Recent Developments in the Law of the Sea 1981-1982

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RECENT DEVELOPMENTS IN THE LAW OF THE SEA
1981-1982

This synopsis highlights major events occurring between December 1981, and December 1982, that affect the law of the sea. It discusses the eleventh session of the Third United Nations Conference on the Law of the Sea and significant events outside the Conference.

THE ELEVENTH SESSION OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

Introduction

Delegates from over 150 nations gathered in New York from March 9 to April 30, 1982, for the final session of the Third United Nations Conference on the Law of the Sea (UNCLOS III). After six years of preparation for the Conference and eight years of negotiations, most participants planned to complete a treaty which would be generally acceptable to all countries.  

As a result of past bargaining sessions, the delegates produced a Draft Convention covering practically all issues relating to the law of the sea. This document represented a compromise: no State, no group of States, and no special interest group remained satisfied with all the terms. From the beginning, the United States placed a high priority on national security interests and thus was willing to relinquish some control over deep seabed resources in return for navigation and overflight rights. Preceding the tenth and what was to have been the last session of the Conference, the Reagan administration precipitously announced it would conduct a policy review regarding "serious problems raised by the Draft Convention." To the dismay of Third World countries, the United States appeared to be questioning the widely-supported fundamentals of the Draft Convention. Although several delegates resented this attempt to make substantial changes at such a late date, the Conference agreed to consider the United States concerns when it reconvened.


5. HOUSE COMM. ON FOREIGN AFFAIRS, 97th CONG., 1ST SESS., REPORT ON THE U.N. THIRD CONFERENCE ON THE LAW OF THE SEA 2 (Comm. Print 1981) [hereinafter cited as UNCLOS III REPORT].


7. STAFF REPORT, supra note 3, at 12.

8. Id. at 20.


10. Oxman, The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981), 76 AM. J. INT'L L. 1, 3 (1982). According to Mr. Kozyrev (Soviet Union), "[t]he United States, by its obstructionist position, was pursuing a certain purpose—that is, to delay the work of the conference or to break it off... or to achieve decisions on a number of issues... such as would only be in the interest of their corporations...." U.N. Dep't of Pub. Information, Press Release SEA/146, at 7 (Aug. 24, 1981).

11. Ratiner, The Law of the Sea: A Crossroads for American Foreign Policy, 60
United States Position Preceding the Eleventh Session

Administrative Concerns with the Draft Convention

In an effort to allay fears that the United States was seeking wholesale changes in the Draft Convention, administration officials attempted to concisely define problems on which the United States would focus at the eleventh session. On January 29, 1982, President Reagan announced six necessary objectives of an "acceptable" comprehensive Law of the Sea treaty:

1. Development of deep seabed mineral resources to meet national and world demand;
2. Sufficient national access, security of supply, avoidance of monopolization by the International Sea-Bed Authority (Authority), and economic development of the resources;
3. A decision-making role in the deep seabed regime sufficient to protect the political and economic interests and financial contributions of participating states;
4. Protection against amendments without approval of participating states;
5. Prevention of other undesirable precedents for international organizations; and
6. Modification so that approval by the Senate would be likely.

Elaborating on these objectives at the intersessional meeting, the United States suggested several major and minor changes to the Draft Convention. These changes fall into two categories:

FOREIGN AFFAIRS 1006, 1013 (1982). In an August 17, 1981 speech before the informal plenary of the tenth session, the Chairman of the Group of 77 expressed a willingness to continue negotiating with the United States, but "there should not be any reopening of issues already negotiated over a long period of time and agreed to by all the delegations." UNCLOS III REPORT, supra note 5, at 22.


13. The Authority is the organization created by the treaty to implement its seabed provisions. Draft Convention, supra note 4, art. 157. The Authority is made up of the Assembly, which sets general policies; the Council, which implements those policies; and the Enterprise, which actually mines the ocean floor. Id. art. 158.

14. The intersessional meeting took place in New York from February 24 to March 2, 1982. The purpose of the meeting was to begin preliminary negotiations for the 11th session. STAFF REPORT, supra note 3, at 13-14.

15. Ratiner, supra note 11, at 1009. Although the President gave the negotiators six broad objectives, the detailed instructions they received were produced by
The potential discouragement of seabed mining; and (2) the administrative procedures of the Authority.

The Potential Discouragement of Seabed Mining

The Reagan administration objected to the following treaty provisions that could hamper the deep seabed mining industry: nodule production limitations, financial burdens imposed by the Authority, and the licensing limits on mining operations allowed each nation.16

Seabed mining production ceilings17 exist in the Draft Convention only for manganese nodules, which contain nickel, cobalt, manganese, and copper.18 Some estimates put the amount of nodules awaiting development in the seabed at 1.5 trillion tons.19 United States concerns with these mining production limitations have been heightened by the discovery of polymetallic sulfide deposits rich in zinc, iron, sulphur, silver, and copper.20 Although polymetallic sulfides are more easily replenished than manganese nodules,21 the potentially enormous mining profits from them may be lost if unreasonable production ceilings are established.22 The treaty gives the Authority power to control non-nodule mineral production through any method it determines is appropriate.23 Under the present draft, the Reagan administration believed that the Authority could place a moratorium on sulfide various agencies of the government and were not sent to the President for his approval. Id.

16. Draft Convention, supra note 4, art. 151, para. 3.
17. Id. art. 151. The method for calculating the production quota for seabed mining is extremely complex and takes into account such factors as land-based mineral production, mineral consumption trend lines, and the linear regression of logarithms of actual mineral production. Id.
20. Murphy, Polymetallic Sulfides, 7 SOUNDINGS, Nov. 1981-Feb. 1982, at 1. Most of these deposits are within 200-mile exclusive economic zones, however, and thus not subject to the treaty’s production limitations. Interview with Michael R. Molitor, former congressional staff delegate, United States delegation to UNCLOS III (Sept. 21, 1982).
21. Sulfides form in much less time than manganese nodules. It may take a million years for a nodule to grow one inch, while sulfides have grown a foot per year. Thus, it may be possible to “harvest” the mineral wealth of sulfides periodically, as opposed to a “one time recovery.” Murphy, supra note 21, at 1.
22. For example, the copper content of manganese nodules is about one percent, while copper content of sulfide deposits may range from five to thirty percent. An eight-foot cube of sulfides weighs approximately a ton, yet acres of ocean bottom are required to produce the equivalent amount of minerals from nodules. Id. at 5.
23. Draft Convention, supra note 4, art. 151, para. 3.
production to discriminate against seabed miners in favor of Third World, land-based producers.\textsuperscript{24}

The Reagan administration also believed that the treaty imposed harsh financial burdens on industrialized countries whose nationals will engage in deep seabed mining. The funds required for the initial Enterprise mining site—perhaps over a billion dollars—would have to be borrowed.\textsuperscript{25} The mining companies also would pay a $500,000 application fee and $1,000,000 a year in fixed annual fees to the Authority.\textsuperscript{26} These costs create an invisible cross-subsidy that benefits land-based producers by increasing the expense of seabed mining, an additional form of regulation at which the Reagan administration balked.\textsuperscript{27}

Finally, the United States opposed production limitations in the draft that regulated the licensing of companies to mine the seabed based upon their national affiliation.\textsuperscript{28} United States production of seabed resources would be controlled in relation to other nations by an anti-monopoly clause, as well as a quota provision that restricts any one country to a total of two percent of the unreserved seabed.\textsuperscript{29} The Foreign Policy Advisory Council and Strategic Minerals Task Force issued a report to the President that concluded:

