March 2019

The Draft United Nations Conventions on the International Seabed Area: Background, Description, and Some Preliminary Thoughts

H. Gary Knight

Follow this and additional works at: https://digital.sandiego.edu/sdlr

Part of the Law of the Sea Commons

Recommended Citation

Available at: https://digital.sandiego.edu/sdlr/vol8/iss3/3

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego Law Review by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
The Draft United Nations Conventions on the International Seabed Area: Background, Description, and Some Preliminary Thoughts*

H. GARY KNIGHT**

I. INTRODUCTION

On December 17, 1970, the United Nations General Assembly adopted by 100 votes (U.S.) to 7 (U.S.S.R.), with 6 abstentions, reso-

* Although I consulted with several representatives of the executive branch of the United States Government in preparing this paper, the views expressed herein are solely my own and are in no way intended to represent the views of either the United States Government or any of the individuals with whom I discussed the issues involved.

I express sincere appreciation to Messrs. Louis Sohn, Bernard H. Oxman and Myron Nordquist, all of the Department of State, Mr. Vincent E. McKelvey of the Department of the Interior, and Mr. Leigh S. Ratiner of the Department of Defense for their cooperation in gathering background material for this paper.

I also express thanks to the Office of Sea Grant Programs (National Oceanic and Atmospheric Administration, Department of Commerce) for the funds which partially supported this research effort.

** Assistant Professor of Law and Marine Sciences, Louisiana State University Law Center; member, Committee on Marine Resources, Section of Natural Resources Law, American Bar Association; Director, Graduate Program in Marine Resources Law, Louisiana State University Law Center.

This paper was delivered by Professor Knight as an address to the 18th
olution 2750C\(^4\) calling for a Third United Nations Conference on the Law of the Sea to be held sometime during 1973 unless postponed by the twenty-seventh session of the General Assembly in 1972 on grounds of insufficient progress of preparatory work.\(^2\) Adoption of this resolution and the initiation of preparations for the 1973 Conference has heightened interest in the question of the establishment of a legal-economic regime, and concomitant machinery, to govern the exploration for and exploitation of the non-living resources of the seabed and subsoil beneath the high seas beyond the limits of national jurisdiction ("seabed question" hereinafter).

The issues to be dealt with at the 1973 Conference will extend far beyond the seabed question, however, since the conference resolution identifies as potential agenda items:

- The regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of preferential rights of coastal States), the preservation of the marine environment (including inter alia the prevention of pollution), and scientific research.\(^3\)

Thus, an almost limitless range of topics relating to management of the marine environment and the exploitation of its resources will be considered by the international community at the 1973 Conference and by the newly expanded 86 member United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction ("Seabed Committee"

Annual Meeting of the Institute on Mineral Law on January 29, 1971, and is reprinted here by permission of the Lousiana State University Law Center.


3. Conference Resolution, supra note 1, operative para. 2.
hereinafter) beginning with preparatory conferences scheduled by the conference resolution for March and July-August, 1971. The General Assembly mandate requires the Seabed Committee to produce at its first two preparatory meetings in 1971 a draft convention for a seabed regime, an agenda specifying all other topics to be dealt with by the 1973 Conference, and draft articles on all such additional agenda items. The conference resolution also specifies that the draft seabed convention is to be prepared on the basis of the declaration of principles on the seabed question which was also adopted at the twenty-fifth session of the General Assembly. Among the provisions of that declaration are items specifying (1) that the seabed and its resources beyond the limits of national jurisdiction are the “common heritage of mankind,” (2) that this area “shall not be subject to appropriation by any means by States or persons . . . and no State shall claim or exercise sovereignty or sovereign rights over any part thereof,” (3) that no State or person may claim, exercise, or acquire rights in the area unless compatible with the international regime to be established and the other principles of the declaration, and (4) that the regime to be adopted shall “ensure the equitable sharing by States in the benefits derived [from seabed exploitation], taking into particular consideration the interests and needs of the developing countries, whether landlocked or coastal.”

4. Resolution 2750C instructs the Seabed Committee to:

[H]old two meetings in Geneva in March and July-August 1971 in order to prepare for the Conference draft treaty articles embodying the international regime, including an international machinery, for the area and the resources of the sea-bed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction, taking into account the equitable sharing by all States in the benefits to be derived therefrom, bearing in mind the special interests and needs of developing countries, whether coastal or landlocked, on the basis of the Declaration of Principles Governing the Sea-bed and the Ocean Floor and the Sub-soil thereof beyond the Limits of National Jurisdiction adopted by the General Assembly on 17 December 1970; and a comprehensive list of subjects and issues relating to the law of the sea referred to in operative paragraph 2 hereof which should be dealt with by the conference, and draft articles on such subjects and issues.

In the United States, the Department of State is charged with responsibility for preparation, negotiation, and representation of this Nation at the 1973 Conference. The Office of the Legal Adviser for Ocean Affairs, under the direction of Assistant Legal Adviser for Ocean Affairs Bernard H. Oxman, carries primary responsibility for this effort within the State Department.

Prior to adoption of these resolutions by the General Assembly, the United States delegation to the August, 1970, session of the Seabed Committee in Geneva tabled a proposed draft convention on the seabed question, entitled "Draft United Nations Convention on the International Seabed Area"6 which, because of its quality and comprehensiveness is likely to be the model from which the Seabed Committee will construct its draft convention. Accordingly, it is appropriate to review briefly the events concerning the seabed question which led the United States Government to prepare and submit the Draft Convention, to describe the functional provisions of the document, and to make some preliminary appraisal of its value in serving national, international, and industry interests.

Part II of this paper deals with background material, covering relevant aspects of marine geology and marine resources law, a short history of the seabed question from August, 1967 to date, the genesis and substance of the Nixon statement of May 23, 1970, and the Draft Convention. Part III summarizes the salient provisions of the Draft Convention and makes some preliminary analytical comments concerning several of those provisions. Part IV is devoted to a brief resume of national, international, and industry interests served by the document.

II. BACKGROUND

In order to view the Draft Convention in proper perspective, it is necessary to understand three aspects of the seabed question: (1) the physical characteristics of the marine areas under consideration, (2) the existing legal-economic regimes governing disposition of resources in these areas, and (3) the recent history of efforts to secure adoption of a regime to govern resource disposition in the area beyond the limits of national jurisdiction.


The document contains a caveat on the cover specifying that it was submitted to the Seabed Committee as "a working paper for discussion purposes," and that it and its appendices "raise a number of questions with respect to which further detailed study is clearly necessary and do not necessarily represent the definitive views of the United States Government." This caveat may in part have been included in the final version of the draft as a response to a letter of objection transmitted to Secretary of State Rogers by four members of the U.S. Senate prior to the August, 1970, meeting of the Seabed Committee.
A. The Continental Shelf and Deep Seabed—Marine Geology And Marine Resources Law.

The seabed and subsoil of the world ocean, the non-living resources of which are the subject of both the Convention on the Continental Shelf and the Draft Convention, is not a uniform phenomenon but rather is composed of several distinct geomorphological features changing in characteristics as one moves seaward. To suggest that the general features of these areas are distinct is not to imply that the lines of demarcation between them are distinct, for such is not the case, and therein lies much of the difficulty in delimiting zones of offshore jurisdiction. As is well known, the legal definition of the continental shelf contained in the Convention on the Continental Shelf varies considerably from the geological definition of the shelf. A quick review of geologic seabed phenomena and the present legal regime governing resource disposition from is thus in order.

1. Marine Geology.

a. The Continental Shelf. The continental shelf is the seaward portion of the extension of the continental land mass which begins with the upland coastal plain and extends seaward until a marked

7. The Draft Convention also covers the subject of living resources of the seabed:

Subject to the provisions of Chapter III [the International Trusteeship Area], each Contracting Party may explore and exploit the seabed living resources of the International Seabed Area in accordance with such conservation measures as are necessary to protect the living resources of the International Seabed Area and to maximize their growth and utilization. Art. 22.

It is beyond the scope of this paper to enter into the debate on the legal-economic regime to govern exploitation of “sedentary species” or “seabed living resources” and, accordingly, the article deals only with the non-living resources of the seabed. See Examination of Living Resources Associated with the Sea Bed of the Continental Shelf with Regard to the Nature and Degree of their Physical and Biological Association with Such Sea Bed, memorandum prepared by the Food and Agriculture Organization of the United Nations, U.N. Doc. A/CONF.13/13; 1 U.N. CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 187 (1958); Goldie, Sedentary Fisheries and Article 2(4) of the Convention on the Continental Shelf—A Plea for a Separate Regime, 63 AM. J. INT'L L. 86 (1969); Oda, A Reconsideration of the Continental Shelf Doctrine, 32 TUL. L. REV. 21 (1957); Oda, Proposals for Revising the Convention on the Continental Shelf, 7 COLUM. J. TRANS. L. 1, 10–18 (1965); Young, Sedentary Fisheries and the Convention on the Continental Shelf, 56 AM. J. INT'L L. 359 (1961).
increase in slope occurs. Although the continental shelf actually consists of the entire continental structure beginning at approximately the 600 foot contour above sea level, only the submerged portion is of interest to those concerned with marine resources, and the term has come generally to refer only to that submerged portion. The average water depth at the break in slope was traditionally considered to be 200 meters although in fact this average depth is approximately 72 fathoms or 130-140 meters. This average figure may be somewhat misleading, however, since there are few places in the world where the 72 fathom or 130-140 meter isobath actually coincides with the shelf edge. Rather, the shelf edge varies from water depths of 20 to 550 meters. The average slope

8. The International Committee on Nomenclature of the Sea Floor suggested in 1953 the following definition of the shelf:

   The zone around the continent, extending from the low-water line to a depth at which there is a marked increase of slope to greater depth.

1 SHALOWITZ, SHORE AND SEA BOUNDARIES 183 (1962) notes:

   [The continental shelf] may be defined as the submerged portion of a continent, which slopes gently seaward from the low-water line to the point where a substantial break in grade occurs, at which point the bottom slopes seaward at a considerable increase in slope until the great ocean depths are reached.


10. See for example, 1 SHALOWITZ, supra note 8 at 246. The International Committee on Nomenclature of the Sea Floor stated in 1953 that "[c]onventionally, the [shelf] edge is taken at 100 fathoms (or 200 meters). . . ." This practice stemmed at least in part from the fact that early nautical charts contained only the 10, 100, and 1000 fathom isobaths, the 100 fathom line most closely approximating water depth above the seaward edge of the continental shelf. Emery, The Continental Shelves, in THE OCEAN (edited by the Scientific American Magazine) 41 (1969) [hereinafter cited as Emery, Scientific American]; Franklin, supra note 9, at 12.


12. SHEPARD, supra note 11, at 61 (observing that only rarely does the shelf edge occur at the 100 fathom isobath).

13. Emery, Scientific American, supra note 10, at 41. See also the following: Guilcher, supra note 11, at 4 "[The shelf break] varies considerably and reaches exceptionally 300 fathoms, or 550 meters, or even more around Antarctica." Hedberg, supra note 8, at 6-7 "[T]he range of water depths at this edge is from only a few meters to more than 600 m. in such places as the Arctic Ocean off Canada and the Ross Sea in the Antarctic."
of the shelf is given as 0° 07', or about ten feet per mile,14 and the average water depth over continental shelves as 30 fathoms.15 The width of the continental shelf also varies substantially, ranging from virtually zero breadth off the western coast of South America to 800 miles or more beneath the Bering Sea, averaging approximately 40 miles in width world-wide.16 In the United States, shelf width varies from as little as one mile off portions of California, to 100-150 miles off the Gulf coast, to over 200 miles off New England.17 The area of world continental shelves, based on a 200

SHEPARD, supra note 11, at 81 “The shelves are deepest off glaciated areas although there are a few deep shelves elsewhere, for example, off Southwest Africa. The shelves are shoalest in areas with extensive coral growth and along unglaciated Siberia where it faces the Arctic ocean.”

14. SHEPARD, supra note 11, at 81.
15. Id. at 79.
16. Id. at 81 “The shelves are widest in the Arctic and along the north and west sides of the Pacific from the Bering Sea to Australia. The shelves are narrowest off young mountain ranges where numerous earthquakes indicate that intensive faulting is still taking place.” See also the following: 1 SHALOWITZ, supra note 8, at 183-85; Emery, Scientific American, supra note 10, at 41 “[T]he shelf ranges in width from 0 to 1500 kilometers, with an average of 76 Kilometers.” Guilcher, supra note 11, at 4 “[A]s a rule [the shelf] is widest in areas where the emerged relief is low, as off northwestern Europe, eastern North America, southeastern South America, and northwestern Australia; it is narrowest in form of subaerial mountains, as off western North and South America.” Hedberg, supra note 8, at 6 “Among the world’s most extensive shelves are those of the Arctic Ocean off Siberia, the Bering Sea off Alaska, the coast of China, and the Arafura Sea off Australia, as well as the Sunda Shelf of Indonesia, the Atlantic shelf off Argentina, the shelf off eastern Canada, and the northwestern European shelf.”

Among states leading in area of continental shelf are the Soviet Union (1,324,000 square miles), Canada (926,800 square miles), the United States (860,600 square miles), Australia (827,500 square miles), Indonesia (503,120 square miles), Argentina (331,000 square miles) and Brazil (264,800 square miles) [from MARINE SCIENCE AFFAIRS—A YEAR OF BROADENED PARTICIPA-

17. 1 SHALOWITZ, supra note 8, at 184. There are a number of excellent small scale maps available which indicate the width of the continental shelf and other features of the seabed, although most are drawn on the basis of equating the shelf edge with the 200 meter isobath. The National Geographic Society ocean floor map series (Atlantic, Pacific, and Indian Oceans) are excellent for all aspects of seabed configurations. An outstanding map prepared by Bruce C. Heezen (Lamont-Doherty Geological Observatory, Columbia University) and Marie Tharp (U.S. Naval Oceanographic Office) entitled Major Topographic Divisions of the Continental Margins is also valuable for visualizing sea floor phenomena. See also the physiographic diagrams of the North Atlantic, South Atlantic, and Indian
meter isobath shelf edge, is generally given as 7.5-7.6 percent of the ocean floor area. Classification of continental shelf types and descriptions of their origins are beyond the scope of this review, but may be found elsewhere. The surface of the shelf shows some degree of topographical relief, including canyons (extending from the coast seaward) and parallel trenches. Most shelf areas are covered by a relatively thick layer of various types of unconsolidated sediment reaching depths of five kilometers, although areas exist without sediment. According to K. O. Emery, "[c]ontinental shelves are characterized by structure and stratigraphy that are similar to, or are natural continuations of, the structure and stratigraphy of the adjacent land." It is therefore not surprising that some mineral deposits found in upland locations are also found on and beneath the continental shelves. Some of the resources, such as fish and manganese nodules are, of course, unique to the shelf environment (vis-a-vis the upland), but large deposits of petroleum and natural gas are also present beneath shelves underlain by consolidated sedimentary strata. This area also is exploited to a lesser extent for sand and gravel, ilmenite, rutile, zircon, tin, monazite, iron, gold, and diamonds.

Oceans prepared by Bruce C. Heezen and Marie Tharp, published by the Geological Society of America, Inc.

18. Emery, Scientific American, supra note 10, at 42; Guilcher, supra note 11, at 5; Hedberg, supra note 8, at 6.
19. See e.g., the discussion in Shepard, supra note 11, at 66-79, 83-93. See also King, An Introduction to Oceanography 54-63 (1966) [hereinafter cited as King].
20. Shepard, supra note 11, at 62-63 (classifies principal shelf sediments as (1) sands (terrigenous (physical), calcareous (organic), and authigenic (chemical)), (2) mud (silt, clay), and (3) gravel). See also Emery, Rome Symposium, supra note 8, at 54; Guilcher, supra note 11, at 5-8; and Hedberg, supra note 8, at 8.
21. Shepard, supra note 11, at 64.
23. Emery, Scientific American, supra note 10, at 52 observes that "about 90% of the world's marine food resources, now extracted at the rate of $8 billion per year, comes from the shelves and adjacent bays."
24. Wenk, The Physical Resources of the Ocean, The Ocean (edited by the Scientific American Magazine) 83, 85 (1970) notes: Oil and gas represent more than 90 percent by value of all minerals obtained from the oceans and have the greatest potential for the near future. Offshore sources are responsible for 17 percent of the oil and 6 percent of the natural gas produced by non-Communist countries. . . . Subsea oil and gas are now produced or are about to be produced by 28 countries; another 50 are engaged in exploratory surveys. All of this resource production takes place, as of this writing, in water depths less than 130-140 meters. See also Guilcher, note 4 supra, at 9-11.
25. Emery, Scientific American, supra note 10, at 52. See also Wenk,
b. The Continental Slope. The continental slope lies seaward of the continental shelf and has recently been the object of a great deal of scientific and political speculation as a result of proposals to extend exclusive coastal state jurisdiction over seabed resources to the outer edge of the slope or continental margin. The term “continental margin” refers generally to the area of seabed including a seaward portion of the shelf, all of the slope, and a landward portion of the continental rise, excluding the ocean basin. The continental slope may be defined as the area of seabed extending from the outer margin of the continental shelf to, in the absence of a continental rise, the oceanic abyss. It has been described as:

supra note 24, at 87 who observes:

Seventy percent of the world’s continental shelves consist of ancient unconsolidated sediments from which are dredged such commodities as sand, gravel, oyster shell, tin, heavy-mineral sands and diamonds.... So far [dredging] has been limited to nearshore waters less than 235 feet deep and protected from severe weather effects.

See also Guilcher, supra note 11, at 9-11. A complete chart of the annual value of exploited mineral resources of the ocean floor beyond the beach zone appears in Emery, Rome Symposium, supra note 8, at 48.

26. Hedberg, supra note 8, at 3 observes:

I would prefer not to restrict [the term “continental margin”] to precise limits, but to let it simply indicate a broad geomorphic-geologic zone, of rather indefinite extent, encompassing the contact of the continental masses with the ocean basins. Geomorphically, it would center on the continental slope, but would also include the seaward part of the submerged continental shelf and the landward part of the continental rise. Geologically, it would include the zone of lateral change in the lithosphere marking the oceanward limits of typical continental crust.

Cf. Guilcher, supra note 11, at 4:

The continental margin is a submarine apron which runs around the continents and includes the shelf, or shallow platform, the slope beginning at the outer edge of the shelf, and the rise or lower slope down to the deep sea floor.

The term continental margin is not yet one of precise definition, and this paper will therefore reflect only the traditional divisions of offshore geology, viz.: the shelf, slope, rise, and ocean floor.

27. Shepard, supra note 11, at 95. Emery, Rome Symposium, supra note 8, at 54 suggested, with others, the following definition of the slope:

The zone bordering the continental shelf that extends seaward from the shelf edge at declivities that average about 4½ degrees down to depths of 1,200 to 3,500 meters. Its outer edge approximately marks the boundary between the low density rocks of the continents and the high density ones of the deep ocean floor or the intermediate ones of the enclosed or marginal seas.

Hedberg, supra note 8, at 11 states:

The continental slope is a worldwide feature representing the frontal edge of the continental platform—the descent from the general level of the top of this platform, within a few hundred
The greatest topographic feature on the face of the earth, an escarpment 3-1/2 km. high and over 350,000 km. in length, which is in turn the surface expression of the greatest structural discontinuity on the earth's surface, the transition from continental to oceanic crust.  

The seaward limit of the slope is ill-defined, but is conventionally taken as the point where the change in gradient from the steep banked slope to the ocean floor reaches less than 1:40.  

The water depth at the seaward extent averages 2500 meters, the range running from less than 1000 meters to more than 4000 meters.  

As a result of an average declivity of 4° 07', the width of the continental slope extends from 15 to 50 kilometers. The area of the slope has been placed at 8.5 percent of the area beneath the oceans.  

Slopes, like shelves, are overlain by unconsolidated sedimentary deposits composed principally of mud, sand, and gravel, with the mud/sand ratio being higher than on shelves.  

Attempting to characterize slope types would also be beyond the scope of this brief summary and it should suffice to note that although slopes, like shelves, contain irregularities, slopes are continuous between the shelf and the deep ocean floor with the exception of intermediate terraces or series of basins and ridges. These intermediate terraces are commonly referred to as continental borderlands or plateaus, the most notable off the United States coast being the Blake Plateau from which manganese nodules have recently been recovered, which

---

29. Hedberg, supra note 8, at 15; Emery, Law of the Sea, supra note 22, at 150.  
30. Guilcher, supra note 11, at 5; Shepard, supra note 11, at 110.  
31. Shepard, supra note 11, at 110. Shepard indicates a range in declivity from 1° 20' to 5° 40' although noting that isolated instances the slope can be much greater. Hedberg, supra note 8, at 11 indicates an average inclination of 2° to 6° with extremes of 27° - 35° off the west coast of Florida, 40° at the edge of the Bahama platform, and in excess of 45° south of Ceylon.  
32. Hedberg, supra note 8, at 11.  
33. Guilcher, supra note 11, at 5.  
34. Shepard, supra note 11, at 111.  
35. For details, see King, supra note 19, at 49-54; Shepard, supra note 11, at 96-114; Guilcher, supra note 11, at 8-11; and Hedberg, supra note 8, at 11-16.  
36. Shepard, supra note 11, at 96; Hedberg, supra note 8, at 8-11.  
37. On this mineral recovery operation and the techniques utilized therein, see Kaufman and Rothstein, Recent Developments in Deep Ocean Mining, paper delivered at the Sixth Annual Marine Technology Society Meeting (1970); Flipse, Developments in Ocean Exploration and Mining, paper delivered to the 1969 Mining Convention, American Mining Congress (1969); Flipse, An Engineering Approach to Ocean Mining, paper pre-
lies at depths of 500-1100 meters, and which has an area of approximately 200,000 square kilometers.\textsuperscript{38} There is growing evidence that many natural resources, including hydrocarbons and surficial hard mineral deposits, occur on portions of the slope in quantities comparable to those occurring on the shelf. The potential of continental borderlands and plateaus especially for economic hydrocarbon and hard mineral recovery in the relatively near future\textsuperscript{38a} has enhanced the feeling of urgency surrounding efforts to secure adoption of a legal-economic regime to govern exploitation of such resources in the interests of all mankind as opposed to extension of exclusive coastal state jurisdiction to cover these areas.

c. The Continental Rise. The continental rise exists in situations where the steep portion of the continental slope is terminated on its seaward edge by a gentle slope which may extend for substantial distances into the deep-ocean basins.\textsuperscript{39} This sedimental struc-

\textsuperscript{38} Presented to First Annual Offshore Technology Conference (1969).

