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SEABED MINING AND THE LAW OF THE SEA TREATY

BY EDWIN MEESE III

President Reagan's appointment on __________ of __________ as __________ is an important step in the President's efforts to secure a workable legal framework for the mining of the world's mineral-rich seabed.

When he entered office, President Reagan inherited a process originally designated to establish such a legal regime -- the Law of the Sea (LOS) negotiations. But the discussions some years before had begun veering off course, and the President immediately recognized that many potential provisions of the treaty would be unfavorable to American interests.

Through his negotiators, President Reagan sought several revisions, supported by our key Western allies, which would have substantially improved the document. But the bloc of countries that formed the dominant force in the treaty discussions bluntly spurned most of the changes the American delegation proposed. As a result, the draft convention approved last April continued to cast the United States as the major bankroller of a seabed mining scheme that could virtually close off U.S. and private sector mining of the seabed.

The seriousness of this issue overshadows the other, less controversial portions of the treaty. For the U.S. now must import more than 50% of our requirements for more than half of the most critical strategic minerals we use. Access to the vast seabed deposits may therefore be essential to protecting the U.S. economy and our national security in future years.

To ensure this access, the President declined to approve the flawed treaty, and has joined instead in an effort to establish an alternative seabed regime. He intends to work closely with other countries having seabed mining potential in order to create a legal environment that would encourage prudent development of the seabed's mineral resources.

He will also continue pursuing bilateral, regional, and multilateral agreements, where useful, to deal with additional maritime matters, such as scientific research and ocean pollution. In other important areas, such as navigation and overflight, traditional freedoms of the U.S. and its allies are already fully secure under existing international law. Thus, participation in the proposed treaty is not necessary to protect ours or our allies' general maritime interests.

Indeed, joining the treaty would be severely damaging to the seabed interests of both the U.S. and other nations. The LOS treaty would actively <u>discourage</u> mineral production from the ocean's floor, a crucial point that many LOS advocates have attempted to obscure.

A review of the treaty's flaws is essential to understanding why an alternative regime is this country's only option for protecting access to vital seabed minerals.

One of the treaty's most basic problems stems from the discriminatory nature of the seabed apparatus itself. The International Seabed Authority, to be established by the treaty to regulate mining, would be governed by two bodies -- an assembly composed of all parties, each with an equal vote, and a 36-member council.

The assembly would be numerically dominated by many small countries which have little or no prospective seabed mining capability. Influential among these nations, in fact, are land-based mineral producers who do not wish to see development of minerals from the seabed because it could jeopardize their competitive position in world markets.

In the council, a bias would exist against the United States. Already established rules would reserve three seats specifically for the Eastern European bloc (and thus, in practice, the Soviets), while the U.S. would not be guaranteed even one seat.

Thus, U.S. access to the oceans' store of strategic minerals would be entrusted to the goodwill of nations which have, for the most part, opposed U.S. political and economic objectives in the past.

Nor would the Authority's operating methods encourage seabed mineral production. The Authority could turn down any application for seabed development, even if the applicant were highly qualified and met all the established standards. Such a process would almost certainly be politicized, and, again, could well become highly unfavorable to the United States. Even if an application were approved, the Authority would be empowered to limit or terminate mineral production from the site.

The Authority would also have its own mining company, to be known as the "Enterprise," to compete with private concerns. This "Enterprise" would enjoy preferential treatment and generous subsidies, including loans and loan guarantees. Under the treaty, the United States would be required to provide one-fourth

of these funds, thereby forcing us to subsidize the very "Enterprise" whose ultimate practical effect could be to put U.S. and other private or national companies out of the seabed business -- if they were ever able to begin mining in the first place.

In addition, private mining firms could be forced to sell their mining technology to the Enterprise and possibly to other countries if the Enterprise could show that it could not get it elsewhere. Governments party to the treaty would be obligated to compel this transfer -- a chilling precedent which would in effect nationalize private property with no guarantee of just compensation.

Finally, and perhaps most dangerous, the treaty would be reopened for amendments 15 years after mining commenced. Since amendments could be added with a three-fourths vote of the parties, U.S. approval would not be required, thus denying the U.S. Senate its constitutional prerogative to advise and consent on the nation's treaty commitments. As a result, the United States would lock itself in advance into quite possibly anti-American treaty changes over which we could have no direct control.

In sum, these provisions would virtually preclude private sector, or even national, seabed mining efforts. Few if any mining firms or countries could afford the tremendous capital investment required for seabed start-up only to risk the taking, a few years hence, of their technology, their choice of mining sites and perhaps even their right to mine. U.S. industry, in particular, has made it clear it would not invest under such an arrangement.

Thus, it would be irresponsible for this nation to subjugate its seabed mining potential to the proposed LOS convention. Rather, it is in the best interests of the United States -- indeed, of the rest of the consuming and producing world -- to explore more productive alternatives to this seriously flawed regime.

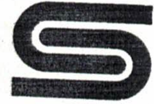
There are many ways to assure the viability of seabed mining through an alternative international arrangement, including bilateral, regional and multilateral accords. The U.S. has already demonstrated its ability to cooperate with its allies by signing an interim agreement on resolving potential mining claim disputes until a more comprehensive regime is in place.

While our allies have not made a decision on ratification of the LOS treaty itself, the U.S. regards this interim agreement as an important development. We will continue consulting with our allies, all of whom have seem defects in the LOS treaty, on the best way to proceed.

November 1, 1982

File - LOS

With Compliments



Mr Keating

Ian MacGregor

British Steel Corporation
Head Office
9 Albert Embankment, London SE1 7SN
Telephone 01-735 7654 Telex 916061

10 DOWNING STREET

THE PRIME MINISTER

11 NOV 1982

10 November, 1982

Dear Mr. Macgregor.

Thank you so much for your letter of 8 November. I have much sympathy with your views and shall give them full weight when the time comes to take a decision on signature of the Convention on the Law of the Sea. At present, we are conducting the usual examination of all aspects of the Convention but there is no doubt in my mind that the provisions on sea-bed mining are very defective indeed, and would be very damaging to this country's interests

Thank you for writing — and so cogently.

Yours sincerely

Margaret Thatcher

Ian MacGregor, Esq.,

cc: Mr R G S Melvin
✓Mr R Keating

BRITISH STEEL CORPORATION

IAN MacGREGOR

8 November 1982

Rt Hon Margaret Thatcher MP
Prime Minister
10 Downing Street
London S W 1

Dear Prime Minister,

The Law of the Sea Treaty and the question as to whether Britain becomes a signatory are matters, I believe, which will affect this country's ability to contribute to the progress of the developed world, and to maintain a significant position in its ranks. May I therefore offer some thoughts on the Treaty in its present form?

Initially, the Treaty discussions concentrated on the navigational problems. Mining of the sea bed and the 'nodules' was seen as a secondary and unimportant future prospect. Today, however, we know that in the twenty-first century, industrial economies will have to look increasingly to the oceans for their mineral resource needs. We cannot yet accurately forecast the potentiality of ocean-bed mining, but it is clearly of much greater significance than was recognised when the proposals were put forward by Mr Mintoff and when the major powers were preoccupied with the need to codify navigation rights.

I believe many people are concerned that the deep sea bed mining section gives the UN the power to mine in its own right, with money provided by developed countries and with the additional power to acquire sites and technology compulsorily from private mining consortia. Such compulsory

/contd

9 Albert Embankment London SE1 7SN Telephone: 01.735 7654 Telex No. 916061

acquisition of commercially and strategically valuable technology could be used by many small UN nations as a precedent in other negotiations involving the use of world resources. Further, any profits can be given to bodies associated with the UN and, if immediate past experience is a guide, conceivably even to such organisations as the PLO and SWAPO.

If I may express a view as the former chief executive of a major international mining company, the proposed regime would seriously deter development of such potential resources which represent, in my view, probable future economic sources for metals and minerals which the UK now freely imports from land-based and privately financed enterprises.

I feel that there would be little point in Britain signing the Treaty if the United States does not. It would be helpful, I think, to call for a reconvening of the Conference to consider the deep sea bed mining aspects of the draft Treaty. All other parts of the Treaty were arrived at by consensus and provide a basis for a workable Treaty. Surely the deep sea mining portion of the Treaty should be framed by a similar consensus.

To push ahead prematurely could condemn future generations to a risky dependence for important minerals on the machinations of a supra-nationalised industry.

Sincerely.

Ian MacGregor.

cc: Mr R G S Melvin

To : Steve Galebach 11/20/82

From : Bob Keating

File - LOS

BRITISH STEEL CORPORATION

IAN MACGREGOR

15 November 1982

Mr Robert B Keating
1681 32nd Street N W
Washington DC 20007

Dear Bob,

I recently sent you a copy of my letter to Prime Minister Thatcher and her reply.

I think there is a growing realisation in some quarters of the government here that, if the current administration is upset with "nationalised" industries, it will be even more upset with "internationalised" industries who are even less responsive to governments.

The problem here is that a lot of people seem to feel that they might offend old Commonwealth interests by changing course, and I suspect that the Foreign Office will be a difficult area. I believe therefore that there is scope for work by the State Department in this area.

Best regards.

Sincerely
Ian.

PS I am sorry I cannot be with you on December 13 for luncheon with Don Rumsfeld, but I do not plan to be in the US at that time.

9 Albert Embankment London SE1 7SN Telephone: 01.735 7654 Telex No. 916061

BRITISH STEEL CORPORATION

IAN MacGREGOR

15 November 1982

Mr Donald Rumsfeld
Box 1045
Skokie
Illinois 60076

Dear Mr. Rumsfeld

I thought it might be of interest to you to see a copy of a letter I sent to Prime Minister Thatcher and her reply.

