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The international community has attempted the most ambitious treaty-making effort in history by trying to decide how the exploitation of the vast mineral wealth of the seas should be governed. The task has not been easy: countries with great differences in culture, politics, technology and geography have opposing viewpoints on the issues which must somehow be accommodated if agreement is to be reached.

Controversy over the resources of the oceans has emerged only in the recent past. In 1967, Ambassador Arvid Pardo of Malta put forth a proposal in the United Nations calling for an international agency to oversee the exploitation of the seas. In a four hour speech the Ambassador electrified many Third World delegates by declaring that the immense mineral riches of the sea were the common heritage of mankind, to be used for the benefit of the less-developed countries of the world.¹

The Ambassador's speech generated international interest in the formation of a regime to exploit the sea-bed.² The United Nations General Assembly created the Ad Hoc


²Collins, Mineral Exploitation of the Seabed: Problems, Progress, and Alternatives, 11 NAT. RESOURCES LAW. 599, 636 (1979) [hereinafter cited as Collins].
Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction. This Ad Hoc Committee was replaced the following year by the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (the "Sea-Bed Committee"). The Sea-Bed Committee later became the preparatory body for the Third United Nations Conference on the Law of the Sea (the "Conference"). The Conference began in 1973 and, after nine sessions, has produced a Draft Convention on the Law of the Sea (the "Draft Convention").

The Conference has been quite successful in reaching consensus over such "difficult political issues" as fishing rights, transit passage of straits (with submerged transit and over-flight), mid-ocean archipelagoes, protection of the

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5 The First United Nations Conference on the Law of the Sea met in 1958 with 86 States participating. Four international conventions were produced. They cover the territorial seas and contiguous zone, the high seas, fishing and conservation of the living resources of the high seas and continental shelf. A second Conference was called by the General Assembly in Geneva in 1960 to seek to resolve disagreements over the breadth of the territorial sea and fishery limits. However, the 82 States represented were unable to adopt any substantive proposal on these matters. United Nations Press Release SEA/18, 28 May 1974.
marine environment and dispute settlement. It was thought that agreement had finally been reached and codified in an acceptable form in the Draft Convention. However, shortly after taking office in 1981, President Reagan announced that an inter-agency re-examination of the Convention had turned up serious problems necessitating a thorough review. That review was completed with the announcement on January 29, 1982 that the President had decided to send negotiators to the March 8th Conference sessions to work with other countries to achieve an acceptable treaty for the world’s oceans.

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8 Ambassador Elliot Richardson at the close of the 1980 summer session said,

Historians are likely to look at the ninth session of the Third United Nations Conference on the Law of the Sea, just concluding here in Geneva today, as the most significant single event in the history of peaceful cooperation and the development of the rule of law since the founding of the United Nations itself. When this session of the Conference resumed some 5 weeks ago it faced a number of basic outstanding issues. Almost all of these have been resolved in a manner commanding the broad support of the Conference participants. It is now all but certain that the text of a Convention on the Law of the Sea will be ready for signature in 1981.

Statement by Ambassador-at-Large Elliot Richardson, Special Representative of the President for the Law of the Sea Conference, Geneva, August 29, 1980.


10 The statement released by the President said:

I am announcing today that the United States will return to those negotiations and work with other countries to achieve an acceptable treaty. In the deep sea-bed mining area, we will
The current Conference session, scheduled to end April 30, has, as of this date, reached a deadlock over U.S. demands for changes in the deep sea-bed mining provisions. The Reagan Administration has proposed over 230 amendments which have been rejected by the "Group of 77" developing countries. The amendments were rejected on the grounds that "they called into question fundamental elements of the treaty already worked out in the negotiations."\(^{11}\)

(footnote 10 continued)

seek changes necessary to correct those unacceptable elements and to achieve the goal of a treaty that:

-- will not deter development of any deep sea-bed mineral resources to meet national and world demand;

-- will assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the International Authority, and to promote the economic development of the resources;

-- will provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;

-- will not allow for amendments to come into force without approval of the participating states, including in our case, the advice and consent of the Senate;

-- will not set other undesirable precedents for international organizations; and

-- will be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.


\(^{11}\)A "Group of 11" Western countries have offered alternatives to the U.S. amendments. The Boston Globe, April 4, 1982, at 15 col.1.
The Conference is stalled by U.S. demands for changes in the chapter that would regulate the mining of important minerals from the world's sea-beds. These minerals consist of tons of potato-sized rocks, or "nodules," lying on the ocean floor. These nodules were first discovered in December 1872 by the H.M.S. Challenger, a wooden steamship from the University of Edinburgh on an expedition to explore the world seas. "One of the major discoveries of the Challenger was that nodules of rocklike materials . . . lay on the deepest bottoms of the Atlantic, the Indian and particularly the Pacific Oceans." 

The nodules contain four minerals which industry sources believe would make deep-sea mining commercially profitable. These minerals, manganese, copper, nickel and cobalt, have important strategic uses for which, in some cases, there is no substitute.


13R. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES, 214, (1979) [herein-after cited as ECKERT].

14Why these geologically ancient nodules are always seen on the top of the ocean floor and are never covered by sediment remains a mystery. Id. at 217.


