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## Elephants, Donkeys, or Other Creatures? Presidential Election Cycles & International Law of the Global Commons

J.M. Spectar

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# ELEPHANTS, DONKEYS, OR OTHER CREATURES? PRESIDENTIAL ELECTION CYCLES & INTERNATIONAL LAW OF THE GLOBAL COMMONS

J.M. SPECTAR\*

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## INTRODUCTION

*Bush, Gore, or Buchanan?* Electoral politics and the results of elections should matter to everyone concerned about the future of international law. Changes in the United States presidency following United States election cycles significantly affect and shape the international law of the global commons.<sup>1</sup> Using a case study methodology, the article examines the effect of changes in presidential administrations on both the law of the sea and the moon treaty regime. It describes how changes in presidential administrations have led to dramatic shifts in United States positions on the norms of the global commons, especially the common heritage principle and its associated concepts.<sup>2</sup> The article posits that presidential politics and related domestic political variables have import to international legal scholars because of the decisive role of the United States president in shaping international law and world ordering. The article also contends that the role of the United States presidential variable warrants serious investigation by international lawyers seeking to understand or predict United States foreign policy on emerging issues of inter-

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1. Like the common heritage of mankind, the phrase "global commons" harks back to the civil law concept of "*res communes*," denoting "things common to all; that is, those things which are used and enjoyed by every one, even in single parts, but can never be exclusively acquired as a whole, e.g., light and air." See BLACK'S LAW DICTIONARY 1304-1305 (6th ed. 1990). See also, HENKIN et al eds. INTERNATIONAL LAW, 1236-1237, 1993 (using the term "commonage" to signify those areas beyond national jurisdiction such as the seabed, that are seen as "belonging to everyone or to no one").

2. The common heritage principle rejects state sovereignty over common resources and urges that some of the benefits of the global commons should be dedicated to all humankind, . . . including future generations. The CHM "principle has become the leitmotif in the progressive development of international law governing the use of areas beyond national jurisdiction. . . . Despite the fact that its precise legal implications still remain rather uncertain, there is general consensus that the common heritage principle tends to create an obligation for individual states to use the resources of the international seabed as well as those of outer space in a way that promotes not only national interests, but the well-being of mankind as a whole." LAKSHMAN GURUSWAMY, ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER, 400-401 (1994). For an extensive definition and analysis of the shifting meanings and alternative interpretations of the common heritage principle, see J.M. Spectar, *Saving the Ice Princess, NGOs, Antarctica and International Law in the New Millennium*, 23 SUFFOLK TRANSNAT'L L. REV. 1 (2000) (defining and analyzing the shifting meanings of alternative interpretations of the common heritage principle).

national law.

The common heritage principle rejects state sovereignty in favor of common resources and urges that some of the benefits of the global commons should be dedicated to all humankind, including future generations.<sup>3</sup> After reviewing the process of global commons regime formation, it is clear that United States support for the evolving norm of the common heritage of mankind ("CHM") varies on a case by case basis.<sup>4</sup> Additionally, United States support for the common heritage sometimes undergoes significant changes during the course of negotiations. In some cases, the United States, after previously supporting the common heritage principle, subsequently rejected it or sought to limit its applicability. This article hypothesizes that variability in adherence to the common heritage principle can be explained by changes in the United States presidency and a new administration's assessment of national and international interest. Thus, new presidents often will use their executive authority to engage in global commons negotiations abandoned by predecessors, to seize the initiative and create new opportunities, and to take such specific actions as signing treaties rejected by predecessors.

Part I of this Article examines the law of the sea negotiations and the effect of the presidential change variable on the international legal positions of the United States. Part II examines how presidential changes in the 1970s affected the moon treaty negotiations and their eventual outcome. In the main, these cases show that as presidential

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3. See S. Chopra, "Antarctica as a Commons Regime: A Conceptual Framework for Cooperation and Coexistence," in GURUSWAMY, *supra* note 2, at 427. This element of the CHM "envision[s] a rational system of resource exploration which will save the area and its resources from depletion and contamination. Environmental protection by way of pollution control and conservation is expected." *Id.* at 427.

4. Although the terms "global commons" and "common heritage of mankind" both hail from the Roman "res communes" (see *supra* note 1), the latter has emerged as the embodiment of certain principles of international governance of areas beyond national jurisdiction. See *supra* (footnotes 2 & 3). For a useful analysis of varying conceptions of commons regimes, see S. Chopra, *supra* note 3 (noting that a commons regime under free access i.e. *res communis* is different from a commons regime as envisioned under the common heritage of mankind. The commons regime with free access is seen as a 'tragedy of the commons, whereby uncoordinated or unregulated resource consumption from the common pool is likely to lead to 'chaotic situations,' and resource depletion to the detriment of present and future generations. *Id.* at 423).

administrations changed, so did the degree or intensity of United States' support for the common heritage principle, thus precipitating or exacerbating the observed variability in American support for the norms of the global commons. Finally, this Article argues that given the significance of the presidential change factor, citizens and scholars interested in the future of world order must ask presidential candidates to respond to questions about these important international issues. They must also insist on satisfactory answers. United States presidents, presidential politics and presidential elections are of importance to legal scholars because of the decisive role of the United States president in shaping international law, especially given the extant hegemonic status of the United States in a uni-polar world.<sup>5</sup> A keen understanding of the role of American presidency in shaping international law is crucial for international lawyers seeking to understand or predict United States' positions on emerging issues of international law.

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5. After the collapse of the Soviet Union, the bi-polar order of the Cold War era ended as well, leaving the United States the sole and undisputed world power or hegemon.

## I. PRESIDENTIAL CHANGE & THE DEVELOPMENT OF GLOBAL COMMONS LAW IN THE SEABED<sup>6</sup>

### A. THE JOHNSON ADMINISTRATION

Technological developments in the 1960s increased the possibility of deep seabed mining. President Lyndon B. Johnson, a Democrat, favored some form of international regulation of the seabed and he laid down an aspirational foundation for future United States international policy towards the commons. Johnson was an early supporter of the precursors of common heritage governance such as the Outer Space Treaty ("OST"). The OST rejected the concept of *res nullius*<sup>7</sup> with regard to outer space, referring to space as "the province of mankind" and calling for outer space exploration for the "benefit of mankind."<sup>8</sup>

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6. See LUC CUYVERS, OCEAN USES AND THEIR REGULATION 152 (1984) (explaining the development of the Law of the Sea via the United Nations). The Third United Nations Conference on the Law of the Sea (UNCLOS III) was a result of the preliminary work done by the United Nation's General Assembly's (UNGA) Seabed Committee. In 1970, the UNGA established the ad hoc Committee on Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction ("the Seabed Committee"). After concluding that it was impossible to consider one part of the ocean without also considering the others, the committee sought and received an expansion of its jurisdiction from the UNGA. The Committee was to (1) prepare draft articles for the deep sea bed and its exploration, (2) prepare a comprehensive list of issues related to the traditional law of the sea and (3) examine the preservation of the marine environment. Between 1970-1973, the Committee held over 469 formal meetings and produced an astounding 160 documents. The Seabed Committee, however, failed to produce a draft treaty. This work was taken up by the first session of UNCLOS III in New York in December 1973. In 1975, the third session (Geneva) produced the Informal Single Negotiating Text and a year later, the fourth session produced the Revised Single Negotiating Text. The sixth session culminated in the creation of an Informal Consolidated Negotiating Text, later revised to the Informal Composite Negotiating Text. The latter document eventually metamorphosed into the Convention of 1982. Whereas the first Law of the Sea in 1958 had 86 participating countries that reached agreement after 73 draft articles, UNCLOS III had about 117 participating countries that only reached agreement after about 300-400 draft articles. See *id.*

7. See BLACK'S LAW DICTIONARY (5th ed. 1979) (defining *res nullius* as the property of nobody).

8. Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan.

President Johnson also called for a new regime for the seas. Johnson advocated a modest variant of the CHM-era approach to common spaces.

Under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among maritime nations. We must be careful to avoid a race to grab and hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms, are, and remain, the legacy of all human beings.<sup>9</sup>

The Johnson Administration's seabed policy was aimed at avoiding military confrontations and other violent conflicts on the high seas. As early as 1966, President Johnson articulated national security concerns about the possibilities of conflict as nations scrambled for the wealth of the oceans. Johnson cautioned against efforts to claim seabed land that could undermine international peace and security.<sup>10</sup> By the end of the 1960s, the increasing number of claims by various states over offshore portions of the high seas threatened to increase the likelihood of conflicts over access to the world's oceans.<sup>11</sup> The United States wanted a conference to deal primarily with these contentious territorial issues in a peaceful manner.

Efforts to develop a regime for the seabed gained significant support after the Maltese Ambassador to the United Nations, Arvid Pardo, challenged the international community. Pardo proposed that the United Nations General Assembly ("UNGA") declare the seabed, the ocean floor, and its resources as the common heritage of mankind."<sup>12</sup> Pardo also called for the incorporation of the CHM principle into the corpus of *jus gentium publicum*<sup>13</sup> via the adoption of an in-

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27, 1967, reprinted in 6 I.L.M. 386 (1967) [hereinafter OUTER SPACE TREATY].

9. Harold M. Schmeck Jr., *Johnson Asks Joint Exploitation of Sea Resources*, N.Y. TIMES, July 14, 1966, at 10 (quoting President Johnson on his beliefs underlying the new regime for the seas).

10. See GEORGE P. SMITH II, RESTRICTING THE CONCEPT OF FREE SEAS 55 (1980).

11. See Marjorie Ann Browne, "The Law of the Sea Convention and U.S. Policy" (visited Apr. 16, 2000) <<http://www.cnice.org/nle/leg-9.html>> (discussing the initial impetus for the United States support of law of the sea negotiations).

12. See generally ARVID PARDO, THE COMMON HERITAGE: SELECTED PAPERS ON OCEANS AND WORLD ORDER 1967-1975 (1975).

13. See BLACK'S LAW DICTIONARY (5th ed. 1979) (defining *jus gentium publi-*

ternationally binding treaty. The UNGA responded by establishing a committee responsible for ensuring that the exploration and exploitation of the seabed was undertaken for the "benefit of all mankind as whole."<sup>14</sup>

Additionally, after Pardo declared that the oceans and seabed beyond national jurisdictions are part of the CHM, Johnson's UN Ambassador Arthur J. Goldberg expressed enthusiastic approbation.<sup>15</sup> Nevertheless, Congressional suspicions about the Maltese proposal forced the Johnson Administration to back off its initial support.<sup>16</sup> Several members of Congress were critical of the State Department for its "possible encouragement" of Pardo's revolutionary common heritage approach.<sup>17</sup> Because several Congresspersons viewed the Maltese proposal for internationalizing the seabed and its resources as "highly detrimental to the national economic interest,"<sup>18</sup> the Johnson Administration retreated from its early endorsement of the CHM.<sup>19</sup>

To accomplish his objective of preventing international conflict over the seabed, President Johnson appointed the Marine Commission to study various proposals for a regime for the oceans. The Marine Commission recommended that the United States support the creation of an International Registry and use some of the collected revenue for aid to developing countries.<sup>20</sup> Nevertheless, the United States House of Representatives Committee on Foreign Affairs clearly told the Johnson White House that "any future commitment

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*cum* as the public law of nations).

14. G.A. Res. 2467 art. XXIII (1968) *reprinted in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 163-64 (Myron Nordquist ed., 1985).

15. ANN L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 200 (1981) (referencing Goldberg's initial support of Pardo's proposal).

16. *See id.* (noting that the United States retreated from its support of Pardo's position).

17. ROBERT L. FRIEDHEIM, UNDERSTANDING THE DEBATE ON OCEAN RESOURCES 36 (1968) (reporting that almost two dozen negative resolutions were introduced into the United States House of Representatives).

18. HOLLICK, *supra* note 15, at 199.

19. *See id.* at 200 (outlining the reasons for the United States changing attitudes toward the Malta proposal).

20. *See* FRIEDHEIM, *supra* note 17, at 35.



on oceans should be made by the executive only, with prior authorization from Congress.”<sup>21</sup> The Committee further warned the President that he should not commit the United States to any agreement on the seabed unless the commitment was in the form of a treaty that was subject to the advice and consent of the Senate.<sup>22</sup>

In sum, the Johnson Administration’s favorable disposition towards CHM provided a normative foundation for progressive internationalism with regard to international common areas. Concern that unregulated competition in the seabed would lead to violent conflicts caused the Johnson Administration to support a CHM framework for managing the commons. Subsequent United States proposals at the seabed negotiations all maintained that the area to be governed by the CHM should be free from territorial claims and should be used only for peaceful purposes. Nevertheless, many of the vexing issues did not emerge until well after the beginning of UNCLOS III<sup>23</sup> and the Moon Treaty negotiations.

## B. THE NIXON ADMINISTRATION

In 1970, the Nixon Administration agreed to promote and convene an international conference on the law of the sea to deal with only territorial issues.<sup>24</sup> As the Cold War raged on, key security concerns loomed large in the president’s assessments of the national and international interest. Unrestricted transit and access to the seas, which cover about seventy percent of the earth’s surface, have always been important interests to national security policy makers.<sup>25</sup> Preserving the freedom of the high seas (*mare liberum*) was a key national security concern at the onset of the UNCLOS III seabed mineral negotia-

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21. *Id.*

22. *See id.* at 35-36 (stating that although the United States did not announce its decision on international control over the seabed, Congress continued to affirm its stance on the need for formality).

23. *See* CUYVERS, *supra* note 6 (describing the Third United Nations Conference on the Law of the Sea (UNCLOS III)).

24. *See* HOLLICK, *supra* note 15, at 234.

25. *See generally*, *Beaches and Ocean Legislation*, Hearing before the Subcomm. on Water Resources and Env’t of the House Comm. on Transp. and Infrastructure, 105th Cong. (1998). [hereinafter Ocean Hearings] (discussing legislation aimed at protecting United States beaches and oceans).

tions. In addition, the United States wanted to ensure unimpeded transit through certain strategically important straits.<sup>26</sup> Nixon's Department of Defense ("DOD") also insisted on preserving the three-mile limit on the territorial sea that was codified in the first and second Geneva Conferences of the Law of the Sea. The DOD argued that this limit must be preserved as a means of "ensuring the mobility of the United States Navy and Air Force over the seas."<sup>27</sup> In particular, the DOD was concerned that if the twelve-mile limit were adopted, several straits used for international navigation would come under the control of unfriendly coastal states.<sup>28</sup> These hostile states could potentially meddle with the transit of United States' submarines and planes.<sup>29</sup> The interest in unrestricted navigation is particularly significant for a nation seeking to project military power globally. In the DOD's view, the nation's security depended upon the ability of the United States to conduct military operations over, under, and on the oceans.<sup>30</sup>

From the beginning of the negotiations, the Nixon Administration had a strong interest in securing access to strategic resources. The United States has always had a strategic interest in certain minerals (nickel, copper, cobalt, manganese etc.) that are in short supply on land but potentially available through deep seabed mining.<sup>31</sup> Congress has made several findings with regard to the problem of availability of strategic minerals:

- (1) The United States' requirements for hard minerals to satisfy national

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26. See Boleslaw Boczek, *Ideology and the Law of the Sea*, 7 B.C. INT'L & COMP. L. REV. 1, 2 (1984).

27. See AMERICAN POLITICS AND THE LAW OF THE SEA 148 (Piper and Terchek eds., 1983) [hereinafter Piper and Terchek].

28. See *id.* at 149.

29. See *id.*

30. See *Defense Department Press Release, No. 451-04, Statement by Secretary Perry* (visited July 29, 1994) <<http://www.clark.net/pub/diplonet/dod-los.html>>.

