is established, apart from the main organs, to carry out direct activities in the seabed area.¹⁰ Similarly a Law of the Sea Tribunal is established for dispute settlements.¹¹

The legal status accorded to the International Seabed Authority is that of an international legal personality. This is further clarified in the text by adding "such legal capacity as may be necessary for the exercise of its functions and fulfillment of its purpose".¹² The Authority has been given certain privileges and immunities in the territory of each state party, to enable it to perform its functions.¹³ The Authority has been granted immunity, along with its property and assets, from legal process, unless otherwise expressly waived by the Authority itself.¹⁴ The property and assets of the Authority, irrespective of their location, will be immune from search, requisition, confiscation, expropriation and any other type of seizure by legislative or executive action.¹⁵ All of these assets and property are free from "restrictions, regulations, controls and moratoria of any nature".¹⁵

Members and staff of the Authority, including its sub-organs, and the representatives of member states attending meetings of the Assembly, the Council or other organs of the Authority, would enjoy in the territory of each member state, immunity from legal process with respect to acts performed by them in the exercise of their functions (unless expressly

waived),¹⁷ and would enjoy immunities from immigration restrictions, alien registration requirements and national service obligations to the same extent as members and staff of other state parties.¹⁸ The members and staff would be accorded the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by states to the representative, officials and employees of comparable rank of other states.¹⁹ The Authority's archives are to be inviolable, irrespective of their location. Official communications are to receive the same treatment as of other international organizations.²⁰ All proprietary data, industrial secrets or similar information and all personnel records are not to be open for public inspection.²¹ The Authority, its assets, property and income and its operations and transactions would be exempt from all taxation and custom duties. The Authority is also exempted from any liability for the collection or payment of any taxes or custom duties.²² With the exception of local nationals, no tax is to be levied on or in respect of expense allowances paid by the Authority to the President or members of the Assembly, or in respect of salaries, expense allowance or other emoluments paid by the Authority to the Chairman and members of the Council, members of the Seabed Disputes Chamber, members of any organ of the Assembly of the Council and the Secretary-General and staff of the Authority.²³ The status, immunities and privileges, thus accorded to the Seabed Authority, are not substantially different from those

accorded to existing international organizations. However the basic purpose of the Authority significantly deviates from the existing international organizational motifs. This will be the first international organization to manage and exploit the resources of the international seabed area.

VII.2 The Assembly: Structure and Functions

A. Structure of the Assembly (including composition; procedure and voting)

The Assembly would consist of all the members of the Authority, that is, all state parties to the convention would ipso facto be the members of the Assembly also, and each member will have one vote.²⁴ The Assembly will hold a regular session each year and whenever necessary the Assembly may convene special sessions in addition to the regular session. Such sessions may also be convened by the Secretary-General of the Authority at the request of the Council or a majority of the members of the Assembly.²⁶ The Sessions of the Assembly shall be held at the seat of the Authority, except when the Assembly decides to hold its session elsewhere. Every member at these sessions will be represented by one representative who may be accompanied by alternates and advisors.²⁷ The Assembly is empowered to adopt its own rules and procedure. At the beginning of each regular session, it will elect its President and other officers as may be required. The President and officers thus elected will hold the office until the election of a new President and officers at the next regular session.²⁸

The Assembly, on questions of substance, takes all decisions by a two-thirds majority of the members present and voting, provided that such a majority is not less than the majority of the members participating in that particular session. For a decision on the question of whether or not the particular issue is of substance, all such issues shall be deemed to be of substance, save, when the Assembly decides with a two-thirds majority and this two-thirds majority is not less than the majority of the members participating in that particular session, that the issue is not of substance.²⁹ When a matter of substance comes up for the first time for voting, the President may himself, or upon the request of at least one-fifth of the members of the Assembly, defer the voting on such a matter for the maximum period of five calendar days. This rule is only once applicable on each matter, however, it cannot be applied so as to postpone the matter beyond the end of the session.³⁰

A majority of the members of the Assembly would constitute the quorum.³¹ The question of procedure and a resolution to convene a special session of the Assembly shall be decided by a majority of the members present and voting.³² At least one quarter of the members of the Authority are required to request, in writing, an advisory opinion from the President on the question of conformity with this convention of a proposed action before the Assembly on any matter. The

Assembly in such a case would defer this matter from a vote and refer it to the Seabed Disputes Chamber for an advisory opinion thereon. Voting on such a matter will remain suspended pending the delivery of the advisory opinion by the Seabed Disputes Chamber. However, the Assembly is empowered to decide for voting on such a deferred matter, only in case of the non-receipt of the advisory opinion by the final week of the session in which the opinion was requested.³³

B. Functions of the Assembly:

The Assembly is to have overall authority with respect to the activities in the area:

"The Assembly is the supreme organ of the Authority, and as such shall have the power to establish the general policies in conformity with the provisions of this Part, to be pursued by the Authority on any questions or matters within the competence of the Authority. The Assembly may discuss any such question or matter, and may decide which organ shall deal with any such question or matter not specifically entrusted by the provisions of this Convention to a particular organ of the Authority."³⁴

The Assembly, in addition to the functions and powers referred to above, shall elect members for the Council in accordance with the provisions laid down for the composition of the Council in the draft convention.³⁵ Upon recommendation of the Council it shall elect the Secretary-General from among

the candidates thus proposed.³⁶ The Assembly will also elect, upon the recommendation of the Council, the members for the Governing Board of the Enterprise as well as the Director-General of the Enterprise.³⁷

The Assembly as a part of its functions is empowered to establish any appropriate subsidiary organ, if formation of such a subsidiary organ is necessary for the performance of its functions. However, in the composition of such subsidiary organs, it has to take into account the principle of equitable geographical distribution and of special interests and the need for members qualified and competent in the relevant technical questions to be dealt with by such organs.³⁸

The Assembly has to assess the amount of contribution from the members to the administrative budget of the Authority. This assessment will continue until the Authority shall have sufficient income from other sources for meeting its administrative expenses, and be made in accordance with an agreed general assessment scale based upon the scale used for the regular budget of the United Nations.³⁹ It will adopt and formulate regulations pertaining to the financial matters including rules on borrowing, however, these will be adopted only upon recommendation of the Council. It shall also decide on the transfer of funds from the Authority to the Enterprise. However, for the transfer of funds from the Enterprise to the Authority, it will decide only upon recommendation of the

Governing Board of the Enterprise.⁴⁰ The consideration and approval of the budget of the Authority upon submission by Council is also to be done by the Assembly.⁴¹

The Assembly has to formulate rules and regulations for the equitable sharing of financial and other economic benefits derived from the activities in the area.⁴² Apart from these, it shall consider the problems of a general nature related to activities in the area, in particular for developing countries and geographically disadvantaged countries.⁴³

VII:3 The Council: Structure and Functions

A. Structure of the Council (including composition; procedure and voting)

The composition of the Council is the most vital of all the sub-organs. It is because the Council, "subject to the policies set out in the Convention and the possible effect of the Assembly's policy guidelines, [has been] given the authority to determine whether exploitation takes place, where it takes place, and by what entity and under what conditions it takes place".⁴⁴

The draft convention establishes a Council composed of 36 members of the Authority and elected by the Assembly. The division of members can basically be divided into two categories i.e., members representing special interests and

members to be elected in accordance of the principle of equitable geographical representation. The former shall have twelve members, whereas twenty-four members have been reserved for the later category. These categories have been further redivided into the following proportion:

(1) Members representing special interests - (a).

"[f]our members from among the eight states [p]arties which have the largest investments in preparation for and in the conduct of activities in the [a]rea, either directly or through their nationals, including at least one [s]tate from the Eastern (Socialist) European region; (b) [f]our members from among those [s]tates [p]arties which, during the last five years for which statistics are available, have either consumed more than 2 per cent of total world consumption or have had net imports of more than 2 per cent of the total world imports of the commodities produced from the categories of minerals to be derived from the [a]rea; and in any case one [s]tate from the Eastern (Socialist) European region; and (c) [f]our members from among countries which on the basis of production in areas under them are major exporters of the categories of minerals to be derived from the [a]rea, and in any case one [s]tate from the Eastern (Socialist) European region".⁴⁵

(2) Members on the basis of geographical distribution

- (a) "[s]ix members from among developing countries, representing

special interests. The special interests to be represented shall include those of [s]tates with large populations, [s]tates which are landlocked or geographically disadvantaged, [s]tates which are major importers of the categories of minerals to be derived from the [a]rea, and least developed countries;

(b) [e]ighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this sub-paragraph. For this purpose the geographical regions shall be Africa, Asia, Eastern Europe (Socialist), Latin America and Western Europe and others".⁴⁶

The United States proposal in contrast to I.C.N.T./ Rev. 1 suggested for a Council made up of 24 members, of which six seats were to be held by the most industrially advanced nations.⁴⁷ Out of the other eighteen seats, twelve members were to come from developing states and the remaining six were not specified except that all the eighteen shall be elected by the Assembly on the basis of equitable geographical representation.⁴⁸ However, the proposal recommends that two of the twenty-four members should be landlocked.⁴⁹ And the members, according to it, were to be elected for three years duration.⁵⁰

The Soviet Union suggested a Council of 30 member states, dividing the membership into five classes i.e.,

Socialist, East European, Asian, African, Latin American and Western European and Others, and accorded five seats to each class.⁵¹ The Soviet proposal provided for one representative of the landlocked countries in each of the five categories.⁵² And the members, according to the Soviet proposal, were to be elected for four years' duration. Basically, the present draft convention does not reflect the views of either of the two proposals.

According to the draft convention elections will be held at regular sessions of the Assembly, and every member will be elected for a term of four years. However, it provides that in the first election of members of The Council one-half of the members of each category will be elected for a period of two years.⁵³ On the re-election of members, it provides that though the members will be eligible for re-election, due regard will be paid to the desirability of rotating seats.⁵⁴ And each member of the Council will have one vote.⁵⁵ The Council, similar to the Assembly, will function at the seat of the Authority. It will meet according to the need of business of the Council, but it is mandatory for the Council to meet at least three times in a year.⁵⁶

In the Council decisions on all questions of substance will be taken by a three-fourths majority of the members present and voting, provided that such a majority is not less than the majority of the members participating in that

particular session. For a decision on the question of whether or not the particular issue is of substance, all such issues will be deemed to be of substance, save when the Council decides with a three-fourths majority, and this two-thirds majority is not less than the majority of the members participating in that particular session, that the issue is not of substance.⁵⁷ A majority of members of the Council will constitute a quorum. All decisions on matters of procedure will be decided by a majority of the members present and voting.⁵⁸ A provision has been made whereby a member of the Authority not represented on the Council may send a representative to attend a meeting of the Council, upon request by such member and when a matter particularly affecting it is under consideration. Though such a representative is entitled to participate in the deliberations, he will not be entitled to vote.⁵⁹

The text establishes two subsidiary organs of the Council, namely (a) Legal and Technical Commission; and (b) Economic Planning Commission.⁶⁰ The composition and functions of these organs will be discussed later. The establishment of subsidiary organs of the Council is crucial to the proper functioning of the Authority. It is these subsidiary bodies which will provide the required expertise that will advise the Council on technical, financial and scientific matters.

B. Functions of the Council

In general, according to the draft convention, "the Council is the executive organ of the Authority, having the power to establish in conformity with the provisions of this Convention and the general policies established by the Assembly.¹¹⁶ The text empowers the Council to supervise and co-ordinate the implementation of the provisions of the Convention and to report to the Assembly the cases of non-compliance.⁶² It is to propose to the Assembly a list of candidates for the election of the Secretary-General⁶³ as well as the candidates for election as members of the Governing Board of the Enterprise including the Director-General of the Enterprise.⁶⁴

The Council will, as and when required, enter into agreements with the United Nations or other intergovernmental organizations on behalf of the Authority, subject to approval by the Authority.⁶⁵ It will examine the reports of the Enterprise and forward them to the Assembly.⁶⁶ It will present to the Assembly the annual report and any other report as required by the Assembly.⁶⁷ It shall issue directives to the Enterprise and exercise control over its activities.⁶⁸ It shall also exercise control over all the activities in the area.⁶⁹ It will, after review by the Technical Commission, approve on behalf of the Authority, formal written plans of work for the conduct of activities in the area.⁷⁶ However, the plan of work will be deemed to have been accepted, unless

otherwise a contrary decision is taken within 60 days of its submission by the Technical Commission. Thus the Council in such matters is required to work expeditiously.⁷¹

The Council will adopt on recommendation of the Economic Planning Commission necessary and appropriate measures to protect against adverse economic effects or specified recommendations; and it will make recommendations to the Assembly on the basis of advice received from the Economic Planning Commission for the compensations to be awarded.⁷² It can adopt and apply provisionally regulations and procedures and any amendments thereto, pending final adoption by the Assembly. However, these rules, regulations and amendments have to be adopted on the basis of the recommendation of the Legal and Technical Commission.⁷³

The Council will review the collection of all payments to be made by or to the Authority regarding operations in the area.⁷⁴ It will submit to the Assembly its budget for approval.⁷⁵ It will recommend to the Assembly regarding financial regulations of the Authority including rules on borrowing and transfer of funds from the Assembly to the Enterprise.⁷⁶

The Council will initiate proceedings on behalf of the Authority, before the Seabed Disputes Chamber in cases of non-compliance and on receipt of the report of the Seabed Dispute

Chamber on findings, it will recommend to the Assembly the measures to be taken.⁷⁷ It is further empowered to issue emergency orders, including orders for the suspension or adjustment of operations, so as to prevent serious harm to the marine environment. It has the power to disapprove of particular areas for exploitation by the Enterprise or contractors, whenever it finds substantial evidence indicating the risk of harm to a unique marine environment.⁷⁸ Further, the Council by this draft convention is required to establish appropriate mechanisms for directing and supervising a staff of inspectors who will be responsible for inspecting the activities in the area to determine whether or not the ruler, regulations, procedures prescribed and the terms and conditions of any contract are being complied with.⁷⁹

VII:3:i The Economic Planning Commission: An Organ of the Council

A. Structure

The Economic Planning Commission will be composed of 15 members. These members will be elected by the Council upon nomination by the State parties. The Council may, if it considers it necessary, increase the size of the Commission, however, with due regard to economy and efficiency.⁸⁰ The members of the Commission are required to have appropriate qualifications: those relevant to mining, management of mineral resources activities, international trade or economics. It

will be the responsibility of the Council to see that membership fulfills the need for all appropriate functions of the Commission as a whole.⁸¹ The Council is required to pay due regard, in the election of members, to the need for equitable geographical distribution and representation of special interests.⁸² The states are forbidden from nominating more than one person as a candidate to serve in the Commission, and no person can serve as a member of more than one Commission.⁸³ For mid-term vacancies the draft convention provides that in case of death, incapacity or resignation of a member prior to the expiry of his term of office, the Council will appoint a member from the same geographical region or the area of interest for the remainder of the term of the previous member.⁸⁴ A three year term for the members of the Commission has been fixed, however, they will be eligible for re-election for another term.⁸⁵ The decisions of the Commission will be taken by two-third majority of members.⁸⁶

B. Function

The Economic Planning Commission is required to perform its functions in accordance with the guidelines and directives of the Council.⁸⁷ The Commission is required to formulate and submit to the Council for approval, all such rules as are required for the efficient functioning of the Commission.⁸⁸ The Commission is required to submit a summary

to the Council along with its recommendations or decisions, showing the divergencies of opinion in the Commission.⁸⁹

On request of the Council, the Commission will propose measures to implement decisions relating to the activities in the area.⁹⁰ It will review the trends of factors affecting supply, demand and prices of raw materials which may be obtained from the area, with due regard to the interests of both mineral exporting and importing countries and in particular the developing countries.⁹¹

The Commission will examine any such situation which is likely to cause adverse effects, "on the economies of developing countries or on their export earnings resulting from a reduction in the price of affected mineral, or in the volume of that mineral exported, to the extent that such reductions are caused by activities in the area",⁹² when brought to its attention by state party or state parties concerned.⁹³ And it will make appropriate recommendations to the Council for submission to the Assembly of a system of compensation for developing countries who suffer adverse effects caused due to activities in the area. After adoption by the Assembly of such recommendations the Commission will make necessary recommendations to the Council for implementation of the recommendations for compensation.⁹⁴

VII:3:ii The Legal and Technical Commission: An Organ of the Council

A. Structure

The Legal and Technical Commission will be composed of 15 members. These members will be elected by the Council upon nomination by the state parties. The Council, may, if it considers it necessary, increase the size of the Commission, however, with due regard to the economy and efficiency.⁹⁵ The members of the Legal and Technical Commission are required to have appropriate qualifications - those relevant to exploration, exploitation and processing of mineral resources, oceanology, or economic or legal matters relating to the ocean mining and other relevant fields of expertise. It will be the responsibility of the Council to see that membership fulfills the need for all appropriate functions of the Legal and Technical Commission as a whole.⁹⁶ The Council is required to pay due regard in the election of members to the need for equitable geographical distribution and representation of interests.⁹⁷ They will not nominate more than one person as a candidate to serve on the Legal and Technical Commission. And no member can serve as a member of more than one Commission.⁹⁸ The draft convention for mid-term vacancies provides that in case of death, incapacity or resignation of a member prior to the expiry of his term of office, the Council will appoint a member from the same geographical region or the area of interest for the remainder of the term of the previous member.⁹⁹ Although three year term for the members of the Legal and Technical Commission has been fixed, they will be eligible for re-election for another term.¹⁰⁰ The decisions of the Commission will be

taken by two-thirds majority of the members.¹⁰¹

B. Functions

The Legal and Technical Commission is required to perform its functions in accordance with the guidelines and directives of the Council.¹⁰² The Commission is required to formulate and submit to the Council for approval, all such rules as are required for the effective functioning of the Commission.¹⁰³ The Commission is required to submit a summary to the Council along with its recommendations or decisions showing the divergencies of opinion in the Commission.¹⁰⁴ On request of the Council, the Commission will propose measures to implement decisions relating to the activities in the area.¹⁰⁵ It will review formal written plans of work for activities in the area and submit appropriate recommendations to the Council.¹⁰⁶

The Legal and Technical Commission, upon request of the Council, will supervise activities in the area, and it can, where appropriate, do so in consultation or collaboration with any entity already carrying out such activities.¹⁰⁷ Upon request by a state party or any other party concerned, the members of the Commission will be accompanied by the representatives of such state party when they are carrying out their functions of supervision or inspection.¹⁰⁸

The Legal and Technical Commission will prepare a report of the environmental implications of the activities being carried out in the area and make the necessary recommendations to the Council about protection of such marine environment, however, they will have to take into account the views of the recognized experts in that area.¹⁰⁹ The Commission is required to formulate rules, regulations and procedures taking into account all relevant factors including assessments of the environmental implications of activities in the area, and it will continue to keep such rules, regulations and procedures under review and will recommend to the Council from time to time, of the amendments required.¹¹⁰

VII:4 The Secretariate: Structure and Function

A. Structure

The Secretariat of the Authority will comprise of a Secretary-General and such staff as is necessary for the function of the Authority. Upon recommendation of the Council, the Secretary-General will be elected by the Assembly for a term of four years and he will be eligible for re-election. The Secretary-General is to be the chief administrative officer of the Authority.¹¹¹ The Secretary-General is required to attend all meetings of the Assembly, the Council and of the subsidiary organs of the principal organs and is also required to perform any other functions which are entrusted to him by any organ of the Authority.¹¹² Other functions of the

Secretary-General include preparing and making a report to the Assembly of the work of the Authority.¹¹³

The draft convention making specifications about the staff of the Authority says that it will consist of such qualified, scientific and technical and other personnel as will be required for the administrative functions of the Authority.¹¹⁴ It further specifies that, in the recruitment and employment of the staff, and in the determination of their service conditions, the primary consideration will be to secure employees of highest standard of efficiency, competence and integrity. Due care is to be taken that they are recruited from as wide a geographical basis as possible.¹¹⁵

The Secretary-General and staff of the Authority, while performing their duties and functions, are forbidden from receiving or seeking any instruction from any government or any source which is external to the Authority. Similarly, each state party is also required to respect the exclusively international character of the responsibilities of the Secretary-General and the staff of the Authority, and not to influence them while they are discharging their duties and responsibilities. This provision further provides that in the case of a violation by a member of the staff, the matter will be submitted to the appropriate administrative tribunal, in accordance with the "staff rules" of the Authority.¹¹⁶

B. Functions.

The Secretary-General is required to make suitable arrangements for consultation and co-operation with inter-governmental and non-governmental organizations recognized by the Economic and Social Council of the United Nations. However, he will perform such functions with the approval of the Council and only when the matters concerned are within the competence of the Authority.¹¹⁷ Any organization which thus enters into agreement with the Authority can designate representatives to attend meetings of organs of the Authority in the capacity of an observer.¹¹⁸ The Secretary-General is required, upon receipt of such reports, to submit them to the members of the Authority.¹¹⁹

VII:5 The Enterprise: Structure and Functions

A. Structure

The draft convention establishes the Enterprise as the organ of the Authority, which is responsible for carrying out direct activities in the area. The principal place of its business will be at the seat of the Authority.¹²⁰ The structure of the Enterprise shall have a Governing Board, a Director-General, and the staff required to perform its duties.

