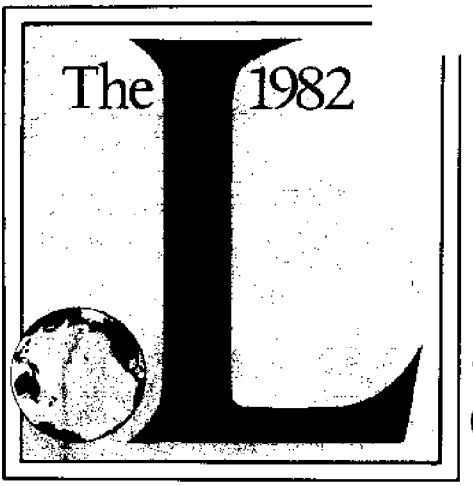

of the Sea Treaty

One observer's assessment of
the conference, the treaty and beyond

Thomas A. Clingan, Jr.

Donald L. McKernan Lectures in Marine Affairs

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The 1982 Law of the Sea Treaty

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Contents

Preface

Although I had known Donald McKernan for several years prior to 1974, I was stunned one morning during the first substantive session of the Third United Nations Conference on the Law of the Sea when, in Caracas, Don informed me of his intention to retire from the State Department. I was even more incredulous when he told me that he wished me to consider replacing him in his post. Those of you who knew Don will understand when I say that I was not asked, but told.

At the time I was an academic lacking, in my view, even the most rudimentary skills and knowledge necessary to the task, except for a deep interest in the legal aspects of fisheries management that Don had nurtured in me since we first met. The very next morning I was contacted by the Embassy and asked to drop by to start the necessary paper work. I knew then that I had to accept the challenge.

Don had been for some time Special Assistant to the Secretary for Fisheries Affairs, and the bureau was only recently reorganized to transform the job into Deputy Assistant Secretary. In the organizational sense, then, I did not replace him, which was good because no person could ever have successfully done that. I determined to build upon what he had established, and in the early weeks and months I drew heavily upon his inexhaustible storehouse of wisdom and was the inevitable beneficiary of his constant moral support.

In short, Don changed my life dramatically and was responsible for giving me a priceless opportunity. I can never forget that fact and I am quite certain that I could never repay him were he here today. Therefore, I am proud to offer this lecture in the memory of a truly monumental person.

The 1982 Law of the Sea Treaty

One observer's assessment of
the conference, the treaty and beyond

I refer to this treatment of the topic as the assessment of one observer, because I believe it is important to emphasize that my comments amount to no more than that. I bring to you a personal and not institutional perspective which may be entirely different from, and perhaps in conflict with, the views of any of the many hundreds of other observers of the conference scene. In addition, I caution you that these views are retrospective. Thus, they may be colored by the fact that I make them with full knowledge of the results which were ultimately achieved. They may not be the same views I held when the outcomes were still indeterminate. History has a way of shaping recollection.

With such reservations, I begin my recollections. I will discuss my views on whether the conference was a success or a failure and some of the specific events that affect my conclusions. I shall necessarily touch upon other aspects such as the degree to which the conference has already shaped the law, offer some modest observations on where we stand now and risk a somewhat obscured peek into the future.

Success or Failure?

First, was the conference a failure? In a narrow sense, if one is to be truly objective, the answer must be a decided "yes". In my view the treaty, at least in its present form, is at best moribund, if not in fact dead. It is not, and cannot be, the universal and comprehensive charter for the oceans that we all anticipated at the outset of negotiations. While at the immediate year's end, 158 entities had signed the convention, 15 had not, including the United States, the Federal Republic of Germany, and the United Kingdom.

It is ironic that these three states together contribute approximately 38 percent of the budget of the United Nations, and would have borne a similar proportion of the financing of the International Seabed Authority and its Enterprise. Perhaps of equal significance is the fact that while 27 of the 60 ratifications necessary to bring the treaty into force have been received, none of the major financial contributors, including the Soviet Union, is among that group. Among those who are so included, the total obligation to the potential costs of the operation amounts to only a few percentage points.

These cold facts suggest that the developed industrial states of east and west are not flocking to join in a process that produces a significant financial commitment to an international organization with a most uncertain future. Even the U.S.S.R. would be forced to swallow hard to meet its financial commitments. Nevertheless, the Soviets may be tempted to ratify for the propaganda value they may perceive. Even that possibility seems remote in a scenario where the United States makes no contribution.

In addition to financial implications, seabed mining itself is moribund. The preparatory Commission charged with developing rules and regulations to be put into effect if and when the Seabed Authority becomes a reality has predicted, optimistically in my judgment, that it

will be some 14 years before the Enterprise, the deep seabed mining company of the Authority, could go into production. Yet at the same time, the state of the international metals market and the inability of major consortia to obtain appropriate financing have led those companies to all but abandon immediate plans to mine. According to some knowledgable participants in that effort, it may be decades before production actually begins.

