

THE NEPAL PROPOSAL FOR A COMMON HERITAGE FUND

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On May 19, 1978, Ambassador Shailendra Upadhyay of Nepal introduced a proposal for a Common Heritage Fund (Nepal or CHF Proposal) in the Geneva portion of the Seventh Session of the Third United Nations Conference on the Law of the Sea (UNCLOS III).¹ This proposal would require each coastal state to contribute a portion of the net revenues from the exploitation of its offshore seabed minerals to a fund which would be used to assist developing nations, to fight ocean pollution, to assist in the transfer of marine technology to developing nations, and to aid the work of the United Nations, particularly in the area of peacekeeping.² At least seventy percent of the disbursements from the coastal states' exclusive economic zones (EEZ's) would be used for development aid.³ One study estimates that the Fund's annual income would reach three billion dollars a year in the near future and substan-

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1. See Memorandum by the Leader of the Delegation of Nepal Relating to the Establishment of a Common Heritage Fund in the Interest of Mankind As a Whole but Particularly in the Interest of Developing Nations, U.N. Doc. A/CONF.62/65 (1978) [hereinafter cited as Nepal Proposal]. See note 135 *infra* for a summary of relevant developments in the recently concluded Spring 1979 meetings in Geneva, the first half of the Eighth Session of UNCLOS III. The Eighth Session will be resumed in New York from July 16 to August 24, 1979.

2. The Proposal provides that

[t]he basic purpose of the Common Heritage Fund is to ensure that a substantial portion of the mineral revenues of the ocean is used to promote human welfare, to nourish world community and world peace and to preserve and protect the marine environment. To this end revenues from the Fund shall be used principally to assist developing nations. They shall also be used in limited amounts to protect the marine environment, to aid the transfer of marine technology and to assist the work of the United Nations, especially in peacekeeping.

Id. art. 298(4).

3. Until the year 2020 at least 70 percent of the revenues appropriated by the Fund must be used for development, whether in direct grants to states or through appropriate international agencies.

Id. art. 306(1).

tially larger sums in the years ahead.⁴

The Nepal Proposal would effect a bold change in the direction of UNCLOS III, which has been stalled on the question of the nature and powers of an international regime to govern deep seabed mining.⁵ It would move UNCLOS III in the direction Ambassador Arvid Pardo of Malta championed in November 1967 in his now famous address in the United Nations General Assembly.⁶ The Proposal would revive a key principle in Pardo's address — that a significant portion of ocean resources should be regarded as the "common heritage of mankind" and used for appropriate international purposes.⁷

The common heritage principle enunciated by Ambassador Pardo was warmly endorsed by the General Assembly⁸ and has been frequently invoked in delegates' speeches. However, the coastal states' appetite for ocean resources and ocean jurisdiction has caused a decline in the vitality and influence of the common heritage principle in each successive session of UNCLOS III. Each victory for coastal state acquisitiveness was a defeat for Ambassa-

4. See note 50 *infra*, and accompanying text.

5. See generally Smith, *The Seabed Negotiation and the Law of the Sea Conference — Ready for a Divorce?*, 18 VA. J. INT'L L. 43 (1977).

6. See Statement of Ambassador Pardo before the First Committee, United Nations General Assembly, U.N. Doc. A/C.1/p.v. 1515-16 (1967) [hereinafter cited as Pardo Statement]. In that address, Ambassador Pardo stated that "[s]hould the international agency be established and should revenues be approximately at the level we estimate, the international picture will be completely transformed. Upadhyay, *A Third World Perspective On Sharing In The Law Of The Sea Conference*, in PEACE JUSTICE AND THE LAW OF THE SEA 18 (J. Logue ed. 1978) [hereinafter cited as Logue].

7. One of the earliest spokesmen in favor of the common heritage principle was Ambassador H.S. Amerasinghe of Sri Lanka, who was later to become the first and only chairman of the Seabed Committee and the first and only President of UNCLOS III. Addressing the General Assembly only a few days after Ambassador Pardo's famous address, he stated:

The Maltese proposal is . . . timely warning to the international community to avoid international competition for the acquisition of the resources of the seabed and the ocean floor in order to further purely selfish national interests. It is a timely warning against the colonization, in the sense of economic appropriation and exploitation, of the seabed and the ocean floor in somewhat the same manner as the voyages of the great navigators of the world, starting five centuries ago, discovered lands and territories which became the property of their nations. The Maltese proposal seeks to avoid the reenactment of that chapter of the world's history. The wealth that the seabed and ocean floor offer is seemingly beyond the dreams of avarice and the world's hopes of peace could be shattered if that wealth were left to be the prey of international rivalry and competition.

U.N. Doc. A/C.1/p.v. 1526, at 10-11 (1967).

8. See Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749 (XXV), 25 U.N. GAOR, Supp. (No. 28) 24, U.N. Doc. A/8097 (1970) [hereinafter cited as Declaration of Principles].

dor Pardo's vision of the common heritage. The cumulative result is that the version of the common heritage in the treaty text now before the Conference, the Informal Composite Negotiating Text (ICNT),⁹ will make only a very small amount of revenue available to the international community. This is true because the ICNT awards all of the immense mineral wealth of the EEZ to coastal states.

The proponents of the Nepal Proposal believe that the current deadlock in UNCLOS III can be broken if the Conference will revive the common heritage principle and make the Conference what so many people had hoped it would be—a major instrument for promoting economic and social justice, environmental sanity, and peace. They believe that adoption of the CHF would facilitate compromise on the deep seabed regime.

This article will examine the Nepal Proposal as an instrument designed to revive Pardo's vision of the common heritage principle. The Nepal Proposal will be compared and contrasted with the ICNT common heritage proposal now before the Conference. Of particular interest is the extent to which each proposal would benefit the developing nations of the world.

I. CARACAS AND THE DECLINE OF THE COMMON HERITAGE

In 1967, shortly after Ambassador Pardo's address, the General Assembly formed an *ad hoc* committee to consider the legal status of the seabed beyond national jurisdiction.¹⁰ In the following year, the General Assembly established the Committee on the Peaceful Uses of the Sea-bed and Ocean Floor Beyond the Limits of National Jurisdiction (Seabed Committee).¹¹ By the time of its last session, in the Summer of 1973, ninety-one nations were members of the Seabed Committee.

In December 1970, on the basis of the Seabed Committee's work and at the instance of Ambassador Pardo, the General Assembly adopted a Declaration of Principles (Seabed Declaration) which declared that the "sea-bed and ocean floor . . . beyond the limits of national jurisdiction . . . are the common heritage of

9. U.N. Doc. A/CONF.62/WP.10 (1977) [hereinafter cited as ICNT].

10. See G.A. Res. 2340 (XXII), 22 U.N. GAOR, Supp. (No. 16) 14, U.N. Doc. A/6964 (1967).

11. See G.A. Res. 2467A (XXIII), 23 U.N. GAOR, Supp. (No. 18) 15, U.N. Doc. A/7477 (1968).

mankind.”¹² The Seabed Declaration made it clear that a major objective of UNCLOS III¹³ would be to harness seabed wealth to assist the developing countries.¹⁴ However, in its Declaration the General Assembly chose phraseology which did not rule out further extensions of national jurisdiction by coastal states at the expense of the common heritage. In his 1967 address, Pardo had consciously and repeatedly described the common heritage area as the area “beyond *present* national jurisdiction.” In its Seabed Declaration, however, the General Assembly left out the word *present*, and described the area as the area “beyond the limits of national jurisdiction.” Since the Assembly refused to decide where national jurisdiction ended, it was no surprise that in the decade following the Declaration many states extended their jurisdictional claims by unilateral actions. As a result, the common heritage became smaller and smaller with each passing year.

In 1974, three years after the General Assembly voiced support for the common heritage principle, the first working session of UNCLOS III was held in Caracas. The Caracas Session has been described by one commentator as the beginning of a reverse trend.¹⁵ At that Session considerable support emerged for a 200-mile exclusive economic zone (EEZ), which would give the coastal states all the resources within 200 miles of shore. The surprise at Caracas was that the two superpowers, both of whom had previously opposed the EEZ, indicated a willingness to accept it. A 1975 estimate indicated that approximately seventy percent of the independent nations of the world voiced support for the 200-mile EEZ.¹⁶ But the breadth and depth of support for the EEZ is yet to be determined. Only gradually did it become clear to the delegates

12. See Declaration of Principles, *supra* note 8.

13. By resolution of December 17, 1970 the United Nations decided to convene the Third United Nations Conference on the Law of the Sea to consider a broad range of oceans issues. See G.A. Res. 2750C (XXV), 25 U.N. GAOR, Supp. (No. 28) 26, U.N. Doc. A/8028 (1970).

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

15. The Caracas session . . . represents the beginning of a reverse trend. It was a return to traditional theories and practices, largely concerned with the question of how to extend national sovereignty over the seas in the most effective way. Once again, national sovereignty was given precedence over the common interests of mankind. Compared to “real politics” of international community [*sic*], the broad vision of Dr. Pardo’s proposals (and of the General Assembly Resolution) appeared to be too revolutionary, even utopian.