16Manganese is used in dry cell batteries but its most important application is in the making of steel where it adds strength or removes impurities, depending on the process used.
The General Services Administration has classified these metals as "critical materials," illustrating their importance to the American economy. United States' access to these minerals is strategically important, as this country imports virtually all of the manganese and cobalt it uses, 77 percent of its nickel requirements and as much as 20 percent of the necessary copper. It has been estimated that one mining site could provide a quarter of the requirements of the United States for these materials. In addition, it is predicted that land-based supplies of manganese will be depleted in 98 years, copper in 55, nickel in 148

Nickel is also used in the manufacture of stainless steel, alloys and for electroplating. Nickel imparts certain properties to alloys, such as an increase in strength and resistance to corrosion, that cannot be economically obtained by other means.

Cobalt is an expensive metal with a relatively small market. It is used in a variety of industrial products, both metallic and non-metallic. The principal characteristic of the metal is its resistance to high temperatures which makes it particularly well-suited to a number of rapidly expanding advanced technology industries.

Electrical conductivity and resistance to corrosion make copper invaluable in the manufacture of electrical equipment, cables and wires for communication and electrical transmission lines, electrical appliances, tubing and sheeting for the construction and chemical industries, alloys and in a number of other uses.


Collins, supra note 2, at 606.
Because these mineral's are so "critical" to the U.S. economy, the Reagan Administration has examined the Draft Convention very carefully. This paper will examine the major Reagan objections to the Draft Convention against the background of the current international legal status of these resources of the sea-bed. It will be argued in Part I that under international law, both customary and conventional, these resources are open to unilateral exploitation on a first-come, first-served basis. United Nations resolutions to the contrary have no binding legal effect. Part II will explain the international regime and its component parts as set forth in the Draft Convention; Part III will discuss the Reagan objections. Part IV will argue against unilateral exploitation of the sea-bed and in favor of a law of the sea treaty while Part V will summarize the various issues discussed.

I. LEGAL STATUS OF SEABED NODULES

The legal status of these minerals under international law is in dispute. Evidence of the present state of the law may be found in the Convention on the High Seas of April 29, 1958 (the "High Seas Convention") and in international customary law.

\[20\text{Id. at 610.}\]

Article 2 of the High Seas Convention²² lists four freedoms of the high seas, but states that the list is not meant to be complete or exclusionary but instead that "additional uses of the high seas, which do not interfere with the reasonable use of the high seas by others, are protected freedoms."²³

Can the exploitation of the deep sea-bed be considered one of these unnamed but protected freedoms? An investigation of the legislative intent of Article 2 would make it appear so. The International Law Commission in its commentary on Article 2 stated, "The list of freedoms of the high seas contained in this article is not restrictive; the Commission has merely specified four of the main freedoms. It is aware that there are other freedoms, such as freedom to explore or exploit the subsoil of the high seas . . . ."²⁴

Exploitation of the sea-bed was again mentioned a year later in a 1956 report²⁵ to the General Assembly: "The Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas. It considered that . . . such exploitation has not yet assumed sufficient practical importance to justify special regulation."

²²Id. at Article 2.
²³Gillis, supra note 20, at 50.
Some scholars have argued that sea-bed exploitation should not be considered a freedom of the high seas because in 1958 such exploitation was deemed to be quite far in the future. When it became a reality, "special regulation" would be needed and that, it is urged, is the purpose of the present conference.26

Yet it is possible that "special regulation" meant simply the enumeration of that freedom, like the other four in the treaty, when it became practical to do so. The fact that mining was technologically impossible when the High Seas Convention was drafted does not preclude States from recognizing future rights to mine when it becomes feasible.

Legal scholars have also argued that deep-sea mining is a freedom allowed by international customary law. International customary law has been defined by Chief Justice Marshall of the United States Supreme Court as the "usage of nations [which] becomes law and that which is an established rule of practice is a rule of law."27 Therefore the question of the legality of sea-bed mining may be answered by looking to State practice in the past. Such State practice must be a custom followed by States because they believe they are legally required to do so.28

26Collins, supra note 2, at 634.

27United States v. Percheman, 7 Peters 51 (1833), reprinted in Collins, supra note 2, at 615.

28SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 32 (5th ed., 1967) [hereinafter cited as SCHWARZENBERGER].
The legality of mining has only been questioned recently. But, there is no room for dispute that as a matter of customary law the resources of the sea-bed have been open for exploration and exploitation. Since time-out-of-mind oysters and shank, sponge and coral, pearls, coal and sand have been extracted and removed from the technologically accessible sea-bed.

The general rule regarding sea-bed exploitation, which has survived for 400 years, has been that ocean resources may be appropriated as long as no claim of sovereignty to the deep ocean floor or the water column above it is made.

Ownership of these resources has traditionally been based upon the ancient Roman concept of res nullius, meaning "[t]he property of nobody. A thing which has no owner." Ownership of an object which was res nullius was originally acquired by occupancy, that is, by taking possession of it. To acquire ownership by occupancy, four conditions needed to be met:

1. The thing must be a res nullius, a thing which never had an owner or which has been abandoned;
2. It must be a thing which is capable of ownership, that is, res in commercio;
3. It must be brought into the actual possession or control of the aspiring owner; and

29 Gillis, supra note 18, at 49.
30 ECKERT, supra note 13, at 3.
31 BLACK'S LAW DICTIONARY 1470 (4th ed. 1968) [hereinafter cited as BLACK'S].
32 STEPHENSON, A HISTORY OF ROMAN LAW 385 (1912) [hereinafter cited as STEPHENSON].
4. The person must acquire it with the intention of assuming ownership in it -- that is, possession must be juridical.