Recently, a significant piece of evidence has emerged bearing upon the economic realities of deep seabed mining. The Australian delegation to the Preparatory Commission tabled a study before Special Commission 2 dated January 14, 1986. According to this study, before such a high risk venture as seabed mining could be viable enough to attract the necessary private capital, it would be necessary to project a discounted cash flow rate of return on investment of at least 18 percent. The study projected the rate of return for the Enterprise at only 1 percent, and for private mining options at no more than 4 percent. Before the 18 percent figure could be reached, according to this study, the present aggregate metal prices would have to double. This turn of events seems unlikely given that the rate of return for land-based mining companies fell from 18 percent in 1979 to a negative 8 percent in 1983.

Finally, it appears that it will be some time—months if not years—before the Preparatory Commission completes its work. Until it does, it will be impossible to tell whether emerging rules and regulations will prove sufficient to entice recalcitrant industrialized countries into the treaty family. Results to date do not so indicate.

Even if the ratification process proceeds at the present rate of about eight per year, it would be four to five years before the treaty could possibly come into force. If one is persuaded, as I am, that significant major players will still hold back, it is impossible to believe that the treaty has any meaningful life. The Authority, hampered by insufficient financing and lacking in appropriate technology, would be ineffective at best and, at worst, an international boondoggle with its major resources absorbed by institutional rather than operational objectives.

Realism, thus, compels me to wonder whether it is merely naiveté or false pride that continues to drive many states to pump money into an operation that seems to have little or no chance of substantial success. Only the unlikely prospect of major changes in attitude on the part of the players in this charade holds any real hope for salvage. Even if it is sustained by the contributions of a number of relatively minor players in the game, it will still be perceived as brain dead. I must conclude, then, that the treaty, as a document of international agreement, is ineffective.

My lament is over once-held hopes and aspirations for a treaty as an effective international charter of a global nature. I hasten to add that there always has been and continues to be a viable public order of the oceans, although its parameters may not be hard and clear. It lacks bright lines.

Later I shall speculate upon the structure of this order in a post-conference era, but first I shall outline my perceptions about certain events that may have contributed to the present state of affairs.

Leadership and Procedural Matters

To the extent that the conference was institutionally successful, the credit, to my mind, is to be laid to its leadership and to its ability to structure procedural rules that perhaps were the only ones adequate to the management of such a large and complex negotiation. In this regard, a key decision was made in Caracas with the adoption of the procedural rule on consensus giving life to the "gentlemen's agreement" of the General Assembly. The consensus rule gave a structural foundation necessary to moving the treaty as a package and avoiding fractionalization of issues.

The consensus rule alone was insufficient to guarantee successful conference management. It was supplemented in the next conference session in Geneva by a decision to place responsibility on the committee chairmen to produce a single negotiating document and, subsequently, the introduction of a unified, single such document. The combination of consensus and the introduction of a single negotiating text was the foundation of the package deal. No other procedure, to my mind, could have stood as much chance for success. These procedural questions were, of course, intimately related to the scope of issues to be taken under consideration.

Prior to the conference, it had been the U.S. view that any negotiation on law of the sea issues be undertaken in "manageable packages", a euphemism for separate agreements on different subjects, as was the case with the 1958 Conventions. This was not possible for at least two reasons:

- In 1970, President Nixon had taken the public position that the negotiations should cover a wide range of subjects. President Johnson, before him, had referred to the oceans as the common heritage. This theme was the same as that incorporated by Arvid Pardo in his speech before the General Assembly in 1967. At the same time, the common heritage theme appealed to those who were enticed by Pardo's view of the oceans as a vast world commons, and many newly emergent nations saw this as an opportunity to create a new global charter in which they might be major participants.
- There was not uniform support among Americans for the manageable package approach. Some believed there might be advantages to negotiating the protection of national resource interests in U.S. coastal areas by creating a situation that required clear demarcation of the extent of those interests.

The Comprehensive Package

In any event, the decision was made to address all oceans interests in a comprehensive negotiation. Whether that decision

contributed to the advancement of the negotiations is a question that can be answered both "yes" and "no".

I believe that in at least the early stages of negotiation the answer might well have been "yes". One major advantage, from my perspective as a second committee negotiator, was that the inclusion of the question of seabed mining upon the agenda and its assignment to the first committee provided a forum that engaged the attention of those interested in advancing third world conceptions of resource allocation. The idea of creating a vast international area beyond national jurisdiction appealed to them. Furthermore, the decision allowed the second committee, which had within its jurisdiction all important coastal state resource questions, to deal with those issues efficiently and with a minimum of ideological rhetoric.

This allocation of conference resources was not met with major opposition probably because as many developing countries were coastal states as were not. Moreover, the split in jurisdiction between the committees enabled some to advance their political objectives in one committee while concurrently protecting their real interests in another. In other words, while many states were actively and vocally pushing the concept of the common heritage of mankind in the first committee, they were agressively ignoring the substance of that concept elsewhere by advocating the continental shelf doctrine and the exclusive economic zone.

In retrospect, I am mildly amused that it was the United States that was so frequently singled out as the destroyer of the concept of the common heritage of mankind. The biggest resource grabs from the grasp of world sharing occurred in the second committee with the full support of many strong coastal state advocates among the Group of 77. This is not to say, of course, that the United States was not among them.

