Chapter 7

Conclusions

Historically the law of the sea has evolved from practices and disputes among states seeking to exercise sovereignty over the use, control, navigation and exploitation of the seas resources. The UNCLOS is the product of a total international social progress extending back, philosophically and historically, to the sixteenth century and far beyond. The Convention is a slow motion metamorphosis. There is, however, more obscure and still more insides distorting effect of the unreformed self-conceiving of the international system. The freedom of seas principle is compatible with the treatment of the seabed and its resources.\(^1\) History of state practices with respect to the high seas reveals attempts to maximize control over resources. Great care and caution is meticulously taken to draw conclusions based on research conducted in this area. The historical overview has been undertaken through territorial sea, continental shelf, and EEZ and seabed.\(^2\)

The CHM has become an extremely important concept and some crystallization of the concept has occurred in the law since the 1967 Arvid Pardo proposal.\(^3\) Overtime, all states, which have expressed views on the subject, have demonstrated their acceptance of that concept, although the exact meaning of the principle has reckoned the subject of great controversy. UNCLOS built upon an historic resolution adopted by the UN General Assembly in December 1970 which, similar to the 1967 Pardo speech, stated that the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the Area, are the common heritage of mankind\(^4\) and, further, that 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.
The foregoing study has brought out the proposed transformation that the international law of the sea has undergone as a result of technological progress and its economic and social repercussions. This transformation has, of necessity, detracted from the absolute character of the fundamental concepts and principles of the regime of the seabed. The reaction of the Group 77 to the United States Unilateral Mining Legislation and rejection of UNCLOS III reveals that the common heritage concept, as interpreted by the Group 77 is fundamentally different from the concept of *res nullius* and *res communis*. During recent decades a number of developing nations have endorsed the common heritage principle as a means of promoting both economic growth and political goals.

This effort has been associated, at times, with a wider global politico-economic movement known as the NIEO, which seek a more equitable distribution of resources and income between the developed (industrial) and developing nations of the world. Formal procedures for deep seabed mining, including the creation of the ISA to implement these procedures, were established. Moreover, a global revenue sharing plan was created so that all nations would receive a share of mining revenues as common property owners of the ocean floor. Such revenues would also serve a redistribution function on behalf of developing nations, which are the least likely to possess the economic means to undertake such mining on their own.

The enactment of Legislation Regulating Unilateral Exploration and Exploitation of the Seabed by the United States and other states is an implicit rejection of the Group 77 interpretation of CHM. The principle articulated by the Group 77 are not cognizable as customary law, however, because uniform state practice consistent with the CHM concept as interpreted by the Group 77, does not
exist, the freedom of the high seas principle. The principle is based on non-appropriation.

The CHM constitutes an alternative to the traditional *res nullius* approach for determining property rights among nations. The latter postulates that land and natural resources belong to no nation until such activities as discovery, exploration, and occupancy establish a widely recognized national sovereignty over them,\(^8\) the resources should be used on a reasonable manner.

The CHM acquires more than reasonableness. It implies common administration and contains notions of trust and trustees. It also specifies that there must be peaceful and equitable use of natural resources. The status of Moratorium Resolution, general principles, resolutions and the principles of CHM are examined, as in the relevant part of the UN Convention. Finally, benefit of mankind, transfer of technology, MSR and legal status are examined. It may therefore be further said that both from the international and philosophical context the principle of CHM as it has sought to be developed is founded on stronger and sound basis.

The political and economic context of deep seabed mining has rendered uncertain in future, widely acceptable treaty regime for deep seabed mining,\(^9\) but also the existing legal regime applicable to that treaty. Whereas unilateral actions by their nature tend to be shortsighted and confrontational, internationally agreed upon norms binding upon all will likely better serve the universal interests in conservation, environmental preservation and rational resource management. The Agreement still requires adherence to policies that regulate deep seabed mining\(^{10}\) and force parties to adopt laws and regulations to control and prevent marine pollution. Some industrialized countries have repeatedly emphasized that they must
have guaranteed access to the minerals produced from the international area in order to meet their industrial needs.