I find a growing recognition in some parts of the United Kingdom government of the problems that the Law of the Sea suggests.

The Prime Minister, who has expressed unhappiness with nationalised industries, has come to realise that what is now being suggested is an "internationalised" industry. While nationalised industries ultimately have responsibility to government, it has become clear to her and others that internationalised industries would be responsible to nobody.

I think that there will be careful thought given to this matter in the UK.

Best regards.

Sincerely

Ian MacGregor

cc. Mr. R.G. Melvin
Mr. R. Keating ✓

9 Albert Embankment London SE1 7SN Telephone: 01.735 7654 Telex No. 916061

11/20/82

To: Steve Galebach

Fm: Bob Keating

November 15, 1982.

THE TIMES

British interest in sea law convention

From Professor D. C. Watt

Sir, Could I return to the question of whether Britain should sign the draft convention on the Law of the Sea? The matter is made the more urgent by four developments. The first is that my article (September 28) and Mr Ivens's reply (feature, October 12) are being cited in internal debate in Whitehall both as representing public opinion and as sources of fact. The second is that yet another American functionary, Mr Donald Rumford, is about to descend on Downing Street to press the Prime Minister to support the United States position.

The third is that texts of the various hearings in Congress make it quite clear that the Reagan Administration believes that all that is needed is an act of Congress to confer title to exploit any part of the ocean floor upon the United States or upon American industry.

The fourth is the increasing evidence that in reaching a decision those responsible for arriving at whatever recommendations are to be put to the Cabinet prefer consultation in private with a very limited range of interests to any wider and more public kinds of consultation.

When I first heard Professor Denman lecture on the exploitation of the resources of the sea he laid great stress on the essential importance, before anything else could be done, upon "establishing a title" to the resources which it was proposed to exploit. The resources of the ocean deeps lie beyond any conceivable national jurisdiction. To attempt to exploit them will require enormous expenditure up-front, before a single penny of return can be expected.

No financial institution in the free world, as was made quite clear to Congress by American bank spokesmen, is likely to put up the billions of dollars required unless clear and indisputable title to the resources concerned is established. That title can only be established by internationally agreed and acceptable laws and procedures. We may wish that the procedures laid down in the draft convention were simpler, less legalistic and less rigid. But it is the only convention likely to win world approval.

As for its terms, they are at least in part of American provenance and the result of a line of policy developed consistently from the days of President Ford and Dr Kissinger through the regime of President Carter. President Carter's Ambassador to the Law of the Sea Conference who, Mr Ivens alleges, acted on his own, without ever seeing President Carter, was Mr Elliot Richardson – as conservative a Republican as could be found in the United States, but of a very different conservatism from that of President Reagan, one based on the rule of law in international as in national affairs. It was he whom President Nixon dismissed from the Attorney-Generalship because he would not call off the Watergate investigation.

If British companies get involved in the exploitation of the ocean's resources British heavy engineering and British Steel will benefit. If they do not, then the field will be left to Japan, France and the Soviet Union. If Britain refuses to sign the convention she will be aligned against much of the Commonwealth, including old and new Commonwealth nations alike, against most of our European partners – and to whose advantage? To the advantage, solely, (if their judgment is correct) of those parts of American industry and government who believe in the supremacy of American interests over those of her closest allies, who think Congress can dispose of the ocean's resources and whose national mining legislation is weighted against British participation.

President Reagan may believe that American enterprises can operate without an internationally accepted regime. American bankers do not. I doubt if British bankers do.

Yours faithfully,

D. CAMERON WATT,
The London School of Economics and Political Science,
Houghton Street, WC2.
November 10.

FINANCIAL TIMES

UN convention on the law of the sea

From the Director, Aims of Industry

Sir,—Your leader (November 10) putting the case for Britain signing the United Nations Convention on the Law of the Sea left out one of the most important arguments against doing so. It is that we will be obliged to hand over our technological secrets to the Soviet Union and other nations and also to train them. That is one of President Reagan's main objections and it is, I believe, something that has been concerning our Government.

At the meeting last week between a number of government departments and interested bodies on the law of the sea, it was pointed out forcibly by one of the most distinguished representatives present that there has been woefully inadequate discussion of this major issue. There has also been, I believe, a misunderstanding of the alleged advantages of the other part of the convention which relates to the freedom of the seas and the continental shelf.

We have not experienced difficulties here for the very good reason that there is a 1958 UN convention on the territorial and high seas and on the continental shelf.

Michael Ivens,
40 Doughty Street, WC1.

Bob — I understand Ian MacGregor is sending you a copy of the PM's reply to his letter emphasizing the defects of

11/30/82

Dear Steve,
Taylor Ostrander will present this paper at the December 3rd meeting of the Atlantic Institute for Intern'l Affairs in Paris (see page 2).
Bob Keating

File - LOS

November 26, 1982

The Law of the Sea and North/South Relations: A Private Sector View

Taylor Ostrander

It is a fitting time to discuss the Law of the Sea.

The proposed Treaty, negotiated over the past decade and adopted at the concluding session of the Third UN Conference on Law of the Sea in New York on April 30 by a vote of 130 to 4, with 17 abstentions, will be opened for signature in Montego Bay, Jamaica, later this month.The United States was one of the four states voting against adoption of the Convention and President Reagan announced last July that the U.S. will not sign the Convention.

(I should explain that the Convention becomes a Treaty only after sixty states have ratified it, but I will use the two terms interchangeably. I should also explain, to avoid confusion when the press reports the signing ceremony later this month, that it is my understanding that the U.S. will sign the Final Act, attesting to its participation in the Conference, but it will not sign the Convention itself.)

The other highly topical item is that several Governments - the U.K. and West Germany in particular - are just now

reconsidering their policy on signature of the Convention in the light of the visit last month of President Reagan's personal emissary, Donald Rumsfeld, former Secretary of Defense and U.S. Ambassador to NATO in earlier Republican Administrations, who has called on the heads of state of the United Kingdom, France, West Germany and Italy, and is in the process of extending these calls to Belgium, the Netherlands, Canada and Japan, to urge them and their governments to follow the U.S. in not signing the Law of the Sea Convention.

Given the fact that the proposed Treaty has been negotiated with the active participation of U.S. delegations during the Nixon, Ford and Carter Administrations, and that the Carter Administration was on the verge of signing the Convention and would have done so if the Conference machinery had moved a few months faster, what is the explanation of the about-face? This is what I propose to talk about today.

My purpose is <u>not</u> to give a detailed description of all aspects of the Law of the Sea Convention, which has resulted from the negotiations of the past 12 years. Even if it were not one of the most complex documents ever negotiated, there would not be time to summarize in the few minutes available to me all aspects of the Treaty, and, in any case, I am not an expert on the legal aspects of the Treaty. I am also not going to discuss in any detail the specific objections of the ocean mining industry in the

United States to the Treaty text. I have never been a spokesman for the ocean mining industry and my company, AMAX, is not now, and does not contemplate becoming, a deep sea miner.

I see that I am announced as presenting "A Private Sector View." As you will quickly judge, the view I will present will be basically that of the Reagan Administration on this issue, though I certainly have no right to speak in their name, but the Reagan Administration position is enthusiastically endorsed by a considerable segment of the private sector in the United States. This includes the ocean mining industry, the handful of U.S. companies most intimately concerned; it includes industry associations that follow the whole range of other subjects under discussion in the UN that are of concern to private business -- technology transfer, patent protection, the code of conduct for transnational corporations: and it includes economists and leaders of public opinion who are concerned with all the current threats to the market economy in the world at large. Of course, there are many voices on the other side of the argument.

Indicative of the strong and widening circle of opposition to the Treaty was a cable to the Presidents of ten national industrial federations in Europe, Canada and Japan, sent on October 28 by the chief executives of seven major U.S. business organizations -- the U.S. Chamber of Commerce, the American Mining Congress, the American Petroleum Institute, the Intellectual

Property Owners organization, the National Ocean Industries Association, the National Association of Manufacturers and the National Federation of Fishermen. Their cable stated that all of these organizations, after careful review, support President Reagan's position on the Law of the Sea Treaty and they appealed to their colleagues in major industry federations in other Atlantic Alliance countries to support a similar position against their countries' signing the Convention.

They went on to say:

"American industry is convinced that the Treaty would establish precedents adversely affecting the commercial and industrial interests of all western industrialized states."

"We believe that the same considerations which led President Reagan to decide the Treaty is contrary to U.S. interests are compellingly applicable to the interests of your country."

"The Treaty creates problems which transcend the realm of intergovernmental political relationships. Viewed from the perspective of its ultimate effect on the well-being of the individual citizens of our countries, the Treaty simply fails to serve the public interest."

These are strong words. The action was, to the best of my knowledge, unprecedented in the relationship among the major business organizations of our countries.

It certainly reflects the growing conviction in the U.S. that the provisions of the Treaty relating to the control of seabed resources are defective and even damaging to our national interest.And it is felt that this is the case also for those other members of the Atlantic Alliance - "the North" - who are presumably interested in making global economic interdependence work in a practicable way, with continued primary reliance on institutions which support market forces, rather than participating in the creation of a radical and seriously flawed new structure of "global management". There does appear to have been a new awareness in Europe recently, among business and other leaders and in some government ministeries, of the undesirable aspects of the proposed regime for the seabed.

The awakening of new concern for the Treaty's implications began nearly two years ago when President Reagan, as of of the first international actions of his new Administration, blew the whistle on U.S. participation in the Law of the Sea process, which was rapidly nearing its end. As had been promised in the Republican Party Platform in 1980, the President stated that his Administration would review all aspects of the proposed Treaty

from the point of view of its concept of U.S. national interest. I believe most of you are familiar with what followed. After a year-long review, which had begun intensively even during the transitional period after his election in November 1980, the President announced on January 29, 1982, that the deep seabed mining portion of the Treaty contained a number of major faults or inadequacies, from the point of view of American interests. He said that he would send his American delegation back to the final negotiating session of the Conference in New York in April to seek revisions which would meet U.S. objectives on six major points.

