

Roderick Ogley

1 INTRODUCTION

If the United Nations' activities were to be roughly divided into the contentious and the cooperative, issues concerning the global commons would obviously fall into the cooperative category. Equally obviously, they have been far from immune to controversy, both endogenic (arising out of the issue as such) and exogenic (arising out the parties' alignments on other issues). Three of the most important such issues have been: the creation of a regime to govern the mining of tracts of the seabed lying outside any state's jurisdiction; the threat to the ozone layer; and, among the issues associated with the Earth Summit, alias the United Nations Conference on Environment and Development (UNCED), at Rio in 1992, the prospect of climate change. In each of these cases, global organization was essential both in raising the issue and in helping to implement the solution adopted.

In this article the global commons refer to those expanses, of land, sea and air, which, until recently at least, no one state could hope to manage, but which we now know can be either exploited, unsustainably, for profit, or damaged, intentionally or not, by activities emanating from a geographically dispersed array of sources. Thus, regulation is imperative and, for preference, at any rate, should be global.

The tasks facing the United Nations in dealing with the global commons have varied according to the problem posed. It has been required, in one case, to act as midwife/governess to a new, prospectively profitable, form of economic activity, and in others as sheriff banning, or rationing, activities hitherto regarded as perfectly legitimate. In responding to these diverse demands, it has lived adventurously.

2 SEA-BED MINING OUTSIDE NATIONAL JURISDICTION

The one case in which the UN has attempted to act as midwife has been that of sea-bed mineral resources in the area beyond the limits of national jurisdiction. Following a Maltese initiative of 1967,

an unopposed General Assembly resolution of 1970 declared these to be the 'common heritage of mankind'. As coastal states rapidly incorporated, in their concept of the continental shelf, any tract of sea-bed that looked as if it might contain oil or gas, the resources constituting the common heritage came to consist almost entirely of the varieties of polymetallic nodules, many of them rich in nickel, copper, cobalt and manganese, that line much of the ocean floor. Even these came to be shared with coastal states as the latter asserted their jurisdiction into exclusive economic zones extending for 200 miles, which in aggregate included a significant proportion of the more promising nodule areas, but the bulk of them remained outside national jurisdiction.

Some argued that, here, sea-bed mining is a 'freedom of the seas' like fishing and navigation, an argument demolished by the fact that sea-bed mining firms laid claim to sites, which they needed to be able to mine exclusively for a substantial span of time, to gain an attractive return on the heavy investment required. Having begun to explore and exploit a site, a given miner would hardly have wanted other miners to exercise their freedom to mine in his immediate vicinity. At the very least, therefore, there had to be an international procedure for determining the size of sites and allocating them to applicants.

Constructing that regime was one of the many items on the massive agenda of the Third United Nations Conference on the Law of the Sea (UNCLOS III). Sea-bed mining was thus scheduled to become the first industry ever to be managed by an international organization. Some of the other items on UNCLOS III's agenda also dealt with the sea as a global commons, notably those having to do with the rights and duties of states in what remained of the high seas, and in particular the duty to preserve the marine environment. Otherwise it was mainly concerned with defining these new zones of jurisdiction of coastal states and clarifying what they could or could not do in each of them, issues which this year's fishing dispute between Canada and Spain seems to have revived. It was committed

to produce, by consensus, a single convention comprehensively rewriting the law of the sea.

Out of this very tall order, it was the sea-bed mining regime that proved the hardest item to deliver. Here the alignments of states came very close to being directly North-South. The South had three main concerns. They wanted to use their numerical majority in the United Nations to control the development of the new industry, and in particular to protect those of their number who were, or might become, land-based producers of the minerals in question, from being swamped by sea-bed competition; they wanted to be in at the start of a new industry, both by giving the proposed International Sea-bed Authority an operating arm, the Enterprise, which would have funds, suitably promising sites and the right to buy technology at fair prices from other miners, and by gaining access to that technology themselves, via the Enterprise; and finally, but with a rather lower priority, they wanted the Authority to be able in effect to tax and redistribute the revenues states and companies earned from sea-bed mining.

For the North, on the other hand, the overriding aim was assured access for firms or states applying for sites, which for them meant that all the grounds on which an application could be rejected had to be written into the treaty. In return for that, under the leadership of Nixon's Henry Kissinger and Carter's Elliot Richardson, they conceded enough to the demands of the South for virtually complete agreement to be reached on the Draft Convention of 1980, leaving only a few loose ends for one last session to clear up.

