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# The High Seas and the International Seabed Area

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# THE HIGH SEAS AND THE INTERNATIONAL SEABED AREA

*Bernard H. Oxman\**

## I. INTRODUCTION

The purpose of this article is to examine the extent to which the legal principles associated with the regime of the high seas apply to the seabed beyond the limits of coastal state jurisdiction. In this regard, its object is to clarify, and thereby perhaps narrow, the scope of the current dispute concerning the nature of the regime applicable to that area of the seabed. Resolution of the apparent issues in dispute by a process of deductive reasoning from a disputed assumption regarding the status of the seabed areas in question is not the goal of this paper.

The public debate on the issue of the relationship between the high seas regime and the seabed beyond the limits of coastal state jurisdiction divides those who believe that the status of that seabed area is high seas from those who say it is not. Both groups largely end the legal inquiry there. The former group asserts that all uses of the seabed and subsoil are governed by jurisdictional rules derived directly or by analogy from existing high seas law. The latter group asserts that the seabed beyond the limits of coastal state jurisdiction is not governed by those rules at all.<sup>1</sup>

If one wishes to present an accurate picture of the state of the law at this stage, one cannot avoid the ambiguous details. The reality is that there is no consensus among states at this time on the underlying conceptual issue of the status of seabed areas beyond coastal state jurisdiction. It may be that one side is, or will turn out to be, correct. That we cannot know with certainty today. The areas of consensus and dispute, however, are more sharply defined than the debate might suggest. Examining them in some detail may help us ascertain where we are and what needs to be done.

This article is set out in three parts. The first section briefly de-

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1. This debate is not unlike the debate regarding the status of the exclusive economic zone. See *infra* note 16.

scribes the geographic scope of the sea. The second section analyzes the geographic scope of the high seas. The last section presents six agreed legal principles relevant to the seabed debate which — contrary to the tone of much of the debate — constitute a substantial and growing consensus on the elements of the legal regime of the seabed beyond coastal state jurisdiction. The article concludes by suggesting that more is agreed in this area than is often acknowledged, and that the broader debate would be aided by recognition of this.

## II. GEOGRAPHIC SCOPE OF THE SEA

If one asks whether the seabed and subsoil are part of the sea for purposes of applying the law of the sea, there can be no doubt that the answer is "yes." The 1958 Conventions on the Territorial Sea and the Contiguous Zone,<sup>2</sup> the High Seas,<sup>3</sup> and the Continental Shelf<sup>4</sup> deal with the seabed and subsoil. Many provisions of the 1982 United Nations Convention on the Law of the Sea also deal with the seabed and subsoil.<sup>5</sup>

This seemingly obvious point has potential legal implications. The sea, including the seabed and subsoil, are subject to a special system of law that incorporates some, but not all, of the rules applicable on land. Perhaps the most important difference is that the rule that sovereignty may be acquired by effective occupation is a stranger to the modern law of the sea. Internal waters may be established by coastal states within geographic limits determined by the international law of the sea without reference to effective occupation.<sup>6</sup> No other states may claim jurisdiction there. Also, every coastal state is entitled to a territorial sea, continental shelf, and now an exclusive economic zone, whose maximum limits are determined by the international law of the sea without reference to effective occupation.<sup>7</sup> No other states may claim

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2. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, arts. 2, 14(3), 15 U.S.T. 1606, 1608, No. 10, T.I.A.S. No. 5639, at 3, 5, 516 U.N.T.S. 205, 208, 214.

3. Convention on the High Seas, Apr. 29, 1958, arts. 2, 24-29, 13 U.S.T. 2312, 2314, 2319-2320, T.I.A.S. No. 5200, at 3, 8-9, 450 U.N.T.S. 82, 96-98.

4. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

5. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, Dec. 10, 1982, U.N. Sales No. E.83.V.5 (1983) [hereinafter U.N. Convention].

6. The question of historic bays is properly regarded as a question of acquisition of title by prescription rather than acquisition of title over *terra nullius* by effective occupation. The requirements for prescriptive title are more exacting, particularly with regard to acquiescence by other states. Moreover, the doctrine of historic bays is applied only in limited coastal areas largely enclosed by land.