Wider understanding of the Convention will bring yet wider application. Stability promises order and harmonious development. Much has been said on the developments relating to treaty laws on deep seabed mining. Yet the position under customary international law remains in conclusive. The conclusion which emerges from the foregoing decision concerning the judicial status of seabed and subsoil beyond the limits of national jurisdiction and the resources thereof in customary international law is that the question is unsettled. But that view, which can reasonably be held is that this area and its resources are *res communis*. What is important and necessary for the new order of ocean is that established rules of law applicable to its use should continue to exist as an integral part of international law.

Flexibility and ingenious solutions are required to tackle these issues. Unless they are dealt with the adequately, no significant breakthrough can be expected. Development capital in the large amounts required by seabed mining is a scarce commodity everywhere. In case of seabed mining, the political risk takes on a new dimension. Once ISA is in place, the alternatives for those who wish to mine the seabed are limited.

The deep seabed regime\textsuperscript{11} under the UNCLOS has, from the point of view of developed countries, failed to provide assured access for states and private enterprises and presents grave institutional difficulties, including excess discretion vested in the ISA and a system decision making demand by a one member, one vote Assembly.\textsuperscript{12} However, the objective of universality of the new regime was threatened by the refusal of the industrialized states to accept the systems for deep seabed mining in Part XI of the Convention.
The Convention, which has been rightly called a ‘Constitution for the oceans’, constitutes a comprehensive reformation of the public international law of the sea. It was not, however, written on a clear slate. Rather it was heavily influenced by prior developments including the earlier international efforts at codification as well as national claims and legislation. On the whole, it represents a compromise among different competing interests as regards the use of the sea, both within and between states. Many of the provisions in the 1982 Convention repeat principles enshrined in the earlier instruments and others have since become customary rules, but many new rules were proposed. Accordingly, a complicated series of relationship between the various states exists in this field, based on customary rules and treaty rules. The customary norm process, with its leisurely development and usually general norms, is inherently less effective at ensuring the stability of world expectations than the more formal and specific treaty process.

The process, as reflected in the UNCLOS III negotiations therefore provides both the greatest hope for long-term stability and the smallest chance for conflict due to ambiguity. Great care must be taken, however, to preserve the integrity and credibility of the customary norm process, both during the course of delicate negotiations and in the future. For many years, following the adoption of UNCLOS, the provisions of Part XI, dealing with deep seabed mining were viewed as an obstacle to the universal acceptance of UNCLOS. That was particularly true in view of the fact that the main opposition to those provisions came from the industrialized countries. Under UNCLOS, all exploring and exploiting activities in the international seabed area would be authorized to conduct its own mining operations through its operating arm, the Enterprise and also to contract with private and state ventures give them mining rights in the area, so they could operate in parallel with the Authority.
Observation to UNCLOS provision dealt mainly with the detailed procedures for production authorization from the deep seabed cumbersome financial rules of contracts, decision-making in the Council of Seabed Authority and mandatory transfer of technology.  

The Law of the Sea Convention offered the United States an extraordinary opportunity. As a comprehensive treaty governing essentially all aspects of ocean law, the Convention would confirm the rights and responsibility of all states, and would lead stability to maritime activities and world order. *Jus cogens* would have enquired that any treaty abrogating norms of the Convention would be void. But the rejection of the principle meant that any other treaty can derogate the Convention, negotiations were recommended in 1990 to revise the seabed provisions. The subsequent amendments in part XI are the most significant in modifying the original interest of the Convention. The industrialized states insisted that current seabed mining claims be honored and not be subject to the international regulatory Authority. Further, the industrialized states won the demand to eliminate any responsibility to transfer or share technology with other countries.

There may be several paths to take, but whichever is chosen, it is essential that the search for a solution be a joint effort, conducted and approved by all interested states, so that a truly universal regime may emerge for the exploitation of the deep seabed resources, the common heritage of all people. The law protect the deep seabed obviously exists. The Guidelines for Prospecting Exploration and Exploitation of Crusts and Sulphides are not more effective, this approach has been undertaken from the above discussions.