This compromise was wrecked the following year by the incoming Reagan Administration. Some concessions were made to the latter's demands, but eventually something very similar to the Draft Convention was adopted by majority vote, against US opposition. The UK and Germany went on to join the USA in refusing to sign it, and although other developed states, and the European Community, did sign it, no state with immediate intentions of going into sea-bed mining ratified it. Still, any 60 ratifications were enough to bring it into force after a further year, and it received its crucial sixtieth,

that of Guyana, in late 1993. This lent urgency to a process apparently initiated by the former Secretary-General, Javier Perez de Cuellar, of consulting selected developed and developing country representatives with a view to concocting a new compromise which would bring the mining states in. In July 1994 the General Assembly unanimously approved a wholesale revision of the sea-bed mining regime, achieving in less than four years, by these modest, behind-the-scenes consultations, the consensus that 93 weeks of conference debates and negotiations, open to all states, and spread over eight years (to say nothing of the previous six in the Sea-Bed Committee of the General Assembly) had failed to achieve at UNCLOS III.

Most of the pre-Reagan concessions won by the South disappeared, including provision for a production limit which would have assured land-based producers that, for 25 years at least, sea-bed mining could take only part of the expected growth segments of the copper and nickel markets. (Cobalt exporters, who would have been hit by almost any nodule mining, were to be given compensation, a prospect which remained in the new text, though only out of funds accruing to the Authority from sea-bed mining). Assurances to the Enterprise that it would be able to obtain the technology it needed at independently-arbitrated prices, and that the money would be found to enable it to go into business on its own from the beginning, were removed. A highly complicated system of payments to be levied on contractors, on which Tommy Koh¹, with the help of computer models, had won such widespread acceptance at UNCLOS III that it remained unchallenged even by the Reagan Administration's onslaught on the Draft Convention, sank without trace and was replaced by vague pieties. In hindsight, it became clear how much more the Group of 77 might have gained, in terms of a law of the sea convention that met their demands, had they been more responsive to Northern worries in the Kissinger-Richardson era.

3 THE OZONE LAYER

The ozone layer negotiations, by contrast, were a response to a threat, not to an opportunity. The layer is a global commons, offering a protective

¹ Tommy Koh, the head of the Singapore delegation, was then chair of UNCLOS III's Negotiating Group 2, to which this question, designated one of the remaining 'hard issues', had been assigned in 1977. In 1981 he was made President of UNCLOS III in

succession to Hamilton Shirley Amerasinghe, of Sri Lanka, who had died in December 1980. When the General Assembly committed itself, in 1989, to UNCED, it appointed him to chair the Preparatory Commission for it.

barrier against the sun's ultra-violet rays. It has been depleted, in recent years, by emissions of certain chemicals which do not occur naturally, and particularly chlorofluorocarbons (CFCs), which were used in, among other things, aerosol sprays and refrigerators, and halons, used in fire-extinguishers. This depletion has led to increased incidence of skin cancer, and to agricultural degradation. There appears to be no correlation between where the chemicals are emitted and where the consequences strike: it has been over the Antarctic that the most striking depletion has occurred.

The tasks were, first, to establish the scientific validity of the above assertions; second, to persuade those firms that used CFCs, or produced goods that did, to agree to a time-table for phasing them out; third, to bring in developing countries, which at that time contributed only marginally to the problem, but could soon be expected to expand their CFC-related activities dangerously; and fourth, to enable the phase out to be accelerated, if subsequent scientific findings were held to warrant it.

It was the United Nations Environment Programme (UNEP) that initiated this process, by funding a conference of the World Meteorological Organization (WMO) on the subject as early as 1975, and then, in May 1977, promoting a 'world plan of action on the ozone layer' and establishing a Co-ordinating Committee on the Ozone Layer (CCOL). It took another eight years, however, for even a framework convention on the subject, the Vienna Convention of 1985, to be adopted. The vagueness of its terms reflected persisting scepticism about the extent, and even the existence, of the hazard. Thereafter, events moved fast. Within two years agreement had been reached on the Montreal Protocol, which provided for a 50 per cent cutback in the production and consumption of five CFCs within ten years, and a freezing of that of three halons within three. The protocol also included provisions for amending these targets, if scientific evidence should warrant, by less than unanimous decisions of 'Meetings of the Parties'. Finally, it set itself, and achieved, the target of coming into force, together with its parent convention, in just 15 months, that is by 1 January, 1989.

