National Laws on Seabed Exploitation: Problems of International Law

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Since the beginning of United Nations’ efforts to establish an international system to regulate the exploration and exploitation of mineral resources of the seabed lying beyond the limits of national jurisdiction, considerable legal controversy has arisen regarding the rules of international law and their effect on the activities of interested states. Two basic theses have been enunciated in that discussion. The first, supported by countries interested in early exploitation, is that international law in general, and the freedom of the high seas in particular, permit any state to exploit the seabed notwithstanding the absence of a convention defining an international regime. The second, supported principally by developing countries, is that international law, particularly in conjunction with its development by the United Nations, permits such exploitation only within the framework of a system embodied in an international convention.

This controversy has recently intensified as a result of individual states’ enactment of laws which provide for unilateral regulation of seabed exploitation. The United States and the Federal Republic of Germany have enacted such laws and other industrialized countries, such as the United Kingdom, France and Japan, are also considering similar initiatives.

The purpose of this article is to examine the present state of international law regulating the use of the seabed and, in light thereof, to discuss the legal implications of any national legislation on the matter. To that end it is necessary to examine some aspects of the historical evolution of the law of the sea, the work of the United Nations, and the impact of national laws on other maritime activities.

I. Historical Evolution of the Principle of the Freedom of the High Seas

It is a well established part of customary international law that freedom of the high seas is the fundamental principle governing mari-
time areas beyond national jurisdiction. The difficulty lies in establishing the substance and precise scope of the principle in contemporary international law.

Historically this principle has found expression in law in essentially negative terms. Thus states were prohibited from interfering in the utilization of the high seas, as was the case in the second part of the Middle Ages. Originally, then, the principle meant freedom of navigation and freedom of exploitation. But soon the needs of the international community caused a modification of this perspective. Exceptions were made to absolute freedom of navigation. For example, piracy and the slave trade were repressed and the right of pursuit was recognized.

The evolution of the freedom of exploitation of marine resources, which originally involved only fisheries, was of even more significance. When toward the end of the 19th century it became apparent that marine resources might be exhausted as a result of uncontrolled exploitation, the absolute freedom set forth in the principle was subordinated; first, to the right of equal access by all states and then later to the conservation measures which began to be introduced.

Recognition of this reality of limited resources led to important changes in the content of the principle. Until that time, the status of *res communis* only differed from the status of *res nullius* in that the former did not permit appropriation of the high seas, but did nothing to prevent excessive utilization. In response to the necessity of such regulation, the concept of utilization for the general interest of the international community began to emerge in quite different terms. The emerging notion was that the use of the high seas would remain open to all states but the right of access would be subordinated to the general interest of all nations as regulated by the international community. No longer could use of the high seas be conceived of as serving the exclusive interests of any one state. While the United Nations has

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1. F.V. Garcia-Amador *La Utilización y Conservación de las Riquezas del Mar* 3 (1956).
4. For historical manifestations of this concern, see Gidel *Le Droit International Public de la Mer* 439 (1932).
5. Garcia-Amador *supra* note 1, at 26-27.
made it possible to give this tendency a precise definition, it was already discernible at an earlier date.\(^7\)

The notion of unrestricted freedom of the high seas was thus subordinated first to that of the abuse of right, and next to a perspective of common use. The fact that this rule is part of international customary law does not mean that it should be an immutable dogma, rather its definition should be subject to adaptations and modifications required by new realities, as the history of its development clearly shows.

When the United Nations first addressed problems related to the seabed, the principle of the freedom of the high seas already had a different meaning. Evolution of the concept further developed along lines which followed the work of the United Nations. Although one might discuss the manner in which the evolution of a concept takes place, it is more important to determine the general historical meaning of a rule of law, and this meaning has been well established in the case of the principle of freedom of the high seas.

II. THE UNITED NATIONS DEBATE AND THE APPLICATION OF INTERNATIONAL LAW

The question of the extent to which the rules of international law were applicable to the seabed arose at the first deliberations of the United Nations on the subject.\(^8\) Underlying this debate was concern over whether the principle of the freedom of the high seas, in its traditional sense, could hamper the development of a proposed international regime.

