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L. F. E. Goldie

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REVIEW ARTICLES

A Selection of Books Reflecting Perspectives in the Seabed Mining Debate: Part II*

L.F.E. GOLDIE†

KRONMILLER, *THE LAWFULNESS OF DEEP SEABED MINING*, (Foreword by Congressmen Murphy and Breaux), Vols. I and II, Vol. I pp. xix and 521, Vol. II pp. iii and 460 \$_____ (both vols.) (Oceana Publications, New York, 1980) [hereinafter cited as KRONMILLER]. The review of Kronmiller's volumes constitutes Part I hereof, *see* 15 *THE INTERNATIONAL LAWYER* 2 (1981).

BARKENBUS, *DEEP SEABED RESOURCES: POLITICS AND TECHNOLOGY*, pp. xiv and 191 (The Free Press, A Division of Macmillan Publishing Co., Inc., New York, 1979) [hereinafter cited as BARKENBUS];

LUARD, *THE CONTROL OF THE SEA-BED: A NEW INTERNATIONAL ISSUE*, pp. x and 309 (Heinemann, London, 1974) [hereinafter cited as LUARD];

ALLEN & CRAVEN, *ALTERNATIVES IN DEEPSEA MINING*, pp. viii and 110 (Law of the Sea Institute, University of Hawaii, Sea Grant Cooperative Report UNIH-SEAGRANT-CR-79-03, 1979) [hereinafter cited as ALLEN & CRAVEN];

KILDOW, *DEEPSEA MINING*, pp. xi and 251 (M.I.T. Press 1980) [hereinafter cited as KILDOW]

FRIEDHEIM, *MANAGING OCEAN RESOURCES: A PRIMER*, pp. xii and 208 (Westview Press, 1979) [hereinafter cited as FRIEDHEIM].

I. Constitutionality

A. *Consent*

In Part I of this review most of the major issues leading to the present Draft Convention on the Law of the Sea (Informal Text)¹ were canvassed, and many of them discussed in some detail. They are, of course, necessarily germane to the reviews which follow in this part as well. At the heart of the review was what were designated the issues of constitutionality in public

*Part I of this Review Article appeared in 15 *THE INTERNATIONAL LAWYER* 2 (1981) at 301. It covered a discussion of KRONMILLER only.

†Professor of Law, Director, International Legal Studies Program, Syracuse University College of Law.

¹U.N. Doc. A/CONF. 62/WP. 10/Rev. 3/Add. 1 (mimeo. 28 August 1980) [hereinafter cited as the Treaty].

international law. These relate both to the question of consent and of rights of access to deep seabed mining resources.

As was pointed out, a common, and perhaps too facile, premise for some commentators on the politics of deep seabed mining issues is that a basic controversy in the Third United Nations Conference on the Law of the Sea (UNCLOS III) arises from the direct confrontation of selfish mining interests against international distributive justice. By contrast, it is my observation that the challenges which have so complicated that conference have arisen from the pitting of opposing blueprints of economic development, theories of legal order, and political ideologies. Thus, a confrontation certainly exists. But it involves a collision about fundamentals, not about superficial matters. Nor is it one of simple possessive greed. This more basic antithesis reflects this reviewer's concern. It demands a greater solicitude, than has been witnessed to date, for international fairness, validity, notice and what we may call "constitutionality," in the sense of due process, limitations on the excessive use of power and restraints on the abuse of rights. Currently, in international fora, it is often possible to find valid and fundamentally important claims of self-determination, human dignity and welfare becoming interwoven with, and diverted by, a hue and cry after fabled villains and other chimera. This has happened in the Third United Nations Conference on the Law of the Sea.

While the current law of resource winning in the commons of mankind is admittedly antiquated, it still has a claim on the necessary morality of obedience to law, and should only be changed by what has just been stipulated to connote valid constitutional processes. Today there is widespread acceptance of an important prudential value of international law that sovereign states are, given the current turbulence of their relations, the bulwarks of their peoples' freedoms. In such an armed and violent world freedom of a people's consent to new obligations which a political mood of the majority, or of the powerful, might otherwise cast upon a minority of states becomes a fundamental protection of the unarmed, the underarmed and the indecisive. Impositions, furthermore, can only create the expectation of further violations of independence and security in the future. These may feed upon themselves and become of possibly ever-increasing severity. While not looking merely to the traditional criteria for determining whether, or when, a new rule of international law has emerged, individual states' intentions, reliances, expectations, hesitations, and downright opposition are still of crucial importance. Consent by states expressly or impliedly but fully given is still a far more important element in international law than is consent by each citizen to the content of each domestic law. Thus state consent should not be cavalierly overridden. We may point out, moreover, that the more highly charged politically or economically the tasks of an international institution are, the more deference should be accorded to the consent of each burdened state, and the more recognition there should be of its needs, sensitivities, interests, capabilities, vulnerabilities and goals. Other-

wise the proposal may cause political frustrations which could undermine, destroy, or at best emasculate the principle or the institution to be established and render it ineffective to carry out even routine functions.

B. Representation

Unlike INTELSAT, even after its recent changes to accommodate to the demands of the Group of 77, the organs established in the Treaty for the seabeds regime carry no weighted representation or voting in favor of countries with the strongest interest in, and the heaviest anticipated use of, the deep seabed resources. States with little or no effective capability or interest will have votes to trade for benefits in other institutions and contexts. States with capabilities will feel handicapped in implementing their goals through a lack of political effectiveness commensurate with their technological and economic capabilities. On the one hand the Treaty creates power without responsibility, on the other, responsibility without power.

Let us recall that within the Authority there is a "supreme" Assembly composed of all states which are parties to the treaty. It is to be responsible for general policies. Its decisions are to be made on the basis of "one state one vote." Questions of substance will require determination by a two-thirds majority. On the nomination of regional and other designated interest groups the Assembly is to elect the Executive Council under a complicated system. The Assembly also has the power of final approval of the Council's provisional rules and regulations. The Council, composed of thirty-six states reflecting "equitable geographical distribution" and various political and economic interest blocs, is intended to deal with specific policies, adopt and provisionally apply rules and regulations (pending final Assembly approval), act upon applications for contracts to mine the seabed, and, subject to assembly approval, make financial decisions.

The Assembly chooses the council periodically from nominations by the various designated blocs. Thus eighteen seats are provided on the basis of geographical distribution (the Eastern European Bloc and the "Western European and others" (including the United States) are to have at least one each). The remaining eighteen seats are distributed among special interest groups as follows: Four seats are allocated among eight states with the largest investment in seabed mining (including at least one from the Soviet Bloc—presumably whether or not it has engaged in any, let alone substantial, investment). The four seats are to go to the group of states which have consumed, or imported, established high levels of minerals of the categories to be extracted from the seabed. This group, too, is required to include at least one Soviet Bloc nation. Again, four more seats go to the major net exporters, and the final six seats are allocated by developing countries representing particular interests—including large populations, land-locked or geographically disadvantaged situations, major importers or producers of the relevant minerals, and the least developed. Here an irony should be stressed. While the Soviet Union, possibly because of the vast potential

wealth of her Siberian treasure house, has shown little practical interest in engaging in deep seabed mining, is assured, either directly or by proxy, of no less than three seats on the Council. By contrast, the United States is not guaranteed even one seat. Of course, she may win a seat through political influence, or perhaps (theoretically) two or even three, but this does not allot to her a voting authority commensurate with her pioneering investment. Indeed, the system is one clearly whereby the countries with the investment and skills to develop deep seabed mining are not only under-represented, they are also forced to compete amongst themselves for the limited votes which have been vouchsafed to them as a group. On the other hand, countries which have no direct interest, indeed possibly no concrete interest at all in the development of this new source of human well-being, can trade votes amongst themselves. That such power has been taken from states with a need for it and has been given to states lacking any concrete interest in developing seabed mining, or states with a definite interest in restraining its development and limiting its production, has been guaranteed by the treaty's elaborate compartmentalization of the Council into pressure blocs and caucus groups.

There is neither a Great Power Veto, as in the Security Council of the United Nations, nor the weighting of the votes in individual states as with INTELSAT's Board of Governors (votes weighted in terms of share participation). Instead, a complicated voting system has been established. Questions of substance require two-thirds or three-fourths majorities, or qualified or unqualified consensus, depending on the category of issue.

There is provision for a Legal and Technical Commission to be composed of qualified personnel, but its composition is required to give effect to the principle of "equitable geographical distribution" and be representative of special interests. It is to make recommendations to the council regarding the approval of any mining application. The council can only reject such a recommendation by consensus. But the sponsoring state may not participate in this vote. On the other hand, if the Commission recommends disapproval of a mining application, the Council may approve the application (thereby rejecting the Commission's recommendation) by only a three-fourths vote. The expressed good intention is that the Commission should be technical rather than political. But, given the type of voting directives or considerations expressed in the treaty, may we not be reminded of a proverbial highway said to be "paved with good intentions"? I urge that this Commission be reviewed so that its electorate will be more consonant with, and responsive to, the goal of technical objectivity.

This structure is particularly significant for the United States as this country is more likely to have the greatest number of qualified applicants. We may also point to a probable scenario. A United States applicant could be confronted by a coalition of landbased mineral producers, western states sponsoring ocean mining competitors, Soviet Bloc and developing country opposition, states that each group might well have their own reasons, possi-

bly disparate from all the others, for blocking approval of a United States-sponsored application. The United States, not being permitted to participate in the vote, might not find it possible to find a single state to break the consensus needed to reject a commission recommendation of approval. This situation has its converse. If the Commission were to approve on political grounds, an unqualified applicant, the United States could not anticipate achieving a consensus Council decision needed to override a politically-biased recommendation by the Commission for approval of an unqualified applicant.

The Authority, moreover, is entitled to represent all seabed mineral production in international commodity arrangements. Given the exiguousness of the United States and Western European effective representation in the Authority's deliberations, and the strength of present, let alone potential, land-based producers in the relevant bodies, one can see a poor outlook for the ocean mining industry in such agreements. (Parenthetically it should be pointed out that commodity agreements are greatly favored over the free market, these days, in international trade in order to force up the prices of raw materials at the expense of distribution and manufacturing and, of course, the ultimate consumer.) In the negotiation of the relevant agreements there could be land-based Trojan horses within the Authority which would, in effect, give those suppliers a double representation. The result, clearly, would be heavily weighted against the western democracies and the consumers in the market economies, not only as far as ocean mining is concerned, but also in terms of their interests in having alternative sources of supply. Thus representation becomes a most important issue, not only in terms of the United States having a direct say, but also in terms of the world market sources, supplies and prices. This reviewer's pessimism in this regard is strongly reinforced by the consideration that amongst a number of states with possibly crucially effective votes will be those with no direct, concrete interest in the outcome of the negotiations. Their votes will be available for trading for other advantages in other contexts.

II. Some Brief Observations

A. *The "Diplomacy of 'Yes . . . But' and of Reluctant Consent"*

When Secretary of State Kissinger (in 1976) launched his own program for ending the stalemate at the conference and for obtaining a viable regime over deep seabed mining and especially to achieve open access (under the "parallel system") to minesites for state-sponsored industry, without discrimination or reference to country or type of ownership, he offered the conference, as a *quid pro quo*, a number of bargaining concessions including the so-called "banking system." By this system a contract applicant was obliged to prospect two complete mine sites, of which the authority would choose one. The chosen site, and the data developed as a result of the prospector's efforts, would then be available for mining either by the Enterprise

or by developing countries. The rest is history. Dr. Kissinger's goal of free access was finessed, even while his banking proposal and other concessions were added to the obligations of the developed countries' ocean miners.

Finally, this reviewer would like to conclude these opening observations by noting that, up to the time the Conference published the Treaty on August 25, 1980, most of the democratic, developed, industrialized countries of the West have tended to view the seabed mining issues as lacking the immediacy and saliency of many other matters being negotiated at the Third United Nations Conference on the Law of the Sea. Indeed, in the light of the vulnerability of the United States and the other Western industrialized countries generally to the cartelization and pricing of raw materials in general, it is surprising that lessons have not been learned and that concern has not surfaced adequately. When these considerations are added to the known facts of the political instability and the potentiality, if not actuality, of ideological hostility of most of the countries from which many of the essential minerals contained in the seabed's manganese nodules are now imported, it is respectfully suggested that the present hierarchization of the various interests which the, or at least, some delegations are called upon to espouse is mistaken. When Captain (subsequently Admiral) Mahan wrote his seminal book *The Influence of Sea Power on History, 1660-1873* he stressed that the idea of seapower connoted a nation's total use of the ocean, and framed its maritime destiny. It should not be conceived as reflected merely in the power of naval forces. Furthermore, he saw the power of the total national destiny as projected into maritime space, not merely the military elements, thereof. It is this whole which provides the predicate for sea power and its key role in the history of a nation. Rather than cutting up sea power and setting up artificial priorities among the artificially severed pieces, delegations should approach the issue holistically.

With some mitigating exceptions, the collection of books in this review is, by and large, not favorable to the position advocated in Kronmiller's two volumes² nor to that adumbrated in the opening paragraphs of this Part. They do differ, however, quite considerably among themselves. The order in which they are presented represents this reviewer's perception of the degree to which they express a position inconsistent with a vigorous diplomacy championing a regime which could provide a benign environment for the development of a state-sponsored (whether state or privately owned) deep seabed hard minerals mining industry, or with the principles underlying the proposal to review the instructions of the United States Delegation to the Third United Nations Conference on the Law of the Sea.

²See *supra*, Part I of the review, 15 INT'L LAW. 301 at (1981).

III. The "World Socialist" Ideologues

A. Barkenbus

In the leading review of this collection (that of Kronmiller's two volumes) regret was expressed that the author had not discussed the politics which lead to the rejection of the United States Draft for a United Nations Treaty on the Law of the Sea, the negotiating posture of this country, and the responses thereto of the Group of 77 and the Soviet Bloc. That review adumbrates the possible form of such an examination in light of Professor Roger Fisher's Prescription for, and his perception of, the guiding principles of a successful and equitable diplomacy, namely finding the "yessable proposition." A primary weakness of Barkenbus's book,³ like the Fisher Prescription, lies in the propensity to accept a belief that most, if not all, American positions can be compromised without seeming to perceive that such openhandedness may in and of itself, render them vulnerable or even cause them to be routed altogether by a determined bluff.

Dr. Barkenbus, a political scientist with the Institute for Energy Analysis, Oak Ridge Associated Universities, has presented a thesis regarding the need of the United States to reconsider its perception of its role in the contemporary world order and to bow to the legal thesis and economic requisitions of the Group of 77, made in the name of the New International Economic Order (and its mandate to transfer "wealth and power to the countries of the developing world").⁴ In particular Dr. Barkenbus advocates that the United States abandon its national interest in, *inter alia*, its national deep seabed mining technology.

It is, of course a truism that there are, in the modern world, contrasting collectively held visions of the future which are communally held by the member of the subgroups of the total world human society. It is, further, true to say that these disparate visions, at least on their economic sides (which clearly are less significant than their political sides—despite the legacy of Karl Marx to both academic simplification and democratic—as well as other—forms of socialism) are clashing over the division of "the collective world product."⁵ But, having stipulated this interesting premise, Dr. Barkenbus does not introduce us to the possible range and effect on the development of world politics of such visions (from the "Orgiastic Chiliasm" of cargo cults to Socialist-Communist Utopias?⁶), nor does he

³P. xi. (Citations to Dr. Barkenbus's book will be by author's name and page (and where relevant, footnote) number only.)

⁴See *supra*, Part I, review of KRONMILLER, note 30 and the text accompanying it, 15 THE INT'L LAW. 301 (1981). See also SCHACTER, SHARING THE WORLD'S RESOURCES (1977); LASZLO, BAKER, EISENBERG AND RAMAN, THE OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER (1978); and MEAGHER, AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER (1979).

⁵BARKENBUS at xi. The phrase is, of course, Dr. Barkenbus's own.