The Treaty surrenders major political and strategic advantages to the Soviet Union to the direct disadvantage of the United States. The Soviets are self-sufficient in the minerals found in seabed nodules, but we are not. They have successfully negotiated two sets of provisions that give them near-certain capability of limiting United States access to deep seabed mineral resources: [1] The Soviet Union sought and gained quota provision that limits any one country to a total of 2 percent of the unreserved seabed area. [2] They further gained a general "anti-monopoly" provision that could be used to discriminate against the United States.\textsuperscript{30}

Thus, the Reagan administration's analysis showed that the United States could face serious long-term problems as a result of the treaty provisions which limit seabed production by individual

\textsuperscript{24} See also Keating, The Law of the Sea Treaty: An Overall Assessment with Recommendations for Executive Action 3 (Dec. 15, 1980) (unpublished manuscript on file with the authors).
\textsuperscript{25} U.N. Dep't of Public Information, Press Release SEA/460, at 9 (Mar. 3, 1982).
\textsuperscript{26} Hearings Before the House Merchant Marine and Fisheries Comm., 97th Cong., 2d Sess. 20 (1982) [hereinafter cited as 1982 Hearings].
\textsuperscript{27} Keating, supra note 25, at 2.
\textsuperscript{28} Id. at 3.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 4.
The Administrative Procedures of the Authority

The International Sea-Bed Authority's decision-making power is shared by two bodies, the Council and Assembly. All signatories to the Convention are guaranteed a seat on the Assembly but not on the Council, with the exception of the Soviet bloc countries which are virtually guaranteed three seats. Also, underdeveloped nations will likely dominate the Council because the Assembly elects Council members. The Reagan administration believed that this possible imbalance of Third World nations in both Assembly and Council did not fairly reflect the economic and political interests of the United States. Thus the United States would essentially relinquish its control over seabed access to competing countries, or to land-based producing countries, who may not wish to see the seabed resources produced at all.

The method adopted to amend the Authority's administrative procedure presented a further problem. The treaty provides for a review conference at the end of fifteen years to solicit changes to Part XI provisions dealing with the seabed area. These amendments are open for consideration for five years so that consensus might be reached, and then voted on if consensus is unobtainable. Once two-thirds of the nations ratify the amendment it becomes binding on all nations, regardless of whether they opposed or supported it, unless they choose to denounce the treaty as a whole.

Concern has surfaced at a variety of levels that this amendment procedure may violate the United States Constitution and thus make it highly unlikely that the treaty could be ratified by the Senate. In a recent speech to the plenary, former Ambassador

31. See generally id. (concluding that United States would make both the military and economic concessions to the U.S.S.R. by signing the treaty).
32. Draft Convention, supra note 4, art. 161, para. 1(a).
33. See supra note 16 and accompanying text.
34. Draft Convention, supra note 4, art. 161; Keating, supra note 25, at 3.
37. Draft Convention, supra note 4, art. 155.
38. The Area is that portion of the seabed which is not within the exclusive economic zone of a Party State, that is, not within 200 miles of an inhabitable land form or on a continental shelf. See Draft Convention, supra note 4, art. 1, para. 1.
39. This provision was later amended to three-fourths. U.N. Doc. A/CONF.62/L.132 Annex V.
40. Draft Convention, supra note 4, art. 316, para. 1.
Malone said: "[T]he Convention would allow amendments to come into force for a State without its consent, which [is] clearly incompatible with United States processes for incurring treaty obligations." In the constitutional context, each time an amendment is added the document becomes a new treaty and subject to re-ratification by the Senate.

Two United States Supreme Court cases at the turn of the twentieth century held that a "treaty must contain the whole contract between the parties and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the other negotiating parties." Whether the treaty contains the whole contract is unsettled, because of the amendment procedures. Thus, there is no clear judicial answer as to whether the treaty presents constitutional ratification problems.

The final administrative procedure opposed by the United States concerns the Authority's methods of distributing proceeds from the Enterprise's deep seabed mining ventures. Specifically, the Authority could give most of these proceeds to countries which contribute little financial support to the Authority or Enterprise, as well as to national liberation movements which contribute no financial support. Some United States Congresspersons have voiced strong opposition to the concept that organizations

45. Upon closer analysis of the Draft Convention, however, the constitutional issue may well be moot. The Review Conference cannot generally adopt a new amendment until twelve months after the deposit of the instruments of ratification, accession, or acceptance by three-quarters of the States Parties. Draft Convention, supra note 4, art. 155, para. 4. Additionally, the denunciation clause allows any party to terminate its obligations under the treaty upon twelve months' notice. Thus, the treaty appears to avoid any constitutional problems by allowing a party to denounce any new treaty prior to being bound. This theory may fail due to article 315, however, which states that "[a]mendments adopted in accordance with this Convention shall be open for signature by States Parties to this convention for twelve months from the date of adoption, at United Nations Headquarters in New York, unless otherwise decided in the amendment itself." Id. art. 315 (emphasis added). Thus if article 315 allows a shorter period for adoption of amendments than twelve months, a nation could theoretically be bound for up to a year by an amendment which it opposed.
47. Draft Convention, supra note 4, arts. 155, 160.
such as the Palestine Liberation Organization could receive money from an Authority which is funded largely by United States dollars.\textsuperscript{48}

\textbf{United States Negotiating Stance}

The United States was widely criticized for these proposed changes, because most delegates considered the treaty nearly final at the end of the tenth session.\textsuperscript{49} The greatest resistance to the seabed changes came from the Group of 77,\textsuperscript{50} who fostered the belief that the United States was undermining the concept that the seabed belongs to the "common heritage of mankind"\textsuperscript{51} to promote its own domestic mining production.\textsuperscript{52} The United States, fully aware of Third World discontent, continued to pursue the President's objectives. This hard-line negotiating stance in the face of resistance by the Third World countries made it clear the United States was prepared to put adoption by consensus in jeopardy.\textsuperscript{53}

Administration officials held several underlying beliefs which they perceived gave the United States great bargaining strength. First, due to provisions of Part XI of the treaty, the Enterprise would have difficulty in financing mining operations\textsuperscript{54} or securing


\textsuperscript{49} Speech by U.S. Ambassador Thomas Clingan, Halifax Conference on the Law of the Sea (June 21-24, 1982).

\textsuperscript{50} The Group of 77 is the 120-member negotiating bloc of less developed countries. Friedman & Williams, The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea, 16 SAN DIEGO L. REV. 555, 555 (1979). As might be expected, the group originally contained 77 members.

\textsuperscript{51} For a discussion on the various meanings attributed to the common heritage phrase, see infra note 69 and accompanying text.

\textsuperscript{52} UNCLOS III REPORT, supra note 5, at 21 (statement of the Hon. Inam Ul-Haq, Chairman of the Group of 77). Chairman Ul-Haq argued that exploitation of the economic resources of the Area which have been declared to be the common heritage of mankind provides mankind with a unique opportunity to share the earth's resources equally among all nations. \textit{Id.}

There has been significant criticism of the common heritage principles, however, and many authors believe the system would fail altogether: "[i]t destroys the idea of private property and the incentive to risk money to explore and develop. Who wants to invest in a company sharing the seabed with a collectivist combine and subject to the regulation of the 'Authority'?" Saffire, \textit{The Great Ripoff}, reprinted in The United States Law of the Sea: A Review of the Issues (on file with the authors).

\textsuperscript{53} N.Y. Times, Apr. 30, 1982, at A1, col. 3.

