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United States Interests in a Convention on the Law of the Sea: The Case for Continued Efforts

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UNITED STATES INTERESTS IN A CONVENTION ON THE LAW OF THE SEA: THE CASE FOR CONTINUED EFFORTS*

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I. INTRODUCTION

Over 150 nations have been engaged in the negotiation of a multilateral Convention on the Law of the Sea at the Third United Nations Conference on the Law of the Sea for more than five years. The negotiations have included virtually every possible issue involving relations between nations with respect to the oceans, such as fishing, national jurisdiction, navigation, environment, scientific research, seabed exploitation, and transfer of technology.[1] The current product of that negotiation is the Informal Composite Ne-

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1. *See* Charney, *Law of the Sea: Breaking the Deadlock*, 55 FOREIGN AFF. 598 (1977); Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT'L L. 57 (1978); Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions*, 71 AM. J. INT'L L. 247 (1977).

gotiating Text (ICNT), a 198-page document containing 303 treaty articles plus seven annexes.[2] Although the participating nations agree on much of the text, significant differences still remain on a number of key issues which could destroy prospects for agreement on the entire text. It is the thesis of this article that the cumulative interests of the United States in the entry into force of an internationally acceptable Convention on the Law of the Sea are strong. However, the alternatives to a treaty, although not optimal, are also acceptable.

Two categories of major United States interests must be reviewed in order to obtain a clear understanding of the issues involved. They are the United States general international relations interests and the United States substantive interests directly at stake in the negotiations. The general international relations interests of the United States include: (1) the impact of the instant negotiations on multilateral relations, particularly north-south relations; (2) the precedential effect on other international issues of the terms of a Law of the Sea Convention; (3) the future use of the Conference negotiating processes; and (4) the development of a dispute settlement system that could permit greater use of third party dispute settlement in international relations. The United States primary substantive interests in the negotiations concern: (1) the exploitation of the living resources of the seas; (2) the protection of the marine environment; (3) the conduct of marine scientific research; (4) the military and commercial freedoms of ocean navigation and use; and (5) the exploitation of the non-living resources of the deep seabed.[3]

How would these major interests be affected by the entry into force of a Convention on the Law of the Sea as contrasted with the

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

3. Other less significant issues from the perspective of United States interests include the limits of the continental shelf, the delimitation of the baseline from which the territorial sea is measured, revenue sharing, the rights of the landlocked and geographically disadvantaged states, ocean boundaries between opposite and adjacent states, and transfer of technology (aside from deep seabed technology).

Although the United States direct interest in the Landlocked and Geographically Disadvantaged States issue is low, the item has developed into a major conference issue. Over 50 members of that group (a blocking one-third) are seeking to link success on their issues to a positive vote on the text. If the United States wants a convention for other reasons, it must assure that this issue is resolved. Similarly, procedural issues such as those extant at the commencement of the 1978 session of the Conference, the status of the Conference President, Hamilton Shirley Amerasinghe, and the power of the Committee Chairmen to veto changes in the ICNT, are important roadblocks to the negotiation.

no-convention alternative? This article will review the United States interests in relation to that question, concluding that the cumulative effect of the individual interests makes it important that the United States vigorously pursue a convention.

II. Interests of the United States in General International Relations

The approach the United States should take towards multilateral relations, particularly with the Third World, is by no means clear. It is clear, however, that a failure of the Conference will substantively affect those relations. If the Law of the Sea negotiations were to fail, there would be greater tension in the relations between the north and south. Efforts to achieve multilateral solutions for a number of multilateral issues might be frustrated, with prejudice to the chances of achieving needed multilateral agreements in such areas as the Antarctic, space, energy, food, other commodities, and the environment. Furthermore, the failure of the Conference could produce such a caustic atmosphere that constructive cooperation and trade between the United States and other nations in an interdependent world would be hampered. The issues under negotiation at the Conference are not among the most critical issues facing mankind; nevertheless, the injuries that could result from a Conference collapse would have a destabilizing impact that could adversely affect those more critical issues. Finally, the failure to provide greater certainty and predictability in nations' ocean relations would lay the foundation for future ocean-related difficulties for the United States. In sum, a Conference failure could adversely affect international relations while a success which produces a convention could have a positive impact on those relations.

Four arguments are put forward to controvert these views. First, the Conference negotiations are arguably so unique that a Conference failure would not substantively affect other subjects. Second, it is felt that the risk of creating a destabilized situation is worth the protection of those United States interests likely to be sacrificed if a convention similar to the ICNT were to become law. Third, it is believed that a Conference failure precipitated by a United States refusal to compromise on certain interests would add to international stability by assuring continued protection for many United States interests. Finally, it is argued that the United States is so sufficiently independent of other nations that it would not be adversely affected by the reactions of other nations.

The first argument simply ignores the linkage with other international subjects already made in the negotiations, particularly

with respect to economic issues. A response to the second argument requires reference to the substantive interests at stake and will be dealt with in the main body of this article. Nevertheless, this argument does not refute the view that there will be negative impacts; rather, it answers that the costs would be acceptable. The third and fourth arguments overstate the ability of the United States to control international relations or to insulate itself from the actions of other countries.

It has been argued that a critical matter raised by the Law of the Sea negotiations is the precedential effect that would result from a United States compromise on certain issues under negotiation—concessions made in the composition and voting system of the International Seabed Authority and in the Authority's power to institute economic controls over deep seabed mining.[4] Arguably, such concessions would be "pocketed" by the Group of 77, thereby making the principles contained in those concessions binding on the United States in other negotiations where its interests may be different, such as the UNCTAD commodity negotiations. Thus, the United States is urged to resist such compromises at the Law of the Sea Conference even if a policy analysis of the issues at stake at the instant negotiation would favor a concession. In fact, it is difficult to conceive of a way that a concession made at the Law of the Sea Conference could produce a binding effect or even strong precedential effect on a United States position at any other negotiation. There is no international legal obligation that would impose such a result. Furthermore, the context and nature of the Law of the Sea negotiations, particularly the deep seabed negotiations, are such that substantive concessions made there can be readily distinguished from any other negotiation. While other countries could urge the United States to take similar positions at other negotiations, there is no reason why the United States would need to acquiesce in those pleas if it is not in the interest of the United States to do so. Timely statements disclaiming any broad implications could be made to assure that no such implications could be derived from a concession if one is made. Similar actions could be readily taken to foreclose the establishment of an inappropriate precedent within the foreign affairs bureaucracy of the United States government.

Little attention has been given to two developments in multilateral relations that have taken place at the Law of the Sea Confer-

4. Darman, *The Law of the Sea: Rethinking U.S. Interests,* 56 FOREIGN AFF. 373, 387 (1977).

ence: movement toward a consensus system of negotiating multilateral agreements and movement toward broad use of third party dispute settlement for treaty-based disputes. Both have importance to the United States beyond the scope of the Law of the Sea Conference. If these developments are successful in the instant negotiations, they might be available for use elsewhere. The consensus system assures that decision-making at a multilateral negotiation of a convention will not be dominated by the numerical superiority of any group of nations.[5] Rather, procedural significance will be given to the variations in the power of nations. Since it is difficult to obtain acceptance of voting systems that overtly recognize the differences in nations' importance, the consensus approach permits the maintenance of an egalitarian procedure which in practice may assure that multilateral negotiations reflect the real geopolitical power of the participating nations. The future availability of this tool may strongly depend on the success of the Law of the Sea Conference.

Ambiguities in treaty texts produced at multilateral negotiations inevitably lead to disputes. When negotiations to settle a dispute fail, a need arises to resolve the dispute peaceably for the sake of the disputants as well as the other parties to the agreement. Unfortunately, despite high expectations, the International Court of Justice has not developed into an acceptable comprehensive compulsory dispute settlement system for these purposes. Although compulsory dispute settlement is provided for in numerous specific international agreements, efforts to expand the role of such systems have met with little success. A significant breakthrough is taking place at the Law of the Sea Conference as a consequence of the wide acceptance of a comprehensive dispute settlement system. Even such traditional opponents of this approach as the Eastern European countries have given their support.

During the course of these negotiations, it has become clear that the traditional reluctance to participate in compulsory dispute settlement systems could be overcome by the creative development of a multifaceted dispute settlement system.[6] Final conclusion of such a negotiation and its successful implementation could pave

5. Sohn, *Voting Procedures in United Nations Conferences for the Codification of International Law*, 69 AM. J. INT'L L. 310, 333-52 (1975).

6. *See* ICNT, *supra* note 2, arts. 279-97; *id.* annexes 4-7; Adede, *Law of the Sea—The Integration of the System of Settlement of Disputes Under the Draft Convention as a Whole*, 72 AM. J. INT'L L. 84 (1978).

the way for broader use of compulsory dispute settlement in the future. Greater use of compulsory dispute settlement could contribute to stable international relations which will benefit the United States. Thus, a number of specific interests of the United States outside the scope of the Law of the Sea Conference may be benefited by the conclusion of an acceptable Convention on the Law of the Sea.