Other important marginal plateaus, indicated by Hedberg, \textit{supra} note 8, at 9, include “the Falkland Plateau, the marginal plateaus off Brazil, the Iberian Plateau, the Voring Plateau off Norway, the Umnak Plateau in the Bering Sea, the Campbell Plateau east of New Zealand, and the Exmouth, Naturaliste, and Coral Sea Plateaus flanking the Australian continent.”

\textsuperscript{38a} The question of when to expect commercial production of non-living seabed resources beyond the 200 meter isobath has received widely varying answers. Estimates of the amount of such activity to be expected in the near-term have tended lately to be conservative as compared to circa 1967 estimates. For example, Francis T. Christy of Resources for the Future, Inc. noted in December, 1970: “[I]t does not appear that there will be significant development of sea-bed resources in the areas beyond the 200 meter isobath during the next decade or two.” Christy, Economic Problems and Prospects for Exploitation of the Resources of the Sea-Bed and its Subsoil, paper presented to Symposium on the Exploration and Exploitation of the Sea-Bed and Its Subsoil, The Council of Europe, Strasbourg, December 3-5, 1970. This indicates, according to Christy, a lack of economic motivation for establishing a seabed regime at this time. However, other factors (principally political and national security, but including the simple fact that it may take 10-12 years to bring such a treaty into force) suggest the need for initiating negotiations now on this subject.

\textsuperscript{39} Shepard, \textit{supra} note 11, at 95. Shepard comments further:

This outer slope is referred to as the continental rise or locally as a \textit{deep-sea fan}. It is not only much less inclined than the inner slope, but it is also much smoother topographically. Accordingly it seems wise to confine the term \textit{continental slope} to the steeper portions and to consider the apron as a part of the deepsea floor.

\textit{Id.} at 95.

\textit{Deep-sea fans} are gently sloping, sediment-covered plains that border the continental slopes in many places. \textit{Id.} at 142.
ture creates a significant problem in some instances in locating the actual edge of the continental formation since it may overlie deep ocean structures at its seaward edge. Accordingly, determination of the “edge of the continental margin” is more difficult to ascertain than the edge of the continental shelf, these being the two boundaries utilized in the regime proposed by the Draft Convention. The rise occurs on the landward side in water depths ranging from 1200 meters to 3500 meters and on the seaward side from 3500 meters to 5500 meters. The area of the continental rise is about 5 percent of the total ocean bottom, has an average slope of approximately one-half degree, and may extend to a width of 1000 kilometers. Detailed discussions of the characteristics of the rise may be found elsewhere but for purposes of this paper it will be sufficient to note the sedimentary nature of the formation, its overlap of the actual boundary between the continental land mass and the oceanic crust, and the fact that hydrocarbons may be found in the area.

\[d. \text{The Abyssal Plain. Beyond the continental rise lies the abyssal plain or ocean basin. Actually, the abyssal plain is but one}\]

---

Hedberg, supra note 8, at 16 states:

The continental rise is the apron of sediments that slopes gently oceanward from the base of the continental slope, generally through a water-depth range of 2,000–5,000 m.

40. As will be noted, however, the Draft Convention contains unique boundary determination provisions which ameliorate much of the difficulty inherent in having to locate precisely these geologic boundaries.

41. Emery, Rome Symposium, supra note 8, at 53. Emery, Law of the Sea, supra note 22, at 151 notes that the edge of the rise may be defined as the point where there is a change in slope to gentler than 1:1,000. See also Guilcher, supra note 11, at 5; and Hedberg, supra note 8, at 16.

42. Emery, Rome Symposium, supra note 8, at 54 indicates that the volume of rise sediments may be 100 million cubic kilometers.

43. Emery, Rome Symposium, supra note 8, at 53.

44. Hedberg, supra note 8, at 16.

45. See King, supra note 19, at 49-54; Emery, Rome Symposium, supra note 8, at 54; and Hedberg, supra note 8, at 16.

45a. It has been observed that:

There is increasing expectation that the continental rise... will prove to have sizable oil deposits. Because of high costs of drilling and producing oil in deep waters, such operations may be unprofitable.

Fortunately, the sedimentary thicknesses suitable for the entrapment of oil are known to be unusually great in many regions of the continental rise. This could lead to very large oil fields, reducing discovery and production costs per barrel of recoverable oil.

phenomenon occurring in the ocean basin, but it is the predominant feature and thus is often used to characterize the entire area. Emery suggested the following definition for the ocean basins: "The two-thirds of the Earth's surface that form the floor of the deep oceans characterized by high density rocks."46 Guilcher explains the phenomenon as follows:

Abyssal plains and hills are a unit extending approximately between 3,000 and 6,000 meters, although these limits may be regionally exceeded upward and downward. They occupy oceanic basins. The plains are flat-bottomed and their slope is less than 1:1,000. They alternate with hills where the topography is gently undulated, the height of the hills ranging from a few fathoms to a few hundred feet. Isolated hills also rise in the abyssal plains. These features are located between the base of the continental rise and the midoceanic ridge. . . .47

Emery characterizes the abyssal plain as follows:

Abyssal plains consist of sediments whose layers are variously formed by slow deposition from suspension, fast deposition by turbidity currents, and probably intermediate-rate deposition by organic debris and chemical precipitates. The total thickness is only a few hundred meters,48 and probably the only minerals of potential economic value are within manganese nodules. These nodules are most abundant on abyssal plains that are protected from the influx of detrital sediment from land by intervening trenches or ridges.49

The deep ocean floor is also characterized by a number of other significant geologic formations, including seamounts, trenches, channels, canyons, and ridges.

Seamounts are "isolated sea-floor elevations rising 3,000 feet or

---

46. Emery, Rome Symposium, supra note 8, at 53.
47. Guilcher, supra note 11, at 12.
48. For a discussion of the thickness of abyssal plain sediments, see Shepard, supra note 11, at 176-77.
49. Emery, Rome Symposium, supra note 8, at 55. For a discussion of the various types of abyssal plain sedimentation, see Guilcher, supra note 11, at 13-17. See also Shepard, supra note 11, at 160-69, and Wenk, supra note 24, at 87, 88 where it is noted that:

The only known minerals on the floor of the deep ocean that appear to be of potential economic importance are the well-publicized manganese nodules, formed by the precipitation from seawater of manganese oxides and other mineral salts, usually on a small nucleus such as a bit of stone or a shark's tooth. These are widely distributed, with concentrations of 31,000 tons per square mile on the floor of the Pacific Ocean. Although commonly found at depths greater than 12,500 feet, nodules exist in 1,000 feet of water on the Blake Plateau off the southeastern U.S. and were located last year at a depth of 200 feet in the Great Lakes.
more above their surroundings. If these mountains have flat tops, they are called guyots, or tablemounts.\(^5\)

Trenches are simply what the name implies, that is, long, narrow, and relatively steep sided depressions in the ocean floor.\(^1\)
The continental slope edge is, for almost one-half its length, margined by deep sea trenches which in some instances are filled with sediments and may even be overlain by continental rises.\(^2\)

Channels and Canyons. Guilcher observes with respect to these features:

> These elongated depressions resembling big river beds are much flatter than the canyons cutting through the continental slope. They do not exceed some tens of meters in relative depth, but may extend for more than 2,000 kilometers in length. They are commonly bordered by levees on both sides.\(^3\)

Ridges. The midoceanic ridge is probably the most interesting recent discovery in marine geology. These ridges circle the globe and are apparently caused by upwelling of magma which then slowly spreads out across the sea floor, giving motion to the giant plates of oceanic crust in the phenomenon known as “sea floor spreading.”\(^4\)

2. Marine Resources Law

Given this introduction to the nature of the seabed, it is now appropriate to outline briefly the status of those legal zones of jurisdiction in the ocean which are of importance to the exploration and exploitation of non-living seabed resources.

a. The Territorial Sea. The territorial sea is a zone of ocean space\(^5\) adjacent to coastal states over which the coastal state, with

\(^{50}\) Shepard, *supra* note 11, at 140-42. For discussions of this phenomenon, see King, *supra* note 19, at 69-72; Shepard, *supra* note 11, at 151-54; and Guilcher, *supra* note 11, at 25-27.

\(^{51}\) Shepard, *supra* note 11, at 142.


\(^{55}\) The term ‘ocean space’ is used to refer to the entire range of vertical
the exception of the rights of innocent passage and entry in distress, exercises absolute territorial sovereignty, including sovereignty in the airspace above the ocean, the water column, and the seabed and subsoil below the ocean waters. The breadth of this belt of exclusive jurisdiction was established during the 18th and 19th centuries by the general practice of Western European nations at 3 geographical miles, but this doctrine has received substantial challenges in recent decades with claims of 6, 12, and even 200 miles being made by coastal states. No international agreement has been reached on the breadth of the territorial sea but it is clear

stratifications which can be made of the marine environment, viz., (1) subsoil, (2) seabed, (3) water column, (4) surface, and (5) atmosphere. The legal regimes established in ocean space often relate, in a particular geographic area, to less than all of these five areas. For instance, the legal regime of continental shelf as set forth in the Convention of the Continental Shelf gives rights only in the seabed and subsoil, with limited rights to use water column space for installations necessary to the exercise of the other rights granted, but confers no sovereignty or other form of jurisdiction over the water column, surface, or atmosphere. Further, the rights granted in the seabed and subsoil under the continental shelf doctrine are for the limited purpose of exploring and exploiting natural resources located there, and for no other purpose. Thus, in analyzing any legal regime for ocean space, one must ascertain (1) the geographic area covered by the zone, (2) the vertical strata included in the regime, and (3) the specific uses permitted within the area and strata.

56. Convention on the Territorial Sea and the Contiguous Zone, supra note 2, provides:

The sovereignty of a State extends, beyond its land territory and its internal waters to a belt of sea adjacent to its coast, described as the territorial sea. [Art. 1]

The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil. [Art. 2]

57. Of the 109 states for which information is listed in the latest tabulation available from the Department of State, 35 states claim 3 or 4 miles; 13 states claim 6 to 10 miles; 51 states claim 12 miles; 4 states claim more than 12 but less than 200 miles; and 6 states claim 200 miles. Thus, 43 percent of states claim 6 miles or less, while 57 percent claim 12 miles or more. This data evidences a clear trend toward the mile limit from days when the 3 mile limit was the subject of virtual unanimity among members of the international community.

58. The 1958 United Nations Conference on the Law of the Sea, which produced four law of the sea conventions (see supra note 2) was unable to agree on a breadth, and the relevant convention provides only that:

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea. [Convention on the Territorial Sea and the Contiguous Zone, Art. 6].

The 1982 United Nations Conference on the Law of the Sea also (but narrowly) failed to agree on a territorial sea breadth. See Dean, The Second
that whatever the breadth accepted or ultimately recognized, the coastal state has the exclusive right to explore for and exploit the natural resources located anywhere in the zone. In 1970, the United States indicated its willingness to have the breadth of the territorial sea fixed at twelve miles, provided that this could be done by an international agreement, that agreement could be reached on the problem of preferential fishing rights for coastal states, and that free passage through international straits could be guaranteed.

b. The Continental Shelf. Initiated by the Truman Proclamation of 1945 by which the United States asserted jurisdiction over natural resources of the seabed and subsoil adjacent to the coasts of this Nation to approximately the 600 foot isobath, the international legal doctrine of the continental shelf (which, in its simplest form, asserts that every coastal state possesses some rights to exploit natural resources from some area of seabed off its coasts) was codified in the 1958 Convention on the Continental Shelf which defined the shelf area as:

[T]he seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

Within this area each coastal state may exercise exclusive sovereign rights for the purpose of exploring it and exploiting its natural resources.

In its decision in the North Sea Continental Shelf Cases, the International Court of Justice observed that the doctrine of the continental shelf had become customary international law:

[T]he most fundamental of all the rules of law relating to the continental shelf [is] that the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of

---

59. See Art. 2 of the Convention on the Territorial Sea and the Contiguous Zone, supra note 56.
63. Id., Art. 2.
exploring the seabed and exploiting its natural resources.\textsuperscript{64}

Substantial debate has taken place concerning the seaward extent of the continental shelf under the convention definition in view of the concepts of "adjacency," "200 meters," and "exploitability," two of which are quite subjective.\textsuperscript{65} The issue has been further confused by the above quoted dicta in the North Sea Continental Shelf Cases. The urging of some that the definition could be interpreted to extend coastal state shelf jurisdiction to the edge of the continental margin\textsuperscript{66} has given an added sense of urgency to the efforts of those who would maximize the area of seabed to be exploited for the benefit of all mankind. Whatever the shelf width ultimately agreed upon, either by new agreement or by interpretation of the existing Convention provisions, it is clear that the coastal state will have an exclusive right to explore for and exploit the natural resources of the seabed and subsoil within the area subject to its jurisdiction.

\textsuperscript{64} North Sea Continental Shelf Cases, [1969] I.C.J. 3, 22. The statement must be considered as dicta since the dispute at bar concerned establishment of lateral boundaries and not the question whether the states involved in the litigation had particular rights in offshore areas \textit{vel non}. Its accuracy, however, is open to little doubt, although the question of its relevance or applicability to states party to the Convention on the Continental Shelf, which utilizes a different definition of the extent of the shelf, is questionable.


c. **The High Seas.** Beyond the seaward limit of the territorial sea lie the high seas, being comprised of the water column. The concept of the freedom of the high seas, as embodied in the Convention on the High Seas, permits the use of the seabed, surface, water column, and atmosphere for the laying of submarine cables and pipelines, navigation, fishing, and overflight, respectively. Neither the Convention on the High Seas nor the rules of customary international law, however, specify what regime is applicable to the exploitation of natural resources of the seabed and subsoil beneath the high seas but (necessarily) outside the legal continental shelf. Although it has been argued that in the absence of special agreement, these resources partake of the same treatment as the living resources in the superjacent waters (that is, that they are *res nullius*, appropriable by the first to reduce them to possession), most authorities agree that this area is at present without any meaningful legal regime, even though little could be done to affect individual mining operations, and that the field is ripe for a *de novo* regime which would give effect to whatever national or international policies might be agreed upon.

This, then, constitutes the scientific and legal setting for the ef-

---

67. Article 2 of the Convention provides:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

1. Freedom of navigation;
2. Freedom of fishing;
3. Freedom to lay submarine cables and pipelines;
4. Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.


68. 2574D, XXIV (1969), declared that, pending the establishment of an international regime for the deep ocean floor, states were to “refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.” This so-called “moratorium resolution” is without real effect, however, since the specification of “beyond the limits of national jurisdiction” begs the question of the area to which it is applicable, and because the major technological powers have declared themselves not bound by the substance of the resolution.
forts of the past three years to create a new regime to govern the exploitation of resources of the seabed and subsoil beyond the limits of national jurisdiction, that is, beyond the legal seaward limit of the continental shelf. The Nixon proposal of May 23, 1970, and the subsequent Draft Convention tabled in Geneva on August 3, 1970, constitute one effort to establish such a regime. The next section will outline briefly the history of the seabed question since August, 1967, as a prelude to description and analysis of the Draft Convention.

B. History of the Seabed Question Since August, 1967.69

August 17, 1967, may be specified as the date on which the seabed question was born, for on that date Ambassador Arvid Pardo, representative of the Permanent Mission of Malta to the United Nations, addressed a note verbale to Secretary-General U Thant of the United Nations proposing the inclusion of an item in the agenda of the twenty-second session of the General Assembly entitled “Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Sea-bed and of the Ocean Floor, Underlying the Seas Beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind.”70 In an accompanying explanatory memorandum, Ambassador Pardo pointed out that:

In view of rapid progress in the development of new techniques by technologically advanced countries, it is feared that . . . the seabed and ocean floor, underlying the seas beyond present national jurisdiction, will become progressively and competitively subject to national appropriation and use. This is likely to result in the


militarization of the accessible ocean floor through the establishment of fixed military installations and in the exploitation and depletion of resources of immense potential benefit to the world, for the national advantage of technologically developed countries.

Accordingly, Ambassador Pardo stated:

'The time has come to declare the sea-bed and the ocean floor a common heritage of mankind and immediate steps should be taken to draft a treaty embodying the following principles:

(a) The sea-bed and ocean floor, underlying the seas beyond the limits of present national jurisdiction, are not subject to national appropriation in any manner whatsoever;

(b) The exploration of the sea-bed and of the ocean floor shall be undertaken in a manner consistent with the Principles and Purposes of the Charter of the United Nations.

(c) The use of economic exploitation shall be undertaken with the aim of safeguarding the interests of mankind. The net financial benefits derived from the use and exploitation of shall be used primarily to promote the development of poor countries;

(d) [The area] shall be reserved exclusively for peaceful purposes in perpetuity.

Further, the memorandum provided:

It is believed that the proposed treaty should envisage the creation of an international agency (a) to assume jurisdiction, as trustee for all countries, over [the area]; (b) to regulate, supervise, and control all activities thereon; and (c) to ensure that the activities undertaken conform to the principles and provisions of the proposed treaty.

This original proposal is set forth here in some detail in order to permit a comparison of its concepts with those embodied in the Draft Convention. With the exception of the special zone of jurisdiction proposed in the Draft Convention (the "Trusteeship Area"), the principal elements of the Pardo proposal have been adopted as

---

71. The seabed question has two aspects: (1) exploitation of marine resources, and (2) military uses of the marine environment. The latter is beyond the scope of this paper, but the following references should provide a basic introduction to anyone interested in understanding the relation between the military and resource issues: Breckner, Some Dimensions of Defense Interest in the Legal Delimitations of the Continental Shelf, in THE LAW OF THE SEA: NATIONAL POLICY RECOMMENDATIONS 188 (Alexander ed. 1970); Brown, The Legal Regime of Inner Space: Military Aspects, 22 CURRENT LEGAL PROBLEMS, 181 (1969); Draft Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 63 DEPT. STATE BULL. 365 (1970); Evensen, Present Military Uses of the Seabed and Foreseeable Developments 3 CORNELL INT'L L. J. 121 (1970); and Geneva Disarmament Conference Agrees on Text of Treaty Banning Emplacement of Nuclear Weapons on the Seabed, 63 DEPT. STATE BULL. 362 (1970).


73. Id., paras. 3 and 4.
the core of the United States policy on the seabed question. However, it was not at all clear in the fall of 1967 that this would be the case.

Although President Lyndon Johnson had presaged the general United States position in his comments at the commissioning of the oceanographic research ship, Oceanographer, on July 13, 1966,74 the United States, as well as other technologically developed countries, was very much taken by surprise as a result of the Maltese initiative. While the Secretary-General noted with respect to agenda item 92 that the United Nations had been active in conducting research on the question of marine resources,75 the twenty-second session of the General Assembly was to provide the first concentrated effort toward developing a regime to govern the exploitation of seabed resources beyond the limits of national jurisdiction.

The formal United States reaction to the Maltese proposal was given by then United Nations Ambassador Arthur J. Goldberg on November 8, 1967, in a presentation in which United States options were carefully protected and a “go-slow” approach suggested for the obvious reason of gaining time to develop policy. Ambassador Goldberg noted:

While my Delegation believes that it is too early to take any final decisions on proposals for a comprehensive legal regime for the deep ocean floor . . . we would participate energetically in the studies which will be needed before such decisions can be made.76

Accordingly, Ambassador Goldberg, among others, suggested creation of a Committee on the Oceans to serve “as the focal point within the general assembly for study and development of the next steps

74. The President there stated:

[U]nder no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.


75. See the Secretary-General’s comments in U.N. Doc. A/C.1/952.

which the nations must take together in this field.”

In accordance with a general feeling on the part of technologically developed powers that immediate action would be precipitous, the General Assembly created an ad hoc committee to study the question of peaceful uses of the seabed and ocean floor beyond the limits of national jurisdiction. The Ad Hoc Committee was requested to prepare a study including a survey of past and present United Nations activities with respect to the seabed question; an account of scientific, technical, legal, and other aspects of the question; and an indication regarding means to promote international cooperation in the exploitation of seabed resources. The Ad Hoc Committee held three sessions during 1968 and established two working groups, one concerned with economic and technical aspects of the agenda item, the other concerned with legal aspects. Its report was adopted on August 30, 1968, and was subsequently delivered to the twenty-third session of the General Assembly. The Report indicated the failure of the Ad Hoc Committee to reach agreement on a statement of principles with respect to the seabed question:

In the course of the final session at Rio de Janeiro, consultations took place between the various groups in an effort to find an acceptable formulation which would command unanimous support. The efforts persisted until the end of the session and considerable progress was made, but final agreement could not be reached in time.

The Report was included in the agenda of the twenty-third session of the General Assembly and was allocated to the First Committee (Political and Security) for consideration and report. The First Committee considered the item during October, November, and December, 1968, and at the conclusion of its deliberations recommended to the General Assembly the adoption of four draft resolutions. The four resolutions, all of which were adopted by the

---

77. Id. We have in this suggestion an international example of the bromide that the best way to get rid of an unwanted problem is to appoint a committee to study it.


