

United States Senate

WASHINGTON, DC 20510

March 24, 2004

Dear Colleague:

As we have listened to debate about the Law of the Sea Convention, we believe the Senate now has the chance to see through to completion Ronald Reagan's vision for the law of the sea. While some have asserted that President Reagan believed the Convention was irremediably defective, that is not true.

President Reagan made his position on the Convention clear in a January 29, 1982 statement. He indicated that "while most provisions of the [then] draft convention are acceptable and consistent with U.S. interests, some major elements of the deep seabed mining regime are not acceptable." President Reagan's statement specified his particular objections to the deep seabed mining regime. Far from concluding that these problems made the Convention irremediably defective, President Reagan supported efforts to fix the Convention and directed his Special Representative to conduct further negotiations to this end. These efforts were not successful and, later in 1982, the United States and many other countries declined to become parties to the Convention.

President Reagan reiterated his views on the Convention in a 1983 statement of United States ocean policy. He stated that, while the United States would not become party to the Convention, the United States accepted and would act in accordance with the provisions of the Convention relating to the traditional uses of the oceans, which generally comprise all of the Convention's substantive provisions except for those relating to deep seabed mining. It has remained U.S. policy since President Reagan's 1983 statement to act in accordance with these Convention provisions.

While efforts to resolve President Reagan's objections to the deep seabed mining regime were not successful in the early 1980s the United States did not give up. Negotiations began again in 1990 under President George H.W. Bush, and culminated in a 1994 agreement that comprehensively revised the Convention's deep seabed mining regime. The revisions made to the regime resolved each of the problems President Reagan identified in 1982.

We are enclosing for your reference a fact sheet and accompanying materials detailing President Reagan's objections to the Convention's original deep seabed mining regime and the ways in which these objections were resolved in the 1994 agreement.

The historical record is clear that President Reagan accepted and embraced the vast bulk of the Convention. The one part of the Convention to which he objected has since been comprehensively renegotiated and each of his objections has been resolved. President Reagan was right to insist on these changes to the Convention. Now that they have been made, the time has come for the Senate to finish the job that Reagan started and to ratify the Convention.

As we have detailed in previous letters, the Convention advances important U.S. national security, economic, and environmental protection interests and has the strong support of the Bush Administration, affected industry, and the environmental community. We urge you to join us in supporting prompt Senate ratification of the Convention.

Sincerely,



Richard G. Lugar
United States Senator



Ted Stevens
United States Senator

Attachment

Fact Sheet on Deep Seabed Mining and the International Seabed Authority

The Law of the Sea Convention creates an organization called the International Seabed Authority (ISA) to administer deep seabed mining in areas beyond national jurisdiction (generally more than 200 nautical miles from the coastline of any state). The ISA's role is limited to deep seabed mining for mineral resources in these areas. It has no authority over any other issues related to the uses of the oceans in areas beyond national jurisdiction, and the Convention provides specific protections for other uses important to the United States such as navigation and overflight.

There has never been any serious dispute over the need for an international regime to administer deep seabed mining. The United States has never claimed sovereign control over seabed resources beyond its national jurisdiction and would not recognize such claims by other countries. Absent an internationally accepted regime governing these resources, companies will be unwilling to make the investments necessary to conduct mining because they will have no way of establishing certain legal title to the sites they wish to mine and the resources found there. At present and for the foreseeable future, deep seabed mining in areas beyond national jurisdiction is economically infeasible due to the costs associated with mining at such depths and the relatively low market prices for deep seabed minerals.

President Reagan accepted the concept of an international regime for deep seabed mining, but had a number of specific objections to the regime established by the Convention when it was initially concluded in 1982. Those objections were set out in a January 29, 1982 statement and accompanying fact sheet issued by the White House, which are attached for reference.

The 1994 renegotiation of the deep seabed mining regime addressed each of President Reagan's objections. Reagan's objections and the manner in which they were resolved in the 1994 renegotiation are summarized below. A 1994 article by Professor Bernard Oxman addressing these issues in greater detail is attached for further reference.

Objection: The Convention provides for policymaking in the ISA to be carried out by a one-nation, one vote assembly; the ISA executive council, which would make day-to-day decisions affecting access of U.S. miners to deep seabed minerals, would not have permanent or guaranteed representation by the United States, and the United States would not have influence in the council commensurate with its political and economic interests.

Changes made to meet objection:

- New rules shift primary ISA policymaking authority from the ISA Assembly to the ISA Council. Under the new rules, all Assembly policy decisions must be based on recommendations by the Council, which the Assembly may accept or reject, but may not modify.

- New rules give the United States a permanent seat on the ISA Council, now the ISA's main decision making body.
- New rules allow the United States to veto the ISA Council's adoption of any rules, regulations, and procedures relating to the deep seabed mining regime, any decisions having financial or budgetary implications (including those relating to distribution of ISA revenues), and any decisions on proposed amendments to the regime.
- New rules allow the United States acting together with two other countries that are major consumers of minerals to veto all other substantive decisions.

Objection: The Convention mandates a Review Conference, to take place 15 years after the first approved commercial production, which would have the power to impose treaty amendments on the United States without its consent.

Changes made to meet objection:

- Mandatory Review Conference provisions eliminated.

New rules permit the United States to veto any proposed amendment to the deep seabed mining regime.