III. Substantive United States Law of the Sea Interests

Five significant substantive United States interests are at stake in the Law of the Sea negotiations: living resource exploitation, marine environment, marine science, navigation and use of the oceans, and deep seabed mineral development. It appears that these interests can be better protected under a Convention on the Law of the Sea likely to be produced at the Law of the Sea Conference.

A. *Living Resources*

At the commencement of the Law of the Sea negotiations it was hoped that significant positive developments could take place to improve the conservation and management of the living resources of the seas. Unfortunately, these developments were thwarted by a period of massive national ocean expansionism. As a consequence, an apparently rational, species-oriented living resource management system was cast aside in favor of a 200-mile zone of national jurisdiction. Although the ICNT includes many references to particular species, the text places the major management power over living resources found within 200 miles of a nation's coast in the hands of the individual coastal states, subject to certain fairly vague management policies.[7] The living resources found beyond the 200-mile zone would be subject to similar vaguely defined management policies.[8] Nevertheless, the ICNT does provide for international cooperation and non-coastal state participation[9] that would qualify coastal state control within 200 miles and broaden the focus of the resource management system. In contrast, in the absence of the Convention all control over living resources within 200 miles of the coast would ultimately fall under the juris-

7. *Id.* arts. 56, 61-67.

8. *Id.* arts. 116-20. *See also id.* arts. 66(3), 67(2), which limit fishing for anadromous and catadromous stocks to the Exclusive Economic Zone.

9. *Id.* arts. 63, 64, 69-71.

diction of the coastal states and the area beyond would be left without even a framework for comprehensive management. Although the United States 200-mile zone is one of the largest and contains a significant amount of resources, the United States interests may be protected best by a more international approach to fisheries management for two reasons.[10] First, the United States has distant water fishery industries that would benefit from greater international cooperation in the management of and access to the living resources of the oceans. Second, the United States has a strong interest in rational management of all the ocean's living resources. Because of the migratory nature and interdependence of many of the ocean's living resources, international cooperative management is desirable if the United States is to obtain optimum benefit from these resources. The ICNT does provide the framework for such cooperative management which would be absent under the no-convention route. Although a number of management agreements are in existence now, their failure to resolve many of the conservation issues has been at least partially responsible for the development of the 200-mile zone. Ad hoc approaches to the management of the ocean's living resources will continue if the Conference fails; more regional agreements will be forthcoming. The opportunities for comprehensive management, however, would be lessened in the absence of a Law of the Sea Convention.

B. *Marine Environment*

The same marginal benefit that the ICNT provides in the case of the living resources of the seas is found in the treatment of the marine environment. There is much developing country indifference and even hostility toward strong efforts to protect the environment on the ground that actions to protect the environment might hamper their economic development. In the absence of treaty obligations and the companion international pressure, many nations would pay little heed to ocean environment concerns. The ICNT represents some progress toward the protection of ocean environment, while setting the stage for more significant future developments. Although no specific marine environment standards are contained in the ICNT, the text does set out general standards and

10. For tables ranking coastal states according to size and coastal length, and estimating their gains or losses under various proposed jurisdictional boundaries, see Hodgson & McIntyre, *National Seabed Boundary Options,* in LIMITS TO NATIONAL JURISDICTION OVER THE SEA 152, 155-64 (G. Yates & J. Young eds. 1974).

allocates enforcement responsibilities that go far beyond the current flag state system.[11] It provides for port state and coastal state enforcement in the case of certain violations within the 200-mile zone and in the ocean beyond.[12] Other sections provide for the establishment of international marine environment standards for ship construction and operation, the publication of environmental impact studies prior to authorization of activities that would cause significant harmful changes to the marine environment, and the regulation of pollution from deep seabed mining operations.[13] Absent a convention, these worldwide protections for the marine environment may be impossible to attain.[14]

C. *Scientific Research*

Currently, much controversy exists within the United States over the marine scientific research provisions of the ICNT.[15] Encouraging the acquisition of knowledge by minimizing restrictions on the conduct of marine scientific research is clearly in the long-term interest of the United States and the world. That interest unfortunately conflicts with coastal state ocean expansionism. Consequently, the coastal states have sought provisions that would require coastal state consent before marine scientists engage in research within the 200-mile zone. Under current international law, the conduct of marine scientific research outside the territorial sea not involving the resources of the continental shelf is considered a freedom of the high seas.[16] In practice, that right is

11. ICNT, *supra* note 2, arts. 193-238.

12. *Id.* arts. 212, 219, 221.

13. *Id.* arts. 207, 210, 212.

14. In an action contrary to the goal of establishing international marine environment protections, the United States recently enacted legislation claiming jurisdiction to regulate the discharge of oil and other hazardous substances within 200 miles of the United States coast. Clean Water Act of 1977, Pub. L. No. 95-217, § 58, 91 Stat. 1566 (amending 33 U.S.C. § 1321 (1970); *see* S. REP. No. 95-370, 95th Cong., 1st Sess. 64 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 6597.

The jurisdictional effect of the statute, if not its very existence, is arguably contrary to other United States interests at stake in the negotiations. At the same time, the legislation does not significantly expand the power of the United States to protect the marine environment in the adjacent seas. Virtually all traffic within the area in question could be regulated under existing port state jurisdiction.

15. ICNT, *supra* note 2, arts. 239-66.

16. *See* Convention on the High Seas, *opened for signature* April 29, 1958, art. 2, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962). *Cf.* Convention on the Continental Shelf, *opened for signature* April 29,

eroding so quickly that absent a convention, the consent of the coastal state will be required before any scientific research is conducted within the 200-mile zone.

The Convention alternative provides certain limited advantages over the no-convention route. Although it provides for a consent regime, the ICNT does contain a number of provisions that would encourage and expedite coastal state consent and would provide for some uniformity in the treatment of marine scientists.[17] Under these provisions a coastal state may deny the right to conduct research only for certain reasons.[18] The provisions further set forth a specific time limit within which a denial must be made if the coastal state is not to be deemed to have consented. The consent requirement is eliminated in the case of operations conducted under the umbrella of an acceptable international organization. In return, the coastal states are permitted to have access to the research data and to demand the right to participate in the research.[19] Although these ICNT provisions do not represent compelling improvements over the no-convention alternative, they do provide benefits to the marine scientists which may be most valuable in the future, particularly since they place some limitations on coastal state action. To the extent that the Convention would enable scientists to conduct more marine scientific research than in the absence of a convention, the Convention is a net benefit to the United States.

D. *Ocean Navigation and Related Uses*

The initial efforts of the mid-1960s to commence the Law of the Sea negotiations were stimulated primarily by the desire of the United States and the Soviet Union to protect traditional commercial and military navigation and use of the oceans. It was clear at

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1958, art. 2, para. 2, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (entered into force June 10, 1954) (requirement of consent by coastal state for research undertaken on the continental shelf). The consent requirement contained in the Continental Shelf Convention has raised substantial obstacles to any research in the waters above the continental shelf. The ICNT would ameliorate some of these problems. *See* ICNT, *supra* note 2, arts. 243-53.

17. ICNT, *supra* note 2, arts. 247-54.

18. The key limitation on the grounds available for the denial of consent is the use of the phrase "in normal circumstances." *See id.* art. 247(3). The history of this term indicates that severe diplomatic disputes between the interested states would have to be present. *See* Oxman, *supra* note 1, 72 AM. J. INT'L L. at 76-77.

19. ICNT, *supra* note 2, art. 250.

that time that important straits were in the process of being incorporated within the territorial sovereignty of coastal states through expanded territorial seas claims. The primary goal of these maritime nations was to insure that the traditional high seas freedoms of military and commercial transit through and over those straits would continue. The ICNT would protect that interest through its provisions on transit passage through and over straits used for international navigation.[20] Similar interests have been protected in the Exclusive Economic Zone and Archipelagic waters.[21]

Two questions have been raised in connection with the straits passage issue. First, does that interest in straits transit still exist? Second, would the interest be protected outside of the Convention? Although the United States is increasingly reluctant to involve itself in military activities throughout the world, it is clear that it retains a strong interest in international navigation, particularly through and over straits. In order to review the military interest, the analysis is divided into two parts—the United States nuclear weapons interest and its conventional military-geopolitical activities interest.[22]

With the advent of missiles capable of delivering nuclear weapons far from a submarine launching pad, it is clear that the real United States nuclear weapons interest in ocean navigation is to hide those weapons-carrying submarines in the oceans so that they cannot be destroyed in a first-strike action. The United States borders on the Pacific and Atlantic Oceans, the Bering Sea and the Gulf of Mexico. Its submarines are capable of staying away from port for long periods of time. It is thus highly debatable whether the United States has a great need for unimpeded submerged straits passage into other ocean areas for such submarines.