31. See Carl Q. Christol, *An International Seabed Authority*, THE LAW OF THE SEA: ISSUES IN OCEAN RESOURCE MANAGEMENT, 172, 179 (Don Walsh ed., 1977) (noting that there are an estimated 100 billion to 1.5 trillion tons of manganese nodules in the Pacific Ocean alone, and about 10 to 16 million tons are added annually). These nodules contain up to 50 percent manganese. See *id.*; see also Boczek, *supra* note 26, at 2.

industrial needs will continue to expand and the demand for such minerals will increasingly exceed the available domestic sources of supply. (2) In case of certain hard minerals, the United States is dependent upon foreign sources of supply and the acquisition of such minerals from foreign sources is a significant factor in the national balance-of-payments position. (3) The present and future national interest of the United States requires the availability of hard mineral resources, which is independent of the export policies of foreign nations . . . (5) The nations of the world, including the United States, will benefit if the hard mineral resources of the deep seabed beyond limits of national jurisdiction can be developed and made available for their use.<sup>32</sup>

Initially, the Nixon Administration took a position strongly in favor of the CHM in the Law of the Sea negotiations. Largely for national security reasons, they supported the Law of the Sea because it furthered key national interests such as free and open access to the commons. But as the nation-states of the developing world (the South)<sup>33</sup> continued to expand the obligations entailed in the principle, the Nixon Administration qualified its endorsement. In particular, the broadening of the CHM principle to include large-scale north-south technology transfers and the South's demand for a large Exclusive Economic Zone ("EEZ")<sup>34</sup> may have weakened the support for the principle among several policy makers.

In 1970, President Nixon articulated a "firm" policy on the seabed.<sup>35</sup> Nixon proposed a three-level system in which the coastal state would possess total control over seabed resources within the 200-meter depth line. Most significantly, Nixon declared the resources beyond this point to be the common heritage of mankind.<sup>36</sup> The area

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32. 30 U.S.C. 1401 2(a) 1-3, 5 (1980).

33. The developing world, consisting of much of Africa, Latin America and Asia, is sometimes referred to as the 'Third World' or sometimes as "the South"—the latter alluding to the hemispheric location of most developing countries.

34. The Exclusive Economic Zone (EEZ) is an area beyond and adjacent to the territorial sea (not extending beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured) over which the coastal state enjoys certain sovereign rights and jurisdiction. *See generally*, HENKIN, *supra* note 1, at 1288-1296.

35. *See* BARRY BUZAN, *SEABED POLITICS*, 104 (1976). (setting out Nixon's "landmark" policy statement).

36. *See id.* at 104.

between the 200-meter line and the edge of the continental margin would be treated as an international trusteeship zone. In this zone, the coastal states would retain many of their powers, but they would also have to share revenues from the zone with the international seabed authority.<sup>37</sup> This authority would possess exclusive jurisdiction over the seabed beyond the margin.<sup>38</sup> The President further proposed that pending the establishment of such an international regime, coastal states should retain the right to grant permits for exploitation beyond the 200-meter depth line.<sup>39</sup> Any revenue derived by states from the exploitation beyond 200 meters during this interim period would be given to an appropriate agency for assistance to developing countries.<sup>40</sup>

The American proposal thus emphasized the exploitation of resources and it favored establishing fixed boundaries before defining the regime and machinery.<sup>41</sup> The United States also attempted to circumvent the moratorium resolution through a provisional policy.<sup>42</sup>

The Nixon Administration followed the presidential initiative with a proposal to the Seabed Committee on August 3, 1970 that contained strong support for the CHM. The Nixon proposal included substantially generous provisions that sought to give effect to the common heritage. It was understood that the advanced state of oil exploitation off American coasts meant that the United States would provide much of the shared revenue from exploitation.<sup>43</sup>

Thus, the United States sought to demonstrate leadership on the issue of a seabed regime by proposing a 'declaration of principles' which was consistent with President Johnson's view that the "deep seas and the ocean bottom are, and remain the legacy of all human

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37. *See id.*

38. *See id.*

39. *See id.*

40. *See* BUZAN, *supra* note 35.

41. *See id.* at 104-05 (comparing the United States interests with Latin American proposals).

42. *See id.* at 105.

43. *See id.* (asserting that this proposal was quite generous, considering the revenue that the United States would be contributing to the proposed fund).

beings.”<sup>44</sup> The United States ‘declaration of principles’ supported the CHM concept and also called for the creation of a modest international regime. The seabed regime should contain provisions for “the dedication of a part of the value of the [exploited] resources to international community purposes.”<sup>45</sup> The United States draft of the ‘declaration of principles’ was supported by many West European states.<sup>46</sup> In addition, even without embracing all the broad legal implications of the CHM, the United States followed its ‘declaration of principles’ with a draft treaty in August 1970 that included a “financially generous international licensing system.”<sup>47</sup>

However, the United States was ambivalent towards the continually expanding and evolving CHM concept. American policy makers were often at odds with the South over the regulatory schemes implicated in the South’s conception of the CHM. The United States was hesitant to express unqualified support for UNGA resolutions calling for the creation of a supranational seabed authority as a means of implementing the CHM.<sup>48</sup> The United States submitted working papers to the UN seabed committee which put forth plans for a relatively weak<sup>49</sup> international machinery that would issue licenses upon the payment of a fee.<sup>50</sup> American proposals effectively rejected the efforts by developing countries to allocate the right of exploration and exploitation solely to an international authority.<sup>51</sup> While the United

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44. HOLLICK, *supra* note 15, at 204 (recounting Johnson’s speech at the 1966 commissioning of “The Oceanographer”, an oceanographic vessel).

45. *Id.*

46. *Id.* at 206.

47. *Id.* at 237.

48. *See id.* at 207 (noting that the U.S. and other industrialized nations, including the Soviet Union, voted against or abstained from G.A. Res. 2647(C) calling for creation of an international seabed machinery to oversee the use of the deep seabed resources “in the interests of mankind”).

49. *See* NASILA S. REMBE, AFRICA AND THE INTERNATIONAL LAW OF THE SEA 62-63 (1980) (favoring more liberal access that would allow private enterprises to exploit resources).

50. *See* RAM PRAKASH ANAND, LEGAL REGIME OF THE SEA-BED AND THE DEVELOPING COUNTRIES 215-19 (1975).

51. *See* ALEXANDRA MERLE POST, DEEP SEA MINING AND THE LAW OF THE SEA 145-46 (1983) (emphasizing the United States’ willingness to participate within an authority operated through separate organs, but not one in which a sole

States was willing to support a relatively weak CHM regime with a mild but "financially generous international licensing system,"<sup>52</sup> it made also clear that such a position was not an endorsement of any complete ban on free enterprise in the commons, temporary or otherwise.

### C. NIXON & THE HARD MINERAL RESOURCES ACT

In the early 1970s, the United States mining industry began taking concerted political action to secure its capital investments. The movement centered on the Deep Seabed Hard Minerals Resources Bill ("DSHMRB").<sup>53</sup> Although the bill was arguably consistent with Nixon's position on the seabed issue, the President refused to come out for, or against it.<sup>54</sup> Unwilling to alienate existing and potential allies at the UN, the Nixon Administration waffled on the bill for more than a year after it was first introduced. The State Department exacerbated the confusion by declaring its opposition to the UN's moratorium resolution. The State Department also signaled tacit support for Senator Metcalf's unilateral exploitation policy.<sup>55</sup> When asked about the moratorium the State Department responded in diplomatic double-talk:

The Department does not anticipate any efforts to discourage U.S. nationals from continuing with their current exploration plans. In the event that U.S. nationals should desire to engage in commercial exploitation prior to the establishment of an internationally agreed regime, we would seek to assure that their activities are conducted in accordance with relevant principles of international law, including the freedom of the seas, and that the integrity of their investment receives due protection in any subsequent

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authority is controlled).

52. See HOLLICK, *supra* note 15, at 237 (explaining that the draft treaty set a continental shelf boundary with an international seabed regime and an intermediate zone extending beyond).

53. See BUZAN, *supra* note 35, at 153-55 (noting that the bill was introduced to Congress in November 1971 by Senator Lee Metcalf). The Hard Minerals Bill, as it is also known, embodied the view held by the U.S. mining industry.

54. See BUZAN, *supra* note 35, at 156 (observing that while Nixon may have empathized with the supporters of the Hard Minerals Bill, he was unwilling to immediately align himself with the cause).

55. See *id.* at 155 (analyzing the State Department's response to Senator Metcalf).

international agreement.<sup>56</sup>

In 1973, the Nixon Administration decided to formally oppose the Hard Minerals Bill, based in part on the realization that the bill was vastly unpopular in the developing countries. The Nixon Administration feared that the developing countries' virulent opposition might endanger the entire package deal,<sup>57</sup> many aspects of which were in America's own interest. The developing countries saw the bill as a rejection of the CHM, especially because it only allowed for a weak international machinery and a small international fund.<sup>58</sup> In addition, the developing countries were particularly alarmed because the bill appeared to give a free rein to the mining companies in derogation of the CHM.<sup>59</sup>

Nevertheless, the Nixon Administration's creative ambivalence provided it with leverage in both the domestic and international arenas. On the one hand, President Nixon played to the domestic arena by endorsing interim unilateral activity by American companies as an alternative to international agreement. At the same time, he continued to withhold support for the Hard Minerals Bill, so long as a successful outcome to the seabed negotiations appeared imminent.<sup>60</sup> Nevertheless, by refusing to support the Hard Minerals Bill, Nixon appeared consistent with his stated policy that the area of the seabed beyond national jurisdiction is the common heritage of mankind. In addition, the Nixon Administration supported the UNGA's Declaration of Principles that contained a far-reaching CHM provision. Yet Nixon qualified American support by rejecting the developing countries' view that support for the CHM necessitated support for a pre-treaty moratorium. Still, the prospect that he might support the Hard Minerals Bill served as important leverage on the international front.

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56. See *id.* at 155-56 (quoting U.S. Senate, *The Law of the Sea Crisis* (Washington Government Printing Office (1972))).

57. See BUZAN, *supra* note 35, at 156 (stating that in 1970 the United States committed itself to a package law of the sea negotiation).

58. See *id.* (demonstrating that the fees and taxes on licensing would be comparatively small and therefore contribute little to the international fund).

59. See *id.* (outlining the reasons behind Nixon's eventual opposition to the Hard Minerals Bill).

60. See *id.* (explaining that Nixon initially hoped to reach agreement by 1975).

In particular, the Nixon Administration could exploit the pressure created by the unilateral threat to serve its own interest in reaching an acceptable package deal as soon as possible.<sup>61</sup>

The delay in taking a firm stance on the Hard Minerals Bill proved to be useful for the United States in the negotiations, providing leverage without compromising Washington's support for the common heritage principle. Nixon ultimately opposed the bill on the grounds that it would compromise the United States position in on-going international negotiations.<sup>62</sup> The Administration was particularly worried that others would see support for the bill as the type of unilateral act that the United States consistently repudiated.<sup>63</sup>

At the same time, the Nixon Administration's position on the law of the sea was both an international and a domestic compromise. Domestically, it sought to reconcile the interests of the DOD, the State Department and the American oil industry. The DOD argued for narrower shelf limits because it feared wide shelf claims would encourage similar claims over the water column, thus prejudicing the freedom of the high seas.<sup>64</sup> The oil industry wanted the United States government to assert exclusive jurisdiction over the mineral resources of all of the submerged area off its shores.<sup>65</sup> The State Department, which was largely responsible for developing the Nixon statement, failed to convince the oil industry of the soundness of the President's policies.<sup>66</sup>

Thus, at the onset of the negotiations, the United States subscribed to a modest variant of the CHM concept, while at the same time insisting that unrestricted exploration and exploitation of the deep seabed was one of the components of freedom of the high seas.<sup>67</sup> The

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61. See *id.* at 157 (observing that the Hard Minerals bill had an immediate impact on law of the sea negotiations debates within the United Nations).

62. See BUZAN, *supra* note 35, at 156.

63. See *id.* (asserting that interim national legislation was an unacceptable substitute for an international agreement).

64. See *id.* at 105 (remarking that any restrictions on the freedom of navigation would have a negative effect on United States military interests).

65. See *id.*

66. See *id.* (describing the oil industry's condemnation of the Nixon statement because of its belief that the U.S. had weakened its position).

67. See HOLLICK, *supra* note 15, at 237-38 (articulating the long held American



United States engaged in a balancing act, putting forth modest proposals, while stemming the radical tide. Although the United States voted for the UNGA's Declaration of Principles, it sought to make reservations to the sweeping implications of the South's conception of the CHM. The United States also rejected the South's effort to impose a moratorium on commercial activities. Thus, the United States opposed the moratorium resolution and made it clear that U.S. support for the Declaration of Principles did not preclude pre-treaty mining.<sup>68</sup> The Nixon Administration's ambivalence towards the CHM concept was demonstrated by its view that "that the UNGA Declaration of Principles did not preclude U.S. companies from mining manganese nodules on the deep seabed" —a position inconsistent with the South's notion of CHM.

Finally, while the Nixon Administration favored a modest conception of the CHM, it nevertheless insisted that unrestricted exploration and exploitation of seabed should remain unburdened by any emerging CHM regime.<sup>69</sup> However, they were prepared to accept a such a regime, even with some offending characteristics, "in order to obtain international agreement on a wide variety of ocean law questions perceived as important to [U.S.] national interest."<sup>70</sup> As Westermeyer observed, the United States policies in the commons were guided by a "moderately strong interest in opportunity to profit," but this interest was "somewhat less important than secure access to resources."<sup>71</sup>

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attitude toward the Law of the Sea).

68. See e.g. HOLLICK, *supra* note 15, at 238 (noting that U.S. support for the CHM did not prevent American miners from harvesting the manganese nodules of the seabed).

69. See HOLLICK, *supra* note 15, 237-38 (accepting the proposal adopted by the U.N. but stating that the U.S. would continue to allow U.S. companies to mine manganese nodules on the seabed).

70. See *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies: Hearings Before the Subcomm. on Science, Technology and Space of the Comm. on Commerce, Science, and Transport.*, 96th Cong. 135 (1980) [hereinafter *Senate Moon Treaty Hearings*] (testimony of Marne A. Dubs, Chairman, American Mining Congress Comm. on Undersea Mineral Resources).

71. WILLIAM E. WESTERMEYER, *THE POLITICS OF MINERAL RESOURCE DEVELOPMENT IN ANTARCTICA* 174 (1984).

## D. THE FORD ADMINISTRATION

While the Ford Administration carried on with the CHM policy it inherited, there were no bold new initiatives. Instead, President Ford chipped away at the expanding scope of the CHM principle and it was often ambivalent and even hostile to the emerging New International Economic Order ("NIEO") agenda.

The Ford Administration was exasperated by the South's increasingly uncompromising CHM politics and its nexus to the NIEO. Throughout its brief tenure, the Ford Administration was confronted by the after effects produced by the Third World's NIEO conferences.<sup>72</sup> By the end of 1974, the NIEO agenda reached a crescendo with the seminal UN Charter of Economic Rights and Duties of States,<sup>73</sup> which included among its many provisions, the CHM principle with respect to the seabed in Article 29. Because the United States was vigorously opposed to the NIEO agenda, the Ford Administration instructed its UN representatives to vote against Res. 3281.

During the mid-1970s, commons negotiations appeared to grind on endlessly. UNCLOS III Session Two, held Caracas from June through August 1974, becoming the longest and most contentious conference. The Caracas session was also marked by a consolidation of interests groups such as the G-77<sup>74</sup> or the landlocked states. These groups, dominated by developing countries, often endorsed seabed proposals in opposition with United States interests. In 1975, the Third Session, held in Geneva, produced the Informal Single Negotiating Text ("ISNT") as the basis for negotiating the final treaty. The ISNT called for a strong seabed authority and it favored a centralized to sea-

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72. A few months prior to Ford's sudden ascendancy to the presidency, the G-77's agenda gained critical mass with the passage of the UN Declaration on Establishment of NIEO. See G.A. Res. 3201 (S-VI), (1974), *reprinted in* 13 I.L.M. 715 (1974) and in LOUIS HENKIN et al, BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW, 519-522, 1993.

73. G.A. Res. 3281 (XXIX) (1974), *reprinted in* 14 I.L.M. 251 (1975) and HENKIN, *supra* note 72, at 511-519.

74. The developing countries of Africa, Asia and Latin America formed the Group of 77 as a caucus or lobbying group for its members' international economic and political interests. The Group that now exceeds 120 members has often voted as a bloc in UN institutions, making its most significant impact on the proceedings of the United Nations Conference on Trade and Development (UNCTAD). See HENKIN, *supra* note 1, at 1395-1396.

bed governance consistent with the G-77 agenda. But the Ford Administration was decidedly lukewarm to the G-77 proposal. Instead, United States representatives put forth a new Draft Proposal in 1976 that included a strict licensing system favorable to American mining interests.