\textsuperscript{54} The United States would have been the largest contributor to the Authority had it signed the treaty. In addition, United States mining companies were expected to contribute greatly to the Enterprise through research and development of potential aids for use by the Enterprise and through their yearly registration fees of at least one million dollars each.
the technology necessary to make deep seabed mining commercially feasible without United States support.55 Second, the Reagan administration believed that the United States could continue to mine the seabed in the 200-mile exclusive economic zone (EEZ) without the treaty.56 Many American islands, such as the Aleutians, are in chains located in areas of potential nodule exploitation.57 The EEZs emanating from these islands alone could produce millions of square miles of seabed for exploitation, since an island with a diameter of ten miles creates an EEZ of at least 132,000 square miles.58 To mine the high seas, the United States could negotiate reciprocating states agreements with other mining countries dissatisfied with the treaty’s provisions.59 These agreements could offer an alternate legal regime secure enough to encourage United States mining if sufficient industrialized nations chose such agreements over the UNCLOS III treaty.60

Moreover, several other factors contributed to the Reagan administration’s confidence in its negotiating position: the obvious worldwide political and military strength of the United States, the United States concessions previously made during the course of UNCLOS III,61 and the lack of enforcement power in the treaty itself.62 Some United States senators have argued that the advan-

55. Treaty provisions for mandatory transfer of technology are discussed infra at notes 114-15 and accompanying text.
56. Article 56, para. 1(a) of the Draft Convention grants a coastal State all economic resources found within a 200-mile zone extending from their shores. Many authors have discussed the likelihood that this 200-mile EEZ will become customary international law regardless of the outcome of UNCLOS III. Comment, Fishery and Economic Zones As Customary International Law, 17 SAN DIEGO L. REV. 661, 668-70 (1980); Molitor, The U.S. Deep Seabed Mining Regulations: The Legal Basis for an Alternative Regime, 19 SAN DIEGO L. REV. 599, 606-07 (1982).
57. CONGRESSIONAL RESEARCH SERVICE, 94TH CONG., 2D SESS., OCEAN MANGANESE NODULES 1-25 (Comm. Print, 1976). For the potential locations of nodule exploitation, see Hom, Horn & Delack, Distribution of Ferromanganese Deposits in the World Ocean, in FERROMANGANESE DEPOSITS ON THE OCEAN FLOOR (1972).
58. See Ely, Seabed Boundaries Between Coastal States: The Effect to be Given Islets as “Special Circumstances,” 6 INT’L L. 219, 234 (1972). For purposes of computation, a circular island is assumed. Where D = diameter of the island, the formula for arriving at the EEZ area is \( A(EEZ) = \pi(D/2 + 200)^2 - \pi(D/2)^2 \).
59. See infra notes 186-88 and accompanying text.
60. See infra notes 187-88 and accompanying text.
61. For example, the United States originally was strongly opposed to the 200-mile EEZ. J. Breaux, Are There Alternatives to the Law of the Sea Treaty? 9 (Oct. 19, 1982) (unpublished paper on file with authors).
62. UNCLOS III REPORT, supra note 5, at 27-28 (statement of Hon. Inam Ul-Haq). The strongest enforcement provision available against a non-signing nation is for the complaining State to bring an action before the International Court of
tages of the treaty to defense\textsuperscript{63} outweigh any detriment from the seabed provisions and that the United States has unfairly switched its emphasis from defense to economics.\textsuperscript{64} The advisors to the Reagan administration, however, found that overall the treaty could adversely affect the United States defensive posture.\textsuperscript{65} In sum, the combination of these factors placed administration officials in a position where few concessions to the Group of 77 seemed necessary.

\textit{Reaction to the United States Position}

The breadth and scope of the changes sought in the Draft Convention created an impression that the United States did not return to the Conference to negotiate in good faith.\textsuperscript{66} Alvaro de Soto, chairman of the Group of 77, noted the United States proposals contained a radical and profound questioning of every aspect of the seabed package that had been negotiated in earlier sessions.\textsuperscript{67} Even more troubling were the perceived inconsistencies between the United States position and the "Declaration of Principles"\textsuperscript{68}—a United Nations document embodying the com-

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\begin{itemize}
  \item \textsuperscript{63} Berkeley Symposium, \textit{ supra } note 48, at 17 (speech by Rep. McCloskey).
  \item \textsuperscript{64} Berkeley Symposium, \textit{ supra } note 48 (speech by Rep. McCloskey). Representative McCloskey stated that, in his opinion, after President Reagan took office in January 1982, the ratio of United States interest in the treaty had reversed from 80/20 national security/deep seabed mining to the exact opposite.
  \item \textsuperscript{65} A report from President Reagan's Foreign Policy Advisory Council and Strategic Minerals Task Force stated that a variety of strategic problems existed with the treaty. These included, among other things, the concentration of enormous economic and political power in the Authority which would be dominated by the Third World, and the lack of United States' assured, continuing, and nondiscriminatory access to critical minerals needed for our industry and defense. Keating, \textit{ supra } note 25.
  \item \textsuperscript{66} United States Delegation Report, \textit{ supra } note 12, at 2.
  \item \textsuperscript{67} Berkeley Symposium, \textit{ supra } note 48, at 22 (speech by de Soto).
  \item \textsuperscript{68} Declaration of Principles Governing the Seabed and Ocean Floor, and the Subsoil, Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8028 (1970). In 1970 the United Nations adopted the Declaration by consensus; thus developing countries argue that it became binding on all participants. Engo, \textit{Reply: A Defense of the Draft Convention}, \textit{5 J. OF CONTEMP. STUD.} 89, 91 (1982). On the other hand, several commentators point out that General Assembly resolutions do not have the force of positive international law, and that nations often paper over real differences by voting for ambiguous resolutions to avoid politically embarrassing confrontation. See Arrow, \textit{The Customary Norm Process and the Deep Seabed}, \textit{9 OCEAN DEV. & INT'L L.} 1, 22-
\end{itemize}
mon heritage principle. The Declaration states, among other things, that the resources of the area should be managed in such a manner as to foster the healthy development of the world economy, and to minimize any adverse economic effects on land-based producers. The United States objective of eliminating production ceilings seemed to ignore this mandate.

According to Lee Ratiner, Deputy Chairman of the United States delegation, the United States returned to the Conference ready to convert Part XI into a "frontier mining code" in which the first company to stake a claim owns the resources. In response to this position, the developing countries reminded the United States that Secretary of State Kissinger first proposed the parallel system of mining as the legal regime for Part XI. The Group of 77 has always opposed the parallel system, believing that deep seabed mining should be carried out by the Authority alone. Only after the United States made several concessions regarding the Enterprise did the Group of 77 finally agree to this arrangement. In its present proposals, the United States

69. Considerable disagreement exists over the exact meaning of the "common heritage" clause in the Declaration. President Lyndon Johnson inspired the development of this principle in a 1966 speech in which he stated that "we must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings." Address by President Lyndon Johnson at Commissioning of Ship Oceanographer, 2 WEEKLY COMP. PRES. DOC. 930, 931 (July 16, 1966). To the current chairman of the Group of 77, the common heritage principle implies the notion "of trusteeship and trustees, which means international machinery; and implies also the notions of equitable sharing and, perhaps most important, equitable participation, joint participation." LAW OF THE SEA: CARACAS AND BEYOND 154-55 (F. Christy, Jr., T. Clingan, Jr., J. Gamble, Jr., H. Knight, and E. Miles eds. 1975) (statement of Alvaro de Soto at the proceedings of the Law of the Sea Institute Ninth Annual Conference, January 6-9, 1975). Despite the numerous meanings attributed to the common heritage principle, the United States adheres to the position that it remains undefined and thus cannot import any legal obligation. Arrow, supra note 68, at 28-30.