Acquisition of ownership by occupancy was applied by the Romans to six categories of things: (1) wild beasts, birds, fishes, etc., (2) precious stones in a state of nature, (3) things captured in war, (4) abandoned property, (5) things found on the sea shore, and (6) islands found in the sea. 34

Precious stones and objects washed up by the sea would seem to be conceptually very close to nodules, as they may both be reduced to ownership by capture. However, as these precious stones and objects would be found on land or in shallow water, a closer analogy might be made to islands which, like nodules, are found on the high seas. "When an island rises in the sea, though this rarely happens, it belongs to the first occupant, for until occupied, it is held to belong to no one." 35 Like islands, the nodules are created by geological processes on the high seas beyond any states' territorial sea. The nodules would, therefore, belong to the first finder who reduced them to his own possession.

It is often argued by less-developed countries which lack the requisite mining technology that the nodules are not res nullius but res communes or things common to all.

33 Id.
34 Id. at 386.
Res communes are "those things which are used and enjoyed by everyone, even in single parts, but can never be exclusively acquired as a whole." It has also been said that res communes are those things having "a money value which is merely incapable of appropriation to individuals." Examples usually given are air and light. Clearly under these definitions nodules could not be classified as res communes, as one could easily sell a nodule and receive the value of its minerals in dollars. The same could not be said of air or light.

The doctrine of res communes has been used to explain the meaning of the ambiguous Declaration of Principles Resolution 2740 (XXV) which was passed by the General Assembly in 1970 by a vote of 108 to 0 with 14 abstentions. This Resolution states that the sea-bed, ocean floor and the resources of the area, are the common heritage of mankind.

36 BLACK'S, supra note 31, at 1469.
37 BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW 91 (1931).
38 BLACK'S, supra note 31, at 1469.
39 The Declaration of Principles Resolution states:

1. The seabed and ocean floor and the subsoil thereof beyond the limits of natural jurisdiction...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.

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole...and taking into particular consideration the interests and needs of the developing countries...."

What this means has never been made clear. Neither the Resolution nor any of the preparatory works defines the phrase. Arvid Pardo, who coined the term, has claimed it is a new basic concept which he wishes to introduce into international law. Dr. Pardo has asserted that the principle of the common heritage of mankind goes beyond the concept of res communes by giving the deep sea-bed a "special status." Because of this status, the area "should be reserved exclusively for peaceful purposes and administered by an international agency in the name and for the benefit of all peoples of present and future generations." 

No one argues that the sea should not be preserved from the military competition evident elsewhere. It would also seem to be conceded by governments if not by the mining industry, that at least some of the benefits of the deep-sea should be equitably shared. As President Lyndon Johnson said in 1966:

"[u]nder no circumstances . . . must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottom are, and remain the legacy of all human beings.

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40 Collins, supra note 2, at 643.
Disagreement arises over the type of international agency to be created and the extent of its control over exploitation. Less-developed countries, afraid that the technologically advanced States might begin unilateral exploitation of the sea-bed before this international agency was even established, passed in the U.N. what has become known as the Moratorium Resolution 2574 (XXIV) of December 14, 1969. This Resolution purported to prohibit any exploitation of the sea-bed or recognition of any claim to its resources pending the establishment of an international regime by the Conference. This Resolution was passed over the fierce opposition of the developed nations and cut

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44 The Moratorium Resolution states:

Pending the establishment of the aforementioned international regime: (a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction; (b) no claim to any part of that area or its resources shall be recognized.


45 Immediately before the Resolution vote, the U.S. delegate stated:

[I]t would be a serious regression from the progress we have made so far, if the United Nations were now to signal that it is willing to make fundamental decisions in sea-bed issues through a politics of confrontation and paper majorities. Such a signal can only undermine that foundation of national confidence upon which the United Nations work on the sea-bed must proceed if it is to come to anything. We earnestly suggest, therefore, that the interests of all of us concerned with this important work would be far better served by the rejection of the present draft resolution.

across traditional East-West voting patterns. The results of the vote reflected the developing split between those poor nations (generally in the southern hemisphere) which lack the requisite mining technology or the resources to obtain it, and the advanced nations of the North.

The American position on the Moratorium Resolution and on the meaning of the common heritage principle has been consistent: both lack binding legal effect. The United States believes that the significance of the common heritage of mankind principle will have to be decided at the Conference. Until that time, "deep sea-bed resources may be recovered lawfully by any State or its nationals as an exer-

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46 The Moratorium Resolution was passed 62 to 28 with 28 abstentions. Those States voting against or abstaining included such unlikely bedfellows as Australia, Canada, China, France, Israel, Japan, Libya, Malta, the Netherlands, Norway, the USSR, the UK and the US. Id.

47 The United States position on the Moratorium Resolution and on the Declaration of Principles Resolution has been stated as follows:

The Executive Branch continues to hold the view that deep sea-bed mineral exploitation constitutes a reasonable use of the high seas and is presently permitted under international law. We have made this position clear to other nations on many occasions. In this connection, the United States has repeatedly expressed its position that the so-called moratorium resolution is without binding legal effect. Some states have suggested that it is possible to interpret the [Declaration of Principles Resolution] as legally prohibiting the exploitation of the deep sea-bed until the new international regime and machinery for that exploitation comes into effect. These states derive this interpretation from their understanding of the common heritage of mankind concept. The United States, however, has consistently maintained that its interpretation of the "Declaration of Principles" does not permit the derivation of a "moratorium effect" from this resolution.

cise of a traditional high seas freedom." 48

Third World countries to the contrary argue that the 1970 Declaration of Principles Resolution is declaratory of an existing principle of international law in the sense that the United Nations vote expresses a consensus of the inter­national community. 49 However, General Assembly resolutions clearly have no legally binding effect in and of themselves. 50

It is also doubtful whether either of these resolutions can be seen as evidence of general State practice and so constitute a rule of international customary law, especially in light of the objections to them by the industrialized States. 51

Thus, under the current state of the law, exploitation of the sea-bed can be justified both under the international customary law theory of res nullius and under the High Seas


50 "Whatever political or moral force such recommendations of the General Assembly may claim, they are not legally binding."