The Governing Board will be composed of 15 qualified members elected by the Assembly. The election will be based on equitable geographical representation.¹²² The members will be elected for a duration of four years and they will be eligible for re-election. However, in election or re-election, the principle of rotation will apply.¹²³ Every member is accorded one vote and all matters before the Board are to be decided by a majority of the votes cast.¹²⁴ The members of the Board are empowered to appoint an alternate to act in their absence with all powers. The members of the Board will continue to function in the office unless their successors are appointed. In case of the creation of a vacancy for more than 90 days before the end of the term of the member concerned, the Board is empowered to appoint another member for the remainder.

However, when the duration of the period left before the ending of the term is less than 90 days, the alternate of the member vacating the office will exercise his powers, except that of appointing an alternate.¹²⁵ The Board is required to function in continuous session and will meet as often as the business of the Enterprise warrants. For any meeting of the Governing Board the quorum will be two-thirds of the members of the Board.¹²⁶ The meetings of the Governing Board could be attended by representatives of the members of the Authority, upon request and when a matter particularly affecting that member is under consideration. The Governing Board is empowered to appoint any Commission necessary for the

functioning of the Enterprise, subject to approval and directives of the Council.¹²⁷

The Director-General of the Enterprise will be elected by the Assembly, upon recommendation of the Council, for a fixed term not exceeding five years, however, he will be eligible to seek re-election for one more term. The Director-General will be the chief of the staff of the Enterprise. He would, under direction and supervision of the Governing Board, conduct the ordinary business of the Enterprise. The Director General would be the legal representative of the Enterprise. And subject to the general control of the Board, he will be responsible for the organization, appointment and dismissal of the staff. The Director-General would not be a member of the Board and though he would participate in the meetings of the Board, he would not have a vote.¹²⁸

B. Functions

The functions accorded to the Enterprise involve:

(a) "to enter into contracts, forms of association, or other arrangements including agreements with States and international organizations; (b) to acquire, lease, hold and dispose of immovable and movable property; and (c) to be a party to legal proceedings in its own name."¹²⁹ The Enterprise would propose to the Council projects for carrying out direct activities, including transportation, processing and marketing

of minerals recovered from the area,¹³⁰ such proposals would be included in a "detailed description of the project, an analysis of the estimated costs and benefits, a formal written plan of work for activities and all such other information and data as may be required from time to time for its appraisal by the Technical Commission and approval by the Council."¹³¹

VII:6 The Seabed Dispute Chamber: Structure and Functions

A. Structure

The draft convention for the settlement of disputes, related to the international seabed area and activities therein, provides for the formation of a Seabed Dispute Chamber.¹³² The Chamber would be composed of eleven members, selected from among members of the Law of the Sea Tribunal by the Assembly of the Authority, by a majority required for matters of substance. In selecting the members for the Chamber, the Assembly would be required to ensure the representation of the principle legal systems of the world and equitable geographical distribution. The Chamber would elect its Chairman from among its members, who would serve for the period for which the Chamber has been selected. The members of the Chamber would be selected every three years and would be re-selected for one more term. In case of the occurrence of a vacancy in the Chamber, the Law of the Sea Tribunal would select a successor from among its members who would hold

the office for the remainder of the term of his predecessor, subject to the approval by the Assembly at its next regular session. To constitute a Chamber a quorum of seven members would be required.¹³³

B. Functions

The Chamber is to exercise its jurisdiction with respect to activities in the area, regarding: "(a) disputes between State Parties concerning the interpretation or application of the ... draft convention; (b) disputes between a state party and the Authority concerning acts or omissions of the Authority or of a State Party which are alleged to be in violation of [the said] part or ... acts of the Authority alleged to be in excess of jurisdiction or a misuse of power; (c) dispute between parties to a contract, ... concerning the interpretation or application of a relevant contract or a plan of work, acts or omissions of a party to the contract relating to activities in the area and directed to the other party or directly affecting its legitimate interests; (d) disputes between the Authority and a prospective contractor who has been sponsored by a State... and has duly fulfilled the conditions of application, concerning refusal of a contract, or a legal issue arising in the negotiation of a contract, and (e) All matters specifically provided for in this convention."¹³⁴

Apart from exercising its jurisdiction in the disputes referred to above, the Chamber would have the additional function of giving advisory opinions when requested, to the Assembly or the Council on legal questions arising within the scope of their activities. The Chamber would render such advisory opinions as a matter of urgency.¹³⁵ The draft convention, however, imposes limitation on jurisdiction of the Chamber with regard to decisions of the Authority.¹³⁶

FOOTNOTES TO CHAPTER VII

1. U.N. DOC. A/CONF. 62/WP. 8/Part I, Part II and Part III and Part IV, 7 May 1975 - Informal Single Negotiating Text, hereafter cited as I.S.N.T.; 14 ILM (1975), p. 683.
2. U.N. DOC. A/CONF. 62/WP. 8/Rev. 1/Part I, Part II, Part III and Part IV, 6 May 1976 - Revised Single Negotiating Text, hereafter cited as R.S.N.T.
3. U.N. DOC. A/CONF. 62/WP. 10, 15 July 1977 - Informal Composite Negotiating Text, hereafter cited as I.C.N.T.
4. U.N. DOC. A/CONF. 62/WP. 10/Rev. 1, 28 April 1978 - Informal Composite Negotiating Text/Revision 1, hereafter cited as I.C.N.T./Rev. 1.
5. Official drafts pertaining to the structure of the Authority include: U.N. DOC. A/AC. 138/25 - U.S. Draft; U.N. DOC. A/AC. 138/33 - Tanzanian Draft; U.N. DOC. A/AC. 138/43 - U.S.S.R. Draft; U.N. DOC. A/AC. 138/44 - Polish Draft; U.N. DOC. A/AC. 138/46; U.K. Draft; U.N. DOC. A/AC. 138/27; French Draft; U.N. DOC. A/AC. 138/49 - 13 Nation Latin American Draft; U.N. DOC. A/AC. 138/54 - Maltese Draft; U.N. DOC. A/AC. 138/55; 7 Landlocked States Draft; U.N. DOC. A/AC. 138/59 - Canadian Draft; U.N. DOC. A/AC. 138/63 - Japanese Draft; U.N. Doc. A/AC. 138/12 - Secretary General's Report on International Machinery.
6. For review of developments in the Conference see John R. Stevenson and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session", 69 Am. J. Int. L. (1975): p. 1; John R. Stevenson and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session." 69 Am. J. Int. L. (1975): p. 763; Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions", 71 Am. J. Int. L. (1977): p. 247; Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1977 New York Session", 72 Am. J. Int. L. (1977): p. 57; Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)", 73 Am. J. Int. L. (1979): p. 1; Edgar Gold, "The Third United Nations Conference on the Law of the Sea: The Caracas Session 1974", 2 Maritime Studies and Management (1974) p. 102; Edgar Gold, "The Third United Nations Conference on the Law of the Sea: The Geneva Session 1975", 3 Maritime Studies and Management (1975): p. 117; Edgar Gold, "The Third

United Nations Conference on the Law of the Sea; The 4th and 5th Sessions, New York 1976", 4 Maritime Policy and Management (1977): p. 171; Edgar Gold, "The Third United Nations Conference on the Law of the Sea: The Sixth Session, New York, 1977", 5 Maritime Policy and Management (1978): p. 63.

For review of the U.S. Draft, see Harry G. Knight, "The Draft United Nations Conventions on the International Seabed Area: Background, Description and Some Preliminary Thoughts", 8 San Diego L. Rev. (1971); John R. Stevenson, "The U.S. Proposal for Legal Regulation of Seabed Mineral Exploitation Beyond National Jurisdiction", 4 Nat. Res. L. (1977).

7. I.C.N.T./Rev. 1, Article 156.
8. I.C.N.T./Rev. 1, Article 157.
9. I.C.N.T./Rev. 1, Article 158(1).
10. I.C.N.T./Rev. 1, Article 148(2).
11. Ibid.
12. I.C.N.T./Rev. 1, Article 176.
13. I.C.N.T./Rev. 1, Article 177.
14. I.C.N.T./Rev. 1, Article 178.
15. I.C.N.T./Rev. 1, Article 179.
16. I.C.N.T./Rev. 1, Article 180.
17. I.C.N.T./Rev. 1, Article 181(a).
18. I.C.N.T./Rev. 1, Article 181(b).
19. I.C.N.T. Rev. 1, Article 181(b).
20. I.C.N.T./Rev. 1, Article 182(1) and (3).
21. I.C.N.T./Rev. 1, Article 183(1).
22. I.C.N.T./Rev. 1, Article 183(1).
23. I.C.N.T./Rev. 1, Article 183(2).
24. I.C.N.T./Rev. 1, Article 159(1) and (5).
25. I.C.N.T./Rev. 1, Article

26. I.C.N.T./Rev. 1, Article 159(2).
27. I.C.N.T./Rev. 1, Article 159(3).
28. I.C.N.T./Rev. 1, Article 159(4).
29. I.C.N.T./Rev. 1, Article 159(6).
30. I.C.N.T./Rev. 1, Article 159(8).
31. I.C.N.T./Rev. 1, Article 159(9).
32. I.C.N.T./Rev. 1, Article 159(7).
33. I.C.N.T./Rev. 1, Article 159(10).
34. I.C.N.T./Rev. 1, Article 160(1).
35. I.C.N.T./Rev. 1, Article 160(2) (a).
36. I.C.N.T./Rev. 1, Article 160(2) (b).
37. I.C.N.T./Rev. 1, Article 160(2) (c).
38. I.C.N.T./Rev. 1, Article 160(2) (d).
39. I.C.N.T./Rev. 1, Article 160(2) (e).
40. I.C.N.T./Rev. 1, Article 160(2) (f).
41. I.C.N.T./Rev. 1, Article 160(2) (e).
42. I.C.N.T./Rev. 1, Article 160(2) (j).
43. I.C.N.T./Rev. 1, Article 160(2) (k).
44. Jonathon I. Charney, "The International Regime for the Deep Seabed: Past Conflicts and Proposals for Program", 17 Harv. Int. L. J. (1976): p. 1 at 14.
45. I.C.N.T./Rev. 1, Article 161(1) (i), (a), (b) and (c).
46. I.C.N.T./Rev. 1, Article 161(1) (d) and (e).

The geographical location of states classified according to regional groups:

<u>Region</u>	<u>Coastal</u>	<u>Landlocked</u>	<u>Total</u>
Africa	30	13	43
Asia	35	6	41

<u>Region</u>	<u>Coastal</u>	<u>Landlocked</u>	<u>Total</u>
Eastern Europe	7	4	11
Latin America	24	2	26
Western Europe and Others	26	6	32
Total:	122	31	153

Source: R.S. Lee, "machinery for Seabed Mining: Some General Issues Before the Geneva Session of the Third United Nations Conference on the Law of the Sea", eds. F.T. Christy et al., in Law of the Sea: Caracas and Beyond (1975), p. 146, n. 26.

47. U.S. Proposal, supra n. 2, Article 36(1), and (2), (a), What criteria constitutes the most industrially advanced nations? The U.S. interprets the term to mean only developed countries and those having the highest gross national product (Appendix E of the U.S. Draft).
48. Ibid., Article 36 (2) (b).
50. Ibid., Article 36 (3).
50. Ibid., Article 36 (4).
51. U.S.S.R. Draft, supra n. 2, Article 21 (9).
52. Ibid., Article 21 (2).
53. I.C.N.T./Rev. 1, Article 161(3).
54. I.C.N.T./Rev. 1, Article 161(4).
55. I.C.N.T./Rev. 1, Article 161(6).
56. I.C.N.T./Rev. 1, Article 161(5).
57. I.C.N.T./Rev. 1, Article 161(7).
58. I.C.N.T./Rev. 1, Article 161(7) and (8).
59. I.C.N.T./Rev. 1, Article 161(9).
60. I.C.N.T./Rev. 1, Article 163(1).
61. I.C.N.T./Rev. 1, Article 162 (2)(a).

63. I.C.N.T./Rev. 1, Article 162 (2) (a).
64. I.C.N.T./Rev. 1, Article 162 (2) (c).
65. I.C.N.T./Rev. 1, Article 162(2) (f).
66. I.C.N.T./Rev. 1, Article 162(2) (g).
67. I.C.N.T./Rev. 1, Article 162(2) (h).
68. I.C.N.T./Rev. 1, Article 162(2) (i).
69. I.C.N.T./Rev. 1, Article 162(2) (k).
70. I.C.N.T./Rev. 1, Article 162(2) (j).
71. I.C.N.T./Rev. 1, Article 162(2) (j).
72. I.C.N.T./Rev. 1, Article 162(2), (l) and (m).
73. I.C.N.T./Rev. 1, Article 162(2) (n).
74. I.C.N.T./Rev. 1, Article 162(2) (o).
75. I.C.N.T./Rev. 1, Article 162(2) (q).
76. I.C.N.T./Rev. 1, Article 162(2) (p).
77. I.C.N.T./Rev. 1, Article 162(2) (t) and (u).
78. I.C.N.T./Rev. 1, Article 162(2) (v) and (w).
79. I.C.N.T./Rev. 1, Article 162(2) (y).
80. I.C.N.T./Rev. 1, Article 163 (2).
81. I.C.N.T./Rev. 1, Article 164(1).
82. I.C.N.T./Rev. 1, Article 163(4).
83. I.C.N.T./Rev. 1, Article 163(5).
84. I.C.N.T./Rev. 1, Article 163(6).
85. I.C.N.T./Rev. 1, Article 163(7).
86. I.C.N.T./Rev. 1, Article 163(10).
87. I.C.N.T./Rev. 1, Article 163(8).
88. I.C.N.T./Rev. 1, Article 163(g).
89. I.C.N.T./Rev. 1, Article 163(10).

90. I.C.N.T./Rev. 1, Article 164(2) (a).
91. I.C.N.T./Rev. 1, Article 164(2) (b).
92. I.C.N.T./Rev. 1, Article 150 (g).
93. I.C.N.T./Rev. 1, Article 164(b) and (c).
94. I.C.N.T./Rev. 1, Article 164(2) (d).
95. I.C.N.T./Rev. 1, Article 163(2).
96. I.C.N.T./Rev. 1, Article 165(1).
97. I.C.N.T./Rev. 1, Article 163(4).
98. I.C.N.T./Rev. 1, Article 163(5).
99. I.C.N.T./Rev. 1, Article 163(6).
100. I.C.N.T./Rev. 1, Article 163(7).
101. I.C.N.T./Rev. 1, Article 163(10).
102. I.C.N.T./Rev. 1, Article 163(8).
103. I.C.N.T./Rev. 1, Article 163(9).
104. I.C.N.T./Rev. 1, Article 163(10).
105. I.C.N.T./Rev. 1, Article 165(2) (a).
106. I.C.N.T./Rev. 1, Article 165(2) (b).
107. I.C.N.T./Rev. 1, Article 165(2) (c).
108. I.C.N.T./Rev. 1, Article 165(2) (d).
109. I.C.N.T./Rev. 1, Article 165(2) (e) and (f).
110. I.C.N.T./Rev. 1, Article 165(2) (g) and (h).
111. I.C.N.T./Rev. 1, Article 166 (1).
112. I.C.N.T./Rev. 1, Article 166(2).
113. I.C.N.T./Rev. 1, Article 166(3).
114. I.C.N.T./Rev. 1, Article 167(1).
115. I.C.N.T./Rev. 1, Article 167(2).
116. I.C.N.T./Rev. 1, Article 168(1).

117. I.C.N.T./Rev. 1, Article 169(1).
118. I.C.N.T./Rev. 1, Article 169(2).
119. I.C.N.T./Rev. 1, Article 169(3).
120. I.C.N.T./Rev. 1, Article 171(1) (3).
121. I.C.N.T./Rev. 1, Annex III, Article 4.
122. I.C.N.T./Rev. 1, Annex III, Article 5(2).
123. I.C.N.T./Rev. 1, Annex III, Article 5(3).
124. I.C.N.T./Rev. 1, Annex III, Article 5(4).
125. I.C.N.T./Rev. 1, Annex III, Article 5(5) and (6).
126. I.C.N.T./Rev. 1, Annex III, Article 5(7) and (8).
127. I.C.N.T./Rev. 1, Annex III, Article 5(9) and (10).
128. I.C.N.T./Rev. 1, Annex III, Article 6(1) and (2).
129. I.C.N.T./Rev. 1, Annex III, Article 12(2).
130. I.C.N.T./Rev. 1, Article 172, and Annex III, Article 11(1).
131. I.C.N.T./Rev. 1, Annex III, Article 11(1).
132. I.C.N.T./Rev. 1, Article 186.
133. I.C.N.T./Rev. 1, Annex V, Article 36 (1) to (7).
134. I.C.N.T./Rev. 1, Article 187.
135. I.C.N.T./Rev. 1, Article 189.
136. I.C.N.T./Rev. 1, Article 190.