Objection: The Convention would give substantial competitive advantages to a supranational mining enterprise and would subject private deep seabed miners to a mandatory requirement for the transfer of technology to the enterprise and to developing countries.

Changes made to meet objection:

- New rules prevent ISA mining enterprise from becoming operational absent decision by ISA Council, which could be vetoed by joint decision of countries with major deep seabed mining investments.

Elimination of requirements for industrialized states to fund ISA mining enterprise and to transfer technology to it and to developing countries. New rules provide that deep seabed mining technology should be acquired on the open market under normal commercial terms.

New rules make potential ISA mining enterprise subject to the same performance obligations as apply to private contractors and require it to operate on sound commercial principles and without subsidies.

Objection: The Convention would impose artificial limitations on seabed mineral production, would give the ISA authority to interfere unreasonably with the conduct of mining operations and to impose burdensome regulations on an infant industry and discriminate against U.S. companies, and would impose large financial burdens on industrialized countries whose nationals are engaged in deep seabed mining and financial terms and conditions that would significantly increase the costs of mineral production.

Changes made to meet objection:

Production limitations and controls eliminated. New rules permit production without artificial limit and prevent subsidization of mining activities or restriction of market access inconsistent with GATT/WTO rules.

- New rules allow the United States to veto the ISA Council's adoption of any rules, regulations, and procedures relating to the deep seabed mining regime.
- Elimination of rules providing for subjective and political considerations in awarding of mining rights that could have been used to discriminate against U.S. companies. New rules provide for awards on first-come, first-served basis to qualified applicants meeting objective criteria.

Elimination of financial terms for mining contracts requiring miners to pay \$1 million annual fee beginning on date mining rights are granted. New rules defer to the future decisions about financial terms and provide that such terms must be commercially reasonable and comparable to those prevailing in similar land-based mining contracts.

U.S. Policy and the Law of the Sea

Following are a statement by President Reagan announcing the U.S. decision to return to the Law of the Sea negotiations and a White House Fact Sheet outlining U.S. policy, both of January 29.

PRESIDENT'S STATEMENT¹

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

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

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

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

unacceptable elements and to achieve the goal of a treaty that will:

- Not deter development of any deep seabed mineral resources to meet national and world demand;
- Assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international authority, and to promote the economic development of the resources;
- Provide a decisionmaking role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
- Not allow for amendments to come into force without approval of the participating states, including, in our case, the advice and consent of the Senate;
- Not set other undesirable precedents for international organizations; and
- Be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

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

I have instructed the Secretary of State and my Special Representative for the Law of the Sea Conference [James L. Malone, Chairman of the U.S. delegation], in coordination with other responsible agencies, to embark immediately on the necessary consultations with other countries and to undertake further preparations for our participation in the conference.

WHITE HOUSE FACT SHEET¹

Today the President announced his decision that the United States will return to the negotiations at the Third U.N. Conference on the Law of the Sea and work with other countries to achieve an acceptable treaty for the world's oceans. This follows a comprehensive inter-agency review of U.S. Law of the Sea objectives and interests as they relate to the current draft convention.

Preparations for the Third U.N. Conference on the Law of the Sea began in 1969. The first substantive session of the conference was convened in Caracas, Venezuela, in 1974. Ten sessions of the conference have been held since then to develop a consensus agreement on provisions covering the full range of ocean interests. These include:

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

Over 150 nations have participated in this effort. By 1980, the conference had reached agreement on all but four outstanding issues: the delimitation of the outer edge of the continental margin, participation of regional organizations in the treaty, establishment of a preparatory commission, and grandfather rights for existing deep seabed miners. Most participants expected that the negotiations would conclude in 1981.

Serious concerns had been raised within the United States, however, specifically with respect to the deep seabed mining provisions of the draft convention. The proposed treaty has some unacceptable elements. Consequently, on March 2, 1981, the Administration announced that it was initiating a comprehensive review of U.S. law of the sea policy.

The United States sought to insure that there was sufficient time for the review of the proposed draft convention before negotiations were concluded. The conference proceeded with technical drafting work and discussion of several outstanding issues during a 5-week session in March and April 1981. In August 1981, the conference reconvened in Geneva for 5 weeks during which the United States aired a series of substantive concerns with respect to the deep seabed provisions of the draft convention. The United States sought to elicit

Republic of Nauru

PEOPLE

The population includes more than 4,000 indigenous Nauruans, nearly 2,000 workers from other Pacific islands, and 1,500 Europeans and Chinese. The inhabitants live in small settlements scattered throughout the island. Nauruans are a mixture of the three basic Pacific ethnic groups: Melanesian, Micronesian, and Polynesian. Through centuries of intermarriage, a homogeneous people evolved. Their language, a fusion of elements from the Gilbert, Caroline, Marshall, and Solomon Islands, is distinct from all other Pacific languages. Most of the people speak English, and all understand it. All Nauruans are professed Christians.

Education is free and compulsory for Nauruan children between ages 6 and 16 and between 6 and 15 for non-Nauruan children. In addition, numerous government scholarships are given for students to attend boarding schools and universities abroad, principally in Australia. Literacy is virtually universal.