Milovanovic, *What Does the Common Heritage of Mankind Mean?*, in Logue, *supra* note 6, at 2.

16. See Alexander & Hodgson, *The Impact of the 200-Mile Economic Zone on the Law of the Sea*, 12 SAN DIEGO L. REV. 570 (1975).

that a large proportion of ocean wealth was within the zone,¹⁷ and that most of this wealth would go to wealthy states.¹⁸ Hence, when the ten-week Caracas Session came to a close, it was clear that the Session was a major defeat for the ideals of Ambassador Pardo and a major victory for ocean nationalism.¹⁹

While some identify the Caracas Session as the beginning of the decline of the common heritage principle, Ambassador Upadhyay and others perceive its decline in prestige commencing well before that Session. In the Background Paper that accompanied his CHF Proposal, Upadhyay stressed the opposition the principle had encountered. He noted that since the common heritage was first enunciated more than a decade before, the principle "ha[d] suffered from misinterpretation . . . attrition and . . . neglect."²⁰ He stated that in his view the emergence of the 200-mile EEZ made a "cruel hoax of the concept . . ."²¹ because the "overwhelming proportion of ocean mineral wealth . . . [is] found within the [EEZ]."²²

Although they were not to prevail at Caracas, many expressed opposition to the 200-mile EEZ. Congressman Donald Fraser, Democrat from Minnesota, stressed that it would be impossible to have a meaningful common heritage if outright ownership of all offshore resources was given to the coastal states. He argued that acceptance of the 200-mile EEZ would deprive the developing countries of substantial revenues and result in the unprecedented division of the oceans into exclusive national areas "with all the consequences of narrow nationalism."²³ In 1972, John Stevenson,

17. See note 40 *infra*.

18. See note 23 *infra*.

19. A 1978 article sketched the triumph of nationalism over the principle of common heritage:

UNCLOS was originally launched against a background of pious slogans about "the common heritage of mankind." During its long sessions and long recesses, nearly a third of all the oceans has been arbitrarily appropriated by about 60 coastal states in the form of "exclusive economic zones." Seabed claims, in places, go still farther; they could be tripled by the now fashionable choice of the continental margin, instead of the shelf as a limit. A conference that began with much talk about the urgent need for co-operative, constructive international action looks like it is ending (if it ever ends) with the retrospective legitimizing of an unparalleled series of annexations.

The Sea Lawyers, THE ECONOMIST, April 15, 1978, at 15.

20. Nepal Proposal, *supra* note 1, at 3.

21. *Id.*

22. *Id.*

23. D. Fraser, *The Ocean As a National Policy Issue 3* (Oct. 18, 1972) (address before the Conference on Uses and Abuses of the Seas, Minneapolis, Minn.) [copy on file with *California Western International Law Journal*]. Congressman Fraser questions whether these

head of the United States Delegation to the United Nations Seabed Committee, told a subcommittee of the House Foreign Affairs Committee that

[r]evenues for the international community as a whole from seabed minerals will not be very meaningful unless payments for this purpose are made not only with respect to the deep seabed exploitation of hard minerals contained in manganese nodules, but also, at least in some measure, with respect to the exploitation of the petroleum and gas resources of the continental margin beyond the 200-meter depth line.²⁴

Stevenson's statement was a reflection of the remarkable sharing proposal that the United States had introduced in the Seabed Committee in August 1970 as part of a United States Draft Treaty (Draft Treaty).²⁵ Two months before the Draft Treaty was made public, President Nixon stressed the common heritage character of seabed resources beyond the 200-meter depth line:

I am today proposing that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the

nationalistic claims to the oceans are in the interest of the developing countries, many of which currently support the 200-mile EEZ.

Estimates show that the nations with the greatest offshore wealth are the United States, the Soviet Union, Canada, and Australia — all highly developed economically. The 200-mile exclusive economic zone would deny the developing countries . . . the opportunity to benefit from economic exploitation off the coasts of the rich developed countries.

Id.

24. *Law of the Sea and Peaceful Uses of the Seabeds: Hearings Before the Subcomm. on Int'l Organizations and Movements of the Comm. on Foreign Affairs*, 92d Cong., 2d Sess. 7-8 (1972) [hereinafter cited as *Subcomm. Report*].

This view was shared by Frank L. LaQue, retired Vice President of the International Nickel Company. LaQue belittled the idea of limiting sharing to the mineral revenues of the deep seabed. In a 1972 memorandum submitted to the House Foreign Affairs Committee, he stated:

If . . . only the revenue represented by some form of taxation of the "profits" from the exploitation of deep ocean metals is available for adjusting the relative prosperity of "developed" and "developing" nations the amount thus available, e.g. about 10% of the total market value of the metals, would represent only a little more than 0.025% of the world Gross National Product and only about 0.2% of the 1967 Gross National Product of the "developing" nations.

On a per capita basis it would amount to only 41 cents per person if it were to be divided equally among the total population, 1594.9 million, of "developing" nations.

Id. at 65. LaQue concluded that developing nations should not count on any substantial sums derived from the exploitation of the deep seabed as a main component for their future development. *Id.* at 66.

25. Draft United Nations Convention on the International Sea-Bed Area: Working Paper Submitted by the United States of America, Report of the Comm. on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction 130-176, U.N. Doc. A/8021 (1970) [hereinafter cited as U.S. Draft Treaty].

high seas reach a depth of 200 meters (218.8 yards) and would agree to regard these resources as the common heritage of mankind.²⁶

Although not without its faults, the Draft Treaty clearly supported the common heritage principle. This is evidenced by provisions that:

1. The International Seabed Area shall be the common heritage of all mankind.

2. The International Seabed Area shall comprise all areas of the seabed and subsoil of the high seas seaward of the 200-meter isobath adjacent to continents and islands.²⁷

The Draft Treaty established a “trusteeship zone” extending from the 200-meter depth line to the end of the continental margin. The coastal state would decide whether and by whom the trusteeship zone would be exploited and how much exploitation there would be. However, the coastal state would be required to contribute between fifty and sixty-six percent of the mineral revenues from its trusteeship zone to the international community.²⁸ This proposal would have created a substantial common heritage revenue. Indeed, according to some experts, the oil deposits beyond the 200-meter depth line, that is, in the proposed trusteeship zone, are at least equal in value to the oil deposits within that line.²⁹

Not all Americans favored the Draft Treaty. Indeed some United States business leaders—particularly in the petroleum industry—were strongly opposed to it.³⁰ In particular, opponents of the Draft Treaty strongly objected to its provisions for concurrent jurisdiction—that is, national and international—within the trusteeship zone.³¹ Oilmen believed that the legal questions posed by concurrent jurisdiction within this zone might delay exploitation of

26. Nixon, *United States Policy for the Seabed*, 62 DEP'T STATE BULL. 737 (1970).

27. U.S. Draft Treaty, *supra* note 25, art. 1(1) & (2).

28. *Id.* app. C, ¶ 9(2).

29. *See Subcomm. Report*, *supra* note 24, at 39.

30. *See, e.g., id.* at 42 (statement of Northcutt Ely, National Petroleum Council).

31. *See id.* at 38. Mr. Ely filed a statement with the Committee urging that the United States should continue to exercise all of its present powers over its continental margin exclusively, and not concurrently with any international organization whatever. It is not necessary, indeed it would be suicidal, to renounce [*sic*] these sovereign powers to some international agency, as was once proposed, and to receive back delegated powers, limited to those enunciated in a treaty. Everything is wrong with that premise, starting with the dichotomy between the interests of the American consumer in obtaining an abundant supply of petroleum at reasonable cost, free of every restraint of trade, and the opposing interests of an international organization charged with the task of getting out of the consumer all that the traffic will bear, under the euphemism of “resource management.”

oil reserves beyond the 200-meter line.³² Business leaders were also less than enthusiastic about the sharing provisions of the Draft Treaty. Their objections focused, however, on the generous percentage of offshore wealth that would be awarded to the international community rather than on the *principle* of offshore sharing. This attitude is evident in a statement by Northcutt Ely, a member of the National Petroleum Council, presented to the same subcommittee before which John Stevenson had appeared. Ely indicated his opposition to the generous provisions of the Draft. However, he made it clear that he favored offshore sharing by referring to the "five commendable principles" in President Nixon's May 23, 1970 statement on the oceans. One of these principles provided for the "collection of substantial mineral royalties to be used for international community purposes."³³

In the statement he prepared for the House Subcommittee, Ely indicated that he thought it appropriate for sharing to begin *twelve* miles from shore, that is, much closer to shore than the Draft Treaty's 200-meter depth line.³⁴ In this respect, Ely anticipated the position taken by the Trilateral Commission in its 1976 report, *A New Regime for the Oceans*.³⁵ In that report, the Commission stated that "[n]ational continental shelf jurisdiction should be limited to 200 miles, with international sharing by wealthy coastal states of a generous portion (such as one-half) of royalties derived from resource exploitation in this zone but beyond the territorial sea."³⁶

The pre-Caracas position of the Soviet Union was also common heritage.³⁷ In the 1972 debates of the Seabed Committee,

32. *See id.*

33. *See id.* at 42.