CHAPTER VIII

DEEP OCEAN MINING: PROPOSALS AND
PERSPECTIVES

VIII:1 New World Order and the Law of the Sea

VIII:1:i Setting

A. Introduction

In 1969 U. Thant, the United Nations' Secretary-General while commenting on the issues involved in the developing law of the sea said:

I do not wish to be overdramatic, but I can only conclude from the information that is available to me as Secretary-General, that the Members of the United Nations have perhaps ten years left in which to subordinate their ancient quarrels and launch a global partnership to curb the arms race, to improve the human environment, to defuse the population explosion, and to supply the required momentum to development efforts. If such a global partnership is not forged within the next decade, than I very much fear that the problems I have mentioned will have reached such staggering proportions that they will be beyond our capacity to control.¹

Global problems are not new to human society. In fact, mankind has never been crisis-free for any substantial period of time. Historical evidences show that sooner or later man has always been able to overcome the crises of his day. In retrospect, it seems that "all crises in modern times were solved soon enough to prevent a reversal of the triumphant march of progress".² Now, is there any reason to believe that the present crises will not be solved? Is there any reason that the precedents of the past will not apply to our present

and future problems and that our problems will not be solved by themselves? Perhaps, the answer to these questions is yes - ~~problems~~ problems of our time will not be solved in the normal course of events. Present problems are numerous. They all exist at the same time and they are closely interconnected. This interrelationship of the present problem areas does not give us an opportunity to deal with one problem at a time. In addition, present problems, being global in character differ substantially from those of the past which were generally regional or national in origin.

According to one view, the distinction between present and past problems is that past problems had negative origins whereas present problems are the result of positive solutions. The past problems were caused by evil intentions of aggressive rulers or governments, or by natural disasters regarded as evil according to human values - plagues, floods, earthquakes and so on.³ "Whereas the present crises which have positive origins" are consequences of actions that were, at their genesis, stimulated by man's best intentions. To reduce human labour by exploiting the non-human energy sources in nature, for example, was a goal no one quarreled with, but it led to the present energy crisis. Strengthening of the group - be it the family, community, or nation - by having a large number of children was commendable; but it led to population crises. To reduce human suffering and prolong human life by conquering disease was certainly a noble aim; but it led to a substantial

increase in the population. Large construction projects, such as building roads, dams and canals, agriculture and forestry practices, hunting and breeding of animals, mining and industrial engineering, etc. - in other words the imposition of man's design on the natural environment for man's own good - was man's way of 'taming' nature; but it led to the environmental crisis.⁴

Another question is of our attitude towards natural resources. In an unchecked pursuit of economic and material growth, perhaps we have put faith in the inexhaustible supply of natural resources: food, energy, raw materials, etc. However, present studies and surveys have indicated that by no means these resources are infinite. They will hardly last for a couple of decades. Some positive estimates, though believe that alternatives will be found, we can by no means be certain that the substitutions will be found when needed and in the required quantities. Such an uncertainty, perhaps, compels us to accept that the present progress cannot continue uninterrupted. This condition, arguably, becomes more aggravated in the light of present systems which govern the complex and diversified human society. This situation which affects the existing world order is bound to influence the present international structures and international economic order.

Present international structure, which is an outcome of the Second World War, shows two significant developments. First, the rich countries had created an enormously powerful

industrial machine. Fed by stimulated demand in the Western world, it was fired by abundant and cheap supplies of oil. Secondly, the post world war period was a time of revolution and liberation. The number of nation states suddenly rose to over 150. This change came as a big blow to rapidly developing Western economies. During colonial history the Western world had guaranteed access to cheap supplies of the Third World's raw materials. The industrialized countries consumed nearly 70 per cent of the world's total output of the nine major minerals, excluding oil, which was required to sustain an industrial economy. Oil supplies, at just over one dollar a barrel, stimulated "growth in energy consumption at between 6 and 11 percent a year. The very cheapness of the supplies ensured rapid growth. It also encouraged extravagance and waste".⁵

Whether the racial or the colonial experiences were more important was not an issue. It was the shifting of power from the western industrialized world to new emerging states which caused much more stress for the booming western economy. "Policy-makers of many industrial states feared the wrath of the African, Asian and Latin American raw-material producers who were no longer content with extent market pricing-policies. The dramatic steps taken by the Organisation of Petroleum Exporting Countries (OPEC) in 1973 terrified the formerly complacent developed states. This assertion of Third World power vis-a-vis former colonial powers of the North portended a new order".⁶

B. Values

In 1975, Kurt Waldheim, the United Nations Secretary-General, while commenting on the world situation, very slightly said:

"Many new nations having won political independence find themselves still bound by economic dependency. For a long time it was thought that the solution to this problem was aid and assistance. It is increasingly clear, however, that a new international economic order is essential if the relations between rich and poor nations are to be transformed in a mutually beneficial partnership. Otherwise, the existing gap between these groups of nations will increasingly represent a potential threat to international peace and security.

Moreover, the dependence of the developing world upon the developed is changing - indeed in certain cases has been reversed. Many developed nations are also finding themselves in serious economic difficulties. The international system of economics and trade relations which was devised 30 years ago, is now manifestly inadequate for the needs of the world community as a whole. The charge against the order in the past was that it worked well for the affluent and against the poor. It cannot now even be said that it works well for the affluent. This is an additional incentive for evolving a new international economic order."

The Third World is neither demanding massive redistribution of the past income and wealth of the rich nations, nor seeking charity from the prosperous, nor equality of income. What the Third World is asking is the equality of opportunity and the right to share in future growth. In an

attempt to secure greater equality of opportunity, "they are simply insisting on the right to sit as equals around the bargaining tables of the world".⁸

Inequality in the international systems is, perhaps, the basic problem. This has resulted in the formation of two worlds: that of rich and that of poor. According to Bariloche this inequality is the root of present world crisis:

The most outstanding feature of the world today is the fact that nearly two-thirds of humanity live in a state of poverty and misery, while the remaining minority is beginning to feel the effects of over-consumption resulting from uncontrolled economic growth. This inequality, which has been increasing, is most clearly manifested in the present division of the world into developed and underdeveloped countries.⁹

If we wish to solve this problem of inequity, society as a whole must accept the responsibility for guaranteeing to mankind a minimum level of welfare and ensure equality in human relations. The "creation of an equitable social order internationally and nationally - can thus be viewed as a precondition for the real pursuit of the fundamental aim".¹⁰ Bariloche proposes an ideal society: "based on the premise that it is one, through radical changes in the world's social and international organization that man can finally be freed from underdevelopment and oppression. What is proposed is a shift toward a society that is essentially socialist, based on equality and full participation of all its members in the

decisions affecting them; consumption and economic growth are regulated in such a way as to attain a society that is intrinsically compatible with its environment".¹¹

Another issue apart from 'inequality' is the 'material growth'. Many of the global crises have been attributed to continuous and rapid material growth. Two contradictory views have been expressed on the material growth and their relation to present global crises. One view argues to bring a stop to present rate of growth, whereas another maintains that the solution to world crises lies only in continued growth. It is a well established fact that "in the world's developed industrialized regions materials consumption has reached proportions of preposterous waste. In these regions there must now be a relative decline in the use of various materials. On the other hand, in some other less fully developed world regions, there must be substantial growth in the use of some essential commodities, either for food production or for industrial production. The very existence of the population in these regions depends on such growth. Hence, unqualified arguments 'for' or 'against' growth are naive; to grow or not to grow is neither a well defined nor a relevant question until the location, sense and subject of growing and the growth process itself are defined".¹²

C. Structure

The world community appears as a "system" by which

we mean collection of interdependent parts rather than merely a group of largely independent entities as was the case in the past. A disturbance in the normal state of affairs in any part of the world immediately spreads all over the world. Many recent events unmistakably show this.

The description of the developments followed by one such event will well illustrate the interdependence and global impact of such events. The winter 1971-72, with its prolonged low temperatures and strong icy winds all over Eastern Europe, effectively destroyed one-third of the Russian wheat crop. Surprisingly, the government bureaucracy ignored the situation, and the spring wheat acreage allocation remained unchanged. Since the direct per capita consumption of wheat in that region is high, it was urgent that the deficit be eliminated. In July 1973 the U.S. government extended a \$750 million credit to the Soviet Union for the purchase of grain over a three year period. Actually, the value of purchase increased significantly before the delivery got underway, since food prices soared all over the world. The price of wheat doubled in North America - hitherto a bastion of cheap supply. More important, and much more unfortunately, that same year's late monsoon heavily damaged the crops on the Indian sub-continent, resulting in a disastrous loss of food supply, which in the aftermath of a tragic war. Then a drought hit China and Africa, and while it was acquiring whatever foodstuffs were left on the market, hundreds of thousands of Africans

faced starvation. Nowhere was wheat to be found, for most of the world's surplus had been sold. A bureaucratic decision in one region resulted in a housewives' strike against soaring food prices in another part of the world and in a tragic suffering in yet another part of the world.¹³

The most outstanding lesson which can be drawn from these events is a realization of how strong the bonds among nations have become. The world cannot be viewed any more as a collection of some 150 odd nations and an assortment of political economic blocs. Rather, the world must be viewed as consisting of nations and regions which form a world system through an assortment of interdependencies.

Another example of present changing international structure can well be noticed in growing economic control of oil exporting countries. The annual excess of revenues to the oil exporting countries will amount to 60 billion dollars, which is about two-thirds of all overseas investment which United States firms have acquired up to this date. Using such a one-year surplus they could acquire control of an amazing number of companies in the Western developed world including such U.S. giants as American Telephone and Telegraph, Dow Chemicals, General Motors, I.B.M., I.T.T., U.S. Steel, and Xerox. And what can be acquired in 10 years? The oil exporting countries will accumulate \$500 billion in less than ten years; an amount which could buy twice the total output of the Japanese economy in the mid-sixties and is of the same order

of magnitude as the total world monetary resources.¹⁴

Developed nations and regions are becoming increasingly dependent on the non-renewable resources from the rest of the world. This can perhaps be best illustrated for the United States which traditionally has been a nation with the most advanced industry and abundance of resources. Until the 1940's the United States was a net exporter of materials. Starting in the early 1950's the situation changed considerably. By 1970 the deficit due to import of materials reached \$4 billion and is projected to climb up to \$60 billion annually around the year 2000, assuming no dramatic change in relative prices for materials takes place. Meanwhile the material consumption in the United States as a portion of the total world consumption has declined from 42 percent in 1950, to 27 percent in 1970; so the situation in other developed regions as Western Europe and Japan is getting relatively even worse.¹⁵

D. Problem Areas

I. The Armaments Race

More than any other major problem the armaments race carries the real threat of the destruction of virtually all life on our planet. World military expenditure now approaching \$300 billion a year - nearly \$35 million every hour of every day - and they continue to rise. More and more Third World Countries are devoting an increasing share of their limited

resources. Third World share of armament and military expenditures rose from six percent in 1954 to seventeen percent in 1974. The armament race deprives mankind of enormous financial and human resources. Nearly half a million scientists and engineers - almost half of the world's scientific and technological manpower - devote their skills to military research and development. The problem is not to shift from war to peace economy, but from war to peace mentality.¹⁶

II. Population

Population growth is a complex subject. It is, however, clear that, given the many uncertainties and unknowns facing mankind, there is every need to exercise caution in discussing the population that our planet can ultimately support. This applies just as much to the rich as the poor nations because of the vastly disproportionate share of the earth's eco-systems they generate. The lowest growth projections indicate that during the first decades of the twenty-first century the earth's population will be almost twice as great as it is now - over seven billion people compared with the present four billion. The 1970's will witness the greatest population growth so far in history: over 800 million will be born - of whom nearly 88 percent, some 700 million, will be in the Third World.¹⁷

To curb high growth rates calls for a concerted attack on poverty, unemployment, illiteracy, hunger, malnutrition and disease; and for the provision of essential social services as well as population limitation measures. The population curtailment cannot be achieved without economic development is obvious.

III. Food

Estimates of the number of people currently suffering from hunger and undernourishment vary from close to half a billion to one and a half billion. There is no single cause of the world food problem. Part of the explanation is to be found in the operation of many of the world's international systems, particularly in the distribution of available food. However, both the industrialized nations as well as the Third World countries have contributed to the world food problem. The annual rate of growth in food production at the global level was 3.1 percent during the fifties and 2.7 percent during the sixties, compared with population growth rates of 2.0 percent and 2.9 percent respectively. Although Third World food growth rates over the past two decades were the same as those recorded in the industrialized countries, gains were greatly reduced because of higher rates of population growth - averaging 2.4 percent a year over the same period. The growth in food production per capita in the Third World in fact narrowed from 0.7 per year in the fifties to 0.2

percent in the sixties. A growth rate of 0.2 percent represents a yearly gain of only 400 grams per capita. The gain in the industrialized countries over the same period was thirty times greater and averaged 11,250 grams.¹⁸

No country can allow itself to be permanently and greatly dependent on others for its foodstuffs. Without international and, where necessary, national reforms, the humble wheatsheaf seems destined to become a powerful weapon of economic warfare. "A C.I.A. report prepared shortly before the Rome World Food Conference pointed to the fact that the United States' food surplus provided 'virtual life and death power over the fate of multitudes of needy'. This power has been recognized by, for example, the American Secretary for Agriculture who has observed: "Food is a weapon. It is one of the principal tools in our negotiating kit".¹⁹ Without a major change of course, the present hunger crisis seems destined to become a starvation crisis.

IV. Natural Resources and Energy

Fears for the exhaustion of natural resources combined with the actions of OPEC have brought raw materials in general and non-renewable resources in particular to the forefront of international discussions. The realization that the industrialized countries are vulnerable to the collective pressure of Third World raw materials producing countries have afforded natural resources a strategic importance.

The contemporary crises give equally strong indications of the emergence of a global and increasingly complex world system. The energy crisis quite readily provides such illustration. In October 1973, when the oil crisis broke out, efforts were directed toward resumption of supply flow to meet whatever demand would develop. But that turned out not to be a real problem. The real problem is only appearing now when a continuous increase in consumption coupled with an increased price for oil is bringing a major transfer of wealth and economic power.²⁰

Another example in the areas of material resources, "The United States, which up to the 1940's was a net exporter of materials, will depend by the year 2000 on imports of around 80 percent for all ferrous metals, excluding iron, and 70 percent for all non-ferrous metals. In late 1973 Morocco increased the price of phosphate exports threefold, while in the spring of 1974 Jamaica increased the taxes on bauxite exports several fold. The objective was not to inflict economic damage in the bauxite importing nations but rather to redress the damage done to the balance of payments due to increased oil and food prices."²¹

V. Trade

Trade is another area where changes in the scale of international activity have called for increasing international

regulation during the last few decades. The regulation introduced so far has mainly been designed to encourage freer trade. Now increasing proportion of discussion is directed in promoting fairer trade: for example, between rich and poor countries. The problem of today is if totally equal trading positions were established, and all restrictions on trade between nations were abolished, the rich countries would take a still larger share of world trade than they do today, while the developing countries will strike further. Already the rich countries, with less than a third of world's population, have 81 percent of world exports, while developing countries, with more than two-thirds of the population, have only 19 percent.²²

Twenty-three governments, mainly advanced Western countries, in 1947 agreed to enter into a General Agreement on Tariffs and Trade (G.A.T.T.). This forum, however, was enlarged in later years. Under this all members agreed to trade with the others on a non-discriminatory basis, granting each other most-favoured nation treatment. New quantitative restrictions were prohibited, though there were many escape clauses. The G.A.T.T. had contained some recognition of the special problems of developing countries. Under Article XVII, less developed countries, together with those engaged in 'economic reconstruction', were able to impose non-discriminatory quantitative restrictions with the consent of other parties.²³

The United Nations Conference on Trade and Development is another organisation forum where trade issues of international nature are discussed. While G.A.T.T. remains the organisation mainly responsible for securing freer trade, UNCTAD has concentrated on developing fairer trade. This organisation has considered mainly shipping, insurance, commodities, excise taxes, quotas, and other matters of special concern to poor countries. One of the main questions which began to be discussed after its two conferences was the possibility of special preferences to be provided by the rich countries generally for exports from the developing countries generally.²⁴

VI. Money

It is not only trade which has become increasingly international in recent years. The same is true for money also. There has been international money of some kind or the other from the earliest times wherever and whenever trade was conducted between nations or societies, some mutually acceptable means of payments were used. The first international understanding on the type of international monetary system came in 1870 when a number of countries, including France, Germany, and the United States - like Britain - adopted a single metal "gold standard". In its purest form this meant that anybody could tender gold and receive the same quantity of a national coinage according to the parity adopted: trade deficits

between countries could thus be balanced by shipments of gold. But, gradually, this was replaced by the "gold exchange" standard. Under this changed system shipment of gold was not necessary abroad to adjust payments imbalances. The monetary authorities of one country would deal at a fixed price with the currency, including the paper currency, of other gold standard countries.²⁵

During the preparations for the post Second World War monetary system, it was a general desire to avoid the anarchy of independent money systems operating without relation to each other. The aim was to achieve a system somewhere between the two previous ones: the internationalist system, with automatic balances but slow adjustment for each unit, and the nationalistic system, with maximum interference and discrimination in trade payments. The outcome of deliberations was International Monetary Fund (I.M.F.). The most outstanding feature of the new system, was that it introduced the idea of deliberate management of the world's monetary system through collective surveillance.²⁶

VIII:1:ii Proposals

A. U.N. Proposals

The concept of the New International Economic Order was presented in a comprehensive form at the Sixth Special Session of the United Nations General Assembly in April 1974. But the

call for fundamental change in the structure of the international economic system and the economic relationships between developed and the developing countries was made well before that time. The presentation of the full range of proposals in 1974 took place in the context of a particular and unusual set of circumstances.

