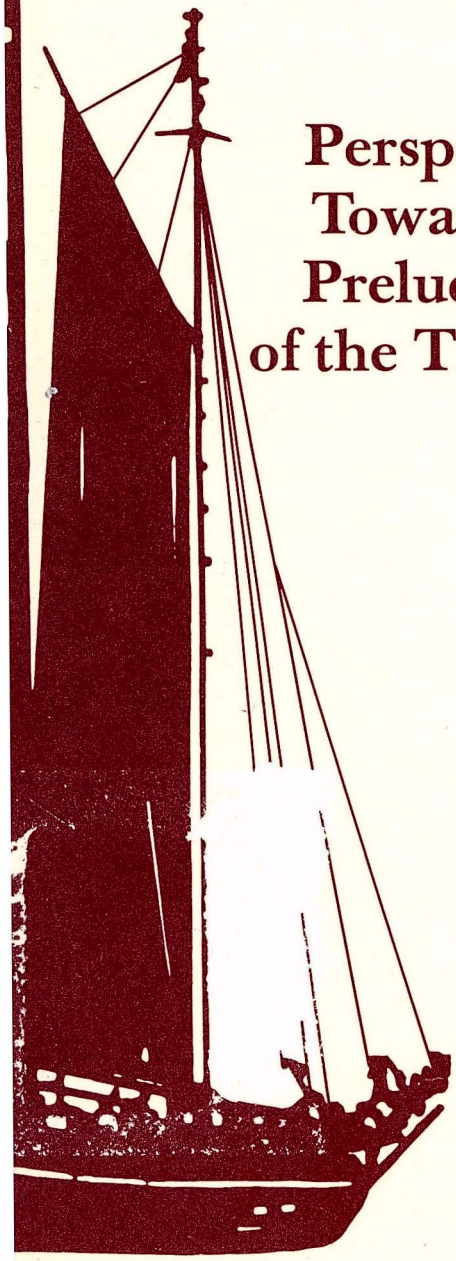
UNIHI-SEAGRANT-BB-83-01

THE LAW OF THE SEA INSTITUTE
OCCASIONAL PAPER NO. 35



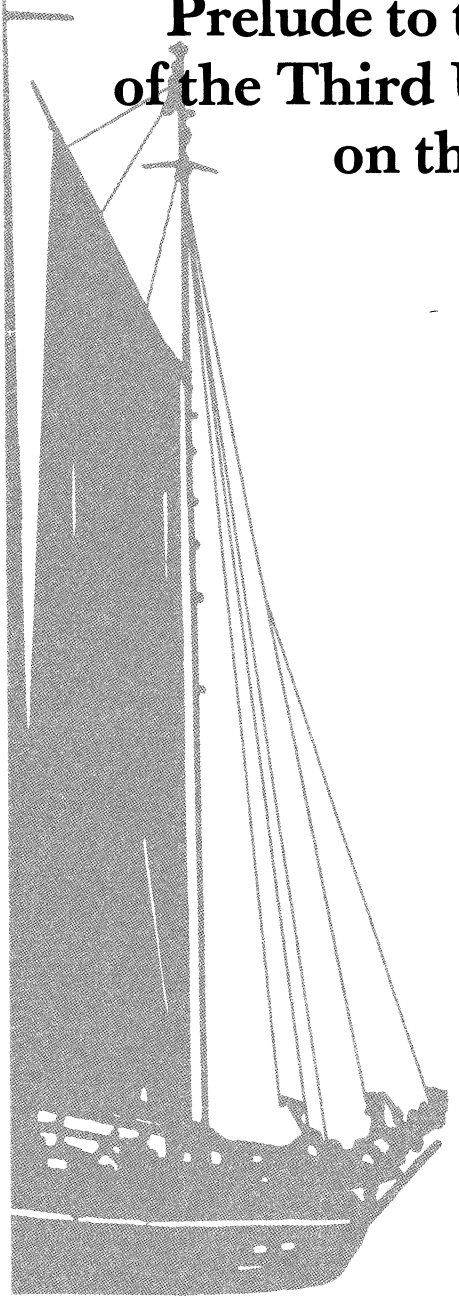
Perspectives on U.S. Policy Toward the Law of the Sea: Prelude to the Final Session of the Third U. N. Conference on the Law of the Sea

Edited by
Charles L. O. Buderi
David D. Caron

PERSPECTIVES ON U.S. POLICY TOWARD THE LAW OF THE SEA: PRELUDE TO THE FINAL SESSION OF THE THIRD U.N. CONFERENCE ON THE LAW OF THE SEA

UNIHI-SEAGRANT-BB-83-01

Perspectives on U.S. Policy Toward the Law of the Sea: Prelude to the Final Session of the Third U. N. Conference on the Law of the Sea



Edited by
Charles L. O. Buderi
David D. Caron

Occasional Paper No. 35

The Law of the Sea Institute
University of Hawaii • Honolulu

The Law of the Sea Institute is housed and sponsored by the William S. Richardson School of Law, University of Hawaii, and is a project sponsored in part by the University of Hawaii Sea Grant Program under Institutional Grant No. NA-81AA-D-00070 from NOAA, Office of Sea Grant, U. S. Department of Commerce.

International Standard Book Number: 0-911189-12-2

Library of Congress Cataloging in Publication Data

United Nations Conference on the Law of the Sea
: 3rd : 1982 : University of California, Berkeley.
Perspectives on U.S. policy toward the law of the sea.

(Occasional paper ; no. 35)
"Proceedings of a symposium sponsored by the Boalt Hall International Law Society, co-sponsored by the Earl Warren Legal Institute and the American Society of International Law, and held at Boalt Hall School of Law, University of California at Berkeley on February 20, 1982"--
1. Maritime law--Congresses. 2. Maritime law--United States--Congresses. I. Buderi, Charles L. O. II. Caron, David D. III. Title: IV. Series: Occasional paper (Law of the Sea Institute) ; no. 35.
JX4411.U54 1982 341.4'5 85-4247
ISBN 0-911189-12-2

Cite as 35 L. Sea Inst. Occ. Paper [page numbers] (1985)

This book may be ordered from:

The Law of the Sea Institute
William S. Richardson School of Law
University of Hawaii
2515 Dole Street
Honolulu, Hawaii 96822
(808) 948-6750 or 941-8500
Telex 7431895 (ITT) Answerback: SEALAW

This volume represents, in large part, the proceedings of a symposium sponsored by the Boalt Hall International Law Society. co-sponsored by the Earl Warren Legal Institute and the American Society of International Law, and held at Boalt Hall School of Law, University of California at Berkeley on February 20, 1982.

ACKNOWLEDGEMENTS

This study is made possible by the advice of the International Law faculty of Boalt Hall School of Law at the University of California at Berkeley, the efforts of the students of the International Law Society of Boalt Hall, the financial support of individuals and organizations, and the participation of the speakers.

The key faculty advisor was Professor Bernard H. Oxman, a Visiting Professor of Law at Boalt Hall from the University of Miami, and a special thanks is given for his time and efforts. Appreciation is also extended for the advice and assistance of Dean Sanford Kadish, Professor Emeritus Stefan A. Riesenfeld, Professor Richard Buxbaum, Professor John McNulty, Professor Kenneth Phillips, and Professor Lawrence Sullivan. Especially helpful also were the ever competent and cheerful staff of the Earl Warren Legal Institute, Ms. Cathy Hill and Ms. Anita Eck.

In planning and executing the symposium, many students were involved. Special thanks are extended especially to Ms. Sonia Bolanos, Mr. Phillip D. Fletcher, Ms. Andrea Gilchrist, Mr. Kevin Harris, Ms. Denise LaChance, Ms. Monessa Lujan, Ms. Lorna Macleod, Mr. Michael Moradzadeh, Mr. Greg Nelson, Mr. Tim Stafford, Mr. Bruce Ventura, and Mr. Gary Wollberg.

Finally, grateful appreciation is extended to the following contributors for their financial support:

The Earl Warren Legal Institute
The American Society of International Law
The Jackson H. Ralston Fund for International Law
The University of California Graduate Assembly
The Atlantic Richfield Company
Standard Oil of California
Natomas Oil Corporation
The Boalt Hall Student Association
Castle & Cooke, Inc.
Brobeck. Phleger & Harrison
Lillick, McHase & Charles
Pillsbury, Madison & Sutro
Ocean Minerals Corporation
Transpacific Transportation Company
Mr. J. Henry Glazer, J.S.D. of "White's Inn"
Podesta Divers, Inc.
Ted L. Rausch Company

Publication of this paper is made possible through the generous support of:

The Andrew W. Mellon Foundation

IN MEMORIAM

This volume is dedicated to the late Ambassador Bernardo Zuleta, whose untimely death in December of 1983 was a stunning tragedy. As the Special Representative of the Secretary General to the Law of the Sea Conference, his vision and intellectual guidance served the Conference and the world community through many years of difficult and trying negotiations. To those who knew him, a great sense of personal sadness is felt at the loss of such an unusually dignified yet open man. Our friend, Bernardo Zuleta of Colombia, will be greatly missed. His will be a cherished memory.

LAW OF THE SEA INSTITUTE

DIRECTOR: John P. Craven

ASSOCIATE DIRECTOR: Scott Allen

ASSISTANT DIRECTOR: Maivan Clech Lam

ADMINISTRATOR/EDITOR: Carol Stimson

EXECUTIVE BOARD

TABLE OF CONTENTS

1. INTRODUCTION

CONTROVERSY AND COMPROMISE: PRELUDE TO THE IMPASSE IN THE LAW OF THE SEA NEGOTIATIONS

Charles L.O. Buderi
Boalt Hall School of Law
University of California, Berkeley

The Reagan Administration's objectives in returning to the law of the sea negotiations were revealed officially on January 29, 1982, and the Law of the Sea Treaty was adopted by 130 nations other than the United States three months later, on April 30. On February 20, in the midst of this critical period, a symposium was held at the Law School of the University of California, Berkeley. Its purpose was to explore the future of the Conference as it prepared for its final meeting in New York in March and April. A distinguished and representative array of Conference participants and scholars attended. The symposium provided an informal setting in which to discuss the Reagan policy review and the value of the Conference. The proceedings of that symposium are presented in this volume.

The remarks made at the symposium provide an insight into the bargaining positions and events which led to the impasse following the Reagan policy review. In conducting its policy review, the United States made fundamental decisions on the conditions under which it would adopt an international legal regime covering the world's oceans.

The symposium's proceedings support the view that the Group of 77, not to mention some Western industrialized nations, were anxious to accommodate certain of the American objectives in order to reach an acceptable global agreement. The U.S. bargaining stance, however, resulted in an impasse in the negotiations which was not resolved to the satisfaction of the Reagan Administration.

It is often argued that the U.S. administration was concerned mainly with ideological considerations in completing its policy review and in later deciding not to sign the treaty and that these concerns produced detrimental results in practice. The outcome of the Tenth Session undoubtedly supports this view. The Administration's refusal is also indicative of its determination and belief that it could achieve the benefits of the treaty, both economic and strategic, without incurring its burdens.

A key burden perceived by the President was no doubt the sharing of authority in the deep seabed mining regime. Moreover, it appeared unwise to make important concessions which would, in the President's view, result in both an actual decline in American influence vis-a-vis the world's nations and in a hardening of bargaining positions against the United States in future multilateral negotiations in the law of the sea mold.

Yet the bargaining stance and subsequent actions of the United States indicate that the President was guided not merely

by such ideological considerations in shaping his policy but also by the belief that compromise was not necessary to achieve U.S. ocean policy objectives. This restricted view constrained the American administration from exploring more attainable avenues of compromise during the Final Session in New York. The view that America's global objectives could be achieved without serious compromise hardened the U.S. bargaining position even more.

The negotiations of the Final Session reflected the variations in interest and commitment of the parties in concluding the treaty. The United States position should be analyzed in light of the Administration's distrust of the Convention's replacement of its sovereign decision-making power with an international policy institution, at least in deep seabed mining. If this analysis is adopted, the statements made before the Final Session, including some in this volume, reveal the determination of the United States to eliminate certain basic concepts and principles that had been established by nine years of drafting and negotiation.

Generally, the countries voting for adoption of the treaty, and those which signed later, based their bargaining positions overwhelmingly on the draft negotiating text. This was the reference against which these nations measured their acceptance of the treaty. Despite scattered objections, the draft treaty embodied a consensus of values and goals. Measured quantitatively, significant alteration of the text would cause a disruption of major proportions: the years of hard work and effort that the Conference devoted to the treaty established substantive principles and administrative processes, and U.S. objections brought into question for many the validity of the document itself and the process from which it was created. The United States proposed fundamental changes leading to broad objectives. These were viewed by many not as mere modifications but as proposals to change the basic premises of past negotiations. To think of them otherwise would have been to undercut a major theme of the treaty, the institutionally shared authority inherent in the proposed deep seabed mining regime. Countries entered the Final Session with institutional preservation a foremost concern which all had agreed should supersede national considerations to the degree reflected in the treaty text. Compromise on technical provisions was possible, but as is clear from Ambassador de Soto's remarks, the basic principles were not.

Opposed to this position, the U.S. delegation was determined to eliminate certain basic treaty principles, as a U.S. negotiator was later to describe, "to convert the treaty into the 'frontier mining code,'" while demanding "virtually autocratic ruling power over the Sea-bed Authority." Two points became clear: (1) the U.S. wished to retreat from the compromises negotiated on the basis of the Kissinger proposals of 1976, and (2) the American negotiating team was not to make serious concessions. Though the Administration publicly had stated an initial bargaining position, there was little

possibility of bargaining. The diminished expectations of those who had anticipated give-and-take in the negotiations were not to be realized. While the world was not prepared to agree to the sweeping changes insisted upon by the U.S., the Administration was fully prepared to withhold its signature from the treaty. Behind its firm position stands a revised policy and an underlying assumption. The policy is that the ability of the United States to enhance its power and to project itself with authority around the globe should not be constrained by a treaty based on a theory of institutionalized shared authority. The assumption is that this goal is achievable and in the interest of the United States. Whether the benefits the United States stood to gain by signing the treaty can be obtained without having signed it is only the first half of the test of the American strategy. The other half is whether the United States can cope in the years to come with new problems, above and beyond those addressed by the treaty, which might have responded to the treaty's concept of interdependence.

II. PROLOGUE

PRESIDENT REAGAN'S STATEMENT ON LAW OF THE SEA
OF JANUARY 29, 1982

The world's oceans are vital to the United States and other nations in diverse ways. They represent waterways and airways essential to preserving the peace and to trade and commerce; are major sources for meeting increasing world food and energy demands and promise further resource potential. They are a frontier for expanding scientific research and knowledge, a fundamental part of the global environmental balance and a great source of beauty, awe and pleasure for mankind.

Developing international agreement for this vast ocean space, covering over half of the earth's surface, has been a major challenge confronting the international community. Since 1973 scores of nations have been actively engaged in the arduous task of developing a comprehensive treaty for the world's oceans at the Third United Nations Conference on Law of the Sea. The United States has been a major participant in this process.

Serious questions had been raised in the United States about parts of the Draft Convention and, last March, I announced that my administation would undertake a thorough review of the current draft and the degree to which it met United States interests in the navigation, overflight, fisheries, environmental, deep seabed mining and other areas covered by that convention. We recognize that the last two sessions of the Conference have been difficult, pending the completion of our review. At the same time, we consider it important that a Law of the Sea Treaty be such that the United States can join in and support it. Our review has concluded that while most provisions of the Draft Convention are acceptable and consistent with United States' interests, some major elements of the deep seabed mining regime are not acceptable.

I am announcing today that the United States will return to those negotiations and work with other countries to achieve an acceptable treaty. In the deep seabed mining area, we will seek changes necessary to correct those unacceptable elements and to achieve the goal of a treaty that:

- will not deter development of any deep seabed mineral resources to meet national and world demand;
- will assure national access to these resources by current, and future qualified entities, to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international authority, and to promote the economic development of the resources;
- will provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
- will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;

- will not set other undesirable precedents for international organizations; and
- will be likely to receive the advice and consent of the Senate. In this regard the Convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

The United States remains committed to the multilateral treaty process for reaching agreement on law of the sea. If working together at the Conference we can find ways to fulfill these key objectives, my administration will support ratification.

I have instructed the Secretary of State and my special representative for the Law of the Sea Conference, in coordination with other responsible agencies, to embark immediately on the necessary consultations with other countries and to undertake further preparations for our participation in the Conference.

III. THE PROCEEDINGS

A. THE REAGAN POLICY REVIEW

THE AMERICAN PERSPECTIVE

Ambassador James L. Malone
Special Representative of the President
to the Third U.N. Conference on
the Law of the Sea

I am pleased to be here today among such eminent law of the sea scholars and international law students. although I must admit that, for a moment, when I received the invitation to attend this Cal Berkeley symposium, I hesitated to accept due to my allegiance to my former law school across the bay. However, I decided that if anything should transcend the traditional University of California-Stanford rivalry, then the subject of the law of the sea should.

As you undoubtedly are aware, on January 29 President Reagan announced his decision to resume United States participation in the Law of the Sea Conference.

In his public statement, the President made clear several points which I would like to enumerate:

- It is important that a law of the sea treaty be fashioned so that the United States can join in and support it.
- Major elements of the deep seabed mining regime are not acceptable to the United States.
- We have six broad objectives with regard to the deep seabed mining regime and we will be seeking changes in the draft treaty in order to achieve them.
- The United States remains committed to the multilateral treaty process and will support ratification if our six objectives are fulfilled.

The President's decision followed a comprehensive interagency review of United States' law of the sea objectives and interests as they relate to the current Draft Convention. The Administration undertook its review because serious concerns had been raised about certain provisions of the Convention, particularly the deep seabed mining articles, by members of Congress, the public, and the industries affected. It was not our intent to retard the progress of the Law of the Sea Conference, nor to delay the successful conclusion of its work. However, the concerns expressed could not be ignored as they affected our basic national interests. economic, political, and strategic. On hindsight, we know that the review was a necessary and useful exercise.

We did try, though, to be mindful of the fact that a great deal of work had been done by this Conference over the last decade. Ten sessions of the Law of the Sea Conference have been held since the first substantive session in Caracas, Venezuela, in 1974. Consensus agreement has been reached during these sessions on several important issues, including:

- Limits of the territorial sea;
- Navigation and overflight rights on the high seas, in territorial seas, in straits and in archipelagoes;
- Delimitation of boundaries between opposite and adjacent states;
- The rights of landlocked and geographically disadvantaged states;
- Protection of the marine environment;
- Freedom of marine scientific research;
- Peaceful settlement of disputes;
- The extent and nature of coastal state jurisdiction over living resources; and
- The extent of coastal state jurisdiction over the resources of the continental margin.

In conducting the review, we made every effort to avoid burdening the Conference with issues that were not vitally important for the acceptability of a treaty to the Administration or the United States Senate. To augment its review process, the United States presented its substantive concerns to the August, 1981 Geneva session of the Conference to elicit some kind of reaction to such concerns and to ascertain what our chances are of resolving some of the problems.

Subsequent to the completion of the interagency review and the President's announcement of his decision, we have been consulting with our principal allies, the Soviet Union, the leadership of the Conference, and influential delegates from the Conference, including the leadership of the Group of 77, in order to obtain their views with regard to our concerns and efforts to improve the treaty. During these informal consultations, we have explained our problems with the Draft Convention in a clear and precise way. We have explored those potential solutions which we believe would meet our national interests and make the treaty acceptable to the United States.

Next week we will be participating in formal intersessional meetings in New York, and during the first week of March we will assess the results of our consultations and the intersessional meetings to determine the negotiability of specific changes to the Draft Convention which would meet the President's six objectives with regard to the deep seabed mining regime.

Since these six objectives incorporate the United States' chief concerns with the Draft Convention, I will now briefly elaborate on them.

First, the treaty must not deter development of any deep seabed mineral resources to meet national and world demand.

The United States believes that its interests, those of its allies, and indeed the interests of the vast majority of nations will best be served by developing the resources of the deep seabed as market conditions warrant.

Many different provisions of the draft treaty, we believe, would discourage development of deep seabed mineral resources, including manganese nodules and any other minerals of the seabed. The particular provisions which contribute to our belief and which require improvement include:

- The production policies of the Authority, which place other priorities ahead of economically efficient resource development.
- The production ceiling, which limits artificially the availability of minerals for global consumption.
- The limit on the number of mining operations that could be conducted by any one country, which potentially limits our ability to satisfy United States consumption needs from the seabed.
- The imposition of large financial burdens on industrialized countries whose nationals are engaged in deep seabed mining and the establishment of financial terms and conditions which would significantly increase the costs of mineral production.
- Broad areas of administrative and regulatory discretion which, if implemented in accordance with the Authority's production policies, would deter seabed mineral development by interfering unreasonably with the conduct ot mining operations and by imposing potentially burdensome regulations on an infant industry.