7. Article 2 of the Convention on the Continental Shelf, *supra* note 4, and Article 77 of the U.N. Convention on the Law of the Sea, *supra* note 5, expressly provide that the rights of the coastal state over the continental shelf do not depend on occupation, effective or notional. Arti-

jurisdiction there either. No claims of sovereignty or territorial jurisdiction are permitted beyond the limits of coastal state jurisdiction established by international law.<sup>8</sup>

The received regime of the seabed beyond coastal state jurisdiction, then, is not a complete *tabula rasa*. An attempt to extend "first come, first served" rules of pre-emptive occupation to large chunks of the seabed is inconsistent with the nature of the modern law of the sea.<sup>9</sup> In itself, this does not mean the seabed and subsoil and their resources cannot be used, but it may mean that pre-emptive claims based on effective occupation need not be respected.

### III. GEOGRAPHIC SCOPE OF THE HIGH SEAS

High seas law is now extensively codified in a variety of international agreements. This portion of the article analyzes the treatment of the geographic scope of the high seas in some of the more important documents, particularly the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea.

#### A. *The Convention on the High Seas*

Article 1 of the 1958 Convention on the High Seas states: "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State."<sup>10</sup> With respect to the freedom of the high seas, Article 2 of that Convention states in part: "It comprises, *inter alia*, both for coastal and non-coastal States: (1) Freedom of navigation; (2) Freedom of fishing; (3) Freedom to lay submarine cables and pipelines; (4) Freedom to fly over the high seas."<sup>11</sup>

Article 24 of the High Seas Convention addresses the prevention of pollution of the seas by the discharge of oil "from ships or pipelines or resulting from the exploitation and exploration of the seabed and its

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cle 241 of the U.N. Convention elaborates on the more general theme by providing that marine scientific research shall not constitute the legal basis for any claim to any part of the marine environment or its resources.

8. Convention on the High Seas, art. 2, *supra* note 3; U.N. Convention on the Law of the Sea, arts. 87, 89, 137, *supra* note 5; 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. (No. 28) at 24, U.N. Doc. A/8028 (1970) [hereinafter Declaration of Principles].

9. Invoking the *S.S. Lotus* case, 1927 P.C.I.J. (ser. A) No. 10, on the issue of pre-emptive claims misses the point. There is ample evidence that claims of sovereignty or exclusive jurisdiction based on effective occupation are prohibited by the law of the sea as a whole, whatever the nature of the specific regime that applies. *Id.*

10. Convention on the High Seas, *supra* note 3, at art. 1.

11. *Id.* at art. 2.

subsoil." Article 25 addresses the prevention of pollution of the seas "from the dumping of radioactive waste."

Articles 26 to 29 of the High Seas Convention contain more detailed rules regarding submarine cables and pipelines, including the duty of the coastal state not to impede the laying or maintenance of such cables or pipelines on its continental shelf. Articles 27 and 28 deal with responsibility for the breaking or injury "of a submarine cable beneath the high seas."

The foregoing texts do not necessarily clarify the broad question of whether the seabed and subsoil are part of the high seas. The references to the "freedom to fly over the high seas" and to "a submarine cable beneath the high seas" may be used to support either conclusion, and may or may not be relevant.<sup>12</sup> If the seabed and subsoil are part of the sea for purposes of the law of the sea, and if the high seas embraces "all parts of the sea" beyond specified coastal limits, then it would seem to follow that the seabed and subsoil beyond those coastal limits are part of the high seas. But even the 1958 Conventions are not that simple.

The precise question is which rules of the law of the sea apply. The text makes it clear that, to the extent one regards the Convention on the High Seas as embodying the regime of the high seas at the time, that regime expressly regulates at least some uses of the seabed. These include not only submarine cables and pipelines, dumping, and pollution resulting from exploitation and exploration of the seabed and subsoil, but other activities traditionally associated with the freedoms of the high seas such as anchoring.

