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THE MOON TREATY AND THE LAW OF THE SEA

This Comment explores the connections between the law of the sea and the evolving law of outer space. The question of resource exploitation, common to both areas of the law, will remain the subject of heated international debate until a practical method of resource management is adopted. Law of the sea experience illustrates the difficulties encountered when legal norms trail behind technological advances. The wiser course would be to set up the basic framework in advance of technology. If this were done, the law would determine the direction of technology, rather than technological might and clamorous marketplace interests determining the law.

INTRODUCTION

In this half of the Twentieth Century the international community faces the intricate task of fashioning a world order with a global perspective. The traditional concept of national sovereignty still dominates; but international law bars its extension to unoccupied territories by force, discovery, or international claim. Areas that are beyond present national jurisdiction are to

1. See U.N. CHARTER art. 2, para. 4.

International reaction to the Russian invasion of Afghanistan in December of 1979 suggests that forceful extension of sovereignty into occupied territory is also unacceptable in theory even though tolerated in practice.

2. For example, territorial claims to Antarctica have been suspended in favor of indefinite international control by the Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

3. On November 14, 1974, Deepsea Ventures, Inc., a private United States company, filed a "Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection" with various governments and private firms worldwide, reprinted in 14 INT'L LEGAL MATERIALS 51 (1975). The claim was rejected by all responding governments including the United States.

4. The most widely acknowledged "common spaces" are the antarctic, the
be maintained as common areas governed by the international community as a whole.5

The negotiations of the United Nations Conference on the Law of the Sea represent the first comprehensive attempt to set up such an international order.6 The ideological debate7 has been fueled, distorted, and prolonged by self-serving economic interests,8 but much of the work has been completed.9 The progress achieved at the most recent session of the Third United Nations Conference of the Law of the Sea (UNCLOS III) indicates that an international treaty governing the seabed may be imminent.10 During the seven years of deliberations, the issue of deep seabed mining was the primary source of discord.11 An uneasy compromise on this issue has finally been achieved, but the underlying normative questions remain unanswered.12

In a separate United Nations arena the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) has been drafting an international treaty concerning the moon.13 This parallel attempt to create an international order has been less turbulent than the law of the sea negotiations because there are fewer special interest groups clamoring to protect their particular economic interests. Because little is known about the natural resources of the moon, it is possible to negotiate primarily on the

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7. See text accompanying notes 76-78 infra.
8. See text accompanying notes 74-75 infra.
9. Moore, Law and Foreign Policy of the Oceans, 9 CAL. W. INT'L L.J. 522, 530 (1979) ("[N]inety to ninety-five percent of the work of the Conference has been completed in a manner that is satisfactory for United States oceans interests and for the common interest in general.").
10. ICNT/Rev. 2, supra note 5.
11. See, e.g., Moore, supra note 9, at 532 (all the remaining problems can be resolved "if and when we can solve the question of deep sea-bed mining"). See generally Haight, Law of the Sea Conference—Why Paralysis?, 8 J. MAR. L. & COM. 281 (1977).
12. See text accompanying note 68 infra.
basis of principle without the divisive pressures of specific marketplace interests. At some level, of course, ideology determines economics, so it should come as no surprise that the major point of contention throughout the negotiations has been the issue of the commercial exploitation of the moon’s natural resources.

At its 1979 session the UNCOPUOS negotiated a compromise which enabled it to reach consensus on a draft treaty. On December 14, 1979, the “Agreement Governing Activities of States on the Moon and Other Celestial Bodies” (commonly known as the Moon Treaty) was adopted by the United Nations General Assembly and has been commended to member States for signature and ratification. Now that the treaty is ready for signing, the United States is hesitating while Congress and the Administration take a closer look at what effect the Moon Treaty will have on international law in general and on the law of the sea negotiations in particular. This Comment will explore the connections between the two agreements and discuss their joint contribution to the evolving concept of international control of areas beyond national jurisdiction.

