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The United States Posture Toward the Law of the Sea Convention: Awkward but not Irreparable

ELLIO T L. RICHARDSON*

The author describes the United States position toward the Convention as disappointing. Having declined to sign the Convention, the United States surrendered global stability for ideological purity. The immediate costs of this position include isolation from direct decision-making in the Preparatory Commission. However, the prospects of long-range detrimental effects on United States oceanic and other global interests will, in the author's view, bring about a reverse of President Reagan's decision.

INTRODUCTION

On July 9, 1982, President Reagan announced that the United States would not sign the Convention of the Third United Nations Conference on the Law of the Sea, which had been adopted in New York on April 30 by a vote of 130 to 4, with 17 abstentions. The President's statement acknowledged that the Convention would benefit a wide array of United States interests—the mobility of air and naval forces, commercial navigation, fisheries, environmental protection, scientific research, the conservation of marine mammals, dispute settlement, and more. The administration objected to only one of the Convention's seventeen parts—that dealing with deep seabed mining. Within that part, the in-
compatibility with free-market principles of some of its provisions, particularly those on technology transfer and the limitation of seabed mineral production, was viewed as fatal to the whole Convention. It is not likely, however, that these provisions will ever be invoked.¹

The Convention was opened for signature in Jamaica on December 10, 1982. It was signed by 117 nations. That number is sufficient to bring into being the Preparatory Commission whose charge will be to design the structures and staffing patterns of the institutions mandated by the Convention and to draft the rules and regulations governing the deep seabed mining regime.² The Convention will enter into force when sixty nations have ratified it;³ given the broad support already in evidence, this could well occur within the next five years.

The United States will then be faced with the question of whether we can afford to remain outside the Convention. The range of our oceanic interests is wider and deeper than that of any other country. We would also gain more from the Convention than any other country. As time goes on it will become increasingly clear that even our deep seabed mining interests will be hurt, not helped, by our staying out. And since our other oceanic interests will also suffer, it seems inevitable that a more realistic assessment of the costs of isolation will in due course bring about a reversal of President Reagan's decision.

EVALUATION OF EXISTING UNITED STATES POLICY

As it stands now, our posture will continue to reflect a mixture of disappointed hopes and avoided realities. The disappointment stems from the fact that the text adopted in New York on April 30 did not come as close to meeting United States negotiating objectives as it could and should have done. Had our delegation concentrated on obtaining the best possible Convention and not been


³. Convention, supra note 1, art. 308, para. 1.

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diverted by ideological pressures, it could have won significant additional concessions. As it was, we obtained valuable provisions for preparatory investment protection (PIP) that will give the American companies that have pioneered deep seabed mining guaranteed access to a specific minesite of up to 150,000 square kilometers, we also gained the assurance of a seat on the Council of the International Seabed Authority as well as certain other marginally useful improvements.

In deciding not to sign the treaty the President also decided not to pursue the indications from several sources that opportunities passed up in April might still be open at the Law of the Sea Conference session to be held in New York on September 22-24, 1982, to act on Drafting Committee recommendations. Our failure to take advantage of this last clear chance has made it all but certain that the deep seabed mining regime that we shall eventually be

4. By the spring of 1982, a series of events—chiefly the election of President Reagan, the change of Senate control, the abrupt announcement on the eve of the Conference’s reconvening in 1981 that the administration would review everything that had gone on before, and the stonewalling that followed in Geneva later that year—had brought the Conference to the point of readiness to make significant concessions. Having participated in negotiating many of the compromises that the Reagan administration sought to reopen, I could not myself play a direct part in exploiting this opportunity. To take advantage of it, it was essential that we not, by making excessive demands, undercut the opportunity to achieve the maximum feasible gains. Although the deliberations of the Public Advisory Committee on the Law of the Sea are confidential, I can appropriately confirm the general impression that the committee, which included representatives of the deep seabed mining consortia, was unanimous in this view. In the end, our advice was not followed. The turning point was the delegation’s failure to pursue the opening created by a group of western delegation heads known as the “Gang of 11” which proposed a series of compromises that could have served as the basis of serious negotiations. Eleventh Session of the Third United Nations Conference on the Law of the Sea, A/CONF.62/L.104 (April 13, 1982) and A/CONF.62/L.104/Add.1 (April 14, 1982) [hereinafter “Gang of 11” Proposals]. For a restrained account of this episode, see Ratiner, supra note 1. See also Whitaker, Outside the Mainstream, THE ATLANTIC, Oct. 1982, at 22.