For it to succeed, however, it had to persuade developing countries to come into the control system. For them, CFCs belonged to the future; they had been looking forward to enjoying the benefits of chemicals that were 'nonflammable, relatively nontoxic, and among the most useful, inexpensive and convenient refrigerants, foam-blowing agents, and solvents available'². China in particular had announced plans for a twenty-fold expansion in its production of CFC-using refrigerators.

The protocol therefore contained two incentives, one positive, one negative. If a developing country became party to the Vienna-Montreal system, it would be given a ten-year exemption from its provisions, so long as its annual consumption over this period did not exceed 0.3 kilograms per capita, an indulgence which in China's case would have permitted an aggregate of CFC emissions higher than that of the USA prior to the adoption of the protocol! If it did not, however, parties were forbidden to trade in CFC-related goods with it. Thus if it expected to remain a CFC-importer, and its suppliers had joined, it would be better off joining, since it could then at least obtain supplies legally during the exemption period. But if it exported CFCs, or saw itself likely to do so in the future, it would be tempted to stay outside and cash in on the shortfall in supply. At this stage, it was by no means clear that the balance of considerations would be in favour of adherence. To generate the near-universality the system required, then, the London Meeting of the Parties in 1990 devised a further inducement, the (at first Interim) Multilateral Fund, to assist developing countries to meet the extra costs of using CFC-free technology.

It is a measure of the success of these incentives that whereas only seven developing countries had originally signed the Vienna Convention, the Montreal Protocol had, by November 1994, acquired 148 Parties, most of them developing countries, including India and China.

Through these 'Meetings of the Parties' the process of dispensing with CFCs, halons and other ozone-depleting substances was accelerated. At

² Szell, Patrick, 'Negotiations on the Ozone Layer', in Gunnar Sjostedt, (ed.) *International Environmental Negotiation*, Sage Publications for the International Institute for Applied Systems Analysis's 'Processes of International Negotiation' (PIN) Project, Newbury Park, California, 1993, p 32.

Copenhagen, in 1992, it was agreed that CFCs, carbon tetrachloride and methyl chloroform would be wholly phased-out by 1996, and 34 hydrobromofluorocarbons (HBFCs) by 1994. 34 hydrochlorofluorocarbons (HCFCs), which had been developed as much less damaging alternatives to CFCs for use in refrigerators and in the preservation of documents and works of art, were added to the list of controlled substances, to be phased-out by 2030. At Bangkok, in 1993, developed countries committed themselves to phase out the production of halons entirely by the end of that year, and to freeze the consumption of methyl bromide, in most of its applications, by 1995, with the possibility of further controls in the light of recommendations of assessments panels.

As a result of these drastic decisions, worldwide CFC production, after rising by nearly a half between 1975 and 1988, fell by 46 per cent by 1991, an impressive testimony to the effectiveness of this complicated episode in global law-making. Since 1985, indeed, the world has acted, on the ozone depletion issue, almost as if it had a single government, determining and adjusting its policy in the light of scientific advice, and applying it with appropriate regard to the circumstances of each case. Moreover, the positions originally taken have, in several cases, been substantially revised. Du Pont, for instance, admitted that they had exaggerated the costs of converting to new CFC-free technology; and the UK, which had begun by dragging its feet, became an enthusiastic supporter from the 1990 (London) Meeting of the Parties.

Later scientific observations made it clear that the Montreal Protocol had underestimated the damage already done to the ozone layer. As late as 1994, the Antarctic 'hole' in it was still growing; but, thanks to the Montreal Protocol and its amendments, it should stop growing by the late 1990s.

4 GLOBAL WARMING

Whereas sea-bed mining challenged the international community to create a framework for managing a new commercial activity in a global commons, and ozone layer depletion demanded the outright and rapid cessation of use of the chemicals responsible, global warming calls for regulating greenhouse gas emissions, not banning them. For instance, although carbon dioxide from fossil energy constitutes more than half of all greenhouse

gases, no-one would suggest that all human activities emitting it should cease. The demand is that the aggregate of such emissions should be sharply reduced.

In the science on which such demands are based, uncertainty abounds. It is now clear that, if no action is taken to prevent it, global temperatures will show a long-term tendency to rise, but how fast this will happen, and with what consequences, remain very much in dispute. Some say it would be accompanied by increased incidence of storms and droughts and that no-one would benefit, while others calculate that there would be winners as well as losers. It was claimed, for instance, that Russia might gain from milder winters in Siberia, which would extend the area that could be cropped, and Argentina and Canada might derive analogous benefits. The most obvious losers would be states with low-lying coastal areas, like Bangladesh and the Maldives Islands, for whom any rise in sea level which global warming would produce could be disastrous.