Much before the adoption of the New International Economic Order resolution, it was understood that a much broader approach to the problems of development than that of the 1950's and 1960's was necessary. It was out of such a concern that the Development Decades were established first, the decade of 1960's, and then of the 1970's. The International Development Strategy adopted in 1970 expressed an ambitious undertaking which has been described as a comprehensive and integrated programme of national and international action to achieve a series of interrelated economic and social objectives. It sought to establish targets for the economies of developing countries and outline a series of policy measures designed to improve the position of developing countries in such fields as international trade, the transfer of real resources and science and technology.²⁷

In October 1964 at Cairo almost ten years before the Sixth Special Session of the U.N. General Assembly, the leaders of 40 Non-Aligned countries observed that "the economic development is an obligation of the whole international community;...that it is the duty of all countries to

contribute to the rapid evolution of a new and just economic order under which all nations can live without fear or want or despair; and rise to their full stature in the Family of Nations;...that the structure of the world economy and the existing international institutions of international trade and development have failed to reduce the disparity in the per capita incomes of peoples in developing and developed countries or to promote international action to rectify serious and growing imbalances between developed and developing countries..."²⁸

The resolution entitled "Declaration on the Establishment of A New International Economic Order" was thus adopted, under such conditions, on May 1, 1974. It was, though, a great step towards changing the existing chaotic order. So far it is just a signboard of poor countries. It is clear from the very first provision of the Declaration which before going for anything else, highlights the changed situation of the world due to independence from colonial and alien domination of a large number of peoples and nations and stresses the dissatisfaction of the poor countries with the "remaining vestiges of alien and colonial domination, foreign occupation, social discrimination, apartheid and neo-colonialism which is among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved."²⁹

However, the Declaration, in addition to explaining

the situation, made recommendations for reshaping the existing international order which is by no means in harmony with the present developments in international, political and economic relations. The Declaration points out that "developing world has become a powerful factor that makes its influence felt in all fields of international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community.... Current events have brought into sharp focus the realization that the interests of the developed countries and developing countries can no longer be isolated from each other, that there is a close inter-relationship between the prosperity of the developed countries and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts."³⁰

The Declaration recommends that the New International Economic Order should be based on principles which guarantee "sovereign equality of states, self determination of all peoples, inadmissibility of the territorial acquisition of territories by force,...and non-interference in the internal matters".³¹ It says that there must be full and effective participation of all countries on the basis of equality in solving the world's economic problems. The Declaration further stresses that there be full permanent sovereignty of

every state over its natural resources and all economic activities. It is needed in order to safeguard these resources. It emphasizes that the state be entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals.³²

The Declaration asserts that the New International Order demands "regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries."³³

The Declaration in a separate provision speaks for the right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities.³⁴ It is an indication of the desire of the world community to redress the disadvantaged and discriminatory situation of those who suffer economically and otherwise, just because of alien control of their territories. The World Community's concern to establish an equitable order among all is embodied in this provision. Another provision demands from the world that they should extend "assistance to developing countries, peoples and territories which are under colonial and alien domination, foreign occupation, social discrimination...or are subjected

to economic, political or any other type of coercive measures to obtain from them the subordination of the exercises of their sovereign rights and to secure from them advantages of any kind, and to neocolonialism in all its forms, and which have established or are endeavouring to establish effective control over their natural resources and economic activities that have been or are still under foreign control".³⁵

The need for a just and equitable relationship is stressed in the Declaration, "between the raw materials, primary commodities, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of world economy".³⁶ This need expressed above is to be taken care of by the extension of active assistance to developing countries by the whole international community free of any political or military conditions.³⁷

The Declaration, among other things says that the main aims of reformed monetary system should be the promotion of the development of the developing countries and the adequate flow of real resources to them. For this it says that there should be preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation.³⁸

Another significant step, towards the New International Order, was taken by the U.N. General Assembly by adopting the Charter of Economic Rights and Duties of States.³⁹ It was adopted pursuant to the urgency stressed in Resolution 45 (III) of 1972 of the United Nations Conference on Trade and Development, to establish generally accepted norms to govern international, economic relations systematically and to recognize that it is not practically feasible to establish a just order and a stable world as long as a Charter to protect the rights of all countries, and in particular the developing states, is not formulated.⁴⁰

The Charter, which is a comprehensive document, apart from identifying and recapitulating the fundamentals of international economic relations, elaborates the economic rights and duties of states and their common responsibilities towards the world community. In regard to the economic rights and duties it declares that every state has the sovereign and inalienable right to choose its economic system as well as political, social and cultural systems in accordance with the will of its people, without outside interference. The rights of each state have been further elaborated and explained, which affirm that each state has the right: to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities; to regulate and supervise the activities of

transnational corporations to ensure that such activities conform with its economic and social policies; to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures.⁴¹

On the issue of the common responsibility of the states towards the international community the Charter reaffirms the theme of the 1970 U.N. General Assembly Resolution 2743 (XXV) - the Declaration of Principles. It recites that all states shall ensure that exploration of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction and the exploitation of its resources are carried out exclusively for peaceful purposes and that the benefits derived therefrom are shared equitably by all states, taking into account the particular need and interests of developing countries. Apart from the ocean bed, it stressed the need for the protection, preservation and enhancement of the environment for the present and future generations. It further adds that it is the responsibility of the states to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states of the areas beyond their national jurisdiction.⁴²

The Charter in the end elaborates the duties of the states and says that "all states have the duty to contribute to the balanced expansion of the world economy, taking duly into account the close interrelationship between the well-

being of the developed countries and the growth and development of the developing countries, and the fact that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts". States are forbidden from the "use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights".⁴³

The last two decades have witnessed the dramatic developments - from independence of states to marginal transfer of economic power to developing countries. Interdependence of the industrialized world on the Third World has increased. The U.N. system has worked well and has provided many valuable solutions. However, the practical success of these solutions is yet an illusion. The base has been made and the structure has been provided but the lack of control in states, which still still continue to function only for their own benefits and are rarely willing to accommodate their rights with the rest of mankind, is perhaps a hurdle, which must be removed to establish a new world order.

B. Private and Institutional Proposals

One of the principal institutions devoting itself exclusively to the cause of new world order is the Club of Rome. It has, since its creation in 1968, published several

studies. Leurdijk draws attention to certain international problem areas for which no institutions at present exist. The new institutions suggested are: "to provide world food security; to hold and manage buffer stocks of major world commodities; to promote cooperation between oil producers and consumers; to resolve differences among transnational enterprises, host countries and home countries; to help manage constructive shifts in industrial geography; to monitor global environmental threats; to manage ocean fisheries and to protect the marine environment; to analyze and propose standards for minimum human needs; to raise funds for development financing directly by fees and taxes on the use of the international commons; and to promote the adjustment of national balance of payment surpluses and deficits".⁴⁵ However, Leurdijk himself questions "Does the U.N. Environmental Programme (U.N.E.P.) not monitor global environmental threats? And is not the International Monetary Fund (I.M.F.) the basic institution to deal with the adjustment of national balance of payments, surpluses and deficits?"⁴⁶ Yes, to some extent these two institutions are there to look after their respective areas, but major changes in these organizations are necessary to suit the need of the new world order.

Some other studies such as Reshaping the International Order (R.I.O.),⁴⁷ What Now,⁴⁸ Aspen Report⁴⁹ and I.L.O. Report⁵⁰ have also identified the problem areas which are necessary for the new world order.⁵¹ On the issue of international

monetary system, R.I.O. recommends the formation of a world treasury.⁵² The Aspen Report, alone, recommends the establishment of a world food conference with the task to reduce food insecurity and promote agricultural production. Priority measures include immediate food aid, the provision of emergency stocks and the set up of a system of world food reserves, especially of grains.⁵³ On trade and industrialization, R.I.O. suggests the transformation of UNCTAD into a World Trade and Development Organization, to regulate the prices of the main exports of Third World countries.⁵⁴ What Now suggests the establishment of an International Trade Organization and observes that trade negotiations and policy-making would probably be more efficiently dealt with by a modest organization, than such long conferences as UNCTAD I, II and III.⁵⁵

On the issue of energy R.I.O. has suggested the formation of World Energy Research Authority, to intensify research activities and to functionally integrate various existing organizations, active in energy field.⁵⁶ On the issue of minerals and ores it suggested the formation of a World Agency for Mineral Resources, to supervise agreements entered into by governments in the field of raw materials. In the longer run to manage a real world market for all mineral resources and a system of world taxation so as to partly replace national mining taxation.⁵⁷ Aspen Report suggests that an International Resource Agency be created to keep track of the present and prospective availability of

scarce resources, the continued supply of which is crucial to the development of strategies of all states.⁵⁸

A proposal made by Borgese suggests the establishment of an International Energy Institute. She points out that "the current so-called energy crisis does not arise primarily from a shortage of natural resources or from a deficiency of technologies. It arises from a crisis of politics and policies internal and international".⁵⁹ She further points out that the long-range implication of this revolution are interdisciplinary and international. They affect the global international system in every sector of activity and organization, including food production and population, the monetary system, transportation and trade; environment and development; national security and international organisation."⁶⁰ She suggests that long-range satisfaction of the energy needs of the world community requires the creation of an international management system for energy resources and technologies, analogous to the international system for the management of ocean resources now under consideration by the United Nations.⁶¹

Transnational enterprises is another issue of vital importance. The R.I.O. Report suggests the creation of an International Authority on Transnational Enterprises, so as to apply some of the conceivable instruments for improving the relative power position of governments - especially Third World governments - vis-a-vis transnational enterprises.⁶²

Aspen Report suggests the establishment of an International Information and Review Agency.⁶³ On scientific research and technological development the R.I.O. Report suggests the creation of a World Technological Development Authority backed up by an International Bank for Technological Development, to function as a planning and programming body, to conduct feasibility studies, devise detailed programmes, arrange their implementation, supervise progress of work and to act as custodian of the resulting technological projects on behalf of all nations.⁶⁴ The I.L.O. Report suggests the establishment of a Consultative Group on Appropriate Technology. It suggests that consultative group could concentrate primarily on the secondary and tertiary sectors. It further suggests that there be an International Appropriate Technology Unit: to identify areas in which technological innovation can have significant impact; to achieve concentrated, co-ordinated research and development in these areas. The main suggested objective is that Unit would promote the technologies appropriate for the needs of the urban and the rural poor in developing countries.⁶⁵ On the problem of world disarmament the R.I.O. Report has suggested a World Disarmament Agency; so as to facilitate disarmament and to supervise the gradual implementation of existing and future disarmament agreements.⁶⁶

The issue of ocean management has been dealt with by the R.I.O., What ~~Now~~ and the Aspen Report. The R.I.O. Report proposes the establishment of a Functional Confederation of

International Organisations, based on the existing but re-structured agencies of the U.N. System (I.M.C.O. and I.O.C.)⁶⁷ and adding to these the International Sea-bed Authority.

It suggests ~~that~~ a whole system be linked through an integrative machinery.⁶⁷ What Now, and the Aspen Report suggest the

creation of an International Seabed Authority to manage and exploit the international commons of oceans.⁶⁸ The R.I.O.

Report, apart from the oceans, suggests that an organisation be made for international commons. The primary function of it will be to define the regime for the commons, than to exploit their resources in the interests of the world's poorest population, and possibly to control the use of the international commons.⁶⁹

VIII:1:iii Appraisal

The study of the world situation, changing values, problem areas of world crisis and proposals made so far, both through the United Nations and other institutions, shows a substantial amount ~~of~~ concern that a new world order is needed. The reconstructing of the existing international order is necessary if mankind wishes to exist at an optimum level of living. Difficulties arise when we ask the question where to start this journey to a new world order. This is certainly not an easy question, because all the areas involved in the international crisis are sensitive. Nobody is prepared to give up what he authoritatively owns today or manages

today. Obviously, the only area left to establish the new world order is the area which can be termed the "international commons". The outer space and oceans are perhaps the best regions to concentrate our efforts. Of these two the oceans are perhaps more suitable, because they correspond to almost all the crisis areas.

The oceans occupy two-thirds of our planet, contain 97 percent of the earth's water, and are largely responsible for determining the earth's climate. The vital importance of the oceans to any future international order is due not so much to present economic activities, but rather to the fact that the seas are the last and greatest resource reserve of our planet, which advancing technology is enabling us intensively to use and exploit. Although ocean space does not yet make major economic contributions, apart from being the medium for navigation and providing increasing quantities of hydrocarbons and fish, its potentiality is enormous. A host of new uses of the sea are arising from offshore harbours to commercial submarine navigation. The traditional nature of the uses of the sea is changing radically. Offshore oil exploration is thrusting into deep water. Minerals in greater quantities will be obtained from sea water. Fresh water extraction from sea water is acquiring great importance. And perhaps within the next five years immense deposits of minerals of the ocean bed will begin to be commercially exploited. Aquaculture and mariculture are expanding and will

enable us to increase the yield of fisheries. Particularly interesting are present experiments in the cultivation of marine plants which offer us the prospect of cultivating the oceans as we do on land. At last it is possible that by the end of this century, the oceans will provide vast sources of energy from waves and currents and from the tropics' temperature differential, which conserves vast energy resources in the temperatures of water at different depths.⁷⁰

The implications of the applications of advanced technology to ocean exploitation are far-reaching both for individual states and for the world as a whole.

The following years have been marked by negotiations between the industrialized north and poor south in an effort to build a New International Economic Order (N I E O). Both the Declaration on the N I E O. as well as the Charter of Economic Rights and Duties of States, as discussed earlier, are, however, disappointing in the development of the stated basic characteristics of the new order. These documents as characterised by Dr. Pardo as a "combination of a petition of rights and a cahier de doléances; they denounce perceived political and economic injustices and present a series of economic demands with regard to food, raw materials, trade, marine transportation, industrialization and transfer of technology".⁷¹

The principles developed by the N I E O resolution and the Charter of Economic Rights and Duties hardly refer

to marine activities. The N I E O resolution makes no reference to marine activities. The Charter in one of its articles refers briefly to the major purpose of the U.N. Resolution 2749 (the Declaration of Principles) of 1979 and reaffirms that the sea-bed is a common heritage of mankind. This irrational dichotomy does not end here. The Informal Composite Negotiating Text/Rev. 1, also, makes no reference to the N I E O. Another striking fact is that "the two processes - the making of the new law of the sea and the making of the N I E O - are running on two different tracks, so to speak, with no contact between them. Within the framework of N I E O negotiations the oceans are hardly mentioned, the potential of marine resources and ocean management for development strategy is yet unexplored".⁷²

The interrelationship between the N I E O and the new law of the sea, being created by UNCLOS-III, is very vital. Few of the projections for increasing the world food production to cope with the rising spectre of starvation and malnutrition take into account the potential of the oceans. Commercial fisheries, presently, do not account for more than 3 percent of the world food supply, and this percentage is decreasing rather than increasing because of the overfishing, mismanagement, and pollution. Under a new law of the sea and with proper management, conservation and new technologies, food from the oceans could be multiplied. "The international character of the oceans facilitates international participation

in production and distribution according to need. Ocean management thus may establish new forms of international co-operation in food production and distribution."⁷³

The seventies have witnessed the extension of industrial revolution into the ocean space - a new revolution i.e., the marine revolution has taken place. This lead to the development of deep ocean mining technology, which may become a vitally important factor in the world economy. Oceanic mineral resources, according to a few conservative estimates, are good enough to meet the world mineral resource demand for thousands of years. A report shows that 43 billion tons of aluminium, 358 billion tons of manganese, 7.9 billion tons of copper, one billion tons of zirconium, 14.7 billion tons of nickel, 5.2 billion tons of cobalt, three-quarters of a billion tons of molybdenum and 207 billion tons of iron are lying on the deep ocean bed.⁷⁴ This quantity is good enough to give a new direction to world economy and thus to new world order.

Oceans have already figured prominently in the area of disarmament. The Treaty on the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil Thereof is a good example of an effort to initiate complete disarmament, in all the international areas, as a step towards the global disarmament.⁷⁵ The present international economy which is virtually controlled by the multinational companies need restructuring to establish

a new world order. If the new world order is to be successful a new system of control and policy-making is desirable at international levels. The sea-bed mining is perhaps the first and most suitable case to establish a new system of checks and control on multinational operation, so as to generate a equitable rate of growth world over. If implemented, it could provide a model for bringing transnational corporations into a structured relationship with the international community. Considered from this angle, the applicability of this system could be very wide: as wide as the range of the transnational corporations. The wider, the better for the new world order.

Over the past decade there have appeared a number of influential studies, the alarming conclusions of which was that mankind faces the inevitable prospect of total economic collapse within a relatively short time because of the combined pressures of population growth, industrialization, increasing resource scarcity, spreading pollution and other factors, unless drastic measures were not speedily taken to curb demographic and economic growth.⁷⁶ Whatever the merits of these it can be stated with some assurance that, assuming attention to scientific research continued, technological advance and an appropriate legal and institutional framework, ocean space will be able to provide for the foreseeable future, and at an acceptable cost much of the food, water and mineral resources which an industrialized mankind will require,

It is the high time and the oceans are the right place

to introduce a new basic legal concept into international law - the concept of international management of resources. In fact, to some extent, it has already been planted in the on-going law of the sea negotiations. If implemented, "new institutions ...could well serve as a model in other areas from the moon to Antarctica".⁷⁷

At last, marine resources and ocean management are an essential component of an international development strategy for the coming decades, if we have to establish a new world order, for three main reasons:

1. Ocean space resources can make a major contribution to development which must fully be utilized;
2. There is a realistic opportunity to develop in ocean space new forms of international co-operation and institutions of economic management which could serve as models for the management of land based or land-and-sea-based activities (e.g., the management of energy);
3. There is a unique opportunity to implement the principles of equity and a more equitable distribution of resources at the international level.⁷⁸

VIII:2 Deep Ocean Mining and the New World Order

VIII:2:i History of Proposals

A. Proposals at the United Nations

Since the beginning of the new law of the sea de-

liberations, various proposals have been put forward for a system of exploitation to be followed by the future sea-bed regime. Although right from the time of discussions in the "1968 Sea-bed Committee" it was clear that a machinery, which was termed as the International Seabed Authority (I.S.A.) will be created, the question of the system of exploitation to be followed by the I.S.A. was always disputed. No significant proposal was put forward until the 1971 Seabed Committee, however, two studies were prepared by the Secretary General's office in 1969 and 1970 respectively.

The Secretary-General's first report on the machinery which was submitted to the Seabed Committee in June 1969 suggested several possibilities on powers and functions of the international machinery, such as (a) registration, (b) granting letters of organization, and (c) operation by an international organization itself.⁷⁹ At this stage developing countries favoured a licensing system due to lack of availability of the seabed mining technology.

The Secretary-General was again requested by the General Assembly in December 1969 to prepare a study on various types of international machinery,⁸⁰ and submit a report to the 1970 session of the Seabed Committee. The report Study on International Machinery⁸¹ was presented to the 1970 Sea-bed Committee in May 1970. The Study suggested four types of international machinery: (a) international machinery for exchange of information and preparation of studies, (b) inter-

national machinery with intermediate powers, (c) international machinery for registration and licensing, and (d) international machinery having comprehensive powers. Out of the four, the first two did not attract the interest of the member states. Although some support was given to the idea of international machinery for registration and licensing, the overwhelming majority favoured the idea of international machinery having comprehensive powers.

Three draft proposals, apart from the Secretary-General's Report, were also submitted in 1970. The United States presented a comprehensive paper Draft United Nations Convention on the International Sea-bed Area⁸² on the 3rd August, the first day of the second session. This comprehensive draft of eight chapters with 77 articles and five appendices suggested licensing system - "All exploration and exploitation shall be licensed by the International Sea-bed Resource Authority upon payment of good got licences".⁸³

The United Kingdom followed the U.S. proposal, on 5 August and submitted a working paper entitled International Regime.⁸⁴ This proposal opposed the actual conduct of operations by an international agency, and suggested some detailed procedures for licence-issuing. The stress was given on issuing of licenses to the member states, and member states would then be responsible for sub-licensing to operators under their own legislation. It further suggested that licensing fees should cover the administrative costs of the international

body and an international royalty should be distributed to state parties, taking into account the special needs and interests of developing countries.

The French proposal, though similar to the British proposal in rejecting the exploitation by an international organization, suggested two different kinds of regimes for the exploration and exploitation of resources. First, the mining of manganese nodules with mobile equipment such as dredging would take the form of simple registration with an international organisation without any exclusive rights. Secondly, the exploitation of oil or natural gas by means of fixed installations would be exclusive and areas would be granted to states, which then could issue licences to applicant companies.⁸⁵

The year 1971 in the history of the new law of the sea is perhaps marked with the submission of maximum number of comprehensive proposals on the regime and the sea-bed mining machinery. The well-discussed Tanzanian proposal, entitled Draft Statute for an International Seabed Authority,⁸⁶ was a comprehensive draft composed of 45 articles. It was this draft which for the first time introduced the so-called parallel system. According to the Tanzanian proposal the Authority would be empowered to explore and exploit directly as well as to issue licences for all activities of exploration and exploitation subject to conditions, including the payment of fees, as the Authority may determine.

