Summer 1980

International Law and Natural Resources Policies

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Recommended Citation
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It is difficult to discuss international resource issues without some understanding of the central role played by international law. International law shapes the underlying framework of the international system for allocating resources, by establishing basic rules about circumstances under which nations can assert property rights in resources; this framework influences both how nations see resource problems and the kinds of solutions they consider. International rules and agreements are the form in which nations usually express their resource arrangements; they indicate how nations deal with these issues now. Finally, international law provides a process, a set of techniques and a body of experience which can help nations to forge better solutions to resource problems; the only tools available for cooperative efforts are those provided by international law.

Of course it is obvious that international rules are only some of the many factors which influence national policymaking and decisions. There certainly will be situations—such as those where vital national interests appear to be involved—where national officials disregard legal considerations or give them little weight. Thus international law is necessary to understanding how nations deal with natural resource issues, but it is scarcely a sufficient element, and political, economic, social, scientific, or technological factors often also will play an equal or more important role.

It is not practical in this essay to attempt to survey all of the international rules, institutions, arrangements, and procedures bearing on natural resource policies and issues. Indeed, it is only recently these problems even have been recognized as a distinct and

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This essay is abridged from a chapter which will appear in RESOURCES AND DEVELOPMENT: NATURAL RESOURCES POLICIES AND ECONOMIC DEVELOPMENT IN AN INTERDEPENDENT WORLD (P. Dorner & M. El-Shafie eds., 1980), and is published with permission. The author wishes to express his appreciation to the University of Wisconsin Seminar in Natural Resources, Economic Development and International Cooperation, and to the University of Wisconsin Sea Grant Program, which have facilitated his work on this and related studies.

important field of international concern, and the law in this area still is scattered. No single body of doctrine yet has emerged which appropriately can be described as an "international law of natural resources," and it still is uncertain whether the many different types of natural resources and the diverse problems they encompass can be handled within a single framework of rules. Instead, this essay will look briefly at three ways in which international law seems important to thinking about international resource policies and problems:

1. the ways in which differing legal concepts of national property rights affect the structure of international resource arrangements;
2. the ways in which disputes about international law reveal underlying differences in views of equity or fairness in international natural resource arrangements;
3. the ways in which international law can help nations reach cooperative arrangements for dealing with natural resource problems.

INTERNATIONAL LAW AND RESOURCE ALLOCATION

International law sets a framework for the international natural resource system by laying down certain fundamental rules as to which nation, if any, may initially "own" or control which resources. These rules affect basic perceptions of international resource issues—what we think the problems are, what we think we need to do about them, and how we think we can do it.

The international society, like most national societies, allocates rights of access to and control of resources through certain rules, broadly analogous to property rules. In international law these property concepts typically are put in terms of national sovereignty or territorial or jurisdictional rights. International law usually regards a nation as having sovereignty or jurisdiction—the right to prescribe and enforce rules without outside interference—over all conduct within its territory. Thus a nation normally has the right to control every type of conduct, either by its own citizens or by citizens of other nations, involving resources within its own territories. How-

2. The approach in this section—and throughout this essay—to the functions of international law and its role in allocating resources is one with which some other international lawyers, especially those in developing nations, might differ. They might, in particular, take the view that a nation's sovereignty or "ownership" over natural resources situated within its own territorial limits is not a right created by and exclusively subject to that nation's own internal law; that international law regarding national sovereignty over resources does not establish but simply recognizes this inherent right; and that in exercising this right of permanent sovereignty over its own natural resources, a nation might choose as a matter of policy to act in accordance with any relevant established international norms but would not be legally bound to do so.
ever, a nation's right to exercise jurisdiction outside its territory is more limited, particularly because it often must be balanced against the claims and interests of other nations. Because the concepts of sovereignty or jurisdiction over resources embrace the right to exclude others from access to or use of these resources, they functionally are equivalent to national ownership.

These are, of course, legal concepts which have evolved from the need of international society to resolve competing claims to limited resources. A particular natural resource is not inherently any nation's "property"; it becomes "property" only when and to the extent that nations decide to treat it as such in their relations.

The fact that rules of sovereignty, jurisdiction, territory, and property are simply social tools, designed to control behavior, has several implications. First, such legal concepts have only that significance and meaning which a particular international society at a particular time chooses to give them; they may change as social attitudes, circumstances, and purposes change. Second, such concepts have meaning only in the context of the broader international legal system, which may condition or limit these rights. Even as international law recognizes the right of a nation to exercise jurisdiction over particular natural resources, it also can require that such rights be exercised with due respect for international agreements freely entered, the rights of aliens, or the interests of other nations.

The international community might have adopted—or might still adopt—a variety of rules to allocate resources among the nations of the world. Possible rules include recognizing (1) national control over natural resources; (2) common access to natural resources; (3) joint national control of resources; and (4) international ownership and control of resources. Although the principle of national control over resources currently is dominant, other approaches have significance in particular areas. Each represents a very different, and to some extent competing, approach to issues of natural resource allocation and management. These rules are now in flux, and some of the distinctions among them are beginning to blur.

National Control over Natural Resources

The most widespread and significant of these approaches to international resource allocation is the principle that a nation may acquire sovereignty or exclusive jurisdiction over particular resources. The best-known and most important application of this principle is the rule that resources located in a nation's territory, including its territorial waters, are subject to its sovereignty. Indeed, this rule is now
so strongly established that territorial sovereignty and sovereignty over resources present within a nation's territory usually are linked inseparably in peoples' minds. Thus the copper present within Chile's territory is considered "Chile's copper," the oil present within Venezuela's territory is regarded as "Venezuela's oil," and the wheat grown in the United States is regarded as "the United States' wheat." Because almost all of the earth's land area now is claimed by one or another nation, almost all of the earth's land and subsurface resources are now "owned" by some nation under this principle.

However, the reach of this principle is no longer limited to resources found on or under land within national territory; recently it has been extended to many of the important resources in the seas adjacent to but not legally within national territory. Since 1945 there has been a dramatic expansion in coastal states' claims to jurisdiction over the resources—although not the waters themselves—of the continental shelves and fisheries in the seas along their coasts. These claims sometimes have created serious tensions among nations competing for access to these resources—the "cod war," "tuna war," "shrimp war," and so on. The precise rules applicable to such claims now are under negotiation at the Third United Nations Law of the Sea Conference, but already there is an overwhelming consensus at the conference favoring recognition of the right of coastal states to exercise resource jurisdiction in an "exclusive economic zone" extending at least 200 miles from their coasts. Relying on this consensus, the United States, Canada, Japan, the Soviet Union, and other nations including those of the European Economic Community, have established 200-mile fishery limits. With the establishment of these 200-mile exclusive economic zones in the oceans, most of the earth's economically valuable mineral and living resources now are effectively under some nation's control.

The principle of national sovereignty over resources generally has been held to mean that the nation having such sovereignty can deny all or some other nations access to or use of such resources. United States restrictions on exports of strategic commodities to certain communist countries and the 1973 Arab oil embargo exemplify this type of claim. This principle also means that a nation can permit access and use to other nations on such terms and conditions as it chooses—for example, by entering concession agreements or trade agreements or by enacting laws controlling the exploitation of natural resources by aliens. However, despite nations' broad control over their own resources under this principle, they may nevertheless be dependent on other nations for realization of some of the benefits accruing from control. Other nations, in the exercise of their own
sovereignty, also have rights to control the import of foreign resources into their territory and to control any activities by their nationals exploiting or using foreign resources. The United States, for instance, on various occasions has refused to permit imports of sugar from Cuba, has established quotas on imports of foreign oil, and imposed constraints on trade, investment, and other transactions with other nations. Consequently, nations, which can exploit their resources effectively only with foreign assistance of nations which can profit from their resources only by exporting them, may find little practical meaning in the right of national sovereignty over the resources themselves, unless other nations are prepared to help exploit these resources and permit access to their markets.

This allocation of resources to various nations sets the stage for international resource policies and issues. A nation which needs another’s resources can secure them only by convincing the second nation to supply them. A nation which can obtain benefits from its resources only by selling them abroad can do so only by convincing other nations to take them. Thus, the nature and extent of the movement of natural resources among nations necessarily depends upon the kinds of influence which nations can use on each other. For the most part, national foreign policies concerning resources are attempts to exert such influence.