TRADITIONAL LAW OF THE SEA

Prior to the United Nations Law of the Sea negotiations, the Geneva Convention on the High Seas codified the doctrine of freedom of the high seas based on three centuries of customary law. The provisions of this document are reiterated without substan-

14. Or perhaps it is the other way around.
19. See, e.g., Lunar Dustup, Time, Mar. 24, 1980, at 47.
21. The fundamental principles are set forth as follows: The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other
tial change\textsuperscript{22} in the negotiating text of the continuing United Nations Conference on the Law of the Sea.\textsuperscript{23} A great deal of debate centers on whether or not deep seabed mining is permissible under existing international law.\textsuperscript{24} The United States claims that it is,\textsuperscript{25} while the bloc of developing nations known as the Group of 77\textsuperscript{26} claims that it is not.\textsuperscript{27}

The United States claim that deep seabed mining is a freedom

rules of international law. It comprises, \textit{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.

These freedoms, and others which are recognized by the general principles of international law, 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.

Geneva Convention on the High Seas, id. art. 2.

22. That is except for the enumeration of two additional freedoms: the freedom to construct artificial islands and other installations permitted under international law, and the freedom of scientific research.

23. ICNT/Rev. 2, \textit{supra} note 5.


25. The executive branch has stated repeatedly that deep seabed mining can proceed under international law. \textit{See, e.g.}, United States Oceans Policy, 6 WEEKLY COMP. OF PRES. DOC. 677, 678 (May 23, 1970). The legislative branch works from the same assumption. \textit{See, e.g.}, \textit{Hearings Before the Senate Subcomm. on Minerals, Materials and Fuels}, 93d Cong., 2d Sess. 944, 975 (1974) (statement of John Moore, Chairman of NSC Inter-Agency Task Force on the Law of the Sea); \textit{Hearings Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries}, 93d Cong., 1st Sess. 15, 50 (1973) (statement of Charles Brower, Acting Legal Advisor to the Dep't of State); \textit{Hearings on the Outer Continental Shelf Before the Special Senate Subcomm. on the Outer Continental Shelf, 91st Cong., 2d Sess. 210 (1970) (statement of John Stevenson, Legal Advisor to the Dep't of State). The underlying concept is not a novel one:

\begin{quote}
\textit{[W]hen the slave says: “The sea is certainly common to all persons,” the fisherman agrees; but when the slave adds: “Then what is found in the common sea is common property,” he rightly objects, saying: “But what my net and hooks have taken, is absolutely my own.”}\\
\end{quote}

26. The countries that comprise this bloc are referred to variously as “less-developed countries,” “Third World countries,” “developing countries,” or “underdeveloped countries.” These terms refer to approximately 119 countries located primarily in Africa, Asia, and Latin America. Friedman & Williams, \textit{The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea}, 16 SAN DIEGO L. REV. 555, 555 (1979).

under the rubric of the Geneva Convention on the High Seas rests on dubious legislative history. The argument that mining can proceed under the auspices of customary international law is equally tenuous because there is no actual custom, and the suggested precedents and analogies "are either inapposite or inappropriate for the mining context."

28. The International Law Commission, which drafted the final text of the Geneva Convention, made the following statement:

The list of freedoms of the high seas contained in [Article 2] is not restrictive. The Commission has merely specified four of the main freedoms, but it is aware that there are other freedoms... The Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas. It is considered that... such exploitation had not yet assumed sufficient practical importance to justify special regulation.

29. See, e.g., Pietrowski, supra note 28, at 51.


31. E.g., Legal Status of Eastern Greenland, [1933] P.C.L.J., ser. A/B, No. 53, at 43-75 ("[V]ery little in the way of the actual exercise of sovereign rights," was necessary to establish sovereignty as long as no other State could make out a superior claim, id. at 46); Clipperton Island Arbitration (Mexico v. France), 2 R. Int'l Arb. Awards 1105 (1931) (France's claim to Clipperton Island upheld even though no French nationals settled the island and French authorities visited there only sporadically); Island of Palmas Case (Netherlands v. United States), 2 R. Int'l Arb. Awards 829, 840 (Penn. Ct. Arb. 1928) (manifestations of sovereignty assume different forms according to conditions of time and place and need not be exercised in fact at every moment on every point of a territory).
incomplete." Furthermore, all attempts to proceed with deep seabed mining have been protested vigorously, indicating a lack of the general consensus necessary to establish customary law.

If there is no existing law on the subject, deep seabed mining might proceed under the maxim that "what is not forbidden is allowed." It is occasionally argued that mining can proceed because no binding international law forbids it. The counter-argument, voiced frequently by the representatives of the developing countries, is that contemporary law evolving from the United Nations negotiations expressly forbids it.