What he did not say, but is well-known to those close to the Administration, is that although the whole structure of the International Sea-Bed Mining Authority which had emerged from the decade of debate was considered objectionable, constituting a highly dangerous precedent, it was so late in the negotiating process that it was felt to be politically unrealistic to expect to be able to start all over again, or to detach for separate and continuing negotiation the seabed mining portion of the draft Treaty and proceed with the navigation, fishing, environmental, scientific research and other portions of the Treaty which the Administration found basically constructive and acceptable. Thus the Administration decided it would accept an international regulatory system for the seabed and an international mining entity if it could obtain a satisfactory solution for six major problems.

As it turned out, even the limited six major points in the Reagan Administration position were not acceptable to the Group of 77, which of course dominated the Conference negotiations. As a result, the U.S. called for a vote on the adoption of the Treaty in order to record its opposition.

But before I describe the International Sea-Bed authority and President Reagan's list of its objectionable features, let me recall that, back in 1974, in the South's first elation over the four-fold oil price increase which they saw as "imposed on the North" by some of their members, North/South discussions at the U.N. took on a new dimension with the adoption of the New International Economic Order and its companion, the Charter of Economic Rights and Duties of States.

Since that time the harsh judgments, extreme proposals and heady verbiage of the New International Economic Order have lived on and flourished - at least on paper. What has happened is that, almost without the North noticing it, the New International Economic Order has become the basic economic constitution of all UN work in the eyes of the Group of 77 and of the UN Secretariat, who follow their majority masters in this matter. Reservations or objections by states of the North have been unavailing against the South's insistence that the New International Economic Order is now the framework of a new international law. This is exemplified in the Law of the Sea Treaty which, as it has turned out, is the most ambitious and far-reaching achievement of the New International Economic Order to date.

A new concept of a round of global negotiations surfaced at the Sixth Summit Conference of the Non-Aligned Nations in September 1979, in Havana, and was adopted by the UN General Assembly in the famous Resolution 34/138. Global negotiations were seen as giving a new impetus toward achieving the purposes and principles of the New International Economic Order and a "restructuring" of the world economy. The Report of the Brandt Commission in February 1980 similarly stressed that global negotiations required an "interlocking program" of "understandings" by all parties and the negotiation of "an appropriate package of measures."

It soon became perfectly clear that a major element in the South's proposed "package deal" was to do away with "Northern dominance" in the IMF and the World Bank (i.e. weighted voting). Instead, the LDCs proposed "democratic management and control" of the IMF, as well as a new international monetary system based on "universality" (presumably including USSR and its satellites), and a new international currency unit.

By 1981 a new element had been added to the South's demands. This is the concept of global management, a "revolution in perspectives and positions of governments" ... the steady and even development of the world's economy on a new basis."

Global management proposes in effect abolishing the working of market forces in the world economy: global demand and supply and trade and payment flows are to be managed; prices are to be set and commodities sold on "fair" terms; i.e.on terms that will assist the LDCs; industry is to be relocated to the LDCs; past debts of the LDCs are to be cancelled or rescheduled, but new debt is to be created without "conditionality" by the new "democratically controlled" IMF and World Bank; even the world economic crisis is to be "managed to a solution". And so forth.

I can think of few greater contrasts than between the prescription for dealing with global economic malaise in Global Strategy for Growth, the report of Lord MacFazdean's Study Group on North/South issues, and that of Kenneth Dadzie, who was then "Number Two" to Secretary General Waldheim at the U.N., in a statement he made to the North/South Round Table in Ottawa in December 1980:

> Dadzie said: "...in a world economy of multiple power centres, and in which the dividing lines between economics and politics and between political economy and national security are daily becoming more blurred, global management and power sharing is ... a necessity."

Lord MacFazdean's group states: " ... for the difficulties to be resolved, it is necessary to "de-politicize' national economies and the world economy as far as possible -- by returning to market principles."

The Reagan Administration came into office in early 1981. To many of us following these matters, it seemed not a moment too soon. Early in his Administration, the President called for a review of the global negotiations proposals and for the full-scale review of the Law of the Sea. Since then, and since the Cancun and Versailles Summits, both global negotiations and global management have become verbal hair-splitting matches --- largely over the issue of the independent agencies --- the IMF, World Bank, GATT, their role in the global negotiations and whether the global negotiation could make agreements and commitments which would be binding on those independent organizations. Meanwhile, the GATT Ministerial meeting took place last week with about half its membership coming from the less developed world, and I doubt that the issue of global negotiations was a serious topic of discussion.

Now let me come back to the Law of the Sea. While the North/South debate has flourished or dwindled in the major U.N. bodies --- the General Assembly, the Committee on the Whole (COW!), UNCTAD, UNIDO, CTC, etc. --- with little concrete to show

for all the rhetoric, in the Law of the Sea negotiations, and in the completed Convention, real global management of the seabed has been decided upon on a scale beyond anything achieved in the global negotiation/management debate in the United Nations proper.

There were two key elements in this victory of the Third World at the Law of the Sea Conference. One was the concept of a negotiated trade-off between the navigational objectives of the developed countries and the determination to monopolize seabed mining on the part of the less developed countries. Simon Webley, in his very useful brochure, published a month ago in London, The Law of the Sea Treaty; Some Crucial Questions for the U.K., says:

> "What in effect has happened is that in the long, drawn-out negotiations, the Western positions on the freedom of navigation have been 'traded off' against detailed plans for a United Nations Authority which would be virtual owner of the deep seabed and would control the economic exploitation of the minerals therein."

The American negotiating delegations prior to the delegation named by President Reagan in 1981 were willing to make this trade-off. This President is not. Nor is his Navy Department.

The second key element in winning the agreement of some countries to the proposed global management of seabed resources over the ocean's resources, was a politico-philosophical doctrine which appeared to some to give legitamcy to the Third World's position. This was, of course, the concept that the oceans are part of "the common heritage of mankind", first enunciated in the UN General Assembly Resolution of 1968 which set in motion the UN's Third Law of the Sea Conference. While many high officials of our governments may have considered this phrase a pleasant and obvious generality, the Treaty in effect defines the seabed as the common property for all time of the proposed new International Sea-Bed Authority.

Now let me attempt a brief general description of the International Sea-Bed Authority, its affiliated Enterprise, and the proposed regime for mining the deep seabed. (Brevity doesn't come easily when dealing with this Treaty!)

I believe it is well known that by the Treaty's definition the seabed is the ocean floor beyond each state's 200-mile Exclusive Economic Zone (or, in some cases, out 350 miles to the limit of the continental shelf.) This seabed constitutes roughly two-thirds of the surface of the world.

Everyone knows of the nodules, usually lying at depths of about 5000 meters, which were first discovered 25 years ago, in

the 1950s and early 1960s. Ironically, after ten years of negotiation about the regime to control the mining of manganese nodules, and just as the Treaty process was nearing its end, exciting new discoveries began to be made of polymetallic sulphides associated with rifts on the ocean floor at depths of 2500-3000 meters!

If universally accepted, the Treaty would create a permanent and binding legal obligation under international law, putting the resources of the deep seabed henceforth under the control of a new international organization, the International Sea-Bed Authority. Once the Convention is ratified by 60 states, this new international organization separates away from the United Nations and becomes an independent world government of the seabed. The new organization discards the Security Council concept of the United Nations, with its great power veto, and it changes the concept of the General Assembly of the United Nations, which under the Charter can only adopt resolutions, not take action, and creates instead an Assembly of all parties to the Convention as supreme policy-making body for ocean mineral resource development -- on a one nation/one vote basis. This is in itself a step of such fundamental importance that one would have expected widespread public and parliamentary debate -- which has happened to a very limited extent thus far.

The administrative structure of the seabed regime created by the Treaty is unbelievably complex. In addition to the Assembly, there is a Council of 36 states, representing a patchwork quilt of "interest categories" which in turn would be served by a 15-member Economic and Planning Commission and a 15-member Legal and Technical Commission. There would be a 21- judge International Tribunal for the Law of the Sea, consisting of various chambers including an 11-judge Seabed Disputes Chamber and, of course, a Secretariat which would be located in Jamaica and for which a temporary headquarters, costing some $10 million, has been under construction for over a year. Already, its staff is forming, leading to the comment by a famous American journalist recently that this would be a "permanent poolside bureaucracy."

This complex organization of government has the dual purpose of controlling the development of deep sea mining and guiding and ruling an "Enterprise" which has its own statutes and 15-member Governing Board. The Enterprise is a semi-monopolistic commercial venture which is to do deep seabed mining on behalf of this world government of the seabed; it has exclusive right to ~~for~~ mine one-half of all the mining sites on the seabed. The Authority will rule, administer and collect substantial shares of any revenues from deep sea mining by such private mining companies as are permitted to operate under a further complex set of provisions. Time does not permit elaboration of all the details, which many find quite shocking.

All of this incredible superstructure is created in order to give international legal effect to the concept that the ocean is "the common heritage of mankind."

But the Treaty's proposed administration of this "common heritage" by the International Sea-Bed Authority is beset with hurried or incoherent compromises that may be at cross-puposes, and the only certainty provided is the assurance of many disputes.

Consider now President Reagan's objections to the Treaty's seabed regime:

1) Because of the protection afforded land-based mineral producers and the denial of market forces in determining rates of production, the Treay will deter rather than promote the development of sea-bed mineral resources which, even though not commercially justified today, are a potentially important future source of strategic and other minerals.