In the past 100 years, the existence of the Nauruans as a people has been threatened on several occasions. Tribal disputes in the 1870s reduced the population to fewer than 1,000 after 10 years of strife. An influenza epidemic in 1919 reduced the population by one-third in a few weeks. During World War II, the Nauruan community again lost two-thirds of its population when the Japanese deported many Nauruans to the Caroline Islands to build airstrips. Since the war, however, the Nauruan population has increased from 1,300 to 7,700.

GEOGRAPHY

Nauru, an oval island in the west-central Pacific Ocean, lies 53 kilometers (33 mi.) south of the Equator, 3,520 kilometers (2,200 mi.) northeast of Sydney, Australia, and 3,912 kilometers (2,445 mi.) southwest of Honolulu, Hawaii. The island is about 19 kilometers (12 mi.) in circumference and contains 21 square kilometers (8 sq. mi.) of land.

Nauru is one of the three great phosphate-rock islands of the Pacific (the other two are Ocean Island, part of the Gilbert Islands, and Makatea Island in French Polynesia). The coast has a

sandy beach rising gradually to form a fertile section several hundred meters wide encircling the island. A coral reef reaches 60 meters (200 ft.) above sea level on the inner side of the fertile area. An extensive plateau bearing high-grade phosphate is above the cliff.

The climate is hot but not unpleasant. Temperatures range between 24°C (76°F) and 33°C (93°F) and the humidity, between 70% and 80%. The average annual rainfall is 45 centimeters (18 in.), but it fluctuates greatly. For example, in 1950 only 30 centimeters (12 in.) of rain fell, but in 1930 and 1940, rainfall measured more than 457 centimeters (180 in.).

Nauru has no capital city; Parliament House and government houses are on the coast and opposite the airport in Yaren District.

HISTORY

Little is known of Nauru's early history. The origin of the inhabitants and the circumstances of their coming are unknown, but they are believed to be castaways who drifted there from some other island.

The island was discovered in 1798 by John Fearn, captain of the British whaling ship "Hunter," on a voyage from New Zealand to the China Sea. He noted that the attractive island was "extremely populous" with many houses and named it Pleasant Island.

The isolated island remained free of European contact for much longer than other Pacific islands. During the 19th century, however, European traders and beachcombers established themselves there. The Europeans were useful to the Nauruans as intermediaries with visiting ships; however, the Europeans obtained firearms and alcohol for the islanders, exacerbating their intertribal warfare.

Pleasant Island came under German control in 1881 under an Anglo-German Convention and reverted to its native name, Nauru. By 1881, when the Germans first sent an administrator to the island, continual warring between the 12 tribes had reduced the population from about 1,400 in 1842 to little more than 900. Alcohol was banned and arms and ammunition confiscated in an effort to restore order. With the arrival in 1899 of the first missionaries, Christianity

candid reactions to areas of its concern and to explore the kinds of solutions that could reasonably be expected to result from further negotiations. The next session of the conference begins in early March.

U.S. concerns about the draft convention center on those issues of access, development decisionmaking, and other provisions noted in the President's statement. Particular elements of the deep seabed provisions that give rise to U.S. concerns include:

- Policymaking in the seabed authority would be carried out by a one-nation, one-vote assembly;
- The executive council which would make the day-to-day decisions affecting access of U.S. miners to deep seabed minerals would not have permanent or guaranteed representation by the United States, and the United States would not have influence on the council commensurate with its economic and political interests;

- A review conference would have the power to impose treaty amendments on the United States without its consent;

- The treaty would impose artificial limitations on seabed mineral production;

- The treaty would give substantial competitive advantages to a supra-national mining company—the Enterprise;

- Private deep seabed miners would be subject to a mandatory requirement for the transfer of technology to the Enterprise and to developing countries;

- The new international organization would have discretion to interfere unreasonably with the conduct of mining operations, and it could impose potentially burdensome regulations on an infant industry; and

- The treaty would impose large financial burdens on industrialized countries whose nationals are engaged in deep seabed mining and financial terms and conditions which would significantly increase the costs of mineral production.

The deep seabed offers a potentially important alternative source of minerals. While current world demand and metals markets do not justify commercial-scale development at this time, multinational consortia have invested substantial amounts to develop technology and to prospect. When economic factors become favorable, deep seabed mining is likely to be an important undertaking.

¹Text from Weekly Compilation of Presidential Documents of Feb. 1, 1982. ■

The 1994 Agreement and the Convention

Bernard H. Oxman

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LAW OF THE SEA FORUM: THE 1994 AGREEMENT ON IMPLEMENTATION OF THE SEABED PROVISIONS OF THE CONVENTION ON THE LAW OF THE SEA

THE 1994 AGREEMENT AND THE CONVENTION

In June 1994, some twelve years after the conclusion of the Third UN Conference on the Law of the Sea, the UN Secretary-General reported to the General Assembly that informal consultations had led to agreements that appeared to have removed the obstacles to general adherence to the 1982 UN Convention on the Law of the Sea.¹

The history of the Convention since 1982 is widely known. In 1982 President Reagan declared that the United States would not sign the Convention because of objections to Part XI, the proposed regime for deep seabed mining. Most other industrialized states signed but withheld ratification while work proceeded in the Preparatory Commission. Most developing states signed the Convention and the number of ratifications increased slowly.