The United States was able to severely restrict the scope and implications of the CHM during the 1976 session. In effect, the Ford Administration representatives worked to revise the work of the previous Geneva sessions and the ensuing text watered down the scope of the emerging CHM regime.<sup>75</sup> The United States Draft proposal also rejected the unitary mining system supported by G-77. Instead, the Ford Administration proposed a parallel system that allowed mining of the CHM on an equal footing between private entities and the UN's Enterprise.<sup>76</sup> To secure support from more moderate Third World States, Secretary of State Henry Kissinger promised financial aid and a modest transfer of technology to the Third World. However, Secretary Kissinger conditioned any financial aid and technology transfers on acceptance of the United States proposal.<sup>77</sup>

The South's linking the CHM to a demand for extensive and mandatory North-South technology transfers increasingly troubled American policy makers. American policy makers were concerned that any mandatory North-South technology transfers could jeopardize United States national security. Thus, American policy maker suggested that to the extent that the CHM incorporated mandatory technology transfer provisions, the CHM might be undesirable from the perspective of national security interests.<sup>78</sup> Also, it was thought that if national security interests were to prevent the technology transfer required by the CHM, the regime "might then be undesirable

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75. See ROSS D. ECKERT, *THE ENCLOSURE OF OCEAN RESOURCES* 286 (1979) (noting that by late 1976, the G-77 was disappointed with the Ford Administration and was hoping for a change in the administration with the 1976 presidential elections and a better deal from President Ford's successor).

76. See POST, *supra* note 51, at 145 (characterizing the parallel proposal as creating a dual system in which the Seabed Authority would retain ultimate control).

77. See *id.*

78. See *Senate Moon Treaty Hearings*, *supra* note 70, at 171 (providing that a "Common Heritage" regime would also breach traditional U.S. interests such as decentralized politics and the principles of a free market economy).

from the standpoint of United States interests in efficient access to the resources in question.”<sup>79</sup>

During the fifth session of UNCLOS III, held in New York from August to September 1976, the deadlock between G-77 and the North on seabed question placed the entire conference in jeopardy. The Ford Administration expressed grave concerns about the Austrian proposal for a compulsory licensing system. The proposal provided for one entity, known as the Enterprise, to be formed between any state and the UN Authority for each mining operation.<sup>80</sup> Under the Austrian proposal the UN Authority would provide half of the investment and half of the Board of Directors.

During the New York session of UNCLOS III, March 15 to May 7 1976, the Ford Administration actively tried to chip away at the expanding scope of the CHM principle. The United States delegation asserted that the excessive demands of the G-77, including the notion that the CHM necessitated an extensive internationally-managed regime, were imperiling agreement. The Ford Administration’s representatives warned fellow conferees that the threat of unilateral nodule mining by the United States “loomed much larger than at previous sessions.”<sup>81</sup> The United States delegation cautioned the G-77 about “the volatile condition of American politics” on the seabed question and effectively threatened a breakdown of the conference unless CHM issues were resolved in favor of American interests.<sup>82</sup> In general, the Ford Administration was also more supportive of continued Congressional efforts to pass the Hard Minerals Act that would substantially erode the scope of the contemplated CHM.

Emboldened by the chill between the United States and UN negotiators, Deep-sea Ventures, Inc., a private company, claimed exclusive rights to develop and mine manganese nodules in a 60,000 sq. km area

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79. *See id.*

80. *See*, POST, *supra* note 51, at 73. The Enterprise is the organ of the seabed Authority charged with exploitation, processing and marketing the minerals recovered from the Area.

81. *See* BUZAN, *supra* note 35, at 302 (asserting that the relative ease of the negotiating sessions was due to the weakened position of the G-77 countries because of clashes over ideological leadership and their inability to unify).

82. *Id.*

of the Pacific.<sup>83</sup> Although this action violated the UN's moratorium and the spirit of the CHM, the State Department was characteristically ambivalent about the Deep-sea claim.<sup>84</sup> However, most other members of the international community rejected the Deep-sea claim as wholly inconsistent with the CHM and criticized the Ford Administration's seeming unwillingness to defend the emerging norms of commons governance.<sup>85</sup>

In sum, support for the common heritage principle was much weaker during the Ford years than before. The Ford Administration was often at odds with the South over the regulatory schemes implicated in the South's conception of the CHM. The ever-widening implications of the CHM—among other factors—served to intensify the Ford Administration's hostility to the common heritage in the mid-seventies.

#### E. THE CARTER ADMINISTRATION

The election of Democrat Jimmy Carter in 1976 increased prospects for a common heritage regime in the seabed. The Carter Administration adopted a more progressive and conciliatory stance on common heritage governance than the Ford Administration had. The new president immediately brought in "new faces" and a higher profile to the policy process of the law of the sea, signaling the importance he attached to the negotiations.<sup>86</sup> To that effect, President Carter appointed former Attorney General Elliot L. Richardson as his ambassador-at-large and special representative to the Law of the Sea conference.<sup>87</sup> Most of President Carter's appointees were strongly in favor of the CHM during the seabed negotiations, and they continued to negotiate the Law of the Sea Treaty in good faith. In addition, during the Carter years, the United States showed more willingness to support the legitimate demands of the NIEO, including a much

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83. See ECKERT, *supra* note 75, at 237-38 (detailing the location of and claims made upon the mine site Deepsea purported to have discovered in the northeast Pacific Ocean in August 1969).

84. See *id.* at 238.

85. *Id.*

86. HOLLICK, *supra* note 15, at 359.

87. See *id.*

stronger CHM regime with a relatively generous international licensing system.

One of the primary factors influencing the Carter Administration's policy was a need to reach a palatable and viable agreement on the seabed. Since the first Law of the Sea treaty in 1958, United States policy makers had expressed an interest in building a regime for the seas that would protect vital national interests. By the mid-1970s, it had become clear that a treaty was necessary to forestall the proliferation of unilateral measures that could jeopardize national security. Less than a decade after Ambassador Pardo's speech, eighty-one states had issued 230 new jurisdictional claims, and states had appropriated approximately 4.5 million nautical square miles of ocean for their exclusive jurisdiction.<sup>88</sup> Without an agreement, these unilateral measures threatened rivalry and chaos to the detriment of United States interests. In addition, achieving agreement on the seabed was also seen as promoting American interests in global institution building and improving North-South relations.<sup>89</sup>

Yet the Administration also had to contend with both the escalating implications of the South's conception of the CHM and the efforts by the domestic mining industry to legitimize unilateral mining. The American negotiators at the UN were increasingly confronted by a "politically charged situation complicated by Group of 77 expectations that the new administration would make major concessions on

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88. Many attributed the problem of 'creeping jurisdiction' to the Truman Proclamation of 1945. The Truman Proclamation on the Continental Shelf heightened the need for an ocean regime. It asserted United States jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf contiguous to the United States, without affecting the legal status of the superjacent waters and the high seas. Many have argued that the Truman Proclamation caused many coastal states to expand their jurisdiction over increasing portions of the seabed. For example, Mexico, Peru, Chile made asserted similar rights in various proclamations. By the 1958 UN Conference on the Law of the Sea, "the concept of the continental shelf as interpreted by the Truman Proclamation had become part of customary international law of the sea." See Boczek, *supra* note 26, at 16; see also CUYVERS, *supra* note 6, at 148.

89. See *Senate Moon Treaty Hearings*, *supra* note 70, at 170 (statement of Richard G. Darman, Harvard Univ. John F. Kennedy Sch. of Gov't) (attesting to United States interests in the UNCLOS negotiations that transcended concerns over deep sea mining).

mining.”<sup>90</sup> Between February and March 1977, the Intersessional Meeting in Geneva circulated a compromise seabed proposal that endorsed a parallel exploitation system.<sup>91</sup> However, the sixth session of UNCLOS III in New York in May and June of 1977 was further marred by a continuing impasse on deep-sea mining issue. To break the deadlock, Mr. Paul Engo, the Chairman of the First Committee, privately re-drafted the deep-sea mining texts for inclusion in the new Informal Composite Negotiating Text (“ICNT”). Engo’s draft included a strong G-77 type Authority.<sup>92</sup> Some emerging features of the seabed Authority were viewed with askance by the Carter Administration particularly because the United States was not adequately represented in the Authority, and because the seabed administration appeared to favor an anti-market fixed fee system.<sup>93</sup>

In order to secure legislative support for the CHM, President Carter had to balance domestic and international interests. To mollify domestic constituencies, the Carter Administration emphasized that the seabed negotiations did not preclude pre-treaty mining.<sup>94</sup> President Carter eventually supported the resilient deep-sea mining legislation that was finally enacted in July 1980.<sup>95</sup> The modified DSHMRA signed by President Carter supported free access norms of commons

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90. HOLLICK, *supra* note 15, at 359.

91. See POST, *supra* note 51, at 73 (including highlights of the ‘Evensen Group’ meeting within a chronological summary of major events influencing the development of the law of seabed mining).

92. See *id.*

93. See *id.*

94. Similarly, the Carter Administration also rejected the Bogota Declaration that averred that parts of the Geostationary Orbit corresponding to the high seas beyond national jurisdiction are the common heritage of mankind. See Bogota Declaration, Dec. 3, 1976, reprinted in, 6 J. SPACE L. 193 (1978). The U.S., like other opponents of the Bogota Declaration, has embraced the view that the Geostationary Orbit is in outer space and is not subject to the common heritage principle. The U.S. delegate to COPUOS argued that at its altitude of approximately 35,000 km, the GSO was “clearly subject” to provisions in the 1967 Outer Space Treaty relating to non-appropriation and free use of outer space on a non-discriminatory basis. See J. Thompson, *Space For Rent: The International Telecommunications Union, Space Law and Orbit/Spectrum Leasing*, 62 J. AIR L. & COM. 279, 295 (1996); see also 21 UN GAOR Committee on the Peaceful Uses of Outer Space Legal SubComm. 2, UN Doc. A/C.105/C.2/SR.377 (1982).

95. 30 U.S.C. sec. 1401 (1982).

governance, including freedom of the high seas and freedom of unilateral mining.<sup>96</sup> However, the DSHMRA also recognized the legitimacy of the CHM principle in seabed governance and placed some limits on unilateral mining.<sup>97</sup> To minimize the potential conflicts that could arise because of unilateral mining, the United States and other deep-sea mining states entered into reciprocal agreements and adopted a system of synchronized claims registration.<sup>98</sup>

Commons negotiations were fraught with controversy and difficult

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96. *See id.* The U.S. Congress (in its findings) stated that "it is the legal opinion of the United States that exploration for and recovery of hard mineral resources of the deep seabed are freedoms of the high seas ..." *Id.* at (a) (12). The Congress also declared that one of the purposes of the Act was "to encourage the successful conclusion of a comprehensive Law of the Sea Treaty, which will give legal definition to the principle that the hard minerals of the seabed are the common heritage of mankind and which will assure, among other things, nondiscriminatory access to such resources for all nations." *Id.* at (b) (1). The Act also encouraged the Secretary of State to "negotiate successfully a comprehensive Law of the Sea Treaty which, among other things, provides assured and nondiscriminatory access to the hard mineral resources of the deep seabed for all nations, [and] gives legal definition to the principle that the resources of the deep seabed are the common heritage of mankind . . ." 30 U.S.C. sec. 1402 (b).

97. Another of the Act's "findings" recognized the U.S. acceptance of the common heritage principle, stating, "on December 17, 1970, the United States supported (by affirmative vote) the United Nations General Assembly Resolution 2749 (XXV) declaring inter alia the principle that the mineral resources of the deep seabed are the common heritage of mankind, with the expectation that this principle would be legally defined under the terms of a comprehensive international Law of the Sea Treaty yet to be agreed upon." *Id.* at (a) (7). While the Act permitted unilateral mining by U.S. citizens it placed several limitations on the activity such as the requirement of mining licenses issued by the appropriate authorities. See 30 U.S.C. sec. 1411 (a).

98. *See e.g.* See 30 U.S.C. sec. 1428 (a): The Administrator of the National Oceanic and Atmospheric Administration (NOAA) was charged with designating certain foreign nations as reciprocating states if they satisfactorily regulated the conduct of their citizens engaged in deep seabed mining and if they recognized U.S. licenses, or permits. See 30 U.S.C. sec. 1428 (a). In addition, states designated as a reciprocating states had to recognize "priorities of right" consistent with the Act [See 30 U.S.C. sec. 1413 (b)] and provide a legal framework for exploration and commercial recovery that did not unreasonably interfere with the interests of others states "in their exercise of the freedoms of the high seas . . ." See 30 U.S.C. sec. 1428 (a) (3-4). The Administrator was prohibited from issuing licenses or permits which would "conflict" with those issued by reciprocating states. See 30 U.S.C. sec. 1428 (b). The Act prohibited U.S. citizens from interfering with the activities of licensees or permittees of reciprocating states. See 30 U.S.C. sec. 1411 (c).



choices during the Carter years. During the seventh session of UNCLOS III (March/May 1978, Geneva and July/August 1978, New York), negotiating groups ("NGs") dealt with many thorny issues related to CHM, including the Authority's decision-making powers, financial assistance and North-South technology transfers.<sup>99</sup> Later, in the eighth session, (March/April 1979, Geneva and July/August 1979, New York), the most controversial deep-sea mining issues dominated the work of three NGs.<sup>100</sup> Then, in the ninth and perhaps the most productive session, the negotiators completed the Draft Convention on the Law of the Sea.<sup>101</sup> Among other things, the Draft Convention recognized that the Area and its resources are the common heritage of mankind, and forbade any state from claiming or exercising sovereignty in the area.<sup>102</sup> The rights in the resources of the Area were vested in mankind as a whole and activities therein were to be carried out for the benefit of mankind, taking into particular consideration the interests and needs of developing States. The Draft Convention also required the seabed Authority to promote and encourage the transfer of technology and scientific knowledge to developing states.<sup>103</sup> However, any technology transfers had to be based on "fair and reasonable commercial terms"<sup>104</sup> and all parties could unilaterally determine what, if any, feasible measures were necessary to accomplish this goal within their respective legal systems.<sup>105</sup> The "compromise" approach also set up a parallel system for exploration and exploitation: activities in the area were to be controlled by the Authority on behalf of mankind and exploitative activities were to be

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99. See POST, *supra* note 51, at 74.

100. See *id.*

101. See *id.* The ninth session took place in New York (Mar./Apr. 1980) and in Geneva (July/Aug. 1980).

102. Subsequently, this became article 136 of the final Convention of 1982. THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA at 115, U.N. Sales No. E.83.V.5 (1983); see also U.N. UNCLOS 3d Conf., art. 136.

103. This eventually became article 144(1)(b) of the 1982 Convention. See THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA at 144 (1) (b).

104. This provision was later adopted in Annex III, article 5. See THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA at 115.

105. See THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA at 115.

carried out by the Enterprise, in association with States parties or enterprises.<sup>106</sup>

The Carter Administration endorsed the Draft Convention of UNCLOS III in 1980, including its strong CHM regime. In fact, the administration's efforts helped to achieve significant consensus on the Draft's 'balanced' compromise formula.<sup>107</sup> The Carter Administration also viewed concessions on the common heritage provisions as "a means to reach international agreement over United States naval access to sea lanes in contested straits and archipelagoes."<sup>108</sup> To preserve the integrity of the Draft Convention, Carter insisted that all states renounce further claims to modify treaty texts.

The Carter Administration was also less hostile to the NIEO agenda. In June 1980, the international community adopted the Geneva Agreement aimed at establishing a Common Fund for the UN Conference on Trade and Development ("UNCTAD").<sup>109</sup> Given the wide-ranging powers of the International Seabed Authority ("ISA"), many analysts viewed the Draft Convention and the final document in 1982 as "a regime in compliance with the demands of the NIEO."<sup>110</sup> But the Carter Administration also rejected what it perceived as the excesses of new norm creation. For example, they opposed the South's efforts (led by Chile) to have the Convention explicitly declare that the provision on the CHM was a rule *jus cogens*, that is, "a peremptory norm of general international law from which no derogation is permitted."<sup>111</sup> Similarly, the Carter Administration also rejected the Bogota Declaration that averred that parts of the Geostationary Orbit corresponding to the high seas beyond national jurisdiction are the common heritage of mankind.<sup>112</sup>

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106. See U.N. UNCLOS 3d Conf., art. 153.