One way to secure access to markets for resources is coercion—the threat or use of force. This method was typical of the imperialist and colonialist periods of history. Coercion still plays an important role in many aspects of international affairs, but several factors have constrained its usefulness in resource policy. Broadly accepted international norms—written into the United Nations Charter, the United Nations Declaration on Colonialism, the United Nations Declaration on Non-Intervention, and an extensive array of other international instruments and precedents—now clearly prohibit a nation from using force to acquire another nation’s territory or resources. In a world of power blocs and alliances, practical political concerns and fears of escalation buttress these norms. The fact that developed nations in recent years rarely have attempted to use military force to protect natural resource interests threatened by developing nations’ actions—for example, in response to the wave of recent nationalizations of foreign oil, copper, and other concessions or to the 1973 oil embargo—suggests the extent to which coercion has been discarded, even by powerful countries, as a way of implementing natural resource objectives. Although developed nations sometimes have intervened in support of resource interests in Africa, Chile, and elsewhere, their intervention usually has been indirect rather than overt.
A second type of influence used to persuade other nations to supply or accept natural resources includes persuasion and appeals to altruism, goodwill, or self-interest. Developing nations recently have urged, with some success, that developed nations extend substantial amounts of economic assistance to poorer nations. Such help may involve the flow of developed country resources and monies to developing countries as gifts or loans at reduced rates—for example, agricultural commodities under the United States agricultural surplus disposal programs—and, of course, financial grants or loans. It also may take the form of favored treatment for developing country products in developed nation markets—for example, the special status accorded by the European Economic Community to such products under the Lomé Convention. International law now recognizes that developed countries at least are obligated to extend economic assistance to developing nations, and an extensive body of rules, agreements, institutions, and procedures has been designed to facilitate and regulate assistance efforts. The question really has become not whether developed nations should give, but how much.

A final way in which a nation may secure another's resources or access to another's markets is the mechanism of exchange—international trade. Commercial exchanges of this type currently are the most important basis for international flows of resources, and most present issues of national and international resource policies relate to the negotiation, terms, and conditions of such exchange. The vast and diverse network of international rules, agreements, and institutions facilitating and regulating world trade in resources includes bilateral and multilateral commercial agreements for specific exchanges of commodities or establishing broad rules to encourage mutual trade and investment: common markets and free trade areas; arrangements such as the General Agreement on Tariffs and Trade for mutual reduction or removal of tariffs and other discriminatory barriers to trade; agreements such as the Lomé Convention to foster trade among specific groups of developed and developing countries; organizations of resource-producing nations, such as the Organization of Petroleum Exporting Countries (OPEC), or of resource-importing nations, such as the International Energy Agency, to strengthen bargaining powers or to deal with common concerns; commodity agreements among both producers and consumers, such as the international tin, coffee, and wheat agreements, to rationalize trade and stabilize prices in particular commodities; United Nations institutions

such as the Conference on Trade and Development, the regional and economic commissions, and the Food and Agriculture Organization; and a wide variety of other bodies dealing with natural resources, trade, and economic development issues.

Common Access to Natural Resources

A second and contrasting approach to the international allocation of natural resources is the principle that resources should not be subject to national sovereignty or jurisdiction but should, in effect, be common property, accessible to any individual or nation wishing to use them.

This principle has found only limited application, chiefly within areas regarded as clearly beyond the limits of national claims to jurisdiction. Moreover, the principle usually has been accepted only in circumstances where resources either were unproven, inaccessible, or available in such quantities that no conflict among potential users has arisen. In practice, where resources have had economic value and restrictions on access have been feasible, some type of property claim—either national or international—typically has been made in an attempt to secure or at least regulate access to the resources. Indeed, there are strong arguments that effective resource management and conservation techniques require some type of proprietary rules. It is recognized generally that the principle of free access tends to produce overexploitation, economic inefficiency, and "external diseconomies."  

Historically, the most prominent example of the principle of common access has been the doctrine of the freedom of the high seas. For several centuries the seas were treated as an international commons. Article 2 of the 1958 Geneva Convention on the High Seas provides in part that:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas . . . comprises . . . inter alia . . .

1. Freedom of navigation;
2. Freedom of fishing. . . .

Under that doctrine, fishing fleets of any nation traditionally had the right to capture fish anywhere in the seas beyond a coastal state's territorial limits, long regarded as only three miles in breadth.

4. The seminal article is Hardin, The Tragedy of the Commons, 162 SCI. 1243 (1968).
However, this traditional concept of the freedom of the seas currently is undergoing substantial change. Many coastal states now claim at least 12-mile territorial seas plus jurisdiction over both mineral and living resources in ocean zones reaching out 200 miles, as well as jurisdiction over migratory species of fish, such as salmon, which spawn in their rivers. Special international joint management regimes have been established to regulate other species of high seas fish and aquatic mammals such as tuna and whales. New types of international managerial regimes are being contemplated for the manganese nodules and other mineral resources of the deep seabed. In practice, with respect at least to several significant natural resources—in particular, fish, oil and gas, and minerals—the concept of the oceans as an international commons has all but disappeared.

Another example of international rules purporting to exclude national sovereignty over particular territory is contained in the 1967 United Nations Outer Space Treaty. Article I of that treaty provides in part that, "Outer space, including the moon and other celestial bodies, shall be free for exploitation and use by all states . . . and there shall be free access to all areas of celestial bodies." 6 Article II provides that, "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." 7

Whether the principle of common access will survive circumstances in which national uses of outer space conflict—for example, where satellites begin to interfere with each other or in which exclusive rights to lunar or extraterrestrial resources acquire great value—remains to be seen. The Outer Space Treaty does not deal specifically with these resource questions. As will be discussed shortly, the recently concluded United Nations Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature in late 1979, goes well beyond the common access principle by providing that the moon and its natural resources are the common heritage of mankind, that the moon is not subject to national appropriation, and that the parties will establish an agreed international regime to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.

7. Id., Art. II.
Joint National Control of Resources

A third possible approach to the international allocation of natural resources is the principle that resources common to more than one nation or in which more than one nation has an active and substantial interest should be shared by the countries concerned according to equitable standards and procedures. This concept is suggested, for example, in Article 3 of the 1974 United Nations Charter of Economic Rights and Duties of States, which provides that, "In the exploitation of natural resources shared by two or more countries, each state must cooperate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interests of others." 8

This concept of joint control finds its most important application in the widely approved principle of equitable utilization or apportionment of rivers or lakes which form a common boundary between nations or lie within more than one country. Under this principle, all of the riparian states of an international river or lake, or all of the basin states of an international drainage basin, have a right to an equitable and reasonable share in the uses of such waters. Conversely, one riparian or basin nation should not use or allow use of these waters in a way that unreasonably interferes with the legitimate interests of other co-riparian or basin states. The principle implies a need for cooperative approaches in the management of these shared resources. This idea of equitable utilization now is embodied in some 300 international agreements dealing with rivers, lakes, and drainage basins throughout the world. Many of these agreements, such as the United States-Canadian Boundary Waters Treaty of 1909, have specific provisions to govern the equitable use of the waters concerned. Some establish joint commissions or other common institutions to facilitate cooperation in the development, management, and use of the waters and in the solution of problems and disputes.

