
Charles E. Biblowit
INTRODUCTION

Throughout the years of negotiations concerning the United Nations Conference on the Law of the Sea, no issue generated more controversy than the "moratorium question"—whether states with the technical capacity to mine the seabed beyond their jurisdictional limits were free, under international law, to do so pending the conclusion of a treaty. Much of this debate rested on
what has proven to be a false assumption: that either a treaty acceptable to the United States and to other potential seabed mining countries would emerge, or the Conference would produce no treaty at all. Contrary to these expectations, a treaty—the United Nations Convention on the Law of the Sea—was adopted and signed by the vast majority of nations, yet was rejected by the United States. The United States now seeks instead to assert the


right of its nationals to mine the seabed independently of the treaty by negotiating a reciprocating states agreement, or "mini-treaty," with the handful of other industrialized countries that have not yet decided whether to sign the United Nations Convention.\(^6\)

This unexpected outcome has given new life to the debate. Indeed, the President of the Law of the Sea Conference has stated

was approved by an overwhelming majority of the industrialized and developing states, and has been signed by most developing countries as well as a number of industrialized states. Among the industrialized states that have signed the Convention are Canada, France, and the Soviet Union. See U.N. Convention on the Law of the Sea 1982, xx-xxi (K. Simmonds ed. 1983) [hereinafter cited as LAW OF THE SEA 1982]. The United States, Venezuela, Turkey, and Israel voted against adoption of the Convention. See id. at xxi. The United States' rejection of the treaty stems not from rejection of the concept of an international regime, but from dissatisfaction with certain provisions of the treaty that arguably do not represent the relative interests of the developed states. MacRae, Customary International Law and the United Nations' Law of the Sea Treaty, 13 Cal. W.J. Int'l L. 181, 221 (1983); see also LAW OF THE SEA 1982, supra, at xvi-xvii (mandatory transfers of technology by member states, power granted to developing nations in Sea-bed Authority, and the process of amendment by majority vote perceived by President Reagan as fundamental reasons for treaty rejection).

\(^6\) See, e.g., LAW OF THE SEA 1982, supra note 5, at xi; Cohen, International Cooperation on Seabed Mining, in LAW OF THE SEA 104-06 (1983); Molitor, The U.S. Deep Seabed Mining Regulations: The Legal Basis for an Alternative Regime, 19 San Diego L. Rev. 599, 608 (1982). France, the United Kingdom, the United States, and the Federal Republic of Germany, have proposed to enter into an agreement by which a reciprocating states' regime would be created to effectuate the exploration and exploitation of the ocean seabed. LAW OF THE SEA 1982, supra note 5, at xi; see Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed, 21 I.L.M. 950, 950-62 (1982). The proposed regime would provide a workable formula for seabed mining without the required technology transfers and international bureaucratic delays that purportedly would accompany a United Nations treaty. See Marshall, Law of the Sea and the New U.S. Oceans Policy, N.Y. St. B.J., Apr. 1983, at 8, 9-10. Such an agreement would provide for reciprocal recognition of each signatory's mining sites and also would contain a dispute resolution mechanism agreed upon by the signatories. Id. at 10. But cf. Oxman, Introduction: On Evaluating the Draft Convention on the Law of the Sea, 19 San Diego L. Rev. 453, 456-57 (1983) (noting that although a regime representing the confluence of interest of like-minded industrialized nations may lead to greater accumulation of seabed wealth, other values may be of more importance than the need to exploit the seabed efficiently).

The negotiations regarding the creation of an alternative mini-treaty by the industrialized nations brought immediate and caustic comment within the United Nations and the developing world. Burke & Brokaw, Ideology of the Law of the Sea, in LAW OF THE SEA 50-51 (1983) (Third World states would challenge a mini-treaty before the International Court of Justice). Some commentators also have been critical. See Molitor, supra, at 611 (referring to the reciprocal states regime as a fundamental violation of good faith); Ratiner, The Law of the Sea: A Crossroads for American Foreign Policy, 60 Foreign Aff. 1006, 1017 (1982) (execution of an alternative reciprocating states regime will render dubious the lawfulness of mining claims based on regime and will bring the mini-treaty and the international regime into conflict).
that he would ask the General Assembly to seek an advisory opinion from the International Court of Justice if any country were to attempt to mine the seabed outside the Convention regime.  

Nevertheless, it recently has been suggested that the issue of the lawfulness of non-treaty mining\(^7\) no longer is important because such activity will not take place. No mining company, it is said, would risk the enormous capital required for such a venture without the certainty provided by a universal treaty. Present economic conditions do not favor seabed mining, and even if seabed mining were to become economically feasible, mining companies would prefer to mine deposits within the recently expanded national jurisdiction of the coastal states;\(^8\) a reciprocating states agreement would never reach fruition because there will be no other states with which to reciprocate.\(^9\) Although I can neither prove nor disprove the facts underlying these contentions, their premises are at least questionable. Efforts to predict when seabed mining will become attractive economically depend on too many uncertain variables to be relied upon: the future state of the world economy, the political stability of land-based mineral producing countries, the prices of various metals, and the development of

\(^7\) Ratiner, supra note 6, at 1017; Richardson, The United States Posture Toward the Law of the Sea Convention: Awkward but Not Irreparable, 20 San Diego L. Rev. 505, 509 n.14 (1983). Ambassador Richardson has indicated that the court probably would hold mining outside the Convention illegal, despite arguments that such mining is a high seas freedom. Richardson, supra, at 509. However, nothing in the court's jurisprudence would suggest such a holding. See infra notes 150-52 and accompanying text.

\(^8\) For the sake of brevity, mining under the flags of states not parties to the Convention on the Law of the Sea will be referred to as “non-treaty mining” throughout this Article, even though it also may occur pursuant to a treaty, separately negotiated by states that did not ratify the Convention.

\(^9\) See Molitor, supra note 6, at 608. Suppliers of venture capital will be hesitant about investing in an enterprise of such magnitude as a deep seabed mining project with merely the security of a “single nation's legislative authority.” Id. It also is unlikely that bankers would risk lending the billion-dollar sums necessary for seabed exploration to entities operating independently of the Convention, since ownership of the discovered resources would be questionable. Borgese, The Role of the International Seabed Authority in the 1980's, 18 San Diego L. Rev. 395, 400-01 (1981); Brewer, Deep Seabed Mining: Can An Acceptable Regime Ever be Found?, 12 Ocean Dev. & Int'l L.J. 25, 42 (1983); Christy, Alternative Regimes for Marine Resources Underlying the High Seas, Nat. Resources Law., June 1988, at 63, 64-66; Marshall, supra note 6, at 13; Richardson, supra note 7, at 508; Nossiter, N.Y. Times, May 2, 1982.

\(^10\) See Ratiner, supra note 6, at 1017; see also Van Dyke & Yuen, supra note 2, at 550 (members of non-treaty regime would suffer adverse effects as a result of Convention). It has been suggested that the industrialized nations most likely to mine the seabed, for example, Japan, France, and West Germany, will find the Law of the Sea treaty too attractive to resist and therefore eventually will ratify the treaty. Ratiner, supra note 6, at 1017.
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technology. History suggests, however, that when technology makes a valuable natural resource accessible, exploitation results. Indeed, the history of classical international law is virtually coextensive with the history of European efforts to exploit the resources of the world that were made available to them by advancing technology. The United States Government must believe that seabed mining will become important or presumably it would not have rejected a treaty that is otherwise so beneficial to its economic and strategic interests.

Moreover, happily or not, the decision of the United States not to sign the Convention is irreversible and a reciprocating states agreement remains a realistic possibility. The United States Senate is an institution jealous of its prerogatives. As long as opponents of the treaty can argue that the Convention raises a possibility of

11 See Branco, The Tax Revenue Potential of Manganese Nodules, 1 Ocean Dev. & Int'l L.J. 201, 203-08 (1973); Young, Inducement for Exploration by Companies, 6 Syracuse J. Int'l L. & Com. 199, 201 (1978). But see E. Luard, The Control of the Seabed 274-80 (1977) (expressing optimism about the predictability of economic variables affecting the viability of seabed mining). The mere presence of minerals on the ocean floor and the existence of the applied technology necessary to harvest and process them is not conclusive evidence that they ultimately will be exploited; a determination of the feasibility of such mining requires recourse to speculative forecasts of future production costs and market prices. D. Leipziger & J. Mudge, Seabed Mining Resources and the Economic Interests of Developing Countries 145 (1976). Consequently, although the earliest anticipated commencement of commercial exploitation of seabed minerals will be in the 1990's, both developed and undeveloped nations are examining the investment atmosphere to measure the availability of risk venture capital. See id. at 130-31. Unfortunately, it is difficult to perform any meaningful cost analysis at this stage, since most expenditures are calculated in terms of exploration costs, and not in terms of the costs of the actual exploitation. Id. at 158. The problem is compounded by the fact that extraction costs will escalate as land-based resources are depleted, since this will increase the number of seabed projects initiated. See R. Eckert, The Enclosure of Ocean Resources 7 (1979). As for market prices, the use of past price patterns to predict future price performance can be misleading, particularly in the fossil fuel market, because of the possibility of cartel formation. D. Leipziger & J. Mudge, supra, at 48.

12 See, e.g., H. Smith, The Law and Custom of the Sea 4-5 (1950) (European voyages of exploration spurred development of modern international law); cf. H. Bokor-Szego, The Role of the United Nations in International Legislation 10 (1978) (effect of technological revolution was to alter the nature of international law and to increase the number of rules comprising it).