Two principal schools of thought were asserted in the debate. The first supported the view that existing rules of international law are unable to ensure the orderly exploitation of the seabed for the benefit of mankind. In this regard, it was argued that the existing

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7. Among other cases, the draft prepared by Strupp for the establishment of an international organization and a regime of sea waters was conceived “with a view to the most favorable utilization in the interest of the international community,” and in accordance “with the common interests of the international community,” *Annuaire de l'Institut de Droit International*. Gidel also referred to the emergence of the concept of common interest by the end of the nineteenth century. U.N. Doe. *supra* note 2, at 73.

8. For a study of the subject in international law, particularly in terms of the Geneva Conventions, see Ad-Hoc Comm.: *Legal Aspects . . . of the seabed . . .* Study by the Secretariat. U.N. Doc. A/A.C.135/19 (1968) and add. 1 (1968), and add. 2 (1968).
legal structure would lead to the appropriation of the seabed\(^9\) and that applicable rules were lacking, as evidenced by the fact that treaties did not generally cover the matter.\(^{10}\) It was also warned that this situation might lead to the colonization of the seabed, which would only exacerbate the differences between the developed and the developing countries.\(^{11}\) Accordingly, the idea of freedom of exploitation without restrictions was rejected, as it was concluded that it would result in conflict and confusion.\(^{12}\) It was stressed, furthermore, that although the basic principles of international law were applicable to the area, they were too imprecise, rudimentary and general, and it would be necessary to perfect them.\(^{13}\)

It was also suggested that international law should be applied in a manner which served the guiding principles forming the concept of the common heritage of mankind,\(^{14}\) or that it be applied only partially or by analogy,\(^{15}\) or when the principles so provide.\(^{16}\) Pursuing this line, several delegations argued that in any case the freedom of the high seas was inapplicable to the seabed area\(^7\) or that it could not be applied \textit{mutatis mutandis}.\(^{18}\) It was also noted that the freedom of the high seas does not imply freedom to exploit the area.\(^{19}\) The thesis of a lacuna in the law was also put forward, even though this question is highly debatable in international law.\(^{20}\)

The second school of thought favored respect for the principle of freedom of the high seas.\(^{21}\) In many cases, however, this position was not so much concerned with applying the principle to the seabed as it was with the danger that the concept of the common heritage of

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9. Malta. U.N. GAOR, First Committee (1515th mtg.) at 8,14 (1967). (References in this and the following notes are made to the Spanish version of the documents).
10. United Kingdom, \textit{Id.} (1524th mtg.) at 3 (1967).
11. Libya, \textit{Id.} (1525th mtg.) at 9 (1967).
mankind, or rules which derive from it, might interfere with other uses of the sea which are of interest to certain states. Thus, this school of thought held new principles could be developed for the seabed without affecting rules of international law applicable to other uses of the sea.

Only a small number of countries favored the view that international law and the principle of the freedom of the high seas should be applied directly to the seabed, without there being any need to develop additional principles. This was in particular the position of the United States and the Soviet Union, though the latter's aim was more to prevent the creation of a supranational organization and to direct the discussions toward development of inter-governmental cooperation.

For other countries the most important problem was to safeguard the traditional uses of the sea. This position was expressed both by reaffirmation of the view that international law, or the interests of other states, must be kept in mind, and by reference to particular uses that should be safeguarded by the application of international law in force, such as the freedom to lay cables and pipelines, the freedom to fish. The importance of this debate lies principally in its contribution to the formation of a consensus on the inadequacy of traditional international law. Even though at the beginning several delegations


27. France, General Assembly, First Committee (1526th mtg.) at 2-3 (Nov. 13, 1967).

28. *Id.* at 3. Ceylon, *Id.* at 12.


expressed themselves with caution on the development of new principles and legal rules,\textsuperscript{31} gradually the opinion prevailed that international law in force was not adequate to regulate exploitation of the seabed from the point of view of the emerging concept of the common heritage of mankind.\textsuperscript{32} Resolution 2340 (XXII) had already anticipated this tendency by taking into consideration not only "the provisions" but also "the practice of the law of the sea". Resolution 2467 (XXIII) also stressed that approach to the problem when it made the Committee on the Seabed responsible for "developing principles and legal rules likely to further international cooperation with respect to the exploitation and use of the seabed." The process culminated in the Declaration of Principles of Resolution 2749 (XXV) which specifically recognized "that the legal regime currently in existence for the high seas does not contain rules of substance allowing regulation of exploration of the aforementioned zone and exploitation of its resources."\textsuperscript{33}

It was to remedy the inadequacy of traditional international law that the General Assembly's Declaration of Principles formally established the concept of the common heritage of mankind and laid the foundation for an international regime. This concept is thus related to international law in two ways. On the one hand, it brings together the principles incorporated by the law of the sea in the course of its evolution, such as the subordination of the absolute freedom of traditional law to the needs and limitations dictated by the needs of conservation, the equal rights of other states, and the general interest of the international community. On the other hand, the concept represents an important step in the gradual development of international law, above all from the point of view of perfecting the principles and applying them specifically to the seabed.