The simultaneous drafting and adoption of the Convention on the Continental Shelf makes it clear, however, that not all uses of the seabed of the high seas are subject to all rules of high seas law under the 1958 Conventions. The exploration and exploitation of the natural resources of the continental shelf are not freedoms of the high seas; on the contrary, they are subject to the exclusive sovereign rights of the coastal state. At the same time, the High Seas Convention itself elaborates certain obligations of the coastal state with respect to the exercise of those very sovereign rights, notably with respect to pollution and submarine cables and pipelines. The end result is that all states enjoy only some freedoms of the high seas on the seabed of the continental shelf, and that the coastal state enjoys exclusive rights with respect to the exploration and exploitation of the natural resources of the conti-

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12. Article 87 of the U.N. Convention, *supra* note 5, substitutes the term "freedom of over-flight" for the term "freedom to fly over the high seas." This would suggest that little if any significance should be attached to the clause "over the high seas" today.

mental shelf, subject to certain obligations derived from the high seas regime. A categorical statement that the continental shelf is, or is not, high seas would not even begin to describe that result with any accuracy.

This analysis of the application of high seas law to the continental shelf suggests only a partial resolution of the issue of the applicability of the high seas regime to the seabed beyond the continental shelf. It is clear that to some extent the high seas regime (including certain freedoms of the high seas) does apply to the seabed of the high seas. Beyond that, it depends on one's point of view. The exclusive rights of the coastal state over continental shelf resources are regarded by some as an exception to the general principle that all uses of the seabed and subsoil of the high seas are subject to the high seas regime. Alternatively, the existence of those coastal state rights is regarded by others as evidence of a principle that, at least in so far as natural resources are concerned, high seas freedoms do not apply to the seabed and subsoil.

The *travaux préparatoires* of the 1958 Conventions shed little light on the issue of the application of the high seas regime to seabed resources beyond the continental shelf. In its commentary on the text that became Article 2 of the Convention on the High Seas, the International Law Commission stated:

The list of freedoms of the high seas contained in this article is not restrictive. . . . The Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas. It considered that apart from the case of the exploitation or exploration of the soil or subsoil of a continental shelf — a case dealt with separately . . . below — such exploitation had not yet assumed sufficient practical importance to justify special regulation.<sup>13</sup>

Some read this statement to mean that the freedom to explore and exploit the seabed and subsoil beyond the continental shelf exists but is not specially regulated. Others read it to mean that the High Seas Convention does not apply to such exploration and exploitation at all.

### B. *The Declaration of Principles*

The preamble of the Declaration of Principles regarding the seabed beyond the limits of national jurisdiction, adopted by the U.N. General Assembly in preparation for the Third U.N. Conference on the Law of the Sea, contains the following preambular clause:

*Recognizing that the existing legal regime of the high seas does not pro-*

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13. *Report of the International Law Commission*, 11 U.N. GAOR Supp. (NO. 9) at 24, U.N. Doc. A/3159 (1956).

vide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources. . . .<sup>14</sup>

This clause has been interpreted by proponents of the alternative positions in the same manner as the commentary of the International Law Commission. It should nevertheless be noted that both this clause and the Commission's commentary deal only with resources, while both the High Seas Convention and the Declaration of Principles address matters going beyond the use of resources. At the least this suggests that there were no serious differences regarding the application of high seas law to non-resource uses.

### C. *The United Nations Convention on the Law of the Sea*

Most of Part VII of the United Nations Convention on the Law of the Sea is identical to the Convention on the High Seas. The most significant change for purposes of this analysis is that the U.N. Convention contains a separate Part XI dealing with the seabed beyond the limits of coastal state jurisdiction. Prior to examining the impact of Part XI, however, it is useful to examine Part VII to determine if the few changes made in the articles dealing with the high seas confirm, or alter, the conclusions we might draw from the text of the Convention on the High Seas.

Unlike the High Seas Convention, Part VII of the 1982 Convention does not define the high seas. Article 86 states in pertinent part: "The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."<sup>15</sup>

This change was the result of lengthy negotiations regarding the question of the application of the high seas regime to the exclusive economic zone.<sup>16</sup> It suggests that the relevant question is application of the rules of high seas law, rather than the status of the area. This is made clear, for example, in Part V of the Convention regarding the exclusive economic zone. Part V incorporates virtually all of the non-

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14. Declaration of Principles, *supra* note 8.