13 In announcing his decision not to sign the Convention, President Reagan acknowledged that "[t]hose extensive parts dealing with navigation and overflight and most other provisions of the Convention are consistent with United States interests." Statement by the President on the Convention on the Law of the Sea, 18 Weekly Comp. Pres. Doc. 887 (July 9, 1982); see also McCloskey & Losch, supra note 4, at 241-42 (United States' interests include freedom of navigation on the high seas and in international straits, protection of fishing and breeding grounds, and of the ocean habitat).
amendment without resubmission to the Senate, the prospects for Senate consent will be dim. Under even the best of circumstances, obtaining Senate approval of a treaty can be difficult. Treaties far less controversial than the Law of the Sea Convention—the Genocide Convention, even the Vienna Convention on the Law of Treaties—have foundered there. In light of the vigorous and influential opposition to the Convention in the United States, and the absence of any substantial constituency supporting it, even a sympathetic President is unlikely to expend much political capital garnering Senate consent. Further, the United States’ nonparticipation in the Preparatory Commission’s drafting of regulations may lead to a regime less favorable to American interests than otherwise would have resulted. In addition, belated signature by the United States would mean that crucial positions

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15 Senate consent to and subsequent ratification of a treaty often will be delayed by domestic political considerations. See G. von Glahn, Law Among Nations 424 (4th ed. 1981). The failure to ratify the Convention also may be the result of disputes as to the pact’s consistency with American law. See, e.g., id. at 308 (citing Convention on the Prevention and Punishment of the Crime of Genocide, which has not been ratified by the Senate for over 30 years, as an example of a treaty whose ratification has been delayed repeatedly as a result of purported constitutional infirmities). See generally Restatement (Second) of the Foreign Relations Law of the United States § 130 (1965) (Congress’ consent required as a condition precedent to President’s ratification of a treaty).


17 The failure of the United States to participate in the final stages of the treaty bargaining process resulted in the loss of potential concessions in the transfer of technology provisions and in the amendment provisions, see Richardson, supra note 7, at 507-08 & 508 n.8, and the nation’s ideologically rigid stance prevented renegotiation which might have resulted in a compromise more sensitive to American interests, see Ratiner, supra note 6, at 1013-14.
in the Secretariat of the International Seabed Authority and on the International Tribunal for the Law of the Sea, which otherwise would have been filled by United States nationals, will be filled by others. Thus, the more time that passes, the less likely it is that the United States will participate.

Nor is it certain that the rest of the industrialized world will ratify the Convention. Several major industrial states have not yet signed the treaty, citing reservations about the seabed mining provisions. These nations may ultimately conclude that their larger national interests are served better by participation, or they may be mollified by the work of the Preparatory Commission. But their signatures still are far from certain. Such nations are subject to conflicting domestic political pressures, and progress at the Preparatory Commission has been slow. Even countries that have signed the treaty may fail to ratify it. The history of United Nations treaty making is replete with treaties that have been adopted overwhelmingly, yet have not been widely ratified. Nations such as France, Japan, and the Soviet Union have signed the Convention, but have kept their options open by adopting interim seabed

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18 See Jones, The International Sea-Bed Authority Without U.S. Participation, 12 Ocean Dev. & Int'l L.J. 151, 155-60 (1983). Passage of the Law of the Sea Treaty without United States participation could have adverse consequences as to the United States' ability to exert leadership and direction in the international arena in areas other than deep sea mining. Id. at 156.

19 See Law of the Sea 1982, supra note 5, at xxi. Prospective seabed mining countries that have not signed the Convention include Belgium, the Federal Republic of Germany, the United Kingdom, and the United States. Id. The United States and the United Kingdom maintain that certain provisions of part XI, including the mandatory transfer of sensitive exploration and exploitation technology, are antithetical to their strategic interests. Id. at xi-xii. See generally E. Luard, supra note 11, at 176-77 (industrialized nation-states urged that the proposed international authority limit its control and supervision over deep seabed mining).


21 See Gamble, Where Trends the Law of the Sea?, 10 Ocean Dev. & Int'l L.J. 61, 76 (1981). Gamble notes that the new treaty might never enter into force at all. Id. at 76-77. After examining the fate of other treaties and conventions that have been adopted by an overwhelming margin, he observes that nearly one-half of the signatories of these treaties failed to ratify them. Id. at 76.
mining laws that could become permanent. In this connection, it should be noted that the headlong rush to sign has not been followed by a similar rush to ratify.

If a significant number of prospective seabed mining states decide not to ratify the Convention, a "mini-treaty" would become a viable alternative. Though the legal and political risks to a miner operating under such a regime are no doubt formidable, they are no greater than those faced by investors in many Third World countries, where mining companies have learned to live with, and to make allowance for, the threats of political turmoil, nationalization, and renegotiation—risks that are absent from a reciprocating states regime. If the price is right, capitalists will take their chances.

Thus, while mining outside the United Nations Convention is unlikely if the United States is the only mining country that fails to ratify, a reciprocating states agreement may well emerge to make non-treaty mining a reasonable prospect. Seabed mining surely will occur, sooner or later. When it does, conflict between parties to the United Nations Convention and non-party miners is the probable result. The legal framework for dealing with such a

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23 As of September, 1983, only 9 of the 131 states that signed the Convention had ratified it. See LAW OF THE SEA BULL., Sept. 1, 1983, at 6-10 (table).

24 See Darman, The Law of the Sea: Rethinking U.S. Interests, 56 FOREIGN AFF. 373, 393-95 (1978); supra note 6 and accompanying text.

25 See, e.g., Darman, supra note 24, at 393 (minitreaty would tarnish the image of international corporations); supra notes 7 & 9 and accompanying text (possible disapproval of International Court of Justice and reluctance of mining companies to mine pursuant to minitreaties).

26 Events in Iran after the fall of the Shah in 1979 illustrate in an unusually dramatic way the risks faced by American businesses in international operations. The immediate consequence of the Iranian revolution and the resulting nationalization was the possible loss of an incalculable amount of money by American firms. See Eskridge, The Iranian Nationalization Cases: Toward a General Theory of Jurisdiction over Foreign States, 22 HARV. INT'L L.J. 525, 525-26 (1981). The subsequent agreement between the United States and Iran requiring the United States to terminate all pending and future proceedings in American courts against Iran and to nullify all judgments and resort to arbitration further complicated the financial consequences of the upheaval. See Dames & Moore v. Regan, 453 U.S. 654, 686-88 (1981) (upholding United States-Iranian arbitration agreement in regard to claims brought against Iran in American courts).
conflict is now largely in place.

Beyond the possibility of a legal confrontation between seabed miners operating outside the Convention and the rest of the international community, there is another reason for giving attention to the lawfulness of non-treaty mining. It raises fundamental questions regarding the nature of the international lawmaking process. Indeed, non-treaty mining must be held lawful unless the international community is prepared to reject one of three norms long considered inherent in the traditional, consensual view of international law: (1) the presumption that states are free to do as they wish in the absence of a rule limiting that freedom; (2) the rule that states cannot be bound, without their consent, by a treaty to which they have not adhered; or (3) the rule that states cannot be bound by a new rule of customary law over their express and timely objection. While elaborate arguments have been made that non-treaty mining would be illegal, all such arguments ultimately must rest on a rejection of one of these fundamental premises.

THE FREEDOM TO MINE THE SEABED

Seabed Mining as a Freedom of the High Seas

The United States and other prospective seabed miners long have insisted that seabed mining is a freedom of the high seas under customary law, as reflected in the Geneva Convention on the High Seas. Opponents of non-treaty mining have maintained,

27 See 9 Official Records, Third United Nations Conference on the Law of The Sea 104, 106, U.N. Sales No. E.79V.3 (1980) [hereinafter cited as UNCLOS Official Records] (insistence by United States, France, and West Germany that seabed mining is a freedom of the high seas). At the Conference, Japan's representative stated that his country did not believe that the measures being undertaken by the other pro-exploitation nations necessarily were unlawful in the absence of a treaty. Id. at 107. The United States ambassador maintained that exploration and exploitation of the seabed is a right inherent in the concept of freedom of the seas. See id. at 106; cf. 2 T. KRONMILLER, supra note 1, at 195-96 (statement of John B. Breaux, Chairman of the Subcommittee on Fisheries and Wildlife Conservation and the Environment, criticizing Third World opposition to the United States' position as a "political attempt to secure economic advantages").


The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:

(1) Freedom of Navigation;
with equal vigor, that it is not. The argument is necessarily inconclusive. Since, in the past, deep seabed mining has not been technically feasible, no definitive state practice exists. Seabed mining is not among the activities expressly named in the Geneva Convention as freedoms of the high seas, but the list is, on its face, open-ended rather than exhaustive. The travaux préparatoires of the Geneva Convention can be cited in support of either position; see also the International Law Commission considered identifying seabed mining as a freedom of the high seas, but decided not to do so precisely because such activities seemed too remote a prospect. One may argue, based on analogies to other activities deemed lawful but not enumerated in the Geneva Convention, that the freedom of the seas may encompass new uses that previously were not feasible technologically. But this argument faces the problem in-

(2) Freedom of Fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.

Id. at 2314, T.I.A.S. No. 5200, 450 U.N.T.S. at 83-84.


Compare 1 T. Kronmiller, supra note 1, at 349-449 (seabed mining open to all nations) and Burton, supra note 2, at 1170-76 (travaux préparatoires support the view that seabed mining is a freedom of the high seas) with Van Dyke & Yuen, supra note 2, at 501-08 (travaux préparatoires are ambiguous and do not demonstrate that seabed mining is a freedom of the high seas).

One analogy employed to justify deep seabed mining is that marine scientific research has been deemed a freedom of the high seas, even though it is not specifically listed in the Geneva Convention as such. See 1 T. Kronmiller, supra note 1, at 495-500. Marine research is analogous to seabed mining in a number of ways. Id. at 495. For instance, research vessels often place equipment into the seabed in the course of their experiments. Id. Another activity that may be permissible as a freedom of the high seas is the disposal of wastes, provided such disposal is conducted in a reasonable manner consistent with treaty obligations. Id. at 504-05. The most common analogies are, however, those specifically mentioned in article 2 of the Convention on the High Seas. This provision labels as freedoms
herent in all such arguments: analogies are, by definition, distinguishable.\(^3\)

The Group of 77 also has argued that even if seabed mining was once a freedom of the seas, it no longer is so because the majority of states now reject this justification; the *opinio juris*—the conviction that a particular usage is a matter of legal right and obligation—is said now to be lacking.\(^4\) But this argument is no more than another way of saying that a new rule of customary law prohibiting non-treaty mining has emerged, a topic to which I shall turn later.\(^5\)

### The Presumption in Favor of Sovereign Independence

Although no firm conclusion can be drawn as to whether seabed mining is a freedom of the high seas, the ultimate justification for the position of the United States rests on the more general, more fundamentally consensual premise that states are free to act in the absence of a restriction imposed by international law, since "[r]estrictions upon the independence of States cannot . . . be presumed."\(^6\) This principle too was affirmed by the western industri-

activities such as fishing and the laying of submarine cables and pipelines. See *supra* note 28.