34. *Id.* at 42.

35. THE TRILATERAL COMMISSION, A NEW REGIME FOR THE OCEANS (1976). The Commission is composed of prominent citizens of North America, Western Europe, and Japan.

36. *Id.* at vii. The date of issuance of this report is significant. By 1976 the United States Delegation had long since abandoned sharing within 200 miles of shore. It is also interesting to note the composition of the Trilateral Commission. Five of its members were to become the top foreign policy leaders in the Carter administration, namely: President Carter; Vice President Walter Mondale; Secretary of State Cyrus Vance; Secretary of Defense Harold Brown; and National Security Council Director Zbigniew Brzezinski. A sixth "graduate" of the Commission is Elliot Richardson, President Carter's choice to lead the United States Delegation to the Law of the Sea Conference.

37. In 1971, Canada was also on record as favoring offshore sharing. In May of that year, a Canadian delegate to the Seabed Committee proposed that all coastal states contribute, pending a final agreement on an international regime, "a percentage, perhaps as little as

Dmitri Kolesnik, the head of the Soviet Delegation, stressed the absurdity of beginning international sharing at the 200-mile mark. Kolesnik told Subcommittee II that “[a] 200-mile area would include ninety-three percent of the total volume of hydrocarbon resources, including both those that had already been discovered and those that would become exploitable in the near future.”³⁸ Kolesnik claimed that the 200-mile concept would reduce the international area of the seabed to an “empty shell” and that all current discussion as to the nature and powers of the Seabed Authority would be “absolutely meaningless since [it] would not have at its disposal any part of the hydrocarbon resources involved or only a very small part of them.”³⁹

As noted above, both the United States and the Soviet Union deserted the common heritage principle at Caracas. Indeed, their “desertion” was the most important development at that crucial session. It created a “bandwagon” psychology for the EEZ.

II. REVIVING THE COMMON HERITAGE?

A. *The Nepal Proposal*

The Nepal Proposal is a conscious attempt to change the direction of UNCLOS III. Nepal believes, however, that the direction of the Conference cannot change unless it reopens a question which most delegates and experts consider closed—who gets the thirty trillion dollars worth of oil and gas within the 200-mile EEZ?⁴⁰

Nepal wants the international community to have a share in that immense treasure. The supporters of the ICNT do not. If the ICNT proposal is adopted, common heritage dollars would come only from mineral exploitation *beyond* 200 miles from shore, that is, beyond the proposed 200-mile EEZ.⁴¹ Hence, under the ICNT

one percent, of the revenues, the governmental revenues *from all the offshore activity beyond internal waters . . .*” in FATE OF THE OCEANS 206 (J. Logue ed. 1972).

38. U.N. Seabed Committee, U.N. Doc. A/AC.138/SC.II/SR.65, at 18.

39. *Id.*

40. According to a 1973 study prepared for the United Nations, the ultimate recoverable offshore hydrocarbons were valued at over 27 trillion dollars. See R. HUDSON, THREE SCENARIOS: THE LAW OF THE SEA, OCEAN MINING AND THE NEW INTERNATIONAL ECONOMIC ORDER 14 (1977); L. G. Weeks, Subsea Petroleum Resources, U.N. Doc. A/AC.138/87 (1973). At 1979 prices, these reserves are worth well over 30 trillion dollars.

41. *Id.* art. 56(1) (a). This article provides:

1. In the exclusive economic zone, the coastal state has:
 - a. sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters, and with regard to

proposal, common heritage dollars would come only from deep ocean mining⁴² and, if agreement can be reached, from a very small portion of the hydrocarbon revenues where continental margins extend beyond 200 miles.⁴³ Neither of these sources, however, is expected to produce a substantial revenue for the international community.⁴⁴ Third World countries are gradually beginning to realize that most of the wealth from the EEZ will go to a very few geographically advantaged states, many of which are already rich.⁴⁵ This is in marked contrast to the Nepal Proposal, which provides that common heritage dollars be available from mineral exploitation *within* the EEZ as well as beyond it.⁴⁶

Reference has already been made to the ambiguity of the phrase "beyond national jurisdiction," which was incorporated into the General Assembly's 1970 Seabed Declaration.⁴⁷ The tragic result of the Declaration's ambiguity is that nations which proclaimed devotion to the principle of the common heritage claimed increasingly more of the oceans' resources, thereby drastically reducing the size and hence the value of the common heritage area.⁴⁸

The above considerations suggest the importance of examining each revenue-sharing proposal to determine precisely how many common heritage dollars per year will go to the international community. In the lengthy and very detailed discussions of the proposed International Seabed Authority, little attention has been

other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and wind.

42. See ICNT, *supra* note 9, art. 136.

43. See *id.* art. 82(1).

44. See text accompanying note 49 *infra*.

45. See note 104 *infra*, and accompanying text.

46. The Nepal Proposal provides:

The sources of the Common Heritage Fund's revenues shall be:

a. the revenues earmarked by the International Sea-bed Authority for distribution by the Fund.

b. the revenues due to the Fund from the exclusive economic zones of States Members, according to the schedule which is outlined in this section of the Convention.

c. the revenues due to the Fund from those portions of the continental margins beyond the exclusive economic zones of States Members, according to the schedule which is outlined in this section of the Convention.

Nepal Proposal, *supra* note 1, art. 303.

47. See text accompanying note 12 *supra*.

48. In a June 1976 banquet address at the Law of the Sea Institute's Tenth Annual Conference, Ambassador Pardo stated that "the provisions contained in the [RSNT] permit further, and perfectly legal, extensions of coastal state control in the seas." Pardo, *Emerging Law of the Sea and World Order*, in CONFERENCE OUTCOMES AND PROBLEMS OF IMPLEMENTATION 411 (E. Miles & J. Gamble eds. 1977).

focused on the questions "how much?" and "when?" The following table is revealing:

Projection of Annual Common Heritage Income In
The Year 1985 From Three Proposed Sharing Plans

ICNT Proposal	\$250,000,000 ⁴⁹
Nepal Proposal	\$4,000,000,000 ⁵⁰
Maltese Proposal	\$20,000,000,000 ⁵¹

Thus, for every common heritage dollar produced by the ICNT plan in 1985, there would be sixteen common heritage dollars produced by the Nepal Proposal and eighty common heritage dollars produced by the original Maltese proposal.⁵² The developing countries of the world can, of course, do far more with a common heritage income of four to twenty billion dollars a year than with an income of \$250 million a year.

Under the Nepal Proposal, poor coastal nations would have to contribute a portion of their offshore revenues to the CHF. Their

49. This estimate is based on a 1978 study which revealed:

If, as the U.N. study assumes, four-metal operations will mine and process 4 million tons of nodules in 1985, and three-metal operations 11 million tons, the total economic rent theoretically available for international purposes would be roughly \$230 million.

LEITENBERG & YAGER, *NEW MEANS OF FINANCING INTERNATIONAL NEEDS* 156 (1978).

50. This is a rough estimate calculated by applying an average 15% contribution under Alternative A of the Nepal Proposal, *see* note 55 *infra*, and using 1976 production figures and prices. *See also* HUDSON, *supra* note 40, at 15-16. At current prices, of course, this figure would be significantly larger.

51. The projection of 1985 income from the Maltese Proposal was determined by quadrupling Pardo's projection of the 1975 yield of 5 billion dollars. *See* note 52 *infra*. The 20 billion dollar projection for 1985 would appear to be conservative in light of the quadrupling of oil prices between 1967 and 1975 and the inevitability of further increases in oil prices by 1985.

52. It is clear from Ambassador Pardo's 1967 address that he envisioned national jurisdiction ending at either a 200-meter depth line or at 12 miles from shore. Either alternative would insure that a major share of the revenues from offshore oil and gas would be a source of common heritage dollars. As Pardo stated in 1967:

We have made some hasty calculations on the amount of revenue which the agency could be expected to receive from such activities. On the assumption that an agency would be created in the year 1970, that technology will continue to advance, that exploitation will be commensurate with the presently known resources of the ocean floor, that exploration rights and leases will be granted at rates comparable to those existing at present under national jurisdiction, and that the continental shelf under national jurisdiction will be defined approximately at the 200-meter isobath or at twelve miles from the nearest coast, we believe that by 1975, that is, five years after an agency is established, gross annual income will reach a level which we conservatively estimate at around \$6 billion. After deducting administration expenses and all other legitimate expenses, including support to oceanographic research, the agency would, in our view, still be left with at least \$5 billion to be used to further either directly or through the United Nations Development Programme the development of poor countries.

See Pardo Statement, *supra* note 6, (p.v. 1516) at 2.

contributions, however, would be very small; in nearly all cases the developing countries would receive substantially more *from* the CHF than they would be required to contribute *to* it. This results from the "graduated sharing" feature of the proposal. Under the graduated sharing provision, contributions to the Fund are graduated to the per capita gross national product (GNP) of the state in question.⁵³ "Development disbursements" from the Fund are also graduated,⁵⁴ but in reverse. In short, rich states would contribute the most, and poor states would get the most. The proposal contains two alternative plans for assessing the required coastal state contributions.