In July 1990, UN Secretary-General Javier Pérez de Cuéllar initiated informal consultations to attempt to meet the objections of the industrialized states. His successor, Boutros Boutros-Ghali, continued those consultations and saw them to conclusion. A new sense of urgency was introduced into the consultations in 1993 when it became apparent that the Convention would receive the number of ratifications necessary for entry into force before the end of 1994.

As reported by the Secretary-General, the consultations resulted in:

- a draft "Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982"; and
- a draft resolution by which the UN General Assembly would adopt the Agreement and urge states to adhere to it and to the Convention.²

The resolution was adopted by the General Assembly at a resumed forty-eighth session on July 28, 1994, by a vote of 121 in favor, none against, and 7 abstentions.³ The Agreement was opened for signature the next day. Over fifty states have already signed the Agreement, including the United States and virtually all other industrialized states.

THE AGREEMENT, THE CONVENTION AND U.S. POLICY

The 1994 Agreement provides, in Article 2, that it is to be interpreted and applied together with Part XI of the Convention as a single instrument; in the

¹ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983) [hereinafter LOS Convention].

² UN Doc. A/48/950 (1994).

³ GA Res. 48/263 (July 28, 1994). The new Agreement is annexed to the resolution, and is hereinafter cited as the Agreement. Russia abstained in the vote to adopt the resolution and Agreement on the grounds that the new provisions regarding pioneer investors discriminate in favor of the United States. The same objection to different provisions was proffered to explain the Soviet abstention in the vote in 1982 on adoption of the Convention by the Law of the Sea Conference.

event of inconsistency between them, the Agreement will prevail. It may take some time before states that have not yet ratified the Convention become party to the Convention and the 1994 Agreement.⁴ More than sixty states, however, have already ratified the Convention, which enters into force for them on November 16, 1994; it would have been unrealistic to expect that before that date all of them would become party to the new Agreement as well. The Agreement therefore contains liberal terms for its provisional application by all, and affords states several years to become party to both the Agreement and the Convention.⁵ With a large number of states, including industrial states, accepting provisional application, one may expect that Part XI will be implemented from the outset in accordance with the new Agreement and with representative participation in decision-making organs.

The purpose of the 1994 Agreement is to enhance the prospects for widespread ratification of the Convention by responding to problems with the deep seabed mining regime in Part XI, particularly those that troubled industrial states, including the United States. The Agreement is designed also to respond to developments in the decade since Part XI was completed, specifically "the growing concern for the global environment," and "political and economic changes, including in particular a growing reliance on market principles."

It may be instructive to consider how the 1994 Agreement responds to the problems identified and the concerns expressed by the United States when it sought, without success, to change Part XI in 1982.

U.S. policy regarding the 1982 Convention, as enunciated by the Reagan administration,⁶ may be summarized as follows. "While most provisions of the draft convention are acceptable and consistent with U.S. interests, some major elements of the deep seabed mining regime are not acceptable."⁷ The United States "has a strong interest in an effective and fair Law of the Sea treaty which includes a viable seabed mining regime."⁸ It was "not seeking to change the basic structure

⁴ Article 4 of the Agreement provides:

1. After the adoption of this Agreement, any instrument of ratification or formal confirmation of or accession to the Convention shall also represent consent to be bound by this Agreement.
2. No State or entity may establish its consent to be bound by this Agreement unless it has previously established or establishes at the same time its consent to be bound by the Convention.

Paragraph 5 of the resolution adopting the Agreement contains essentially the same language.

⁵ Pursuant to Article 7, pending entry into force of the Agreement, and absent written notification to the contrary by the state concerned, states that either consented to adoption of the Agreement in the General Assembly, or sign or adhere to the Agreement, or consent in writing to its provisional application "shall apply this Agreement provisionally in accordance with their national laws and regulations, with effect from 16 November 1994" or such later date as this obligation is applicable to them. Should the Agreement enter into force before November 16, 1998, provision is made for grace periods extending up to that date for states that have not completed the ratification process. Agreement, annex, sec. 1, para. 12.

⁶ The Reagan administration's statements quoted hereinafter appear in the following documents: Statement by the President, *U.S. Policy and the Law of the Sea*, Jan. 29, 1982, DEPT. ST. BULL., Mar. 1982, at 54; White House Fact Sheet [accompanying Presidential Statement], Jan. 29, 1982, *id.* at 54-55; Statement by Ambassador James L. Malone, Special Representative of the President, before the House Merchant Marine and Fisheries Committee, Feb. 23, 1982, *id.*, May 1982, at 61-63; Statement by the President, July 9, 1982, *id.*, Aug. 1982, at 71; Statement by Ambassador James L. Malone, Special Representative of the President, before the House Foreign Affairs Committee, Aug. 12, 1982, *id.*, Oct. 1982, at 48-50.

⁷ Statement by the President, Jan. 29, 1982, note 6 *supra*.

