1-1-1979

The United States’ Legislative Response to the Third United Nations Conference on the Law of the Sea Deadlock

Robert E. Bostrom

Follow this and additional works at: http://lawdigitalcommons.bc.edu/iclr

Part of the International Law Commons, Law of the Sea Commons, and the Legislation Commons

Recommended Citation


This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
The United States’ Legislative Response to the Third United Nations Conference on the Law of the Sea Deadlock

I. INTRODUCTION

The Informal Composite Negotiating Text (ICNT)\(^1\) of the United Nations Law of the Sea Conference\(^2\) is unique from the perspective of international law. It is at once both *lex specialis* and *lex generalis*. Articles 133 to 192 of the

\(\text{1. 8 U.N. CLOSOR 1, U.N. Doc. A/Conf. 62/WP. 10 (1977) [hereinafter cited as ICNT].}\
\(\text{2. Concern for the peaceful uses of the seabed beyond the limits of national jurisdiction by the United Nations was first included on the agenda of the General Assembly in 1967 at the initiative of the representative from Malta. The examination of this item resulted in the adoption of Resolution 2340 (XXII) which called for the establishment of the Ad Hoc Committee. G.A. Res. 2340, 22 U.N. GAOR, Supp. (No. 16) 14, U.N. Doc. A/6716 (1968). The Committee was assigned the task of studying the peaceful uses of the seabed and the ocean floor beyond the limits of national jurisdiction. Subsequent to the report of the Ad Hoc Committee to the General Assembly at its 23rd session, the General Assembly adopted Resolution 2467 (XXIII) which established the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction on December 21, 1968. G.A. Res. 2467, 23 U.N. GAOR, Supp. (No. 18) 15, U.N. Doc. A/7218 (1969). In December 1970 the General Assembly adopted two important resolutions. Resolution 2749 (XXV) called for an international regime to manage the seabed for the "common heritage of mankind" and reiterated a moratorium on the exploitation of the seabed until such a body was established. G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 28) 24, U.N. Doc. A/8028 (1971). Under Part C of Resolution 2750 (XXV) the new Law of the Sea Conference was scheduled to be convened in 1973. G.A. Res. 2750, 25 U.N. GAOR, Supp. (No. 28) 26, U.N. Doc. A/8028 (1971). The Committee was instructed under the provisions of this resolution to begin the preparatory work for the Conference. The Conference was assigned the following areas of concern:}\
\(\text{1) the establishment of an equitable international regime (including international machinery) for the area and the resources of the seabed and the ocean floor beyond the limits of national jurisdiction;}\
\(\text{2) a precise definition of the area;}\
\(\text{3) a regime of the high seas;}\
\(\text{4) a regime of the continental shelf;}\
\(\text{5) a regime of the territorial sea, in particular its breadth and the question of international straits;}\
\(\text{6) regime for the contiguous zone;}\
\(\text{7) fishing and the conservation of the living resources of the high seas;}\
\(\text{8) preservation of the marine environment;}\
\(\text{9) promotion of scientific research and its transfer to those states less technologically developed.}\
\(\text{Id. The Committee met in Geneva and New York from 1969 through 1970 and submitted a final}\
\(\text{409}\
\)

Resolution 3067 (XXVIII), dated November 16, 1973, declared that the first session of the Law of the Sea Conference would be convened in New York from December 3, 1973 to December 14, 1973; this preparatory session was to be for organizational matters, the establishment of subsidiary organs, the allocation of work to those organs, and other procedural matters. G.A. Res. 3067 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) 13, U.N. Doc. A/9030 (1974). Under paragraph 3 of this resolution the General Assembly stated that the mandate of the Conference:

Shall be to adopt a convention dealing with all matters relative to the law of the sea, taking into account the subject matter listed in paragraph 2 of the General Assembly resolution 2750 (XXV) and the list of issues relating to the law of the sea formally approved on August 18, 1972 by the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction and bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole.

The General Assembly further decided that the second session for the purpose of beginning the substantive work would convene for a period of ten weeks from June 20, 1974 to August 29, 1974 at Caracas. Any future sessions, if necessary, might be scheduled by the Conference. This resolution invited the Conference to make arrangements for the Session and referred to it all relevant documentation of the General Assembly and the Seabed Committee. 3067 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) 13, U.N. Doc. A/9030 (1974). Under paragraph 3 of this resolution the General Assembly stated that the mandate of the Conference:

At the first session in New York held in December 1973, the Draft Rules of Procedure for the Conference was drawn up, 3 U.N. CLOSOR 67, U.N. Doc. A/Conf. 62/L.1 (1974). It was decided that a quorum for the purpose of declaring a meeting open for debate was one-third of the states attending. For the purpose of making decisions a simple majority of the states must be present. Each state at the Conference was assigned one vote. Conference decisions on matters of substance required approval by two-thirds of the states present and voting. Decisions on matters of procedure would be by a majority of states present and voting. The President of the Conference was given the authority to decide the nature of a vote if conflict arose regarding the procedural or substantive nature of a vote. During the course of the first and second sessions it was decided that the work of the Conference would be allotted to three main subcommittees. At the outset of the third session, which was held in Geneva from March 17 to May 9, 1975, it was decided that it would be a negotiating session with few formal discussions or debates. The principal result of the third session was the preparation of three single informal negotiating texts covering all the work before the Conference. These texts correspond to the tasks assigned to the three committees and were prepared by the Chairmen thereof. They do not necessarily represent consensus or agreement but were to function as the basis for negotiations at the fourth session. These texts represent the judgment of the respective chairmen as to what would represent appropriate starting points for discussion at the fourth session, which commenced on March 15, 1976 in New York.

These texts are collectively referred to as the Single Negotiating Text (SNT) 4 U.N. CLOSOR 137, U.N. Doc. A/Conf. 62/WP. 8/Part I (1975) [hereinafter cited as SNT]. Copies of the SNT were distributed on the last day of the third session hence they were not subject to debate or discussion in that forum. The Fourth Session was held at the United Nations in New York in the Spring of 1976. It produced a revised version of the SNT which is referred to as the Revised Single Negotiating Text, 5 U.N. CLOSOR 125, U.N. Doc. A/Conf. 62/WP. 8/Rev. 1, (1976) [hereinafter cited as RSNT]; see 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) [hereinafter cited as Oxman]. The United States characterized this text as the basis for further negotiations but not wholly acceptable in its present form. In the summer of 1976 the Fifth Session was held in New York. No new negotiating text was prepared as a result of a deadlock on ocean mining and other issues. At the Sixth Session, which was held in New York in 1977, the Informal Composite Negotiating Text (ICNT) was produced. This Text reorganized all of the material of the earlier texts into a comprehensive draft treaty albeit with certain fundamental and substantive changes. ICNT, supra note 1. The ICNT was termed as "fundamentally unacceptable" by U.S. Ambassador to the Law of the Sea Conference Richardson at the conclusion of the Sixth Session. U.S. LOS Delega-
Text³ have the potential to embody and to implement the contemporary notion of need as the basis for international aid, i.e., an international law of global welfare recognition. Such a recognition is based on the conceptualization of the "common heritage of mankind" in the specific instance of the seabed exploitation questions and the special recognition of the lesser developed countries (LDCs) as a special group entitled to and requiring privileges relative to the developed countries (DCs) in a more general context. Such a realization requires a legal structure that reflects these new concepts and assists in their development. In Articles 133 to 192⁴ of the Text one can see the rudiments of such a structure.

In addition to the conclusion that it is in the immediate interests of the LDCs to get as strong an international authority as possible to preside over deep seabed exploitation, the fact stands out that the prime objective of this group at the current session of the Conference should be the conclusion of an agreement, since any accord is better than none from their perspective. As will be explained below,⁵ if agreement is not reached, the ensuing circumstances may vest interests and prohibit an agreement in the future.

It should be stated at the outset that it is also in the interests of the DCs to seek agreement at this session. From the perspective of long term global stability, the whole can only be as strong as its weakest links. The notion expressed in the "Philadelphia Declaration" of the International Labor Organization, that "poverty anywhere is a danger to prosperity everywhere,"⁶ is but one expression of this reality. In the event of exploitation of the seabed unilaterally by those developed States possessing the technology and the capital to do so, the gap between the rich and the poor certainly can be expected to widen. In the absence of an international agreement, unilateral exploitation will be unavoidable. Hence, agreement is important from a practical perspective. From a legal, philosophical point of view, it is important

---

³ ICNT, supra note 1, arts. 133-192, formerly Part I of the Single Negotiating Text, supra note 2.
⁴ ICNT, supra note 1, arts. 133-192.
⁵ See text accompanying notes 85-126 infra.
⁶ W.D. VERWEY, ECONOMIC DEVELOPMENT PEACE AND INTERNATIONAL LAW 339 (1972); see also E.V. ROSTOW, LAW, POWER & THE PURSUIT OF PEACE 110 (1968).
because it allows mankind the opportunity for a unique social experiment virtually unparalleled in contemporary history. The establishment of an international authority allows the function of international law and organization to be real, visible and immediate in the pursuit of a relatively apolitical goal.

This Comment will outline briefly the problem that exists concerning the International Authority. Initially, it will examine the International Authority as it is presently structured in order to provide an exposition of what the conflicts are. This examination of the structure of the Authority is a necessary prerequisite to a perception of the overall picture of conflict. Secondly, the author will illustrate some of the previous points of conflict that provoked legislation in 1973-1974 and the importance of a *quid pro quo* in the context of a package deal. Thirdly, and most importantly, this Comment will examine in detail the

7. This Comment will deal with articles 133-192 of the ICNT, supra note 1, formerly Part 1 of the SNT, supra note 2, which corresponds to the work of the First Committee. The First Committee has been assigned the task of establishing a regime and machinery to deal with the exploitation of the seabed beyond the limits of national jurisdiction.

As regards the establishment of international machinery, which will be the focus of this paper, two main problems can be discerned. One concerns who is to do the actual exploitation of the seabed, *i.e.*, States parties, juridical entities possessing the nationality of a State, nationals of States parties, or the International Authority itself. This issue and the four basic positions advanced are fully explained and differentiated in Acedé, *The System for Exploitation of the "Common Heritage of Mankind" at the Caracas Conference*, 69 AM. J. INT'L L. 31 (1975). The issue has been largely resolved in terms of the "two areas" system. The "two areas" system means that in submitting bids and sites to the International Authority, firms would provide pairs of alternative sites of approximate equal size and value. The Authority would select one of these for its own exploitation or sub-contracting thereof. This would be done under the aegis of the Enterprise, one of the organs of the Authority. The other site would go to the firm submitting the alternative pairs of sites. ICNT, supra note 1, art. 169. This solution represented the broadest base of compromise on the question of who shall exploit. It does, however, effectively deny the Authority a monopoly on exploitation.