Second, the treaty must assure national access to resources by current and future qualified entities to enhance United States security of supply, avoid monopolization of the resources by the operating arm of the International Authority, and promote the economic development of the resources.

It is our strong view that all qualified applicants should be granted mining contracts and that the decision whether to grant a contract should be tied exclusively to the question of whether an applicant has satisfied objective qualification standards. The draft treaty provides no assurance that qualified private applicants sponsored by the United States government will be awarded contracts. We believe that certification for a contract award should not be rejected by the Authority unless a consensus of objective technical experts votes that the applicant's qualifications were falsely or improperly certified.

Also, we must recognize in the treaty through a specific provision the legal and commercial rights of private companies that have made pioneer investments in deep seabed mining. With due regard for the various views held as to the particular rights which pioneer investors have acquired, we believe that one must focus on the basic realization that deep seabed mineral resources would simply not be made available for the benefit of mankind without the continuing efforts of the pioneer miners who invest substantial resources in prospecting for the deep seabed minerals and in developing the necessary technology. Such efforts must be protected and fostered by this treaty regime.

Finally, we believe that the parallel system should be redesigned to permit private miners to operate independently. As it now stands, the draft treaty creates a system of privileges which tends to discriminate against the private side of the parallel system, giving substantial competitive advantages to a supranational mining company, the Enterprise.

Rational private companies would therefore have little option but to enter joint ventures or other similar ventures either with the Enterprise or with developing countries. Not only might this deny the United States access to deep seabed minerals through its private companies but, under some scenarios, the Enterprise could establish a monopoly over deep seabed mineral resources.

Third, the treaty must provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states.

In that the United States most likely would be one of the largest contributors to the Sea-bed Authority and to the financing of the Enterprise, and perhaps the largest potential consumer of seabed minerals and investor in deep seabed mining through its private firms, we have a profound interest in a fair, effective deep seabed mining regime. Detracting from this goal, in our view, is the existing decision-making system in the Draft Convention for the Sea-bed Authority.

Policy-making in the Sea-bed Authority would be carried out by a one-nation, one-vote Assembly and the Executive Council of the Authority, which would make the day-to-day decisions affecting access of United States miners to deep seabed minerals, would not have permanent or guaranteed representation by the United States. Thus, the United States would not have influence on the Council commensurate with its economic and political interests, and control over United States access to seabed resources essentially would be given to competing countries or to land-based producing countries which do not wish to see the resources produced at all. A decision-making system must be formulated which ensures that any nation having a vital economic or political stake in the Authority's decisions has sufficient affirmative and defensive influence to protect its interests.

There is also a question with regard to minerals other than manganese nodules. In our judgment, the development of other seabed resources should proceed without restraint, pending the development of rules and regulations. Land-based producers argue for delay in the development of other resources until actual rules are formulated. The President's objective would not be met by a seabed mining regime which would deter production, prohibiting the economically efficient development of such resources.

Fourth, the treaty must not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate.

The draft treaty now permits two-thirds of the States Parties acting at the Review Conference to adopt amendments to Part XI of the treaty which would be binding on all States Parties without regard to their concurrence. Although a State can withdraw from the treaty if an amendment is imposed without its consent, withdrawal would be an unacceptable alternative to a country which has invested significant capital in the

development of deep seabed mining through an international treaty regime. To meet this objective of the President, a review conference should not have the power to impose treaty amendments on the United States without its consent.

Fifth, the treaty must not set other undesirable precedents for international organizations.

The President particularly considered as adverse precedents the artificial production limits, the protection of land-based minerals, and the mandatory transfer of technology. Most, if not all, of the adverse precedents which would be establisned by the draft treaty could be avoided by achieving the six objectives set out by the President. Our negotiating efforts, however, should not result in offsetting or replacing one undesirable precedent with another. Our task in returning to the negotiating table is to satisfy all of the President's objectives. In solving problems in the draft treaty, however, we will be mindful of the possibility that a particular solution, although viable in the context of a law of the sea treaty, might be inappropriate as a precedent for some future negotiation or for United States participation in other global institutions.

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

As mentioned earlier, concerns raised by Congress were instrumental in convincing the new administration that an extensive review of the Draft Convention was necessary and that the Senate most likely would not consent to the Convention as it now stands. It is our judgment that the Senate and the Administration will be favorably disposed to a law of the sea treaty which meets the enumerated six objectives.

Of particular concern to the President and the Senate are two significant commercial and political issues: the mandatory transfer of private technology and participation by and funding for national liberation movements. One of America's greatest assets is its capacity for innovation and invention and its ability to produce advanced technology. It is understandable, therefore, that a treaty would be unacceptable to many Americans if it required the United States or, more particularly, private companies, to transfer that asset in a forced sale to the Enterprise or to developing countries.

In closing, I would like to emphasize that we will continue to work closely with members of Congress, the Law of the Sea Advisory Committee, the public, and the various law of the sea delegations at the Conference to do everything possible to obtain a treaty that will be ratifiable by our Senate. What we want to do now is to return to the bargaining table with a clear and firm position that meets our national as well as global interests. We will work cooperatively and diligently at the Conference to seek an acceptable result.

It is my opinion that, from reactions to the statement of the President which we have received, there is a widespread appreciation of the President's commitment to the multilateral treaty process. We have seen a growing willingness to explore solutions that might address our concerns. We are going to New York with a goal of having our national interests furthered though a multilateral law of the sea treaty. Finally, if we can find ways and means to meet the presidential objectives, we can count on the President's active support for the Senate's ratification of the treaty.

AN EVALUATION OF THE DEEP SEABED MINING CONTROVERSY

Ambassador Paul Bamela Engo
Permanent Mission of the United Republic of Cameroon to the U.N.
Chairman of the First Committee, UNCLOS III

The Boalt Hall International Law Society of the University of California deserves our congratulations and indeed gratitude for the opportunity offered for preliminary dialogue on the concerns expressed by the United States administration in announcing a decision to recommit the United States to working with other nations for the attainment of a universal treaty and the Eleventh, final decision-making Session of the Conference. It is a privilege for me to be a participant in some capacity. I can only hope that my modest contribution will subscribe in some way to a constructive as well as a productive discourse.

It is particularly useful that important members of the United States delegation, perhaps the oldest and most experienced in the policies of the year-old administration in Washington, are present. That presence and the unique expertise they bring should enhance the quality of productivity here.

I am sure I can be expected to do no more than think aloud on the issues touched upon in President Reagan's statement of January 29, 1982, and developed further by Ambassador James Malone this morning. Undoubtedly, the decision to return to the Conference to work for "an acceptable treaty" is welcome. Yet I must say from the outset that a prudent reaction to that statement must remain preliminary and at best only cautiously optimistic. It would appear premature to judge the scope of the "major elements" which our American colleagues will seek to revise in the Draft Convention. We cannot expect to know their bottom line on any of these issues until consultations bring them to light in the weeks ahead.

This, however, is not to slam the door on a desirable discourse of the preoccupations outlined in the President's statement. There is a tremendous need for all the facts to be known by the public that will be served by the new law of the sea. The analysis emerging from an exercise such as this, devoid, hopefully, of political rhetoric and destructive confrontation, can help the process of education, not only for participants but also for those outside who seek the knowledge of truth and circumstance. I feel duty bound to make available information as to what has been achieved in the areas of concern to the United States.

The Third United Nations Conference on the Law of the Sea is a stimulating, ambitious exercise which only an audacious generation like ours could venture. It represents the widening of the scope of dialogue on matters of global interest, providing opportunity for effective participation by all nations, large and small. The emerging consensus on the issues provides redefinition of the dimensions by which norms of international law could be measured with universal recognition.

The results of our endeavors, in my view, demonstrate the value of our joint resolve to provide some response to rapid and critical changes imposed by the times on the international environment. Staggering advancements in science and technology may have brought new opportunities, enhancing our progress towards better living standards through economic and social development; but they have also brought frightening components which intensify our dilemma in finding ways and means to save the human race from annihilation. The preoccupations and contemplations of unimaginative or instinctive nationalism within individual nation-states tend to obscure our vision of the community of interests we share for survival.

Each nation, great or small, is part of a wider community of nations. For better or for worse, we are condemned to a common destiny and face the same threats in a nuclear age. None can afford the luxury of isolationism. The Third United Nations Conference on the Law of the Sea must be seen as an instrument for exploring potentials for inspired international cooperation in placing the ocean resources at the disposition of the present needs of mankind as a whole.

It is against this broad perspective that we have tried and must continue to process any issues considered to be outstanding. We can productively use this forum as a workshop to analyze frankly the issues and perhaps to reach conclusions which should aid the impending decision-making Eleventh Session of the Conference, as well as provide for the general public the truths by which the results of years of difficult and complex negotiations should be judged.

We may now conveniently turn to the "unacceptable elements" outlined in President Reagan's statement. I must state at once that I do not wish anything I say here to be construed as a reflection of the views of the Third World or any section of the Conference. I have encountered the problems and issues of the Conference as a Chairman, not a delegate. The contents of my preliminary reactions to the United States concerns are intended to place in proper perspective the evolution of the negotiating process so far. I say this because Chairman Caron's letter credited me with the "ability to articulate the concerns of the Third World." I am sure our American colleagues would accept that the views I shall express are not inconsistent with those generally held at the Conference.

In announcing the return of the United States to the Conference negotiations, President Reagan referred to the deep seabed aspects, stating that his country

> will seek changes necessary to correct those unacceptable elements to achieve the goal of a treaty that:
>
> (1) will not deter development of any deep seabed mineral resources to meet national and world demand;

(2) will assure national access to these resources by current and future qualified entities, to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international authority, and to promote the economic development of the resources;
(3) will provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
(4) will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;
(5) will not set other undesirable precedents for international organizations; and
(6) will be likely to receive the advice and consent of the Senate. In this regard, the Convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

It is to be presumed that, in the American opinion, none of these elements have been met at all or adequately. Most if not all of these areas involve problems with a long history, a history which has recorded active participation by the United States, a country whose delegations were led by distinguished citizens, all Republicans. The only Democrat worked under a Republican Secretary of State. Groping in obscure conjecture as my faculties are, I do not wish to undertake a fruitless analysis of those problems in every sphere, especially as a number of them appear to need some clarification from the United States authors.

There appear to be three categories of "elements" posed in the President's policy statement:

(a) the first postulates broad conclusions. An example is goal (5), which seeks to ensure that "other undesirable precedents for international organizations" are not set. In the absence of concrete illustrations and appropriate proposals, it is difficult to comprehend the nature of that objective;
(b) the second presents ideas based on seemingly broad common ground but upon which a difference of perspectives may exist. Examples are to be found in elements (1) and (2), which appear to deal respectively with issues touching upon production limitations and access to resources. Here, some general comments may prudently be made because of the guide provided by the Declaration of Principles Governing the Sea-bed and Ocean Floor [1].
(c) the third consists of those which address more specific areas on which the immediate basis for the consensus

reflected in the Draft Convention evolved from years of arduous negotiations. In this category are elements (3), (4), and (6), respectively the decision-making processes; the entry-into-force provisions regarding amendments to the Convention; and the specific areas declared to be of special concern in the advice and consent that the United States Senate must give, i.e., "certain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements."

I intend to deal with questions falling within the last two categories to the extent to which they can be addressed constructively.

DEVELOPMENT OF RESOURCES: PRINCIPLES AND POLICIES

As I indicated earlier, the provisions advanced by the principles governing the Area of the deep seabeds and its resources [2] as well as the general policies for the development of those resources [3] take their breath from the Declaration of Principles Governing the Sea-bed and Ocean Floor [4]. That Declaration was adopted without objection [5] and thus provided a binding consensus and a *jus cogens* for at least the Conference participants [6].

A central thought adopted by the Declaration was stated in its very first operative paragraph. It introduced a novel concept known as "the common heritage of mankind" to the legal status of the Area and the resources of the deep seabed. The early debates in the Sea-bed Committee and at the Third United Nations Conference itself made it clear that attempts to draw parallels between this concept and norms known to old or so-called classical (mainly European) law were misplaced.

In the introduction [7] to the Informal Single Negotiating Text [8] I submitted to the Conference in 1975, I commented as follows:

> The old distinction between *res nullius* and *res communis* must admit of further development in this aspect of law. It is my view that the totality of what constitutes the common heritage of mankind cannot satisfactorily be aligned to either norm. This Convention must be read in its own context, not in accordance with juridical notions that may be irrelevant within the universe of discourse here."

I also drew attention to the "prevailing view" at the Conference that it was "difficult and in fact unnecessary to resolve the question of defining so new and so revolutionary a concept in precise terms." The better approach would have been to elaborate certain norms and principles from which rational definitions may later be made by jurists and political scientists. Our primary preoccupation at the time was not with jurists and the juridical classification of concepts! The

prohibitions contained in operative paragraphs 2 and 3, against appropriation and claim, exercise or acquisition of rights with respect to the Area, were declaratory of where it was intended to place the property in the Area and its resources -- i.e., mankind as a whole.

Two fundamental ideas of relevance to our discourse here were clear from the provisions of the Declaration:

(a) It reiterated the conviction that " ... the exploitation of its resources shall be carried out for the benefit of mankind as a whole" [9];
(b) It requires, inter alia, that "the regime shall ... ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal" [10]; and
(c) It bore in mind that " ... the development and use of the Area and its resources shall be undertaken in such a manner as to foster the healthy development of the world economy and balanced growth of international trade and to minimize any adverse economic effects caused by the fluctuation of prices of raw materials resulting from such activities" [11].

All texts, including both the ISNT [12] and the present Draft Convention, adopted and progressively developed both ideas.

The United States wants a treaty that will "not deter development of any deep seabed mineral resources to meet its national and world demand." It would appear at first sight that this may well invite two constructions; each, I fear, may be provocative of indignation having regard to the basis of negotiations so far:

(a) It may be a suggestion that the notion of "production limitation" may be scrapped and that there should be an encouragement of open competition between seabed mining and land-based mining; or
(b) that land-based production be systematically or gradually phased out to make room for an unlimited increase in seabed mining.

Whichever interpretation is intended, I am of the view that the proposal will meet considerable difficulty. In the first place, it would appear to be inconsistent with the Declaration of Principles. Having regard to the present global situation, a gradual or systematic squeezing out of one source of mineral production to the increasing advantage of the other would hardly "foster the healthy development of the world economy and balanced growth of international trade" decreed by the Declaration. Indeed, it would probably be disruptive of it. One could not reasonably contemplate the creation, through a universal treaty, of conditions that guaranteed to any existing

consumer country, currently partially dependent on imports of minerals, future self-sufficiency through its participation in seabed activities alone. I am advised that it is not practical. In any case, it it were politically feasible, it would prove unacceptable to the bulk of land-based producers and others who would not permit the "common heritage" to be employed uniquely to meet the needs and interests of one industrialized state or even a group of industrialized states.

Secondly, it would completely ignore the mandate to protect or minimize adverse economic effects on the land-based producers, especially the developing countries among them, who depend on export earnings from the same minerals to be extracted from the deep seabeds. The developing nations have supported the fundamental idea of an orderly and rational management of the resources of the seabeds to foster healthy development of the world economy and the expansion of opportunities for the use of these resources. They have equally emphasized the provisions for equitable sharing of benefits by all states, including the developing countries. They can see no design in any of these objectives to limit seabed resources to any particular country. "Benefits" has a qualitative connotation and does not include detriment, especially prejudice that would outweigh gains to the tune of tragedy for the fragile economies of developing countries.

The Draft Convention has presented a system of production limitation which affects both land-based and seabed mining. The idea has been to give a fair chance to the new industry to survive in an existing and competitive market for minerals to be derived from deep seabed mining, while ensuring that no serious disruptions occur with regard to land-based industries.

The Authority, all of mankind assembled, would not exist if no activities in the Area were carried out. Some land-based producers, especially the developing countries among them, might also well cease to exist as free and independent nations were this crucial mineral industry to be wiped out or considerably reduced.

Mankind as a whole must benefit. This principle demands that total loss must be ruled out. It must also be excluded that a section of mankind should benefit at the expense of others. All miners, both land-based and seabed producers, would have to understand that there is a vast majority of mankind which does not belong either way, but looks forward to other forms of benefits to be generated by activities in the Area. For these, the importance is to be laid on a volume of activities in the deep seabed that generates sufficient benefits to make our aspirations meaningful.

It would be undesirable for the two categories of producers to compromise these interests in seeking mutual agreement. The danger of this happening, even unintended, is real. After all, most if not all of the major consumers of these minerals are prospective seabed producers, and many of the major land-based producers are also potential seabed producers. There is a vast territory of mutual interest for both. Many land-based

producers, especially the young nations among them, do not belong to either category, nor do other non-producer countries who must share in the benefits of rational management of the resources of the Area.

It is my view that the present balance must be maintained as much as possible, but we must endeavor to create an effective institutional framework in which principles and criteria for protection of the young nations to which I have referred can be maximized according to their several necessities.

It is with the increase in the availability of the minerals produced from the resources of the Area as needed, in conjunction with minerals produced from land sources to ensure adequate supplies to consumers, that the United States can hope to gain access to those critical resources to meet its national demand. The present system guarantees sufficiency of supply to meet world and consequently national demands. From now on, the U.S. can expect to break to an increase in imports from other nations. It would have direct access to seabed resources and would not feel so vulnerable for having a large percentage of its needs for strategic minerals imported from elsewhere.

The next issue is one of direct access to seabed minerals through participation in activities in the Area. The parallel system, proposed by the United States and adopted on terms by the Conference, is reflected in the Draft Convention [13]. United States' going superiority in the development of deep seabed technology provides guaranteed access, I venture to suggest, given the opportunities the system grants to applicant States and their enterprises.

It would appear to the objective observer that it cannot be helpful at this stage to refer to "monopolization" of the resources by the Enterprise. There are two parts of an agreed parallel system. An equal number of mine sites will be available to each. Logically, the Authority cannot be heard to complain about monopolization by States and their enterprises, etc., who by their sheer numbers, finance, and efficiency will together undertake the greater volume of activities in the Area. These latter have lesser reasons to complain of monopoly by the Enterprise. Their states of origin or sponsoring states will also be members of the Enterprise. If the term "monopoly" may properly be used in the present context, it would refer to the few industrialized countries of this age who will have all access to the contract area as well as be active partners in running the affairs of the Authority's Enterprise. Even joint-venture arrangements would increase their participation and access, while reducing still further such participation by the rest of the world. The Enterprise is not intended to personify a political and economic monster far removed from the industrialized countries and their nationals and threatening them constantly.

It has never been the intention to equate the Enterprise with individual private companies or States in the allocation of mine sites. In any case, what is "reserved" for the Authority may be allocated to developing countries (among whom many are

already potential seabed miners) and some of it may also fall into joint ventures with the States or their companies which already operate under contracts in the non-reserved contract areas.

The developing countries have reiterated their consistent view that the system was never conceived in terms of competition between the Enterprise and private enterprise of State Parties. They believe that the operations of the Enterprise will benefit the entire world community, including the developed and industrialized countries. The reference to discrimination in its favor could not find a constructive legal or even political base. The provisions to make the Enterprise effectively operational simultaneously with other operators can by no stretch of the imagination be called discriminatory. Their view is widely shared among most developed country delegations.

It is not clear what is intended by the call for "the promotion of the economic development of the resources." The most favorable construction one can put appears to be that the reserved areas must not be kept inoperative indefinitely. If this is a correct interpretation, then perhaps the question is how to deal with reserved mine sites which neither the Enterprise nor applicant developing countries can exploit for long periods of time.

I am of the opinion that provisions made for joint ventures between the Enterprise and applicant companies or States would resolve this issue. In any case, I strongly believe that in the long term the Enterprise will find it more expedient and profitable to enter into joint ventures on favorable terms than to do it all alone! The new industry is so complex and expansive, award of service contracts will be inevitable even on the part of private companies undertaking a venture "alone"! With the Enterprise having access thereby to technology, the risk of which is borne by a partner in the venture, this system must prove to be irresistible! There would be no constitutional mandatory transfer for the partner and the Enterprise would get going without the fear currently expressed by the non-industrialized countries.

This leads one to wonder if the term "technology transfer" itself is not the psychological disease we ought to be curing. What is at the root of concern for the Enterprise is that it effectively carries out activities in the Area. Perhaps other alternative formulae should be considered that ensure that activities in both the reserved and contract areas are effectively and simultaneously carried out. If delay in carrying out activities in the reserved area is occasioned by the door to technology license being slammed in the face of the Enterprise, then it should be made clear that the door to all activities of the same parallel would be equally closed to the carrying on of activities.

The present Draft Convention has provided one solution. Provided that the basic condition of the viability of the Enterprise can be met by express provisions, there should be no difficulty in allaying fears whatever the source of concern.