2) It does not provide assured future access to these resources for qualified miners, and creates un-acceptable monopoly privileges for the Enterprise which the developed states are committed to finance.

3) The decision-making process, for all its complex provisions for representation by "interest categories" does not fairly protect the states that have the capital and technology without which exploration and mining will not take place, nor does it reflect their contribution.

4) The Treaty can be amended after 20 years by vote of three-quarters of the member states, a procedure not compatible with U.S. treaty ratification processes, and which will in any case tend to limit investment.

5) The requirement for mandatory transfer of technology to the Enterprise is unacceptable.

6) Allowing national liberation movements to share in future revenues sets an unacceptable precedent.

These are the points which the Group of 77 refused to concede. voting "no" on the Convention, the U.S. Ambassador stated: he Treaty does not serve the broader goal of bringing the eloped and developing countries closer together."

What a long way all this is from the original proposal of the United States and other industrial countries back in 1974-1975! It was proposed then that nations should sub-license their private mining companies to explore and mine deep sea minerals with only an international guarantee of the areas allocated to them by national administrations, and with national taxation of profits.

Many of us are convinced that the world is just not ready for global management on this scale, within this time frame and under such auspices. We believe that the public and many members of parliament in our countries do not have a real appreciation of what is being given away or of the real significance to their future of such Third World-dominated "global management".

As knowledge of the regime that has been agreed upon for the International Sea-Bed Authority becomes known to wider circles who have not been through this past decade of negotiations and compromise, the prevailing view which many of us find among reasonable people is a feeling that the Treaty's authors couldn't have been serious, that no one in their senses could have put forward so bizarre a vehicle to which to entrust such vast potential resources, now just at the threshhold of discovery. It is bewildering to consider future international economic relationships if this kind of bureaucratic structure is to characterize the management of global economic affairs!

Of course, there are some in our countries who tend to find this structure an exciting new venture -- a positive step along the path of global restructuring, an instituion of the "global village", righting the alleged wrongs of the past by shifting resources to developing nations. These "global villagers" are found mostly in government, in academic circles and in the churches -- even in the negotiating delegations of some of the industrialized states.

It is obvious that one of the principal Third World objectives in creating the proposed International Sea-Bed Authority and Enterprise is to establish a precedent for similar global management under United Nations auspices of other aspects of our world, notably Antarctica, the Moon, Outer Space, the radio spectrum and other "global commons". It is because of a strong determination not to leave unchallenged this attempt to establish the International Seabed Authority and Enterprise as far-reaching institutions of global management that the Reagan Administration is giving such a high priority at the highest level to obtain the agreement of other governments to follow its lead in not signing the Convention.

Washington is also urging completion of the Reciprocating States Agreement among the half-dozen major nations whose parliaments have already enacted legislation authorizing the grant of permits to national firms or consortia for exploration of the deep seabed.

Unchallenged success in establishing the Law of the Seas regime as envisaged in the Treaty would bedevil our countries for years to come in their efforts to create soundly based and mutually supportive relations with the Third World. It could also lead to a fundamental change in the nature of the world economy away from any market orientation. As one of your Governors, Ian MacGregor, wrote to me recently:

> "The proposed Law of the Sea completely changes the Western World's approach to its raw material supplies and makes these, for all time, subject to the control of an international body which, in essence, will more or less preclude the application of private capital in this field."

12.3.82

— Bill — Pls. snoop & make recommendation. Mike

THE WHITE HOUSE
WASHINGTON

December 3, 1982

TO: MIKE UHLMANN
MIKE GUHIN

FROM: ED HARPER EH/BA

On December 1, I sent out the attached memo regarding Sea Bed Mining.

Today, I received some additional information from Ken Cribb in regard to my question-which is also attached.

May I have a recommendation by 12/7/82?

Thanks.

EDWIN L. HARPER

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 1, 1982

MEMORANDUM FOR MIKE UHLMANN
MIKE GUHIN

FROM: EDWIN L. HARPER

SUBJECT: UN $20 Million on LOS - Sea Bed Mining.

Does the U.S. have to pay part of this? Can we avoid this?

Please make a recommendation by 12/7/82.

Thanks.

OFFICE OF
POLICY DEVELOPMENT
1982 DEC -1 P 6:15

THE WHITE HOUSE

WASHINGTON

1 December 1982

MEMORANDUM FOR ED HARPER

FROM: KENNETH CRIBB, JR. *Ken*

SUBJECT: Law of the Sea and the UN

Attached is a copy of the Law of the Sea/ United Nations item discussed at yesterday's Management Meeting, which OPD has been asked to check out.

Many thanks.

Attachment

BOB WILSON

MEMBER OF CONGRESS
1953 TO 1981

SUITE 400
499 SO. CAPITOL ST., S. W.
WASHINGTON, D. C. 20003

November 17, 1982

110096

The Honorable Edwin Meese
Counselor to the President
The White House
Washington, D. C.

Dear Ed:

Having been an advisor to the Law of the Sea Conference for several years, I heartily subscribe to the comments of William Safire and the Wall Street Journal editorial about the Law of the Sea.

Hope we can withhold 25% of the U.N. contribution to this ridiculous matter.

Sincerely,

Bob Wilson

"SEA LAW SEDUCTION" AT "CLUB SEABED"

Controversial Law of the Sea Treaty will be signed in Jamaica next month at what Essayist William Safire, in THE NEW YORK TIMES (Nov. 8), characterized as "Club Seabed."

Says THE WALL STREET JOURNAL (Nov. 9): "Sparing no expense, the U.N. is expected to lay out up to $20 million celebrating this attempt to tax Western mining companies and to steal their technology. While the Reagan Administration opposes the treaty, U.S. taxpayers may wind up paying one-quarter of the bill but also for the operating expenses of the U.N.'s new International Seabed Authority."

THE JOURNAL's editorial, entitled "Sea Law Seduction," also includes these paragraphs:

> "Because the seabed authority isn't likely to raise any of its own revenues any time soon, it will be funded out of the general U.N. budget, of which the U.S. pays 25%. As a result, U.S. taxpayers will underwrite a quarter of this seabed piracy unless the U.S. cuts its U.N. contribution to reflect its non-participation in the seabed scheme.

"The U.S. already withholds a portion of its U.N. funding obligations, equal to 25% of the funds given to the PLO, the Southwest Africa Peoples Organization and Cuba. If the administration really opposes giving the U.N. control over American mining ventures, the president should not only refuse to initial the Law of the Sea but also to provide any money for the seabed authority. The big party in Jamaica next month deserves a bit of dampening."

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 6, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: U.N. $20 Million on LOS

Funding for the LOS Seabed Authority will be provided out of the U.N. budget, of which the U.S. pays 25%.

On December 3, we sought an amendment in the U.N. which would have required funding of the Seabed Authority by LOS signatories only. We lost the vote.

Our only recourse now is to withhold a pro rata amount from our U.N. contribution. Such a move will be supported by a few of the bureaus in the State Department, but undoubtedly will be opposed by the international organization types.

I strongly recommend that we withhold part of our contribution:

- The Soviets have withheld from time to time, and in reacting to this, we have always reserved our rights to withhold part of our contribution.

- There is precedent -- we currently withhold 25% of funds given the PLO, SWAPO, and Cuba.

- By withholding funding, we make it more likely that other countries will stay out of the LOS treaty. Seabed Authority costs are likely to grow in the future, and without the U.S. and the U.K. footing the bill, other countries are not going to want to sign on to this kind of financial obligation.

- Withholding a portion of our contribution is the politically sensible thing to do. In these times of fiscal constraint, aid through international organizations is very unpopular with the public -- particularly aid to support an anti-American third world party in Montego Bay. If we do nothing to withhold the funding, we will hear a hue and cry from our friends in the Senate.

File - LOS 8259020

CITIZENS FOR OCEAN LAW

316 PENNSYLVANIA AVENUE S.E. · SUITE 303 · WASHINGTON, DC 20003 · (202) 547-6165

December 15, 1982

The Honorable George P. Shultz
Secretary of State
Department of State
Room 7226
Washington, D.C. 20520

Dear George:

As you know, among the countries that signed the Law of the Sea Convention last week in Jamaica were 15 western industrialized nations. Those of our allies which did not sign the Convention because they share U.S. concerns about its deep seabed mining provisions--among them the Federal Republic of Germany, the United Kingdom, Italy, and Belgium--indicated that they would focus their attention on the rule-making process for seabed mining that will commence next March; they will reserve final judgment on the Convention until they are able to review the implementing rules to be prepared by the Preparatory Commission.

The United States is thus left in a period of limbo during which, because other countries will defer a final decision on the Convention, it will be impossible for us to secure U.S. interests through whatever combination of alternative bilateral and multilateral agreements may be thought possible. In my recently acquired capacity as chairman of Citizens for Ocean Law, an organization founded over two years ago to broaden and deepen American public understanding of the need for an agreed rule of law in the oceans, I would therefore urge you to:

(1) reconsider U.S. participation in the Preparatory Commission as an observer, in order to hedge our bets against the possible need for eventual adherence to the Convention, and

(2) withhold any definitive statements or actions on national ocean policy that could needlessly provoke counter-assertions of law or policy from other nations, undermine much of the international consensus which President Reagan recognized as consistent with U.S. and global interests, and possibly endanger vital national rights of navigation and overflight.

On the first point, I would like to bring to your attention a resolution adopted by the State Department's Public Advisory Committee on the Law of the Sea, of which I serve as public chairman. On July 14, five days after the President's decision not to sign the Law of the Sea Convention, this long-standing committee of expert advisers recorded its sense "that the goals of the President's six objectives can best be achieved if the United States Government maintains a continuing and active presence in the treaty process, including the Preparatory Commission."*

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* Following the July 14 meeting, a poll of the entire Committee resulted

File - LOS

8239020

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* Following the July 14 meeting, a poll of the entire Committee resulted in adoption of the resolution by a vote of 69 to 12, with five abstentions and three disapprovals of the resolution mechanism.