The second issue concerns the structure of the proposed International Authority and the degree of its powers. While the framework of the Authority and its subsidiary organs has basically been agreed upon, a great deal of conflict remains over the voting system, internal distribution of power among the organs, and the actual extent of the power of the Authority. Because the various aspects of the Conference are being considered in terms of a "package deal" to encourage trade-offs and compromises on the wide range of issues, it is important to look at the structure of the Authority and its powers and voting procedures to better understand the points of conflict between the major positions and to foresee possible resolutions of conflicting positions in terms of *quid pro quo* in these areas. See generally Oxman, supra note 2; Stevenson & Oxman, *Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1 (1974) [hereinafter cited as Stevenson & Oxman]; Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1973 Geneva Session*, 69 AM. J. INT'L L. 763 (1975) [hereinafter cited as Geneva Session]; Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1 (1975) [hereinafter cited as Caracas Session]. Within this context one of the most controversial areas has been the extent of the implications of deep seabed exploitation and means of dealing with them; in other words, what is at stake.

8. In reiterating the importance of the "package deal" concept and the need for a wide range of mutual concessions to be made by the parties concerned, three categories of examples can be enumerated. The first was suggested by Professor Gardner. Gardner, *Offshore Oil and the Law of the Seas*, N.Y. Times, Mar. 14, 1976, § 3, at 14E, col. 2 [hereinafter cited as Gardner]. He pointed out two possible tradeoffs pertaining to the acceptance of revenue-sharing by the industrialized
unilateral action being debated in the United States. As the LOS Conference negotiators continue to fail to arrive at an agreed upon international system, the Congress is being pushed by mining consortia9 towards implementing a

nations from either 200 meters or 12 miles seaward. On the one hand "acceptance of revenue-sharing could be traded for international endorsement of coastal state jurisdiction over seabed resources to 200 miles and to the edge of the continental margin where it exceeds that distance." Id. The other possible tradeoff is that "the revenue-sharing proposal could be used to persuade these countries to accept a compromise giving industrialized nations reasonable terms of access to deep sea minerals and reasonable security of investment for their ocean mining enterprises." Id.

It is the author's view that this first category of quid pro quo exchanges involves a trade of the policy orientation of the Authority, i.e., revenue-sharing, for a matter of the delimitation of coastal State jurisdiction. Also included in this category is the "Kissinger exchange" of production controls for the rights of free transit in international straits and navigation in the 200 mile economic zone.

The second category of quid pro quo exchanges involves compromise within the terms of the actual structural composition of the Authority and the voting procedure of its component organs. Numerous examples can be cited here. The LDCs might concede to a relatively weaker Authority if they had the potential to dominate its decisions and policy. On the other hand, the United States might concede to a strong Authority (as it presently exists in the text) if its interests were better represented within it. In either case the tradeoff occurs between the overall power of the Authority and the balance of power within it. This is one of the reasons that the earlier exposition of the Authority and its component organs is important.

A third category of possible tradeoffs exists between the two categories defined, i.e., between some aspect of the structure of the Authority and, for example, the issue of the extension of national jurisdiction to the edge of the continental margin beyond 200 miles. The United States might agree to a stronger Authority or a system of equal voting if the area under the jurisdiction of the Authority was smaller.

"The possibility of these types of exchanges is significant and underlines the importance of the "package deal" concept. When a deadlock is reached within a narrow category of compromise, the attempt for resolution can be expanded to a broader range of negotiating points. The problem begins when minimum demands are treated as maximum concessions and vice versa. By expanding the arena of negotiations, the likelihood of agreement is increased. In the context of the power of the Authority and the distribution of power within it, when consensus breaks down in this specific realm it can be sought by respective concessions in other areas of the negotiations.

9. Congress has recognized that American firms and consortia involved in the development of technology for deep seabed mining have invested huge sums of money. In the absence of an international legal framework providing for a system of licenses and permits they are hesitant to make additional outlays. On the problem of risk of investment and exclusive rights as distinct from political risk see Burton, Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims, 29 STAN. L. REV. 1135, 1143-44 (1977); Note, Murky Waters: Private Claims to Deep Ocean Seabed Minerals, 7 LAW & POL'Y INT'L BUS. 1237 (1975). The following chart illustrates those consortia involved:

<table>
<thead>
<tr>
<th>Names of Companies</th>
<th>% Ownership of Effective Interest</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kennecott Consortium:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kennecott Copper Corp.</td>
<td>50</td>
<td>United States</td>
</tr>
<tr>
<td>British Petroleum Co.</td>
<td>10</td>
<td>Great Britain</td>
</tr>
<tr>
<td>Rio Tinto Zinc Corp., Ltd.</td>
<td>10</td>
<td>Do.</td>
</tr>
<tr>
<td>Consolidated Gold Fields, Ltd.</td>
<td>10</td>
<td>Do.</td>
</tr>
<tr>
<td>Noranda Mines, Ltd.</td>
<td>10</td>
<td>Canada</td>
</tr>
<tr>
<td>Mitsubishi Corp.</td>
<td>10</td>
<td>Japan</td>
</tr>
</tbody>
</table>
unilateral national system. The author will conclude with a discussion of the importance of an overall international agreement and the likely impact of a unilateral response by the United States.

Ocean Management, Inc.:
- Inco, Ltd. ............................. Canada
- Arbeitsgemeinschaft Meerestechnische gewinnbare Rohstoffe (AMR) ....... Federal Republic of Germany
- Sedco, Inc. ................................ United States
- Deep Ocean Mining Co. (DOMCO) ...... Japan

Ocean Mining Association (Service Contractor:
- Deepsea Ventures, Inc.):
  - United States Steel Corp. .......... United States
  - Union Minere, S.A. ............... Belgium
  - Sun Oil Co. .......................... United States

Ocean Minerals Co.:
- Lockheed Missiles & Space Co. ........ United States
- Standard Oil of Indiana ................ United States
- Royal Dutch Shell ..................... Netherlands
- Bos Kalis Westminster ................ France

French Association for Nodule Exploration:
- Centre National pour l’Exploitation des Oceans (CNEXO) ......... France
- Comissariat a I’Energie Atomique (CEA)
- Bureau de Recherche Geologiques et Miniers (BRGM)
- Societe Metallurgique Nouvelle/Societe Le Nickel (SMN/SLN)
- Chartiers de France Dunkerque 

Continuous Line Bucket (CLB) Group: About 20 companies in 6 countries including Australia, Canada, France, Federal Republic of Germany, Japan, and the United States Consortium for development of mining system but not commercialization

DOMA: A group of 34 Japanese companies ...... Japan


10. The major issues regarding the agreement emerging in the Conference relates to the extent of the adversity of the economic implications of the exploitations of the mineral resources of the deep seabed and the proposed mechanisms for minimizing the possible adverse effects on the LDCs. The mineral resources at the heart of the issue are the so-called “manganese nodules.” These nodules are dark, shiny rocks approximately the size of a fist. It is estimated that approximately 30% of the dry weight of the nodules would represent recoverable metal content. The metals that could be recovered are manganese (24%), nickel (1.6%), copper (1.4%), cobalt (0.21%) and trace minerals (0.3%).

It is essential to point out that the proportion of these metals in the nodules doesn’t correspond to the overall global supply and demand patterns. The potential magnitude of the manganese nodule supply is astounding. Only a minute fraction (3%) of the ocean floor could supply the annual demand for these minerals except copper. In addition, it has been estimated that although it takes thousands of years for a nodule to be formed, they are continuously being formed at a rate that exceeds the present consumption of these metals. Report of the Secretary-General, 26 U.N. GAOR, Comm. on the Peaceful Uses of the Seabed 26, U.N. Doc. A/AC. 138/36 (1971) [hereinafter cited as 1971 Report]. Admittedly, only a small percentage may be commercially recoverable, but they nonetheless represent a vast potential source. Since any exploitation of these nodules will represent a totally new input to present supply patterns, it has been assumed
II. STRUCTURE OF THE AUTHORITY

Articles 150 and 151 of the ICNT\textsuperscript{11} set out in general the nature and fundamental principles of the functions and operations of the proposed Authority. The International Authority will be an organization through which States that

that the impact will have a depressing effect upon the prices of these minerals. This depression in prices would have particularly severe consequences for LDC producers for several reasons.

Firstly, while the share of the LDCs in world production of certain minerals has been decreasing, due to increased production for export by developed countries, the dependence of the LDCs on mineral exports for government revenues has been increasing. Secondly, it would alter the flow of private investment from the LDCs to deep sea mining activities. Simultaneously, seabed exploitation would divert the development of technological refining and extraction methods toward the direct processing types applicable to seabed extraction. Finally, the inability of the LDCs to participate directly in seabed exploitation could have a further negative impact in terms of the increasing gap between the rich and the poor. This inability to participate is precipitated by technological and financial impediments. See \textit{Kaldor, Stabilizing the Terms of Trade of Underdeveloped Countries}, 8 \textsc{Econ. Bull. Latin Am.} (1963) (which discusses the notion that the benefit of technological progress in manufacturing are retained by the producers, but benefits of technological progress in primary extractive production are retained by the consumers).

Since aggregate demand for many of these minerals is not very responsive to an increase in price, the output from the seabed would tend to displace marginal land production. This effect would be exacerbated by the factors mentioned above, \textit{i.e.}, restrictive efforts on land-based production because of its diminished profitability and the accompanying alteration in the flow of investment. It should be kept in mind that with any reference to price elasticity (or the degree of demand responsiveness to price changes) is affected by the availability of substitutes when prices increase. Conversely attention must be directed at the possibilities of using the minerals for other purposes if prices decrease and the ensuing consumption in greater quantities than under traditional supply and demand schedules.

One mitigating effect upon the detrimental consequences for LDC producers is that world demand for these minerals is expected to increase at approximately 5% per annum. However, this utilization of increased supply hardly seems adequate when one looks closely at production possibilities from this as yet untapped source. It has been estimated by the United Nation's Secretariat that one deep sea mining operation by 1980 might supply from .13% to 7.9% of world demand of the four major metals recoverable from the nodules. 1971 Report, \textit{supra}, at 56, table XVIII.