A second area in which the principle of joint national control of resources has been applied is the cooperative management of certain fisheries. The principle of freedom of fishing on the high seas in many cases has led to overexploitation and depletion of stocks and to economic inefficiency for some nations' fleets. One response has been pressure to expand fisheries' limits—to bring particular fisheries under one nation's control and management authority. In this case, a nation's own enforcement agencies can compel compliance with con-

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8. U.N. General Assembly Resolution No. 3281 (xxix), Charter of Economic Rights and Duties of States, 14 INT'L LEGAL MATERIALS 251 (1975), Art. 3.
servation and other regulations. But another response has been agree-
ment by all nations in the fishery to create joint institutions—such as
the International Whaling Commission, the International Halibut
Commission, and the Great Lakes Fisheries Commission—for man-
aging and conserving the particular fishery resource. Some of these
commissions have been empowered to set (and to some extent en-
force) overall quotas and specific national allocations for catches. In
this case, the problems of securing compliance have proved more
difficult.⁹

A third area in which nations have employed the principle of joint
control involves problems of international pollution. The concept
that nations have responsibilities to each other in this regard is stated
in Principle 21 of the United Nations Declaration on the Human
Environment, adopted by the United Nations Conference on the
Human Environment at Stockholm in 1976:

States have, in accordance with the Charter of the United Nations
and the principles of international law, the sovereign right to exploit
their own resources pursuant to their own environmental policies,
and the responsibility to ensure that activities within their jurisdic-
tion or control do not cause damage to the environment of other
States or of areas beyond the limits of national jurisdiction.¹⁰

A more specific statement of the idea that states should work to-
gether toward a joint solution of these types of common resource
problems is contained, for example, in a recent draft principle ap-
proved by the governing council of the United Nations Environ-
mental Program in 1978:

States have a duty to cooperate in the field of the environment
concerning the conservation and harmonious utilization of natural
resources shared by two or more States. Accordingly, consistent
with the concept of equitable utilization of shared natural resources,
States should cooperate with a view to controlling, preventing, re-
ducing, and eliminating adverse environmental effects which may
result from the utilization of such resources. Such cooperation shall
take place on an equal footing and due account shall be taken of the
sovereignty and interests of the States concerned.¹¹

⁹ See, e.g., A. KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES:
A STUDY OF REGIONAL FISHERIES ORGANIZATIONS (1973).

¹⁰ United Nations Declaration on the Human Environment, appearing in REPORT OF
A/CONF. 48/14 (1972). The text of the declaration also is reprinted in 11 INT'L LEGAL
MATERIALS 1416 (1972).

¹¹ Draft Principles of Conduct in the Field of the Environment for the Guidance of
States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two
Efforts to put cooperative management of common environmental problems into practice include such international agreements as the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area, the 1976 Convention on the Protection of the Mediterranean Against Pollution, and the United Nations Environmental Program. In contrast with international declarations, resolutions, and statements of principles, international agreements are, of course, legally binding and usually provide procedures for enforcement.

The unique case of Antarctica and its offshore waters presents, temporarily at least, still another example of joint national control of resources. Much of the continent itself is claimed by one or more nations, but none of these sometimes conflicting claims has been accepted generally. The United States and the Soviet Union, which carry on the most extensive programs in Antarctica, have neither made claims themselves nor recognized claims by any other nation. At present, activities on the continent are governed by the Antarctic Treaty of 1959, a treaty in which 20 countries are now participants. The treaty demilitarizes the continent, reserves it for peaceful and scientific purposes, and prohibits nuclear explosions or the disposal of radioactive wastes. Conflicting national claims to territory essentially are "frozen" for the 30-year life of the treaty; scientists may pursue their work anywhere on the continent without restrictions. Pursuant to the treaty, the parties meet biennially to exchange information, to consult on matters of common interest, and to formulate, consider, and recommend to their governments measures in furtherance of the principles and objectives of the treaty. These measures may include the preservation, exploitation, or conservation of resources.

Up to now, no natural resources of commercial significance have been exploited on the Antarctic continent, and the Antarctic Treaty is silent about the exploration and exploitation of the continent's resources. However, there is recent evidence that the continent and continental shelf may contain minerals and oil and gas, and there is rising interest in possible harvest of the vast quantities of krill and other living resources in the oceans off Antarctica. Concern that states driven by growing energy and resource requirements might
seek to reassert national claims of exclusive access to Antarctica’s land and marine resources, that disputes over resources might challenge the stability of the Antarctic Treaty regime, and that resource exploration and exploitation might threaten the Antarctic environment, have spurred the development of new collaborative efforts among the nations participating in the treaty. These efforts include negotiation of a Convention on Antarctic Marine Living Resources, agreement on a voluntary temporary moratorium on mineral resources exploration and exploitation in Antarctica, and a consensus that the parties to the treaty should begin discussions promptly regarding development of an internationally agreed mineral resources regime. It seems likely that the parties to the treaty at least will try to maintain the unique cooperative regime they have established.¹²

International Ownership and Control of Resources

A fourth possible approach to international allocation of natural resources contends that resources should be regarded as the property of all mankind and exploited only by or under the management of international institutions. The most important example of this approach is the proposed international regime, now under negotiation at the Third United Nations Law of the Sea Conference, to govern the exploitation of the resources of the deep seabed.

In the 1960s it became apparent that new deep sea technology might permit the mining of manganese nodules which lie scattered over many areas of the deep seabed. These nodules can reach the size of a small ball and are composed of manganese, iron, nickel, copper, cobalt, and various other minerals. Developing countries feared that a few technologically advanced industrial nations, particularly the United States, might attempt to appropriate these resources for themselves. This concern was galvanized by a series of speeches in the United Nations by Ambassador Arvid Pardo of Malta in 1967, in which he proposed that the resources of the deep seabed beyond the limits of national jurisdiction be treated as a “common heritage of mankind” subject to international authority. Subsequent General Assembly resolutions and declarations asserted that these resources were indeed “the common heritage of all mankind” not subject to national appropriation or claims of sovereignty, called for a collectively established international regime to exploit deep seabed re-

¹² These issues and developments are discussed in a forthcoming study by the author and others tentatively titled THE NEW NATIONALISM AND THE USE OF COMMON SPACES: ISSUES IN MARINE POLLUTION AND THE EXPLOITATION OF ANTARCTICA (J. Charney ed.), prepared under the auspices of the American Society of International Law (to be published early 1981).
sources "for the benefit of all mankind" and called for the convening of an international conference on the law of the sea.

The Third United Nations Conference on the Law of the Sea convened in 1973 with the purpose of revising broadly the international law of the sea and, in particular, establishing an international regime to govern deep seabed mining. This task has proved extremely complex, lengthy and difficult. Through the end of 1979 the conference has held eight negotiating sessions, and a ninth negotiating session is scheduled for 1980, during which it is hoped that a formal text of a comprehensive Convention on the Law of the Sea can finally be adopted. However, as of early 1980, the prospects that the conference would prove successful in reaching broad agreement on the text of a convention, or that if such a convention is approved by the conference, it would be widely and promptly ratified by major nations such as the United States, remained uncertain.

The issues and developments at the conference have been discussed in a number of recent books and articles. In broad outline, the differences in view on deep seabed issues at the conference have been between the United States and the few other technologically advanced states capable of commercially mining manganese nodules in the near future and the much larger group of developing nations which do not presently have that capability. The technologically advanced states have pressed for an international system which would ensure access by private or national enterprises to seabed deposits, provide such enterprises security of tenure, and otherwise provide a climate in which private and national enterprises would be prepared to proceed with commercial development of the resources. Developing states, on the other hand, have pressed for an international system in which they can control access, the manner and rate of exploitation, and the profits realized; indeed, they would prefer that mining be done only by an international "enterprise" subject to their control. As the conference has proceeded, the negotiations have increasingly been linked to the complex of broader, ideological issues

embraced in the debate over the concept of "new international economic order."

As of early 1980, there appears to be a broad consensus that the mining of deep seabed resources will be controlled by an International Seabed Authority composed of the nations of the world, represented through an Assembly of all nations and a smaller Council; that mining will at least initially be carried on by both private and national enterprises and by the Authority itself, acting through an operating agency called The Enterprise; that the technologically advanced nations and their companies will provide financial and technical assistance to The Enterprise; that the Authority will have broad powers, including powers to establish limits on production; and that a substantial share of profits realized will be returned to the international community, primarily for the use of developing nations. But a number of major issues remained unresolved, including voting procedures in the Council of the Authority; the selection of applicants for mining sites; security of tenure for private companies granted mining rights; and certain problems regarding production limits, technology transfer and the sharing of profits.

Whether the conference ultimately succeeds or fails, it is likely to have a lasting impact on how nations think about natural resource problems. The concept that seabed resources are a common heritage of all peoples which ought to be administered by international institutions establishes a precedent capable of future expansion as the world encounters increasing and ever more perplexing problems of resource scarcity. The establishment of an international agency which can itself engage in resource exploitation activities is another significant innovation. Finally, the conference is a crucial test of the ability of developed and developing nations to reach accommodation on an important resource issue, and its outcome could positively or adversely affect international attitudes, negotiations and arrangements on many related issues.