The United States could contribute significant expertise to the Commission's task of drafting technical rules for seabed mining. These could go a long way toward eliminating worst-case interpretations of the Convention's seabed mining provisions and clarifying any ambiguities. Most of the participants in the work of the Preparatory Commission are likely to be technically rather than politically oriented. If the U.S. demonstrated a serious commitment to work through this process, we could exercise considerable influence on the substantive merits of the rules and regulations. At any point when we felt we had lost influence, we could cease to participate, and if in the end the rules proved unsatisfactory, our position would in no way have been prejudiced.

In the event that protecting U.S. interests outside the Convention should prove more costly than acting within its framework, it would have been inexcusably shortsighted not to have exhausted the remaining opportunities to improve the treaty's controversial seabed mining provisions. I would be happy to furnish you with a number of specific ideas as to what might be accomplished in the Preparatory Commission to respond to U.S. criticisms of the treaty's seabed mining regime.

On the second point, I believe that the Presidential Proclamation on an Exclusive Economic Zone (EEZ) now being considered deserves careful reflection. A forceful unilateral declaration of ocean law and policy--particularly to the extent that this measure redefines the scope of coastal-state rights and obligations within the EEZ as agreed during a ten-year negotiation--could trigger various and conflicting claims by foreign nations. This would unravel the very fabric of law we set about to create ten years ago. A far wiser course would be to defer any such actions until the options open to us to protect U.S. ocean interests have been more clearly identified.

With warm regards and best wishes,

Sincerely,

Elliot L. Richardson
Chairman, Board of Directors

f.le - LOS

The Honorable John Lehman December 21, 1982

Dear John:

I attended the John Breaux - Elliot Richardson debate on the LOS treaty held at the Carnegie Endowment Institute last Monday, December 13. My comments on this debate may be summarized as follows:

John Breaux did a first-class job of explaining his position on the LOS treaty, as well as supporting his bill on the EEZ.

Most of what Richardson said was predictable. He played down the fact that 46 countries did not sign the treaty in Montego Bay on December 10. He predicted that at least 20 of the countries which either did not sign at Montego Bay, or which were not there at all, would shortly sign. He stressed that the LOS treaty somehow transcended the significance of the oceans alone, and that the U.S. had clearly abdicated its leadership role in the world by rejecting the treaty.

Roger Brooks of The Heritage Foundation asked Richardson how he could belittle the fact that most of the nations that did not sign the treaty are those without whom seabed mining would not take place. For while the treaty was endorsed by a host of small developing countries, the leading industrial states, representing more than half the global GNP, had joined with the United States in rejecting it. Roger also pointed out that Richardson himself had predicted that the U.S. would be isolated from the world community on the LOS issue, and become a pariah from the world community. (Richardson told Jim Malone at the LOS Advisory Group Meeting in June, "There's not a chance in hell of a European nation going along with us on a mini-treaty, or any other arrangement outside the LOS treaty".) Richardson retorted with more one-world arguments, maintaining that the great community of nations (117) had signed the treaty, and that non-signers would not be able to pick and choose from those parts of the treaty which they like. He made special reference to the navigation and fisheries provisions of the treaty. He stressed that the Reagan Administration was ignorant of the importance of an all-embracing, comprehensive LOS treaty in an increasingly inter-dependent world.

Richardson insisted that the U.S. missed many opportunities to improve the treaty to its satisfaction, and should have worked far more diligently to change those ocean mining provisions which it found unacceptable; changes which can still be made if we participate in the PrepCom. He also berated the efforts of Administration officials to "strong arm" U.S. allies to reject the treaty. For example, he maintained that the Japanese did not sign the treaty out of courtesy to Rumsfeld, but would do so after the new Prime Minister met with President Reagan next month in Washington. What was surprising to me was his statement to the effect that it was not significant that West Germany and England did not sign the treaty (the implication being that the FRG and UK are currently being led by two politicians who are no less "ideological" than our own President).

Richardson purported that the U.S. was hypocritical on the LOS seabed mining provisions because multinational corporations are willing to accept far more "disadvantageous" conditions in their contracts with Third World countries than those under the LOS treaty (he used as an example the Pertamina contract for oil exploration in Indonesia). I believe we should be prepared to rebut this argument strongly in future discussions with pro-treaty adherents. The operations of multinational corporations in LDCs do impose special conditions, but these have to be examined quite carefully when one discusses technology transfer and production limitations. Those conditions that an LDC might impose upon a multinational corporation operating within its territorial limits are quite different from the conditions that would be imposed by an international seabed authority for ocean mining.

Richardson made a great to do about Administration ideologues having imposed their ideological judgements on the LOS treaty, rather than taking a professional, pragmatic point of view of the treaty's benefits and shortcomings. For example, he underscored that the seabed mining provisions which the Reagan Administration takes such exception are really not that bad or harmful to our interests (e.g., technology transfer, production limitations). Permitting ideology to override pragmatism would mean missing the opportunity to bring about changes in rules and regulations under the PrepCom which would be entirely satisfactory to the American people. He then called upon Ambassador Bruckner of Denmark and Ambassador Brennan of Australia to support his viewpoints. Both of these gentlemen made strong statements to the effect that the Reagan Administration had missed a great opportunity to enhance and promote international peace and world stability by rejecting the LOS treaty, and that we should expect to pay dearly for our mistake.

Comments: Both the recent LOS seminar at Duke University and last Monday's debate have convinced me that Elliot Richardson and his Citizens for Ocean Law will continue their energetic efforts to have the U.S. continue in the LOS process. Their theme is, "The rest of the world will get along without the United States in the LOS treaty, but can the U.S. get along without the rest of the world?". This being the case, I believe we must now take the "high road" with counterarguments structured along the following lines:

1. The LOS treaty is filled with ideology, and it is not possible for the U.S. to simply take a pragmatic approach to the treaty's provisions (e.g., technology transfer, production limitations, etc.). For example, although the production limitation provision is stipulated for only 15 years, under the Review Conference such limitations could be extended or made even more onerous. In fact, after 20 years, the regime could be changed completely by a 75% majority so that the present system could be replaced by the Enterprise exclusively.

2. In the context of precedents, it has to be stated more emphatically that the proposed regime - and especially the Enterprise - represents a signficant introduction of "centralized planned economy" concepts into the international arena

that could lead to the eventual elimination of private sector operations. In this context, the "Common Heritage of Mankind" is an idea that fits quite happily into the global socialists tool kit as a theory of property, and as a slogan for those global socialists, and anti-Free Enterprise factions, who advocate a New International Economic Order; an idea that would apply equally well to the Outer Space Treaty and the Draft Treaty on the Moon, or for that matter to Anartica. This idea is clearly leading the United Nations itself into commerce in a way its Charter can never have intended, there to dominate the free enterprise resource markets. In sum, for the Intern'l Seabed Authority to have supreme title to the deep seabed can only have serious economic and political consequences for democracy and capitalism. We must ask what place such an unprecedented monopoly would have on the economics of the marketplace, and in imperilling our country as the pride of free markets and of private property.

3. We must also make the point better that this centralized and collectivist scheme, with its built-in controls, bias and discrimination in favor of the Third World and Soviet bloc, not only discriminates against the more technically competent and financially able nations, but is doomed to failure. The evidence of history is that all coercive collective enterprises, and the national economies based upon them, fail for want of individual commitment and reward (even Rousseau and his collectivists, while espousing social, economic, and political theories based on the common will of all mankind, stoutly maintained that private property was "le droit le plus sacre --- dieu moral des empires").

4. It also occurs to me that while the seabed authority scheme is ostensibly set up and motivated for the benefit of all mankind, we must make it clearer that mankind must surely include the many countries unwilling to sign the treaty. Mankind as a whole has given no power of attorney to the LOS Conference. The Common Heritage of Mankind has an engaging ring about it as an idea, but must we allow rhetoric to be exchanged for reason?

5. I think it is also necessary to speak more of the menacing prospect of where the ISA's powers may lead. The real danger lies in the possible extension of the power of the ISA as an international institution, the greatest monopoly on earth, with supreme control over the licensing and disposition of deep ocean resources - that is, over something like 60% of the resource-spread of the globe.

6. The misleading statement that the LOS treaty can be fixed if we but stay in the process and participate in the PrepCom must also be put to rest. Fixing the rules and regulations of the PrepCom will not cure the major defects of the treaty (rules of voting and decision-making).

7. Finally, we must box in Elliot Richardson and his cohorts with respect to how many of our fundamental American values is he willing to sacrifice for the LOS treaty. Would the surrender of four of our basic political and economic principles be too few in exchange for such a treaty, or would nine be too many? Perhaps it would be this line of counterattack that would be more understandable to those of our citizens who are not knowledgeable about a treaty that would disenfranchise the major economic powers of the Free World, and which would be a model that would be repeated again and again.