SCHWARZENBERGER, supra note 28, at 289.

51 Due to the demise of the colonial system and the large number of now independent states which have joined the United Nations it would theoretically be possible to "assemble a majority in the General Assembly that would represent as little as 4.7% of the world's population [and] 1.3% of gross world product."

Convention. U.N. resolutions attempting to limit or define these freedoms are without binding legal effect.

II. THE REGIME ESTABLISHED BY THE DRAFT CONVENTION

It is necessary at the outset for one to have an understanding of the international regime for the deep-sea and its component parts created by the Draft Convention. The Convention would create an International Sea-Bed Authority (the "Authority") whose headquarters would be in Jamaica. All States which are parties to the Convention would automatically be members of the Authority. The principal organs of the Authority would be the Assembly, the Council and the Secretariat. In addition, the operative arm of the Authority, the Enterprise, would be created which would undertake mining activities in the Area.

The Assembly would consist of all members of the Authority and each member would have one vote. As the only component of the Authority which would consist of all the members, the Assembly would be considered the supreme, law-making organ of the Authority to which the other principal organs would be accountable.

The Council would be made up of thirty-six members of

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52Draft Convention, supra note 6, at Article 156.
53Id. at Article 158.
54The area is defined as "the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction." Id. at Article 1.
55Id. at Article 159(5).
56Id. at Article 160(1).
the Authority, elected by the Assembly. The Council would be the executive organ of the Authority and would generally be charged with carrying out the policies of the Authority. The Council would also approve plans of work (contracts) in accordance with Article 6 of Annex III and in accordance with Article 162(n) of the Draft Convention. Two organs of the Council would also be established: the Legal and Technical Commission and the Economic Planning Commission.

The Economic Planning Commission would be responsible for submitting to the Assembly a system of compensation for developing States suffering adverse effects from mining in the area. The Legal and Technical Commission would review written plans of work and make recommendations to the Council.

The Secretariat would consist of a Secretary-General and such staff as the Authority would require. The Secretary-General would be the chief administrative officer of the Authority.

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57 Id. at Article 161.
58 Id. at Article 162(1).
59 Id. at Annex III, Article 6.
60 Id. at Article 162(n).
61 Id. at Article 163(1)(a) and (b).
62 Id. at Article 164(2)(d).
63 Id. at Article 165(2).
64 Id. at Article 166.
The system of exploitation now embodied in the Draft Convention is the result of a compromise proposed by the United States between developed and developing countries. The former viewed any sort of international mining regime with great suspicion and wished to keep the sea open for exploitation by private companies. The latter greatly feared a new colonization of the sea-bed by the advanced States and sought to allow only deep-sea mining by the proposed international regime. Under the so-called parallel system of exploitation, a mining company would be required to prospect an area large enough to sustain two mine sites. The Authority would then decide which site to reserve for its own use. Activities in the area would be carried out by either the Enterprise, States Parties or by natural or juridical persons in association with the Authority. Activities in the area would be carried out in accordance with a formal written plan of work which every applicant would be required to submit. The plans of work would take the form of a contract when approved.

The Draft Convention would also create a Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea. The Chamber would have jurisdiction over dis-

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65 Support for a parallel system of exploitation was expressed in a major speech by Dr. Henry Kissinger, the U.S. Secretary of State, delivered in New York in July of 1976.

Carias, supra note 49, at 33.

66 Draft Convention, supra note 6, at Article 153(3).

67 Id. at Articles 186-191.
putes between States, between a State and the Authority and, in certain instances, between parties to a contract whether they be States, the Authority, the Enterprise, State entities and natural or juridical persons.68

III. ADMINISTRATION OBJECTIONS TO THE DRAFT CONVENTION

The Reagan Administration has been criticized for conducting a policy review at such a late stage in the negotiations.69 However, any treaty to take effect must obtain the advice and consent of the Senate. In its present form, it is highly doubtful the Convention would receive such consent.70

James Malone, Chairman of the U.S. delegation to the Conference, has voiced concern over several provisions which might prevent Senate ratification. These areas of concern include: (a) the transfer of technology, (b) the lack of assured access to mining sites for American companies and the fear that the international regime created by the treaty may eventually monopolize production, (c) the lack of a

68 The Chamber has jurisdiction in disputes between parties to a contract concerning the interpretation or application of a contract or plan of work and acts or omissions of a party to a contract directed to the other party or directly affecting its legitimate interests.

Id. at Article 187.


70 "[I]t is the best judgment of this Administration that this Draft Convention would not obtain the advice and consent of the Senate." Statement by James Malone, Chairman of US Delegation to Law of the Sea Conference, before the House Subcommittee on Oceanography on April 28, 1981 in DEP'T ST. BULL. 48,49 (July 1981) [hereinafter cited as THE BULLETIN].
guaranteed seat on the Council for the United States, (d) the review conference and the fear of treaty amendments over the objection of the Senate, (e) the production limitations, (f) the lack of judicial review over Authority decisions, and (g) the provisions concerning liberation movements.  