In 1990, the Science Working Group of an Intergovernmental Panel on Climate Change, set up by the World Meteorological Organization, predicted a rise in average global mean temperature of 1 degree by 2025 and 3 degrees by the end of the twenty-first century, and sea-level rises of about 6cm per decade, or about two feet over the century. This might not, in itself, sound particularly momentous, but the threat of consequent loss of territory has prompted the creation of a new pressure-group, the Association of Small Island States (AOSIS). In the 1980s, as well as carbon dioxide from fossils (55 per cent), the main greenhouse gas emissions were agricultural carbon dioxide (about 20 per cent), methane, which is less lasting, (15 per cent), and CFCs (just over 10 per cent). Stabilizing their concentration in the atmosphere would apparently require cuts of between 60 per cent and 80 per cent in the emissions of all but methane.

An attempt to ration emissions of greenhouse gases would encounter three major difficulties: determining a maximum permissible aggregate for any given period; allocating this total among states (and perhaps other actors); and devising a way of checking that no-one emitted more than their entitlement, difficulties analogous to those faced by the Food and Agricultural Organization's fishery commissions in trying to limit catches on the high seas to

sustainable levels before coastal state jurisdiction expanded to cover almost all fishing stocks. The fishery commissions failed. It will be remarkable if the attempt to control global warming is any more successful.

The attempt nevertheless needs to be made. It would be rash for any country to assume that climate change would do it no damage, and callous to ignore the likely costs that others, mainly those with extensive low-lying coastal areas, will bear. Establishing a system that stabilizes concentrations of greenhouse gases in the atmosphere at an acceptable level must be among our global priorities from now on. That achieved, we can forget about it and concentrate on other, more creative, concerns.

Though the developed countries are, of course, overwhelmingly responsible for the chronic and alarming build-up of greenhouse gases, developing countries cannot be left out of any system for controlling them. They already account for 40 per cent of current emissions and, if nothing is done, this will rise to two-thirds by 2025. Halting global warming thus requires them too to make drastic changes in their development plans.

This does not mean that they must abandon hope of development. As the official title of the Earth Summit at Rio, the United Nations Conference on Environment and Development, insists, the two aspirations are compatible. Hence the commitment to sustainable development and the consequent creation of the UN Commission for Sustainable Development (CSD), implying that development must proceed in such a way that the global commons we leave for future generations has not deteriorated. It is now becoming generally acknowledged that, where environmentally friendly methods and technology are more expensive, the rich must, at least, be ready to cover the difference for developing countries, and preferably, in return for the latter's cooperation in protecting these global commons, actively support their development plans.

Five documents emerged from Rio: two conventions, on Biodiversity and Climate Change, each prepared by its own Intergovernmental

Negotiating Committee; the short Rio Declaration; the somewhat ambivalent Statement of Forest Principles, and the 800-page Agenda 21, giving a detailed elaboration of how, over the foreseeable future, these twin aspirations of UNCED, environmental protection and development, could be realized. A Desertification Convention, also mooted at Rio, was adopted two years later. This article will confine itself to the Framework Convention on Climate Change. Without denying the importance of biodiversity, desertification, and forests, they all relate to land areas clearly falling under the jurisdiction of one or more states, so they cannot logically be regarded as global commons.

In adopting these conventions and declarations of intent, UNCED confounded expectations. The Preparatory Commission (PrepCom) which the General Assembly had established to help UNCED to bear fruit had held a series of sessions, and the last, in New York in March and April 1992, ended, according to Weizsaecker, in a mood of pervasive gloom. 'None of the central issues had been resolved, neither finances, institutional arrangements, climate, biodiversity or forests [and] many observers, including nearly all German NGOs ... believed it would be a festival of vanity and nonsense'³. The Bush Administration had retreated from an early willingness to think in terms of specific targets for emission reductions, although the EC and other OECD countries had offered to commit themselves to reducing their carbon dioxide emissions to their 1990 level by 2000. The convention does refer to this target, but in ambiguous terms, allowing the USA to argue that, in signing it, it was obliged merely to 'communicate detailed information on [its] policies with the aim of returning individually or jointly' to the 1990 level for all greenhouse gases not controlled by the Montreal Protocol⁴. The UK, in contrast, accepts that it is thereby committed to take measures aimed at this target⁵ and in April 1993 the newly-elected President Clinton brought the USA into line with the rest of the OECD countries.