⁸ Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

of the treaty" or "to destroy the system" but "to make it work for the benefit of all nations to enhance, not resist, seabed resource development."⁹ If negotiations could fulfill six key objectives with respect to the deep seabed mining regime, the "Administration will support ratification" of the Convention.¹⁰ It was the administration's "judgment that, if the President's objectives as outlined are satisfied, the Senate would approve the Law of the Sea treaty."¹¹

The six objectives identified by President Reagan required a deep seabed mining regime that would:

- Not deter development of any deep seabed mineral resources to meet national and world demand;
- Assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international authority, and to promote the economic development of the resources;
- Provide a decisionmaking role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
- Not allow for amendments to come into force without approval of the participating states, including, in our case, the advice and consent of the Senate;
- Not set other undesirable precedents for international organizations; and
- Be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.¹²

How the 1994 Agreement responds to U.S. objections and U.S. requirements may be considered under several headings.

Decision Making

Like many international organizations, the International Sea-Bed Authority established by the Convention will have an Assembly in which all parties are represented, a Council of limited membership, and specialized elected organs also of limited membership.

1982 text: While all specific regulatory powers with regard to deep seabed mining are reposed exclusively or concurrently in the Council, Article 160 gives the Assembly "the power to establish general policies."

Problem: "Policymaking in the seabed authority would be carried out by a one-nation, one-vote assembly."¹³

Response: The 1994 Agreement qualifies the general policy-making powers of the Assembly by requiring the collaboration of the Council. It also provides: "Decisions of the Assembly on any matter for which the Council also has competence or on any administrative, budgetary or financial matter shall be based on the

⁹ Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.

¹⁰ Statement by the President, Jan. 29, 1982, note 6 *supra*.

¹¹ Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

¹² Statement by the President, Jan. 29, 1982, note 6 *supra*. The White House Fact Sheet accompanying the President's announcement of the six objectives in January 1982, and congressional testimony by the President's special representative later that year, identified the elements in the Part XI regime that related to one or more of those objectives. Note 6 *supra*.

¹³ White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

recommendations of the Council."¹⁴ The Assembly may either approve the recommendations or return them.¹⁵

Problem: "The executive council which would make the day-to-day decisions affecting access of U.S. miners to deep seabed minerals would not have permanent or guaranteed representation by the United States."¹⁶

Response: The new Agreement guarantees a seat on the Council for "the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product."¹⁷ That state is the United States.

1982 text: Consensus on the thirty-six-member Council is required for such matters as proposing treaty amendments; adopting rules, regulations and procedures; and distributing financial benefits and economic adjustment assistance.¹⁸ Other substantive Council decisions require either a two-thirds or three-quarters vote.¹⁹

Problem: The "United States would not have influence on the council commensurate with its economic and political interests."²⁰ "The decisionmaking system should provide that, on issues of highest importance to a nation, that nation will have affirmative influence on the outcome. Conversely, nations with major economic interests should be secure in the knowledge that they can prevent decisions adverse to their interests."²¹

Response: The new Agreement establishes "chambers" of states with particular interests.²² Two four-member chambers of the Council are likely to be effectively controlled by major industrial states, including the United States (which is guaranteed a seat in one of those chambers).²³ The Agreement provides that "decisions on questions of substance, except where the Convention provides for decisions by consensus in the Council, shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers."²⁴ Any three states in either four-member chamber may therefore block a substantive decision for which consensus is not required.

The Agreement further specifies: "Decisions by the Assembly or the Council having financial or budgetary implications shall be based on the recommendations of the Finance Committee."²⁵ The United States and other major contributors to the administrative budget are guaranteed seats on the Finance Committee, and the committee functions by consensus.²⁶

This approach to voting enables interested states (including the United States) to block undesirable decisions. Because blocking power encourages negotiation of

¹⁴ Agreement, annex, sec. 3, paras. 1, 4.

¹⁵ *Id.*, para. 4. Rules, regulations and procedures adopted by the Council on prospecting, exploration and exploitation and the financial and internal management of the Authority remain in effect provisionally until approved by the Assembly or amended by the Council in light of the Assembly's views. LOS Convention, Art. 162, para. 2(o)(ii).

¹⁶ White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

¹⁷ Agreement, annex, sec. 3, para. 15(a).

¹⁸ LOS Convention, Art. 161, para. 8(d).

¹⁹ *Id.*, para. 8(b), (c).

²⁰ White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

²¹ Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

²² Agreement, annex, sec. 3, paras. 9, 10, 15.

²³ *Id.*, paras. 10, 15(a), (b). Major land-based producers and exporters of relevant minerals, such as Canada and Chile, would be represented in their own four-member chamber. *Id.*, para. 15(c).

²⁴ *Id.*, para. 5.

²⁵ *Id.*, para. 7.

²⁶ *Id.*, sec. 9, paras. 3, 8.

decisions desired by and acceptable to the states principally affected, it enhances affirmative as well as negative influence.