Moreover, drafting crusts and sulphides seabed mining regulations a new for prospecting and exploration would be substantially inefficient and could also result in
the ISA missing opportunities for improving regulations on all seabed mineral mining through information sharing, as the development and fine turning of the regulations for each mineral serves to inform the regulations of the others. In its present format, regulation 31, section 3 is equivocal and could submit each contractor to different measures of control. Second, Regulation 31, section 4 requires that contracts establish environmental baselines, utilizing recommendations preferred by the Legal and Technical Commission. Although the Legal and Technical Commission has fulfilled its obligations in creating guidelines, the ISA has failed to consider whether contractors possess the level of sophistication necessary to undertake this role and whether bias on the ISA belief impedes baseline accuracy as well as legitimacy on the eyes of the international community.

The scope of the treaty application, accommodation of different interests and activities in the ocean, the location of powers, financial arrangement and operational efficacy, the exploitation system and conditions of exploitation. Whenever appropriate, suggestions are made with a view to eliciting responses to some proposed solutions to these questions. Of course, technological advances have not been limited to aiding exploitation of resources. Many important and fundamental questions remain to be settled before an international seabed regime and machinery can be established. To achieve this, it is of paramount importance that the regime or machinery must reflect in an effective manner, the underlying considerations and objectives of the different interest groups.

Efforts to make the world ocean governed by international law are also under way in the socialist and other democratic countries, for they have always wanted the worlds oceans to be the sense of the broadest possible international co-operation, not confrontation. However, while the availability of easily accessible and less costly
sources of minerals in land deposits used to relegate the task of deep seabed mining to the remote future, the political and economic developments of the past few decades have placed this item high on the agenda. This task must be resolved if not today then tomorrow. International rules and national legislation relating to pollution from deep seabed mining have yet to be developed. Factors lead the states that had historically supported part XI to accept the need for reform.

It cannot, however, stop the technological progress and prevent the growing possibilities of exploration and exploitation of the natural resources of the seabed in regions with ever-deeper superjacent waters. Since the adoption of the UN Convention on the Law of the Sea by UNCLOS III in 1982, those permanent UN bodies whose legal framework had been clarified by the Convention and had been established to implement ocean governance had their roles limited to extremely specific objectives. These bodies are the ISA for handling seabed development; the ITLOS for settling disputes; and the Commission on the Limits of the Continental Shelf for establishing the outer limits of a coastal states, continental and shelf. The ISA adopted its first legislation in 2000, entitled Regulations on Prospecting and Exploration for Poly metallic Nodules in the Area, which made executing the initial exploration contracts possible. The regulations focus exclusively on prospecting and exploration for nodules; therefore, commercial nodule mining, such as exploitation is not addressed.

There are several steps that the ISA can implement in order to improve the regulations. First, the ISA must clarify the regulations prohibition on prospecting on regulation 2, section 2. This rule is ambiguous and others little guidance for would be prospector, especially given the scientific community’s dearth of knowledge regarding the deep seabed environment. The rules governing exploration are more
comprehensive than those that govern prospecting. Nevertheless, many shortcomings in the present exploration regulations must be improved.

The overall goal of traditional ocean policy consists of the maintenance of forcible legal order. These specific goals are security, management of conflict, and protection of environment and promotion of ocean knowledge. Technological developments and a changing international focus have contributed to circumstances suggesting that these goals are not being fully met. The regulations are commendable and deserve the recognition of the international community as a first step in attempting to protect and preserve the marine environment from the effects of seabed mining, but these guidelines remain difficult in numerous respects.

Thus any international initiative adverting these global concerns must be based on co-operation, equity and the needs of future generation. The utilization of marine minerals is driven by growing societal and industrial needs, which may be met by turning to the sea for materials that are in short supply, strategically vulnerable, environmentally sensitive to recover on land, or can be recovered more economically from the sea floor. The reduction and control of pollution also requires further action by the international community.