The conventional military activities interest of the United States is still significant. Although the likelihood of direct wartime action in distant lands seems to be decreasing, there are other geopolitical uses that have current importance. Examples of these uses include the location of United States Navy ships off the Horn of Africa during the recent Somalia-Ethiopia conflict[23] and the

20. *Id.* arts. 37-44; *see* Burke, *Who Goes Where, When and How: International Law of the Sea for Transportation,* 31 INT'L ORG'N 267 (1977); Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text,* 52 WASH. L. REV. 193 (1977).

21. ICNT, *supra* note 2, arts. 52-54, 58.

22. For a complete review of these issues, see Osgood, *U.S. Security Interests in Ocean Law,* 2 OCEAN DEVELOPMENT INT'L L. 1 (1974).

23. N.Y. Times, Feb. 7, 1978, at 3, col. 1, 3 (city ed.).

continuing maintenance of military supply lines to Israel. The retention of the right of straits passage to permit access for conventional military purposes remains important to the United States and the rest of the world. In certain situations straits provide the only viable access to an area. In other situations, the alternative route would be costly, time-consuming, and possibly dangerous. Although United States military involvement in any area of the world should be avoided if possible, the flexibility which access for conventional military activities provides would appear to diminish pressure to take the more drastic nuclear alternative. The continued maintenance of the right of straits passage would also decrease the possibility of involvement or conflict with straits states in cases where the United States exercises its claim to transit straits in order to get conventional military access to areas of interest. The transit passage rule essentially requires that the straits states remain neutral in such situations, insulating themselves from involvement in third party disputes. Thus, from a military use perspective, the United States does have a substantial interest in straits passage.

It is unclear what control the straits states would realize under the no-convention alternative. Under current international law, a vessel transiting a territorial sea strait is subject to the regime of non-suspendable innocent passage.[24] The definition of "innocent" is both vague and capable of subjective application. Thus, under traditional international law a straits state could prevent passage which it decides is not innocent. Depending on the circumstances and the interpretation of the term, military vessels engaged in certain activities could arguably be precluded from transiting such straits. Furthermore, increased nationalism and the increased legitimacy of measures to protect the marine environment necessarily point in the direction of greater straits state claims of jurisdiction. This could ultimately result in required prior notification by a transiting vessel, required prior straits state consent, as well as possible unilaterally imposed construction, manning, and operation requirements that could prejudice United States military interests.

The United States has a commercial navigation interest in transit passage through and over straits, but it may not be as compelling as the military interest. As the world's largest trader,

24. Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* April 29, 1958, arts. 14-23, 15 U.S.T. 1607, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964).

the United States has a clear interest in maximum transit freedoms. Actual or perceived limitations on commercial transit will result in diminished use and/or increased cost of transportation. Although the ICNT regime would assure the minimum possible interference obtainable at this time, it is not clear that the no-convention alternative would result in significant additional inhibitions on commercial activities, except perhaps in politico-military confrontations. Traditionally, coastal state treatment of commercial ships in innocent passage has not resulted in undue limitations. Although nations are increasingly aware of environmental needs and desirous of exercising national sovereignty, their interests have not changed so drastically that they will necessarily impose significant new restrictions on commercial transit at an early date. Rather, it is likely that the expansion of straits state jurisdiction would be incremental, following the laws of creeping jurisdiction. Although denials of a right to transit a strait may be rare, such denials could come at the most critical times since greater straits state control would necessarily involve the straits state in any third party dispute in which a disputant used the strait for access purposes. Thus, it appears that so-called creeping straits state jurisdiction is likely to take place if no Law of the Sea Convention enters into force.

The second issue with respect to navigation is whether transit rights could be protected independent of the Convention. Since the straits states will make some claims to control traffic in their respective straits, the burden of limiting coastal state control to acceptable bounds will be upon those states interested in navigation through straits.[25] Could this expansion of strait state jurisdiction be thwarted in the absence of a convention? In preparation for this potential struggle, the United States is already considering its options.[26] There is talk of diplomatic initiatives and cooperative United States-Soviet task forces being used to maintain the desired transit rights by steaming through international straits. It is unlikely that the straits states would directly interfere with such

25. There is a distinct possibility that some or all of the important strait states would not become parties to a Law of the Sea Convention of the nature being discussed. A broadly accepted convention, however, would have the practical if not legal effect of proscribing extensive jurisdictional claims by the non-party strait states.

26. In what may be a precursor of the United States position, a long-time negotiator for the United States on this issue has recently published an article opining that such transit rights are extant in current public international law. Oxman, *supra* note 1, 71 AM. J. INT'L L. at 63 n.27.

transiting actions, but the lack of interference would not mean that the actions would be successful or that they would not involve costs and risks. Such actions would be expensive and would exacerbate relations between the United States and the straits states subjected to this kind of action. It is likely that only the major straits would be transited regularly, leaving the many minor straits open to coastal state claims. Finally, such actions would not assure such transit rights for unprotected commercial shipping and research vessels. Although user state retaliation might be threatened, it is probable that the private companies, research institutions, and perhaps ultimately the United States would acquiesce to incremental increases in coastal state control over shipping activities because the cost would be minimal.

Alternatively, the maritime countries could seek to negotiate bilateral or limited multilateral agreements with the straits states. While such agreements are possible, it is clear that the costs required to conclude such agreements would exceed those currently contemplated within the Law of the Sea negotiations. As discussed above, there are numerous reasons why the United States is pursuing a comprehensive Convention on the Law of the Sea. The same is true in the case of the straits states.[27] Thus, the bilateral negotiations for transit rights through an individual nation's straits would involve dynamics different from those found at the Law of the Sea negotiations. A more direct *quid pro quo* could be demanded by the straits states, particularly in situations where the maritime states have significant interests in transit through the strait. Furthermore, by entry into such agreements the maritime states would at least tacitly recognize the legitimacy of the straits states' right to consent to passage, leaving open the possibility that more substantial costs would be imposed if the agreement were to be abrogated or renegotiated at some future time. Finally, it is likely that a comprehensive Law of the Sea Convention would be more durable than a limited agreement with specific straits states, many of which have governments that are of questionable stability over the long-term.

The same analysis can be brought to bear on similar issues arising in the Exclusive Economic Zone and Archipelagic waters. As the negotiations proceeded, it became clear that the continuation of high seas uses within 200 miles of the coast and waters adjacent to archipelagoes were also at risk. The compromises with respect

27. *See* page 44 *supra*.

to the Exclusive Economic Zone negotiated at the 1977 session of the Conference appear to favor continued protections for these high seas uses, albeit somewhat ambiguously.[28] Greater threats to such uses would clearly develop without a convention. Although the tactics used to maintain those high seas rights might be the same as in the case of the straits issue, the results would be less likely to succeed for two reasons. First, the United States interests in the maintenance of such rights, although strong, are not as imperative as straits passage, because outside of closed seas there are alternative routes and locations for the relevant high seas uses beyond the 200-mile zone and archipelagoes. Second, the areas are so diffuse and large that effective transiting actions would require considerably more effort. Thus, the entry into force of the Convention best protects these interests within the 200-mile zone and archipelagic waters, as well as within straits used for international navigation.

E. *Seabed Exploitation*

The final and perhaps most controversial interest to be discussed concerns seabed exploitation. There is little dispute over the regime for the continental shelf. With or without the Convention the coastal states will have jurisdiction over all seabed resources within 200 miles from shore and probably further in the case of very broad continental margins. Apparently, this will assure undisputed coastal state rights in virtually all of the petroleum products of the oceans.[29] Thus, the only significant remaining seabed issue is the regime for the deep seabed beyond coastal state jurisdiction. The subject is relatively new in international law and relations and has been tied to broader international issues. Consequently, the negotiation of this regime has been complicated and difficult.

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28. ICNT, *supra* note 2, arts. 55, 56, 58, 86-89.

29. It is estimated that only 1 to 5% of the seabed petroleum is located beyond 200 miles from shore, with 0 to 2% located in the deep seabed. Charney, *The Equitable Sharing of Revenues from Seabed Mining,* POLICY ISSUES IN OCEAN LAW 53, 68 (American Society of International Law Studies in Transnational Legal Policy No. 8, 1975).

The group of over 50 Landlocked and Geographically Disadvantaged States has sought access to these resources of the continental shelf. In the face of strong coastal state resistance it appears that they will be forced to settle for something less.