5. Draft Final Act, supra note 2, res. II, para. 1(e).

6. The assurance is, however, ambiguous since it guarantees the seat for the “largest consumer” of seabed minerals without making clear whether the measure is volume or value. The latter interpretation is necessary to assure the seat for the United States, and it is clear that this was the interpretation intended by the Conference. It can be made explicit in the rules and regulations. Other improvements include the contract approval system for mining entities, a policy orientation of the Authority more favorable to mineral production, and provision for the adoption of rules and regulations for newly discovered seabed minerals which precludes a moratorium on these minerals. Ratiner, supra note 1, at 1016.

7. The message came, for example, early last summer from an informal meeting of members of the “Gang of 11” and leaders of the Group of 77 held during the regular session in Geneva of the International Law Commission.
obliged to join will be less satisfactory than it could have been.\footnote{8} For as long as the decision stands, American companies will be barred from access under the United States flag to the strategic minerals of the deep seabed. Had the President's advisers faced up to this fact, the outcome might well have been different. Listening instead to the Convention's most irreconcilable critics, they embraced the illusion that assured access might somehow be afforded by a reciprocating states agreement or "mini-treaty."\footnote{9} They did so, moreover, despite the plain warnings to the contrary contained in every responsible survey undertaken by the United States Government, including a recent report by the General Accounting Office.\footnote{10} These surveys had concluded that there would be no "mini-treaty" for the simple reason that few, if any, of our allies would join one. They also predicted that American companies will not operate under domestic legislation.\footnote{11} Indeed, I have yet to find a single representative of an American deep seabed mining company willing to state publicly that his company is prepared to take that risk.

The reason is clear. Domestic United States law cannot confer on anyone a generally recognized legal right to exploit a defined area of the seabed. But without such a right good for at least twenty years, no rational investor will gamble $1.5 billion on a deep seabed mining project.\footnote{12} It will not suffice for seabed mining

\footnote{8} The improvements lost include, at a minimum, less onerous provisions for technology transfer (Convention, supra note 1, Annex III, art. 5) and relaxation of the provisions for the adoption of amendments emanating from the Review Conference (Convention, supra note 1, art. 155, para. 4). The surviving possibility of additional concessions is touched on below.

\footnote{9} A reciprocating states agreement would rest on national legislation providing for the recognition of claims by the enterprises of other States enacting similar legislation. The States that have thus far enacted such legislation, in addition to the United States, are the Federal Republic of Germany, France, Japan, and the United Kingdom. Expressly reserving their right to join the Convention, the countries that have enacted seabed mining legislation, except Japan, on September 2, 1982, signed an agreement to consult for the purpose of resolving conflicts arising from overlapping claims. See infra Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed, Sept. 2, 1982 cited in Trea-

\footnote{10} United States General Accounting Office, Comptroller General's Report to the Congress, Impediments to United States Involvement in Deep Ocean Mining can Be Overcome 3, 30-31 (1982).

\footnote{11} Alexander, The Reaganites' Misadventure at Sea, FORTUNE, Aug. 23, 1982, at 129.

\footnote{12} As generally understood, an integrated deep seabed mining project would embrace not only a mining vessel and dredging equipment but vessels for trans-
claims to be recognized only by a handful of like-minded countries. And even the seabed mining States concede that international law would not require non-members of the reciprocal regime to respect it.13

Thus, even if it were universally agreed that deep seabed mining is a high seas freedom, such agreement would not provide a secure legal foundation for investment; it would merely grant to everyone the right to jump anyone else’s claim. Only a few leading industrial countries, in any case, maintain that deep seabed mining is a high-seas freedom. Those same countries have accepted the jurisdiction of the International Court of Justice (ICJ). They would accordingly face the ever-present risk—indeed, the likelihood—that the ICJ will eventually declare that any deep seabed mining activity that does not conform with the Convention is illegal.14

13. See Deepsea Ventures, Inc., Notice of Discovery and Claim of Exclusive Mining Rights and Request for Diplomatic Protection and Protection of Investment (filed with Office of the Secretary, Dep’t of State, Nov. 15, 1974) reprinted in CONGRESSIONAL RESEARCH SERVICE, SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 94th CONG., 2d Sess., REPORT ON OCEAN MANGANESE NODULES app. E (1976). For the State Department’s announcement rejecting this claim, see id., App. F.