⁶See for these characterizations of utopian visions of the future as they have been experienced in history, and other intermediate categories, MANHEIM, IDEOLOGY and MORE, UTOPIA, *passim*, and especially 173-236 (1936).

further discuss the visions he does perceive, either from the points of view of historical validity, or of their imputed potential political effectiveness. To begin on the first page of the book with what, appears at least, to be the language of political and social epistemology and then to abandon that promise of a perspective on competing world views is to promise a feast but provide something rather more mundane. Instead of continuing on the high note with which it began, the book offers a combination of quasi-empirical observations about perceptions of the world order ("... the international struggle for economic control taking place today. . .")⁷ and scoldings about his perception of the United States' comprehension of its own future role ("United States citizens . . . are not prepared for a new era in which the United States is placed within, rather than atop, the community of nations"⁸). When America finds its currency a victim of speculation rather than a standard, when its afflicted dependence on other nations for the necessary resources of its economic survival becomes a pathetic object of price-fixing calculations, and when its political fears have become the gage of manhood for the leadership of juvenescent societies, Dr. Barkenbus's scoldings seem sadly anachronistic. If the United States seems to be pursuing her national interests today, it is not because she is in Dr. Barkenbus's imagery, perched "atop" the community of nations and is imposing her own view of a world-wide Common Gofod, rather it is because she wishes to remain within that community and not become submerged beneath it as a passive and exploited object.

Chapter 2, "The Legal Background" is, one may presume or at least hope, not written for lawyers, especially lawyers who have some perceptions of the history of ocean law and of emergent demands for change in that area. The chapter in question is not only brief, it also fails to grapple with such important legal issues as the scope and limits of the freedom of the high seas, the legal status of the Moratorium Resolution⁹ and of the Declaration of Legal Principles¹⁰ of the United Nations General Assembly (and, hence, of the "common heritage of mankind" thesis). In addition, this chapter on "legal matters" failed to distinguish between the two disparate sets of claims standardly made by miners, namely those arising from claims to own the manganese nodules which have been brought under the physical control of the first taker, and those concerning exclusive rights of mining, (i.e., usufructuary rights—as distinct from rights of ownership (*dominium*) or sovereignty (*imperium*) over a "mining tract"¹¹). Finally, Barkenbus

⁷BARKENBUS at xii.

⁸BARKENBUS at 171.

⁹G.A. Res. 2749, 24 U.N. GAOR Supp. 28 at U.N. Doc. A/8028 (1970), 10 INT'L LEGAL MAT'LS 220 (1971).

¹⁰G.A. Res. 2574D, 24 U.N. GAOR Supp. 30 at 11, U.N. Doc. A/7630 (1969), 9 INT'L LEGAL MAT'LS 422 (1970).

¹¹A minor question mark regarding the quality of Barkenbus's legal research arises from his view, expressed at 37, that the legal basis of the Deepsea Ventures' claim was a "legal brief . . . written by the law offices of Northcutt Ely, Washington, D.C.". While this reviewer par-

presents the overly simplistic point of view that the basic issue of the Third United Nations Conference on the Law of the Sea involves a confrontation of selfish, proprietary mining interests versus international equity. This is, of course both mistaken and misleading. As has already been pointed out,¹² underpinning the disputes over seabed mining at the conference, and fundamental to them in point of fact, lie differences over blueprints for legal and juridical order, economic systems, and political ideologies and commitments, rather than confrontations of equity against greed.

The book then takes up the United States' "mineral problem"¹³ and presents a Panglossian viewpoint ("[t]here is no justified fear that we will run out of nonfuel minerals. . . . Nor is it likely that the four key minerals in the manganese nodule could become subject to a general supplier cartel").¹⁴ This chapter's penultimate sentence tells us: "In short, the so-called mineral problem has unnecessarily retarded negotiating progress at UNCLOS and threatened the collapse of the entire conference."¹⁵ By focussing on the United States' and other western developed states' interest in ensuring access by their miners, and by ignoring the plenitude of other difficulties and obstacles, Barkenbus argues, not particularly accurately, that in reality the segment of the American mining industry interested in deep seabed mining enterprises is wearing the black hats and is represented as causing this very complex Conference to stall. He bases his argument on the oversimplifying, fallacious and distorting premise that the rest of the world appears to have a common policy and has reached full agreement on every issue raised at the Conference. For example, he writes:

The fact is that outside the seabed mining issue (and the proposed regime for scientific research) the United States has generally been pleased with the UNCLOS progress—as reflected in the various negotiating texts that have emanated from annual sessions. . . . Were the U.S. government to take unilateral action on the deep seabed, therefore, the above agreements, which were painstakingly put together over years, could all come undone. Thus, the "package" nature of UNCLOS negotiations has proved a serious restraint upon U.S. government action on the seabed issue.¹⁶

anticipated, at the above "law offices," in the formulation of that "legal brief" (in reality a Counsels' Opinion) in 1974, and in drafting the "Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection and Protection of Investment by Deep-sea Ventures, Inc." dated November 14, 1974 and addressed to the Honorable Henry A. Kissinger, Secretary of State, he had, more than a year previously, published an article which formed the basis of the above letter, "Notice," "legal brief," and Deepsea Venture's decision to proceed with its project. See L.F.E. Goldie, *A General International Law Doctrine for Seabed Regimes* 7 INT'L LAW. 796 (1973). Indeed, the memorandum of law upon which that 1973 article was based, was cited in its second footnote, which is hereby drawn to Dr. Barkenbus's attention. See also L.F.E. Goldie, *Mining Rights and the General International Law Regime of the Deep Ocean Floor*, 2 BROOKLYN J. INT'L L. 1 (1975).

¹²See *supra*, Part I, § I.

¹³Chapter 4 at 61-81.

¹⁴BARKENBUS at 78.

¹⁵BARKENBUS at 79.

¹⁶BARKENBUS at 89.

Apart from the rather careless perception of the negotiating texts as "agreements" and further admission of the unsatisfactory nature (from the United States point of view) of the proposed regime for scientific research, the above statement refuses to acknowledge the United States' resistance to the currently drafted provisions regarding the protection of marine mammals, environmental protection, and this country's considerable and unhappy insecurity with the provisions on freedom of navigation in the economic zone and rights of transit passage through archipelagic waters. (These additional "treaty stoppers" are merely cited as further examples of unsatisfactory provisions outside the context of deep seabed mining and are selected from amongst a number of objectionable arrangements upon which the Conference would appear to have reached a "consensus.") The chapter under discussion also gives inadequate consideration to the dissatisfaction of the developing "landlocked and geographically disadvantaged" states with what they feel to have been the cavalier treatment that they have received at the hands of their fellow Group of 77 members who possess frontages onto the oceans. Even the package (or packages?)¹⁷ has so many

¹⁷See, for an example of the constant flow of adjustments to the packages, the changes in the Informal Composite Negotiating Text from its first publication as U.N. Doc. A/CONF.62/WP.10 (15 July 1975) to its current version as Informal Composite Negotiating Text/Revision 2, U.N. Doc. A/CONF.62/WP.10/Rev. 2 (11 April 1980). It should be noted that prior to the July 1975 text there were: the Informal Single Negotiating Text, 1975 (Third Session), Parts I, II and III of this text appear at the *Third United Nations Conference on the Law of the Sea Official Records*, Vol. 9, 137, UN Doc. A/CONF.62/WP.8 (1975); Part IV of the text appears at UNCLOS III Official Records, Vol. 5 at 111, UN Doc. A/CONF.62/WP.9 and Add. 1; and the Revised Single Negotiating Text, 1976, Fourth Session, the document appears as an UNCLOS III official document (UN Doc. No. 000) A/CONF.62/WP.8/Rev.1 (6 May 1976).

For a discussion of the notion of the "package" see this reviewer's statement, as Committee Rapporteur, of the First Working Session (Tuesday, Aug. 29, 1978) of the Committee on the Law of the Sea at the 58th Biennial Conference of the International Law Association (Manila, August 27 - September 2, 1978), REPORT OF THE CONFERENCE at 310, 312-13 and 320-21 (1980) especially at 312-13 where this reviewer pointed out:

Here the notion of the "package" (*i.e.*, the delicate skein of mutually traded interlocking and interdependent formulae in the various "negotiating texts" whereby the contingent agreement of one delegation to the negotiated language on one set of issues is dependent upon the acceptance by others of the compromise or negotiated language of all the other issues considered to be within the "package") becomes important. Not only has the Conference inherited the in-interest groups to be found in the politics of the General Assembly, for example the Group of 77 (G.77) and the various Geographical Groups, but also it has seen the proliferation of additional ones, for example the Landlocked and Geographically Disadvantaged States. (This last Group has even given birth to a sub-group namely the *developing* landlocked and geographically disadvantaged States). Also States with similar economic interests such as the States which are land based producers of minerals for export (commonly known as the "mineral producing" States), or those States with deep ocean mining capabilities and ambitions, tend to combine. Thus a complex of diplomatic and political interdependencies have arisen which are precariously balanced on the ability of each State or Group to caucus for and engage in trade-offs to achieve negotiated clauses and formulations in the ICNT, and, of course, concessions and agreements in other areas. In this complex network the giving of concessions or agreeing to formulations demanded by other States constitute the consideration given by the former categories of States for their desired formulations in areas they deem crucial. Thereafter those other (the given) formulations in their turn, too, become necessarily the subjects of protection by those States whose agreement to them was the price they paid for their obtaining their own cherished provisions.

loose ends that the question of timely ratification and entry into force (as distinct from a purely ceremonial session for signatures) does not enjoy the impending certainty, but for the seabed mining disagreements, which Barkenbus would have his readers believe to exist. Nor does he provide persuasive arguments, in terms of the evolution of the negotiations directed to reach a universally acceptable convention, in support of his thesis that the only obstacles to a speedy and successful end of the long-drawn-out negotiations at the Third United Nations Conference on the Law of the Sea for a comprehensive and universally acceptable Treaty governing the Law of the Sea for the foreseeable future are those created by the selfish stratagems of the American deep seabed hard mineral mining industry.

In addition, Barkenbus takes up the vexed question of the United States domestic legislation to govern seabed mining conducted by American enterprises together with the proposal of a "reciprocal regime" whereby the American statute is linked with reciprocating, complementary and analogous legislation enacted by other countries. The legislation, the passage of which was problematic when Dr. Barkenbus's book was written, has now been enacted in the United States,¹⁸ and in the Federal Republic of Germany.¹⁹ At the time of this writing²⁰ similar legislation is being considered in France, Italy and the United Kingdom. Be that as it may, Barkenbus expresses unequivocal opposition to the bill, as the Deep Seabed Hard Mining Resources Act of 1980²¹ then was. He supports this opposition on the basis of two premises which, however, may not be entirely consistent with each other. The first relates to Barkenbus's prediction (as of the time of his writing) that the opposition to the bill, coming from an effective alliance of the Department of State and the "UNCLOS forum"²² (presumably this new grouping is a combination of the Group of 77 and the Soviet Bloc?)

For, with the subsequent failure of agreement on the formulae given in consideration goes the failure of those formulations agreed to as their price. Because a package represents so much diligent and delicate bargaining, attempts to "unpack" or "disassemble" the package are regarded as attempts to take an unfair advantage. If any States or interest groups impose too great demands they tend to be, unless they can show justifications with which the Conference can sympathise, suspected of launching attacks on the package. When these occur, as will be seen in later paragraphs, delegations combine to resist the assault.

But here a caveat should be lodged. Opposition, as a review of the reception of selected items from the Seventh Session's Report will testify, continues from very important (indeed crucial States and interests. On the other hand, though compromise and changing perceptions on the part, especially, of the "Western and Other" (*i.e.*, the majority of the industrialized States) geographical group, a growing agreement in a number of important areas—two common examples being the economic zone and the archipelago doctrine—is increasingly discernible. May these eventually become crystallized into custom before the "Constitution for the Oceans" enters into force as a world-wide law-changing and codifying Convention?

¹⁸Deep Seabed Hard Minerals Resources Act of 1980. 94 Stat. 553, 30 U.S. 1401 (1980). It was signed into law by President Carter at Camp David, Md., June 28, 1980.

¹⁹Entered into force August 23, 1980. Xerox copy of an English translation held in this review's files.

²⁰March 1981.

²¹*Supra*, note 18.

²²BARKENBUS at 99.

would be capable of preventing the bill's passage through the Congress. He perceives this "alliance" as having, up to the time of writing his book, "successfully resisted an approach based on narrow technical determinism"²³ (namely an evaluation of the negotiating texts' packages²⁴ in terms of the possibility that technological developments may outpace negotiating goals).

The second premise of his opposition to the passage of the bill is that such an event (i.e., the seabeds bill becoming law as, indeed, it now has) would not soften "the negotiating stances of UNCLOS delegates from developing nations".²⁵ It would, accordingly, "fall short of the presumed intended goal [of the bill's becoming domestic United States law] namely, to facilitate agreements at UNCLOS."²⁶ He concludes his discussion of the "unlikely" passage of the seabed mining bill (now law) with an observation reflecting a rather ideological commitment, and some skepticism of the Ambassador of the United States' position. He writes: "Unfortunately, united opposition to the pleas from mining companies for haste does not constitute a sufficient condition for reaching international accommodation."²⁷

Part 2 of the book, "International Negotiations," begins with Chapter 6—entitled "Supranationality." This word represents an idea of growing importance and increasingly specific legal reference, namely a form of political and economic integration which has been, perhaps, up to now, rather optimistically called "functional federalism." Its paradigm was launched in 1950. This was the famous "Schuman Plan," the pooling of the entire French and German production of coal and steel under a joint High Authority. This international, or rather transnational, organization then emerged as a new entity, and as a new model for international institution building, namely the European Coal and Steel Community (ECSC). The constitutive Treaty of this novel institution entered into force, for its six original members,²⁸ on July 25, 1952. Ernst Haas, in his classic book on European integration, after pointing out the capacity of the ECSC's High Authority to "rule the conduct of coal and steel enterprises,"²⁹ and of the Member States, defines the idea of supranationality in the following important terms (terms which, in general, have become indicative, if not definitive, in the standard use of the word "supranational" and its grammatical variants ever since):

Supranationality in structural terms, therefore, means the existence of governmental authorities closer to the archetype of federation than any past interna-

²³ *Id.*

²⁴ See *supra*, note 17 for a discussion of the concept of "the package" and a note regarding its instability.

²⁵ BARKENBUS at 98.

²⁶ *Ibid.*

²⁷ BARKENBUS at 99.

²⁸ These were Belgium, France, Federal Republic of Germany, Italy, Luxembourg, and the Netherlands.

²⁹ HAAS, *THE UNITED OF EUROPE* 59 (1978) [hereinafter cited as HAAS].

tional organization, but not yet identical with it. While almost all the criteria point positively to federation, the remaining limits on the ability to implement decisions and to expand the scope of the system independently still suggest the characteristics of international organization.³⁰

Dr. A.H. Robertson gives us another definition of the term, with similar institutional values and perceptions in terms of the ECSC experiment. He writes:

From this brief sketch, it will be apparent that the Coal and Steel Community represents a much more developed form of international institution than any of those described above as organs of international co-operation. There it was possible to distinguish three degrees of evolution: organs of simple consultation, organs of powers of decisions and organs with powers of both decision and execution. With the E.C.S.C. we reach a fourth stage: the executive powers of the High Authority are more extensive, since it can take decisions which are directly binding on national enterprises without the intervention of governments; the parliamentary powers are more developed, because the Assembly can overthrow the executive; and there exists a Court of Justice with power to ensure the rule of law in the interpretation and application of the treaty.³¹

Outer limits to the conception of what is a supranational entity should be designated, if only to set it off from more fully federated entities. Haas has indicated these to be

1. limited ability to implement its decisions; and,
2. limits to expand the scope of the system independently of the consent of all the Contracting Parties.³²

Barkenbus describes the powers of the International Seabed Authority in Chapter 6, entitled "Supranationality," and quite adequately defines his use of the term. He writes:

Chapter Six is devoted to examine the UNCLOS debate over the degree of supranationality with which to endow the International Seabed Authority (ISA). The essence of this debate, which has been the issue foremost in the consideration

³⁰*Ibid.*

³¹ROBERTSON, THE LAW OF INTERNATIONAL INSTITUTIONS IN EUROPE 29 (1961) [hereinafter cited as ROBERTSON, INTERNATIONAL INSTITUTIONS]. See also Robertson, *The Legal Problems of European Integration* [§ 5 The Meaning of "Supranational"], 91 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 109, 143-48 (1957).