\(^5\) See *infra* notes 131-37 and accompanying text.

\(^6\) The S.S. Lotus (Fr. v. Turk.), 1927 P.C.IJ., ser. A, No. 10 at 18 (Judgment of Sept. 7). The concept of a state's freedom to act in the absence of any restriction is perhaps best presented in this oft-quoted statement from the *S.S. Lotus case*:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in convention or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

*Id.* The presumption has not met with universal approval. See, e.g., Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, [1953] BARR. Y.B. INT'L L. 1, 9-18. Fitzmaurice's contention is that while in
alized countries during the Law of the Sea Conference, and has support in the decisions of international tribunals; in determining whether the conduct of a state is lawful, courts generally ask whether the action is contrary to a rule of international law, rather than whether it is affirmatively authorized by a permissive rule.

At the very least, the presumption in favor of sovereign independence is warranted with respect to activities made possible for the first time by advances in technology. Were it not so, such activities would always be unlawful because there could be no specific prior customary rule permitting them. The practice of states has been to proceed without awaiting the authorization of the international community. Neither the United States nor the Soviet Union

the past states may have been free to act in the absence of any prohibition, in the modern world such a policy “leads in the final analysis to anarchy, since in the absence of any clearly proved restricting rule it makes the rights and actions of States dependent in the last resort on their own will and nothing else.” *Id.* at 10; *see also* H. Lauterpacht, *The Function of Law in the International Community* 95-96 (1933) (danger exists that the conception of states’ independence may be used improperly).

*See supra* note 27 and accompanying text. In a debate on the proposed implementation of unilateral deep seabed mining legislation, the French delegate M. De Lacharriere argued that “no Government could be bound under international law unless it agreed to be so bound in a treaty.” 9 UNCLOS Official Records, *supra* note 27, at 106. He also contended that since there were no provisions in existing positive international law that prohibited the reasonable exploitation of the seabed, France was free to act. *Id.* The French delegate was supported by the United States delegate, *id.* at 104, the West German delegate, *id.* at 106, and the representative from Belgium, *id.* at 107. *See generally* *id.* at 103-09 (opinions of delegates from numerous states on the question of unilateral exploitation of the seabed).

*See* Arrow, *The Customary Norm Process and the Deep Seabed*, 9 Ocean Dev. & Int’l L.J. 1, 3 (1981). In Fisheries, (U.K. v. Nor.), 1951 I.C.J. 116, 132 (Judgment of Dec. 18), the court stated that the actions of the Norwegian Government in setting its boundaries were not contrary to any general legal principles or to any express provisions of international law. *Id.* at 143. Judge Alvarez stated, in a separate opinion, that the steps taken were permissible because they were reasonable, and did not infringe upon rights acquired by other states, nor did such steps harm any general interests. *Id.* at 153; *see also* North Atlantic Coast Fisheries Case (Gr. Brit. v. U.S.), Hague Ct. Rep. (Scott) 141, 156 (Perm. Ct. Arb. 1910). In North Atlantic, Great Britain asserted a right to regulate the liberties conferred by a fishing treaty involving British waters, although the treaty did not expressly provide for such regulation. Hague Ct. Rep. (Scott) at 157. The Court stated that “the right to regulate...is an attribute of sovereignty.” *Id.* Accordingly, if one nation objects to regulations promulgated by another state within that state’s territorial limits, the objecting state would have the burden of proving that the action contravened a rule of international law. *Id.* The Court concluded that the United States—the objecting party—did not demonstrate that a rule of international law controlled the matter, and therefore Great Britain was entitled to take measures necessary for the protection of fisheries and the insurance of proper public morals in general. *Id.* at 171.

In these cases, and in the S.S. Lotus, (Fr. v. Turk.), 1927 P.C.I.J., ser. A. No. 10, at 18 (Judgment of Sept. 7), the court placed the burden of demonstrating a violation of international law on the aggrieved state. *See, e.g.*, *id.*
sought permission before sending the first satellites into earth orbit or before beginning the exploration of outer space. They acted on the presumption that they were free to do so in the absence of a rule to the contrary, and international approval followed. The presumption in favor of sovereign independence is surely the working presumption of the world’s foreign ministries. Indeed, it is a necessary consequence of the consensual view of the nature of international legal obligation. If this presumption is accepted, states are free to mine the seabed beyond their national jurisdiction unless to do so would violate some rule of international law. A determination of the lawfulness of non-treaty mining, therefore, requires a search for a prohibitory rule.

Lawmaking Treaties and Objective Regimes

The Effect of the Convention on Non-treaty Mining

One argument advanced for the proposition that non-treaty mining is unlawful is that the Convention has created legal obligations binding upon nonparties. The language of the treaty has been read as purporting to bar all states, not merely states parties, from engaging in seabed mining without proper authorization from the International Seabed Authority. Although this argument defies the conventional wisdom that treaties bind only parties, eminent publicists have stated that some treaties can create “objective

39 The first attempt by the United Nations to regulate the legal status of outer space was the formation of the Ad Hoc Committee on the Peaceful Uses of Outer Space in 1958. See G. von Glahn, supra note 15, at 421. The Soviet Union, however, refused to participate in this endeavor. Id. Consequently, a treaty concerning the subject of outer space was not signed until January 27, 1967, long after both the United States and the Soviet Union had commenced space exploration. Id. at 422.

40 See, e.g., Fisheries (U.K. v. Nor.) 1951 I.C.J. 116, 152 (Judgment of Dec. 18) (individual opinion of Judge Alvarez); The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10, at 18 (Judgment of Sept. 7). But see Van Dyke & Yuen, supra note 2, at 519-21 (noting that although the Fisheries and S.S. Lotus cases are good law, the proposition that states may act freely in the absence of a specific rule arose only because the unique facts of each case dictated such result).

41 See Ratiner, supra note 6, at 1017, 1020; Richardson, supra note 7, at 509 n.14; Van Dyke & Yuen, supra note 2, at 535.

42 See infra notes 47-57 and accompanying text.

regimes" or have a "lawmaking" character that creates obligations \( \text{erga omnes} \). If such a category of treaty exists, and if this is what the Convention intends, there would be a strong case for including it in the category of treaties that are binding upon nonsignatories. The Convention is a constitutive treaty, of a public character, that establishes an international organization. It was prepared under the auspices of the United Nations with the participation of nearly all the nations of the world. It is "dispositive," in Judge McNair's sense, because it concerns territorial rights and creates a special regime for the Area—the seabed beyond national jurisdiction. It is questionable, however, whether the text of the Convention purports to forbid non-treaty mining, and, even if it does, contemporary international law has rejected the view that there exists such a special category of treaties capable of binding non-party states without their consent.

44 The nature of "objective regimes" has been explained in the following manner:

From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence.


45 Lord McNair expounded on the asserted authority of treaties with regard to third parties:

[T]he effect of certain kinds of treaties \( \text{erga omnes} \) is to be attributed to some inherent and distinctive juridical element in those treaties—in some cases, the 'dispositive' or 'real' character of the transaction effected by the treaty, and the permanent nature of the rights created by or in pursuance of the treaty—in others, the semi-legislative authority of groups of States particularly interested in the settlement or arrangement made.

A. McNair, The Law of Treaties 255 (1961); see also J. Brierly, The Law of Nations 326-27 (6th ed. 1963) (examples of treaties binding all states, whether signatories or not); H. Kelsen, Principles of International Law 484-87 & n.64 (R. Tucker 2d ed. 1966) (treaties imposing obligations on third states); 1 J. Westlake, International Law 60-61 (1904); Fitzmaurice, The Law and Procedure of the International Court of Justice: General Principles and Substantive Law, [1950] Brit. Y.B. Int'l L. 1, 8-10. The International Law Commission, however, declined to include an article in the Vienna Convention that recognized treaties creating objective regimes. See Vienna Convention, supra note 43, art. 34, 8 I.L.M. at 693.

46 "Dispositive" or "real" treaties concern \( \text{in rem} \) rights. A. McNair, supra note 45, at 256. The most recognizable of the objective treaties are the peacemaking variety, which affect the demarcations of national entities through boundary realignment, through establishment of cessions, or through declarations concerning waterways and the territorial rights of bordering nations. Id. The territorial rights thus created have a permanence beyond the existence of the treaty or even the existence of a signatory; in effect, all nations are compelled to honor them. Id. at 256-57.
The argument that the Convention bans all mining outside the treaty regime rests on the observation that certain provisions of the Convention relating to seabed mining refer to "States," while other provisions refer to "States Parties." This distinction is reinforced by the treaty's express definition of "States Parties" as "states which have consented to be bound by this Convention and for which the Convention is in force." Apparently, when the drafters intended a provision to apply only to parties, they said so, and when they intended a provision to apply to nonparties as well as to parties, they were equally explicit. Article 137 provides that no "state" may exercise rights with respect to minerals recovered from the seabed except in accordance with the Convention.

47 Compare LOS Convention, supra note 5, art. 137, para. 1, at 1293 ("[n]o State shall claim or exercise sovereignty or sovereign rights over any part of the [seabed] Area or its resources") and id. art. 142, para. 1, at 1294 (resource salvage activities that overlap limits of national jurisdiction must "be conducted with due regard to the rights and legitimate interests of any coastal State") with id. art. 139, para. 1 at 1293 ("States Parties . . . are responsible for ensuring] that activities in the [seabed] Area . . . be carried out in conformity with [the Convention]") and id. art. 144, para. 2, at 1294 ("Authority and States Parties shall co-operate in promoting the transfer of technology and scientific knowledge" to developing states).

48 Id. art. 1, para. 2(1), at 1271.

49 See supra note 48 and accompanying text. The language of the Convention arguably distinguishes between those provisions that reiterated customary international law, or that were intended to have a dispositive effect, and those intended to have contractual ramifications only. See Lee, The Law of the Sea Convention and Third States, 77 Am. J. Int'l L. 541, 550 (1983) (table). A rule of international law may have a dual effect, functioning both as a conventional agreement between states parties, and as customary law in regard to third states. Id. at 553. Such a situation has been acknowledged by the International Law Commission:

A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the states parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other states.