70. Engo, supra note 68, at 91-92.

71. Ratiner, supra note 11, at 1012.


73. Engo, supra note 68, at 89, 93.

74. Berkeley Symposium, supra note 48, at 20 (speech by de Soto); UNCLOS III REPORT, supra note 5, Annex IV, at 29.

75. See STAFF REPORT, supra note 3, at 16-17; Berkeley Symposium, supra note 48 (speech by de Soto). The developing countries never conceived of the parallel
seemed to renege on those compromises.\textsuperscript{76}

Throughout the intersessional meeting and into the eleventh session, the United States continued to seek the signing of reciprocating states agreements with its allies.\textsuperscript{77} Since the developing countries perceived these arrangements as mini-treaties for unilateral exploitation of the seabed, they considered such actions as evidence of the United States' insincerity in negotiating a comprehensive treaty.\textsuperscript{78} Thus, as the Conference opened March 8, 1982, in New York, confrontation between the United States and the Group of 77 appeared inevitable.

The Eleventh Session

At the close of the tenth session in August 1981, three main issues remained to be settled: establishment of the Preparatory Commission, protection of pioneer mining investments, and participation by entities other than States.\textsuperscript{79} Apart from these areas, delegates agreed to discuss improving the seabed mining provisions only if such changes would enhance the prospects for consensus.\textsuperscript{80}

On March 8, 1982, the New York session began with UNCLOS III President Tommy T. B. Koh welcoming the decision by the United States to return to the Conference.\textsuperscript{81} For the first three weeks, Committee I, Committee II, Committee III, and the Working Group of 21\textsuperscript{82} met separately to negotiate the three pending system in terms of competition between the Enterprise and private miners. They believe the Enterprise will benefit the entire world community including the mining countries. UNCLOS III Report, \textit{supra} note 5, Annex IV, at 29.

\textsuperscript{76} United States Delegation Report, \textit{supra} note 11, at 2.

\textsuperscript{77} Ratiner, \textit{supra} note 11, at 1011; \textit{see infra} notes 186-89 and accompanying text.

\textsuperscript{78} Ratiner, \textit{supra} note 11, at 1011.


\textsuperscript{82} The eleventh session retained the structure of previous sessions consisting of three main committees and the Working Group of 21. Committee I dealt with management and control of deep seabed resources. Given a broad mandate to cover most of the traditional law of the sea issues, Committee II handled such topics as the territorial seas, the exclusive economic zones, and straits. Committee III developed legal regimes for marine pollution and scientific research. \textit{Synopsis, Recent Developments in the Law of the Sea: 1977-78}, 16 San Diego L. Rev. 705, 707-13
issues. During the same time the United States, in response to requests for more specific proposals, condensed its intersessional paper into a comprehensive set of amendments referred to as the "green book." Delegates reacted adversely to the proposed changes; some viewed the book as a frontal assault on the parallel system of mining. To avert a complete standoff on seabed issues, a group of the heads of delegations from eleven western states (Group of 11) produced a set of proposals which they hoped might bridge the gap between the positions of the United States and the Group of 77.

Although the Group of 11's proposals failed to address several concerns expressed in the green book, they did make considerable progress in meeting President Reagan's six objectives. If the United States delegation had been willing to work with these proposals, perhaps a satisfactory compromise could have been reached. Instead, the United States delegation voiced its opposition in such strong terms that Conference leaders concluded the proposals had been rejected. This perceived inflexibility on the part of the United States provoked intransigence elsewhere.

At the conclusion of informal negotiations, the Collegium recommended several changes to the Draft Convention and intro-
duced three draft resolutions: one proclaiming that people of non-independent territories should benefit from the resources of the convention, and two dealing with seabed issues. After plenary debate on these recommendations, the Collegium incorpo-
rated the approved changes into the text of the Draft Convention. Meanwhile, delegates continued working toward refinement of the draft resolutions that would be adopted along with the Convention.

In keeping with its timetable, the Conference began accepting amendments on April 7, 1982. Thirty-one sets of amendments were advanced, with the United States, its allies, and the Group of 11 putting forth the most significant proposals. After working to reach a general agreement on the amendments, President Koh and other Conference officers concluded the majority could not be incorporated into the Convention. President Koh appealed to the delegates not to press their proposals, because such far-reaching changes could upset the compromises built into the Draft Convention and destroy potential consensus. Most sponsors heeded this appeal, including the United States which withdrew its seabed amendments in hopes of promoting substantive negotiations on its concerns. Thereafter the Conference voted on only three amendments; none passed.

Throughout the two-month session, Conference leaders focused primarily on protection of pioneer investors and establishment of a preparatory commission. Thus, the opportunity to deal substantively with the seabed mining provisions did not arise until the final ten days of the Conference. President Koh sought a compromise between the Group of 77 and the United States. Although he had some success, the compromises did not come close to satisfying United States demands.

1 Press Release SEA/494, supra note 79, at 7.
2 Id.
3 Id. The resolutions are not incorporated into the Draft Convention because they will take effect before the treaty enters into force.
4 Id.
5 United States Delegation Report, supra note 12, at 4-5.
8 United States Delegation Report, supra note 12, at 5.
9 Press Release SEA/494, supra note 79, at 9. Two amendments submitted by Spain concerned passage through international straits; a Turkish amendment would have deleted the article forbidding reservation to the convention. Id.
11 Ratiner, supra note 11, at 1016-17; see infra notes 127-31 and accompanying text.
On April 30, 1982, the United States forced a vote on the Draft Convention and four resolutions. One hundred and thirty nations voted in favor, seventeen abstained, and four voted against. In a speech before the plenary, Ambassador Malone explained that the United States rejected the treaty because the Conference had totally failed to accommodate President Reagan's objectives.

The Convention and Final Act were opened for signature in Montego Bay, Jamaica on December 10, 1982. On the first day, 119 States signed. Beyond Montego Bay, however, lies the process of ratifying the Convention. Once sixty States ratify or ac-
cede to it, the treaty will become law for the adhering States.\textsuperscript{109}

\textit{Substantive Changes Made to the Draft Convention}

International Seabed Area

During the eleventh session the United States joined with six other industrialized Western countries having a particular interest in seabed exploitation—Belgium, France, the Federal Republic of Germany, Italy, Japan and the United Kingdom—to produce eighteen pages of formal amendments designed to make Part XI more acceptable.\textsuperscript{110}

The seabed amendments proposed by the seven mining nations were sweeping in scope, although they omitted many of the original changes sought by the United States green book. Those changes would have:

1. guaranteed that the first generation of seabed investors would obtain authorization from the Authority to mine the Area commercially;\textsuperscript{111}
2. shifted from the Authority to the States some of the responsibility for ensuring compliance with seabed policies;
3. increased the majority needed for key decisions by the Authority's Council;
4. ensured that no amendments to seabed provisions would take effect unless they were ratified by all nation States to the Convention or allowed the seabed part of the Convention to be amended by a two-thirds majority, but would not have bound States which had opposed those amendments;
5. required the Authority to obtain its mine-sites on the basis of random selection rather than by choosing the best of two mining sites proposed by the applicant;
6. opened to State and private enterprise areas reserved for the Authority which went unused for ten years or more;\textsuperscript{112}

\textsuperscript{109} Press Release SEA/494, \textit{supra} note 78, at 2. Ratification often proves to be the most difficult part of bringing a new treaty into force. It took an average of six years following signature of the 1958 Geneva Conventions to achieve a sufficient number of ratifications to allow them to come into force. Gamble, \textit{Where Trends the Law of the Sea?}, \textit{10 Ocean Dev. \\& Int'l L} 61, 76 (1981). For a discussion of the effect the treaty will have on non-signing nations, see \textit{infra} notes 164-87 and accompanying text.