The convention came into force in 1994 and the first meeting of its supreme body, the Conference of the Parties (COP I), was held in Berlin this March. It made a good start. Helped by a switch in India's

³ Weizsaecker, Ulrich von, *Earth Politics*, Zed Books, London, 1994, p 169.

⁴ Article 4.2(b).

⁵ *Climate Change, the UK Programme*, Cm 2427, HMSO 1994, p6.

position, which led to the emergence of a 'Green Group' of 72 countries, COP I decided that the convention's existing commitments to reduce greenhouse gases were inadequate, and set up an *ad hoc* open-ended group to negotiate 'a protocol or other legal instrument' to strengthen them, thus following quite closely the path trodden by the Vienna Convention on the Ozone Layer. AOSIS, led by Trinidad, called for a drastic further reduction in carbon dioxide emissions, to 20 per cent below their 1990 levels by 2005. This would have been in line with the Toronto Targets, set out by a meeting of experts in 1988, and the eventual achievement of the 60 per cent to 80 per cent reductions demanded by the 1990 IPCC report. COP I did not endorse this call, but there is still time. Given the strong resistance on the part of the OPEC (oil-exporting) countries to any new commitment, the mandate to the *ad hoc* group was an achievement in itself.

Nor did it resolve the question of voting procedures. The OPEC countries, while acquiescing, eventually, in the task assigned to this group, insisted that consensus should remain the basis of future COP decisions. Since, however, the convention allows for amendment by three-fourths of its parties, they could be overridden by a majority large enough and determined enough to take that route.

More worrying are the claims many NGO observers made at COP I that, as things stand, the parties are not on course to achieve the targets for carbon dioxide emissions reductions they have set themselves. Much therefore will hang on the effectiveness of the convention's Subsidiary Body on Implementation (SBI) which is to hold its first session in Geneva in October.

COP I also made progress on what is called joint implementation. What this means is that developed countries would be able to meet targets to which they have pledged themselves not just by reducing their own emissions but by financing projects which would reduce emissions by other countries. The convention already allowed them to do this through arrangements among themselves; COP I agreed to allow them also to negotiate such joint implementation with willing developing countries during a pilot phase, but without, in this phase, earning emission credits.

UN handling of the climate change issue is only now beginning to grapple with the inherent difficulties described earlier in this section. It has moved more slowly than the ozone layer negotiations, where the first explicit and quantitative commitments, embodied in the Montreal Protocol, came a mere two years after its framework convention. This, in itself, is no cause for dismay. Global warming is a long-term threat, and averting it is necessarily a long-term enterprise.

5 FINANCIAL MECHANISMS

Appropriately, in each of the three cases examined, where it is the developed countries that have done almost all of the damage done so far, or, in the case of sea bed mining, would, initially at least, make almost all of the profits, the regulatory system that has emerged provides for some transfer of resources to developing countries.

The Law of the Sea Convention, as adopted in 1982, envisaged three sources from which the International Sea-Bed Authority established under it would acquire revenues for distribution among its members: charges levied on states and companies awarded contracts to mine; payments from coastal states in respect of the exploitation of any part of their shelves lying beyond the outer edge of their 200-mile Economic Zones; and the profits to be made by its operating arm, the Enterprise.

The agreement of 1994 threw out the substantial payments the convention had originally required of contractors. These had ranged from 35 per cent to 70 per cent of profits, once original investment costs had been recovered, plus a production charge rising from 2 per cent to 4 per cent, or, if the contractor so chose, no profits tax but a production charge of from 5 per cent to 12 per cent. The charges that will replace them will be fixed by a Finance Committee, subject to approval by the Authority's Council. They are to be 'fair both to the contractor and to the Authority' and comparable to those paid by their counterparts on land. Given that the Finance Committee, elected by the Authority's Assembly, must include at least one sea-bed mining state, one major importer of sea-bed minerals, and until the Authority becomes self-supporting, the largest five contributors to its budget, and will operate by consensus, 'fairness to the contractor' is likely to be the prevailing consideration.

The role of the Enterprise was also drastically revised under the new agreement. It was to have been able to go into business on its own, and to have been given commercially attractive sites (through the requirement that each applicant for a site shall offer the Authority a choice between two); sufficient money to exploit one site (half from interest-free loans, half from commercial loans guaranteed by States Parties); and, for an initial period, the right to buy any technology it needed at prices to be fixed by an independent tribunal (and the duty to pass this on to developing countries planning to enter the field themselves). All that it will now have are the sites, and it must operate, initially at least, through joint ventures with the contractor supplying them.