Alternative A is decidedly the most generous. Under this plan, coastal state contributions would range from a minimum of 1% to a maximum of 20% of net revenues.⁵⁵ During the first five years of the treaty's life, each state's contribution would be only half of the amount indicated.⁵⁶ In addition, Alternative A makes special provisions for "hardship" cases. The Fund's governing institutions are authorized to reduce a state's contribution by as much as one-half, if circumstances warrant.⁵⁷

Alternative B would require much smaller contributions than Alternative A in two categories of production: (1) production that is "ongoing" at the time the Treaty goes into force,⁵⁸ and (2) areas which, though not in production when the Treaty enters into force, are under lease at that time.⁵⁹ In these cases, contributions would range from 1% to 10% depending on per capita GNP.⁶⁰ For all *other* minerals exploited within a nation's EEZ, required contribu-

53. See Nepal Proposal, *supra* note 1, art. 304.

54. See *id.* art. 306(2)(a).

55. Each state shall contribute not less than one and not more than twenty percent of the indicated net revenues to the Common Heritage Fund. The percent required of it will be in approximate proportion to the per capita income of the State in question. In the first five years of the Fund's operation the base figure for determining the percentage contribution required of a State shall be 300 dollars, *i.e.* the particular State's contribution obligation will be one percent of its net revenues for each 300 dollars of per capita income or major fraction thereof up to a maximum contribution of 20 percent. After the first five years a comparable base figure shall be determined by the Board and Assembly, taking into account changes in the value of currency.

Id. art. 304, Alternative A.

56. *Id.* Alternative A(4).

57. *Id.* Alternative A(5). The power to recognize hardship cases, however, is limited to the first 20 years of the Treaty. *Id.*

58. Nepal Proposal, *supra* note 1, art. 304, Alternative B.

59. *Id.*

60. The contribution in the former would be 1%, in the latter 10%. See *id.*

tions would range from 1% to 20%, as in Alternative A.⁶¹

It must be stressed at this juncture that the Nepal Proposal *does not* reject the EEZ concept. What Nepal insists on is that there be a common heritage “contribution” to the international community from that zone. In effect, the contribution will be a common heritage “tax” on the EEZ’s mineral revenues.⁶² This aspect of the Nepal Proposal distinguishes it from the EEZ in the ICNT. The Background Paper Nepal submitted with the proposal attempts to reconcile the common heritage concept with that of the EEZ, two of the most central ideas in the Conference.

The concept of the Common Heritage of Mankind has been damaged by those who contend that there is a necessary incompatibility between the idea of the Common Heritage and the idea of the economic zone. We believe that both ideas are essential and we believe that they are necessarily intermixed, *i.e.*, the economic zone can and should make a substantial contribution to the implementation of the concept of the Common Heritage.⁶³

The minerals within the Nepal Proposal’s EEZ would be the exclusive property of the coastal state, just as a homeowner’s home is *his* exclusive property. However, in the same way that a homeowner is required to pay a tax on his exclusively owned property, the coastal state would be taxed on the revenues from mineral exploitation in its exclusively owned EEZ. According to the Nepalese Ambassador, “[I]t is morally appropriate to insist that some of that EEZ wealth be regarded as the common heritage of mankind [since] al-

61. *Id.*

62. The concept of the 200-mile EEZ is contrary to the traditional law of the sea. According to that law, the sea beyond a very narrow — typically three mile — zone was regarded as either *res nullius*, that is, no one’s property, or *res communis*, common property. Within that high seas area, no nation had a right to appropriate areas of the high seas for its exclusive use. Use of this area was open to everyone.

Modern technology, however, has undermined the traditional law of the sea and made important aspects of it counterproductive. Freedom of fishing, for example, threatens the very existence of marine species which are essential to human nourishment. Unrestricted pollution threatens the very life of the oceans. Unrestricted exploitation of seabed oil is economically unworkable. Large investments of capital are required for that exploitation, capital which will not be forthcoming unless the exploiting entity has the exclusive right to exploit within the area in question for a considerable period of time. In short, freedom of the seas is today a recipe for disaster.

However, if freedom of the high seas is an undesirable and unworkable policy for resource exploitation and protection of the marine environment, unrestricted control by coastal states is not the only alternative to it. A second alternative is to give the coastal states duties within the EEZ as well as rights and to put revenue-sharing high on the list of those duties. The ICNT *does* list some duties but revenue-sharing is not one of them.

63. Nepal Proposal, *supra* note 1, at 3.

most all the wealth within the EEZ was traditionally regarded as either *res communis* or *res nullius*.”⁶⁴

The Nepal Proposal contains ten articles which would become an integral part of the comprehensive Law of the Sea Treaty, on which the Conference hopes to achieve agreement.⁶⁵ Among other things, these articles provide that the affairs of the Fund will be administered jointly by a one nation-one vote Assembly — the Assembly of the International Seabed Authority — and by a thirty-six member Board of Governors.⁶⁶ Eighteen members of the Board would be elected to represent regions.⁶⁷ Of the remaining members, nine would be elected from “net contributors” to the Fund and nine from “net recipients.”⁶⁸ Since contribution and distribution formulas are specified in the treaty articles, the powers of these decisionmaking bodies are quite limited.⁶⁹ Nevertheless, these bodies would have important responsibilities — for example, how to disburse the thirty percent of the Fund revenues which is not mandated to assist development⁷⁰ and whether to reduce the amount of a coastal state’s contribution because of hardship.⁷¹

Arvid Pardo has warmly welcomed the Nepal Proposal, calling it a very constructive proposal which merits the most serious attention at UNCLOS III.⁷² Other prominent personalities have also welcomed the CHF Proposal, including: Maurice Strong, founding

64. *Id.*

65. These articles would become a new Part XVI of the ICNT. The original Part XVI, which deals with “Final Clauses”, would be renumbered Part XVII.

66. Nepal Proposal, *supra* note 1, art. 299(1).

67. *Id.* art. 300(1)(a). These would be elected as follows: Africa (five); Asia (four); Eastern Europe (Socialist) (two); Latin America (three); and Western Europe and others (four). *Id.*

68. *Id.* art. 300(1)(b)-(c).

69. The Chairman of the Seabed Committee and President of UNCLOS III, Ambassador Amerasinghe of Sri Lanka, said of the international regime that

[i]f the international area is to be so determined as to exclude those parts of the seabed and ocean floor which are capable of exploitation in the foreseeable future and if thereby the best part of the ocean wealth is to be left within national ownership, the international regime would not need to be provided with wide comprehensive powers but on the other hand would need to be equipped merely with marginal, residual or rudimentary authority.

Address by Ambassador Amerasinghe, World Federalists of Delaware (May 24, 1971).

70. Nepal Proposal, *supra* note 1, art. 301(2).

71. *Id.* art. 304(5).

72. WORLD ORDER RESEARCH INSTITUTE REPORT No. 29 (May-June 1978). Although Ambassador Pardo is no longer a diplomat, the “Father” of the Law of Sea Conference is still a close student of the Conference. Currently, he is Professor of Political Science and a member of the Institute for Marine and Coastal Studies at the University of Southern California.

Director of the United Nations Environment Program; Jan Tinbergen, Director of the RIO Project and Nobel Prize-winning economist; Aurelio Peccei, Chairman of the Club of Rome; United States political scientist Hans J. Morgenthau; and Charles Yost, former United States Ambassador to the United Nations. During the August 1978 UNCLOS III meetings in New York, an international committee was formed to champion the CHF approach. The committee, which is called Common Heritage International, is headed by Arthur Lall, former Indian Ambassador to the United Nations, and is comprised of prominent members from twenty-one nations.⁷³

The appeal of the CHF Proposal to internationalists is hardly surprising. Ambassador Upadhyay has stressed his country's belief that any treaty which the Conference adopts will have a significant influence on the international system as a whole. In his view, a treaty incorporating the CHF Proposal would have a very constructive effect on that system. At the Spring 1978 session of the Conference, he stated the "[i]mplementation of the [CHF] . . . would greatly improve the climate of international relations and would be a significant step toward the goal of a new and more just international economic order."⁷⁴ The required contributions to the Fund, he said, "would be a prudent investment in the future of humanity, in the furtherance of peace and justice and in the protection of the marine environment. It will also be a major step toward the reconciliation of nations East and West, North and South, developed and developing."⁷⁵ It is Upadhyay's belief that future generations will judge UNCLOS III by its success or failure in ensuring that a substantial portion of EEZ wealth "is used to build a just and peaceful world society."⁷⁶

B. Nepal Challenges the Conventional Wisdom

It is clear that the Nepal Proposal challenges a central tenet of the conventional wisdom of UNCLOS III — that is, that any "adoptable" law of the sea treaty must, as the ICNT does, award *all* of the valuable minerals within the 200-mile EEZ to coastal states. Although critics of the proposal credit Nepal with idealism and im-

73. See Common Heritage International, Statement of Beliefs and Purposes (Aug. 22, 1978) [copy on file with *California Western International Law Journal*].