Numerous studies have been prepared by UNCTAD, ECOSOC, and the United Nation's Secretariat attempting to identify the problems associated with the production of these minerals from the seabed. See notes 54-58 \textit{infra}. These problems have been approached from the perspective of the anticipated scale of seabed production relative to the global supply and demand patterns. These studies have not been in total agreement with one another in terms of the anticipated impact upon the LDC producers. They also make certain assumptions on which their data and conclusions flow from that which hasn't been substantiated and won't be until seabed exploitation becomes operational. The basic underlying assumption is that seabed production would be competitive with land-based production. Aside from the assumption of profitability other variables are significant, such as 1) the state of known land-based reserves; 2) the circumstances of seabed production; \textit{i.e.}, marketing, taxation rates, etc.; 3) the changes in the degree of elasticity; and 4) the technological qualities of the seabed minerals. Perfectly reliable quantification of the possible impact is admittedly not possible at present. It is important, nevertheless, to examine the general conclusions of these studies on those points where relative agreement is present because these studies are being used as the basis of evidence in the formulation of a policy for the regulation of seabed production and prices. This regulation is necessitated, according to the studies, if adverse consequences to the LDC producers economies are to be avoided. This evidence has been used to support opposing positions of the nature and extent of these economic implications and what solutions are appropriate to offset them, \textit{i.e.}, compensatory financing, commodity cartels, quota limitations, etc.

\textsuperscript{11} ICNT, \textit{supra} note 1, arts. 150, 151.
are parties to the Convention shall: 1) administer the area; 2) manage its resources; and 3) control the activities in the area. It is based upon the sovereign equality of all members. Activities would be conducted both directly by the Authority and under Authority auspices through: 1) States parties to the Convention; 2) State enterprises and; 3) Persons (natural or juridical) possessing the nationality of States or controlled by them by entering into service contracts, joint ventures, or any form of association which guarantees direct and effective control by the Authority itself through the Enterprise.

A look at the actual structural composition of the Authority reveals five main organs: the Assembly, the Council, the Secretariat, the Enterprise and the Sea-Bed Disputes Chamber.

A. The Assembly

The Assembly consists of all members of the Authority, i.e., all States parties to the Convention. It would meet every two years in regular session with special session determined at the request of the Secretary-General of the Authority, the Council or the Assembly itself.

The Assembly would be the supreme policymaking organ, the locus of power and authority. It would have the power to lay down guidelines and issue directives of a general nature to be pursued by the Council or other organs. Specifically, its powers and duties would include:

1) election of the members of the Council in accordance with article 159;
2) appointment, upon the recommendation of the Council, of the members of the Tribunal and of the Board of Governors;
3) establishment of such subsidiary organs as may be necessary for the performance of its functions;
4) determination of the contributions of States parties for the administrative budget of the Authority;
5) adoption of financial regulations of the Authority;
6) approval of the budget of the Authority;
7) request and consideration of special reports from the Council and other organs on any matter within the scope of the Convention;

12. Id., art. 150.
13. See ANNEX of this Comment.
14. ICNT, supra note 1, arts. 156-158.
15. Id., art. 158.
16. Article 159 specifies that 36 members be elected by the Assembly. Of these 18 would be in accordance with the principle of equitable geographic representation and 18 with a view toward the representation of special interests, i.e., four members from among countries who have demonstrated substantial investment and technology resources in the Area, four of the major importers of minerals to be derived from the Area, four of the major exporters of minerals to be derived from the Area and six members from the most disadvantaged less developed countries. ICNT, supra note 1, art. 159.
8) studies and recommendations for the purpose of promoting international cooperation and the progressive development and codification of international law;

9) "Establishment and adoption of criteria, rules, regulations and procedures for the equitable sharing of benefits derived from the area and its resources, taking into special account for the interests and needs of the developing countries, whether coastal or landlocked";\(^ {17} \) and

10) "Consideration of problems arising from States in connection with the activities in the area, from the landlocked or otherwise geographically disadvantaged location of some of them and recommending basic guidelines for appropriate action."\(^ {18} \)

In addition, there is a residual powers clause that states that any power or function not specifically delegated to other organs of the Authority shall be vested in the Assembly.\(^ {19} \)

Voting in the Assembly would be on the basis of one vote per State party.\(^ {20} \) Substantive decisions and the decision of whether a matter is substantive would require a two-thirds majority of members present and voting provided that a majority of Assembly members are present.\(^ {21} \) Decisions on other matters would be by a simple majority of members present and voting.\(^ {22} \) Upon written request of not less than one third of the members of the Assembly, a vote on any matter shall be deferred pending reference to the Sea-Bed Disputes Chamber for an advisory opinion on any legal question connected therewith.\(^ {23} \)

B. The Council

The Council would serve as the executive organ of the Authority in acting in accordance with the guidelines set by the Assembly.\(^ {24} \) Once that policy had been established, its application and implementation would become the responsibility of the Council. The Assembly would dictate what was to be done, the Council in conjunction with its technical supporting staff would determine how it was to be done, subject, of course, to the approval of the Assembly. The Council’s functions and duties would be to:

\(^ {17} \) Id., art. 158 (2) (XII).
\(^ {18} \) Id., art. 158 (2) (XIII).
\(^ {19} \) Id., art. 158 (1).
\(^ {20} \) Id., art. 157 (3).
\(^ {21} \) Id., art. 157 (6).
\(^ {22} \) Id., art. 157 (7).
\(^ {23} \) Id., art. 157 (10).
\(^ {24} \) Id., arts. 159-161.
1) supervise and coordinate the implementation of the provisions of this convention and invite the attention of the Assembly of candidates for appointment to the Tribunal and Governing Board of the Enterprise;
2) establish subsidiary organs;
3) transmit to the Assembly:
   a) schedules of the apportionment of benefits derived from activities in the area;
   b) reports of the Enterprise;
   c) annual reports and any special reports that may be requested by the Assembly;
4) approve and supervise the activities of the Enterprise;
5) approve, on behalf of the Authority, of contracts for activities in the area;
6) adopt, on behalf of the Economic Planning Commission, of any programs or measures designed to avoid or minimize the economic implications of the exploitation of resources from the area;
7) adopt, upon the recommendation of the Technical Commission, of rules, regulations and procedures relating to technical, operational and financial matters;
8) make recommendations to States parties relating to measures necessary to give effect to the provisions of the convention; and
9) make recommendations to the Assembly concerning suspension of the rights and privileges of membership for gross and persistent violations of the convention.

The members of the Council are to be selected for four year terms at the regular sessions of the Assembly in accordance with the aforementioned requirements. In the first election, in order to secure rotating membership, 18 of the members would be elected to only two year terms. Reelection is allowed but not encouraged since rotation of members is desired to achieve universal participation.

The Council would meet as often as the operation of its tasks required, but not less than three times yearly. It is obliged to establish an Economic Planning Commission, a Technical Commission and a Rules and Regulations Commission. The Economic Planning Commission would be composed of 18 members appointed by the Council. The latter two commissions would be composed of 15 members appointed by the Council. Appointment would be

25. Id., art. 160.
26. Id., art. 159(3).
27. Id.
28. Id., art. 159(4).
29. Id., art. 161.
30. Id., art. 162.
31. Id., arts. 163, 164.
based upon technical competence with due regard for special interests and the desirability of equitable geographic representation. They would not serve as representatives of their nations but rather in the capacity of international civil servants, as does the staff of the United Nations. The SNT called for the appointment of "persons of high moral character who may be relied upon to exercise independent judgment. They serve in their individual capacity."\(^{32}\)

States parties to the Convention would submit names of nominees for appointment who would serve three year terms if appointed.\(^{33}\) They would receive remuneration from the Authority and be eligible for appointment to an additional term of office.\(^{34}\) A chairman and two vice-chairmen would be selected yearly by each commission. Voting would be on the two-thirds majority principle\(^{35}\) in contrast to the three-fourths majority of the members present and voting in the Council.\(^{36}\) These commissions would meet as often as required.

The main duties of the Economic Planning Commission include:

1) to prepare the extent of the area and the volume of the area to be made available for exploitation;
2) to take action, including commodity arrangements and buffer stock arrangements, to minimize the adverse economic implications for LDCs whose export earnings are affected; and
3) to receive from States parties, whose economies are affected, requests for investigations into any problems or solutions overlooked by the Commission.\(^{37}\)

The Technical Commission is charged with the supervision of activities in the area, preparation of studies and reports, and the formulation and submission to the Council of technical and operational rules, regulations and procedures relating to:

1) the management of seabed resources;
2) ocean and marine engineering and mining and mining processing technology;
3) operation of marine installations, equipment and devices, ocean and environmental research;
4) actuarial and accounting techniques;
5) preparation of reports regarding the Area; and
6) inspection of all activities in the Area.\(^{38}\)

\(^{32}\) SNT, supra note 2, art. 29 (5).
\(^{33}\) ICNT, supra note 1, art. 161 (2).
\(^{34}\) Id., art. 161 (5).
\(^{35}\) Id., art. 161 (8).
\(^{36}\) Id., art. 159 (7).
\(^{37}\) Id., art. 162.
\(^{38}\) Id., art. 163.
The Rules and Regulation Commission would be responsible for the formulation and submission to the Council the rules, regulations and procedures of article 160(2)(XIV) as well as the preparation of studies and reports at the request of the Council.39

C. The Secretariat

The Secretariat of the Authority40 is composed of a Secretary-General and supporting staff. The Secretary-General, who would be appointed by the Assembly upon the recommendation of the Council, will function as the chief administrative officer of the Authority, being required to submit an annual report to the Assembly. However, much of the power relating to inspection vested in the Secretariat under the SNT has been transferred to the Technical Commission under the ICNT.

The Secretary-General had been empowered under the SNT to establish a staff of inspectors to determine and oversee compliance with the provisions of the Convention. This staff would report situations of non-compliance or violation to the Secretary-General. The Secretary-General in turn would then inform the Chairman of the Council and the Chairman of the Technical Commission of such situations. These inspectors would have had unlimited access to all places, data, and people dealing with activities in the area.41 Most of these responsibilities were transferred to the Technical Commission by the ICNT.42 Stripped of these powers, the Secretariat is mainly an administrative body whose "staff shall be kept to a minimum."43

D. The Enterprise

The Enterprise is the organ of the Authority which is charged with the preparation and execution of mining activities in the area by the Authority.44 It is the operational organ of the Authority through which exploitation of the area assigned to the Authority under the terms of the Convention either in monopolistic fashion or, as seems likely to emerge as a compromise, the "two areas system" procedure. It would do this either on its own or through service or partnership arrangements with existing firms.45 This type of subcontracting is analogous to the procedure used by public utility companies today in the United States in subcontracting work out to private firms when their own man-power or equipment is insufficient.