A. The Mandatory Transfer of Technology Provisions

The mining industry and the U.S. Administration strongly object to the provisions of Article 14472 regarding the transfer of technology. Under this article, the Authority would be called upon to take measures to promote and encourage the transfer of mining technology and scientific knowledge to developing states. Programs would be developed for the transfer of technology to the Enterprise and developing States including, inter alia, increasing the access of the Enterprise and of developing States to the relevant technology under fair and reasonable terms and conditions.

When applying for a contract to mine a site, the prospective miner would have to agree to transfer to the Enterprise technology which he planned to use (and which in the future is actually used)73 should the Enterprise determine that it is unavailable on the open market.74 A miner could use the technology of a third party only if that party agreed

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71 Id.
72 Draft Convention, supra note 6.
73 Id. at Annex III, Article 5.
74 Id. at Annex III, Article 5(3)(a).
to the transfer under fair and reasonable commercial terms. Only technology which could be transferred would be used; if the Enterprise sought the technology of a third party (which had been transferred to the miner) and that party refused, the miner would be precluded from using it. 75

If the Enterprise invoked the transfer obligation, it could do so only under fair and reasonable commercial terms and conditions. 76 The obligation to transfer would expire ten years after the Enterprise began commercial production. 77

Despite strong American opposition, the so-called "Brazil clause" was incorporated into the Convention. 78 This clause would permit developing countries to take advantage of these technology transfer provisions in the event that the Enterprise decided not to mine a certain site and turned it over to a less-developed country. This clause would only apply to exploitation of the reserved sites. Although there are provisions for the settlement of technology transfer disputes, 79 the U.S. mining industry

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75 Id. at Annex III, Article 5(3)(b).
76 However, as one congressman has stated, "[a]nytime you force someone to sell something, that person is at a serious disadvantage." Interview with Rep. John Breaux, New York Times, March 15, 1981, at E5, col.3.
77 But note possibility of treaty amendments over Senate objections.
78 Richardson, supra note 48, at 204.
79 One mining industry representative has called the dispute settlement procedures "meaningless." While the Draft Convention would provide for binding arbitration under present United Nations arbitration rules, it would also allow these rules to be changed in the future by the Authority.
"feels the neutrality of arbitrators on any aspect of the dispute settlement procedures is very doubtful, especially when asked to determine what are fair and reasonable commercial terms and conditions."\textsuperscript{80}

The arbitrator's neutrality is questionable due to the method of selection. Each party would nominate one arbitrator; the remaining three would be chosen by both parties from a list composed of four names from each member state.\textsuperscript{81} If the parties could not agree on three names, as would seem likely, the President of the Law of the Sea Tribunal would appoint three arbitrators from the list.\textsuperscript{82} The President would be chosen by the Assembly which, due to its one-nation, one-vote structure, would contain an automatic majority of developing States. The result would be "an Eastern European Socialist or developing State President selecting three out of five arbitrators from a list of nominees suggested for

(footnote 79 continued)

No arbitration panel could interpret the treaty provisions; that would be a question for the Sea-Bed Disputes Chamber (the "Chamber"). However, the Chamber could not question the Authority's discretionary powers, nor could it declare any rules, regulations or procedures adopted by the Authority invalid. The mining industry feels these limitations on the judiciary would be at best irrelevant because the Chamber could only be expected "to reflect the overwhelming majority of third-world votes plus Soviet bloc votes in the Assembly and thus to be thoroughly biased against the private miner."

\textsuperscript{80}Ely, One OPEC Is Enough!, 5 REG. 19, 23 (1981 [hereinafter cited as Ely].

\textsuperscript{81}Gillis, supra note 18, at 61.

\textsuperscript{82}The Draft Convention, supra note 6, at Annex VI, Article 3(9).

\textsuperscript{82}Id. at Annex VI, Article 3(3).
the most part by the developing States." Private miners would be reluctant to commit substantial sums of money and sea-bed technology under these conditions.

At the heart of the technology transfer dispute is the miner's fear that such technology transfer terms are "another effective means for a developing-state dominated Authority to control the entry of industrialized States into seabed mining activities." A State or private company's mining activities in the non-reserved area could be directly prohibited by the revocation of the contract of a miner who refused to transfer his technology. The Enterprise, in addition to other advantages, would receive the benefit of any new technological breakthroughs owned by any of the private miners, thus indirectly increasing the likelihood of creating an Enterprise monopoly.

B. The Question of Assured Access to Sea-Bed Resources

The uncertainty surrounding the question of assured access is a major objection of the mining industry and of

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83 Gillis, supra note 18, at 65.
84 Id. at 61.
85 Ely, supra note 79, at 21.
86 The Enterprise would receive its prospected sites at no cost with each contract application. The Enterprise would be furnished with sufficient start-up capital to exploit one site (worth approximately 1.25 billion dollars). The Enterprise could also be exempted from the fees levied on private miners by an Assembly vote. In addition, the Enterprise would be authorized to negotiate with the countries in which it operated for tax-exempt status.
87 Id. at 24.
88 Id.
the U.S. government to the current Draft Convention. Commercial miners believe that through transfer of technology provisions, production limitations and other means discussed later, developing countries may monopolize deep-sea mining. One former U.S. ambassador to the Conference has stated, "I am afraid what was negotiated was to give an Enterprise to the Group of 77 on one side of the system, and not to have clear assured access on the other, but to have some rather significant ambiguity about the access on our side of the system." 88

A crucial aspect of the question of assured access which would not threaten U.S. interests is the contract approval process. This process would begin in the Legal and Technical Commission (the "Commission") which would determine if the applicant and his plan of work complied with the requisite criteria. 89 The Commission would then make a recommendation to the Council.