107. See *id.*

108. CHRISTOPHER SIMPSON, NATIONAL SECURITY DIRECTIVES OF THE REAGAN & BUSH ADMINISTRATIONS, THE DECLASSIFIED HISTORY OF U.S. POLITICAL & MILITARY POLICY 1981-1991, 56 (1995).

109. See POST, *supra* note 51, at 74.

110. Willy Ostreng, *The Conflict and Alignment Pattern of Antarctic Politics: Is a New Order Needed?* in THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS 438 (Arnfinn Jorgensen-Dahl and Willy Ostreng eds., 1991).

111. INTERNATIONAL LAW AND DEVELOPMENT 98-99 (Paul de Waart ed., 1988).

112. See *supra* note 94.

Nevertheless, the need for an agreement resulted in a give and take process that created multiple and diffuse issue linkages that affected U.S. support for the CHM. Eventually, the Carter Administration accepted the deep seabed regime—despite some offending characteristics - to achieve agreement on several ocean law issues deemed important to national interests.<sup>113</sup> In spite of the treaty's overall contribution to United States interests, the newly installed Reagan Administration refused to sign and ratify the 1982 Convention.

#### F. THE REAGAN/BUSH ADMINISTRATIONS AND THE CHM IN THE SEABED

The election of Republican Ronald Reagan in 1980 contributed to the rejection of the seabed regime that had been so painstakingly cobbled together by the defeated Carter Administration. Reagan supporters were particularly disenchanted with the implications of the common heritage principle for American national interests. Furthermore, the Reagan Administration was concerned with the precedential value of the Law of the Sea Treaty on the moon and Antarctic regimes. The negotiators of other global resources regimes in progress were looking at the Law of the Sea as a standard for CHM regimes. The opponents of the Moon Treaty also feared that the seabed regime, when finally established, could be seen as a model for the moon negotiations.<sup>114</sup> Reagan was disinclined to support a strong CHM regime for the seabed because of concern about its precedential value at other global resource regime negotiations.

Key personnel appointments of the Reagan Administration made continued support for the CHM less likely. Reagan's new Secretary of State, Alexander Haig, had a long history of opposition to the CHM, particularly its reincarnation in the Moon Treaty. When Haig was president of United Technologies Corporation the company took public positions against the Moon Treaty and its CHM provision.<sup>115</sup>

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113. See *Senate Moon Treaty Hearings*, *supra* note 70, at 141 (statement of Marne A. Dubs, chairman, America Mining Cong. Comm. on Undersea Mineral Reserves). While formal negotiating procedures treated separable interests separately, the overall negotiations were understood to be a 'package deal.' *Id.* at 170.

114. See *id.* at 8 (statement of Roberts B. Owen, legal advisor, Dep't of State).

115. PHILLIP QUIGG, A POLE APART, THE EMERGING ISSUES OF ANTARCTICA 177 (1983) (quoting an advertisement run by United Technologies in the Wash-

Furthermore, in March 1981, the Reagan Administration fired George Aldrich, President Carter's ambassador to the Law of the Sea, along with most senior members of his delegation, less than forty-eight hours before the conference was to resume.<sup>116</sup> Ambassador Aldrich, a staunch advocate of CHM governance, had gone so far as to call for an expansion of the common heritage or the global commons<sup>117</sup> into Antarctica.<sup>118</sup> The anti-CHM bias of Reagan appointees was further evidenced by the re-emergence of Leigh S. Ratiner. The State Department retained Ratiner, a vigorous opponent of the CHM, as a consultant in late 1981. Ratiner was subsequently hired to be the deputy chairman of the U.S. delegation to the March/April 1982 session of the Law of the Sea Conference.<sup>119</sup> These key personnel changes indicated diminishing support for the CHM principle as well as a disinclination for CHM politics and governance. President Reagan's appointments were a reflection of his "skeptical" views about the Third World, particularly the "attempted North-South dialogue on the distribution of the world's resources."<sup>120</sup> As Henry Plotkin observed, Reagan "had an abiding suspicion of such grandiose attempts to redistribute economic goods and seemed to feel that less developed countries would progress more rapidly economically if they were more informed by American capitalism

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ington Post on Feb. 14, 1980).

116. See Bernard Gwertzman, *President Replaces Top U.S. Diplomats at Law of Sea Talks*, N.Y. TIMES, Mar. 9, 1981, at A1.

117. See QUIGG, *supra* note 115, at 177. The United States government treats the term common heritage of mankind as "virtually synonymous" with the commons defined as "those areas beyond the jurisdiction of any state which are available for the use of all . . . . These commons are: first, the oceans, including the bottom of the oceans, that is the seabeds, beyond the limit of national jurisdiction; second, outer space, above the limits of national jurisdiction (wherever that may be); and third, Antarctica, although one must note that some states have still preserved their territorial claims to parts of Antarctica under the Antarctic Treaty regime." *Id.* at 177 (quoting George H. Aldrich, *A Few Thoughts on the Concept of the 'Common Heritage of Mankind*, 1-2 (Sum. 1980) (unpublished manuscript)).

118. See *id.* at 171, 281 (quoting Aldrich's unpublished statement that Antarctica should be considered part of the commons).

119. See *id.* at 176.

120. Henry A. Plotkin, *Issues in the Presidential Campaign*, in GERALD POMPER et al. THE ELECTION OF 1980, REPORTS AND INTERPRETATIONS 60 (1981).

than by socialism or communism.”<sup>121</sup>

The ascendancy of Reagan appointees into the foreign policy apparatus had a negative impact on the development the CHM at UNCLOS III. G-77 delegates were baffled by new American efforts to undo the draft Convention of 1980. Recall that President Carter approved the draft Convention, notwithstanding its strong CHM provisions. Nevertheless, the attempts to reach a compromise between Reagan's position and the South's were of no avail because “the adamant position of the United States delegation precluded a new compromise.”<sup>122</sup> Without the approval of the most powerful state, prospects for a CHM regime were considerably dim.

Ironically, the Conference had been very close to agreement just before Reagan took office in January 1981. Nevertheless, shortly after his inauguration, the newly constituted United States delegation withdrew its consent to the burgeoning agreement<sup>123</sup> and substantially altered the course of United State/CHM policy. Yet, the Reagan Administration's attack on the treaty on national security or economic grounds were less than persuasive.

Prior to the arrival of the Reagan Administration, many United States policy makers had recognized that they had much to gain from the emerging Convention in terms of national security interests. The 200-mile EEZ added considerable wealth to the nation. Under the treaty the United States would have the largest EEZ area—approximately 2,222,000 square nautical miles.<sup>124</sup> Further, the American edge in deep-sea mining technology meant that it could someday avail itself of the strategic minerals therein. In addition, despite the early misunderstanding about the principle of the high seas as it related to the CHM, the Convention did not include any limits on the freedom of the seas in the formulation of the CHM principle. In fact, the 1982 Convention included provisions assuring unrestrained navi-

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121. *Id.*

122. CUYVERS, *supra* note 6, at 152.

123. *See id* (explaining how the new Administration's decision to reevaluate the nation's position with regard to deep-sea mining disrupted the fragile consensus reached earlier).

124. *See* ECKERT, *supra* note 75, at 317 (highlighting the United States many major international and domestic interests, economic and otherwise, in the world's oceans).

gation in the oceans, particularly over the pivotal international straits,<sup>125</sup> regimes of innocent passage in the territorial sea, unimpaired transit in archipelago sea lanes and rights of overflight over the high seas including the EEZs. Article 137 instituted the principle of non-appropriation with respect to the Area. To further the purposes of free and open access for peaceful purposes, Article 141 declared the Area to be open to use by all states. According to the Convention and pertinent rules of international law, all activities in the Area, including military activities, could be conducted freely.<sup>126</sup> Thus, at the conclusion of UNCLOS III in 1982, United States policy makers should have had more reasons to support the convention than to reject it. In addition, American support for the CHM was necessary to secure the South's support for key United States national security objectives such as the freedom of the seas. The Carter Administration had successfully nurtured and secured the South's support of many of United States objectives by demonstrating its willingness to support a package deal that included a generous CHM regime.

The Reagan administration rejected the Carter era achievements in the seabed treaty process and put forth its own negotiating strategy.<sup>127</sup> In National Security Directive ("NSDD") #20, the Reagan Administration "adopted a strategy favored by most U.S. mining interests and the leadership of the United States Navy."<sup>128</sup> The unclassified portions of the NSDD set forth United States objectives which, taken in aggregate, emasculated the burgeoning CHM regime at UNCLOS III. Reagan's NSDD #20 called for a treaty that:

(a) will not deter development of any deep seabed mineral resources to meet national and world demand; (b) will assure national access to those resources by current and future qualified entities to enhance U.S. security of supply, avoid monopolization of the resources by the operating arm of the International Authority and to promote the economic development of the resources; (c) will give the United States a decision-making role in the

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125. See Piper and Terchek, *supra* note 27, at 149.

126. See Letter from Warren Christopher, Secretary of State, to William J. Clinton, President of the United States (Sept. 23, 1994) (on file with author) [hereinafter Christopher Letter] (stating that the Convention preserves the rights of both military and commercial navigation).

127. See CHRISTOPHER SIMPSON, *supra* note 108, at 56. (discussing the transition of the Law of the Sea Policy from the Carter to the Reagan Administrations).

128. *Id.*

deep seabed regime that fairly reflects and effectively protects its political and economic interests and financial contributions; (d) will not allow for amendments to come into force without United States approval. . . (e) will not set other undesirable precedents for international organizations; and (f) will be likely to receive the advice and consent of the Senate. (In this regard, the convention should not contain provisions creating serious political or commercial difficulties, including provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.).<sup>129</sup>

The Reagan Administration made it clear that the fulfillment of these objectives shall be "considered mandatory in the negotiations."<sup>130</sup> This new negotiating strategy was designed to identify "unacceptable" provisions and to "achieve those changes necessary to fulfill all U.S. objectives."<sup>131</sup> The Directive also indicated a desire to negotiate bilateral agreements with other countries to secure "recognition of deep seabed mining licenses."<sup>132</sup>

The Reagan Administration also pushed for rejection of seabed treaty provisions, claiming they did not satisfy national economic interests. Despite the concessions obtained by President Carter, critics of UNCLOS III concluded that in economic terms, the treaty negotiations were a failure for the United States.<sup>133</sup> They argued that the South had acquired too many economic gains at the expense of the North. It was thought that the treaty terms for the structure and distribution of ocean property arrangements would "very likely offer less to the U.S. in economic rents than either the package of military and resource rights which the U.S. had before the Third UNCLOS, or the package that would be implied or made express by the enclosure

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129. *See id.* at 90-91 (setting forth United States objectives in regard to the negotiations at the Law of the Sea Conference).

130. *Id.* at 91 (explaining that the United States negotiating efforts will be based on the guidelines set forth in the interagency review).

131. *Id.* (providing the national negotiating strategy).

132. *Id.* at 56 (noting that the still-classified portions of this directive reportedly contain information pertaining to United States intelligence-gathering and submarine operations in deep seas).

133. *See ECKERT, supra* note 75, at 319 (arguing that the draft treaty terms for the structure and distribution of ocean property arrangements will likely offer less to the United States in economic rents than did either of the United States packages before the Third UNCLOS).

movement . . . .”<sup>134</sup>

Several mining companies, united under the auspices of the American Mining Congress (“AMC”), were active in building Reagan Administration opposition to the CHM.<sup>135</sup> The AMC was very successful in lobbying against the adoption of the proposed seabed treaty—a task made easier because of the new administration’s penchant for laissez-faire approaches. The AMC Committee on Undersea Mineral Resources was displeased with the effect of the CHM principle in the Seabed negotiations at UNCLOS III. In the AMC’s view, the “diverse and radical meaning to be attached to this phrase was largely unappreciated by the developed nations and they unfortunately agreed to its adoption in the Declaration of Principles.”<sup>136</sup>

The AMC believed that the CHM principle, as operationalized in the International Seabed Administration (“ISA”), discriminated against American companies in favor of a potentially inefficient and unaccountable Seabed Authority. According to the AMC, “the multifaceted discrimination in favor of the Enterprise and gross excess of discretion to be reposed in the Authority—free from meaningful recourse against abuse of administration—make it unrealistic to expect future participation by private enterprise under such a regime.”<sup>137</sup> In effect, the CHM will be given meaning by the ISA and that meaning takes concrete form in the establishment of the Enterprise as the mining arm of the Seabed Authority.<sup>138</sup> In the AMC’s view, the CHM, as incorporated into the NIEO, and elaborated in the deep seabed negotiations, is “inconsistent with the fundamental require-

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134. *Id.* at 319.

135. See CHRISTOPHER SIMPSON, *supra* note 108, at 56 (noting that by rejecting the seabed treaty and its common heritage provision, the Reagan Administration “adopted a strategy favored by most mining interests.”)

136. *Senate Moon Treaty Hearings*, *supra* note 70, at 140. In fact, even while adopting the CHM in the resolution, the United States negotiators stated that the meaning of the phrase would be in accordance with the treaty to be negotiated. See *id.*

137. *Id.* at 143 The privileged and tax-exempt statutes that the Enterprise would enjoy vis-à-vis private companies would deter private enterprises from participating in deep seabed mining).

138. *Id.* (explaining how the phrase “Common Heritage of Mankind” will be defined in the Law of the Sea negotiations).



ments of private investment in natural resources development.”<sup>139</sup> The AMC also maintained the CHM symbolized a “system in which complete international control over access to, and the disposition of, important natural resources is exercised so as to effect the transfer of wealth, technology and political control from the industrialized countries to the developing countries.”<sup>140</sup>

Furthermore, the American Mining Congress reasoned that most countries that viewed the CHM as synonymous with ‘common property’ also interpreted the CHM as mandating a moratorium on commercial exploitation.<sup>141</sup> Investors were unwilling to commit large sums of money because of the uncertainty created by the possibility of a *de facto* or *de jure* moratorium.

The precedential value of the commons negotiations was also of great concern to the AMC. The AMC reasoned that formulation of the “political and economic value of the common heritage” at UNCLOS III would tend to affect the development of the Moon Treaty and other global resource regimes.<sup>142</sup> The AMC believed that the UNCLOS III experience was “an international consensus regarding common heritage resources,”<sup>143</sup> and it feared that most nations would “feel legally bound to follow the precedent irrespective

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139. *Id.* at 141 The CHM clearly has an entrenched meaning in the developing world and this meaning has been repeatedly buttressed in their public statements, particularly because it has become a rallying point for the New International Economic Order. Thus while the United States maintained the CHM meant freedom of access, the G-77 and others insisted that the CHM meant ‘common ownership.’ *Id.* at 144.

140. *Id.* at 141 (presenting the definition of CHM for a majority of nations). The United States was prepared to accept the deep sea bed regime even with the offending characteristics in order to obtain agreement on a wide variety of ocean law issues perceived as important to the national interest). *See id.*

141. *Senate Moon Treaty Hearings*, *supra* note 70, at 141 (stating that for those countries where “common heritage” is synonymous with “common property,” common property resources are owned by the entire community and that no country or company can remove such resources without the permission of every member of the community).

142. *See id.* at 142 (reasoning that in future celestial body resource negotiations, Third World nations will probably not undermine the political and economic value of the common heritage doctrine formulated at the Law of the Sea Conference).

143. *See id.* (stating the belief of the AMC in regard to common heritage resources).

of their individual political and economic interests.”<sup>144</sup> Finally, the AMC argued that parallels between the moon treaty and UNCLOS III would deter private investment in extraterrestrial exploitation.<sup>145</sup>

Eventually, the Reagan Administration failed to negotiate an acceptable seabed agreement. While the Administration found the “navigation, overflight and most other provisions” acceptable, it concluded the deep seabed mining provisions did not fulfill the objectives set forth in NSDD # 20.<sup>146</sup> Consequently, the President decided that the United States would refuse to sign the Convention. In NSDD #43, the Reagan Administration stated its intention to reject CHM provisions of the seabed.<sup>147</sup> The United States withdrawal from the agreement almost threatened to derail the entire agreement and it effectively undermined the legal significance of the regime.