Production Limitation

Problem: "The United States believes that its interests . . . will best be served by developing the resources of the deep seabed as market conditions warrant. We have a consumer-oriented philosophy. The draft treaty, in our judgment, reflects a protectionist bias which would deter the development of deep seabed mineral resources."²⁷ Specifically, the "treaty would impose artificial limitations on seabed mineral production"²⁸ and "would permit discretionary and discriminatory decisions by the Authority if there is competition for limited production allocations."²⁹ The production ceiling is undesirable as a matter of principle and precedent,³⁰ and the process for allocating production authorizations is a significant source of uncertainty and discriminatory treatment impeding guaranteed access to minerals by qualified miners.³¹

Response: The new Agreement specifies that the provisions regarding the production ceiling, production limitations, participation in commodity agreements, production authorizations and selection among applicants "shall not apply."³² In their place, the Agreement incorporates the market-oriented GATT restrictions on subsidies.³³ It prohibits "discrimination between minerals derived from the [deep seabeds] and from other sources,"³⁴ and specifies that the rates of payments by miners to the Authority "shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage or imposing on them a competitive disadvantage."³⁵

Technology Transfer

Problem: "Private deep seabed miners would be subject to a mandatory requirement for the transfer of technology to the Enterprise and to developing countries."³⁶ This provision was considered burdensome, prejudicial to intellectual property rights, and objectionable as a matter of principle and precedent.³⁷

Response: The new Agreement declares that the provisions on mandatory transfer of technology "shall not apply."³⁸ It substitutes a general duty of cooperation by sponsoring states to facilitate the acquisition of deep seabed mining technology, "consistent with the effective protection of intellectual property rights," if the Enterprise (the operating arm of the Sea-Bed Authority) or developing countries are unable to obtain such technology on the open market or through joint-venture arrangements.³⁹

²⁷ Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

²⁸ White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

²⁹ Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.

³⁰ Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

³¹ Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.

³² Agreement, annex, sec. 6, para. 7.

³³ *Id.*, paras. 1(b), (c), 3.

³⁴ *Id.*, para. 1(d).

³⁵ Agreement, annex, sec. 8, para. 1(b).

³⁶ White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

³⁷ Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.

³⁸ Agreement, annex, sec. 5, para. 2.

³⁹ *Id.*, para. 1(b).

Access

Problem: "The draft treaty provides no assurance that qualified private applicants sponsored by the U.S. Government will be awarded contracts. It is our strong view that all qualified applicants should be granted contracts and that the decision whether to grant a contract should be tied exclusively to the question of whether an applicant has satisfied objective qualification standards."⁴⁰

Response: The new Agreement eliminates the provisions for choice among qualified applicants.⁴¹ Access will be on a first-come, first-served basis. The qualification standards for mining applicants are to be set forth in rules, regulations and procedures adopted by the Council by consensus and "shall relate to the financial and technical capabilities of the applicant and his performance under any previous contracts."⁴² If the applicant is qualified; if the application fee is paid; if procedural and environmental requirements are met; if the area applied for is not the subject of a prior contract or application; and if the sponsoring state would not thereby exceed maximum limits specified in the Convention, "the Authority shall approve" the application.⁴³ Its failure to do so will be subject to arbitration or adjudication.⁴⁴

The new Agreement contains special voting rules that facilitate a decision to approve an application to explore or exploit minerals. In the Legal and Technical Commission, only a simple majority is required for recommending approval.⁴⁵ When that recommendation reaches the Council, the application is deemed approved unless disapproved within a prescribed period (normally sixty days) by the same vote required for substantive decisions.⁴⁶ Thus, any three industrial states in a four-member chamber may prevent disapproval.

The new Agreement accords important "grandfather" rights to the U.S. consortia that already have made investments under the U.S. Deep Seabed Hard Mineral Resources Act.⁴⁷ They are deemed to have met the necessary financial and technical qualifications if the U.S. Government, as the sponsoring state, certifies that they have made the necessary expenditures.⁴⁸ They are also entitled to arrangements "similar to and no less favourable than" those accorded investors of other countries that registered as pioneers with the Preparatory Commission prior to entry into force of the Convention.⁴⁹

Problem: U.S. objectives "would not be satisfied if minerals other than manganese nodules could be developed only after a decision was taken to promulgate rules and regulations to allow the exploitation of such minerals."⁵⁰

Response: The new Agreement requires the Council of the Authority to adopt necessary rules, regulations and procedures within two years of a request by a state whose national intends to apply for the right to exploit a mine site.⁵¹ This

⁴⁰ Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

⁴¹ Agreement, annex, sec. 6, para. 7.

⁴² LOS Convention, Art. 161, para. 8(d), Art. 162, para. 2(o)(ii); Ann. III, Art. 4, paras. 1, 2, Art. 17, para. 1(b)(xiv).

⁴³ LOS Convention, Art. 162, para. 2(x); Ann. III, Art. 6, paras. 1-4, Art. 10; Agreement, annex, sec. 1, paras. 7, 13.

⁴⁴ LOS Convention, Arts. 187, 188, 286-88, 290; Agreement, annex, sec. 3, para. 12.

⁴⁵ Agreement, annex, sec. 3, para. 13; *see* LOS Convention, Arts. 163, 165.

⁴⁶ Agreement, annex, sec. 3, para. 11(a).

⁴⁷ 30 U.S.C. §§1401-1473 (1988 & Supp. IV 1992).

⁴⁸ Agreement, annex, sec. 1, para. 6(a)(i). ⁴⁹ *Id.*, para. 6(a)(iii).