15. U.N. Convention, *supra* note 5, at art. 86.

16. The author has previously expressed his views on this matter elsewhere. Oxman, *An Analysis of the Exclusive Economic Zone as Formulated in the Informal Composite Negotiating Text*, in *LAW OF THE SEA: STATE PRACTICE IN ZONES OF SPECIAL JURISDICTION* 57, 77-78 (T. Clingan ed. 1982) (Proceedings of the Law of the Sea Institute, Thirteenth Annual Conference); Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT'L L. 57, 67-75. "[T]he question whether relevant aspects of the economic zone regime are part of the high seas regime has been resolved by making relevant aspects of the high seas regime part of the economic zone regime and by deleting the geographic definition of the high seas." *Id.* at 74.

resource provisions of Part VII into the economic zone regime "in so far as they are not incompatible with this Part." However, pursuant to Articles 56 and 58 of the 1982 Convention, not all of the freedoms of the high seas continue to apply to the exclusive economic zone; freedom of fishing, for example, yields to coastal state sovereign rights over living resources.

Another important change with respect to high seas freedoms is made in Article 87 of the 1982 Convention. It preserves the words *inter alia* from Article 2 of the High Seas Convention, making clear that the enumeration of certain high seas freedoms is not exhaustive. At the same time, it expands and qualifies the list of enumerated freedoms as follows:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;<sup>17</sup>
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in Section 2;<sup>18</sup>
- (f) freedom of scientific research, subject to Parts VI and XIII.<sup>19</sup>

For purposes of this study, two of the changes in article 87 are significant. First, the enumerated freedoms include at least one other freedom that normally entails use of the seabed and subsoil, namely the construction of artificial islands and installations. Second, while the exercise of certain high seas freedoms on the seabed is expressly qualified by cross-references to Part VI (continental shelf), there are no qualifying cross-references to Part XI (seabed beyond the limits of national jurisdiction).<sup>20</sup>

#### D. *Conclusions Regarding Geographic Scope of the High Seas*

The foregoing analysis clearly suggests that there is no serious dispute regarding the application of high seas law to at least some uses of the seabed and subsoil beyond the limits of coastal state jurisdiction. Among these would be the freedom to anchor, to lay submarine

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17. Part VI of the U.N. Convention, *supra* note 5, deals with the continental shelf.

18. Part VII, Section 2 of the U.N. Convention, *supra* note 5, deals with conservation and management of the living resources of the high seas.

19. Part XIII of the U.N. Convention, *supra* note 5, deals with marine scientific research.

20. The author does not suggest that too much be made of the second point. It does not mean that Article 87 should be read in isolation from Part XI. It does suggest, however, that Part XI was not regarded as contradicting the application of high seas law to at least some uses of the seabed in principle. The author has reported elsewhere on the difficulties encountered by the Drafting Committee of the Conference in harmonizing texts emerging from different main committees of the Conference. Oxman, *The Third United Nations Conference on the Law of the Sea: The Tenth Session*, 76 AM. J. INT'L L. 1, 17-19 (1982).



cables and pipelines, to construct artificial islands and other installations, and to conduct marine scientific research. Needless to say, these freedoms must be exercised with due regard to other uses.

It is at this point that this conclusion must be tested against the positions taken by states with specific reference to the seabed beyond the limits of coastal state jurisdiction.

#### IV. GENERAL PRINCIPLES

##### A. *Prohibition on Claims*

The fundamental principle of high seas law regarding national claims is stated in Article 2 of the High Seas Convention: "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty."<sup>21</sup> Articles 87 and 89 of the 1982 Convention repeat this principle.

The U.N. General Assembly's Declaration of Principles regarding the seabed beyond the limits of national jurisdiction states: "The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof."<sup>22</sup> Article 137 of the 1982 Convention states with respect to the same area: "No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized."<sup>23</sup>

The United States Deep Seabed Hard Mineral Resources Act, asserting "high seas freedom to engage in exploration for, and commercial recovery of, hard mineral resources of the deep seabed," expressly affirms that by enactment of the Act the United States "does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or ownership of, any areas or resources in the deep seabed."<sup>24</sup>

From these texts we can articulate an important but not explicit commonality, one subject to erosion, and fragile if not identified and preserved.<sup>25</sup> Even those who reject the broad principle that the seabed has the status of high seas in fact accept one of its most important

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21. Convention on the High Seas, *supra* note 3, at art. 2.

22. Declaration of Principles, *supra* note 8.

23. U.N. Convention, *supra* note 5, at art. 137.

24. 30 U.S.C. § 1402 (1982).