It would appear to me more appropriate, however, to address the preoccupation with protection of qualified applicants. The Draft Convention has made what is generally felt to be adequate provisions for protecting such applicants who have been favorably recommended to the Council by the Legal and Technical Commission [14]. The consultations may wish to address the U.S. perspectives on how best to ensure that the criteria for qualification contained in Annex III [15] are the only ones to be taken in account by the Commission. Now that a dispute settlement system has been generally agreed upon in this regard, I would have thought that this problem had been eliminated in the Draft.

DECISION MAKING

I shall now turn to the decision-making process. The United States would like a treaty that would "provide a decision-making role ... that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states." As I have pointed out earlier, the presumption is that the present Draft Convention does not meet the United States concerns.

This problem was discussed in considerable detail in my report (as Chairman) to the Conference at the end of the Resumed Ninth Session in Geneva two years ago, before the Draft Convention was presented [16].

In analyzing the American president's concern in the field, it is necessary to separate two important components: the criteria of political and economic interests on the one hand, and that of the financial contributions of participating states on the other.

As my report to the Conference indicated, it was and has been difficult to extract from the industrialized countries, and the United States in particular, some definition of what they consider to be their qualified interests in this regard. The term "political" appears to be new, but welcome. What then is the nature of the "political" and "economic" interests, not just in general terms, but specifically above and beyond the political and economic interests of other nations? If the scope of these were known with some clarity, perhaps a re-examination of the problem could be more productive.

It has been the consensus that the system employed by the United Nations Security Council would be unsuitable and indeed unacceptable for the Council in the Authority. The Security Council system provides a veto power for each of five permanent members upon whom the San Francisco Conference placed primary responsibility for maintaining peace and security for all time. It was clear at the adoption of the U.N. Charter that those five members, perhaps alone, had the military capabilities to fulfill such a mandate.

With the new Authority there is no similar provision nor such preoccupation. The scope of activities covered by the Authority's mandate bears no similitude to the range of

responsibilities assigned to the U.N. Security Council. The universe of contemplation for the Authority is the exploration of the Area of the deep seabeds and the rational exploitation of its resources for the benefit of mankind as a whole. The role of Council is to execute this to this end. The consensus that emerged from years of debate was that there was no justification for constitutional permanent membership in its Council, nor for the granting of disciplinatory veto powers to any named state or group of states. I shall return to the question of membership later.

The disdain for the Security Council system was only in part due to what the vast majority of the Conference considered, to put it very politely, the wrongful use of the veto power there. It was the considered opinion of the enlightened majority that those who sought the veto under this Convention were too interest-oriented and the abuse of power would be an obvious temptation in an atmosphere of economic activities. The prevailing interest of all of mankind could not be exposed to the arbitrary whims of a single state or a group of states forming an interest bloc.

The loud outcry against the unproven tyranny of the majority could not muffle the persistent cry against the unceasing experience of the proven tyranny of the minority under the veto system of the United Nations Organization.

The Draft Convention addresses realistic measures that ensure that over sensitive matters no minority opinion could be silenced. An example of such matters, which is of particular concern to the United States, is the fate of qualified applicants who submit plans of work for non-competing contracts. If the Legal and Technical Commission recommends approval, the plans cannot be rejected even by a majority of the Council itself. No matter how interest- oriented the minority may be, a rejection must satisfy the consensus rule (article 162 (2) (j)).

The three-tier system of voting on matters of substance discourages misuse of collective power and promotes consultations and understanding among the various interest groups. All members of the Authority, by their very membership, will have their diverse political and economic interests, each defying rational or objective definition. It is my view that the present balance is protective of all, including those of the subjective opinion that their interests are greater in magnitude than others.

Let me turn briefly to the criteria of "financial contributions of participating states." It is the consensus at the Conference that the Authority should be made to be financially self-supporting as soon as possible. Financial contributions by States Parties was agreed to only as a temporary measure to enable the Authority to get on its feet during the first few operative years of its life. The temporary nature of this criteria cannot therefore validly permit of a permanent constitutional provision.

In spite of what I have said in both instances about the constitutional aspects, it is my impression that the voting

pattern will follow the natural course of political and economic interests. The present Conference typifies the future -- with a variety of interests providing strange bed-fellows!

One brief comment about membership. I should like to point out these two things:

(a) that the categories of interest to be represented in the Council of the Authority, as now enshrined in article 161 (1), was meant to ensure adequate representation of such interests therein. A consensus on this paid us a reluctant but convenient visit there!

(b) the current formulation was in fact drafted, at my request, exclusively by those who considered themselves potential members of each of the first four categories. Thus, the first two were primarily the result of consensus among Western industrialized States, with satisfaction that all within that economic and political categorization would be assured a seat in the Council.

I am sure that the Conference will be willing to consider any further consensus that could evolve from consultations among all who belong to such interest groups as are enumerated in article 161 (1). I do not believe that it would present insurmountable difficulties, for instance, to reduce the figure from eight to six or even five in subparagraph (a) -- i.e., the figure from which our members shall be selected. The tightening up of qualification for that category may well encourage competition for entry therein. I do not believe, however, that any changes to subparagraphs (a) and (b) would do any better in guaranteeing United States membership than that which the present text and current practice in international relations have already done without constitutional fanfare! If the broad underlying problem is purely ideological, then I think that a proper forum of the directly interested parties must be quickly chosen for its resolution.

I would be equally frank in saying that there were reasons for ensuring that a minority but important geographical region, representing a distinctive economic and social system, is not inadvertently excluded from the Council. Those reasons have not changed. This aspect of the consensus was reached many years and negotiating texts ago! I would strongly recommend that areas be addressed only where the door may appear to be open, even if only slightly!

THE REVIEW CONFERENCE

The United States' concern here is shared by a number of Western industrialized countries mainly as a constitutional question. The issue is whether or not amendments to the Convention should automatically be binding for all States Parties, by virtue of having entered into force pursuant of prescribed procedure. For the United States, it is argued that such amendments require the advice and consent of the United

States Senate. It also appears that the United States in particular would not accept the principle of being bound by amendments not approved by it. The implication of this is that the amendments should not be adopted, etc., except by a consensus of the States Parties.

Two facets of the same issue must be examined separately. The first masquerades as a constitutional problem: can a State Party to a Convention be automatically bound by amendments to that Convention which it has not ratified or acceded to? The second is a political one: should the State agree to be bound by those amendments to which it is opposed anyway?

These two point to the same issue. Article 155 (4) provides for reference to States Parties of such amendments for ratification, accession or acceptance. It also prescribes that these shall not enter into force until twelve months after the date of deposit of the instruments of ratification, accession or acceptance by two-thirds of the States Parties.

The problem is thus not really one of a State Party being automatically bound by the decisions of a two-thirds majority regarding amendments. The text respects the legislative processes of nations by giving adequate time. If this time is insufficient, it could be reasonably extended. Thus, in reality, it is not a constitutional problem.

It would appear to me that the real problem lies in the rules of procedure for adopting such amendments. Some industrialized states would want to play a decisive role in the voting system and consequently prefer the consensus rule.

The Group of 77's rebuttal appears to be shared also by many lesser industrialized nations as well as some industrialized countries. The nagging question that must be answered as far as they are concerned is: what happens if the Review Conference fails to reach agreements by consensus after five years of negotiations? The present parallel system would have come to an end and critical proposals for changes or the establishment of a new and more workable system of exploration and exploitation may be before the Conference. If the Western proposal for consensus were to be adopted, it appears to be the opinion of these opponents that there would be no end to the negotiations, and this could be deliberately designed to maintain the existing system. In other words, the real danger as they see it lies in the abuse of the consensus rule and the possibility of retaining a system in spite of adverse findings on the elements enumerated in article 155.

It would consequently appear to me that the substantive question is still before us. I do not honestly believe that this will prove to be a question deserving so much attention. In the first place, I do not believe that the voting pattern will, even in the early years of the Authority's existence, be the same as it may be now with regard to interest alignments. Secondly, with the communal interest in various benefits to be derived, five years is much too long a period to permit of irresoluble deadlocks. Thirdly, I am persuaded by the thought that experience and practice, probably also tamed by revolutions

in science and technology, would introduce new forms of association which elude our contemporary imaginations. These could reduce the present discussion to the purely academic. We will probably be proved right for making the present system of exploitation interim in a long process. How can we be sure that in twenty years the developing countries of today will still be attracted to the unitary system of exploitation by the Authority alone or the industrializated countries of this decade wedded still to a parallel system or the form it takes in the present Draft Convention?

However, delegations see through peculiar political lenses and are usually afraid of what seems to be conjecture, no matter how convincing. So the issue still thrives on borrowed time.

You may thus understand why I would consider this to be a matter on which I cannot make any helpful statement at this stage. I do not even believe that the discussions here could do any more than underline existing perspectives -- but I would be in a very happy frame of mind to be proved wrong.

STATUS OF NATIONAL LIBERATION MOVEMENTS

This is a matter being dealt with in major part by the informal plenary meeting of the Conference.

The United States president indicated, inter alia, that the provisions relating to "the participation by and funding for national liberation movements" were unlikely to receive the advice and consent of that country's Senate. In spite of the years spent in this nation, I am not above owning that my expertise in the thinking and workings of the Senate is very limited. I shall consequently do no more than outline the main issue, as I see it.

Article 140 of the Draft Convention addresses the concept of "Benefit of Mankind," placing special emphasis on the imperative to meet the needs and interests of developing countries, "and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions" [17].

The contentious provision is that which I have quoted. The United States' concern is that the funds of the new Sea-bed Authority could be used to finance so-called violence in the struggle for freedom. This would especially be unacceptable in some specific cases.

The Conference has considered this issue in the light of the interests and needs of deprived peoples for economic and social development and there have been serious attempts to reassure some of our Western colleagues of this sphere of contemplation. Although no direct reference has been made, perhaps for reasons of political sensitivities, the application of article 140 (2) has been given specific importance.

Article 140 (2) decrees that "the Authority shall provide for equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate

mechanism, on a non-discriminatory basis, in accordance with article 160 paragraph 2 (f) (i)."

The relevant provisions of the said article 160 accords powers and functions to the Assembly to consider and approve, upon the recommendation of the Council, the rules, regulations and procedures for the equitable sharing of such financial and other economic benefits. It is important to note that the Assembly's decision would be based on the Council's recommendations. It cannot reject them outright, but must return them to the Council for reconsideration in the light of the view expressed by the Assembly.

As indicated earlier, article 161 prescribes a three-tier approach to the taking of decisions on matters of substance by the Council: two-thirds, three-fourths and consensus [18]. It will be observed that this subject is not among those listed directly. In those circumstances [19], such decisions as are not listed, but which the Council is authorized to take under the rules, regulations and procedures of the Authority, etc., shall be taken pursuant to a subparagraph to be determined by the majority required for questions under subparagraph (d) -- that is to say, by a consensus of members present and voting. Thus, the granting of benefits of any kind would require, in the final analysis, a consensus agreement in the Council. These provisions were introduced to reassure those who needed reassurances on this question. With regard to revenue sharing of payments or contributions made through the Authority by coastal states from exploitation of the continental shelf beyond 200 miles, article 82 (2) makes it clear that only States Parties may benefit. No mention is made to other peoples.

MANDATORY TRANSFER OF TECHNOLOGY

President Reagan was equally specific on the prohibition of what he termed "the mandatory transfer of private technology." It is one issue, he indicated, on which it was not likely that the Senate would give advice and consent.

Some years ago, I had the privilege of being a guest of honor at a Congressional luncheon in Washington. At that time, it was made clear to me, by members of the executive branch as well as by the distinguished members of the Senate, that a going concern was an alleged insistence on the part of developing countries that expensive technology should be transfered "free of charge." I tried to reassure them of the perspectives of the Group of 77 as I knew it: that is to say, that the Group did not want free transfer!

Two weeks later, I was to make clear in the Informal Composite Negotiating Text [20] what I believed to be the general feeling: technology transfer had to be made on "fair and reasonable terms" [21]. The obligation provided in Annex II arose only if the Authority had reason to request any such transfer.

What was involved was not the sensitive technology (proprietary data, designs, etc.) developed, but, in the words

of the Text, "an agreement to make available to the Enterprise under license the technology used or to be used by the applicant." Nowhere in the text is it stated that proprietary data must be handed to the Enterprise, or to developing countries.

I was also encouraged by my consultations with some members of the industry. Research and development were so cost intensive that there would be an obvious drive to get purchasers of the finished products in order to recuperate some of the expended capital. Besides, the costs prohibited the reservation of developed technology for the developers' sole use. Furthermore, the nature of the industry was such that no applicant would even need to purchase every technology to cover all phases of activities in the Area of the deep seabeds. No single company was undertaking to develop all aspects of the technology needed for activities in the Area. We were under the duty to ensure that both sides actually worked in the parallel system; the implications of the consensus involved was that both sides had the necessary machinery of operations. There appeared to be no practical, as opposed to ideological, problem.

These factors presented me with a dilemma in subsequent debates. If technology would be so readily available, why would the developing countries need a mandatory transfer to the Authority (Enterprise)? On the basis of the same data, why would the industrialized countries oppose mandatory transfer if in fact they were convinced that the provision may never be invoked?

The provision for transfer on "fair and reasonable terms" did not prove to have been enough. In later texts we were to build on illusory common grounds. The present Draft Convention introduced what was at the time of its issue a good basis for consensus -- better than the Informal Draft. What in fact was done through the years was to:

(a) emphasize the need to ensure that the Enterprise, like each contracting operator, is not deprived of access to technology through commercial conspiracy;
(b) give assurances that the commitment requested of the applicant would not be invoked unless and until the Enterprise finds itself unable to obtain the same or equally efficient and useful technology on the open market, and for that matter when requested it was to be given on fair and reasonable commercial terms;
(c) ensure, similarly, that the transfer involved was to be under license or other appropriate arrangement satisfactory to the parties concerned;
(d) ensure that the provisions for such transfer were for limited duration and confined to specific circumstances.

The present Draft Convention is the product of give and take between the opposing schools of thought. The common ground remained the need to make both sides of the parallel system work. The Enterprise is one of the principal actors in the

system. With all respect due to holders of contrary opinion, I must urge the rejection of the over-simplified assertion that struggle will be between the States and the Enterprise. States and the Enterprise (of which they would share membership) will have to face powerful non-members of the Authority -- the powerful, well-organized, more experienced, better-equipped multi-national corporations. These are in business to make a profit and, unless tied by terms of contract, all the ideals of benefit sharing, cooperation, and the like would not be worth the paper on which they are written.

While the multi-nationals have, we are told, various alternatives, the Enterprise will have only one fundamental mandate: to survive as an effective instrument by which mankind as a whole may expect to participate directly in activities in the Area of the deep seabeds. The Enterprise must survive, must not be stillborn, must be supplied the boots by the straps of which it is expected to survive.

It is not, as I see it, an issue of whether technology transfer should or should not be employed as a means of redressing the current imbalances and inequities in a world still dominated by the retrogressive theory of might is right. We are united at least by the need to ensure that an area in which we all recognize or should recognize the legal right to a "common heritage" is not made a fertile ground for the imperfections of the land space. What is more, we must face the fundamental truth that without the Enterprise as a viable actor, the system by which we seek fulfillment of common aspirations would present to us illusions of attainment by which we may be swallowed by disaster.

I believe that we can find common ground for further improving our attained consensus, bearing these truths in mind. We are not in reality addressing the obligations of States. We are designing the obligations of legal entities whose existence is best guaranteed by the attainment of international peace and security, with companies who must see (as most are) that their contribution to the activities in the seabed Area will enhance the profit they seek -- and more! It is for this reason that we must insist that these companies succeed side by side with the Enterprise!

It is not the lack of institutions or the creation of them that impedes the attainment of international peace and security; it is human nature and the complexity of illusions.

NOTES

1. United Nations General Assembly Resolution 2749 (XXV) adopted 17 December 1970.
2. Section 2 of the Draft Convention on the Law of the Sea. Conference document A/CONF.62/L/78.
3. Section 3 of the Draft Convention.

4. Ibid.
5. Only the United Kingdom abstained; all other votes, including those of all other industrialized countries, were affirmative.
6. There appears to be broadly based opinion that its content is declaratory of generally accepted principles and norms of international law, enjoying universal recognition.
7. UNCLOS Document A/CONF.62/C.1/L.16 of 5 September 1975.
8. UNCLOS Document A/CONF.62/WP.8/Part I of 7 May, 1975.
9. Fourth Preambular paragraph. Operative paragraph 7 defines the scope of application, giving a desirable discriminatory consideration to meet the interests and needs of developing countries.
10. Operative Paragraph 9.
11. Sixth Preambular paragraph.
12. Informal Single Negotiating Text (1975).
13. Notably in article 153 and Annex III.
14. Article 162 (2) (j) ensures that the Council would reject such recommendation only on a consensus of its membership.
15. Article 4 of Annex III.
16. See Conference documents A/CONF.62/L.62 and its annex document A/CONF.62/C.1/L.28.
17. Art. 140 (1).
18. Paragraph 7.
19. See paragraph 7 (f) of article 161.
20. Document A/CONF.62/WP10 of 15 July 1977.
21. Annex II Paragraph 5 (j) (iv).

THE DEEP SEABED MINING CONTROVERSY: A REJOINDER

Leigh S. Ratiner
Counselor to the Chairman of the U.S. Delegation
to the U.N. Law of the Sea Convention

My commendations to Ambassador Engo for his eloquent explanation of the Draft Convention as we find it now. I think perhaps the most important observation I can make since I'm not in a position to take issue with his statement is simply to reassure you that there are two sides to this story. I will not even attempt in the short time available to me to tell you what the other side is but only to make some relatively brief observations about the Convention.

In an earlier period of time when I was in private practice, I did have occasion to spend a great deal of time on Capitol Hill on behalf of many different interests, both corporate and developing countries'. In that period, while waiting out the Carter Administration, I noticed that the Law of the Sea Treaty, as it was emerging in January, 1977, was in my professional judgment, as a Washington lobbyist and someone close to the Senate Foreign Relations Committee, a totally unratifiable treaty in the United States. Needless to say, that was not just an option which I held and kept to myself. I informed every responsible American government official in these negotiations of my judgment. I do not want to put too much emphasis on my judgment, but there were very few people in those years who knew both the law of the sea and the Senate and the Senate staff and the House of Representatives and their staffs' opinions more closely than I did. As my colleagues at this table know, I did have occasion during that same period to lobby against and attempt to defeat American signature of a treaty on the moon and other celestial bodies which would have created a common heritage of mankind regime for those resources as well as the ones that were affected by the Law of the Sea Treaty. I noticed Ambassador Engo's reference to the Declaration of Principles which began this process and I think it's important to observe that when the United States agreed to the Declaration of Principles every delegate at the Law of the Sea Conference knew that we did so in an effort to begin the negotiation of the Law of the Sea Treaty. We did not accept any preconceived or predetermined definition of the term "common heritage of mankind." It was always understood that the American government's position was that the term "common heritage of mankind" could only be defined, legally defined, by a comprehensive treaty to which the United States was a party. The derivative argumentation that "common heritage" has a certain preset meaning and therefore many things in the Draft Convention must, per force, flow from that interpretation is a dominant view. It has created perhaps the most difficult negotiating baggage for all American negotiators since the start of the Conference. I suppose, in short, I should say it was a

tragic mistake for the United States to have accepted the Declaration of Principles if it were going to be forced to accept as well a definition that it clearly did not accept at the time.

The short of it is that the Declaration of Principles contains no definition of the "common heritage of mankind" and none could have been negotiated at the time the Declaration was negotiated. Everyone knew that the definition would be the treaty on the law of the sea. So it does us very little good to argue that the treaty should take a certain shape because we all agreed to the Declaration of Principles. The principle, for example, in the Declaration which Ambassador Engo referred to at some length on protecting the developing countries from adverse consequences which result from seabed production, I would like to note, was not even operative language in the Declaration of Principles. It was a preambular paragraph and was never accepted by the United States as a principle for the guidance of the treaty negotiations which have taken place over a twelve-year period since the Declaration of Principles was first adopted.

One of the reasons that it is not useful for me, aside from the shortage of time, to try to show you the other side of the picture on each of the points that Ambassador Engo has referred to is because some fundamental political facts have changed in the past twelve months. The American people brought to Washington a new administration which had a somewhat different historical perspective, and perhaps more accurately a different view of where the United States should be going in world affairs. In many respects the Reagan Administration observed the Law of the Sea Conference as one of the patterns of behavior of the United States in preceding years which gave it cause for some alarm. The things that had already been agreed to by United States delegations before were viewed as leading the United States in a direction in multilateral diplomacy which would be harmful to its interests unless that direction was reversed. The new administration was quite well aware that previous administrations over a long period of years had worked with great diligence at the Law of the Sea Conference and that a number of compromises had been made during that period of time.