³²In this regard Articles 154 and 155 of the Treaty should be noted. Paragraph 4 of Article 155 is illustrative of the point being made herein. It states:

Five years after the commencement of the Review Conference, if agreement has not been reached on the system of exploration and exploitation of the resources of the Area, the Conference may decide during the ensuing twelve months, by a two-thirds majority of the State Parties, to adopt and submit to the States Parties for ratification, accession, or acceptance such amendments changing or modifying the system as it determines necessary and appropriate. Such amendments shall enter into force for all States Parties twelve months after the date of deposit of the instruments of ratification, accession, or acceptance by two-thirds of the States Parties.

In brief, two-thirds of the States Parties to the treaty are, under this provision, empowered to legislate for all the States Parties, notwithstanding the options of any or all states contained in the remaining, non-consenting one-third. The Group of 77 (even without the votes of the Soviet Bloc) could muster the necessary two-thirds ratifications, etc., to bind the developed industrialized democracies. See also Article 314 of the Treaty.

of UNCLOS delegates, resides in the determination of who should establish the conditions of mining and who should carry out exploitation. Just as do nearly all the issues under consideration, the controversy over supranationality breaks down essentially on a North-South basis.³³

This reviewer agrees that others (for example the delegation of the Soviet Union to UNCLOS III) have used the term "supranationality" and its grammatical variants to describe the powers of the International Seabed Authority, particularly with regard to its power of regulating state and privately owned enterprises. This reviewer is troubled by the use of this term with reference to International Seabeds Authority (ISA). Unlike the strictly regulatory competences of the High Authority, for example, the negotiating discretions, contracting capacities, expropriating powers and administrative goals of the ISA come far closer to a "world socialist" power of controlling industry (both state sponsored, privately and publicly owned entities, and the Enterprise). In addition, it is not intended, as are the European Communities, to achieve goals of improving the welfare of the controlled industries and of the consumers of their products. The policies it is expected to pursue, for example, in terms of production controls, are based on the needs of interests and motivated by considerations outside the seabed mining industry and inimical to it. Again, the ISA has its own Enterprise existing outside, and in competition with the state-sponsored industry. Moreover the Enterprise, clearly, has a very different constituency from that of the state-sponsored industry the ISA is to regulate. For, what well may prove to become the most influential interest groups in the ISA may turn out to be those states which oppose seabed mining as competition for land-based producers and those states who view it as an exploitable source of compulsorily acquired technology, revenues and political trade-offs. These elements of political and economic exploitation and discrimination, which underpin both the Conference's and Dr. Barkenbus's view of the ISA, are not paralleled in the European Communities. Furthermore, being entirely novel among both existing and proposed international institutional arrangements, they are not currently found among the technical (as distinct from the rhetorical) denotations of the term "supranationality" and its grammatical variants. In light of the above discussion it should be clear that the ISA enjoys powers, the lack of which Professor Haas has indicated as negative criteria for calling an institution "supranational" rather than something else, for example, possibly, "federal." In the present context, however, such alternative terms to that chosen by Dr. Barkenbus as "world socialist" or "Leviathan" terms, far more graphically and accurately represent the political colossus he advocates.

The reason for this reviewer's taking Dr. Barkenbus to task on his use of the term supranational is that its significance transcends a merely semantic issue. It raises two points illustrating the importance of language for non-

³³BARKENBUS at 103.

rational persuasion and the manipulation of linguistic symbols to score rhetorical points outside the logic of rational discourse: (1) the term supranationality is a "stylish word"³⁴ among political and legal theorists today, and may attract more intuitive sympathy than reflection; (2) writing, especially on such a subject, should exhibit a conscientious, if not even a fastidious, respect for our language. Accordingly, one should resist its debasement which, this reviewer respectfully argues, would be symbolized by the general adoption of the Soviet Union's usage on this point. Hence, resort to the term supranational in this context should be seen as not only a matter of concern regarding the debate on law of the sea matters, and the rhetoric of delegations at the Conference, but also, and far more significantly, on account of the disguises and decoys which important political and legal ideas may utilize for the sake of respectability (and acceptability) in international relations.

Part 3, entitled "Contrasting Visions of the Future," is not about those differences of culture which create different social epistemologies, but about the differing images which may be projected thereby. It is, in the main, a reproachful reproof of the United States policy and diplomacy at the Third United Nations Conference on the Law of the Sea as if it had been something other than the one of retreat, concession and conciliation, which has been its exclusive, if sadly faineant hallmark. It reads, accordingly, rather like an overlong and overly didactic (if misguided) editorial reprimand. After outlining what he perceived to be Dr. Henry Kissinger's diplomatic posture at UNCLOS III when he was Secretary of State, the demands of Congress and the claims of private industry for a climate which would make investment and mining operations feasible (and there are many differences between all three!) Dr. Barkenbus evinces a determination to "march to a different drummer." He seems particularly disillusioned about Dr. Henry Kissinger's proposal, on April 8, 1976, of a "banking" system whereby miners are called upon to give to the Operating Authority or developing countries exclusive rights of information and to exploit prime mine sites which they (the miners) have prospected in detail. Dr. Kissinger offered a number of other concessions including the United States' acceptance of production controls. Despite the record Barkenbus writes: "there has been no significant concession in U.S. policy during the decade of the 1970s. . . ."³⁵ To most observers the banking system was one of a number

³⁴FOWLER'S MODERN ENGLISH USAGE (Gowers, ed. 2nd ed. 1965) discusses at 717, "stylish words" as follows:

No one, unless he happened upon this article at a very early stage of his acquaintance with this book, will suppose that the word *stylish* is meant to be laudatory. Nor is it; but neither is this selection of stylish words to be taken for a blacklist of out-and-out undesirables. . . .

What is to be deprecated is the notion that one can improve one's style by using stylish words, or that important occasions necessarily demand important words. . . . The writer who prefers the stylish word for no better reason than he thinks it stylish, so far from improving his style, makes it stuffy, or pretentious, or incongruous. . . .

³⁵BARKENBUS p. 155.

of very significant concessions (for a further example, a generous, if muddled, agreement to technology transfer and the production controls already mentioned) which Dr. Kissinger offered in exchange for open access (under a "parallel system") to minesites. The concessions were accepted, but the *quid pro quo* asked in return, namely open and nondiscriminatory access, was finessed. In fact, the posture of the United States Delegation throughout the negotiations has been one of repeated reluctant consent to ever freshly demanded new concessions when those earlier asserted were agreed to.

A critical comment on the application of the Fisher Prescription³⁶ to the UNCLOS III seabed negotiations has already been offered. Barkenbus's position should be distinguished therefrom. It goes even further down the road of unilateral concession giving. While Professor Fisher's doctrine suggests a means of reaching what is perceived as a favorable conclusion to negotiations by making "yessable proposals," Dr. Barkenbus would appear to be opposed to the United States' negotiating for any kind of favorable climate for United States economic interests. That is, he argues that the United States should abandon all aspects of negotiation from the viewpoint of economic self-interest in terms of an assured supply of necessary economic minerals, materials and fuels from the seabed.

Instead, Dr. Barkenbus offers a plan for an Operating Authority with a monopoly of the prospecting, mining, processing, distribution and marketing of manganese nodules and the metals, materials and minerals derived from them. He argues, furthermore, that this blueprint is modeled on the International Communications Satellite Organization (INTELSAT). He writes, in part:

When INTELSAT was originally formed, it reflected the hegemony of American technology and expertise in communications satellites.³⁷

He then points out that this hegemony has been replaced by a largely internationalized system.

In this reviewer's opinion Barkenbus's resort to the INTELSAT analogy is false and misleading on the basis of the following important differences:

(1) INTELSAT governs a service organization which calls for a single, unitary administration. Furthermore, it is inherently both low-keyed politically and monopolistic technologically. Its internationalization is a method of mitigating INTELSAT's essentially monopolistic structure by opening up its decisional process to other parties who use the service, but do not accept being placed in purely passive roles or being denied any effective say in the manner of providing the services to which their participation is essential. Seabed mining's goal is to win, process and distribute manganese nodules and the metals and materials which they contain. Such a process does not require the monopolistic structure demanded by the nature of INTEL-

³⁶See 15 INT'L LAW. at 342-43 (1981).

³⁷BARKENBUS at 175.

SAT, its technology and services. Indeed such a structure would be a burden imposed on the industry for ulterior reasons, not, as with INTELSAT, required by its function and goals;

(2) A further point of essential difference between the two activities lies in the subject matter to be regulated. Communications provide a service between at least two parties. The act of providing that service necessarily intervenes between the parties by the very fact of the necessary channels of communication. Regulating communications services, accordingly, calls for the recognition of the interests of all who engage in communications activities, both actively and passively. Communication is thus basically a common community phenomenon. (There is no coincidence in the intended signification of these two words despite their common linguistic roots.) Mining, unlike communications, is a solitary activity. There is no "miner" with an essential human "minee." It involves no intercourse to which a plurality of interests are essential. Deep seabed mining, accordingly does not present the type of transnational raw material for institutional regulation which INTELSTAT is postured to govern.

(3) INTELSAT is seen as being coordinated with alternative forms of the media of communications traffic, cables for example, so that the service can integrate all forms of traffic. Deep seabed mining is seen as the rival of, and competitor with, landbased mining activities and be subject to production controls for that reason;

(4) In contrast with INTELSAT, even after the recent changes in its structure which have been made to accommodate the demands of the Group of 77, the organs created in the 1980 Draft Treaty on the Law of the Sea do not carry any weighted representation or voting in favor of countries with the strongest interest in, or the heaviest anticipated use of, deep seabed resources. States with little or no effective capability or interest will have voting strengths equal to those which represented both great need and great investment. Dr. Barkenbus was remiss in not taking this most important difference into account;

(5) As Barkenbus himself points out, only some eighty-one nations had signed INTELSAT's Definitive Arrangements by February 12, 1973, as participants.³⁸ By contrast some 156 nations are participating in UNCLOS III. Each one of them has a claim to be negotiated and recognized, and if not conceded to entirely, at least to be treated as a valid trading asset. In brief, there is a diversity of interests and objectives which have to be brought into the framework of a deep seabed institution which, if they were found in INTELSAT, would require a completely different organizational structure;

(6) The Soviet Union, which has its own international satellite communications service, is not a participant in INTELSAT. In terms of participation in ISA, on the other hand, it has quite clearly, demanded a

³⁸BARKENBUS at 176.

commanding position³⁹ especially since the Authority is the sole representative of the seabed mining industry in the negotiation of international commodity agreements, if only to protect potential markets for its Siberian ores.

(7) Finally, while the United States and its residents constitute very heavy users of INTELSAT, and provide a very large proportion of its traffic, there is not, at present, the same inherent capacity, in INTELSAT, to take advantage of the heavy American dependence to control American consumption of its service, nor to regulate the content of messages to and from the United States. But who knows? Perhaps those states which now support the "McBride Report"⁴⁰ and promote its thesis of a "new information order" (i.e., worldwide censorship) may well hope to find in INTELSAT an instrument of control. If such a use on INTELSAT were to develop it would not remain, one might suspect, the currently popular guide for some writers' blueprints for future institution building.

B. Luard

In the concluding paragraphs of his book, Mr. Luard,⁴¹ formerly a junior minister in the erstwhile Labour Government of the United Kingdom, a delegate to the United Nations General Assembly 1967-68, and now the Labour Opposition "Shadow Cabinet's" expert on the Third United Nations Conference on the Law of the Sea in the United Kingdom Parliament, professes his preferred blueprint of an ideal regime for deep seabed hard mineral mining. He states his goal as follows:

The newly discovered resources of the sea bed provide, for the first time in man's history, the opportunity to put into practice a form of world socialism. Here for the first time, the common ownership of common resources, and their use in the interest of all, may be used to bring about a redistribution, however, inadequate, not from rich individuals to poor within single states, but from rich individuals to poor within the world as a whole.⁴²

This thought, it is clear, was never far from the author's mind throughout his book, which was published in 1974. Since then the great caravan that is the Third United Nations Conference on the Law of the Sea has moved on, and many of the book's observations, proposals, theses and arguments are now anachronisms. Thus, when the book was written, it was accurate to say, regarding ideological evaluations of an emerging regime governing the deep seabed, that:

The Communist countries insisted, even more emphatically than the western countries on the need for caution. They accepted that legal principles must be worked out to govern exploitation and to "foster the development of international

³⁹See, e.g., Treaty, Art. 161.

⁴⁰INTERNATIONAL COMM'N FOR THE STUDY OF COMMUNICATION PROBLEMS (UNESCO), *MANY VOICES—ONE WORLD: TOWARDS A NEW, MORE JUST AND MORE EFFICIENT WORLD INFORMATION AND COMMUNICATION ORDER* (1980).

⁴¹Citations to Luard's book will be by author's name and page (and where relevant, footnote).

⁴²LUARD at 296.

co-operation" (to use their favorite phrase) to provide "free access to the resources of the seabed to all countries" (as the Bulgarian delegate put it) and to ensure "fullest freedom of high seas." Indeed, free enterprise was in many ways their watchword. The Bulgarian delegate even demanded, in words which would have done credit to an arch-capitalist monopolist, that "the regime to be established should be efficient and profitable with minimum operating costs."⁴³

This passage no longer reflects the stance of the Soviet Bloc. The states who are its members have now reversed their position and speak strongly for an Enterprise existing under its own operating regime and enjoying monopolistic powers. The Comecon states' change in attitude may be, in part at least, due to the consideration that the vast treasure house which is Siberia relieves the Soviet Union, and possibly her satellites, from the prospect of dependence on the seabed's mineral riches for very many decades to come, while the United States' dependence on extraterritorial sources is already with us. This dependence however, is growing rapidly in degree and intensity as each year passes. The soviet's change in position may also be due, in part at least to the beckonings of ideological leadership in promoting a "world socialist" enterprise which would not involve embarrassment or loss of tranquillity to the nations of the Warsaw Pact and Comecon.

The book is of some remaining interest, however, on three grounds: First, it presents a record, perhaps not always as accurate as it could be, of the diplomacy which led to the General Assembly's two key resolutions (the Moratorium Resolution⁴⁴ and the Declaration of Principles),⁴⁵ on Group of 77 claims with regard to the future directions of the Law of the Sea and especially of deep seabed mining, the negotiations in the Seabeds Committee and the early sessions of the Conference. Secondly, it offers a discussion of the various possible regimes which have been proposed. Finally the author presents a blueprint of his own.

As a preliminary matter, Luard's view of the Declaration of Principles, and especially its "Common Heritage" formula in Article 1, invite discussion. Furthermore, such a discussion cannot ignore that Luard's views on this specific topic reflect his general view of the authority of majorities in the United Nations General Assembly and its authority to impose obligations on minorities. He writes:

Even the general acceptance of the somewhat amorphous conception of the common heritage of mankind was not wholly without significance. Like the acceptance of a regime, and even more forcefully, the phrase emphasized that the resources of the area were generally regarded as common property, to be taken and used only with the consent of all and according to a system agreed by all. In so far as any property rights existed, the phrase implied, these were vested in the

⁴³LUARD at 176.

⁴⁴G.A. Res. 2574D, 24 U.N. GAOR, Supp. 30 at 11, U.N. Doc. A/7630 (1969).

⁴⁵United Nations 1970 Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 U.N. GAOR, Supp. 28 at 24, U.N. Doc. A/8097 (1970), 10 INT'L LEG. MAT'LS. 220 (1971).

world community and could not be simply appropriated through finding and exploiting. Just as many governments assert property rights in natural resources within their territories, the international community now, this phrase implied was taking the first steps in asserting its property rights in seabed resources within the international area.⁴⁶

In succeeding paragraphs Luard continues to argue for his perception of the "quasi-legislative"⁴⁷ authority of the General Assembly of the United Nations. He takes the view that it is unlawful for any state, or person, to appropriate or use the resources and minerals of the deep ocean floor. His book clearly takes it for granted that the Declaration constitutes "instant customary international law."⁴⁸ Thus, for example, he writes of the Declaration as having been "passed,"⁴⁹ and that it "formally registered the responsibility of the U.N. for defining the rules"⁵⁰ governing the future use and exploitation of the seabed. Finally, he draws on "perceived similarities"⁵¹ between the Declaration and the Antarctica⁵² and Outer Space⁵³ Treaties—despite the fact that these latter two instruments are conventions in force, while the former is merely an unimplemented Resolution of the General Assembly of the United Nations—a Resolution which, moreover, did not receive unanimous, or near-unanimous assent. It should be noted, in contrast with Luard's thesis, that a considerable number of states which voted in favor of the Declaration of Principles expressed, at the time of their affirmative votes, reservations and understandings to the effect that it

⁴⁶LUARD at 137; see also *ibid.* at 266.