25. It is important to bear in mind that none of these texts prohibit use, including exploration and exploitation of resources. The question of the appropriate rules governing different uses is another matter.

implications, namely the prohibition on national claims. Those who reject the broad principle that all states are bound by Part XI of the 1982 Convention as customary international law nonetheless accept the prohibition on claims if only by virtue of their position that the area has the status of high seas.

This point of agreement is not as obvious as it seems, and may in fact erode unless the existence of such agreement is emphasized. A number of commentators have on occasion confused the position that the area is high seas with the position that no law, or at least no traditional law, applies. If the area is high seas, no part of it may be subjected to national claims. If no law applies, then those who reject Part XI of the Convention may contend that states are theoretically free to make pre-emptive claims on the grounds that such claims are not prohibited by international law.<sup>26</sup>

In this regard, it is important to recognize what is, and is not, in dispute with respect to the legislation and agreements of the United States and certain other states with respect to deep seabed mining. The United States statute prohibits the issuance of authorizations to mine by the United States if the area proposed is already subject to a previous authorization issued by a reciprocating state.<sup>27</sup> The Provisional Understanding Regarding Deep Seabed Mining agreed by several Western states in essence implements this reciprocating state system.<sup>28</sup> In the words of the statute, the United States thereby "exercises its jurisdiction over United States citizens and vessels, and foreign persons and vessels otherwise subject to its jurisdiction."<sup>29</sup> The reciprocating states are doing the same. No pre-emptive claim is made as against the world; what is asserted is a universal right to mine and a right of each state to prevent its nationals from mining.

Some may wish to argue that the universal right to mine may be exercised only in conformity with the provisions of the 1982 Convention. They may also wish to argue that while no pre-emptive claims are asserted as against the world, the legislation and agreements may create a political situation in which any global agreement would have to respect the essence of existing authorizations as a condition of acceptance.<sup>30</sup> Be that as it may, there is no basis at present for asserting

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26. See *supra* note 9 and accompanying text.

27. 30 U.S.C. § 1412 (1982).

28. Provisional Understanding Regarding Deep Seabed Mining, Aug. 3, 1984, 23 I.L.M. 1354 (1984).

29. 30 U.S.C. § 1402 (1982).

30. Resolution II appended to the Final Act of the Conference deals with the protection of preparatory investment in pioneer activities. U.N. Convention, *supra* note 5, at 158, 177-82.

that any state is violating the "no-claims" principle in letter or in spirit.

It is in the interests of all states to emphasize the universal agreement on this point, if only to prevent far-fetched interpretations of the due regard principle. While high seas law does not permit a pre-emptive claim as against non-consenting states of an exclusive right to mine a site measuring thousands of square miles for several decades, all states are required to have due regard to the exercise of the rights and freedoms of other states, including deep seabed mining. Apart from the question of the lawfulness of the mining, there is no doubt that unreasonable physical interference with a mining ship or installation would be prohibited.

Some have sought to go further, however, and convert the venerable "reasonable regard" or "due regard" principle<sup>31</sup> into the functional equivalent of a pre-emptive claim. They argue that mining in an area already staked out by someone else violates the "due regard" obligation. There is no precedent for such extended application of the principle with respect to fisheries or even nuclear tests. It is contradicted by the limited and unobjectionable safety zone provisions of the Continental Shelf Convention<sup>32</sup> and the 1982 Convention,<sup>33</sup> which deal with installations that may be used to exploit resources located well beyond the safety zones. The very states that advocates of such a position seek to benefit would presumably shudder at the notion of such a broad extension of the reasonable regard principle with respect to the waters of the high seas or the exclusive economic zone, or even non-resource uses of the seabed.

The key point is that the "reasonable regard" or "due regard" principle must be read in conjunction with the "no claims" and universal use principles. Accordingly, whatever the position of states regarding the appropriate system for mining the deep seabeds, it is not in their interests to loosen the restraints of the "no claims" principle on those who take a different view of the regulation of mining. Both the high seas and the Part XI advocates must be encouraged to live with the restraints as well as the benefits of their position.

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31. High Seas Convention, *supra* note 3, at art. 2; U.N. Convention, *supra* note 5, at arts. 87, 147.

32. Convention on the Continental Shelf, *supra* note 4, at art. 5.

33. U.N. Convention, *supra* note 5, at arts. 60, 80, 147, 260. Article 147 combines the rules on safety zones in paragraph 2 with its enunciation of the "reasonable regard" principle in paragraphs 1 and 3.