The Reagan Administration’s policy on the CHM was a microcosm of its hostility to UN-style multilateralism, the NIEO and to evolving norms of international environmental law.<sup>148</sup> Reagan ap-

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144. *Id.* (recognizing that the law of the sea experience will not be automatically transferable to the context of celestial body resources, but the common heritage principle should be followed).

145. *See id.* at 142 (arguing that few private investors will be prepared to make financial commitments of the magnitude required to develop space resources when they know that the rest of the world contests their legal rights to carry out commercial recovery and utilization operations).

146. *See* SIMPSON, *supra* note 12708, at 151 (presenting the conclusions found in NSDD #43).

147. *See id.* at 151 (stating that NSDD #58 also called for continued “work on longer-term actions as called for by NSDD #43”).

With respect to the deep seabed mining, the United States will substantially increase its international efforts and focus them exclusively on the objectives of having its allies and, as appropriate, other countries, not accept the deep seabed mining regime—and thus not sign or ratify—the Convention and of establishing an alternative arrangement to that regime. *Id.*

In NSDD #83, dated March 10, 1983, the Reagan Administration established a 200-mile EEZ similar to that in the Law of the Sea Convention. *Id.*

148. *See* Barbara J. Bramble and Gareth Porter, *Non-Governmental Organizations and the Making of US International Policy*, in *INTERNATIONAL POLITICS OF THE ENVIRONMENT* 323-24 (Andrew Hurrell and Benedict Kingsbury, eds., 1992) (stating that the Reagan Administration was resolutely anti-multilateralist). For example, international financial institutions were expected to support United States foreign policy objectives or risk being “downgraded in Administration policy priorities.” *See id.* Furthermore, the UN was often ignored or marginalized: the

pointees, such as UN Ambassador Jeanne Kirkpatrick, the doyenne of anti-internationalist orthodoxy, proselytized against various UN institutions. Unlike the Nixon and Carter Administrations, the Reagan Administration was robustly opposed UN style multilateralism.<sup>149</sup> Thus, the Reagan Administration, led by apostles such as Secretary Haig and Ambassador Kirkpatrick were bent on reigning in or undermining the progressive internationalism of the UN system. President Reagan's policy towards the CHM also fell prey to a retrenchment from the progressive international environmental policies initiated in the Nixon era.<sup>150</sup> The collapse of CHM diplomacy was in part, a casualty of the ideological animus of the Reagan Administration towards UN multilateralism and international legal norms.<sup>151</sup>

The Bush Administration did not play a leadership role in developing the CHM in the seabed. Specifically, the Bush Administration made no major initiatives to resolve the deadlock on the UNCLOS III seabed provisions and the moon treaty also remained unsigned. Bush's loyalty to Reaganism, which one commentator dubbed "fawning and slavish at times"<sup>152</sup> arguably remained unblemished throughout his one-term presidency. It may be said in Bush's defense that by the late eighties, the demands for common heritage governance had subsided, partly due to the difficulties encountered in establishing the seabed and moon regimes. Nevertheless, when the opportunity arose again to designate another area (Antarctica) as the common heritage, the Bush Administration did not support the UN's CHM-style proposals for Antarctica.<sup>153</sup>

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Reagan Administration withheld UN dues, reduced the United States' voluntary contributions to the UN, abandoned United Nations Educational, Cultural and Scientific Organization, ("UNESCO") and threatened to withdraw from other UN agencies. *See id.*

149. *See id.*

150. *See id.* at 323 (observing that the Reagan Administration refused to acknowledge the acid rain problem, resisted efforts to limit exports of hazardous chemicals, tried to eliminate US funding for United Nations Environmental Program ("UNEP"), ignored global population explosion and cast the sole dissenting vote against the World Charter for Nature in 1984). *Id.*

151. *See supra* note 148.

152. *See* Ross K. Baker, *The Second Reagan Term*, in *THE ELECTION OF 1984*, 133 (1984).

153. *See generally*, J.M. Spectar, *supra* note 2. When the United Nations General Assembly voted on November 22, 1989 to declare Antarctica a "world park"

G. THE CLINTON/GORE ADMINISTRATION AND THE CHM IN THE  
SEABED

After President William J. Clinton took office in 1993, his Administration reversed Reagan-Bush policies on the seabed and made significant steps in advancing the new international law of the global commons.<sup>154</sup> Most notably, President Clinton rescued the Law of the Sea by supporting revision of the seabed provisions and clarification of the CHM. Clinton noted that his quest for an Agreement on the CHM provisions of the seabed were part of overall U.S. national security strategy.<sup>155</sup>

The United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea. Since the late 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea that will be respected by all countries. Each succeeding U.S. Administration has recognized this as the cornerstone of U.S. ocean policy.<sup>156</sup>

The desire to reach a comprehensive international seabed agreement increasingly was viewed as crucial to United States economic security and well being. Ninety-five percent of American foreign trade is transported on the oceans.<sup>157</sup> More than fifty percent of American citizens live and work within fifty miles of the coastline.<sup>158</sup> The national security apparatus takes considerable interest in sound

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under international management, the U.S. refused to "participate in the vote." See UN Doc. A/C.1/44 L.59. See also, Spectar, *supra* note 2. Eventually, environmentalists pressured the Bush Administration to support a "nature preserve" approach for Antarctic governance. See Spectar, *supra* note 2.

154. See Letter from President William J. Clinton, President of the United States, to the Senate of the United States (Oct. 6, 1994) (on file with author) [hereinafter Clinton Letter] (requesting the advice and consent of the Senate to accession to and ratification of the 1982 Convention and the subsequent Agreement in October, 1994).

155. *Id.*

156. See Clinton Letter, *supra* note 154.

157. See S. REP. NO. 105-209, at 2 (1998) [hereinafter Senate Ocean Report] (stressing the importance of the oceans to the United States' domestic and foreign interests).

158. See *id.* (noting that one out of every six American jobs is marine-related).

oceans policy and management because the "health and wellbeing" of the majority of Americans is intimately linked with the fate of the oceans.<sup>159</sup>

As a result, the Clinton Administration took an active role in new UN negotiations to clarify the seabed provisions of UNCLOS III and to produce a treaty that could be ratified by the U.S. Senate. The new Agreement of 1994 modifies Part XI of the Convention and it "gives specific meaning to the common heritage principle as it applies to the mineral resources of the seabed beyond coastal state jurisdiction."<sup>160</sup> President Clinton maintained the new Agreement protected "the interests of the United States as a global maritime power,"<sup>161</sup> by, *inter alia*, preserving the freedom of navigation. In recommending that the United States sign the Agreement, Secretary of State Warren Christopher stated:

For reasons of national security, the United States has also supported this principle (i.e. the common heritage) to ensure that the deep seabed is not subject to national appropriation, which could lead to confrontation or impede the mobility or operations of U.S. armed forces. Article 137, like the DSHMRA, (the Deep Seabed Hard Minerals Resources Act of 1980) advances these interests by providing that no State shall claim or exercise sovereignty over any part of the Area or its resources or recognize such claims by others. In furtherance of this principle, article 141 declares the Area to be open to use by all States. Only mining activities are subject to regulation by the International Seabed Authority. . . . Other activities on the deep seabed, including military activities, telecommunications and marine scientific research, may be conducted freely.<sup>162</sup>

Finally, in recommending the seabed Agreement to the Senate for

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159. See Bureau of Oceans and International Environmental and Scientific Affairs, FACT SHEET: U.S. OCEANS POLICY AND THE LAW OF THE SEA CONVENTION, 1 (May 28, 1998) <[www.state.gov/www/global/oes/fs oceans\\_lo s.html](http://www.state.gov/www/global/oes/fs oceans_lo s.html)> (recognizing the importance of maintaining the quality of the coastal marine environment, since a majority of Americans live in coastal areas).

160. See Christopher Letter, *supra* note 126 (recommending that the Convention and the Agreement be transmitted to the Senate for its advice and consent to accession and ratification).

161. See Clinton Letter, *supra* note 154, (asserting that the Convention preserves the right of the U.S. military to use the world's oceans to meet national security requirements and of commercial vessels to carry sea-going cargoes).

162. See Christopher Letter, *supra* note 126.

ratification, President Clinton also emphasized that the Agreement protected national security interests.<sup>163</sup> Clinton urged Congress to support both the Agreement and the CHM principle "to ensure that the deep seabed is not subject to national appropriation, which could lead to confrontation or impede the mobility or operations of the United States armed forces."<sup>164</sup> Once again, another electoral outcome—Clinton's election in 1992—had precipitated another *volte face* in the international law of the global commons.

## II. THE PRESIDENTIAL CHANGE FACTOR AND THE DEVELOPMENT OF THE MOON REGIME

The designation of the seabed as the common heritage of mankind led to similar demands for other common spaces, especially the moon. Although the United States supported the CHM at the onset of the moon regime negotiations, changes in presidential leadership affected the level of support for the efforts to develop a regime for the moon. The electoral cycles from Nixon to Reagan, and particularly the presidential change of 1980, precipitated or exacerbated the observed fluctuations in the level of United States support for the emerging international law of the global commons. The following discussion examines how changes in the presidency affected the level of support for the common heritage principle during the moon regime negotiations.

### A. THE NIXON POLICY ON THE MOON REGIME

President Nixon was generally supportive of the negotiations to develop a CHM regime in the moon. From the beginning of the negotiations, the Nixon Administration supported the Argentine Draft Moon Treaty of July 1970, which contained strong CHM provisions.<sup>165</sup> Nevertheless, the Nixon Administration suggested several

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163. See Clinton Letter, *supra* note 154, (stating that national security interest are protected by stabilizing the breadth of the territorial sea at twelve nautical miles and setting forth navigation regimes).

164. Christopher Letter, *supra* note 126.

165. See Egypt and India Working Paper 20, U.N. Doc. A/AC. 105/C.2 (X1) (1972) (echoing the Argentine Proposal) The Egyptian and Indian proposal provided:

The moon and other celestial bodies and their natural resources shall be the common heritage of mankind. (2) The exploration and use of the moon and

pro-investment amendments to the Argentine proposal. In 1972 and 1973, the Nixon Administration put forth its own Working Papers which expressed strong support for the CHM, while rejecting the South's claim that support for the CHM in the Moon required a pre-treaty moratorium.<sup>166</sup>

Due to the prevailing Cold War, the Nixon Administration had a security interest in ensuring that it obtained at least as good an agreement as the Soviets. It was important that the United States, and not the Soviets, be seen as playing a leading role in the Moon Treaty negotiations. It was also important to the Nixon Administration that the United States not be viewed as caving in to the Soviets in order to bring about a consensus.<sup>167</sup> The Nixon Administration believed that if the United States did not ratify a treaty that contained language designating a future 'international regime' to govern exploitation, it would be greatly prejudiced if the Soviet Union led a substantial majority of states in ratifying the agreement.<sup>168</sup> In particular, there

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other celestial bodies shall be carried out in the interest of mankind as a whole and the benefits arising therefrom shall be made available to all peoples without discrimination of any kind. (3) In the distribution of such benefits account shall be taken of the need to promote the attainment of higher standards of living and conditions of economic and social progress and development, pursuant to article 55 (a) of the Charter of the United Nations, in the interests and requirements of the developing nations.

*Id.*; see also Scott F. Cooper, Note, *The 1979 Agreement Governing the Activities on the Moon and Other Celestial Bodies: Does it Create a Moratorium on the Commercial Exploitation of the Moon's Natural Resources?* 5 J. L. & TECH. 63, 73 (1990) (stating the United States acknowledged that the moon's natural resources should be considered as the common heritage of all mankind).

166. See Carl Q. Christol, *The Common Heritage of Mankind Provision in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 14 INT'L LAW 429, 457, 468-469 (1980).

167. See *Senate Moon Treaty Hearings*, *supra* note 70, at 62 (statement of S.N. Hosenball) (asserting that the Soviet Union, not the United States, conceded issues in order to bring about consensus).

168. See *id.* at 97 (statement of L. Friedman, Member of the Public Policy Comm., American Institute of Aeronautics and Astronautics) (expressing the view that if the United States decides not to ratify such a treaty it will forfeit the right to have a say in the nature of the regime in the future). Two examples of situations in which the United States has experienced such consequences follow: On the positive side, the United States was an early signatory of the International Telecommunications Satellite Organization ("INTELSAT"), and because of its relative technological advantage, the United States preserved a "significant and economically

was concern that if the USSR and its "captive nations" signed the moon treaty before the United States, it would appear to be the protector and benefactor of the regime it developed.<sup>169</sup>

Furthermore, from the beginning of the negotiations, the Nixon Administration had an interest in assuring United States access to extraterrestrial strategic minerals, given their importance to future national security.<sup>170</sup> NASA studies revealed that "appreciable amounts" of strategic resources such as silicon, aluminum, titanium, iron ore and magnesium are found on the moon and other celestial bodies.<sup>171</sup> In 1979, the United States was a net importer of several materials utilized in the production of defense hardware.<sup>172</sup> While these materials probably could not be returned economically to earth, the NASA study suggested these resources would be used in space.<sup>173</sup> Although the United States had no plans in place to develop such extraterrestrial facilities, it had to preserve its options. For example, the NASA study suggested that the United States might have to erect large structures in outer space such as the proposed solar power satellite.<sup>174</sup> Concerned that environmental impacts and exorbitant freight

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beneficial role in the resulting international regime." *See id.* On the other hand, the United States' abdication of a leading role in the International Atomic Energy Agency ("IAEA"), dealing with the matter of reprocessing spent nuclear fuel, has cost the United States the loss of any significant voice in the international safety regulations governing this process and much of the early technological lead in the field. *See id.*

169. *See id.* at 115 (statement of Sen. Schmidt) (expressing concerns about possible complications if the USSR signed the moon treaty before the United States). In response, Ambassador Ratiner conceded that there was some reason to be concerned over the issue and suggested that the United States offer to negotiate some kind of protocol defining the CHM in a manner more favorable to it. *See id.*

170. *See id.* at 145 (statement of Franklin D. Kramer, Principal Deputy Assistant, Assistant Secretary of Defense for International Security Affairs) (pointing out that several minerals that are found on the moon are used extensively in the manufacture of current defense hardware).

171. *See id.*

172. *See Senate Moon Treaty Hearings, supra* note 70. (statement of Franklin D. Kramer) (explaining that in 1979 the United States imported 100 percent of the exported titanium, 98 percent of the magnesium, 28 percent of iron ore, and 8 percent of aluminum. *See id.*

173. *See id.* (explaining that these materials will be used in space because extraterrestrial resources are not a competitive economic resource for earth).

174. *See id.*



costs might preclude the transportation of terrestrial materials to outer space, the United States wanted the treaty to assure the use of 'in place' extraterrestrial materials.<sup>175</sup> Thus, the Nixon Administration was generally interested "from a national security point of view" in ensuring that the provisions of the treaty relative to exploitation of these critical extraterrestrial resources were satisfactory.<sup>176</sup>

The United States also had a strong national interest in lunar exploitation when such activity became economically feasible. Unlike the Soviets, who were perturbed by what they perceived to be the private property and free enterprise connotations of the common heritage approach, the United States was intent on securing the right to free and open commercial access to lunar resources in the Moon Treaty.<sup>177</sup> The United States saw the treaty as a way of advancing such vital interests as lunar exploitation for commercial purposes and scientific investigation.<sup>178</sup> The latter objective included an interest in the right to bring lunar samples back to earth, as well as an interest in sustaining missions to celestial bodies.<sup>179</sup>

As the negotiations began, the Nixon Administration also sought to augment the Outer Space Treaty ("OST") with a new treaty that would cover all celestial bodies, mandate notification of intended activities on celestial bodies, and, provide for dissemination of pertinent information.<sup>180</sup> In addition, it was believed the Moon Treaty would lay the basis for a reasonable approach to the use of non-terrestrial natural resources.<sup>181</sup>

Initially, the United States supported some form of regulation of the commons as a means of maximizing efficient exploitation<sup>182</sup> and

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175. *See id.* at 146.

176. *See Senate Moon Treaty Hearings*, *supra* note 70, at 146 (stating that the DOD was commenting on establishing an international regime to govern the exploitation of extraterrestrial resources).

177. Christol, *supra* note 166, at 456-459.

178. *See id.* at 12.

179. *See id.*

180. *See id.* at 11.

181. *See id.* (indicating that proponents of this position maintained that the non-appropriation provisions of Article VI of the OST did not apply to the moon).