1. Legal-Political Background

There had been only limited interest in the deep seabed, primarily from marine scientists and military strategists, prior to the recent expansion of commercial efforts to develop a technology capable of mining deep seabed manganese nodules. Such nodules contain significant amounts of nickel, copper, cobalt, manganese, and other metals. A few companies believe that they will be able to profitably exploit these metals.[30] Since international law is a reflection of nations' needs, no doctrine of general international law or treaty has directly addressed the legal regime for commercial mining of the deep seabed. The first United Nations Conference on the Law of the Sea in 1958 produced the Convention on the Continental Shelf, which codified the law for the continental shelf.[31] Because the participants in that Conference believed that many years would pass before it would be necessary to address the law for the deep seabed, that subject was ignored. The 1958 Conference also produced the Convention on the High Seas, which codified the law of the high seas applicable to the oceans beyond the territorial sea.[32]

To the extent that any positive doctrine of international law could be said to apply to the deep seabed at that time, that doctrine would have been the regime of the high seas. The doctrine of the high seas permits nations to make reasonable non-exclusive use of the resources of the high seas, including the exploitation of its resources; conversely, it forbids any long-term appropriation of any part of the area.[33] Historically, the law of the high seas has

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30. Economic Implications of Seabed Mineral Development in the International Area: Report of the Secretary General, 3 U.N. L.O.S. III O.R. 4, U.N. Doc. A/CONF. 62/25 (1974) [hereinafter cited as U.N. Report]; NATIONAL ACADEMY OF SCIENCES, MINING IN THE OUTER CONTINENTAL SHELF AND THE DEEP OCEAN 69-102 (1975). For a list of companies formed for commercial recovery of manganese nodules, see SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 94TH CONG., 1ST SESS., OCEAN MANGANESE NODULES 15, Table II-1 (Comm. Print 1975).

The potential for exploitation of other deep seabed resources cannot be ignored, although little is known about the nature of the resources at this time.

31. Convention on the Continental Shelf, *supra* note 16.

32. Convention on the High Seas, *supra* note 16.

33. A similar result could be obtained by assuming that no international law is applicable because restrictions on the actions of nations through international law may not be presumed. The S.S. Lotus, [1927] P.C.I.J., ser. a, No. 10. Thus, there would be no restriction on nations' actions with respect to the deep seabed but for general international obligations of nations to act reasonably vis-a-vis each other. *See* L. HENKIN, LAW FOR THE SEAS MINERAL RESOURCES (Institute for the Study of Science in Human Affairs, Monograph No. 1, 1968); Burton,

been appropriate for the traditional transient uses of the seas—fishing, commercial navigation, overflight, and military uses. However, it is inappropriate for the taking of deep seabed manganese nodules where the assurance of exclusive rights to exploit a specific seabed area appears necessary for financial, equipment design, and planning purposes. Consequently, when the question of the legal regime for the deep seabed resources was first directly addressed, it was recognized that the law needed to be created or at least clarified. Although tenable legal arguments existed to support a right to claim exclusive seabed rights on the theory that the seabed was *res nullius* (comparable to unclaimed territories), this theory appears to have been eschewed by the international community in favor of a theory approaching the doctrine of *res communis,* which recognizes a community interest in the deep seabed forbidding permanent appropriation by any nation.[34]

Prior to the commencement of the Law of the Sea Conference, a series of United Nations General Assembly resolutions were passed relating to the regime for the deep seabed.[35] Much disagreement exists concerning the effect and meaning of the 1969 United Nations General Assembly Moratorium Resolution and the 1970 Resolution declaring the deep seabed as the common heritage of mankind, to be exploited pursuant to an international regime yet to be negotiated.[36] Many nations, including all of the developing coun-

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Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims, 29 STAN. L. REV. 1135 (1977).

34. L. HENKIN, *supra* note 33.

35. G.A. Res. 2574, 25 U.N. GAOR, Supp. (No. 30) 10, U.N. Doc. A/7630 (1969) (adopted by a vote of 62 to 28, with 28 abstentions) declared a moratorium on claims to national jurisdiction to the seabed "beyond the limits of national jurisdicton." G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 28) 24, U.N. Doc. A/8028 (1970) (adopted by a vote of 108 to 0, with 14 abstentions) sought to declare the principles governing the seabed, the ocean floor, and the subsoil thereof beyond the limits of national jurisdiction. G.A. Res. 2750, 25 U.N. GAOR, Supp. (No. 28) 25, U.N. Doc. A/8028 (1970) called for the convening of a Law of the Sea Conference.

36. The key paragraphs of the Declaration of Principles in G.A. Res. 2749, *supra* note 35, are:

> 1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.
>
> 2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

tries, argue that the resolutions established the resources of the deep seabed as the common property of all mankind. Thus, a nation would commit a violation of international law if it exploited the deep seabed outside of the context of an international agreement. Other countries maintain that the resolutions have no legal effect, merely calling for a negotiation that would give content to the words "the common heritage of mankind." The United States, as a prominent supporter of the latter view, maintains that deep seabed mining is a right protected under the regime for the high seas unless and until a new binding international convention on the subject comes into force.[37]

United Nations General Assembly resolutions have no independent binding effect. Those who wish to restrict nations' activities in the deep seabed have assumed a heavy burden, particularly in light of strong opposition by the United States and other developed countries. Nevertheless, the relevant national and corporate practice thus far has been to refrain from engaging in significant deep seabed mining activities largely consistent with restrictions on the right to exploit the seabed. Thus, a persuasive legal argument that nations may not unilaterally exploit the resources of the deep seabed can be grounded upon one interpretation of the Common Heritage Resolution, the Moratorium Resolution,[38] and interna-

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3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established.

The Moratorium Resolution, G.A. Res. 2574, *supra* note 35, adopted by a bare 2/3 vote with the United States voting against, calls on nations to refrain from seabed exploitation beyond the limits of national jurisdiction.

37. For a collection of such statements, see *Deep Seabed Mining and the Law of the Sea: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations,* 95th Cong., 1st Sess. 13-19 (1977) (statement of Congressman John B. Breaux) [hereinafter cited as *House Hearings*]; Burton, *supra* note 33.

Regardless of the exact legal interpretation of the term, it is clear that it was envisaged that the regime would provide significant participation for all countries under the umbrella of an international organization. All proposals on the subject during the preparatory work for the Law of the Sea Conference recognized this assumption. *See* Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 28 U.N. GAOR, Supp. (No. 21) 70-164, U.N. Doc. A/9021 (1973).

38. *See* notes 35 & 36 *supra.*

tional practice. Accordingly, a dispute settlement tribunal potentially could find that international law forbids deep seabed mining absent international agreement.

Although it is unlikely that such a case would ever be submitted to a tribunal for a binding decision, the judgment of the international community on the legality and/or propriety of the action has great practical importance. A very large number of nations of every political and economic persuasion are likely to oppose unilateral deep seabed mining by one or a few major industrialized countries. Such opposition has motivated the nations that are developing mining technology to continue to seek multilateral agreement for the deep seabed. Thus, an important issue facing the potential deep seabed exploiters is the uncertainty surrounding the legal and political status of the deep seabed.

2. The Deep Seabed Negotiations

At this time agreement on the regime for the deep seabed continues to elude the negotiators, placing the entire Conference in jeopardy. This issue has been under negotiation in the First Committee of the Conference. Blame may be placed on virtually every participant for the current negotiating difficulties—the United States' advocacy of a very hard-line, free market approach, Canada's protectionist attitudes, Algeria's revolutionary posture, other nations' equally inflexible positions, the delegates' inability or unwillingness to develop reliable negotiating processes, the First Committee Chairman's insensitive actions and the personality conflicts evident throughout much of the negotiations. Despite these problems, the delegates have agreed on many significant aspects of a regime for the deep seabed. However, controversial issues remain which, if not resolved, could cause the negotiations to collapse, leaving deep seabed mining in the uncertain legal-political environment discussed above.

The Appendix to this article identifies fifteen significant topics under negotiation and traces the development of those topics through three of the most recent negotiating texts,[39] the Revised Single Negotiating Text (RSNT),[40] the Evensen Text,[41] and the

39. For a review of the prior deep seabed texts, see Charney, *The International Regime for the Deep Seabed: Past Conflicts and Proposals for Progress,* 17 HARV. INT'L L.J. 1 (1976).