Although there may be doubts as to when or how the principle of the freedom of the high seas became a guiding principle for the international community, such doubts are resolved by the Declaration of Principles, at least concerning the seabed. The Declaration reflects the consensus of the international community on the essential elements of the new legal regime applicable to the seabed. The concept of the common heritage of mankind constitutes the synthesis of these


\textsuperscript{32} For a study on this concept in the work of the United Nations, FRANCISCO ORRECO VICUÑA: LOS FONDOS MARINOS Y OCEÁNICOS (1976).

\textsuperscript{33} The texts of these and other relevant resolutions can be found in SHICERNODA THE INTERNATIONAL LAW OF OCEAN DEVELOPMENT (1972).
elements. This also signifies the culmination of an enormously important stage in the evolution of the law of the sea.

The legal value and the binding character of the Declaration have also been the subject of controversy. While some countries regard the Declaration as definitely binding in character, others do not, and still others consider that it could only be applied until such time as it was forcefully violated. It was also suggested that some specific principles be declared binding, particularly that of peaceful use, or that all the principles be finally included in the international convention.

The argument concerning the legal value of General Assembly resolutions is not new. It has arisen each time an important resolution has been adopted. It is quite obvious, however, that the resolutions containing declarations of principles have a higher relative value, for they express the consensus of the organized international community on the fundamental aspects of the progressive development of international law. In this regard, the resolutions have a precise juridical value which obligates states to refrain from any activity contrary to their content. Even if their binding character lacks enforcement mechanisms or necessary sanctions, the simple application of the principle of good faith would lead to an identical conclusion.

In the particular case of Resolution 2749 (XXV), the fact that it provides for the creation of an international regime and enforcement machinery does not mean that its validity or its binding character are contingent upon that regime. Its binding character exists from the moment the Resolution was adopted, and that is sufficient justification to require each state to refrain from incompatible activities. Since an early stage a number of delegations considered the common heritage of mankind as a new principle of jus cogens, a situation which

which has been broadly debated at the Conference on the basis of a proposal by Chile.\textsuperscript{40}

III. THE DECLARATION AND THE SCOPE OF THE MORATORIUM

The United Nations discussions analyzed above had another important result. The concept of a moratorium was developed to prevent the initiation of incompatible activities. This is also a fundamental part of the legal framework involving the seabed which must be considered.

At the time of the first debates on this subject, the thinking concerning a moratorium was closely associated with the problem of establishing a precise definition of the limits of national jurisdiction, particularly in regard to the freezing of sovereignty claims in order to forestall appropriation of the seabed. This line of analysis was based on a broad interpretation of Article 1 of the Convention on the Continental Shelf. That initiation, however, was gradually separated from the question of limits and shifted to the specific problems of exploitation of the seabed zone.

It was the opinion of several delegations the status quo should be maintained with respect to exploitation,\textsuperscript{41} while emphasis was given to the idea that neither individual nations nor international organizations could acquire rights on the basis of resource exploitation.\textsuperscript{42} It was also suggested that exclusive United Nations jurisdiction be de-


The Proposal by Chile originally introduced in Conference U.N. Doc. FC/14, Aug. 29, 1979 reads as follows:

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


\textsuperscript{41} For a summary of opinion, U.N. Doc. supra, note 21, at 29-30.

clared over the seabed\textsuperscript{43} or that a \textit{de jure} and \textit{de facto} freeze of the status quo should be declared with respect to seabed resources.\textsuperscript{44} There were different perspectives on whether the moratorium should last either until the entry into force of a new treaty or until agreement was reached on the distribution of benefits.\textsuperscript{45}

Several draft moratorium proposals were introduced in 1968 stressing the principal non-appropriation, non-exercise of sovereignty rights, and abstention of any claim or of the exercise of any right, entitlement, or interest not expressly and internationally recognized.\textsuperscript{46} Also, Resolution 2467A (XXIII) declared that exploitation should be undertaken for the benefit of all mankind. All these initiatives were included in Resolution 2574D (XXIV) which declared that, pending the establishment of the international regime, states, individuals and other legal entities must refrain from any exploitation of the resources of the seabed and that no claim relating to any part of the seabed or its resources would be admitted. The Declaration of Principles reiterated the moratorium and reaffirmed those obligations.