182. *Cf.*, Arthur W. Blaser, Note, *The Common Heritage in its Infinite Variety*:

diminishing the possibility of chaotic rivalries.<sup>183</sup> Hence, the United States took a proactive stance towards the common heritage on the moon negotiations as it had at UNCLOS III. In fact, under President Nixon's leadership, the United States was one of the first states to recommend that the moon be designated as the CHM in the course of active negotiations.<sup>184</sup> Thus, unlike the Soviets who resisted the CHM for much of the 1970s, the United States welcomed the notion that resources of the moon and other celestial bodies were the CHM.<sup>185</sup>

The negotiations to establish the moon as part of the CHM continued for several years as states wrestled over the scope, content and import of the CHM. The Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space ("COPUOS") ultimately drafted the agreement.<sup>186</sup> The United States policy towards the moon treaty was supposedly a continuation of the policy that led to the Outer Space Treaty ("OST"). The key United States goal was to increase the benefits accruing to it by allowing "law and common sense to precede power and competition into outer space."<sup>187</sup> But unlike its precursor, the OST,<sup>188</sup> the proposed Moon Agreement proved to be more controversial because of its explicit articulation of the common heritage of mankind principle.

The CHM language of Article 11 was the most contentious aspect of the negotiations and it contains the main provisions of the moon agreement.<sup>189</sup> Although the United States was an early proponent of the CHM principle in the moon regime, the United States became increas-

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*Space Law and the Moon in the 1990s*, 5 J. L. & TECH. 79, 91, n.74 (1990) (citing Amb. Richardson's comments in a letter to the Washington Post on March 24, 1980).

183. See *id.* (declaring that the creation of an international regime was intended to oversee exploration, exploitation and to insure peace and prevent international conflict and chaos).

184. *Senate Moon Treaty Hearings*, *supra* note 70, at 12.

185. See *id.*

186. See Carl Q. Christol, *supra* note 166 at 432 (explaining that the organization saw the need for economic advancement and the encouragement of investment and efficient development in order to assure that the resources of the moon and other celestial bodies would become a reality).

187. See *Senate Moon Treaty Hearings*, *supra* note 70, at 17.

188. OUTER SPACE TREATY, *supra* note 8.

189. See Christol, *supra* note 166, at 466.

ingly concerned about the widening implications of the principle. In addition, the Soviets opposed the CMH principle during most of the negotiations.<sup>190</sup> The differences between the United States, the South, and the Soviets over the CHM made it more difficult to reach a consensus on Article 11.<sup>191</sup>

For the most part, the United States supported the position that the natural resources of the moon and other celestial bodies should be governed by the CHM principle.<sup>192</sup> In formulating its position on the CHM in the Moon Treaty, the United States drew upon President Nixon's 1970 statement on the seabed and two draft proposals put forth by Brazil and Argentina.<sup>193</sup> The groundbreaking Argentine proposal that formally began the CHM debate over the Moon Treaty was presented to COPUOS on July 3, 1970.<sup>194</sup> At first, Article 1 of the original Argentine proposal included only the natural resources of the moon and other celestial bodies as the CHM. But this was later revised and enlarged on March 30, 1973 to include the moon and other celestial bodies as well as their natural resources as part of the common heritage of mankind.<sup>195</sup>

The Nixon Administration led the way in introducing detailed CHM provisions after the initial Argentine draft.<sup>196</sup> While the first United

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190. *See id.* (stating that the Soviet Union accepted the article after initial non-support).

191. The Moon Treaty negotiations dragged on interminably. As the COPOUS grew in membership from 37 to 54, the 'older' members, including the United States, were troubled by the fact that the new member states were challenging the legitimacy or "viability" of the consensus procedure used for decision-making. *See Senate Moon Treaty Hearings, supra* note 70, at 63.

192. *See* Christol, *supra* note 166, at 468-69 (citing S.N. Hosenball's statements to the House of Representatives Subcomm. on Space Science and Application, on September 6, 1979). Hosenball was the head of the United States delegation to COPUOS in 1979. *See id.* at 467.

193. *See id.* at 432-33.

194. *See id.*

195. *See id.* at 455 (citing U.N. Doc. A/AC. 105/101, (1972) and U.N. Doc. A/AC.105/196 (1977)).

196. *See* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L. L. 418, 422-23 (1980) (explaining how the Moon Treaty could be an advantage or disadvantage to United States interests). The United States also presented a total of sixteen Moon Treaty proposals to COPUOS—more than all other states combined. *See* Blaser, *supra* note 182, at 91, n.

States working paper of April 13, 1972 accepted the Argentinean CHM proposal in its original form,<sup>197</sup> the working paper of April 17, 1972 alluded to a need to encourage investment and efficient development of the moon.<sup>198</sup> The Nixon Administration also proposed a conference to arrange for an international sharing of benefits at a time when practical use of the resource was either imminent or feasible.<sup>199</sup> "This proposal was subsequently incorporated in article 11, paragraph 5, and article 18 of the Moon Treaty."<sup>200</sup>

Despite early American support, the moon treaty negotiations soon developed the same North-South polarization as the Law of the Sea process, thus placing severe strains on President Nixon's relations with the Third World nations in the UN.<sup>201</sup> The South wanted a moratorium on commercial exploitation of the moon's bounty while treaty negotiations were in progress and before a CHM regime was in place. In the wake of the success of the UNGA's "moratorium resolution" on the deep seabed, the developing countries began seeking a pre-regime moratorium resolution on outer space activities.<sup>202</sup> The South wanted to prevent any exploitation until an agreement was reached on how to redistribute the benefits of exploitative activity.<sup>203</sup> In 1973, India submitted a proposal which stated that "exploitation of the resources of the moon and other celestial bodies and their subsoil shall not be done except in accordance with the international regime to be established."<sup>204</sup>

American support for the common heritage grew increasingly cautious. The United States was not in favor of an expansive regime

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197. See Christol, *supra* note 166, at 457 (citing UN Doc. A/AC.105/C.2 (XI)/Working paper 12, UN Doc. A/AC. 105/196, Annex 1, 23 (April, 1977)).

198. See *id.*

199. See *id.* at 457 (stating that the United States proposed a future conference to negotiate an "arrangement for the international sharing of the benefits and utilization of resources of the Moon and celestial bodies").

200. *Id.*

201. See *Senate Moon Treaty Hearings*, *supra* note 70, at 170 (calling for the need to have a treaty to improve North-South relationships).

202. See Christol, *supra* note 166, at 467.

203. See *id.* at 462.

204. See Cooper, *supra* note 165, at 76 n.71 (citing Indian Working Paper-U.N. Doc. A/AC.105/196, art. X).

that would have the effect of undermining private investment. While support for a moderate CHM gained support among the United States negotiators, they were adamantly opposed to the pre-treaty moratorium on exploration the South demanded.<sup>205</sup> The United States informed COPUOS it was unprepared for either an express or an implied pre-regime moratorium and considered such a moratorium unreasonable.<sup>206</sup> The American delegation made it known that the net effect of such a moratorium would be "to destroy any incentive for the development of the [needed] technology, either for use experimentally or for its mass production."<sup>207</sup> Although the United States expressed support for a limited international regime to oversee the allocation of some the future benefits, it also made it clear that this was not a condition precedent for exploitative activities.<sup>208</sup> As Carl Christol, an expert on the moon treaty observed, the treaty, despite assertions to the contrary, does not legitimize a moratorium on lunar exploitation.<sup>209</sup> Christol argues the treaty allows signatories to the agreement to carry out commercial exploitation in much the same manner as American fishermen are allowed to harvest fish in the ocean.<sup>210</sup> Finally, the United States also rejected the mandatory provisions with regard to the sharing of technology or benefits.

The perceived connection between the emerging moon agreement and a Soviet draft proposal, as well as the atmosphere of mutual suspicion engendered by the Cold War also made it less likely that the United States would support the moon regime. Less than a year after the seminal Argentine moon treaty proposal, the Soviet Minister of Foreign Affairs, Andrei Gromyko, requested that the UNGA consider the "Preparation of an International Treaty Concerning the

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205. See Christol, *supra* note 166, at 470.

206. See *id.* at 462; see also S. Neil Hosenball, *Current Issues of Space Law Before the United Nations*, 2 J. SPACE L. 5, 9-10 (1974) (explaining the draft treaty on the moon and space objects).

207. Christol, *supra* note 166, at 462; see also Hosenball, *supra* note 184.

208. See Christol, *supra* note 166, at 463.

209. See *Senate Moon Treaty Hearings*, *supra* note 70, at 185.

210. See *id.* George Aldrich, United States Ambassador to the Law of the Sea, has rejected the view that "implication of a legal moratorium is in fact inherent in the concept of common heritage or in the underlying problem of the use of these common areas of the world." *Id.* at 222-23. Aldrich includes Antarctica in the list of areas designated as the global commons. *Id.* at 222.

Moon.”<sup>211</sup> Subsequently, the Soviet proposal of June 4, 1971 opposed any treaty provisions concerning use and exploitation of the moon’s resources and did not include a CHM provision.<sup>212</sup> Yet, while the United States was not enthusiastic about the Soviet initiative, “a review of the Soviet text suggested to the United States that the Soviet initiative might be converted into one which would positively carry forward United States interests.”<sup>213</sup> In particular, the United States was interested in the arms control features of the Soviet proposal. In addition, it was encouraged by the Soviet suggestion that the moon should be used exclusively for ‘peaceful purposes.’ Nevertheless, due to the fear and mistrust created by the Cold War, the United States shied away from Soviet proposals, constructive or otherwise, thus further imperiling the nascent moon regime.

The ideological and geopolitical conflict between the United States and the Soviet Union percolated into North-South conflict over the CHM. In the years leading to the conclusion of the treaty, American support for the common heritage aligned it with the South on an important issue. The Soviets, who opposed the CHM in the moon treaty negotiations, were effectively isolated.<sup>214</sup> This anomalous situation cast into doubt the view, widely held in some American circles, that the CHM was a socialist plot.<sup>215</sup> On the contrary, Marxists were just as suspicious of the concept and its ties to ‘bourgeois’ conceptions of property law.<sup>216</sup>

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211. *See Senate Moon Treaty Hearings, supra* note 70, at 11.

212. *See id.*

213. *Id.* (stating that the Soviet draft gave little attention to the issue of exploiting natural resources).

214. *See id.* at 13.

215. *See* Blaser, *supra* note 182, at 91.

216. *See* Christol, *supra* note 166, at 458-459 (noting that as late as 1977, Soviet commentators offered “fierce resistance” to the CHM principle). The Soviets argued that the concept of “heritage” was merely a philosophical expression and could not be found in the substance of civil law. *Id.* at 458. Meanwhile, it was argued that only the elements of civil law accepted by the U.S.S.R. could become part of international public law. *Id.* at 458. The CHM principle was “unacceptable” because “it had its source in the civil law concepts of inheritance and succession.” *Id.* According to Soviet jurists, the CHM approach “uses civil law categories in an arbitrary eclectic fashion without any regard for established legal realities and brings to mind undesirable associations like the *res omnium communis* ‘notion’ which had been ‘transferred’ from the Roman private law into the field of interna-

During most of the negotiations, the Soviet position towards the CHM was riddled with contradictions. The Soviet's proposed "Treaty Concerning the Moon" submitted on May 21, 1971 made no reference to the CHM concept.<sup>217</sup> While the Soviet proposal did not mention the CHM, it did not reject the existing prohibition (in the OST) against public sovereignty in the space environment.<sup>218</sup> The Soviets accepted the widely held view that the space environment was *res communis*, while at the same time they sought to prevent the establishment of property rights and ownership on the surface and subsoil of the moon.<sup>219</sup> Ironically, the Soviets also opposed the institution of a pre-regime moratorium. Article 8 of their proposal averred that no state or other entity may claim the surface or subsoil of the Moon as their property. "The emplacement of vehicles or equipment on the surface of the Moon or in the subsoil thereof, including the construction of installations integrally connected with the surface or subsoil of the Moon, shall not create a right of ownership over portions of the surface or subsoil of the Moon."<sup>220</sup>

According to G. Zhukov, the Soviet proposal elaborated on the OST—particularly by prohibiting military uses of the moon, encouraging scientific exploration, and promoting the interests of mankind.<sup>221</sup> Eventually, the Soviets supported an emasculated version of the CHM principle.

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tional relations." *Id.* at 459. Since it was "erroneous" to extend civil law concepts bearing on the meaning of CHM to international relations, it was therefore "ungrounded" to refer to the CHM as a principle of international law. *Id.*

217. See Christol, *supra* note 166, at 456 (citing UN Doc. A/8391 (June 4, 1971)).

218. See *id.*

219. See *id.* (noting this paradox demonstrates that the Soviets accepted the common heritage of mankind provision); see also REQUEST FOR THE INCLUSION OF AN ITEM IN THE PROVISIONAL AGENDA OF THE TWENTY-SIXTH SESSION: PREPARATION OF A TREATY CONCERNING THE MOON, U.N. Doc. A/8391 (1971) [hereinafter PREPARATION OF MOON TREATY] (confirming the Soviet Union's stance on non-existent property rights).

220. See *id.* (arguing that a lack of ownership right results in a lack of legitimate property transfers); see also PREPARATION OF MOON TREATY, *supra* note 219 (asserting that the Soviets' cooperative stance is that the moon should not be a source of international conflict, therefore, general international law rules should govern).

221. See Christol, *supra* note 166, at 456 (arguing that exploration and use of the moon's resources does not constitute a right of ownership).

## B. THE FORD ADMINISTRATION AND THE MOON REGIME

While the United States played a key role in the early years of the moon regime, it abdicated its leadership position on the moon treaty during the Ford Administration. In particular, the United States did not make any groundbreaking proposals. Meanwhile, the Soviet Union took advantage of the leadership vacuum and began to assert itself at COPUOS.

Although the Ford Administration continued to express support for the CHM, this support for the norm began to weaken through resisting the South's efforts to expand the scope of CHM obligations. The Ford era marked an increasing frustration with the feeding frenzy of escalating aspirations embodied in the UN's common heritage politics. The South's expansive interpretation of the common heritage principle often came into conflict with the more restrictive conception put forth by the United States. The ensuing conflicts were a source of constant irritation for administrations during much of the 1970s and 1980s.

President Ford revealed his exasperation with the South's common heritage politics when he pledged to resist the South's attempts to "exploit the machinery of the United Nations for narrow political interests."<sup>222</sup> Luminous plenipotentiaries such as Henry Kissinger, John Scali and Daniel Patrick Moynihan echoed the President's displeasure.<sup>223</sup> In December 1974, John Scali, the United States representative to the UN chastised the UNGA for its penchant to "adopt one-sided, unrealistic resolutions that cannot be implemented."<sup>224</sup> Ambassador Scali also warned UNGA delegates that such actions effectively violated the rules of the Charter.<sup>225</sup>

The Assembly can seek to represent the views of the numerical majority of the day, or it can try to act as a spokesman of a more global opinion. . . Each time this Assembly makes a decision which a significant minority of members regard as unfair or one-sided, it further erodes vital support for the United Nations among that minority. But the minority which is so offended may in fact be a practical minority, in terms of its capacity to sup-

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222. GEORGE P. SMITH, *supra* note 10, at 70.

223. *See id.*

224. *Id.*

225. *See id.*



port this Organization and implement its decisions. Unenforceable, one-sided resolutions destroy the authority of the United Nations . . . they encourage disrespect for the Charter.<sup>226</sup>

Scali reminded the UN delegates that American financial support and goodwill are necessary for the UN's viability. The United States' "great investment" in the UN was imperiled by the South's abuse of the UN's rule making process.<sup>227</sup> Americans would be unwilling to support an organization wherein "the rule of the majority becomes the tyranny of the majority."<sup>228</sup> Scali further warned the UNGA "every majority must recognize that its authority does not extend beyond the point where the minority becomes so outraged that it is no longer willing to maintain the covenant which binds them."<sup>229</sup>

President Ford's replacement for Ambassador Scali, Daniel Patrick Moynihan, also took a tough stance towards the UN. Early in 1975, Moynihan proclaimed that it was time for the United States to start "raising hell" in the UN.<sup>230</sup> Not to be outdone, Secretary Kissinger, a former UN Ambassador expressed the fear that the UN might not survive if feckless Third World pressures continued.<sup>231</sup> The Ford Administration's disenchantment with the NIEO agenda of the UN's Third World majority further lessened the likelihood of U.S. support for the common heritage.