\textsuperscript{111} The Authority has a great deal of discretion as to which miners will receive permits to participate in the parallel system. Some of the factors to be considered are: degree of cooperation with the Authority, ability to transfer needed technology to the Enterprise, past mining record of the applicant, and the character of the mining site to be developed. \textit{Draft Convention, supra} note 4, Annex III, art. 7.

\textsuperscript{112} The Authority could reserve considerably more sites than the Enterprise operation could mine. Keating, \textit{supra} note 24, at 3.
7. guaranteed a seat on the Council for the largest consumer of seabed minerals;\footnote{113} and
8. made less rigorous demands on contractors to transfer technology\footnote{114} to the Authority.\footnote{115}

In an effort to strike a compromise between these suggested changes and the Group of 77's adamant rejection of them,\footnote{116} the Group of 11 also submitted proposals for amendments to the seabed area.\footnote{117}

These changes affected a large number of articles in the Draft Convention, but only three that related to the seabed area became part of the Convention:\footnote{118} (1) guarantee of a seat on the Council to the largest consumer of seabed minerals; (2) the specification of "development of the resources in the Area" as the first objective of future international seabed policy; and (3) the requirement that future seabed review conferences follow decision-making rules of the Law of the Sea Conference\footnote{119} when acting on any amendments to the Convention.

For the most part, the amendments submitted by western nations were not endorsed by the conference delegates. China and Peru called the proposals "unrealistic," while other members of the conference termed them "sweeping and radical."\footnote{120} To preserve consensus, President Koh asked convention delegates on April 20, 1982, to withdraw all amendments submitted by their individual States and informal alliances.\footnote{121} The western nations

\footnote{113} The largest consumer is expected to be the United States. The Soviet bloc nations are presently guaranteed a seat on the Council, whereas western industrial nations are not. \textit{See} Draft Convention, \textit{supra} note 4, art. 161, para. 1(b).

\footnote{114} Commercial miners under the treaty are forced to transfer mining technology to the Enterprise or to developing States. They may be compensated for this transfer under "fair and reasonable terms and conditions." \textit{Draft Convention, supra} note 4, art. 144.

\footnote{115} \textit{See} Draft Convention, \textit{supra} note 4, art. 144, para. 2. The Reagan administration and mining industry oppose these demands because of the relationship of technology to defense, and the fear that compensation will never include all the hidden costs of research and development, and the probability that this mandatory transfer will discourage United States technological development if the future exclusive right to its use is denied.


\footnote{117} \textit{Id.} at 7.

\footnote{118} Press Release SEA/494, \textit{supra} note 79, at 14.

\footnote{119} This change also included the requirement that all attempts must be made to reach consensus, and only after exhaustion of these attempts may a vote be taken.


\footnote{121} Press Release SEA/494, \textit{supra} note 79, at 15.
complied only after assurances that no other amendments to the seabed area would be considered, except those proposed by President Koh in two reports issued April 29, 1982.122

The four compromise changes proposed by President Koh123 were to: (1) expand the ability of the Authority to regulate exploitation of a greater variety of seabed minerals; (2) change the requirement to amend the seabed Area from two-thirds vote to three-fourths; (3) prohibit unfair economic practices; and (4) remove the clause which required prior investigation by the Authority into whether proposed seabed contracts complied with the Convention and rules.124 These proposals were adopted in an effort to gain consensus prior to the April 30 deadline for adoption.125

Protection of Pioneer Investments

Protection for pioneer mining companies which have invested substantial sums in exploring a particular area had never been discussed prior to the eleventh session.126 Nevertheless, Conference leaders recognized that industrial countries representing the mining consortia needed guarantees that these companies would be able to continue with commercial recovery at the same sites after adoption of the Convention.127 The developing countries appeared willing to make significant concessions in this area.128

The issue of pioneer rights dominated the eleventh session, the principal concerns being size of the site, definition of pioneer investors, and relationship of pioneer investors to the seabed mining regime embodied in Part XI.129 On April 30 the Conference adopted a preparatory investment protection (PIP) resolution that represented a combination of the proposals put forth by the mining nations, the Group of 77, and the Group of 11.130 According to its terms, a State or private investor may qualify as a pioneer if it expended $30 million in pioneering activities before January 1, 1983, with not less than ten percent of that amount

127. Press Release SEA/494, supra note 79, at 27.
128. Ratiner, supra note 11, at 1014. The developing countries were prepared to make a concession so significant as to lure United States allies into the treaty. Id.
130. See Press Release SEA/494, supra note 79, at 27.
spent on site-specific activities.131 The developing countries were given until January 1, 1985, to meet this criterion.132 Aside from developing countries which may qualify, the resolution limits the number of pioneers to eight: four consortia composed of nationals from Belgium, Canada, Federal Republic of Germany, Italy, Japan, Netherlands, United Kingdom, and the United States; and four State-owned enterprises or consortia from France, Japan, India, and the Soviet Union.133

Under this plan pioneers are confined to exploration activities that may be carried out in a site limited to 150,000 square kilometers.134 In keeping with the parallel system, each investor must relinquish half that area to the Enterprise within eight years.135 The PIP resolution requires each pioneer investor to be sponsored by a “certifying State”136 which has signed the Convention. The Soviet Union objected to this provision as discriminatory. Not being a member of a consortium, the Soviet Union had to sign the Convention to qualify for pioneer status, but the United States could participate in pioneering activities without signing if its firms are associated with a consortium which has a member from a signatory State.137 This argument drew little support because once the treaty enters into force and the Enterprise begins operating, a consortium cannot begin mining activities until all its members have ratified the Convention.138

Before a certifying State can register a pioneer investor with the Preparatory Commission, it must resolve overlapping claims

132. Id. para. 1(a)(iii).
133. Id. para. 1(a)(ii). See Press Release SEA/494, supra note 79, at 29, for a list of the presently existing consortia.
134. Press Release SEA/494, supra note 79, at 30. The developing countries and Japan argued for smaller sites in fear that a few countries would monopolize the most productive areas. Id.
135. Draft Final Act, supra note 103, res. II, para. 1(e).
136. Id. para. 1(c). A certifying State must assure that the necessary funds are made available to the Enterprise, that the investor meets the qualifications, and that the area applied for in the application does not overlap with other previously allocated areas. Staff Report, supra note 3, at 41.
137. Press Release SEA/494, supra note 79, at 31. The Soviet Union abstained from the April 30 vote, saying that it “will be unable to become a party to the convention if the resolution . . . still contains provisions which place the USSR in an unfavorable position vis-a-vis several other states.” U.N. Doc. A/CONF.62/L.144 (1982).
to that site. The resolution provides a simple procedure for certifying States to follow in settling these disputes. All delegates involved considered the PIP resolution on the whole a favorable response to the industrial countries' demands.

Preparatory Commission

On April 30, 1982, the Conference also adopted the resolution establishing a Preparatory Commission for the Authority and the International Tribunal for the Law of the Sea. Probably the most important responsibilities given the Commission involve drafting the rules and regulations for seabed mining and implementing the system for protection of pioneer investors. Because these rules may affect vital economic and security interests of all mining States, membership and the appropriate mode for decision-making were key issues.

The United States and other industrial nations wanted countries which sign only the Final Act to qualify for voting membership in the Preparatory Commission. In rejecting this proposal the Collegium reasoned that "[t]he magnitude of commitment should determine the level of participation . . . ." Accordingly, States signing the Final Act may join in the work as observers, but not in the decision-making process. Suggestions for the method of decision-making ranged from simple majority to consensus. The Collegium proposed that UNCLOS III's rules of procedure apply for adoption of Preparatory Commission rules of procedure. Thereafter, the Preparatory Commission should establish its own method for handling questions of substance.