**Evolving Law of the Sea**

In 1969 the United Nations General Assembly adopted what is popularly called the Moratorium Resolution which requires that States refrain from exploiting the deep seabed until international control is effected. The United States and twenty-seven other

gimes, 7 INT'L LAW. 796, 798, 807-12 (1973). But see Burton, supra note 24, at 1156-57.

Another argument rests, by way of analogy, on the recognition of rights to sedentary marine species, such as oysters, sponge, and coral, that lie beyond national jurisdiction. See, e.g., Goldie, The Occupation of the Sedentary Fisheries Off the Australian Coasts, 1 SYDNEY L. REV. 84 (1953); Hurst, Whose is the Bed of the Sea?, [1923-24] BRIT. Y.B. INT'L L. 34; M. McDougall & W. Burke, THE PUBLIC ORDER OF THE OCEANS 635 (1962). But see Burton, supra note 24, at 1154-56; Saffo, supra note 30, at 502-03.

33. Burton, supra note 24, at 1153. See generally id. at 1151-59; Saffo, supra note 30, at 506; Note, supra note 24, at 1256.

34. Deepsea Ventures' claim, see note 3 supra, was expressly rejected, and United States legislation to permit deep seabed mining has been criticized by developed and developing countries alike. See, e.g., 9 UNCLOS III OR (109th mtg.) 105, U.N. Doc. A/CONF.62 (1978) (U.S.S.R. joins the Group of 77 in protesting proposed U.S. legislation).

35. See text accompanying notes 49-59 infra.


38. Statement of the Group of 77, supra note 27.


The General Assembly . . . declares that, pending the establishment of the aforementioned international régime:

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

(b) No claim to any part of that area or its resources shall be recognized.

Id. at 11.

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industrial nations cast their votes against the resolution. In doing so the United States reaffirmed its position that nonexclusive deep seabed mining is a freedom of the high seas available to all nations and insisted that it did not consider the Moratorium Resolution binding.

A year later the United States supported a United Nations resolution known as the Declaration of Principles. This resolution declares the seabed to be the "common heritage of mankind" and not subject to appropriation or any use that is incompatible with the international regime to be established.

At issue is whether either of these resolutions has the force of law. The United States claims that neither resolution is binding without a treaty giving legal definition to the suggested princi-

40. Id. (28 other countries abstained and 62 voted for the resolution).

The General Assembly . . . [s]olemnly declares that:
1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.
2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.
3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration.
4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established.
5. The area shall be open to use exclusively for peaceful purposes by all States, whether coastal or landlocked, without discrimination, in accordance with the international regime to be established.
6. States shall act in the area in accordance with the applicable principles and rules of international law, including the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

43. Id.
The Group of 77 claims that the Declaration of Principles is binding at least to the extent that no State may undertake resource exploitation without the consent of the international community. According to this view, the Declaration of Principles in effect establishes the moratorium that the United States rejected in the earlier resolution.

Under the United Nations Charter, General Assembly resolutions are only "recommendations" and, therefore, not legally binding. It has become a clear precept of international law, however, that under certain conditions United Nations resolutions may claim varying degrees of legal validity. When, for example, a resolution verbalizes the opinio juris of the international community, the resolution represents binding international law. In such a situation the resolution does not create the law, but rather reflects pre-existing law created by a general consensus of opinion or practice. Nevertheless, the resolution identifies and for-
malizes the latent legal principle, and thus itself becomes authoritative.\footnote{Texaco Case (International Companies v. Libya) 104 J. du droit int’l 350 (1977), reprinted in 17 INT’L LEGAL MATERIALS 1 (1978) (provisions that proclaim rules recognized by the community of nations do not create a custom but confirm one).}