Although the Resolution on the moratorium was opposed by some countries,\textsuperscript{47} and others felt that it would not prevent exploitation\textsuperscript{48} or that it might lead countries to attempt to expand zones under their national jurisdiction,\textsuperscript{49} it was adopted by a large majority in the General Assembly.\textsuperscript{50} Certain countries, among them the United States, explained their negative votes and argued that the Resolution was not binding. It should be borne in mind, however, that this is not an isolated General Assembly resolution but one which is part of an


\textsuperscript{44} Mexico, General Assembly, First Committee, (1529th mtg.) U.N. Doc. A/C.1/P1529 at 8 (1967).


\textsuperscript{47} See France, General Assembly (1680th mtg.) U.N. Doc. A/C.1/PV.1680.


\textsuperscript{50} Resolution 2574D was adopted by 62 votes in favor, 28 against and 28 abstentions. All countries having the technology for exploration voted against it.
evolutionary process of international law culminating in the Declaration of Principles, which was adopted with no dissenting votes. The arguments outlined above with regard to the legal value of the Declaration are therefore also applicable to the Resolution on the moratorium.

One may conclude from this process of evolution of the law that any exploitation of the seabed is prohibited by express legal rules if it is incompatible with the future regime or, in the meantime, with the Declaration of Principles.\(^5\) As we have already observed, the fact that these obligations lack appropriate enforcement mechanisms in no way affects their continuing validity or the application of the principle of good faith.

IV. UNILATERAL LEGISLATIVE INITIATIVES AND SIMILAR PROPOSALS

Parallel to the development of the Third United Nations Conference on the Law of the Sea, several initiatives have been taken in an effort to authorize exploitation of the seabed on a unilateral basis. Most of them have originated in the United States but, as already noted, some have come from other industrialized countries. These initiatives can be grouped in three categories: (1) a request for diplomatic protection of investments; (2) national legislative actions or proposals; and (3) negotiation of a "mini-treaty."

A. Request for Diplomatic Protection of Investments

In 1974 the firm Deep-Sea Ventures sent to the State Department of the United States a notification of discovery and claim of exclusive mining rights, requesting diplomatic protection as well as protection of the projected investments.\(^5\)\(^2\) This request was based on three arguments: (1) the practice of States with respect to utilization of the continental shelf should allow the application of the same criteria to the seabed; (2) the Convention on the High Seas of 1958 implies the freedom to exploit the seabed; and (3) there is no prohibitive rule in international law.


52. For the text of this presentation see 14 INTERNATIONAL LEGAL MATERIALS 51-65, (1975).
None of those arguments was particularly convincing,\textsuperscript{53} and they entirely disregarded the work of the United Nations on this subject; therefore they became incompatible with the legal framework examined above. More important yet, the request assumed legal actions by the United States, the effect of which would occur outside that country's national jurisdiction.

It is interesting to note that the statement issued by the State Department in response to the request\textsuperscript{54} recognizes two important principles: in the first place, that the development of the law of the sea should properly proceed through the United Nations Conference and not through unilateral claims, and, in the second place, that rights over seabed mineral resources cannot be recognized in areas outside national jurisdiction. The statement added, however, that the freedom of the high seas would permit mining of the seabed.

From the viewpoint of international law there is a contradiction in this regard. On the one hand, recognition is given to the existence of a seabed area beyond the limits of national jurisdiction. The recognition of this concept draws directly on the work of the United Nations, particularly the Declaration of Principles, and therefore implies a recognition that this and other U.N. instruments contain applicable rules of law. But on the other hand, the declaration that the freedom of the high seas permits mining in the area disregards the fact that those same U.N. instruments have established certain regulatory principles, among them the moratorium on exploitation of the seabed.

In any case, this initiative was unsuccessful. It was, moreover, completely rejected by the Canadian Government.\textsuperscript{55}

B. National Legislation and other Proposals

The most important initiatives regarding exploitation have consisted of the unilateral national legislations enacted both by the United States and by the Federal Republic of Germany.\textsuperscript{56} Other industrialized countries are also considering this approach. Notwithstanding the complexity of these laws, and even the differences existing between them, certain basic shared principles and features should be pointed out.