It was therefore with some pain that the Administration decided that it was essential for the United States to stop the progress of that Conference in the interests of insuring that it did not go in a direction which would again mislead other nations into thinking that this treaty could be ratified by the United States Senate.

The Administration also was mindful of the fact that previous negotiators had been Republicans. But I must say to my good friend Paul Engo that being a Republican can mean many things. The Reagan Administration is what we have to contend with and not Henry Kissinger Republicanism or John Stevenson Republicanism or indeed any other individual's Republicanism. The Reagan Administration took office, you will recall, on the day the Iranian government released the American hostages in

Teheran -- an event reflecting an increasing bitterness and resentment in the United States toward the phenomenon (I don't like the use of the following term but nevertheless it's quick and short and expressive) of being kicked around in the world. The United States has not liked this phenomenon and that is part, certainly not all, of the reason that President Reagan was elected.

The Draft Convention was interpreted by many people who came into the Administration at high, low, and middle levels of government as really kicking the United States in the teeth. There are ways of defending that Convention but these people started from the following perspective. The United States consumes about 25 percent of the world's raw materials. It contributes about 25 percent of the United Nations budget. It is called by all nations, and it believes itself to be, a great nation. Yet, when these people read this Draft Convention they discovered, for example, that the Convention could be amended at any time by a two-thirds vote of all countries and that the United States would be bound to those amendments after a certain period of time had elapsed for a review conference, and that the United States would have no voice in fundamental changes to a treaty which is purporting to regulate global access to the resources of almost two-thirds of the globe. That provision, to someone coming from the perspective I just described, turned out to be so offensive that it is clear that on that issue alone the treaty could not be ratified in the United States if it were presented in its present form.

With respect to the Executive Council of the Sea-bed Authority, Americans were not pleased to see that the socialist group of countries were guaranteed seats, regardless of whether they were industrialized countries, regardless of whether they were consumers of minerals, regardless of whether they produced minerals from the seabed or did not produce from the seabed. Three of the thirty-six seats on the Executive Council of the Sea-bed Authority were guaranteed to the socialist group.

None were guaranteed to the United States; none were guaranteed to its western industrialized allies; there are arguments that can be made that the United States should be more sophisticated in its reading of the Draft Convention and those arguments do not fall on deaf ears except in certain quarters in Washington which decide whether to ratify the treaty.

With respect to the taking of decisions in the Council, the United States well understands that the developing countries do not want to recreate the Security Council of the United Nations or any other system which gives such a powerful voice to such a small number of countries. Moreover, the United States is not proposing in these resumed negotiations a system like the U.N. Security Council. But the United States today feels quite strongly that a system which is devised to regulate the resources of almost two-thirds of the earth's surface ought to reflect the fact that one of the players in that international organization does consume 25 percent of the world's raw materials and does make a 25 percent contribution, not only to

the creation of the International Sea-Bed Authority but to the very international mining company with which its companies are expected to compete under this draft treaty -- the so-called Enterprise. The United States' taxpayers would guarantee 25 percent of the Enterprise's credit so that the Enterprise could compete with American mining companies who are trying to extract or develop these resources for world markets. These are facts. This is not an interpretation of the treaty. This is what the treaty plainly states.

There is nothing in the Draft Convention, I stress, nothing which guarantees the United States of America, if it produced a qualified applicant as defined by the treaty, access for the development of the relevant seabed resource. In that connection let me point to a simple economic fact. The best thinking available both in our government and in the private industry with respect to a commodity called manganese, found in manganese nodules in abundance, is that after approximately the years 1990-2000 most of the world's manganese ore will be found in South Africa and in the Soviet Union. Steel cannot be made without manganese. If this is true, and I have no reason to doubt the figures of both the government and the industry on those occasions when they coincide, then one has to give some credence to a view in the United States Senate that it would be foolhardy to put American access to the very raw material necessary to its future capacity to make steel at the disposal of an organization in which, first of all, the United States is not terribly influential, and, second of all, the most influential participants are the countries which produce the very same raw materials on their land and are therefore not anxious to see a new independent and secure source of supply for the same raw materials.

One cannot blame these land-based producing countries for wanting to protect their economies and in some cases their stranglehold over western industrialized countries. That is normal, natural, and expected. I assume the United States would do the same thing if it had that stranglehold over those resources. But it is very difficult to see how an administration concerned with the future well-being and economic development of the United States would willingly put it back into that hangman's noose. This is particularly so after American experience with the cartelization of oil and how that cartel has dramatically changed our economy, and indeed the economies of many developing countries.

So I only point out that there is an American perspective born of experience, born of national interest, born of the desire to protect our economy and our future, which says we think we should have a bigger voice in the way in which this new global institution makes decisions than the voice that has been granted so far in the Draft Convention.

Let me mention briefly the issue of production limitations and production policies. Production controls serve a particular philosophy and a particular interest. The philosophy is what Paul Engo referred to as balanced growth of the world economy.

But that also means that someone other than the marketplace ought to decide from where the resources come so that countries who produce those resources do not have their access to world markets for those resources reduced. Thus if I were the representative of a country which produced large amounts of nickel, copper, cobalt, or manganese -- the principal four metals in manganese nodules -- I would certainly negotiate vigorously to insure that the seabed was viewed as a balanced or perhaps complementary source of raw materials so as to protect my own ability to export those same commodities to world markets. This is the interest which necessarily accompanies the philosophy.

The Reagan Administration, however, is not anxious to see limitations on production of raw materials which we consume. There is a tendency, proven by most economists, for raw materials, when production is limited, to rise in price. It is not in the interests of the United States to see either a significant rise in the price of these raw materials as a result of limitations of production nor is it in the interest of the United States from its particular economic and philosophical perspective to see a central government which plans the development of these resources. We are now witnessing an administration that would like to try to remove the government from as many areas of industrial and commercial activity as possible in order to let market forces dictate how the world's economy will be supplied and by whom. I understand that this is a particular perspective and particular philosophy of a particular administration. But it is also an administration which is in power for the foreseeable future and which can cooperate to produce a Law of the Sea Treaty which all nations can accept or which can make it impossible to have a consensus in the law of the sea. I am also aware that these treaty articles we are dealing with can be adopted by a vote at the United Nations -- indeed that vote could occur in perhaps four and one-half to five weeks under the schedule adopted by the United Nations General Assembly. Moreover, it is possible for a treaty to be open for signature, to be signed by many nations, and eventually to enter into force and to claim the right to control and regulate these resources -- even if the United States remains outside the treaty regime. Scholars, many of whom are present today, can long speculate about the legal utility of a treaty which purports to regulate all of ocean space with respect to the resources of the seabed, if a major nation remains outside the treaty regime.

I know that the United States government at its highest levels does not want to remain outside the treaty regime. But I also know that the President feels strongly that the six objectives referred to by Ambassador Malone and elaborated by him this morning are thought by the President to be his minimum needs to join the Law of the Sea Treaty and to become an active supporter in the Senate of its ratification.

I will close with just a couple of political observations. First, President Reagan is probably the first president who has

had responsibility for the law of the sea negotiations who could get this treaty ratified. We have not before been in a situation where the President had as much influence in the Senate with respect to a subject like this one as to be able to predict that he, if he actively supports this treaty, could get it ratified. This was not true in previous administrations.

Second, I think it is extremely unlikely, if the United States remains outside the Law of the Sea Treaty, that our Western allies from the industrialized countries will join in the treaty. I want to emphasize that none of those countries has made any statement to that effect and that this is a matter of personal conjecture based on my own view of world politics and my own personal knowledge of how industrialized countries tend to behave.

I also think that if the Western European industrialized countries and Japan should decide to stay out of the treaty if the United States does, it is very unlikely that the Soviet Union will be willing to join the treaty if for no other reason than that the first opening operations of the Sea-bed Authority and the Enterprise will cost between half a billion and a billion dollars to the Soviet Union if it did not have Western Europe, Japan and the United States to join in the treaty with it. This is a fact which will not be lost on the Treasury Department counterpart in Moscow.

I think that a treaty which is adopted without the participation of the countries that I have just mentioned would be a treaty which served no interest and would serve no country's interest. Surely there would be no production controls in such a treaty, for example. It wouldn't be possible to control production if major producers stayed outside the treaty. It would not be a treaty in my judgment that served the interests of the United States either. I think that a comprehensive treaty on the law of the sea is a far better solution to ocean problems than for the United States to unilaterally formulate ocean policies and I hope that the situation doesn't arise where that occurs. But, I do think we are witnessing an administration which is quite principled, quite strong, and quite anxious to protect its national interests. While the President has indicated the desire to use creativity, imagination, and flexibility in the final negotiation of this treaty, and expects his negotiators to do so with great vigor, he is expecting his negotiators as well to deliver a result which he finds acceptable from a national interest point of view and which he thinks the Senate will be willing to ratify.

THE RESPONSE OF THE GROUP OF 77

Ambassador Alvaro De Soto
Ministro Consejiero
Permanent Mission of Peru to the U.N.

As I was about to leave the U.N. to catch my plane to come here yesterday, a gentleman from the press handed me a clipping from the Washington Post of yesterday with an Op Ed article by James J. Kilpatrick. The title of the article is "The Hell with the Law of the Sea." I don't want to give the impression that this is going to set the tone of whatever I am going to say here, but it certainly did help as a sort of a prologue to some of the things I have heard here today and that I have been hearing in the air for the last year or so.

I disagree with the U.S. position that there is no agreed definition of the concept of the common heritage of mankind which the Declaration of Principles enshrines. Had the Declaration of Principles limited itself to a bald statement that the resources of the seabed beyond the limits of national jurisdiction constitute the common heritage of mankind, I could perhaps agree that it was from then on the role of the international community through the Law of the Sea Conference to fill in the blanks and lay down the definition. However, the Declaration of Principles did say more and I think it did contain concepts and notions which, put together, constitute a definition of the common heritage of mankind principle. Regardless, it definitely meant that the deep seabed and its resources should be reserved exclusively for peaceful purposes, that mankind as a whole should be able to benefit from any activities to be carried out in the seabed, that States should jointly participate in administration of the resources of the seabed, that no one state should unilaterally appropriate the resources of the seabed or the Area, and that no state should exercise sovereignty.

It is true that the idea that seabed activities should be carried out in such a way so as to harmonize with stable growth in the world economy and so as to protect existing land-based producers of minerals is only contained in a preambular paragraph of the Declaration. But one should not underestimate the importance or the value of a preambular paragraph because such paragraphs can also be interpreted as starting points. This is especially so in a declaration which does not have an operative character but rather has the character of declaring what the regime is or the set of principles are to govern a particular activity. I think that gives this preamble a different character in legal terms from the sort of interpretation one normally gives to preambular paragraphs in other types of instruments.

Furthermore, one must take note of the context of this debate and take note of the origins of this negotiation which has lasted in fact 14 years. We have negotiated on the basis of

a package deal in which certain central compromises have involved states making tradeoffs in their interest. In such a context, you cannot simply pick and choose the elements that you like. Instead, states are obliged, after following an introspective process where they revise and examine their own balance of interests, to take the good with the bad and the valuable with the merely tolerable.

The position of the Group of 77 starts from the Declaration of Principles. We in the Group of 77 feel that to exploit the deep seabed in the best way is to exploit it consistent with the principle of the common heritage of mankind. Such a regime would properly translate in operative terms the notion that we should all have a share, a cooperative share, in this enterprise to create an international seabed authority which, on behalf of all mankind, will be exclusively empowered to exploit the seabed, availing itself as it sees fit of the services of, or in joint ventures with, those who already possess the technology and the capital necessary. This reflects the proposals originally put forward by members of the Group of 77 in the early part of the 1970s.

We felt that this was the authentic way, the community method of being true to the principles and of simultaneously reflecting everyone's interests. It was obvious to the Group of 77 that, if there was a general interest in exploiting the seabed in a way harmonious with existing activities which are related to the seabed, this was the way to do it. The proposal envisioned setting up a governing scheme, an Authority, having an assembly which would be composed of all of the members, (i.e., all the parties to the Convention) and which would be the body which would articulate the policy of the Authority. The policies of the Authority would be executed by a Council. The actual carrying out of the activity of mining would be accomplished by setting up and operating a community effort, the Enterprise. The Enterprise would be able to enter into ventures or contracts with those possessing the necessary technology and capital.

The proposals have changed a great deal since then. The industrialized countries strongly resisted the idea that the Authority should have the virtual monopoly which we would have liked it to have. They also strongly resisted the idea that the Assembly should be the prevalent organ for the articulation of policy. They strongly resisted many other aspects of the proposals of the Group of 77.

In 1976, then Secretary of State Kissinger put forward a proposal for a compromise which he referred to as the parallel system which is a term that I myself have never liked and which allowed for mining to be carried out both by the Authority and by operators sponsored by member States.

To insure that the activities to be carried out by the Authority would not be hampered by the fact that this Enterprise to be set up by the Authority did not have initially the pioneering technology, the operators and States backing them would help in providing the Authority financing and the

necessary technology on fair and reasonable terms. It was also accepted in Secretary Kissinger's compromise that this system, set up as a compromise, should be reviewable after a given period of time so as to determine whether it was actually functioning in a manner satisfactory to all and in light of the principles established in the Declaration of 1970. The idea was also put forward in this compromise that adequate provisions should be made so that the production from seabeds should be gradually phased-in in such a way as to not inadequately or unfairly affect the economies of developing countries which are producers of the same minerals which are to be extracted from the seabed.

The details of this system, which is referred to by some as the parallel system, were negotiated from 1976 through 1980. In the summer of 1980, we found ourselves poised on the verge of reaching a final agreement and there was a considerable likelihood that the Convention could have been adopted at that time. The rest is history. The United States withdrew from negotiations to review its position. During the year that followed we awaited a policy decision on the part of the United States containing the conclusions of its review of the law of the sea issues. These have been explained in Ambassador Malone's statement.

The statement is of course not a full articulation of a position on the part of the United States. Ambassador Malone writes that it is essentially an indicative posture and an iteration of conditions to be fulfilled prior to acceptance of the Convention. The statement is not the final instructions for the U.S. delegation at the Spring 1982 session of the Conference. However, if it does presage in any way what is to be the position of the United States delegation, my impression prima facie is that it will not only cause a considerable difficulty, but that there is some question as to whether the Group of 77, judging from the positions it has taken in the light of fairly similar statements by the U.S. delegation during the course of the last year, will agree to engage in any negotiations on the basis of the agenda implicit in the outline given. The Group of 77 made it very clear in the course of last year that it would not and could not accept a major overhaul of the system negotiated from 1976 through 1980. The Malone statement would seem to contain a radical and profound questioning, not only of every one of the aspects of the package referred to earlier -- that is the parallel system, transfer of technology, financing of the Enterprise, production control, the review conference and the machinery for decision-making (that is to say, everything) -- but it would seem also to go even further back by putting into question the very scope of applicability of the regime for the seabed as conceived in the Declaration of Principles, which stated very clearly that the Area and its resources constitute the common heritage of mankind. Now the Area is only the area beyond national jurisdiction. Likewise, "resources" are all the resources without distinction. However, Ambassador Malone points to polymetallic sulfides and

the need to insure freedom of exploitation of any resources other than manganese nodules even if international rules and regulations for the exploitation of such other resources have not been drawn up. Coupled with the sort of input into rule-making that the United States would like to have in the Convention -- that is, to impose any rule that it wants and to block any rule that it does not want -- these considerations, put together, would mean that in fact the seabed regime would never have any authority whatever on any resource other than manganese nodules. Personally, I conclude that polymetallic sulfides are within the Area which is known as the common heritage of mankind and which lies beyond national jurisdiction. If they were within national jurisdiction, that would be another matter.

The United States has often expressed its desire to avoid vulnerability to a cartelization of mineral producers, analogous to that achieved by petroleum producers in 1973 and 1974. As a veteran of a few years of having done everything within my power to try to set up a cartel on copper, I do not find such fears justified. In trying to set up a copper cartel for the last few years, I assure you, it just can't be done. Furthermore, I really doubt whether it can be done for nickel, or manganese, or cobalt or any other deep seabed minerals. There is simply not the concentration of production among the right producers. Too many of these minerals are being produced by the developed countries, and they are not as widely needed as is petroleum. Thus this fear is a phantom which can just be blown away with ease.

Ambassador Malone has stated that he received some indications recently of fairly positive reactions to the decision of the United States to rejoin the negotiation and to some of the requests that are being made for changes in Part XI of the Convention regarding the seabed. He certainly did not get a positive reaction from me or the Group of 77. I'm not sure who he spoke to, but I frankly see very little grounds for optimism.

To the contrary, I have heard speculation, which I do not want to believe under any circumstances, that the decision to rejoin the negotiations under the terms set forth by Ambassador Malone in fact reflects a decision not to seriously rejoin in the negotiations because the U.S. government must be aware that those terms and the agenda for renegotiation implicit in those terms (probably requiring an additional four or five years of negotiation as we all draw very close to the initiation of granting exploitation permits under the U.S. unilateral legislation) is simply not a viable proposition. The position is not realistic under the existing realities in the Law of the Sea Conference.

If the U.S. is aware of this, is the U.S. really moved by the fear that in fact the Convention might not only be adopted without it, but that it might be adopted with the participation of western Europeans, the Japanese and the Soviet Union? That fear I can easily understand because I think that fear is not

completely unrealistic. If the U.S. were to stay out of the Law of the Sea Convention, there are grounds for believing that miners presently acting under U.S. jurisdiction might wish to seek protection under perhaps more accommodating flags which do participate in the Law of the Sea Treaty, and I can easily understand that the U.S. government would not like this to happen, even though this, of course, would be merely a manifestation of free-market forces at play.

There have been attempts, unsuccessful so far, to set up what is known as a reciprocating states arrangement or a mini-treaty of some sorts among those four states that have adopted unilateral legislation of the seabed. This is something of an irritant to the negotiations. It is not helpful because it is, regardless of whether it so intended, an attempt to preempt the negotiations of the Law of the Sea Conference or to in fact provide a substitute Convention. Such an arrangement between those few states won't have much legal or practical impact. I doubt whether any bank in its right mind would invest in seabed mining outside of the Law of the Sea Convention if that Convention is adopted by the Conference in accordance with its rules of procedure.

The spirit of the agreement of the Law of the Sea Conference on its rules of procedures reaching back to 1973 has been, in accordance with the notion of the package deal and the whole basic tension underlying the premises of the negotiations, that this Convention should be adopted by a consensus in order to ensure that all states were party to it and that all interests were more or less adequately reflected.

Although I have not been given any mandate, I am sure that I can speak for the Group of 77 when I say that they would very much want the U.S. to be a party to the Law of the Sea Convention. I choose my words carefully. They would want the United States to be a party to the Convention. There are many ways of becoming a party to the Convention. One can sign it and ratify it and one can accede to it. It is not necessary to be one of the original signatories of the Convention in order to become a party to it. It is not a closed convention. It is what we call, at least in my country, in our system of teaching international law, an open convention. So if a convention were to be adopted now and any state, whether it be the United States or any other, did not feel it could participate, it could have that possibility. I hope that it would feel encouraged to join later on. I hope that we will not be in that position. I hope that we could all introspect somewhat and consider the fact that, although national interests and their pursuit are a laudable and legitimate exercise, to live in the community of nations, one must compromise. In my own country, considerable pain is being undergone by many people who feel that we are selling out on some of our own basic notions regarding the law of the sea if we accept the Convention. My government is making vigorous efforts, having considered the overall interests engaged and the compromises made, to convince those who have doubts that this treaty is a beneficial one. My government has

concluded that it is preferable to engage in this effort so long as all others also make compromises. I hope that we all can consider that possibility.

THE CANADIAN PERSPECTIVE

Ambassador J. Alan Beesley, Q.C. (Canada)
Chairman, The Drafting Committee, and
Canadian Ambassador to the Third U.N. Conference
on the Law of the Sea

Representing the Canadian perspective, I quote from the Secretary of State for External Affairs, the Honorable Mark McGuiggan, who made a lengthy reference to the Law of the Sea Conference in his statement to the 36th General Assembly on September 21, 1981:

> I wish to emphasize that the Conference is not merely an attempt to codify technical rules of law. It is a resource conference. It is a food conference. It is an environmental conference. It is an energy conference. It is a conservation conference. It is an economic conference. It is a transportation and freedom of navigation conference. It is a maritime boundary delimitation conference. It is a scientific research and transfer of technology conference. It is a conference which can have tremendous implications for East-West relations. It is fundamentally a conference on peace and security.

In his closing comments, he stated that this Conference compares in importance to the founding conference of the United Nations in San Francisco. So perhaps it is appropriate in this time and place to emphasize that this is the kind of priority and importance the Canadian government attaches, not to the Conference as an end in itself, but to the Convention that it is trying to achieve, and which we have succeeded in achieving.