14. Ambassador T.T.B. Koh of Singapore, the President of the Conference, has stated publicly that “I will take it upon myself to persuade the United Nations General Assembly to adopt a decision asking the International Court of Justice for an advisory opinion on whether such activities under unilateral national legislation are lawful, or are they illegal . . .”? Text of press conference by T.T.B. Koh given on May 3, 1982; see also Ratiner, supra note 1, at 1017. The conjecture that the ICJ is likely to eventually declare deep seabed mining outside the Convention to be illegal rests on the inferences drawn from: (a) the probable entry into force of a widely accepted treaty purporting to establish an exclusive regime governing access to the “common heritage of mankind”; (b) the fact that most countries have regarded the deep seabed as off-limits to mining except pursuant to international agreement ever since the adoption in 1969 by the United Nations General Assembly of the Moratorium Resolution, G.A. Res. 2574, 24 U.N. GAOR Supp. (No. 30) at 10-11, U.N. Doc. A/7834 (1969) (adopted December 15, 1969); and in 1970 of the Declaration of Principles, including the principle that the resources of the deep seabed belong to the “common heritage,” G.A. Res. 2769, 25 U.N. GAOR Supp. (No. 28) at 28, U.N. Doc. A/8028 (1970) (adopted December 17, 1970); and (c) an analysis of the composition of the ICJ.
Though less good than it might have been and far from perfect, the Convention's deep seabed mining regime is not unworkable.\textsuperscript{15} Depending upon metal-price prospects, at least some of the deep seabed mining companies domiciled in other Western industrial countries would be willing to operate under the Convention, and they will have the encouragement of their governments in doing so.\textsuperscript{16} If, therefore, we remain outside the Convention, an American company that wishes to engage in deep seabed mining will have no choice but to proceed under the flag of a country that has joined the Convention.

Aware of this, industry representatives have lately begun to revive the idea of a government guarantee against loss. But even if Congress, which has previously rejected the idea, could be induced to change its mind, it is inconceivable that such protection could continue if the ICJ holds that all deep seabed mining not sanctioned by the Convention is illegal.\textsuperscript{17} And since it is likely that the court will so decide sooner than the full recovery of the initial investments in deep seabed mining, which could easily take ten years, a guarantee that did not cover this risk would be worthless. It would in any case be anomalous if, having given free-market principles precedence over all the many benefits of the Convention, the United States were then to sacrifice those same principles for the sole sake of access to deep seabed minerals.

It is possible, of course, barring a sharp and predictably long-term increase in metal prices, that legal and political uncertainties will tip the scales against private investment in deep seabed mining even under the Convention. In that event some form of

\textsuperscript{15} For a comparison with resource-extraction agreements between multinational corporations and developing countries, see Katz, Financial Arrangements for Seabed Mining Companies: An NIEO Case Study, 13 J. WORLD TRADE L. 209 (1979).

\textsuperscript{16} See, e.g., M. Dubs, Remarks at American Bar Association Meeting 65, 71-72 (San Francisco, California) (Aug. 9, 1982).