The Administration has questioned whether a qualified U.S. mining company could be unreasonably denied or delayed access by the Commission. It has been stated that "the issuance of contracts to industrialized States could be easily stopped or controlled to exercise leverage and force adhesive contract terms." 90 The Administration has argued

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89 Richardson, supra note 48, at 199.

90 Gillis, supra note 18, at 63.
that should the Commission recommend against granting a contract to an otherwise qualified U.S. company, it would be difficult for the U.S. to overturn the decision. A three-fourths vote of the Council would be required to override Commission recommendations and, due to the seating arrangement provisions discussed later, the Soviet Union, her allies, and developing States would be guaranteed eleven Council seats -- an effective veto.91

This veto would only exist, however, when attempting to overturn Commission recommendations. Two issues regarding the Commission thus become important: the selection process for Commission members and the voting procedures in the Commission. Commission members would be chosen by a three-fourths vote of the Council; a biased Commission would thus be possible only if twenty-seven out of the thirty-six members so voted, an unlikely occurrence. In addition, although the voting procedures have yet to be established by the Preparatory Commission, the U.S. representative will "insist that this . . . be no more than a simple majority."92 Moreover, even if the Council were to reject a Commission recommendation (e.g., in favor of a qualified U.S. company) and a conciliation could not be reached, the plan would be deemed approved unless rejected by consensus or by the absence of formal objections.93

91 Id. at 59.
92 Richardson, supra note 48, at 200.
93 Gillis, supra note 18, at 63.

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Thus, although other aspects of the Convention could effectively deny industrialized States access to the seabed, the contract approval process would not. The contract approval process has been described as "fair, clear and well-nigh automatic"; the system could only be distorted "if three-fourths of the members of the Council made a conscious and determined effort to elect unsuitable Commission members who would ignore the requirements of the treaty." C. Council Seating Arrangements

A related stumbling block to Administration approval of the Convention is the lack of an assured seat for the United States on the Council. In the Council, the Soviet Union and its allies would have three guaranteed seats, but the United States would be required to "compete with its allies for any representation."  

Under a complex system designed to protect all the various interest groups, elections to the thirty-six member Council would take place in the following order: (a) four out of those eight States "which have the largest investments in preparation for and in the conduct of activities in the area." (One of these four must be from the Eastern Socialist European region); (b) four members who are major consumers or importers of the metals involved and "in

94 Richardson, supra note 48, at 199.
95 Id. at 200.
96 THE BULLETIN, supra note 70, at 49.
97 Draft Convention, supra note 6, at Article 161(1)(a).
any case one State from the Eastern Socialist European region";\textsuperscript{98} (c) four members who are major exporters of area minerals including at least two developing countries whose economies rely a great deal on these mineral exports;\textsuperscript{99} (d) six less-developed countries representing special interests,\textsuperscript{100} and (e) eighteen members elected to ensure "an equitable geographical distribution of seats in the Council as a whole." Each geographical region elects at least one member under this provision. The five relevant geographical regions are Africa, Asia, Eastern Socialist Europe, Latin America, and Western Europe and others.\textsuperscript{101}

Under these seating arrangements it is true that most of the time the United States would have a seat. Yet the United States would not be considered a geographical area but rather part of "Western Europe and others." Article 161(4) states that "due regard should be paid to the desirability of rotating seats."\textsuperscript{102} Thus, eventually "the principle of rotation could still apply to rotate us [the U.S.] off at some time in the future."\textsuperscript{103} By contrast, the Soviet

\textsuperscript{98} Id. at Article 161(1)(b).
\textsuperscript{99} Id. at Article 161(1)(c).
\textsuperscript{100} The special interests include those of States with large populations, States which are land-locked or geographically-disadvantaged, States which are the major importers of area minerals, States which are potential producers of such minerals and least developed States.
\textsuperscript{101} Id. at Article 161(1)(e).
\textsuperscript{102} Id. at Article 161(4).
\textsuperscript{103} Moore, supra note 88, at 28.
The Reagan Administration believes that the United States, as the largest technological maritime State, should be given an assured seat on the Council. As Ambassador Pardo recognized in 1969, no major maritime State could sign a treaty that "did not give sufficient assurance that its interests would be considered. Such interests are not adequately safeguarded in the United Nations, where even very small states such as mine [Malta] have the same legal weight as the great powers." As Ambassador Moore has written, the lack of a guaranteed U.S. seat alone "would be a treaty stopper in the U.S. Senate and indeed ought to be." D. The Review Conference

Another area of Administration concern is the review process. Fifteen years after the earliest commercial production began under an approved plan of work, the Assembly would call a review conference. The Conference would consider, inter alia, whether the parallel system of exploitation had "benefitted mankind as a whole," whether the policies of the production controls had been fulfilled and whether the system had resulted "in the equitable sharing of

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104 Pardo, supra note 41, at 216.
105 Moore, supra note 88, at 28.
106 Draft Convention, supra note 6, at Article 155.
benefits from activities in the area, taking into particular consideration the interests and needs of the developing States."107 The Conference would also "ensure that the principles of the common heritage of mankind, the international regime designed to ensure its equitable exploitation for the benefit of all countries, especially the developing States, and an Authority to conduct, organize and control activities in the area, [had been] maintained."108