### C. THE CARTER ADMINISTRATION AND THE MOON REGIME

Although the Carter Administration played a "leading role" in drafting the Moon Treaty, neither the Senate nor the President carried forth the agreement.<sup>232</sup> Throughout much of the negotiating period, the Administration supported the emerging agreement, includ-

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226. G. SMITH, *supra* note 10, at 70 (quoting John Scali's address to the Plenary Session of the United Nations General Assembly December 1974).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 71. *See also*, Beeston, *UN is at Risk Says Kissinger*, DAILY TELEGRAPH 14, July 16, 1975, at col. 4.

232. *See* QUIGG, *supra* note 115, at 175 (noting that UN General Assembly adopted the treaty without a dissenting vote).

ing the CHM provision. Increasing political rhetoric against the Moon Treaty during the election year probably caused the Carter Administration to limit its support for the emerging Agreement. Due to the shifting political winds at the dawn of the Reagan era, President Carter could not muster sufficient support for the Moon Treaty.<sup>233</sup> Carter neither signed the Agreement, nor sent it to the Senate for ratification.

President Carter's administration had supported the final stages of the Moon Treaty negotiations, including the controversial common heritage provisions. As Article 11 (1) of the Moon Agreement states: "the moon and its natural resources are the common heritage of mankind."<sup>234</sup> As a result, the moon was not subject to national appropriation by any claim of sovereignty; neither the moon nor its resources could become the property of any state; and all state parties have an equal right to explore the moon. The parties to the agreement also agreed to establish an "international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon."<sup>235</sup> The exploration and use of the moon shall be

the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Due regard shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations."<sup>236</sup>

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233. *Senate Moon Treaty Hearings*, *supra* note 770, at 171 (statement of Richard Darman, John F. Kennedy School of Government, Harvard University) (noting that the country was experiencing a resurgence of conservatism.) Apparently even Mr. Carter appeared to be veering rightward in the election year: "The Jimmy Carter of 1980 was not the Jimmy Carter of 1976. He had become more hawkish on foreign policy and more deeply suspicious of Soviet intentions." *See* POMPER, *supra* note 120, at 57.

234. Agreement Governing the Activities of States on the Moon and other Celestial Bodies, December, 1979, (entered into force, 11 July, 1984). G.A. Res. 34/68, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46, at 77, U.N. Doc. A/Res/34/68 (1979), 18 I.L.M. 1434 (1979), *reprinted in*, LAKSHMAN GURUSWAMY, SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER, 399, 402 (1994) [hereinafter *THE MOON TREATY*].

235. *See* *THE MOON TREATY*, *supra* note 234, at article 11 (5).

236. *See id.* at article 4.

The moon is to be used exclusively for peaceful purposes<sup>237</sup> and exploration and use of the moon should be carried out "in accordance with international law."<sup>238</sup> The CHM provisions of the moon agreement proved to be quite divisive, with some critics claiming that the treaty represented a sell-out of United States interests to the Soviets and the NIEO radicals.

The Carter Administration's refusal to sign the moon treaty was, in part, a reaction to intense bipartisan pressure from the Senate during an election year. The lobbying against the CHM provision of the Moon Treaty was so effective that both the majority and minority leaders of the Senate Foreign Relations Committee "cast aspersions" on President Carter's Moon Treaty policy.<sup>239</sup> Senators Church and Javits wrote:

We remain skeptical of further efforts to extend the concept of the common heritage when the understanding of this principle on the part of many countries of the world is so contrary to our own interests. In this regard, suggestions by some participants in the [Law of the Sea] negotiations that Antarctica also be declared the common heritage of mankind are indications of the general trend we are confronting in international forums.<sup>240</sup>

During Senate hearings on the Treaty, senators were concerned that the final draft of the treaty was effectively a rubber stamp of a Soviet text. Many senators feared that the United States delegation to COPUOS had "surrendered to a negotiating attack by the USSR and certain Less Developed Countries, with the result that the final treaty represent[ed] essentially a Soviet-inspired text."<sup>241</sup> While Ambassador Hosenball stated that the final draft reflected the work of several delegations, he nevertheless conceded that the Soviet text, as im-

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237. *See id.* at article 3.

238. *See id.* at article 11 (4); *See also* PREPARATION OF MOON TREATY, *supra* note 219 (indicating that the moon should be governed by the rules of the general international regime and any additional treaties or agreements).

239. *See* QUIGG, *supra* note 115, at 175 (demonstrating the Senate's opposition to the Moon Treaty).

240. *See id.* at 176 (emphasizing further the Senate's hostility to the Moon Treaty).

241. *See Senate Moon Treaty Hearings, supra* note 70, at 11 (statement of Roberts B. Owen, Legal Adviser, Department of State).

proved, had also been incorporated into the final agreement.<sup>242</sup> Still, American representatives to COPUOS sought to assure the Senators that the United States “did not have to give in on any issue to bring about the consensus”<sup>243</sup> in July 1979. Furthermore, Ambassador Hosenball countered that it was the Soviets who had had to make concessions to join in on the consensus. The Soviet Union, he said, had to give in on: “(1) the scope of the treaty to include celestial bodies other than the moon, (2) the provision of information as stated in Article V, paragraph 1, and Article VII, paragraph 2, and (3) agreeing to include a formulation of the common heritage principle.”<sup>244</sup> To allay the senators’ concerns about the Soviet contribution, Hosenball indicated that the fundamental consensus on the agreement was reached in the early years<sup>245</sup> while the United States was exercising a strong leadership role.

The State Department also rejected criticism that the treaty was a giveaway to the Soviets. Specifically, the DOS pointed to key United States victories in the moon treaty negotiations process. The Secretary of State Cyrus Vance noted that the treaty “contains no moratorium on exploitation and, in fact, has provisions designed to facilitate and encourage such exploitation.”<sup>246</sup> Further, Article XI (3) of the

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242. *See id.* at 51 (indicating that the final agreement was a negotiated text). COPOUS adopted an unusual procedure for this treaty. Some of the draft articles required interpretation but instead of amending the text, Committee understandings were included in the Committee’s report. These understandings were officially accepted by the UNGA by reference when adopting the treaty text. This unusual process occurred because although consensus had been achieved on the treaty text prepared by Austria, it was uncertain whether an amended treaty would achieve the same consensus. The UNGA accepted the COPOUS draft treaty text without voting on December 5, 1979. *Id.* at 174 (Statement of E. Galloway).

243. *See id.* at 62 (statement of S. Neil Hosenball in response to questions from Senator Stevenson) (confirming that although the United States did not play a leadership role in bringing about a consensus, nevertheless, they played a leadership role in the treaty preparation process).

244. *Id.* at 63 (acknowledging that the Soviet Union was the last to sign the moon treaty).

245. *See id.* (affirming that in 1974 the committee membership increased from 37 to 47) This increase demonstrated a growing effort to drive the committee to reach a conclusion on the moon treaty particularly because it was the closest to consensus and it appeared that the differing issues could be resolved.

246. *See Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, before the U.S. Senate Committee on Commerce, Science, and*

Moon Treaty made it clear that the OST's non-appropriation principle applied to the natural resources of celestial bodies only when such resources are "in place."<sup>247</sup> In addition, the DOD and the DOS had ensured that the Moon Treaty did not contain mandatory technology transfer provisions that could harm national security. As a result, the Secretary of State argued the treaty satisfied United States objectives and that the Soviets had not gotten the better of the

The belief that the Treaty would benefit the Soviet Union to the disadvantage of the United States was also rejected. While the Soviet Union first proposed a Moon Treaty, their draft text contained no detailed provisions concerning exploitation. It was rather, characterized by the Soviets as a 'navigation treaty'. It was the United States, which in 1972 first proposed detailed provisions concerning exploitation and the common heritage concept. Until July of 1979, the Soviet Union maintained strong opposition to the common heritage concept, and it was essentially because of this opposition that the Treaty was not concluded several years ago.<sup>248</sup> Despite these protestations, the accusations that the treaty was a giveaway to the Soviets continued to haunt the treaty as opponents of President Carter questioned his international policy.

The L-5 society<sup>249</sup> and the Space Futures Society ("SFS") mounted a concerted attack against Carter Administration policy on the moon

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*Transportation*, 96th Cong. 313 (1980) [hereinafter *OTA Moon Agreement Study*] (letter of the Secretary of State to Senator Church) (noting that while the Soviet Union first proposed a moon treaty, their draft contained no details while the United States proposed detailed provisions concerning the exploitation of the moon).

247. *Id.* "Thus, Article 11(3) would permit ownership to be exercised by States or private entities over those natural resources which have been removed from their 'place' on or below the surface of the moon or other celestial bodies." The Secretary of State added that such removal is also permitted by the OST that states that "outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States . . . ." *Id.* at 313.

248. *See id.* (arguing that the treaty would not benefit the Soviet Union).

249. The "L" in the L-5 society stands for "libration," a point at which the gravitational pulls of earth, moon and sun are equalized. *See* QUIGG, *supra* note 115, at 176. L-5 is the fifth libration point, wherein the group intended to position a space platform to produce various goods out of sunlight and moon dust. *Id.* The group consisted of about four thousand members, including industrialists, scientist and idealists. *Id.*

regime, even resorting to incendiary redbaiting as part of their strategy.<sup>250</sup> Against the backdrop of the 1980 presidential elections, these attacks further exposed the putative weaknesses in the President's policy on the global commons and probably contributed to his reluctance to sign an agreement he had helped negotiate. These groups argued the treaty operated against United States vital interests and furthered the interests of the Soviet Union.<sup>251</sup> In particular, the SFS contended that the treaty advanced the Soviet strategic goal of separating the United States from its energy and industrial lifeline.<sup>252</sup> Since Americans appeared poised to reap significant rewards, particularly energy savings, from space industrialization, the USSR needed the Moon Treaty to forestall American private investment in space industrial development.<sup>253</sup> According to this view, by thwarting United States development in space, the treaty afforded the Soviets time to catch up.<sup>254</sup>

The SFS charged that the Carter Administration was "almost totally ignorant of the value of space, its potential development for an industrial base or its economic benefits."<sup>255</sup> In addition, the group claimed that its investigation revealed that the National Security Council, ("NSC") NASA, the DOD and the State Department had

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250. See QUIGG, *supra* note 115, at 176. (noting that the space Futures Society is a non-profit charter segment of the L-5 dedicated to the industrialization and humanization of space). *Id.* Both the SFS and the L-5 have a strong libertarian bent. *Id.*

251. See *Senate Moon Treaty Hearings*, *supra* note 70 at 233. (Statement of Space Futures Society) (asserting that the treaty goal to facilitate the transfer of wealth from the industrialized countries to the developing countries is a detriment to the U.S.).

252. See *id.* at 233 (letter from Alexander Haig to Robert B. Owen, Legal Advisor) (noting that many critics argued that the treaty failed to provide assured access to raw materials, thereby resulting in the probability of a regime subject to the hands of the Third World).

253. See *id.* (identifying the SFS belief that the Moon Treaty affects more than what goes on in space, including the political and economic development of countries).

254. See *id.* (relaying the SFS belief that the Moon Treaty offers the Soviets means of protecting investments while at the same time developing their technology so as to compete in a global market).

255. See *id.* at 234 (asserting that the product of the negotiations to this treaty is a product of lower level negotiations whereby the Americans lack the understanding of protecting their interest in space).

not established a coherent position on the treaty.<sup>256</sup> As a result, the SFS contended that the Soviets took advantage of American ignorance. The SFS also suggested that the Soviets intended to gain an advantage in the military and economic competition against the United States by using the treaty to maintain a strategically favorable status quo.<sup>257</sup> In the SFS view, the treaty was a mediocre document that was bad for United States national security.

The SFS also attacked President Carter's space policy and his handling of the Moon Treaty. The SFS suggested that Carter's attitude toward space policy caused him to disregard the burgeoning Moon Treaty and its controversial CHM regime. The SFS charged,

The Carter Administration is one which seems almost deliberately disinterested in space. The Administration has consistently, since taking office, relegated space industrialization to the realm of the science fiction writer, discounting it as an area for major economic development.<sup>258</sup>

According to the SFS, the Carter Administration did not begin to evaluate the proposed agreement in earnest until the L-5 Society took issue with the treaty's provisions.<sup>259</sup> The SFS alleged that the administration had neither a coherent position on the treaty nor a coherent moon or space policy.<sup>260</sup> The SFS claimed that its own investigation revealed that the Carter Administration had never undertaken economic impact assessments of the agreement, or examined its implications for national security,<sup>261</sup> and the organization questioned how the President could sign a Moon Treaty in the absence of a coherent

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256. See *Senate Moon Treaty Hearings*, *supra* note 70, at 234 (statement of Space Future Society) (declaring that the SFS even had to explain what the treaty was and its implications).

257. See *id.* (characterizing the Carter Administration as completely disinterested in space and asserting that the treaty itself must be sent back to the UN for re-negotiation for its deficiencies).

258. See *id.*

259. See *id.* (arguing that no studies had been done or requested but the President insinuated that he would sign the treaty).

260. See *id.*

261. See *Senate Moon Treaty Hearings*, *supra* note 70, at 234 (relating the results of SFS inquiries at the National Security Council, NASA, the State Department, the Department of Defense, and the economic division of the CIA).

space policy.<sup>262</sup> They further noted that President Carter had signed an Executive Order stating the treaty could not provide a cause of action against the administration, a step that led the SFS to speculate that the administration was attempting to immunize itself against restraint of trade suits that might be brought against it by aerospace companies or private investors.<sup>263</sup> As a result, the SFS recommended the treaty be renegotiated, and urged the establishment of a panel of experts on space industrialization to advise the president.<sup>264</sup> At the same time, the SFS began lobbying members of the Senate, the House and various federal agencies to oppose the treaty.<sup>265</sup> Ultimately, treaty proponents were unable to overcome the allegations that the treaty favored the Soviet Union. The SFS was thus able to significantly undermine United States support for the CHM regime on the moon.

However, SFS criticisms of the treaty may have overlooked certain potential arms control benefits perceived by President Carter's Department of Defense. As the Deputy Secretary of Defense Franklin Kramer testified before the Senate, the arms control aspects of the treaty were "generally consistent . . . with United States policy and interests."<sup>266</sup> In particular, the arms control provisions of the Moon Treaty reconfirmed the prevailing arms control regime in the 1967 OST.<sup>267</sup> The DOD calculated that the perceived benefits to be gained from ratification of the Moon Treaty would hopefully encourage non-signatories of the OST's arms control regime to sign and ratify the moon agreement.

In other areas, however, the DOD expressed greater caution. United States defense officials were concerned by "the potential scope of the coverage of the treaty and the application of the treaty's

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262. *See id.*

263. *See id.*

264. *See id.* at 235 (proposing that the panel be composed of experts from government agencies, industry and concerned public groups).

265. *See Senate Moon Treaty Hearings, supra* note 70, at 234.

266. *Id.* (statement of Franklin Kramer, Assistant Secretary of Defense for International Security Affairs).

267. *See id.*



provisions to various possible space activities of interest to DOD.”<sup>268</sup> The DOD believed that the agreement would positively “affect the security interest” of the United States because it expanded the applicability of the arms control language in the 1967 OST to vast new areas of outer space.<sup>269</sup> The new areas covered by the treaty included “the orbits around and other trajectories to and around all celestial bodies except earth.”<sup>270</sup> The DOD found it necessary to further scrutinize the treaty language to insure that “certain possible non-aggressive military activities in deep space or in the vicinity of the Moon are not precluded.”<sup>271</sup> In particular, the DOD wanted to insure that the treaty’s references to “peaceful purposes” were interpreted in a manner consistent with United States interpretations of the OST and the UN Charter.<sup>272</sup>

Treaty supporters advanced several other important reasons for endorsing the treaty. From the beginning of the negotiations, American policy makers were concerned that if the United States did not ratify a treaty that retained language designating a future ‘international regime’ to govern exploitation, the United States may forfeit the right to shape the future of the CHM regime. Proponents also suggested it was in America’s interest to ratify the treaty as a means of promoting harmony in COPUOS,<sup>273</sup> so as to provide the United States with bargaining leverage in ongoing negotiations on communications and remote sensing satellites.<sup>274</sup> Conversely, there was further concern that United States rejection of the treaty may undermine the principle of consensus decision making used by COPUOS.<sup>275</sup>

In addition to the political impact of the SFS’ and L-5’s opposition, a diverse coalition of business interests opposed the treaty, claiming that

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268. *Id.* at 146.