The provision for payments by coastal states for operations in their outer shelves (Article 82) remains. Starting at 1 per cent of the value of production in the sixth year, they rise by 1 per cent a year to a maximum of 7 per cent from the twelfth onward.

That same Finance Committee will also decide, subject to the approval of the Council and the Assembly, how these revenues are to be distributed. It is not yet clear how much profit there is likely to be in sea-bed mining, but given the tight grip the sea-bed mining states are keeping on their individual and collective vetoes, the chances of the Authority's having a substantial sum to distribute to the needy, as a form of supplementary aid, look slight.

The Ozone Layer system, as we have seen, had to wait for the Second (London) Meeting of the Parties to the Montreal Protocol to acquire a fund to smooth the path for developing countries. Then an Interim Fund was set up, of up to \$160m for two years, or \$240m if India and China acceded, as they did. At Copenhagen, where the Fund was made permanent, a three-year target of \$500m was agreed, but a year later, the then Director, Mostafa Tolba, was bemoaning the fact that only \$18m of the first year's \$152m had been forthcoming.

The Fund is managed by an executive committee divided equally between developed and developing

country parties to the protocol, and operates through four agencies, UNDP, UNEP, UNIDO and the World Bank. It would appear that the developed countries have been slow to fulfil their financial commitments to this fund, in spite of the remarkable progress many developing country parties had made, according to Tolba, in complying with the demands of the protocol.

The financial mechanism for which the Climate Change Convention provides is to be operated by 'one or more existing international entities' (Article 11.1) and has been given the major preliminary task of helping developing country Parties to prepare their national plans. It is for the Conference of the Parties (COP) to decide how to ensure that the projects this mechanism supports conform with the COP's 'policies, programme priorities and eligibility criteria'. As noted earlier, the 'interim operator' of the mechanism is the Global Environmental Facility (GEF), administered jointly by the UNDP, UNEP and the World Bank, but located in, and chaired by, the World Bank. In an independent evaluation of its 'pilot phase', published in 1994, concern was expressed at the keen rivalry between the Bank and the UNDP, and the lack of a GEF secretariat to act as arbiter between their conflicting pressures.⁶ Developing countries, too, were particularly unhappy with the 'one dollar one vote' decision making system, in contrast with the one state one vote principle which holds good for the United Nations' organs.

After protracted negotiations, the GEF was restructured in March 1994. It now has a 32-member Council, half of whose members represent developing countries and the other half industrialized and former communist countries, and a voting system that combines that of the World Bank with that of the UN. It received a further \$2 billion in pledges for the three years 1994-1997. These structural changes in the GEF, and the fact that they have been followed by an increase in financing, are remarkable. At Berlin, COP I continued to accept the GEF, thus restructured, as the 'interim financial mechanism' for which the Climate Change Convention provides.

⁶ UNDP, UNEP, World Bank, Global Environment Facility: Independent Evaluation of the Pilot Phase, World Bank, 1994. The Evaluation further noted (p 136) that UNDP Resident

Representatives were nowhere playing the coordinating role envisaged in the GEF planning documents.

6 ASSESSMENT

The global commons have, over the last 30 years, presented the United Nations with problems, and opportunities, quite different from those in the minds of its founders when they launched it in 1945. On sea-bed mining, ozone layer protection and climate change, it has been called upon to articulate, and implement, a conception of the common good that transcends the good of specific states, groups of states and other actors such as firms.

Its greatest achievement, so far, has been in ozone layer protection. Since the signing of the framework treaty (the Vienna Convention) of 1985, progress has been spectacular, though, soberingly, we cannot yet be sure that it will not be one of those brilliantly successful operations from which the patient fails to recover. Even so, if its momentum is maintained, it may not be long before the world has done all that remains open to it to do to reverse the depletion of the layer, with a virtually total ban on all substances responsible for that depletion. For prompting that impressive global response to a crisis, the institution that can take the credit is UNEP.

By contrast, the UN's exercise in midwifery to the embryonic sea-bed mining industry, through the Third United Nations Conference on the Law of the Sea, was a disaster. A convention emerged in 1982, but the foetus, frightened by the Reagan Administration and its allies, took one look at it and rushed back into the womb. Twelve years later, a Caesarian performed by the Secretary-General has at least permitted a form of delivery for the infant. How robust it will be, and how socially conscious a citizen of the commons it will grow up into, remain to be seen.