The influence of the conference is already evident in unofficial proposals that the Antarctic continent and its mineral resources be declared the "common heritage of mankind," and in the far-reaching resource provisions of the recently concluded United Nations Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. Article II of that agreement provides in part:

1. The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 of this article.
2. The moon is not subject to national appropriation by any
claim of sovereignty, by means of use or occupation, or by any other means.

3. Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person. . . .

* * * * *

5. States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.

* * * * *

7. The main purposes of the international regime to be established shall include:
   (a) The orderly and safe development of the natural resources of the moon;
   (b) The rational management of those resources;
   (c) The expansion of opportunities in the use of those resources;
   (d) An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration. . . .

Of course, few nations have any immediate stake in lunar resources and these principles are unlikely soon to be put to any practical test. But the agreement nevertheless will have precedential effect.

INTERNATIONAL LAW AND THE SEARCH FOR EQUITY

International law not only shows how the international resource system works but also can suggest certain respects in which it seems weak. Uncertainty and debate about applicable rules and institutions may signal a lack of consensus or dissatisfaction over existing arrangements and a need for change. The character of such debates can help define what the basic differences—often differences in values, perceptions, and objectives—really are. Current disputes and uncertainties about international law’s applications to natural re-

source issues indicate a broad and basic disagreement between developed and developing nations concerning the fairness or equity of the existing international economic and natural resource system, the values which ought to underlie that system, and the structure of the legal order appropriate to these values.

In broad terms, the developing nations take the position that existing disparities between standards of living in developed and developing nations are unjust; that a drastic redistribution of wealth, income, and power in favor of the developing nations is needed to establish some degree of equity; and that the international economic system must be restructured to provide more equality of opportunity among nations and better prospects for such redistribution. They argue that an international society in which a few nations and a small fraction of the world’s population are very rich, while most nations and the overwhelming majority of the peoples of the earth are very poor, inherently is unjust—particularly because, in the developing nations’ view, rich nations have become rich largely through colonial or other forms of exploitation of the developing world.

Moreover, developing nations believe that not only is there an imbalance of wealth and power but inequities are increasing rather than diminishing—the rich are getting richer and the poor poorer. Developing nations maintain that market forces do not work equally well for rich and poor nations and that poor nations in practice have had little role in international economic decision making. As developing nations see it, traditional legal arrangements and institutions, which are largely the creation of the Western developed nations, have tended to support and perpetuate this inequitable system. In effect, the poverty of the developing nations is in part the fault of the developed nations and an economic and legal system which serves developed nations’ interests. The developing nations consequently call for a new system—a new international economic order—designed to redress these imbalances and injustices and establish greater equity.

Developed nations generally have agreed that gross disparities in income and wealth among nations are undesirable and some redistribution should be sought. However, they have differed with developing nations about the reasons for these disparities and the means by which greater equity can be achieved. Developed nations justify their wealth as resulting from their enterprise, organization, skill, and technology operating principally in the free market context, and do not accept the argument that their wealth is based on exploitation of other peoples or other’s resources. They argue that developing nations, with some assistance, through similar efforts should be able
to achieve economic development and narrow the existing gap in wealth and income. They argue that the remedy for present problems lies not in any drastic change in the present system, but rather in greater efforts by developing nations to organize their societies in ways which promote, not obstruct, development objectives. As developed nations see it, existing international legal arrangements and institutions for the most part continue to be both adequate and necessary to the achievement of these goals, and any substantial change in these arrangements—particularly those which interfere with free market mechanisms—is likely to make things worse rather than better.

This debate obviously raises many labyrinthine issues—the nature and causes of poverty and economic development; the ways of "breaking out" of the cycle of poverty; the possibility—and desirability—of all nations attaining standards of living and material consumption comparable to those now enjoyed by the richest nations; how material welfare should be measured; and so forth. One of the most difficult of these—and one on which law has a bearing—is the concept of equity. As Schachter has pointed out,\textsuperscript{15} nations have had great difficulty in agreeing on the kinds of arrangements which are fair, just, or equitable. Equity can be defined by various standards—equality, need, historic entitlement, capacity, degree of contribution, and others. It is not surprising that each nation tends to urge a criterion of fairness which most accords with its own interests.

It is beyond the scope of this essay to attempt a comprehensive look at the issue of equity or to suggest any conclusive answers to the pervasive questions of equity. However, it may be useful to illustrate the kinds of legal contexts in which issues of equity have emerged.

\textit{The Scope of National Sovereignty over Natural Resources}

Questions inevitably arise about the fairness of the principles which govern the international allocation of natural resources—especially the dominant principle of national sovereignty over resources. Why is it just that one nation rather than another should own or control a particular resource? How equitable or rational are the basic assumptions upon which the international system currently distributes resources?

The most interesting questions involve the concept of national control. Under the generally accepted distributive principle which

\textsuperscript{15} SCHACHTER, \textit{supra} note 1.
permits each nation to control resources within its territory and within 200 miles of any coastline it may have, resources are allocated solely on the basis of geographic accident. Sovereignty over territory carries with it sovereignty over resources, and territorial situs is controlling. Other factors which might be relevant in determining allocational equity in other contexts, such as equality, effort, or need, have no role in this view. Sparsely populated nations may control vast wealth in natural resources. Heavily populated nations, with a great need for resources, may control few or none. A nation owning resources vital to other nations may, by virtue of its right of control, threaten to deny or actually deny these resources as a way of exerting pressure on other nations to act in ways other than those they would prefer. It is not surprising that nations which are poorly endowed with natural resources and gain little from the principle of national control or which desire greater or more assured access to other nations’ resources may see this principle as less than fair and press for some international limits on its exercise.

For the time being these questions are largely theoretical. The principle of national sovereignty over territorial resources is firmly entrenched through both tradition and the realities of power, and any substantial modification of this doctrine in the near future seems highly unlikely. Nevertheless, several recent developments may indicate international concern about the equity of the principle of national sovereignty over territorial resources, a growing sympathy for some restraints on the exercise of national sovereignty, and the possibility that at least some change in the way nations view this principle gradually is occurring.

First, there appears to be a fairly broad consensus within the international community that very rich nations should share part of this wealth through economic assistance to needy nations. It is interesting that certain wealthy developed nations such as Sweden, Canada, and the Netherlands, and even certain wealthy developing nations such as Kuwait, Venezuela, and Saudi Arabia seem to view assistance to others as an obligation. Some developing nations frequently phrase requests for aid in terms of claims, obligations, and duties.

Second, an extensive debate has occurred at the Third United Nations Law of the Sea Conference over coastal state control of resources in adjacent 200 mile ocean zones. Landlocked and “geographically disadvantaged” states have pressed for rules which would permit them an equitable share in the benefits of these offshore resources; other nations which traditionally have fished such waters have pressed for rules which recognize and preserve their historic use.
The conference discussions also reveal broader sentiment for the view that coastal nations not only have rights but also international custodial duties in the management and conservation of offshore resources, and that coastal states ought to permit other nations access to ocean resources they are not able to exploit themselves.

Third, questions have been raised—first by developing or socialist nations facing pressures from Western developed nations, more recently by Western developed nations facing pressures from oil-producing developing nations—about the extent to which international law should permit nations to use their control over resources to bring political or economic pressure on other nations. At some point, the use of such pressures (or of any other types of pressures used improperly or for improper purposes) may fall within the scope of established international norms condemning coercion or intervention. Distinctions between direct military coercion and economic embargo of vital food or resource needs are becoming harder to draw. Both Saudi Arabia and the United States apparently have disclaimed an intention to use oil or food as foreign policy weapons.

Fourth, emerging principles of international environmental law suggest some international constraints on a nation's freedom to pursue any resource policy it chooses, at least if those policies degrade the environment of other nations. A nation in principle may not pollute an international river or discharge wastes from resource exploitation into the atmosphere or oceans, if these threaten severe environmental damage to its neighbors or to the international community. Even in its internal resource decisions, a nation must take some account of the impact of these decisions on other nations' interests.