### B. *The Universal Use Principle*

Article 2 of the High Seas Convention states that the high seas are open to all nations. It goes on to state that freedom of the high seas "is exercised under the conditions laid down by these articles and by the other rules of international law." Article 87 of the United Nations Convention on the Law of the Sea provides, "The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law."

The Declaration of Principles Regarding the Seabed Beyond National Jurisdiction states, "the area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination, in accordance with the international regime to be established." With respect to the same area, article 141 of the United Nations Convention on the Law of the Sea provides, "The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part."

Part XI of the 1982 Convention contains substantial restrictions on use of the seabed beyond coastal state jurisdiction, but these relate only to "activities in the Area." The term "activities in the Area" is defined by Article 1 to mean "all activities of exploration for, and exploitation of, the resources of the Area." Article 133 defines "resources" to mean "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules."

Accordingly, the effect of Part XI with respect to activities other than exploration and exploitation of mineral resources is the same as the effect of the high seas regime. The area is open to use by all states. Moreover, nothing in the specific provisions of Part XI regarding exploration and exploitation of mineral resources contradicts the universal use principle. The Convention expressly contemplates access by all, with discrimination prohibited.<sup>34</sup> Article 150 (g) indeed goes beyond this to encourage "the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area."

The idea that universal use of an area is subject to generally agreed regulation is no stranger to the high seas regime. Article 10 of the High Seas Convention requires states to conform to generally accepted

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34. U.N. Convention, *supra* note 5, at arts. 141, 151(1)(c), 152(1), 153; ann. III, arts. 6(3), 6(5), 7(2), 7(5); ann. IV, arts. 12(3), 12(5).

international standards regarding safety measures and labor conditions. Article 94 of the United Nations Convention on the Law of the Sea elaborates on this duty at great length. The same idea forms the cornerstone of Part XII of the 1982 Convention regarding protection of the marine environment.<sup>35</sup>

The example of high seas fisheries is particularly instructive in this regard. The right to fish on the high seas is expressly subject to conservation rules, including the duty to cooperate with other states in the adoption of conservation measures.<sup>36</sup> Accordingly, the principle of international regulation of the exploration and exploitation of seabed resources is not unique to Part XI of the 1982 Convention, but emerges from high seas law as well.

Questions of course remain regarding the scope of participation in regulation. Regulation of high seas fishing is generally entrusted to user states, although the basic duties are set forth in global conventions on the law of the sea. Environmental protection at sea is frequently addressed on a global basis, as evidenced not only by Part XII of the 1982 Convention and various environmental treaties, but by the establishment of the U.N. Environment Programme and the expanded composition of the Marine Environment Protection Committee of the International Maritime Organisation as compared with its Maritime Safety Committee. At the same time, regional regulation is also extensive.

Under high seas law, an exclusive right to mine a large area for an extended period can be established only with the consent of other states. As U.S. law and the negotiations among the Western states participating in mining arrangements with each other clearly reveal, that consent is necessarily conditioned on agreed understandings regarding the size of mine sites, the duration of the rights, the means of acquiring priority, and associated environmental and other conditions.<sup>37</sup> An examination of those conditions will reveal striking similarities among national laws on deep seabed mining, the Provisional Understanding reached among Western states, and Annex III of the 1982 Convention.

It of course comes as no surprise to discover that the essence of the problem regarding Part XI of the 1982 Convention concerns the ob-

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35. *See id.* at arts. 213-219.

36. Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, arts. 1, 4, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.M.T.S. 285; U.N. Convention, *supra* note 5, at arts. 116-119.

37. *See* 30 U.S.C. § 1428 (1982); Provisional Understanding Regarding Deep Seabed Mining, *supra* note 28.

ject, nature and administration of some of the mining regulations. Resolution of those difficulties does not appear imminent. However difficult and important these issues may be, they nevertheless do not entail rejection of either the universal use principle or the agreed regulation principle by either side.

### C. *The Reasonable Regard Principle*

If everyone has the right to use an area for the same or different purposes, it is clear that the right to use must be conditioned by a duty to respect others' right to use the same area.

Article 2 of the Convention on the High Seas provides that high seas freedoms "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." Needless to say, if one regards deep seabed mining as a freedom of the high seas, this principle protects mining activities from interference and at the same time limits mining activities that may interfere with other uses, including other mining activities.