40. U.N. Doc. A/CONF. 62/WP.8/Rev. Part I (1976) [hereinafter cited as RSNT].

41. Suggested compromise formulations, First Committee Chairman's Nego-

ICNT.[42] Part I of the Revised Single Negotiating Text is a product of the Conference session held in spring, 1976. It is viewed as the best text that western-developed consumer nations such as the United States, the United Kingdom, France, Japan, and West Germany could obtain. In fact, its status as a Committee text has been contested by the Group of 77 because it is alleged to be the product of the negotiations of a small non-representative secret group of delegates. The unofficial Evensen Text was produced during the 1977 session of the Conference.[43] This text was openly discussed within the Committee I Working Group and appeared to constitute an acceptable middle ground for all but the most radical of the Group of 77. The substance of the deep seabed portion of the ICNT[44] is the third text described in the Appendix. That text was supposed to represent the most current text under negotiation in Committee I. After receipt of the Evensen Text the Chairman revised it without consultation with the Committee or a representative subgroup.[45] The United States and other developed countries have maintained that the resulting text is a drastic departure from the compromises reached in the Working Group unduly favoring the position of the radicals in the Group of 77 and others that want to delay or block deep seabed mining. Consequently, the ICNT has become highly controversial on both procedural and substantive grounds, stimulating efforts to fashion a Conference-wide strategy capable of producing compromises that could be generally acceptable at the 1978 session of the Conference.

Intersessional meetings during the winter of 1977-78 made it clear that substantial changes in the ICNT and Conference procedures would be needed if an agreement is to be forthcoming. There appears to be agreement that the Committee structure would be

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tiating Group, U.N. L.O.S. III, U.N. Informal Doc. No. 77-76653 (July 5, 1977); Suggested compromise formulation, First Committee Chairman's Negotiating Group, U.N. L.O.S. III, U.N. Informal Doc. No. 77-76619 (June 29, 1977); Suggested compromise formula, U.N. L.O.S. III, U.N. Informal Doc. No. 77-76231 (3d rev. June 11, 1977).

42. *See* note 2 *supra.*

43. The Committee I Working Group, under the chairmanship of Minister Jens Evensen of Norway, produced the text. Informal Composite Negotiating Text, Explanatory Memorandum by the President 5, A/CONF. 62/WP.10/Add. 1 (1977); Report of the United States Delegation, U.N. L.O.S. III at 1 (6th sess. May 23-July 15, 1977) (unclassified).

44. ICNT, *supra* note 2, pt. XI; *id.* annexes II, III.

45. Informal Composite Negotiating Text, Explanatory Memorandum by the President, *supra* note 43, at 5-6; *see* Report of the United States Delegation, *supra* note 43, at 5.

virtually dissolved, thereby unifying and centralizing the negotiation process. The success of this new approach will not be known until the conclusion of the 1978 formal session of the Conference.[46]

Despite these problems a review of the Appendix shows that much is unchanged from text to text, indicating that tentative agreement has been reached on many aspects of the deep seabed regime.[47] All texts would establish an International Seabed Authority under which all deep seabed mining would be conducted. The organs of the Authority would include a one-nation, one-vote Assembly, a structured Council, functional commmissions, an Enterprise, and a Secretariat.[48] In addition, a dispute settlement system would be created.[49] Although the Convention would specify many policies, the Assembly would establish other general policies.[50] The Council would set specific policies and would be concerned more directly with resource exploitation, principally the approval or rejection of specific exploration and exploitation activities pursuant to the recommendations of the Technical Commission.[51] The Council would be structured to represent the various political and economic interests, and the Technical Commission would consist of experts appointed by the Council.[52] A Rules and Regulations Commission and an Economic Planning Commission would complement the operations of the Council.[53]

Exploration and exploitation would be conducted under the so-called "parallel system." Private and state enterprises would be virtually free to conduct deep seabed prospecting. Once sites have been identified for exploration and potential exploitation, the private or state enterprise would submit an application under the sponsorship of its state for a contract to explore and exploit either

46. The intersessional meetings in New York in February 1978 saw deep seabed negotiations take place outside of Committee I with the ICNT serving as the text to be discussed and modified. These negotiations produced no dramatic substantive developments. Another significant obstacle to substantive and procedural progress has been the question of the continuing presidency of Hamilton Shirley Amerasinghe. This issue was under discussion at the Conference as this article went to press.

47. The negotiations have been conducted with reference to manganese nodule production. Although the text is broad enough to encompass any other resource, its application may not be satisfactory.

48. ICNT, *supra* note 2, art. 156.

49. *Id.* art. 187; *id.* annex V.

50. *Id.* arts. 136-53, 158.

51. *Id.* arts. 160, 163.

52. *Id.* arts. 159, 163.

53. *Id.* arts. 162, 164.

one of two equal areas of the seabed. The Authority would then select one site for the applicant to work and would designate the other as a reserved area to be exploited by the Enterprise or by developing countries directly. A contract would be entered into between the applicant and the Authority if the applicant met all the requirements of the Convention and those specified in the rules and regulations of the Authority. In addition to normal qualifications, conditions on transfer of technology, payments to the Authority, and procedures to protect the marine environment would have to be met.[54]

An alternative to direct contracting for state and private commercial entities would be to enter into an arrangement with the exploitation arm of the Authority, the Enterprise, to do all or part of the mining activities that the Enterprise would wish to conduct. The Enterprise would appear to be analogous to a corporation established pursuant to the Convention, with the parties to the Convention serving as the shareholders.[55] This parallel system with state-sponsored commercial entities on one side and the Enterprise on the other, would be in force for the first twenty years of the Convention. It would be subject to renegotiation at a review conference to be held at the conclusion of that period.[56]

There are three major deep seabed issues requiring resolution: (1) the political control of the Authority: the Council's jurisdiction, composition, and voting system; (2) the system of exploitation; and (3) the Authority's resource policy. Subsidiary issues include the financial arrangements for contractors, the dispute settlement system, the review clause, and the provisional entry into force of the deep seabed text.[57] The most important issue is political control. If that issue can be satisfactorily resolved, the balance needed in the more technical areas would become more apparent. Thus, if the delegates were to agree on a political structure in which they had confidence, less pressure would exist to include in the text many details which present negotiation difficulties due to the lack of reliable data and the presence of ideological conflicts.

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54. *Id.* arts. 151, 160; *id.* annex II, paras. 3-5, 10.

55. *See id.* arts. 151, 169; *id.* annex II, para. 6; *id.* annex III.

56. *Id.* art. 153.

57. There are numerous other technical problems in the text requiring work by the Drafting Committee of the Conference or other suitably qualified experts. *See, e.g.*, ICNT, *supra* note 2, arts. 158(2)(xvi), 160(2)(xiv) (duration and use of provisional rules and regulations), 177 (whether there are any exceptions to the privileges and immunities provided in Annex III); 178, 181(a) (what organ waives the Authority's immunities).

The core of the political issue is found in the Council articles. Currently, the texts are ambiguous with respect to the power of the Assembly to dictate Council actions. To the extent that the Assembly could dictate to the Council, the political control would rest in the one-nation, one-vote Assembly which would be dominated by the Group of 77. If the Council is vested with independent powers, the next critical question is its composition and voting system.

A significant difference exists between the treatment of the Council issue under ICNT and the Evensen Text.[58] Not only does the ICNT provide for smaller developed country representation in the Council, but it also eliminates the chambered voting requirement of the Evensen Text which was developed to assure that the Council's decisions would take into account the views of the relevant interest groups.

The creation of the parallel system is the result of the conflicting desires of the participants as to the entities that would be able to exploit the deep seabed. Some nations, particularly the Group of 77, wish to see the Enterprise have the exclusive right to exploit the resource, while others, particularly the major industrialized countries, have sought a system that would provide for the assured right of state and private companies to exploit. The parallel system was developed to assure access to the Enterprise as well as state and private companies. Unless a balance is maintained as to the conditions on access for each side, it is feared that the disfavored side would not have effective access to exploit the deep seabed.

A comparison of the RSNT, the Evensen Text, and the ICNT clearly demonstrates the conflict over the parallel system of exploitation.[59] Although all three use the parallel system approach, the assurance of access for state and private enterprises to deep seabed mining varies greatly. The RSNT provides for a relatively secure right of access for both sides upon satisfaction of specified requirements. However, it contains little to assure that the Enterprise would ever become operative. In contrast, the ICNT gives the Authority significant powers and discretion to deny and condition access by state and private enterprises, but provides for little or no review by the dispute settlement system. The text places no limitations on the activities of the Enterprise. Furthermore, the ICNT provides the Enterprise with the benefits of unlimited state-funded financing, mandated transfer of technology, and exclusive

58. *See* Appendix, *infra*, subject no. 3.
59. *See id.* subject no. 6.

access to one-half of the sites nominated by state and private commercial entities. Thus the system is rendered so out of balance that it would be likely to lead to exploitation only under the Enterprise. The Evensen Text would seek to limit and direct the discretion that is given to the Authority. It would assure conformance with Convention requirements through the comprehensive dispute settlement system.