39. Id., art. 164.
40. Id., arts. 165-168.
41. SNT, supra note 2, arts. 40-41.
42. Compare id. with ICNT, supra note 1, art. 163.
43. ICNT, supra note 1, art. 166 (1).
44. Id., art. 169.
45. See id., Annex III, art. 151.
It would act in this capacity as would a contractor, actually doing the mining operation itself or awarding service contracts to third parties on behalf of the Authority. Though subject to the general policy considerations outlined by the Assembly and the supervision of the Council, the Enterprise "shall within the framework of the international legal personality of the Authority, have such legal capacity and functions as provided for in the Statute set forth in annex III to the present Convention." 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 an area of the seabed "sufficiently large and of sufficient value to allow the Authority to determine that one half of it shall be reserved solely for the conduct of activities by the Authority through the Enterprise or in association with developing countries." 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.

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. 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, and would be subject to renegotiation at a review conference to be held at the conclusion of that period.

46. Id., art. 169 (2).
47. Id., Annex II, art. 5 (j)(i).
49. See id., arts. 151, 160, Annex II, arts. 3-5, 10.
50. See id., arts. 151, 160, Annex II, art. 6; Annex III.
51. Id., art. 153.
III. ELEMENTS OF CONFLICT IMPEDING AGREEMENT

A. Historical Background: The SNT

While there were key areas of conflict between the States negotiating the SNT, some progress had been achieved. An attitude of limited compromise was present at the Fifth Session. This was exemplified by two manifestations of this spirit. The first was the apparent agreement on the "two areas" system of exploitation. This proposal was addressed to the question of who shall exploit the area. The second was the April 10, 1976 decision of the United States to agree to the temporary limitation of seabed exploitation in order to minimize the adverse economic implications for the economies of the LDCs.

52. See note 7 supra.
53. This was announced in a speech by then Secretary of State Kissinger before members of the Foreign Policy Association, the U.S. Council of the International Chamber of Commerce, and the United Nations Association on April 9, 1976. Kissinger Prods Sea-Law Session, N.Y. Times, April 9, 1976, at 1, col. 4; see also the discussion in Teltsch, U.S. Seabed Proposals Set Off Debate, N.Y. Times, April 11, 1976, at 10, col. 1.
54. At first glance, the fears of the LDCs with regard to the impact of deep seabed mining seem well-founded, i.e., price deterioration of these minerals can be expected from the increase in supply. Upon closer analysis, however, several factors stand out. Firstly, the markets and prices for manganese and copper are not expected, on the basis of United Nations' studies, to be seriously affected. Most of the impact will be upon the nickel and cobalt markets.

Closer examination of the cobalt and nickel markets and the pattern of trade and production is revealing. The number of LDCs that export large quantities of these minerals are few. The role of developing countries in the production of nickel is small and only three of them are involved to any appreciable extent. They are Cuba, Indonesia, and New Caledonia. In 1968 New Caledonia accounted for three-fourths of the total LDC total with nickel accounting for about 2% of Cuba's total exports and less than 6% of Indonesia's total exports. The respective figures are even smaller for percentages of GNP and foreign exchange earnings.

The case is similar with cobalt. Only three LDCs export significant amounts of cobalt, i.e., Zaire, Morocco and Zambia. These amounts are small in terms of percentages of GNP and total export earnings. Cobalt represented only 5% of Zaire's total exports and 6% of Zambia's total exports. The net result of price and volume changes might be that total earnings decline or increase less rapidly. This impact is still largely undetermined despite extensive attention directed at its determination. There are too many intervening variables such as relative efficiencies, patterns of trade, and market structures.

Even in these few instances the general consequence of seabed production will be the displacement of marginal land production. It is unlikely that the operations of relatively greater efficiency will be affected. The net result of price and volume changes might be that total earnings decline or increase less rapidly. This impact is still largely undetermined despite extensive attention directed at its determination. There are too many intervening variables such as relative efficiencies, patterns of trade, and market structures.

It can be ascertained from them that the disruption to the LDC economies that would be affected at all would be somewhat less than catastrophic. But any loss of export income creates additional problems for economies already strained by the process of development. Going beyond the percentages of GNP and foreign exchange earnings that would be affected several other effects might be mentioned. Subsidiary aspects of disruption such as the promotion of other industries within the economy, creation of employment and unemployment, etc., i.e., the spinoffs of a slight decline in GNP, may be more substantial than the actual percentage decline of the GNP. While export quotas and buffer stocks, two traditional schemes to deal with the problems of primary products are not applicable there are other approaches that have been suggested. These include compensatory financing, preventive price-fixing and production controls. Com-
who export the minerals in question. Manganese\textsuperscript{55} and, more importantly,

pensatory financing would include taxing the revenues of deep seabed mining operations with these revenues being collected and redistributed by international machinery to those LDC exporters affected by the deep seabed exploitation. This would most effectively and selectively assist those particular countries directly affected. The preventive mechanisms of artificially limiting production or setting artificially high prices would have an affect on the "fourth world" LDCs in much the same way that the OPEC price rise did. These States, who are particularly natural resource deficient, would be forced to pay higher prices. For some recent examples of the constant fluctuation of world mineral prices, see \textit{Copper Prices Leap, Reaching Records at Some Companies}, Wall St. J., Feb. 6, 1979, at 38, col. 2; \textit{Price of Zinc Settles At 37.5 Cents a Pound}, Wall St. J., Feb. 9, 1979, at 31, col. 3; \textit{Lead, Zinc Surge Seen as Part of Metals Craze Reflecting Inflation, Political Unrest Worries}, Wall St. J., Feb. 22, 1979, at 37, col. 3. For a discussion of the source of supply problem, see \textit{European Countries Stockpile Minerals in Case Unstable Nations Cut Deliveries}, Wall St. J., Feb. 26, 1979, at 24, col. 1.

Preventative mechanisms are less selective in their effects. Under a compensatory financing system there would be a redistribution of wealth from the taxes paid by the mining companies to the LDCs without directly further deteriorating the position of the "fourth world" LDCs. There is no easy solution to the problem. This was aptly summed up in a working paper submitted by the United States to the Law of the Sea Conference in 1974 which stated:

To the extent that there are beneficiaries of restricting seabed production, they will be land-based producers who are largely the industrially developed countries. Those suffering the greatest losses will be the world's consumers, including the peoples of the lesser developed economies who depend so heavily upon the capital goods made with these minerals for increasing their future standards of living.

A/Conf. 62/C.1/L.5, \textit{supra}, at 10. The proper use of policy instruments is essential if a sufficiently broad strategy for the exploitation of the nodules is to be achieved.

Factors affecting supply and demand and prices of minerals obtainable from the deep seabed must be considered in outlining the basic framework for a successful and equitable approach to the problem. This approach must be politically satisfactory and implementable from the perspectives of both the LDCs and the developed countries. It would have to include: a) schedules of the total seabed area for total volume which would become available for exploitation; b) conditions for limitations on the recovery of some resources; c) mechanism for the stabilization of minerals at just prices; and d) schedules of compensatory payments that might be made to LDC's affected by deep seabed mining. See 4 U.N. CLOSOR 121, U.N. Doc. A/Conf. 62/37 (1975). Whatever the approach taken to the solution of the problem, prices will invariably be higher than they might otherwise be. This is perhaps the real problem. Reference can be made to the near disastrous impact of the OPEC-induced oil price rise in the "fourth world" LDCs. For a discussion of the situation in Angola see Adelman, \textit{Report from Angola}, 53 FOREIGN AFF. 566 (1975); Mar­cum, \textit{Lessons of Angola}, 54 FOREIGN AFF. 407 (1976). The problem with seeking the best and most appropriate economic solution is that it may not prove to be politically feasible.

55. The relative importance of these minerals, the LDCs that produce them and the importance of that production to their economies can be ascertained in terms of the relative percentage of the total GNP and the amount of foreign exchange generated by such production. Manganese is used primarily in the production of steel in the form of alloys with silicon and iron. In fact 94\% of world manganese consumption is in the steel industry with another 5\% consumed for chemical and allied uses and the remaining 1\% for dry cell batteries. There are virtually no feasible substitutes at present. 1971 Report, \textit{supra} note 10, at 24. While there has been a fairly steady rise in manganese consumption (an average of 5\% yearly from 1950 to 1968), production has paced this increase and more so resulting in a decrease in prices. 14 UNCTAD (Provisional Agenda Item 4), U.N. Doc. TC/B/483 (1974); id., Add. I [hereinafter cited as 14 UNCTAD]. Future de­mand is not expected to be substantially greater than the 5\% average annual increase that has been witnessed in the past two decades. 1971 Report, \textit{supra}, note 10, at 26. Existing supplies are certainly ample. Reserve deposits of manganese ore are the equivalent of some one billion tons. They are double the cumulative demand projected for the world through the year 2000. \textit{Id.} Any discussion of reserves suffers from certain deficiencies. One is the diversity and range of various estimates such as those by Professor John Tien of Columbia University, the Club of Rome, and the World Bank. Other factors such as recycling and one pointed out by Radetzki who states:
The largest single producer of manganese is the U.S.S.R. which in 1968 accounted for 33% of the world total. Other major producers include; South Africa, Brazil, India, Gabon and Australia. The LDCs, while accounting for only 36% of world production, nonetheless represent 60% of world trade in manganese. 1971 Report, supra note 10, Annex, tables A.3, A.9. Major importers have been the European Community, the U.S., Japan and the United Kingdom.

While seabed exploitation as a source of manganese might be expected to contribute to already seriously deteriorating prices, the removal of manganese from the nodules had not been proven either technologically or commercially attractive. Report of the Secretary-General, 27 U.N. GAOR, Comm. on the Peaceful Uses of the Seabed 14, U.N. Doc. A/AC: 138/73 (1972) [hereinafter cited as 1972 Report]; Report of the Secretary-General, 3 U.N. CLOSOR 4, U.N. Doc. A/CONF. 62/25 (1974) [hereinafter cited as 1974 Report]. The demand schedule for manganese is fairly inelastic with no new uses foreseen to absorb increased supplies even at lower prices. It is expected that until and unless the technological capacity is developed for the commercially feasible extraction of manganese from the nodules, seabed exploitation will have relatively little impact upon the manganese market. If manganese is extracted from the nodules, the estimates vary but the conclusion is obvious. 14 UNCTAD, supra.

Copper is consumed in the form of ores and concentrates, refined copper and copper products. Approximately one half of the demand for copper is for use in electrical equipment and supplies. Major secondary sources of demand arise from the communications industry, i.e., electronics, telephone and telegraph, wire and cable, radio, television, etc. The construction industry is responsible for some 16% of demand with another 12% going into the transportation industry and approximately 10% is earmarked for the production of copper alloys. 14 UNCTAD, supra note 55. Virtually irreplaceable for some uses, it faces damaging competition from aluminum, plastics, steel and glass, especially in the electrical, construction and communications industries. This trend of substitutability has been reinforced by rapidly fluctuating prices and supplies although stable supplies and lower prices result in a return to copper usage in many instances.