Some of the factors involved in the Canadian stance are set out in an article I wrote some ten years ago [1]. Anyone who would read it would not be surprised at the policies Canada has pursued in this Conference because we have made them known from the outset. We declared what our objectives were and we sought to achieve those objectives in the negotiations within the Conference. Furthermore, anyone reviewing the history of the negotiations would be unable to draw any conclusion except that this Conference has made tremendous progress. It has settled many issues which, in 1972, seemed virtually insoluble.

Given the chaotic state of the law of the sea when we began, if one could call it law at that time, I often wonder if I have dropped onto the wrong planet when I hear the present uncompromising positions concerning the Convention. The international community has negotiated a treaty consisting of some 500 articles including the annexes, every article of which has been very painstakingly negotiated. Moreover, in passing, I note that the U.S. delegation has consistently adopted a constructive problem-solving approach throughout this

Conference. The United States has never simply walked away from an issue at the Conference. The United States has never simply adopted a stonewall approach, which other great powers have done. Some nations have been dragged kicking and screaming to the compromises we hammered out. The United States, however, has been willing to accept compromises which have not been perfect from the U.S. point of view but which did satisfy the fundamental range of U.S. interests.

The first comment I wish to make is that it is understandable to the Conference committees that governments come and go in any democratic country and even in some not-so-democratic countries. But the national interests of such countries do not change radically over a period of weeks or months or even years. However, perceptions of the national interest change and I think that's part of the problem the Conference now faces. Within the Reagan Administration there is a new perception of the U.S. interest and this new perception is very difficult for the allies and friends of the United States to accept. I include the term "friends" because you would be surprised at how many friends the United States has in this Conference. Well over 150 nations very much want the U.S. to be party to this Convention. I know of no state that is indifferent or that would want the United States out of the Conference.

Although we are all collaborating with the United States delegation, we've constantly been reminded of the Congressional imperative: that is, the threat that the U.S. Senate will not give its advice and consent to the Law of the Sea Treaty. The reference by the Reagan Administration to the need for the advice and consent of the Senate is not the first time we have heard of this possible threat to the Convention. Leigh Ratiner himself has spoken very persuasively and honestly on this subject today and has given us his own personal impression of Congressional relations in early 1977. Yet, maybe even he wasn't aware of the effort to keep Congress informed. I refer to one example.

On June 29, 1977, Congressman Fraser hosted a luncheon of House and Senate members at which both Ambassador Engo and I made speeches at least as lengthy as the ones we are making today. Following this, Congressman McCloskey introduced into the Congressional Record on July 14, 1977, Ambassador Engo's statement, on his own behalf and on behalf of Ben Gillman. My statement was introduced into the Congressional Record in the House of Representatives on July 20, 1977, and at a later date in the Senate. Mr. Fraser's introduction to my own statement furthermore points out that Ambassador Richardson would be reporting to the International Relations Committee on July 25, 1977. This is only my perspective, of course, but it illustrates that there was an intent and an effort to insure that influential members of Congress and staffers were kept informed. The fact that a new U.S. administration has adopted a different position from the preceding administration is, of course, a separate issue.

But, in any event, 1980 is not so very long ago. The U.S. position was formalized then to some extent by the passage of the Deep Seabed Hard Minerals Resources Act and, despite some changes in Congress, I note that the Act itself specifically acknowledges the commitment of the United States to the 1970 Declaration of Principles referred to by several speakers. Sections 2a, 3, and 4 of the 1980 Act state that, on September 17, 1970, the United States supported by affirmative vote the United Nations General Assembly resolution declaring inter alia the principle that the natural resources of the deep seabed are the common heritage of mankind.

My comments are not intended as a reply to what Leigh Ratiner has stated. On the contrary, they are an attempt to show the dilemma in which Canada finds itself at this stage. The Canadian government is sympathetic to the aspirations of the developing countries yet very responsive to the needs of the United States. It is not an easy situation to face. It is one that could easily lead to a very gloomy view of what we might expect out of this Conference. I hope we will not find such a gloomy view, but it would be foolish to suggest that renegotiation of the Convention is going to be an easy road -- it simply is not.

Former U.S. Secretary of State Henry Kissinger helped create the confusion in which we now find ourselves. In September of 1976 Mr. Kissinger stated to a reception for the heads of the delegations to the Conference that the United States would be prepared to agree to rules of financing the Enterprise in such a manner so that the Enterprise could begin its model operation either concurrently with the mining states or private enterprises or within an agreed time span that was practically concurrent. This would include agreed provisions for the transfer of technology so that the existing advantage of certain industrial states could be equalized over a period of time.

Life goes on, and situations change. Perhaps Mr. Kissinger doesn't have quite the influence that he once had, although it seems to be reemerging. But be that as it may, delegates negotiating from 150 states operated on the assumption that this was the U.S. national interest which should be taken into account.

Again, in a later address in 1979, Henry Kissinger stated that "the United States is prepared to accept a temporary limitation for a time period fixed in the treaty on production of seabed minerals tied to the projected growth and the world nickel market." Thus this troublesome and controversial issue of the nickel production didn't emanate from Canada or other land-based producers, but rather from a highly placed source within the United States.

With regard to Conference preparation and negotiation, I would also like to make a few points. It is incorrect to think that the Conference has only diplomats and that the diplomats have been left to their political devices to the detriment of the countries they represent and the technical issues they

address. The Canadian delegation is packed with technical experts. A multidisciplinary approach is reflected in this Conference in many delegations, especially those from developing countries. Let me offer Zimbabwe as one example. Following independence, Zimbabwe sent technical delegates who knew exactly what the issues were and who went on to defend Zimbabwe's interests very effectively. They were experts, they were not diplomats. For Zimbabwe, they were mineral experts. In the Canadian case, the rapporteur of our delegation was part of the very first seabed negotiations and is involved today as well. Without him I couldn't understand the other technical people in the delegation quite simply because he has to interpret.

I can't answer all the criticisms made of the treaty in a brief exposition. However, I can attempt to meet the deep seabed criticisms where some very fundamental issues are at stake. The fundamental issues go beyond the metal industry of any country or the immediate foreseeable need for strategic materials because the moral aspects of this scenario include, for example, the fact that in Canada, our major mines are operating at sixty percent capacity because of the overproduction elsewhere of minerals that are apparently about to run out any day now. In visiting a company's mining sites in Thompson, Canada, I went down 7,000 feet and found to my surprise that the deeper we went, the richer the ore became. However, production is so slow that they seem to be barely getting to that level even though the mine has been around for sixty or seventy years. What I found is of even greater significance because that same company has also closed up its mining operations in Guatemala. Is that hurting Canada or is it hurting Guatemala? It really hurts both, obviously. The same company has cut back substantially in its operations in Indonesia and thus we're talking about real national interest here, not pure questions of ideology.

If we're talking about a free market economy, how did this group of free marketeers ever produce this cartel called the mini-treaty? I cannot reconcile the concepts that I hear from this new U.S. orthodoxy for this sudden urgent negotiation of a mini-treaty during the very period when everyone is supposed to be in a production holding pattern. The mini-treaty at the time of this writing was evidently ready to be signed by the U.S., Germany, U.K. and France. It has not been signed as far as I know, thank God. In my view, the mini-treaty tends to preempt many of the fundamental purposes of this Convention which has been negotiated for fourteen years. It allocates mine sites for exploratory purposes only, but such mine sites are to be guaranteed in any comprehensive treaty also. It even establishes arbitration procedures. I'd be interested to know if it places the tribunal in Hamburg as the Convention does. I at least urge that potential parties to the mini-treaty should heed the advice of others that any signature should be delayed so as to give the Conference a chance to finish.

In closing, I quote from another high authority within Canada, Prime Minister Trudeau, who, when speaking on occasion of receiving the Family of Man Award, stated:

So long as the nation state continues to exist as an entity, obsolete though it will seem, and so long as nation-states remain a key element in the way in which the world is organized, then the integrity of the nation-states must be nurtured and safeguarded. But massed tightly on the planet as we are, a world of selfish and agressive nation-states will not work. We have seen the results too often before. The essential counterpoint of the world being of individual nations is willingness to acknowledge a new concept of sharing -- sharing of power, sharing of resources, sharing of responsibilities.

We need to develop an equilibrium of national and international goals. We shall have to develop a new alertness to the impact of single actions on the common good. I wonder if there is anything that's more relevant than that on the economic situation of the world today. We need to assure that the international economic system and its institutions reflect the political and economic realities of today and tomorrow, not yesterday. It is necessary to integrate new factors into the equations of interdependence and cure the misperception that more power entails more responsibility. It is necessary to identify those vital sectors for cooperation which impel an international approach. It is necessary to recognize that many nations will be making decisions about their own economies designed to enhance their self-reliance and thus their ability to make a more effective contribution to the international system. We must extend the profound and wholehearted understanding to countries which find themselves overwhelmed by dependencies. In our efforts to assist others, we must recognize that few countries in the Third World are as blessed with resources, stability and sheer physical space as we were in the early stages of our development in North America.

And in a place that knew something of the Gold Rush, that is a very appropriate comment. He concluded with the following and I conclude with it also:

I urge that we address with new vigor fundamental questions of the environment. The biosphere which envelopes and nourishes us is an inheritance which we dare not squander. The earth, the air, the lakes and seas all claim respect from the hand of man and should receive the dedicated attention of bilateral and international negotiators. The work of the Law of the Sea Conference should not be lost. It is vital, not only to the national interest, but to international equity and stability.

NOTES

1. Beesley, J. A., International Perspectives, July-August, 1972.

A VIEW FROM CONGRESS

Congressman Paul N. McCloskey, Jr.
Republican from California
U.S. House of Representatives

My perspective on the law of the sea is a political one. I can add nothing to the interpretation of the technical language of the Convention or to the nuances of the diplomacy involved. I have watched Ambassador Zuleta, Ambassador Engo, Ambassador de Soto, Ambassador Beesley, and Professor Bernard Oxman of our own delegation cope with these problems over the past eight years, and I have immense respect for them. However, as a politician I look at what ultimately will occur in the United States Senate, at what has always disturbed the United States delegation and the delegations of other countries, at whether in the last analysis the United States Senate would actually give its advice and consent to a law of the sea treaty.

I have great personal hope that a treaty can be negotiated and ratified. In my judgment, to have a treaty that would determine the seaward limits of maritime zones under international law would alone be worth having, because I can recall in my lifetime four specific incidents where differences between the U.S. and other nations over the limits of the territorial sea nearly led to war. I refer to the case of the U.S.S. Pueblo, where we sent a ship within what we deemed to be high seas but which was deemed by North Korea to be its territorial sea; the case of the Turner Joy and the Maddox which led to the Gulf of Tonkin Resolution and to U.S. involvement in Viet Nam; and the case of the Mayaguez, where we got into a shooting incident with the Cambodians. Most recent was the case of the two Libyan aircraft shot down within what Libya claimed to be its territorial sea, a claim which the United States denied.

Clearly, in a dangerous world it would be of incredible benefit to all if nations of the world were guaranteed by law of their rights in the passage of straits, in overflight by aircraft, and in undersea transit by submarines. The world grows increasingly dangerous; yet if we could extend international law over two-thirds of the earth's surface it would be an immense achievement, an immense step toward world peace under world law, a goal to which all of us should be dedicated.

But ultimately the test will come in the United States Senate and in whether the Reagan Administration can seek and support ratification. It has been only in the last month, February, 1982, that those of us in Congress who have observed this administration have had before us the Administration's proposals. Furthermore, I say to my friends here from the other nations involved that I was tremendously concerned that this administration would decide to scuttle the treaty entirely. If you observed the emergence of the American Mining Congress's

position in the summer of 1981, there was an expression of hope that Candidate Reagan could be prevailed upon for a commitment to end U.S. involvement in the Conference. People of that persuasion were successful in writing into the Republican platform and the President's campaign platform what amounted to a commitment to scuttle the treaty unless significant changes were made. Yet it appeared that the Reagan Administration had not paid significant attention to what its negotiating policy should be, either during the transition from President Reagan's election in November, 1980, to his accession to office in January, 1981, or after his inauguration until the Tenth Session of the Conference was to commence in March, 1981. I and other members of the Congress who had followed the Conference were somewhat embarrassed when the Administration in effect said as those negotiations began, "We are not going to participate; we want a year to study the process."

In the years preceding 1982 when I first began observing this process, it seemed that if I were to weigh the interests of the United States in the treaty, I would have said that the national security aspects and the establishment of the boundaries of the outer continental shelf, the territorial sea, and the economic zone, but particularly the security aspects, amounted to eighty percent of what the United States felt its interests were in the treaty. At that time only twenty percent related to the manner and the regime in which the nodules of the deep seabed were developed. But as the Reagan Administration took office, it was quite apparent that this was a Republican administration wedded to the concepts of the free enterprise system, wedded to interest in capitalist investment and capital expansion, and determined to prevent anything like a transfer of technology or a ceiling on production. Issues that, in prior years, the United States had taken a much softer position on in the negotiations. Indeed, when President Reagan took office in January, 1981, I would have said that the mix of U.S. interests in the treaty had changed and that instead of an eighty/twenty national security/deep seabed mining mix of interests, the new interests were eighty percent in deep seabed mining and only twenty percent in national security.

Now that apparently has changed over the past year. It is quite common for new administrations to go through a shaking-down process where they look at the realities and the history of events rather than those glowing promises that were made to their supporters in a political campaign. In examining President Reagan's six points, I note that while production ceilings and access by U.S. companies are mentioned, the protection of the United States in the decision-making procedure and the danger of amendments after the first term of treaty are also mentioned. Furthermore, when one examines the issues purported crucial to advice and consent by the Senate, there are actually only two subpoints: the fear of mandatory transfer of private technology and the possibility of benefits from deep seabed mining going to national liberation movements.

Now I would like to comment on the political realities of a U.S. Senate which rejected the Covenant of the League of Nations in 1919, which forced the abandonment of the SALT II treaty which I deemed beneficial to this country. It is clear that the U.S. Senate is quite capable of rejecting a law of the sea treaty and I think that the emphasis expressed by Ambassador Malone in this regard over the mandatory transfer of private technology and over the danger of financial benefits from seabed mining going to national liberation movements is real and is sound. What I have seen of the political process in both the House and Senate indicates that we are in a period where politicians and the American public at large can be carried away by simple concepts. You may recall the "giveaway" of the Panama Canal. It took immense courage by the Senate of the United States to give its advice and consent to the Panama Canal Treaty at a time when two-thirds of the American people thought it was a giveaway. At the present time, this administration is in a battle not limited to just the matters of private technology transfers and to deep seabed mining. There is a very grave dispute going on in this country about the transfer of any technology at all, particularly to the Soviet Union. There is a fear that as the United States' position in the world declines, technology may be the only great asset we have left and that therefore the transfer of technology somehow hurts the national security of the United States. You see that fight going on today as to whether we should sell computers, for example, to the Communist bloc. I can say that, given the present makeup of the Congress of the United States, the mandatory transfer of private technology alone could convince enough senators to oppose ratification of the treaty.

Even more dangerous is the existence of a lobby in this nation with the power to defeat any treaty which provided for the transfer of financial benefits from U.S. seabed mining operations to a national liberation movement such as the Palestine Liberation Organization (PLO). You may recall that in the recent AWACs sale, where the President of the United States desired to deal with Saudi Arabia in the same way we deal with other countries, the power of that lobby was sufficient to cause the House of Representatives to vote 301 to 110 against the sale of the AWACs. Only by tremendous personal leadership was the President able to obtain by two votes passage of the agreement to sell the AWACs to Saudi Arabia. So it is a very real question whether agreements over amendments to the treaty can be reached considering the commitment of Third World nations to national liberation movements. I would suggest that provisions for transfer of financial benefits to the PLO could alone kill this treaty. Although I deplore that fact, I believe it is the political reality in this country.

The men here that Boalt Hall has attracted have given a great percentage of their working lives to this treaty. I quite agree with Ambassador Zuleta that it would be a tragedy if after fourteen years of work we were not able to take one small step toward the rule of international law because we could not

achieve a treaty that could be ratified by the United States Senate. I have tried to point out the consequences of non-ratification to the mining companies in my district, which includes the Silicon Valley which has the Lockheed Missiles and Space Company (Lockheed is one of the chief potential deep seabed miners). Without a treaty it will be very difficult for any private company to go forward with deep seabed mining with any substantial guarantee against incidents. It would be simple indeed for people on sailboats, or even surfboards, to sail in front of these technical marvels moving along at one knot trying to bring up nodules from three miles deep, to effectively block the use of our technology. I would like to ask my friends in Congress whether they realize that to scuttle the treaty may effectively block the very use of the deep seabed technology which they desire. This is not a time for any nation to throw down the gauntlet and threaten to exercise rights by force. I hope what has been done in these fourteen years can reach a successful conclusion. However, I have a deep sense of pessimism in this regard. Considering the six points that the United States has advanced, and the history of the Conference, and the character of the nations that have participated in it for so long, it is going to test the souls of the participants in those negotiations to reach the compromises that will be acceptable to all sides. I hope it can be done. I believe an acceptable agreement is a matter of as much importance as those negotiations in Philadelphia in 1787 when those thirteen states were finally able to agree on a Constitution for the United States and get it ratified by nine states. In a nuclear world this treaty has even more importance. I hope to participate and advise both sides as the Conference proceeds. But there are going to have to be compromises by the Group of 77 as there are going to have to be compromises by the United States if the treaty is ever to be ratified by the United States Senate.

B. THE CONVENTION AND CUSTOM

THE IMPACT OF THE THIRD UN CONFERENCE ON THE LAW OF THE SEA

Ambassador Bernardo Zuleta
U.N. Under-Secretary General
Special Representative of the Secretary General
to the Law of the Sea Conference

In a few days, more exactly on March 18, we will be commemorating the fourteenth anniversary of the opening of the Ad-hoc Committee established by the General Assembly of the United Nations to study the peaceful uses of the seabed and the ocean floor beyond the limits of national jurisdiction. When the Third United Nations Conference on the Law of the Sea convenes for the eleventh time on March 8, many of the participants in the sober ceremony that took place in 1968 will be there, accompanied by the cherished memory of those who are no more of this world, to remind us that this has been the longest, most ambitious and most innovative endeavor ever undertaken by the community of nations, and that whatever the ultimate outcome of this collective effort, it is evident that international law will never be the same and that the legal regime for the oceans will certainly not be the customary law of the sea as it existed when it commenced.

There is broad support for the view that even if the First and Second Conferences on the Law of the Sea had been able to produce a general agreement on the basic conceptual definition of the territorial sea and on the question of its breadth, political and technological development would have made it necessary to reopen the whole question of the utilization of ocean space and the exploitation of its resources.

A new awareness had been developing for some time that the traditional doctrine according to which the sea beyond a narrow belt under territorial sovereignty was res communis could not offer a valid answer to the threats to the marine environment posed by the new technologies, nor could it give the necessary legal and political stability to the substantial investments that would be necessary to explore and exploit the resources of the seabed and ocean floor.

The idea that the sea was the common heritage of mankind (patrimoine de l'humanite) and should be administered by a society of nations had been advanced near the turn of the century by that remarkable legal thinker, M. de Lapradelle, and dismissed by his contemporaries who were more inclined to preserve a system that had served well the purposes of the maritime powers.

But the concept surfaced again in 1958, in the opening statement made by the President of the First Law of the Sea Conference, Prince Wan Waithayakon of Thailand, to emphasize that any legal regime applied to ocean space should ensure the preservation of the sea and its resources for the benefit of all.

The need to ensure the protection and preservation of the seabed environment and at the same time to provide a stable legal and political framework for the exploitation of the resources must have been foremost in the mind of President Lyndon B. Johnson when, on the occasion of the launching of a research vessel in 1966, he warned against the creation of "a new form of colonial competition among the maritime powers" and "a race to grab and to hold the land under the high seas." He stated that "we must ensure that the deep seabeds and the ocean bottoms are, and remain, the legacy of all human beings."

The initiative launched by Ambassador Pardo of Malta one year later was not only very well conceived but also timely, and the concept of common heritage emerged as the only possible legal framework within which the wealth of the seabed could be utilized for the benefit of mankind as a whole, without endangering the oceans as a source of life.

It must be observed, at this point, that the expression "common heritage" has been translated into French as patrimoine commun and into Spanish as patrimonio comun. In the tradition of Roman law, as in many other legal systems, it was the duty of the heirs and successors to preserve and maintain undivided the patrimony, so that the fruits therefrom could benefit succeeding generations. The expression in a broader sense has always been used to denote some intangible assets of a human being, a society, or a nation which have to be preserved. It is in that sense that we speak of the cultural and artistic heritage, (patrimonio cultural y artistico) or of moral heritage, (patrimonio moral). The concept of common heritage implies, therefore, a balance of rights and duties but in particular the obligation to protect and preserve the patrimony, while making the benefits available to all those who are entitled to them.