The resource policy issue[60] has been produced out of the conflict between the proponents of unrestricted seabed production and the producers of competing land-based sources of nickel, copper, cobalt, and manganese. The latter are supported by others seeking to advance the New International Economic Order goals of the Group of 77. The land-based interests have sought protections against the adverse impact of seabed mining through general policy statements in the text, the expansion of the power of the Authority, provisions authorizing compensation for the adverse impact of seabed mining competition, as well as the inclusion of specific production limitations on deep seabed mining. The strength and the comprehensiveness of those limitations on seabed mining are at the center of the resource policy issue.

One of the most controversial provisions in the ICNT is the 20-year limitation upon the production of nickel from manganese nodules to 60 percent of the cumulative growth segment of the world demand for nickel. This restriction effectively limits the production of all metals from manganese nodules. This 60 percent figure is the greatest limitation found in the three texts. The production limitation provisions raise two significant questions, which are as yet unanswered: (1) whether the ICNT would so restrict seabed mining that the industry would choose not to proceed; and (2) whether the limit contained in the RSNT would permit such large scale seabed mining that the land-based producers would suffer a substantial adverse impact. All the evidence available at this point indicates that the adverse impact of even unrestricted seabed production on the competing land-based producers will be minimal, except perhaps in the cobalt market.[61] On the other hand, it is not clear that any of the production limitations would necessarily have

60. *See id.* subject no. 4.

61. U.N. Report, *supra* note 30, at 4; Economic Effects of Deep Seabed Exploitation, Working Paper of the United States of America, 3 U.N. L.O.S. III O.R. 164, U.N. Doc. A/CONF. 62/c.1/L.5 (1974).

a substantial negative impact on the development of the manganese nodule industry.[62]

The other significant outstanding issues are closely related to the first three. The financial arrangement issue concerns the amount and nature of the taxes and other fees charged to seabed exploiters.[63] Of course, the nature, extent, and discretion provided will have a most important impact on the future of deep seabed mining. The dispute settlement issue concerns the availability of third party dispute settlement that could be important in assuring that the Authority contractors and nations comply with the terms of the Convention.[64] The review clause issue arose from a proposal by then Secretary of State Kissinger aimed at encouraging Group of

62. At the February 1978 informal intersessional meeting of the Conference a group of experts calculated the amount of nickel that might be produced under the production limitation used in the ICNT, assuming a 4.5 percent annual growth in nickel demand. Based upon a three million dry ton per year mining operation producing 35,100 tons of nickel per year, the following number of sites would be available:

Year	*Total Sites*
1985	6.5 - 8.2
1990	7.7 - 9.0
1995	12.8 - 13.7
1999	17.9 - 18.8

Half of those sites would be reserved for the Enterprise to develop. Report of the Chairman of the Informal Sub-Group of Technical Experts, U.N. L.O.S. III, U.N. Informal Doc. No. EIEG/1 (Feb. 16, 1978). Coincidentally, a report of the United States Congressional Research Service estimates a rate of development of the manganese nodule industry that closely parallels these results. SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HOUSE COMMITTEE ON INTERNATIONAL RELATIONS, 95TH CONG., 2D SESS., DEEP SEABED MINERALS: RESOURCES, DIPLOMACY, AND STRATEGIC INTEREST 111-23 (Comm. Print 1978) [hereinafter cited as HOUSE COMMITTEE PRINT].

A further motivation for limitations on the exploitation of the seabed is derived from a current dispute over the number of actual first generation mine sites that are available. *See generally* OCEAN MINING ADMINISTRATION, U.S. DEP'T OF THE INTERIOR, OCEAN MINING: AN ECONOMIC EVALUATION (1976); Menard & Frazer, *Manganese Nodules on the Sea Floor: Inverse Correlation Between Grade and Abundance,* 199 SCIENCE 969 (1978). This has given rise to the "anti-monopoly" provisions, which are aimed at assuming that a few consortia in Western developed countries do not capture all available sites. *See* Appendix, *infra,* subject no. 5.

63. *See* Appendix, *infra,* subject no. 7. The implications of the current text on financial arrangements are demonstrated in charts prepared during the February 1978 intersessional meetings. Hypothetical Calculations Based on Paragraph 7 of Annex II of the ICNT, U.N. L.O.S. III, U.N. Informal Doc. No. 78-75505 (Feb. 10, 1978).

64. *See* Appendix, *infra,* subject no. 13.

77 flexibility in return for an obligation to renegotiate the major operative parts of the seabed text at a conference in twenty years. While virtually all participants appear to support such a review conference, much dispute exists over whether the text should specify what regime should prevail if the review conferees fail to agree.[65] A final issue to be addressed concerns whether the deep seabed text would become effective at a very early stage or whether it must wait for the conclusion of the time-consuming ratification process needed to bring the entire Law of the Sea Convention into force.[66] Delayed entry into force could defer the commencement of deep seabed mining.

In summary, the RSNT limits the Authority's power to condition contracts, to vary terms applicable to contracts, and to deny contracts. The ICNT, in contrast, leaves much room for negotiation and variation, opening the door to the introduction of many political and economic considerations before and after the issuance of a contract. It is not clear which result would be in the best interests of private industry. It would like to have the certainty and predictability produced by limited Authority discretion, while at the same time it needs sufficient flexibility to permit the regime to adjust requirements in order to meet new commercial, environmental, and safety needs. This need for flexibility, particularly acute in a new industry, must be counterbalanced by the desire for certainty and evenhandedness. The conflict is particularly significant because the negotiations are being conducted in the context of a sometimes acrimonious north-south confrontation. This confrontation might be carried into the Authority to the detriment of the future of deep seabed mining.

3. The Future Legal Regime for the Deep Seabed

If the Law of the Sea negotiations are successful, the Convention produced will probably provide for a regime that closely resembles that found in the Evensen Text. Alternative regimes, such as a licensing system, a unitary joint venture system, or a clean parallel system do not appear to be negotiable at this stage.

Since the ICNT treatment of the deep seabed items previously discussed will not be accepted by the United States and certain other developed countries, there appear to be only two alternatives open to the Conference: (1) to move toward the kinds of solutions

65. *See id.* subject no. 14.
66. *See id.* subject no. 15.

found in the Evensen Text, or (2) to develop a text that does not resolve the remaining issues, but defers them to a future negotiation under the same rules used at the Conference. Many negotiators favor the approach used in the Evensen Text because it came very close to producing agreement at the 1977 session.

Developments subsequent to the 1977 session have made it clear that the Conference will follow precedent by proceeding to negotiate on the basis of the latest official text, the ICNT, despite objections on procedure and substance. Similarly, the previous unofficial text, the Evensen Text, will be technically disregarded.[67] Thus, efforts to return to the approach used in the Evensen Text will be time-consuming and difficult. Unfortunately, even if the effort were to succeed, the legal regime developed may not produce optimum results, particularly because the regime found in the Evensen Text is very complex and contains inherent conflicts.

The alternative "framework" approach avoids substantive decisions and may be acceptable for that reason.[68] Further deferred negotiations may provide the opportunity to develop a superior legal regime that may be in the long-term interests of all. Nevertheless, such a deferral has two drawbacks. First, it would inevitably be tied to a moratorium on deep seabed mining which may adversely affect some potential mining companies, although a

67. At the 1976 spring session in New York the informal "Pinto" text was discarded in favor of the controversial Informal Single Negotiating Text produced by the Chairman of the First Committee. Similarly, at the 1976 summer meeting in New York, the Revised Single Negotiating Text was used as the basis of discussion despite significant objections.

68. Such a framework regime could take many forms. One possible approach would be to retain as much as is generally agreed to in Part XI of the ICNT, leaving the remaining open issues for further negotiation within the Assembly. Articles 133-49, 168, 170, and 186 clearly could be agreed upon at an early date. Similarly, the organizational structure of the International Seabed Authority contained within articles 187-92 could be settled. The Basic Conditions of Exploration and Exploitation, Annex II, the Statute of the Enterprise, Annex III, as well as article 169, which authorizes the Establishment of the Enterprise, would be deferred. On the other hand, the general outline of an Enterprise and perhaps even generally recommended resource policies along the lines of article 150(1) might also be able to be settled. Further negotiations of the treaty and annexes would take place within the Assembly under the same rules of procedure as used in the Law of the Sea Conference. All recommendations would need state ratification.

Such an approach would in fact be in conformity with the Conference's treatment of most other subjects. As the discussion in the text indicates, many detailed issues have been deferred to future negotiations. It should be clear to the participating nations that a large multilateral conference is not the place to negotiate detailed arrangements.

short-term moratorium would produce no significant adverse impact on the potential consumer nations.[69] Second, it is believed that absent a substantive settlement on the deep seabed mining regime, many countries would have no strong interest in concluding the broader Law of the Sea Convention. Such a deferral of the entire Convention could be detrimental to many United States interests.