60 Article 137 of the Law of the Sea Convention provides:

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person...
Therefore, it can be argued that all states, not just state parties, are bound to conform to the treaty regime. The text of the Convention can, however, equally bear a meaning narrower than the prohibition of all non-treaty mining: nonparties are free to mine the seabed and states parties may be free to respect nonparties’ mine sites, but the parties are bound contractually not to recognize the nonparties’ title to the minerals after they have been removed from the seabed. This view is supported by the distinction drawn in the Convention between the “resources” of the Seabed Area in place and the “minerals” recovered from the Area as a result of mining operations. Under this construction, the provision that “[n]o state or . . . person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area” purports only to deny the validity of the nonparties’ title to minerals after recovery, not their right to engage in mining per se. The next sentence provides: “otherwise, no such claim, acquisition or exercise of rights [i.e., title to the recovered minerals] shall be recognized.” This sentence, therefore, means only that if a non-party mines the seabed, the parties must not recognize its invalid title to the minerals after their removal from the seabed. The distinction is an important one. If the Convention is read as merely denying the validity of nonparties’ claims to title to the minerals after recovery, it may disrupt trade in the minerals between parties and nonparties—but not trade among nonparties. It would not exclude non-treaty mining from the category of high seas freedoms, or permit direct interference with such

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appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.

3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

LOS Convention, supra note 5, art. 137, at 1293 (emphasis added).

81 See LOS Convention, supra note 5, art. 133, at 1293. “Resources” refers to all minerals in situ at or beneath the Area’s seabed, while the term “minerals” designates those resources recovered from the Area. Id.

82 Id. art. 137, para. 3, at 1293.

83 Id. The Convention provides: “The minerals recovered from the Area . . . may only be alienated in accordance with . . . the rules, regulations, and procedures of the Authority. . . .” Id. art. 137, para. 2, at 1293.
mining.

Other provisions of the Convention are consistent with this interpretation. Article 139 directs "States Parties" to ensure that the activities of "States Parties" in the deep seabed are carried out in conformity with the Convention;\(^4\) it does not require that the activities of all "states" be carried out in conformity with the Convention. Article 311 prohibits only "States Parties" from entering into agreements in derogation of the common heritage of mankind principle.\(^5\)

Article 153 also may be read as purporting to create an objective regime. It provides that mining activities in the Area are to be carried out by the International Seabed Authority itself through its mining arm (the "Enterprise") or by "States Parties" in association with the Authority.\(^6\) However, if this article is read in conjunction with the preceding provision that addresses the powers of the Authority,\(^7\) it may be interpreted as a mere limitation on the Authority itself, permitting it to authorize mining only by the Enterprise or by states parties in cooperation with the Authority. In this light, Article 153 has no bearing on the rights of nonparties.

Thus, the text of the Convention does not necessarily even purport to create an objective regime binding on nonparties. It may be construed as simply a contractual commitment among the parties—to mine the seabed only in accordance with the Convention and to treat as invalid nonparties' claims of title to minerals after recovery from the seabed.\(^8\)

**The Validity of Treaties Binding on Nonsignatories**

In any event, whatever the intent of the Convention's drafters, contemporary international law decisively has rejected the position that a treaty can bind nonparties without their consent.\(^9\) Under

\(^{44}\) *Id.* art. 139, para. 1, at 1293. The treaty holds the states parties liable for any damages resulting from their failure to ensure that activity in the Area is carried out in accordance with the Convention. *Id.* art. 139, para. 2, at 293.

\(^{45}\) *Id.* art. 311, para. 6, at 1327. For a discussion of the principle of the common heritage of mankind, see *infra* notes 102-20 and accompanying text.

\(^{46}\) LOS Convention, *supra* note 5, art. 153, para. 2, at 1297.

\(^{47}\) *Id.* art. 152, at 1297.

\(^{48}\) *See id.*, art. 133, at 1293. If the Convention is read as merely imposing a duty on nonrecognition of non-party title to an area's minerals on the states parties, then no effective interference with activity exclusively between nonparties may be gleaned from the Convention's language.

\(^{49}\) *See Cahier, Le Problème des Effets des Traités A L'Égard des États Tiers*, 143
the Vienna Convention on the Law of Treaties, a treaty provision may create an obligation binding a third state in only three circumstances: (1) when parties to a treaty intend to impose an obligation on a third state and that state accepts the obligation;60 (2) when a treaty provides for sanctions against non-consenting aggressor states pursuant to the United Nations Charter;61 and (3) when the rule is binding on the third state under the customary international law, independent of the treaty itself.62 The first and second circumstances are inapplicable here, and the third must be rejected, since no rule of customary law prohibits seabed mining by nonparties to the Convention on the Law of the Sea.63

In drafting the Vienna Convention, the International Law Commission gave extensive consideration to a proposal that a special category of treaties creating objective regimes be recognized.64

Recueil des Cours 589, 644 (1974). International tribunals have declared third nations not to be bound by multilateral treaties, following the rule pacta tertiis nec nocent nec prosunt ("treaties are neither of benefit nor of detriment to third parties"). See H. Kelsen, supra note 45, at 484; A. McNair, supra note 45, at 309. This principle was firmly established by the Permanent Court of International Justice in the case of the Free Zones of Upper Savoy and the District of Gex, (Fr. v. Switz.), 1932 P.C.I.J., ser. A/B, No. 46, at 141 (Judgment of June 7), in which the court noted that "Article 435 of the Treaty of Versailles [was] not binding upon Switzerland, who [was] not a party to that Treaty, except to the extent to which that country accepted it." Id. But cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 58 (Advisory Opinion) (non-member states obliged to "act in accordance" with Security Council Resolution).

60 The Vienna Convention is largely a codification of the customary law of treaties. See Vienna Convention, supra note 43, art. 35, at 693. The Convention provides:

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Id.

61 Id. art. 75, at 707. Article 75 provides:

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Id.

62 Id. art. 38, at 694. Article 38 provides that "a rule set forth in a treaty [may become] binding upon a third State as a customary rule of international law, recognized as such." Id.

63 See infra notes 131-137 and accompanying text.


1. A treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular
Among the most outspoken opponents of the objective regime proposal were representatives from Third World countries, who recognized the concept as a relic of the colonial era during which European nations sought to legislate for the world at large. Moreover, even proponents of the objective regime theory recognized that a nonparty could not be bound to a treaty rule over its express objection. While the world conceivably might be better if a majority of mankind could legislate by treaty for all, no such process would be acceptable to the nations of the world today. Such a process is simply incompatible with the dearly held principles of sovereignty and equality of states. After thoroughly reviewing the issue, the Commission rejected the objective regime proposal for lack of support and concluded that treaties that become binding erga omnes do so only through the process of customary law formation. Therefore, since the United States is not a signatory to the
Law of the Sea Convention, the only way it could be barred from mining the deep seabed is if a rule of customary international law exists that would prohibit mining outside of the Convention.

CUSTOMARY LAW

The Moratorium Resolution and the Declaration of Principles

In order to determine if there is a rule of customary international law prohibiting deep seabed mining outside the convention regime, some consideration must be given to the legal effect of United Nations General Assembly resolutions. With limited exceptions, not relevant here, General Assembly resolutions are not binding on member states. Resolutions are recommendations, not international legislation. They can, however, and often do contribute to the formation of new customary rules, for the General Assembly is the great forum of the world community. An assessment of whether the norms stated in any particular resolution have crystallized into customary law requires one to look at the form and language of the resolution, the size and composition of the vote, the significance attributed to the resolution by the member states at the time of its adoption, and the influence of the resolution on state practice. In addition, principles of estoppel and acquiescence may be invoked against states voting in favor of a resolution.

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70 The powers of the General Assembly are limited to those enumerated in the United Nations Charter. U.N. Charter art. 10. These powers include the powers to make recommendations to members and to the Security Council, id. arts. 11, 13, the power to investigate, id. art. 11, and a general administrative and budgetary power, id. art. 17, paras. 1, 3.

71 See, e.g., I. Brownlie, Principles of Public International Law 14, 695-98 (3d ed. 1979).


73 Cheng, supra note 72, at 38-39.
Two resolutions in particular have been relied upon to support the argument that customary law forbids non-treaty mining: the Moratorium Resolution of 1969 \( ^{74} \) and the Declaration of Principles of 1970. \( ^{75} \) The Moratorium Resolution called upon states to refrain from mining the seabed pending agreement on an international regime. \( ^{76} \) Since more than half of the member states of the United Nations either voted against the Moratorium Resolution or abstained from voting on it, since virtually all of the industrialized nations of the world dissented, and since even some of its proponents described it as merely hortatory, no binding rule of customary law can be derived from it. \( ^{77} \)

The Declaration of Principles, however, requires a more discriminating analysis. It has all the formal characteristics of a "law-making" resolution. \( ^{78} \) The Declaration was adopted without dis-

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\( ^{74} \) Moratorium Resolution, supra note 1.


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

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 . . . rights over any part thereof.

Id.

\( ^{76} \) Moratorium Resolution, supra note 1.

\( ^{77} \) Sixty-two General Assembly members voted for adoption of the Moratorium Resolution, 28 voted against adoption, 28 abstained, and 8 members were absent. See 12 United Nations Resolutions 93 (D. Djionovich ed. 1975). Australia, Austria, Canada, Denmark, France, Hungary, Italy, Japan, Poland, South Africa, the Soviet Union, the United Kingdom, and the United States were among the nations voting against adoption. Id.; see also Arrow, supra note 2, at 375 ("Moratorium Resolution . . . cannot be considered evidence of customary international law"); Brown, supra note 2, at 542 ("Moratorium Resolution neither created binding rules immediately nor provided a significant basis for the future development of such rules").