It must also be recalled that in 1970, only a few months before the General Assembly adopted, without any dissenting vote, the solemn Declaration of Principles declaring that the resources of the seabed beyond national jurisdiction were the common heritage of mankind as a whole, another President of the United States, Mr. Nixon, had formally proposed in a statement of policy that all nations adopt as soon as possible a treaty under which the resources of the seabed would be regarded as the "common heritage of mankind."

As early as 1968, it became clear that the definition of the limits of the area that would be treated as common heritage made it unavoidable to discuss, as an integral part of the problem, the nature and extent of the national jurisdiction of coastal states, a question whose solution had eluded the international community for more than 400 years. It had to be recognized in the process that the traditional concept of a narrow territorial sea based on the cannon range, coupled with a continental shelf whose outer limits could only be established on the basis of the exploitability test, would not ensure that the resources of the ocean could be utilized in a rational manner, nor would it reconcile the interests of states that depended very heavily on their own coastal resources for food

supplies, energy, and development with those of the international community which needed to preserve the freedoms of navigation, overflight, and other freedoms normally associated with the peaceful utilization of ocean space.

The "package deal" idea developed as the only possible approach when it was realized that all the legal problems in relation to ocean space were interrelated and that therefore a new law of the sea convention would have to deal with codification and progressive development, with the creation of a novel regime of law, with the constituent instrument of an international organization, and with the conferring of jurisdiction on courts or tribunals either existing or yet to be established.

And this is exactly what the Third United Nations Conference on the Law of the Sea has been doing for more than eight years, after six more years of preparatory work, with the full participation of all states, whether or not they are members of the United Nations.

That the Conference has produced the most remarkable innovation in international law-making, and that the more than 470 articles that constitute the Draft Convention represent the tireless efforts, over a long period of time, of a unique assembly of jurists and diplomats, is not in question any more. Even the cynics who dismissed it after the Caracas session as yet another example of tropical frivolity are now complaining that the Conference has produced too many novel ideas that are beyond their understanding.

Not enough attention has been paid to one of the many changes that the Conference has introduced in treaty-making: for the first time in recorded history, the draft, embodied in six different languages, has been examined by a Drafting Committee assisted by six linguistic groups, in order to ensure that the corresponding provisions in the different versions can be given a common meaning which will effect the general purpose which the treaty is intended to serve.

We are now nearing the end of this long journey. In accordance with its own rules of procedure, the Conference will have to decide very soon whether all efforts at reaching general agreement have been exhausted.

Before that definitive step is taken, in keeping with the Gentlemen's Agreement and the rules of procedure, the President of the Conference and the Chairmen of the main Committees assisted by the General Committee should make every effort to achieve consensus on the Convention as a whole.

In the light of the most recent development, there seems to be no serious possibility that a Convention will not be adopted after all. So the question that will need to be answered by all the participants in the Conference is what will be the effect of the transference of the draft into a treaty.

We know that this new instrument will bind only states which choose to become parties by ratification and only after a certain number of ratifications have been deposited. However, the question of the impact of a new Convention that by

definition has a universal vocation on customary international law as perceived by some of the different legal systems does not lend itself to very precise answers. Nor is it clear whether states which chose not to become parties to the Convention can invoke provisions of their choice against parties or in fact what parts of the package could be available to those that have in the end rejected it.

It can be argued, of course, that many new developments in the law of the sea that found their place in the Draft Convention are generally recognized as new customary law through a process that was accelerated by the Conference itself. This may be true, in a general way, with regard to some aspects of the coastal jurisdiction up to a distance of 200 nautical miles. There is, however, no common denominator, outside of the Draft Convention, with regard to state practice as it affects fisheries, drilling, scientific research, protection of the marine environment, designated sea lanes, or even the basic question of the drawing of baselines.

A preliminary examination of state practice in the Caribbean Basin, as one among many examples, will show that there are at least ten different variants of extended jurisdiction, all the way from a limited fisheries zone that excludes some of the migratory species to a claim of unqualified territorial sovereignty. Only ten out of twenty-four countries have molded their legislation after some of the provisions of the Draft Convention, without taking upon themselves some of the duties that have been the subject of hard bargaining in the process of building the package.

Article 73 of the Draft Convention, for instance, rules out imprisonment or any other form of corporal punishment as means to enforce fisheries laws and regulations. There are some countries whose legislation includes such drastic measures, and many others may find it tempting to adopt similar laws.

Is this the kind of customary law of the sea that would be invoked by those states that would choose not to become parties to the Convention?

The test of what would be international law based on state practice with regard to other aspects of ocean space such as passage through straits, marine scientific research, or the outer limits of the continental shelf, in the absence of a generally agreed Convention, might prove to be even less conducive to clear answers.

Let us not forget that state practice in the present world does not have a common diplomatic language, and it has to be inferred from a multiplicity of legislative and regulatory actions based on diverse legal and political systems and reflected in official documents which are authentic only in their original language.

If we want the law of the sea to be real international law and not the expression in legal jargon of political and economic conflicts, there is no viable alternative to a generally agreed Convention. A treaty with less than general acceptance, while a better solution than no treaty at all, would fall very short of

the objectives that the United Nations had in mind when the Conference was convened in 1973.

Much thought has been devoted to the precedential impact of the future convention, both by those who fear innovation and by the large sectors of public opinion who believe that a just and equitable international economic order which would take into account the interests and needs of mankind as a whole can only be achieved through multilateral negotiations.

It is not enough to belabor the question of how specific portions of the new conventional regime could be invoked as precedents in other fields. Let us also ask ourselves what kind of precedent would be established in international relations, were we to fail after fourteen years of very serious negotiations in achieving a generally acceptable Convention that would consider the problems of ocean space as a whole and would ensure that the common heritage of mankind would be administered not by a sector of the international community but by all the peoples of the world.

AN OPPORTUNITY LOST

Professor Arvid Pardo
Institute for Coastal and Marine Studies
University of Southern California

We are all aware of the framework within which the Law of the Sea Conference (UNCLOS) has been held: the vital military importance of ocean space, the fact that ocean space contains incalculable living and non-living resources, the importance of navigation and other uses of the sea -- and we are all aware that traditional uses of the sea are being radically transformed by technology and that new, varied, and important uses are arising.

It was the increasing value of ocean space uses and resources that triggered the processes which led to the recently concluded Conference. And it is the increasing value of ocean space which is bringing about the demise of traditional law of the sea. Like Humpty Dumpty, all the king's horses and all the king's men cannot put traditional law of the sea together again. They cannot, because traditional law of the sea, which served the international community so well for more than three centuries, cannot readily be adapted to a situation where ocean space and its resources are being used and exploited ever more intensely.

The recently concluded law of the sea negotiations also have another aspect: they are, together with the questions of disarmament, of the New International Economic Order, and others, a part of the contemporary global problematique of peace. They are influenced by, and in turn influence, negotiations in other areas of the problematique.

We must understand these basic facts in order intelligently to evaluate the historical Convention adopted by UNCLOS last year, preparation of which was in itself a major achievement.

The new Convention [1] marks a fundamental change in the structure of traditional law of the sea because of its comprehensive approach to ocean affairs.

Important innovations are almost too numerous to enumerate. They include:

1. The concept of transit passage through straits used for international navigation;
2. The concept of archipelagic baselines and archipelagic waters;
3. The concept of exclusive economic zone;
4. Fundamental change in the definition of the legal continental shelf;
5. Explicit recognition of the freedom of scientific research and of the freedom to construct artificial islands and other installations as freedoms of the high seas;
6. The duty of international cooperation in the development and transfer of marine science and technology;

7. The concept of a comprehensive environmental law of the sea based on the obligation of all States to protect and preserve the marine environment.

These provisions, among many others, some technical and some substantive, are complemented by two far-reaching innovations which, if effectively implemented, could mark a revolution not merely in the law of the sea but in international relations. I refer to the dispute settlement system which is the most comprehensive and at the same time flexible and "binding" system of its kind devised up to now by the international community and, secondly, to international agreement that the seabed and its mineral resources beyond the limits of national jurisdiction have a special legal status as the common heritage of mankind. The establishment of an effective international organization to implement this principle could be a precedent of incalculable importance in the future.

Inevitably a complex document such as the present Convention, which is 200 pages long and which deals with highly controversial matters involving vital interests of States, cannot be expected to be without shortcomings.

The important question, however, is not whether the Convention has shortcomings but whether they more than counterbalance its positive aspects.

From a world order point of view, the major concern must be whether the present Convention adequately serves the functions which all international law must serve, that is to say, a) accommodation of interests, b) prevention of conflict, c) predictability, and, finally, d) the promotion of common or community objectives.

I shall attempt briefly to evaluate the Convention against these criteria rather than express an opinion as to whether the Convention adequately satisfies the perceived or presumed interests of the United States.

ACCOMMODATION OF INTERESTS

The Convention obviously bears throughout the mark of accommodation of interests, for without such accommodation it would have been impossible to elaborate a text which has been signed by the great majority of States. It could even be argued that accommodation in some cases may have been carried too far. Thus certain important provisions, such as article 7 (2) and the last sentence in article 47 (7), have been inserted in the Convention merely to accommodate the interests of a single State. The question is not whether accommodation of interests and political compromise -- the so-called "package deal" so long and tenaciously pursued at the Conference -- was necessary, but whether apparent political compromises in the Convention are substantive or only carefully drafted formulations designed to mask continued fundamental disagreement on basic issues. In this case, of course, no real accommodation of interests has occurred and conflict is not avoided but merely postponed.

It is impossible to generalize in this connection.

In some cases, as, for instance, with respect to the limits of the territorial sea, the provisions of the Convention undoubtedly reflect substantive agreement on the part of the overwhelming majority of the international community. In other far more numerous instances, however, there are strong grounds for believing that representatives at the Conference, having ascertained the difficulty of reaching agreement on the substance of an issue, have thereafter mainly searched for a formula sufficiently vague or sufficiently ambiguous to permit all significant States concerned to claim that their policy objectives have been more or less satisfactorily achieved. Thus article 76 of the Convention on the definition of the so-called "continental shelf" -- a term which now bears little relationship to its original meaning -- enables States which argued for a clearly defined maximum limit of the shelf to claim that such a limit has been incorporated in the Convention [2]. At the same time, those States which argued for an expansive, flexible definition of the legal continental shelf are reasonably satisfied, for they are aware that baselines are established at the discretion of the coastal State within the broad guidelines of article 7, that the wording of article 76 is sufficiently flexible and ambiguous to accommodate most coastal State claims and that the proposed Commission on the Limits of the Continental Shelf has only powers of recommendation. Article 74 on the delimitation of the exclusive economic zone between States with opposite or adjacent coasts is another example of a formula designed to satisfy the requirements of States with diametrically opposed views. A further example is the phrase "exclusively for peaceful purposes" which recurs with a certain frequency in the Convention. The meaning of the phrase is nowhere defined, but the words convey the vague, misleading, but useful impression that somehow the ongoing intensive militarization of ocean space is being reversed. Those States that wish strictly to limit the military uses of ocean space can claim that the arms race in the seas has been significantly limited, while those States which consider extensive military use of the seas a regrettable necessity are not incommodated. Several further provisions of this kind could be cited.

SILENCE, AMBIGUITY, AND UNPREDICTABILITY

Vagueness, ambiguity, and sometimes silence on major questions do not further the achievement of two additional objectives: prevention of conflict and predictability -- i.e., the ability to foresee what activities can be undertaken with reasonable assurance that other States will acquiesce. It is difficult to assert that the Convention performs this function on a consistent basis. The Convention, of course, is very clear on the fact that all economic uses of the marine environment are reserved to coastal States <u>at least</u> to 200 nautical miles from the appropriate baselines. It is also true that the rights of

coastal States are, in general, carefully outlined, particularly within the exclusive economic zone and the legal continental shelf. However, when the Convention deals with matters other than the rights of coastal States, it is often studiously unclear and predictability suffers.

For example, article 19 of the Convention purports to give objective definition to the principle of innocent passage of foreign vessels in the territorial sea. Passage of a foreign ship is considered prejudicial to the peace, good order, or security of a coastal State and hence not innocent if it engages in a dozen or so enumerated activities including "any activity not having a direct bearing on passage;" but article 19 does not state that a foreign ship not engaging in the enumerated activities has the right of innocent passage. Thus the right of innocent passage is exercised now, as in the past, subject to the discretion of the coastal State concerned. Part III of the Convention establishes the right of transit passage through straits used for international navigation between one area of the high seas or an exclusive economic zone and another area of the seas and an exclusive economic zone, but the term "straits used for international navigation" is not clearly defined. The British Channel and the Straits of Gibraltar transited by hundreds of ships daily are, no doubt, clearly straits used for international navigation, but the legal status of many less frequently transited straits could be doubtful. Indeed even the legal status of heavily transited straits may be contested [3]. It is surprising that the drafters of the Convention did not take the opportunity to clarify the legal status of many straits by adding an Annex to the Convention enumerating those straits which are considered to be straits used for international navigation as has been done (Annex I) for living resources of the sea considered to be highly migratory. It would have been also useful to include in the Convention an article to the effect that disputes on whether a particular strait is or is not used for international navigation are subject to compulsory and binding dispute settlement.

Silence is another technique which has been used to avoid mention of controversial problems. Thus there is no mention in the Convention of any of the numerous outstanding legal issues concerning the Arctic and Antarctic. Far more importantly, the Convention ignores the many issues relating to military uses of the marine environment. It is known that the legality of many of these uses is controversial. While most powers go to considerable lengths to avoid confrontations in the seas, one can anticipate that certain legally doubtful military uses of the marine environment could give rise to dangerous incidents in the present international climate. I certainly recognize that the question of military uses of the seas is highly delicate and very controversial. Perhaps one should not expect the Convention to contain mandatory provisions on this subject but it seems quite unfortunate that on this vital matter the Convention is unable to make even such general exhortations as have been lavished on a variety of other subjects of varying

importance. It is strange that, for instance, the Convention contains many pages of general norms and exhortation on marine pollution but not a word on a subject which could involve the peace of the world [4].

PROMOTION OF COMMUNITY OBJECTIVES

A comprehensive law of the sea treaty should promote common or community objectives, such as the protection of the marine environment. Committee III of the Conference, under the able chairmanship of Ambassador Yankov, has certainly done, in Part XII of the Convention, remarkable work in developing international law in this connection. Nevertheless, even in this portion of the text, which in many respects is unique, there are serious deficiencies, including lack of any reference whatsoever to the controversial question of the disposal of radioactive wastes. This is a question that was singled out for special mention in the 1958 Geneva Convention on the High Seas [5] and it is a matter of more than ordinary contemporary importance at a time when the use of nuclear energy for peaceful purposes is spreading throughout the world and when the seabed is being seriously considered as a possible permanent waste disposal site by an increasing number of countries.

In this connection it may be worthwhile to observe that substantial quantities of low-level radioactive wastes have been dumped in the marine environment since 1946, often with few precautions. It would also appear that occasionally high level radioactive wastes have been deposited on the seabed. For a number of reasons, including the accumulation of high level radioactive wastes in temporary sites on land, seabed or sub-seabed disposal of such wastes is being increasingly studied as a viable option. While no doubt radioactive wastes may be one of the "toxic, harmful or noxious substances" mentioned in article 194 (3) (a) of the Convention and while it is true that under article 210 (1) States have accepted the obligation to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping," it seems, nevertheless, highly unfortunate that the drafters of the present Convention did not see fit, as in 1958, to single out the dumping or release of radioactive wastes in the marine environment as worthy of special precautions. It is unlikely that this omission is fortuitious, for the Convention contains special provisions (article 23) on foreign nuclear-powered ships transiting the territorial sea.

We may perhaps not unfairly conclude that the Convention, evaluated from a non-national point of view because of its silence, vagueness or ambiguity on many fundamental questions, does not consistently serve any of the functions which all international law must serve.

The Convention, however, should not be evaluated in isolation. A treaty in itself of limited value could be extremely valuable if it were to strengthen world order by furthering equity between States or by suggesting effective

solutions to resource management and conservation problems in the marine environment.

With regard to the first question, there can be no doubt that the Convention, far from furthering equity between States, reflects primarily the highly acquisitive instincts of many coastal States, both developed and developing, and particularly of those States with long coastlines fronting on the open oceans and of mid-ocean archipelagoes.

Probably more than 40 percent of ocean space, by far the most valuable in terms of economic uses and accessible resources, is placed under some form of national control. All known commercially exploitable hydrocarbon deposits, all commercially exploitable minerals in unconsolidated sediments from sand and gravel to tin, most phosphorite nodule deposits, a significant portion of the recently discovered polymetallic sulphide and cobalt crust deposits, several manganese nodule deposits, over 90 percent of commercially exploited living resources of the sea, and all known sites suitable for the production of energy from the sea are recognized as the exclusive property of coastal States.

Nor is this all. Since the limits of national jurisdiction are not clearly defined in the Convention, some coastal States fronting on the open sea and some mid-ocean archipelagoes can continue, within certain limits, to extend their control in the marine environment as their marine capabilities increase or their national interests appear to dictate.

The magnitude of the appropriation, which has been carried out under a cloud of misleading rhetoric, is unprecedented in history in terms both of the area and of the resources involved. Despite timid attempts at compensation, no one can deny that the Convention is grossly inequitable not only to land-locked and geographically disadvantaged States but also as between coastal States themselves. According to some knowledgeable persons, a dozen or so coastal States will acquire more than half the enormous marine area which now passes under coastal State control [6]. At the same time, the provisions of the Convention legalize absurdities: for instance, the Pitcairn Islands with 60 inhabitants may legally claim control over the resources of a maritime area several times larger than that which can be claimed by the Federal Republic of Germany with more than 60 million people. The Republic of Kiribati (the former Gilbert Islands) with about 55,000 inhabitants acquires rights over resources in a marine area larger than that which may be claimed by the People's Republic of China with more than one billion people [7].

This is not to say that for many reasons some extension of coastal State jurisdiction in the marine environment is not unavoidable and I certainly have no objection to a 200-nautical-mile exclusive economic zone which conveniently consolidates into a single regime a variety of coastal State jurisdictional claims advanced over the past forty years [8].

However, to be equitable the extension of coastal State control in the marine environment should be balanced at least by

clear and definitive limits to national jurisdiction, by the development of an expanded concept of State responsibility, particularly with respect to resource management and protection of the marine environment, and by the establishment beyond national jurisdiction of a viable and meaningful international regime capable of filling the vacuum of the high seas and compensating in some measure those countries which will suffer most from an extension of national jurisdiction in the oceans.

Those balancing factors are lacking in the Convention.

The Convention does not clearly define the limits of national jurisdiction in ocean space nor, despite a number of general provisions [9], does it seriously address the difficult problems of marine resource management. I note in this connection (a) that most, if not all, the general provisions concerning management of marine resources are qualified or negated by subsequent specific provisions [10]; and (b) that under the Convention, the coastal State has no specific resource management responsibilities in its archipelagic waters, territorial sea or legal continental shelf. A fundamental deficiency, finally, is the unstated assumption in the Convention that all coastal States are both willing and able competently to manage marine living resources within their jurisdiction, an assumption which patently does not correspond to reality. Even if all coastal States did have this capacity, rational marine living resource management on a national basis would be impossible in the small marine areas controlled by the majority of States.

No doubt even poor national management of marine living resources is preferable to freedom of fishing under contemporary conditions, but national management of marine living resources is not the only alternative to freedom. There exists the concept that ocean space and its living and non-living resources beyond reasonable limits of national jurisdiction are a common heritage of mankind and hence should be administered [11] by the international community for the benefit of all its members both rich and poor.

I have already mentioned that, in my opinion, the concept of common heritage could be a precedent of far-reaching importance for world order since it could in due course serve as a model for the cooperative management of other areas beyond national jurisdiction, such as the moon or, perhaps, Antarctica.

An international regime in ocean space beyond reasonable limits of national jurisdiction has become necessary, *inter alia*, for three purposes:

1. It must fill the jurisdictional void which exists beyond national jurisdiction in order to prevent the total division of ocean space between coastal States;
2. It must ensure competent and non-discriminatory resource management beyond national jurisdiction in order to prevent unnecessary waste and depletion of resources;
3. It must promote equity between States, while at the same time providing to all States benefits unobtainable under a national lake regime.

Very early in the recently concluded Conference it became clear that the major maritime powers would tolerate a common heritage regime and related institutions only with respect to the seabed and its resources beyond national jurisdiction. Since the jurisdictional void of the high seas could not be filled completely, it became extremely important to create a common heritage regime and related institutions which could perform the other two functions enumerated above. Unfortunately this has not been done. Apart from the dispute settlement system for the seabed, from some of the general provisions in sections 2 and 3 of Part XI, and from a few other articles in the same Part of the Convention, the implementation of the common heritage principle is fundamentally flawed and simply not viable.

I shall limit myself to the briefest of comments in this connection.