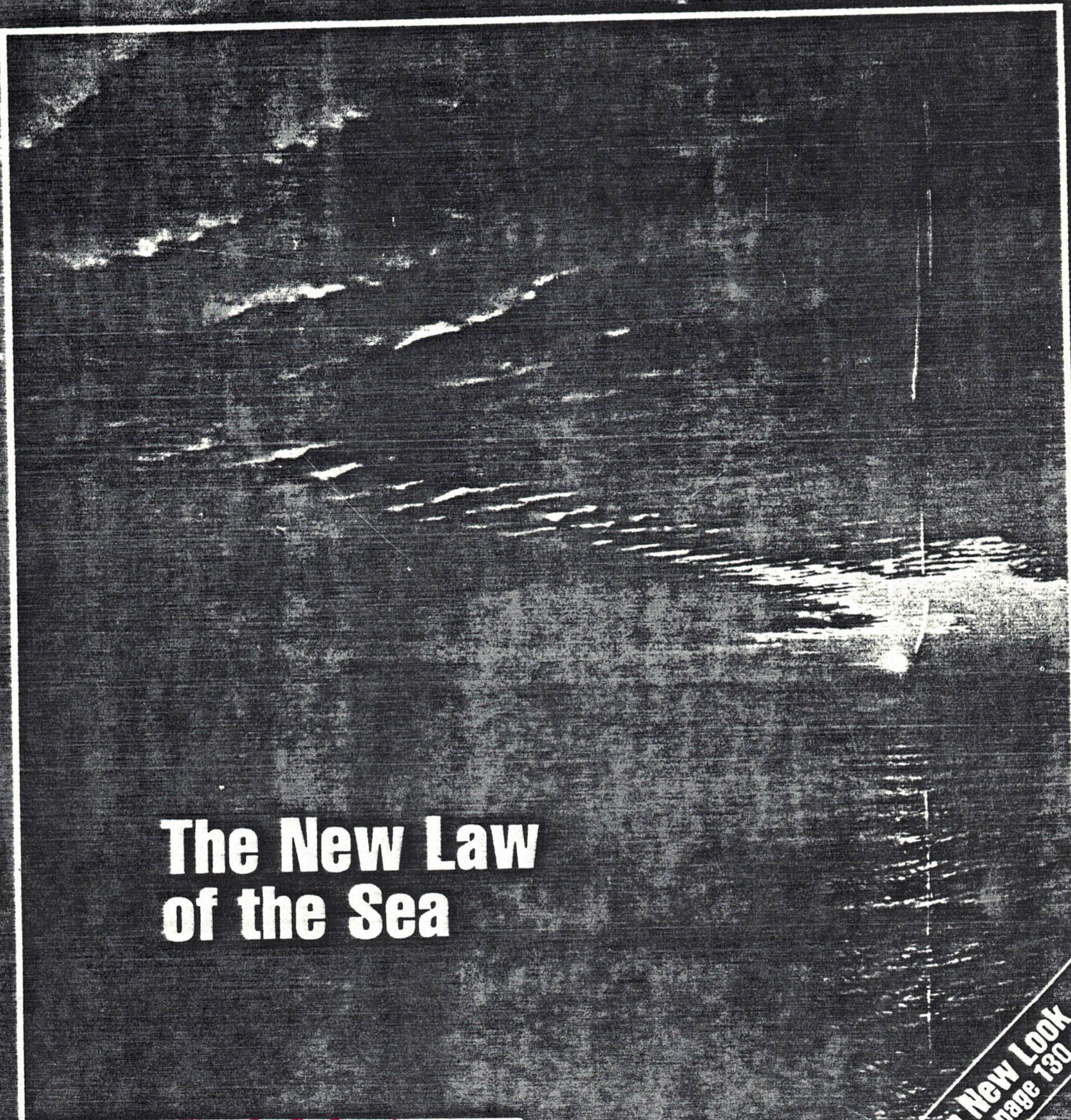
Sincerely,

Robert B. Keating

cc: Hugh O'Neill

American Bar Association Journal

February, 1983



The New Law of the Sea

Our New Look
See page 130

001259
DB 6856150O OO
W FERRY PENDLEY
4501 N 18TH ST
ARLINGTON VA 22207

The New Law of the Sea

By Bernard H. Oxman

ON December 10, 1982, a new United Nations Convention on the Law of the Sea was opened for signature in Jamaica, the climax of 15 years of treaty negotiations among the nations of the world in a special committee of the United Nations and, since 1973, at the Third U.N. Conference on the Law of the Sea.

Although President Reagan found that the "navigation and overflight" and most other provisions of the convention "are consistent with U.S. interests" and "serve well the interests of all nations," he, along with the governments of Belgium, Great Britain, Italy, Luxembourg, and West Germany, declined to authorize signature of the convention because of its deep seabed mining provisions. The five other members of the European Common Market, most other Western countries, the Soviet bloc, China, and most African, Asian, and Latin American countries signed the convention on December 10. More signatures are expected within the next two years. There is a substantial possibility that more than the necessary 60 states will ratify the convention and bring it into force in the 1980s.

Except for those on deep seabed mining and settlement of disputes, the provisions of the convention are already regarded by some government and private experts, including the authors of the new draft *Restatement of the Foreign Relations Law of the United States*, as generally authoritative statements of existing "customary" international law applicable to all states. The president of the conference, however, joined many of his colleagues in warning that other countries will not necessarily accord Americans their *quids* if the United States stays out and denies them their *quos*.

There are many facets to the current debate regarding the convention, a treaty of some 200 single-spaced pages whose 446 articles describe the basic rights and duties of states in connection with all activities at sea. Broad issues of process, principle, and precedent are invoked with respect to matters as varied as defense, ecology, economics, ethics, oceanography, politics, and (sometimes) law.

It is not my purpose to rehearse the debate but merely to give a brief summary of its object: the convention. Still, every sentence and omission reflects some professional judgment with which others might reasonably differ.

The third time at bat

As its title indicates, the recent conference was not the first effort to lay down the rules of the law of the sea by universal agreement. Efforts to codify the law of the sea began under the League of Nations, culminating in the adoption by the first U.N. conference of four conventions in 1958. Although ratified by the United States and many other maritime countries, these conventions did not fully achieve the objectives of a modern, universally respected body of law. Negotiated before almost half the current community of nations won independence, they were not ratified by a substantial majority of states, failed to resolve certain important issues (for example, the breadth of the territorial sea), and did not deal in detail with certain new problems (for example, environmental protection and deep seabed mining).

The second conference was called in 1960 to try again to fix a maximum limit for the territorial sea, but it failed. There

remained no sufficiently reliable basis for predicting or restraining the increasingly conflicting claims of states to use and control the sea.

The third conference was charged by the U.N. General Assembly with preparing a new and comprehensive convention on the law of the sea, by consensus if at all possible. Its aim was to achieve a degree of universal agreement on the rules of behavior at sea that, since World War II, had eluded both the earlier conferences and the processes of customary international law. Beginning in 1975, the officers of the conference combined texts and ideas that emerged from informal negotiations and submitted them as an informal negotiating text at the end of a session. Delegations returned to the next session with a clearer idea of what they were prepared to accept. The final text emerged from the eighth iteration in this process. The few substantive amendments pressed to a vote were defeated.

Following the U.S. request for a record vote, on April 30, 1982, the conference adopted the text by a vote of 130 delegations in favor, including Canada, France, and Japan, and four against, including the United States, with 18 abstentions and 18 unrecorded.

The legal map of the sea

The convention applies to the "sea." Oceans, gulfs, bays, and "seas" are part of the sea; lakes and rivers are not. It long has been accepted that the sea may not be claimed in the same manner as land areas. Some parts are allocated to adjacent coastal states. The rest is open to all.

The convention seeks to accommodate the interests of a state:

(1) by giving it and its nationals freedom to act in pursuit of those interests (for example, navigation rights and high seas freedoms); and

(2) by limiting the freedom of others to act in a manner adverse to those interests

(a) by imposing a duty on foreign states and their nationals to act in a prescribed manner (for example, safety and environmental restrictions), or

(b) by giving a state the right to prevent or control activities of foreign states and their nationals (for example, territorial sovereignty or coastal state jurisdiction over mining or fishing).

Because rules generally apply to all, states must balance their desire to maximize their own freedom of action with their desire to limit the freedom of action of others. A typical coastal state might prefer a broad territorial sea for itself and a narrow one for everyone else. Sometimes it can be more complicated than that. A government may seek to control the foreign or domestic pressure on itself or its successors to behave in a particular way by limiting its freedom of action. Law that is difficult to change, such as constitutional law or treaty law, is one way to achieve this.

Internal waters

Not only lakes and rivers, but harbors and other parts of the sea are so much enclosed by the land that they are, in effect, internal. An example is a small bay. Emergencies aside, the use of internal waters, including their seabed and airspace, generally requires coastal state consent. Because they are more open and useful to navigation, however, in those internal waters, which are established by a "system of straight baselines" connecting coastal or insular promontories, foreign states enjoy the same passage rights as in the territorial sea. The convention contains a number of technical rules on how to establish baselines delimiting internal waters. These are largely drawn from the 1958 Territorial Sea Convention.

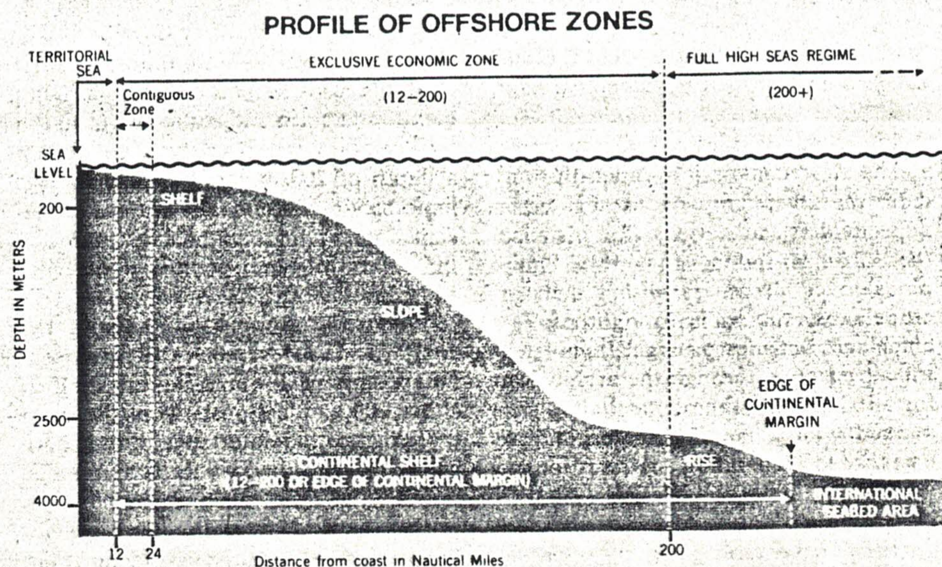
One innovative provision permits a state to investigate and try foreign ships visiting its ports for discharging pollutants in violation of international rules and standards virtually anywhere at sea.