Despite the recent slack in the demand for copper, the long term prospect appears somewhat more favorable with average growth rates forecasted at between 3.7 and 5.2 percent yearly to the year 2000. 1971 Report, supra note 10, at 27. Reserves appear to be substantial and it is anticipated that areas such as Iran and Indonesia having porphyry deposits will acquire some importance. U.S. Bureau of Mines, Mineral Facts and Problems (1974). Significant for these reserve figures and any others is the ease and the frequency of recycling copper.

The major producers of copper include the U.S., U.S.S.R., Zambia, Chile, Canada, Zaire, and Peru, while the primary consumers include Europe, the P.R.C. and the United States. As is the case with manganese, albeit for slightly differing reasons, production of copper from the nodules is expected to have relatively little impact on the world copper market. As with manganese, copper is difficult and expensive to extract from the nodules. The relative amounts of copper in the nodules is too small to have a sizeable impact upon the enormous world demand figures. See note 10 supra. The demand for copper is approximately ten times the demand for nickel, but metal production from the nodules will be approximately in the ratio of four tons of copper per five tons of nickel. On the basis of this relationship the effect of seabed mining on copper markets (if copper is extracted from the nodules at all) under present trends would be one tenth the impact on nickel markets. 1972 Report, supra note 55, at 14; 1971 Report, supra note 10, at 9-9; A/Conf. 62/C.1/L.5, supra note 54, at 4. Admittedly, this relationship could be altered if the demand for nickel increased faster than the demand for copper. For example, assuming that nickel demand were to increase by 40% and copper demand only by 10%, then in thirty years copper demand would only be two times nickel demand as opposed to ten times. It is anticipated that it will take this long for the state of technology to be able to extract copper from the nodules at a commercially feasible cost. This is but one of the variables that the assumptions and forecasts of these studies are subject to.

The primary finished product users of nickel are the chemical, petroleum and aircraft in-
and cobalt. In return for this concession, the United States presumably had ended successfully its quest for free transit through international straits and navigational rights within the 200 mile economic zone. Here can be observed an example of the operation of the package deal concept of trade-offs in the different parts of the SNT.

These examples are not exhaustive but are mentioned to point out that an
attitude of conciliation and compromise was present. Whether this attitude will prevail through the negotiation of other contentious issues remains to be seen. The notion of a package deal, i.e., all four parts of the SNT being accepted or none of them, predominated because it was felt that the greatest opportunity for compromise was present with the possibility of trade-offs among the four parts and the wide range of issues dealt with therein. The points of conflict that will be elaborated upon in this section are not all-inclusive; rather, they are offered as representative of the basic points of divergence between the United States, the Group of 77, and to a lesser extent the Soviet Union at this stage of the negotiations.

In the negotiations up to and including the SNT, there had been several areas of conflict between the basic positions taken by the United States and the Group of 77. The position of the Soviet Union had been somewhat ambiguous but, seemed to lean toward the position of the United States on the

---

sources as a by-product of other primary ores such as lateritic oxide nickel and copper. The U.S. Bureau of Mines has estimated that U.S. demand for cobalt will be between 18 and 30 million pounds in the year 2000. U.S. Bureau of Mines, Mineral Facts and Problems (1974). These figures represent a growth rate of between 1 and 2.5 percent based on present prices. The rest of the world’s consumption is expected to be between 41 and 54 million pounds in the year 2000 up from present consumption of slightly less than 30 million pounds. The Cobalt Information Center, an organization that monitors cobalt research and outlook in Europe and the Western Hemisphere, estimated that the 10-year period of 1958 to 1968 witnessed an average yearly increase in consumption of from 7 to 8 percent. Land-based production is expected to be adequate to meet existing demand especially with increased supplies from lateritic oxide nickel deposits. 1971 Report, supra note 10, 32. It is helpful to note that scrap cobalt is generated in fairly large quantities but, little information is available on actual amounts. In 1968 world production was approximately 20,000 tons with Zaire producing over one-half of this total. Zambia, Canada, Morocco and Finland supplied the rest. 13 UNCTAD, supra, at 3.

The anticipated high volume of cobalt production from the nodules relative to present demand schedules suggests that this market may be the first to be effected from seabed production. One early report estimated that a single mining operation could supply 8% of demand in 1980 extrapolating from current demand schedules. 1972 Report, supra note 55, at 11. This figure is lessened somewhat by two factors: 1) demand for cobalt would increase substantially if prices decreased; and 2) the nature of the present market structure allows the dominant producers to restrict supply in response to price movements. Cobalt production from the seabed will reduce prices but there is a floor to the decrease in cobalt prices, i.e., the price of nickel. Since cobalt can substitute for nickel if the price of cobalt drops to the price of nickel then the increased demand will tend to prevent further price decreases and perhaps increase them although certainly not back to their original level.


60. This type of tradeoff is suggested by Gardner, supra note 8.

issues relating to the status of the International Authority in Part I of the SNT.\textsuperscript{62} The United States steadfastly maintained that there ought to be a weighted system of voting and/or a veto power in the Council. Furthermore, the United States had contended that the locus of power and authority be vested in the Council rather than the Assembly. In addition, the United States sought to keep the degree of power given to the Authority at a minimum level.\textsuperscript{63} These general positions have been taken by most of the industrialized countries and the Soviet Union.\textsuperscript{64} The position of the Group of 77 is largely represented in the form Part I of the SNT, \textit{i.e.}, equal voting, the Assembly as the supreme organ, and significant power vested in the Authority. The Group of 77 also sought to increase the attention given to the objective of minimizing the economic implications for those LDCs who are mineral exporters\textsuperscript{65} and are likely to be affected by the exploitation of the seabed. The United States has acceded to production controls.\textsuperscript{66} In these three areas the basic positions are represented. The Group of 77 is seeking a strong International Authority dedicated to their needs with equal voting principles enabling the members of the Group to dominate the operation of the Assembly. The industrialized countries have thus far been resisting such a scenario, having observed at close range in the 30th General Assembly of the United Nations what an extension of democratic principles can mean for an embattled minority.

This already chaotic situation of deadlock was exacerbated by increased pressure upon the Government from domestic quarters in the United States to commence unilaterally deep seabed exploitation in the absence of an international agreement and despite the so called moratorium.\textsuperscript{67} Such threats of

\begin{footnotes}
\item[62] The convergence of the U.S. position and that of the U.S.S.R. has been particularly noticeable on the issues of voting procedure in the Council and a weak International Authority that leaves the industrialized States with control over the resources of the deep seabed. See Soviet position supra note 61.
\item[64] Soviet position, supra note 61.
\item[65] See notes 54-58 supra.
\item[66] This is incorporated in ICNT, supra note 1, art. 150(B)(i).
\end{footnotes}
unilateral action by the U.S. met with hostility from numerous LDC delegations to the Conference. The most notable reaction was in response to the attempt by a subsidiary of a U.S. firm, Deep Sea Ventures, Inc., to receive diplomatic protection from the United States State Department for a claim on the deep seabed in the eastern part of the north Pacific Ocean. The State Department refused to extend such protection. Nonetheless, negative and hostile reactions were expressed by many LDCs as well as some industrialized States.

B. The ICNT and Issues Going Into the Eighth Session

There are many areas of conflict now present. Many of these basic points in question such as: 1) the issue of what entities are to be responsible for the exploitation of the Area during the interim period; 2) the question of the manner in which the activities are to be carried out; 3) the predominant role to be performed by the Authority in the organization, conduct and control of the activities; and 4) the question of certain specific obligations of the contracting parties (such as the obligation to transmit technology to the Enterprise), have received tentative agreement. Some functions of the Authority have caused difficulty, especially those connected with the equitable sharing of profits, the conduct of marine scientific research and the transfer of technology.

Three major issues relating to the deep seabed require resolution before any real progress can be said to have been achieved:

1) the system of exploitation;
2) the political control of the Authority and the related issues of the Council’s jurisdiction, composition, and voting system; and
3) the Authority’s resource policy.


68. This was filed with the office of the Secretary of State on November 15, 1974. See 14 INT’L LEGAL MAT’LS 51 (1975).
69. Id.
70. Id.
71. Darman, supra note 63, at 390-95.
72. 10 U.N. CLOSOR 14, U.N. Doc. A/Conf. 62 RCNG 1 (1978) [hereinafter cited as RCNG]. They have been removed from Article 151 and have been placed in the articles containing the general principles concerned. With regard to the transfer of technology, the changes made in Article 144 of the ICNT, supra note 1 and particularly those made in certain subparagraphs of paragraph 4 in id., annex II result in the establishment of what, in my view, are more realistic and more specific rules than those contained in the Composite Text.
Within these main areas are subsidiary issues including the financial arrangements for the contractors, the dispute settlement system, the review clause and the provisional entry into force of the text. These present a number of problems. For example, looking at the problems involved in the financial arrangements of the contractors, one can observe the type of issues that arise:

1) the amount of the application fee;
2) the amounts of the annual fixed fee, if paid annually or if paid in a lump sum;
3) the percentage of the market value of the processed metals, or the percentage of the amount of the processed metals produced from the nodules extracted from the contract area, which a Contractor should pay to the Authority, if he chooses to make his financial contributions by way of the production charge;
4) in the case of a Contractor who chooses to make his financial contributions by way of a combination of production charge and share of net proceeds, three questions remain outstanding: first, how much should the Contractor pay by way of production charge? second, what percentage of the Contractor’s total net proceeds should be attributed to mining of the resources of the contract area? third, what should be the Authority’s share of the net proceeds attributable to the mining of the resources of the contract area, on each of the eight levels of profitability. 73

The heart of the political issue is in the Council articles. It is ambiguous to what extent the Assembly has the power to dictate Council actions. If the Assembly could dictate the Council’s actions then political control would lie in the Assembly which would be dominated by the Group of 77 as a result of the one nation, one vote voting provision. 74 If in fact the Council has independent power then the issue becomes the composition and its voting system. 75

As has been discussed, 76 there has been agreement as to the creation of a parallel system of exploitation. But agreement ends here. The parallel system was designed to assure access of the Enterprise as well as State and private companies to the Area. Although the ICNT has adopted a parallel system of exploitation, it does so in such a way as to virtually assure that the Enterprise will be the only entity to have effective access to the area. Since the Group of 77 would like to see the Enterprise have exclusive rights of exploitation, the ICNT approximates the position and the desires of the Group of 77. Under the ICNT the Authority is given significant power and discretion to control and deny access to the area by State and private enterprises. No limitations

74. ICNT, supra note 1, art. 157 (5).
75. Id., art. 159 (3).
76. See note 7 supra.
are placed on the activities of the Enterprise.\footnote{77} In addition, the ICNT, in effect, provides that the Enterprise shall have the benefits of unlimited financing, exclusive access to one-half the sites suggested by the State and private entities and mandated transfer of technology.\footnote{78} These conditions effectively deny entry into commercial activities by State and private entities.