⁵⁰ Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

⁵¹ Agreement, annex, sec. 1, para. 15(b).

applies to manganese nodules or any other mineral resource. If the Council fails to complete the work on time, it must give provisional approval to an application based on the Convention and the new Agreement, notwithstanding the fact that the rules and regulations have not been adopted.⁵²

The Enterprise

Problem: "The treaty would give substantial competitive advantages to a supra-national mining company—the Enterprise."⁵³ It "creates a system of privileges which discriminates against the private side of the parallel system. Rational private companies would, therefore, have little option but to enter joint ventures or other similar ventures either with the operating arm of the Authority, the Enterprise, or with developing countries. Not only would this deny the United States access to deep seabed minerals through its private companies because the private access system would be uncompetitive but, under some scenarios, the Enterprise could establish a monopoly over deep seabed mineral resources."⁵⁴

Response: The new Agreement provides: "The obligations applicable to contractors [private miners] shall apply to the Enterprise."⁵⁵ It requires the Enterprise to conduct its initial operations through joint ventures "that accord with sound commercial principles," and delays the independent functioning of the Enterprise until the Council decides that those criteria have been met.⁵⁶ The Agreement does not exclude the Enterprise either from the principle that mining "shall take place in accordance with sound commercial principles" or from its prohibitions on subsidies.⁵⁷ It specifies that the "obligation of States Parties to fund one mine site of the Enterprise . . . shall not apply and States Parties shall be under no obligation to finance any of the operations in any mine site of the Enterprise or under its joint-venture arrangements."⁵⁸ The Agreement also eliminates mandatory transfer of technology to the Enterprise and the potentially discriminatory system for issuing production authorizations.⁵⁹

The Agreement makes clear that a private miner may contribute the requisite "reserved area" to the Enterprise at the time the miner receives its own exclusive exploration rights to a specific area (thus minimizing its risk and investment).⁶⁰ That miner has "the right of first refusal to enter into a joint-venture arrangement with the Enterprise for exploration and exploitation of" the reserved area, and has priority rights to the reserved area if the Enterprise itself does not apply for exploration or exploitation rights to the reserved area within a specified period.⁶¹

Finance

Problem: "The treaty would impose large financial burdens on industrialized countries whose nationals are engaged in deep seabed mining and financial terms and conditions which would significantly increase the costs of mineral production."⁶²

⁵² *Id.*, para. 15(c).

⁵³ White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

⁵⁴ Statement by the Special Representative of the President, Feb. 23, 1982, note 6 *supra*.

⁵⁵ Agreement, annex, sec. 2, para. 4.

⁵⁶ *Id.*, para. 2.

⁵⁷ Agreement, annex, sec. 2, para. 4, sec. 6, paras. 1(a)-(c), 3.

⁵⁸ *Id.*, sec. 2, para. 3.

⁵⁹ See notes 32, 38 *supra*.

⁶⁰ Agreement, annex, sec. 1, para. 10.

⁶¹ *Id.*, sec. 2, para. 5.

⁶² White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

Response: The new Agreement halves the application fee for either exploration or exploitation to \$250,000 (subject to refund to the extent the fee exceeds the actual costs of processing an application), and eliminates the detailed financial obligations of miners set forth in the 1982 text, including the million-dollar annual fee.⁶³ Financial details would be supplied, when needed, by rules, regulations and procedures adopted by the Council by consensus, on the basis of general criteria that, for example, would link the rates to those prevailing for mining on land, and prohibit discrimination or rate increases for existing contracts.⁶⁴

With respect to state parties, in addition to eliminating any requirement that states contribute funds to finance the Enterprise or provide economic adjustment assistance to developing countries,⁶⁵ the new Agreement provides for streamlining and phasing in the organs and functions of the Authority as needed, and for minimizing costs and meetings.⁶⁶ Budgets and assessments for administrative expenses are subject to consensus procedures in the Finance Committee and approval by both the Council and the Assembly.⁶⁷

Regulatory Burdens

Problem: "The new international organization would have discretion to interfere unreasonably with the conduct of mining operations, and it could impose potentially burdensome regulations on an infant industry."⁶⁸

Response: The substantive changes set forth in the new Agreement, including the elimination of production limitations, production authorizations and forced transfer of technology, and the relaxation of diligence requirements, substantially narrow the area of potential abuse.⁶⁹ The new procedural provisions, including voting arrangements in the Council and the Finance Committee, and restrictions on the Assembly, decrease the risk of unreasonable regulatory decisions.⁷⁰ As indicated in its Preamble and in the General Assembly resolution adopting it, the new Agreement is the product of a marked shift, throughout the world, from statist and interventionist economic philosophies toward more market-oriented policies. Taken together, the new provisions and new attitudes give reason to expect the system to operate in accordance with the provisions of the Convention and the Agreement guaranteeing the miner exclusive rights to a mine site, security of tenure, stability of expectations and title to minerals extracted, and according the miner and its sponsoring state extensive judicial and arbitral remedies to protect those rights.⁷¹

What cannot be supplied in advance by any blueprint for a deep seabed mining regime is the measure of confidence born of experience with a system in operation.

⁶³ Agreement, annex, sec. 8, paras. 2, 3; LOS Convention, Ann. III, Art. 13, para. 2.

⁶⁴ Agreement, annex, sec. 3, para. 7, sec. 8, para. 1, sec. 9, paras. 7, 8; LOS Convention, Art. 161, para. 8(d), Art. 162, para. 2(o)(ii).

⁶⁵ Agreement, annex, sec. 2, para. 3, sec. 7, para. 1(a); see LOS Convention, Art. 173.

⁶⁶ Agreement, annex, sec. 1, paras. 2-5, sec. 2, paras. 1-2.