The other participants, however, particularly the developing countries, do have an interest in concluding a Convention on the Law of the Sea independent of a complete resolution of the deep seabed issue. There are at least five categories of interests which they appear to have. First, many have substantive interests in the terms of a convention which may limit the actions of others or legitimatize their own, in such areas as the Exclusive Economic Zone, Archipelagic waters, straits, the rights of the landlocked and geographically disadvantaged states, and revenue sharing. Second, many have an interest in playing some role in seabed development, even if only to assure that the development is limited. Third, the Group of 77 has a substantial interest in protecting the viability of multilateral negotiations in order to assure their use elsewhere and to improve the prestige of the United Nations system. The members of the Group of 77 recognize that the effectiveness of the Group in international affairs is heavily dependent upon negotiation in a multilateral forum. A failure at the Law of the Sea Conference would prejudice the continuing use of multilateral negotiations. Fourth, they could benefit from the expanded use of compulsory dispute settlement which would increase the likelihood that international issues would be resolved on terms other than the geopolitical strength of the adversaries. Finally, the ego involvement of the many long-term delegates to the Conference and the supporting national and United Nations bureaucracies cannot be ignored. They see themselves as having a large investment in the success of the Conference. Consequently, they will try to avoid a total failure.

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69. Neither an early shortage of those metals nor effective producer cartels appear likely. *See Metals from Deep Seabed Nodules: U.S. Dependence on Nickel, Copper, Cobalt, and Manganese and Feasibility of Cartel Action, House Hearings, supra* note 37, at 109 (report by James E. Mielke); HOUSE COMMITTEE PRINT, *supra* note 62, at 42-78; Charney, *supra* note 1, at 620.

To be negotiable, the moratorium would have to be either limited in duration or limited to a "reasonable time for serious negotiations to take place." Upon dissolution of the moratorium all nations would be placed in the uncertain legal-political *status quo ante.*

If the Conference fails to produce a generally acceptable regime, those countries that are most highly motivated to commence deep seabed mining at an early date would have to make some hard choices. At present, the passage of unilateral domestic legislation appears likely.[70] Consideration is also being given to the negotiation of a treaty among interested nations that would be open to all countries. Although it is unlikely that any but the most industrialized western countries would join such a treaty, its existence might tend to legitimatize deep seabed mining. It would probably purport to give private companies the right to apply for licenses for deep seabed mining under domestic regulation. Nevertheless, if effective, the treaty essentially would cut the rest of the world out of participation in the regime for the mining of the deep seabed.

Whether deep seabed mining proceeds at an early date under such a mini-treaty and/or unilateral legislation depends upon at least five factors. The first factor is the actual economic and strategic value of deep seabed mining to the countries likely to engage in such mining. Currently, its value is low.[71] Second, the effectiveness of the reactions by the Group of 77 and the other land-based producers to unilateral mining is dependent upon a number of factors: the degree of animosity present when the Conference concludes, the presence of an aggressive leader of the opposition group, the state of other north-south relations, and the significance of the threat that deep seabed mining would pose to land-based producers. Third, early seabed mining may be opposed by the Soviet Union. The decision of the Soviets could be influenced by the state of East-West relations, their desire to curry favor with the Group of 77, and their estimate of the effect that delayed deep seabed mining would have on their economic interests. Fourth, the tactics adopted by the opposition to deep seabed mining must be considered. These tactics could include jawboning, a request for an

70. *See* H.R. 3350, 95th Cong., 1st Sess., 123 CONG. REC. H1074, E693 (1977) (to Committee on International Relations on Nov. 7, 1977); H. R. REP. No. 588, 95th Cong., 1st Sess. (1977); S. 2053, 95th Cong., 1st Sess., 123 CONG. REC. S13924, S13980 (1977); *Mining of the Deep Seabed: Hearings on S. 2053 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources and the Senate Comm. on Commerce, Science, and Transportation,* 95th Cong., 1st Sess. (1977). For a consideration of a similar bill in the 94th Congress, *see* S. REP. No. 754, 94th Cong., 2d Sess. (1976).

71. *See* Testimony of David E. McGiffert, Ass't Secretary of Defense for International Security Affairs, before the House Committee on International Relations, 95th Cong., 1st Sess. (1977) (unpublished); note 69 & accompanying text *supra.*

International Court of Justice advisory opinion, the passage of United Nations resolutions, the conclusion of a separately negotiated deep seabed treaty, suits in the International Court of Justice, and economic retaliation against the countries and companies connected with the unilateral deep seabed mining. The tactical option of linking deep seabed mining to other international issues is also available. For example, if in the unlikely case OPEC linked access to petroleum to unilateral action, support for unilateral action in Western Europe and Japan would decrease significantly. Fifth, the timing and tactics used by those seeking deep seabed mining will be important. If unilateral actions are taken shortly after the end of negotiations, the former negotiators will be in a position to assure coordinated actions in opposition to unilateral action. Similarly, brazen actions by the potential deep seabed miners could create the incident that could spark significant coordinated reactions.

Considered in its entirety, unilateral deep seabed mining has the potential of becoming a *cause celebre* of the Group of 77, creating a difficult situation for the United States. Accordingly, an unstable situation is likely to result if the Conference fails. Assessed in the light of the political, legal, and economic uncertainties facing deep seabed mining, it seems unlikely that strong support would be forthcoming from the key developed western countries for a rapid development of deep seabed mining. If this presumption is correct, the no-conference route would produce at best little or no deep seabed mining for a number of years. Individual states might thereafter proceed to conduct some commercial mining, near their land possessions. If seabed mining is found profitable, customary international law may develop which will permit mining by nationals and licensees only in deep ocean areas adjacent to the Exclusive Economic Zones of their respective countries. Such a development could lead to the evolution of extended zones of national jurisdiction that may pose problems to the exercise of high seas freedoms by the United States. At some point, international agreement on some limited revenue sharing might evolve. However, the development of an international regime as envisioned in the current negotiations will be unlikely once this Conference ends.

Deep seabed mining under the ICNT's International Seabed Authority appears to be a dismal alternative. The Authority would contain a large bureaucracy possibly armed with the potential to disrupt or even foreclose deep seabed mining. Nevertheless, it is reasonable to believe that in practice the Authority's actions would not approach even the worst case analysis, for three reasons: (1) adequate protections against unreasonable Authority actions are

likely to emerge from the negotiations; (2) once the Authority comes into operation with the likely infusion of more technically-oriented persons and the diffusion of the international diplomats and lawyers, the drive may well be to encourage and develop seabed mining; and (3) movement toward seabed development will be assured through a balanced Council and an effective dispute settlement system.

It is hard to predict with any degree of certainty what the legal regime for deep seabed mining will be. It is equally difficult to predict which alternative would be superior from the point of view of industry, government, or the public. Nevertheless, it still appears that the international regime route is superior for the United States. While a comprehensive international regime has many advantages, the problems besetting the Conference give rise to legitimate fears that the international regime route may not realize its potential. Although many believe that the United States has already invested too much in the negotiations and that further efforts would not be cost-effective, the pursuit of an international regime appears worthy of a continuing effort.

IV. Conclusion

The review of the United States interests at stake at the Law of the Sea Conference reveals that the Convention would provide certain benefits to the United States not available in the absence of a convention. Although the benefits to be derived from the Convention in some substantive areas are not overwhelming, in the case of navigation and the other related ocean uses, the Convention route would provide significant advantages over the alternatives. The impact of the deep seabed issue is still undecided. A regime on the deep seabed that provides for a well-constituted Council and a system of exploitation that reasonably assures that deep seabed mining would be able to proceed subject to rational regulation is in the best interest of the United States. Such a regime should be sought even if it means a further deferral of the date on which mining will commence. When all of the United States substantive interests in a Law of the Sea Convention are added to the more general international relations interests that could be enhanced by the successful conclusion of the negotiations, it becomes clear that the United States possesses a substantial interest in the success of the Conference even though individual interests may not be overwhelming. At the present time there is some possibility that an acceptable Convention can be negotiated. While that possibility remains, the United States should continue to pursue the Convention route.

APPENDIX

COMPARISON OF THREE TEXTS ON THE REGIME FOR THE DEEP SEABED CONSIDERED AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

Subject	Revised Single Negotiating Text Part I and Annexes I-III	Evensen Text	Informal Composite Negotiating Text Part XI and Annexes II, III, V
1. Organs	Principal organs are the Assembly, Council, Tribunal, and Secretariat. Other organs established include the Enterprise, Economic Planning Commission, Technical Commission, and Rules and Regulations Commission. Arts. 24, 29.	Same as RSNT but the text assumes that the Tribunal will not be an organ of the Authority. Rather, it would be a panel of the Law of the Sea Tribunal. Art. 33.	Same as Evensen. Arts. 156, 187; annex V.
2. Functions of Assembly v. Council	The Assembly is the supreme organ of the Authority, with the power to prescribe general policies and to entrust organs with powers not granted in the text. It also elects members of most organs, including the Council, and has the final say in financial decisions upon the recommendation of the Council. Arts. 24, 25, 26. The Council prescribes specific policies, supervises activities in the area, makes recommendations to the	Similar to the RSNT. The power of the Assembly to "prescribe" general policies is changed to the power to "establish" such policies. A major change is a provision giving the Assembly the power to adopt the rules, regulations, and procedures provisionally adopted by the Council. A larger role for the Assembly in the budget process is implied.	Same as Evensen except that subjects not entrusted to a specific organ are impliedly kept under greater Assembly control. Art. 158(1).