The resource policy issue has manifested itself in the conflict between the advocates of unlimited seabed production and the producers of land-based sources of supply who want the Authority to have the power to limit the amount of production from the seabed.\footnote{79} This limitation has been achieved in the ICNT in the form of a 20 year limitation upon the production of nickel from the manganese nodules to 60 percent of the cumulative growth of world demand for nickel.\footnote{80} The review clause issue came out of a proposal by the then Secretary of State Kissinger in an attempt to encourage the Group of 77 to be flexible in exchange for an agreement to renegotiate the major parts of the seabed text at a conference to be convened in 20 years.\footnote{81} Much dispute still exists as to whether the text should specify what the regime should do if the conferees fail to agree.\footnote{82}

It is clear that fundamental uncertainties are present as to what the future of the Law of the Sea Text will be. Which group or groups of states will be able to dominate decision-making within the Authority? The group having power within a powerful Assembly or a powerful Council could control who would exploit the Area and how it would be exploited. Within these contexts come the issues of how much mineral exploitation could be marketed commercially, at what price it would be sold, and at whose cost and by whose technology it would be exploited. The industrialized nations have developed and are in the process of developing at great expense the technology required to exploit the deep seabed.\footnote{83}

Under the Authority as it is presently established under the ICNT the DCs would not be assured of access to mining sites, they would be forced to share their costly technology with the Authority, and many other limitations would be imposed. For this reason and other reasons beyond the narrow scope of this

\begin{footnotes}
77. ICNT, supra note 1, arts. 150, 151.
78. See id., Annex II (Basic Conditions of Exploration and Exploitation, see especially art. 5).
79. See notes 54-58 supra.
80. ICNT, supra note 1, art. 150(B)(i).
81. Id., art. 153.
82. Id., art. 153(6) mandates the elimination of the parallel system if the conference is unable to reach agreement within 5 years. This is the so-called converging system.
\end{footnotes}
paper, the United States has refused to agree to such a text that vests significant decision-making power in the LDCs within the Authority. It is this text that has spurred interest in the United States Congress to unilaterally adopt legislation that would provide the basic elements required by American consortium groups before they can proceed to begin actual exploitation of the deep seabed.

IV. THE UNITED STATES' UNILATERAL LEGISLATIVE RESPONSE

A. Background

Legislation on the subject of deep seabed hard mineral resources has been under consideration in the House Committee on Merchant Marine and Fisheries since the 92nd Congress. In each session of Congress, final action was delayed because of repeated assurances that the upcoming session of the U.N. Law of the Sea Conference would culminate with a successful Law of the Sea Text. Every time the predictions of success by Administration officials proved to be incorrect. The most recent Law of the Sea Conference Session was no more successful than the past and, as a result, both the Senate and the House proceeded with detailed hearings on a number of bills designed to protect the interests of the United States and provide a legal framework for consortia involved in the technology for deep seabed exploitation. The general characteristics of the legislation include the following:


85. Early bills on the subject included H.R. 13076, 92d Cong., 1st Sess. (1972); H.R. 13904, 92d Cong. 1st Sess. (1972); and H.R. 14918, 92d Cong., 1st Sess. (1972). During the 92d, 93d and 94th Congressional Sessions, 16 days of hearings and five days of mark-up sessions were held in the House Subcommittee on Oceanography. H.REP. No. 1834, 95th Cong., 2d Sess. 339 (1979).

86. At present three types of technology have been developed at great expense. These include the air lift, hydrolift, light media lift and mechanical lift such as the continuous line bucket system (CLB). Through companies such as Kennecott and other consortia, governments have poured vast sums of money into exploration and technological development. These include: 1) in Australia, Australia's Bureau of Mineral Resources; 2) in France, CNEXO (government consortium) and the French Atomic Energy Commission; 3) in Japan, Science and Technology Agency has subsidized Sumitomo Shoji and Sumitomo Shipbuilding and Machinery has also subsidized the Sumitomo group and the creation of Deep Ocean Mining Association (DOMA) a semi-public venture; 4) in the U.K., the Department of Trade and Industry has supported Rio Tinto Zinc and Consolidated Gold Fields of the Kennecott Group; 5) in the U.S., government activity has...
1) it recognizes U.S. responsibilities under the concept that the resources of the seabed are the common heritage of mankind;
2) it will be superseded whenever a law of the sea treaty takes effect with regard to the United States;
3) it requires that revenues be set aside for developing countries;
4) it establishes stringent standards for the protection of the marine environment;
5) it does not assert any right of sovereignty over seabed mine sites; and
6) it does not declare or imply any intention that American seabed mining companies should remain outside the jurisdiction of an International Seabed Authority when an international treaty comes into being.

The objective of the United States throughout the Law of the Sea negotiations has been the achievement of a comprehensive treaty that protects the interests of the United States as well as the interests of all the nations involved. The interests of the United States include assured access to seabed minerals. The United States has sought to create a parallel system of mining that would attract commercial investment, would be economically viable and would accommodate the interests of the developing nations. The basic requirements of this system from the United States' point of view are that it should:

1) ensure access and tenure by all qualified miners;
2) set realistic production controls and financial arrangements;
3) provide for transfer of technology under fair terms and conditions; and
4) be administered by an international body that makes decisions recognizing the interests at stake in investment, production, and consumption. 87

The sum of all of the other benefits 88 that might be attainable by the Con-

---

been carried out by the Bureau of Mines, the U.S. Geological Survey, and the National Oceanic and Atmospheric Agency. In addition to them, the U.S. National Science Foundation and the University of Hawaii have been included in nodule activity; 6) in the U.S.S.R., the Marine Geological Prospecting Board has carried out activities; 7) in the Federal Republic of Germany, the Federal Ministry for Education and Science has funded activities and the government has and continues to subsidize a joint venture of Pruessag, Metallgesellschaft, Salzgitter, and Rheinbraun known as the MAR group. The assistance provided by these governments is extensive ranging up to U.S. $3 million in lump sums and U.S. $700,000 annually. 1974 Report, supra note 55 at 8-17.

87. This discussion is drawn from various statements by Ambassador Richardson, supra note 84 and the Congressional Hearings, supra note 83.
88. These benefits include those related to navigation and other related uses, orderly management of deep seabed on an international level, and the precedental effect for the development of global institutions for the increasing number of problems that require global treatment. For a discussion of these and other benefits, see Darman supra note 63.
ference are insufficient to outweigh the U.S. interests in an Authority that does not meet the above criteria.

The negotiating realities reflect an extremely polarized situation: the United States and a few other industrialized countries on one side and the Group of 77 on the other side. The Group of 77 has adopted a text of extreme positions and related texts. A kind of informal unanimity exists among this group of some 110 to 120 nations which has the effect of giving veto power to a small group of influential extremists. It is the recognition of this North-South block posturing that has seen the United States in 1978 come within a vote of getting the Deep Seabed Minerals Resources Act to the Senate floor.90


90. S. 2053, 95th Cong., 1st Sess., Joint Hearing, supra note 83, at 4, is a bill to promote the orderly and environmentally sound exploration for and the commercial recovery of hard mineral resources of the deep seabed pending adoption of an international regime. The Deep Seabed Mineral Resources Act was not voted out of the Foreign Relations Committee, which means the legislative process must begin all over again in the 96th Congress. While both South Dakota senators have consistently opposed the deep seabed mining bill, Sen. George McGovern had voted for the version approved by the Senate Foreign Relations Committee; Sen. Abourezk rejected it. Nautilus, OCEAN SCI. NEWS, Oct. 16, 1978, at 1-2. It appears that seabed mining proponents will move again in the next session to introduce the legislation. The bill met all the challenges of a substantive nature and it would have passed the Senate with only 20 or so dissenting votes if it hadn't gotten hung up on a procedural matter with Sen. Abourezk. Id.

The bill's passage in the next Congress is not assured. New members in the House and the Senate could change the picture. Nevertheless the seabed mining legislation received the approval of four different committees in the House and passed overwhelmingly the full test on the House floor by a vote of 312 to 80 on July 26, 1978. 124 Cong. Rec. H7382 (daily ed. July 26, 1978).

There are a number of related bills in the House. H.R. 3350 and H.R. 4582, 95th Cong., 1st Sess. (1977) are bills to promote the orderly development of hard mineral resources in the deep seabed pending adoption of an international regime. H.R. 3652, H.R. 4922, H.R. 5624, and H.R. 6846, 95th Cong. 1st Sess. (1977) are bills to insure the development of U.S. ocean mining capabilities, and to support the continuance of the Law of the Sea negotiations. H.R. 6784, 95th Cong. 1st Sess. (1978) is a bill to encourage an international regime to govern the uses of the oceans and their resources. Hearing, supra note 83, at 1, 10, 17. H.R. 3350 was the bill that was passed by the House.
B. The Deep Seabed Minerals Act

As the United States continues in its attempts to revise the negotiating text so that it provides assured access for nations and private companies under non-discriminatory conditions and under a United States' dominated Authority, domestic interests\(^\text{91}\) have realized that the final agreement is years away. The legislation that has been created as a result of their efforts has seven major provisions, although the exact details of these bills vary slightly among the Committee versions and the House and Senate versions.

First, the bills are transitional in nature and specifically denominate the desire of the United States for the achievement of a fair and effective Law of the Sea Agreement. They would merely establish a mechanism by which the United States will regulate its nationals who conduct seabed mining until an international system is created.\(^\text{92}\) No licenses or permits would be issued once such an international treaty becomes binding upon the United States.\(^\text{93}\)

Second, U.S. nationals would not be permitted to engage in the exploration for or exploitation of manganese nodules on the deep seabed without a federally issued license or permit.\(^\text{94}\) These permits would limit the area to be mined by one company. The versions of the bill adopted by the Senate Foreign Relations Committee and the Senate Energy Committee would give this licensing power to the Secretary of the Interior\(^\text{95}\) while the Senate Commerce Committee version designates the Secretary of Commerce as the licensing authority.\(^\text{96}\)

Third, the United States Government would guarantee reductions in a firm’s investment caused by a future international agreement in varying degrees. The bill adopted by the Senate Energy Committee combines government insurance provisions with voluntary insurance that would protect damages to a firm’s investment for which it had no legal remedies.\(^\text{97}\) The version of the bill recommended by the Senate Foreign Relations Committee

\(^{91}.\) The scope of this paper is limited to the mining interests. The most vocal industrial representatives are Lockheed Missiles and Space Corp., INCO LTD., Kennecott Copper Corp., U.S. Steel Corp., SEDCO Inc., American Mining Congress, American Institute of Mining Underwriters, DeepSea Ventures, Earle V. Maynard Co., Standard Oil Co. of Indiana, and Chase Manhattan Bank, N.A. Another domestic source of pressure is the Department of Defense.