The issue of global warming will certainly remain with us. Beginning with the WMO and, again, UNEP, it moved more rapidly to a framework convention than the ozone case had done, no doubt stimulated by the importance of not missing the launch-pad of the Rio Earth Summit in 1992, where it was signed, and, in consequence, firmly linked with development. The task of averting, or sharply slowing down, global warming remains awesome, and commitments, both in terms of self-restraint and of providing the money to carry the developing countries along with the enterprise, have as yet been modest; but the United Nations can certainly

take credit for the way it has brought it into the forefront of public concern and kept it there. If ozone protection is any precedent, it is going the right way towards translating the broad and largely nebulous obligations of its framework convention into specific targets. What it must also ensure, of course, is that the targets are sufficiently stringent, and that they are met!

The UN's success with ozone layer protection and (so far) with the threat of global warming, in contrast to the expensive failure of UNCLOS III's attempt to devise a sea-bed mining regime, suggests that issues concerned with the global commons are best taken to technical bodies like UNEP and WMO, rather than the General Assembly, but this is an oversimplification.

In hindsight, the very title which the Maltese gave to the mineral resources of the sea-bed in their original agenda item of 1967, and which they persuaded the General Assembly to endorse in its 1970 Declaration of Principles, the 'common heritage of mankind' can be seen to have contributed to UNCLOS III's failure to devise a generally acceptable regime for them. It made the issue emphatically political, and its seductive resonance greatly heightened expectations. Moreover, by the time UNCLOS III came to hold its first substantive session in Caracas in 1974, the developed world had been rocked by the huge increases in oil prices in the early 1970s and challenged by the General Assembly's adoption of the Declaration and Action Programme for a New International Economic Order (NIEO). The developing countries were determined that the NIEO should be reflected in the sea-bed mining regime which UNCLOS III was to generate, and were slow to recognize the limits on the concessions the mining states could make, particularly on the subject of 'assured access'. It was not inevitable that a law of the sea convention emerging from a conference like UNCLOS III should have had to undergo major surgery before any mining state would ratify it, but in this case the chances of success were blighted by the fact that it came at a time of unusual assertiveness by the developing countries, which led them to overplay their hand.

Two unfortunate procedural decisions further stacked the odds against UNCLOS III's generating an acceptable sea-bed mining regime. First, the man appointed to the chair of the relevant committee,

Paul Engo of the Cameroun, was an unsuitable choice. Though a good legal draughtsman, he proved much less effective in mediating between the differing groups than two *ad hoc* mediators, Jens Evensen of Norway and Chris Pinto of Sri Lanka, and was prone to revise the substance as well as the wording of proposals on which they had with great difficulty managed to secure provisional agreement, and twice shattered fragile compromises with his alterations, which then went on to become the conference's official texts. Yet the principle of equitable geographical distribution dictated that UNCLOS III's five chief officers should between them cover the world's five major regions, so that, as the only African among them, Paul Engo could not be replaced by a non-African, still less by a delegate from the same country that supplied the (original) president, Sri Lanka. This made for tortuous progress.

The other major mistake made in setting up UNCLOS III was to commit it to arriving at a single comprehensive convention, by consensus. This meant a package deal. Put crudely, in return for assured access and for safeguards for their other uses of the sea, in the face of coastal state enclosures and creeping jurisdiction, the sea-bed mining states – which also tended to be maritime states whose activities took them close to other states' coasts – were initially prepared to make concessions giving developing countries a say and a significant role in the sea-bed mining regime. But when, in areas other than sea-bed mining, UNCLOS III proved more successful, and a regime evolved which the maritime states found tolerable, they followed Reagan's lead, detached it from its package, and declared it to be 'instant customary international law', whose validity in no way depended on the enactment of the comprehensive convention of which it was supposedly part.

The Rio 'Earth Summit' – officially the UN Conference on Environment and Development (UNCED) – made none of these mistakes. Its products, the Framework Convention on Climate Change, the Biodiversity Convention, the Rio Declaration, the Statement of Forest Principles, Agenda 21, and, eventually, the Desertification Convention, were not made interdependent in the sense that subscribing to any of them meant subscribing to them all. They were the fruits of a variety of processes: the climate change convention originated in the IPCC set up by the WMO, the Biodiversity Convention in

an Intergovernmental Negotiating Committee set up by UNEP, and the others came out of the General Assembly's own Preparatory Commission for UNCED. Whereas UNCLOS III lasted for 93 weeks, UNCED was over in two, and was thus short enough to induce heads of state and government to attend. In the process as a whole, there was much more opportunity for science to influence delegates. Indeed, the very concept of global warming, like that of ozone depletion, can hardly be understood except by means of a scientific theory. That is not, of course, to pretend that politics had no role in these deliberations, but certainly its role was rather less dominant here than in the sea-bed mining negotiations at UNCLOS III.