79. Id. operative para. 2.


81. Id. para. 88.

General Assembly on December 21, 1968, dealt with various aspects of the seabed issue. Resolution 2467A83 established a permanent United Nations seabed committee, elaborating on the duties to be performed by it; resolution 2467B84 dealt with the hazards of pollution which might arise from the exploitation of seabed resources and urged member states to take appropriate action with respect thereto; resolution 2467C85 requested the Secretary General to undertake a study on the question of establishing in due time appropriate international machinery for the promotion of the exploration and exploitation of the resources of the seabed area and the use of such resources in the interests of mankind; and resolution 2467D86 endorsed the concept of the International Decade of Ocean Exploration.87

The permanent seabed committee returned to the tasks entrusted to it with the hope of establishing a set of principles upon which to base a regime for exploiting seabed resources, an effort in which the ad hoc committee had failed. Like the ad hoc committee, the permanent Seabed Committee established two working subcommittees, and held three sessions during 1969. The Committee's Report,88 which indicated further failure to agree on a set of principles, was submitted to the twenty-fourth session of the General Assembly where the First Committee again recommended adoption of four resolutions all of which were ultimately passed by the General Assembly. The resolutions adopted by the General Assembly in December, 1969 proved substantially more controversial than those adopted a year earlier and greatly accelerated the pace at which

83. G. A. Res. 2467A XXIII (1968), 8 INT'L LEGAL MATERIALS 201 (1969), adopted by 112 votes to none, with 7 abstentions.
85. G. A. Res. 2467C XXIII (1968), 8 INT'L LEGAL MATERIALS 204 (1969), adopted by 86 votes to 9, with 24 abstentions.
87. On the adoption of these four resolutions, see Haight, The Seabed and the Ocean Floor, 3 INT'L LAWYER 642 (1969).
nations began to develop their policy positions with respect to the seabed question. Resolution 2574A requested the Secretary General:

[T]o ascertain the views of Member States on the desirability of convening at an early date a conference on the law of the sea to review the regimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the high seas, particularly in order to arrive at a clear, precise and internationally accepted definition of the area of the sea-bed and ocean floor which lies beyond the limits of national jurisdiction, in the light of the international regime to be established for that area . . . .

The replies to the inquiry of the Secretary General made pursuant to that resolution were largely favorable to convening a conference and, as noted earlier, the General Assembly at its twenty-fifth session called for the Third United Nations Conference on the Law of the Sea.

Resolution 2574B urged the Seabed Committee to continue with its work in an attempt to reach agreement on principles to govern the seabed regime and resolution 2574C urged the Secretary General to prepare further studies on the subject of international machinery to govern exploitation of seabed resources.

By far the most controversial resolution was 2574D, the so-called “moratorium resolution,” which declared that pending the establishment of an international regime for the seabed:

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the seabed and ocean floor, and the subsoil thereof beyond the limits of national jurisdiction;

(b) No claim to any part of that area or its resources shall be recognized.

This resolution was adopted over the vigorous opposition of the United States and other technologically advanced countries who saw it as a potential impediment to development of offshore mineral
recovery technology.\textsuperscript{96} As noted above,\textsuperscript{96a} the inability to determine the area to which the moratorium applied because of the failure to have agreed on the "limits of national jurisdiction," and the statement of the United States Government that it would not be bound by the resolution, made the General Assembly's effort of dubious value. In fact, it has been suggested that the resolution had just the opposite effect from that intended by encouraging coastal states to accelerate the seaward extension of offshore technology in order to stake out as large an area as possible under the label of "national jurisdiction" pursuant to the exploitability provision of the Convention on the Continental Shelf. In any event, the question of the legal effect of the moratorium resolution has become somewhat less important in view of (1) the fact that there is at present no commercial offshore operation in water depths beyond 200 meters,\textsuperscript{97} and (2) the initiative of the United States Government in proposing an interim policy prior to adoption of an international regime for the seabed area.\textsuperscript{98}

The Seabed Committee subsequently returned to its deliberations but achieved no agreement on a set of principles through its August, 1970 meeting in Geneva.\textsuperscript{99}

The restriction of this account, so far, to activities at the United Nations should not imply that other groups, both public and private, were not equally active. The United States Congress expended considerable effort to determine just what the effect of the United Nations' actions on the seabed question were on the Na-


\textsuperscript{96a} See supra note 68.

\textsuperscript{97} Statement of Hon. Elliot L. Richardson, Under Secretary of State and Testimony of John R. Stevenson, Legal Adviser of the Department of State, in Hearings on Issues Related to Establishment of Seaward Boundary of United States Outer Continental Shelf before the Special Subcommittee on Outer Continental Shelf of the Senate Committee on Interior and Insular Affairs, 91st Cong., 2d Sess., Part 2, 427, 452 (1970) [hereinafter cited as Richardson Statement or Stevenson Testimony].

\textsuperscript{98} See section III,F, this article.

tional interest as well as what United States' policy ought to be. The Congressional proceedings can be classed generally as conservative, with the exception of the efforts of Senator Claiborne Pell.\footnote{100} The most notable effort of the Federal government was the Report of the President's Commission on Marine Science, Engineering and Resources\footnote{101} which outlined in some detail an international regime to govern exploitation of seabed resources beyond the limits of national jurisdiction. Other groups also made proposals for seabed regimes, including the Center for the Study of Democratic Institutions,\footnote{102} the Commission to Study the Organization of Peace,\footnote{103}

\begin{itemize}
  \item The Commission was created pursuant to Public Law 89-454, the \textit{"Marine Resources and Engineering Development Act of 1966."} The Report of the Commission, \"Our Nation and the Sea: A Plan for National Action,\" was published, together with three volumes of Panel Reports relating to the principal Report, in January, 1969. The portions of the Report pertinent to the seabed question can be found at 141-57 of \"Our Nation and the Sea,\" and at VIII-10 through VIII-44 of the \textit{Report of the International Panel (\"Marine Resources and Legal-Political Arrangements for Their Development,\") Vol. 3, Panel Reports}.\footnote{101}
  \item Elizabeth Mann Borgese's concepts were outlined in \textit{The Republic of the Deep Seas}, 1 \textit{The Center Magazine} (No. 4) 18 (1968) and in \textit{The Ocean Regime: A Suggested Statute for the Peaceful Uses of the High Seas and the Sea-Bed Beyond the Limits of National Jurisdiction,} a Center Occasional Paper, Vol. 1, No. 3 (October, 1968). Her ideas were further amplified through the \textit{Pacem in Maribus} Convocation held in Malta during June-July, 1970, proceedings from which should be available sometime during 1971.\footnote{102}
the National Petroleum Council,104 and the World Peace Through Law Center.106 Among the many proposals and suggestions were those to place title to the seabed in the United Nations,106 to establish no regime other than the control to be exercised by the nation whose flag the vessel or structure flies,107 to develop a new and comprehensive international organization to administer exploitation of seabed resources,108 to do nothing at present and simply let a system evolve on a case by case, or conflict by conflict, basis,109 to establish an international agency whose sole function with respect to seabed resource exploitation would be to record claims made for notice purposes,110 and to extend national jurisdiction to mid-ocean on an equidistance or other principle.111 There were, of course, other proposals, both complex and simple, and an incredible amount of literature on the seabed question and matters ancillary thereto.112


104. Petroleum Resources Under the Ocean Floor prepared by the National Petroleum Council's Committee on Petroleum Resources Under the Ocean Floor (March, 1969).


108. See, e.g., Borgese, The Ocean Regime, supra note 102; The United Nations and the Bed of the Sea (II), supra note 103.


111. See, e.g., Bernfeld, Developing the Resources of the Sea—Security of Investment, 2 Int'l Lawyer 67 (1967), also published in 1 Natural Resources Law, 82 (No. 1) (1968). For an indication of possible consequences of adoption of this "national lake" theory, see the map appended to The Law of the Sea: The Future of the Sea's Resources (Alexander ed. 1968).

112. Two bibliographies covering this era have been prepared: Koers, The Debate on the Legal Regime for the Exploration and Exploitation of
The formulation of United States policy was achieved through an inter-governmental agency group assigned to analyze the seabed question and produce policy recommendations thereon. The range of inputs to the group was broad:

Extensive discussions were held among all of the interested departments and agencies of the U. S. Government. The members of the executive branch benefited from the hearings held by [the Senate Subcommittee on the Outer Continental Shelf] and by other committees and subcommittees of the Senate and the House of Representatives, as well as from many private discussions with Members of the Congress.

We also had the benefit of numerous discussions with leaders of industry and representatives of various public groups. We found that the report of the Commission on Marine Science, Engineering, and Resources... and reports prepared by the Secretary General of the United Nations were very helpful.

Also, as a participant in the U. N. Seabeds Committee and its predecessor, the Ad Hoc Seabeds Committee, we gained much from hearing the views of other countries.112a

The actual origin of the first formal United States' policy statement, however, was within the Department of State, specifically involving then Undersecretary of State Elliott Richardson, who submitted one of several position papers on the seabed question to the White House. The Richardson position paper was ultimately adopted by the White House staff and the policy statement drafted there was approved by the Department of State. On May 23, 1970, President Nixon issued the statement outlining for the first time the United States' policy on the seabed.113 Although the Nixon Proposal was only a bare-bones outline of an international regime, the interagency group was at that time well on its way to fleshing out the proposal in the form of a draft treaty as evidenced by the positions taken by Under-Secretary Richardson and Legal Advisor Stevenson at the May 27, 1970 outer continental shelf policy hearings. As noted above, the Draft Convention was tabled in Geneva on August 3, 1970, thus ending one chapter of the seabed story and beginning another.

112a. Richardson Statement, supra note 97, at 429.
113. Nixon, United States Policy for the Seabed, 9 INT'L LEGAL MATERIALS 807 (1970), 62 DEPT' STATE BULL. 737 (1970). The substance of the Nixon proposal will not be discussed here since it is simply a sketch outline of the more comprehensive Draft Treaty. The full text of the Nixon Proposal follows this article as Exhibit A.
C. *The Draft Convention.*

The Draft Convention, to be discussed in detail in the remainder of this paper, would create a legal-economic regime to govern the exploitation of seabed resources and an administrative machinery to manage regime. An International Seabed Area would be created and defined as the area of seabed and subsoil lying seaward of a 200 meter isobath boundary. This area, to be the "common heritage of mankind," would be divided into two portions, one (the International Trusteeship Area) lying between the 200 meter isobath boundary and the seaward edge of the continental margin, and the other (the non-trustee portion of the International Seabed Area) lying seaward of the continental margin boundary. Within the Trusteeship Area the adjacent coastal state would administer all exploration and exploitation activities, under whatever conditions and rules it chose to prescribe, subject only to the general provisions of the Draft Convention covering the entire International Seabed Area. A portion of the revenues derived from activities conducted in this area, however, would be payable to the International Seabed Resource Authority. Beyond the Trusteeship Area, the administering authority would be the International Seabed Resource Authority, and all revenues derived from operations in this area would be payable to it. The revenues thus generated would be used to assist developing countries and to support research efforts relating to exploitation of seabed resources.

The Authority would be composed of an Assembly (an organ in which each party to the Convention would participate, but which would have little real power), a Council (which would be effectively controlled by the major technological powers and which would be the effective policy and decision making body of the Authority), a Tribunal (to administer the compulsory dispute settlement provisions of the Convention), a Secretariat, and three standing Commissions (to administer such matters as boundary determination, operations, and rules and recommended practices).

Before entry into force, all nations are required to condition resource exploration and exploitation activities occurring on their continental shelves beyond the 200 meter isobath on the international regime to be adopted, thus preventing any interim acts which might destroy the effectiveness of the Convention concepts. The Draft
Convention contains five appendices providing detailed rules for licensing and operations in the International Seabed Area as well as formulae for allocation of Authority revenues and determination of Council membership. Finally, the Draft Convention envisions "annexes" to be prepared by one of the Commissions which would be in the nature of regulations governing seabed activities permitted by the Convention.

Given this thumbnail sketch, for orientation and vocabulary purposes, I shall now turn to a more in-depth analysis of the provisions of the Draft Convention, and make some comments thereon.

III. SUMMARY OF PROVISIONS OF THE DRAFT CONVENTION, AND SOME PRELIMINARY THOUGHTS


As must necessarily be the case with any National policy decision of major importance, the Draft Convention represents a compromise among several United States' interest groups. As must also necessarily be the case with any document designed for international acceptance, the Draft Convention also represents a possible compromise among several views prevalent in the international community. Thus, the compromise is both internal and external.

113a. My intent in the remainder of this paper is not to attempt a comprehensive enumeration and evaluation of all of the issues involved in the Draft Convention or the seabed question, but rather to raise a few selected issues which I feel are of particular importance and to outline some of the thoughts which have occurred to me on these issues. In short, this is the broad overview to be supplemented during the next three years by in-depth analysis of single issues.

Further, the specific criticisms contained in this paper should be viewed as constructive criticism and not as indicating dissatisfaction with the concepts proposed in the Draft Convention. As will be noted in section IV, I fell the Draft Convention is, by and large, an excellent proposal and one which will serve well the national interests, the interests of the international community, and the interests of operating companies upon whom we must rely for exploitation of deep ocean resources.

114. In testifying before the Special Subcommittee on Outer Continental Shelf of the Senate Interior and Insular Affairs Committee, Elliott Richardson, then Under Secretary of State, observed:

As you can see [the Nixon Proposal] is calculated to meet a number of competing interests, and does reflect very considerable and careful deliberations within the administration. . .

[B]etween the international legal provisions applicable to territorial seas . . . on the one side and those applicable to the exploitation and exploration of the seabeds on the other, in the case of the seabeds, we were searching for a way of recognizing a broad and international interest on the one side and the opportunity to dedicate resources to all mankind, while on the other recognizing that there are very real and very legitimate interests on the part of the coastal states in the waters off their shores.

Richardson Statement, supra note 97 at 432, 434. Secretary of State Rogers
The policy determinants in these compromises have been excellently discussed elsewhere and I will only summarize briefly here the nature of the conflicts of interest involved.

Internally, the petroleum industry and to a substantial extent the Department of the Interior, desired maximization of seabed areas subject to the exclusive jurisdiction of the United States. This position resulted in part from a desire to continue to operate beyond the 200 meter isobath under the same legal regime which has been applicable to offshore oil operations under Federal jurisdiction since 1953, the date of enactment of the Outer Continental Shelf Lands Act. Similarly the industry would probably prefer to continue to negotiate directly with other nations under existing arrangements for concessions or other rights permitting exploitation of offshore resources. Admittedly, there is a certain security in operating under a regime which one has found to be suitable, and it appears to be this desire for maintenance of the status quo (which, by and large, has produced favorable economic results for the industries affected) that guides the industry's thinking. Further, there is the expected inertia of any complex industrial organization against radical changes in routine. Although, as will be pointed out later, the regime proposed in the Draft Convention may be quite favorable to the hydrocarbon, natural gas, and hard mineral mining industries involved, nonetheless there is an understandable reluctance to "learn the ropes" of an entirely new administrative system. This reluctance should be ameliorated somewhat, however, by the trusteeship zone concept which permits the coastal state

also noted: "The Draft Convention was designed to accommodate the different interests of a large number of nations." List of Questions Pertinent to the Outer Continental Shelf Submitted to the State Department by the Committee, and Their Answers, in Hearings on Issues Related to Establishment of Seaward Boundary of United States Outer Continental Shelf of the Senate Committee on Interior and Insular Affairs, 91st Cong., 2d Sess., part 2, 463, 466 (answer to Question No. 15) (1970) [Hereinafter cited as Rogers].

115. Ratiner, United States Oceans Policy: An Analysis, 2 J. MARITIME L. & Comm. 225 (1970). Mr. Ratiner is an attorney in the Office of the Secretary of Defense and is Chairman of the Department of Defense Advisory Group on the Law of the Sea. He was, and remains, an active participant in the inter-agency group responsible for drafting and negotiating the agreements to be reached at the 1973 Conference.

to apply the administrative regime of its choice from the 200 meter isobath to the edge of the continental margin, there being a strong likelihood that the Outer Continental Shelf Lands Act will be made applicable to the edge of the United States’ continental margin and the existing systems continued there.\textsuperscript{117} Finally, the adoption of such a regime is apt to encourage less developed coastal nations to imitate the regime proposed for the International Seabed Area beyond the Trusteeship Area and it is possible this would offer to the industries involved less favorable treatment than they have been able to exact from these states in the past. However, as also noted later, there are concomitant benefits which would seem clearly to outweigh this fear.

On the other side of the fence stand the Department of Defense and the State Department, both of whom are actively supporting the adoption of a seabed regime such as that outlined in the Draft Convention. The Department of Defense is, of course, interested in preserving national security and to this extent is very much interested in securing an international agreement on free passage through, under, and over international straits as well as access to the seabed of continental margins beyond the 200 meter isobath. The Department of Defense thus sees the seabed regime as (1) an appropriate tradeoff for acquisition of these other rights, and (2) an assurance against further unilateral extension of exclusive coastal state authority over the seabed. The Department of State’s primary interest seems to lie in structuring an international regime to govern the exploitation of seabed resources which will benefit not only the United States but the international community at large and which will therefore further the foreign policy interests of the United States. These interests will not be detailed here but are dealt with in a separate section concerning the interests served by the Draft Convention.\textsuperscript{118} Suffice it to say here that the struggle between these two opposing factions (and it should be noted parenthetically that there are many shades of opinion on the issues involved—that this is no black-and-white problem) has been long and arduous. A great deal of input was provided by all interested parties and the Draft Convention is the compromise result of those inputs. Typical of the compromise is the trusteeship zone concept.\textsuperscript{119} On the one extreme there are those

\textsuperscript{117} See post section III.D.2, however, where I suggest that it may be more desirable to establish a new regime to govern resource exploration and exploitation activities in the United States’ Trusteeship Area.

\textsuperscript{118} See post section IV.

\textsuperscript{119} Secretary of State Rogers noted specifically on this point:

The concept of trusteeship was devised as a new means of achiev-
who would have preferred an international regime beginning at the limit of the territorial sea (twelve miles) and on the other hand those that would have preferred extension of exclusive coastal state jurisdiction to the middle of the oceans (or at least to the edge of the continental margin). The trusteeship zone concept offers a compromise by permitting the international community to gain the revenue from the area seaward of the 200 meter isobath boundary (thus satisfying in part the "internationalists") while yet retaining a sufficient measure of coastal state jurisdiction out to the continental margin to satisfy more chauvinistic interests.

On the international level there are many interest groups involved, although the principal struggle is between the technologically advanced countries with large continental shelf areas, who obviously stand to profit internally from a wide shelf under exclusive coastal state jurisdiction, and less developed countries with no appreciable resources in their offshore areas. Neither side seems to have sufficient votes to secure the two-thirds majority necessary for adoption of their respective positions at an international conference and thus the Draft Convention serves as a compromise between these interests by permitting technological powers with broad shelves to effectively control the Authority, to derive substantial revenues, and to retain control over the energy resources, while at the same time providing a source of revenue for the have-not nations of the world. There are, of course, less developed countries with broad continental shelves which are resource rich and who would side with those who wish to extend exclusive coastal state jurisdiction; and there are also states whose onshore resources are so critical to their economies that they wish economic control over ocean production (for example, Kuwait and certain Latin American states with respect to oil and hard minerals, respectively).

Accordingly, in reviewing the Draft Convention and in analyzing its provisions one should bear in mind that this is not an ideal document from any particular interest group's point of view but that it is the result of compromise process, the end product being a regime which will maximize net benefits to the world community.

Rogers' Answers, supra note 114 at 463 (answer to Question No. 1).
B. Basic Principles—The Concept of “Common Heritage.”

The fundamental objectives of the Draft Convention seem to be (1) to maximize the area of seabed not subject to exclusive coastal state jurisdiction and (2) to provide economic benefits for the international community at large rather than to coastal states on the basis of national proximity to seabed resources. This, it must be presumed, is the implementation of the concept of “common heritage” as set forth in Article 1 of the Draft Convention: “The International Seabed Area shall be the common heritage of all mankind.” This notion of “common heritage of mankind” has appeared frequently throughout the debate on the seabed question, both in the United Nations and elsewhere, but it has never been precisely defined, if indeed it is capable of any more precise definition than the above specification of fundamental Draft Convention objectives. Ambassador Pardo used the term in his August, 1967, United Nations speech suggesting that “the time has come to declare the seabed and the ocean floor a common heritage of mankind.” A year earlier President Johnson had urged that the deep seas and ocean bottoms remain “the legacy of all human beings,” language closely approximating the common heritage notion. Most recently, President Nixon used the term in his May 23, 1970 policy statement:

I am today proposing that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters and would agree to regard these resources as the common heritage of mankind.120

The use of a phrase such as “common heritage” in a document of this type has obvious drawbacks because of the general danger of using, in a new context, an old phrase about which people may have preconceived notions. It was in a not altogether facetious vein that Francis T. Christy suggested at the Pacem In Maribus Convocation held in Malta during the summer, 1970 that those debating the seabed question would be better off to refer to this concept as “Herman Comitage,” thus avoiding problems of preconceived notions, whether legal, economic, social, or otherwise. Professor L.F.E. Goldie recently made a similar observation with respect to the distinction between registry and recording systems for seabed regimes, terminology which has also been used quite freely in describing international regimes to govern exploitation of seabed resources without much attention to its precise legal meaning.121

Accordingly, the most satisfactory approach to understanding “common heritage” would be to briefly review the Draft Conven-

tion with a view toward determining what provisions, if any, deal with the broad subject of international or communal, rather than national, aspects of resource allocation. Such an examination results in identification of three areas which one might conclude reflect the concept of common heritage. These are (1) a doctrine of non-appropriation, (2) distribution of revenues on an international basis, and (3) and international administrative system for the International Seabed Area.\textsuperscript{121a} In each of these categories national exclusivity is eliminated or diminished in favor of international or communal jurisdiction, regulation or receipt of profit.

The concept of non-appropriation is contained in Article 2 of the Draft Convention which prohibits any state from claiming or exercising sovereignty or sovereign rights, or recognizing any such claim or exercise, over any part of the International Seabed Area or its resources. Article 2 further provides that no state has nor may acquire any right, title, or interest in the International Seabed Area or its resources except pursuant to the resource disposition provisions of the Draft Convention. Article 2 thus contains provisions similar to those in the outer space treaty and the Antarctic treaty with respect to non-appropriation, effectively removing national interest in the area and replacing it with an international administrative system. The Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies\textsuperscript{122} provides in Article 2 that “outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” The Antarctic Treaty of 1959, of course, prohibits states from acquiring any interest in Antarctic territory through the conduct of activities permitted by the convention, specifically scientific research.\textsuperscript{123} Since some property interest is necessary if the resources

\textsuperscript{121a} See Pavicevic, \textit{The Ocean Floor—The Common Heritage of Mankind}, 20 \textit{Review of Int'l Affairs} (Belgrade) (No. 478) 33, 34 (1970) which I reviewed after completion of this section of the paper. “Three elements of the conception that the ocean floor is the ‘common heritage of mankind’ are that the ocean floor is common property, that there should be joint administration of it and that there should be a joint and just distribution of benefits.”


of an area are to be exploited, the Draft Convention goes on to provide detailed rules with respect to the manner in which states or persons may acquire sufficient interests, through the licensing of exploration and exploitation rights, in order to economically exploit these resources. These methods will be discussed in the section concerning disposition policies. The working paper contains a caveat following Article 2 stating:

(NOTE: The preceding Article is not intended to imply that States do not currently have rights under, or consistent with, the 1958 Geneva Convention on the Continental Shelf.)