Article 87 of the 1982 Convention repeats this principle, expressly including deep seabed mining:

These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

With particular regard to deep seabed mining, article 147 provides:

1. Activities in the Area shall be carried out with reasonable regard for other activities in the marine environment.
3. Other activities in the marine environment shall be conducted with reasonable regard for activities in the Area.<sup>38</sup>

Once again, the dispute over high seas status is of no relevance. The reasonable regard or due regard principle applies under either view.

### D. *The Peaceful Purposes Principle*

Article 88 of the 1982 Convention states, "The high seas shall be reserved for peaceful purposes." Article 141 declares that the seabed beyond national jurisdiction is open to use "exclusively for peaceful purposes."

The author has expressed his views on the meaning of this princi-

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38. The alternative use of the terms "reasonable regard" and "due regard" is of no consequence. See Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 827 n.52 (1984).

ple elsewhere, and will not repeat them here.<sup>39</sup> The main point is that this principle also involves no dispute between advocates and opponents of the high seas status position.

### E. *Marine Scientific Research*

Article 87 of the 1982 Convention expressly identifies scientific research as one of the freedoms of the high seas, subject to the provisions of Part XIII of the Convention dealing with marine scientific research in more detail. Article 240, which applies to all areas, provides, "All States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in this Convention."

With reference to the seabeds beyond national jurisdiction, Article 143 provides, "States Parties may carry out marine scientific research in the Area," and Article 256 provides, "All States, irrespective of their geographical location, and competent international organizations have the right, in conformity with the provisions of Part XI, to conduct marine scientific research in the Area."<sup>40</sup>

Article 143 is the only provision that specifically enumerates requirements for marine scientific research on the seabed beyond national jurisdiction. Its first and third paragraphs essentially summarize and cross-reference the requirements applicable to all marine scientific research under Part XIII. Its second paragraph deals with research conducted by the Seabed Authority itself.

Once again, assuming general acceptance of the provisions of the Convention apart from Part XI, it is clear that the debate over high seas status is irrelevant to the issue of the right to conduct marine scientific research.

### F. *The Common Heritage Principle*

The Declaration of Principles adopted by the U.N. General Assembly states, "The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind." Article 136 of the 1982 Convention declares, "The Area and its resources are the common heritage of mankind." No similar

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39. *Id.* at 829-32.

40. The Convention text is not consistent in its use of the terms "States" and "States Parties." In the particular context of marine scientific research, the difference in terminology would not appear to have any significance. The argument that scientific research on the seabed is limited to parties would be contradicted by Articles 87, 238 and 256 in any event.

provision appears in the 1958 Conventions on the Law of the Sea or elsewhere in the 1982 Convention.

The debate over the deep seabeds is sometimes presented as a conflict between "high seas" and "common heritage." It should be clear from all the materials previously analyzed that this is misleading. The common heritage principle, as incorporated into Part XI of the 1982 Convention, exists alongside a significant number of other principles elaborated in Part XI that have their origin in high seas law.

It is argued that the common heritage principle requires more elaborate institutional and substantive restraints on the "universal use" principle than have been customary on the high seas. Be that as it may, the very idea of negotiated restraints on the exercise of high seas freedoms is not alien to high seas law and tradition; quite to the contrary, it is an integral part of the system. One simply cannot imagine multiple and potentially conflicting uses of the high seas without agreement on ground rules. It is difficult to imagine the absence of organizations such as IMO and ICAO devoted to the continual elaboration and administration of such ground rules with respect to particular uses. Protection of the marine environment in an area open to use by all requires agreement on environmental restraints by all users, and mechanisms for enforcing and updating those restraints.

In truth, there is nothing in the common heritage principle that is inconsistent with high seas law. States may accept any substantive or institutional restraints on their high seas freedoms that they believe suitable. Were Part XI "generally accepted," there would even be some basis in high seas law for arguing that at least some of the relevant regulations must be respected by all.<sup>41</sup> Certainly in spirit, high seas law is far closer to the idea of a common heritage of mankind than to appropriation by coastal or other states.