Efficient governance of oceans, based on the principle of sustainable development and protection of the marine environment, requires sufficient understanding of all aspects of oceans and seas. The complexity of the international regime of the oceans and seas is enormous. International coordination and cooperation is becoming even more imperative to ensure implementation of all existing norms in a coherent manner and assess the needs for future action at national, regional, interregional and global level.
The notion that the deep seabed and subsoil are the CHM may reasonably be argued to have crystallized in law, but its exact content is not clear. A better understanding of the oceans through application of marine science and technology, and a more effective interface between scientific knowledge and decision making, are central to the sustainable use and management of the oceans. The UNCLOS 1982 places special emphasis on the critical importance of protecting and preserving the marine environment.\textsuperscript{17}

The United States enjoys unprecedented technological and economic advantages and is therefore eminently able to connect to the precautionary environmental policies such as those prolonged by the ISA regulations. Instead of treating the ocean as an indivisible ecological whole the 3\textsuperscript{rd} United Nations Conference on the Law of the Sea partitioned it horizontally, vertically and functionally. The law of the sea divides the oceans into international, regional, national and private areas with no central control over them and no comprehensive plan for the preservation of marine environment. International environmental law aims to evolve an integrated legal approach to environmental management and solve environment related conflicts at regional and global levels. The negotiation of resolutions or recommendations or declarations in important global forums often carries normative weight and facilitates their entry into customary law. Similarly, the key principles followed include sustainable development, intergenerational equity, common but differentiated responsibility, prior informed consent, precautionary principle, polluter pays principle, and permanent sovereignty over natural resources.

The development of law of the sea, notes that the current Convention is inadequate to ensure long-term protection for the marine environment. It is apparent that existing knowledge about the deep ocean environment and especially the
potential consequences of mining activity is highly uncertain. Also, most deep seabed mineral resources are located in areas, which have not been claimed by any particular nation. Realistically, only the industrialized nations are capable of excavating these resources. Less developed nations fear that they will not have access to these minerals, and have been in favor of establishing a strong international regulatory body. The Convention has controversial aspects as well. With respect to the administration of the regime many of the criticisms reflect a concern that the organization will become highly politicized and the decision-making arrangements designed to increase industrialized country influence will result in gridlock.

If deep seabed mining is to take place on a commercial scale, it will have to be based on a legal regime that enjoys widespread support within the international community. The provisions of the Convention and the recently concluded Agreement are the only basis upon which such support is likely to be achieved. The Convention is now in force, preliminary indications are that most other industrialized nations are likely to ratify or accede to the Convention in the next few years. The most constructive and useful work the Authority can do is to develop its capacity of depository of available data and information about the mineral resources of the area and to promote, encourage and disseminate how research on these resources and on the deep ocean environment in general.
Suggestions:

1. There is a need for developing proactive, transparent and integrated seabed management regime that seeks to ensure conservation and sustainable use, including though properly regulating and managing access to deep seabed resources. Such regime shall be promptly implemented.

2. There is need to exchange information on the latest research findings and development efforts relating to the deep sea environment, the nature of the seabed, and the technology that may be used for under sea mining.

3. There is need to provide the Authority with advice and information that will help to evaluate the seabed activities of contractors and aid it to develop new guidelines and recommendations of part of its task of administering the international seabed area.

4. The developed states must ratify UNCLOS and 1994 Agreement on its implementation; these states should take a leadership role in the substantive work of the Authority.

5. Expanding the work of the ISA to develop the regulations for exploration and exploitation of the seabed resources is very much required.

6. There ought to be amendment of or review to the Law of the Sea Convention 1982 and the 1994 Agreement. There is urgent need to frame Forth UN Conference on the Law of the Sea (UNCLOS IV) to make a comprehensive estimation of the hitherto growth of the legal framework and enable appropriate changes along with continuity.

7. ISA and the Tribunal are still in the early phase of their establishment and operation. It is important that member states pay their assessed contributions in full, on time and without conditions to enable their effective functioning.
8 The CHM doctrine, which was postulated under the United Nation’s Law of the Sea Convention 1982 and a doctrine which ensures a collective means of exploring and exploiting resources of the seabed must be seen as the guiding principle upon which further development of international law should proceed. The roots of confrontation should be removed.

9 With the recent technological developments and peripheral changes in the use of the sea, the doctrine of freedom of sea will have to be drastically modified.
Chapter Notes


2. Article 136


4. Supra note 2

5. Article 136 UNCLOS


8. UNCLOS Part xi


10. Ibid Section 5

12. See Part xi 1982
14. Article 144 UNLOS
17. See Article 145 UNCLOS