The difficulty lies in determining whether or not a particular General Assembly resolution crystallizes the *opinio juris* of the international community. One of the most important considerations\footnote{Along with an analysis of the intent of the drafters, the type of resolution involved, the precision of the language, the level and authority of the governmental representatives who approve the agreement, and the subsequent treatment of the agreement (for example whether or not it is registered under Article 102 of the United Nations Charter).} is an analysis of the vote that produced the resolution.\footnote{Texaco Case (International Companies v. Libya) 104 J. du droit int’l 350 (1977), reprinted in 17 INT’L LEGAL MATERIALS 1 (1978) (analysis of voting pattern deemed significant).} A unanimous vote is at least presumptive evidence that the resolution expresses the *opinio juris* of the nations involved.\footnote{In the context of outer space negotiations, the U.S.S.R. undertook to respect principles of a declaration “if it were unanimously adopted”; the representative of the United Kingdom stated that “a resolution, if adopted unanimously, would be most authoritative”; and the United States delegate stated that “[w]hen a General Assembly resolution proclaimed principles of international law . . . and was adopted unanimously, it represented the law as generally accepted in the international community.” Cheng, supra note 48, at 25-26.} If the nations voting represent all geographical areas and all economic systems, the presumption is virtually incontestable.\footnote{Supra note 42.}

Using this approach, the Declaration of Principles,\footnote{See, e.g., Texaco Case (International Companies v. Libya) 104 J. du droit int’l 350 (1977), reprinted in 17 INT’L LEGAL MATERIALS 1, 28 (1978).} which declares the seabed to be the common heritage of mankind, is binding international law,\footnote{Supra note 42.} whereas the Moratorium Resolution,\footnote{Supra note 42.} which forbids mining without international approval, is not. Be-
cause the Moratorium Resolution lacks the support of the industrialized world,\textsuperscript{59} it does not represent the consensus of international opinion necessary to the formation of binding customary law.

There are, however, other methods whereby a resolution that is technically nonbinding can acquire some degree of legal validity. According to the United Nations Office of Legal Affairs:

[A declaration] may be considered to impart, on behalf of the organ adopting it, a strong expectation that members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.\textsuperscript{60}

A United Nations resolution is, at the very least, evidence that the subject matter is of international concern. It represents the opinion of a substantial portion of the international community and must be taken into consideration.\textsuperscript{61} Subsequent State practice is the determining factor. If States in fact conform to the rule over

\textsuperscript{58} President's Remarks at the Commissioning of the Research Ship, the "Oceangrapher," 2 WEEKLY COMP. OF PRES. DOC. 930, 931 (July 18, 1966).

In August of 1968 the United States voted for the Report of the Ad Hoc Committee of the United Nations which stated that the exploration and use of the seabed and ocean floor and the subsoil thereof and the exploitation of their resources should be carried out for the benefit and in the interest of mankind.

In December of 1968 the United States voted in favor of General Assembly Resolution 2467 A which stated that the exploitation of the seabed should be carried out for the benefit of mankind as a whole, taking into account the special interests and needs of the developing countries.

In May of 1970 President Nixon proposed that:

\[ \text{[All nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed ... and would agree to regard these resources as the common heritage of mankind.} \]


In August of 1970 the United States submitted to the United Nations Seabed Committee a draft proposal which stated that the deep seabed area should be the common heritage of mankind. U.N. Doc. A/AC.138/25 (1970).

In December the United States voted in favor of General Assembly Resolution 2749, the Declaration of Principles, which "[r]ecognizing that the existing legal regime of the high seas does not provide substantive rules for regulating the exploitation of the aforesaid area and exploitation of its resources," declared that the resources of the area "are the common heritage of mankind." \textit{Supra} note 42.

58. \textit{Supra} note 42.
59. See text accompanying note 59 supra.
60. Memorandum of the U.N. Office of Legal Affairs on the "Use of the Terms Declaration and Recommendation.
61. See U.N. CHARTER art. 2, para. 2; Hearing on S. 2801 Before the Subcomm. on Minerals and Fuels of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. '74 (1972) (statement of John Stevenson, Legal Advisor of the Dep't of State) (the Moratorium Resolution must be given "good faith consideration").
an extended period, the rule becomes customary and, therefore, binding on principles akin to estoppel.\textsuperscript{62} The subjective opinion or motive of a State is irrelevant in this regard; it is the actual recognition of, or acquiescence in, the rule that is dispositive.\textsuperscript{63}

Under this view the Moratorium Resolution may be well on its way to becoming customary law. It could be argued that by refusing to support private claims\textsuperscript{64} and by delaying national mining legislation\textsuperscript{65} the United States has acquiesced to the binding character of the Moratorium Resolution—regardless of diplomatic protests to the contrary.\textsuperscript{66}

The progress achieved at the ninth session of UNCLOS III\textsuperscript{67} makes an authoritative consensus in the form of a binding treaty possible.\textsuperscript{68} The compromise on the issue of deep seabed mining permits parallel exploitation by private companies and by a mining company representing the international community.\textsuperscript{59} There may be no agreement on the underlying issues, but peaceful coexistence now seems attainable.