To understand the nature of our resource interests, one need only look at the 1970 proposal of the United States for a trusteeship zone with regard to the continental shelf. That proposal, which appeared to cut off coastal state shelf jurisdiction at a very narrow limit, in fact did just the opposite while at the same time protecting U.S. navigation objectives. Our early position opposing an economic zone of extensive proportions must, in this light, be seen as essentially tactical—a "goody" to be traded away an an appropriate point. No one could really believe that the United States fervently rejected extended jurisdiction adjacent to its own coasts if that control could be tied to and limited to resource questions.

But the question as to the wisdom of including mining in the total package can just as easily be answered "no". It was the issues represented by that package which eventually caused the conference to end in discord and frustration. The bombastic rhetoric of both sides eventually overwhelmed the patient efforts of wise compromisers and carried the conference unerringly to its tumultuous conclusion.

Nevertheless, it was probably inevitable, even desirable, to include mining in the package. The mood was such that stubborn refusal by the industrialized states to consider the issue would most

likely have resulted in early failure of the effort. Moreover, the argument can be made that agreement on navigation and coastal state resource issues within the context of a broader and globally acceptable charter for the oceans is far preferable than peacemeal treaties to which only a limited number of states would feel compelled to adhere. If one accepts this as the proper conclusion, then the next, and more difficult question to be addressed is why the conference, so successful in its other areas of negotiation, was unable to reach a satisfactory resolution with respect to deep seabed mining.

It is here that one should be particularly sensitive to the necessarily subjective nature of my comments. My view of the dynamics of the conference is but one among many. Only when those many perspectives are known and studied could any attempt be made at objective conclusions. Even then it is unlikely that these varied perspectives would lend much of value for modelling large multilateral conferences in the future. Further, it is not my purpose to ascertain fault or to lay blame, but rather to speculate about some of the conditions, attitudes or events that led to the inevitable conclusion.

The Role of Ideology

First, let us consider the question of ideology, although I doubt that the term is uniformly understood. There is no doubt that fundamentally different philosophies played an important role in the failure to achieve consensus. Strife was intense between those who sought to advance the principles of the new international economic order and the reallocation of global resources and those who supported, to a greater or lesser degree a free market philosophy.

Ironically, at no time was there any demonstrable and immediate prospect of the exploitation of manganese nodules. This improbability gave an air of unreality to the negotiations, an atmosphere which enhanced rather than diminished the temptation to rhetoric. The rhetoric was largely absent in the second committee, where representatives dealt with matters of significant national interests which could be quantified. As a result of these fundamental differences, a parallel system was adopted to effect a workable compromise. The result of the decision to accept a parallel system was the production of texts of almost overwhelming complexity. In essence, the emerging texts outlined a global seabed mining contract, and, that being so, a vast number of contingencies had to be taken into account.

In retrospect, I would be inclined to inquire from the mining companies whether under any circumstances they would be tempted to seek a uniform contract for land-based mining to be applicable in every country in which they might have an interest. I sincerely doubt it, and I believe they would think me addled. Yet we embarked upon this incredulous course, attempting to negotiate extensive safeguards and guarantees that were difficult to comprehend by the sophisticated delegations, let alone those less so. Certainly, the disparity in knowledge and sophistication did nothing to lessen the tendency toward rhetorical response on a sometimes highly simplistic level.

The United States chose to deal with the ideological differences in a very clever way—so clever that the decision, seemingly wise at the time, may have been one of the most unfortunate of the conference. If one carefully examines the texts—and this is not limited to the mining texts—one can detect a consistent pattern. First there is concession to a rhetorical principle which is then circumscribed with precise language. In the second committee texts, for example, one finds that the waters within an archipelagic envelope are subject to that state's sovereignty which extends to the air space, the seabed and subsoil, and all resources contained therein. But then one discovers that this sovereignty is exercised "subject to this Part". What follows is a series of detailed provisions that make clear there is in fact no "sovereignty" over these waters in the classic international law sense.

This technique of giving with one hand and taking away with the other was employed in spades in the mining provisions. Article 136 states that the Area and its resources are the common heritage of mankind. That this phrase implies common ownership is further reinforced by the next article which vests the resources of the Area in mankind as a whole. Yet the mining provisions as a whole spell out precisely what is meant by the "common heritage of mankind", particularly those provisions that deal with the distribution of revenues, and the allocation of and access to mine sites. Arguably, such provisions as that dealing with production controls are the same. A close analysis of the production limitations can but lead to the conclusion that they are ephemeral at best, a "no bite" set of rules. Yet the principle of production controls was conceded.

This widespread concession of principle while tactically retaining loaded words in the texts contributed markably to the rejection of the treaty by the United States. Although I was persuaded of the correctness of the technique at the time, I now consider it a significant blunder. That blunder was compounded by the acceptance of titles to the articles drafted by the secretariate but at no time negotiated or even discussed. Many of these titles merely wave a red flag at those with ideological concern: Article 136, "Common heritage of mankind"; Article 140, "Benefit of mankind"; Annex III, Article 5, "Transfer of technology" are a few examples. This concern is most clearly illustrated in the six principles President Reagan set forth as essential for U.S. support for the treaty at the completion of his administration's review. The one least noticed was the requirement that the treaty establish no unsatisfactory precedents for future negotiations on other subjects. For "precedents" read "principles". Finally, it is no secret that ideology, however, defined, played a prominent role in the final sessions of the conference after the election of President Reagan.