⁴⁷ This phrase is not Luard's, who might well disown for any number of reasons, but Professor Richard Falk's. See the latter's *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966).

⁴⁸For the original coinage of the phrase quoted in the text see Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 2, 3 (1965). For a discussion of the arguments on the legal status of the Declaration of Legal Principles and of the common heritage, see, *supra*, text accompanying footnotes.

⁴⁹LUARD at 137.

⁵⁰*Ibid.*; see also at 288 where Luard writes: "The Declaration of Principles, which was supported unanimously. . . ." This statement and other similar statements should be contrasted with:

1. Professor Jennings's remark regarding the necessity of giving weight to the explanations given for votes cast in *The United States Draft Treaty on the International Seabed Area: Basic Principles*, 20 INT'L & COMP. L.Q. 433 at 439 (1970); and
2. the reservations stated by the United States Representative and Legal Advisor to the Department of State to the effect that the Declaration was not legally binding, but should be given "good faith consideration." See letter from John R. Stevenson, as Chairman, Interagency Law of the Sea Task Force and Legal Adviser, Department of State, to Senator Henry M. Jackson, dated May 12, 1972, *Hearings on S. 2801 (Development of the Hard Mineral Resources of the Seabed) before Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs, 92d Cong. 2d Sess. at 74-75 (1972)*.

⁵¹LUARD at 288.

⁵²Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, done January 27, 1967, T.I.A.S. No. 6374, 610 U.N.T.S. 205. See also draft United Nations Agreement Governing Activities of States on the Moon and Other Celestial Bodies, 1979 U.N.G.A. Res. 34/68, U.N. GAOR, Supp. No. 46 at 77, U.N. Doc. A/34/Supp. 46 (1980).

⁵³Antarctica Treaty, signed December 1, 1959, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

neither codified existing customary international law nor, alternatively, had a legislative impact changing existing law.

Back in the early 1970s when Luard was writing his book, the diplomatic campaign of some South and Central American countries (under the brilliant leadership of Chile, Ecuador and Peru—the “CEP countries”) to win worldwide acceptance of an extensive and exclusive maritime jurisdiction over both living and non-living resources in the air and water columns as well as on the seabed and in the subsoil, of an offshore zone extending two hundred sea miles seaward from the baselines from which the states’ territorial seas were measured, had not proved to be the success it has later become. Accordingly, the question of “limits” was then of great importance, since the type of high seas’ seabed regime would have to be conditioned, if not determined, by the extent of the sea areas covered, and by the variety and richness of the resources to be regulated. In later years, since the 200-mile Exclusive Economic Zone (EEZ) has become widely recognized so that many now believe, indeed, that it has already become a vested right established under customary international law,⁵⁴ interest in seabed resources beyond the limits of national jurisdiction has focused almost exclusively on the mining of manganese nodules. (The winning of oil, for example, which has been found in the subsoil of the seabed at profound depths, would appear technologically, to be a possibility only for the remote future and petroleum at lesser depths have become widely viewed as almost totally falling within the patrimonial rights of coastal states.)

Luard’s perception was that the seabed regime’s structure(s) and functions and, above all, its powers, would be conditioned by where the boundary between maritime zones under national jurisdiction and the international area would be drawn, and conversely, the structure(s), functions and powers of the regime could determine where states would be willing to demarcate the international regime’s limits. The second half of Luard’s proposition has not proved, in practice, to have been as valid as the first. The more recent resolution of the problem of the limits between coastal states’ regimes and that of the international seabed area was not so much due to the nature of the seabed regime as to the individual demands of states to control unilaterally offshore resources out to greatly augmented bounds. Be that as it may, Luard appears to be thinking along similar lines as those which led to the compromise “modified form of economic zone”⁵⁵ which was originally proposed in the *United States Draft for a United Nations Convention on the International Seabed Area* (August 3, 1970).⁵⁶ He favors a narrow area of “full national economic rights,”⁵⁷ This zone

⁵⁴ See, e.g., L.F.E. Goldie, *Customary International Law and Deep Seabed Mining, Symposium: Mining the Deep Seabed: A Range of Perspectives*, 6 SYRACUSE J. INT’L L. & COM. 173 at 179-80 (1979).

⁵⁵ LUARD at 258.

⁵⁶ 9 INT’L LEGAL MAT’LS 1046 (1970) [hereinafter cited as *United States Draft*].

⁵⁷ LUARD at 259.

should only extend out to the 200-meter bathymetric line as in the U.S. proposal."⁵⁸ Beyond this zone he argues for a further area in which the coastal state should be accorded some exclusive rights, out either to the 500-meter bathymetric contour line, or to a distance of 200 miles. But in this area the coastal state's competence should be limited, either in time, or by accountability, or, possibly, both. With regard to the temporal limitations, Luard proposes a fifteen or twenty year term, after which the additional zone would, in Luard's words "revert to the international system."⁵⁹

Secondly, Luard's proposed restrictions on sovereign rights are seen in terms of accountability. They would involve, also as in the United States' original 1970 proposal, a "trusteeship area." This would entail payments of a proportion of the proceeds of exploitation to an international authority. Such funds should thereafter be disbursed for "development purposes." Accountability would have the further advantage, in terms of Luard's thesis of "world socialism," of limiting coastal state discretion. One variant of this blueprint to which Luard points would involve an increase of the payments to the international "regime,"⁶⁰ and a decrease in the coastal states' powers over exploitation "at each 50 miles."⁶¹ He argues that all "these compromise schemes have the attraction of considerable logic and natural justice."⁶² He sees his blueprint as constituting a "scheme in which rights were *shared* between coastal areas and the world as a whole. . . ."⁶³

With regard to wide range proposals for various types of seabed regimes, beyond the limits of national jurisdiction Luard adumbrates the distinctive features of the main varieties of blueprints.⁶⁴ Starting with a simple "notification"⁶⁵ or "recording"⁶⁶ type of regime, he next outlines that predicated on "registration" and, in this context, discusses the range of possibilities in terms of the discretion which could be accorded to, or withheld from, the registering agency. He is critical of both the notification structure, as he is of all the variants of the registration regime on the ground that "the *initiative* would still remain with the operators."⁶⁷ This is, apparently, a fatal flaw in all of these proposals because it would give the "most technically advanced countries and firms" a "huge advantage over those states or companies with a less advanced technology."⁶⁸ Is this simply a statement of

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ LUARD at 261. (author's emphasis).

⁶⁴ LUARD at 170-74.

⁶⁵ LUARD at 170.

⁶⁶ See for a discussion of the significance of the idea, in law, and especially in the context of regimes governing deep seabed mining, of "recording" in contrast to "registration", Goldie, *The Contents of Davy Jones's Locker—A Proposed Regime for the Seabed and Subsoil*, 22 RUTGERS L. REV. 1 at 44-45, especially footnote 117 (1967) [hereinafter cited as Goldie, *Davy Jones's Locker*].

⁶⁷ LUARD at 171. (author's emphasis).

⁶⁸ *Id.*

prejudice, of Luard's own subjectivities? In his evaluation Luard does not discuss issues of efficiency and productivity, the utility of winning nodules from the point of view of the general welfare, or even the question of advanced enterprises operating under the flags of Group of 77 countries.

Next he discusses regimes of allocation—that is, regimes whereby an administrator or an authority apportions minesites and controls, not only the distribution of the sites, but which ones will be distributed, what the conditions of allocation will be, and amongst whom these mining privileges will be allotted. These have, to him, the advantage (and this is an advantage from the viewpoint of bureaucracy's mandarins—since it places the priorities of planners ahead of the demands of the market place) of denying business initiatives, especially the initiative of choosing and defining minesites, to the operators. In this context he surveys a number of variants modelled on the differing national legislation regarding drilling and mining on the continental shelves of several countries, including the United States and the United Kingdom.

The fourth category of regimes Luard envisages is that of the "international enterprise" in various forms. The sub-types within this grouping, as he presents them, are: (1) The international authority enjoying a monopoly of the exploration, exploitation, transportation, processing and marketing of the seabed nodules and their contents; and (2) A system whereby the authority contracts with states' public and private enterprises and, in effect, engages in joint ventures with them—exchanging its monopoly for the expertise and technology of the contracting enterprises. Unfortunately, the author does not explain whether such contracts would be merely management contracts, partnership or joint venture agreements, or concessions. Nor does he discuss, in this context, the vexed question of technology transfer to the international enterprise and/or developing countries. Finally, he does not appear to recognize the possibility, advocated by the United States delegation at the Third United Nations Conference on the Law of the Sea, of the "Parallel System."

Under this last blueprint (i.e., that of the "Parallel System") both private and state-owned enterprises are envisaged as being able to operate under the regime but in parallel, and in competition, with the international enterprise, which furthermore, would be given a number of advantages—some say, unfair advantages. Even this system has many problems. For example, a number of developing states still seek to add limitations and restrictions of developed countries' state-owned and private mining enterprises. Many of these restrictions and limitations appeared (when this reviewer last examined public statements by leading members of the United States government) to be unacceptable to the United States. This country's objections include resistance to the conditions, scope and fairness of the demands for

technology transfer⁶⁹ (as now demanded at the Conference by representatives of the Group of 77), and to the restrictions on the freedom of access to mine sites which the United States asserts to be essential to the proper functioning of a true parallel system. In concluding his chapter on "The Regime" Luard lists some twenty-five points with regard to which "there remains a wide gap"⁷⁰ between the states and groups of states negotiating at the Conference and concludes that list with the comment that "[t]hese are only the more important points of disagreement."⁷¹

After reviewing the "basic interests and issues,"⁷² the author then proposes "a possible regime."⁷³ Under the heading of "the System of Exploitation"⁷⁴ he points out that a regime established for exploiting the seabed "need not be too uniform"⁷⁵ with regard to all the possibly available resources. He points out that the "resources of the seabed are of a number of quite different kinds."⁷⁶ These include "the three main categories often referred to in U.N. debates and in some of the draft treaties."⁷⁷ He lists them as follows:

- (1) fluid seabed resources such as oil, gas, sulphur and geothermal energy;
- (2) nodules on the surface of the seabed; and
- (3) hard minerals beneath the seabed.

To these three categories of deep seabed resources Luard adds others "that are rarely mentioned"⁷⁸ namely:

- (1) phosphorites, and other resources of the seabed;
- (2) hot brines (in a few isolated areas);
- (3) the living resources of the seabed (the "so-called sedentary"⁷⁹ species of fish); and
- (4) gravel, copper and tin, "at present dredged near the coast, which may eventually be exploited in deep waters."⁸⁰

Because Luard correctly perceives that the regime need not be uniform for all these resources, and because the dramatic move seaward of the limits of national jurisdiction over sea and seabed areas has effectively limited, at

⁶⁹Thus, in ENTERPRISE 18 at 20 (February 1980) Ambassador Elliot Richards was quoted as saying:

There are still a number of things wrong with the technology transfer provisions that appear in the negotiating texts. We intend to do what we can to circumscribe the obligation to tailor it to the specific needs of the "parallel system" rather than the appetites of developing countries. But I am convinced that the obligation itself is essential to agreement on a comprehensive treaty.

⁷⁰LUARD at 191-92.

⁷¹LUARD at 192.

⁷²This is the title to Chapter 11, at 197-209.

⁷³This is the title to Chapter 12, at 210-61.

⁷⁴LUARD at 224.

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

least for the time being, the possibility of developing international regimes for winning resources other than manganese nodules, the remaining interest of Luard's blueprint is now limited to the mining of that resource. But here the reader will immediately note the considerable similarity of Luard's proposals for the governance of the mining of deep seabed manganese nodules with the United States 1970 Draft, especially with regard to membership, participation, controls and the distribution of benefits. But such a similarity has not been a guarantee of the general, if not universal, acceptance of the United States Draft. On the contrary, criticisms of, and hostility towards, that document, and the demands made upon the United States government and industry for further diplomatic concessions, together with insistence on restrictions on private enterprises' and state-owned access, to mining the deep seabed extensions of maritime areas under exclusive state control, demands for the transfer of technology, and the free transmission of wealth and power, have all combined to lead to that Draft's subsequent oblivion. This history, enacted subsequently to the publication of the book under review, indicates, perhaps ironically, that contemporary Group of 77 claims (as far as deep seabed mining is concerned) are far less hospitable to American and the other Western developed countries' private and state-owned enterprises interested in mining manganese nodules than is Dr. Luard's "world socialism"⁸¹ of many high seas resources. This now seems to be a rather anachronistic manifesto as it echoes down the corridors of time from the first half of the decade of the 1970s.

IV. A Potpourri of Views

A. *Allen and Craven*

This slim publication describes itself as a report of the proceedings of a Workshop held on December 11-14, 1978 in "the idyllic surroundings of Aspen Institute Hawaii."⁸² The Workshop was organized and convened under the auspices of the Law of the Sea Institute of the University of Hawaii. Generally speaking the contributions appear to fall into three categories: (1) those which would seem, possibly, to have been edited from summary records (and perhaps preliminary or preparatory materials as well) of the discussion; (2) general working papers for which no ascription is given; and (3) individually written studies for which authorship was credited. All of these quite disparate component writings were collected under several main headings, namely, "Simplification as a Strategy for Facilitating Agreement," "Continuing Problems Concerning Major Issues," and "The Consequences of Failure to Agree." The individually written and signed papers were four in number. They were presented by, respectively,

⁸¹ See *supra* note 42 and the text accompanying it.

⁸² *Id.* p. vii. (Citations to the summaries and contributions contained in the ALLEN & CRAVEN collection of papers and comments will be by editor's name and page (and where relevant, footnote) number only.)

Ambassador M.C.W. Pinto, or Dr. C. Rudiger Wolfrum and Professor Douglas M. Johnston, and Robert B. Krueger, Esquire. The ensuing discussion and comments were offered by persons from among those who had been invited to participate⁸³ and had actually attended⁸⁴ the proceedings.

1. "COMMON HERITAGE"

Ambassador Pinto of Sri Lanka opened the discussion with a forthright statement of the view held by a number of representatives at the Third United Nations Conference on the Law of the Sea from Group of 77 states which asserts that manganese nodules on the deep ocean floor beyond the limits of the national jurisdiction of any state "cannot be freely mined," on the ground that they constitute "the common heritage of mankind." This "common heritage" principle, in his view, means that "[i]n their original location these resources belong in undivided and indivisible share [*sic*], to your country and to mine, and to all the rest—to all mankind."⁸⁵ Of the various notions of "common heritage" Ambassador Pinto plumps for the one which effectively would prohibit deep seabed mining without the assent of an international organization purporting to speak "for all mankind." His thesis, is, of course, based on an historically untrue premise. Nevertheless it underpins much of what is said in favor of the view to which he gives expression, namely that:

[A]ll of us agreed eight years ago that this was the absolute, fundamental rule of the game, that this was in fact the law. . . .⁸⁶

There is, of course, an ambiguity in the phrase "all of us agreed." Does the "us" denote representatives of the Group of 77 only? If so, by what lawful authority does that Group bind non-agreeing, non-member states? If, alternatively, the phrase is intended to denote universal agreement, then it is untrue. The voting in the United Nations General Assembly on the Declaration of Principles Resolution,⁸⁷ in Article 1 of which a broad and undefined statement of the common heritage theory was enunciated, was as follows:

For:	108
Against:	0
Abstentions:	14
Absent:	0

Of those voting for the Resolution, it should be noted, once more, a number of representatives unequivocally asserted views of the common

⁸³ See ALLEN & CRAVEN, Appendix C at 109.

⁸⁴ See ALLEN & CRAVEN, Appendix B at 107.

⁸⁵ ALLEN & CRAVEN at 13.