First, the Convention does not even attempt to define the limits of the seabed and ocean floor beyond the limits of national jurisdiction (the Area). The Area is supposed to be defined indirectly as coastal States gradually establish the outer limits of their legal continental shelves under article 76 of the Convention. It is a process which is expected to take at least ten years from the date of entry into force of the Convention [12]. The future Authority is totally excluded from influencing in any way this process [13]. Thus the Authority is at the mercy of coastal States and could be faced with a situation in which it cannot proceed to exploit mineral resources because the nearest coastal States will not inform it of the limits of their legal continental shelf.

Secondly, the scope of the common heritage regime and related institutions has been severely limited a) by defining the words "activities in the Area" to mean only activities of exploration for, and exploitation of, the mineral resources of the Area, b) by giving the word "resources," which in the 1971 Declaration of Principles was understood to mean "living and non-living resources," the limited meaning of "mineral resources in situ," and c) by drafting a text which contemplates only the exploration and exploitation of manganese nodule deposits, thus ignoring both cobalt crusts and the probably more important polymetallic sulfide deposits. Finally the outer limits of the legal continental shelf have been defined by article 76 in such a way as virtually to exclude the possibility of finding hydrocarbon deposits in the international seabed area.

Thus the economic significance of the seabed area governed by the common heritage principle is much reduced.

Thirdly, the development of manganese nodule deposits has been rendered unnecessarily complicated and expensive, inter alia, a) by unnecessary and unrealistic production controls in the international seabed area [14]; b) by the totally unnecessary creation of a "parallel system" of exploitation which is supposed to accommodate the interests of Western free market countries, developing countries, and socialist countries, but which in effect creates a very expensive and

bureaucratically top-heavy system the initial cost of which some years ago was expected to range between US $350 to $700 million [15]; c) by establishing a decision-making system for the Council of the future Authority which is almost certain to make timely and appropriate decisions impossible [16].

These among many other deficiencies are likely to ensure that manganese nodule production in the Area will not be profitable for the forseeable future. Thus, far from providing all States with benefits unobtainable under a national lake regime, it is likely that the common heritage system envisaged in the Convention will prove to be an enduring economic burden in the international community. Indeed there could be a danger that the future Authority's inability to administer seabed mineral resources effectively and efficiently might bring the principle of common heritage itself into disrepute and thus prejudice the future of equitable and cooperative development of resources at the international level.

Implementation of some provisions of Part XI of the Convention and of many provisions contained in the related annexes was indefinitely postponed by the adoption of Resolutions I and II at the Spring 1982 Session of UNCLOS [17]. It might, perhaps, be possible for the Preparatory Commission of the Authority to use these resolutions to draft provisional rules, regulations and procedures modifying as much as legally possible some of the more unrealistic or burdensome provisions contained in, for instance, Annex III of the Convention. Whether this will in fact be done will depend, of course, upon what action members of the Preparatory Commission will decide to take.

CONCLUSION

Although the present Convention reproduces, almost without change, most of the definitions and technical rules contained in the 1958 Geneva Conventions and adds a few more, it is to a far greater extent than these Conventions a political document. As such the present Convention is truly a "package deal" containing innumerable bilateral and multilateral political compromises. In fact, many of the legal rules established sometimes are based on nothing more substantial than political deals designed to accommodate the parochial interests of individual States [18].

As a political document, the present Convention reflects, although to a different extent and in different ways, both the predominant interests of politically predominant States and the general aspirations of the world community.

Thus from one point of view the importance of the Convention resides principally in the official recognition of the results of the ongoing enclosure movement in ocean space which benefits mainly the relatively few States which possess long coastlines fronting on the open seas. In this connection the Convention is particularly deferential to a concept of State control, in areas within coastal State jurisdiction, as wide and as unfettered as politically possible [19].

It would not be right, however, to view the Convention as reflecting only the perceived national interests of a relatively small group of States. Much of the rhetoric of the Convention, several general provisions and whole sections, such as the dispute settlement provisions and Part XI on the international seabed area, reflect -- imperfectly, vaguely, even sometimes wrong-headedly -- a general aspiration for a new order in the seas, based on international cooperation in meeting the needs of mankind as a whole. Unfortunately this new order remains essentially a rhetorical aspiration.

It is clear from what I have said that I consider the new Convention on the Law of the Sea as fatally flawed. A truly historic opportunity has been lost to mold the legal framework governing man's activities in the marine environment in such a way as to contribute effectively to the realization of a just and equitable international order in the seas, responsive to the vital need for harmonization of marine uses and management of marine resources for the benefit of all.

Nevertheless we cannot reject the Convention out of hand if we believe that it is important to maintain some semblance of global law of the sea or if we support introduction of the principle of common heritage of mankind into international law. Judgement on the usefulness or otherwise of the present Convention must also depend upon general considerations of public policy and upon whether the Convention appears satisfactorily to protect the national interest.

I would like to conclude with a paragraph from a 1970 State Department bulletin:

> The stark fact is that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community. If it is not modernized multilaterally, unilateral action and international conflict are inevitable ... The United States has a special responsibility to move this effort forward. [20].

These words are as true now as they were twelve years ago. The present Convention is not the end, rather the beginning of a long process which must eventually lead to a more rational and efficient use of our environment and towards a more just and equitable world order.

NOTES

1. United Nations document A/CONF 62/122 of October 7, 1982.
2. " ... the outer limits of the continental shelf on the seabed ... either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2500 meter isobath ...." Doc. cit art 76 (5).

3. For instance, "the Governments of the Republic of Indonesia and of Malaysia agreed that the Straits of Malacca and Singapore are not international straits, while fully recognizing their use for international shipping ...." (Joint statement of the Governments of Indonesia, Malaysia and Singapore, November 16, 1971.)
4. Many questions concerning military uses of the marine environment are unresolved and could give rise to serious incidents. The legality of the following, among other activities, is controversial: a) establishment of security zones beyond the territorial sea; b) exclusion of foreign shipping from large areas of the high seas which have been unilaterally reserved for security purposes; c) emplacement of anti-submarine warfare devices on the legal continental shelf of another State without the latter's knowledge or consent, etc.
5. See 1958 Geneva Convention on the High Seas, article 25.
6. See, for instance, James Bridgman, Paper No. 3, Villanova Colloquium on "Peace, Justice and the Law of the Sea," 1977.
7. The absurdities quoted, and several others which could be quoted, derive from the disingenuous definition of islands contained in article 121 of the Convention read in conjunction with Part IV (Archipelagic States).
8. The 200-nautical-mile exclusive economic zone, however, should be measured from the coast or from straight baselines the length of which is strictly limited. This is not the case in the present Convention which permits baseline manipulation (and hence further extension of coastal State jurisdiction) since, inter alia, no limit is set on the length of straight baselines (see Convention, article 7, particularly paragraphs (1), (2), and (5)).
9. Thus, for instance, the Convention obligates States to "promote and facilitate the development and conduct of marine scientific research" (article 239) which is the indispensable prerequisite to rational resource management. Within the exclusive economic zone "the coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources ... is not endangered by over-exploitation" (art. 61 (2)), and States are enjoined to cooperate with each other and with "competent" international organizations to this end. Beyond national jurisdiction "all States have the duty to take ... such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas" (art. 117, see also art. 119). an obligation identical to the one already affirmed in the 1958 Geneva Convention on Fisheries (art. 1 (2)) and elaborate provision is made for international management of the mineral resources of the seabed beyond national jurisdiction.

10. Thus the general obligation to promote marine scientific research is followed by a specific provision subjecting marine scientific research "of direct significance for the exploration and exploitation of natural resources" to a discretionary consent regime which may inhibit research (Convention, art. 246 (5) (a)); the general duty of the coastal State to ensure that the maintenance of the living resources of the exclusive economic zone is not endangered by over-exploitation, is heavily qualified by the fact that the coastal State establishes the allowable catch virtually at its discretion; etc. The approach adopted by the Convention to problems of marine living resource management is well illustrated by article 63 (2) which reads as follows: "where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek either directly or through appropriate sub-regional or regional organizations to agree upon the measures necessary for the conservation of these stocks in the adjacent area." In short, conservation only beyond national jurisdiction.
11. It is perhaps useful to clarify that, in the original concept, the common heritage of mankind was not owned by mankind (or by the international community however defined) but was held in trust by mankind. Mankind through the international community had the jus utendi but not the jus abutendi or the right of disposal.
12. See Convention, Annex II, article 4 read in conjunction with article 8.
13. Under a previous version of the Convention (document A/CONF 62/WP 10/ Rev 3, article 134), the Authority was to have been notified by the coastal States concerned of the limits of the Area and was required to register and publish the notifications received; now even these vestigial functions have been taken away.
14. Production controls were supposed to protect developing countries' producers of minerals contained in manganese nodules "from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral or in the volume of that mineral exported ..." Instead the production controls envisaged in the Convention protect mainly developed countries, such as Canada, from possible future competition, because they are based on the quantity of nickel expected to be produced from manganese nodules (see Convention, article 151. Developing countries are not major nickel producers). Secondly, commercially exploitable manganese nodule deposits are found on the legal continental shelf of some States as defined by article 76 of the Convention, hence production controls in the international area alone can only weaken the competitive chances of the Authority.

15. See United Nations document A/CONF 62/ L 65.
16. The Council is the most important organ of the future Authority with regard to the exploration and exploitation of manganese nodules. It is defined in the Convention as "the executive organ of the Authority having the power to establish ... the specific policies to be pursued by the Authority on any questions within the competence of the Authority" (article 162). In this vital organ, where provision has been made for States with violently opposed interests and ideologies to be represented, decisions will be taken by majorities, ranging from a simple majority in procedural questions to a consensus for the most important questions. It seems rather optimistic, under the circumstances, to expect timely and appropriate decisions.
17. Resolution I establishes a Preparatory Commission a) to prepare draft rules, regulations, and procedures to enable the future International Sea-bed Authority to commence its functions, b)to exercise the powers assigned to it under Resolution II, c) "to undertake studies on the problems which would be encountered by developing land-based producers likely to be most seriously affected in the Area ...," and d) to perform traditional preparatory functions, such as drafting a budget. Resolution II guarantees that a limited number of "pioneer investors" will obtain manganese nodule exploitation contracts and production authorizations from the future Authority under certain conditions.
18. See. for instance. Convention article 7(2), 47(2), 47(8), etc.
19. Without prejudice, however, to navigational uses of the marine environment. These are safeguarded to some extent not only because the international community has a common interest in safeguarding freedom of trade but also because navigational uses of the sea closely affect the security interests of the major maritime powers.
20. United States Policy for the Sea-bed. State Department Bulletin 737, 1970.

INTERNATIONAL STRAITS: A PERSPECTIVE ON STATE PRACTICE AND UNCLOS III

Rear Admiral Bruce Harlow
Assistant Judge Advocate General
United States Navy

INTRODUCTION

A great deal has been written in the war of the publicists concerning perceived ambiguities in certain of the navigation and overflight provisions of the Draft Convention. One section that has received particular attention and analysis has been the section concerning the regime of transit passage through international straits [1], both as to the question of submerged transit and as to residual coastal state regulatory and enforcement competence.

The role of publicists is important, as is recognized in article 38 of the ICJ statute, but I think we all realize that the bedrock of international law is not to be found in the pages of a learned law review; the bedrock of international law is to be found in the practice of states, and it is from the practice of states that the dispositive analysis of the straits articles will ultimately be gleaned.

My comments then are intended not as an academic argument, but as a personal forecast of how state practice will evolve in this area after UNCLOS III, both from a standpoint of legality and reality.

REAL-WORLD CONTEXT

In order to place the UNCLOS III negotiations concerning international straits in a real-world perspective, it is necessary first to reflect on certain facts and factors which have had a direct influence on the formulation of the present straits text:

- International straits are by their very nature of critical importance to world maritime traffic, as they constitute rivers of navigation between the open oceans of the world. Without free transit through international straits, the high seas lose their global unity and the free flow of trade is disrupted to the detriment of all.
- If unilateral competence in straits were granted to the bordering states, the world community's vital interest in open lines of communication would be dependent upon the hope that strait states would always be guided in their exercise of jurisdiction by selfless, apolitical goals. Such an expectation is obviously unrealistic and cannot serve as a basis for stability and predictability in the world's maritime environment.

The fundamental responsibilities of naval mobility -- protection of maritime sea lanes and projection of strength to distant stations and allies -- are likewise dependent upon unimpeded transit through international straits. This is especially pertinent under a negotiating package which would permit extensions of the territorial sea to 12 nautical miles, as more than 100 international straits which currently possess a high seas corridor could become overlapped by territorial seas. If the right of collective self-defense under article 51 of the United Nations Charter is to be effective, access through maritime chokepoints must be maintained as open to all.

- Because of the critical importance of international straits, the law of the sea has always treated these straits as being juridically distinct from territorial seas. Article 16.4 of the 1958 Convention on Territorial Seas bears witness to this distinction by foreclosing the strait state from even temporarily suspending the passage rights of others through international straits.

- Without such a principle of open access, political, military and economic considerations would combine to force the world maritime powers into a struggle for influence at these strategic ocean crossroads, adding a dangerous new variable to the balance-of-power equation. In the words of John Norton Moore:

> To permit extending coastal states' jurisdiction to enable them unilaterally to control or impose conditions on such an important community freedom would be inequitable, inefficient, and conducive to conflict. Transit through such chokepoints is fundamentally different from transit through the territorial sea in general, and in the common interest must be recognized as such.

- Within the context of the "package deal" negotiations at the Conference, it was clearly understood that the provisions covering transit passage through international straits were intended as an enhancement of world mobility interests. This enhancement was one of the benefits negotiated by the major maritime powers in exchange for agreement to increased coastal state competence in other areas (e.g., 12-nautical-mile territorial sea and resource-related competence out to 200 nautical miles)[2]. To try to read into the straits articles a narrow interpretation, with all questions of intent being resolved in favor of coastal state jurisdiction, is to ignore the "package" context altogether. It would in effect be draining substance from the "quid," leaving coastal-state competence as the only beneficiary in a strangely one-sided "package". Such was not the intent of the negotiators, nor will it be the perspective of states in practice.

TEXTUAL ANALYSIS

The Draft Convention's provisions on international straits are a product of the above considerations and are drafted to protect the world's vital interest in freedom of transit, without neglecting the legitimate interests of the bordering states. The strait states' pollution, marine safety, and resource interest are carefully accommodated within this context, through such means as flag state obligations and international standards, thereby safeguarding the navigation interest from unilateral interference.

Since the straits articles are structured to prevent such unilateral interdiction of the flag state's navigational interests, it is difficult to understand how some authors continue to perceive in the text a competence on the part of the strait state to prohibit transit in a submerged mode. Elliot Richardson and John Norton Moore have both authored excellent articles which address and refute this position in detail; allow me here to just highlight the major points which will be dispositive for purpose of state practice.

- The absence of any specific reference to the right of submerged transit in the straits articles is sometimes proffered as an argument against the existence of such a right. The transparency of this argument, however, becomes clear when one takes note of the high seas articles, where there is likewise no specific mention of a right of submerged navigation, but where the existence of such a right is beyond question. Where special rules are to be applied relating to submarines, specific provision is made, as, for example, in article 14.6 of the 1958 Territorial Sea Convention and article 20 of the Draft Convention. The absence of any specific reference to submerged navigation in the straits regime thus serves as a confirmation, rather than as a derogation, of the right.

- Article 39.1(c) of the Draft Convention specifically refers to "normal modes of continuous and expeditious transit" through straits. When analyzing the meaning of the phrase "normal mode," it is difficult to argue any other construction than that, as pertains to submarines, the "normal mode" is submerged [3]. Their speed and maneuverability are significantly reduced on the surface, which, when coupled with the limited visibility their above-water structure affords, would make such a surface mode quite abnormal in a regime which has as one of its objectives the promotion of safety in circumstances of dense traffic. There is no evidence in the negotiating history that the word "normal" was somehow intended as a restrictive term of art, and common sense is otherwise sufficient to discern what mode of navigation would be "normal" for something with a name like submarine. The use of the word "expeditious" (both in articles 38.2 and 39.1(c)) also clearly implicates a mode of navigation conducive to optimum efficiency in movement.

- Article 38.2 of the Draft Convention makes specific provision for "freedom of navigation" and incorporates it as an integral part of the transit passage regime. The term "freedom of navigation" was carefully chosen by the original drafters of the straits provisions, as it carries over, except as explicitly restricted, the high seas connotation of the phrase into the new regime. The import of the phrase was well understood long before 1958, and the High Seas Convention of that year served to confirm and codify its traditional meaning -- freedom of the flag state to exercise its discretion in the method of navigation, subject only to the due regard standard in order to not unreasonably interfere with the exercise of the maritime freedoms of others. "Freedom of navigation" clearly connotes the right of transit on and under the waters in question, and the negotiators clearly understood that, in the absence of a specific limiting provision, the right of submerged transit would continue to pertain.

- The intent of the major maritime powers on the point was unmistakeable -- each of their proposals of draft language for the straits regime relied on the phrase "freedom of navigation" as being clearly inclusive of submerged transit, and it was the draft offered by the U.K. that was ultimately adopted into the composite text. The U.K., in submitting this draft, made specific reference to the need "to ensure that <u>unrestricted navigation</u> through those vital links in the world network of communications should remain available for use by the international community." (Emphasis added.)

- Some authors have made the argument that, in the absence of specific provision to the contrary, rules of innocent passage are controlling in transit passage situations. This argument relies on the residuum clause in article 34 as a vehicle for incorporating general territorial sea principles into the transit passage regime, including the "surface and show of the flag" requirement of article 20. This intricate argument ignores, however, the basic purpose behind the transit passage provisions: the establishment of a juridically distinct regime to deal with juridically distinct interests.

- If the negotiators had contemplated a regime that bottomed on principles of innocent passage, they could have easily adopted the language of article 16.4 of the 1958 Territorial Sea Convention, with an additional provision for nonsuspendable overflight. Instead, the drafters adopted the distinct terminology of "transit passage" and "normal mode," and incorporated the high seas concept of freedom of navigation and overflight. Unless one is to assume that 150 delegations, staffed with notable experts on the law of the sea, were drafting by accident rather than by design, the conclusion is inescapable that transit passage is distinct from, and independent of, principles of innocent passage. When principles of innocent passage were intended to apply in the straits articles, the negotiators made that intent clear, as is evidenced in article 45.

- Clearly article 38.2 does not carry over the full spectrum of discretion in the flag state that would otherwise pertain in a high-seas setting; the straits articles carefully define necessary limitations to tailor the freedoms of navigation and overflight to the straits environment. Freedoms of navigation and overflight remain, however, the cornerstones upon which the straits articles are built. The regime is one of freedoms with specific limitations, not one of innocent passage with specific additions.

- The straits states were also under no misgivings as to the import of the text, for the Conference's negotiating history attests to a number of instances where certain states attempted unsuccessfully to eliminate the right of submerged transit for the straits regime. If it were not clear to all that the right existed in the text, such efforts would make little sense. These objections are graphic evidence of the clarity of the straits articles in preserving freedom of navigation, including submerged transit.

- The situation here is similar to interpretational arguments which attempt to read into the provisions on the exclusive economic zone (EEZ), a coastal state competence to prohibit the exercise of high seas navigation and overflight freedoms (such as routine military operations) in the economic zone. If the text were not clear that the coastal state lacks such competence outside the territorial sea, why would delegations wanting broader coastal state jurisdiction continue to complain? During informal meetings of Committee II at various sessions of UNCLOS III, certain states have unsuccessfully argued for a revision of the negotiating text to preclude military exercises in the EEZ without coastal state authorization. Such instances again point out the clarity of the text to the Conference participants, whether the issue is the right of submerged transit through international straits or the right to conduct certain high seas activities in the EEZ or on the continental shelf.

Intricate interpretive arguments which hold these rights as suspect may have a place in academic journals, but state practice in the real world will pass them by, since they lack basis both within the context of the Conference and in the words which were carefully constructed into the text. No text, however constructed, is immune from the tenacity of an academic in search of ambiguity, but I firmly believe that the Draft Convention is clear to the participating states, and that state practice will follow reality, not theory, in the continuing evolution of the law of the sea.

CONCLUSION

As part of the package deal, the world community has clearly withheld from the coastal state the right to restrict submerged passage through international straits or to restrict the high seas freedoms of navigation and overflight beyond the

territorial sea. If, for example, the right of submerged passage is ever lost to an expanded coastal state competence, it will not be due to any lack of clarity in the Draft Convention, but due to the lack of will on the part of the world community to preserve that right through systematic state practice. A determined policy of assertion and exercise of community maritime rights will be as important under the new regime as it has been in the past.

AFTERTHOUGHTS

My comments today have been necessarily restricted to only a small portion of the Draft Convention. I have made no mention of the seabed mining issues which, as you already know, will be the focus of attention in the months to come. No implication should be drawn, however, that the U.S. Department of Defense will support ratification of the treaty in spite of its current shortcomings in that area.