\textsuperscript{17} Such a guarantee was a feature of the deep seabed mining bills filed in 1977 and earlier. See, e.g., S. 2801, 92d Cong., 1st Sess. (1971); S. 1134, 93d Cong., 1st Sess. (1973); S. 713, 94th Cong., 1st Sess. (1975); S. 2053, 95th Cong., 1st Sess. (1977); S. 493, 96th Cong., 1st Sess. (1979). Late in 1977, however, when the Carter administration decided that support of such legislation was essential to its negotiating leverage and accordingly dropped the objections to the legislation which it and previous administrations had consistently maintained, it did so on the condition that the indemnification provisions be eliminated. In exchange the industry won language directing United States negotiators to seek a "grandfather" clause protecting companies that had invested in deep seabed mining before the entry into force of a treaty from any loss thereby caused. 30 U.S.C. § 1401 (Supp. 1981). The preparatory investment protection (PIP) provisions of the Draft Final Act, supra note 2, res. II, come close to fulfilling this directive.
risk insurance would also be necessary. But the risks to be insured against would be much less substantial than the risks of operating outside the Convention. And though we would be sacrificing ideological purity, we would gain in its place both consistency and the advantages obtainable only under the Convention.

As to the latter, the President's advisers avoided a second reality. They downplayed the concern that United States isolation could undercut our other oceanic interests. It could, for example, endanger our national security interest in freedom of navigation and overflight. It was to protect that interest that the United States took the lead in calling for a new United Nations Conference on the Law of the Sea. We succeeded in persuading other countries to respond to our navigational concerns only by agreeing to address their resource interests. This was the essence of the "package deal" pursued by the Conference from its beginning in 1973. Just such a proposal was embodied in the complex 200-page document adopted in New York. If we persist in our present course we shall be inviting the rest of the world to tell us that we cannot expect to rely on the parts of the Convention we like while at the same time rejecting the parts we don't like. The result, instead of strengthening the rule of law, would make a mess of it—at least for us.

Nor will this be the only non-mining cost of isolation. At the Economic Summit meeting held in Paris on June 6, 1982, President Reagan agreed that the United States would participate in a "global dialogue" on economic issues. Having turned our back on the most comprehensive global dialogue thus far conducted, we will have crippled our capacity to play a leading role in the next rounds. Where shaping the multilateral institutions of the future

18. Richardson, Seabed Mining and Law of the Sea, Vol. 80, No. 2045 DEP'T ST. BULL. 60 (1980). Any substantial chance that the ICJ might hold illegal exploitation of the seabed not sanctioned by the Convention would in itself create a risk more serious than the aggregate risks of operating under the Convention. If, as is likely, recovery of the miner's initial investment will take ten years, even a 50-50 chance that such a judgment could be rendered within that period would make the cost of insurance extremely high.

is concerned, we cannot insist on having everything our own way and still expect to be taken seriously.

**CAN THE UNITED STATES “SALVAGE” THE CONVENTION?**

Despite the United States’ failure to take advantage of earlier opportunities to obtain improvements in the Convention’s deep seabed mining provisions, an effort to win further concessions even at this late date has been launched by friends of the Convention who despair of its being ratified by the United States Senate in its present form but who also see the adverse consequences for United States interests of our remaining outside it.20 It is difficult, however, to conceive of a process, short of the convening of a whole new conference, that could make substantive changes in a Convention that has already been opened for signature. And even if this problem could be surmounted, it would be difficult to obtain improvements going beyond those previously proposed by the “Gang of 11,”21 and the Reagan administration has indicated that it would not regard these as sufficient. The willingness, in any case, of the rest of the world to solve the procedural issue and then to make significant concessions depends on the importance it attaches to United States participation. Although throughout most of the Conference our only source of negotiating leverage is the created impression that the United States could well afford to go it alone, there is now an emerging awareness that our staying out deprives those who join of nothing but our money. And since it is also becoming clear that the Enterprise does not really need to start out with 100% ownership of an entire integrated seabed mining project,22 the prospect that our share of the Enterprise’s funding will be withheld is rapidly losing its capacity to inspire alarm. Although for these reasons I do not dare to pin much hope

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20. A leading role in this effort is being played by Professor John Norton Moore, Director of the Center for Oceans Law & Policy at the University of Virginia. It is also being encouraged by members of the United States Senate, including Senators Charles H. Percy and Claiborne Pell, who have long supported the effort to achieve a sound Law of the Sea treaty. See *Hearings on the Nomination of Kenneth Dam to be Deputy Sec’y of State Before the Senate Comm. on Foreign Relations*, 97th Cong., 2d Sess. 9, 42-47 (1982).