\textsuperscript{54} Text in 14 INTERNATIONAL LEGAL MATERIALS 66 (1975).
\textsuperscript{55} \textit{Id.} at 67-68.
\textsuperscript{56} The final bill was approved by the U.S. Congress on June 9, 1980 as H.R. 2759, 96th Cong., 2d Sess. (1980). It was signed by President Carter on June 28, 1980
In spite of several references to the importance of the Law of the Sea Conference, it is considered an essential principle in these laws that there exists, by virtue of the freedom of the high seas, a right to exploit the seabed, even in the absence of an international regime. From the point of view of international law, this position once again shows the tendency to disregard the gradual development of international law relating to the seabed which has developed in the United Nations with the support of the governments concerned, as evidenced by their votes on the Declaration of Principles. Here a new contradiction emerges since on the one hand the freedom of the high seas is regarded in a traditional light, while on the other the nations also recognize the concept of the common heritage and its implementation through the United Nations.

A second feature common to these laws is the unilateral establishment of a regime regulating exploitation activities. The details regarding licensing, protection, and other topics vary in each case, but what matters is the fact that they call for a unilateral regime. First of all, this amounts to an implicit admission that the invoked principle of freedom of exploitation of the seabed is not synonymous with freedom unfettered by any controls, for otherwise a regulatory regime would not be needed. In that regard it seems that at least the first stage in the evolution of the law of the sea is recognized, in which uncontrolled freedom was subordinated to other exigencies such as conservation. Secondly, it follows that it is necessary to set up some sort of regulating authority for authorization and enforcement purposes. If such an authority is conceived as a national entity, it will still be restrictive as far as the principle is concerned, since it will represent the assumption that the freedom is, after all, not as absolute as it is argued to be.

The third shared feature is that the laws embody the idea of a "reciprocating state" which would be establishing similar regimes and authorizing reciprocal recognition of exploitation licenses. Aside from the strategic goal of using this mechanism to establish a network of bilateral recognitions, it also implies to some extent that the freedom


in question is subordinated to the same rights of other states. This again shows that it is not an absolute freedom and implies at least limited and partial recognition of another step in the evolution of the law of the sea.

Another interesting characteristic that the laws have in common is that they foresee the possible entry into force of an international convention on the subject and include some rules of transition. In particular it is provided that commercial production may begin only after January 1, 1988, which in principle leaves time for the Law of the Sea Treaty to enter into force and supersede national legislation. Also, a revenue-sharing trust fund is provided for in order to meet contributions required under the above-mentioned treaty. Particularly difficult issues arise from the provisions establishing a grandfather clause and the security of tenure, in relation to the work of the Law of the Sea Conference and the discussions on interim protection of investments as suggested by the United States delegation. Even if all these provisions remain incompatible with the work of the United Nations, they reveal an awareness that the international community and the concept of the common heritage cannot be entirely ignored.

The foregoing leads to the conclusion that the unilateral legislative initiatives all suffer from incompatibility with relevant provisions of the law of the sea in force. Though certain steps in its evolution are implicitly recognized, these initiatives fail to acknowledge the most recent and most important one, the one culminating in the concept of the common heritage. As we have seen, that concept redefines the principle of the freedom of the high seas by subordinating it to the general interest of the international community as defined by the latter. Consequently, any unilateral legislation will result in a violation of law now in force.

The discussion of these laws had also been important from the point of view of analyzing the attitude of two important sectors, particularly in the United States: private enterprise and the executive branch. It is understandable that the private sector should have supported initiatives of this kind, which favor its interests quite generously. But the position of the executive branch is more delicate in


58. See the following statements by various industry representatives: Hearings before Senate Comm. on Commerce, Foreign Relations, and the Armed Services, S.713, (May 19, 1976) (Statements Northcutt Ely, Counsel to Deep Sea Ventures, Inc.; J.E. Flipse, President of Deep Sea Ventures, Inc.; Conrad G. Welling, Ocean
that it must take into account the principle of good faith in international law, particularly with respect to the negotiations of the Third Conference. This point also has a relationship with the problem of the international responsibility which the governments involved may have accepted.

When the Resolution on the moratorium was adopted, the State Department’s legal adviser at that time, John Stevenson, who later headed the United States delegation to the Conference, stated that it was not binding upon his country but added, “The United States is, however, required to give good faith consideration to the Resolution in determining its policies.”