The Soviet Union was the next to submit a proposal entitled Provisional Draft Articles of a Treaty on the Use of the Sea-bed for Peaceful Purposes,⁸⁷ composed of 29 articles. The sections on the licences for industrial exploration and exploitation and distribution of benefits were left blank except for titles.

The Polish proposal⁸⁸ on international machinery following the U.S.S.R., was not in the form of draft articles. The proposal suggested that the machinery should develop in stages. First, it should be established on a small scale. Second when an appropriate level of commercial exploitation is reached, it should function as an independent, self-sufficient organisation of the U.N. system. However, the proposal does not clarify the system to be adopted in the first stage, though for the second stage it recommends registration and licensing.

The British proposal, entitled International Sea-bed Regime: Proposals for Elements of a Convention,⁸⁹ like earlier proposals was not in article form. This proposal, like the 1970 British proposal, with some changes, suggested that the Authority would issue non-exclusive prospecting licences and exclusive development licences to states who could then sub-licence operators, and would receive royalties on production from operations. It recommended that a convention should establish a system under which all states can obtain a fair share of exclusive licences in the international area.

The next proposal to follow the British was a proposal of 13 Latin American nations. The working paper consisting of 45 articles was advanced by Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Mexico, Panama, Peru, Trinidad-Tobago, Uruguay and Venequela.⁹⁰ It suggested that apart from the Assembly, Council and Secretariat there should be an International Sea-bed Enterprise. For the Enterprise it was intended that it be empowered to undertake all technical, industrial and commercial activities, including production, processing and marketing, and to take all necessary measures, including control, reduction or suspension of production or fixing of prices, whenever production has adverse economic effects for developing countries as exporters of raw materials. Though it is ~~said~~ by many scholars that by such a control proposal intended a direct exploitation system, perhaps the intention was to develop a joint venture system.⁹¹ The proposal suggested that in undertaking exploration and exploitation activities the Authority could avail itself of the services of other organisations by a system of contracts or by the establishment of joint ventures. It is clear from the proposal that the Authority should have an overall control over all the activities, but by suggesting a contract or joint venture it certainly intended that there be a joint venture system for exploitation activities. The proposal clearly envisions that there can be no exploration and exploitation activities without joint venture due to non-availability of

technology, but it tries to secure for the Authority the right for exclusive administration of exploitation activities.

Malta, following the Latin Americans, presented a comprehensive working paper composed of 205 articles entitled Draft Ocean Space Treaty.⁹² The paper, recommending the licensing system, said that international ocean space institutions issue licences for the exploitation of non-living resources of the international ocean space. Another proposal from the seven land-locked and shelf-locked states (Afghanistan, Austria, Belgium, Hungary, Nepal, Netherlands and Singapore), entitled International Sea-bed Convention,⁹³ suggested that Assembly of the Authority could establish a body for direct exploration, exploitation and marketing, including direct licensing of a private or public enterprise, joint ventures and service contracts. This proposal, however, was unclear and did not suggest a uniform system of exploration and exploitation. Japan, the last in the series of 1971 proposals, submitted a proposal entitled Outline of a Convention on the International Sea-bed Regime and Machinery.⁹⁴ It suggested that a licensing system be followed and the licences for exploration and exploitation be given to contracting states.

The later years of the Sea-bed Committee did not receive any proposal on the system of exploration and exploitation and instead concentrated on the structure and powers of various organs of the Authority. The UNCLOS-III also did not come out with any significant and different proposal than

the earlier ones, except the latest proposal presented by the Netherlands, submitted in the first part of the Eighth Session of the UNCLOS-III. This proposal, which came up in the wake of grave differences and dissatisfaction of the majority of states over the existing form of exploitation system in the present text, suggests a new system-an equity joint venture system.⁹⁵ This system, which is still under the study of member states, has been welcomed by a substantial number of states.

B. Other Proposals

These proposals were put forward during the Sea-bed Committee years, namely: Borgese Proposal;⁹⁶ Danzing Proposal;⁹⁷ and Pell Proposal.⁹⁸ These proposals, though varied in their scope, content, and details, all suggested a licensing system for the exploration and exploitation of sea-bed resources. Some extracts from these proposals will illustrate the nature and varying degree of control they suggested:

I. Borgese Proposal:

The regime is authorised:

1. To regulate, supervise, and control all activities on the high seas and on or under the sea-bed;
2. To regulate effectively the commercial exploitation of the sea-bed;
3. To issue licences to Member States and to intergovernmental or non-governmental international organizations and corporations

for the peaceful and orderly exploration and exploitation of the sea-bed and below the sea-bed according to rules to be promulgated by the Regime.⁹⁹

II. Pell's Proposal:

The activities of nationals and non-governmental entities in the exploration of submarine areas of ocean space and the exploitation of the natural resources of such areas shall require authorization and continuing supervision by the appropriate State Party to the Treaty, and shall be conducted under licences issued to State Parties to the Treaty making application on behalf of their nationals and non-governmental entities. When such activities are to be carried on by an international organization, a licence may be issued to such organisation as if it were a State.¹⁰⁰

III. Danzing Proposal:

The ocean bed shall be open for exploration and use by all States with discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to exclusive exploration and exploitation rights granted by the Ocean Agency.¹⁰¹

These proposals were unclear and did not elaborate even on the system to be employed for licensing. The systems suggested in these proposals are no more relevant under the present situation and the present form of Informal Negotiating Text/Revision 1, ¹⁰² which reflects a different approach.

VII:2:ii Description of SystemsA. Licensing System

The licensing system for sea-bed mining, which had been proposed since the opening of the new law of the sea discussions, needs a clear explanation. The licensing system when proposed during the earlier Sea-bed Committee years was advanced with an understanding that the Sea-bed Authority will not itself go for direct exploitation, and will issue licences to state parties, or other juridical persons or organisations possessing nationality of that state. It was not suggested at that stage that two separate exploitation systems (i.e. licensing and direct exploitation by the Authority) be created together. The intention behind the licensing system was the allocation of a site for exploration and exploitation of the resources.

Under the licensing system the control of the sea-bed and its resources is to lie under the International Seabed Authority. The licensing authority would determine the particular areas to which exclusive rights for purposes of exploration and exploitation would be granted. In this system, it was suggested that the exploration should not be restricted to any particular area. However, the various suggestions clarified that to explore the prospective party must obtain an exploration licence.¹⁰³

The suggestion for exploitations varied and a common

view was to auction the sites to the highest bidder. The default of such a system is that in this most industrialized countries would effectively acquire vast areas of the sea-bed. Another view suggested was to allocate the sites to states on a quota basis both in terms of area and resource concentration. This system is also not workable due to want of technology in the Third World. It will also provide an edge to industrialized countries.¹⁰⁴

This system will involve certain regulations and conditions, such as: lease to be given only for a limited period; production quotas; safeguards against pollution and protection of human life; collection of licensing fee as well as royalties on mineral production.¹⁰⁵ Although this system may incorporate some regulatory powers, no effective control over activities in the area and on resource management is envisaged. None of the proposals in favour of the licensing system have any provision which ensures effective participation of developing countries.

B. Parallel System

The parallel system, as it exists in the Informal Composite Negotiating Text/Rev. 1 means that the activities in the area [1] shall be carried out by the Enterprise, and [2] in association with the Authority by States Parties or State Entities, or persons natural or juridical which possess the nationality of State Parties or are effectively controlled by

them or their nationals.¹⁰⁶

In this system, on the one side, the Enterprise, operational arm of the Authority, will directly carry out the exploration and exploitation activities. And on the side of the States parties or juridical persons, having the nationality of any state will also carry out the same exploration and exploitation activities, by entering into contract or obtaining a licence from the Authority. It is clear that in this system two separate categories of exploitation activity will be carried out. The Enterprise has to carry out its activity on its own; whereas the activities by the State Parties (i.e., industrialized countries) and the private sector will be carried out either by a single technologically advanced state or multinational joint-consortia.

Further in this system the number of sites under the operation of private sector will vary according to the number of sites reserved for private sector exploitation.¹⁰⁷ Though the activities of the private sector will be subject to rules and regulations laid down in the Text and Authorities' supervision, it will more likely be an independent operation rather than a controlled one.

The parallel system, creation of industrialized states, is a compromise between the direct exploitation by the Authority and the free access by way of licences to the industrialized states or their private sector. Under this system

both the Authority's Enterprise and States and their companies would operate under equal terms within the Authority. This structure definitely places the Enterprise in a position of competition, which certainly cannot survive, thus making it unnecessary. "If the States and companies having the technology and the means are free to mine all the minerals they need for their own use and for international trade, where is the incentive for the international community to pour aid into an artificial 'Enterprise'? Former Secretary of State Henry Kissinger's offer to finance the Enterprise in return for the acceptance of free access to States and their companies means, in simple terms, to try such free access - which, of course, may be worth quite a lot. In addition, it means offering to pay for private profits with public funds. But that is not all. The parallel system also completely changes the significance of the I.S.A.'s Enterprise".¹⁰⁸

C. Unitary Joint-Venture System

The unitary joint-venture system as proposed by the Netherlands in the VIII Session of the UNCLOS-III,¹⁰⁹ though different from the earlier joint-venture systems, is based on the same principle, i.e., exploitation by way of joint-investment by the Enterprise and private sector. In this system no independent exploitation will be carried out in the private sector. They will by way of the unitary joint-venture system invest the required capital together and will be

partners in the exploitation venture and not competitors. The profits will be shared by both in proportion to their shares.

Under the Netherlands proposal the whole mining area will be divided into two regions, namely: (i) reserved area; (ii) non-reserved area. Both of the areas will be exploited by joint-venture system. However, the Enterprise will have the option for 80 percent of the investment for operation in reserved area and 20 percent of the investment for operation in the non-reserved area. Similarly, the consortia entering into joint-venture will have the option of 80 percent investment for operation in non-reserved area. Thus, if both the operations start together, the Enterprise will have 50 percent operational participation in the total area.

In this particular system the Enterprise will remain intact. This does not restrain the Enterprise from starting an operation on its own and carrying out operations in reserved areas by way of joint-venture contracts. Besides this, the Enterprise will have a right to enter into a joint-venture with any consortium in the non-reserved area. This also guarantees a new right to contractors to enter into a joint-venture in the reserved area. This system as a whole ensures equal participation to both, the Enterprise and multinational consortia.

VIII:2:iii Evaluation of Systems

A. Criteria

The sea-bed activities, particularly mining, have to be evaluated in terms of growth in the developing countries, so as to reduce not only the economic gap between the rich and the poor but also establish a new model and a new precedent which can safely and effectively be applied in other problem areas of world crisis. It is certain that if the approach to manage sea-bed activities is conducive to the demands of a new world order, the same principles and similar institutional concepts and forms can be applied in other areas with some assurance that they are workable and productive to meet the demands of the present day world.

The concept of "common heritage of mankind" as discussed in earlier chapters induces a new framework of global management system. This system which is conceptualized to establish new international institutions for sea-bed is motivated by the global and humanistic idea of equality and equal opportunity to all with special consideration of the Third World. To meet the demands of such an idea, it is necessary to evaluate the main systems of sea-bed resource exploitation in terms of their possible contribution towards such value objectives as bridging the gap between the rich and the poor, equality, equal opportunity, and redressing of the past damages done to the Third World economies. The system of exploitation

to be employed here must not only be conducive to solve the problems politically and in terms of growth of developing countries, it must also be able to establish a new revolutionary workable system as a precedent to generate the process of equality for mankind as a whole. For the purpose of this evaluation the following aspects are being discussed: mining industry; generation of income; political order; strategic issues; transfer of technology and international control of transnational corporations.

Here in this chapter the effort is made to study the pros and cons of all the three systems suggested so far. The analysis is made in terms of trade flows and capital flows as well as in terms of technology transfer between developed countries and developing countries.

For the analysis of these systems, it is necessary to understand the present position of developed and developing countries. To this date the development of developing countries is far less than the development of developed countries, because at present developing countries export commodities and earn foreign exchange only. In contrast to this developed countries establish industry and develop existing industry in their own countries. Technology flow from developed countries to developing countries is negligible. With the development of new technology, production is increased and thus new jobs are created in developed countries only. What the developing countries lose in the present system is less

development of technology, less job creation and also they earn less profits. Developed countries, on the other hand, by producing finished goods and selling them to developing countries earn much more profit than the amount they spend in buying raw materials. Thus, whatever amount of foreign exchange or revenue is earned by developing countries, most of it, or sometimes even more, is spent in buying the manufactured goods from developed countries. The overall development continues to be much more in the developed countries by way of continuous process of job creation, more profits on manufactured goods, and development of technology. This prevents the technology flow from developed to developing countries, reduces the possibility of their industrialization, and thus keeps their growth rate to a minimum.

I. Licensing System

Mining Industry:

The impact of a licensing system on the land-based mining industry of developing as well as developed countries is the same, though the developing countries lose more. At present countries like Gabon, Ghana, Zaire and Zambia shiver. Sea-bed mining is bad news for them, as it means a decline in the land-based production of these countries. Zaire, which produces 52.9% of the world's cobalt, and Zambia, which follows Zaire with 8.9% of the world's cobalt production, are concerned about their developing economies which heavily depend on their land-

based mining industry. The same is true for Gabon which produces 11.4% of the world's manganese and is the main supplier of this vital metal to a majority of industrialized countries.¹¹⁰ Gabon has enormous reserves of this mineral. Seabed mining, if left unchecked, will compel the land-based mining industry of these countries to drastically reduce their production or even up to complete closer of these industries. This view is easily understandable in the light of the estimates of science magazine - "\$1 of capital invested in ocean mining will return at least \$3, compared with land-mining, where land-mining, where \$9 may produce \$1 a year".¹¹

The licensing system if adopted for sea-bed mining will give a free hand to few multinational consortia, who are basically land-based mining industries of industrialized world.¹¹² This system ensures freedom for exploration and exploitation to industrialised countries, particularly mineral importers, with a bare minimum of international control. Under it the developed mineral exporters will be able to seek their independence from developing mineral exporter countries, thus, damaging the poor developing economies of land-based producers. The overall impact of licensing system will lead to drastic reduction in the mining activities of land-based producer countries, leading to unemployment, economic stagnation and almost complete disappearance of land-based mining industry from developing countries.

This effect will also be felt by the developed countries like Canada, which accounts for 25% of the world's nickel production and substantially supports its present economy from nickel export.¹¹³ It is not only the developing land-based producers, who are worried about this system. In general, all the mineral exporting countries are concerned with the system of exploitation to be adopted by UNCLOS-III. A licensing system without proper control is damaging to all the countries having land-based mining industry, particularly mineral exporting nations.

Generation of Income:

Under the licensing system, without an international resource management system, which is one of the basics of common heritage of mankind concept, free access will not only be damaging to land-based mining industry but will also deprive developing countries of the substantial amount of profits and resource supply to developing mineral exporting countries.

Under the licensing system, the Sea-bed Authority is only entitled to collect revenues by way of licensing fee and royalties. This system does not give the Authority the power of price fixation and resource distribution. The sea-bed mining companies, after payment of licensing fee and royalty, will be free to sell the resources according to their business needs and profits. Thus ultimately, with the power of price fixation in the international resource market, the sea-bed

mining industrialized nations will not only control the supply of resources, but will control it the way that best suits their profit-making interests. The economy of industrialized world will thus further improve the gap between the developed and developing countries will continue to increase.

The developing countries in this system will have to satisfy themselves with a share in the revenues earned by the Authority. The share to which they will be entitled, in the "common heritage of mankind" pool, will not even be enough to compensate for the loss which they will suffer due to the loss in their revenue earning by export of mineral resources. This system is in no way productive for the world growth as a whole and particularly it will be damaging to the Third World economies. It will defeat the very idea of common heritage of mankind concept, i.e., the international resource management system, which was intended to reduce the gap between the poor and the rich.

Political Impact:

The impact of this system on the world political alliances has been alarming. A new trend in politics has evolved in the world with industrialized mineral importing countries on one side, and developing mineral exporting countries on the other. This situation has placed countries like Canada on the fence - making it difficult to know which side to favour. The

Canadian situation is very critical with a huge, land-based, miner-exporting, mining industry and also possessing sea-bed mining technology. It fears reduction in the prices of its land-based production of nickel. On the other hand, it also does not intend to lose the opportunity of a free licensing system for sea-bed mining, for which it is one of the very few contenders.

The implications of such proposals have led to the formation of a strong Third World block opposing the industrialized mineral-exporting world, with the others sitting on the fence, not knowing what to do exactly.

Strategic Issues:

What we face today in regard to a sea-bed mining system is a strategic problem, not only because it is to solve the conflicting interests of the rich and the poor, but also because whatever precedent we establish today for sea-bed mining is like to be followed in the search for solutions in other international crisis areas. It may be other international areas like outer space or Antarctica, or it may be the problem of international control of energy, food or other basic needs of mankind.

The establishment of such a free system which cares only for the rich, very few rich, to flourish and improve, which completely discards the rational demands of the Third World, will certainly establish a bad precedent to begin with,

particularly when we are faced with similar problems in outer space and Antarctica.

Transfer of Technology and Control of Transnational Corporations:

Another area to examine and evaluate the licensing system is "transfer of technology and control of transnational corporations". So far transnational corporations have been free to work the way they want, with a minimum of control by the nation of their origin. In international business, there is virtually no code for multinational corporations. They are not obliged, so far, to transfer their technology, and are able to protect their scientific advancement under the patent laws of their respective countries.

The licensing system does not provide for technology transfer, and a few transnational corporations are free to enter this area of fabulous business without any competition or technology transfer. It also does not provide for any international control over transnational corporations. If the world community fails at this juncture to provide for an international system of control on these companies and a method of technology transfer for equal growth in the world, it will perhaps never get such an opportunity. It is to be noted that if we establish a system conducive to world growth in oceans, we can establish a good precedent for other crisis areas of the world.

II. Parallel System

Mining Industry:

The parallel system, under which sea-bed mining is to be carried out by the Enterprise as well as the private sector, has different effects than the licensing system on the land-based mining industry. Under this system there will be two kinds of sea-bed mining: one controlled by the world community through the Authority and the other independent and free from control. These two will be competitors of each other and minerals produced by the two will be priced at two different levels. The private sector, though it may reduce the land-based mining of the developing countries, will not substantially hit the land-based mining industry of industrialized world, except for reduction in price due to increased production. On the other hand, developing countries will lose their export since (i) demand in the industrialized world would be fed by the private sector sea-bed mining, and (ii) demand in the mineral importing developing countries would be fed by the resources produced by the Enterprise.

The biggest loser in this system will be the land-based mining industry of the developing countries. The industrialized countries having land-based mining will very easily be able to compensate for the loss from the profits of the sea-bed mining industry. Unemployment in the developing countries will increase, because there will not be any substitute for land-based mining, whereas developed countries will not

suffer any problem of unemployment due to conversion of existing mining industry into sea-bed mining industry.

Generation of Income:

It is the generation of income which matters most in the parallel system. This factor is the most vital of all in determining its probable impact on the growth of developing countries and the practical application of the concept of the common heritage of mankind.