\(^{93}.\) S. 2053, § 102(C)(1)(a), in Joint Hearings, supra note 83, at 16 states that the Secretary may not issue "Any license or permit after the date on which an international agreement pertaining to exploration and commercial recovery enters into force with respect to the United States, except to the extent that issuance of such license or permit is authorized by such agreement."


\(^{95}.\) S. 2053, § 4(13), in Joint Hearings, supra note 83, at 12.

\(^{96}.\) H.R. 3350, § 3(1), in Hearings, supra note 83, at 2 designates the Secretary of Commerce.

\(^{97}.\) S. 2053, § 202, in Joint Hearings, supra note 83, at 38; See S. REP., supra note 67, at 58-61 for a detailed examination of the Senate Energy Committee amendments.
deletes reference to investment guarantees and political risk insurance,\(^98\) instead urging that U.S. negotiators make "good faith" efforts to obtain a grandfather clause for any miners that might engage in exploitation under the authority of this act.\(^99\) The House bill is similar to the one recommended by the Foreign Relations Committee, substituting a statement of Congressional intent calling for the Law of the Sea Treaty to contain grandfather rights\(^100\) stating:

It is the intent of Congress —

(1) that any international agreement to which the United States becomes a party should, in addition to promoting other national oceans objectives —

(A) provide assured and nondiscriminatory access, under reasonable terms and conditions, to the hard mineral resources of the deep seabed for United States citizens, and

(B) allow United States citizens who have undertaken exploration for, or commercial recovery of, hard mineral resources of the deep seabed under title I before such agreement enters into force with respect to the United States to continue their operations under similar terms, conditions, and restrictions as have been imposed on them under title I and any regulation issued thereunder, or otherwise provide for the continuation of such operations in a manner that does not unreasonably impair the value of investments that have been made in relation to such operations.\(^101\)

Fourth, the bills would authorize the Secretary of the licensing agency to designate a foreign nation as a reciprocating State for the purpose of promoting the orderly development of the deep seabed resources.\(^102\) They provide a procedure whereby the United States would recognize non-conflicting applications of foreign governments.\(^103\) The House bill limits such reciprocal treatment to a nation that "has established a special fund for the payment of contributions to an international regime (established under an international agreement) for the sharing with the international community pursuant to such an agreement."\(^104\) The President is given the power to revoke the designation

---

100. This type of a provision raises some constitutional questions: Can Congress interfere in this manner with treaty obligations? Furthermore, to what extent is this a promise that the Congress will not ratify any treaty that does not contain these provisions?
103. Id.
of a foreign nation as a reciprocating State if he determines that "the foreign nation no longer complies with the requirements of subsection (a)." 105

Fifth, the legislation expresses serious concern that any activities in the deep seabed be carried out in accordance with careful concern for the environmental integrity of the deep seabed area. The approach in this respect has been to require the filing of an environmental impact statement, 106 to require monitoring of activities in the area by the Environmental Protection Agency, 107 and to make the approval of any application for a permit 108 a "major Federal action" for the purposes of the National Environmental Policy Act of 1969. 109

Sixth, the legislation will establish a deepsea revenue sharing fund. 110 The House version would impose a 3.75 percent of the imputed value of the resource that is removed 111 while one Senate version would levy a ten percent of the imputed value of the resource that is removed. 112 The creation of such a fund is an essential feature of seabed mineral legislation. It would demonstrate the support of the United States for the principle that commercial activity on the deep seabed should benefit all nations and be an expression of the fact that the United States is not seeking to undermine the concept of the "common heritage of mankind." 113 There would be created in the Treasury of the United States a trust fund designated as the "Deep Seabed Revenue Sharing Trust Fund" "of such amounts as may be appropriated or credited to the Trust Fund as provided in this section." 114 The Secretary of the Treasury is assigned management responsibilities for the fund. 115 If an agreement is reached on a Treaty within 10 years from the enactment of the bill then the

105. Id., § 107(d).
106. Id., § 105; S. 2053, § 109(c), in Joint Hearings, supra note 83, at 32.
110. 1978 H.R. 3350, § 401, supra note 94, 124 Cong. Rec. at H7346 establishes a removal tax on seabed production and provides that revenues earned from the tax shall be contributed to a fund for distribution to the international community upon the entry into force of a Law of the Sea Treaty. The Senate Energy Committee version of S. 2053, § 203 calls for a study regarding the feasibility and desirability of revenue sharing. Senate Report, supra note 99, at 6. The Senate Commerce Committee version of S. 2053 deleted all reference to an international fund on the grounds that it is a tax issue and the Finance Committee has announced that it will be offering a floor amendment on this section. Id.
113. However this also serves as a final warning to the LOS Conference negotiators. The Conference has 10 years to come with an acceptable agreement before the world community's interest in the deep seabed revenue sharing fund reverts back to the U.S. Treasury. 1978 H.R. 3350, § 403(d), (e), supra note 94, 124 Cong. Rec. at H7347.
114. Id., § 403(a). These section references in notes 113 supra and 115 infra are the same for the Senate Foreign Relations Committee Amendment. Senate Report, supra note 99, at 9-11.
115. 1978 H.R. 3350, § 403(c), supra note 94, 124 Cong. Rec. at H7347.
amounts in the Trust Fund shall be available, as provided by appropriation Act for making contributions required under such treaty for purposes of the sharing among nations of the revenues from deep seabed mining. Nothing in this subsection shall be deemed to authorize any program or other activity not otherwise authorized by law.116

If an agreement has not been reached within 10 years then the funds in the Trust Fund would be available for "such purposes as the Congress may hereafter provide by law."117

Seventh, the legislation is explicit in its disclaimer of sovereignty over the deep seabed.118 This is an important symbolic manifestation of the commitment of the United States to the concept of the "common heritage of mankind."

In addition to these seven major elements incorporated into the legislation there are other less significant elements that are present such as vessel documentation and build America provisions119 as well as domestic processing requirements.120

C. Summary

To the extent that it attempted to introduce security for the consortia involved to go ahead with exploration and exploitation, the legislation would have been successful. According to a major marine insurance underwriter in the field:

As I would view the problem for ocean miners from an insurance point of view, industry is not concerned with the security of the investment involved with research and development, but is concerned with the prospective investment in the permanent plant, attendant machinery, and associated at sea mining and transportation systems. If they may be assured that there is no risk of loss legally or politically to specified sites at which they actually have a legal claim,

116. Id., § 403(d).
117. Id., § 403(e).
118. Id., § 101(2); S. 2053, § 2(B), in Joint Hearings, supra note 83, at 7.
119. S. 2053, § 102(c)(2), in Joint Hearings, supra note 83, at 17. As approved by the Senate Energy Committee the section requires permittees to use only mining and processing vessels that are documented under U.S. law or the law of reciprocating states. Senate Report, supra note 99, at 13. 1978 H.R. 3350, § 103(c)(2), supra note 94, 124 Cong. Rec. at H7343 requires mining, processing and at least one transportation vessel to be U.S. documented. The Senate Commerce Committee amendments include the same vessel documentation requirements as id., § 103(c)(2) and in addition require that mining and processing vessels be constructed in the United States. Senate Report, supra note 99, at 13.
120. Both the Senate Energy and Commerce Committees' versions of S. 2053, § 102(c)(3), in Joint Hearings, supra note 83, at 17, require that all of the hard mineral resources recovered by each permittee be processed in the United States or aboard vessels documented under the laws of the United States unless a waiver is obtained. 1978 H.R. 3350, § 103(c)(5), supra note 94, 124 Cong. Rec. at H7343, requires the issuance of regulations on the location of processing plants which take into account various factors including the foreign policy interest of the United States.
they would be unconcerned with a risk of loss and thusly would not need insurance. If the treaty provides this security, we could eliminate this as a risk of loss.

If through appropriate legislation, there is suitable indemnity for these risks of loss on the part of a stable government so that the risk of loss might be transferred to that political body, again there would be no need for insurance.\(^{121}\)

By introducing this element of security\(^{122}\) the legislation has sought to prevent potential participants in the ocean mining industry from losing the desire to invest because of the ambiguous international situation relating to the development of the oceans and a law of the oceans.\(^{123}\) Such a development also has the effect of solidifying the present advanced state of the technological capacity of American industry.

The legislation further succeeds in attempting to implement the United Nations Law of the Sea Conference objective of recognizing the oceans as being the "common heritage of mankind" and to leave open the future possibility of achieving a comprehensive international accord.\(^{124}\) Within this context the legislation also creates a mechanism to protect legitimate American investments made in advance of a subsequent Law of the Sea Treaty by providing for a system of insurance or calling for the United States to obtain a "grandfather clause" in the subsequent international agreement.\(^{125}\) Finally there is ample expression of concern for the protection of the marine environment and a system to protect its integrity.\(^{126}\)

---

121. Hearings, supra note 83, at 385-86 (statement of Earle V. Maynard, President, Earle V. Maynard & Co.).


123. For testimony of representatives of the consortiums involved in deep seabed mining, see Joint Hearings, supra note 83, at 112-280. E.g., Phillip Hawkins, Vice-President of United States Steel, stated:

The endorsement of the United States of a treaty based on the RSNT, the Engo, or the Evenson text would make it impossible to invest stockholders money in such a venture, or to represent to lending institutions that a project loan would be justified for the continuation of a deep sea mining program . . . . S. 2053, in general, states sound national policy. It might well be a stepping stone to reciprocal international legislation, a de facto treaty, based on sound principles. This legislation, which is premised on continuance of the freedom of the seas, imposes restrictions on the miner which do not now exist in that exercise of that freedom, but restrictions of this nature would be justifiable and acceptable if the deep sea miner were afforded in exchange the all important predictability of investment conditions and recognition of his rights covering a specific mine site.

Id. at 213-14. See also Strauss, A View From Private Industry, 12 J. INT'L L. & ECON. 269 (1978); S. REP., supra note 67, at 43-49.

124. See notes 1-10 supra and accompanying text.

125. See note 101 supra and accompanying text.
V. Summary

A. Possibilities of Agreement and Compromise within the U.N. Law of the Sea Conference

Many of the specific conditions for exploitation by enterprises remain to be delineated in the text of a future LOS agreement. The question arises as to whether they should be negotiated now or be determined by the Council and the Economic Planning Commission, Technical Commission, and the Rules and Regulations Commission later. Certainly, from the perspective of the mining companies with the technology necessary to begin exploitation, the prime prerequisites for actual mining operations are that they be granted exclusive rights to and security of tenure in that area being exploited. These are the two aspects of legal security that the firms themselves have identified as essential.127 These security elements have been dealt with in the present text to the satisfaction of these mining consortia. To keep the rest of the specific questions within the highly politicized realm of the negotiations is to invite a stalemate. To deal with them later in the functional forum of the three commissions of the Council is to seek a meaningful regime.