⁸⁶ *Id.*

⁸⁷ UNGA Resolution 2749 (XXV), 17 December 1970, Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction, 25 U.N. GAOR Supp. 28 at 24, U.N. Doc. A/8097 (1970). 10 INT'L LEG. MAT'LS 220 (1971).

heritage principle inconsistent with Ambassador Pinto's definition.⁸⁸ For example the United States government stated that the Resolution did not make it necessary to halt deep seabed mining activities by United States nationals or enterprises. The United States point of view was shared by the other western industrialized democracies.⁸⁹

Furthermore, Ambassador Pinto interprets the "common heritage" theory in a way which would appear to assume general if not universal approbation, if not ratification, when he says:

This [i.e. the "common heritage of Mankind"] means that those minerals cannot be freely mined. They are not there, so to speak, for the taking. The common heritage of mankind is the common property of mankind. The commonness of the "common heritage is a commonness of ownership and benefit. The minerals are owned in common by your country and mine, and by all the rest as well. In their original location these resources belong in undivided and indivisible share to your country and to mine, and to all the rest—to all mankind, in fact, whether organized as States or not. If you touch the nodules at the bottom of the sea, you touch my property. If you take them away, you take away my property.⁹⁰

He further explains this approach to the legal interpretation of the "common heritage" principle in the following terms:

The legal status of the resources of deep seabed itself forbids mining under unilaterally developed individual or group regimes however well-intentioned, however efficient, however designed to fit in and coalesce with some future internationally agreed regime. . . . [T]he "common heritage of these resources . . . is more akin to property held in trust—held in trust for "mankind as a whole," for the public. It is therefore closest to "*res publicae*," the property of the people, to be administered by the people and for the people.⁹¹

As has already been pointed out, a number of countries, including many of the western developed states, including the United States, while agreeing to the insertion of the slogan in Article 1 of the Declaration, made it very clear that to them "common heritage" meant open access. The "commonness of the "common heritage" was seen, by them as the commonness of a common pasture or a common well, where all may pasture their domestic animals, or from which all may draw their water.⁹²

⁸⁸See, e.g., Letter from John R. Stevenson, Chairman, Interagency Law of the Sea Task Force and Legal Adviser Department of State, to Senator Henry M. Jackson, dated May 19, 1972. *Hearings of S.2801 (Development of Hard Mineral Resources of the Deep Seabed) Before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs*, 92nd Cong. 2d Sess. at 74-75 (1972). See also Statement by President Richard Nixon on the Ocean Policy of the United States, 23 May 1970, U.N. Doc. A/AC. 138/22, 9 INT'L LEG. MAT'L 807 808 (1970).

⁸⁹For a discussion of this point see: (i) *supra*, Part I, footnotes and the accompanying text; (ii) *infra*, this Part, footnotes 91 and 92 and the accompanying text; (iii) Goldie, L.F.E., *Mining Rights and the General International Law Regime of the Deep Ocean Floor*, 2 BROOKLYN J. INT'L L. 1, 36-40 (1975); and (iv) Goldie, *A General International Law Doctrine for Seabed Regimes*, 7 INT'L LAW. 796, 816-21 (1973).

⁹⁰ALLEN & CRAVEN at 13.

⁹¹ALLEN & CRAVEN at 14-15.

⁹²For an extended discussion of the debate now raging on the legal status of the "common heritage" theory see *supra*, Part I, § III. C. and D, and note especially the text accompanying

While discussing the "conditions of entry" to be imposed on miners under the ICNT (Conference's working text at the time of Ambassador Pinto's delivery of the paper under review—very similar considerations still prevail under the current Draft Treaty of the 1980 Resumed Ninth Session), in contrast with their hopes to engage in deep seabed mining, Ambassador Pinto was perhaps with very good reason, neither clear nor specific. In particular, he did not discuss meaningfully the vexed issues of the industry's freedom of access and the Group of 77's aspirations for the Enterprise to benefit from interdictions imposed thereon in order to bring drastic concessions of technology transfer. Ambassador Pinto's partisan presentation was followed by a summary of the discussion which raised no new general issues. The record shows, however, that "[w]hile the workshop was in session . . . the Federal Republic of Germany announced that legislation [i.e., on deep seabed mining] had been introduced in the Bundestag." A translation of the text of the Bill was attached to the report.⁹³

2. "SOME CONTINUING PROBLEMS"

The "common heritage" presentation, which has just been indicated, was followed by a miscellany of topics included under the general heading of the "Continuing Problems." This Chapter was divided under the following sub-chapters and parts:

- A. System of Exploitation
 - 1. Award of Contracts and Joint Ventures and the Banking System
 - 2. Production Limits and Anti-Monopoly Quotas
- B. The Assembly, Composition of the Council, and Relationship of the Council to the Assembly
- C. Technology Transfer
(This topic is supplemented by a paper by Rudiger Wolfrum entitled "Transfer of Technology: Some Critical Remarks and Suggestions for Change"⁹⁴)
- D. The Review Clause
- E. Dispute Settlement.

a. Technology Transfer

Space constraints call for concentration on only one of the many interesting and important topics listed under the heading of "Continuing Problems." (the title of this section might equally, of course, be entitled "Stubborn Problems," "Recalcitrant Problems" or even "Stubborn Antagonisms"). Be that as it may, the topic selected for a brief review is "technological transfer," and especially Dr. Wolfrum's fine contribution thereto.

ibid footnotes 51 and 52, and Jennings, *The United States Draft Treaty on the International Seabed Area: Basic Principles*, 20 INT'L & COMP. L.Q. 433 at 439 (1971).

⁹³ALLEN & CRAVEN, Appendix A at 83-105.

⁹⁴ALLEN & CRAVEN at 35.

After a concise outline of the evolution of the idea of technology transfer from the discussions of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction on down to the basic conference working paper current at the time of his presentation (the Informal Composite Negotiating Text (ICNT) as revised in the Spring 1978 Session of UNCLOS III) Professor Wolfrum points out that a number of different systems for regulating technology transfer have been concurrently resorted to without clearly resolving the scope of each or indicating which should prevail in the event of inconsistent or possibly alternative applications. Nor is there any clear connection between the privilege of access and the burden of transferring a valuable property.

First, Dr. Wolfrum reviews the system of transfer under Article 144 ICNT. He finds that a number of questions are left open in its relationship with Article 274 ICNT. While Article 144 deals with the transfer of deep seabed mining technology, he states the "scope of Article 274 ICNT is broader and covers scientific research as well."⁹⁵ Secondly, he points out that Article 144 "does not indicate what is meant by 'programs for transfer of technology'."⁹⁶ This is a most important issue to be left beclouded. Since, in the western industrialized states, private enterprises, rather than the states themselves, own seabed mining technology, an important question must be answered. How should the states acquire the technology to be transferred by them? By creating tax and other incentives for transfer? Or by expropriating the owners outright of their properties? The United States Senate might be reluctant to join a regime which could become so expensive to the American taxpayer. Dr. Wolfrum also raises a very interesting point when he says:

At first glance, the wording of Article 144 ICNT may not appear to tend in this direction [i.e., of investing the Authority with a monopoly of coordinating transfer of technology], but the development of the provision makes it likely that it is intended to create such a monopoly of [*sic*] the Authority.⁹⁷

Secondly, he connects Article 150(b) and (c), Article 151 paragraph 8 of the ICNT with Annex III, Article 5, paragraphs 3, 5 and 7 and Article 12.⁹⁸ Dr. Wolfrum then observes that:

Under these provisions the Authority may require that the contractor make available to the Enterprise the same technology to be used in the Contractor's operations on fair and reasonable terms.⁹⁹

The sanction for failing to agree with the terms of transfer carries a very severe penalty, in that the negotiations for the transfer are intended to take place after the applicant has received a contract, hence after he has laid out his investment—which he is thereupon in jeopardy of losing. Nor does this

⁹⁵ ALLEN & CRAVEN at 94.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

procedure for technology transfer carry any reciprocal benefits for the contractor. As Dr. Wolfrum points out, the Enterprise gains. Under it, the contractor is placed in a "no-win" situation: antithetically the Enterprise is in a "can't lose" one. The ICNT's third system, as Dr. Wolfrum adumbrates it, constitutes an organizational structure whereby the Authority can tie negotiations for technology transfer to the grant of access. "If no agreement on the transfer of technology is reached, the applicant will not receive a contract."¹⁰⁰ Whereas the second system adumbrated above may be subject to binding arbitration, under this third approach the decision of the Authority cannot be reviewed by the seabed dispute chamber. Having completed his review, Dr. Wolfrum points out that the three types of regimes of technological transfer, as they stood at the time of his writing, illustrate graphically a change in priorities in the negotiations on this topic at the Conference. Whereas at earlier sessions, as in earlier "negotiating texts", the stress was on transferring technology to help developing countries participate in deep seabed mining, the later sessions and documents tend to focus on the Enterprise, which now becomes, on behalf of "all mankind" the major direct beneficiary of technology transfer.

Turning to more general issues regarding the transfer to technology, the book under review indicates the main difficulties in the ICNT (and these still survive into the Draft Treaty) as being: (a) lack of clarity of the technology to be subject to the regime of transfer; (b) uncertainty as to how the transfer could take place; (c) financing and compensation problems; and (d) lack of reciprocity—the Enterprise is not obliged to transfer technology. Turning to freedom of access to mine the seabed, Wolfrum stresses the importance of the interrelationship between the system to be established and the transfer of technology. Transfer of technology will differ, depending on which of the various forms of access to be applied. The main classes are: (a) a "unified system" which permits only the Authority to engage in mining, hence there is no access by privately owned mining companies or state owned enterprises in this category;¹⁰¹ (b) a "unified system" whereby other entities may also mine, but only in joint ventures with the Authority, with this system, mining enterprises' access will necessarily be dependent on their joint venture agreements with the Authority; (c) the "parallel system" whereby the Enterprise and state licensed entities have a regulated access to mining the deep seabed; and (d) a licensing system whereby only entities licensed by states may mine. Under this last system the most extensive freedom of access is assured. Of the four methods Professor Wolfrum considers only (b) and (c) to raise relevant issues. He views (d) as politically not feasible and under (a) transfer of technology to third parties would merely waste resources (as they would have no use for it)—since technology transfer to the Authority would be replaced by service contracts. Under (b) he

¹⁰⁰ ALLEN & CRAVEN at 38.

¹⁰¹ ALLEN & CRAVEN at 40.

considers transfer to the Enterprise as "economically unjustifiable,"¹⁰² but considers that there would be a case for doing so in favor of developing countries. Under (c) Wolfrum argues that developing countries should be placed on a more equal footing with the Enterprise in obtaining technology, and that full compensation should be paid to the enterprise owning the technology in the first place. On the other hand, he is apprehensive that the developed countries' hopes for free access would be "compromised."¹⁰³

b. "Reluctant Consent" and "Parliamentary Diplomacy"¹⁰⁴

(i) *Alternative Criteria for Reviewing the Conference:*

The Contrary Goals of "Acceptance" v. "Legal Change"

Under Chapter V, "Deep Ocean Mining: Interim Arrangements and Alternative Outcomes," Professor Douglas M. Johnston presents an interesting, stimulating and very imaginative study on possible patterns of sub-optimal agreement (reluctant consent). He starts with the perception that the success of the Third United Nations Conference on the Law of the Sea need not be measured "from a purely diplomatic viewpoint."¹⁰⁵ This he defines as securing "the acceptance of almost all nations, regardless of its contents."¹⁰⁶ While recognizing that such an "outcome would be a truly spectacular accomplishment, indeed perhaps the most impressive in the history of conference diplomacy,"¹⁰⁷ he sees an alternative mode of measuring success or failure, namely by means of the political yardstick of law reform or legal development (the former being narrower than the latter). The advocates of the former position, we are told, have two related objectives: the development of equity-related norms and the elaboration of universal democratic participatory procedures. He adds that some of the law reform advocates are directing their hopes towards the achievement of a more evenhanded distributive justice. He adds that some of these are not only motivated by a need for distributive justice but also press for "remedial, or even retributive, justice as an admittedly non-egalitarian approach to securing the objective of equality of opportunity."¹⁰⁸ Professor Johnston also observes that both the "law reformists and the legal developmentalists [*sic*] accept that a treaty failure need not be a total failure in a more fundamen-

¹⁰² ALLEN & CRAVEN at 41.

¹⁰³ ALLEN & CRAVEN at 43.

¹⁰⁴ The term "Parliamentary Diplomacy" is used to indicate the contemporary phenomenon of multilateral negotiations, by means of "the package" ("the delicate skein of mutually traded interlocking and interdependent [provisions]) of a "negotiating text" whereby the contingent agreement of each delegation to the "negotiated language on one set of issues is dependent upon the acceptance by others of the compromise or negotiated language of all the other issues considered to be within the 'package'."—See Goldie, Rapporteur First Working Session of the Committee on the Law of the Sea, REPORT OF THE FIFTY-EIGHTH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION (Manila—1978) 310 at 312 (1980).

¹⁰⁵ ALLEN & CRAVEN at 57.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ ALLEN & CRAVEN at 58.

tal sense.”¹⁰⁹ They see that, even in the absence of a treaty “things will never be the same again.” The Conference’s deliberations will have effectively played a most significant part in shaping, developing, and reforming a new customary international law of the sea.

Of course, the effect of the Conference on the shaping and evolution of a new body of customary norms would be varied. Thus, while the new, extended regimes of coastal state jurisdiction would survive a treaty failure, the consequences would be different for deep seabed mining. He writes:

For the reformists a treaty failure would be a failure above all to institutionalize deep ocean mining in an area to be reserved for the common heritage of mankind, in a manner likely to result in an equitable redistribution of income and capability within an organizational structure which itself would be characterized by a redistribution of decision-making power and influence. For the legal developmentalists a treaty failure would be interpreted as a missed opportunity to expand, clarify and rationalize the newly emerging regimes in a systematic, coherent manner thereby ensuring continuing uncertainties, resentments, and conflicts in the expanding uses of the ocean.¹¹⁰

(ii) *“Reluctant Consent” and Ideological Discord*

Professor Johnston next discusses what he entitles “Three Scenarios of Reluctant Consent.”¹¹¹ These he calls, respectively, the “freeze-and-detach approach” the “interim authority” approach and the “constitutional development” approach. By “freeze and detach” Johnston means finalizing (freezing) current drafts from Committees II and III and those on dispute settlement, and of “detaching” the work of Committee I on deep seabed mining for special attention. Several variants of this are propounded. The first reflects what has been, in fact, developing, namely broadly perceived agreement, at least on generalities, in the areas which he suggests should be “frozen”—namely the work of Committees II and III. On the other hand, countries with the strongest interest in the present outcomes of those Committees’ deliberations (and “packages”),¹¹² for example the states of Latin America, Johnston feels, would be most reluctant to accept any proposal to detach. They would, presumably, prefer very strongly to go forward to the signing and ratification of a treaty.

The second variant of this “first scenario” (freeze-and-detach) is the proposal that the work of Committees II and III be cast into the form of an incomplete draft Treaty and the work of Committee I be transferred to a more congenial forum devoted only to the settlement of the outstanding issues connected with the deep seabed mining regime to be agreed upon. In order to obtain “reluctant consent” Johnston then suggests a sub-variant of this second variant of the “freeze-and-detach” scenario. This proposal

¹⁰⁹ ALLEN & CRAVEN at 59.

¹¹⁰ *Ibid.*

¹¹¹ ALLEN & CRAVEN at 61.