22. The basic components of an integrated project are briefly described in note 12, supra. The States Parties to the Convention are obligated to participate, on a basis proportional to their shares of the United Nations budget, in guaranteed loans and interest-free advances to the Enterprise aggregating an amount sufficient to finance one integrated project. Convention, supra note 1, Annex IV, art. 11, para. 3(a), (b). Given $1.5 billion as the estimated cost of such a project, the United States share (25% of the total) would be $375 million. With the United States out, the member States could agree to make available to the Enterprise $1.25 billion instead of the full amount. While this might mean that the Enterprise had to forego the purchase of, say, the transport vessels, that would not significantly impair its capacity to carry out the role envisioned for it.
on our being able to secure additional improvements at any early
date, the effort is certainly well worth pursuing, and I hope it will
be pursued.

It is not too late, meanwhile, to reverse our present position on
participating in the work of the Preparatory Commission. While
we cannot be a voting member of the Commission, we can as a
signatory of the Final Act participate as an observer, and that
will at least give us the opportunity to exercise some influence
over the content of the rules and regulations. And even though
the chances of our eventually adhering to the Convention were
rated as significantly lower than I rate them, we would be foolish
to renounce that opportunity.

In addition to serving both our basic national interest in global
stability and a long list of narrower concerns, the Convention
would also benefit our strategic interest in an alternative source
of nickel, copper, cobalt, and manganese. It would be ironic if, in
the name of that same interest, we handed over the exploitation
of seabed minerals to our industrial competitors.

CONCLUSION

The real importance of the Law of the Sea Convention cannot
be found either in the sum of its parts or in its extraordinarily
comprehensive whole. It lies rather in its demonstration of the
capacity of 160 sovereign States to work out rational accommoda-
tions among vital competing interests. This is an achievement
whose significance will loom ever larger as the world increasingly
finds itself forced to come to grips with its own inseparability.

The United States especially has much to gain from the
strengthening of the rule of law. Through a long succession of
Presidents, Secretaries of State and Defense, Chairmen of the
Joint Chiefs of Staff, and Law of the Sea Delegation heads, we
held fast to the awareness that the Law of the Sea Convention
could make important contributions to this objective. I have no
doubt that the continuing force of our enduring interests will in
due course reinstate that perception.

24. Under article 308, paragraph 4, of the Convention, supra note 1, the rules
and regulations will take effect provisionally upon the entry into force of the Con-
vention, and they can thereafter be changed pursuant to article 162, paragraph
2(0) only by consensus. This means that the form in which the rules and regula-
tions emerge from the Preparatory Commission is critically important. See Draft
Final Act, supra note 2, res. I.
APPENDIX

AGREEMENT CONCERNING INTERIM ARRANGEMENTS RELATING TO POLYMETALLIC NODULES OF THE DEEP SEA BED

THE PARTIES TO THIS AGREEMENT:
— HAVING regard to investments made in exploration, research and other pioneer activities relating to the polymetallic nodules of the deep sea bed;
— RECALLING the interim character of legislation with respect to deep sea bed operations enacted by certain Parties;
— DESIRING to make appropriate provisions for avoiding overlaps in the areas claimed for future pioneer activities in the deep sea bed and to ensure that, during the interim period, such activities are carried out in an orderly and peaceful manner;
— EMPHASIZING that this Agreement is without prejudice to the decisions of the Parties with respect to the Convention on Law of the Sea adopted by the Third United Nations Conference on the Law of the Sea;
— DESIRING also to avoid any discrimination among Parties in the implementation of this Agreement;
— DESIRING further to insure that adequate areas containing polymetallic nodules remain available for operations by other states and entities in conformity with international law;