The parallel system as it means creates a competitive atmosphere between the Enterprise and private sector - status symbol of the poor. The Enterprise, which will depend on technology transfer from the private sector and financing from the world community, will have to compete with the powerful multinational consortia with all sorts of sophisticated technology and finances. It is practically impossible for the Enterprise to work, and compete with profit making capacity of the private sector, which has skill and experience in resource development and marketing. The amount of profit earned, if any, by the Enterprise will be so negligible that it will hardly be able to offer anything to mankind out of the pool of the common heritage of mankind. Most of the aid given by the world community to make the Enterprise work, along with a substantial amount of revenue earned from the sale of resources, will be consumed by the Enterprise to keep itself alive from the threat of competition from the private sector.

It is certain under this system that developing countries get nothing out of the Enterprise's grand design. But the evil effects of this system are not only confined to the developing countries, they also reduce the margin of profit of developed countries because the developed countries also contribute to the funding of the Enterprise. When the Enterprise fails to contribute to developing countries, it will automatically fail to contribute to developed countries too. The sufferer in this system is mankind at large, because it will be only a few private sector people who will earn the profit. Even the masses of developed countries will lose because it will be their public money, which will be paid by their respective governments to fund the Enterprise and the money of big businessmen. This system on the whole does not work for either of the two, the rich or the poor.

Political Impact:

The impact of the parallel system on international politics is, similar to the impact of the licensing system. Developing countries have emerged as a group to oppose both systems on the ground that they are too competitive. But in the case of the parallel system they believe they would lose even more than under a licensing system.

Strategic Issues:

Once the system of competitive atmosphere between the Authority, the representative of mankind, and the private

sector, the empire of rich is established in the ocean bed, it is very much likely that the same pattern will be followed in the other international areas. What is at stake here is thus not only the sea-bed but also the resources of the other international areas also. If the example set for managing the resources of the one area is based on a wrong system, or the concept of the common heritage of mankind is not applied in the correct sense, the same precedent may be followed in other international areas also.

This competition between the few multinationals and mankind, if accepted, will increase the yawning gap between the rich and the poor. It is very much likely that the leverage thus obtained by the handful of multinationals will be used for further exploitation of developing countries to keep the economic institutions of the world under their control.

Transfer of Technology and Control of Transnational Corporations:

To some extent the parallel system was created to satisfy the ego of the Third World to have an Enterprise as their status symbol. It was agreed that the private sector will provide the Enterprise with the necessary technology for deep ocean mining. It is true that there will be transfer of technology to the Enterprise so that it is able to function. However, the question here is the level and quality of technology which will actually be transferred to the Enterprise.

Let us consider the case of armament sale. It is true that the industrialized world transfers the technology to the developing world by selling the armaments. But is it not also true that the technology thus transferred or sold to the developing countries is the one which has already become obsolete in the industrialized world? Is it not also true that armaments are sold only after the industrialized world has assured itself that the "quality" of technology being transferred will not compete with its monopoly?

Surely the technology to be transferred to the Enterprise should be of the same quality that will be used by the private sector in their exploitation activities. Perhaps it is hard to believe that the private sector, which exists and continues to grow on the basis of exclusive control over technology, will part with its technology to create another equal competitor.

Considering another aspect of this technology transfer, we find that though it will be transferred once, there is no provision or arrangement for continuous flow of technology to the Enterprise. This creates another question, whether it will be possible for the Enterprise, even when the total amount of technology available is transferred to it in the beginning, to continue to grow and improve the technology with the same speed as that of the private sector. Again, we find that the

lack of continuous flow of technology transfer will soon place the private sector in a more dominating position than it will have in the initial stages.

So far as the development of a system of international control on the transnational corporations is concerned, the parallel system again fails like the licensing system. This system ~~also~~ allows the transnational corporations to dwell all around the world without any control. It is to be remembered, if we fail to establish such a system for their control in ocean-bed activities, i.e., in regard to the first international area, we will, perhaps, never succeed in developing a device for the control of these multinationals.

III. Unitary Joint-Venture System

Mining Industry:

The possible impact of the unitary joint-venture system on the mining industry is yet to be studied and analyzed. This, which was proposed in the Eighth Session of the UNCLOS-III, however, indicates some positive outcomes.¹¹⁴ What we need as a system for deep ocean mining is a system which can save the land-based mining industry from sabotage, likely to be caused by the deep ocean-mining industry. The system under which the land-based mining system can exist, has to have some kind of international control on production and price fixation of mineral resources. Or to put it in another way, we need a system which allows the development of international resource

management.

The issue of international resource management or control on production and price fixation can only be solved if we are able to tie up the private sector (deep ocean mining industry) and the Enterprise together so that they both make some profit. This means that no one sector should be left free enough to manipulate the production and price fixation in a manner which suits itself only. The unitary joint-venture system, by providing for compulsory participation of both the competing entities in each venture, is able to (1) tie up the two entities together and (2) give both of them a capacity to play a decisive role. This system, by its provision of 80 and 20 percent participation of the Enterprise and the private sector respectively in the reserved areas, and vice versa in the non-reserved area, also gives ample freedom to both the entities to exercise their control in the areas reserved for their majority participation. Thus, this system is able to put a check on the free and unlimited production policy of the private sector.

Once we are able to establish a system which has enough provisions to control the production and price fixation of mineral resources, the impact of the sea-bed mining industry on the land-based mining industry will be minimized. The probability is that there will not be any effect on the land-based mining. The volume of sea-bed mining production will increase slowly and will not exceed the world's demand and fill

in the existing gap between the demand and the production. Prices, by exercising international control, will be kept under control and will save land-based mining from turning into an expensive and uneconomic business. Perhaps it is correct to say that of the existing proposals only the unitary joint-venture system provides the basis for an international resource management system and seems likely to save the land-based mining industry from an otherwise inevitable collapse.

Generation of Income:

The amount of income to be generated under the system of unitary joint-venture will be uniform. In this system, because there will be no competition between the Enterprise and the private sector, the Enterprise will also earn profits in the same ratio as the private sector. The certainty of earning profits for the Enterprise will be the same as that for the private sector. These profits earned out of the common heritage of mankind pool can thus be used for the benefit of all mankind. As mentioned earlier, the harm to the land-based mining industry in the Third World will be negligible. Thus, whatever the Third World will receive out of the common heritage pool of profits will be an addition to their existing economies.

This system will also suit the land-based mining developed countries, because on the one hand their land-based mining industry will be safe, and on the other hand they will

earn additional profits through (1) their private sector and (2) through their share in the common heritage pool of profits.

This system also ensures equitable sharing in the profits earned by the Authority by developed and developing states. The financing of the Enterprise will be eased due to contributions from developed and developing countries and also international money-lending institutions. Though it is expected that in the initial stages the Enterprise will not be in a condition to go for extensive mining in a reserved area, the Enterprise can begin its business by investing 20% in joint-ventures with consortia, and it can earn an amount equal to one full-scale operation just by entering into five joint-venture operations in non-reserved areas. This will also ease the problem of initial technology transfer.

This system has the advantage that "it reduces the investment share of the Authority to a contribution of 20% in the joint-venture (in the non-reserved area), which during an initial phase, might be advantageous. As a matter of fact, the initial financing of the Enterprise (capital for one full scale comprehensive operation) would enable the Enterprise to become a partner in five joint-ventures...".¹¹⁵ The problems of an immediate start, participation in profits and decision making will be solved irrespective of the 20% or 50% participation. This system solves most of the problems and assures balanced growth by way of 50% participation and profit

sharing, giving the opportunity to developing countries to grow in some proportion to that of developed countries. This system helps to compensate developing countries for the loss caused to their economies by sea-bed mining.

Political Impact:

The unitary-joint-venture system in international politics should create a new understanding between the rich and the poor nations. By this system a spirit of co-operation and care for the developing countries will be generated in place of the spirit of confrontation between the industrialized world and the Third World which has been engendered under the two other systems. The adoption of this system in the long run will reduce the tension between the two opposing interests due to the system's balanced and equitable approach.

Strategic Issues:

Moreover, the unitary joint-venture system can act as a model for other international crisis areas. Once there is success in the establishment of a cooperative and equitable system on the ocean bed, it can be applied to outer space issues and in efforts to control and manage energy, food, and resources from international spaces. The strategic importance of it is enormous - it can be the beginning of a new era in international cooperation:

Transfer of Technology and Control of Transnational Corporations:

This is perhaps the only system, out of the three discussed here, in which the transfer of technology will be automatic. The probability of the transfer of obsolete and incomplete technology is also removed under this system. Once a consortium enters a joint-venture, it will be concerned with making profitable use of the best and most up-to-date technology available. This system removes the defect of earlier systems, which had no provision for complete and smooth transfer of technology.

On the question of the building of a system of control and regulation of transnational corporations, this system of joint-venture between the private sector and an international organization provides for a code of conduct to be observed by those entering into a joint-venture contract. This can be a new beginning in establishing an international system of control and regulation of transnational corporations and can be easily applied to other areas also.

B. Rating:

This system of exploration and exploitation of the international sea-bed area should be such as to achieve the objective of the common heritage of mankind, i.e., it must serve mankind as a whole. Therefore, it is "indispensable that the Enterprise, as the operating organ of the Authority, should be effective and capable of undertaking activities in

the area at the same time as other entities. To meet this end the Enterprise has to have financial means, technology and trained personnel."¹¹⁶ On this, perhaps, Frank Njenga rightly pointed out that "...we had to imagine ways and means to equalize two different kinds of entities: the powerful consortia with all their capital and credit, technology and organization, some of which are already engaged in sea-bed operations; and the Enterprise, an entity so far existing only in our imagination, a creature to be born without the necessary tools of fulfilling the purpose for which it was created."¹¹⁷ The solution which we are seeking should be designed to serve the developing countries, whose economies are still developing and will be the most affected by sea-bed mining operations.

The two other systems considered above show a tendency towards non-proportionate growth. When we compare the three (licensing, parallel and unitary joint-venture systems) together, the parallel system shows the least growth and development for developing countries. It is due to double investment in sea-bed operations by the Enterprise and multinational consortia. This system, by way of investing all the contributions made to the Authority into the Enterprise and making it compete with far better equipped, powerful consortia, in fact, not only reduces the possibility of its profit earning but also restricts its operational area. Because the amount of profit earned by way of licensing or contracts with consortia

are likely to exceed the amount of profits, earned by the Enterprise by direct operation. Although politically the Enterprise will be controlled by the numerical superiority of developing countries, economically it will be controlled by a few multinational consortia by making it compete with already developed consortia.

The licensing system is far more productive than the parallel system for the reason that the Enterprise is not to go for exploitation activity by itself, and thus it does not spend money in exploitation and only earns by way of licensing fee or contract money. This system, in spite of the fact that it is better than the parallel system, does not provide a balanced system of growth and is more prone towards developed countries. The unitary joint-venture system is perhaps the only system which provides for 5-% participation in overall operations. This also solves the initial problems of technology transfer, financing, training of experts, participation in management and control, and this gives the opportunity to the Enterprise to enter into five operational contracts in non-reserved areas in the beginning and without competition. Thus the profits earned under this system in the initial phase will be equal to those which an independent multinational consortium is likely to earn in the parallel system, which otherwise due to competition and complete investment will be far less than the one assured in the unitary joint-venture system. Therefore, the recommended approach is based on the amount of

profits likely to be earned by the Enterprise. Since the development and growth of developing countries are directly or indirectly dependent on profits earned, there is a need for a system which can provide balanced growth to both developed and developing countries, so as to serve mankind as a whole, the main objective of this UNCLOS-III.

VIII:2:iv, Projections

A. Joint-Venture With or Without Modification

According to the analysis made in the earlier part, I suggest that the unitary joint-venture system is the only workable system out of the three systems.

The conflict between the North and the South was deadlocked on the issue of the exploitation system. On one side was a developed world demanding a free and open system and on the other side developing countries demanding a system with international control coupled with international management. Though it is true that even this unitary joint-venture system does not fulfill the demands of all, it seems to be a widely supported system and a viable system to be placed in the Text to be revised in 1980.

This system was advanced, at the end of the first part of the Eighth Session of UNCLOS-III, by the Netherlands. So far it has been studied by the developing countries and the socialist states along with the Soviet Union, during the second

part of the Eighth Session of the UNCLOS-III. It was not subjected to formal discussion in the Eighth Session but the Group of 77 considered it during its meeting before the beginning of the Session. All the African States and a few Asian States and two Latin American States have agreed to support it and press it as a joint proposal in the coming Ninth Session. The Latin Americans have yet to announce their formal stand but have privately indicated their support for this system. However, they are taking time to examine the probable future effects of this system, and if necessary, to modify or amend it to make it more viable. The Soviet Union and other Socialist States officially indicated their reluctance for any change in the existing form of the Text, but have privately agreed to support the unitary joint-venture system, if the Group of 77 endorses it.¹¹⁸

The overview of the situation clearly indicates that the Asian and the African States have already agreed, Socialist States along with the Soviet Union are prepared to endorse it, subject to complete endorsement by the Group of 77. Latin America is examining its merit not to reject but to modify and amend, if necessary. It seems very likely that the system of unitary joint-venture will be strongly endorsed by all these states in the next Session. The only opposition left to this system is from the West European and Other (WEO) states. It is difficult at this stage to visualize how this system will replace the parallel system, given the present opposition from

the states possessing the required technology for sea-bed mining.

One possible solution might be that after the endorsement of the unitary joint-venture system by the Group of 77 and Socialist States the West European States might agree to accept it, subject to some modifications and amendments. However, it seems very unlikely that major amendments will be possible, particularly when the Conference will be hard pressed for time in the Ninth Session, which is officially designated the last session of the Conference.

All issues at UNCLOS-III have been decided by consensus. This system, to become a reality, also needs to be decided according to the principle of consensus. In case it falls short of unanimous acceptance of the member states, the issue might be put to vote at the end of the session. Even if the system were endorsed by the majority of mankind, and will be a part of the Text for the treaty, it may still lack the support of states possessing the technology. In the opinion of the author, it is very likely that the system will be endorsed in the next Session, partially amended.

B. Probability in Case of Failure

Finally, it is possible that the conference might fail to reach any kind of agreement at all on this issue. In this case the Conference itself might break down. However,

total failure seems unlikely. UNCLOS-III has already achieved most of what it set out to accomplish. It has already agreed on all the earlier unresolved issues of two earlier Law of the Sea Conferences. Given the extent of consensus on other issues, the Conference now seems assured of a successful outcome. The Conference, which spent six years in its preparation and has spent another six years in the conference process, can not, perhaps, afford a complete failure just for a single universal issue.

One of the possible outcomes seems to be a "freeze and detach" alternative. It has been observed that under this approach a treaty might be concluded in the areas in which the issues have been resolved. The issue of deep ocean mining, i.e., the system of exploitation, may be separated from the other areas for further consideration, elaboration, discussion and study.¹¹⁹ In worst circumstances this approach seems to be the last alternative, because just for the reason of one unresolved issue several other issues which have been resolved should not end up in failure as a whole of the Conference.

The freeze and detach approach is likely to be more acceptable to the developing countries. In this, apart from freezing other resolved issues of the Conference, the Authority might also be formed without any operational capacity. The Assembly of the Authority thus created can work on the remaining details of the exploitation system including the

system of exploitation itself. In such an approach the Authority will be formed which will perhaps suit the interests of the developing countries. However, such an approach is unlikely to be acceptable to developed countries because they had been demanding a comprehensive draft treaty before the conclusion of the treaty.

Another possible approach, according to a recent view, is the establishment of an Interim Authority.¹²⁰ It is true, under the present circumstances, when the West is pressing hard and is becoming impatient to go out for seabed exploitation, some kind of interim arrangement becomes a necessity. However, it seems unlikely that UNCLOS-III will agree to any interim arrangement for immediate exploitation. The developing countries feel they are now very close to an agreement and any type of interim arrangement will give an opportunity to the industrialized world to further delay a global agreement in order to continue their exploitation activity in the confused state of affairs.

It is quite understandable that an issue which could not be resolved during 12 years of exhaustive negotiations will perhaps be extremely difficult to solve once an interim arrangement is reached. The industrialized world will lose its interest in the negotiations, because the sea-bed will remain more vulnerable to them under the interim arrangement than what it would be after the conclusion of a final agreement. The author fully agrees with a recently expressed view that "during

the designated interim period it would be preferable that...joint-ventures with national governments or private enterprises capable of engaging in deep ocean mining, ideally perhaps within the framework of a unitary joint-venture system of exploitation instead of that of the currently proposed 'parallel system',¹²¹ be followed. Although this approach will be good, the negotiation of such an interim arrangement will be equally difficult compared to that of the present state of negotiations.

If the Treaty is concluded on the basis of a majority vote, the following scenario might appear: one group of states votes against the Treaty; another group votes in favour but does not sign; still another signs but does not ratify; a fourth ratifies, but only subject to reservations on a number of important issues. If the unitary joint-venture system is endorsed by the Conference the Treaty will succeed in attracting enough votes for its adoption as well as its ratification. However, it seems that the industrialized West will oppose the Treaty so drafted, if it is voted as a whole, or may oppose the part dealing with the system of exploitation if the voting goes on from article to article. Under any one of these situations, if the West expresses its reservation on the system of exploitation, perhaps the whole exercise might collapse. It might lead to a state of chaos so that even with a Treaty, seabed mining will be impossible.

It seems that negotiations on any workable alternative, in case of failure of an agreement on a Treaty, will be rather

more difficult than the present state of negotiation process. This leads the author to believe that either the Conference would have to struggle to have the seabed mining issue settled in the next Session, or it might prefer to extend the Conference to another session. Considering the handicap of time in the next session, i.e. Ninth Session, UNCLOS-III will struggle to reach consensus, in order to avoid alternatives. The Conference has reached a point of no return, it can now hardly afford to see its twelve years of continuous efforts go to waste.

FOOTNOTES

CHAPTER VIII

1. Quoted by Dick A. Leurdijk, World Order Studies (1979), p. 3.
2. Mihojlo Mesarovic and Eduard Pestel, Mankind At the Turning Point (1974), p. 10.
3. Ibid., p. 11.
4. Ibid., p. 11.
5. Jan Tinbergen, Reshaping the International Order (1976), p. 11.
6. Alan G. Friedman and Cynthia A. Williams, "The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea", 16 San Diego L. Rev. (1979): p. 555 at 557.

The oil embargo of 1973-74 was the major producer action by developing countries to have a profound impact upon the richer nations. It changed the preceptions of the United States, Western Europe, Japan and others in a basic way. The Third World "roared", and the West was forced to listen. [Ibid.].
7. Tinbergen, supra n. 5, pp. 7-8.
8. Ibid., p. 16.
9. Leurdijk, supra n. 1, p. 20.
10. Ibid., p. 30.
11. Quoted by Leurdiji, ibid., p. 31.
12. Mesarovic and Pestel, supra n. 2, p. 3.
13. Ibid., pp. 19-20.
14. Ibid., pp. 22-26.
15. Material Needs and the Environment Today and Tomorrow. See generally Final Report of National Commission on Materials Policy (1973).