¹¹² For a provisional definition of the idea of the “package” in the context of UNCLOS III negotiations see, *supra*, note 103 and the material therein cited.

involves calling into being an interim version of the Council in order to constitute such a "more congenial" forum for continuing and completing the negotiations on the final ocean mining system. This approach, relying as it does on a smaller and more technically oriented body, would, clearly, be unattractive to developing countries, or at least less attractive to them than Scenario Two—The Interim Authority Approach. Although this sub-variant of the second variant of "freeze-and-detach" would fall short of establishing the autonomous, regulatory and entrepreneurial Authority which the Group of 77 is demanding, it clearly offers something more to that interest group than Professor Johnston's third variant of the "freeze-and-detach" scenario. This, the third of the scenarios of reluctant consent, Professor Johnston designates as "constitutional development." It is predicated on what he perceives to be the "strong suit of the Conference, namely 'normative development.'"¹¹³ There has been more progress in this area of the Conference's diplomacy, he perceives, than in formulating the organizational, procedural and operational details of the regime to govern deep seabed mining. He distinguishes between two variants within this scenario—the Symmetrical Variant and the Asymmetrical Variant. The former he perceives as possibly being cast in the form of a Declaration of Principles, perhaps to be denominated the "Caracas Declaration of Principles on the New Law of the Sea."¹¹⁴ Such a Declaration might well be characterized (and designated) as a "Treaty of Principles." It should be "subject to *signature* only."¹¹⁵ Johnson considers that to make the text subject to ratification would most likely be counter-productive, in that such a requirement could raise national constitutional difficulties.¹¹⁶ He also advocates that signature to such an instrument should not be capable of qualification by the attachment of reservations or unilateral interpretations.¹¹⁷ Given the potential impact of Article 18 of the Vienna Convention on the Law of Treaties¹¹⁸ (1969) and of the similar proposition to be found in the *Certain German Interests in Polish Upper Silesia Case*,¹¹⁹ which impose the obligations of a treaty before its entry into force upon the constitutional processes for the making of treaties laid down in Article II of the United States Constitution, a warning must be issued that such a signature by the United States could, and no doubt would, be viewed abroad as an international retraction of valid United States domestic legislation namely the Deep Sea-

¹¹³ALLEN & CRAVEN at 66.

¹¹⁴ALLEN & CRAVEN at 67.

¹¹⁵*Ibid.* (author's emphasis).

¹¹⁶This proposal does not take into account, this reviewer suggests, the status, in United States constitutional law, of executive agreements and the delicate situation of "self-executing," as distinguished from "non-self-executing" agreements.

¹¹⁷This prohibition would inevitably compound the problem regarding, and the consequential handicaps to consent involved with, the special constitutional law issues pointed out in the preceding footnote.

¹¹⁸U.N. Doc. A/CONF. 39/27 (1969), 63 AM. J. INT'L L. 875 (1969).

¹¹⁹[1962] P.C.I.J., Series A, No. 7, 30.

bed Hard Mineral Resources Act of 1980¹²⁰ and as preventing the implementation of that statute both domestically and internationally.

The Asymmetrical Variant of this third scenario is perceived as a rather "lopsided outcome"¹²¹ which has been touched by "freeze-and-detach." This proposal envisages a combination of two different types of documents—a Declaration (or Treaty) of Principles for deep seabed mining conjoined with a Draft Treaty (or Draft Articles) finalizing the work of Committees II and III. The author sees the advantages of this variant as including a return on the world community's "investment"¹²² in the Third United Nations Conference on the Law of the Sea and as providing the "maximum legal protection—not to say guarantee—against the contingency of unilateral deviations from the spirit or letter"¹²³ of the Conference's texts. To this review there seems something circuitous in this second point. "Reluctant consent" is to be won for the UNCLOS III texts by obtaining "reluctant consent" to "their spirit or letter." But, by definition, it is that very "reluctant consent" which is to be wooed, or at least solicited.

(iii) *Scenarios of "Delayed Acquiescence"*

Perceiving that "consent" to the foregoing scenarios and their variants may be too "reluctant" to be forthcoming, Professor Johnston thereafter examines two scenarios with "suboptimal outcomes."¹²⁴ He considers that these should be characterized as falling under "delayed" rather than "reluctant" consent because they could come into being independently of UNCLOS III, but would produce consequences which would induce or, perhaps, propel, states into resuming the Conference "satisfied at least that the worst fears associated with 'unilateralism' have not been confirmed by events."¹²⁵ He designates these two latter scenarios as the "Mini-Treaty Approach" and the "Regulated Marketplace Approach." The former has a number of variants, the two main ones, however, are those which are to be limited exclusively to mining states and those which may be open to "a limited number of non-mining or future mining states."¹²⁶ It suffices to point out that the Deep Seabed Hard Mineral Resources Act of 1980¹²⁷ envisages, through the exercise of authority delegated in the Act and the existence of similar legislation in other countries, the actualization of these

¹²⁰94 Stat. 553, 30 U.S.C. §§ 1401-1473, 26 U.S.C. A §§ 4995-4998, 6621 (1980).

¹²¹ALLEN & CRAVEN at 68.

¹²²Johnston writes, at ALLEN & CRAVEN at 68:

Indeed it might be argued that a dual textual outcome of this kind [i.e. the "Asymmetrical Variant"] represents precisely the extent of consent and consensus so far obtained at UNCLOS III, and that the world community is *entitled* to an interim product which could be seen to represent the return on its "investment" in this particular exercise in conference diplomacy.

¹²³ALLEN & CRAVEN at 68-69.

¹²⁴ALLEN & CRAVEN at 69.

¹²⁵*Id.*

¹²⁶ALLEN & CRAVEN at 70.

¹²⁷*Supra* note 119.

possibilities and, furthermore, perceives of their coming into existence through what would appear to be administrative arrangements arising from relatively interrelated unilateral legislation by participating states.¹²⁸ Describing the "Regulated Marketplace Scenario" Johnston envisions the mining states as enacting "permissive national legislation on deep ocean mining"¹²⁹ and, rather than establishing a mini-treaty approach, or even the administrative interrelations envisaged, for example, in the United States Deep Seabed Hard Mineral Resources Act, leaves the mining companies or consortia to allocate their mine sites and possibly to regulate market access. This, of course, smacks of cartelization and of the possibility of running afoul of the U.S.A.'s, the Common Market's and the latter's member states' anti-monopoly laws and policies. Furthermore, this marketplace blueprint might well lead to governmental pressures of many kinds, especially through relatively informal inter-state arrangements. The two main subgroups which Johnston describes of this scenario are the Regional Variant and the Global Variant. The former, in his view, would have the advantage of leaving *some* play for competition and market forces, whereas the Global Variant would, presumably, eliminate the play of competition. It would be a complete cartel arrangement if the member corporations did not succumb to temptations to break rank. Because of the felt need, today, for governmental activism, the valid theoretical distinction drawn in Professor Johnston's paper between the "mini-treaty" and "regulated marketplace" scenarios would quickly become blurred in practice. A mixed scenario would then result.

c. Predictions and Preferences

In his conclusion Professor Johnston states a preference for Variant 1 of the Freeze-and-Detach scenario. On the other hand, his tentative prediction would appear to be that a combination of the mini-treaty and regulated marketplace approaches will emerge. These will, however, emanate under "carefully cultivated diplomatic circumstances which will permit eventual reconciliation with the majority of developing nations."¹³⁰ The price of such a development, Professor Johnston believes, will be the perpetuation of "an ideological division between the more extremist and the more moderate advocates of the New International Economic Order."¹³¹

It is to be regretted that an even fuller treatment of the contents of the book under review has not been possible and that all the contributions in it have not been covered and reviewed. Although the book is now aging fast in an environment where such an inevitable condition can be fatal, it still contains some very important contributions to the subject of deep seabed

¹²⁸See *id.* § 118.

¹²⁹ALLEN & CRAVEN at 72. See, *e.g.*, the statute cited *supra* note 125 and the text accompanying it.

¹³⁰ALLEN & CRAVEN at 74.

¹³¹*Id.*

mining law and policy. Generally speaking, its contributions are thought-provoking, basic, analytically perceptive and, as Dr. Samuel Johnson may well have said it, "concentrates the mind wonderfully."

B. *Kildow*

Consisting of a collection of seminar essays presented at the Massachusetts Institute of Technology during December 1978 and January 1979, the volume¹³² edited by Dr. Judith Kildow presents some discrete and even disparate views on the various technological, economic, organizational, political and legal aspects of the international problems concerning deep seabed mining. This collection is divided into four major sections with a varying number of contributions in the first three. The fourth has only one. The sections are:

- I. Changing Institutions and Resource Conditions
- II. The Value and Abundance of the Resource
- III. United States, Third World, and Industrial Perspectives on Deepsea Mining
- IV. Summary and Conclusions

Some fourteen people were contributors, and each submitted one paper, except Kildow, who jointly with Vinod K. Dar contributed "Introduction to an Unusual Resource Management Problem" and wrote the concluding essay "Points of Consensus and Points of Controversy."

Because of the considerable number of contributors, and of the relative brevity of each contribution, it would be difficult to do justice, within the space constraints of this review, to all, if justice were measured in terms of an equally lengthy discussion for each. Accordingly, some pieces will be passed over, others briefly canvassed and only relatively few will receive that to which all may be entitled in terms of adequate consideration. Indeed, the second section of the book under review, "The Value and Abundance of the Resource" will, despite some interesting and important contributions, be passed over altogether, as will some authors in the third section, despite the fact that, no doubt, they deserve better of this review. The constraints of space dictate this ruthless pruning.

1. KILDOW AND DAR

In their introductory comments Kildow and Dar begin by recalling some key events in the past five to seven years which have stressed the dependence of the United States on the importation of key resources and her vulnerability to foreign political and economic actions. They then stress that the likelihood of foreign countries' policies and decisions disruptive of American economic stability are likely to increase in the future due to

¹³²Citations to the individual contributions contained in the Kildow volume will be by the editor's name and page (and where relevant, footnote) number only.

changes which are continuing at an accelerating pace in world conditions. They classify these changes as strategic, structural and attitudinal. *Strategic changes* they define as the emergence of new resource powers and the attempts by some of them to expand their market shares at the expense of established mining firms "by pursuing policies of revenue and employment maximization rather than profit maximization."¹³³ *Structural changes*, resulting mainly from decolonization and Third World countries' policies of nationalizing Western mining investment, lead to the consolidation of new coalitions (and the decay of old ones) in order to extract economic rents from the consumer economies. *Attitudinal changes* in the global distribution of economic rents among developing and developed countries has underpinned and validated claims for the New International Economic Order. This, in turn, has created both the moderate drives for a respectable competitive position in the world market and radical ones to institute fundamental changes. States adhering to these latter tenets are consciously in conflict with the developed industrialized democracies.

In the face of these basal changes in the global environment, the United States' decision-makers are confronted by chaotic conditions and have no overall guidance. In particular, the "uncoordinated integration"¹³⁴ of foreign and domestic bureaucratic functions (together with the seemingly inevitable bureaucratic rivalries and warfare) has led cross-currents and confusion in our resource diplomacy.

The joint authors of this introductory study then present deepsea mining as "a good case study of the structural and substantive dilemmas of current U.S. resource policy."¹³⁵ They point out that:

For the United States, the problem is that deepsea mining falls into several categories of policy issues that are currently under heavy scrutiny by the federal government: (1) non-fuel minerals policy; (2) U.S. interests in the ocean; (3) the U.S. role in the Third World; and (4) the most effective organization of government to handle resource-related problems.¹³⁶

In addition, there is another "fundamental domestic problem"¹³⁷ which seems to dominate national policy-making—the "appropriate role for the federal government in private-sector activities."¹³⁸

Under the rubric of "An Unusual International Problem,"¹³⁹ the authors discuss deepsea mining as an alternative to the threats to the developed countries' markets which arise from political instability, possible Soviet expansion in Southern Africa and the Middle East (they theorize that a "major component of the Soviet Union's geopolitical strategy seems to be to spread its influence over areas that are major suppliers of minerals to the

¹³³KILDOW at 4.

¹³⁴KILDOW at 8.

¹³⁵KILDOW at 10.

¹³⁶KILDOW at 12.

¹³⁷KILDOW at 13.

¹³⁸*Id.*

¹³⁹*Id.*

West"),¹⁴⁰ the growing competition among industrialized and industrializing countries for the same global pool of resources, and the demands of the proponents of the New International Economic Order. The problem is seen as "unusual" because the Group of 77 see seabed mining as conducive to the resource independence of the industrialized democracies and thereby reducing their leverage in the international arena, especially those which capitalize on the economic triangle of the United States/Europe/Japan and the political triangle of the United States/the Soviet Union/China. Furthermore, within the Western industrialized democracies the Group of 77 has an "unusual"¹⁴¹ constituency in that they have elicited "an unusually favorable response from the liberal elites of the industrialized countries."¹⁴² Finally, the structure of an international seabed authority dominated by the Group of 77 could effectively transmit the instabilities of the South to the North and foster rivalries among the industrialized powers. The problem would appear to be "unusual" also because much of it would appear to be result of the divided counsels in the West (and especially in the United States) rather than any need for exchanges of significant concessions in an arms length bargaining situation.

The fourth section of the Kildow and Dar study is entitled "An Unusual Industry Problem."¹⁴³ This presents an *omnium gatherum* of discrete facts, issues and problems, including a brief indication of the main features of the seabed mining bill¹⁴⁴ then being considered by Congress (together with a recondite indication of a possible international reciprocal regime envisaged in that Act of Congress), a spectrum of the main alternative systems, "from passive to active"¹⁴⁵ which have "been proposed in the past five years,"¹⁴⁶ various possible configurations of the nodule gathering device, problems of impacts of seabed mining on markets, the multinational corporations as models for mining consortia, and the INTELSAT analogy.¹⁴⁷

Such an undigested agglomeration of unlike matters, many of which deserved far more thought and space than was accorded them, render this final section of the book's introductory essay very disappointing. Furthermore, it detracts from both the achievement and the promise of the authors' most thoughtful section, namely that entitled "An Unusual International Problem" and fails to fulfill expectations engendered by the title of the paper as a whole.

¹⁴⁰KILDOW at 14.

¹⁴¹KILDOW at 18.

¹⁴²*Id.*

¹⁴³KILDOW at 22.

¹⁴⁴This bill is now law. See Deep Seabed Hard Mineral Resources Act of 1980, 94 Stat. 553, 30 U.S.C. § 1401 (1980), Pub. L. No. 96-283. See, *supra* this part, note 18 and the accompanying text.

¹⁴⁵KILDOW at 24.

¹⁴⁶*Id.*

¹⁴⁷See *supra*, text accompanying notes 37-42.

2. KOBLER

Arthur Kobler, of the Commodities Office, Department of State, contributed a brief paper introducing the collection in Part III of the book, "United States, Third World, and Industrial Perspectives on Deepsea Mining." This essay on "Governmental Treatment of Ocean Mining Investment,"¹⁴⁸ first, indicates a number of major problems encountered in the seabed mining context. Then, after pointing to the choice that the United States government had made, for foreign policy reasons, to press for the negotiation of an international regime, he compares the basic United States interest in an open access system with the type of regime presented in the UNCLOS III negotiations. He finds a wide gap between the criteria for a genuine open access system and the regime which the conference has proposed. He closes his paper with the rather defensive and indeed apologetic statement that:

In conclusion, let me simply reiterate that the major objective of the United States in the seabed negotiations is to resolve the various disputes, such as technology transfer and production control, in such a way as to guarantee assured access and create a hospitable climate for investment in the seabeds.¹⁴⁹

3. DARMAN

In his substantial contribution to the Kildow collection, namely his *United States Deepsea Mining Policy: The Pattern and the Prospects*,¹⁵⁰ Professor Richard G. Darman, first, examines some "major points of objective perspective that help describe the environment in which United States policy has developed"¹⁵¹ and then he takes up the pattern of the development of United States seabeds policy in terms of those perspectives. Thirdly, he projects the likely further evolution of United States policy. (He extrapolates, more or less, from the situation of the time of writing, presumably late 1978 and early 1979, and does not take into account the possible future change of direction as a result of the now-pending (as of April 1981) reappraisals of the previous (Carter Administration) policy by the incoming Reagan Administration.) Finally, Darman "frames an analysis of the consequences of that policy from the perspective of United States interests."¹⁵²

Because Darman's "objective perspectives" reflect his perception of the real world within which United States' policies have been formulated, and which has not been as clearly perceived by American governmental decision-makers, he gives a brief adumbration of the world political environment and so provides a necessary prolegomenon to an understanding of his

¹⁴⁸KILDOW at 151.

¹⁴⁹KILDOW at 158.

¹⁵⁰KILDOW at 159.

¹⁵¹*Id.*

¹⁵²*Id.*

comments on those policies themselves. First, he deplores a tendency to underemphasize the extent and potential wealth of the high seas area. Secondly, he stresses that the value of seabed resources should not be predicated on "some discounted present value estimate of the economically interesting minerals,"¹⁵³ and that a regime governing it may have important political consequences extending beyond deep seabed mining and may reflect fundamental values involving future generations. Thirdly, he stresses that the political significance of the regime has risen importantly. For most delegations it is no longer a question of negotiating for a regime which will administer the winning of a new resource on equitable and utilitarian principles. Rather, it has become an important symbol in the vindication of the New International Economic Order and in the creation of a "global commons." In this regard the principle of the "common heritage of mankind" focuses the global political consciousness of developing countries to Outer Space and Antarctica as well as to Ocean Space.