The Preparatory Commission will now begin meeting at the seat of the Authority in Jamaica. In addition to drafting rules and regulations, the Commission will perform other functions
such as establishing a special commission to bring the Enterprise into early and effective operation, and studying the effect of seabed mining on land-based producers. The United Nations will finance its operation.

Participation by Entities other than States

Three groups who sought participation in the conference were considered: intergovernmental organizations (for example, the European Economic Community), non-fully independent self-governing territories (for example, Cook Islands), and national liberation movements (for example, the Palestine Liberation Organization). After considerable discussion, compromises were reached involving each of these groups.

Intergovernmental Organizations

These associations may become a party to the treaty if a majority of their member States have signed the Convention, and their member States have transferred competence over matters governed by the treaty to the group. The organization remains a party to the treaty if any one member State still remains party to it. The association must also outline the competence granted to it by each State in a declaration. If that competence includes the right to vote in place of the represented State Party, then that State Party is precluded from voting in addition to the intergovernmental organization. The association's vote shall carry the number of ballots that have been relinquished to it by the State Party.

Self-Governing Associated States and Territories

The agreement that these territories shall enjoy full participation rights was reached in Geneva at the tenth session and incorporated into the Convention at this session. These provisions

149. Id. at 1-3.
150. Id. at 3.
151. Murphy, supra note 20, at 1.
152. Draft Convention, supra note 4, Annex IX, art. 2.
153. Id. art. 1.
155. Draft Convention, supra note 4, Annex IX, art. 4.
156. Id.
157. See id. art. 305, para. 1.

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cover the Cook Islands, Antilles, Niue, St. Kitts-Nevis-Anguilla and the Trust Territory of the Pacific Islands, all of which were invited to attend the Conference as observers.\textsuperscript{158}

\textit{National Liberation Movements (NLMs)}

These organizations, which have been participating in the Law of the Sea Conference as observers, shall be able to sign the Final Act as observers. They will obtain observer status in the Preparatory Commission and in the Authority's organs.\textsuperscript{159} This allows them to represent the views of their people and request protection of their interests. There are four liberation movements that have been allowed to join as observers: the South West African People's Organization (SWAPO), African National Congress of South Africa (ANC), Pan Africanist Congress of Azania (PAC), and the Palestine Liberation Organization (PLO).\textsuperscript{160}

The United States strongly opposes the inclusion of NLMs in the treaty as observers because of Part XI that allows some seabed proceeds to be distributed to observers.\textsuperscript{161} The NLMs are prohibited from voting as a party, but may attend and speak at any Convention\textsuperscript{162} meeting. The observers may lobby for regulations that benefit their constituents.\textsuperscript{163}

\textit{Effect of the Treaty on Non-Signing Nations}

Since the inception of UNCLOS III, delegates have worked for a treaty that would be widely accepted and easily ratified.\textsuperscript{164} The delegates chose consensus as the method of decision-making to achieve this goal.\textsuperscript{165} A crucial question is the effect that the treaty will have should international consensus fail.\textsuperscript{166}

No treaty in recent history has gained the support of most nations. Since 1946, fifteen treaties dealing with the law of the sea

\textsuperscript{158} Murphy, supra note 20, at 1.
\textsuperscript{159} Id.
\textsuperscript{160} Press Release SEA/494, supra note 79, at 44-45.
\textsuperscript{161} See supra notes 46-48 and accompanying text.
\textsuperscript{162} Draft Convention, supra note 4, Annex IX. The Draft Convention provides for future conferences composed of all parties to consider proposed amendments to the Convention (that is, a review conference for the seabed provisions), as well as other meetings to elect the judges of the International Tribunal for the Law of the Sea and the members of the Commission on the Limits of the Continental Shelf. Id. arts. 155-170.
\textsuperscript{164} Sohn, supra note 80, at 333.
\textsuperscript{165} Id. at 333-40.
have been ratified and were still in force on January 1, 1982.167 Of these fifteen, only three have been ratified by more than eighty nations, and only one has been supported by more than one hundred nations.168

If the treaty fails widespread approval, but is ratified by sixty States,169 then global acceptance is unlikely.170 A treaty that “limps into force” will probably mean that the more general provisions of the treaty such as the 200-mile EEZ, will become customary international law, while more controversial areas, such as seabed exploration, will remain unresolved.171 With only this minimal support, the impact of the treaty on non-signing nations could be negligible.172 Conversely, if most nations adopt the treaty, perhaps 140 or more, it would be more likely that the treaty as a whole would become binding on all States as customary international law.173

Although the president of the Conference has threatened to challenge any nation violating the principles of Part XI in the International Court of Justice,174 it is questionable whether this action could produce little more than “a chilling effect on seabed mineral investment” due to the resultant protracted litigation.175 Furthermore, a ruling by the International Court of Justice could not enforce provisions of the treaty on non-signing nations unless those provisions had become customary international law.176

Should the treaty fail to attract widespread support, the most delicate issue to be resolved will be the seabed area. Already some seabed developers from nations endorsing seabed mining as a freedom of the high seas have begun to consider making “claims” to the ocean floor.177 This action is likely to cause a hos-

167. Id. at 537-39.
168. Id.
169. See Convention, supra note 106, art. 308.
170. Gamble, supra note 109, at 77.
171. Id.
172. Id.
173. Id.
174. Ratiner, supra note 11, at 1017.
175. Id.
tile response from those nations who endorse the common heritage of mankind.\textsuperscript{178} However, the present climate of questionable stability may cause mining companies to be reluctant investors of the approximately $500 million necessary to develop a site without some assurances of security.\textsuperscript{179} In the absence of a widely supported international agreement, the mining companies would be forced to look to their own national government for support.

The United States has formally taken the position that deep seabed mining is a freedom of the high seas\textsuperscript{180} by passing the Deep Seabed Hard Minerals Resources Act of 1980 (Deep Seabed Act).\textsuperscript{181} This Act is United States law on seabed mining until superseded by a comprehensive law of the sea treaty.\textsuperscript{182} The Deep Seabed Act controls the licensing and issuance of permits for the mining of deep sea resources by United States citizens or corporations.

Mining companies who seek security for their investments may find the Deep Seabed Act meets their need.\textsuperscript{183} Although the United States could provide military security for mining operations, the Deep Seabed Act primarily relies on three congenial methods to ensure security. First, interference from United States citizens will be prevented by exercising jurisdiction over them.\textsuperscript{184} Second, the Act requires the Secretary of State to attempt to reconcile conflicts with citizens or corporations of other nations.\textsuperscript{185} Finally, the United States will act to control other na-

\textsuperscript{178.} Ratiner, \textit{supra} note 11, at 1017.
\textsuperscript{179.} \textit{Id.}
\textsuperscript{180.} \textit{Deep Seabed Hard Minerals: Hearing Before the House Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries}, 93d Cong., 1st Sess. 50 (1974) (statement of Charles N. Brower, Acting Legal Adviser, U.S. Department of State) ("[a]t the present time, under international law and the High Seas Convention, it is open to anyone who has the capacity to engage in mining of the deep seabed subject to the proper exercise of the high seas rights of the countries involved; it is the legal opinion of the United States that exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas . . . ").
\textsuperscript{182.} \textit{Id.} § 1402(b)(2). The Act authorizes the Administrator of the National Oceanic and Atmospheric Administration to issue licenses for exploration, and permits commercial recovery of the deep seabed resources to United States citizens or corporations and other entities controlled by United States citizens. \textit{Id.} § 1413. United States citizens are forbidden to engage in seabed exploration or exploitation unless they receive a license or permit. No commercial recovery is permitted prior to January 1, 1988, a date sought by Ambassador Richardson to minimize international friction while not slowing the timetables of private seabed miners. \textit{Id.} § 1411(a).
\textsuperscript{183.} \textit{1982 Hearings, supra} note 26, at 2 (speech by Conrad Welling).
\textsuperscript{185.} \textit{Id.} § 1412(b)(4).
tions and their citizens through the use of controversial reciprocating states agreements. If the United States succeeds in forming such agreements with other major mining countries, miners may feel secure in their rights to exploit a particular site.