While there is widespread agreement that the seabed is "the common heritage of mankind,"\textsuperscript{70} there is sharp disagreement over

\begin{thebibliography}{99}
\bibitem{62} See MacGibbon, Estoppel in International Law, \textit{7 Int'l Comp. L.Q.} 468 (1958); Rubin, \textit{The International Legal Effects of Unilateral Declarations}, \textit{71 Am. J. Int'l L.} 1, 16-17 (1977).
\bibitem{63} See Cheng, \textit{supra} note 48, at 36.
\bibitem{64} See note 3 \textit{supra}.
\bibitem{66} That the Administration is aware of this international booby-trap was shown recently by the leak of a classified communication directing the Navy to send ships into the disputed waters of nations that claim a territorial limit of more than three miles "because simply protesting diplomatically about such limits would not be effective." \textit{N.Y. Times}, August 10, 1979, § A, at 1, col. 3. It may also explain, in part, the Administration's change of opinion regarding unilateral seabed mining legislation.
\bibitem{67} In August 1980.
\bibitem{68} Recent announcements indicate that the Reagan administration intends to block the completion of the treaty which had been expected in the spring of 1981. The intricate balance achieved by years of negotiations may be lost in the shift to the policies of an eager new administration.
\bibitem{69} ICNT/Rev. 2 at Annex 3, art. 3.
\bibitem{70} See text accompanying notes 42-57 \textit{supra}.
\end{thebibliography}
what that concept means. The Group of 77 claims it means that the seabed belongs to the international community as a whole which must give its approval before any resources can be removed. The developed nations, on the other hand, claim that the common heritage concept permits anyone to exploit the seabed. Both positions are calcified by insistent economic interests. The countries with the technological capability of exploiting seabed minerals are mineral-importing countries, anxious to secure a plentiful and reliable source of supply. Many of the countries lacking technological capability are mineral-exporting countries, are anxious to maintain their current market advantage.

Added to this already complex equation is the ideological debate over the developing nations’ demand for a new order that would close the economic gap between developed and developing countries. The political force of this movement, coupled with possession of scarce resources, gives the developing nations bargaining power sufficient to hold the developed countries, with their superior military and technological strength, temporarily at bay.

**THE LAW OF OUTER SPACE**

International negotiations regarding the law of outer space have roughly paralleled those regarding the law of the sea. The principles agreed to in the 1967 United Nations “Treaty on Principles Governing the Activities of States in the Exploration and Use of Space” have been intentionally parallel to those in the Law of the Sea. The United States supports an international agency with limited authority. See, e.g., U.N. Draft Convention of the International Seabed Area, reprinted in 9 INT’L LEGAL MATERIALS 1046 (1970).

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75. Id. at 20. See Friedman & Williams, supra note 26, at 573 (special interests of the land-based producing States significantly influence negotiating positions).


77. Id.


Outer Space, Including the Moon and Other Celestial Bodies,”
(Outer Space Principles) will be readily recognized by law of the
sea experts. The first four articles, for example, set out the fol-
lowing familiar principles: 1) Outer space activities shall be car-
ried out for the benefit of all countries irrespective of their degree
of economic or political development; 2) Outer space shall be the
province of mankind; 3) Outer space shall be open to exploration
and use by all States in accordance with international law;
4) Outer space is not subject to national appropriation by claim
of sovereignty or by any other means; 5) The United Nations
Charter applies to outer space; and 6) Outer space shall be used
eclusively for peaceful purposes.\footnote{81}

The negotiations of the United Nations Committee on the
Peaceful Uses of Outer Space (UNCOPUOS), in attempting to

\footnote{80. Outer Space Treaty, \textit{supra} note 5.}
\footnote{81. Article I
The exploration and use of outer space, including the moon and other ce-
lestial bodies, shall be carried out for the benefit and in the interests of all
countries, irrespective of their degree of economic or scientific develop-
ment, and shall be the province of all mankind.

Outer space, including the moon and other celestial bodies, shall be free
for exploration and use by all States without discrimination of any kind, a
basis of equality and in accordance with international law, and there shall
be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, includ-
ing the moon and other celestial bodies, and States shall facilitate and en-
courage international co-operation in such investigation.