I must stress that while it was quite clear to me that key players in the new administration wanted nothing to do with this treaty in any form, the delegation itself was not in consensus. Some, of course, rejected the entire structure with contempt. Others were of the view that if the difficulties seen by the president could be corrected to an adequate degree, the treaty would be acceptable to the United States. That was, after all, what the president had said. Those in the latter

group, I believe, saw real problems in the mining texts that would in fact make it problematic whether an unsubsidized mining segment in the United States could operate profitably under the treaty. They believed that if the mining industry were satisfied, opposition to the treaty would diminish, if not disappear. These people were to be severely disillusioned.

Following the decision not to sign the treaty, comments were made before various fora to the effect that even had the mining industry been satisfied, the administration would still have found the treaty fatally and uncorrectably flawed. In sum, then, the ideological differences over a resource that could not have been expected to produce meaningful revenues during the life of an average treaty played an inordinately prominent role in the negotiations, and attempts by both sides to paper them over with clever drafting techiques failed.

Barriers to Agreement

But the ideological problems were not the only ones that brought about the present state of affairs. I previously alluded to the role that complexity played in making agreement more difficult, and I believe it should be underscored again. While studies by the secretariate and papers from academic institutions did much to alleviate this problem, they did not eliminate it. As the conference wore on, the United States, sensing that its initial strategy of spelling everything out in detail was leading to a negotiation that could last for decades, reversed its policy and sought to remove much of the detail by insertion of many references to rules, regulations and procedures of the Authority, to be negotiated subsequent to the adoption of the treaty, presumably in the Preparatory Commission. The concept behind this change of policy was threefold:

- It would simplify the task of the conference.
- The details could be negotiated in what was perceived as a technical negotiation, as opposed to a political one, thus removing most of the rhetoric.
- These rules and regulations could then be produced before the U.S. Senate in the course of its deliberations to reassure it of the workability of the system.

Despite this effort at simplification, a great deal of difficult detail remained, and the United States insisted that the key points remain in the body of the treaty itself. It was difficult to achieve compromise on much of this detail. No one knew much about the practical requirements of deep seabed mining, and this uncertainty left both sides unwilling to compromise an unknown future.

The next barrier to consensus flowed from a number of unforeseen events. I shall refer to three that in my mind played important parts in the results. The first was the procedural decision of the conference to prepare a series of negotiating texts. In my previous comments I described this as an important positive step. It also had its negative side. It placed a great deal of power, in the early stages of the

conference, in the hands of the respective committee chairmen. That choice was necesary if the conference was to progress, but it was also uniformly understood that each chairman would include in his negotiating texts only those provisions which had in fact been fully discussed. It was on the basis of such full discussion that each chairman was to draft articles that would lead toward compromise.

In large part, the chairmen followed that procedure, but there were notable exceptions that damaged the negotiating process. Perhaps the most notable example was the revised version of the first committee text that emerged following the fifth session of the conference in 1976. Although there had been considerable discussion of the first committee issues, notably under the leadership of Jens Evensen of Norway, few results of that negotiation found their way into the revised text, and many did find their way in that had not been negotiated at all. The reaction of the United States was sharp and prompt, including a not too veiled threat to reconsider participation in the conference. Such events set back the conference timetable, undercut confidence in the procedures of the conference, and caused general confusion about the state of the play.

This event was of sufficient proportion that the conference was forced to adopt new procedures to ensure that no one person could make changes in the text unless they were agreed or unless it appeared through debate in plenary that the change was likely to improve the prospect for consensus. The arbitrary manipulation of texts was exacerbated and facilitated by the lack of clear cut workable procedures in the first committee. Over the course of the conference, just about every procedural device was used to attempt to facilitate negotiations, but none seemed to work well. Informal groups, working groups, seminars, and the like abounded, sometimes with more than one group focussing on the same topic at the same time. It is not surprising that unproductive, or even counterproductive, procedures produced unproductive results.

Another contributor to confusion was the internal politics of the Group of 77 and of the African group, which involved the role of the chairman as well. On this aspect, I will not dwell, because it would lead me to comment on personalities, and for obvious reasons I will not do so. Suffice it to say that there were throughout the conference substantial leadership and personality problems affecting the work of the first committee. This difficulty relates as well to my next comments.

A significant series of events having, I believe, an important long-term effect on the negotiations, occurred beween the sixth and seventh sessions of the conference. The government of Sri Lanka changed, and Shirley Hamilton Amerasinghe was replaced as the head of the Sri Lankan delegation. Although the government of Sri Lanka did not object to his continuation as conference president, several Latin American states did, on the ground that the conference rules did not permit one to hold the presidency unless he or she was an accredited member of a delegation. The stated reason for the objection was a superficial one only. There had been growing for some time *sub rosa* discontentment among some Latin American states with respect to the

presidency. This unrest was slowly growing into hostility. Much of this feeling arose when the president transferred the approval of text revisions from individual chairmen to the collegium, that is, the president and the chairmen in concert.