The problem for this Administration is that the United States could, in the future, be bound by a treaty the Senate has never ratified. If, after five years, the Conference were unable to reach agreement, it could, by a two-thirds majority adopt amendments changing or modifying the system as it saw fit. These amendments would become binding upon all States if ratified by two-thirds of the parties. "A simple two-thirds vote easily controlled by the Group of 77 could easily rewrite the deep sea-bed mining text in any way desired and it would become binding on the United States with no recourse on our part except to drop out of the treaty altogether . . . ."109 At that point, State practice might have crystallized around the form of exploitation in the Convention so that international customary law no longer sanctioned unilateral exploitation.110 In the opinion of

107 Id. at Article 155(1).
108 Id. at Article 155(2).
109 Moore, supra note 88, at 28.
110 Ely, supra note 79, at 24.
one former ambassador to the Conference, "to say that our vital interests are simply going to be put up for a two-thirds vote at the end of a twenty-year period is absolutely wrong . . . ." 111

E. The Production Limitations

Another part of the treaty particularly upsetting to the mining industry is Article 151 which would set ceilings on the amount of nickel which could be produced annually (and so the other metals as well). The ceiling would be designed to protect the export earnings of countries, usually less-developed, which rely on the export of a mineral also likely to be mined from the area. The amount of production would be limited to the increase in the consumption of nickel.

One problem with the complicated formula in the text is that it "is based on a projection forward of past trends [and so] it is impossible to predict exactly what level of production will be allowed during the fifteen years the limit will, in effect, apply." 112 For the miner investing the estimated ten million dollars simply to prospect a single mine site 113 the unanswered question of how much he would be allowed to produce would only increase his uncer

111 Moore, supra note 88, at 28.
112 Richardson, supra note 48, at 201.
113 Id. at 202.
tainties.\textsuperscript{114}

On the positive side, a floor has been added which would lessen the impact of any fall in demand.\textsuperscript{115} This floor substitutes a 3 per cent growth rate for any rate which is actually lower.

Article 151 has also been criticized for it would allow the Authority to join cartels to "stabilize the market price for land-based producers."\textsuperscript{116} Failing that, the Assembly could set up a system of compensation to aid developing countries suffering from a drop in export earnings as a result of sea-bed mining.\textsuperscript{117} Industry sources fear that the end result of these provisions would be to eliminate "any possibility of the U.S. achieving self-sufficiency in manganese, nickel or cobalt. They would also artificially inflate the price U.S. consumers have to pay for sea-bed minerals, just as the production controls of OPEC have in-

\textsuperscript{114}[One] should not minimize the potential hazards involved in the continuous operation of mine ships in the high seas with sophisticated equipment for gathering and lifting nodules from about 500 metres water depth. The vagaries of the weather at the surface, resistance of materials subject to the high pressures and corrosion of the water column, topographic hazards at the seafloor, the logistics of maintaining a large crew out at sea for an extended time, are some of the factors that will bear on the operational results of nodule mining once it starts on a commercial scale. It remains to be seen how attractive the economic returns of the industry will actually turn out to be.

The Secretary-General's Report, supra note 16, at 26.

\textsuperscript{115}Draft Convention, supra note 6, at Article 151(2)(b)(iv).

\textsuperscript{116}Gillis, supra note 18, at 61.

\textsuperscript{117}Draft Convention, supra note 6, at Article 151(4).
flated the price of oil."118

F. The Lack of Judicial Review

The Sea-Bed Disputes Chamber would be an integral part of the International Sea-Bed Authority and the regime of the area. In this connection, the Chamber would enjoy in addition to its contentious jurisdiction,119 an advisory jurisdiction at the request of the Assembly or of the Council.120 But the Chamber would have no jurisdiction with regard to the exercise by the Authority of its discretionary powers; in no case would it substitute its discretion for that of the Authority. The Chamber would be forbidden to decide whether any rules, regulations or procedures adopted by the Authority conformed to the provisions of the Convention; nor could it declare any such rules, regulations or procedures invalid.121

By exempting the International Sea-Bed Authority from judicial review, the Convention only increases the fears of the developed countries that "once constituted the International Sea-Bed Authority will become a leviathan, which shall chart its own unchecked course, to the severe detri-
G. Resource Sharing with Liberation Movements

Another rather peculiar provision could be interpreted as requiring the sharing of deep-sea resources with various liberation movements. One article would require that activities in the area be carried out for the benefit of mankind as a whole, "taking into particular consideration the interests and needs ... of peoples who have not attained full independence or other self-governing status." The unique situation could then arise where a signatory to the Convention had to share deep-sea resources (through the Authority) with an anti-government movement directed against it. The United States has specifically mentioned the Palestine Liberation Organization in this regard.

IV. THE CASE AGAINST UNILATERAL EXPLOITATION AND IN FAVOR OF A TREATY

Despite these objections there are a number of reasons why a treaty is important to the United States. Although the United States may legally begin unilateral exploitation, such a course of action would not be in the country's best interests.

The United States and the Federal Republic of Germany

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122 Collins, supra note 2, at 676.
123 Draft Convention, supra note 6, at Article 140. See Article 160(2)(f).
124 THE BULLETIN, supra note 70, at 49.
have each enacted legislation which licenses their own na-
tionals to mine the sea-bed and which also recognizes the
licenses of other nations. The number of nations
expected to pass similar legislation in the future is quite
small, from six to eight at most. Such unilateral exploi-
tation and legislation would not guarantee a clear title
whereas the Draft Convention "would obtain a good interna-
tional title, alongside good national title, to minerals
extracted . . . ." Various legal challenges to unilater-
al exploitation can be envisioned which would disrupt mining
by the developed nations and impede the flow of risk capital
to mining companies.