\( ^{78} \) Although resolutions adopted by the General Assembly are not legally binding on members, certain resolutions may become binding on all states through operation of customary law. See Van Dyke & Yuen, supra note 2, at 524-25; supra note 72 and accompanying text. Part of the determination whether a particular resolution has become customary law revolves around whether the resolution was framed as a "recommendation" or as a "declaration." See Brown, supra note 2, at 540. United Nations practice is that "a 'declaration' is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated . . . A recommendation is less formal." Id. at 538-39 (quoting Memorandum of the United Nations Office of Legal Affairs on the Use of the Terms "Declaration and Recommendation," 18 U.N. ESCOR, para. 3, U.N. Doc. E/CN.4/ L.610 (1962)). Of course, the size of the majority that supported the resolution, and the practice of states with regard to the rules laid out in the resolution, will be relevant to the determination. See Brown, supra note 2, at 539-40.
sent and the abstainers have become supporters; it may therefore be treated as unanimously approved for all practical purposes. Moreover, the United States itself arguably has seen a distinction between the legal effect of the Moratorium Resolution and that of the Declaration of Principles. With respect to the former, the United States consistently has asserted its non-binding nature. With respect to the latter, the United States has been less consistent, and has sometimes merely asserted that the resolution does not prohibit non-treaty mining while otherwise taking no position on its legal significance. Assuming for the sake of argument that states are bound by their universal support for the Declaration of Principles, it is necessary to turn to the text of the Declaration to determine to what norms they may have bound themselves.

First, the Declaration of Principles contains no explicit prohibition against seabed mining. That nations which had so recently voted against the Moratorium Resolution were able to vote for the Declaration suggests the obvious: that they did not interpret the Declaration as barring non-treaty mining and that the Declaration was drafted with purposeful ambiguity so that the members would not have to retreat from their positions. For example, the preamble to the Declaration refers to the Moratorium Resolution in neutral language, “recalling,” not “affirming” it. The United States may then maintain fairly that, when it accepted the Declaration’s principles, it did not accept an interpretation of the resolution that

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80 Mineral Resources of the Deep Seabed: Hearings Before the Subcom. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 74-75 (letter from Legal Advisor, Dept't of State); H.R. Rep. No. 411 (II), 96th Cong., 1st Sess. 43-44 (1979). However, some Western States were careful to state reservations regarding the legal force of the Declaration at the time of its adoption. See 1 T. Kronmiller, supra note 1, at 250-52.

81 See Van Dyke & Yuen, supra note 2, at 525. The language of the Declaration of Principles is sufficiently vague that it is subject to greatly disparate interpretations. See supra note 75. The quest for a maximum amount of support for a United Nations resolution often leads to imprecise enactments. H. Nicholas, The United Nations as a Political Institution 108 (1959). Such “watering-down” of United Nations resolutions is a common practice. See id.

82 See Declaration of Principles, supra note 75, preamble; 1 T. Kronmiller, supra note 1, at 253. “Recalling” clearly does not mean “reaffirming.” See 1 T. Kronmiller, supra note 1, at 253. Use of the latter term would have rendered unanimity impossible, since it would have induced the industrialized nations that had opposed the Moratorium Resolution to vote against the Declaration of Principles. Id.
would have the effect of imposing a moratorium on non-treaty mining. Another preambular paragraph states that the “existing legal regime of the high seas does not provide substantive rules for regulating” the exploration and exploitation of the seabed. Although this provision is merely preambular, distinguished jurists have cited it as authority for the proposition that customary law does not authorize seabed mining. Western nations, however, have started from the traditional premises that seabed mining is a freedom of the high seas and that states are free to do as they wish in the absence of a prohibitory rule. From this perspective, no regulatory regime is required to authorize seabed mining. While a regulatory scheme limiting this freedom may be desirable for many reasons, until one is agreed upon, freedom of the sea prevails.

The Declaration of Principles and the Prohibition on Appropriation and Sovereignty

The Declaration states that the seabed shall not be subject to appropriation and that no one shall exercise sovereignty or sovereign rights over any part of it. The prohibition against appropriation and sovereignty no doubt is accepted universally today as customary law. The Group of 77 maintains that non-treaty mining would violate this ban. It contends that recovery of the resources is tantamount to exercising sovereignty, for “[e]xploitation presup-
poses . . . prior title to the land . . . .”91 This argument is not without some practical force. If a state is free to mine the deep seabed, it gets all the benefits of ownership regardless of what formal claims are made.92 Moreover, in light of the evident tendency of national jurisdictional claims to expand,93 Third World countries may well be concerned that mining claims will develop over time into permanent vested rights.94 In other contexts, the granting of a mineral concession, the issuing of licenses and the enforcement of conservation measures have been considered manifestations of sovereignty and evidence of title.95

Nevertheless, both the text of the Declaration of Principles and general international law support a different interpretation of this provision—one espoused by the United States and other Western industrialized nations: that while the provision prohibits claims to sovereignty over, or title to, the deep seabed, it has no bearing on the right to mine the seabed on a non-exclusive basis.96

92 See id. at 244. The Declaration of Principles provides that no territorial claims to the seabed can be made by any state. See Declaration of Principles, supra note 75, at 245. It therefore follows that there can be no mining, because in order to establish rights over a mining deposit, there also must exist title to the land constituting that deposit. See Biggs, supra note 91, at 245.
96 See 1 T. KRONMILLER, supra note 1, at 343-44. Japan and key members of the Euro-
First, the Declaration prohibits appropriation of the "area," not of the "resources of the area," and consistently maintains this distinction. Second, the Declaration draws a distinction between "exploration," "use," and "exploitation" on one hand, and "appropriation," "ownership," and "claims of sovereignty" on the other; only the latter are prohibited. Although these distinctions may appear spurious to some, they are rooted firmly in international law. The argument that exploitation "presupposes prior title" or is an "exercise of sovereignty" simply does not square with the practice of states in exploiting the navigational capacity and living resources of the high seas, as well as the radio spectrum and satellite orbits, without prior title or claims to sovereignty. In addition, limitations on the duration and scope of seabed mining operations suggest that mining does not constitute an assertion of title or sovereignty. Moreover, the United States has never claimed that a miner could stake out a site and exercise exclusive rights thereon without the authorization of a universal treaty.

The United Economic Community supported unilateral seabed mining. Id. at 326. The United Kingdom, Belgium, and Italy, among others, have stated that the Declaration of Principles and the Moratorium Resolution do not prohibit deep seabed mining by individual states because there is no incompatibility between unilateral legislation and the resolutions. Id. at 327. The Netherlands also rejected the argument of the Group of 77. Id. at 328; see also supra note 27 and accompanying text (American position is that seabed mining is a freedom of the high seas and unilateral mining is not inconsistent with the Declaration of Principles). The Soviet bloc, however, now concurs with the view of the developing countries that seabed exploitation by private and state enterprises is impermissible. Id. at 207.

See Declaration of Principles, supra note 75, paras. 2, 4. The second paragraph of the Declaration of Principles prohibits any entity from taking exclusive possession of the "area,"—the seabed, the ocean floor, and the subsoil thereof—beyond the limits of national jurisdiction. See 1 T. KRONMILLER, supra note 1, at 266. Since the "resources of the area" are not mentioned in this paragraph, they cannot be regarded as included in the term "area." Id. Paragraph 4 provides: "All activities regarding the exploration and exploitation of the resources of the area . . . shall be governed by the international regime to be established." Declaration of Principles, supra note 75, para. 4. The term "shall" in paragraph 4 is best interpreted in the present imperative. 1 T. KRONMILLER, supra note 1, at 272.

The concepts of "exploration" and "exploitation" are governed by paragraph 4 of the Declaration, and "use" is mentioned in paragraph 5. See Declaration of Principles, supra note 75, para. 5. Paragraph 5 reads, in pertinent part: "The area shall be open to use exclusively for peaceful purposes . . . in accordance with the international regime to be established." It should be observed that these terms are all discussed in terms of the future regime. See also S. CASEY, PRECEPT FOR BENTHIC EXPLORATION AND EXPLOITATION 50-52 (1968) (existing rules for exploration and exploitation of mineral resources below the seas).

See generally Brown, supra note 2, at 527-31 (mining rights limited in area and time). The distinctions in the Declaration reinforce the argument that seabed mining may be undertaken only temporarily and that no claim of title to it validly may be made. Id. at 530.

See 1974 DIG. U.S. PRAC. INT'L L. 343 [hereinafter cited as 1974 DIGEST]; see also 1
States' position always has been that mining is a high seas freedom and therefore entitled to protection against unreasonable interference; but that freedom of the seas does not include exclusive rights to explore and exploit the seabed. The absence of a claim to exclusivity precludes the characterization of non-treaty mining as violative of the prohibition on appropriation and sovereignty.

The Declaration of Principles and the Common Heritage of Mankind

The Declaration of Principles also states that the seabed and the resources of the area are the common heritage of mankind, and that "exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind." Though few seem to question the proposition that the common heritage of mankind is a suitable designation for the status of the seabed, the

T. Kronmiller, supra note 1, at 345-48. Pending the outcome of the Law of the Sea Conference, the United States would not grant exclusive mining rights to the seabed mineral resources. 1974 Digest, supra, at 343; 1 T. Kronmiller, supra note 1, at 874.

See Law of the Sea Negotiations: Hearing Before the Subcom. on Arms Control, Oceans, International Operations and Environment of the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. 20 (1981) (statement of George Taft, Department of State) [hereinafter cited as Hearing on LOS Negotiations]; Van Dyke & Yuen, supra note 2, at 539 (United States as well as other nations recognize that no nation has a right to establish exclusive control over any seabed area).

The Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1401-1473 (Supp. V 1981), formalized the position of the United States and provides authorization for an administrative agency to issue licenses for exploration and exploitation of the seabed. Id. § 1412(a). This act does not "assert . . . sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed." Id. § 1402(a)(2); see Van Dyke & Yuen, supra note 2, at 539-40.