This qualification may have been aimed at critics of the Draft Convention who suggested that the United States, by the draft's non-appropriation and "transition" provisions, was making a unilateral renunciation of rights to seabed resources which may appertain to the United States by virtue of the Convention on the Continental Shelf. Such an assertion was made in the Allott-Jackson-Bellmon-Metcalf letter of July 21, 1970, to Secretary of State Rogers in which it was said that:

Article 2 carries with it the improper implication that the United States has in fact already renounced its sovereign rights to the natural resources of the seabed of the U. S. continental margin beyond the 200 meter depth limit. Further, it purports to surrender our sovereign rights to those resources without any provision that such renunciation would be effective only upon the condition that a sizable majority of other coastal states would likewise agree to surrender their sovereign rights to such resources. In other words, it appears to be a unilateral renunciation without any quid pro quo.

Such a position seems untenable in view of President Nixon's own statement that:

[A]lthough I hope agreement on [an international seabed regime] can be reached quickly, the negotiation of such a complex treaty may take some time. . . . A substantial portion of the revenues derived by a state from exploitation beyond 200 meters during this interim period should be turned over to an appropriate international development agency for assistance to developing countries. I would plan to seek appropriate congressional action to make such funds available as soon as a sufficient number of other states also indicate their willingness to join this interim policy.124 (emphasis added.)

Distribution of revenue may be made to two categories of recipients. The revenue may be used (1) as indirect assistance for the promotion of the economic advancement of developing states [Article 5(1) and Appendix D, §3.1] and (2) for the purpose specified in Article 5(2), namely the promotion of research, development of

knowledge, and the providing of technical assistance, with respect to the exploitation of seabed resources.\textsuperscript{125} Thus the income is not allocated on a basis of national proximity to the resource but rather on the basis of the needs of the international community at large.

Finally, of course, an international rather than an exclusively national regime is established to administer the International Seabed Area, although a substantial incursion on this concept was made with the adoption of the trusteeship area in which the coastal state may prescribe any system of its choosing for the disposition of the resources. In this category, then, national control is diminished but not entirely removed.

Thus, common heritage seems to mean, as noted at the outset of this section, that as large an area of seabed as is politically feasible will be freed from potential assertions of national sovereignty and will be made subject to administration on an international basis, with the object of providing subsidies for developing countries and for scientific research to benefit all mankind.

In addition to the concept of "common heritage" the basic principles section of the Draft Convention contains provisions relating to: (1) reservation of the International Seabed Area exclusively for peaceful purposes (Art. 4); (2) maintenance of the freedom of the high seas (Art. 6); (3) shared or multiple use of the marine environment (Arts. 7 and 8); and (4) insurance against damage to human life and safety, and the marine environment (Art. 9; see also Art. 23).

An issue clearly fundamental to effectuation of the basic principles (including the common heritage concept) of the Draft Convention concerns the status of non-parties to the Convention, should it be adopted and enter into force. Until such time as the Convention becomes customary international law binding on the entire international community (an event not likely to transpire soon), non-party states would be free to exercise rights under the customary international law rules of the doctrine of the continental shelf or of the Convention on the Continental Shelf if they were party thereto. Presumably there would be no legal impediment to such activities. However, there are a number of reasons why such

\textsuperscript{125} See a more detailed discussion of the revenue disposition system, section III.E., this article.
activity is not likely, beyond the simple political solution of bringing economic pressure to bear on the non-conforming states. Such reasons include: (1) the guarantee provided in the Convention that states can give valid licenses to companies which might otherwise refrain from operating in that state’s shelf or slope area; (2) the desire, on the part of less developed states, to share in the revenues to be distributed by the Authority; and (3) the desire, on the part of technologically advanced states to provide for a stable ocean mining regime. These arguments seem compelling, and in view of the high number of ratifications suggested before entry into force (see post sec. III.F) the United States is not likely, should it ratify the Convention, to find itself in an unworkable minority.

C. The International Seabed Resource Authority.

An administrative structure (or “machinery”) to administer the exploitation of non-living resources of the seabed beyond the limits of national jurisdiction is necessitated by the legal-economic regime adopted for that function. It is conceivable that regimes could be adopted which would require either none or a minimal amount of international machinery for administration purposes. For instance, if the non-living resources of the seabed were analogized to the living resources of the high seas, as some have attempted to do, and the exploitation system was carried out in the same manner as international fisheries, that is, on a res nullius basis with title going to the person who first reduces the resource to his possession, then little or no international machinery would be required, exploiters being governed solely by the rules of the nation whose flag their vessel or structure flies. Of course, even in international fisheries some international institutionalization has been required (regional fishery bodies already exist), so it is not likely, even under the so-called “flag-nation” theory of exploiting non-living resources, that no machinery would be required. However, under this system or under a recordation system, in which claims need only be placed of record for notice purposes, a quite minimal international organization would be needed.

However, the legal-economic regime proposed by the United States in the Draft Convention is quite comprehensive and requires an organization of substantial size and complexity to perform the research, administrative, policy making, and dispute settling func-

---

126. These suggestions were made by Legal Adviser Stevenson to the Senate Outer Continental Shelf Subcommittee. See Stevenson Testimony, supra note 97, at 445.
tions. Accordingly, the International Seabed Resource Authority (Authority hereinafter) was designed to fill the role of administrative machinery with respect to the legal-economic regime proposed in the Draft Convention. The Authority is composed of an Assembly, a Council, a Tribunal, a Secretariat, and three standing Commissions. The legal status of the Authority is to be the same, together with privileges and immunities, as specified in the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations. There follows a description of the organization and function of each of these organs of the Authority.

The Assembly. Each state party to the Convention is a member of the Assembly and exercises one vote therein. The Assembly is convened a minimum of once every three years although extraordinary sessions may be convened on call of the Council or by the Secretary-General of the Authority at the request of twenty percent of the Contracting Parties. Assembly decisions are by majority vote. The powers and duties of the Assembly are set forth in Article 35 and it becomes clear on a reading thereof that the Council rather than the Assembly is actually the decision and policy making organ of the Authority since most of the Assembly's functions are approbative or ministerial. Most importantly, the Assembly does have the authority to approve budgets proposed by the Council and to approve proposals by the Council for changes in allocation of net income of the Authority.

The Council. The Council is to be composed of twenty-four states party to the Convention, with Council membership being divided into two categories: (1) the six most industrially advanced parties and (2) eighteen additional parties of which at least twelve are to be developing countries, the eighteen to be selected on the basis of equitable geographical distribution. Further, at least two of the twenty-four Council members must be landlocked or shelf-locked countries. The importance of the "big six" lies in the fact that decisions of the Council require not only approval by a

---

127. 33 U.N.T.S. 261.
128. Draft Convention, supra note 6, Art. 34(1) and (4).
129. Id., Art. 34(2) and (5).
130. Id., Art. 35(f) and (g).
130a. Id., Art. 36(1) and (2).
131. Id., Art. 36(3).
majority of all twenty-four of its members, but also a majority of members in each of the two categories. Thus, in order to adopt a proposal, at least four of the “big six” must favor the proposal and, although there is no veto power, any three of the “big six” could block affirmative action. This provides a guarantee for the technologically developed countries that the Authority will be run in accordance with the policies of those who have the greatest financial and political stake in seabed operations, and yet avoids the veto problem which has hamstrung the United Nations Security Council for twenty-five years. There must be doubts, however, as to the salability of this provision to the less developed countries. The quid pro quo is, as always, the share of revenues which the developing states will derive from an efficiently run Authority, yet the same developing states are likely to be chary of United States intentions in such a proposal—they have expressed fears for some years now of a United States-Soviet Union hegemony over world military, political, and economic affairs, and when one throws Japan and West Germany into the picture, a powerful alliance is created indeed. On the other hand, it is problematic whether the major technological and wide shelf countries would enter into any such agreement in the absence of reasonable assurances of control over the organization and its operations.

The proposal for selecting the six most industrially advanced parties set forth in Appendix E is based on the following formula:

those six Contracting Parties which are both developed States and have the highest gross national product shall be considered as the six most industrially advanced Contracting Parties. Under this formula, the Council decides which states are the six most industrially advanced prior to each regular session of the Assembly and reports its decision to the Assembly. The Appendix does not specify the criteria to be used in making the requisite determinations, but merely provides that the Council “shall make rules to ensure that all questions relating to the determination of such Contracting Parties are considered by an impartial committee before being decided upon by the Council.” There are obviously two key problems in this selection procedure: (1) whose GNP figures, determined on what basis, will be taken as authoritative, and (2) which countries are to be designated as developed and which as developing for example, the United States Department of State maintains a breakdown of developed and developing

132. Id., Art. 38.
133. Id., Appendix E, Sec. 1.
134. Id., Appendix E, Sec. 3.
states but it is doubtful whether the international community would accept reference to a United States source alone since unilateral manipulation of the lists could conceivably be utilized to fix membership on the Council in accordance with U. S. wishes.

My principal criticism, however, of the criteria for determining "big six" membership on the Council is the exclusive reliance on gross national product figures as a measure of industrial advancement or, for that matter, the use of the basic requirement of industrial advancement at all as a measure of the state's role or interest in exploitation of seabed resources. I am here making the perhaps unwarranted assumption that "big six" membership should go to those states having the greatest economic, technological, and geographical interest in offshore mining rather than those wielding general economic or technological power. The use of GNP alone as a criteria for industrial advancement could conceivably permit inclusion of the "big six" of a state with no continental shelf resources, no offshore technology, and a minimal interest in the activities conducted there. That is, of course, not the case if one takes GNP figures of recent years, but the criteria utilized should be valid for all time and should not be used simply as a device for packing the Council with state currently possessing political power or other attributes making them desirable as control elements in the Authority.

I would suggest that there are a number of factors, admittedly including GNP, which should be considered in determining membership in this most important category. These would include:

1. GNP (which, although as I have indicated may not be sufficient in itself, certainly should be considered in any list of factors);
2. Area of continental shelf and slope;
3. Resource potential of continental shelf and slope;
4. Dollar value of marine resource production; and
5. Dollar investment in offshore technology.

Three items, namely GNP, shelf area, and dollar value of marine resource production are readily ascertainable and could be combined in a formula for determining the states with the greatest stake in seabed exploitation. Potential resource evaluation and dollar investment in offshore technology would be substantially more dif-
difficult to quantify, but are nonetheless important aspects of a state's interest in the marine environment. As a tentative proposal, I would suggest ordering the ten top ranking states in each of these five categories (or the three more easily quantifiable categories if the latter two prove overly troublesome), assigning each state a point value from ten to one as they decrease in rank from the leader in each category, subsequently summing each state's performance in the selected areas, the total to be used as an index of interest in seabed exploitation and thus as a qualifier for "big six" membership on the Council. Any other method would be just as acceptable, so long as factors relating more specifically to exploitation of the resources of the marine environment are included and so long as reliance is not placed exclusively on the gross national product. Finally, if such a standard is used, I see no valid reason for excluding developing countries from "big six" membership. It seems highly unlikely that a state qualifying among the top six in such categories could conceivably be ranked by any institution as "less developed," but even if that should be the case it should not act as a bar to "big six" membership on the Council.

Assuming, however, adoption of the GNP formula, and based on recent GNP figures, the "big six" would be the United States, the Soviet Union, Japan, West Germany, France, and the United Kingdom, provided all were parties to the Convention. Italy and Canada would be numbers 7 and 8, respectively, and since their GNP growth rates are substantially in excess of that of the United Kingdom, they might be expected to overtake the latter for the sixth position at sometime in the future. The People's Republic of China ranks between the United Kingdom and Italy, but is not considered a developed country by the United States Department of State.

Article 40 sets forth the powers and duties of the Council among the more important of which are (1) to appoint and supervise the operations of the three standing Commissions, (2) to submit proposed budgets to the Assembly for its approval, (3) to submit proposals to the Assembly for changes in the allocation of income of the Authority, and (4) to adopt rules and practices for exploration and exploitation activities upon recommendation of the Rules and Recommended Practices Commission.

The Tribunal. The Tribunal is authorized to decide all disputes and advise on all questions relating to the interpretation and application of the Convention which have been submitted to it in accordance with the provisions of the Convention.135 Article 50

135. Id., Art. 46(1).
permits any party to the Convention to bring a complaint before the Tribunal if it feels that another party has failed to fulfill any of its obligations under the Convention, thus providing a system of compulsory dispute settlement. However, an exhaustion of remedies requirement necessitates that the complaining party first proceed before the Operations Commission, the latter being required to deliver a written opinion on the matter, non-compliance with which permits recourse to the Tribunal. In addition, the Operations Commission may itself (or on request of any licensee) proceed in similar fashion, first issuing a written opinion, against any licensee or Contracting Party. Of substantial importance to operating companies is the provision of Article 54 permitting a Contracting Party to bring any matter before the Tribunal concerning the “legality of measures taken by the Council, the Rules and Recommended Practices Commission, the Operations Commission, or the International Seabed Boundary Review Commission on the grounds of a violation of [the] Convention, lack of jurisdiction, infringement of important procedural rules, unreasonableness, or misuse of powers . . . .” Thus an effective system is established by which an adversely affected operating company may challenge the validity of a particular obligation imposed upon it. This provides substantially more review over administrative procedures than operating companies now have in the United States under the Outer Continental Shelf Lands Act.

The Commissions. Article 42 provides for a Rules and Recommended Practices Commission, an Operations Commission, and an International Seabed Boundary Review Commission, each to be composed of five to nine members appointed by the Council.

The obligations of the Rules and Recommended Practices Commission are to (1) recommend to the Council for adoption annexes containing rules and recommended practices for seabed exploitation, (2) to collect and disseminate to the Contracting Parties “information which the Commission considers necessary and useful in carrying out its functions.” Details concerning the establishment of rules and recommended practices are found in

136. Id., Art. 50(1).
137. Id., Art. 50(2)-(5).
138. Id., Art. 51.
138a. Id., Art. 43(2) (a) and (b).
Chapter V (Articles 66-72) of the Draft Convention. Such rules are to be in the form of annexes to the Convention which are to be approved by the Council upon recommendation of the Commission, and which become effective three months after submission of the Contracting Parties in the absence of disapproval registered by more than one-third of such parties. Such annexes may cover virtually every aspect of resources exploitation operations in the International Seabed Area. Provision is made for waivers from the application of such rules and recommended practices in special circumstances, with appeal to the Tribunal in cases of a failure by the Operations Commission to issue waivers.

The Operations Commission is charged with responsibility for (1) issuing licenses for activities in the non-trusteeship portion of the International Seabed Area, and (2) supervising the operations in the entire International Seabed Area in cooperation with the Trustee or Sponsoring Party.

The International Seabed Boundary Review Commission is charged with responsibility for reviewing boundaries (200 meter isobath, and continental margin) submitted to it by Contracting Parties in accordance with Articles 1 and 26. The Commission may make recommendations to the Contracting Parties on the subject of lateral offshore boundaries (see Article 30 on the system for resolving this category of offshore boundary dispute), and may also, at the request of a Contracting Party, “render advice on any boundary question arising under this Convention.”

The Secretariat. The Draft Convention also authorizes a Secretariat for the Authority, being comprised of a Secretary General and “such staff as the International Seabed Resource Authority may require.”

Some criticism has been directed at the proposed Authority, principally on the grounds that it would become a “super-soverignty” which would be in the words of one group, “so vast as to make the size of the United Nations pale by comparison.” Although this statement is somewhat overdrawn, a more valid point was made by the same group noting that “[p]resent leasing activities beyond the

---

139. Id., Art. 67(e).
140. Id., Art. 68.
141. Id., Art. 72.
142. Id.
143. Id., Art. 45.
144. Id., Arts. 61-64.
200 meter depth limit could not generate sufficient revenues to begin to fund such an organization.” Since here is at present no commercial production of any non-living resource beyond the 200 meter isobath one can hardly quarrel with the conclusion. However, one assumes that the Authority would grow from modest proportions in response to increasing activity in the area under its jurisdiction and, indeed, the Draft Convention provides that in the period before the Authority acquires income sufficient for the payment of administrative expenses “the Authority may borrow funds for the payment of those expenses.”

There are a number of quite attractive features about the administrative regime as proposed, including: (1) the compulsory dispute settlement provisions; (2) the administrative procedures available through the Commissions for resolving daily problems of operating in the International Seabed Area; and (3) the effective control over the organization by technologically advanced states through the composition and voting rules relating to the Council. In negotiations on the structure of such an Authority, these features, at least, should be retained.

D. Rules For Resource Disposition.

The Draft Convention establishes three separate horizontal stratifications of ocean space for purposes of exploring and exploiting the non-living resources of the seabed. The document would create the International Seabed Area comprising “all areas of the seabed and subsoil of the high seas seaward of the 200 meter isobath adjacent to the coast of continents and islands.” Further, the International Trusteeship Area would be established, being that part of the International Seabed Area “comprising the continental or island margin” between the 200 meter isobath boundary and a line drawn beyond the base of the continental slope “where the downward inclination of the surface of the seabed declines to a gradient of 1:—.” Provision is also made in both Articles 1 and 26 for

146. Draft Convention, supra note 6, Art. 74(2).
147. Id., Art. 1(2).
148. Id., Art. 26(1). The specific figure is omitted from the Draft Convention but a note appended to the provision specifies that:
The precise gradient should be determined by technical experts, taking into account, among other factors, ease of determination, the need to avoid dual administration of single mineral deposits, and
a system analogous to straight baselines where irregularities trans-
est either the 200 meter isobath boundary or the continental margin
boundary.

Some proposals, including that of the Commission on Marine
Science, Engineering and Resources, had suggested a *depth-distance*
criterion for establishment of the seaward boundary of the con-
tinental shelf, for example, 200 meters or 50 miles, whichever was
the farther seaward. Undersecretary Richardson explained the
selection of the depth only criterion before the Senate Outer Con-
tinental Shelf Subcommittee by stating that whereas other pro-
posals provided only one boundary (between the area of exclusive
coastal state jurisdiction and an international area) and therefore
it was desired in those cases to have the line farther seaward for
protection of various national interests, the Nixon Proposal en-
visioned the trusteeship zone concept where interests of the
coastal state would be adequately safeguarded out to the edge
of the continental margin, there thus being no need for other
than a depth criterion.\textsuperscript{149} This reply, of course, overlooks the fact
that the Commission's proposal also included an intermediate
zone concept virtually identical to that proposed in the Draft Con-
vention. The selection of the 200 meter isobath as the boundary
seems to have been made on the basis of maximizing the area
from which revenues would be paid, in whole or in part, to the
Authority, consistent with the conflicting interests which had to
be accommodated in adopting such a boundary.\textsuperscript{149a}

The Article 1 and the Article 26 boundaries are to be established
by the following process: (1) Each party to the Convention
delineates its boundaries by straight baselines not exceeding 60
nautical miles in length following the general direction of the 200
meter isobath, in the case of the International Seabed Area, or the
edge of the continental margin, in the case of the Trusteeship Area;
(2) such parties must submit their boundary descriptions to the

\begin{itemize}
\item the avoidance of including excessively large areas in the Inter-
national Trusteeship Area.
\end{itemize}

Cf. text accompanying note 29, supra indicating that a gradient less than
1:40 is generally taken as ending the continental slope and beginning the
deep ocean floor. Obviously the boundary under the Draft Convention will
be determined by more complex formulae.

\textsuperscript{149}. Richardson Statement, supra note 97, at 433.

\textsuperscript{149a}. Single line and intermediate zone proposals have not been the only
alternatives suggested. For an interesting option based on regional ar-
rangements, see Goldie, *Where is the Continental Shelf’s Outer Boundary?*
also the various proposals identified in the text accompanying notes 100–
11, supra.
International Seabed Boundary Review Commission within five years after the entry into force of the Convention, for acceptance by the Commission; and (3) boundaries not accepted by the Commission and not resolved by negotiation between the Commission and the affected state within a year of the submission are to be resolved by the Tribunal.\textsuperscript{150}

Once these boundaries are established, the three zones of seabed jurisdiction will consist of (1) the continental shelf area (landward of the 200 meter isobath boundary), (2) the International Trustee-ship Area (between the 200 meter isobath boundary and the continental margin boundary), and (3) that portion of the International Seabed Area beyond the Trusteeship Area (seaward of the continental margin boundary). It should be noted that the rights granted in each of these areas, whether by the Convention on the Continental Shelf or the Draft Convention, relate primarily to the exploration and exploitation of non-living resources of the seabed and subsoil, and the division of other portions of ocean space will depend on separate agreements (e.g., agreement on the breadth of the territorial sea).

Different procedures for disposition of resources will be in effect in each of these three zones, the substance of those procedures being analyzed in this section.

A side note is in order first, however, since the question of offshore boundaries must bring to mind, in the United States, the protracted litigation between the Federal government and the several coastal states over boundaries separating the two jurisdictions in the conduct of seabed exploitation on the continental shelf.\textsuperscript{151} It

\textsuperscript{150} Draft Convention, Arts. 1(3) and (4), 26(2) and (3). With respect to Article 26 boundaries, the Draft Convention contains a note following that article stating that: “Additional consideration will be given to problems raised by enclosed and semi-enclosed seas.”