Fourthly, the regime to be created will, once established, become a "largely free-standing and operational politico-economic system."¹⁵⁴ Fifthly, while the United States has consistently viewed the deep seabed regime as only one among several important interests, and not the most important, the political overspill from such a new free standing system, and the emerging values for which it stands, may well have important limiting impacts upon the traditional high seas freedoms of military and commercial navigation. It should be noted, moreover that these traditional freedoms are those to which, in its conventional wisdom, the United States Delegation has given the highest priority, despite the potentiality for their restriction which a powerful and independent seabed regime could, and probably would, entail for them.

Darman's sixth and last objective perspective is to point out that the values which are often stated as the goals of the various parties negotiating the regime to be established do not, in fact, inherently need the international governmental and economic structure now being ordained at UNCLOS III. From security of miners' tenure to claims for equitable shares by developing countries, the whole spectrum of values can be established (within the frame of the present, traditional regime) by domestic legislation and relatively informal agreements and simple revenue and technology sharing and subsidy measures.

Under the general heading of *The Pattern of United States Policy Evolution*¹⁵⁵ Darman points to the single-minded pursuit, regardless of other negotiating options, by the United States of a universal agreement on a mining regime within the broader context of comprehensive law of the sea negotiations conducted under the auspices of the United Nations. Within this framework, Darman points out, "United States policy has shown rela-

¹⁵³KILDOW at 160.

¹⁵⁴KILDOW at 161.

¹⁵⁵KILDOW at 162.

tively little substantive consistency—other than a clear pattern of concession to the policy preferences of the Group of 77, concession that has characteristically been unilateral.”¹⁵⁶

Indeed, the pattern of United States negotiations began with yielding (without any *quid pro quo*) the fundamental institutional issue that a significant Seabeds Authority should be established, and a fundamental issue of principle, namely the “common heritage of mankind.” Since then the United States has continuously “offered further concessions in an effort to gain improvements in a revised negotiating text.”¹⁵⁷ After highlighting these self-imposed initial handicaps on the United States’ bargaining position’s inauspicious initiation, Darman then traces the consistent pattern of concessions, retreats, further concessions, ephemeral rallies and still further retreats and concessions. In commenting on this less-than-heroic picture Darman writes:

In return for all these concessions, the United States has received (at this writing [i.e. early 1979]): textual incorporation of its concessions (or even more concessional variations thereof); no substantive concessions from the Group of 77; an outright rejection of the parallel system; a series of essentially unchanged demands from the Group of 77; and expression by the Group of 77 of a continued “willingness to negotiate.” For the latter, the United States has seemed to be most appreciative.¹⁵⁸

Under the rubric “Likely Next Steps in the Seabed Negotiations,”¹⁵⁹ Darman examines two “conference-breaker” issues which had not, at the time of his writing, been seriously taken up by the Conference. These are:

- (1) Composition, powers and voting of the Assembly and the Council;
- (2) Quotas and the equitable distribution of contracts among classes of applicants and states.

These issues have been designated “conference breakers” because of their importance, especially to the United States’ hopes of access and an equitable sharing in the benefits of deep sea mining and, in a contradictory mode, to the ideological aspirations of the Group of 77. Because, however, Darman sees the confrontation as “pragmatic” on the one hand, but “ideological” on the other, he predicts further “pragmatic” concessions resulting in a system giving considerable (in this reviewer’s opinion, with the advantage of hindsight, unexaminable and subjective) discretion to the International Seabeds Authority, supreme policy-making powers invested in a one-nation/one-vote Assembly, and a clear veto power given to developing countries.

He states:

In sum, given the pattern noted above and many other considerations, it seems reasonable to expect that any deepsea mining regime that emerges from the pres-

¹⁵⁶KILDOW at 163.

¹⁵⁷KILDOW at 165.

¹⁵⁸KILDOW at 167. Note omitted.

¹⁵⁹KILDOW at 169.

ent United Nations Conference will have most or all of the characteristics that the United States deemed "fundamentally unacceptable", following the issuance of the Informal Composite Negotiating Text (ICNT): but it also seems reasonable to expect that the United States negotiators might nonetheless find such a regime acceptable . . ."¹⁶⁰

The Draft Convention on the Law of the Sea (Informal Text)¹⁶¹ substantially confirms Darman's pessimistic predictions.

While the consistency of the United States' retreats and concessions carries with it a hopeless sense of inexorability and doom, this is not a result of an inevitable fate. Under the caption "A Path Not Taken" Professor Darman discusses a "plausible alternative."¹⁶² In brief he presents arguments supporting the viability of the "prompt enactment of domestic legislation along the lines of H.R. 3350 as it passed the House of Representatives in 1978 and prompt issuance of permits under such an act."¹⁶³ Such a statute has, of course, now been passed¹⁶⁴ and the National Oceanographic and Atmospheric Agency, the agency entrusted with administering it, is promulgating regulations with a view to the "prompt issuance" of mining licenses.

In addition, Darman points to the need for reciprocating agreements and harmonious domestic legislation among developed countries, and the participation of developing countries in consortia and agreements for technology transfer. In addition, provision should be made for revenue sharing. Events have, to some extent, now overtaken these proposals. The participation of developing countries in such a regime remains to be seen and will depend on their acceptance of a more decentralized model than the one for which their more militant members have been pressing at the Conference.

Professor Darman concludes his presentation with a statement of "A Framework for the Evaluation of Likely Impacts (from the Perspectives of United States Interests)."¹⁶⁵ Taking the highly concessional, centralized regime as the focus, and the decentralized reciprocating domestic laws' regime as the "path not taken" he evaluates the former in terms of "favorable" versus "unfavorable" effects from the standpoint of United States interests.

He includes among the "favorable" effects, the following:

1. Negotiation of a comprehensive law of the sea treaty would protect or promote certain non-seabed interests that the United States attaches to the law of the sea negotiations, for example fishing interests, freedom of commercial and military navigation, environmental protection and the development of compulsory dispute settlement. His brief comments on each of these interests leaves the reader with the sense that real cost has been paid by the United States for largely illusory concessions;

¹⁶⁰KILDOW at 172.

¹⁶¹U.N. Doc. A/CONF. 62/WP. 10/Rev. 3/Add. 1 (mimeo., 28 August 1980).

¹⁶²KILDOW at 172-75.

¹⁶³KILDOW at 172-73.

¹⁶⁴This is now the Deep Seabed Hard Mineral Resources Act of 1980. *See, supra*, note 142.

¹⁶⁵KILDOW at 175.

2. A widely accepted, and in some respects a somewhat more stable legal framework for deepsea mining. Again, owing to the powers of the Authority, the indicated advantages would be cancelled out by either destabilized contractual relations or destabilized political support for the Authority.

He lists the unfavorable effects as:

1. In aggregate, a reduced rate of investment in the development of deep seabed resources (a) with respect to minerals in nodules and (b) with respect to other resources;

2. For United States companies in particular, a reduced share of aggregate investment in and earnings from seabed investment;

3. Because of points 1 and 2, and because the projected regime would give wide discretion to the new Authority, reduced surety of United States access to the mineral resources of the deep seabed;

4. Reduced incentives for technological development;

5. Increased prices of the minerals involved;

6. A reduction in the resources available for global redistribution of wealth;

7. A reduction in high seas freedoms in the deep ocean area;

8. Adverse precedential effect with respect to the development of global political and economic institutions generally.

While all the above call for comment and explanation, space permits only a brief outline of the rationale of item 7. Darman argues, and in this reviewer's opinion argues both correctly and cogently, that, notwithstanding the would-be limiting language in the text, an expansion of the Authority's powers and controls of other high seas uses than deepsea mining would be "the natural line of development."¹⁶⁶ Indeed, Darman sees the concentration of power vested in the Authority as leading to a "creeping jurisdiction" phenomenon which has been observed and discussed in terms of coastal state encroachments into the free high seas from the shore.

In this reviewer's opinion Professor Darman's contribution to Dr. Kildow's volume provides an important and clear statement of the direction in which the United States Delegation at UNCLOS III has taken and has given the American public and its political representatives a due and timely warning of a number of the results of that direction which could be of considerable harm to United States interests in the long term.

4. ADEDE

Dr. Andronico O. Adede has given us a statement of the "Developing Countries' Expectations from and Responses to the Seabed Mining

¹⁶⁶KILDOW at 180.

Regimes Proposed by the Law of the Sea Conference.”¹⁶⁷ Much of what he says regarding developing countries expectations has already been averted to in other contexts in this review—especially that of the Kronmiller volumes. This is, as may be expected, a defense of the tactics and goals of the Group of 77. One new point of interest does, however, arise. He argues that the Seabed Authority is not “a monster, but an institution upon which mankind has bestowed confidence.”¹⁶⁸ He also argues that “the optimistic” rather than “the pessimistic view” should be taken of the Authority. He exhorts his readers to have confidence that even if the Seabeds Authority is given unexaminable discretions and even if these may be exercised, from time to time, to the disadvantage of the United States and the other industrialised western powers, by and large the powers granted in the seabed mining provisions will be exercised reasonably. But that leaves the developed, industrialised democracies with an important question unanswered: should they listen only to what Hannah Arendt has called “the rationalizing liberal within us . . . wheedling us with the voice of commonsense?” Or may this involve too great a gamble?

6. KILDOW

The general editor of the volume, Dr. Judith T. Kildow, also writes the concluding study, “Points of Consensus and Points of Controversy.” Specifying that the “ultimate purpose of the seminars was to determine a net strategic and economic value of the manganese nodules to the United States”¹⁶⁹ she claims that there seems to be a general agreement on quantities and grades of the mid-Pacific deposits, but wide disagreement regarding those of other areas. Two subsidiary but interesting points in this context are: (1) the observation that, while in the past the unit of measure consisted of the number of minesites, this has now been bypassed and estimates are not being given in terms of tons of nodules; (2) estimates of production potential presented by industry spokesmen exceed those of the academic ocean researchers.

Controversy has arisen over the effects of deepsea mining on world metal markets, projections of future demand, broad new uses for manganese, substitution effects, the question of the reliability of the current sources of cobalt and manganese, and the security achievable through the cultivation of alternative suppliers, or through resorting to stockpiling and the use of economic and political leverages.

Dr. Kildow then touches on the political, economic and technological problems regarding alternative regimes and the controversies involved with the range of possible choices. She presents a gradation of opinion, ranging from those who argue that the industrialized nations should pursue other

¹⁶⁷KILDOW at 193.

¹⁶⁸KILDOW at 208.

¹⁶⁹KILDOW at 247.

international arrangements than the various versions of the regime proposed by UNCLOS III, since its inhibiting effects far outweighed its advantages for the industrialized nations, to those who advocate that "the industrialized world must capitulate to the Group of 77 because the cost of not doing so would be too high."¹⁷⁰

She also touches on the then (1979) possibility of United States legislation to govern deepsea mining (now an actuality)¹⁷¹ and the opinions which confront one another on this move, from those who attack it as a malevolent compromising of the United Nations negotiations, which are too important to be tampered with, to those who support it as a catalyst for the conference negotiations and a stimulant of reasonableness and agreement.

C. Friedheim

The *Friedheim* Book, like the *Allen and Craven* and *Kildow* collections, is an anthology of essays by a number of different authors writing from the perspectives of different disciplines, commitments, interests and approaches. The essays are, however, disparate and diverse, rather than interlocking.¹⁷² They are not convergent, nor do they reflect an integrated and interdisciplinary whole. The book presents twelve authors of some thirteen rather brief essays (the book's editor, Dr. Robert Friedheim, contributed two papers) on various topics within four main areas (Parts) namely: (1) The Nature of Ocean Space (2 essays); (2) Technical Problems and Opportunities for Using Ocean Space (3 essays); (3) Political, Economic, and Legal Problems and Opportunities for Using Ocean Space (7 essays); and (4) Getting Our Own House in Order (1 essay).

Of the essays contained in the book only four will be reviewed as being most germane to the interest and context of this review, namely two (plus the Forward) by Friedheim, "The Political, Economic and Legal Ocean" in Part I; "The Nature of Ocean Space" and "Arvid Pardo, the Law of the Sea Conference, and the Future of the Oceans" in Part III, "Political, Economic, and Legal Problems for Using Ocean Space," and one each by Arvid Pardo "Law of the Sea Conference—What Went Wrong" and Ross Eckert "Ocean Enclosures: A Better Way to Manage Marine Resources."

1. ARVID PARDO

Although Ambassador Pardo's paper does not appear first in the volume being reviewed in this section of this Part, it does strike the keynote around which, at least to some extent, and perhaps with a degree of uncertainty and hesitation, this book would appear to be orchestrated. Hence it will be reviewed first.

¹⁷⁰KILDOW at 250. She adds to the statement quoted in the text the following parenthetical comment: "(the source of this anxiety was never clearly brought out)."

¹⁷¹See *supra*, note 162 and the accompanying text.

¹⁷²Citations to the individual contributions contained in the Friedheim volume will be by the editor's name and page (and where relevant footnote) number only.

After a brief introductory statement of his view of the world (angled as it is from a perspective of Malta's political, economic and physical location), and of the history of the law of the sea over the past three-to-four centuries, Ambassador Pardo argues that the erosion of the traditional freedom of the high seas has, in the recent past, been due to the increase in range, number and intensity of the uses of the high seas and to the decline of the traditional naval powers—"particularly Great Britain, which lived largely by fishing and grew wealthy on trade."¹⁷³

He adds that the changes in humanity's uses of the ocean which we are witnessing are due to the technological revolution which "has given us the tools to penetrate, use and exploit ocean space in all its dimensions and for an increasing number of purposes."¹⁷⁴ He also pointed to the "contemporary global population and industrialization explosion"¹⁷⁵ which can only be sustained by "enormous and ever-increasing" pressures on global resources and energy—a process requiring that mankind turn more and more to the oceans.

He then tells us that the Government of Malta became alarmed at these threats to her viability as an independent sovereign island state in the center of the Mediterranean. It appeared, so he says, that the freedom of the high seas would lead to the fragmentation of ocean space under different sovereignties, and would "forever confine Malta, which possess no land resources, to exploitation of the meagre living and non-living resources of the Central Mediterranean."¹⁷⁶ Furthermore, Malta foresaw that such an enclosure, or series of enclosures, would run counter to her vital interests in:

- (a) the maintenance of sea and air navigation;
- (b) the reduction of international tensions which, if allowed to escalate, could lead to conflict; and
- (c) the institutional strengthening of international law as the shield of small and weak states.

The other half of his advocacy is that, to avoid such an adverse denouement, states' individual enclosures of the ocean commons should be limited through the countervailing authority of a central enclosure system. At the heart of his thesis, then, is the objective of replacing the freedom of the high seas with an antithetical institution, namely the Common Heritage of Mankind. He writes:

The objective of the Maltese proposal was to replace the principle of freedom of the sea by the principle of the common heritage of mankind in order to preserve the greater part of the ocean space as a commons accessible to the international community. The commons of the high seas, however, would be no longer open to the whims of the users and exploiters; it would be internationally administered. International administration of the commons and the management of its

¹⁷³FRIEDHEIM at 137.

¹⁷⁴FRIEDHEIM at 138.

¹⁷⁵*Id.*

¹⁷⁶FRIEDHEIM at 139.

resources for the common good distinguished the principle of common heritage from the traditional principle of the high seas as *res communis*.¹⁷⁷

He envisages this new system substituting for the freedom of the high seas as: (a) entailing the effective management of the living resources of the sea; (b) the regulation of deep seabed mining so as to ensure the participation of, and benefits for, poor and geographically disadvantaged states; (c) ensuring the maximum freedom of navigation, overflight and scientific research; and (d) accommodating foreseeable new uses of the oceans, "such as mariculture"¹⁷⁸ into the general framework.

He then states the Maltese, that is his, view of the Common Heritage of Mankind as a legal institution. It has, in his eyes, the following five characteristics:

1. It cannot be appropriated. It is open to the use of the international community, but is not owned by the international community;
2. It requires a system of management in which all users have a right to share;
3. It implies an active sharing of benefits in the widest sense—i.e. in technology and management as well as in financial redistribution;
4. The area covered by the concept is reserved for peaceful purposes; and
5. Since it is reserved for future generations environmental protections are necessarily implied.