HAVE AGREED AS FOLLOWS:
1. The object of the present Agreement is to facilitate the identification and resolution of conflicts which may arise from the filing and processing of applications for authorizations made by Pre-Enactment Explorers (PEEs) on or before March 12, 1982 under legislation in respect of deep sea bed operations enacted by any of the Parties.
2. In the case of a conflict between the areas claimed in such applications, the Parties shall afford the applicants adequate opportunity, and shall encourage them, to resolve such conflict in a timely manner by voluntary procedures.
3. The Parties with whom applications for authorizations have been made by PEEs on or before March 12, 1982 shall follow the procedures set out in Part I of the Schedule hereto in respect of such applications.
4. The Parties shall consult together:
   (a) with a view to coordinating and reviewing implementation of this Agreement;
   (b) before issuing any authorization under their respective laws relating to deep sea bed operations;
   (c) in regard to consideration of any arrangement to facilitate mutual recognitions of such authorizations, it being understood that any such arrangement shall not enter into force before January 1, 1983;
   (d) before entering into any other bilateral or any multilateral arrangement between themselves or any arrangement with other States, with respect to deep sea bed operations.
5. In the event that any of the Parties with whom applications for authorizations have been made by PEEs on or before March 12, 1982 enter into an agreement for the mutual recognition of authorizations granted under their respective laws in re-
spect of deep sea bed operations, the Parties concerned shall apply the procedures and impose the requirements set out in Part II of the Schedule hereto.

6. To the extent permissible under national law, a Party shall maintain the confidentiality of the coordinates of application areas and other proprietary or confidential commercial information received in confidence from any other Party in pursuance of cooperation under this Agreement in accordance with the principles set out in Part III of the Schedule hereto.

7. The Parties shall settle any dispute arising from the interpretation or application of this Agreement by appropriate means. The Parties to the dispute shall consider the possibility of recourse to binding arbitration and, if they agree, shall have recourse to it.

8. The Schedule hereto is an integral part of this Agreement and Part IV thereof shall apply for the interpretation of this Agreement.

9. The Parties shall not enter into any supplementary international agreement inconsistent with this Agreement.

10. This Agreement may be amended by written agreement of all the Parties.

11. This Agreement shall enter into force upon signature.

12. After entry into force of this Agreement, additional States may be invited to accede to this Agreement at any time with the consent of all Parties.

13. Any Party may denounce this Agreement on 30 days' notice to the Government of the United States of America, and in no case shall the denunciation have effect before January 3, 1983.

DONE at Washington this second day of September, 1982, in the English, German and French languages, all texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the United States of America, which will transmit a duly certified copy to each of the other signatory Governments.

THE SCHEDULE

PART I
APPLICATION PROCEDURES
FOR PRE-ENACTMENT EXPLORERS

1. Each Party as provided in paragraph 3 of the Agreement shall forthwith inform the other Parties of entities which have filed applications with it.

2. Any application filed on or before March 12, 1982 shall be deemed to be filed on that date.

3. Each Party shall with all dispatch determine whether:
   (a) each application filed with it fulfills its domestic requirements;
   (b) the applicant is a PEE with respect to the area applied for (an applicant filing on behalf of a PEE shall itself be deemed a PEE for that application);
   (c) the area is bounded by a continuous boundary;
   (d) the area is reasonably compact.

4. Each Party shall:
   (a) notify the other Parties of the results of the initial processing under paragraph 3 above;
   (b) with the other Parties establish the final list of applications to which this Agreement applies;
   (c) inform the other Parties whether the applicant has applied for the same area, or substantially the same area, to one or more other Parties;
   (d) if the applicant agrees, inform the other Parties of the coordinates of the area specified in any application filed with it;
   (e) endeavor to determine the exact locations of any conflicts.

6. Where it is informed of the relevant coordinates, each Party shall notify each of its applicants who is involved in a conflict that a conflict exists. Such notification shall include coordinates identifying the areas in conflict and the identity of each applicant with whom conflict has arisen.

7. Each Party shall ensure that domestic conflicts are resolved pursuant to its respective domestic requirements. Upon agreement of the applicants, domestic conflicts may be resolved in accordance with the international conflict resolution procedures specified in the Schedule. The Parties shall enter into consultations if it appears that the resolution of a domestic conflict might affect the international conflict resolution procedures, or vice versa.

8. (1) Each Party shall accept amendments to applications to which this Agreement applies only if they:
   (a) pertain to areas with respect to which the applicant is a PEE (the area applied for in an amendment need not be adjacent to the area applied for in the original application); and
   (b) are made in order to resolve an existing conflict with respect to that application.

   (2) Each Party shall process any amendment filed pursuant to this paragraph in accordance with the procedures described in the foregoing provisions of this Part except that paragraphs 2, 3(c), 3(d), and 4(c) shall not apply to amendments.