See Declaration of Principles, supra note 75, para. 1. In a historic address before the General Assembly of the United Nations, the Maltese ambassador, Arvid Pardo, proposed that the mineral wealth of the oceans be declared "the Common Heritage of Mankind." See Mann-Borgese, The Role of the Sea-Bed Authority in the '80s and '90s, in The Management of Humanity's Resources: The Law of the Sea 35 (R. Dupuy ed. 1982). The "common heritage" idea has received favor among the developing countries. Oda, The Sharing of Ocean Resources—Unresolved Issues in the Law of the Sea, in The Management of Humanity's Resources: The Law of the Sea 53, 57 (R. Dupuy ed. 1982); see also R. Anand, Legal Regime of the Sea-Bed and the Developing Countries 207-10 (1975) ("common heritage" symbolizes the hopes and needs of the developing world). The developed countries have stressed the limited significance of the Declaration. See supra notes 80-83; see also 1 T. Kronmiller, supra note 1, at 250-52 (discussing reservations of Australia, Belgium, Japan, Norway, Portugal, the Republic of China, the Soviet Union, the United Kingdom, and the United States). See generally Biggs, supra note 91, at 237-45 (discussing the common heritage and the principles that constitute it as customary law).

Declaration of Principles, supra note 75, para. 7.
meaning of this ringing phrase has engendered controversy.\textsuperscript{104} The substantive meanings attributed to it range from a regime of common international ownership, exercised by a central lawmaking body, under which no exploitation is permissible without the consent of the international community,\textsuperscript{105} to a regime of free use, under which anyone may exploit the seabed on a first-come basis.\textsuperscript{106}

Third World spokesmen repeatedly have adopted the former interpretation, equating the concept of the “common heritage” with “common property,” and have inferred from this that exploitation requires the consent of the international community.\textsuperscript{107} Under this view, it is maintained that “heritage” necessarily refers to a property right passed from one generation to the next.\textsuperscript{108} But “heritage” is not a term of art in the common law of property in

\begin{footnotesize}
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\item \textsuperscript{104} See R. Anand, \textit{supra} note 102, at 205-06; D. Leipziger \& J. Mudge, \textit{supra} note 11, at 179-80; infra notes 105-06 and accompanying text.
\item \textsuperscript{105} See 1 T. Kronmiller, \textit{supra} note 1, at 280; Pinto, \textit{The Developing Countries and the Exploration of Seabed}, \textit{Colum. J. World Bus.}, Winter 1983, at 30, 32. During the UNCLOS negotiations, the Group of 77 sought to implement the common heritage idea by concentrating all seabed mining activities in the hands of an international organization. See D. Leipziger \& J. Mudge, \textit{supra} note 11, at 183; E. Luard, \textit{supra} note 11, at 169; see also Eichberger, \textit{A Case for the Administration of Marine Resources Underlying the High Seas by the United Nations}, 1 \textit{Nat. Resources Law.} 85, 90 (1968) (United Nations should create machinery and establish rules under which seabed exploitation will be accomplished).
\item \textsuperscript{106} E.g., Goldwin, \textit{Locke and the Law of the Sea}, \textit{Commentary}, June 1981, at 46, 48; see also D. Leipziger \& J. Mudge, \textit{supra} note 11, at 183.
\item \textsuperscript{107} See Pinto, \textit{supra} note 105, at 32. Ambassador Pinto described the common heritage principle with the following language:
\textquote{The commonness of the “common heritage” is a commonness of ownership and benefit. In their original location, the resources of the area belong in undivided and indivisible share, to all countries—to all mankind, in fact, whether organized as states or not. “Touch the nodules at the bottom of the sea,” they seem to say, “and you touch my property.”}
\textit{Id.}; see also 2 UNCLOS Official Records, \textit{supra} note 27, at 33 (Tanzania); \textit{id} at 37 (China); 1980 Letter, \textit{supra} note 29, at 112 (plea against exploitative licensing). Common heritage means that an area cannot be subjected to sovereign claims in public law, nor to appropriation in private law, and may imply that all states should participate in the activities in the area as well as benefits from such activities. See R. Anand, \textit{supra} note 102, at 211-12. The United States has been unwilling to accept this broad definition of the common heritage principle. It asserted in the Deep Seabed Hard Minerals Resources Act that it had supported the General Assembly's Declaration of Principles Resolution and the concept of the “common heritage of mankind” with the expectation that the principle would be defined under the terms of the Law of the Sea Treaty. See 30 U.S.C. § 1401(a)(7) (Supp. V 1981); Arrow, The “Alternative” Seabed Mining Regime: 1981, 5 \textit{Fordham Int'l L.J.} 1, 25 n.149 (1981).
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\end{footnotesize}
English speaking countries, and, in ordinary usage, does not refer to property rights at all. A variant of this argument acknowledges that “heritage” is “relatively neutral” in English, but contends that the term as used in other U.N. languages is not. Thus, it is said that “patrimonio” (Spanish) and “patrimoine” (French) involve “possessory and property rights.” Even if the term has a technical legal meaning in other languages, however, not all uses of the term have such implications. One would not interpret the bromide that “la science est la patrimoine des hommes d’étude” to mean that these learned gentlemen have a property right. A more realistic explanation of the choice of the term “heritage” is that it was intended to imply that present generations have a responsibility to future generations for the proper use of the resources to which the term refers.

Moreover, even if one accepts the equation of “heritage” with “property,” conclusions about the incidents of this particular form of common property would be unwarranted. The concept of common property simply has no settled meaning in international law. Although some conception of property may be common to all legal systems, the specific rights and obligations attaching to the idea of property are not identical, and no basis exists for concluding that international “common property” implies any particular configuration of rights except as they have come to be defined by treaty and custom. Therefore, the inference that the consent

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110 Id. “Patrimoine” (French) and “patrimonio” (Spanish), mean “inheritance” as well as “heritage,” and thus imply that property rights are passed to future generations. Id.
111 PETIT LAROUSSE 761 (1961) (knowledge is the heritage of scholars).
112 See Saffo, supra note 109, at 514. Saffo explains that the context in which the term “common heritage of mankind” is used and the fact that the Declaration of Principles itself failed to define the term illustrates that the concept is a “nascent legal principle capable of future elaboration.” Id. at 515.
113 The term “common property” has been used to refer to that which belongs to no one in particular (res nullis), yet belongs to everyone equally (res communis). G. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 2-18 (1980). However, different and conflicting meanings often have been ascribed to this term and to the term “res communis.” Id. at 2-20 to 2-22; see Burton, supra note 2, at 1151-64.
114 The proliferation of contradictory and often self-seeking interpretations of common property has led to the realization that standardized norms defining the principles must be established. See G. TUNKIN, THEORY OF INTERNATIONAL LAW 133-41 (1974) (discussing international treaty norms in view of the Vienna Conference). Treaties, for example, constitute attempts to establish such standardized norms, see id. at 138, since the underlying consensual basis of a treaty gives it the power to create a single rule of law for all participants, see T. ELIAS, THE MODERN LAW OF TREATIES 40-42 (1974). Consequently, only a mutually satis-
of the international community is required does not necessarily follow from acceptance of the seabed as common property. Pufendorf made this point 300 years ago when he distinguished a "positive" community over things from a "negative" one.\textsuperscript{115} Common property in the positive sense cannot be disposed of without the consent of the coproprietors, while common property in the negative sense is equally available to everyone for exploitation without any necessity for consent.\textsuperscript{116} Further, long before the Seabed Declaration, the expressions "common property," "common patrimony," "common heritage," and "common legacy" were applied to the seabed, the oceans, and the living resources of the oceans in contexts which plainly assumed that exploitation could take place without the express consent of the international community.\textsuperscript{117} Some support for the consent requirement may be found in the Gulf of Fonseca case, in which the Central American Court of Justice held that Nicaragua could not grant a concession in the Gulf to the United States because the Gulf was the common property of the three riparian states and the consent of all would be required.\textsuperscript{118} In that case, however, the issue was whether, upon the dissolution of the Central American Federation, the Gulf was to remain under common, undivided sovereignty, or to be divided among the riparians. The Court did not purport to decide the meaning of "common property" under general international law.\textsuperscript{119}
This is not to suggest that the common heritage principle places no restrictions on the conduct of states operating under a reciprocating states regime. Though a free access regime might provide some benefits for "mankind as a whole," it would hardly give "particular consideration [to] the interests and needs of developing countries."120 This requirement, however, could be satisfied by appropriate provisions in a reciprocating states agreement.

Construction of the Declaration of Principles

The strongest argument for reading a prohibition on mining outside the U.N. Convention into the Declaration of Principles derives from reading together the 3d, 4th, 9th, and 14th paragraphs of the Declaration. These paragraphs declare that an international regime is to be established via an "international treaty of a universal character, generally agreed upon,"121 to govern the exploration and exploitation of the resources of the seabed.122 They further declare that no state or person shall exercise rights to the seabed or its resources that are incompatible with this regime.123 Accordingly, it has been argued that the Convention is the treaty through which a new regime has been created for the seabed. The Convention is "universal" because it purports to apply to all states and not merely to states parties.124 It is "generally agreed upon" be-
cause the great majority of nations of the world have signed it. Thus, pursuant to the Declaration, all states have agreed that no seabed mining activities will take place which are not in conformity with the Convention regime.

Although this argument can be said to be consistent with the language of the Declaration, finding such consistency requires a construction of the Declaration that is not credible. None of the interested states would have supported the Declaration if they had understood such support to mean that they were binding themselves in advance to the unknown terms of a treaty to be negotiated in the future. Moreover, such a construction would be anomalous in light of the law of treaties. A state that has signed a treaty is obliged to refrain from acts which would frustrate the treaty’s purpose only until it has made clear its intention not to become a party; it is not legally bound to ratify the treaty. Thus, once it has made clear its rejection of the treaty, it is free from legal restraints under it. A fortiori, a state that merely has voted for a General Assembly resolution cannot be bound legally to comply with a treaty the terms of which are not yet known. If a state may free itself from obligations under a treaty that it has negotiated and signed, it surely must be free to reject a treaty it has never signed and never seen.

A more plausible interpretation of these Declaration provisions is that they represent no more than a commitment to attempt to negotiate a treaty. A treaty of “universal character, generally agreed upon” may mean a treaty adopted by consensus.