74. Upadhyay, *The Case For The Nepal Proposal*, in WORLD ORDER RESEARCH INSTITUTE REPORT No. 29, at 2 (May-June 1978).

75. *Id.*

76. Nepal Proposal, *supra* note 1, at 3.

agination, they contend that serious consideration of the CHF Proposal by the Conference would be a waste of time, divisive, and make agreement on a comprehensive law of the sea treaty more difficult. *Ergo*, the Nepal Proposal is too late.

Upadhyay and other supporters of the Nepal Proposal have responded to these and other criticisms. However, they have not always found it an easy task to get a hearing. Throughout the twelve weeks of the 1978 session — eight in Geneva and four in New York—the Conference officers allowed no discussion of the CHF Proposal. They explained that the agenda of that two-part Seventh Session had been set well before the Nepal Proposal was first circulated in March 1978.⁷⁷ The focus of these Seventh Session meetings was on so-called “hard core” issues,⁷⁸ such as the regime for deep seabed mining. Hence, Upadhyay was not allowed to address the Plenary meeting until the very last day of the eight-week Geneva Session. Although Upadhyay was offered the opportunity to introduce his plan in a *closed* meeting, he declined because he wanted his remarks to become part of the permanent record of the Conference.⁷⁹

In his brief intervention in the Seventh Session, Upadhyay said that in Nepal’s opinion, “the success or failure of the Conference depended upon the consideration of such a proposal.”⁸⁰ He emphasized that the Proposal “did not raise any problem regarding the legal status of the exclusive economic zone; nor did it question the sovereign jurisdiction of the coastal state in that zone.”⁸¹ Although Nepal is flexible as to the details of its proposal, the following excerpt from the Summary Record of that 1978 meeting demonstrates Upadhyay’s determination to solicit support for the proposal both within and without the Conference.

[Upadhyay’s] delegation was aware that the proposal needed to

77. The Nepal Proposal was officially introduced into the Conference by Ambassador Upadhyay’s May 5, 1978 letter to the Conference President requesting that the Proposal be circulated as a Conference document. However, on April 12 the Conference had agreed to concentrate on seven “hard core” issues. A negotiating group was set up for each issue. While two of the groups dealt with the EEZ, only the issues of living resources within the zone and dispute settlement were addressed. *See* U.N. Press Release SEA/322, at 5 (May 22, 1978).

78. For a list of the seven hard core issues, *see* U.N. Doc. A/CONF.62/61, X OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 2 (1978).

79. Interview by the author with Ambassador Upadhyay of Nepal, in Geneva, May 4, 1978.

80. U.N. Doc. A/CONF.62/SR.106, at 17 (1978).

81. *Id.*

be studied, discussed and perhaps clarified and that it was impossible to consider it immediately. It should therefore be studied during the intersessional period, in private meetings, informal meetings and meetings of individual delegations. At the next session, his delegation would seek the support of members of the Conference to ensure that the proposal would be considered as one of the main items for discussion.

He thanked the delegations which had made their views known, or which had supported the idea of forming a common heritage fund. He proposed to make greater efforts to interest world public opinion in such a project and to obtain the support of members of the Conference.⁸²

Ambassador Upadhyay began to solicit public support during the Geneva portion of the Seventh Session although, as the above passage suggests, he was aiming for the 1979 Session for a full, in-depth consideration of his proposal.⁸³

The cool reception by some Secretariat members was matched by the cool reactions of some of the most prominent conferees. On May 18, one day prior to Upadhyay's speech, Norwegian Minister Jens Evensen, an important figure in the Conference, told the plenary meeting that there could be no sharing of mineral revenues from the EEZ.⁸⁴ It is interesting to note that Norway's four million people are among the greatest gainers from the ICNT-EEZ. Indeed, if the oil wealth within Norway's EEZ were prorated, each Norwegian citizen would get at least \$22,000 of that wealth.⁸⁵

The experts stress that the ICNT version of the EEZ appears to

82. U.N. Doc. A/CONF.62/SR.106, at 17 (1978). The United Nations bureaucracy was not very helpful in bringing Upadhyay's speech to public attention. Ordinarily, the Summary Record of a plenary meeting is published within four or five days of the close of the meeting. Although Upadhyay's speech was in English, the English version of the May 19 Summary Record was not issued until late August, nearly 3 1/2 months later and midway into the resumed session of the Conference at United Nations Headquarters in New York City.

83. The first part of the Eighth Session was held in Geneva from March 19 to April 27, 1979. The session will resume in New York from July 16 to August 24, 1979. See note 135 *infra* for a summary of relevant developments.

84. The Summary Record of that meeting report the Norwegian Minister as saying that [he] wished to make it quite clear that the possibility of an accommodation between land-locked States and States with special geographical characteristics, on the one hand, and coastal States, on the other, must be restricted to access to living resources. Such an accommodation could in no circumstances cover minerals, either under the convention or under any other agreement.

U.N. Doc. A/CONF.62/SR.102, at 11 (1978).

85. Norway's crude oil reserves are estimated at six billion barrels and its population at 4,040,000. At \$15 per barrel, the reserves are worth \$90 billion or approximately \$22,277 per capita. 1979 THE WORLD ALMANAC 565.

have broad support in the Conference, among developing as well as developed nations. Upadhyay apparently believes, however, that if delegate support for the ICNT-EEZ is broad, it is not deep, especially among Third World nations. He maintains that a fair examination of the implications of the ICNT-EEZ will confirm Ambassador Pardo's judgment of the ICNT's essentially similar predecessor, the Revised Single Negotiating Text (RSNT).⁸⁶ That text issued from the Spring 1976 Session of the Conference. Concerning the RSNT, Pardo stated: "Even the partial division of ocean space now contemplated will . . . enormously increase present inequalities between states and consequently will give rise to acute tensions and conflicts . . ." ⁸⁷ Upadhyay believes that on close examination the Nepal Proposal will be seen to have much broader appeal than the ICNT-EEZ. Indeed, the proposal has a number of features which should prove attractive to Third World states, especially those of low income.

III. OCEAN WEALTH AS A SOURCE FOR DEVELOPMENT CAPITAL

The CHF's most obvious appeal to low income countries is that it would be an important source of development capital—something which the ICNT Proposal will not supply in any significant amount. That this capital is urgently needed is a widely accepted view. In a recent study, the World Bank observed that "[e]ven maintaining present rates of progress will require large increases in the flows of capital to developing countries On current projections, it is clear that absolute poverty will continue to be a massive problem for many decades."⁸⁸ The World Bank study concludes on a pessimistic note, stating that the growing uncertainty in international trade and the declining pace of economic recovery in the industrialized countries have created an environment "less favorable for progress than it has been for much of the past twenty-five years."⁸⁹ Commenting on the failure of the developed countries to meet past targets for assistance to the poorest countries, the World Bank report concludes that while the funds available to those countries will gradually rise, they will "still fall far short of the internationally accepted target of 0.7 percent of do-

86. U.N. Doc. A/CONF.62/WP.8/Rev. 1/Parts I, II & III, V OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 125 (1976).

87. Pardo, *supra* note 48, at 411-12.

88. World Development Report, 1978, as summarized in 124 CONG. REC. S.14223 (daily ed. Aug. 23, 1978) (remarks of Senator Mathias).

89. *Id.*

nor countries' GNP."⁹⁰

Steinberg and Yager have also emphasized the need for increased capital flow to the developing countries to sustain the six percent annual growth rate target set by the United Nations for the Second United Nations Development Decade.⁹¹ They estimate that the average annual flow of capital to the non-oil-exporting developing nations required to sustain a six percent growth rate is between \$50 billion and \$53 billion. This would leave these countries with an annual "shortfall" of approximately \$18 billion.⁹² That figure would be easily covered by the Maltese Proposal, and the Nepal Proposal would make a substantial dent in it. The ICNT Proposal, however, would cover less than two percent of that deficit.

The United Nations has made it clear, however, that the *amount* of aid is not the only important consideration. In General Assembly Resolution 3362, a Special Session of the General Assembly stated that "[c]oncessional financial resources to developing countries need to be increased substantially, *their terms and conditions ameliorated and their flow made predictable, continuous and increasingly assured* so as to facilitate the implementation by developing countries of long-term programmes for economic and social development."⁹³ The Nepal Proposal acquires special interest in light of the specifications of Resolution 3362. It is clear that, if adopted, it would not only increase the flow of capital to poor developing countries, but it would also make that flow *predictable, continuous, and increasingly assured*. As Steinberg and Yager point out, the same cannot be said of the grants from developed countries on which developing countries traditionally have pinned their hopes for capital assistance.⁹⁴ As they indicate, assistance from these countries has not been predictable, continuous or increasingly assured.

Michael Harrington, a leading American social critic, is one of

90. *Id.* at S.14224.

91. See STEINBERG & YAGER, *supra* note 49, at 2.

92. See *id.* at 13.

93. G.A.O.R., Seventh Special Session, Supp. (No.1), Resolution 3362 (1975) (emphasis added). It was this Special Seventh Session which focused Third World attention on the goal of a "New International Economic Order (NIEO)". Development capital is essential to a realization of that order. Yet, as one commentator has pointed out, in the years since the Seventh Special Session, Third World countries have worked to give a relatively few countries offshore oil and gas worth trillions of dollars — dollars that could have provided much of the development capital the Third World needs.