   (3) Amendments filed under paragraph 8 of the Schedule shall be eligible for mutual recognition in accordance with the terms of an agreement entered into by any of the Parties pursuant to paragraph 5 of the Agreement.

PART II
CONFLICT RESOLUTION
FOR PRE-ENACTMENT EXPLORERS

9. (1) Where there is an international conflict, the Parties shall use their good offices to assist the applicants to resolve the conflict by voluntary procedures.

   (2) If, within six months from the entry into force of an agreement between the Parties referred to in paragraph 5 of the Agreement, notwithstanding the good offices of the Parties, all applicants involved in an international conflict have not resolved that conflict, or are not parties to a written agreement submitting the conflict to a specified binding conflict resolution procedure, the conflict shall be resolved by binding arbitration in accordance with Appendices 1 and 2 if a Party so elects.

   (3) The procedures provided in the Appendices shall commence ten days after a Party notifies the other Party or Parties of the decision to elect arbitration.

PART III
PRINCIPLES OF CONFIDENTIALITY

10. In implementing the provisions of paragraph 6 of the Agreement, Parties shall apply the following principles:
   (a) The confidentiality of the coordinates of application areas shall be maintained until any conflict involving such area is resolved and the relevant authorization is issued, except on the basis of a demonstrated need to know and adequate assurances that the confidentiality of the information shall be maintained by the recipient;

   (b) The confidentiality of other proprietary or confidential commercial information shall be maintained in accordance with domestic law as long as such information retains its character as such.
PART IV
DEFINITIONS

11. In this Agreement:
(a) "activities" means the undertakings, commitments of resources, investigations, findings, research, engineering development, and other activities relevant to the identification, discovery, and systematic analysis and evaluation of polymetallic nodules and to the determination of the technical and economic feasibility of exploitation;
(b) "authorization" means any license, permit, or other authorization issued under the national law of a Party which authorizes the holder to engage in deep sea bed operations in a specified area or areas;
(c) "conflict" means the existence of more than one application or amendment covered by this Agreement submitted by different applicants:
   (1) whether filed with the same Party or with more than one Party; and
   (2) in which the deep sea bed areas applied for overlap in whole or part, to the extent of the overlap;
   "international conflict" means a conflict arising from applications or amendments filed with more than one Party; "domestic conflict" means any other conflict;
(d) a "pre-enactment explorer" ("PEE") is an entity which was engaged, prior to the earliest date of enactment of domestic legislation by any Party, in deep sea bed polymetallic nodule exploration by substantial surveying activity with respect to the area applied for; and
(e) "polymetallic nodules" means any deposit or accretion on or just below the surface of the deep sea bed consisting of nodules which contain manganese, nickel, cobalt, or copper.

APPENDIX 1
Arbitration Procedure

1. In this Appendix, "Party" means a Party to this Agreement which is also concerned in the arbitration, and "other Party" includes any such Party or Parties.

2. The parties presenting the case shall seek to agree in writing within sixty days after the expiry of the ten-day period provided by paragraph 9(3) of the Schedule on three arbitrators, or, if they agree to have only one arbitrator, on that one arbitrator.

3. Any Party may object to the choice of any arbitrator or arbitrators under paragraph 2, by written notice received by the other Party within thirty days after the expiry of the period provided by paragraph 2 above. Upon objection to any arbitrator by a Party, the other Party may, when three arbitrators have been chosen under paragraph 2, object to either or both of the other arbitrators by written notice received by the other Party within fifteen days after the expiry of the period provided by the immediately preceding sentence.

4. If a Party objects to the choice of any arbitrator in accordance with paragraph 3 or if an arbitrator becomes unable to act, the parties presenting the case shall seek to agree on a replacement in writing within sixty days after receipt of the notice of objection or after the date when the arbitrator becomes unable to act. If agreement is reached, a Party may object to the choice of a replacement by written notice received by the other Party within thirty days. If the parties presenting the case have not reached agreement, or if a Party objects to the choice of a replacement in accordance with this paragraph, the Secretary-General of the Permanent Court of Arbitration shall appoint a replacement without delay.