\textsuperscript{151} Probably the best short summary of the state-federal submerged lands dispute is Swarth, Offshore Submerged Lands: An Historical Synopsis, 6 Land and Natural Resources Division J. 109 (U.S. Dep’t of Justice) (No. 3) (1968). See also Chapter 3, Study of the Outer Continental Shelf Lands of the United States (Clearing House for Federal Scientific & Technical Information, PB 188, 715 1968), at 122. At present, the coastal states have title, by virtue of the Submerged Lands Act [43 U.S.C. §§ 1301-15 (1964) (originally enacted as Act of May 22, 1953, ch. 65, 67 Stat. 29)] to submerged lands out to three geographical miles from the coastline (except for Florida’s Gulf Coast, and Texas, whose boundaries extend out three
is appropriate to consider what effects, if any, the regime proposed by the Draft Convention might have on the ultimate disposition of this controversy. It has been suggested that the Federal government might wish to reverse its past policy on straight baselines and establish such lines in order to move the United States boundary farther seaward and thus expand the area under (1) exclusive United States jurisdiction or (2) United States trusteeship. The Federal government has in the past resisted all such suggestions as a matter of national policy although there are areas of the Nation’s coast (notably portions of the coasts of Alaska, Louisiana, and Florida) which seems to fit the criteria established for such lines in the Convention on the Territorial Sea and the Contiguous Zone. The Draft Convention gives no comfort to supporters of such a concept, however, since it does not use any distance criteria in establishing boundaries for its zones of offshore jurisdiction. Thus, nothing would be gained for the United States under the Draft Convention by moving the baseline seaward, since neither the 200 meter isobath boundary nor the continental margin boundary is dependent on the location of the baseline for its determination.

Of more importance may be the effect of the Draft Convention on the question of regulation of oil and gas production from offshore marine leagues) and the Federal government has jurisdiction seaward of that line to the limit of national jurisdiction.

152. In both United States v. California, 381 U.S. 139 (1964) and United States v. Louisiana, 394 U.S. 11 (1969), the Supreme Court held that the option to use straight baselines (as permitted by the Convention on the Territorial Sea and the Contiguous Zone (supra note 2, Art. 4)) rested exclusively with the Federal government, and that individual states might not therefore establish such baselines. This was in accord with the contention of the Federal government in those cases that such power affected the conduct of foreign relations and must be vested exclusively in the executive branch of the Federal government. Not so coincidentally, application of that position also maximized the area of submerged lands under Federal jurisdiction vis-à-vis the coastal states.

153. Moving the baseline from which zones of offshore jurisdiction are measured has the same effect of expanding the area under exclusive coastal state control as widening the breadth of such zones, and may be more easily justified on the basis of existing customary or conventional international law.

154. That Convention provides:

In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured. [Art. 4].

155. Other suggestions, notably that of the Commission on Marine Science, Engineering and Resources, provided for a combined depth-distance criterion for these boundaries, such as 200 meters or 50 miles, whichever is the farther seaward. See supra text accompanying note 149.
shore areas by governmental authorities. Only the states of Texas and Louisiana presently apply M.E.R. and marlat demand prorationing to offshore production, and their rules have in the past also been extended to outer continental shelf lands off their coasts which are under the general administration of the Federal government.\textsuperscript{156} On December 4, 1970, however, President Nixon proposed to halt this extension of state jurisdiction by directing the Department of the Interior to assume responsibility for conservation of and production of oil and gas on outer continental shelf lands.\textsuperscript{157} The Draft Convention permits coastal states, in their discretion, to establish prorationing in the Trusteeship Area.\textsuperscript{158} One effect of adoption of the Draft Convention provisions might be to strengthen United States resolve to administer production restriction regulations on the outer continental shelf itself, rather than relying on state initiatives, since the subject matter would now affect vital foreign policy interests of the nation, not just the national economic interest in hydrocarbon production. Any factor which will result in the Federal government reviewing the subject of offshore prorationing with a view toward maximizing net resource or economic return (whichever priority seems most crucial at the time) for the Nation as a whole, without great regard to either (1) protection of federal jurisdictional interests against "creeping" state jurisdiction, or (2) temporary economic dislocation in two coastal states, is a desirable one. Accordingly, 

\textsuperscript{156} This was done with the tacit consent of the Federal government, presumably through the delegated power of the Secretary of the Interior in the Outer Continental Shelf Lands Act to cooperate with the conservation agencies of coastal states in the "enforcement of conservation laws, rules, and regulations." Sec. 5(a) (1).

\textsuperscript{157} See \textit{Weekly Compilation of Presidential Documents}, Monday, Dec. 7, 1970 (Vol. 6, No. 49) 1623, 1626. The President there stated:

\textit{Up to now, State restrictions on production on Federal offshore leases have held down the supply of crude oil. I have been informed by the Director of the Office of Emergency Preparedness that these State restrictions are not necessary for national security, moreover, they actually interfere with the freedom of our domestic market system. Consequently, I have today directed the Interior Department to assume complete regulating responsibility for conservation and production of oil and gas on all Federal offshore lands. This means that more oil will be produced on those lands while maintaining strict environmental standards.}

\textsuperscript{158} \textit{Draft Convention, supra} note 6, Appendix C, Sec. 8.1 ("The Trustee Party may establish proration, to the extent permitted by its domestic law.")
there seem to be no adverse effects stemming from the Draft Convention on either the state-federal offshore boundary dispute or the question of jurisdiction to regulate offshore hydrocarbon production, and, indeed, perhaps some benefits on the latter issue.

1. Landward of the 200 Meter Isobath.

Since Article 1(2) of the Draft Convention provides that the International Seabed Area comprises all areas of seabed and subsoil seaward of the 200 meter isobath, the Convention on the Continental Shelf should be amended to provide for a 200 meter isobath limit on the shelf. In such case, the Convention on the Continental Shelf would remain the applicable international law in the area landward of the 200 meter isobath.

In the absence of such amendment, complex problems would arise concerning what legal definition of the extent of the shelf (Convention on the Continental Shelf, or Draft Convention) would be applicable in dispute resolution. The recently adopted Convention on the Law of Treaties\textsuperscript{159} contains in Article 30 rules on the applicability of treaty provisions where a subsequent treaty on the same subject is entered into by some or all of the parties to the earlier treaty, but this convention itself may not be binding on all of the parties to a dispute (of course, to the extent that the provisions of Article 30 reflect customary international law, all members of the international community would be bound thereby).

Since sovereign rights to exploit the natural resources of the seabed on the continental shelf area are exclusive with the coastal state,\textsuperscript{160} the state could apply any regime desired regarding exploration and exploitation of the seabed resources located thereon consistent with the Convention on the Continental Shelf and other applicable principles of international law. Presumably, however, the problem of other (that is non-mineral resource exploitation) uses of the continental shelf landward of the 200 meter isobath would still exist. The proposition has been asserted that although a coastal state may make whatever non-mineral resource exploitation use it wishes of the seabed and subsoil within its jurisdiction, such user is not necessarily exclusive, since the theory upon which it is based is \textit{res nullius} and since the exclusivity provided by the Convention on the Continental Shelf relates only to exploitation of mineral resources. One can also assimilate the concept of the


\textsuperscript{160} Convention on the Continental Shelf, \textit{supra} note 2, Art. 2(2).
high seas to the seabed beneath (which seems completely unjustified in view of the tremendous differences both in physical characteristics of the two environments and the uses which can be made thereof) and then conclude that there exists no body of law governing such non-resource exploitation uses on the seabed unless one might imply a test of reasonableness in use so as not to interfere with uses previously established by others. Under this position, the government of Mexico could establish or license an artificial island or floating airport outside the limits of the United States territorial sea, but on its continental shelf, with the full protection of international law. This view, however, is open to substantial doubt insofar as the United States' shelf area is concerned as a result of the holding in United States v. Ray wherein the Court found the "vital interests" of the United States in its continental shelf, though short of the title required at common law to support a trespass action, sufficient to warrant an injunction against the threatened non-mineral resource exploitation activity. Clearly, then, at least the United States judiciary (or a portion of it) regards the right to make other than resource exploitation use of the continental shelf as being exclusive, or subject to a claim of exclusivity, in the coastal state.

In view of the uncertainty surrounding this question, it would seem appropriate to specify the circumstances under which coastal states would be permitted to make non-resource exploitation uses of their shelves at the same time the Convention is amended to provide for the fixed limit to the legal shelf.

As for the applicable regime, it is highly likely that the United States will continue to apply the Outer Continental Shelf Lands Act to that portion of the shelf under jurisdiction of the Federal government (states' submerged lands granted pursuant to the Submerged Lands Act of 1953 would continue to be administered by the appropriate coastal states in the absence of amendment or repeal of the Submerged Lands Act). Certain amendments will be necessary in the Outer Continental Shelf Lands Act with respect to the Trust-

162. For a discussion of the "other uses" problem and a proposed solution in terms of unilateral and international action, see Comment, Continental Shelf Law: Outdistanced by Science and Technology, 31 La. L. Rev. 108 (1970).
teeship Area if that body of law is to be applied there, but these amendments will not be necessary (or perhaps even desirable) in the area landward of the 200 meter isobath. Accordingly, it is suggested, post, that a new act be adopted for the Trusteeship Area, although it may be only a modified Outer Continental Shelf Lands Act, in order to apply the most appropriate rules to the two areas separately.

Finally, all revenues generated in the shelf area may be retained by the coastal state or applied to any use deemed appropriate by such state.

2. The International Trusteeship Area.

a. Preliminary Note. At the outset, a few comments about the notion of the “trusteeship” concept are in order. The Commission on Marine Science, Engineering and Resources made a similar proposal in its Report, calling the area an “intermediate zone,” and giving the coastal states rights therein similar to those granted under the Draft Convention. The selection of the terms “trustee” and “trusteeship” has had, however, some unfortunate repercussions. An early indication of dissatisfaction occurred at the Pacem in Maribus Convocation in Malta, June-July, 1970, where the Nixon Proposal was described by Professor Louis Sohn. Many representatives of less developed countries, particularly Mr. Duke E. Pollard of Guyana, were concerned in the extreme that the ghost of colonialism was being resurrected in the form of the proposed international trusteeship. The issue was further complicated by the insistence of many of the lawyers there present, also especially from less developed countries, on a rigid interpretation of the term “trustee” in terms of Anglo-American law, with all the implications and complications of trust law. In order to clarify the issue, spokesmen for the United States Government have explained that: (1) the coastal state is acting as trustee for the international community only in the sense of its responsibility to administer resource exploitation in the area and to pay a portion of the revenue derived therefrom to the Authority, and (2) the term “trustee” means only what is specified in the Draft Convention concerning rights and duties of trustee states and has no relation to the concept of trusts in Anglo-American law. On the first point, Undersecretary Richardson observed in his Senate Outer Continental Shelf Subcommittee testimony:

The term “trusteeship” implies a responsibility entrusted, and

here the coastal state would be entrusted by the rest of the world through the international regime with responsibilities, and so, therefore, we thought it was a descriptive word in the sense that it carried connotations of a responsibility, exercised for the benefit of all mankind.\textsuperscript{164}

On the second point, Richardson noted that it was not the intent of the drafters that the term “trustee” carry with it “all the specific applications that attach to [it] under Anglo-American common law.”\textsuperscript{165} State Department Legal Advisor John Stevenson elaborated further at the same hearing by noting:

\begin{quote}
[T]he treaty itself, which will be very carefully negotiated to reflect the responsibilities of the coastal state . . . will be the guiding legal document here, and the terms of the coastal state’s duties will either be set out or delegated in the treaty itself.\textsuperscript{166}
\end{quote}

It is, therefore, clear that with respect to the trusteeship concept no outside body of law need be referred to in administering the international regime or in settling disputes occurring with respect thereto, but that the entire range of rights and obligations attaching to the notion of a “trustee state” will be established and defined by the treaty itself.

The compromise nature of the trusteeship area concept and the interests served thereby have been summarily noted above. Perhaps the most succinct statement of the necessity for such a system was made by Lewis M. Alexander:

\begin{quote}
Any viable arrangements for the seabed beyond national limits, must . . . be able to acquire at least some revenue from resource exploitation within the span of a relatively few years. Such revenue will probably come first from the development of resources of the continental slope. Yet the legitimate interests of the coastal state—including those involving wealth acquisition—must also be protected in this area close to its shores. No proposal, except one embodying an intermediate zone concept . . . can satisfy both requirements.\textsuperscript{167}
\end{quote}

Proponents of a “simpler” system for exploiting seabed resources argue for a single line of demarcation between the “national” area and the “international” area. The difficulty with such a proposal is the requisite compromise—national interests desire the line fairly

\begin{flushright}
\textsuperscript{164} Richardson Statement, supra note 97, at 434.  
\textsuperscript{165} Id. at 435.  
\textsuperscript{166} Stevenson Testimony, supra note 97, at 434.  
\end{flushright}
far seaward from the coast for (1) national security purposes and (2) assurance of some economic return from development of off-shore mineral resources; international interests desire the line fairly close to the coast in order that meaningful amounts of revenue will be produced for disposition to developing countries in the relatively near term. No adequate compromise of these two conflicting positions could be realized with a single line boundary. Thus, as Alexander notes, the trusteeship zone concept permits coastal states to have protection of security interests and to receive a portion of revenues generated, while ensuring that the international community will also have some revenues at a reasonably early date.

b. The Trusteeship System. In the International Seabed Area (which includes, of course, the International Trusteeship Area) "[a]ll exploration and exploitation activities . . . shall be conducted by a Contracting Party or group of Contracting Parties or natural or juridical persons under its or their authority or sponsorship." The issue involved here is whether operating companies may obtain licenses directly from the Authority in the International Seabed Area beyond the Trusteeship Area, or whether they will be required to go through states in order to acquire the privilege of operating in the area. The policy decision indicated by the Draft Convention reflects the latter choice. The factors favoring establishment of such a policy include (1) effectiveness in identifying the operator and determining its qualifications, (2) joint responsibility (operator and Sponsoring or Authorizing State) for the conduct of activities in the area, and (3) maximization of protection for the Authority and the environment in connection with operations in the area. A negative factor is that the system may encourage "forum shopping" by operating companies seeking to secure the most favorable treatment by a particular state. In mitigation of this possible negative element it should be noted that whatever the Sponsoring or Authorizing State, ultimate control over operations to the extent necessary to compel adherence to the rules in the Draft Convention still rests with the Authority, particularly in the non-trustee portion of the International Seabed Area.

All activities relating to the exploration and exploitation of non-living seabed resources in the International Seabed Area must be licensed by the Authority or by the appropriate Trustee Party.  

168. Draft Convention, supra note 6, Art. 10.  
A "Trustee Party" is a Contracting Party "exercising trusteeship functions in that part of the International Trusteeship Area off its coast in accordance with Chapter III."\textsuperscript{170} A State which licenses an operating company in its Trusteeship Area, or otherwise authorizes any activity in the International Seabed Area, is known as an "Authorizing Party," whereas a State sponsoring an operating company's application for a license or permit before the Authority is known as a "Sponsoring Party."\textsuperscript{171}

The Draft Convention states that except as specifically provided "the coastal state shall have no greater rights in the International Trusteeship Area off its coast than any other Contracting Party."\textsuperscript{172} The Draft Convention then gives Trustee Parties exclusive control over the administration of the exploitation of seabed resources in their respective Trusteeship Areas.\textsuperscript{173} Within the Trusteeship Area the adjacent coastal state may apply any system of resource disposition so long as the same is not inconsistent with the general rules of the Convention, and the Trustee Party is responsible for issuing, suspending, and revoking mineral exploration and exploitation licenses as well as the other administrative obligations set forth in Article 27. The Draft Convention provides that the Trustee Party may, in its discretion:

a. Establish the procedures for issuing licenses;

b. Decide whether a license shall be issued;

c. Decide to whom a license shall be issued without regard to the provisions of Article III [which provides that "the international seabed area shall be open to use by all states, without discrimination, except as otherwise provided in this Convention]; ... 

Such control was thought necessarily vested in the Trustee Parties in order to avoid the difficult situation of a state being compelled to issue licenses to a state or nationals of a state, conceivably in an area only 12 miles from its coast, with whom it did not have

\textsuperscript{170} Id., Art. 75(2).
\textsuperscript{171} Id., Art. 75(3) and (4).
\textsuperscript{172} Id., Art. 27(1). The function of this proviso is to eliminate any residuum of authority in the coastal state and ensure that the only rights acquired in the Trusteeship Area by coastal states are those specifically conveyed by the Draft Convention. This hopefully will eliminate "creeping jurisdiction," the process by which coastal states supposedly expand the nature of jurisdiction or control exercised over adjacent marine areas.
\textsuperscript{173} Id., Art. 27(2).
friendly relations. Thus the right to discriminate against foreign nationals, a concept embodied in the administration of the United States outer continental shelf lands,174 is made applicable to the Trusteeship Area as well. Undersecretary Richardson explained the this was possibly the most important of the powers of the Trustee Party, observing:

> It seems to us fairly self-evident that a coastal state would wish to exercise the power of decision as to whether or not a license should be granted to a particular applicant, having in view the national antecedents of the applicant; having in view the relations between the coastal state and the nation; and we have felt, therefore, that to have proposed unilateral international control of such a decision as that would go too far in overriding clear interests of the coastal states.175

In the case, as is likely to occur in some instances, that the appropriate Trustee Party is incapable either from the standpoint of technical competence or facilities to administer its Trusteeship Area, Article 29 of the Draft Convention provides that such party may enter into an agreement with the Authority under which the Authority will “perform some or all of the trusteeship supervisory and administrative functions provided for . . . in return for an appropriate part of the trustee party’s share of international fees and royalties.”

Appendix C sets forth the “Terms and Procedures for Licenses in the International Trusteeship Area,” noting that all provisions of the Draft Convention except those in Appendix B (relating to terms and procedures applicable to licenses in the International Seabed Area beyond the International Trusteeship Area) are applicable to the International Trusteeship Area. Section 2.1 of Appendix C provides that the Trustee Party “shall have the exclusive right, in its discretion, to approve or disapprove applications for exploration and exploitation licenses.” Section 3.1 further provides that the trustee party “may use any system for issuing and allocating exploration and exploitation licenses.” Other provisions of Appendix

---

174. The Outer Continental Shelf Lands Act contains no definition of the classes of entities competent to receive leases under the Act with respect to nationality, but the regulations promulgated by the Secretary of the Interior provide:

Mineral leases issued pursuant to section 8 of the act may be held only by citizens of the United States over 21 years of age, associations of such citizens, States, political subdivisions of a State, or private, public, or municipal corporations organized under the laws of the United States or of any State or Territory thereof.

43 C.F.R. § 3380.1. Presumably it would be in the interest of the United States to include a similar provision in the regulations affecting resource disposition in the Trusteeship Area.

175. Richardson Statement, supra note 97, at 436.
C call attention to the general obligations with which the trustee party must comply, since such provisions are applicable to the entire International Seabed Area. Provisions are also included concerning unit management and proration.

As noted above\textsuperscript{175a} a Trustee Party may, to the extent provided by its municipal law, apply prorationing to production from its Trusteeship Area. This permits the coastal state to maintain requisite control over its internal economy insofar as the latter is affected by mineral production and to provide for efficient resource recovery. Of course, prorationing was originally designed to permit maximum efficient recovery of a resource by limiting the amount and location of production. However, in the United States, market demand prorationing has also been used effectively to maintain the price of crude oil at a level sufficient to permit economic operation of the oil industry and it is for such market stabilization purposes as well as efficient resource production that prorationing will ultimately be necessary with respect to mineral resources produced from the International Seabed Area.

The United Nations Secretariat has noted in this regard:

Exploitation of the mineral resources of the sea-bed may also have a favorable effect on the stability of raw material markets by diversifying the sources of supply and, in some instances, easing the excessive reliance of consumers on a limited number of producers. At the same time, if exploitation takes place at a rate exceeding that at which sea-bed minerals can be absorbed into the world market, internationally agreed measures may be necessary to safeguard the interests of those developing countries which depend heavily on mineral production in case this new source of supply jeopardizes their markets or the price level for their exports [Citing “Economic Implications of the Exploitation of Mineral Resources on and Underlying the Sea-bed and Ocean Floor and its Subsoil with Particular Reference to World Trade and Prices,” U.N. Doc. No. A/AC. 138/14.\textsuperscript{176}]

Since production from the International Seabed Area may have deleterious effects upon the economies of single resource dependent states, certain countries, Kuwait and Chile for example, raised seri-

\textsuperscript{175a} See section IIIID this article; text accompanying note 158, supra.
ous questions about the desirability of a seabed regime whose object is to promote development of resources. On December 17, 1970, the General Assembly adopted, in addition to the two resolutions already discussed in this paper, resolution 2750A,177 which:

Requests the Secretary-General to cooperate with the United Nations Conference on Trade and Development, specialized agencies, and other competent organizations of the United Nations system in order to:

(a) Identify the problems arising from the production of certain minerals from the area beyond the limits of national jurisdiction and examine the impact they will have on the economic well being of the developing countries, in particular on prices of mineral exports on the world market;

(b) Study these problems in the light of the scale of possible exploitation of the seabed taking into account the world demand for raw materials and the evolution of costs and prices;

(c) Propose effective solutions for dealing with these problems.

This report is to be submitted to the Seabed Committee during one of its 1971 sessions. Such a study is a Brobdingnagian undertaking and it is not likely that any meaningful answers will be obtained during 1971. Neither is it likely that the quantity of production sufficient to have the type of adverse economic impact feared will occur before the end of this decade. It is desirable in the interim that the United Nations and, when it comes into existence, the Authority, spend a substantial amount of time evaluating the economic impact of seabed minerals on the world market structure.

The Trustee Party is obligated to forward a percentage of all fees, royalties, and other income derived from resource exploration and exploitation activities conducted in the Trusteeship Area to the Authority. The Draft Convention suggests forwarding between 50% and 66-2/3% but this is, of course, a highly negotiable point. Section 9.1 of Appendix C permits the Trustee Party to collect fees and payments in addition to those set forth in Draft Convention but Section 9.2 requires it to transfer between 50% and 66-2/3% of such additional fees to the Authority. Even though as noted the Trustee Party has great latitude in authorizing and administering activities conducted in its Trusteeship Area, nonetheless such activities must comply with the provisions of the Draft Convention, the appendices therefor, and any applicable annexes. To ensure compliance, Article 19 of the Draft Convention provides (1) that each state is responsible for regularly inspecting operations of its authorized or sponsored parties and that such reports are to be submitted to the Authority; and (2) that the Authority, on its own initiative or at

the request of any interested party, "may inspect any licensed activity in cooperation with the Trustee Party or Sponsoring Party, as appropriate, in order to ascertain that the licensed operation is being conducted in accordance with this Convention." Thus, in the Trusteeship Area, the Authority retains, *inter alia*, the power necessary to ensure compliance with the provisions of the Draft Convention, even though the Trustee Party is the primary administrator.