⁶⁷ *Id.*, sec. 3, paras. 4, 7, sec. 9, para. 8.

⁶⁸ White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

⁶⁹ Agreement, annex, sec. 1, para. 9; see notes 32, 38 *supra*.

⁷⁰ See notes 14, 15, 17, 22-26 *supra*.

⁷¹ LOS Convention, Art. 153, para. 6, Arts. 187-88; Ann. III, Arts. 1, 10, 16, 18(3), 19(2), 21; Agreement, annex, sec. 1, para. 13.

Distribution of Revenues

1982 text: The Convention authorizes the equitable sharing of surplus revenues from mining, "taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence or other self-governing status."⁷²

Problem: "The convention would allow funding for national liberation groups, such as the Palestine Liberation Organization and the South West Africa People's Organization."⁷³

Response: Political developments in Africa and the Middle East have mitigated this problem. Moreover, distribution to such groups would be a practical impossibility unless the Sea-Bed Authority's revenues from miners and from the Enterprise exceeded both its administrative expenses and its assistance to adversely affected land-based producers, and would be possible then only if the Council decided by consensus to include such groups in the distribution of surplus revenues. A decision on distribution of surplus funds would also be subject, under the new Agreement, to a consensus in the Finance Committee.⁷⁴

Review Conference

Problem: "A review conference would have the power to impose treaty amendments on the United States without its consent."⁷⁵

Response: The new Agreement declares that the provisions in Part XI relating to the review conference "shall not apply."⁷⁶ Amendments to the deep seabed mining regime could not be adopted without U.S. consent.⁷⁷

CONCLUSION

The 1994 Agreement substantially accommodates the objections of the United States and other industrial states to the deep seabed mining provisions of the Law of the Sea Convention. The Agreement embraces market-oriented policies and eliminates provisions identified as posing significant problems of principle and precedent, such as those dealing with production limitations, mandatory transfer of technology, and the review conference. It increases the influence of the United States and other industrial states in the Sea-Bed Authority, and reflects their longstanding preference for emphasizing interests, not merely numbers, in the structure and voting arrangements of international organizations. Detail that is objectionable or premature is eliminated or qualified. The Sea-Bed Authority is streamlined and its regulatory discretion curtailed. The role of its operating arm—the Enterprise—is delayed and sharply confined. Deep cuts are made in the financial obligations of states and private companies.

United States accession to the Convention and ratification of the new Agreement will promote widespread adherence by states generally. This will protect not

⁷² LOS Convention, Art. 160, para. 2(f)(i), Art. 172, para. 2(o)(i).

⁷³ Statement by the Special Representative of the President, Aug. 12, 1982, note 6 *supra*.

⁷⁴ LOS Convention, Art. 161, para. 8(d), Art. 173; Agreement, annex, sec. 3, para. 7, sec. 9, paras. 7(f), 8.

⁷⁵ White House Fact Sheet, Jan. 29, 1982, note 6 *supra*.

⁷⁶ Agreement, annex, sec. 4.

⁷⁷ LOS Convention, Art. 161, para. 8(d), Art. 314, para. 1.

only deep seabed mining but many other important interests in the oceans.⁷⁸ In the meantime, provisional application of the Agreement by the United States and by a substantial number of other states will help ensure that Part XI will not be implemented in unmodified form, that the full range of affected interests will be represented during the early stages of organization when important precedents and procedures are established, and that these precedents and procedures will facilitate widespread ratification of the Convention and the Agreement.

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INTERNATIONAL LAW IMPLICATIONS OF THE 1994 AGREEMENT

This paper analyzes the legal implications of the Draft Resolution and Draft Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982,¹ as well as the effectiveness of the proposed arrangements under international law.

PREPARATION OF THE AGREEMENT AND THE GENERAL ASSEMBLY RESOLUTION

In July 1990, the UN Secretary-General, Javier Pérez de Cuéllar, took the initiative to convene informal consultations aimed at achieving universal participation in the Law of the Sea Convention. He noted that, in the eight years that had elapsed since the Convention was adopted, significant political and economic changes had occurred. The anticipated commercial mining of deep seabed minerals had receded into the twenty-first century; there was a strong shift toward a more market-oriented economy; and the Cold War was being replaced by a new spirit of international cooperation in resolving both political and economic problems. In 1992 the new Secretary-General, Boutros Boutros-Ghali, agreed to continue the consultations, with the assistance of UN Under-Secretary-General and Legal Counsel Carl-August Fleischhauer.

Between 1990 and 1994, fifteen meetings were held. After identifying nine issues of special concern to a group of developed countries, general agreement was reached on relatively detailed solutions to six of them, while for three of them it was thought sufficient to prepare general principles to be applied when commercial production of deep seabed minerals became imminent. After this preliminary agreement between some especially interested developed and developing states, the consultations were opened in 1992 to all United Nations member states and between seventy-five and ninety states became involved in the remaining meetings.

In 1993 attention turned to developing various procedural approaches to the form that the final document should take. Four of them were chosen for more detailed exploration:

⁷⁸ See John R. Stevenson & Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AJIL 488 (1994) and papers cited in note 3 thereof.

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¹ Draft Resolution and Draft Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, UN Doc. SG/LOS/CRP.1/Rev.1 (June 3, 1994) (English version of six-language text) [hereinafter Agreement].