269. *Id.*

270. *See Senate Moon Treaty Hearings, supra* note 70, at 146.

271. *See id.*

272. *See id.*

273. *Id.* at 121. (Testimony of L.S. Ratiner).

274. *Id.*

275. *See Senate Moon Treaty Hearings, supra* note 70, at 146. Ratiner challenges this view stating “there is no evidence that our successful negotiation of previous space treaties or the preservation of the consensus principle is attributable to some general sense of goodwill.” *Id.*

the CHM provisions were tantamount to "socializing the moon."<sup>276</sup> These groups lobbied against the treaty and urged the United States to resist the pressure from the developing countries in the UN to accept the CHM regime.<sup>277</sup> The critics also argued that CHM regimes were "riddled with dis-economies of scale"<sup>278</sup> and would lead to inefficient production as well as a decline in the real income of most Third World nations.<sup>279</sup> American supporters of the Moon Treaty tried to downplay the significance of the treaty's CHM language, claiming it was merely "aspirational, rather than something which might constrain United States policy."<sup>280</sup>

As both the election season and the Senate hearings on the treaty rolled on, the growing opposition to common heritage governance may have caused the Carter Administration to reduce support for the lunar CHM regime. During the Senate hearings on the Moon Treaty, the State Department emphasized that the CHM concept "embodies no substantive rules or a pre-determined form of legal regime."<sup>281</sup> The DOS spokesperson added that as a result of the concept's lack of specificity, the United States has "consistently refused to give the phrase content which would be adverse to United States interests."<sup>282</sup> In addition, the State Department also expressed support for the view that the meaning of the CHM ought to be "clarified through the inclusion, in the instrument of ratification, of an additional explana-

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276. See Blaser, *supra* note 182, at 91 (quoting a 1980 newspaper advertisements by United Technologies that formed part of an extensive anti-treaty lobbying campaign).

277. See *id.* (describing anti-treaty newspaper advertisements warning of the capacity of Third world nations to create an "OPEC-like monopoly" over the exploitation of resources in space).

278. *Id.*

279. See Per Magnus Wijkman, *UNCLOS and the Redistribution of Ocean Wealth*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 589, 595 (Richard A. Falk). Al. eds., 1985) (citing the UNCLOS III seabed mining regime as an example of an economically inefficient approach to exploiting resources in the commons).

280. See Blaser, *supra* note 182, at 91 (describing the efforts of Moon Treaty proponents to disassociate the treaty's CHM regime from that expressed by UNCLOS).

281. *Senate Moon Treaty Hearings*, *supra* note 70, at 12 (statement of Roberts B. Owen, Legal Adviser, Department of State).

282. *Id.*

tory, interpretation.”<sup>283</sup> Further, the State Department argued that CHM “can acquire substantive meaning only by reference to the specific context in which it is employed.”<sup>284</sup> As a result, the treaty stipulated that the meaning of the CHM for purposes of the moon regime is to be determined only by referring to the pertinent provisions of the Moon Treaty. As the qualifying language stated, the CHM “finds expression in the relevant provisions of this Agreement, and in particular in paragraph 5 of this article.”<sup>285</sup> The United States endorsed this contextual framework for interpreting the meaning of the CHM in the moon regime. On November 7, 1979, Ambassador Petree of the United States reiterated this contextual approach to the meaning of the CHM before the UN special Political Committee debating the Moon Treaty.<sup>286</sup>

Ultimately, the Moon Treaty adoption process was doomed along with President Carter’s unsuccessful bid for the White House. As some commentators observed, the nation was undergoing a process of “conservative ideological renewal”<sup>287</sup> inspired, in part, by the anti-multilateralist rhetoric of the Reagan supporters. Perhaps to avoid handing his critics the opportunity to charge him with ‘selling out’ to the UN, the Carter Administration consigned the Moon Treaty to a never-ending interagency task force. Carter’s “interagency task force” on the Moon Treaty purported to undertake a careful study of the treaty and its implications for the future.<sup>288</sup> The State Department representative at the Moon Treaty hearings predicted that the President would not express approval or disapproval until sometime in

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283. *Id.* at 14 (citing a recommendation of the American Bar Association’s Committee on International Law).

284. *Id.* at 12.

285. *Id.* at 13 (noting that the Soviet Union had insisted on the inclusion of this limiting language, leading ultimately to the grudging acquiescence of the developing countries).

286. *Senate Moon Treaty Hearings*, *supra* note 70, at 13 (emphasizing that the ambassador’s statement in this setting is “legally authoritative as a matter of treaty interpretation under relevant international law”).

287. *Id.* at 171. (statement of Richard Darman, John F. Kennedy School of Government, Harvard University).

288. *See id.* at 3. (statement of Robert B. Owen, Legal Adviser, Department of State).

1981—*after* the elections.<sup>289</sup> Though the moon regime negotiations had enjoyed continued American support throughout the 1970s, the State Department refused to take a position at the senate hearings on the treaty. Instead, the State Department deferred judgment on the Moon Treaty to the interagency task force.

All of the responsible agencies which have an interest in the Moon Treaty are undertaking a study to evaluate the criticism which has recently arisen to see whether this criticism will alter the original feeling about the treaty.<sup>290</sup>

At the conclusion of the negotiations in 1979, the domestic political climate was becoming less receptive to an UNCLOS III style moon agreement. Alexander Haig, a virulent opponent of the CHM during his tenure as President of United Technologies, was appointed President Reagan's Secretary of State. Due to the "change in administration and given the political complexion of the new Senate at the start of 1981, the Moon Treaty lost all hope of ratification."<sup>291</sup> The defeat of the progressive internationalist administration of President Carter, an ardent supporter of the Moon Agreement, by the anti-internationalist President Reagan effectively doomed the moon agreement and stunted the development of the international law of the global commons.

## CONCLUSION

*Bush, Gore, or Buchanan?* The 2000 presidential race, like all before, will have serious consequences for the future of international law. As this analysis of global commons regimes reveals, changes in

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289. *See id.*

290. *Id.* at 6 (statement of Robert B. Owen, Legal Adviser, Department of State).

291. QUIGG, *supra* note 115, at 175. The Bush Administration did not play a leadership role in developing the CHM in the seabed. In addition, Mr. Bush neither signed nor submitted the moon treaty to the senate for ratification. While the Clinton Administration rescued the CHM principle in the seabed from desuetude, (see *supra* note 153) the Moon Treaty, and its CHM provision remains unsigned. The Clinton Administration has not made any efforts to revive the Moon Treaty. In a telephone interview conducted by the author, Mr. John Zillman of the U.S. State Department's Treaty Office, indicated that he was unaware of any current U.S. efforts to resuscitate the Moon Treaty.

presidential administrations often lead to changes in the degree or intensity of United States support for the norms of the global commons, thus precipitating or exacerbating the variability observed in American support for norms such as the common heritage of mankind. In addition to ideology and political philosophies, the presidents' decision to support the norms of the global commons appears to have been generally based on an assessment of national security, economic, political, diplomatic and environmental interests. As between national security and other interests, it appears that the presidential calculus was weighted in favor of national security interests. As the cases demonstrated, the person and party in power and their support base among key interest groups are critical variables with real consequences for the development of international law. Similarly, the philosophical or ideological disposition of the candidate does have bearing on how he interprets United States obligations in international law, as well as on his commitment to internationalism.<sup>292</sup> The candidate's international legal philosophy can suggest something about his commitment to the norms of international law, including his commitment towards the dynamic process of new norm creation and sustenance intrinsic to building a progressive/Grotian world order.<sup>293</sup>

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292. Internationalism can be defined as "a general foreign-policy orientation characterized by international cooperation, international law and institutions, economic interdependence, international development, diligence in seeking arms control, and restraint in the use of force." Tom J. Farer, *International Law: The Critics are Wrong*, FOREIGN POLICY, Summer 1988, at 22, 22 (discussing the revival of internationalist policies in the later years of the Reagan Administration); see also, Thomas L. Hughes, *The Twilight of Internationalism*, FOREIGN POLICY, Winter 1985, at 25 (lamenting the increasingly anti-internationalist tendencies in American political discourse in the early 1980s).

293. A Grotian world order is built on an interdependent communications network of rules, norms and principles within which transnational (and national) elites operate. See Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL ORGANIZATION 97, 101 (Kratowil and Mansfield, eds., 1994). In a Grotian world order, international regimes are a "pervasive and significant phenomenon" in the international system and require as much attention as other traditional causal variables such as power. Regimes are "sets of implicit or explicit norms, rules, decision-making procedures around which actors' expectations converge in a given area of international relations." *Id.* at 97. Grotians consider regimes "inherent attributes" of any "complex, persistent pattern of human interaction." *Id.* at 99. Enduring patterns of interaction (even in market settings) can "become infused with normative significance." *Id.* at

Changes in presidential administrations sometimes precipitated changes in the prioritization and articulation of American interests in the global commons, thus affecting the degree or intensity of United States support for the common heritage principle and other norms of the global commons. While support for the international norms of the global commons was very strong in the Nixon and Carter Administrations, presidential support for seabed and the moon regimes was weaker during the Ford Administration. Presidential support for the seabed regime appeared to be strongest during the Nixon and Carter Administrations and much weaker during the Reagan, Bush and Ford Administrations. Meanwhile, support for the international norms of the global commons was weakest during the Ford Administration. The transition from Carter to the Reagan contributed to a marked and rather dramatic shift in the assessments of national interests and policies in the global commons. President Reagan's election sparked a conservative rethinking of many policies and programs and that, in turn, affected United States global commons policies at the international level. Thus, Reagan's foreign policy in the global commons reflected the anti-internationalist temper of many of his domestic political supporters and business constituencies. The ideological animus of the Reagan Administration inspired and fueled significant derogations from the emerging principles of global commons governance. Consequently, Reagan's Administration effectively abandoned the seabed and moon treaties. While President Clinton resuscitated the seabed treaty, neither the Bush nor the Clinton Administrations have taken any steps to revive the Moon Treaty.

Given the linkages between domestic and international politics, the changes in the United States domestic political environment, particularly changes in the presidency, often have ripple effects on American assessment and articulation of national or world interest in the global commons. Interest articulation and aggregation in the domestic political arena contribute to the expression of national interest

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100. Meanwhile, an on-going relationship also becomes "embedded in a broader social environment that nurtures and sustains the conditions necessary for its functioning." *Id.* at 100-101. Patterned conduct reflecting calculations of interest usually gives rise to regime formation, and regimes, in turn, reinforce patterned behavior. *Id.* Grotians believe regimes can have a significant impact on behavior or outcomes, particularly when they 'operate' as intervening variables." *Id.* at 101-102.

at the international level and to presidential posturing in global commons negotiations. Thus, there is a dynamic and mutually reinforcing interplay between presidential politics and the processes of international law and policy. The modified structural realist approach advanced here suggests that the international lawyers need to examine the political philosophies, personalities, political interests, alliances and electoral cycles inside the "black box" of the state in order to understand developments in international law.

Official presidential posturing for global consumption often had to be counter-balanced by adroit servicing of local political, business and environmental constituencies. To develop a successful policy in the global commons, American presidents had to be able to successfully juggle and satisfy the dissonant demands of many diverse constituencies. For example, President Nixon's balancing of the interests of domestic and international constituencies during the seabed case is most illustrative. Similarly, President Carter's policies on the global commons also evinced a creative fusion of domestic and international politics. Because of his interest in gaining the support of domestic environmental groups, Carter took bold initiatives towards advancing the international law of the global commons, as evidenced by the strong support for the CHM during the Carter years.<sup>294</sup>

In a uni-polar world dominated by an undisputed hegemon one cannot over-emphasize the significance of the President of the United States on the future of world order. Like Atlas or the archimedean lever, the United States is poised to lead the world in a new century. Yet, there are also those isolationists and anti-internationalists who are feverishly working to close the windows to the world, to seal the doors shut and to put on gilded blinders. There's the rub. Given the effect of United States elections on the development of an international legal order, it is no stretch to say that the future of humankind and prospects for a just world ordering in this new millennium, rest in large measure on the solemn, thoughtful

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294. But like Nixon, Carter had to contend with dissonant demands of domestic and international interests. In the seabed regime, Carter managed to please both sides by signing the Hard Minerals bill, while strengthening its CHM provision, and while at the same time making considerable progress to conclude UNCLOS III. Carter's policies on the CHM were thus an extension of his domestic politics, the latter reinforcing the former as well.

and cosmopolitan or globalized choices of American voters. The United States voter, privileged to possess a membership card in the most powerful and the most successful nation-state in history, should be aware of the implications of his or her choice on world order. As we voters pull the lever (or, someday click the mouse) for elephants, donkeys or some other creatures (chameleons, serpents, skunks or dodos) several key questions must have been asked and satisfactorily answered.<sup>295</sup>

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295. What is the candidate's international legal philosophy? Is the candidate a grotian idealist, a realist or an anti-internationalist isolationist? Is s/he a neorealist or a progressive pragmatist? Would the candidate be receptive to the new norm creation and sustenance necessary for the progressive development of international law? Is the candidate committed to signing progressive international instruments aimed at increasing international human rights? International equity? Bridging the global digital gap? Supporting living wage standards for global labor? Does the candidate interpret international human rights and humanitarian laws narrowly or expansively? What does the candidate consider a just world order? Is the candidate aware that nearly three-fifths of humanity lives in dire want? That millions are dying of AIDS and other plagues worldwide without any ability to afford any available prescriptions? The looming pandemics? Ebola? That tens of thousands of the world's children are fighting the grown ups' wars, working in factories or brothels and living on street corners? More importantly, what is the candidate's plan for dealing with these and other crises: resettling war refugees, protecting the mushrooming class of orphans of war and disease, providing support to the dismembered and scarred victims of war and civil strife, improving the socio-economic conditions of women world-wide including putting an end to female genital mutilation and other forms of irrational patriarchal domination? Does the candidate have a clear plan to diffuse the time bombs ticking in the Middle East, Taiwan, the Korean peninsular, Kashmir, Iraq, and Algeria? What is the plan to end the war and bring about demilitarization in the Sudan, Congo, Chechnya and other powder kegs? What is the candidate's plan to stop the tinderbox in the Asian sub-continent (especially India and Pakistan) and the ex-Soviet satellites from blowing up and thereby consuming millions in a thermo-nuclear conflict? What is the candidate's plan to promote healing and love (yes, love) between the Serb and Kosovar, the Hutu and the Tutsi, the Christian and the Muslim, the Arab and the Jew? The White, the Brown, the Yellow and the Black? What is the candidate's realistic and viable plan to deal with global environmental disasters, global warming, the greenhouse effect, ozone depletion, deforestation, desertification in Africa, and the massive accumulation of radioactive and other hazardous wastes? Does the candidate have a coherent and workable plan for preventing and or dealing with extant, inevitable or imminent mass migrations, failed states, and crazy mini-states with weapons of mass destruction? Does the candidate have a credible plan to prevent or arrest Rwanda-style ethnicidal, fratricidal and genocidal orgies? What is the candidate's plan for dealing with the global implications of an imminent new age of eugenics, cloning and other bio-experimentation coming on the heels of the completion of the human genome project? What would this candidate do about the



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following challenges and imminent crises: the approaching Malthusian population nightmare? The rapidly approaching day of twelve billion humans—in a world of scarce and rapidly diminishing resources? What is the candidate's plan for preventing or handling the new global tech threats, including on-going and spiraling attempts by a loose network of tech-savvy international cyber terrorists to disable e-commerce, financial centers or telecommunications satellites? What is the candidate's plan for addressing inevitable or imminent biological and chemical terrorism on a global scale? And please do not forget to ask about the candidate's plan for alleviating the crushing debt burden borne by the world's most world's most wretched innocents? This list is not intended to be exhaustive, but merely present some of the many important issues about which voters should seek candidates positions. Please feel free to e-mail me at [spectarj@ulv.edu](mailto:spectarj@ulv.edu) with your own suggestions for even more appropriate 'world order' questions for presidential candidates at the dawn of a new millennium.