16. Tinbergen, supra n. 5, p. 27; Leurdijk, supra n. 2, p. 24.
17. Tinbergen, ibid., p. 29; Leurdijk, ibid., p. 24.
18. Tinbergen, ibid., pp. 30-31; Leurdijk, ibid., p. 24.
19. Tinbergen, ibid., p. 33.
20. Mesorovic and Pestel, supra n. 2, p. 22.
21. Ibid., p. 26.
22. Evan Luard, International Agencies: The Emerging Framework of Interdependence (1977), 207.
23. Ibid., p. 198-199.
24. Ibid., p. 202.
25. Ibid., pp. 219-220.
26. Ibid., pp. 222-224.
27. Don Mills, "The North-South Dialogue: Background and Present Position", Eds. Antony J. Dolman and Jan Van Ettinger, Partners in Tomorrow (1978), p. 63.
28. Quoted by Mills, ibid., pp. 63-64.
29. U.N. General Assembly - Sixth Special Session, Resolution No. 3201 (S-VI), para. 1; Alfred George Moss and Harry N. M. Winton, Comp., A New International Economic: Selected Documents 1945-1975 (UNITAR, 1976), Vol. 2, p. 891.
30. Ibid., para. 2 and 3.
31. Ibid., para. 4(a).
32. Ibid., para. 4(c) and (e).
33. Ibid., para. 4(g).
34. Ibid., para. 4(h).
35. Ibid., para. 4(i).
36. Ibid., para. 4(j).
37. Ibid., para. 4(k).
38. Ibid., para. 4(l) and (n).

39. U.N. General Assembly, Res. #3281 (XXIX), adopted on December 21, 1974 by a vote of 120 in favour to six against with ten abstentions; 14 I.L.M. 251.
40. See Proceedings of the United Nations Conference on Trade and Development, Third Session, Vol. 1, Report and Annexes, Annex I.A.
41. Ibid., Chapter II, Article 2 (a), (b) and (c).
42. Ibid., Chapter II, Article 29 and 30.
43. Ibid., Chapter II, Article 30.
44. Ibid., Chapter II, Article 31.
45. Leurdijk, supra n. 1, p. 55.
46. Ibid., p. 81, note 12.
47. Jan Tinbergen, Reshaping the International Order (1976).
48. Marc Nenfin, What Now (Upprola, Sweden: The Dog Hammarskjold Foundation, 1975).
49. Harlan Cleveland, Aspen Report (Colorado, U.S.A.: Aspen Institute for Humanistic Studies, 1975).
50. International Labour Office, I.L.O. Report (Geneva: I.L.O., 1976).
51. For summary of four studies under discussion see, Leurdijk, supra n. 1, pp. 94 to 97.
52. Tinbergen, supra n. 47, p. 165; Leurdijk, ibid., pp. 56 and 94.
53. Leurdijk, ibid., p. 96.
54. Tinbergen, supra n. 47, pp. 177-178.
55. Leurdijk, supra n. 1, p. 95.
56. Tinbergen, supra n. 47, pp. 182-183.
57. Ibid., pp. 180-182.
58. Leurdijk, supra n. 1, p. 96.
59. Elisabeth Mann Borgese, "Proposal for the Establishment of International Energy Institute", eds., Stephen Arthur Saltzman and Elisabeth Mann Borgese, Energy Technology and Global Policy (1977), p. 257.

60. Ibid., p. 257.
61. Ibid., p. 258.
62. Tinbergen, supra n. 47, pp. 196-197.
63. Leurdijk, supra n. 1, p. 96.
64. Tinbergen, supra n. 47, pp. 189-190.
65. Leurdijk, supra n. 1, p. 97.
66. Tinbergen, supra n. 47, p. 208.
67. Ibid., pp. 210-216.
68. Leurdijk, supra n. 1, pp. 95-96.
69. Ibid., p. 94.
70. K.F. Scott, "Introduction", 4 Ocean Management (1978): 163; Arvid Pardo, Law of the Sea and a New International Order, A lecture given at Dalhousie University, Canada on 13 March, 1979.
71. Pardo, ibid., p. 2.
72. Elisabeth Mann Borgese, Managin Sea-bed Minerals; The Law of the Sea and the New International Economic Order. (An unpublished paper).
73. Elisabeth Mann Borgese, "The New International Economic Order and the Law of the Sea", 14 San Diego L. Rev. (1977): 587.
74. Wolfgang Friedmann, The Future of the Oceans (1971), pp. 20-21.
75. Elisabeth Mann Borgese and Dick A. Leurdijk, Disarmament and Development (1979), p. 14.
76. Donella H. Meadows, The Limits to Growth (1972), see generally.
77. Pardo, supra n. 70, p. 7.
78. Arvid Pardo and Elisabeth Mann Borgese, Marine Resources, Ocean Management and International Development Strategy For the 1980's and Beyond (An unpublished study, 1979), p. 3.

79. U.N. Doc. A/AC. 138/12 and Add. 1.
80. U.N. General Assembly Res. # 2574 C (XXIV).
81. U.N. Doc. A/AC. 138/23.
82. U.N. Doc. A/AC. 138/25 (U.S. Proposal).
83. Ibid.
84. U.N. Doc. A/AC. 138/26 (U.K.'s Proposal).
85. U.N. Doc. A/AC. 138/27 (French Proposal).
86. U.N. Doc. A/AC. 138/33 (Tanzanian Proposal).
87. U.N. Doc. A/AC. 138/43 (U.S.S.R. Proposal).
88. U.N. Doc. A/AC. 138/44 (Poland's Proposal).
89. U.N. Doc. A/AC. 138/46 (British Proposal).
90. U.N. Doc. A/AC. 138/49 (Proposal of 13 Latin American States).
91. Cf. Shigeru Oda, The Law of the Sea in Our Times - 11: The United Nations Seabed Committee 1968-1973 (1977), p. 171.
92. U.N. Doc. A/AC. 138/53 (Maltese Proposal).
93. U.N. Doc. A/AC. 138/55 (Seven Land-Locked States).
94. U.N. Doc. A/AC. 138/63 (Japanese Proposal).
95. Statement by Ambassador William Riphogen of the Netherlands, in April, 1979: United Nations Press Release, Round up of the First Part of the Eighth Session (U.N. Doc. SEA/360, 30 April 1979).
96. Elisabeth Mann Borgese, The Ocean Regime - A Center Occasional Paper, Center for the Study of Democratic Institutions (October 1968).
97. Aaron L. Danzing, Revised Draft Treaty Covering the Exploration and Exploitation of the Ocean Bed (1971), drafted by the U.N. Committee of the World Peace Through Law Center, A.L. Danzing, Chairman. This is a revised version of the Treaty Governing the Exploration and Use of the Sea-bed, Pamphlet Series No. 10 of the U.N. Committee of the World Peace Through Law Center (1968).

98. Senator Chaiborne Pell, Treaty on Principles Governing the Activities of States in the Exploration and Exploitation of Ocean Space, Resolution presented in the Senate of the United States, 91st Congress 1st Session S. Res #92, February 4, 1969.
99. Borgese, supra n. 96, Article V, A.
100. Pell, supra n. 98, Article 15.
101. Dansing, supra n. 97, Article II, para. 2.
102. I.C.N.T./Rev. 1, U.N. Doc. A/CONF. 62/WP. 10/Rev. 1, 28 April 1979, Article 153.
103. U.N. Doc. A/AC. 138/23 (Secretary-General's Report, Study on International Machinery (1970)).
104. Ibid.
105. Ibid.
106. I.C.N.T./Rev. 1, U.N. Doc. A/CONF. 62/WP. 10/Rev. 1, Article 153(2).
107. The production of Enterprise and the number of mining sites as suggested in the Document NG2, 29 April 1978, has three schedules of operation. According to Schedule 1, Enterprise will undertake only one mining operation during the first 16 years of the Authority's existence. Whereas the private sector will undertake six mining operations. Schedule 2; assumes three operations initiated by the Enterprise as well as private sector during the first six years. One operation beginning every alternate year. The last, Schedule 3, proposed two full plus two half operations during the first seven years, i.e., two wholly-owned projects and two joint-ventures (50%).
108. Borgese, supra n. 73, p. 590.
109. The Netherlands Proposal, supra n. 95.
110. F.L. LaQue, "Different Approaches to International Regulation of Exploitation of Deep-Ocean Ferromanganese Nodules", 15 San Diego L. Rev. (1978): p. 477 at 488 and 489; United States Bureau of Mines, Mineral Commodity Profile M.C.P. - 4, 5 and 7 (July, 1977).
111. Quoted by Elisabeth Mann Borgese, The Impact of Sea-bed Mining on Developing Countries (Unpublished Study, presented at the First Part of the Eighth Session of the UNCLOS-III, at Geneva, in April 1979).

112. United Nations: Facts, Issued by the Centre for Economic and Social Information/O.P.I., DESI Facts 79/1, April 1979.

113. Supra n. 110, see both.

114. Borgese, supra n. 111; Elisabeth Mann Borgese; Working Paper for Consideration by the Group of 77, New York, July 16-19, 1979 (A paper presented at the meeting of the Group of 77 before the second part of the Eighth Session of the UNCLOS-III).

Mrs. Borgese has pointed out that Unitary Joint-Venture system is more productive to the growth of the world as a whole. Compared to other systems, it is the only one which can provide the required institutions and a system of control on transnational corporations.

115. Borgese, supra n. 111; For the tentative estimates on deep ocean mining projects see - J.D. Nyhart, et al, A Cast Model of Deep Ocean Mining and Associated Regulatory Issues (March 1978); and Franz Diederich, et al, Analysis of the M.I.T. Study on Deep Ocean Mining - Critical Remarks on Technologies and Cast Estimates (March 1979).

116. Statement by William Riphogan, supra n.

117. Statement of Ambassador Frank Njenga, Chairman of Negotiating Group I. (U.N. Doc. A/CN.4.62/L.35).

118. The views of the countries were collected by the author during his private discussions with the delegates at the UNCLOS-III, Eighth Session, which the author attended as an observer from the International Ocean Institute.

119. Douglas M. Johnston, "Deep Ocean Mining: Interim Arrangements and Alternative Outcomes", (An unpublished paper, delivered at the Symposium of the Law of the Sea Institute, Hawaii, in March 1979).

120. Ibid.

121. Ibid.

CHAPTER IX

CONCLUSIONS

The law of the sea has always played a prominent role in international relations, reflecting the influence of a variety of interests: trade, transportation, conquest, among others. The recent history of the law of the sea shows that the concepts of the territorial sea, the continental shelf and the economic zone have adapted to the discoveries and developments in science and technology. In the last decade or so, the deep ocean floor itself has become vulnerable to scientific and technological growth.

Ambassador Pardo of Malta, visualizing the growing significance of the mineral resources of the seabed, was the first person to point out to the world how important these resources were to mankind. Coining the concept of the "common heritage of mankind", he suggested the revolutionary idea of internationalizing the resources of the deep ocean bed and also pointed out that if these resources could be put under an international management system, a similar approach might be taken to other resources in "international spaces". The chief issues involved are the delimitation of the international area beyond the national continental shelf area and the design of a viable system of exploitation.

The Seabed Committee of the United Nations worked from 1968 to 1973 to find solutions for these and other seabed issues involved. Finding it difficult to arrive at an agreement, the Committee developed an expanded agenda of wider-

ranging issues to be worked on at the Third U.N. Law of the Sea Conference (UNCLOS-III). The Seabed Committee in later years did remarkable work. The Declaration of Principles, an outcome of the Seabed Committee, though controversial, was a landmark in itself.

The Third United Nations Conference on the law of the Sea began its work in 1973, taking over the work done by the Seabed Committee. Since then the Conference has gone as far as the Eighth Session. It has passed through very critical periods, when there was a complete deadlock on many vital issues. Despite all sorts of difficulties the Conference succeeded in resolving several conflicting issues. Issues related to the system of exploitation, which can make or break the Conference, are yet to be resolved. The present deadlock on the system of exploitation is significant not only for the Conference's success but also for the success of the New International Order.

One of the few major achievements of the UNCLOS-III is the issue of the definition of the Continental Shelf. It was one of the core problems of the UNCLOS-III and it has been almost settled. The definition of the Continental Shelf, as present in the ICNT/Rev. 1, is a considerable departure from the earlier definition of the Geneva Convention. The Conference which needed a precise definition to delimit the national seabed area from the international area, and a definition to

secure the maximum possible area for mankind, has to some extent succeeded in achieving its objective. According to the present definition, the national continental shelf will be assumed to end at 200 miles if the prolongation of the shelf is less than 200 miles, or at the place where it ends between 200 miles and 350 miles distance, or at 350 miles if the continental shelf prolongation extends beyond 350 miles. This definition, though flexible according to geological criteria, is precise in the sense that once the limits of the continental shelf are fixed, the problem of uncertainty will be resolved. This definition is a considerable improvement over the earlier continental shelf definition of UNCLOS-II, which was left open to technological and scientific advances. The agreement reached on the present definition in the Eighth Session of UNCLOS-III proves the success of the Conference in one of the most difficult areas. However, it must be accepted that the extension of the continental shelf up to 350 miles does not leave sufficient area for mankind.

Another significant success achieved at UNCLOS-III is the acceptance of the "common heritage of mankind" concept as a new international legal concept. It has been accorded significant importance in the Text (ICNT/Rev. 1) and to some extent it has been given the shape of a functional concept. It is quite an achievement because in the Seabed Committee years the common heritage concept was not acceptable to many states.

Now, after these twelve years, most of those who were opposed to the acceptance of this new concept as a legal principle have gradually, in this process of the UNCLOS-III, given their acceptance. However, this concept still needs elaboration. Perhaps, as discussed earlier, the common heritage concept should be given a specific meaning. The absence of proprietor rights within this content ought to be clarified expressly in terms of a concept of an integrated international management system. Furthermore, the definition should emphasize the fact that the common heritage of mankind refers to future generations of mankind as well. In other words, the concept should be preserved for mankind in perpetual succession.

Why is the deep ocean mining so vital? It is vital because this is perhaps the last chance for the world community to find a workable and equitable system which can ensure a balanced growth and equitable management of the international spaces. If we succeed today in the establishment of an international management system in the ocean bed, we establish a solid precedent for other international areas also.

The UNCLOS-III has demonstrated the desire of mankind to change the existing world order. As a result of this process, a new political order has emerged: the Third World on one side and the industrialized West on the other. In this age of economic turmoil the poor are demanding economic justice, a justice which must be based on equality and not charity: In the final stages of the Conference, the debate on deep ocean mining has focussed on three main alternatives: a free

licensing system, a "parallel" system, and a unitary joint-venture system. There is general agreement that what is needed is not just a system to exploit the resources but an international management system for an interdependent world.

To some extent an analogy can be drawn with issues in outer space: delineation of national and international space; legal status of international space including the moon and other celestial bodies; resources of the moon and other celestial bodies as well as the probability of the resources to be found and developed in outer space. According to the present technology and science, exploitation of the resources of the moon and other celestial bodies does not seem to be feasible in the near future. However, some scientists have indicated that space stations can be built in outer space in the near future for solar energy generation. They have also expressed the probability of building similar stations on the moon. An interesting part of these scientific predictions is that the use of the mineral resources from the moon will be economic as compared to the earth's mineral resources if solar energy stations are to be built. An interesting question is if the mineral resources of the moon are used by one state to construct these space stations, will it amount to exploitation or appropriation of mineral resources? Though this question does not seem to be an immediate problem, certainly it needs consideration in light of the common 'heritage of mankind'

principle. Another problem is the unlimited and creeping jurisdiction of states in space. It certainly needs serious consideration because the probability of remote sensing is likely to be abused in the absence of a precise definition. The extent of national jurisdiction in space is also increasing with developments in science and technology, just as national jurisdiction on the seabed was left free to increase with the availability of exploitation technology. Institutions similar to the Seabed Authority are to be established to regulate the resources of outer space and celestial bodies, based on concepts such as the "common heritage of mankind".

Antarctica is another significant international area with which the analogy of the seabed can be drawn. Antarctica, though not an international area in the strict sense of the definition of international area, has precipitated problems of an international nature. The present Antarctic Treaty does not answer many questions: delimitation of Antarctica from the oceans; delimitation of the Antarctic seabed or continental shelf from the international seabed area; the difference between the legal status of the areas which fall under the sector claims and the area free of any sector claim; the issue of exploitation of the Antarctic resources. These issues have yet to be resolved. The recent technological and scientific developments which have made the Antarctic resources accessible have raised questions about the adequacy of the existing Antarctic Treaty.

The presence of considerable amounts of oil and gas on the Antarctic continental shelf, and coal and other minerals on the Antarctica land mass, has generated enough concern in the international community. The Antarctic Treaty, which is self-contradictory, on one hand speaks of the absence of sovereignty in Antarctica and on the other hand recognizes the old sector claims involving sovereignty. It is very difficult to ascertain whether or not the Antarctica Treaty signatories have a right to claim a continental shelf for the Antarctic region when, according to UNCLOS-III, the continental shelf is the prolongation of the sovereign land mass when the legal status of Antarctica itself hangs between a sovereign and a non-sovereign status.

The present Antarctica Treaty involves only a few interested states and the old claimant states. It needs further internationalization for which representation of the interests of mankind as a whole is necessary. This is necessary for the success of the new law of the sea also, because it involves the problem of the Antarctic Sea and the Antarctic continental shelf, which hitherto is defined in terms of 60° south latitude. Although the maintenance of existing claims to Antarctica is a barrier to the application of such principles as the common heritage of mankind. It is suggested that Antarctica be put under international control. The application of the principles of

seabed mining to Antarctica could help reduce present tension over its resources and delimitation problems.

The Seabed Authority, in which a framework of international management and control and an international profit-making organization is developed, is analogous to the notion of the state-owned corporation. In the latter, the state proposes to an organization in the interests of the people of the state when it realizes that free enterprise in that particular area may be detrimental to such interests. The Seabed Authority is also being formed with similar intentions. Mankind, after realizing that the interests of the majority of people in the world will suffer unless an international machinery is formed, internationally owned, to safeguard their interests, has resolved to establish an International Seabed Authority. This is a good beginning in understanding and realizing the interests of mankind. UNCLOS-III, which has contributed by establishing an Authority has also greatly contributed by establishing new principles of international control and management.

Another contribution and a significant achievement is an effort to develop a framework for international control on the transnational corporations. It is indeed in the interest of mankind to ensure that the few do not continue to grow rich at the expense of many. It is high time and the right place to develop a code of regulation for those who so far continue

to escape all such regulations which might stop the growth of their ever increasing wealth.

The ocean bed, at last, is likely to develop a new integrated system of international management and control, through its system of deep ocean mining, which can thereafter be easily applied to other areas, such as energy, food, trade, transportation and disarmament. This is perhaps the first and the last opportunity for mankind to establish a system of global control, management and regulation - based on co-operation, peaceful co-existence and equity.