	Assembly, and adopts rules, regulations, and procedures. Arts. 27, 28.	The Council is now given the power to "establish" specific policies. Its decisions on rules, regulations, and procedures are subject to the final approval of the Assembly. Arts. 26, 28.	
3. Composition and Voting in the Council	36 members elected by the Assembly: 6 high seabed technology countries including one Eastern (Socialist) European country; 6 less-developed countries (LDC), one from each of six categories: exporters and importers of land-based minerals, large population, landlocked, geographically disadvantaged (LL & GDS), and least developed; 24 on the basis of equitable geographic distribution. Decisions on important questions require 2/3 plus one vote of members present and voting. A 2/3 majority determines whether an issue is an important question. Other questions require only a majority of members present and voting. Art. 27.	36 members: 4 high seabed technology countries including one Eastern (Socialist) European country; 4 major importers; 4 major exporters; 6 LDCs, with the same six special interests which are listed as "categories" in the RSNT; 18 chosen by geographic distribution—at least two from each region. A matter is deemed substantive unless a substantive vote decides otherwise. A substantive decision requires a majority of four of the five categories of members plus 2/3 of all members present and voting. Matters of procedure are decided by a 2/3 vote. Art. 27.	Council composition follows the Evensen text with the additional specification of one Eastern (Socialist) European county representative among the importers and two developing countries among the exporters and a diminution of the minimum number of representatives from each geographical region to one. Voting is not chambered. Only a 3/4 majority of those present and voting is required on a matter of substance. Art. 159.

4. Resource Policy	General obligation to foster healthy development of the world economy, especially with reference to the developing countries, to expand opportunities to participate in the development of resources, and to increase the availability of resources. Protections against substantial declines in mineral export earnings of developing countries caused by seabed production through new international arrangements and a production limit on nickel production in first 20 to 25 years not to exceed the cumulative growth segment of the nickel market. Art. 9.	The policy goals language is similar to the RSNT, although additional policies are listed, including orderly and safe development, balanced growth in international trade, equitable sharing, transfer of technology, just, stable and remunerative prices, and prevention of monopolization. Protection of developing exporting countries from adverse effects on their export earnings and economies is sought by facilitating international arrangements and limiting seabed nickel production by the cumulative growth segment of the world nickel market for the first seven years. Thereafter, until the passage of 20 years after 1980, the limit would be 2/3 of the cumulative growth. Art. 9.	The policy is stated in more mandatory terms. The text raises the policies of transfer of technology and protection of the LL & GDS to the level of major policies. The interim production limit after the first seven years has been lowered to 60% of the cumulative growth segment of the world nickel market. Compensation to developing countries suffering adverse effects on their export earnings or their economies is authorized. Art. 150.

5. Anti-monopoly	Policy to ensure equitable sharing of the economic benefits of activities in the area. Art. 9(6). Discussion otherwise deferred. Annex I, para. 8(e).	The prevention of monopolization is a resource policy goal. Art. 9(1)(b). Otherwise, a specific provision is left open. Annex I, para. 8 (*bis*)(l).	Provides that the prevention of monopolization is a resource policy goal, and that antimonopoly provisions are acceptable in principle. Art. 150(1)(f); Annex II, para. 5(l).
6. System of Exploitation	Parallel system with the Authority on one side and state and private entities on the other. If the applicant for a contract satisfies specified qualifications, the Authority shall enter into negoations to conclude a contract. The Authority is given limited bases for refusing to contract. If there are conflicting applications, the Authority may negotiate and contract with the best qualified applicant. Contractor has security of tenure. A vested right in rules and regulations in force at time of contract is implied. The system applies equally to contractors and the Enterprise. Applications for a contract for exploration and exploitation require a dual nomination of minesites, one	A parallel system with dual nomination to be made upon application for a contract to explore and exploit. Applications are periodically opened, and if applications are in conflict because they seek the same area, or all cannot conform to the production limitations, selection is to be made on a comparative basis. Where no conflict exists, negotiations to conclude a contract with a qualified applicant are mandatory, and the scope of the negotiation is limited. Annex I, para. 8 (*bis*). The contract must be approved by the Council. The Council is deemed to have given its approval if disapproval does not	Similar to the Evensen text with additional discretionary powers given to the Authority to encourage and perhaps require prospective contractors to transfer technology and to contract directly with the Enterprise. Annex II, paras. 4(c)(ii), 5.

		of which the Authority will place in the reserved area. Art. 22; Annex I.	occur within 60 days of submission. Art. 28(2)(ix). The Enterprise is not subject to the requirements set out above. Security of tenure is protected. Dual nominations are required. Annex I, para. 8 (*bis*).	
7.	Financial Arrangements for Exploiters	Alternative tentative texts have been drafted. Special Appendix.	Not considered.	Charges to a contractor are imposed for filing the application, for the annual right to mine, for the annual right to exploit, for a royalty, and for a profit share. The amount of such charges is left blank. Annex II, para. 7.
8.	Financing the Enterprise	A general provision permitting alternate methods of obtaining funds in addition to Assembly appropriations. Annex II, para. 6. Assembly may assess members of the Authority based on a scale of assessments. Art. 48.	Similar to the RSNT but with more detail. A provision for government guaranteed loans and the receipt of funds from contractual relationships between the Enterprise and other entities. Annex II.	Same as Evensen text, with an addition that the Enterprise's assets include charges enabling the Enterprise to come into early operation. Annex III, para. 10.
9.	Transfer of Technology	The Authority and states shall promote programs and measures. Contractors shall draw up programs for the training of personnel from the Authority and developing countries. Art. 11; Annex I. para. 10(b).	Follows RSNT, but adds the Enterprise as a recipient of technology. Amendment to Art. 11.	An additional stronger role, enabling the Authority to require the transfer of seabed technology from prospec-

			tive applicants and contractors, is established. Art. 151(8); Annex II, paras. 4, 5.
10. Marine Environment	Measures shall be taken to protect the marine environment from "activities in the area." The text had limited application to beneficiation and processing. Rules and regulations on the subject were authorized, but contractors might have a vested right in those rules and regulations in force at the time of contract. Art. 12; Annex I, para. 12. Assessments of the environmental implications of activitites in the area are to be conducted by the Technical Commission. Art. 31.	Not considered.	Similar to the RSNT. Additional protections against injuries from beneficiation, transport, and processing are included. Art. 145; Annex II, para. 11(b)(6). *See also* arts. 208-23.
11. Scientific Research	No limitation except that it is to be conducted for peaceful purposes. The Authority may conduct scientific research or contract for it. Art. 10.	Not considered.	A stronger role for the Authority is implied. Arts. 151(7), 143.
12. Revenue Sharing	The Assembly decides criteria, rules, and regulations for equitable sharing. Art. 26(2)(x).	Similar to RSNT. Art. 26(2)(x).	Mandate that there be a sharing of the benefits with developing countries with emphasis on the LL & GDS and countries that have not attained full

			independence or other self-governing status. Art. 151(9).
13. Dispute Settlement System	Adjudication by the Tribunal unless the parties agree to arbitration. Fairly comprehensive powers to adjudicate disputes among states, applicants, contractors, and the Authority, as well as the power to render advisory opinions arising under Part I of the RSNT. Arts. 33-40; Annex III.	Similar scope to the RSNT. A significant exception to jurisdiction forbids the dispute settlement organ from ruling upon the conformity with the Convention of any rules or procedures that have been adopted by the Council or by the Assembly. Art. 37.	Similar to Evensen with the additional apparent exclusion from dispute settlement of disputes over the Authority's refusal to conclude a contract and disputes over the discretionary action of any organ. Arts. 187-92.
14. Review Clause	None.	Five year periodic review. Twenty year review conference. Basic principles are not reviewable. No provision for other action if no agreement is forthcoming. The taking of decisions follows the procedures at L.O.S. III. Arts. 64, 65.	Same as Evensen, with an additional provision mandating the elimination of the parallel system if the conference is unable to reach agreement within 5 years—the so-called "converging system." Art. 153(6).
15. Provisional Application	Tentative article providing for entry into force upon the 36th notification by a signatory that it will apply the convention provisionally. Art. 63.	Not considered.	Omitted.