Finally, Section 10.1 provides that the trustee party may "impose higher operating, conservation, pollution, and safety standards than those established by the Authority, and may impose additional sanctions in the case of violations of applicable standards." Some concern has been expressed over the possibility that less developed countries might bring pressure to bear on technologically advanced countries with broad shelf areas to develop the resources of their respective Trusteeship Areas as part of an implied obligation (undertaken in becoming a party to the Draft Convention) to maximize the revenue to be made available to the Authority. This could have substantial adverse effects on the environment and the economy in situations such as Santa Barbara Channel off the California coast where for one reason or another the United States Government might decide to withdraw from further leasing or exploitation activities large sections of what are known to be highly productive oil and gas producing areas. There is, however, nothing within the four corners of the Draft Convention which would support this concern. Article 28(b) specifically gives the Trustee Party the discretionary power to decide whether or not a license shall be issued at all within the Trusteeship Area; section 2.1 of Appendix C gives the Trustee Party the exclusive, discretionary right to approve or disapprove any application for an exploration or exploitation license in the Trusteeship Area; and section 10.1 of Appendix C authorizes the Trustee Party to impose higher conservation standards than those established by the Authority which conservation standards could logically include the creation of areas to be withheld altogether from leasing. Secretary of State Rogers quite specifically stated in response to questioning on this subject that "the trustee nation would have the right to exclude either exploration or exploitation of the resources of the International Trustee-
Further, the Authority has the power to designate portions of the International Seabed Area as international marine parks and preserves where such areas have "unusual, educational, scientific, or recreational value," and Article 25 further provides that the establishment of such a park or preserve in the Trusteeship Area "shall require the approval of the appropriate Trustee Party." Thus, at least one mechanism is available for formally withdrawing areas from disposition, although the Article 25 route would not be the only method of effecting such a withdrawal. Certainly, there would be nothing in the Draft Convention itself to prevent a less developed country or group thereof from utilizing a forum such as the United Nations to berate a technologically developed power for taking such a step. However, in view of the effective control which the leading technological powers will have over the Authority through the composition and voting structure of the Council, and the fact that it is the technology of those very nations who might be subject to criticism which permits the revenue to be available to less developed countries at all, it is unlikely that such pressures would be publicly brought to bear. Even assuming that such was the case, this would be a political question for resolution at the time and should not deter the United States or any other technological power from entering into the Draft Convention as presently proposed.

Of substantial importance is the regime which coastal states, particularly the United States, might apply to their Trusteeship Areas. Preliminary inquiries indicate that a simple extension of the Outer Continental Shelf Lands Act, with the amendments required by the provisions of the Draft Convention, is likely to be the approach taken in the United States. Two issues of importance are raised by such an inquiry: first, what objectives are to be achieved by the regime, and second, whether different regimes are appropriate for different resources. In view of the general policy overtones of the Draft Convention, it is clear that a developmentally oriented regime designed to maximize revenue for distribution by the Authority is planned for the non-trusteeship portion of the International Seabed Area. If a regime similar to that applicable in the non-trusteeship portion of the International Seabed Area is to be made applicable to the Trusteeship Area, the Draft Convention objectives must also be consistent with United States policy objectives in that area. The Commission on Marine Science, Engineering, and Resources noted, ableit specifically with respect to hard

178. Rogers' Answers, supra note 114, at 467 (answer to Question No. 20).
178a. See section IID, 3 this article.
minerals, the following desiderata:

The system should seek to encourage exploration.

The system's primary objective should not be to maximize near-term Federal income from rents, royalties, or bonuses but rather the aggregate net economic return to the nation from ocean mining activity. . . .

The system should take into account the fact that the United States faces competition from other nations that may offer to lease their offshore mineral rights on terms more attractive to U.S. capital.  Accordingly, I suggest that the regime to be made applicable to the United States' Trusteeship Area should also be designed to maximize development of the resources situated there and to the extent the Outer Continental Shelf Lands Act does not afford a vehicle for accomplishing this objective it should be amended or replaced.

As to the requisites of the different mineral extraction industries, a good argument can be made for differentiating at least between petroleum and natural gas, and perhaps sulphur, on the one hand, and hard minerals, on the other. Under the Outer Continental Shelf Lands Act, competitive bidding is required for all leases, no distinction being made between hydrocarbons and hard minerals. The hard mineral mining industry has made a case concerning the inapplicability of the competitive bidding principle with respect to offshore hard minerals, and their position was essentially adopted by the Commission on Marine Science, Engineering and Resources which observed that:

[O]nly a few types of hard mineral deposits extend from the land offshore, making the projection of favorable target areas much more difficult. Further, the exploratory techniques are more expensive because the horizontal dimensions of most hard mineral deposits are smaller than fossil fuels. The steps from discovery to production of hard minerals also involved considerably more effort than fossil fuels and, except for nearshore operations, involve new, costly technology.

Some debate has centered around the question whether the absence of offshore hard mineral activities in the United States is due to inex-
appropriate legislation (viz., the competitive bidding requirement and other features of the Outer Continental Shelf Lands Act) or simply the fact that such activities are not yet economically competitive with upland sources. The latter argument seems to be more compelling, but there also seems no good reason to maintain a legislative system which only increases the margin between inaction and economic feasibility. In this regard, the Commission recommended that:

[W]hen deemed necessary to stimulate exploration, the Secretary of the Interior be granted the flexibility to award rights to develop hard minerals on the outer continental shelf without requiring competitive bidding. . . .

Accordingly, whether or not the Outer Continental Shelf Lands Act is amended as to the continental shelf area, amendment is appropriate with respect to the Trusteeship Area. I suggest therefore that, at least with respect to hard minerals (and preferably as a general regime for all minerals), the United States adopt new legislation applicable to the Trusteeship Area (perhaps the “Trusteeship Area Lands Act”) which would contain provisions similar to those in force for the non-trusteeship portion of the International Seabed Area. In short, such a regime would permit non-exclusive exploration activities not limited as to area but without preferential rights to exploitation, followed, upon proper application, by exploitation licenses or leases, a portion of which would be relinquished upon attaining commercial production. If more than one application is filed for a particular area, cash bonus competitive bidding would decide the recipient of the tract or tracts in question. This system would provide a greater development initiative (particularly with respect to hard mineral mining activities) and should result in discovery, and ultimately production, of more resources.

183. It is beyond the scope of this paper to evaluate economic aspects of offshore mineral production. The reader who wishes to review some of the Congressional testimony by economists on this issue as related specifically to the seabed question should read Statement of Dr. Miller B. Spangler, Outer Continental Shelf Hearings, Part 2, supra note 45a; Statement of Leonard L. Fischman, Consulting Economist, id. at 321; and Statement of Walter J. Mead, Professor of Economics, University of California at Santa Barbara, id. at 328. See also the many fine contributions on seabed economic questions made by Francis T. Christy, including Alternative Regimes for Marine Resources Underlying the High Seas, 1 NAT. RES. LAWYER (No. 2) 63 (1968), A Social Scientist Writes on Economic Criteria for Rules Governing Exploitation of Deep Sea Minerals, 2 INT'L LAWYER 224 (1968), Marigeneous Minerals: Wealth, Regimes, and Factors of Decision, in SYMPOSIUM ON THE INTERNATIONAL REGIME OF THE SEA-BED at 113 (Sztucki ed. 1970) and Economic Problems and Prospects for Exploitation of the Resources of the Sea-Bed and its Subsoil, supra note 38a.

184. Our Nation and the Sea, supra note 101, at 137.
than would be the case under the existing regime governing the United States' outer continental shelf. In fact, just such a system has been suggested by representatives of the United States Geological Survey through a "four-stage" system for acquisition of rights to exploit hard mineral resources. Stage one would consist of a non-exclusive exploration permit to be issued pursuant to Section 11 of the Outer Continental Shelf Lands Act; stage two would consist of competitive bidding for leases providing exclusive rights for exploration; stage three would consist of the lessee exercising his right to convert from an exploratory lease to a development lease; and stage four would consist of the issuance of a mining production lease. According to its proponents, the system could be effected under present Outer Continental Shelf Lands Act provisions and thus has the dual virtue of achieving the desired economic and resource objectives while not requiring new legislation or extensive amendment of existing legislation.

3. The International Seabed Area Beyond the Trusteeship Area.

Three separate sections of the Draft Convention are applicable to this area: (1) Chapter II of the text of the Convention, which sets forth general rules applicable to the entire International Seabed Area, (2) Appendix A, setting forth terms and procedures applying to all licenses in the International Seabed Area, and (3) Appendix B specifying terms and procedures applying to licenses in the International Trusteeship Area, beyond the International Trusteeship Area. It should be noted that items (1) and (2) above relate to the Trusteeship Area as well as the area beyond and that in establishing the regime of its choice the Trustee Party must not contravene any of these provisions.

Section 1.1 of Appendix A provides that all exploration and exploitation operations "which have as their principal or ultimate purpose the discovery or appraisal, and exploitation, of mineral deposits" are to be licensed. Presumably the qualifying language "and exploitation" would exclude scientific research from the requirement of licensing, and indeed, Article 24 of the Draft Convention provides that each party to the Convention agrees to "en-

---

courage, and obviate interference with, scientific research.” In ad-
dition, that article requires contracting parties to “promote inter-
national cooperation and scientific research concerning the Inter-
national Seabed Area” through various means. 185

Two categories of licenses may be issued as provided in Appen-
dix A: (1) a non-exclusive exploration license authorizing geo-
physical and geo-chemical measurements, and bottom sampling,
which license is not restricted as to an area but which grants ne-
ither an exclusive right to exploration nor any preferential right in
applying for an exploitation license (such exploration licenses are
to be issued for two year terms and are renewable for successive
two year periods); (2) exclusive exploitation licenses authorizing
the exploration and exploitation of specified minerals in a design-
nated area. Exploitation licenses include the exclusive right to un-
dertake deep drilling operations which right (with one exception
to be noted later) can be granted only under an exploitation li-
cense. Exploitation licenses are issued for limited terms and expire
at the end of fifteen years if no commercial production is achieved.

Minerals are broken down into three categories in Section 5.1 of
Appendix A for specifications in exploitation licenses, category
one including fluids or minerals extracted in a fluid state, category
two including manganese-nodules and other surficial deposits, and
category three including other minerals (including manganese-oxide
nodules) occurring beneath the surface of the seabed, and metallic-
ferous muds.

There is a third form of “quasi-license” consisting of an authoriza-
tion for deep drilling for purposes other than exploration or ex-
ploration of seabed minerals (that is, for scientific purposes). 186

Individuals or companies are not permitted to acquire licenses di-
rectly from the Authority but must be authorized (referring to “a
Contracting Party authorizing any activity in the International Sea-
bed Area, including a Trustee Party issuing exploration or exploi-

185. It is the view of the State Department that the Draft Convention
provisions would completely free the Trusteeship Area for scientific re-
search: “The coastal nation would not be entitled to impose any restrictions
on scientific research in the trusteeship area.” Rogers’ Answers, supra
note 114 at 467 (answer to Question No. 21) (Emphasis added). Presumably
this means that even the consent of the coastal state would not have to be
secured in advance as is now the case under the Convention on the Con-
tinental Shelf (supra note 2, Art. 5(8)). This is, of course, a situation
highly desired by the international scientific community. See Burke, Ma-
rine Science Research and International Law, Occasional Paper No. 8, Law
of the Sea Institute, University of Rhode Island (Sept., 1970), especially
23-25.

186. Draft Convention, supra note 6, Appendix A, see Sec. 1.4.
tation licenses”\textsuperscript{187} or sponsored (referring to “a Contracting Party which sponsors an application for a license or permit before the International Seabed Resource Authority”\textsuperscript{188}) by a state party to the Convention, which State is required to certify to the operator’s financial and technical competence and which is responsible for requiring the operator to conform to the rules, provisions, and procedures set forth under the terms of the license issued. Fees are payable for both exploration and exploitation licenses, a portion of which (again, 50-66\textsuperscript{2}/3\% is suggested) is to be forwarded by the Authorizing or Sponsoring Party to the Authority.

The maximum size of blocks under an exploitation license is to be 500 square kilometers for fluids or minerals extracted in a fluid state, three quarters of which area must be relinquished when production is commenced.\textsuperscript{189} A license may be issued for any area less than the maximum 500 square kilometer area. Each block must be the subject of a separate license, but licenses to a rectangle containing as many as 16 contiguous blocks may be taken out under a single certificate. This same maximum area is also applicable to the “other minerals” category but the relinquishment factor there is seven-eighths of the total area of the block upon commencement of production and exploitation licenses may be taken only to as many as eight contiguous blocks under a single certificate. For surficial deposits, the maximum block size is 40,000 square kilometers, to be reduced by three-quarters at the commencement of production. Licenses to only as many as four contiguous blocks may be taken out under a single certificate. Section 5.8 provides that “commercial production shall be deemed to have commenced or to be maintained when the value at the site of minerals exploited is not less than $100,000.00 per annum.” Detailed rental fees and work requirements are also specified in Appendix A as well as provisions relating to submission of work plans and data under exploitation licenses prior to the commencement of commercial production; production plans and producing operations; unit operations; payments on production plans and producing operations; unit operations; payments on production (specified as being equivalent to five to forty

\textsuperscript{187} Id., Art. 75(4).
\textsuperscript{188} Id., Art. 75(3).
\textsuperscript{189} Relinquishment does not apply to licenses issued for areas of one-quarter of a block or less. \textit{Draft Convention}, Appendix A, Sec. 5.3.
percent of the gross value at the site of oil and gas, and two to twenty percent of the gross value at the site of other minerals); graduation of payments according to environment and other factors; liability and revocation.

For the area seaward of the International Trusteeship Area the disposition rules are set forth in Appendix B. This procedure requires an applicant for an exploitation license to file a “notice of intent to apply for a license”\textsuperscript{1} accompanied by evidence of the deposit of the license fee, which notice of intent reserves the block specified for 180 days (notices of intent are not renewable). If only one notice of intent has been received for a particular block at the opening of such sealed notices, the applicant is granted a license in accordance with the general terms of the Convention without further payment. If, however, more than one notice of intent is received at the same opening, notice is given to all such applicants and their Sponsoring Parties, and, 180 days later, sealed bids to be submitted on a cash bonus basis will be opened. Bidding is limited to the original applicants whose applications were received during the 180 day period following the filing of the first notice of intent. The term of the licenses in the area beyond the Trusteeship Area, assuming commercial production is achieved within fifteen years of the issuance of the license, is for a term of twenty years renewable for one additional twenty year period on approval of the Sponsoring Party. At the end of the forty year term, or earlier if the license is voluntarily relinquished or expires, the areas to which the license applied are to be offered for sale by competitive bidding on a cash bonus basis and the previous licensee has no preferential right to such area or any portion thereof. The provisions of Appendix B also contain details on work requirements and unit management.

Disclosure requirements are set forth in Appendix A governing all International Seabed Area activities and require that licensees (1) maintain records of drill logs, geophysical data and other data acquired in the area to which their license applies and (2) must provide access to them to the Authorizing or Sponsoring Party on request.\textsuperscript{1} Further, at five year intervals or upon relinquishment of rights to an area, operators must transmit to the Authorizing or

\textsuperscript{1} Such notices of intent may be filed directly with the Authority without the necessity of securing a Sponsoring Party. However, when the formal application for a license is made, a Sponsoring Party is required and the notice of intent must be filed with the proposed Sponsoring Party at the same time as transmittal to the Authority. \textit{Draft Convention}, Appendix B, Sec. 3.2.

\textsuperscript{1} \textit{Draft Convention}, supra note 6, Appendix A., Sec. 7.3.
Sponsoring Party such “maps”, seismic sections, logs, assays, or reports,” as are specified in an Annex to be prepared by the Operations Commission. Authorizing or Sponsoring Parties are required to hold such data in confidence for ten years after receipt but are also required to make the data available upon request to the Authority for its confidential use in the inspection of operations. Ten years after receipt by the Authorizing or Sponsoring Party to such data, it is to be transmitted to the Authority and is to be made available by the Authority for public inspection.

There are substantial differences of opinion concerning the disclosure of such data, especially interpretations of geophysical data, and the value of such disclosure requirements. The oil and gas industry in the United States has strongly opposed disclosure requirements on the ground that such data, especially interpretation of geophysical data, constitute the work product and trade secret of the operator. Disclosure, the argument runs, could result in “competitive injury to the lessee.” Further, the operators question the usefulness of such interpretative data in evaluating resource potential since there may be as many interpretations for a given set of data as there are interpreters. Nonetheless, good arguments can be made, especially with respect to a new regime which can authorize the requisite staff and financial resources for such tasks from the outset, for maximum disclosure, and, indeed, this is more the rule than the exception when one reviews offshore mineral leasing administration systems around the world. It is, of course, highly desirable for the lessor or vendor of a resource to have at least as much knowledge about its value as the lessee or vendee, and until the United States Government or the Authority

182. Id., Appendix A, Sec. 7.4.
193. Id.
184. Id., Appendix A, Sec. 7.5. An additional disclosure requirement is contained in Appendix A, Sec. 1.4(e): “The applicant agrees to make available promptly the geologic information obtained from such [deep] drilling to the Authority and the public.” This requirement relates only to deep drilling for purposes other than exploration or exploitation, i.e., scientific research, conducted under a non-fee special drilling permit issued by the Authority and does not affect operating companies’ commercial deep drilling activities.
goes into the marine resource evaluation business it simply must rely principally on private sources for the data it needs in order to ensure the public that market value, or something approaching that elusive concept, is acquired for the disposition of the resource.  

It should be noted that following the Santa Barbara Channel incident, increased disclosure requirements were imposed on companies' operations under the Outer Continental Shelf Lands Act, and that there seems to be a general trend, for reasons of (1) environmental protection and (2) economic evaluation of potential resources, toward greater disclosure requirements.

The system of disposition applicable to the non-trustee portion of the International Seabed Area, and which I have suggested be made available also to the Trusteeship Area under United States trusteeship, is clearly designed to promote development of resources. This is evidenced primarily by the large areas opened for exploration and to be available under exclusive exploitation licenses. It has been determined that the larger the area involved (and the more capital available for exploration as well) the greater the chances of securing a return on investment. Further, the non-competitive situation where only a single notice of intent is filed permits acquisition of an exclusive exploitation license for a nominal license fee rather than a huge cash bonus of the type which companies operating on the United States continental shelf have become accustomed to bidding and paying. Obviously, such a developmentally oriented disposition system is advantageous where a principal objective of such system is the generation of energy sources. Clearly, this is a motive of the drafters of the Draft Convention, for, as will

196. As a result of the Santa Barbara Channel oil spill incident, and other factors, the United States Government is expanding substantially its efforts to evaluate offshore areas for mineral potential. Obviously, however, the government cannot commit the funds necessary to a detailed evaluation of a specific small tract (or large number of the same) as can be done by operating companies. Thus, disclosure requirements are necessary in order to close the "information gap" between the lessor and lessee. Although it would be absurd, under principles of free enterprise, to suggest that such be the case in a private transaction, we are here dealing with a public resource and with a government charged with proper administration thereof. Accordingly, operations on the continental shelf or slope are not and should not be conducted with the principal objective of maximizing net profits to the operators, but rather of maximizing net social return (bearing in mind the relationship between the two).

197. See, e.g., Harris and Euresty, A Preliminary Model for the Economic Appraisal of Regional Resources and Exploration Based Upon Geostatistical Analysis and Computer Simulation, 64 BULL. COLO. SCHOOL OF MINES (No. 3) 71 (1969) in which studies are reported concluding that: "[T]he risk of not finding a deposit is negligible for the exploration of 1 million square kilometers, .05 for 100,000 square kilometers, and about .5 for 10,000 square kilometers. Id. at 73.
be noted later, the providing of assistance to developing countries can be done in large part by providing them with an assured energy source. This is not to suggest that substantial revenues will not be generated for the Authority, however, since the relinquishment provisions will permit remunerative cash bonus bidding procedures where proven resources exist.

Finally, in both the Trusteeship Area as well as the area beyond, primary responsibility for policing activities conducted lies with the Authorizing or Sponsoring Party rather than the Authority. For instance, Article 11 of the Draft Convention provides that “[e]ach Contracting Party shall take appropriate measures to ensure that those conducting activities under its authority or sponsorship comply with this Convention” (para. 1); that each such party make it an offense “for those conducting activities under its authority or sponsorship in the International Seabed Area to violate the provisions of this Convention” (para. 2); that each such party “be responsible for maintaining public order on manned installations and equipment operated by those authorized or sponsored by it” (para. 3); and that each such party is “responsible for damages caused by activities which it authorizes or sponsors to any other Contracting Party or its nationals” (para. 4). Thus the Authority will rely, in large measure, on Contracting Parties for the day-to-day policing of activities in the International Seabed Area, entering this aspect of administration only when the Contracting Parties fail to carry out their Convention duties or obligations.

This, then, concludes the brief overview of the regimes applicable to the International Seabed Area. Attention will now be turned to two other facets of the proposed regime, revenue allocation and interim provisions.

E. Distribution of Revenue.

Appendix D to the Draft Convention contains provisions relating to the division of revenue to be derived from seabed exploitation activities. Section 1.1 limits disbursements to the net income of the Authority except during the period before the Authority acquires sufficient income for the payment of its own administrative expenses, in which case the Authority is authorized to borrow funds for the payment of such administrative expenses.198 The Council

198. Draft Convention, supra note 6, Art. 74(2).
is also charged with specifying in the budget to be submitted for approval by the Assembly what portion of the revenue is to be used for the payment of administrative expenses of the Authority. The operative provision of Appendix D is contained in Section 3.1 which provides that:

The net income, after administrative expenses, of the Authority shall be used to promote the economic advancement of developing States Parties to this Convention and for the purposes specified in paragraph 2 of Article 5 and in other Articles of this Convention.