The Department of Defense is acutely aware of the significant national security implications of the seabed mining text, both as it pertains to access to strategic minerals and to the transfer of technology. Foreign governments should be under no illusion; the U.S. military establishment will not be the weak flank in U.S. efforts to improve the seabed articles. The United States government is proceeding to the Conference with a united interagency front. Changes to the seabed mining text have to be made, and all states concerned need to roll up their sleeves, sit down at the table, and show the cooperative spirit and flexibility necessary to produce a mutually acceptable text. If that happens, and we have every expectation that it will, the objective of Caracas -- a comprehensive universal treaty on the law of the sea -- will be in our grasp at last.

NOTES

1. In the discussion of transit passage that follows, the term "international strait," unless otherwise indicated, makes reference to an article 37 strait under the Draft Convention: a strait which is "used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."
2. As noted, the enhancement of maritime mobility through straits was part of the overall package negotiated on Committee II matters, not just a precise counterweight for the provision which would permit a 12-nautical-mile territorial sea. The transit passage regime will also apply to international straits which are currently overlapped under the traditional 3-nautical-mile standard.

3. The discussion on normal mode in transit passage applies equally to archipelagic sea lanes transit (see article 53.3 of the Draft Convention). This and other parallels of construction between the two regimes lead to the same conclusion as to the right of submerged navigation through archipelagic sea lanes.

PROGRESSIVE DEVELOPMENT OF PUBLIC INTERNATIONAL LAW THROUGH INTERNATIONAL CONFERENCE NEGOTIATIONS

Professor Jonathan I. Charney
Faculty of Law
Vanderbilt University

INTRODUCTION

This paper does not address the current public policy debate on the substantive interests of the United States in the signing and ratifying of the Law of the Sea Convention, but rather focuses on certain procedural questions related to the development of new public international law that are illustrated by the law of the sea negotiations. Since the effectiveness of the international legal system is an important interest of the United States, an examination of the Third United Nations Law of the Sea Conference from this perspective may have considerable value. Perhaps, armed with the lessons of this conference, the effectiveness of the international legal system can be improved.

The essence of this paper is that conference negotiations must be seen as closely linked to developments outside of the conference. Thus, the conference is neither the beginning nor the end of the process of developing the public international law of the sea. In my opinion this fact is not sufficiently appreciated. This inquiry is divided into two parts. First, the paper discusses the contribution the Conference has made to the progressive development of general international law. Second, the paper addresses the difficulties faced in areas where there has been rapid development of new technologies. The negotiations for a regime for deep seabed mining serves as a classic illustration of these difficulties.

DEVELOPMENTS IN GENERAL INTERNATIONAL LAW

At the time that the international community first considered commencing the negotiating process that led to the convening of the Third United Nations Conference on the Law of the Sea it was recognized that some existing public international law of the sea needed to be changed. In addition, it was recognized that certain rules needed to be clarified and that new norms would be necessary for new ocean activities. The Conference was charged with addressing all aspects of the law of the sea and producing a convention that would contain the new treaty-based laws of the sea. Thus, it was called upon to serve a quasi-legislative function.

Despite its checkered history, and despite the fact that the actual entry into force of a universally-accepted Convention on the Law of the Sea remains in doubt, the Conference has accomplished many of its goals. Even if the Convention were never to enter into force, the multi-year Conference has provided an opportunity for nations to seriously

focus on the needs of international law in the oceans, to communicate views and information relevant to those needs, and, ultimately, to evolve new understandings on the preferred legal norms. As a consequence of this focused and serious communication, the international community has already developed understandings on some new norms of behavior and substantial progress has been made towards that end in other areas. The Convention as adopted contains the essence of many of those understandings and its entry into force would cement those agreements. If, however, the Conference were to stop its work today, that progress would be reflected to a great extent in general international law that is binding on the international community.

Although the transformation from an adopted Convention to general international law would not be automatic and would depend upon many factors, there is little doubt that future international law will be greatly affected by the instant negotiations regardless of whether or not a Law of the Sea Convention enters into force. The clearest example of a contribution to international law through the negotiating process is the recognition that every coastal state has a right to a 200-nautical-mile zone of national jurisdiction that is not a territorial sea (articles 55 and 57). While there had been much activity on this subject outside of conference negotiations, the resolution of the issue was substantially facilitated by the preparatory work of the Conference and the early Conference sessions. At present, the exact scope of that zone is not completely settled. The basic concept is, however, an accepted fact of international law. Other areas where developments in general international law will be realized regardless of whether the Text will come into force are

1. the final demise of the maximum limit of the territorial sea at three nautical miles and the probable limit at this time at 12 miles (article 3);
2. the evolution of special baseline rules for reefs and deltas (article 6 and 7.2.);
3. refinements in the law of innocent passage with regard to the rights and obligations of the transiting vessel and the coastal state (articles 17-26);
4. the development of a concept of transit passage through straits used for international navigation (articles 37-94);
5. the development of special rules for the waters adjacent to archipelagoes, i.e., archipelagic baselines, archipelagic waters, and archipelagic sea lanes passage (articles 46-54);
6. the evolution of a duty on the part of exploiters and coastal states to coordinate their uses of the living resources of the oceans (articles 61-73, 117-120);
7. acceptance of the fact that the limit of the regime of the continental shelf is not found near the seaward limit of the geologic continental shelf but runs at least throughout the entire geologic continental margin (article 76.3);

8. the evolution of a general duty to protect the marine environment by balancing ecological needs with the abilities of the coastal state to avoid the damage and to coordinate these activities with other interested states. An undeveloped economic condition or the desire to advance economically are probably not a basis for releasing the state from its duties to the environment (articles 192-196);
9. a qualified right of the coastal state to exercise extraordinary jurisdiction in ocean areas adjacent to its shores to protect the marine environment in highly unique and fragile areas (articles 211.6 and 234); and
10. a decrease in the freedom of scientific research in the ocean in favor of greater coastal state control over scientific research undertaken within its zones of national jurisdiction (articles 246-253).

The conference process may have even contributed to the general international law of the deep seabed, although due to the considerable controversy surrounding that subject, the nature of that contribution is difficult to define at this time.

Arguably, contributions to general international law may be the only real value of such a conference. Public international law does not fit into the positivist mold of a legal system which has a sovereign, an enforcement system, and subjects. The ultimate test of the viability and effectiveness of a purported rule of <u>international</u> law is the existence of an understanding among the members of the international community that the rule is normative and thus is considered to be legally obligatory. This is true regardless of what the formal source of the law is, be it customary or conventional. Traditionally, the evolution of these norms has required long periods of international interaction in order to become identified as international law. In our fast-moving world, such slow evolution has become impracticable. Consequently, more rapid methods of generating new international legal norms have been sought. Treaties and resolutions have been viewed by many as superior methods of law development. However, the effectiveness of the approach is not the coming into force of the treaty but rather the generation of a consensus within the international community that the rule is accepted as binding on the community.

The conference process permitted the participating states to communicate their needs and interests and to evolve towards an international consensus on particular norms of behavior, albeit often with much difficulty. The institution of the conference accelerated the necessary communication and permitted the relatively rapid development of mutual understandings on some new rules.

In general, I view this process as beneficial and believe that it has been successful at the Law of the Sea Conference. Such an approach does present some problems, however. In the first place, the rapid development of new rules through the

conference process short circuits the slower customary law route. It may be unwise to develop new norms quickly, since the situation might not be ripe for the application of international law. The many holes and ambiguities found in the Convention reflect the recognition that certain issues were not ready for a legislated solution. A related problem is that positions taken and understandings reached at a diplomatic conference may not adequately reflect the real interests of the participating states. The traditional approach, which looks to real world behavior of nation states over significant periods of time, provides a greater assurance that the norm reflects a real community consensus. On the other hand, there are benefits to be gained by facilitating the development of new norms through the conference process -- speed, structure and stability. On balance, I believe that this aspect of the Law of the Sea Conference has been positive and commends itself to use in the future.

THE NEGOTIATION OF TECHNICAL ISSUES [1]

There are, however, other subjects within the Conference that may not be susceptible to resolution outside of a written agreement among states. The key example of this class of subjects is the regime for deep seabed mining. These subjects appear to require for resolution, concrete and detailed rules and, often, the establishment of new international institutions.

While many complain about the slow progress made on the deep seabed regime, in large part the pace is a reflection of the knowledge that if no consensus is reached within the international community, no written rule of law produced by the conference can be implemented successfully. This, of course, arises because of the nonpositivist nature of international law. A negotiated rule that does not reflect a consensus of the international community would not be effective as a norm because effectiveness in the international arena is dependent on the consensus. As many jurisprudes observe, a consensus, or at least acquiescence on the part of the subject population, is necessary even in a legal system that does fit the positivist mold.

The difficulties faced by the international community in its attempt to evolve a legal regime for deep seabed mining have broad implications. Part of the problem has been the difficulty of reaching a political agreement on a highly controversial subject. However, there is a narrower aspect of the problem: the procedural obstacles faced by the international legal system when it is called upon to evolve new legal norms demanded by new industrial and technological developments. Such a challenge is not unique to the deep seabed or to the Law of the Sea Conference.

The failure of the international law to adequately address the control of nuclear energy, despite early attempts to do so (such as in the Baruch plan after World War II) is a fact with which we must continue to live. The difficulties now about to

be faced in the area of development of outer space law point to the likelihood that this challenge will continue.

In this highly interdependent world, many activities have global implications and require global solutions, often with the aid of the international legal system. This is particularly true where rapid technological development is applicable to areas outside of the jurisdiction of states, i.e., the oceans, outer space, and Antarctica. It can also be true where technologies have global implications within nation states such as in the environmental and economic arenas. These technological developments often call for the rapid creation of detailed norms of international law either to facilitate their development or to control their adverse impacts.

The negotiation conference would appear to be an ideal route for creation of such norms. Despite the newness of the problems associated with technological developments, we continue to negotiate their solutions at diplomatic conferences in traditional ways that have not changed in their essential characteristics for decades, if not for centuries. The task of evolving these new norms is left to relatively uninformed generalists.

The history of the deep seabed negotiations is a perfect case in point. While many delegations had technical experts associated with them and the secretariat had its experts, the treatment of technical information was less than satisfactory. If one were to study the information that was available to the negotiators over the course of the Conference, it would become clear that the information that was available was sparse and often highly inaccurate and misleading. The inadequacy of the information and the inability of many to absorb information that was available was not conducive to a rational and effective negotiation, especially in the highly charged political atmosphere present. Only relatively recently have concerted efforts been mounted to provide credible information to the interested participants so as to focus on the technical issues and to assure its integration into the negotiating process.

This was accomplished through the formation of small groups of delegates that were devoted to resolving specific technical issues and that were staffed with experts. The two most successful groups of this kind have been the Archer Subgroup of Technical Experts, which focused on production control issues, and the Koh Working Group of Technical Experts, which addressed financial arrangement issues. Reports such as the MIT study of the economics of the deep sea mining industry provided needed technical information. As a consequence, the negotiations were able to progress on those technical issues. Unfortunately, the legacy of earlier failures remains in the text and will continue to haunt the regime of the deep seabed. The difficulties faced by the Conference on the question of defining the limit of the continental shelf can also be attributed, in part, to inadequacies in the management of the technical aspects of the issue.

Negotiation is a process of communication. The communication of highly technical information in the context of a diplomatic negotiation is particularly difficult but is a necessary ingredient to the development of new legal norms in areas where technology is a factor. Unless communications are improved, it is probable that the difficulties faced at the Law of the Sea Conference will be repeated elsewhere. The consequence will be that international law will be limited in its ability to meet the demands of new industrial and technological developments. Such a situation will inure to the detriment of all but particularly to those who rely heavily on technological advances for economic growth, such as the United States. If it is determined that an international agreement is desirable, thought must be given to assuring that the processes can be effective. There are many techniques that can be used to accomplish this objective, but unlike the past, affirmative efforts to that end are required. General and particular strategies to fill these needs ought to be developed at an early date so that the difficulties that were faced at the Law of the Sea Conference will not be repeated in other settings. Procedures that might be worthy of consideration include the following:

1. Schedule the negotiations with an eye towards the adequacy of the relevant information. The states and sponsoring organizations should look at the point of development of the technology, the proprietary nature of the relevant information, and the possibility of avoiding restrictions placed on the availability of the information by industry, and the availability of nonpolitical studies by scholars and others.
2. Utilize various forums other than the negotiation conference to narrow and refine the political, legal and technical issues.
3. Develop a credible and efficient system to distribute available information by publishing studies and conducting educational programs aimed at potential delegates as well as domestic bureaucracies involved in the development of national positions.
4. Develop methods to generate information as needs are identified through credible sources such as known experts, independently established expert groups (e.g., the Scientific Committee on Antarctic Research), universities, etc. Such information could be sponsored by the Conference or interested delegations.
5. Structure the negotiations to have expert groups put in place at the negotiations early in the process so that they can coordinate their activities with the political negotiations to service the needs of the political process.
6. Assure that delegations are equipped with expert members. If that is not possible for all delegations, provide a vehicle for the pooling of resources to provide this asset.

CONCLUSION

In conclusion, it would appear that the negotiations have already been a qualified success by facilitating the development of new legal norms, but the difficulty faced by the Conference in effectively addressing new industrial technological developments is symptomatic of a deficiency in the system that warrants early attention. The solution may be found in part within the structure of these negotiations but equally important are developments outside of the Conference.

NOTES

1. This issue is examined in greater detail in Charney, "Technology and International Negotiations," 76 AJIL 78 (1982).

INTERESTS IN TRANSPORTATION, ENERGY, AND ENVIRONMENT

Professor Bernard H. Oxman
School of Law
University of Miami

Before proceeding with my topic, I think it's important to indicate, with the Chairman of the Drafting Committee present, that I don't believe that there is one participant who feels that the Convention approaches even closely the measure of certainty, predictability, precision, and resolution on every conceivable outstanding issue that a lawyer might bring to bear if he were drafting a will that would have to stand up against all potential attack once his client had died.

You may be aware of a very famous dictum delivered by the Supreme Court of the United States: "It is, after all, a constitution that we are interpreting." I do want to emphasize that the Convention on the Law of the Sea should be regarded in many respects as a constitutive document rather than as a settlement. Likewise, I would agree with Professor Charney that in a constitutive document there is certainly room for a style of drafting which produces words such as "due process of law" which many have regarded as helpful in the course of years and which I find to be no more precise than some of the words we put here. But I would also quote from Admiral Harlow's remarks, in which he points out that no text, however constructed, is immune from the tenacity of an academic in search of ambiguity. He goes on to say that he firmly believes that the Draft Convention is clear to the participating states and that state practice will follow reality, not theory, in the continuing evolution of the law of the sea. I think that is something to bear in mind.

Turning more to my assigned subject, just a few days ago I spoke, after many years of noncommunication, with a former classmate who is now a vice president of an American oil company. He informed me in the course of the conversation that his company had made the decision to oppose the Draft Convention on the Law of the Sea. I responded that that decision indicated to me that his company had probably decided to invest in deep seabed mining. He said that they had not made that decision but that they were opposed to the Convention because it contained a clause requiring that all abandoned or disused installations or structures on the continental shelf must be entirely removed. I pointed out to him that that language was copied verbatim from the existing convention on the continental shelf to which the United States is already a party. His general counsel apparently had not informed him of that fact. I cited this as an example of the kind of problem one has in dealing with the so-called complex of energy, environment, and transportation issues in a convention of this sort. Such a convention must, on the one hand, try to set up a macro-superstructure for these activities; on the other hand, it must also detail rules and therefore detail exceptions to the rules. Moreover, the more

detailed the exceptions, the more one is compelled to write exceptions to the exceptions. As a structural matter, this is one ground on which the deep seabed mining text could certainly be criticized.

The assessment of the effect of a convention of this sort on energy, transportation, and environmental interests should under no circumstances turn on a particular clause such as that one, although you may be interested to know that there are moves going forth in the Conference to correct that text -- both the environmentalists and the oil companies want it corrected -- and it seems it's just a problem of process to get it corrected. Most people would argue that the most important energy interest engaged by the Law of the Sea Convention concerns the provisions on jurisdiction over that portion of the seabed likely to contain oil and gas. I think that is open to dispute. What is clear from present data is that an even larger proportion of the world's total consumption of oil and gas will be increasingly moved by ship, by tanker, over very large distances. The distances are so large that I have grave doubts, and I think everyone else has to have grave doubts, about how any kind of regional approach to the underlying issues could accommodate the relevant interests. As the recent war between Iraq and Iran demonstrated, the interests in the movement of oil out of the Persian Gulf are global in character. It is not sufficient if those global interests have a meeting of Persian Gulf states to decide on whether or not, or how expensive it will be, to move Persian Gulf oil out of the Persian Gulf. I would also argue very strenuously that if the interests in movement of oil and gas out of the Persian Gulf into the Indian Ocean and on to the rest of the world are global and major in character, it goes without saying that the interests in military communication to and from that part of the world are also global in character.

Therefore, if one looks at the energy issue from the perspective of consumers, as most nations of the world do, the issue which one must address is the impact of the law of the sea on the cost of moving the energy by sea. Of course, all sorts of costs are involved. The most significant may be environmental, another interest which is global in character. The pollutants don't stay in one place and the ships carrying oil don't stay in one place. A ship that is badly constructed in Japan is a ship that is badly constructed when it's navigating off the United States. Pollutants can move across the ocean, winds can carry them in one direction or another, as indeed the two states bordering the English Channel have discovered in the course of several accidents. Therefore, a solution to that problem and a balancing of the relevant interests involved is going to require action on a global level as well.

Finally, there is the interest in the extraction of energy directly from the oceans. In this case, the Conference is often described as a major "land grab," it has assigned not only the 200-mile zones but all of the continental margin beyond 200 miles to the coastal states. I really do not think it is fair

to call the Conference a land grab in this regard. I think the coastal states would have asserted rights over the continental shelf whether there had been a Conference or not.

Indeed, one of the most interesting characteristics of the Conference is that the coastal states with broad continental margins insisted that they already had vested rights in the continental margin which under customary international law could not be taken away. I think that perspective simply has to be seen and understood. To that extent, the Convention tends to confirm and add precision to existing trends in state practice. There is nothing wrong with this, but there is something that has to be remembered. Too many people, in my view, are assuming that under a treaty there is a regime of coastal state jurisdiction on the seabeds on one side and a regime of an international sort on the other, and that therefore you need a precise line separating these two areas, but that without a treaty that problem does not exist. I'm not so sure. The United States, the Federal Republic of Germany, France, and the United Kingdom have all enacted legislation applicable to the seabed beyond the continental shelf without defining the continental shelf. Sooner or later, it will be necessary for a company to figure out whether they're to go to the United States or the Federal Republic or some other country under the mining legislation or to a coastal state in order to get permission to work in a particular area. Oddly enough, it will probably be the marine scientists who will first face the question since they will have to decide whether to ask for permission to conduct research. And at that point, questions can arise about what may be one of the most important frontier energy source areas in the oceans, the continental rise lying at the foot of the continental slope. Now, the geological reality is that the continental rise includes sediments which have lying beneath them both continental crust and oceanic crust. Therefore, in my opinion, if you want to add a measure of certainty before making colossal investments in oil exploitation of the continental rise, you must deal with that issue as well.

The underlying reality that I wish to stress is that the global issues posed by transportation, the need for energy, and the need to balance the environmental concern will not go away. I would like to choose a most dramatic example to illustrate this point. It is perceived by some who favor rapid development of offshore resources that every time there is a major continental shelf accident, a major blow-out of any sort in any part of the world, there is immediately public pressure in virtually all other parts of the world to slow down the development of continental shelf oil and gas, to be more careful, to stop it -- nobody wants his house, his area polluted. Yet there is a major interest in assuring that energy interests both in transportation and in seabed exploitation are developed and respected as rapidly as possible. Meanwhile, global environmental standards which reduce the chances of accidents have the effect of reducing and making more expensive the potential for development. The reconciliation of these

interests will require a global approach and will eventually force itself on the international community. The superstructure for environmental protection in this Convention is very workable and should encourage a lot of subsequent work. But it does not, as stated by Ambassador Pardo, contain very many precise environmental rules. It contains one which is new to international law and which is not qualified: that all states have the obligation to protect and preserve the marine environment. Judges strongly favor such unqualified statements of principle in cases where there is ambiguity. This principle would have to be stressed.

Whether the Convention is by any stretch of the imagination the best way to deal with and promote these interests is a close question. It has things that everyone could criticize. But to imagine that the international community can take these issues and wipe them off its agenda is simply totally unrealistic. The law of the sea will not go away, the problems will not go away, indeed the Law of the Sea Convention will not make them go away. It will simply provide some basis for dealing with them. But deal with them we must and deal with them on a global basis in some kind of global forum, in my opinion, we will have to do.