Many Latin states had a strong interest in the second committee texts. They were comfortable in the knowledge that these texts had been under the surveillance of Ambassador Andres Aguilar, a fellow Latin from Venezuela, and an able leader with broad and deep knowledge of the workings of the second committee materials. They had less, and in some cases no, confidence in the ability of President Amersinghe to protect the interests that they had fought hard to have reflected in the provisions accepted to that time. Thus they grasped enthusiastically at the opportunity provided and campaigned to unseat Amerasinge. This angered the Asians who sought and eventually achieved the support of the African group. Ultimately, the Latins were soundly defeated when Amerasinghe's seat was confirmed by vote. The depth of their feelings was confirmed by a symbolic walkout of the Latin country representatives to the conference.

It is my belief that some Latins had hoped to elevate Aguilar to the presidency but had underestimated the Asian determination to hold on. This seemingly trivial hiccup in the conference schedule had rather profound ramifications. First of all, Amerasinghe was no longer perceived as a consensus president, and this fact weakened him in his dealings with individual delegations or groups. His power to command results was vastly diminished. This was evidenced by occasional open or clandestine threats to challenge his rulings by vote.

The second, and by far more significant, result of the battle was the substantial power shift that occurred within the Group of 77. In the early days of the conference, it could be said with some confidence that the leadership within the group was Latin-dominated, particularly by Brazil and Peru. The United States accepted this appraisal, and there was a feeling that anything that could be negotiated with these two countries stood a chance of being accepted by the Group of 77 as a whole. In other words, the United States perceived that the Latins could "deliver" the Group of 77.

This had a number of consequences. The close relationship of the United States with these countries, which was open and apparent and which was privately referred to as the "little Mafia", bred resentment not only among Asians and Africans within the Group of 77, but also among other Latins who felt excluded. This latter factor led Mexico, for example, to defeat efforts by a small negotiating group known as the "secret Brazil group" to achieve changes in the text that had been quietly negotiated.

The fight over the presidency vastly reduced the power of the Latins to influence positions and decisions within the group. Yet, no other strong leadership emerged so that in many instances the group of 77 was simply unable to take any position at all. The complexion of the conference had drastically changed in 1978, yet, through various procedural devices the conference was able to proceed along a positive line, albeit slowly, in the direction of consensus.

Changes in U.S. Stance

This brings me to the final event I wish to discuss and it is, of course, the change in the U.S. administration at the end of the conference. While this may seem like an abrupt change of subject, there is a relationship which I shall describe.

The change in the administration brought about significant changes in attitude, and with them important shifts in emphasis. Prior administrations placed substantial weight, not only on the resolution of particular resource and military issues, but also upon the role of the treaty in relationship to broader questions of world public order, global uniformity in an area of the law where previously no such uniformity existed, and the peaceful settlement of disputes by a meaningful and effective mechanism. The new leadership placed heavier emphasis on the protection of U.S. economic and industrial interests, as perceived by them. Even previously consistent Defense Department objectives became modified. Earlier U.S. conference positions reflected clearly the determination to preserve naval mobility and protect U.S. security interests. This was well exemplified by the continual linkage of acceptance of the concept of the exclusive economic zone with such subjects as the satisfactory resolution of a transit regime through international straits.

In this period, the attention of defense representatives was largely devoted to the second committee. After the election, while navigation issues continued to be a concern, a new element found its way into their thinking. Navigation issues were perceived as short-term problems which could be managed with or without a treaty if necessary. Perhaps with the OPEC experience fresh in mind, there was a growing emphasis on assuring to the United States a supply of strategic minerals to sustain the national fighting capacity well into the future. Deepsea minerals—nickel, copper, cobalt and manganese—were seen as important long-term strategic imperatives. Thus attention was refocussed on the first committee. Committee two tactics were confined solely to the preservation of gains already obtained.

Here, I must diverge into personal comment. At no point was it ever made clear to me how deep seabed mining operations could ever be made secure, nor was it ever clear to me why a venture so speculative as deep seabed mining could loom so large in our strategic planning. In any event, U.S. members of mining consortia happily took this signal, and properly so, as evidence that the administration was no longer willing to accept delegation judgments at face value, and that the industry's leverage with the delegation was vastly strengthened. Therefore, they embraced the new concept, but did not, in my judgment, fully understand that this concept went far beyond a commitment to seek only the changes desired by the industry.

Another impact upon the course of negotiations was the change in the structure, tactics, and objectives of the U.S. delegation itself, and of its relationships with various components of the conference as an institution. Following the election, the constitution of the U.S. delegation changed drastically. New players were added. Some former players returned. And a substantial number of members in all areas of interest were removed from the delegation. This reorganization caused difficulties at a time when the United States needed most to be unified and to capitalize on its depth and sense of continuity.