There are thus two principal objects in the allocation of revenue: (1) economic assistance to developing states and (2) advancement of research and knowledge concerning exploitation of seabed resources.

Article 5(1) provides with respect to the first object of distribution that:

The International Seabed Resource Authority shall use revenues it derives from the exploration and exploitation of the mineral resources of the International Seabed Area for the benefit of all mankind, particularly to promote the economic advancement of developing States Parties to this Convention, irrespective of their geographic location. Payments to the Authority shall be established at levels designed to ensure that they make a continuing and substantial contribution to such economic advancement, bearing in mind the need to encourage investment in exploration and exploitation and to foster efficient development of mineral resources.

Section 3.2 of Appendix D provides further:

The portion to be devoted to economic advancement of developing states parties to this Convention shall be divided among the following international development organizations as follows: (NOTE a list of international and regional development organizations should be included here, indicating percentages assigned to each organization).

The intent of the framers of the Draft Convention would thus seem to be to provide indirect rather than direct subsidies to developing states and, if this is so, a number of issues are raised. First, since Article 5(1) limits permissible recipients of Authority distributions to developing states who are also parties to the Convention, some problems may arise if the portion of income to be devoted to the economic advancement of developing states is to be channeled through international development organizations which are not bound by the provisions of the Convention. For example, if the Inter-American Development Bank were to be recipient of some portion of these funds and if Chile were not a party to the conven-

199. Id., Appendix D, § 2.1.
200. See Agreement Establishing the Inter-American Development
tion, it might be inconsistent with the purposes and principles of the Inter-American Bank to exclude Chile or Chilean nationals from the benefits which could be theirs under normal distribution of Bank funds. On the other hand, it would unduly burden the Authority to make direct grants to developing states or their nationals, a function already well performed by international and regional development agencies now in existence. The solution would seem to require only that the international development agencies understand clearly that distributions from allocations made by the Authority must benefit only states or nationals of states which are parties to the Convention and ensure that no institutional barriers to this policy are allowed to exist.

Second, and on a positive note, it seems clear that such a form of distribution would provide a sounder avenue for raising the economic and industrial status of developing countries than the present system of competing distributions by major economic powers, principally the United States and the Soviet Union. Presumably, the funds distributed by the Authority would contain no strings, and carry no political or ideological overtones, such as must always be the case with grants from either of the two super powers (regardless of protestations to the contrary). Further, this system should alleviate some of the strain placed on the economies of the super powers since the goal of raising the level of industrial production in developing countries should now be achieved at the same point in time with less demand on the United States and the Soviet Union than would be the case without the seabed regime. This presumes, of course, that substantial revenues are generated for disbursement by the Authority.

The second form of net income distribution is specified in Article 5(2) which provides that:

A portion of these reveues shall be used, through or in cooperation with other international or regional organizations, to promote efficient, safe and economic exploitation of mineral resources of the seabed; to promote research on means to protect the marine environment; to advance other international efforts designed to pro-


201. It should be noted with respect to the Inter-American Development Bank, however, that the Bank's loan authority is discretionary in that it “may make or guarantee loans to any member.” Id., Art. 3, § 4.
mote safe and efficient use of the marine environment; to promote
development of knowledge of the International Seabed Area; and to
provide technical assistance to Contracting Parties or their na-
tionals for these purposes, without discrimination.

As noted above, it is the duty of the Council to submit to the As-
sembly proposals for the allocation of the income of the Authority
and it will be incumbent upon the Council to determine which ave-
uue of distribution, Article 5(1) or Article 5(2), or in what percen-
tages, will reap the greatest benefit for mankind. This will be no
easy decision. Secretary of State Rogers suggested that:

The promotion of the economic advancement of developing coun-
tries would clearly constitute a priority use for such funds, not only
because this represents one of the most important common objec-
tives of all nations interested in peace and stability, but also to as-
sure that states which may not themselves have the technological
capability or geographic position enabling them to derive direct
benefits from the exploitation of such resources will in fact receive
such benefits.202

Notwithstanding these laudable objectives, I would suggest at the
outset that greater emphasis should be given to Article 5(2) uses
since this should help to accelerate the pace at which substantial
amounts of revenue will be generated from the seabed and thus,
in the long run, maximize the amount of net income available for
distribution for Article 5(1) purposes.

The revenue distribution provisions of the Draft Convention cer-
tainly raise some critical questions of political feasibility. Since
there is no veto in the Council and since at least three of the "big
six" states will be required to block affirmative action concerning
allocation of net income of the Authority, neither the United States
nor the Soviet Union can be absolutely assured of distributions
which promote their own national policies. The use of the veto
power in the United Nations Security Council has, of course, per-
mitted both the United States and the Soviet Union to use the
United Nations as a forum for promotion of the national interests
of their respective states.203 Certainly it is desirable to avoid the

202. Rogers' Answers, supra note 114 at 464 (answer to Question No. 3).
203. See, e.g., Walton, After Many a Summer Dies the Majority, Satur-
day Review Magazine, June 27, 1970, at 19, suggesting that the U.S. and the
U.S.S.R. support the United Nations only at such times, respectively, as
they command sufficient allegiance from other members to control policy
decisions made by the Security Council or the General Assembly. It is
becoming clear now, particularly as evidenced by the attitudes and voting
patterns of the less developed countries on the seabed question, that neither
super power commands such an advantage. Certainly that should be the
case in any seabed regime adopted, provided however that sufficient con-
trol rests in a consortium of developed nations to ensure effective and effi-
cient exploitation of the resources involved considering that they are the
type of ineffectiveness created in Security Council operations by the veto power, and the "big six" approach seems to be a suitable compromise. However, in view of the fact that the remaining four of the "big six" are likely to be Japan, Germany, France, and the United Kingdom, neither the United States nor the Soviet Union can be assured of lining up two of those four states on a regular basis. If anything, the lineup favors United States policy but with recent developments in French foreign policy and the efforts of Chancellor Brandt to bring about reconciliation between West Germany and Eastern Europe, not to mention pressures being placed on Japan to abandon the United States as a military ally, there is certainly no guarantee that the "big six" of the Council would be an easily manipulated body. This, of course, is all to the good, but precisely the lack of manipulative guarantees may cause certain interest groups in both the United States and the Soviet Union to urge their states not to become parties to the Convention should it be adopted in the form proposed. Obviously, without the participation of virtually all major technological powers and broad shelf states, the Convention will be of dubious value. Such political questions can and should be analyzed in great detail by political scientists between now and the time of the 1973 conference.

Perhaps the single strongest issue raised against the revenue distribution provisions of the Draft Convention is that it constitutes a "give away" of national resources. This is a doubtful assertion at best and it can be demonstrated that no vested national interest is being "given away" or even traded for other rights or advantages. The Convention on the Continental Shelf, to which the United States is a party, defines the portion of seabed and subsoil in which contracting states have exclusive mineral resource exploitation rights as extending to the 200 meter isobath "or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." Since no commercial production of non-living resources exists at present beyond the 200 meter isobath, and since the mere granting of ex-

---

204. See supra section II.C.
205. See, e.g., Ely Statement, S.3970 Hearings, supra note 66.
206a. Living resources considered by at least some to fall within the repository of the technicological know-how which makes such exploitation, and the revenues derived therefrom, possible.
ploration permits alone could not conceivably meet the "exploita-
bility" criterion of the Convention on the Continental Shelf.\textsuperscript{206b} 
no interest in seabed resources beyond the 200 meter isobath has as 
yet vested in any state party to the Continental Shelf Convention, 
including the United States. At best such interest is an inchoate 
right, in the nature of an inheritance, to vest on occurrence of a 
condition. In fact, the position of many groups, including the 
American Bar Association, is not that any such interest has vested 
in the United States but rather that this Nation should stand on its 
rights to acquire these interests under the exploitability criterion 
of the Convention on the Continental Shelf rather than acceding 
to an international regime such as that proposed in the Draft Con-
vention. Thus the United States, in agreeing to the regime pro-
posed in the Draft Convention, is simply exchanging an inchoate 
right for a definite, present interest and could in no sense be said 
to be "giving away" a \textit{vested} National resource. The decision of 
the International Court of Justice in the North Sea Continental 
Shelf Cases\textsuperscript{207} is often cited as authority for the proposition that a 
coastal state's interest in seabed resources extends at present to 
the edge of the continental margin by interpreting the notion of 

\textit{"sedentary species"} classification of the Convention on the Continental 
Shelf are exploited beyond the 200 meter isobath (see Christy, \textit{Economic 
Problems and Prospects for Exploitation of the Resources of the Sea-Bed 
and Its Subsoil}, supra note 38a.) The exploitability test has never been 
successfully interpreted, however, and it is arguable that the extension of 
jurisdiction based on that test should be on a resource by resource basis, 
i.e., extension for oil and gas purposes to be determined only by exploit-
ability of oil and gas, rather than oysters. It is upon such a premise that 
I here assert lack of jurisdiction under the Convention on the Continental 
Shelf beyond the 200 meter isobath.

206b. "Conceivably" is, admittedly, a strong word considering the lack 
of agreement on exactly what meets the "admits of exploitability" test. 
Clearly, actual exploitation is not required since this would render the 
definition absurd (exploitation could not be attempted until exploitation 
was achieved). However, "admits of exploitability" obviously means some-
thing more than the reflections of a petroleum geologist on the possibili-
ties of commercial oil operations in particular water depths. Whether it 
means something more than the granting of leases by the coastal state be-
yond the 200 meter isobath is debatable. \textit{See}, e.g., \textit{Miron, The Outer Con-
tinental Shelf—Managing (or Mismanaging) its Resources}, 2 \textit{J. MARITIME 
L. \\& COMM.} 267, 268 (1970) describing the position of the Department of 
the Interior that United States jurisdiction extends at least to areas for 
which permits or leases have been granted in the past. I would suggest 
that the mere leasing of such areas alone does not meet the test of "admits 
of exploitability" since leases may be issued for a number of purposes (in-
cluding claims of jurisdiction which may or may not be later upheld) and 
may ultimately prove not to "admit of exploitation" (e.g., the only phos-
phate lease issued on the United States' outer continental shelf was aban-
doned when commercial feasibility could not be demonstrated).

207. \textit{Supra} note 64.
“natural prolongation” to include the entire continental margin, a not unreasonable assertion in view of the geological phenomena involved.208 This assertion overlooks two facts: (1) that the cited statement in that case is dicta, since the issue before the Court was not the seaward extent of the continental shelf but rather the determination of principles applicable to delimitation of lateral shelf boundaries between adjacent states; and (2) the proposition is stated to be a rule of customary international law from which derogation may be made by international agreement, an event which has in fact happened in the form of the Convention on the Continental Shelf.209 Thus, the United States is bound by the definition of Article 1 of that Convention, and may not rely on a customary rule of international law to the contrary, at least vis-a-vis other states parties to the Convention. Following this argument, one must then conclude that under the Convention on the Continental Shelf no vested National interest in seabed resources exists beyond the 200 meter isobath.

Assuming arguendo, however, a vested interest in resources to be made subject to the international regime by the Draft Convention, is the United States even then engaged in a great “give away” as urged by some? Certainly the trusteeship concept ensures that the resources beyond the 200 meter isobath will themselves be subject to national disposal both as to policy on exploitation (when, where, and by whom) and as to disposition once exploited. Thus the United States will lose neither control over nor use of the energy sources located in the area landward of the edge of the continental margin, the broadest claim of national jurisdiction asserted today by any reasonable interest group. Although no resources are being “given away,” the Draft Convention does require the states party thereto to pay a portion (the Draft Convention suggests 50%-66-2/3%) of payments (bonuses, license fees, royalties, etc.) received by it to the Authority for disposition in accordance with the provi-

208. See supra text accompanying note 64, and Jennings, The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North for Case Judgments, supra note 66.

209. This portion of the argument presumes, as is likely the case, that the customary international legal principle of the doctrine of the continental shelf is not a peremptory norm of international law from which no derogation is permitted. See Convention on the Law of Treaties, supra note 159, Art. 53.
sions of the Draft Convention. Operating companies are not affected economically since this merely reflects the ultimate recipient of the payments they are now, and would be under any regime adopted, obligated to make to the coastal state. The United States is in fact contracting away a portion of the revenues it receives from the Trusteeship Area, but will retain a sufficient amount so as not to be out of pocket for administrative expenses. Thus, still assuming some present vested interest in resources beyond the 200 meter isobath, the United States would be giving up only a right to receive a portion of revenues derived from operations conducted in the Trusteeship Area. But this is no “give away” for there is a significant _quid pro quo_. The United States will acquire benefits, both direct and indirect, far in excess of the payments it is required to make under the provisions of the Draft Convention. I have outlined such national benefits in the section of this paper entitled “Summary of Interests Served by the Draft Convention Regime,” and will not, therefore, set them forth here.

To conclude, then, the revenue disposition provisions of the Draft Convention (1) will require no relinquishment of control over the resources themselves by the coastal state, (2) will require no relinquishment of any presently vested interest, and (3) although some limited inchoate rights are being given up, sufficient _quid pro quo_ is received to make the bargain one in the national interest.

**F. The Transition Provisions.**

The provisions of the Draft Convention on transition²¹⁰ (i.e., the time interval between the present and the date the Convention enters into force) had its genesis in the speech by which Ambassador Pardo first raised the seabed question in the United Nations in August 1967.²¹¹ He expressed at that time the fear of his country that increased technological competence might result in a race to grab and hold the resources of the seabed, such an event being to the detriment not only of developing countries but all mankind. It has become increasingly clear over the past few years that many states did indeed view the absence of effective international control over extensions of maritime jurisdiction as creating an open season for extending claims of territorial sovereignty far into the ocean, beyond any generally accepted or economically rational limits. In addition, the ambiguous “exploitability” definition contained in Article 1 of the Convention on the Continental Shelf seemed to some

---

²¹⁰. *Draft Convention*, supra note 6, Art. 73.
²¹¹. *Supra* note 70.
an ideal peg upon which to hang extensive claims of jurisdiction over non-living seabed resources. Indeed, the United States Department of the Interior had, by 1970, issued leases in water depths far beyond 200 meters. It was to forestall advances into the ocean based not on rational economic principles but for political and industrial power purposes that many states supported the so-called moratorium resolution\textsuperscript{212} passed by the United Nations General Assembly in December 1969. As noted above, that resolution may have had exactly the opposite effect from that intended by its supporters. In any event, it was clear to the drafters of the Draft Convention that a real problem existed considering the normal time lag between the present and the date at which the Draft Convention is likely to come into force.

If the Convention should be adopted in mid-1973, and assuming it provides for 40 ratifications for entry into force including those of the most industrially advanced nations (as suggested by Secretary of State Rogers in his answers to questions propounded by the Senate Outer Continental Shelf Subcommittee),\textsuperscript{213} it could be 1980 or beyond before the Convention enters into force. The four law of the sea conventions adopted at Geneva in April 1958, required only 22 ratifications for entry into force. Such entry into force occurred in September 1964 for the Convention on the Territorial Sea and Contiguous Zone (6 years, plus), September 1962 for the Convention on the High Seas (4 years, plus), March 1966 for the Fishing Convention (8 years), and June 1964 for the Convention on the Continental Shelf (6 years, plus). Thus an average of six years expired before these international agreements became effective, the earliest being more than four years from the date of adoption. In response to the existence of this problem, President Nixon in his statement of May 23, 1970, outlined an “interim policy” in the following terms:

I suggest that all permits for exploration and exploitation of the seabeds beyond 200 meters be issued subject to the International Regime to be agreed upon. The regime should accordingly include due protection for the integrity of investments made in the interim period. A substantial portion of the revenues derived by a state from exploitation beyond 200 meters during this interim period should be turned over to an appropriate international development

\textsuperscript{212} Supra text accompanying and following note 95.
\textsuperscript{213} Rogers’ Answers, supra note 114 at 466 (answer to Question No. 14.)
agency for assistance to developing countries. I would plan to seek appropriate Congressional action to make such funds available as soon as a sufficient number of other states also indicate their willingness to join this interim policy.\textsuperscript{214}

The provisions of the Draft Convention on transition fall into two categories: (1) authorizations to exploit mineral resources given by contracting parties prior to July 1, 1970, and (2) such authorizations given after July 1, 1970. With respect to the former, the Convention provides that such authorizations are to be continued without change after the coming into force of the Convention provided that "[a]ctivities pursuant to such authorization shall, to the extent possible, be conducted in accordance with the provisions of this Convention."\textsuperscript{215} Further, \textit{new activities} conducted under previous authorizations begun after the entry into force of the Convention are to be subject to the regulatory provisions of the Convention concerning "the protection of human life and safety and of marine environment and the avoidance of unjustifiable interference with other uses of marine environment."\textsuperscript{216} Finally, contracting parties are obligated to "pay to the International Seabed Resource Authority, with respect to [pre-July 1, 1970] authorizations the production payments provided for under this Convention."\textsuperscript{217} The question must be asked whether or not the United States can accede to such a concept under present constitutional, statutory, and regulatory provisions affecting offshore mineral development. The "to the extent possible" qualifier of Article 73(2)(a), although not relieving the United States or its licensees operating beyond the 200 meter isobath from legal liability under the Convention, nonetheless greatly lessens the standard to be met. It is entirely possible that provisions of internal law could be asserted here as vitiating the obligation to conform to a particular rule or regulation ultimately embodied in a seabed convention, even though as a general principle of international law municipal law may not be asserted as a bar to performance of an international obligation. The determination of what is "possible", however, leaves a great deal of room for unilateral interpretation, and it seems unlikely that the provision would be strictly construed by a third party decision maker should the matter reach that stage of controversy. Thus, even though the specific provisions of the seabed convention ultimately to be agreed upon may not be known at the time such operations are taking place, an admittedly troublesome point, it is highly im-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{214} Nixon, \textit{United States Policy for the Seabed}, supra note 113, at 738.
\item \textsuperscript{215} Draft Convention, Art. 73 (2)(a).
\item \textsuperscript{216} Id., Art. 73 (2)(b).
\item \textsuperscript{217} Id., Art. 73 (2)(d).
\end{enumerate}
\end{footnotesize}
probable that any substantial liability would attach to operations licensed by the United States in its Trusteeship-Area-to-be. The situation is clearly different with respect to "new activities" conducted under previous authorizations. Such "new activities" would, I assume, include the drilling of new wells on existing oil and gas leases. However, here the new regime applicable is limited specifically to safety and multiple use considerations and it is likely that United States standards would be higher in any event than those requirements specified in the seabed convention. Nonetheless, the United States would, under the Fifth Amendment to the Constitution, have to make compensatory payments to its lessees if the additionally imposed obligations required expenditures not required or requireable by United States law. On the other hand, it is within the power of the United States Government, and specifically, the Secretary of the Interior, to prescribe new regulations concerning offshore operations, and it would be possible to encompass the safety and multiple use concepts of the Draft Convention in new regulations prior to any operations authorization beyond 200 meters, to the extent they were not already incorporated in domestic law or regulations.

Finally, the revenue payment provisions of the pre-July 1, 1970 Draft Convention transition provisions raise some substantial problems. In the absence of an in-force seabed regime, and assuming exploitation activities conducted beyond 200 meters pursuant to the Outer Continental Shelf Lands Act and the Convention on the Continental Shelf, the United States would be obligated to make payments to the Authority which otherwise would have been made to the Treasury of the United States. Once the Draft Convention enters into force, no amendment of the Outer Continental Shelf Lands Act would be required to effect this changeover in payee since the Act is applicable only to:

[A]ll submerged lands lying seaward and outside of the area of lands beneath navigable water [granted to the states by the Submerged Lands Act], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

Since Articles 1 and 2 of the Draft Convention would effectively

218. Outer Continental Shelf Lands Act, supra note 116, Sec. 1338.
219. Id., section 1331(a).
remove any right or claim of appurtenance to the United States of areas of seabed beyond the 200 meter isobath boundary the payment provisions of Article 9 of the Outer Continental Shelf Lands Act would no longer be applicable to the beyond 200 meter isobath area.220 On the other hand, until such time as the seabed convention enters into force for the United States, the Convention on the Continental Shelf and the Outer Continental Shelf Lands Act still dictate payment of revenues to the United States Treasury. Accordingly, an amendment of the Shelf Act would be required in order to reflect the policy decision to make interim payments to some international development agency or agencies. It is, in fact, the Administration's position that Congressional approval would be necessary for such interim payments and that the Administration would not seek such Congressional approval in the first place unless it was assured that a satisfactory number of other countries would agree to do likewise.221

As to post-July 1, 1970, authorizations (but pre-entry into force of the seabed convention) the Contracting Party must, notwithstanding prior issuance of a valid license or lease, acquire, or sponsor its licensee in acquiring, new licenses pursuant to the Draft Convention provisions.222 Although the Draft Convention notes that such new licenses issued by a Trustee Party "shall include the same terms and conditions as the previous authorization," it also provides that such licenses are not to be inconsistent with the Convention and that the Trustee Party itself is responsible for complying with increased obligations.223 Obviously, this will require a commitment on the part of the United States Government to subsidize any of its licensees to the extent that the obligations imposed by the Draft Convention are greater than those imposed by the United States under the Outer Continental Shelf Lands Act in areas seaward of the 200 meter isobath boundary.224 The Draft Convention also provides that "[f]ive years after entry into force

220. However, in view of the vague and history shrouded nature of the terms "jurisdiction and control," taken in conjunction with the rights of the Trustee Parties in the Trusteeship Area, it would be advisable to amend section 1331(a) of the Act to reflect the new limitation on offshore lands subject to United States jurisdiction.