Article II

Outer space, including the moon and other celestial bodies, is not sub-
ject to national appropriation by claim of sovereignty, by means of use or
occupation, or by any other means.

Article III

States Parties to the Treaty shall carry on activities in the exploration
and use of outer space, including the moon and other celestial bodies, in
accordance with international law, including the Charter of the United Na-
tions, in the interest of maintaining international peace and security and
promoting international co-operation and understanding.

Article IV

States Parties to the Treaty undertake not to place in orbit around the
Earth any objects carrying nuclear weapons or any other kinds of weap-
ons of mass destruction, install such weapons on celestial bodies, or sta-
tion such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by all States Parties
to the Treaty exclusively for peaceful purposes. The establishment of mil-
itary bases, installations and fortifications, the testing of any type of weap-
on and the conduct of military maneuvers on celestial bodies shall be
forbidden. The use of military personnel for scientific research or for any
other peaceful purposes shall not be prohibited. The use of any equip-
ment or facility necessary for peaceful exploration of the moon and other
celestial bodies shall also not be prohibited.

\textit{Id.} arts. I-IV.
draft a treaty based on those principles, revolved around the issue of the exploitation of natural resources. As in the law of the sea, this issue was generally recognized to be the problem whose solution would facilitate agreement on the other unresolved issues. For eight years statesmen and scholars argued about the meaning and effect of the common heritage concept, the desirability of a moratorium, and the interests of the developing countries in much the same manner as their maritime counterparts.

In 1979 a compromise was achieved. The developed countries agreed to accept Brazil's formulation of the common heritage principle: "The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 of this article." The pertinent section of paragraph five reads as follows: "States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible." In effect the developed States have agreed that the common heritage principle means that an international regime should control resource exploitation. In exchange for this concession, the developing countries agreed not to insist on a provision imposing a moratorium on exploitation pending the establishment of the international regime. Thus the Moon Treaty expresses no moratorium, and none is implied by its legislative history.

The result is that the debate about what the common heritage of mankind means has been set to rest in a treaty that may become binding international law. The underdeveloped countries have won the ideological debate which appears to bolster their economic position. But, like the moon itself, this arrangement has its dark side. The lack of a moratorium on exploitation, in con-

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82. As requested by G.A. Res. 2779 (XXVI) of Nov. 29, 1971.
86. See, e.g., Christol, Space Joint Ventures: The United States and Developing Nations, 8 AKRON L. REV. 389 (1975).
87. Moon Treaty, supra note 13, art. XI, para. 1.
88. Id. at para. 3.
89. Hosenball, supra note 16, at 100.
junction with a provision that allows property rights in resources after their extraction from the natural environment, makes the practical effect of the compromise exactly what the developed countries wanted. Exploitation will be allowed on a “first come, first served” basis accompanied only by a duty to try to set up an international regime. Under these conditions the developed countries will have no economic incentive to establish an international regime which might restrict their access, control their production, and tax their profits. There will be political pressure to do so, but because it will be to the advantage of the developed countries to postpone international control indefinitely, the projected regime will have to be based on their terms or not be established at all.

This mirrors the history of the law of the sea negotiations. It was to the advantage of the developing countries to prevent the establishment of the International Seabed Resources Authority as long as the developed countries could be restrained by political or economic means from exploiting the resources in the interim. Only when unilateral action was inevitable was a compromise achieved. In the Moon Treaty the underlying dilemma remains the same, but the actors have changed places. It is now the developed countries who will benefit from impasse.

If, when exploitation of the moon becomes feasible, the developed countries can act on the basis of principle, unclouded by immediate marketplace interests, the effect of the Moon Treaty’s compromise is harmless. Law of the sea experience, however, teaches that such fortitude is unlikely. Because the Moon Treaty applies not only to the moon itself, but to all nonterrestrial bodies in our solar system, the potential for inequity is enormous.

A Proposed Reconciliation

Although the seabed and the surface of the moon differ physically, their legal natures are the same. Like the high seas and the
antarctic, the seabed and the moon are withdrawn from national sovereignty and open for use by all members of the international community. In theory, therefore, the same principles should apply to both. Indeed in practice most of the existing law is analogous if not identical. International argument about the meaning of the term "common heritage of mankind" is diminishing, but the fundamental practical difficulties are unchanged. Resource exploitation will remain the subject of heated and prolonged international debate until a practical method of resource management is adopted.