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126 Declaration of Principles, supra note 75, para. 9; see, e.g., 1980 Letter, supra note 29, at 112.
127 See Vienna Convention, supra note 43, art. 18(a), 8 I.L.M. at 686.
128 See Hassan, Good Faith in Treaty Formation, 21 Va. J. Int’l L. 443, 459-64 (1981) (discussion of discretionary ratification). Although a state has no legal obligation to ratify a treaty that it has signed, it arguably may have an affirmative moral obligation to do so. Id. at 459; see also Draft Convention on the Law of Treaties, 29 Am. J. Int’l L. 637, 657-65 (Supp. 1935) (pt. 3) (state has moral obligation to fulfill a treaty it has signed); Harley, The Obligation to Ratify Treaties, 13 Am. J. Int’l L. 389, 405 (1919) (obligation increases with scope and difficulty of negotiation).
129 See Arangio-Ruiz, The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations, 137 Recueil des Cours 419, 449 (1972). Parties to a declaration are not legally bound as they would be to a ratified treaty; they only are bound by their adherence to it through custom. Id.
Such a treaty would be "universal" in that no state rejects it; and it would be only "generally agreed upon" because many states may dislike specific provisions, but be willing to accept the treaty as a whole. Under this interpretation, no such treaty has been adopted because the treaty was approved by vote, not by consensus.

Thus, even if the Declaration of Principles can be said to have binding force, nothing on its face compels the conclusion that seabed mining is prohibited outside the Law of the Sea Convention. Each of the relevant provisions of the Declaration is subject to more than one plausible interpretation. Of course, if a consensus has developed as to any particular interpretation during the course of the ensuing years of negotiation, that interpretation would be a customary norm. However, the prospective seabed mining states, which would be specially affected by such a rule, repeatedly have rejected any interpretation of the Declaration which would bar non-treaty mining. Indeed, they have asserted throughout the course of negotiations that mining is lawful, and may proceed as a freedom of the high seas. Though the position of these states may be a minority one, the principle of majority rule does not govern in international law. Something more—be it consent, ac-


See North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.) 1969 I.C.J. 3, 43 (Judgment of Feb. 20) (formation of new rule of customary international law requires acceptance of the practice by "states whose interests are specially affected"); Lauterpacht, Sovereignty Over Submarine Areas, [1950] BRIT. Y.B. INT'L L. 376, 394 (any new international norms relating to sea will have particular effect on a few large nations, such as the United States and Great Britain). Hence, the significance of such a change lies not simply in the number of states participating in its promulgation, but also in the identity of the states involved. Id.; see also Waldock, The Legal Basis of Claims to the Continental Shelf, 36 GROTIUS SOC'Y 115, 137 (1950).

See supra note 81 and accompanying text.

See supra note 27 and accompanying text.

See Van Dyke & Yuen, supra note 2, at 497-98. Of all the states taking part in the United Nations Law of the Sea Conferences, about 12 or 15 countries consider seabed exploitation a high seas freedom, while 130 countries oppose that view. Id.; Hearing on LOS Negotiations, supra note 101, at 30 (statement of Ambassador Richardson) (United States position on seabed exploitation a minority view).

See J. BRIEFLY, OUTLOOK FOR INTERNATIONAL LAW 99 (1945). The creation of a new rule of international law does not depend on a plurality. Id. To achieve binding force, consensual agreement must be reached by all parties involved; however, the new rule will not bind those who have objected. Id.; see Fitzmaurice, The General Principles of International
quiescence, or consensus—is required to create a new rule of customary law. The statements and actions of the seabed mining states demonstrate that they have not consented to or acquiesced in a prohibitory rule; no consensus has emerged and no such rule has crystallized. Furthermore, even if a prohibitory rule could be said to have come into existence by virtue of support for it among the overwhelming majority of states, the traditional view holds that it could not be opposed to those states that have rejected it clearly and persistently during the process of its formation.\footnote{37}

The conclusion of a treaty embodying a particular construction of the Declaration of Principles does not change this result. From the standpoint of nonsignatories, the Law of the Sea Convention is \textit{res inter alios acta}.\footnote{38} A subsequently concluded recip-

\textit{Law Considered from the Standpoint of the Rule of Law,} 92 \textit{Recueil des Cours} 1, 101-05 (1957). Put another way, for the custom to become binding law, a general usage or practice must exist and must be regarded as binding by the participants. Fitzmaurice, supra, at 101. This requirement amounts to consent. \textit{Id.} at 102. See generally G. Tunikin, supra note 114, at 123-33 (consensual framework a prerequisite to transform custom into law); D'Amato, \textit{On Consensus,} [1970] \textit{Can. Y.B. Int'l L.} 104, 104-05 (international law defined as that common perception among states as to what law should be); MacGibbon, \textit{Customary International Law and Acquiescence,} [1957] \textit{Burr. Y.B. Int'l L.} 115, 131-38 (customary rights and duties endowed with binding force via consent).

\footnote{137} See, e.g., Fisheries Case (U.K. v. Nor.), 1951 \textit{I.C.J.} 116, 131 (Judgment of Dec. 18) (Norway not bound by 10-mile rule because of consistent and unequivocal refusal to accept it); Asylum (Colum. v. Peru), 1950 \textit{I.C.J.} 266, 277-78 (Judgment of Nov. 20) (Peru not bound by custom among Latin American countries since it had repudiated that custom); see also I. Brownlie, supra note 71, at 10-11 (states unaffected by rule rejected by them at its conception); G. Tunikin, supra note 114, at 130 (state objecting to formation of new rule not bound because of lack of consensual agreement). See generally Fitzmaurice, supra note 36, at 24-26 (no rule of international law has bound a state that rejected it at rule's formation); Fitzmaurice, supra note 136, at 99-101 (disassociation from rule at its conception will prevent state from becoming bound); Fitzmaurice, \textit{supra} note 45, at 49-50 (outright rejection of rule at formation prevents binding application to rejecting state).

\footnote{138} The law of evidence defines the term \textit{res inter alios acta} as acts and statements of or in relation to strangers, and declares them irrelevant. \textit{See, e.g.,} Chicago & E.I.R.R. v. Schmitz, 211 Ill. 446, 456, 71 N.E. 1050, 1054 (1904). As applied to treaty-making, the rule embodies a consensual requirement; that is, "as regards States which are not parties . . . a treaty is \textit{res inter alios acta}." A. McNair, \textit{supra} note 45, at 309. According to Lord McNair, it is a well-established principle that a treaty imposes no obligations upon nonparties. \textit{See id.} at 310; \textit{supra} note 45 and accompanying text. An example of the workings of this provision may be found in the Swiss case of Trampler v. High Court of Zurich, discussed in 1925-1926 \textit{Annual Digest of Public International Law Cases} 351 (1929). In that case, Trampler, a German national, owed a debt to two French nationals, and was sued in the High Court of Zurich, the city in which he was then living. \textit{Id.} He objected to the court's exercise of jurisdiction over his person, claiming that under the Treaty of Versailles, an exclusive proceeding had been established for claims of war debts. \textit{Id.} The court denied this objection on the ground that Switzerland was not a party to the Versailles Treaty, and therefore, the treaty had no effect on the jurisdiction of a Swiss court. \textit{Id.}
roving states agreement among four or five states has no less legal significance in international law than a previously concluded treaty among 120 states.  

The Common Heritage of Mankind as a Peremptory Norm

Perhaps in implicit recognition of these stumbling blocks, Third World opponents of non-treaty mining have characterized the common heritage of mankind principle as a peremptory norm of international law. A peremptory norm is one that is "accepted . . . by the international community of States as a whole," as being so fundamental that no derogation is permitted. A treaty violating such a norm is void. It has been asserted that the common heritage of mankind is a customary rule that has the force of a peremptory norm; 2 UNCLOS Official Records (17th plenary mtg.), supra note 27, at 87, U.N. Sales No. E.75.V.4 (1974) (Indian ambassador stated that common heritage principle represented not just a conventional but also a peremptory norm of international law); 14 UNCLOS Official Records (136th mtg.), supra note 27, at 37, U.N. Sales No. E.82.V.2 (1980) (Argentinian ambassador expressed regret that two states violated what his nation, and vast majority of countries, viewed as jus cogens by enacting unilateral mining provisions).

Rules of jus cogens "are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." I. BROWNLIE, supra note 71, at 513. Therefore, a treaty that contradicts a peremptory norm of international law cannot stand. See Vienna Convention, supra note 43, art. 53, 8 I.L.M. at 698-99. Peremptory norms are referred to as jus cogens. See Report of the International Law Commission to the General Assembly, 18 U.N. GAOR Supp. (No. 9) at 697, U.N. Doc. 5509, reprinted in [1963] 2 Y.B. Int’l L. COMM’N 187, 198. Norms of jus cogens represent overriding principles that cannot be avoided by individual agreements. See Schwarzenberger, International Jus Cogens?, 45 TEX. L. REV. 455, 466 (1965). Rules of jus cogens "are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." I. BROWNLIE, supra note 71, at 513. Therefore, a treaty that contradicts a peremptory norm of international law cannot stand. See Vienna Convention, supra note 43, art. 53, 8 I.L.M. at 689. See generally T. ELIAS, supra note 65, at 49-51 (detailing compromise reached by Third World, Eastern European, and Western States to include a jus cogens provision at Vienna Convention).

Certain activities have been deemed so repugnant that prohibitions against committing them often are cited as examples of peremptory norms of international law. For example, a treaty purporting to recognize genocide would be in derogation of a fundamental, peremptory norm, and therefore would be void. Id. In considering the 1966 draft articles on the law of treaties, some members of the United Nations International Law Commission believed that illustrations of "some of the most obvious and best settled rules of jus cogens" would be helpful. See Report of the International Law Commission to the General Assembly, U.N. Doc. A/6309/Rev.1, reprinted...
mon heritage is a peremptory norm by virtue of its acceptance as such by the overwhelming majority of states at the Conference on the Law of the Sea, on behalf of the “international community of states as a whole.” This view is reinforced by the Convention’s prohibition of reservations, its restrictions on amendments with respect to the seabed mining provisions, and its prohibition on states parties entering into agreements in derogation of the common heritage principle. According to this view, a reciprocating states agreement is void because it violates the peremptory norm.