94. See STEINBERG & YAGER, *supra* note 49, at 13.

the few liberal figures who has seen the oceans as a major source of development capital. Harrington asserts that “[i]f these riches could be developed on behalf of the world’s poor it would not be necessary to transfer existing resources from North to South, with all the political problems that such a move entails.”⁹⁵ Yet the world’s response to this great opportunity has been to turn its back on “one of the greatest, and most painless, opportunities for international justice that has ever existed, or is ever likely to exist.”⁹⁶ This, Harrington asserts, is the result of Third World support for the 200-mile EEZ, which maximized their short-term interests but had the long-term effect of conceding the hydrocarbon wealth to the wealthy nations.⁹⁷

The United Nations Conference for Trade and Development (UNCTAD) has frequently stressed the developing countries’ need for capital. A recent UNCTAD report stated:

The payments difficulties now being encountered, and likely to persist in the period ahead . . . reflect changes of unprecedented magnitude taking place in the international economy, including in particular dramatic changes in relative prices and the worldwide impact of recession and continuing inflation in developing countries.

To meet such deficits, induced primarily by events outside the control of developing countries, *institutional arrangements are urgently required to channel financial support on a scale far larger than is currently available.*⁹⁸

Substantial annual infusions of ocean wealth would be of great assistance to the development plans of poor Third World nations. But revenues from the CHF Proposal could also be used to launch the “Common Fund” which UNCTAD is trying vigorously to promote.⁹⁹ The purpose of the Common Fund is to finance the purchase and storage of buffer stocks of key commodities.¹⁰⁰ It is hoped that the operation of the Common Fund will help developing countries to get just and stable prices for the commodities which

95. See M. HARRINGTON, *THE VAST MAJORITY: A JOURNAL TO THE WORLD’S POOR* 247 (1977).

96. *Id.* at 245-46.

97. *Id.* at 247.

98. Trade and Development Issues in the Context of a New International Economic Order, UNCTAD IV Seminar Program, U.N. Doc. UNCTAD/OSG/104/Rev. 1, at 16 (1976) (emphasis added).

99. UNCTAD IV—And Beyond, Background Paper No. 2 [copy on file with *California Western International Law Journal*].

100. See *id.* at 2.

are such an important part of their exports.¹⁰¹ UNCTAD hopes that the developed nations will provide a substantial portion of the six billion dollars which will be required to establish the Common Fund.¹⁰² However, if these nations do not come through with the required sums, the CHF Proposal is a possible source for all or part of the required capital. This would require, however, some modification in the Nepal Treaty articles.

Another prominent individual who perceives the development potential in ocean wealth is Maurice Strong, the founding Director of the United Nations Environment Program and a member of Common Heritage International. Early in the fateful Caracas Session, Strong spoke of the opportunity that ocean wealth presents to poor countries. As summarized in the Summary Record,

[H]e said that the problem of sea-bed resources raised a critical question of equity in the relations between the more industrialized and the developing countries, as well as between coastal and shelf-locked or land-locked States. Failure to create a strong sea-bed regime would lead to pre-emption of the lion's share of the benefits by those with the capital and technology required, and to an accumulation of new pollution problems that would threaten in particular those States least able to take protective measures.

The two-thirds of the world's population whose lives were polluted by worsening poverty must receive their share of the benefits of exploiting the resources of the oceans; it was not a matter of charity but of equity. The Conference had the opportunity to provide the additional resources required to bring decent standards of life to those people. Such action would not only reduce their dependence on the vagaries of development assistance from the more wealthy countries but would also provide a new underpinning for their economic security, which was indispensable to a viable world order.¹⁰³

IV. THIS MONUMENTAL GRAB FOR RICHES

Many factors have contributed to the undercutting of the common heritage principle—greed, nationalism, the sudden rise of oil prices, and, perhaps most importantly, shrewd packaging of the 200-mile EEZ in a “good for the Third World” wrapping. The last

101. *See id.* at 1.

102. *See id.* at 5.

103. Statement of Maurice Strong, 8 July 1974, Mtg. of Plenary, UNCLOS III Records, U.N. Doc. A/CONF.62/SR.31 (1974).

point is particularly important. Indeed, as Nepal tries to revive the common heritage, much of its efforts is devoted to convincing the developing nations that it is the rich developed countries and not the poor developing countries that will gain the most from the ICNT-EEZ.

During the UNCLOS III meetings in Geneva in 1978, Ambassador Upadhyay made three simple but important points about the distribution of ocean mineral wealth. First, he stressed that in real dollar value, the overwhelming majority of exploitable ocean wealth is located within 200 miles of shore.¹⁰⁴ Second, if the ICNT-EEZ is adopted, over half of the world's EEZ would be claimed by just ten countries;¹⁰⁵ of the seven nations with the largest EEZ's, six are developed. More EEZ would go to the top thirteen developed countries than to all the developing nations.¹⁰⁶ Third, if the ICNT-EEZ is adopted, most poor countries would get only a tiny portion of the immense wealth of the oceans, totaling less than a billion dollars a year until well into the 1990's.¹⁰⁷

Arvid Pardo has consistently stressed the same theme — the injustice inherent in the division of ocean wealth in the several negotiating texts. During the final meetings of the Seabed Committee in 1973, he stated:

[T]he situation now is like sharks smelling blood in water; they go crazy, attacking the carcass, tearing it to pieces and killing each other; all at the same time. The states are trying to swallow the carcass of the ocean space beyond national jurisdiction and, in the process, are very likely to inflict serious injury on themselves.¹⁰⁸

At a Villanova University address to mark the tenth anniversary of his 1967 speech, Pardo stated that “the magnitude of this monumental grab for riches is totally unprecedented in world history. . . . [T]he rich continue to get richer, the poor remain poor, and the landlocked countries, which with few exceptions are the poorest of the poor, become poorer.”¹⁰⁹ Of the ICNT Proposal, he has said that it is clearly “excessive.”¹¹⁰ Pardo has concluded that

104. Upadhyay, *supra* note 74, at 2.

105. *Id.* The ten countries are: the United States, Australia, Indonesia, New Zealand, Canada, the Soviet Union, Japan, Brazil, Mexico, and Chile.

106. Bridgman, *Who Gets What Resources in the ICNT: The Top Twenty-Five*, in Logue, *supra* note 6, at 11.

107. *Id.*

108. Pardo, *Justice and the Oceans*, in Logue, *supra* note 6, at 52.

109. *Id.*

110. *See id.* at 57.

if the common heritage principle is abandoned, UNCLOS III will not achieve results even if a comprehensive law of the sea treaty is agreed upon. In his tenth anniversary address, he made a very succinct statement of his views on the importance of the common heritage principle:

The effort to implement the principles of equity and of the common heritage of mankind in the seas was the major impulse in the decision of the United Nations General Assembly to convene the present Law of the Sea Conference. This effort was the glue which gave a focus to the early stages of the negotiations. If the effort is abandoned, if the principles are forgotten, the Conference cannot achieve constructive results, even if agreement on a treaty is reached.¹¹¹

Upadhyay agrees with Pardo's view that the basic fault with UNCLOS III is a moral one. In his view, the mineral and food resources of the oceans "are essential to the survival and prosperity of mankind."¹¹² In the absence of an equitable international sharing of the ocean's wealth, Upadhyay foresees the demise of UNCLOS III:

[I]f the Law of the Sea Conference fails it will be because we, the participants in it, did not hold high the idea of the common heritage of mankind. We did not do that because, in spite of our awareness of new challenges facing the earth and its inhabitants, we are still victims of narrow self-interest.

. . . .

Look at the result! Most of mankind's share of ocean resources has been thrown into the coffers of a few rich countries.¹¹³

It was at the Pardo Colloquium that Upadhyay first sketched the outlines of the CHF Proposal which he would introduce in Geneva seven months later. In his proposal, the Nepal Ambassador stated that the time was ripe for a bold initiative in the Conference:

There are signs that many delegations realize that great damage has been done to the concept of the common heritage. But man has the ability to correct wrongs. I suggest that if the least developed and the landlocked and geographically disadvantaged states decide to propose this Common Heritage Fund they will stimulate the thinking of the delegates to the Law of the Sea Conference. I believe those states are ripe for such an initiative. For, except for a handful of them, the developing countries

111. *Id.*

112. Upadhyay, *A Third World Perspective on Sharing in the Law of the Sea Conference*, in Logue, *supra* note 6, at 17.

113. *Id.* at 18-19.

have little or nothing to gain from the ICNT.¹¹⁴

He concluded:

In my view a plan of this kind is the only way in which there can be meaningful sharing in the Law of the Sea Treaty. It is the only way we can realize the concept of the common heritage of mankind and, through that concept, realize the ideas of equity and justice on which it is based.¹¹⁵

V. IDEOLOGY COMES TO THE FORE

The awarding of the real common heritage — offshore wealth — to the coastal states has been a major reason for the long deadlock in the Conference on the crucial issue of the nature and powers of the International Seabed Authority (ISA). Third World countries have begun to realize that if the ICNT-EEZ is adopted, Ambassador Pardo's dream of substantial common heritage funding for those countries will be shattered. Realizing that there would be no significant *financial* dividend from an ICNT treaty, many Third World nations became increasingly interested in obtaining an *ideological* dividend from a treaty. That ideological dividend is an ISA which is so powerful that it will be a symbol of, and a down payment on, the New International Economic Order (NIEO).