It may even be that the UN is better equipped to meet threats to the global commons than to create systems for managing their profitable exploitation to the benefit of all. In the two cases considered here, the developed countries, while clearly responsible for most of the environmental damage done so far, needed to bring in the developing countries whose share in polluting the ozone layer and the atmosphere was rapidly accelerating. In the case of sea-bed mining, had it been considered as a separate issue, the mining states did not need the developing countries to become parties to their regime, provided that they acquiesced in its operation and were themselves prepared to accept it once they were in a position to go into mining themselves. They did indeed at one point seek to develop a mini-regime among themselves, rather as, *mutatis mutandis*, they have done in Antarctica. The idea that the global commons belong to all of us, or at any rate to all states, and thus that we should all share in the benefits derived from mining it, is progressive, but difficult to realize, and has now, in the 1994 Agreement to the Law of the Sea Convention, become somewhat attenuated. Even so, and favourable though the amended text is to sea-bed miners, the idea is not yet dead.

There is one further way in which these global commons issues have helped to transform the UN. They have promoted an enhanced hospitality to non-governmental organizations (NGOs) in its deliberations. Contention has long persisted, in the life of the UN, over which NGOs can be recognized as observers at its conferences and other proceedings, and what they may and may not do in that capacity. NGOs vary widely in weight and in the quality of their contributions, but at their best can

assist the process of global management by offering the fruits of their expertise in debates, by monitoring the compliance of their governments with agreed environmental norms, and by campaigning, nationally and internationally, for new or more stringent norms. NGOs cannot replace governments, and will not, and should not, be allowed to outvote governments; but they can often outthink governments. That they have increasingly been given the chance to demonstrate that fact to those on whose decisions the fate of the global commons may rest is a development to be welcomed without reservation.

7 CONCLUSION

Global organization has thus been indispensable in dealing with the global commons, in spite of the financial and other constraints under which it labours. Dynamic and resourceful as it has undoubtedly been, it will need to be even more so over the next 50 years.

The flexibility the United Nations has shown in practice is in marked contrast to the rigidity of its Charter, which can be amended only after adoption by a two-thirds vote of the General Assembly followed by the ratifications of two-thirds of its membership, 'including all the permanent members of the Security Council' (Article 108). Thus, any attempt to create a new 'principal organ' such as an Economic Security Council discussed elsewhere in this Bulletin, or abolish or even alter the size, composition, Charter-designated functions or decision making rules of an existing 'principal organ' could be thwarted by the refusal of any one permanent member to ratify the change. The permanent members were specified in 1945, and, although at that time they were well chosen, given the fact that the Organization was being set up by the victors and reflected their dominant position in the world, it would be absurd to make UN reform permanently hostage to that historical moment. If the Charter were to be amended to add new permanent members, as seems not unlikely, further UN reform would become even more difficult, since each of them could also block it. To improve the capacity of

the UN to respond to a changing world, therefore, including a world of changing threats to its commons, Article 108 should be amended so that subsequent amendments, at least if they did not relate to the Security Council and security functions would **not** require the ratification of all permanent members of the Security Council before coming into effect. Instead, amendment might be made to require a three-quarters rather than a two-thirds majority in the adoption vote and, correspondingly, the ratification of three-quarters of the membership, as in the Climate Change Convention.

The other two changes that would better enable the UN to respond to the as yet unpredictable challenges it is likely to encounter in the next 50 years would be in relation to its finances. For decades its largest contributors have been niggardly in their willingness to finance it, and in the case of the USA, unreliable in finding their share of budgets to which they have agreed. Unreliability is worse than niggardliness. It means that the Secretariat is distracted from its tasks by uncertainties about how it is going to pay the costs incurred in performing them. A mortgaging system, whereby each member handed over to it title to property of sufficient value to cover some years' subscriptions, which the UN could sell to cover contribution arrears (except those caused by recognized 'force majeure') might be worth introducing, even at the cost of reducing the assessed share of the USA and perhaps of some other major contributors.

Finally, the challenges of the global commons, and in particular of global warming, give the UN the chance to experiment with other sources of revenue. Global taxes on activities that generate carbon dioxide emissions, such as air travel and private motoring, might not only put more resources at the UN's disposal but also contribute towards achieving emission reduction targets by reducing the demand for the goods to which they were attached. In this, as in other reforms, the need is for flexibility, the readiness to try new things, and to abandon them if they do not work. From its record on global commons issues, it is a virtue the UN clearly has.