Sovereignty issues may be foremost, but other approaches to the international allocation of resources also raise questions of fairness. The principle of joint national control over resources does not, on the face of it, indicate how a river flowing through or between countries should be allocated among them. Should respective geographical shares in the basin, population, historic use, or present needs determine water allocations? What should be the allocative priorities accorded such potential uses as drinking water, irrigation, navigation, industrial use, waste disposal, or recreational use? How are shares in a jointly managed fishery to be allocated—by historic use, currently available fishing capacity, or need—and to what extent should new fishing nations be allowed to enter a fishery already subject to joint control by other established nations? Should nations currently active on the Antarctic continent be entitled to joint shares in whatever
resources may be discovered or exploited there, or should other nations also get some share? If so, on what basis should any division be made?

The principle of international control over resources—as in the continuing negotiations at the Third United Nations Law of the Sea Conference—also raises difficult and thus far unresolved questions of equity. To developing nations, it would be unfair for a few developed nations currently capable of mining seabed resources to reap the benefits of this common heritage. The only just result, in their view, is to give control of these resources to the developing countries themselves, which represent the bulk of the world’s nations and population and have the greatest need of the benefits of the seabed. To developed countries, on the other hand, it would be unfair for their companies—which have invested effort, skill, and capital in developing the technology of seabed mining—to lose control over the fruits of their enterprise, and have both control and rewards fall instead to nations which have invested little or nothing.

Apart from the issues of equity in each of these allocative principles when considered separately, there also are questions of fairness, consistency, and justification of these principles when they are considered collectively. For example, international law recognizes that the United States, physically able to control the flow of the Colorado River, cannot deny Mexico, heavily dependent on these waters, an equitable share in this resource. On the other hand, Mexico, physically able to control its oil resources, presumably can deny the United States any access whatsoever to Mexican oil, even if the United States ultimately becomes heavily dependent on imports of Mexican oil. In similar fashion, the United States presumably may deny exports of its agricultural commodities to particular foreign nations for political or other reasons, even if these nations are heavily dependent on such exports to feed their peoples.

Does the fact that the Colorado River flows a short distance through Mexican territory, or that the resource is water rather than oil or grain, make such a difference in practice to justify such very different ways of viewing international rights and obligations concerning these different resources? Again, recent developments indicate that manganese nodules on the deep seabed more than 200 miles from nations’ coasts now are to be regarded as the common heritage of mankind, but fish swimming in the oceans within 200 miles no longer are to be regarded as common property, but rather as the exclusive property of the adjacent coastal state. Why is it fair that all nations should share in one but not the other? Indeed, the recogni-
tion of coastal state jurisdiction over immense oil, fish, and other resources of the adjacent seas in retrospect may appear a shortsighted giveaway—accruing largely to a few developed nations—of potential international resources which might better have been allocated for broader global uses. The principal beneficiaries of 200-mile economic zones, of course, have been large nations with long coastlines and broad continental shelves—chiefly developed nations and particularly the United States, the Soviet Union, Canada, and Australia, as well as a few of the developing nations such as India and Brazil. These are controversial issues which the international community may have to face eventually.

In the long run, increasing tension between the dominant principle of national control over resources and the more recently emergent principles of joint and international control may require some type of accommodation. In the broadest sense, all natural resources (and indeed all knowledge) might be called the common heritage of mankind. One might visualize a future international society which takes the view that all nations depending on a particular resource share an important interest in it, and in fairness should have at least some say in its use and management. International commodity organizations expressly recognize that both producers and consumers have interests in particular resources and should share certain kinds of decisions about these resources; these agreements are, perhaps in embryo, a step in the direction of an all-encompassing common heritage. It is, of course, most unlikely that we soon will see international or joint control of resources located within national territories. But, as world problems of resource scarcity increase in severity, it is conceivable that, over time, pressures to modify the principle of exclusive national sovereignty over resources may mount.

The Protection of Foreign Investment

Nations also disagree about the fairness of rules for protection of foreign investments in natural resources, and in this area the applicable law is now particularly uncertain.

Under traditional principles of international law—those supported by most capitalist developed nations—every nation has jurisdiction over the activities of aliens and foreign property interests within its territory. It is recognized that a nation may prohibit the entry of foreign businesses or investments, permit such entry only on compliance with certain conditions, and regulate foreign businesses and investments within its jurisdiction. However, according to traditional doctrine, these rights of the host nation are limited in several re-
spects. By entering international agreements, a nation specifically may obligate itself to permit entry to foreign businesses and investments and to provide them certain levels of treatment; if so, it is bound by those obligations. A nation in any event is bound by customary international law to provide certain minimum levels of fair treatment to aliens and their property within its territory.

Traditional international law also recognizes that every nation, unless it has agreed otherwise, may nationalize or expropriate foreign property within its territory so long as that taking is nonretaliatory, nondiscriminatory, and for a public purpose. In order to comply with international standards of fair treatment, the taking must be accompanied by prompt, adequate, and effective compensation. A failure to provide such compensation may give rise to an international claim by the home state of the affected alien. Developed nations see these rules as just. In their view, it would be inequitable if a host nation were to renege on a solemn agreement, take a foreigner's property without paying for it, or otherwise treat aliens, their property, or their investments arbitrarily or unfairly.

Developing and socialist nations have attacked some of these traditional legal principles on the ground that they have been developed, in their view, by the capitalist and colonialist nations without the participation of socialist and recently emerging nations, and are designed solely to serve these Western industrial nations' selfish interests. They believe that some of this traditional law cannot be considered binding on non-Western nations. Developing nations accept, of course, the principle that every state has broad jurisdiction over aliens and alien property within its territory, but they would free this right of many of the constraints that traditional international law appears to impose. As developing nations see it, each nation has an inherent right to control its own resources entirely as it sees fit, without restriction or the threat of foreign pressure or interference. Any alien wishing to do business or invest in a host nation does so subject to that nation's right to exercise its sovereign powers; an alien has no right to demand treatment better than that to which the host nation's citizens are entitled, or to ask his home country to intervene or espouse his claim if he is dissatisfied with such treatment. Moreover, every nation has the sovereign right to nationalize or expropriate foreign concessions or other property as it sees fit, paying only whatever compensation it believes is appropriate.

Developing nations view this approach as fair, among other reasons, because they believe foreign business interests often have obtained and operated resource concessions and other businesses in
non-Western countries in an exploitative and dishonest way. In the past, it is said, foreign concessions and investments sometimes were obtained or accompanied by coercion, fraud, or bribery; foreign investors and companies sometimes failed to make fair payments or pay fair taxes to the host country; foreign businesses, particularly transnational companies, made excessive profits; and foreign businessmen or their governments sometimes sought by coercion, political and economic pressures, and other means to improperly influence the host country's political system and affairs in order to advance their business interests. Developing countries see foreign-owned transnational corporations in particular as villains. Of course, whether the evidence supports these charges has been the subject of heated debate.

This position of the developing and socialist nations is spelled out in a number of United Nations and other declarations and resolutions dealing with "permanent sovereignty over natural resources." The most recent and important of these statements is Article 2 of the 1974 United Nations Charter of Economic Rights and Duties of States, which provides that:

1. Every state has and shall freely exercise full permanent sovereignty including possession, use and disposal, over all its wealth, natural resources and economic activities.

2. Each state has the right:
   (a) To regulate and exercise authority over foreign investment within its natural jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
   (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this sub-paragraph;
   (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State.
Six of the developed nations, including the United States, expressly stated reservations to this article because it could be construed as inconsistent with what they regarded as existing international law. These nations consequently also voted against the Charter as a whole; ten other developed nations abstained.

Developing nations argue that the Charter of Economic Rights and Duties is in effect the current binding international law in this respect. They contend that General Assembly declarations, by virtue of their widespread (although not necessarily universal) support, can manifest binding international norms—in effect, create instant customary international law. Developed nations, on the other hand, argue that the United Nations Charter defines General Assembly actions as recommendations not binding on the members. In their view, it is unrealistic to claim that a resolution supported only by developing nations constitutes a binding customary rule when it is apparent that the industrial nations, which represent much of the world’s wealth, population, and power, do not support it.

Whatever the technical legal analysis, it seems clear that the charter and related declarations reveal developing nation attitudes which influence all nations’ expectations and which developed nations will have to take into account.