As mentioned above, the adoption of a unilateral law is contrary to the moratorium. Even more serious is the fact that the good faith of the United States might have been compromised not only with regard to the moratorium, but also with regard to the United Nations process as a whole, including the Declaration of Principles and the Conference work.

This was the main reason why the United States Government, until recently, took the official position of opposing unilateral legislative initiatives, as voiced by representatives of the State Department, the heads of delegations to the Conference, and the Departments of Interior, Commerce, and the Treasury. Already in 1977, how-

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59. 10 International Legal Materials 831-32 (July 1972).
60. See the policy discussion of the Seabed Committee. U.N. Doc. A/A.C.138/S.C.1/SR.64 at 13 (March 19, 1973) and the letter from Charles N. Bower, Legal Advisor of the State Dept. to Senator William Fulbright, Chairman of the Senate Committee on Foreign Relations (March 1, 1973). A similar statement before that Senate Committee was made by John N. Moore, Advisor in International Law at the State Dept. (June 14, 1973).
61. Hearings before the Senate Interior and Insular Affairs Comm. (June 4, 1975) (Statement of John R. Stevenson); Hearings before the Senate Comm. on Armed Services, Commerce and Foreign Relations (May 17, 1976) (Statement of T.Vincent Learson);
62. Hearings before the Senate Comm. on Armed Services, Commerce and Foreign Relations (May 17, 1976) (Statement of Thomas S. Kleppe, Secretary of the Interior); Hearings before the House Interior and Insular Affairs Subcomm. on Mines and Mining (May 18, 1976) (Statement of Leigh S. Ratiner, Administrator of the Ocean Mining Administration).
63. Hearings before the Senate Comm. on Armed Services, Commerce and Foreign Relations (May 17, 1976) (Statement of Elliot L. Richardson, Secretary of Commerce).
64. Hearings before the Senate Comm. on Armed Services, Commerce and Foreign Relations (May 19, 1976) (Statement of J. Robert Vastine, Deputy Assistant
ever, a change in position first became discernible. This apparent shift began with the statement that the executive branch did not support the legislation "at this time." Then it was said that the position could be "revised" in the light of the Conference work, and finally that the executive branch "strongly supported" adoption of the legislation.

At some point it was thought that this change in position might have been dictated by tactical considerations in the context of the United Nations negotiations, but the enactment of the legislation proved that the problem is perhaps more profound, and could perhaps seriously affect the good faith that all nations must demonstrate in such negotiations. It is difficult to understand how a country could have approved the Declaration of Principles and be working in the Conference on the preparation of an international regime, and at the same time support initiatives that clearly conflict with the legal framework and the negotiating effort. An additional fact casts doubt on the good faith of the United States: two United States representatives recently involved in the work of the First Committee of the Conference made their views known publicly when they left the United States Delegation, and in so doing propounded the idea of developing alternative solutions different from those which were in the process of being developed in the work of the United Nations, in which they had actively participated.

It is not surprising that the discussion on unilateral legislation generated a great deal of controversy in the Conference. The Chairman of the Group of 77 noted that both the moratorium and the Declaration of Principles are fully in force. The head of the United

Secretary of the Treasury, who discussed the decision to support the negotiation of a treaty. See also, U.S. Seeks Framework for Developing Seabed Resources, Treasury Papers at 8-9 (June 1976).


States delegation has reiterated his Government's opinion on the non-binding nature of those instruments. Although the debate has brought forth nothing new, it did underscore the substantive juridical problem. Ambassador Richardson has stated that it is possible "only to impose legal limitations on the national action of a State outside the limits of its jurisdiction by including them in the rules of international law." That is precisely what the United Nations has done in gradually developing international law in this area, with the support of the United States.

C. Negotiating of a "Mini-Treaty"

A third approach to the problem by the industrialized countries has been suggested: the negotiation of a "mini-treaty" between the countries that wish to exploit the area immediately. This initiative is similar to the mechanism of "reciprocating states" mentioned above in that it leads to a regime of reciprocal recognition of license, even if in this case the regime is based on a treaty instead of unilateral legislation simultaneously adopted.