This lack of continuity cannot be overemphasized. There was much less institutional memory than in any other period of the conference. It is my belief that this led us into some basic missteps. First, important personal relationships were lost between the delegation and major conference participants. Second, few remaining on the delegation had any real sense of the import of changes—some subtle and some not so subtle—that had occurred in conference dynamics over the years. I previously referred to the shift of power within the Group of 77. It was not clear to me that this fact was fully grasped. There was a tendency to believe that the old power structure was still in place, with resulting overemphasis on the influence of the Latin Americans in the Group of 77. We may well, as a result, have created a situation where communications were not so effective as they should have been with segments of the conference community.

It is hard to compute the magnitude of this problem, but I think one example is indicative. I refer to the now infamous "Green Book", the detailed book of amendments to the treaty tabled by the United States during the 1982 New York session. Prior to that time, discussion had been centered upon a paper (presenting alternative solutions to outstanding problems) that was prepared by the U.S. delegation. Purportedly in response to demands by the Group of 77 that specific proposals should be tabled so that the Group of 77 could see in some detail how far the United States intended to go in attempting to modify the foundation principles in the seabed mining provisions, the Green Book was prepared and disseminated with a clear announcement by the U.S. representative that the book in no way amounted to an ultimatum. The shock in the conference was instantaneous, with the group rejecting the book as any kind of basis for negotiations. The book contained the ultimate U.S. position on all outstanding issues. Only subsequently was the possibility raised, with some substantial foundation, that this book had not been demanded by the entire Group of 77, but only by certain representatives among them. Be that as it may, the damage was severe. Confusion was the order of the day, with mixed signals everywhere.

A group of lesser industrialized countries, called the Group of 11, attempted to salvage the situation by tabling their own more moderate set of articles, but that effort failed to obtain U.S. support since not all of the issues represented by the President's six objectives were covered. Moreover, the Group of 77 made clear that they would not permit discussions outside the scope of the eleven's proposal. This tense situation had been made inevitable by the long 18-month period during which the administration reviewed the provisions of the treaty.

During that period, negotiations almost came to a standstill. The period of inactivity created an atmosphere of doubt and uncertainty among delegations, including our allies. The Soviets took

the opportunity to step up propaganda efforts. Credibility in the sincerity of the U.S. intentions fell. As a result, the 77, fearing the worst, hardened their negotiating positions. They were beginning to believe, correctly or not, that no matter how many concessions they might make, the United States would demand more. By the time the review was completed and negotiations resumed, it was undoubtedly too late to hope for a successful result. Communications had broken down, and distrust ran high.

The situation was exacerbated by the untimely death of Shirley Amerasinghe. Ambassador T.T.B. Koh of Singapore assumed the presidency after a period of intergroup maneuvering. Koh was an entirely different type of president. He took a more active interest in the substance of the negotiations than had Amerasinghe, a masterful manager of conference dynamics. Koh was not only interested in bringing the conference to a quick and successful conclusion, but he also had an intellectual interest in the kind of treaty that might emerge. His inability to draw substantive discussion from the U.S. delegation during the long review period, I believe, frustrated him and motivated him to put pressure on the United States by insisting that the treaty be concluded in 1982. It was an impossible feat, as history now records.

Treaty Status

While the treaty has a large number of signatories, it is not yet in force, and it appears that it will be some time before that event occurs. Twenty-seven ratifications have been received—slightly fewer than half of those required. But to say that the treaty is not in force does not mean that it lacks force. Certainly, as to the signatories, the Vienna Convention places upon them the obligation to act in such a manner so as not to defeat the objectives and purpose of the treaty. While this gives signatory states a great deal of leeway, they are under considerable restraint. Even as to non-signatories, the convention is having its impact. To the extent that the provisions of the treaty can be said to codify customary international law, non-signatories carry the burdens and may claim the benefits of those provisions.

Much has been written on the requirements of customary international law, and it is not my purpose to reopen those arguments. But, assuming that some provisions of the treaty are expressions of custom, which are they? It is not possible to reply with any degree of accuracy or comprehensiveness. Certainly some are clear. I refer to those provisions which are borrowed from the 1958 Geneva Conventions and which have been widely respected. Rules concerning the flags of vessels and piracy are prime examples. Even countries which had not achieved independence in 1958—thus did not participate in those treaties—recognize the beneficial protection of such provisions. Some other provisions of the treaty, while entirely new concepts, seem to have been widely accepted in principle. The concept of the exclusive economic zone is one such example. Still other parts of the treaty, also representing new concepts, are much more questionable.

Archipelagoes

The United States, through its President, has made the claim that most of the non-seabed provisions of the treaty represent customary international law. It has not clarified which, if any, of these provisions are not. I doubt very sincerely whether the United States would be willing to admit that the concept of archipelagic sovereignty over resources is such a principle, unless it could be assured that the safeguards for archipelagic sealanes passage as set forth in the treaty will be accorded to its vessels. Thus, it is clear that the United States seeks to breathe life into the treaty except for the seabed mining provisions, and thereby seeks to claim all the non-seabed rights without the burdens of Part XI and associated articles.