221. Stevenson Testimony, supra note 97 at 447.

222. Draft Convention, Art. 73(3).

223. Id.

224. Secretary of State Rogers correctly observed that "[u]ntil a new Convention enters into force, our authority [for issuing leases beyond the 200 meter isobath] would be based on the 1958 Geneva Convention on the Continental Shelf and applicable principles of international law." Rogers' Answers, supra note 114 at 465 (answer to Question No. 8).
of this Convention all such [post-July 1, 1970] authorizations not converted into new licenses . . . shall be null and void."225 Should this occur the United States Government would likely be liable to its licensees for compensation at such time as the licenses were declared null and void by the Authority because the United States would be internationally bound by the provisions of the Convention and could not, under rules of international law, assert a provision of municipal law (the Fifth Amendment, e.g.) as a bar to fulfillment of an international obligation.226 The Draft Convention recognizes this problem noting that:

Any contracting party that has authorized activities within the International Seabed Area after July 1, 1970, but before this Convention has entered into force for such party, shall compensate its licensees for any investment losses resulting from the application of this Convention.227

Some criticism has already been made of the transition provisions. For instance, the Allott-Jackson-Metcalf-Bellmon letter of July 21, 1970, to Secretary of State Rogers observed that:

Article 73 would purport instantaneously to bind the Secretary of the Interior in his administration of the Outer Continental Shelf Lands Act to impose such grievously uncertain conditions on Outer Shelf Leases issued after July 1, 1970, beyond a depth of 200 meters, so as to ensure a virtual moratorium on all such leasing. No company could safely agree to entering into a lease under such uncertain conditions. Further in this regard, it is argued that only by an amendment of the Outer Continental Shelf Lands Act that such a restriction be placed on the Secretary of the Interior with respect to his present administration of outer shelf lands.

Two comments are in order with respect to the position of those senators. First, it is highly questionable whether the conditions to be imposed are so "grievously uncertain" or that imposition of

225. Draft Convention, Art. 73(5). If current conservative estimates of expected commercial mining activities beyond the 200 meter isobath are accurate (see, e.g., Christy, Economic Problems and Prospects for Exploitation of the Resources of the Sea-Bed and its Subsoil, supra note 38a), the "transition" problem may be more academic than real. On this basis one can make a de minimus argument in response to assertions of difficulty with the concepts outlined in the Draft Convention on transition; this would not, however, be a satisfactory answer if the result were to substantially discourage investment in the seabed area beyond the 200 meter isobath.


227. Draft Convention, supra note 6, Art. 73(6).
those conditions would ensure a “virtual moratorium on all such leasing.” In the first place, it is highly probable that the conditions to be imposed will ultimately turn out to be quite close to those posed in the Draft Convention. Secondly, the United States Government must, under its constitutional obligation imposed by the Fifth Amendment to the Constitution, stand behind its licensees and compensate them for any additional obligations. This being the case, the companies involved in offshore mining have an extremely stable and well financed guarantor, and there is no reason why they should be hesitant to move beyond the 200 meter isobath so long as the Fifth Amendment remains unamended. Further, there is simply no method to ensure maximization of the area under an international regime and at the same time not prevent exploration for the next seven or eight years other than that proposed in the Draft Convention. Finally, as noted in the May 23, 1970, Presidential speech, the decision has been made at the Presidential level to condition all further permits or licenses granted by the United States on offshore areas beyond 200 meters and also outside the 12 mile limit as being subject to the international regime to be adopted. In fact, this has already occurred in the case of an exploration permit granted to Deepsea Ventures, Inc. for its manganese nodule investigations on the Blake Plateau off the southeastern coast of the United States.

On the Senators' second point, it seems on the contrary clear that an amendment of the Outer Continental Shelf Lands Act will not be required in order to impose such conditions on licensees but that such conditions could be imposed through the Secretary of In-

228. This assumes that agreement will be reached at the 1973 conference on 12 miles as the width of the territorial sea. See the United States proposal to this effect in Stevenson, International Law and the Oceans, supra note 60. This has substantial relevance for the United States since several of the Santa Barbara Channel leases, portions of which are in water depths in excess of 200 meters, are actually within the 12 mile limit and thus, under the package of agreements expected to come out of the 1973 Conference, would remain under the exclusive and absolute jurisdiction of the United States.

228a. OCS Permit E 3-70 (letter of June 29, 1970 from H.A. DuPont [Regional Oil and Gas Supervisor (Eastern Region), U.S. Geological Survey, Department of the Interior] to J.E. Flipse [President, Deepsea Ventures, Inc.]. The final paragraph of that permit provides:

In accordance with the policy statement of the President dated May 23, 1970, exploration permits issued pursuant to Section 11 of the Outer Continental Shelf Lands Act of 1953 pertaining to areas of the seabed beyond the depth of 200 meters are subject to the provisions of any future treaty, regarding the exploration and exploitation of the natural resources of these areas, to which the United States is a party. Accordingly, this permit is subject to the policy conditions incorporated in that statement.
terior's discretionary power to promulgate regulations with respect to outer continental shelf operations. Assuming that the Act continues to apply to operations beyond the 200 meter isobath during the interim period, the Secretary of the Interior has discretionary power to:

> [A]dminister the provisions of this Act relating to the leasing of the outer continental shelf, and [to] prescribe such rules and regulations as may be necessary to carry out such provisions.\(^{229}\)

There would seem to be no impediment to the Secretary's promulgating a regulation requiring all permits and leases to be conditioned subject to the international regime to be agreed upon subsequently. Apparently, it was not felt necessary to take even this step, however, as evidenced by the conditioning of the Deepsea Ventures exploration permit.

In conclusion, the expected time lag between proposal and entry into force of an implementing convention dictates that some interim measures be adopted in order to avoid frustration of the effort. Further, some good faith indication on the part of major technological powers is appropriate in view of the skepticism with which the Draft Convention has been viewed by some developing countries. The proposed interim system provides an adequate response to both these situations and would, therefore, seem to be in the best national interest.

IV. INTERESTS SERVED BY THE DRAFT CONVENTION

Any proposed regime and attendant machinery to govern the exploitation of non-living resources of the seabed beyond the limits of national jurisdiction must ultimately be examined in light of the interests which it will serve. On the one hand, if the proper national, international, and industrial interests are not well served by the Draft Convention, the document has little chance of ripening into a binding international agreement. If, on the other hand, it does serve such interests, then there is every likelihood that the 1973 Conference will produce an agreement not dissimilar to it. It is, therefore, of importance to examine, however cursorily, the national, international, and industrial interests which would be served by an international agreement containing provisions identical to or

\(^{229}\) Outer Continental Shelf Lands Act, supra note 116, sec. 5.
similar to those set forth in the Draft Convention. I suggest that in balance the Draft Convention is in the national interest, in the interest of the international community, and in the interest of the hydrocarbon, natural gas, and hard mining mineral industries.

A. THE NATIONAL INTEREST.

First, the revenue distribution provisions of the Draft Convention will, assuming adequate income, assist in closing the gap between the developed and the less developed countries of the world. This is very much in the interest of the United States, for several reasons. It is our present policy to provide direct subsidies to developing countries in order to attempt to raise their economic and industrial bases. The revenue distribution provisions of the Draft Convention are, therefore, consistent with present United States foreign policy with respect to foreign aid and would, indeed, reduce the economic burden which we now bear in that regard. It should be noted, however, that the proposed system of revenue disposition is not viewed by the State Department as a part of the United States foreign aid program per se:

The provision for the collection of revenues for international community purposes is not designed either as a foreign aid system or as a substitute or supplement to a foreign aid system. It is designed to assure that funds will be available for international community purposes as a result of the exploitation of resources which would be regarded as the common heritage of all mankind. . . . The system of international revenues is regarded as an integral part of a general international settlement regarding rights and responsibilities in the seabeds, and is not a system of grants, gifts, or other forms of foreign aid.230

In spite of this protestation, one cannot in all reality divorce the increased revenues to be made available by the Authority for assistance to developing countries from the quantity of United States foreign aid to those same countries necessary to achieve the desired political stability and rate of economic growth. Undersecretary Richardson himself observed on this point that the Nixon Administration believes that "we should be moving progressively over time in the direction of greater reliance on multilateral bodies in the field of economic development and assistance."231 Further, economic disparity has throughout history been the source of great trouble for mankind. It has been noted that "[t]he history of man is the record of a hungry creature in search of food."232 Since the

230. Rogers' Answers, supra note 114 at 464 (answer to Question No. 3).
231. Richardson Statement, supra note 97, at 447.
The history of man has also been the record of a creature constantly at war, it is not unreasonable to suggest that the closing of the economic gap may do much to strike at the roots of the causes of war and thus serve the national interest in bringing about world peace. Finally, the United States is the world leader as a producer of goods and services and certainly has the capacity to expand this capability. It is, therefore, in the interest of industrial growth in the United States to raise the economic and industrial levels of developing countries so that they might also be markets for our products and services.

Second, the framework envisioned will bring about order and stability in the oceans with respect to resource activities. It may also serve as a model for further international cooperation, a goal suggested by Elizabeth Mann Borgese. To refer again to Under Secretary Richardson's testimony on the Nixon Proposal:

> If we have no treaty governing the right of exploration and exploitation of the continental margin, we can anticipate a situation in which coastal states progressively, over time, [claim] unilaterally wider and wider areas of exclusive control not subject to any international regulation or limitation.

Certain disorder and conflict will follow if no regime at all is adopted and the resources are subject to appropriation by the first to reduce them to possession. This is, of course, the situation at present with respect to international fisheries, and no one is prepared to say that the existing system is adequate or has not resulted in numerous and serious national conflicts. Such a so-called “flag nation” system for exploiting the resources of the seabed also suffers from other defects, specifically the lack of security of investment, lack of dispute resolving mechanisms, lack of adequate safeguards for the environment, and a lack of benefit sharing by all nations of the world.

---


234. Richardson Statement, supra note 97 at 441.

234a. The most general weakness of the “flag-nation” proposal, however, is that it would reduce non-living seabed resources to essentially a “common property resource” status as is presently the case with demersal and pelagic fisheries. It is the inability in such a system to allocate rights, limit entry, derive rent, and the like that makes the fishery industry an uneconomic one. There would seem to be no excuse for imposing such a “common property” system on a resource not normally or naturally requir-
Third, adoption of the Draft Convention, sponsored as it was by the United States, will greatly improve the U. S. posture (or profile) in world affairs, a posture which is at an exceedingly low level at the present time. It is difficult to convince many of the less developed countries and, indeed, even some of our economically developed allies, of our good intentions with respect to mankind and world order when we are embroiled in the Southeast Asia fiasco, an almost unreasoning ideological warfare with the Soviet Union, an intransigent position toward Communist China, and a general military involvement in practically every area of the world. Here, then, is an opportunity for the United States to go on record as genuinely supporting the advancement of developing peoples and indicating an unselfishness in managing the abundant resources which are ours. Although I have suggested elsewhere that the United States is not engaging in a "give away" of any dimension in accepting a regime such as that proposed in the Draft Convention, nonetheless the United States has sufficient resources to be quite generous with respect to these unappropriated resources of submerged lands. Since the Draft Convention does not require us to relinquish administrative control out to the edge of the continental margins, there seems to be little reason why we should not be willing to give up (if, indeed, we have a vested right thereto at all) a share of potential income from the area beyond 200 meters if there is a strong probability that this will reap benefits such as enhanced prestige and creditability in the international community.

Fourth, the development oriented provisions of the Draft Convention with respect to resource disposition should encourage exploration and production of seabed resources, thus ensuring a long term supply of energy fuels for the Nation.

Fifth, it is clear that the United States is increasingly concerned, from a military strategy standpoint, about the unilateral extension of territorial claims into the ocean. Such claims have the poten-

---


tial for obstructing free passage through international straits as well as affecting the deployment of conventional military devices on the seabed. The Draft Convention would limit exercise of exclusive coastal state jurisdiction for other than mineral exploitation purposes to the twelve mile limit, since under both the Convention on the Continental Shelf (to the 200 meter isobath) and the Draft Convention (to the continental margin boundary) exclusivity is permitted only with respect to the exploitation of seabed resources and would not, therefore, act as a bar to other uses. The basis for this assertion with respect to the Draft Convention is Article 3 which provides that “[t]he International Seabed Area shall be open to use by all States, without discrimination, except as otherwise provided in this Convention.” The Convention provides “otherwise” only with respect to exploration and exploitation of certain natural resources, presumably leaving all other uses to be covered by the “open to use by all States” proviso of Article 3.234c

These, then, are some of the National interests served well by the regime proposed in the Draft Convention. It would not suffice, however, simply to establish a regime beneficial to technologically advanced states if there were not concomitant advantages for the international community as a whole.

B. INTERNATIONAL INTERESTS.

There are a number of interests of the international community at large which will be served by the Draft Convention and which should help ensure its adoption at the 1973 conference. Some of these are coincident with the National interests noted above, particularly the establishment of world order with respect to the oceans and the exploitation of seabed resources, and the additional revenue to be generated for the general support of developing countries. Both of these elements have been discussed and will not be repeated here. On the revenue distribution advantage, however, a question

234c. See also Draft U.N. Convention on the International Seabed Area: U.S. Working Paper Submitted to U.N. Seabeds Committee, supra note 6, at 210:

The rights of states to conduct activities other than exploration and exploitation of natural resources in the International Trusteeship Area and beyond would be expressly protected by the convention, and the International Seabed Resource Authority would be empowered to adopt the additional rules necessary to protect these other uses of the marine environment.
may be raised at this point why a developing country would be willing to settle for one-half to two-thirds of the revenue derived from exploitation of resources from world shelves beyond the 200 meter isobath when, by extending exclusive jurisdiction over its shelf out to the edge of the continental margin, or beyond, it could have all of the revenue derived from that area. The answer is to be found in a quantification of values, admittedly a difficult proposition at this time. However, it should be noted that not all developing countries are coastal states, and not all of those that are coastal states have any guarantee that abundant resources lie off their own coasts. It therefore seems that the greater probability of income to developing states would be to take less than all of the revenue derived from exploitation of resources in continental shelf and slope areas where resources are known to exist as opposed to gambling on possible production off their own coasts. Further, even if developing or other states took the position that it was more desirable to have all the revenues from extension of their own shelf and slope areas, it is highly doubtful whether they could secure a two-thirds majority necessary to adopt such a proposition at the 1973 Conference.

Beyond these reasons there are other significant advantages to the international community.

First, the system proposed in the Draft Convention would guarantee access to and control over disposition of the energy resources of submerged lands out to the edge of the continental margin. These energy sources must be tapped and made available to the respective developing countries if a substantial increase in industrialization is to occur there. A system which would permit an international authority to have control over the ultimate destination of raw materials beyond the 200 meter isobath would not be acceptable to less developed, or for that matter industrially advanced, nations for the simple reason that it would limit the resources available exclusively to that state. The Draft Convention, however, guarantees the requisite access and control, and therefore assists in lessening the economic gap between rich and poor countries.

Second, another advantage for a significant portion of the international community was expressed by Legal Adviser Stevenson in these words:

Maritime states' interest in freedom of navigation and other freedoms of the seas would be served by the limitation of coastal state sovereign rights over the seabed to the point where the high seas reach a depth of 200 meters. This will protect against the risk of coastal state sovereign rights with respect to the seabed beyond a depth of 200 meters expanding through the process of "creeping
jurisdiction" to include sovereignty over the waters above. Since all rights coastal states will have in the Trusteeship Area will be specifically delegated in the convention and not derived from any residual sovereignty, there will be no basis for expanding jurisdictional claims.235

Third, of great interest to the international scientific community is the concept of absolutely free access for scientific research in the entire International Seabed Area, a right conferred by the Draft Convention.236

Fourth, a distinct advantage to the international community comes through the use of Authority revenues for Article 5(2) purposes, i.e., promotion of development of knowledge and providing of technical assistance. It is only through transfer to less developed countries of the technological and managerial methodology with respect to seabed exploration activities that the third world can avoid a United States hegemony over seabed activities. If Servan-Schreiber is correct in his analysis of the "conquest" of Europe by American managerial talent,237 the same "conquest" can happen in the seas, either unilaterally or by a few technologically advanced states acting in concert, with the attendant long-term disadvantages for the remainder of the world. As Servan-Schreiber observes, it is pleasant to have capital infusion and increased productivity, but unpleasant to have to rely eternally in a subservient state on foreign "know-how" to maintain one's economy. Thus the regime proposed, whether intentionally or not, provides a remedy if the technology transfer also includes managerial methods and is designed to ensure ultimate self-sufficiency on the part of less developed nations in the conduct of seabed operations.

C. INDUSTRY INTERESTS.

Naturally, none of these benefits to the Nation and the world community can come about unless those industries technologically capable of exploiting hydrocarbons, natural gas, and hard minerals on and beneath the seabed are willing to engage in such activities under the regime proposed by the Draft Convention. I submit

235. Id.
236. Draft Convention, supra note 6, Art. 24; see Richardson Statement, Outer Continental Shelf Hearings, Part 2, at 450; and Burke, Marine Science Research and International Law, supra note 185.
237. SERVAN-SCHREIBER, THE AMERICAN CHALLENGE (1968), passim.
that the interests of industry are well served by the proposed regime.

First, the disposition provisions applicable to the non-trustee international area are quite developmentally oriented. As noted above, they provide almost unlimited exploration rights and permit extremely large areas to be retained for exploitation purposes until commercial production is achieved. In that sense, the Draft Convention is not unlike early mining laws of the United States which so greatly contributed to the mineral production and industrial and economic expansion of the United States during its frontier era. Obviously, the Authority will not acquire a great deal of income during these developmental stages and the industries which undertake these early exploration and exploitation activities will receive a great economic boon if their efforts are successful. This is not to suggest that the Authority is getting less than an adequate break, for the requirement of relinquishment of a portion of the area covered by exploitation licenses when commercial production is achieved permits the Authority to relicense that area on a competitive bidding basis if the production appears attractive. In the Trusteeship Area it is quite likely that most nations of the world (probably all except the United States) will apply regimes similar to that applicable in the non-trustee International Seabed Area for the exploitation of the resources thereof. In fact, most nations' offshore mining laws now conform to that general pattern. If in the United States the Outer Continental Shelf Lands Act is extended to cover the Trusteeship Area however, the interests of industry should still be served since industry representatives have indicated for a number of years, particularly to me and others connected with the Study of the Outer Continental Shelf Lands of the United States that they were well satisfied with the Outer Continental Shelf Lands Act and its administration and did not see it as a deterrent to further offshore exploration and exploitation activities.237a

Thus, under the proposed regime, the hydrocarbon industry particularly, and equally the hard mineral mining industry, should be able to inexpensively discover great new reserves and to produce substantial sources of energy from them.

Second, industry will be protected as never before from the threat

---

237a See, e.g., the remarks of Meyers, Acquisition, Development and Operation of Offshore Leases, with Particular Emphasis on Group Ownership, 20th Oil & Gas Inst. 203, 238 (1969):

[The Outer Continental Shelf Lands Act] has worked rather well insofar as the oil industry is concerned [and] it is safe to assume that the industry will oppose any sweeping changes which would in its opinion encumber the orderly exploration and development of the outer continental shelf for oil and gas.
of expropriation without payment of compensation.\textsuperscript{238} The Council, the effective policy making body of the Authority, will be composed of states whose status guarantees that no such activities will be permitted or tolerated. Further, considering the makeup of the Council, it is not likely that the Authority will capriciously or arbitrarily impose heavy royalty or other payment burdens on licensees operating in the international seabed area, as is often the case with individual countries when substantial reserves are discovered off their coasts. Industry can, therefore, be assured of a stable regime both \textit{politically} and \textit{economically}, in which to operate, something which they do not now have off the coasts of many nations. This stability should, of course, result in increased income to the producing companies.

Third, and as a generalization of the last mentioned advantage, operating companies will be assured of a regime with none of the uncertainties presently plaguing offshore development beyond the 200 meter isobath. As Under Secretary Richardson noted, there will, under the Convention provisions, be "clear rules of the game under which [operating companies] would be in a position to be applicants for rights of exploration off the coast of other countries."\textsuperscript{239}

Fourth, the dispute settlement provisions of the Draft Convention should be extremely attractive to industry since the latter will no longer be placed in the sometimes untenable position of negotiating directly with a foreign government. Their position will now be argued by their national governments before the Tribunal and all states will be bound by the decisions thereof, or by the Commission decision if the administrative level decision is satisfactory to the claiming party. This, too, should result in far more stability and predictability of operations than is the case where a company must negotiate with a potentially capricious national government concerning its offshore operations.\textsuperscript{240}

\textsuperscript{238} \textit{Draft Convention}, Art. 20 provides:
1. Licenses issued pursuant to this Convention may be revoked only for cause in accordance with the provisions of this Convention.
2. Expropriation of investments made, or unjustifiable interference with operations conducted, pursuant to a license is prohibited.

\textsuperscript{239} \textit{Richardson Statement}, supra note 9 at 450.

\textsuperscript{240} Although not agreeing with the international system proposed by the Commission on Marine Science, Engineering and Resources, Melvin Conant of the Government Relations Department of Standard Oil Company (New Jersey) noted in 1968 the parameters for industry satisfaction
Thus it seems, on this analysis, that national, international, and industry interests are well served by the Draft Convention, and that the United States Government and the affected industries should actively support its adoption at the 1973 Conference.

V. CONCLUSION

It is clear that there is much work to be done in the drafting and negotiating process leading to the 1973 conference. It has been the attempt of this paper to raise a few of the issues involved in the concepts embodied in the Draft Convention and to indicate generally why the document is a basically good one for the Nation, the international community, and the offshore mining industry.

with a governmental system for administration of seabed resource exploitation:

[T]he enterprise has its own reference points, based upon past experience, which help it judge the future; whether an investment is made will depend upon the comparative attractiveness of one proposal weighed against others. Obviously where there is a set of dependable factors, e.g., long-term political and economic stability (or development), mutual interest in the effective and efficient development of the resource in question, and means for resolving disputes which may arise, the prospect is good for reaching and implementing agreement. The central observation must be that the more "dependable" factors [which] can be enlisted in favor of a major investment, the better the prospect of company interest leading to engagement.

Conant, Industry's Needs—Political, in THE LAW OF THE SEA: INTERNATIONAL RULES AND ORGANIZATION FOR THE SEA (Alexander, ed. 1969) at 325. I suggest that the Draft Convention offers industry the requisites stated by Mr. Conant, viz., "long-term political and economic stability," "mutual interest in the effective and efficient development of the resource," and "means for resolving disputes." These are guaranteed, respectively, by the constituents and voting rules of the Council, the revenue sharing provisions, and the Tribunal.