The territorial sea

Every coastal state is entitled to exercise sovereignty over a belt of sea adjacent to the coast, including its seabed and airspace. This "territorial sea" is measured seaward from the coast or baselines delimiting internal waters.

One of the reasons for calling the third conference was that the two earlier conferences failed to reach agreement on the maximum permissible breadth of the territorial sea and, accordingly, on the extent of the free high seas. Respect for the old three-mile limit had eroded. Some territorial sea claims extended as far as 200 miles. The new convention establishes 12 nautical miles as the maximum permissible breadth of the territorial sea.

The sovereignty of the coastal state in the territorial sea is subject to a right of "innocent passage" for foreign ships but not aircraft or submerged submarines. The question of what constitutes "innocence," as well as the extent of coastal state regulatory power over ships in passage, remained in dispute following the 1958 conference. While repeating the provisions on innocent passage of the 1958 convention, the new convention adds a list of activities that are not "innocent passage," prohibits discrimination based on the flag or destination of a



Photography/Four by Five, Inc.

ship, and clarifies the right of the coastal state to establish sealanes and traffic separation schemes and to control pollution.

Straits

Any extension of the geographic area in which a coastal state exercises sovereignty at sea reduces the area in which the freedoms of sea, including freedom of navigation and overflight, may be exercised. In narrow straits, extension of the territorial sea or the establishment of straight baselines may eliminate any (or any usable) high seas passage through the area. At the same time, states bordering straits may be subject to political pressures to assert control over transit for reasons of national defense or environmental protection, not to mention the dream of a sultan's ransom in tolls and tribute.

Under the 1958 convention a coastal state may not suspend innocent passage in a strait used for international navigation. The new convention establishes a more liberal right of "transit passage" in straits for aircraft and submerged submarines as well as surface ships. Among those are the straits of Dover, Gibraltar, Bab-el-Mandeb, Hormuz, and Malacca. The debate about whether warship passage is "innocent" is rendered irrelevant. There is no right to stop a ship in transit passage, unless a merchant ship's violation of internationally approved regulations threatens major damage to the marine environment of the strait.

Special long-standing treaty regimes for particular straits (such as the Turkish straits), rights under the peace treaty between Egypt and Israel, and artificial canals are unaffected by the convention.

Archipelagic waters

The new convention generally validates the sovereignty claims of some independent island nations (for instance, the Bahamas, Indonesia, and the Philippines) over all waters within their archipelagos, subject to a right of "archipelagic sealanes passage," similar to transit passage, through the archipelago for all ships and aircraft, including submerged submarines. Specific criteria are established for limiting the situations in which archipelagic baselines may be drawn around an island group and how far they may extend.

The contiguous zone

The coastal state may take enforcement measures in a contiguous zone adjacent to its territorial sea to prevent or punish infringement of its customs, fiscal, immigration, or sanitary laws in its territory or territorial sea. The new convention extends the 1958 limit of this contiguous zone from 12 to 24 nautical miles from the coast (baseline). It also permits the coastal state to take special measures to protect archeological treasures.

The continental shelf

It is now generally accepted that the coastal state has exclusive "sovereign rights" to explore and exploit the natural resources of the seabed and subsoil of the continental shelf adjacent to its coast and seaward of its territorial sea. The questions are where, and for what other activities, is coastal state authorization needed.

The coastal state has exclusive sovereign rights to the natural resources of the continental shelf adjacent to its coast. The questions are where and for what activities is coastal state authorization needed.

The 1958 Convention on the Continental Shelf defines the continental shelf as the area of seabed and subsoil adjacent to the coast and extending from the territorial sea to where the waters reach a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil.

The new convention permits the coastal state to establish the permanent outer limit of its continental shelf at either 200 nautical miles from the coast (baseline) or the outer edge of the continental margin (the submerged prolongation of the land mass), whichever is further seaward. Its elaborate criteria for locating the edge of the continental margin are designed to allocate virtually all seabed oil and gas to coastal states. Once approved by an international commission of experts, the coastal state's charts showing the location of the outer edge of its continental margin are final and binding on the rest of the world (at least the other parties to the convention). This *ex parte* procedure is intended to lower the risk of investment in a manner similar to the action to quiet title.

In addition to control of natural resources and installations used to exploit them, the 1958 convention gave the coastal state effective control over scientific research on the continental shelf. Some coastal states claim a right to control all uses of the continental shelf. The issue may arise in discussions of new fixed uses, such as offshore military structures, ports, airports, power plants, or even pirate broadcasting schemes and gambling casinos. Or it may arise in the context of international monitoring efforts for purposes such as arms control, navigation safety, weather prediction, or environmental protection.

Under the new convention the coastal state, with respect to the continental shelf, has not only sovereign rights over the natural resources of the seabed and subsoil but also the exclusive right to authorize and regulate drilling for all purposes and the right to consent to the course for pipelines. Its newly elaborated rights regarding installations and marine scientific research on the continental shelf are generally the same as its rights in the exclusive economic zone.

The new convention specifies three new duties of the coastal state. The first, applicable to the entire continental shelf, requires every coastal state to establish environmental standards for all activities and installations under its jurisdiction that are no less effective than those contained in international standards. At the same time the rigid petroleum installation removal regulations of the 1958 convention were relaxed in response to the concerns of oil companies.

The other new duties are applicable only to that part of the continental shelf that is seaward of 200 nautical miles from the coast. One requires the coastal state to pay a small percentage of the value of mineral production from the area into an international fund to be distributed to parties to the convention, particularly

developing countries. Another prohibits the coastal state from withholding consent for marine scientific research outside specific areas under development.

The exclusive economic zone

The provisions on the exclusive economic zone are all new law. Measured by any yardstick — political, military, economic, scientific, environmental, or recreational—the overwhelming proportion of activities and interests in the sea is affected by this new regime.

Under the convention every coastal state has the right to establish an exclusive economic zone seaward of its territorial sea and extending up to 200 nautical miles from its coast (baseline). Seabed areas beyond the territorial sea and within 200 miles of the coast are therefore subject to the continental shelf and economic zone regimes.

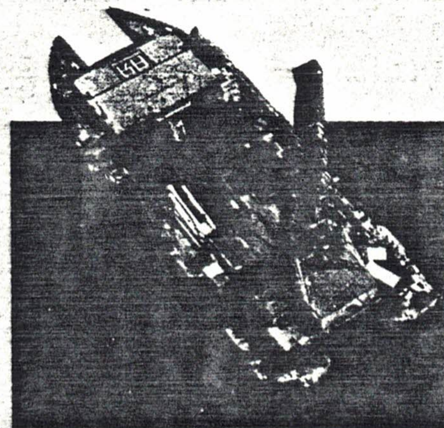
Two separate sets of rights exist in the economic zone: those enjoyed exclusively by the coastal state and those that may be exercised by all states. The division is by activity, not area or ship.

The rights of the coastal state in the economic zone are:

- exclusive sovereign rights to control the exploration, exploitation, conservation, and management of living and nonliving natural resources in the waters and the seabed and subsoil;
- exclusive sovereign rights to control other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds;
- the exclusive right to control the construction and use of all artificial islands and installations and structures that are used for economic purposes or may interfere with the coastal state's exercise of its rights in the zone (for example, an oil rig or offshore tanker depot);
- the right to be informed of and participate in proposed marine scientific research projects and to withhold consent for a project in a timely manner under specified circumstances;
- the right to control the dumping of wastes; and
- the right to board, inspect, and, when there is threat of major damage, arrest a merchant ship suspected of discharging pollutants in the zone in violation of internationally approved standards. This right is subject to substantial safeguards to protect shippers, sailors, and consumers. Even if investigation indicates a violation, the ship must be released promptly on reasonable bond. If release is not obtained within ten days, an international court may set the bond and order release "without delay." If so authorized, a private party may seek this release order on behalf of the flag state. The convention establishes a time limit for prosecution, requires that the coastal state observe "recognized rights of the accused," prohibits punishments other than monetary fines, and restricts successive trials by different states for the same offense.

The rights of all states in the economic zone are:

- the high seas freedoms of navigation, overflight, and the laying of submarine cables and pipelines; and



- other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines. This category may cover a gamut of uses—for example, recreational swimming, weather monitoring, and various naval operations.

This allocation of rights is accompanied by extensive duties.

Because both the coastal state and other states have independent rights to use the economic zone, each is required to ensure that its rights are exercised with "due regard" to the rights and duties of the other.

Flag states must ensure that their ships observe generally accepted international antipollution regulations.

The coastal state must take measures to ensure that activities under its jurisdiction or control do not cause pollution damage to other states.

The coastal state is required to ensure the conservation of living resources in the waters of the economic zone. Except with respect to marine mammals, it also must promote the optimum utilization of these resources by determining its harvesting capacity and granting access under reasonable conditions to foreign vessels to fish for the surplus, if any, that remains under its conservation limits. Neighboring states with small enclosed coastlines, or none at all, enjoy some priority of access to this surplus. International protection of whales and other marine mammals is required, as is regional regulation of migratory species.