The nation has been, and is continuing to be, accused of adhering to the provisions it likes and discarding the others, contrary to the spirit of the consensus and the package deal. To the degree one could argue that the seabeds provisions, being highly institutional in nature, cannot represent customary international law and thus need not be followed by the United States, the administration seems to be on high ground. One cannot create an organization or sets of contractually based rules by custom. Even if this were possible, the United States consistently and clearly stated throughout the conference that seabed mining is a freedom of the high seas and will remain so until the law is changed by an international agreement to which it is a party. It has been consistently recognized that a rule of customary law cannot affect a state which has openly rejected it.

Straits

One of the most important new parts in the treaty from the U.S. perspective is the international straits chapter. Here, again, it has been argued that these rules represent customary international law. It has been just as vigorously argued that they do not. What is the truth?

Clearly, there is no widespread agreement on the issue. Many of the rules in the straits chapter are detailed, and it is difficult to find sufficient state practice at this time to support their inclusion as custom. Further, some of these rules, such as those relating to the establishment of binding traffic separation schemes and sealanes, require institutional implementation. But the real issue is whether the general principle of transit passage is one of which the United States and other non-signatories may claim the benefit. It is highly important that these rights obtain in such critical areas as Malacca, Hormuz, Bab el Mandeb, Gibraltar, and others. This is a national security issue of first magnitude.

The underlying problem lies in the distinction between non-suspendable innocent passage and transit passage. The former is the regime of the 1958 Convention, but does not satisfy the needs of modern naval powers. The latter, which includes the rights of submerged transit and overflight, is new. From that perspective, the rights appear to be contractual in nature, thus would not be available to non-parties. Yet there is a more fundamental principle of international law—one of the oldest—and that is the basic right of

international communication, a right which lies at the foundation of international law itself. This right was adequately provided for when territorial seas, at least arguably, extended no further than three nautical miles. The extension provided for in the treaty to 12 nautical miles (and probably recognized as custom) causes conflict with the communication principle in these restricted waters. Arguably, then, the older and more widely protected principle should suffice to assure that the prior practices of maritime powers will continue. Time, of course, will tell. Surely, the high degree of necessity of protecting the rights of passage will be recognized, and not lightly discarded. If they were to be, the maritime powers would be forced to seek new ways, perhaps at high financial and political cost, to assure their continued mobility.

Exclusive Economic Zone

Let me return briefly to the exclusive economic zone. The practice of declaring such zones is so widespread, with broad international recognition, that no one would seriously argue today that the principle of coastal state resource jurisdiction to a maximum of 200 nautical miles is not a right under international law. For the most part, the new national laws on the subject have sought to be consistent with the provisions of the treaty. The new Mexican law is a prime example, and, in large part, U.S. law is also consistent. Thus the treaty, though not yet in force, has made a major contribution to the development of this law.

With respect to fisheries, the EEZ concept has bestowed upon coastal states the kind of control over resource management decisions that they have long sought and desperately needed. Again, the conference created widespread recognition of the beneficial nature of such rules, and thus they will survive whether or not the treaty goes into force.

Consistency

The United States, as it has the right to do, has taken advantage of this change in law, although its own law is not entirely consistent with the treaty. The treaty rule with regard to enforcement of salmon regulations is not the U.S. rule on the subject. Moreover, the U.S. law and position with regard to tuna is not supportable under international law, and I think it is high time this is recognized. The U.S. interpretation of that article is rejected by the vast majority of the world. It has caused conflict with our neighbors and vastly reduced our credibility with friendly nations in the South Pacific which in turn has paved the way for increased Soviet presence and influence in the area. This latter factor alone should convince those at high government levels of the need for a policy change, but the implications of the policy beyond fishing seem to have been ignored.

Variation from non-seabed provisions by the United States, being a non-signatory, cannot encourage other states, signatories or not, to be consistent. On the contrary, non-consistent acts by the United States are open invitations to others to vary their own conduct from that called for in the treaty. The growing apprehension on the part of others that

the United States is prepared to adhere to international law only when it suits its own purposes, coupled with a lack of effective dispute settlement mechanisms on the international plane, creates an atmosphere in which the temptation to do as one pleases is indeed great.

Perhaps the most chilling example, although by no means a typical or common one, is the recent clash in the Gulf of Sidra. If the United States insists on certain rights in the name of security, how far will others go to assert a similar claim? Absent the treaty, there is simply no effective forum to resolve such differences.

The temptation to protect national interests is by no means limited to nations with hostile intent. Recently, for example, Canada announced that beginning in 1987 it will implement a system of straight baselines enclosing its arctic area, a decision which the United States believes is in violation of the spirit if not the letter of the treaty. Would Canada's consideration of its national interest have been viewed differently if both countries were supporting the treaty?

The Continental Shelf

The United States has not yet clarified its policies with regard to many specifics of the non-seabeds texts. With regard to the continental shelf, for example, there are questions regarding how far it is prepared to follow the treaty. To date, it has announced that there is no change in the policy with regard to the shelf. This could mean that the United States rejects the new definition of the outer limit of the shelf and continues to adhere to the exploitability test of the 1958 Convention. Or it could mean that the administration wisely has recognized that there is no need to clarify this situation at the present, because there are no potential conflicts forcing more precision.