5. If the Parties presenting the case fail to agree on three arbitrators (or an arbitrator) within the period provided by paragraph 2, three arbitrators shall, on re-
quest of a Party, be appointed without delay by the Secretary-General of the Permanent Court of Arbitration.

6. Any arbitrator appointed by the Secretary-General of the Permanent Court of Arbitration shall not be a citizen of a Party, shall have international standing and expertise, and shall have personal characteristics which place him in a neutral position with respect to the subject of the dispute. The Secretary-General shall not be confined to any particular list of arbitrators in making this selection. Appointments by the Secretary-General shall not be open to challenge.

7. Insofar as any matter is not dealt with by Appendix 2 and other relevant provisions of this Agreement, the arbitrator or arbitrators shall, consistent with Appendix 2, be guided by the general principles of law as recognized by the Parties, which, where the case is presented by a Party or Parties means the general principles of public international law (lex lata) as recognized by the Parties.

8. The arbitrator or arbitrators shall decide where he or they shall sit and shall, in consultation with the parties presenting the case, adopt rules of procedure consistent with this Appendix.

9. The case will be presented by a Party or by its applicants involved in the conflict, at the option of the Party and each side of the case shall be represented as it sees fit.

10. A Party may intervene as of right.

11. An arbitrator may not abstain from voting on the award. If there are three arbitrators, their award shall be made by a majority vote.

12. The award of the arbitrator or arbitrators shall be rendered within one year from the date of the final appointment of the arbitrator or arbitrators unless all Parties or parties presenting the case otherwise agree or unless the arbitrator or arbitrators for good cause extend the deadline for the making of the award for one or more 30 day periods, in any case not to exceed 120 days.

The award shall be final and binding on the applicants involved in the conflict and on the Parties and shall be enforced by the Parties. The applicants involved in the conflict shall without delay file amendments to their applications consistent with the arbitral award. Within two months of the date of the award, a Party or any applicant represented in the arbitration may request an interpretation of the award. Such interpretation shall be provided within four months of the request.

13. The expense of the arbitration, including the remuneration of the arbitrators, shall be borne by the parties presenting the case. Unless the arbitrator or arbitrators determine otherwise because of the particular circumstances of the case, the parties presenting the case shall bear the expenses in equal shares.

14. If an applicant of a Party is involved in conflicts with two or more applicants of two or more States Parties to this Agreement, every effort shall be made to consolidate the arbitration proceedings.

APPENDIX 2

Principles for Resolution of Conflicts

1. In determining the issue as to which applicant involved in a conflict shall be awarded all or part of each area in conflict, the arbitral tribunal shall find a solution which is fair and equitable, having regard, with respect to each applicant involved in the conflict, to the following factors:

- (a) the continuity and extent of activities relevant to each area in conflict and the application area of which it is a part;
- (b) the date on which each applicant involved in the conflict or predecessor in interest or component organization thereof commenced activities at sea in the application area;
- (c) the financial cost of activities relevant to each area in conflict and to the application area of which it is a part, measured in constant terms;
- (d) the time when activities were carried out, and the quality of activities; and
- (e) such additional factors as the arbitral tribunal determines to be relevant,
but excluding a consideration of the future plans of work of the applicants involved in the conflict.

2. When considering the factors specified in paragraph 1, the arbitral tribunal shall hear, and shall, except for purposes of apportionment pursuant to paragraph 3, limit its consideration to all evidence based on the activities specified in paragraph 1, which were conducted on or before January 1, 1982, provided, however, that an applicant must prove at-sea prospecting in the conflict area prior to June 28, 1980 as a pre-condition to presentation of further evidence to the arbitral tribunal regarding activities in the conflict area.

3. In making its determination, the arbitral tribunal may award the entire area in conflict to one applicant involved in the conflict, or the arbitral tribunal may apportion the area among any or all of the applicants involved in the conflict. If, after applying the provisions of paragraph 1 of this Appendix, the arbitral tribunal determines the area in conflict should be apportioned, then the arbitral tribunal shall, to the maximum extent practicable consistent with its application of those provisions, apportion the area in a manner designed to satisfy the plan of work set forth in the application of each applicant which is awarded part of the area.