If the economic zones or continental shelves of neighboring coastal states overlap, they are to be delimited by agreement between those states on the basis of international law in order to achieve an equitable solution. This general provision should be read against the background of an increasing number of bilateral agreements and international judicial and arbitral decisions on offshore boundary delimitation.

The high seas

Like the 1958 Convention on the High Seas, the new convention does not contain an exhaustive list of the freedoms of the high seas. Both expressly name the freedoms of navigation, overflight, fishing, and laying of submarine cables and pipelines. The new convention also lists freedom of scientific research and freedom to construct artificial islands and other installations permitted under international law.

Largely copied from the 1958 convention, the new high seas regime has been augmented by stronger safety and environmental obligations of the flag state and special provisions on the suppression of pirate broadcasting and illicit traffic in drugs. Freedom to fish on the high seas is subject to specific conservation and ecological requirements. Free high seas fishing is eliminated for salmon and can be eliminated or restricted for whales and other marine mammals.

Unlike the 1958 convention, the new convention does not contain a definition of the high seas. Rather it says that its articles on the high seas apply to all parts of the sea beyond the economic zone,

and that most of those high seas articles also apply within the economic zone to the extent they are not incompatible with the articles on the economic zone. Thus, for example, the rules of navigation for ships and the law of piracy continue unchanged in the economic zone.

The international seabed area

The "international seabed area" comprises the seabed and subsoil "beyond the limits of national jurisdiction"—that is, beyond the limits of the continental shelf subject to coastal state jurisdiction. This area is declared to be the common heritage of mankind. Its principal resource of current interest consists of polymetallic nodules lying at or near the surface of the deep ocean beds, particularly in the Pacific and to a lesser degree in the Indian Ocean. The nodules contain nickel, manganese, cobalt, copper, and traces of other metals.

Nonresource uses, including scientific research, are free, and prospecting is almost as free. On the other hand, mining requires a contract from an International Seabed Authority. Parties to the convention are prohibited from recognizing mining rights asserted outside the convention system.

To obtain a contract conferring the exclusive right to explore and mine a particular area with security of tenure for a fixed term of years, a company must be "sponsored" by a state party. It must propose two mining areas, one to be awarded to the company and the other to be "reserved" by the Seabed Authority for exploration and exploitation by its own commercial mining company, the Enterprise, or by a developing country.

Assuming that procedural requirements are met, the Seabed Authority may refuse to issue the contract to a qualified applicant in essentially four circumstances:

- if the applicant has a poor record of compliance under a previous contract;
- if the particular area has been closed to mining because of special environmental problems;
- if a single sponsoring state thereby would acquire more active mine sites, particularly in the same general area, than are permissible under fairly broad geographic and numerical limits; or
- if there is already a contract or application for all or part of the same area.

Before beginning commercial production, a miner must obtain a production authorization from the Seabed Authority. This must be issued so long as the aggregate authorized production from the international seabed area would not thereby exceed a 20-year interim ceiling that, in the absence of an applicable commodity agreement, limits total production of nodules to an amount that would generate by any given year no more than the cumulative increase in world demand for nickel in the five years before the first mine begins commercial production, plus 60 per cent of the cumulative projected increase in total world demand for nickel thereafter.

In exchange for mining rights in a contract that may not be modified without its agreement, the mining company assumes three basic obligations:

The Seabed Authority may refuse to issue a contract conferring the exclusive right to explore and mine an area for a fixed term of years if any of four specific circumstances are present.

- It must abide by various performance, safety, environmental, and other technical ground rules.
- It must pay to the Seabed Authority a specified proportion of the value of production or, at its election, a smaller proportion of production coupled with a specified proportion of profits. The Seabed Authority must use the funds to cover its administrative expenses and may then distribute the remainder to developing countries and peoples designated by regulation.
- Until ten years after the Enterprise first begins commercial production, it must be willing to sell to the Enterprise, on fair and reasonable commercial terms and conditions determined by agreement or commercial arbitration, mining, but not processing, technology being used at the site, if equivalent technology is not available on the open market. Alternatively, it would have the same obligation to a developing country planning to exploit the "reserved" site submitted by that company.

The International Seabed Authority

If Jamaica ratifies the convention, it will be the site of the International Seabed Authority established to administer the system for mining in the international seabed area, which will have the standard structure of an intergovernmental organization—an assembly of all states parties, a council of greater limited membership, and a secretariat.

The 36-member council must include four of the largest consumers and four of the largest (land-based) producers of the types of resources produced from the deep seabed, as well as four of the states whose nationals have made the largest investment in mining the international seabed area. The Soviet bloc obtained an express guarantee of three council seats in exchange for effectively conceding at least seven, and probably eight or nine, to the West, including a guaranteed seat for the largest consumer, which would be the United States should it become a party. Developing countries will hold most of the remaining seats.

Although the assembly is referred to as the supreme organ of the Seabed Authority, the adoption of legally binding mining rules and regulations, restrictive environmental orders, and proposed amendments to the provisions of the convention regarding mining in the international seabed area requires a consensus decision of the council. Other substantive decisions, depending on their importance, require a three-fourths or two-thirds vote in the council. A technical commission is required to recommend council approval of applications for mining contracts if they satisfy the relevant requirements of the convention and the rules and regulations. That recommendation may be rejected only by consensus, excluding the applicant's sponsoring state.

The Enterprise—an intergovernmental mining company—is the most unusual feature of the Seabed Authority. Its initial capitalization target is the cost of developing one mine site, now estimated at well over $1 billion. Half will be in the form of private loans guaranteed by the states parties and half in the form of

continuous line bucket dredge system

hydraulic dredge system

Illustration courtesy Encyclopedia Britannica, 1980 Yearbook of Science

private loans guaranteed by the states parties and half in the form of interest-free loans from the states parties.

The deep seabed mining system is subject to review 15 years after commercial production begins. Should the review conference be unable to reach agreement on amendments within five years after it is convened, it may adopt amendments to the mining system by a three-fourths vote. These would enter into force for all parties a year after ratification by three fourths of the parties but would not affect mining under contracts already issued.

General duties

The convention specifies a number of duties that apply to all or almost all of the sea. The most developed are the strong new duties to protect and preserve the marine environment. There also are duties to promote marine scientific research and dissemination of scientific knowledge, to protect archeological treasures found at sea, to use the seas for peaceful purposes, to refrain from any threat or use of force contrary to the U.N. Charter, and to settle disputes peacefully. There is a special chapter guaranteeing landlocked states access to the sea. Abuse of rights is prohibited.

Settlement of disputes

The convention is the first global treaty of its kind to require, without a right of reservation, that an unresolved dispute between states parties concerning its interpretation or application be submitted at the request of either party to the dispute to arbitration or adjudication for a decision binding on the other party. There are, however, important exceptions to this rule:

- disputes concerning the rights of the coastal state in the economic zone or the continental shelf may be submitted by another state only in cases of interference with navigation, overflight, the laying of submarine cables and pipelines, and related rights, or in cases of violation of specified international environmental standards;
- disputes regarding historic bays and maritime boundary delimitation between states with opposite or adjacent coasts, disputes concerning military activities, and disputes that are before the U.N. Security Council may be excluded by unilateral declaration.

Arbitration is the applicable procedure unless:

- emergency measures (for example, vessel release) are necessary before an arbitral panel has been constituted;
- both the "defendant" and the "plaintiff" have accepted the jurisdiction of the International Court of Justice in The Hague or the new Tribunal on the Law of the Sea, to be established in Hamburg if West Germany becomes a party to the treaty; or
- the dispute concerns exploration or exploitation of the resources of the international seabed area. In this event, the case may be brought to a chamber of the Tribunal on the Law of the Sea or commercial arbitration, depending on the circumstances. These fora are open to states parties and to the deep seabed mining companies sponsored by them.

Unresolved disputes between states parties concerning the interpretation of the application of the convention must be submitted to binding arbitration or adjudication at the request of either party to the dispute

Preparatory commission and pioneer investors

This spring a preparatory commission of treaty signatories will commence drafting provisional mining regulations for the international seabed area that will interpret, clarify, and apply the convention text with greater precision. Only when the regulations are drafted will the lawyer be able to know the exact nature of a miner's rights and obligations under the deep seabed mining system and the mining contracts to be issued. These regulations will enter into force automatically with the convention a year after 60 states have ratified the convention.

A conference resolution authorizes the preparatory commission to register the deep seabed mining companies that made substantial investments before 1983 as pioneer investors, each with the exclusive right to carry out exploration and testing in a registered area of 150,000 square kilometers at the start. Once the convention enters into force, a qualified pioneer investor sponsored by a state party must be granted a mining contract for that half of the original registered area selected by the investor if the preparatory commission has certified compliance with the conference resolution.

Great Britain, France, the United States, and West Germany signed an agreement in September, 1982, to deal with applications for overlapping areas previously filed under their respective deep seabed mining laws by explorers who engaged in substantial surveys of the area applied for prior to June 28, 1980. This agreement is envisaged by and consistent with the conference resolution on pioneer investment, although some individuals prefer to regard it as a first step in establishing an international arrangement for deep seabed mining outside the convention.

The convention does not permit reservations, but it does permit other declarations and statements. Amendment is possible, but difficult.

A party has the right to withdraw from the convention at any time on one year's notice.

Not all good or bad

No compromise document of the complexity of the new Convention on the Law of the Sea can be all good or all bad from anyone's perspective. It is, however, for some time to come the only basis for achieving a body of rules for using the sea whose legitimacy is globally recognized. In that sense, the choice is between imperfect law and no law.

Journal

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