If the decline of the common heritage has made the Conference more ideological, a revival of the common heritage might have the opposite effect, that is, it might facilitate a pragmatic compromise on the question of the Seabed Authority. However, if the common heritage is not restored, there is reason to believe that the deep seabed question will continue to be approached ideologically, and a solution to it will continue to escape the Conference.

Professor Henkin of Columbia University perceives a connection between the erosion of the common heritage and the tendency of the Conference to become more ideological.

Perhaps because it soon appeared that the deep-sea bed would not in fact produce tremendous wealth right away, the general agreement that there should be some revenue sharing was soon submerged beneath other, largely ideologically [*sic*] differences. "Radical" Third World states sought arrangements that would not only give the Third World virtually all the economic benefits, but would also give the exclusive right to mine to international institutions which the Third World would control and which would enable Third World governments and their citizens to be

114. *Id.* at 20.

115. *Id.*

educated in the technology and to manage as well as operate the international enterprise.¹¹⁶

Henkin notes, however, that the developed states were not — and are not now — willing to accept such a “unitary” system of deep ocean exploitation.¹¹⁷

The connection between the diminution of the common heritage and the radicalization of Third World thinking has also been noted by other commentators. Friedheim and Durch have emphasized the attempt by the Group of 77¹¹⁸ to force the developed states to accept the NIEO. Although the developed nations have moved some distance toward the Group of 77's position, the Group of 77 appears unwilling to compromise and has become more, rather than less, radicalized over time.¹¹⁹ As Friedheim and Durch state, “The Group of 77[s] disinterest in incremental bargaining would be consistent with their insistence that ISRA is not a matter of compromise, . . . but a matter of principle.”¹²⁰ The authors are not optimistic about the future of the Conference:

The prospect of a New International Economic Order appears to drive an intransigent Group of 77 to demand nothing short of unconditional acceptance of their unassailably just position by the developed states. If the 77 sincerely believe their own rhetoric — and we think that many of them do — then we see little hope for an outcome on ISRA that is satisfactory to all parties. The [Group of] 77 appear[s] to have made their choice, favoring political and symbolic ends over short-run economic gains.¹²¹

That an NIEO perspective deeply influences many Third World states is not just a perception of commentators from the developed world. Third World diplomats are also conscious of the NIEO concept in UNCLOS III. In a Spring 1978 meeting in Geneva, Alvaro de Soto Polar of Peru stated:

There is a very different line of approach taken by the developed and the developing states toward seabed mining The main difference lies in an attitude, which has inspired the devel-

116. Henkin, *The Changing Law of the Sea: Technology, Law and Politics*, in *MARINE TECHNOLOGY AND LAW: DEVELOPMENT OF HYDROCARBON RESOURCES AND OFFSHORE STRUCTURES* 143 (Ocean Association of Japan 1977).

117. *Id.*

118. The group of 77 is the “caucus” of developing countries in many international bodies. It is so named because the caucus consisted originally of 77 member states. Currently, 119 states are members.

119. Friedheim & Durch, *The International Seabed Resources Agency Negotiations and the New International Economic Order*, 31:2 *INT'L ORGANIZATION* 379 (1977).

120. *Id.*

121. *Id.* at 383.

oping countries in all international negotiations in the last few years — the desire for a New International Economic Order. It is impossible to separate the negotiations on the seabed from those on the NIEO as a whole. The actions of developing countries have been influenced by the thought that the model created in an International Seabed Authority should be the first such model in a NIEO. It should thus be directed toward the ideal of transfer of resources, of technology, and also, ideally, of power from the developed to the developing countries.¹²²

In these same meetings, Ronald Katz, Deputy Director of the United States Department of State's Office of the Law of the Sea Negotiations, stated that "the law of the sea negotiations are among the first to test the new concept of the NIEO."¹²³ Katz recognized that precedents in this regard are being set at UNCLOS III, but warned that "[i]f we try to load all of the ideology onto this one conference, it may collapse under all [the] weight."¹²⁴

As noted above, Third World attitudes on the nature and powers of the ISA have tended to become more radicalized with the decline of the common heritage principle. The ISA's power to control production and set floors on prices, its one nation-one vote Assembly, and its right to the trade secrets of private companies are virtues to Third World countries who see the ISA as a model for future North-South economic relations. But what Third World countries perceive as virtues, developed countries consider vices. Indeed, the United States has taken the position that key features of the ICNT's deep seabed regime are quite unacceptable.¹²⁵

VI. DEADLOCK IN THE CONFERENCE

At the close of the Seventh Session in late 1978, an acceptable compromise on the future ISA seemed far off. Nepal's answer to this deadlock was to revive the common heritage principle. The United States approach, on the other hand, was a move toward unilateralism.

The Chairman of the United States delegation to UNCLOS III, Ambassador Elliot Richardson, began to urge Congress to act unilaterally in a way that would rival in importance two earlier ex-

122. Alvaro de Soto Polar, Summary of Remarks of the Speakers from Five Panel Discussions on UNCLOS III, at 6 (Geneva, 11 April-9 May 1978) [copy on file with *California Western International Law Journal*].

123. *Id.* at 11.

124. *Id.*

125. U.N. Doc. A/CONF.62/RCNG/1, at 27 (1978).

amples of United States unilateralism — the 1945 Truman Proclamation¹²⁶ and the 200-mile fishing zone bill.¹²⁷ After the Seventh Session, Ambassador Richardson made a major effort to secure passage of legislation which would authorize private industry to mine the deep seabed. It was generally assumed that Richardson believed that the threat of unilateralism would move the Conference toward agreement on a deep seabed regime which would be acceptable to Congress. In an August 1978 statement to the General Committee, he argued:

Far from jeopardizing the Conference, sea-bed mining legislation should facilitate the early conclusion of a generally acceptable treaty by dispelling any impression that the Governments of the countries preparing to engage in such mining could be induced to acquiesce in an otherwise unacceptable treaty as the only means of obtaining the minerals of the seabed beyond national jurisdiction.¹²⁸

Critics of the Ambassador believe that the Third World will not be pressured into an agreement, and that Richardson's "ploy" will increase Third World intransigence and possibly torpedo the Conference. On September 15, the last day of the Summer 1978 meetings, Ambassador Nandan, Chairman of the Group of 77, spoke out strongly against the unilateral approach.

The Group of 77 considered the legislation in question contrary to the Declaration of Principles contained in General Assembly resolution 2749 (XXV), which had been adopted by consensus, and to the moratorium on sea-bed exploration and exploitation established by General Assembly Resolution 2574D (XXIV), as well as a similar resolution adopted by UNCTAD at its third session. According to those resolutions, unilateral legislation relating to sea-bed resources beyond national jurisdiction has no validity in international law, and activities conducted thereunder had no legal status.

.....

It was incomprehensible that at a time when the Conference was at an advanced stage in negotiating an internationally agreed regime for the exploration and exploitation of the resources of the deep sea-bed, States engaged in those negotiations should contemplate unilateral action which could jeopardize the negotiations and the success of the Conference itself. There

126. Pres. Proclamation No. 2667, 3 C.F.R. 1943-1948 (Compilation) 67, 59 Stat. 884, 13 DEP'T STATE BULL. 485 (1945). It is known as the Continental Shelf Proclamation.

127. 16 U.S.C. § 1811 (1976).

128. U.N. Doc. A/CONF.62/BUR/SR.41, at 8-9 (1978).

could be no substitute for a universally agreed treaty for a rational and equitable development of the resources of the deep sea-bed area in the interests of the world community as a whole. Over-all agreement should not be jeopardized through hasty and short-sighted actions.¹²⁹

Nadan's tough statement contained an implied threat to the United States and other countries which might be tempted to act unilaterally and cautioned that such action would precipitate a chaotic situation with respect to ocean law.¹³⁰

Ambassador Nandan's strong retort, which was echoed by other Third World countries,¹³¹ may have caused the Senate to stop the Richardson-backed bill which, in similar version, had passed the House by an overwhelming vote.¹³² The Senate bill did not reach the floor before Congress adjourned in mid-October 1978.

VII. CONCLUSION: CAN NEPAL BREAK THE DEADLOCK?

Nepal's positive approach is profoundly different from the negative approach adopted by Ambassador Richardson. Nepal believes that a bolder and more generous treaty is the answer to the Conference deadlock. It offers the Common Heritage Fund and all that it could mean for development, peace, and saving the gravely threatened marine environment.