The key question is whether the restraints of Part XI that are not generally accepted may be imposed on non-parties. The argument that they may not be so imposed is not peculiar to high seas law, but rather derives from international law more generally. That argument is wholly independent of positions regarding the common heritage principle, and indeed may even be supported by the principle. There is ample support in municipal law for the premise that those with co-equal rights in a thing cannot be deprived of those rights without consent.<sup>42</sup>

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41. See Convention on the High Seas, *supra* note 3, at art. 10; U.N. Convention, *supra* note 5, arts. 94, 213-19.

42. The question of whether they may be compelled by a court to accept a monetary equivalent of those rights is presumably not relevant to this inquiry.



## V. CONCLUSION

As of today, the basic structure of the international law applicable to the seabed beyond coastal state jurisdiction is agreed. National claims are prohibited. The area is open to use by all. Any use of the area must be conducted with reasonable regard for other uses of the marine environment, and other uses of the marine environment must be conducted with reasonable regard for any use of the area. All uses of the area must be conducted in accordance with the duty to protect and preserve the marine environment.

The significance of this level of agreement, given the alternatives, should not be obscured by debates over whether the agreed principles derive from high seas law as a legal matter, or purely as a historical matter. Broadside attacks on high seas law or on Part XI of the Convention do little more than place in jeopardy those basic principles that are agreed. Such attacks are far too sweeping to explain with any accuracy what is not agreed.

The area of disagreement concerns the nature and administration of restraints on the exploration and exploitation of mineral resources. Even in this respect, the area of disagreement is far narrower than it seems. For example, by tying the spatial and temporal criteria for exclusive rights to a mine site to use,<sup>43</sup> Part XI of the 1982 Convention is much closer to pure Lockean theories of property than its ideological opponents seem prepared to admit.

It is natural that those favoring the restraints on mining set forth in Part XI argue that the exercise of a right of access to deep seabed resources is conditioned on compliance with those restraints, while those opposing the restraints argue that the right of access is independent of compliance with conditions that have not been agreed. It is implausible to assume that this kind of debate can be resolved in the abstract by invoking, or rejecting, the application of high seas law as a whole.

More specifically, even with respect to the points of disagreement, the debate over high seas status is irrelevant. In the words of Article 2 of the High Seas Convention, "freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law." The real question is not whether there is a universal right to mine, but whether "the other rules of international law" now include the restraints of Part XI. That is a question to be answered by the principles applicable to the emergence of new norms of

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43. See U.N. Convention, *supra* note 5, ann. III, art. 17, para. 2.

international law, not by principles specific to the law of the sea or the seabed.

Those who support a universal duty to respect the restrictions on mining set forth in Part XI must demonstrate that those restrictions are now part of international law. For this purpose, it is essentially irrelevant whether they maintain that there was no prior international law on the matter, or that the prior high seas right to mine was subject to the emergence of subsequent specific regulation, or that the prior high seas right has now been conditioned by the emergence of specific regulation. But a great deal is lost by making the first argument and completely rejecting the applicability of high seas law. That argument is worse than unnecessary and descriptively inaccurate: from the perspective of those who reject the restraints of Part XI, it implies that the *Lotus* case gives them a completely free hand. That is no good for anyone.

At the same time, those who maintain that the specific restrictions on seabed mining set forth in Part XI apply only to the parties to the Convention must counter the contention that those restrictions are now part of international law. For this purpose, it is essentially irrelevant whether they maintain that the principles and rules set forth in the Convention bind only its parties or maintain that some of the detailed restraints and institutional arrangements in Part XI of the Convention have not been accepted by states with significant interests in the matter. But a great deal is lost by making the first argument and completely rejecting the general acceptability of the Convention as a whole, or even Part XI as a whole. That argument too is worse than unnecessary and descriptively inaccurate: from the perspective of those who reject the high seas argument, it implies that the principles of the Convention as a whole, including the unobjectionable principles embodied in Part XI, are not relevant to relations with non-parties. That too is no good for anyone.

From the perspective of a seabed miner, it is perhaps a bit disingenuous to say that the legal principles applicable to the seabed beyond coastal state jurisdiction are now generally agreed, except for the problem of regulating deep seabed mining. But from the perspective of all the interests of all the states in the world, that is no mean achievement. Mining is not yet imminent. The rhetoric used in the debate regarding the matters that remain to be agreed should not cloud or, worse still, prejudice the principles that are agreed.

*Pas trop de zèle!*