The difficulties with this argument are several. First, a reciprocating states agreement need not be inconsistent with the common heritage principle, properly construed. Second, a specific proposal to include in the Convention a provision declaring the common heritage principle a peremptory norm met with substantial opposition and was rejected in favor of narrower language precluding only states parties from entering into agreements in derogation of

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1966 International Law Commission Report, supra note 196, at 169, 248, U.N. Doc. A/CN.4/SER.A/1966 [hereinafter cited as 1966 International Law Commission Report]. In addition to prohibitions against genocide and the use of force in international relations, the examples included: (1) a treaty to commit a crime under international law; (2) a treaty advocating trade in slaves; (3) a treaty in violation of human rights; and (4) a treaty in violation of the principle of self-determination. See Vienna Convention, supra note 43, art. 53, 8 I.L.M. at 699. Article 53 of The Vienna Convention on the Law of Treaties defines a peremptory norm of general international law as one “accepted and recognized by the international community of States as a whole.” Id. (emphasis added). The words “as a whole” were added by the committee that drafted the article to ensure that no one nation by itself could prevent the recognition of a rule of international law as a *jus cogens* norm. C. Rozakis, The Concept of Jus Cogens in the Law of Treaties 77 (1976); I. Szucki, Jus Cogens and the Vienna Convention on the Law of Treaties 98-100 (1974). This terminology necessitates an inquiry into how many nations must object to prevent the recognition of a peremptory norm. See, e.g., I. Szucki, supra, at 99-100. One commentator has suggested that a numerical consideration should not be dispositive, but rather, that “the existence of contrary practice by a number of States weakens the evidential position of that [proposed *jus cogens*] norm.” C. Rozakis, supra, at 79. Advocates of the position that the common heritage doctrine is a peremptory norm, however, cite for support the vast majority by which the Declaration of Principles was accepted. See 1980 Letter, supra note 29, at 112; supra note 79 and accompanying text.

See LOS Convention, supra note 5, art. 309, at 1327 (no reservations or exceptions allowed unless specifically permitted); id. art. 311(6), at 1327 (states parties agree not to enter any agreement, nor make any amendment, in derogation of the “common heritage” principle); see also id. art. 155, at 1297-98; id. arts. 312(1), 313(1), 314, at 1327-28.

One commentator has suggested that an alternative treaty might best be drafted to withstand future legal challenge before an international tribunal by adopting realistic provisions for sharing the resources of the “common heritage.” See D’Amato, supra note 139, at 284-85.
Indeed, the view that nonderogation provisions in a treaty demonstrate the existence of peremptory norms was rejected by the International Law Commission in drafting the Vienna Convention on the Law of Treaties. Moreover, the fact that a norm is accepted as customary law by the "international community of states as a whole" does not make it peremptory; rather, its peremptory nature must be recognized by the "international community of states as a whole." Even if the Convention is ultimately ratified by enough states to be described as the "international community...as a whole," no inference properly could be drawn that all signatories consider the common heritage principle a customary norm, rather than merely a treaty norm, let alone that they consider it peremptory.

The Chilean delegation proposed the following language in an effort to declare the "common heritage" principle a peremptory norm of international law:

The States Parties to the present Convention accept and recognize on behalf of the international community as a whole that the provision relating to the common heritage of mankind set out in article 136 is a peremptory norm of general international law from which no derogation is permitted and which, consequently, can be modified only by a subsequent norm of general international law having the same character.


States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be a party to any agreement in derogation thereof.

LOS Convention, supra note 5, art. 311(6), at 1327.

The International Law Commission suggested that a rule of international law does not assume the character of jus cogens simply because the treaty asserts that this is the case. See 1966 International Law Commission Report, supra note 143, at 248. Though parties may include a provision forbidding derogation from a specific provision of the treaty, that provision does not become a peremptory norm unless "the particular nature of the subject-matter with which it deals...give[s] it the character of jus cogens." Id.; see also I. Sztucki, supra note 144, at 180 (convention failed to delineate treaty categories to which jus cogens would apply).

To satisfy the provision of article 53 of the Vienna Convention, the rule of international law first must be shown to be a "customary or conventional rule." C. Rozakis, supra note 144, at 73-74. Beyond this preliminary test, however, the norm's peremptory quality must be both "accepted and recognized by the international community of States as a whole." Vienna Convention, supra note 43, art. 53, 8 I.L.M. at 698-99. That is, "[i]t must be proved...that the rule enjoys the consent of the international community as to its specific character, namely its capacity to invalidate agreements contrary to its content, thereby limiting the autonomy of State will." C. Rozakis, supra note 144, at 74.
But surely, the argument must be wrong at a more fundamental level. I have already shown that customary law does not prohibit seabed mining under a reciprocating states regime. If no such customary norm exists, *a fortiori* no such peremptory norm exists, for it makes no sense to establish a lower threshold for the creation of a peremptory norm than for any other norm.

**Conclusion**

Under this analysis, the International Court of Justice, faced with a request for an advisory opinion, would have to conclude that seabed mining under a properly drafted reciprocating states agreement is lawful despite the Law of the Sea Convention. To do otherwise would entail the rejection of one of three norms long recognized as reflecting the consensual nature of international law: the presumption that states are free to act in the absence of a restraining rule of law; the rule that states cannot be bound by a treaty without their express consent; or the rule that states cannot be bound by a newly created customary norm over their express and timely opposition.

Although eminent authorities have asserted that the World Court would hold non-treaty mining illegal,¹⁶⁰ nothing in the court's jurisprudence suggests such temerity. Indeed, the court, when recently presented with an opportunity to introduce a bold principle of substantive redistribution into its case law, declined the invitation.¹⁶¹ Yet such a ruling would have been a less radical departure from prior understandings than would be a ruling that rejects one of the three norms previously mentioned and thus jeop-

¹⁶⁰ See Richardson, supra note 7, at 509. Ambassador Richardson, former Chairman of the United States Delegation to the Conference under President Carter, contends that the International Court of Justice is likely to declare non-treaty mining illegal. See id.; see also R. Anand, supra note 102, at 267-68 (since the Declaration of Principles, "there is no longer a legal vacuum" regarding the seabed, and actions by developed countries in violation thereof properly are criticized); cf. Ratiner, supra note 6, at 1017 (extended confrontation before the General Assembly and the International Court of Justice challenging an alternative treaty would have a chilling effect on seabed mineral investment).

¹⁶¹ See Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18 (Judgment of Feb. 24). In that case, Tunisia argued that an equitable delimitation of the continental shelf should work in its favor since, by comparison to oil-rich Libya, Tunisia is resource poor. Id. at 77. The court firmly rejected this proposition, observing that "these economic considerations cannot be taken into account for the delimitation of the continental shelf areas appertaining to each Party." Id. The court found these considerations too variable to provide a basis for decision. Id.
ardizes the consensual framework of the law of nations. Nor do I think that many states would want the court to reject rules intrinsic to the consensual view, however much they may wish to have non-treaty mining held illegal. Certainly the Eastern European states are attached at least as strongly to the consensual view as are the states of the West. Even the Third World nations, despite their collective majority, might be circumspect about such inroads on their own individual sovereignty.

Does all this mean that we would be faced with an irresolvable stalemate—two lawful treaty regimes, under which the members of each are free to stake conflicting claims and poach on the other’s mining sites? The rule that the freedom of the high seas must be exercised with reasonable regard to the interests of other states in their exercise of such freedom—accepted under both regimes—might preclude direct disruption of mining activities, but probably would not prevent conflicting claims. No relevant substantive rule of boundary delimitation exists.

Is this then the infamous “lacuna” in the law? Would an international tribunal have to throw up its hands in defeat? The answer is “no”—or, at least, “not quite.” International law does provide an answer, if not an entirely satisfactory one. It requires the parties to undertake to negotiate in good faith for an equitable solution of conflicting claims. Although this proposition has been questioned, international tribunals have held repeatedly that conflicting claims to natural resources give rise to an obligation to negotiate. This rule is reflected also in the many bilateral agree-

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153 See Geneva Convention, supra note 28, art. 2, 13 U.S.T. at 2314, T.I.A.S. No. 5200, 450 U.N.T.S. at 82-84. The Convention on the High Seas provides that the freedom of the high seas must be exercised “with reasonable regard to the interests of other States in their exercise of” the same right. Id. The freedom of the high seas principle is recognized under the Law of the Sea Convention as well. See LOS Convention, supra note 5, art. 87(1), at 1286-87. Moreover, the requirement that the exercise of high seas freedom must be conducted with due regard for others' rights to exercise the same freedom also has received express recognition. Id. art. 87(2), at 1287. Therefore, both treaty regimes would recognize, at least in principle, a duty on the part of states to allow other states to exercise their rights.


ments between neighboring states that prescribe negotiations in the event of disputes concerning marine resources. It is reinforced by the United Nations Charter, which requires states to resolve their disputes by peaceful means. Pursuant to this rule, the parties to a seabed mining dispute are obliged “to conduct themselves [so] that negotiations are meaningful,” and to “make every possible effort” to achieve agreement.

Such an obligation to negotiate may seem to be a futile and ineffectual solution. Why, after all, should negotiations undertaken, say, a decade hence succeed where a decade of negotiations behind us has failed? I believe there is reason to be hopeful that an accommodation could be reached. The prospects for agreement may be better when seabed mining is an imminent reality rather than a speculative possibility. All participants will be acting on the basis of more complete information. We shall know what the costs of seabed mining are, and what the rate of return will be. We shall know if the International Seabed Authority can operate fairly and efficiently. We shall know if the United States needs a universal accord in order to enjoy the benefits of unimpeded navigation. We shall know if the rest of the world needs the capital and technology the United States can provide in order for seabed mining to proceed. Perhaps then, and only then, when the stakes are known, will all participants be willing to put aside the ideological posturing that has precluded agreement thus far. Perhaps then, and only then, will they recognize that deep seabed mining is not a contest between the chimera of a New International Economic Order and the ghosts of John Locke and Adam Smith, but a practical problem for which practical solutions are feasible.

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See, e.g., Treaty Concerning Sovereignty and Maritime Boundaries, Dec. 18, 1978, Australia-Papua New Guinea, art. 6, reprinted in VIII NEW DIRECTION IN THE LAW OF THE SEA 215, 227 (1980) (the parties agree to negotiate to achieve “equitable sharing of the benefits” of mineral or natural gas deposits extending across the seabed jurisdictional lines defined in the agreement).