Convinced that reciprocating states agreements provided a viable alternative to the Draft Convention, the Reagan administration made concerted efforts to sign such agreements before the eleventh session. However, once the session began the other mining nations heeded a warning by President Koh that such negotiations jeopardized the successful conclusion of UNCLOS III and postponed discussions of these mini-treaties. Many conferees believed that negotiation of a reciprocating states agreement at a time when the United Nations was striving for consensus in a multilateral treaty was a bad faith gesture.

After adoption of the Convention, the United States convinced France, West Germany, and the United Kingdom to sign an agreement to resolve any conflicting claims filed by seabed mining consortia. All three countries, however, reserved a right to ratify the Convention. Several commentators believe that most industrial

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186. See id. § 1428. The Act gives the Administrator of the National Oceanic and Atmospheric Administration authority, with direct participation of the State Department, to enter into agreements with "like-minded" countries for reciprocal recognition of each other's claims to the seabed. Id.


188. See Ratiner, supra note 11, at 1010, for expression of the differing views within the United States Delegation.

189. Id. at 1011.


nations will sign and ratify the treaty to obtain its many benefits and to preserve good relations with Third World countries. France signed the Convention on the day it was opened for signature. Subsequent ratification of the Convention will eliminate its participation in such agreements. The same will be true of West Germany and the United Kingdom, should they sign the Convention.

BEYOND THE CONFERENCE

Continental Shelf Delimitation

Issues of boundary delimitation continue to be intensely debated because no acceptable formula exists to calculate the dividing line between continental shelves. Every boundary dispute presents a unique situation requiring consideration of each country's geography and other relevant circumstances. UNCLOS III leaves this problem unresolved. Article 83, paragraph 1 of the Convention provides, as a vague guideline, that opposite and adjacent states should reach an equitable solution in determining the continental shelf boundary.

In a 1982 opinion, Tunisia/Libyan Arab Jamahiriya, the International Court of Justice interpreted article 83, paragraph 1 as embodying the trend in customary international law to de-emph-

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195. Ratiner, supra note 11, at 1017. "Article 137, paragraph 3 prohibits states from recognizing seabed mining claims which are not derived from the Treaty. Under customary international law principles of treaty interpretation, a state which signs a treaty is bound not to act incompatibly with it, pending its ratification and entry into force." Id.

196. For a discussion of the international efforts towards an acceptable rule on continental shelf delimitation, see Adeede, Toward the Formulation of the Rule of Delimitation of Sea Boundaries Between States With Adjacent or Opposite Coasts, 19 VA. J. INT'L L. 207 (1979). Korea and China are debating which legal principles to apply in delimiting the continental shelf under the Yellow Sea. Pak, The Continental Shelf Between Korea, Japan, and China, 4 MARINE POL'Y REP. 1, 3 (1982).

197. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be made by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. Convention, supra note 106, art. 83(1).

198. Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya), reprinted in 21 INT'L LEGAL MATERIALS 225 (1982).
size the equidistance principle in favor of a solution based on “equitable principles.” The parties requested the court to state what rules of international law may be applied for delimitation of the continental shelf, taking into account “equitable principles and the relevant circumstances which characterize the area, as well as the new accepted trends admitted at the Third [United Nations] Conference on the Law of the Sea.”

Both Tunisia and Libya argued that a determination of the natural submarine prolongation of their land would correctly delimit the boundary. The court, however, ruled that the natural prolongation theory alone could not govern determination of the boundary because the shelf between these two adjacent countries extends beyond their shore as one continuous shelf. To achieve an equitable solution, the court had to look beyond physical characteristics to a consideration of other circumstances such as economic interests and historical factors.

In January 1981, Malta sought to intervene in the Tunisia/Libya case pursuant to article 62 of the court’s statute, which allows intervention by one whose legal interests may be affected. Because Tunisia and Libya did not ask the court to establish the dividing line, but simply to determine which rules to apply in delimiting the boundary, the court held that Malta’s interests were not directly affected within the meaning of article 62. As a result of this denial, Malta and Libya recently petitioned the court to determine which rules to apply in delimiting their continental

199. The equidistance-special circumstances rule as set out in article 6(2) of the 1958 Geneva Convention on the Continental Shelf provides that in absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

200. Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya), reprinted in 21 INT’L LEGAL MATERIALS 225, 228 (1982).

201. Id. at 239.

202. Id. at 262-63.

203. Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya): Application by Malta for Permission to Intervene, 1981 L.C.J. 3. This is “the first time the International Court of Justice has squarely faced and ruled on the right of a third state to intervene in a case to which two other states are parties.” Comment, Intervention in the International Court, 75 Am. J. Int’l L. 903 (1981).

Another continental shelf case now before the International Court of Justice involves a decade-long dispute over the maritime boundary in the Gulf of Maine. Invoking a Special Agreement annexed to the Boundary Settlement Treaty between Canada and the United States, the parties agreed to submit their dispute either to a Chamber of the International Court, or if the chamber could not be constituted within six months, to an ad hoc court of arbitration. On January 20, 1982, the court agreed to accommodate the parties' "special agreement" by forming a chamber of five judges to hear the dispute. The case should be a landmark in the delimitation of sea boundaries as the first decision to establish a single maritime boundary for both the continental shelf and fishery zones.

**Fishing Disputes**

Although the majority of coastal nations claim jurisdiction over tuna and other highly migratory species within their 200-mile eco-

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205. *A New Case is Submitted: Continental Shelf (Libya Arab Jamahirya/Malta),* U.N. Communiqué No. 89-14, July 27, 1982.

206. *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area,* reprinted in 21 INT'L LEGAL MATERIALS 69 (1982). The United States and Canada are presently involved in four bilateral boundary disputes: Gulf of Maine, Dixon Entrance, Strait of Juan de Fuca, and Beaufort Sea. Resolution of the Gulf of Maine dispute will likely influence the outcome of the other delimitations. Note, *Delimiting Continental Shelf Boundaries in the Arctic: The US-Canada Beaufort Sea Boundary,* 22 VA. J. INT'L L. 221, 223 (1981). The Gulf of Maine case will be the first to use the 1972 Rules of Procedure adopted by the International Court of Justice, allowing the parties to bring their dispute before a Chamber of the court rather than the full court. Here, the parties have not only a role in the selection of the judges, but also a decisive voice as to the number of judges. Rhee, *Equitable Solutions to the Maritime Boundary Dispute Between the United States and Canada in the Gulf of Maine,* 75 Am. J. INT'L L. 590, 595-97 (1981); Feldman & Colson, *The Maritime Boundaries of the United States,* 75 Am. J. INT'L L. 729, 762-63 (1981).