One logical way to solve the dilemma is to see to it that no one benefits from impasse—in effect to take away the trump card. If the Moon Treaty were to recognize the community ownership of resources and establish a regime to control exploitation and distribute prospective wealth now—before specific economic interests prejudice the outcome—the bargaining positions would be equalized as far as possible.

Starting from the assumption that justice depends on impartiality, John Rawls suggests that impartial decision-making can occur only where the participants are free of self-interest. To accomplish this the decision-makers must assume a conceptual "veil of ignorance." "They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations." Because participants are prevented from knowing what

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95. See, e.g., Dekanzov, Relationship Between the Status of Outer Space and the Status of Areas Withdrawn from State Sovereignty, in PROCEEDINGS OF THE SIXTEENTH COLLOQUIUM ON THE LAW OF OUTER SPACE 9 (M. Schwartz ed. 1974).

96. See text accompanying notes 79-86 supra.

97. The treaty has already encountered some resistance from the 4,000 member L-5 Society, which hopes to see a space colony built in orbit around the moon. Lunar Dustup, TIME, Mar. 24, 1980, at 47. The society has hired Washington lobbyist Leigh S. Ratiner who for 5 years was the chief spokesman for seabed mining interests. Broad, Earthlings at Odds Over Moon Treaty, 206 Sci. 915, 915 (1979). One aerospace industry, United Technologies, has placed an ad in the Washington Post attacking the treaty. According to the ad:

The draft agreement would have the effect of imposing an indefinite delay on commercial development of space at a time when the U.S. is a world leader in space technology. . . . If the draft treaty stands up in Congress, American inventiveness and enterprise would be shut off from the industrialization of space.


99. "Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage." Id. at 136.

100. Id. at 136-42; see Arnold, supra note 78, for a suggested application of this theory to the law of the sea negotiations.

role they will play in the order they establish, they will choose principles that apply fairly to all groups.\textsuperscript{102}

Although this ideal situation can never be completely realized,\textsuperscript{103} it is possible to minimize the negative effects of self-interest by setting up a legal regime before specific interests have vested. In negotiations for a lunar regime the veil of ignorance would be gossamer at best because the developed nations know that they are likely to be the first to have the technological capability to exploit whatever resources become available.\textsuperscript{104} This advantage can be offset, however, by a definite and substantial commitment to share revenue or technology with members of the class of countries defined as underdeveloped by the agreement.

A substantial commitment will be more palatable to developed nations before specific resource interests are realized for two reasons. First, promises of benevolence in the future are more likely to be based on principles of equity and less likely to be narrowed by self-interest than are promises of immediate benevolence. Second, the commitment can be made without substantial protest when it is still unknown which sector of the economy will be affected. Once the commitment is made, it becomes a given fact included in any calculation of possible profit. It is seen as a prerequisite to the venture rather than as a loss of projected profit.

Because it will be unknown which sector of the economy will be adversely affected by competition with moon-based industries, the decision to protect existing industry or let the risk fall where it will can be based on principle rather than on self-interest. Similarly, the absence of strong lobbying efforts by specific interest groups\textsuperscript{105} will enable diplomats to convince governments of the advantages of the proposed regime in terms of equity and the benefit of preventing future bitter conflict. Preempting the involvement of specific economic interests leaves the ideological interests free to negotiate a compromise regime that is more likely to be both equitable and internationally acceptable.

Even if the Moon Treaty were signed in its present form, a

\begin{footnotes}
\item[102] Id. at 137.
\item[103] And Rawls offers it only as a “viewpoint,” a “perspective,” or a “guide to intuition” that “leads to a certain conception of justice.” Id. at 139.
\item[104] The recent economic crises of many developed countries may weaken the likelihood for many.
\item[105] But see note 97 supra.
\end{footnotes}
move to set up the regime before resource exploitation becomes feasible could be initiated at the Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space to be held in the latter half of 1982. Law of the sea experience illustrates the difficulties encountered when legal norms trail behind technological advances. The wiser course would be to set up the basic framework in advance of the technology. If this were done, the law would determine the direction of technology, rather than the more dangerous alternative of allowing technology to determine the law. Technological might and clamorous marketplace interests should not be allowed to dictate legal norms or there will be no justice.

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