Many of the problems with the various forms of text have been brought out in other forums.128 They include such matters as the relationship of the International Authority’s Sea-Bed Disputes Chamber129 with the Tribunal established for the entire ICNT.130 In this respect the Group of 77 has expressed the view that the Authority’s Chamber should have jurisdiction only over contractual matters. Other possible contentious issues remain for the future, e.g., which 18 members of the Council will be elected for short terms initially and which of the four judges of the Tribunal will be appointed for short terms.

It can also be anticipated that there will be a great deal of political infighting and jockeying for positions on the independently selected Economic Planning Commission, Technical Commission, and the Rules and Regulations Commission. While this may occur, as it does for positions on the staff of the United Nations Secretariat, there is no reason to believe that the members, once selected, will be any less independent of their states of nationality and functionally effective than their Secretariat staff counterparts. In this relatively depoliticized atmosphere of “technocrats” the aforementioned procedural details can be worked out with greater effectiveness and in a more rational atmosphere.

126. See notes 106-108 supra.
127. See note 121 supra.
128. See, e.g., Oxman, supra note 7; Geneva Session, supra note 7; Caracas, supra note 7; Stevenson & Oxman, supra note 7.
129. ICNT, supra note 1, arts. 187-192.
130. Id., Annex V.
The more substantive areas of conflict, such as the method of voting in the Council, are still contentious and must be reconciled before agreement can be reached. Several alternatives for voting procedure exist that would not involve substantial concessions by any of the dominant actors. It would not be necessary for the United States to insist that there be a veto power in the Council. One alternative proposal calls for the establishment of a consumer and a producer group within the Council. Each group would vote separately with majority approval required from each group on substantive questions. Another proposal would offer a weighted voting system patterned after the voting weights on the Governing Board of the International Energy Agency. Each member is assigned a constant number which would be augmented by an additional figure based on oil consumption. In the Authority’s Council this “weight” might be determined by the relative degrees of consumption and production of the minerals involved. Under such a scheme those countries with a greater national interest from the standpoint of production or consumption would have an input into policy-making proportionate to that interest.

With regard to the question of the minimization of the economic implications, another possible solution, in addition to compensatory financing, production controls or price controls, would have the advantage of being more selective in its impact. This proposal would be directed at offsetting the effect of higher prices arising from the implementation of anyone of the three mechanisms. Essentially, it would allow the Enterprise to offer its mineral production from the seabed exploitation to be sold to the “fourth world” LDCs at lower prices than the prevailing international market price established by the Authority.

B. Prospects for Agreement

Perhaps the strongest motive for some form of accord is the consequences of no agreement. Despite the controversy over the delimitation of national jurisdiction under the “exploitability criterion” of Article 1 of the Geneva Convention on the Continental Shelf, it seems likely that, because of the


132. Article 1 states “the shelf may extend beyond the continental terrace, but such an extension or any extension beyond the 200 meter depth depends for its validity upon proof of exploitability.” Geneva Convention on the Continental Shelf, [1958] 15 U.S.T. 471, T.I.A.S. No. 5578, 5639. How far seaward this “exploitability” may go has been the subject of controversy. The International Court of Justice has emphasized in at least two cases, the Norwegian Fisheries Case in 1951, Fisheries Case (United Kingdom v. Norway), [1951] ICJ 116, and the North Sea Continental Shelf Cases, (Germany v. Denmark; Germany v. Netherlands) [1969] I.C.J. 1, that the continental shelf is a natural prolongation of the land of the coastal state. The implication
vested interests represented in the large financial outlays that have occurred in six or seven industrialized nations, certain nations will be forced to go ahead unilaterally, or multilaterally, with the exploitation of the deep seabed. The United States is particularly poised to go ahead under such conditions as this Comment has pointed out.

The impact of such unilateral and relatively unbridled deep seabed exploitation would be as follows: 1) the LDCs would be unable, for technological and financial reasons, to enter into the competition for deep seabed exploitation; 2) there would be an increasing disparity of GNP between the “rich and the poor” as the benefits of such exploitation would accrue solely to certain industrialized states unless a voluntary system of redistribution was established; and 3) the economic impact of unregulated production would have a depressing effect on international price schedules as the new sources of supply entered the market.

In addition to the potential increase in the gap between the LDCs and the DCs that could result from exploitation in the absence of an international regime, the rapid technological development of the mining operations for the deep seabed will result in increasing amounts of pressure being brought to bear on national governments, and in the rapid intensification of vested interests having a stake in the continued absence of an international regime. If technological developments and North-South tensions move ahead too rapidly, they may preclude the possibility of political agreement on the question of an international regime. Once the faits accomplis of actual exploitation of the deep seabed has occurred, the situation acquires an entirely new mise en scène.

Allowing unilateral exploitation would effectively outlaw the regulation and order that could be provided by an international regime. The absence of an

here is that “exploitability” would not result in a totally elastic expansion or extension of the continental shelf and that there is a point at which it cannot be considered a natural extension of the land or close to its shores. One possibility in this regard is that the U.N. General Assembly request an Advisory Opinion from the Court on the legality of unilateral exploitation of the deep seabed.

133. See note 9 supra.

134. Clearly, this writer feels that the United States has conceded to the LDC demands as far as it should from a U.S. foreign policy perspective. The foreign policy of the United States has been passive for the past five years. The retrenchment of post-Watergate U.S. foreign policy was commented on regarding Iran in Editorial, A Revolution that Keeps Rolling On, Manchester Guardian, Mar. 18, 1979, at 10, col. 3. The LOS area provides a functional non-risk situation to assert its power in the world arena if the LDCs do not manifest a willingness to compromise in the Spring 1979 LOS Conference.

135. This problem is discussed by Adoph Berle in connection with the 1944 Chicago Civil Aviation Convention who writes: “By the time the world attempted to come to grips with the problem of civilian air use, the whole question had already been complicated by a series of nationalistic legal claims, similar to the claims now being advanced in connection with the seabed.” Berle, Analogies Between Enterprise Activities in Airspace and in the Oceans, in 4 PACEM IN MARIBUS 93 (E. H. Burnell & Van Simson eds. 1971).
agreement on an international legal structure and set of norms throws future development to the winds of fate and effectively allows a de facto monopoly by the "haves." It leaves the less technologically advanced nations without the chance of participating in seabed exploitation. One writer who has examined this relationship of these factors in depth concludes:

The clarification of the creeping shelf boundary, of the potential challenges to investment in "hot spot" areas, of the multiple uses conflicts and safety problems arising therefrom, and of the continued erosion of the freedom of the seas are directly related to the widening gap between the northern and southern halves of the globe and developments in ocean technology. By "waiting and seeing" we are, therefore, not only accepting the build-up of international tensions, we are also accepting as faits accomplis both good and bad technological and economic changes. This means, in fact, that we accede to the time scale and decisions made by the stipulators and appliers of scientific and technological innovators, who are not necessarily exponents of an international social conscience.136

VI. CONCLUSION

It appears to be in the self-interest of the LDCs to get some form of agreement on an international regime, even if it does not meet their maximum demands. It certainly makes good sense to take an uncompromising position in attempting to achieve one's demands but, it makes more sense to realize when a position is unattainable and to salvage whatever is possible.

Thus far in the negotiations the LDCs, in the form of the Group of 77, have met with a fair degree of success in pressing their demands. This must not prohibit agreement based upon some concessions on their part. Whether their expressed intransigence is a bargaining ploy, or if it is sincere, will be revealed at the conclusion of the Conference. One hopes that their realization of the situation is more sophisticated than it appears. They stand the most to lose from the unilateral exploitation of the seabed that will occur if an international regime is not agreed upon. It is in their self-interest, as well as in the interest of the progressive development of international law, to reach an agreement based upon mutual consensus and compromise. Presently, the United States is ready to go ahead unilaterally.

A final factor that remains to be mentioned concerns the susceptibility to change of the concluded agreement. Once the ICNT has come into force it

does not suddenly become immune to change and adaptability. Indeed, it is precisely its susceptibility to change and adaptation to new conditions that will enable it to rank high in the attempts of mankind to formulate international order and to foster and stimulate the functional development of international law. In the long run its structures may not survive completely intact but, as a manifestation of a crucial conceptualization that wields the potential to radically alter the development of global society, it will loom as the first and unique attempt at a social experiment designed to put decision-making and sovereignty over natural resources into the hands of the global community.

Robert Everett Bostrom

137. Indeed, the text of the ICNT specifically calls for a review conference. ICNT, supra note 1, art. 153. The problem here is that if the conference is deadlocked after 5 years the Assembly would have the power to impose a moratorium on new contracts and plans for the work of the Enterprise. S. REP. supra note 67, at 46-48.

138. That present attempts at treaties arising out of the universal legislative process are but important first steps in the process is noted by Richard Kearney and Robert Dalton in their commentary on the Vienna Convention on Treaties: "One substantial achievement is the provision of a mechanism to adjust the conflicting demands between the forces of stability and change... The treaty on treaties does not approach perfection. The international legislative process remains much too primitive a mechanism to produce an approach to perfection. This convention is, however, in an unspectacular and earthbound way, a giant step for mankind toward a world in which the rule of law will be not a dream but a reality." Kearney & Dalton, The Treaty on Treaties, 64 AM. J. INT'L L. 495, 561 (1970).

139. Attempts are being considered for the natural resources of the Antarctic. See Comment, Survival of the Antarctic Treaty: Economic Self-Interest v. Enlightened International Cooperation, 2 B.C. INT'L & COMP. L. J. 115, 127-28 (1978). Recent concern over air pollution in the Arctic that emanates from industrialized nations underscores another area which requires global cooperation in an international organization. Sullivan, European Smog Linked to Mysterious Arctic Haze, N.Y. Times, Feb. 18, 1979, at 18, col. 1. The real answer, and it may be unattainable because of an impasse in LOS negotiations, is a dialogue which recognizes the interdependence of LDCs and DCs and seeks to establish principles that assure functional cooperation in an area of functional need.
ANNEX

INTERNATIONAL AUTHORITY

ASSEMBLY

SEABED DISPUTES CHAMBER

COUNCIL

SECRETARIAT

ECONOMIC PLANNING COMMISSION

TECHNICAL COMMISSION

RULES & REGULATIONS COMMISSION

ENTERPRISE