If the administration were to embrace the new definition, it could be accused of giving tacit recognition to an International Seabed Authority. It was the creation of that body that precipitated the need for a more precise definition of where national jurisdiction ceases. Furthermore, it would be difficult for the United States to embrace the new definition without also dealing with the treaty provision addressing revenue sharing on the shelf beyond 200 nautical miles. This provision was the *sine qua non* to the general acceptance of a generous outer limit. One goes with the other. At some time—the point at which more extensive drilling becomes possible and feasible—the United States will have to come to grips with such problems, along with its views on the applicability of provisions for the boundary review commission.

Deep Seabed Mining

Mining remains a severe political problem. Although it is nonexistent, it is still a serious source of contention. The United States did not and cannot accept the mining provisions in the treaty. It is arguable as to what extent some of the protested provisions—such as production controls, access, and participation—are truly damaging. Nonetheless, the package was, in my mind, correctly rejected, even if

for the wrong reasons.

Can the mining package be changed? For the foreseeable future, the probability of renegotiating certain treaty provisions lies somewhere between slim and none. Nor does it seem probable that the rules and regulations likely to emerge from the Preparatory Commission will do more than mitigate some of the most objectionable procedures. Thus, it seems unlikely that many, if any, of our industrialized friends will ever embrace the total package.

What Lies Ahead?

It seems to me that two possibilities emerge. The first is that the developing countries will refuse to agree to a set of rules that might be encouraging to the industrialized states. In that event, the treaty as written is doomed to failure. But the recognition of that failure will be slow in coming, and it will take even longer for countries to swallow enough pride to admit the truth. When recognition sets in on both sides, many years hence, renegotiation may be possible, and then only if seabed mining becomes feasible without national subsidy.

The second possibility is that the developing countries accept the probability of the first scenario and decide to do something about it. While it would not be easy to create rules and regulations that would more than mitigate the harshness of the parallel system, there is room in the treaty for another tack. Leaving the mining provisions in place, the preparatory commission could, if it had the political will, take advantage of the much more liberal provisions in Annex III regarding joint ventures with the Enterprise. In effect, this would amount to abandoning the parallel system, while leaving the provisions in the treaty governing it intact and working toward creating a much more attractive joint venture system. The opportunity for much flexibility is there if states are willing to so interpret the treaty. From my understanding of what is happening in Prepcom, there seems to be little recognition of or support for the latter scenario. I come full cycle, then, to my spirit of initial pessimism for the treaty.

Is there anything to be learned from our experience? For one thing, we have learned that it is unrealistic to expect to negotiate international resource rights while broader global needs go unresolved. While, as some have claimed, the New International Economic Order may be dead or dying, as such, the problems that gave rise to that effort remain, and a high degree of sophistication and statesmanship will be required to reach a new understanding of international economics that will address that underlying problem. It is only when countries are willing to deal realistically with this problem that future negotiations regarding ocean resources can be addressed without the politization we saw in the Law of the Sea Conference.

I now believe that the conference was doomed from the outset. This is particularly so since those negotiations that failed involved no realistic economic interest of anyone, but purported to do so thus creating a perfect forum for international political posturing at no cost to any nation. If my evaluation is correct, then it would seem that the

dream of a global oceans charter, commendable in principle, is not realistically attainable in our lifetime. That being so, we are in a period of high uncertainty concerning the protection of perceived national interests, and it will be increasingly important to act consistently and coherently with respect to the uses of the ocean, and to avoid major suprises which can trigger further losses of confidence in the rules. Insofar as the agreed texts are concerned, the treaty at least remains the best set of guidelines for the future.

It is important to me, therefore, that the United States recreate its image in the international community as a nation committed to the rule of law and dedicated to world leadership. This will require not only great expertise but also willingness to exert the effort necessary to achieve global understanding of actions and motives. We must, in short, exercise the highest degree of statesmanship. At all costs, we must avoid short-term, bilateral solutions to problems that could undermine the international public order.

Epilogue

Don McKernan worked hard for this treaty. It was important to him, and he perceived it to be important to the United States. I have tried, by this modest effort, to explain to him what went wrong and where we are. If he were here today, I expect he would be the first to challenge some of my assumptions, perceptions and conclusions. But I also believe that he would fully support my concern that the United States should reinforce its image as a nation dedicated to the rule of law, a role that befits a leader in the world community.

The McKernan Lectures

This lecture series was created to honor the memory of Donald L. McKernan, who died in Beijing, May 9, 1979, while participating in a U.S. trade delegation. Professor McKernan's last job was that of Director of the Institute for Marine Studies, University of Washington. Before that, he had several distinguished careers—as fishery scientist, fisheries administrator, Director of the Bureau of Commercial Fisheries, and special assistant to the Secretary of State for fisheries and wildlife in the U.S. Department of State.

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Clingan has served on a great many boards and committees including the Marine Board, National Academy of Engineering; Law of the Sea Committee, International Law Association; Ocean Policy Committee, National Academy of Science; and the National Advisory Committee on Oceans and Atmosphere.

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