§ 1401. Title I of the Act deals with the regulation of exploration and
commercial recovery activities by U.S. citizens, which include licensing
procedures and environmental protection measures; Title II concerns the
effect an internationally ratified treaty on the law of the sea would
have on the Act; Title III deals with enforcement measures and penal-
ties; and Title IV deals with deep sea-bed hard mineral removal taxes.
See also Arrow, The Proposed Regime for the Unilateral Exploitation of
Deep Seabed Mineral Resources by United States, 21 HARV. J. INT'L L. 337
(1980).

126 Rosenne, Reflections on the Third U.N. Conference on the Law of the
Sea: Where It Stands in April, 1981, in PROCEEDINGS OF CONFERENCE ON

127 The Group of 77 could bring suit in the national courts of the
developed State sponsoring the mining company. The Group of 77 would
claim its right, as members of the world community, to bring a class
action suit on behalf of the common heritage of mankind, which was being
wrongfully appropriated by the mining company.

Alternatively, such a suit could challenge the exclusivity of the
claim. Res nullius recognizes only a right to take possession on a
first-come, first-served basis. It does not recognize the right to
exclude others from the same area. If such a suit were successful and
one or more less-developed nations began "poaching" operations, the
profitability of the original miner's venture would be gravely threa-
tened.
Unilateral exploitation would also aggravate tensions which are already present between the United States and Third World countries. The possibility of achieving international agreements in other important areas such as the Antarctic, space, energy, food, other commodities and the environment would be greatly lessened. Moreover, the lack of progress at 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."128

A successful Conference on the other hand, would place very strong international emphasis on the rule of law.129 The members of the Conference are "engaged in an effort to bring nations together around a common framework not only about what the law is, but also about procedures for resolving disputes that may arise in the future."130

(footnote 127 continued)

A different type of suit could be brought by an undeveloped country in its own courts. If the court found the mining operation to be illegal, it could then award damages to the country as its share of the plundered common heritage of mankind. The damages could be collected by expropriating other financial interests of the mining company in that country.


129 Moore, supra note 88, at 24.

130 Id.
Deep sea-bed issues are only a part of the Conference's work; the negotiations have included virtually every possible issue involving relations between nations with respect to the oceans, such as fishing, jurisdiction, navigation, environment and scientific research. Parts of the Draft Convention are very favorable to United States' interests. The United States for example, has specific navigational interests protected by the enactment of a treaty which are particularly important. These include the freedom for SSBN nuclear submarines to travel submerged through straits used for international navigation, the ability of aircraft to have overflight of these straits and generally the right of commercial and military ships to travel the oceans freely.

As Ambassador Moore has noted there is a hint of a trade-off in obtaining these navigational rights in the Convention in return for restricting United States' freedom to exploit the sea-bed. Other comments taking the opposite view emphasize the importance of mining rights over these navigational freedoms. The Draft Convention should not be signed simply because some United States' interests would be promoted. Navigational rights and assured access to the sea-bed are important and they should both be included in

131 Charney, supra note 128, at 39.
133 Id. at 24.
134 ECKERT, supra note 13, at 281.
any treaty the United States signs.\textsuperscript{135}

Aside from the legal and political arguments in favor of a treaty, there are strong equitable considerations against unilateral exploitation. New sources of wealth, created by technological advances, should not be used to widen the already large gaps in wealth between the First and Third Worlds.\textsuperscript{136} While States may have the legal right to \textit{res nullius}, elements of equity should be introduced into the international legal system so that some of this previously unowned wealth reaches those countries with the greatest need.\textsuperscript{137}

V. CONCLUSION

The 150 nations at the Conference have much invested in a successful law of the sea treaty. While it is too soon to be able to predict a successful outcome, conference members have narrowed the areas of disagreement to those provisions relating to deep-sea mining.

\textsuperscript{135}Moore, \textit{supra} note 88, at 27.

\textsuperscript{136}One former U.S. Supreme Court Justice and U.N. Ambassador explains the equitable arguments of many Third World countries: "They do feel deeply that, particularly with respect to mineral and energy resources in their own countries, they were taken advantage of during the period of colonialism. And who can deny that this was the case? They do not want the seas similarly colonized. We should agree that they should not be."


The disagreement stems from two differing views on the legal status of these resources. The industrialized nations claim the right unilaterally to exploit the sea-bed as a traditional freedom of the high seas. The minerals, or nodules, are res nullius which anyone may take. Less developed nations argue that the nodules are res communes or a part of the common heritage of mankind. As such, no one may legally commence mining operations absent a treaty, for to do so would constitute a theft of a portion of the common heritage.

The Reagan Administration was greatly criticized by Third World nations for undertaking a policy review at such a late stage in the negotiations. Many doubted the new President's commitment to a law of the sea treaty and feared unilateral action on the part of the industrialized nations. While there are strong political and equitable arguments against unilateral exploitation, President Reagan has raised objections to the Draft Convention which, from the United States' viewpoint, must be clarified.

The Group of 77 sought assured access through the international sea-bed regime: this has been achieved. It is not at all clear whether under some of the sea-bed mining articles the industrialized nations' access is as secure. At the heart of the Administration objections is the fear that Western access may be greatly limited. Any successful treaty must clarify the ambiguities surrounding this issue, or there will be no treaty.

Roger Tansey Hertz

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