In addition, Pardo sees the concept as joined with the idea of functional sovereignty "as distinguished from the traditional concept of territorial sovereignty."¹⁷⁹ He explains his meaning of functional sovereignty as "jurisdiction over determined uses as distinguished from sovereignty over geographic space."¹⁸⁰

After setting forth with some specificity the blueprint which has only been outlined in these paragraphs, Pardo then proceeds to answer the question "What Went Wrong?"

He finds his answer in the drive, first foreshadowed at Caracas in 1974 (the first substantive session of UNCLOS II), for attaining "the perceived immediate national goals of coastal states."¹⁸¹ He also observes (perhaps rather bitterly) that the "attempt to extend the common heritage principle to all ocean space beyond national jurisdiction was decisively defeated at Caracas,"¹⁸² and that its implementation with regard to the seabed beyond national jurisdiction "became the occasion for a bitter debate between developed and developing countries . . ."¹⁸³ His criticism of the "Composite Test" would, possibly, be applicable, *mutatis mutandis*, to the 1980 Draft

¹⁷⁷FRIEDHEIM at 139-40.

¹⁷⁸FRIEDHEIM at 140.

¹⁷⁹FRIEDHEIM at 141.

¹⁸⁰*Id.*

¹⁸¹FRIEDHEIM at 143.

¹⁸²*Id.*

¹⁸³*Id.*

Treaty. His perception of the Text's shortcomings may be summarized as (1) the seaward expansion of the coastal states by various devices (including the development of the "Archipelago Theory, the Exclusive Economic Zone," and the imprecision of definition more generally); (2) the failure of Malta's concept of the "common heritage" principle in the face of "the realities of seabed exploitation;"¹⁸⁴ (3) coastal state control over scientific research; (4) concurrent coastal state enforcement powers with regard to vessel source pollution; (5) the non-viability, in his view, of the "common heritage" principle when applied only to deep seabed mining and when the traditional doctrine of freedom of the high seas is retained for all other uses of the oceans beyond the areas of national jurisdiction.

Ambassador Pardo also observes that the negotiations for an international seabed regime "have suffered not only from lack of intelligent leadership, but have been also bedeviled by ideological confrontations between developed and developing countries."¹⁸⁵ He considers that the result of the Conference, as at the time of his writing, to be "total confusion,"¹⁸⁶ and concludes with the comment that "[i]f the world rejects the Maltese dream, therefore, it will destroy itself."¹⁸⁷

2. FRIEDHEIM

a. *"The Political, Economic, and Legal Ocean"*

The first major theme in this essay is the legal status of the Oceans Past—their recent past—as in "international common." The author's thesis is simply that the freedom of the high seas, and the use of the oceans as an international common, was "a reasonable description of the state of the oceans and the relationship of man's tools for taming the oceans to its fundamental nature."¹⁸⁸ This overly simplistic approach leaves out of account the importance of the doctrine of the freedom of the high seas to both Dutch and English merchants and fisherman and to the dominant seapower. A mention of at least the significance of these interests and the economic and military power by which they were vindicated and enforced would have added a tincture, at least, of historical seriousness. To talk merely of the economic and social structural functions of tools, without any reference to the modes of their institutionalization and the play of (the frequently conflicting) interests to which their utilizations give rise and instrumentality is like presenting *Rosenkranz and Guildenstern Are Dead* on stage after promising an all-star production of *Hamlet*. Indeed, in writing about the history, over the past 370 years or thereabouts, of the regime of the oceans, without mentioning Admiral Mahan's seminal work, *The Influence of Sea Power on History 1660-1873*, greatly resembles a production of *Ham-*

¹⁸⁴FRIEDHEIM at 144.

¹⁸⁵FRIEDHEIM at 147.

¹⁸⁶FRIEDHEIM at 148.

¹⁸⁷*Id.*

¹⁸⁸FRIEDHEIM at 30.

let without the Prince of Denmark appearing on stage—let alone being placed “center stage front.” Unfortunately, moreover, the subject matter does not permit Friedheim to display a Tom Stoppard-like tongue-in-cheek humour.

Be that as it may, Friedheim points out that the current political crisis regarding the law of the sea, and the confrontations of UNCLOS III, are due to the fact that the multiplication of uses of the sea, increasing congestion, irreversible pollution effects, and the dawning of the reality that the seas are not, despite Grotius’s assumptions, of infinite ability to absorb the detritus and contaminants of the world without deleterious environmental side effects, recuperative flexibility, resource productivity and benignity to human needs. But here again, the regime that is being shaped is clearly predicated on a premise of the sovereign equality of states, itself a reflection of power and its deployment, as well as of an ideology and its demands. The manner in which ideology, through the uses of power and their interactions, shapes social relations and institutions, is at least as important as the “material substrate” of tools and the resources upon which they operate and which, reciprocally, help shape society and the modalities of their realization.

Friedheim’s solution to the problem posed by the over-use and pollution of the ocean commons is “national” (as distinct from Pardo’s “international”) enclosure. He agrees, perhaps somewhat fatalistically, that national enclosure “is *not* the optimal system.”¹⁸⁹ This reviewer, without opting for the fatalism, has, for a long time, also rejected “national enclosure” as a solution of the world’s maritime problem. Almost a decade ago he wrote:

On all hands people uncritically accept as true the lightsome remark that freedom of the high seas serves the interests of the Great States and therefore the restriction of that freedom must inevitably provide a vital lifeline for the lesser and poorer nations. True it is all that states, great and small, individually seek to increase, to the maximum degree, their own exclusive uses of the common seas’ resources. In such enterprises the richer and more assertive might well be seen as benefiting more from their common heritage than the poorer or more modest. In such a free-for-all many states cause their jurisdictions to creep, and leap, seaward in an enclosure movement. But I have yet to find the enclosure of a manor’s commons which profited its yeomanry. For I am told by a wordly-wise London friend that all private Acts of Enclosure are introduced into the Parliament by Members who are drawn from the village squirearchy. These landed gentlemen carry through their bills either on their own behalf or to assist friends placed in a similar standing in the agricultural interests of their counties. Is the situation among nations so different? Like great magnates, great states could live well upon abundant resources which a seaward enclosure movement would add to their present wealth. Small states, by contrast would, with only rare and perhaps bizarre exceptions, be entitled to more meagre patches of the commons. Lastly, landlocked states would suffer the fates of cottagers who previously owned no land of their own but could wring sustenance from the village common, but who,

¹⁸⁹FRIEDHEIM at 39.

after an enclosure, become landless save for their little garden plots, and so must find masters in order to stay alive and feed their families.

Should the seas become enclosed, may not ships be forced to pay tolls and transit fees along routes which formerly were free? And may not fishermen become merely rent-paying tenants and licensees as if states held the divided fields of the formerly common oceans in fee? The costs, which these tolls and rents would add to all commodities drawn from or moved across the sea, would inevitably fall, like infamous excise taxes, most heavily upon the poorest and those least likely to reap an equivalent benefit from being able to impose similar charges in their turn. The smaller states would thus be excluded from the major benefits of an enclosure of the oceans, but they would still bear a disproportionate share of the higher costs and prices which would result from the engrossment of the oceanic commons into the exclusive patrimonies of coastal states.¹⁹⁰

Apart, however, from some rather recondite references to the complexities of a "new paradigm"¹⁹¹ Friedheim does not, in the essay at present under review, indicate something better than the second best ("not . . . optimal")¹⁹² enclosure system. This is the subject of his second essay. It is a critical presentation of Friedheim's view of both Pardo's perception of the contemporary world process and of his panacea for the ills of it.

*b. Arvid Pardo, The Law of the Sea Conference,
and the Future of the Oceans*

This second essay by the book's general editor, Dr. Friedheim, has a double function. First, and most obviously, it is, even if critical, still a eulogy of Ambassador Pardo's unique historical role. But, secondly, it is also a probe into the subject's dream-life as that pertains to the international law of the sea. And it is this second aspect of this second piece by Dr. Friedheim that arrests this reviewer's attention. For, above all, we must remember that we are not seeing Ambassador Pardo's own perceptions of his dedicated work, as it were in the clear, but through Dr. Friedheim's lenses. For, whether or not Dr. Friedheim is a Marxist scholar, he presents Pardo in seemingly elementary Marxian terms, as this review will show. In this context it is perhaps interesting to note that the Pardo's views are presented in terms of his "dreams"—both hopes and fears. Friedheim sees these fears as stemming from the rapid development of ocean technology and the possibility of the unchecked overthrow of the world's ecosystem as well as a world-wide economic and political free-for-all accompanying a Gadarene rush into the oceans. These fears (Pardo's nightmares perhaps?) may be summarized as:

1. The oceanic environment could be irrevocably degraded through, for example, the unchecked dumping of radioactive waste in the sea;

¹⁹⁰See Goldie, *A Modest Proposal for Preventing International Law from Being a Burthen to the International Community and to Law Teachers*, 13 VA. J. INT'L L. 331 at 336-37 (1973).

¹⁹¹FRIEDHEIM at 40.

¹⁹²FRIEDHEIM at 39.

2. The confirmed expansion of states' claims to exercise jurisdiction ever further seaward would "balkanize"¹⁹³ the world;
3. The military uses of ocean space would fuel the arms race;
4. Deep seabed mining would create competitive supplies with land based sources of nickel, manganese, cobalt, and copper (here he would seem to hold that to disturb the traditional monopolies would economically desecrate the world as would the physical degradation of the oceans occasion the environmental degradation of the globe's ecosystem);
5. Ocean mining would increase the productive capacities of the developed countries and, necessarily in Friedheim's perception of Pardo's view of the world, exacerbate the gap between developed and developing states "even further";¹⁹⁴ and
6. The open system of the contemporary world order is inadequate to establish a needed regime of ocean management.

Dr. Friedheim's perception of Ambassador Pardo's more benign (to him—Pardo) dream was a perception which answered, in his (Friedheim's Pardo's) mind, the fears which the contemporary order apparently provokes. This is the maintenance of a relatively (or "reasonably"¹⁹⁵) modest outward limit of coastal state enclosure and the collective enclosure of the remaining ocean space under the slogan of the "common heritage of mankind" whereby the "people of the world would collectively 'own' the oceans and . . . the exploitation of its resources by any or all claimants at their will would cease."¹⁹⁶

After eliminating the theoretical choice of the freedom of the high seas as offering a possible regime for the future, Friedheim's Pardo then turns to the two scenarios of national enclosure and international enclosure. As has been noted, Pardo's preference, as is Friedheim's Pardo's, is for the central or international enclosure.¹⁹⁷ Friedheim then presents the usual criticisms of schemes for centralization—abstractness, inefficiency, injustice and a need for the individualization and concretization of justice. He also points out the difficulty of ascertaining the common good on a world scale.

After reviewing the pros and cons of Ambassador Pardo's centralized enclosure scheme and of national enclosures, Professor Friedheim concludes his second contribution to the book by both paying tribute to Arvid Pardo's role and observing that national enclosures, although suboptimal, will provide a mixed outcome. He writes, on this second point:

¹⁹³FRIEDHEIM at 151.

¹⁹⁴*Id.*

¹⁹⁵FRIEDHEIM at 152.

¹⁹⁶*Id.*

¹⁹⁷Friedheim writes: "Professor Pardo's preference for central or international enclosure is clear and unequivocal." He reinforces this assertion with a quotation from Dante's *DE MONARCHIA*. See FRIEDHEIM at 154.

Under national jurisdiction we will be able to resolve some problems but will handle others less well or not well at all. On balance, I believe we will be able to solve more problems that we fail to solve.¹⁹⁸

3. ROSS ECKERT

This is a brief study which stresses the analogies between communal ownership on land ("the essence of communal ownership is that no individual has a property right to a resource without capturing or occupying it"¹⁹⁹) and in the oceans. It also stresses the "communal inefficiencies"²⁰⁰ of publicly owned resources—[s]treets, parks, lakes and beaches are usually dirtier and more cluttered than their privately-owned counterparts"²⁰¹. These inefficiencies are seen as due to overcrowding and congestion. Such problems arise, according to Eckert, "because the ownership arrangements are so weak."²⁰² Eckert, agreeing with Friedheim and Pardo, sees analogies between the ocean as a common property resource and communal property arrangements on dry land, with the former being exposed to similar fates of overcrowding, pollution and inefficiencies as are now experienced in the context of the latter. His solution is to argue for a national enclosure movement in the oceans giving rise to "relatively 'private' structures of resource rights."²⁰³ He sees this as providing, on efficiency grounds, a preferable system to, not only strict open access, but also the "treaty arrangement UNCLOS is most likely to yield."²⁰⁴ He concludes by advocating that public policy within the United States and even at the United Nations should avoid any attempts to erect barriers to further enclosures. Present trends should not be reversed. Rather, national enclosures "should be welcomed and, if anything, encouraged."²⁰⁵

V. Conclusion

The views expressed in the books and essays discussed in the foregoing paragraphs include proposals for highly centralized organizations which would replace the present regime of the free high seas. These may be envisaged as "world" socialist (Barkenbus, Luard), or simply as vesting "functional sovereignty" for regulating the oceans in a world body (Pardo). But there is a spectrum of viewpoints which extend from those of the centralizers to writers who advocate an enclosure movement by states with some international co-operation of a functional, horizontal order. The particular arrangements and compromises contained in the Draft Treaty do not

¹⁹⁸FRIEDHEIM at 160.

¹⁹⁹FRIEDHEIM at 94.

²⁰⁰*Id.*

²⁰¹FRIEDHEIM at 94-95.

²⁰²FRIEDHEIM at 95.

²⁰³FRIEDHEIM at 99.

²⁰⁴*Id.*

²⁰⁵FRIEDHEIM at 100.

appear to be particularly favored by any of the considerable number of contributors noticed here (except, possibly, Dr. Barkenbus).

Primarily, of course, the Treaty preserves the freedom of the high seas in a more restricted area of the oceans; this, both the central enclosure advocates and the advocates of national enclosures, would bring to an end. Secondly, while the Treaty's seabed mining provisions (with the Authority and the Enterprise in clear control of the industry) reflect, as far as they go, the "world socialist" ideals of Luard and Barkenbus, they fail to satisfy most of the centralizers' hopes for a considerable range of resources to be governed by the Authority and exploited by the Enterprise—or at least under its eye.

Third, environmental concerns, and concerns regarding freedom of scientific research and the conservation of marine mammals²⁰⁶ were treated, on the whole, and, perhaps, rather surprisingly, as matters of rather minor importance.

It is perhaps symptomatic of the contemporary decline of the moral obligation of respect for law and due process that neither the advocates of a central enclosure (including the "world socialists"), nor the apologists of national enclosures, paid any heed to the claims of international constitutionality. The possibility of arguments, couched in terms of the want of consent and of the expropriation of vested rights based on the freedom of the high seas, simply were ignored. Similarly, the requirement that a non-consenting state should not be bound by a treaty would appear to be regarded as completely irrelevant to the serious work of these law of the sea "experts."

In comparison with the Kronmiller volumes, and apart from the individual essays which have been favorably noticed, the larger measure of the writings reviewed in this part seem to this reviewer to lack thoroughness, depth, a full command and use of the available materials, and analytical perceptiveness and a sensitivity to the general principles of international law bearing upon the law of the sea in general and upon deep seabed mining in particular.

Finally, perhaps, a mention should be made of the fact that many books on the topic of this review have not been mentioned. First, the books which have been noticed in the preceding pages have come to this reviewer's attention in the usual random manner of receiving books from publishers for review. But those which have been the subject of a printed discussion are not the only ones which have been so received. Others there are which, after perusal, have been passed over in silence. They have lacked either the good or the bad qualities which demand comment. Rather, even though

²⁰⁶With the exception of a commendable essay, Woodhouse, *Management of Marine Mammals*, FRIEDHEIM at 124-136. It is to be regretted, however, that this piece does not provide the student with as extensive or thorough a study as may be desired and, indeed, is definitely needed.

unattractive, in that they have little or nothing to offer or say, they have a maidenly modesty, in that they do not obtrude themselves with absurd or challenging attitudes. This permits a reviewer to be indulgent rather than reproving.