Even though this initiative is technically different from a legal standpoint, it is just as incompatible with existing law as is unilateral legislation. Moreover, it can commit the good faith and the responsibility of several states, which would tend to intensify the problems under discussion. Whether the aggregate of national laws might lead to the "mini-treaty" approach remains to be seen.

made on March 19, 1979 and, at the Ministerial Level of the Group of 77, on Sept. 29, 1979. After the adoption of U.S. legislation, a number of statements and documents were also issued. See Letter from the Chairman of the Group of 77, Ambassador E. Kanyanya, to the President of the Conference, U.N. Doc. A/C.62/SR.100 (July 28, 1980); Legal Position of the Group of 77 on the Question of Unilateral Legislation (Aug. 26, 1980); Letter from the Chief Delegates of Colombia, Chile, Ecuador and Peru to the President of the Conference Accompanying the Declaration of the South Pacific Commission of July 22, 1980; the Inter-Governmental Council of Copper Exporting Countries (CIPEC) also approved a declaration in Lusaka, July 1980.


71. See Darman, supra note 68. It has also been suggested that there could be advantages if the conference ends with a "non-treaty." Hollick, What To Expect From a Sea Treaty, 18 FOREIGN POLICY 68 (Spring 1975).
V. UNILATERAL LEGISLATION WITH RESPECT TO THE EXCLUSIVE ECONOMIC ZONE

It is often argued that it is contradictory to say that unilateral legislation on the seabed would be incompatible with existing law and the Conference work without applying that objection to the abundant legislation on the Exclusive Economic Zone. Except for their similarity from the standpoint of legal technicality, however, the two situations have nothing in common.

Since Chile proclaimed its 200-mile zone in 1947, the essential purpose of all legislation adopted on this matter has been to prevent the depletion of marine resources by abuse of the principle of freedom of the high seas.72 In contrast, legislation on the seabed is predicated on a traditional concept of freedom, even if it partially reflects some preoccupations with conservation and the environment.

In addition, United Nations endeavors regarding the Exclusive Economic Zone have produced a certain basic consensus which has been absent in the seabed discussions. As a result, national laws, besides having contributed to the formation of the consensus, are generally in harmony with the essence of the regime created by the Conference. It would be hard to say the same in the case of the seabed. Today a case can be made for the view that the Exclusive Economic Zone, at least on the issue of fisheries, has become part of international customary law,73 which certainly cannot be said of the law regulating use of the seabed.

Finally, it must also be borne in mind that the common heritage concept represents a special development of the law of the sea applicable only to the seabed, which means that any unilateral legislation designed to set up a regulatory system is incompatible with existing law. By definition, we are dealing with a zone outside national jurisdiction; such a zone is difficult to compare with other institutions which, like the Exclusive Economic Zone, are subject to national jurisdiction. Someday those relationships may change and the common heritage concept may become coextensive with living marine resources, as has already been proposed.74 Although that has not yet

72. See generally, Vicuña, supra note 32.
73. For an examination of the legislation on the Exclusive Economic Zone and its relationship to international customary law, see Caminos, El Regimen de Pesca y Conservación de los Recursos Vivos en la Zone Económica Exclusiva: Implicaciones Jurídicas y Económicas, 1 ECONOMIC COMMISSION FOR LATIN AMERICA AND INSTITUTE OF INTERNATIONAL STUDIES OF THE UNIVERSITY OF CHILE 97 (1978).
74. See Vicuña, supra note 32 at 238-41.
come about, it is safe to say that the future looks more promising for international regimes than for unilateral legislation.

VI. Conclusion

The sort of debate we have been examining inevitably arises whenever fundamental changes in the law are proposed. It results from the conflict between forces favoring innovation and those defending the status quo. That is why the problem must be analyzed from the perspective of its historical evolution. In this case such an examination demonstrates profound innovation rooted in the past. The United Nations has given these innovations concrete form by elucidating the applicable concepts and rules of law. Unilateral legislation would seem to have little chance of turning back a process of this nature.

Furthermore, if the principal aim is to establish a stable legal framework for the orderly exploitation of mineral resources of the seabed in which all would have a legitimate chance of participating, there is no alternative to an internationally-structured regime. Unilateral legislation might perhaps temporarily satisfy some interests, but it would be incapable of ensuring necessary stability and would in the end create unfavorable conditions for investments.75

75. Arguing in favor of the need of achieving a satisfactory compromise at the Conference, one author concludes: “Failure to make such a change will doom the Conference and result in destabilizing illegitimate unilateral actions detrimental to all in the long run.” Charney, Law of the Sea: Breaking the Deadlock, 55 Foreign Affairs 598, 629 (April 1977).