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APPENDIXES

APPENDIX A

DECLARATION OF PRINCIPLES GOVERNING THE SEA-BED AND THE OCEAN FLOOR, AND THE SUBSOIL THEREOF, BEYOND THE LIMITS OF NATIONAL JURISDICTION

U.N. GENERAL ASSEMBLY RESOLUTION 2749 (XXV), 17 DECEMBER 1970

The General Assembly, Recalling its resolutions 2340 (XXII) of 18 December 1967, 2467 (XXIII) of 21 December 1968 and 2574 (XXIV) of 15 December 1969, concerning the area of which the title of the item refers,

Affirming that there is an area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national-jurisdiction, the precise limits of which are yet to be determined,

Recognizing that the existing legal regime of the high seas does not provide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources,

Convinced that the area shall be reserved exclusively for peaceful purposes and that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole,

Believing it essential that an international regime applying to the area and its resources and including appropriate international machinery should be established as soon as possible,

Bearing in mind that the development and use of the area and its resources shall be undertaken in such a manner as to foster the healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by the fluctuation of prices of raw materials resulting from such activities,

Solemnly declares that:

1. The sea-bed and ocean floor, and the subsoil thereof,

beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established.

5. The area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked without discrimination, in accordance with the international regime to be established.

6. States shall act in the area in accordance with the applicable principles and rules of international law, including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries.

8. The area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area. One or more international agreements shall be concluded as soon as possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor and the subsoil thereof from the arms race.

9. On the basis of the principles of this Declaration, an international regime applying to the area and its resources

and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The regime shall, inter alia provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof, and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.

10. States shall promote international co-operation in scientific research exclusively for peaceful purposes:

a. By participation in international programmes and by encouraging co-operation in scientific research by personnel of different countries;

b. Through effective publication of research programmes and dissemination of the results of research through international channels;

c. By co-operation in measures to strengthen research capabilities of developing countries, including the participation of their nationals in research programmes. No such activity shall form the legal basis for any claims with respect to any part of the area or its resources.

11. With respect to activities in the area and acting in conformity with the international regime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, inter alia:

a. The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment;

b. The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment.

12. In their activities in the area, including those relating to its resources, States shall pay due regard to the rights and legitimate interests of coastal States in the region of such activities, as well as of all other States, which may be affected by such activities. Consultations shall be maintained with the coastal States concerned with respect to activities relating to the exploration of the area and the exploitation of its resources with a view to avoiding infringement of such rights and interests.

13. Nothing herein shall affect:

a. The legal status of the waters superjacent to the area or that of the air space above those waters;

b. The rights of coastal States with respect to measures to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the area, subject to the international regime to be established.

14. Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international regime to be established. The same responsibility applies to international organisations and their members for activities undertaken by such organizations or on their behalf. Damage caused by such activities shall entail liability.

15. The parties to any dispute relating to activities in the area and its resources shall resolve such dispute by the measures mentioned in Article 33 of the Charter of the United Nations and such procedures for settling disputes as may be agreed upon in the international regime to be established.

APPENDIX B

RESOLUTIONS ADOPTED ON THE REPORT OF THE AD HOC COMMITTEE OF THE SIXTH SPECIAL SESSION

DECLARATION ON THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER

We, the Members of the United Nations,

Having convened a special session of the General Assembly to study for the first time the problems of raw materials and development, devoted to the consideration of the most important economic problems facing the world community,

Bearing in mind the spirit, purposes and principles of the Charter of the United Nations to promote the economic advancement and social progress of all peoples,

Solemnly proclaim our united determination to work urgently for THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, making it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations, and, to that end, declare:

1. The greatest and most significant achievement during the last decades has been the independence from colonial and alien domination of a large number of peoples and nations which has enabled them to become members of the community of free peoples. Technological progress has also been made in all spheres of economic activities in the last three decades, thus providing a solid potential for improving the well-being of all peoples. However, the remaining vestiges of alien and colonial domination, foreign occupation, racial discrimination, apartheid and neo-colonialism in all its forms continue to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved. The benefits of technological progress are not shared equitably by all members of the international community. The developing countries, which constitute 70 per cent of the world's population, account

for only 30 per cent of the world's income. It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developed and the developing countries continues to widen in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality.

2. The present international economic order is in direct conflict with current developments in international political and economic relations. Since 1970, the world economy has experienced a series of grave crises which have had severe repercussions, especially on the developing countries because of their generally greater vulnerability to external economic impulses. The developing world has become a powerful factor that makes its influence felt in all fields of international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community.

3. All these changes have thrust into prominence the reality of interdependence of all the members of the world community. Current events have brought into sharp focus the realization that the interests of the developed countries and those of the developing countries can no longer be isolated from each other, that there is a close interrelationship between the prosperity of the developed countries and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts. International co-operation for development is the shared goal and common duty of all countries. Thus the political, economic and social well-being of present and future generations depends more than ever on co-operation between all the members of the international community on the basis of sovereign equality and the removal of the disequilibrium that exists between them.

4. The new international economic order should be founded on full respect for the following principles:

(a) Sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States;

(b) The broadest co-operation of all the States members of the international community, based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all;

(c) Full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries, bearing in mind the necessity to ensure the accelerated development of all the developing countries, while devoting particular attention to the adoption of special measures in favour of the least developed, land-locked and island developing countries as well as those developing countries most seriously affected by economic crises and natural calamities, without losing sight of the interests of other developing countries;

(d) The right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result;

(e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right;

(f) The right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples;

(g) Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries.

(h) The right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities;

(i) The extending of assistance to developing countries, peoples and territories which are under colonial and alien domination, foreign occupation, racial discrimination or apartheid or are subjected to economic, political or any other type of coercive measures to obtain from them the subordination of the exercise of their sovereign rights and to secure from them advantages of any kind, and to neocolonialism in all its forms, and which have established or are endeavouring to establish

effective control over their natural resources and economic activities that have been or are still under foreign control;

(j) Just and equitable relationship between the prices of raw materials, primary commodities, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy;

(k) Extension of active assistance to developing countries by the whole international community, free of any political or military conditions;

(l) Ensuring that one of the main aims of the reformed international monetary system shall be the promotion of the development of the developing countries and the adequate flow of real resources to them;

(m) Improving the competitiveness of natural materials facing competition from synthetic substitutes;

(n) Preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible;

(o) Securing favourable conditions for the transfer of financial resources to developing countries;

(p) Giving to the developing countries access to the achievements of modern science and technology, and promoting the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies;

(q) The need for all States to put an end to the waste of natural resources, including food products;

(r) The need for developing countries to concentrate all their resources for the cause of development;

(s) The strengthening, through individual and collective actions, of mutual economic, trade, financial and technical co-operation among the developing countries, mainly on a preferential basis;

(t) Facilitating the role which producers' associations may play within the framework of international co-operation and, in pursuance of their aims, inter alia assisting in the promotion of sustained growth of the world economy and accelerating the development of developing countries.

5. The unanimous adoption of the International Development Strategy for the Second United Nations Development Decade was an important step in the promotion of international economic co-operation on a just and equitable basis. The accelerated implementation of obligations and commitments assumed by the international community within the framework of the Strategy, particularly those concerning imperative development needs of developing countries, would contribute significantly to the fulfilment of the aims and objectives of the present Declaration.

6. The United Nations as a universal organization should be capable of dealing with problems of international economic co-operation in a comprehensive manner and ensuring equally the interests of all countries. It must have an even greater role in the establishment of a new international economic order. The Charter of Economic Rights and Duties of States, for the preparation of which the present Declaration will provide an additional source of inspiration, will constitute a significant contribution in this respect. All the States Members of the United Nations are therefore called upon to exert maximum efforts with a view to securing the implementation of the present Declaration, which is one of the principal guarantees for the creation of better conditions for all peoples to such a life worthy of human dignity.

7. The present Declaration on the Establishment of a New International Economic Order shall be one of the most important bases of economic relations between all peoples and all nations.

APPENDIX C

THE ANTARCTIC TREATY

The Governments of Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America,

Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord;

Acknowledging the substantial contributions to scientific knowledge resulting from international co-operation in scientific knowledge resulting from international co-operation in scientific investigation in Antarctica;

Convinced that the establishment of a firm foundation for the continuation and development of such co-operation on the basis of freedom of scientific investigation in Antarctica as applied during the International Geophysical Year accords with the interests of science and the progress of all mankind;

Convinced also that a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations;

Have agreed as follows:

Article I

1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.

2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research for any other peaceful purpose.

Article II

Freedom of scientific investigation in Antarctica and

co-operation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.

Article III

1. In order to promote international co-operation in scientific investigation in Antarctica, as provided for in Article II of the present Treaty, the Contracting Parties agree that, to the greatest extent feasible and practicable: -

- (a) information regarding plans for scientific programs in Antarctica shall be exchanged to permit maximum economy and efficiency of operations;
- (b) scientific personnel shall be exchanged in Antarctica between expeditions and stations;
- (c) scientific observations and results from Antarctica shall be exchanged and made freely available.

2. In implementing this Article, every encouragement shall be given to the establishment of co-operative working relations with those Specialized Agencies of the United Nations and other international organizations having a scientific or technical interest in Antarctica.

Article IV

1. Nothing contained in the present Treaty shall be interpreted as: -

- (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
- (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
- (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. 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 an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Article V

1. Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.

2. In the event of the conclusion of international agreements concerning the use of nuclear energy, including nuclear explosions and the disposal of radioactive waste material, to which all of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX are parties, the rules established under such agreements shall apply in Antarctica.

Article VI

The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.

Article VII

1. In order to promote the objectives and ensure the observance of the provisions of the present Treaty, each Contracting Party whose representatives are entitled to participate in the meetings referred to in Article IX of the Treaty shall have the right to designate observers to carry out any inspection provided for by the present Article. Observers shall be nationals of the Contracting Parties which designate them. The names of observers shall be communicated to every other Contracting Party having the right to designate observers, and like notice shall be given of the termination of their appointment.

2. Each observer designated in accordance with the provisions of paragraph 1 of this Article shall have complete freedom of access at any time to any or all areas of Antarctica.

3. All areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, shall be open at all times to inspection by any observers designated in accordance with paragraph 1 of this Article.

4. Aerial observation may be carried out at any time over any or all areas of Antarctica by any of the Contracting Parties having the right to designate observers.

5. Each Contracting Party shall, at the time when the present Treaty enters into force for it, inform the other Contracting Parties, and thereafter shall give them notice in advance, of

- (a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory;
- (b) all stations in Antarctica occupied by its nationals; and
- (c) any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article I of the present Treaty.

Article VIII

1. In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers designated under paragraph 1 of Article VII and scientific personnel exchanged under subparagraph 1 (b) of Article III of the Treaty, and members of the staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions.

2. Without prejudice to the provisions of paragraph 1 of this Article, and pending the adoption of measures in pursuance of subparagraph 1 (e) of Article IX, the Contracting Parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution.

Article IX

1. Representatives of the Contracting Parties named in the preamble to the present Treaty shall meet at the City of Canberra within two months after the date of entry into force of the Treaty, and thereafter at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and

formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding:

- (a) use of Antarctica for peaceful purposes only;
- (b) facilitation of scientific research in Antarctica;
- (c) facilitation of international scientific co-operation in Antarctica;
- (d) facilitation of the exercise of the rights of inspection provided for in Article VII of the Treaty;
- (e) questions relating to the exercise of jurisdiction in Antarctica;
- (f) preservation and conservation of living resources in Antarctica.

2. Each Contracting Party which has become a party to the present Treaty by accession under Article XIII shall be entitled to appoint representatives to participate in the meetings referred to in paragraph 1 of the present Article, during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition.

3. Reports from the observers referred to in Article VII of the present Treaty shall be transmitted to the representatives of the Contracting Parties participating in the meetings referred to in paragraph 1 of the present Article.

4. The measures referred to in paragraph 4 of this Article shall become effective when approved by all the Contracting Parties whose representatives were entitled to participate in the meetings held to consider those measures.

5. Any or all of the rights established in the present Treaty may be exercised as from the date of entry into force of the Treaty whether or not any measures facilitating the exercise of such rights have been proposed, considered or approved as provided in this Article.

Article X

Each 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 principles or purposes of the present Treaty.

Article XI

1. If any dispute arises between two or more of the Contracting Parties concerning the interpretation or application of the present Treaty, those Contracting Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent, in each case, of all parties to the dispute, be referred to the International Court of Justice for settlement; but failure to reach agreement on reference to the International Court shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any various peaceful means referred to in paragraph 1 of this Article.

Article XII

1. - (a) The present Treaty may be modified or amended at any time by unanimous agreement of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX. Any such modification or amendment shall enter into force when the depositary Government has received notice from all such Contracting Parties that they have ratified it.

(b) Such modification or amendment shall thereafter enter into force as to any other Contracting Party when notice of ratification by it has been received by the depositary Government. Any such Contracting Party from which no notice of ratification is received within a period of two years from the date of entry into force of the modification or amendment in accordance with the provisions of subparagraph 1 (a) of this Article shall be deemed to have withdrawn from the present Treaty on the date of the expiration of such period.

2. - (a) If after the expiration of thirty years from the date of entry into force of the present Treaty, any of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX so requests by a communication addressed to the depositary Government, a Conference of all the Contracting Parties shall be held as soon as practicable to review the operation of the Treaty.

(b) Any modification or amendment to the present Treaty which is approved at such a Conference by a majority of the Contracting Parties there represented, including a majority of those whose representatives are entitled to participate in the meetings provided for under Article IX, shall be communicated by the depositary Government to all the Contracting Parties immediately after the termination of the Conference and shall enter into force in accordance with the provisions of paragraph 1 of the present Article.

(c) If any such modification or amendment has not entered into force in accordance with the provisions of subparagraph 1 (a) of this Article within a period of two years after the date of its communication to all the Contracting Parties, any Contracting Party may at any time after the expiration of that period give notice to the depositary Government of its withdrawal from the present Treaty; and such withdrawal shall take effect two years after the receipt of the notice by the depositary Government.

Article XIII

1. The present Treaty shall be subject to ratification by the signatory States. It shall be open for accession by any State which is a Member of the United Nations, or by any other State which may be invited to accede to the Treaty with the consent of all the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX of the Treaty.

2. Ratification of or accession to the present Treaty shall be effected by each State in accordance with its constitutional processes.

3. Instruments of ratification and instruments of accession shall be deposited with the Government of the United States of America, hereby designated as the depositary Government.

4. The depositary Government shall inform all signatory and acceding States of the date of each deposit of an instrument of ratification or accession, and the date of entry into force of the Treaty and of any modification or amendment thereto.

5. Upon the deposit of instruments of ratification by all the signatory States, the present Treaty shall enter into force for those States and for States which have deposited instruments of accession. Thereafter the Treaty shall enter into force for any acceding State upon the deposit of its instrument of accession.

6. The present Treaty shall be registered by the depositary Government pursuant to Article 102 of the Charter of the United Nations.

Article XIV

The present Treaty, done in English, French, Russian, and Spanish languages, each version being equally authentic, shall be deposited in the archives of the Government of the United States of America, which shall transmit duly certified copies thereof to the Governments of the signatory and acceding States.

In witness whereof, the undersigned Plenipotentiaries, duly authorized, have signed the present Treaty.

Done at Washington this first day of December one thousand nine hundred and fifty-nine.

APPENDIX D

TREATY ON PRINCIPLES GOVERNING THE ACTIVITIES OF STATES IN THE
EXPLORATION AND USE OF OUTER SPACE, INCLUDING THE MOON AND
OTHER CELESTIAL BODIES

The States Parties to this Treaty,

Inspired by the great prospects opening up before mankind as a result of man's entry into outer space,

Recognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,

Believing that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development,

Desiring to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes,

Believing that such co-operation will contribute to the development of mutual understanding to the strengthening of friendly relations between States and peoples,

Recalling resolution 1962 (XVIII), entitled "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space", which was adopted unanimously by the United Nations General Assembly on 13 December 1963,

Recalling resolution 1884 (XVIII), calling upon States to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction or from installing such weapons on celestial bodies, which was adopted unanimously by the United Nations General Assembly on 17 October 1963,

Taking account of United Nations General Assembly resolution 110 (II) of 3 November 1947, which condemned propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace or act of aggression, and considering that the aforementioned resolution is applicable to outer space,

Convinced that a Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, will further the Purposes and Principles of the Charter of the United Nations,

Have agreed on the following: -

Article I

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation.

Article II

Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Article III

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.

Article IV

States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by all

States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

Article V

States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle.

In carrying on activities in outer space and on celestial bodies, the astronauts of one State Party shall render all possible assistance to the astronauts of other States Parties.

States Parties to the Treaty shall immediately inform the other States Parties to the Treaty or the Secretary-General of the United Nations of any phenomena they discover in outer space, including the moon and other celestial bodies, which could constitute a danger to the life or health of astronauts.

Article VI

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.

Article VII

Each State Party to the Treaty that launches or procures the landing of an object into outer space, including the moon and other celestial bodies, and each State Party from whose

territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such objects or its component parts on the Earth, in air space or in outer space, including the moon and other celestial bodies.

Article VIII

A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return.

Article IX

In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, may request consultation concerning the activity or experiment.

Article X

In order to promote international co-operation in the exploration and use of outer space, including the moon and other celestial bodies, in conformity with the purposes of this Treaty, the States Parties to the Treaty shall consider on a basis of equality any requests by other States Parties to the Treaty to be afforded an opportunity to observe the flight of space objects launched by those States.

The nature of such an opportunity for observation and the conditions under which it could be afforded shall be determined by agreement between the States concerned.

Article XI

In order to promote international co-operation in the peaceful exploration and use of outer space, States Parties to the Treaty conducting activities in outer space, including the moon and other celestial bodies, agree to inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, locations and results of such activities. On receiving the said information, the Secretary-General of the United Nations should be prepared to disseminate it immediately and effectively.

Article XII

All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity. Such representatives shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited.

Article XIII

The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the moon and other celestial bodies, whether such activities are carried on by a single State Party to the Treaty or jointly with other States, including cases where they are carried on within the framework of international inter-governmental organization.

Any practical questions arising in connexion with activities carried on by international inter-governmental organizations in the exploration and use of outer space, including the moon and other celestial bodies, shall be resolved

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by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to this Treaty.

Article XIV

1. This Treaty shall be open to all States for signature. Any State which does not sign this Treaty before its entry into force in accordance with paragraph 3 of this Article may accède to it at any time.

2. This Treaty shall be subject to ratification by signatory States, Instruments of ratification and instruments of accession shall be deposited with the Governments of the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America, which are hereby designated the Depositary Governments.

3. This Treaty shall enter into force upon the deposit of instruments of ratification by five Governments including the Governments designated as Depositary Governments under this Treaty.

4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification of and accession to this Treaty, the date of its entry into force and other notices.

6. This Treaty shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

Article XV

Any State Party to the Treaty may propose amendments to this Treaty. Amendments shall enter into force for each State Party to the Treaty accepting the amendments upon their acceptance by a majority of the States Parties to the Treaty and thereafter for each remaining State Party to the Treaty on the date of acceptance by it.

Article XVI

Any state Party to the Treaty may give notice of its withdrawal from the Treaty one year after its entry into force by written notification to the Depositary Governments. Such

ithdrawal shall take effect one year from the date of receipt of this notification.

Article XVII

This Treaty, of which the English, Russian, French, Spanish and Chinese texts are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified copies of this Treaty shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding States.

In witness whereof, the undersigned, duly authorized, have signed this Treaty.

Done in triplicate, at the cities of London, Moscow and Washinton, the twenty-seventh day of January, one thousand nine hundred and sixty-seven.