This debate remains unresolved. Developing and socialist nations often have succeeded in nationalizing, expropriating, and otherwise imposing stricter regulation on foreign concessions and investments in resources. However, in many cases of nationalization or expropriation, they also have agreed to pay some compensation, often through negotiation of lump-sum settlements of international claims. In practice, despite continuing differences on matters of abstract legal principle, both developed and developing nations have devised techniques which promote and protect foreign investment and give investors some measure of security. These devices include commercial, or “friendship, commerce, and navigation,” treaties; clear conditions and specific protections for investments within domestic law; investment guaranty agreements and programs; the World Bank Convention on the Settlement of Investment Disputes, which provides a mechanism for arbitrating contracts between consenting nations and foreign investors; and a variety of participation, divestment, “fadeout,” and

other measures to increase national participation and benefits in foreign investments.

These are issues in which reasonable arguments can be made on both sides, and the question of fairness often will depend on circumstances. As Arab and other developing nation investments in developed nations increase, multilateral stakes in international rules protecting investments against arbitrary expropriations or actions will grow too, and perspectives may begin to converge. Viewpoints often change when one must consider the mirror effects of one’s own principles and actions. For example, if Arab nations can take U.S. investments in Arab countries, paying only "appropriate" compensation, presumably the United States can take Arab investments in the United States, also paying only the "appropriate" compensation.

In the final analysis, it may be less important to investors what the relevant rules are—how much special protection or treatment such rules actually afford—than that whatever rules do apply are clear and dependable. There is much to suggest that foreign investment will proceed where profit opportunities exist, that it will adjust to whatever conditions are applicable, so long as investors have some certainty about the rules of the game. Effective flows of investment among nations will require some kind of predictable framework, and international rules are the most practical and effective way of meeting this need.

**Pricing International Resources**

Nations again disagree about fairness when confronting natural resource prices and the kinds of international arrangements appropriate to the achievement of stable and equitable prices.

Developing nations contend that present prices for the raw materials they export are inequitably low compared to the prices of the industrial goods they import. They press for international arrangements which would both raise these commodity prices relative to the prices of industrial goods imported from developed nations, and stabilize commodity prices at these higher levels. They point to the heavy dependence of many developing economies on earnings from primary commodity exports, to substantial price fluctuations for many of these commodities, and to a purported secular decline in these prices relative to prices of industrial and other goods which they import. They argue that developed nations traditionally have kept commodity prices inequitably low through colonial dominance, market control, and superior bargaining power. They believe that the exploitation of non-Western peoples through the maintenance of low
resource prices is one basis for the developed nations' wealth. In the developing nations' view, higher commodity prices can serve as a major means for redressing these injustices and redistributing wealth to those properly entitled to a greater share of it. To achieve stable higher commodity prices, developing nations propose:

1. More legal and moral support for producers' associations, on the OPEC model, to strengthen the bargaining power of producer nations, to secure fair commodity prices, and to establish a framework for producers' cooperation on other common problems;

2. An integrated, long-term, commodity program covering some 18 commodities and supported by common institutions and a common fund;

3. The negotiation of preferential trading and tariff agreements to strengthen regional trade among developing countries and to ease access of developing nations' products to developed nations' markets; and

4. Indexing or similar devices in international contracts and price arrangements to maintain the real levels of commodity earnings and purchasing power against the pressure of inflation or declining currency values in developed nations.

These approaches are recommended in the 1974 United Nations Charter of Economic Rights and Duties and in a number of other international instruments. For example, Article 5 of the charter provides that:

All States have the right to associate in organizations of primary commodity producers in order to develop their national economies to achieve stable financing for their development, and in pursuance of their aims, to assist in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly all States have the duty to respect that right by refraining from applying economic and political measures that would limit it.\(^7\)

Article 6 provides:

It is the duty of States to contribute to the development of international trade of goods, particularly by means of arrangements and by the conclusion of long-term multilateral commodity agreements, where appropriate, and taking into account the interests of producers and consumers. All States share the responsibility to promote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices, thus contributing to the equitable

\(^7\) Id., Art. 5.
development of the world economy, taking into account, in par-

Developed nations, in contrast, generally have been unwilling to concede that commodity prices are inequitably low or to cooperate in designing international arrangements to increase those prices substantially. In broad terms, they maintain that equitable prices and efficient allocation of resources are best furthered through the free and nondiscriminatory operation of market forces, not through devices which restrain these market forces. They view producers' associations, such as OPEC, as cartels designed to impose artificially high rather than equitable prices. They find harm, not benefit, for the international economy in such cartels and argue in particular that OPEC's fivefold increase in petroleum prices in 1973-74 has had a traumatic impact on the international economy. In the Law of the Sea negotiations and elsewhere, developed nations have resisted the concept of production limits as a means of increasing resource prices. Although developed nations have on occasion been prepared to support preferences and commodity agreements on a case-by-case basis—for example, in the Lomé Convention and the international tin, coffee, and wheat agreements—their view of broader proposals such as the United Nations Conference on Trade and Development's Integrated Program for Commodities has been unenthusiastic at best.

It is not easy to envisage the kind of legal arrangements which might eventually emerge from this debate or the likelihood that price agreements really will help to solve problems of economic development and income maldistribution. An internationally agreed definition of just prices is certain to remain elusive, and national definitions will tend to reflect national interests. For a variety of reasons, it seems unlikely that nations producing commodities other than petroleum will be able to emulate OPEC's success in forming associations and in raising prices. Indeed, some observers are skeptical of OPEC's long term viability. Commodity agreements involving both producers and consumers are subject to several theoretical and practical criticisms; they have had a very mixed record of success and have tended to break down under stress. Preferences are but the reverse side of discrimination, and generate their own problems.

If a major aim is the redistribution of income from the richer to the poorer peoples of the world, higher commodity prices may not be a realistic or effective way of accomplishing the objective. In some developing countries where the rich control most of these resources,
a principal effect of higher raw material prices is to make the rich still richer with little benefit to the poorer masses. (It is similarly argued that many foreign aid programs have aided primarily those segments of developing societies which need no aid.) At the least, developing nations can make their appeals to equity and justice more persuasive by ensuring that redistribution to poorer people actually occurs. As many observers have suggested, there is little equity in any arrangements which transfer income from the many less-than-wealthy consumers in developed nations to the very few wealthy people who may control resources in developing nations. Certainly developing nations will win more support from more people in developed nations if they can dispel a widely held image that their governments are frequently undemocratic, oppressive, and corrupt; that their income and wealth is highly concentrated in the hands of a very small group and its powerful friends; and that any higher earnings from international trade will be spent mostly by this dominant group for their own frivolous ends, for armaments, or for other purposes that confer few benefits on their peoples. This is not to suggest that problems of oppression, corruption, concentration of wealth, or waste are unique to developing nations or that the governments of some developed nations do not share responsibility for support of some oppressive and corrupt developing nation regimes.

There are, nevertheless, several commodity-pricing aspects on which both developed and developing nations should be able to agree. All nations share an interest in relative market certainty—in commodity prices likely to remain relatively stable and in a supply and demand likely to remain relatively predictable. There is surely a broad need to stabilize markets when goods are in drastic oversupply and prices are collapsing and to provide some allocation mechanism in conditions of extreme scarcity. Even if nations are unable to agree on a fair price in the abstract, they may be able to agree that equitable prices are better approximated by negotiations which both sides perceive as balanced than by one party’s fiat or by unequal negotiations. Perhaps that sort of agreement, at least, could be realized through appropriate long term trade or commodity schemes. International law may not be able to define equity in prices, but it may be able to establish equity in the bargaining processes through which prices are arrived at and commodities exchanged.

A major question, of course, is whether nations might be able to devise some kind of commodity arrangement for oil. On balance, the prospects for such arrangements seem poor, even though there are ways in which both producing and consuming nations could gain
from such agreement. Oil-consuming nations might gain assurances against another drastic curtailment of supplies or another abrupt leap of prices as in 1973 and 1974. Under some predictability of supply and price, consuming nations and enterprises could make more rational, efficient, and effective plans for energy needs. Oil-producing nations might gain explicit consuming nation acceptance of gradually rising oil prices, consumer cooperation in long range planning of oil production and distribution, and, in particular, a political and economic climate more conducive to their interests and their planning for the future. Oil-producing nations cannot be very comfortable with a situation in which a fivefold increase in oil prices—whether or not justified—has given rise to resentment and a feeling of exploitation among many oil consumers; in which consuming nations desperately seek to reduce energy needs or develop alternative sources of energy, and in which the ability of producer nations to hold on to their gains, over the long run, may sometimes seem fragile. Producer nations might consider it preferable to enter agreements which consolidate and legitimize their present position—perhaps with indexing provisions to protect certain real prices for oil.