What chance does the Nepal Proposal have? The author agrees with the conventional view that it is unlikely the original version of the proposal will be part of the final treaty. He agrees with the conventional view that agreement on *any* law of the sea treaty is not likely. But he feels that the "support potential" for a treaty which incorporates the CHF approach is much greater than the support potential for a treaty, such as the ICNT, which does not incorporate that approach. If this judgment is correct, the problem for Nepal — and for other champions of the common heritage — is

129. *Id.* at 7-8.

130. U.N. Press Release SEA/334, at 6 (Sept. 15, 1978). The release reported Nandan as saying that unilateral action

may conceivably wreck the Conference and destroy the hard-won progress that it has made. . . . The responsibility of such an unfortunate consequence must rest squarely on their shoulders. . . . Unilateral recovery and appropriation of the resources which are the subject of the (Seabed) Declaration is more than claiming sovereignty. It, in fact, amounts to an exercise of sovereignty.

131. U.N. Doc. A/CONF.62/BUR/SR.41, at 11-12 (1978).

132. The bill passed the House of Representatives by a vote of 312 to 80. 125 CONG. REC. H. 1212 (daily ed. March 8, 1979).

how to get the tired Law of the Sea Conference to take the Nepal Proposal seriously.

A significant step in that direction occurred in the days before the Spring 1979 Geneva Session. At a "common heritage workshop" held at the Church Center for the United Nations in New York, Rikhi Jaipal, India's Ambassador to the United Nations, said that the Conference should give a fair hearing to the Nepal Proposal. He told the workshop that he did not understand why the proposal "[had] not even been discussed by the Law of the Sea Conference"¹³³ and indicated his government's belief that the Nepal Proposal ought to be examined carefully by that Conference.

At the same mid-February workshop, Dr. Mohan Lohani, Ambassador Upadhyay's successor as head of the Nepal Mission to the United Nations, reiterated his country's hopes for its CHF Proposal. In a paper presented at the workshop, Lohani stated:

Critics of the Nepal Proposal contend that the proposal with its noble objectives has come too late. But all of us know that the Law of the Sea Conference has now reached an impasse on the question of deep-sea mining. Nepal believes that a more imaginatively conceived and more generous treaty can revitalize the Conference and go a long way towards realizing the goals of equity, justice, peace and development. A treaty incorporating the CHF would have a positive and meaningful impact on the world order as a whole.¹³⁴

Perhaps the most appropriate comment on Nepal's chances would be a variation on Winston Churchill's famous epigram: "The test of a great nation is what it can do when it is tired." The challenge to the six-year-old Law of the Sea Conference is what can *it* do when it is, as it is, *very* tired.¹³⁵

133. *In India Urges Common Heritage Fund Proposal Get 'Fair Hearing' at Spring Law of Sea Meetings*, Common Heritage Report No. 30, at 1 (Mar. 1979) [copy on file with *California Western International Law Journal*].

134. *Would Generous Sharing Help Get a Law of the Sea Treaty? The Nepal Common Heritage Fund Proposal As an Example* (statement of Mohan Lohani, Workshop held February 16, 1979 in New York City) [copy on file with *California Western International Law Journal*].

135. There were a number of interesting developments with respect to the Nepal Proposal in the March 19-April 27 Geneva portion of the Eighth Session of UNCLOS III and immediately thereafter. On April 27, the last day of the Session, Conference President Amerasinghe told the Plenary that the Nepal Proposal was one of a number of issues and proposals which should form the subject of further negotiations during the resumed session, which will meet in New York from July 16 to August 24, 1979. It seems probable the New York session will also consider two abbreviated versions of the CHF Proposal, which Nepal drafted and circulated. Both retain the key features of the original Nepal Proposal.

The first of these abbreviated versions, entitled "Informal Proposal for a Common Heri-

tage Fund," was circulated on April 20, 1979, by Nepal, Lesotho, Upper Volta, and Zambia. The Informal Proposal took the form of two brief amendments to Article 173 of the original ICNT, entitled "Special Fund." The Informal Proposal would have changed that title to "Common Heritage Fund" and made changes in paragraphs one and two of the article. However, the new draft treaty — ICNT/Rev. 1 — issued in mid-May made radical changes in Article 173, which the Informal Proposal sought to amend, including changing the title of Article 173 from "Special Fund" to "Expenses of the Authority." The wording of the article was so changed that Nepal decided it was no longer an appropriate "peg" on which to hang CHF amendments.

In early June, Nepal circulated a "New Informal Proposal for a Common Heritage Fund" essentially similar to its April 20th proposal. The New Informal Proposal is made up of two amendments to ICNT/Rev. 1. The first amendment would add a Paragraph 4 to Article 56, entitled: "Rights, jurisdiction and duties of the coastal State in the exclusive economic zone." The proposed new paragraph 4 of Article 56 would read as follows:

4. a. The coastal State shall make payments or contributions in kind to a Common Heritage Fund from the proceeds accruing to it from the exploitation of the non-living resources of the EEZ.

b. The rate of payments and contributions to the Fund shall be determined by the Authority, taking into account the relative capacity of States to make such payments and contributions.

c. The Authority shall make disbursements to the States Parties to this Convention on the basis of equitable sharing criteria, taking into account the interests and needs of developing countries, particularly the least developed and the land-locked amongst them. The Authority may also make disbursements to protect the marine environment, to foster the transfer of marine technology, to assist the work of the United Nations in the aforementioned fields, and to help finance the Enterprise.

The second amendment makes a related change in Paragraph 4 of Article 82, entitled: "Payments and contributions with respect to the exploitation of the continental shelf beyond 200 miles." If amended, paragraph 4 of Article 82 would read:

The payments or contributions shall be made to a *Common Heritage Fund, as established in Article 56*, through the Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing countries, particularly the least developed and land-locked amongst them.

The texts of the "Informal Proposal for a Common Heritage Fund" and the "New Informal Proposal for a Common Heritage Fund" were supplied by the Nepal Mission to the United Nations. [Copy on file with the *California Western International Law Journal*].

Speaking in Plenary on the last day of the Geneva meetings, Dr. Mohan Lohani, Chairman of the Nepal Delegation, briefly reviewed developments in the nearly twelve months since the Nepal Proposal was introduced and summarized some of the response to the proposal. The following are excerpts from that April 27 intervention:

It is now nearly a year since the Delegation of Nepal introduced its proposal (A/CONF.62/65) for a Common Heritage Fund as part of the Law of the Sea Convention being negotiated in the Law of the Sea Conference. While we note with regret that the Conference has not yet seen fit to take up our proposal, we understand and respect the reasons why it has not done so. The Conference, as we have seen, has been spending almost all its time and energy on some outstanding "hard-core" issues.

... But we want to add that in our judgment there are other important hard core issues In Nepal's view the poverty and misery of 800 million human beings is a hard-core issue about which the Conference must do something meaningful. Yet everyone agrees that the sharing provisions in the ICNT will prove insignificant in alleviating that poverty and misery. When the needs of the poor are so great, does it really make sense to award most of the thirty trillion dollars worth

of offshore mineral wealth to a very few States, many of them already very rich? We believe that does *not* make sense.

...
 We are fully aware that the CHF proposal has had its critics; . . . their criticisms have been most helpful. At the same time, we are happy that the proposal has found strong supporters. The best example I can give you is that late last summer an international committee was established to support the idea of a Common Heritage Fund and to warmly welcome the Nepal Proposal for such a Fund. The name of this new committee is Common Heritage International.

...
 The formation of such a distinguished group in such a short time suggests that the CHF Proposal has struck a very responsive chord. Two sentences from the group's "Statement of Beliefs and Purposes" illustrate this point: "Although the hour is late, we believe that there is still time to make the Law of the Sea Conference a major turning point in the struggle to build a new a more just economic and political order, to protect the gravely threatened marine environment and to preserve endangered marine species. But for this to happen the Conference must recover the vision that inspired its launching, the vision of the oceans as the common heritage of mankind."

...
 We earnestly hope that every delegation in this Conference will respond positively to this proposal. The establishment of a Common Heritage Fund will not only help to realize that noble concept which was the *raison d'être* of the present Conference, but will also go a long way toward creating the new international economic and political order which is essential if we and future generations are to live together in peace and justice and in a healthy and prosperous world.

Address by Dr. Mohan P. Lohani, Eighth Session of UNCLOS III, in Geneva (April 27, 1979).

In his "Explanatory Memorandum by the President of the Conference," which serves as an introduction to the ICNT/Rev. 1, President Amerasinghe restates his view that the Nepal Proposal should be considered at the resumed session:

The team (the President and the Chairmen of the three Committees) agreed that it was most important that the President should stress, in this explanatory memorandum, that it had been able to address itself only to the texts placed before the Plenary by the respective Chairmen and by the President and that, accordingly, as the President had already recognized in the Plenary, many issues and proposals had not yet received adequate consideration and should form the subject of further negotiations during the resumed session.

These included the other issues referred to in paragraph 6 of A/CONF.62/62 which mentioned, *inter alia*, . . . the proposal by Nepal on a common heritage fund (A/CONF.62/65)

U.N. Doc. A/CONF.62/WP.10/Rev.1, at 19-20 (1979).