208. *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area,* reprinted in 21 INT'L LEGAL MATERIALS 69, 72-73 (1982). Because the present court does not include a Canadian judge, the acting president also acceded to Canada's request to choose a Canadian judge ad hoc pursuant to article 31(2). *Id.* at 73. As a result, all five judges will be from industrialized western states. This raises an important policy question: because the issue is likely to concern many states, is it proper for the Chamber to be composed solely of judges from western states? Comment, *International Adjudication: Settlement of the United States-Canada Maritime Boundary Dispute,* 23 HARV. INT'L L.J. 138, 142 (1982).

nomic zone, the United States refuses to recognize this jurisdiction.210 Following this policy, commercial tuna fleets from the United States fish as they please beyond the twelve-mile territorial sea of coastal States and risk having their boats seized by nations that claim jurisdiction beyond twelve miles.211 In the last two years, for example, Mexico has seized fourteen tuna boats from the United States and fined the owners more than $6 million.212 United States law encourages tuna fishermen to risk seizure by providing reimbursement for their losses,213 and by giving the State Department authority to ban importation of fish products from the impounding country.214 Because the fines are paid from taxes, the American taxpayer, in effect, is subsidizing the Pacific tuna industry. As a result of these seizures, the United States has also placed an embargo on Mexican-caught tuna.215

Recognizing that such retaliatory measures worsen United States relations with Mexico and other coastal nations, several members of Congress are seeking legislation to ameliorate the problem.216 In a speech supporting the American Tuna Protection Act, Senator Weicker urged other senators to recognize exclusive jurisdiction over tuna within the economic zone before the United States alienates all its South Pacific friends.217 The State Depart-

ment opposes such legislation as an ineffective unilateral effort that will only harm the American fishing industry. According to a State Department spokesperson, this industry can only be managed effectively through regional agencies.218

The United States position is reflected in article 64 of the Convention, which requires coastal States and other interested countries to cooperate in forming regional international organizations.219 However, the degree of authority given these regional bodies is unclear.220 Coastal States interpret this article as recognizing their sovereign right over tuna traveling through their waters;221 the United States and other nations maintain that the legislative history of article 64 clearly shows an intent to establish regional management of tuna to the exclusion of sovereign jurisdiction.222

Falkland (Malvinas) Island Dispute and Antarctica

The Argentine invasion of the Falkland Islands in 1982 had serious law of the sea ramifications for ownership of Antarctica resources. Argentina has long claimed ownership of not only the Falklands, but also of that portion of Antarctic resources which would accompany the Islands within a 200-mile EEZ.223 The EEZs around the Falkland Islands, South Georgias, and the South Sandwich Islands (all administered by the United Kingdom)224 would control broad expanses of the Antarctic's oceans and the exploitation of its vast resources.225

A fierce battle rages for control of Antarctic resources not gov-

219. Convention, supra note 106, art. 64, para. 1.
221. Id. at 4-5. Coastal States interpret the language of article 64(2) of the Convention as incorporating articles 56, 61, and 62. Id.
222. Speech by August Felando at Law of the Sea Symposium, University of San Diego (Apr. 24, 1982); Dyke & Heftel, supra note 220, at 1.
224. The British Title to Sovereignty in the Falkland Islands Dependencies, 8 POLAR REC. 125, 128-33 (1956).
One of the major resources now exploited are small shrimp-like animals called krill. The owners of Antarctic islands will gain strong claims to krill when the treaty is renegotiated, because of the newly established 200-mile EEZs surrounding the islands.

Because there are disputed claims as to areas within Antarctica itself, the ownership of Antarctic islands may affect claims to portions of that continent. The Argentine invasion of the Falklands, had it been successful, would have established a stronghold from which Argentina could assert future Antarctic claims. Such invasions may become more commonplace in light of the unsettled sovereignty and potentially great riches of the Antarctic continent.

**International Whaling**

This year several important issues faced whale protection groups, the most important of which was the protection of the sperm whale now in danger of extinction. Even after an IWC vote in 1981 of 25 to 1 to place a moratorium on sperm whale killing, the sole dissenter (Japan) continues to refuse to stop hunting these whales. A second and equally serious problem is the "cold" harpoon. Although the International Whaling Commission agreed by consensus in 1981 to prohibit use of the "cold" harpoon after the 1982 whaling season, four signatory countries

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227. Joyner, supra note 225, at 702-03.

228. The major concentrations of krill are located in potential EEZs of both the continent and some of the islands. See B. MITCHELL & J. TINKER, ANARCTICA AND ITS RESOURCES 67 (1980).


230. The two major organizations which protect whaling are the International Whaling Commission (IWC) and the Convention on International Trade in Endangered Species (CITES). These organizations will continue to control whaling even after the adoption of the Convention, which defers its power in this area to the major whale protection societies.


232. Id. Although the IWC is without authority to enforce its decisions, the threat of economic sanctions by the United States and other members may be sufficient to assure compliance if those methods were used. The Pell and Packwood amendments to the Fishery Conservation and Management Act of 1976 provide that the United States can deny fishing rights within the United States 200-mile zone and halt all fish imports of nations that ignore commission decisions. Pub. L. No. 96-61, 93 Stat. 407 (1979).

233. A "cold" harpoon is one that uses no exploding tip.
(Japan, Soviet Union, Norway and Iceland) have announced that they will continue to use the harpoon until a suitable explosive replacement can be developed. The invention of such a device could take years as some species of whales, such as the Minke, are so small that the explosive charge in the harpoon destroys much of the whales' economic value.

The thirty-fourth annual meeting of the IWC took place in Brighton, England during the week of July 18, 1982. The issue which proved to be the most controversial was the ban on commercial whaling. After several years of failing to gain the three-fourths majority to impose a moratorium, the ban was finally agreed upon. Twenty-five nations, including the United States, voted in favor of the ban. Although seven nations including Japan, Norway, and the Soviet Union, which together account for ninety percent of all commercial whaling, oppose it, the moratorium begins on January 1, 1986. For whalers, this represents a drastic change from their present quota of over 14,000 whales. Some IWC observers expect resistance to the moratorium from those nations who now oppose it. Norway, in fact, has already vowed at the July meeting not to honor the ban. Owing to increasing popular support of the ban, however, international trade sanctions could be imposed against those countries failing to comply.

234. ANIMAL WELFARE INSTITUTE, SAVE THE WHALES (Apr. 1982).
237. Japan led the fight against this proposal. Japan is the world's largest consumer of whale meat. Its whaling industry is also the largest in the world, employing an estimated 50,000 persons. The Japanese contend that the IWC is underestimating the available whale stocks and therefore the quotas are based on inaccurate information and are overly restrictive. L.A. Times, Nov. 23, 1979, § 8, at 1, col. 1.
238. Id.
240. Id.
241. L.A. Times, July 18, 1982, § 5, at 2, col. 6. Six years ago, the quota was 25,000 whales; three years ago it was 20,102 whales; two years ago the quota was 15,656 whales; and last year the Commission set the quota at 14,553. Approximately 14,000 whales were actually taken in that year. San Diego Tribune, Aug. 2, 1982, at B10, col. 1.
244. In 1972, the United Nations Conference on the Human Environment adopted the whale as the symbol of the environmental crisis facing this planet and called unanimously for a ten-year moratorium on further killing of the species. L.A. Times, Nov. 23, 1979, § 8, at 1, col. 1. The United Nations could choose to encourage and support sanctions against whaling nations. Id. Also in 1972, the United States adopted a landmark law, the Marine Mammal Protection Act, which
SUMMARY

After eight years of working to create a universally acceptable treaty, all participants left the eleventh session disappointed at their failure to achieve consensus. Many commentators and representatives viewed UNCLOS III as an experiment in international cooperation, which could serve as an impetus to collectively solve other difficult global problems. The effect of the international legal regime established depends on which States sign and ratify the treaty. Regardless of the outcome, much can be said for the accomplishments of UNCLOS III as it draws to an end. The delegates produced an elaborate document encompassing a broad range of issues on uses of ocean space. Some of its concepts have already received widespread adoption. At the very least, the treaty provides a blueprint for future undertakings when the world community seeks anew that elusive goal: a comprehensive law of the sea agreement which attracts worldwide consensus.

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