At present, however, producer and consumer nations both appear to believe that they will do better without such agreements. They seem to think that the risks of conceding some points in such agreements simply are not worth whatever security and predictability may result. It is difficult to assess the bases for these attitudes. Apparently producing nations believe, given the ultimate exhaustibility of their resources, that they must secure the highest possible rate of return on their exports within existing political and economic constraints. Producing nations which can use their strong bargaining position on oil as leverage in broader issues of political and economic policy—including Middle East problems—apparently are reluctant to give up this leverage through a settlement covering oil questions alone. Consuming nations, for their part, appear reluctant to sanction existing price levels. They seem to hope that political and market forces, conservation, and alternative energy sources ultimately will make their bargaining position better than it is now. Although consuming nations apparently have been willing to yield in some broader economic and political points in order to secure access to oil, they are not prepared to go as far in this respect as some producers wish. At the moment, each group seems content to wait the situation out, to see what develops. If these are, in fact, the perceptions of the nations involved, the chances for useful cooperation in the immediate future seem slim.
International law plays an indispensable role in helping nations cooperate to manage international natural resource problems. Decisions on a new international economic order or any other international approaches to resource problems inevitably will have to be expressed in and implemented through international agreements, institutions, and procedures. International lawyers necessarily will be involved in the design of cooperative arrangements and in working out solutions to the complex problems of coordination, risk management, collective decisionmaking, and dispute settlement.

International cooperation is one way, although not the only way, in which nations seek to manage their mutual resource interdependence. Interdependence in this sense means simply that a nation cannot effectively realize its natural resource policies without taking the actions and reactions of other nations into account. A nation needing resources which others hold cannot acquire these resources unless others are willing to make them available. A nation with an economy dependent on foreign exchange earnings from resource exports cannot sell those resources abroad unless others are prepared to buy them. A nation sharing particular resources with others, such as common international drainage basins, or desiring to use particular resources in common areas beyond the limits of national jurisdiction, such as the manganese nodules on the deep seabeds, cannot use or manage such resources effectively if other nations interfere. It is an accepted fact—indeed a cliche—that for most nations interdependence in this sense is a fact, not a choice.

Faced with such interdependence, a nation might seek to reduce its dependence on others’ behavior by abandoning or modifying its natural resource objectives or by trying to achieve them through self-reliance or go-it-alone policies less subject to the effects of other nations’ actions. A nation alternatively might seek to coerce or persuade other nations to adopt policies which further, or at least do not interfere with, its own objectives. Finally, a nation might seek to establish cooperative arrangements with other nations, exchanges of behavior which permit each party to advance its resource goals in a more efficient way. Cooperative arrangements frequently are more effective and less costly than the alternatives in dealing with problems of interdependence, both for the nations concerned and for international society in general.

This view does not mean that either interdependence or cooperation is desirable for its own sake or that the benefits of cooperative arrangements necessarily will be equal for all parties. As Holsti has
noted, "dependence" is more of a reality for most states than "interdependence," and consequently attitudes toward cooperation may differ:

The policies required for global cooperation are essential for the major powers, and many other states as well, but in some cases they might be a luxury that highly dependent states cannot afford. If there is growing interdependence, it is neither universal nor symmetrical. Until more equitable relations between developed and developing states are achieved, we cannot expect the latter to jump enthusiastically on the international cooperation bandwagon, particularly in those issue-areas (e.g., pollution) where they are not major contributors to the problem.19

However, in situations where nations are dependent on each other's conduct, it generally is more advantageous to seek solutions which mutually advance their goals and avoid conflict.

But international cooperation is not always easily achieved. The nations concerned first must recognize that opportunities for effective cooperation exist and communicate their interest in cooperating. They must believe that each can gain from cooperation. Finally, they must find some way of dealing with the risks that each nation may perceive—risks that the eventual costs of cooperation may turn out to exceed the benefits; risks that other nations may not perform on their promises; risks that alternative and perhaps better ways of achieving policies may be foreclosed. Experience suggests that governments are reluctant to undertake risks. Efforts to reach cooperative arrangements usually demand long and difficult negotiations full of potential pitfalls.

International legal techniques, however, provide an extensive toolbox of risk management devices—for example, ways of ensuring that performance will occur or have a certain value, withdrawal arrangements, third-party guarantees and dispute settlement methods, and many others—through which nations can overcome problems of uncertainty and distrust and allocate and adjust risks among themselves in a manner which makes mutual cooperation possible.20 Moreover, international law serves to buttress nations' expectations that international agreements and other cooperative arrangements will be respected and observed.

20. These risk-management devices are discussed in BILDER, HELPING NATIONS CO-OPERATE: RISK-MANAGEMENT TECHNIQUES IN INTERNATIONAL AGREEMENTS (to be published 1981).
Nations in fact already have reached a great number of cooperative means for dealing with international resource issues. In adapting these existing international organizations and agreements and in devising new cooperative arrangements, nations and international law certainly will face a bewildering array of issues. Some of the more significant and pervasive of these can be indicated briefly.

Participation

International arrangements for managing natural resources cannot work unless a significant number of the directly concerned nations participate. Producers' associations, such as OPEC, will be ineffective unless all major exporters of the resource participate or at least tacitly cooperate. Commodity agreements, such as the International Tin Agreement, cannot operate successfully unless almost all important producers and consumers are prepared to join. Capital-exporting nations cannot establish effective arrangements for protecting foreign investment unless capital-importing nations are willing to share in such arrangements. Arrangements must be designed not only to attract participation by all nations whose cooperation is important but also to ensure that their participation will continue.

Decisionmaking

International resource arrangements inevitably will raise difficult questions about the scope, procedures, and effect of collective decisionmaking. If an institution has little real power, if its "decisions" are only hortatory, decision-making procedures may occasion little debate. But if institutions can make decisions on natural resource production, allocation, or pricing with binding legal effect, such procedures become very important.

Issues of decisionmaking have continued to occupy center stage in the north-south debate. Developing nations generally have insisted that decision-making authority should rest with the majority of nations participating—a procedure which of course will permit developing nations effective control over such decisions. Western developed nations generally have been reluctant to accept the principle of such an "automatic" developing nation majority, which they fear is subject to abuse. They have pointed out that the present one nation-one vote formula makes it possible theoretically for two-thirds majorities to be reached in international organizations such as the United Nations General Assembly, by votes of nations representing a very small fraction of the world's population, productive capacity, income, or power. In the absence of any spirit of compromise or
accommodation, the overwhelming voting power of developing nations could result, as developed nations see it, in the words of one recent United States representative to the United Nations, in a "tyranny of the majority." Developed nations consequently have pressed, as a condition of their cooperation in new resource and other arrangements, for fairer types of decision-making procedures—weighted voting, veto, or conciliation devices—more capable of protecting their interests.

This controversy persists in the United Nations General Assembly commodity agreement negotiations, negotiations for the proposed International Seabed Authority, and many other north-south meetings. Perhaps in time this issue may become less acute as more nations attain development, interests diverge over a wider spectrum, and the groups of developed and developing nations become more heterogeneous and less cohesive. But, at least in the short run, if effective north-south cooperation is to be achieved, some mutually acceptable compromises will have to be reached on this question.

**Dispute Settlement and Enforcement**

International cooperative arrangements on natural resources also will involve questions of dispute settlement and enforcement. There can be no guarantee that nations always will comply with their obligations, and the international system currently lacks effective means of compelling compliance. One of the best ways of dealing with disputes is a preventive one of adequate consultation and other anticipatory mechanisms for avoiding dispute. The best of these other mechanisms, of course, is to ensure that cooperative arrangements are fair and balanced, that they serve the needs of all parties so all parties want to see continued effective operation of the agreement. International level devices which can help with this job include joint commissions and other consultative techniques, fact finding, mediation, arbitration, and international courts. In addition, despite the absence of formal law enforcement agencies in the international system, there are in practice many informal pressures which can be brought to bear on nations to meet their obligations—international criticism and various economic or political sanctions, including exclusion from such cooperative arrangements. Imaginative techniques of this sort have been successfully employed in the General Agreement on Tariffs and Trade and various commodity agreements, and similarly innovative arrangements for dispute settlement have been proposed in the current Law of the Sea negotiations.
PROBLEMS OF SHARING THE WORLD'S RESOURCES ARE NOT ABOUT TO BE WHISKED AWAY BY TECHNOLOGICAL MIRACLES, MORAL REVOLUTION, OR POLITICAL BROTHERHOOD. INDEED, THE PROSPECTS PROBABLY ARE FOR INCREASED INTERNATIONAL COMPETITION, TENSION, AND POSSIBLY CONFLICT AS NATIONS EACH SEEK A GREATER SHARE OF RESOURCES TO MAINTAIN OR INCREASE THE MATERIAL STANDARDS OF LIVING FOR GROWING POPULATIONS. DIVERGENT CRITERIA ABOUT "FAIRNESS" IN RESOURCE DISTRIBUTION AND APPROPRIATE WAYS OF INDUCING EQUITY UNDOUBTEDLY WILL PERSIST. DIFFERING VIEWS MAY BE HELD ABOUT THE CONTENT AND SCOPE OF THE PRINCIPLE OF NATIONAL SOVEREIGNTY OVER TERRITORIAL RESOURCES, THE COMMON HERITAGE PRINCIPLE OR OTHER ALLOCATIVE PRINCIPLES, AND THE EXTENT TO WHICH THESE ARE INHERENT PRINCIPLES, WITHIN EACH NATION'S SOLE DISCRETION TO INTERPRET, OR, ALTERNATIVELY, SUBJECT TO CHANGE THROUGH THE PROCESS OF DEVELOPMENT OF INTERNATIONAL LAW. EACH NATION WILL CONTINUE TO PRESS FOR DEFINITIONS OF EQUITY AND FOR RESOURCE ARRANGEMENTS WHICH FURTHER ITS OWN INTERESTS AND INCREASE ITS OWN SHARE OF RESOURCES. NATIONS WILL HAVE LITTLE HOPE OF MEETING PROBLEMS OF RESOURCE ALLOCATION, ESPECIALLY UNDER PREDICTED RESOURCE SCARCITIES, UNLESS THEY ARE PREPARED TO WORK TOGETHER IN AN EFFORT TO SOLVE THEM.

INTERNATIONAL LAW CANNOT DRAW UP SOLUTIONS TO RESOURCE PROBLEMS OR MAKE NATIONS COOPERATE. LAW CANNOT DICTATE APPROACHES OR ARRANGEMENTS OR TRANSCEND WHATEVER LEVELS OF ACCOMMODATION AND COOPERATION NATIONS THEMSELVES ARE READY TO CHOOSE. LAW SIMPLY IS ONE OF THE TOOLS AVAILABLE TO NATIONS COLLECTIVELY SEEKING TO ARRANGE THEIR RELATIONS AND MANAGE THEIR COMMON PROBLEMS. IT CAN, HOWEVER, HELP NATIONS TO REACH COOPERATIVE ARRANGEMENTS AND HELP ENSURE THAT SUCH ARRANGEMENTS ARE SENSIBLE, WORKABLE, AND FAIR.

THERE IS STILL A GREAT DEAL ABOUT WHY AND HOW NATIONS COOPERATE WITH EACH OTHER AND ABOUT THE ROLE OF LAW IN FURTHERING SUCH COOPERATION THAT WE DO NOT KNOW. ARE CONFRONTATION TECHNIQUES, SUCH AS THOSE APPARENT IN SOME ASPECTS OF CURRENT NORTH-SOUTH ISSUES, AN EFFECTIVE WAY OF BRINGING ABOUT EVENTUAL COOPERATION, OR DO THEY TEND INSTEAD TO INCREASE IDEOLOGICAL AND OTHER OBSTACLES TO USEFUL COOPERATION? TO WHAT EXTENT ARE PERCEPTIONS OF EQUITY AMONG ALL PARTICIPANTS A NECESSARY OR SUFFICIENT CONDITION FOR ENDURING COOPERATIVE ARRANGEMENTS, AND WHAT FACTORS ARE LIKELY TO INFLUENCE PERCEPTIONS OF EXPLOITATION AND INEQUITY? WHAT ARE THE APPROPRIATE CRITERIA FOR DECIDING WHETHER ARRANGEMENTS SHOULD BE BILATERAL, REGIONAL, WORLDWIDE; FOR DETERMINING THE EXTENT TO WHICH DECISION-MAKING AUTHORITY CAN BE USEFULLY DELEGATED TO AND EXERCISED BY COLLECTIVE AGENCIES; FOR APPORTIONING VOTES IN SUCH COLLECTIVE DECISIONS?
Diplomats and lawyers lack a clear understanding of how uncertainty and risk affect negotiations or of the role of trust and risk management techniques in overcoming such wariness. Can trust be built up through less important agreements leading gradually to more important ones? Are there ways in which nations can cooperate effectively despite distrust? What legal or other devices might allow nations to manage or adjust such risks in order to reach workable agreements, and what are the advantages and disadvantages of such techniques? How can nations satisfy the tensions between their desire for flexibility in their own obligations but certainty about other nations’ obligations? Is it realistic to expect guarantees against uncertainty and risk as a condition of cooperation; if not, what kinds and levels of risk are tolerable?

Although there is much we have to learn, at least a few broad conditions for more effective international cooperation on natural resource issues can be suggested. First, both developed and developing nations must come to terms with the fact that their interests are entwined and that policies of either confrontation or autarky will pose serious risks and costs. There is simply no practical alternative to cooperation.

Second, nations must admit that any quest for a single standard of equity is likely to prove impossible, that cooperation requires constructive efforts by all nations to reach compromises with others’ points of view, and that agreements can be effective only when both sides see them as fair. In particular, the bargaining power of developing nations must be strengthened to enable them to participate more fully in the management of international affairs, and developed nations must take seriously the deeply felt conviction of peoples in developing nations that the present international order is unjust and that they are entitled to greater opportunities to share in the world’s resources and wealth. On their part, developing nations must recognize that their claims to “equity” may ring hollow unless their governments take steps to become more representative, to protect and promote the human rights of their people, and to reduce internal inequality and poverty. More than rhetoric or token concessions will be necessary if these fundamental differences are to be bridged and system stability maintained.

Third, nations must move away from unresolvable debates on ideology and matters of principle to a reasoned dialogue, workmanlike discussions, and good faith bargaining on the very practical questions of specific and pressing resource and other economic problems. Arrangements should be tailored to solve specific problems, designed to anticipate and avoid rather than simply to resolve disputes, and
provide mechanisms for continuing readjustment among the parties as circumstances change. Even when full agreement proves impossible, it may be useful to establish rudimentary arrangements or institutions which bypass unresolvable problems but provide an adaptable and expandable framework for meeting incipient problems.

Finally, all nations must realize that the peaceful coexistence of nations requires international order; that international order necessarily implies some limits on absolute national sovereignty and discretion; and that international law serves in the broadest sense to implement rather than obstruct the achievement of long-run national interests. National sovereignty should be viewed not as an ideological absolute, but as a functional approach to the achievement of national goals. Possible gains from unilateral national action always must be balanced against the gains that nations can achieve collectively through international approaches. In the long run, nations cannot hope to have the benefits of international order without also accepting some of the constraints which any order necessarily imposes.

Some believe that the existing international system, based on nation-states, is incapable of coping with long run problems of resource allocation or other challenges. They insist that some radical transformation in the international political structure is necessary if these problems are to be met. With more than 150 nations pursuing separate objectives in a competitive effort to increase their share of limited world resources, the chances of somehow achieving a rational and equitable system of allocation of these resources may indeed seem remote. In fact, the complexity of nations' interactions and interdependencies has reached a level which sometimes appears to defy comprehension and control. It may be, as some have suggested, that a system of equitable and efficient allocation of international resources ultimately can be achieved only through planning and regulatory techniques implemented by international agencies with supranational authority.

However, if this analysis is correct, it offers small help or comfort; there is little prospect that such a radical transformation soon can occur. In practice we have little choice but to work as best we can within the existing system and with the various tools at hand, to try to forge effective and fair solutions to the very difficult problems we face. There is reason to hope that if nations bring to such efforts common sense, imagination, a respect for others' views, and goodwill, these problems can be met successfully.