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REFORMING PART 11 OF THE 1982 UNITED NATIONS LAW OF THE SEA CONVENTION

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I. INTRODUCTION

The Third United Nations Conference on the Law of the Sea (UNCLOS III) was convened to curtail claims of expanding national maritime jurisdiction. Looking at what could be done by whom, where, in, on, and under the oceans, the conference delegates did not question the validity and legality of expanding maritime claims over adjacent ocean waters beyond the traditional three mile territorial sea.[1] By consensus, conference delegates agreed to regimes governing ocean use that preserved traditional high seas freedoms despite those broader maritime claims.

The most contentious issues during the conference concerned deep seabed mining. In an attempt to pre-empt unsettled issues of delimitation, developing countries obdurately created a massive, monocratic, international bureaucracy modeled on principles of a centralized economy to regulate the exploitation of deep seabed resources.[2]

In 1981, the Reagan Administration conducted a comprehensive review of the draft convention to determine whether the United States' interests were adequately protected. Out of that review came serious objections to Part 11, the deep

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[1]R. OGLEY, INTERNATIONALIZING THE SEABED (1984).

[2]Even the 1982 Convention fails to definitively delimit the continental shelf. Confusion and disagreement prevail over both boundaries: its baseline and its outer limits.

seabed mining regime, and a conclusion that its present form was inimical to US interests. While it considered the nonseabed portions generally acceptable, it found those interests inadequate to overcome the serious deficiencies of Part 11.[3]

President Reagan announced in January, 1982, that the United States would continue negotiations, would attempt to focus attention on the objectionable provisions, and would attempt to develop positive solutions to those objections. The United States' goal was to revise Part 11 so that it would neither deter deep seabed mining nor restrict the global market for seabed minerals. A key source of concern to the United States was the decision making system of the International Seabed Authority (The Authority). Its single, most important deficiency was its failure to reasonably reflect the financial contributions and economic and political interests of member States through a skewed representational scheme and cumbersome voting procedures.[4]

Unable to obtain the desired changes, President Reagan formally announced in July, 1982, that the United States could not and would not sign the treaty. Finding that Part 11

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[3]Malone, Who Needs the Sea Treaty?, 54 FOREIGN POL'Y 44 (1984).

[4]In announcing U.S. objections to Part 11 of the draft convention, the president made clear the U.S. remained committed to multilateral negotiations, and equally committed to protecting U.S. interests from inimical concessions. Id. at 51.

rendered the treaty fundamentally flawed, he announced that the United States nonetheless considered the nonseabed portions to be evolving customary international law.[5]

Important economic and political changes during the past several years lead one to speculate on their inevitable impact on the law of the sea. How will the Soviet's move away from a centralized economy affect its position on Part 11? Would it support reform? Will the democratization of Eastern Europe favorably affect Part 11 reform? What effect will the Third World foreign debt crises and a depressed minerals market have on Part 11 reform? Will new materials, developed to replace seabed minerals, affect the future of deep seabed mining? Most importantly, disputes over maritime claims continue with at least one ending in armed conflict. How many more will also end that way?

The 1982 United Nations Law of the Sea Convention[6] is first and foremost a treaty of delimitation. It both codified and created international law, and whether it successfully delimits jurisdictional waters is a matter of considerable debate. In any event, it symbolizes man's magnificent effort to peacefully resolve a very important issue. Perhaps a second look at its seabed mining regime is in order before

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[5] Id. at 44.

[6] U.N. Doc. A/CONF.62/122 (1982); U.N. Doc. A/CONF.62/122/Corr. 3 (1982); U.N. Doc. A/CONF.62/122/Corr. 8 (1982); 21 ILM 1261.

tossing the treaty aside forever. One must first consider, though, whether the time is ripe for that second look; is the international community ready to reform Part 11? Should the United States have a policy on Part 11 reformation? The answer to both questions is yes; a more opportune time cannot be imagined.

This paper reviews the United States' objections to Part 11 and proposes different methods for reformation. Opening with a brief history of the delimitation controversy through UNCLOS III, it then continues with an overview of Part 11 and U.S. objections thereto. It concludes by proposing methods of reformation.

II. BACKGROUND

The fundamental dispute underlying deep seabed mining is delimitation of national jurisdiction over significant parts of the ocean. That dispute, de-escalated by the Grotian concept of freedom of the seas, once again intensified in response to the Truman Proclamation.[7] At peril are the high seas.

A. 1300 A.D.-1949

The law of the sea, one of the most settled areas of international law, has evolved primarily through custom. Responsive to changing technology, it is at once dynamic and stable. Its adaptability, dynamism, and stability is evident

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[7]Proclamation No. 2667, 10 Fed. Reg. 12303.

from its evolution through State practice, the formulation of recognized general principles of law, and the negotiation of multilateral treaties, all products of State consent.[8] Time-honored customs have shown a tenacity and adaptability to modernization few other legal areas can boast.[9]

For over 300 years, the Grotian concept of freedom of the seas was an ironclad principle of international maritime law.[10] Unyielding yet flexible, it accommodated coastal States desires for security without a loss of its essential freedoms. Coastal States claiming jurisdiction over ocean areas adjacent to their coasts, asserted a right to a territorial zone in the interests of national security. Despite common acceptance of a principle of protection, wide disagreement existed over the boundaries of such zones. Eventually there evolved the three

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[8]Joyner, Normative Evolution and Policy Process in the Law of the Sea, 15 OCEAN DEV.AND INT'L L., 61 (1985).

[9]B. FLEMING, Customary International Law and the Law of the Sea: A New Dynamic, in LAW OF THE SEA: STATE PRACTICE IN ZONES OF SPECIAL JURISDICTION 489 (T. Clingan ed. 1982).

[10]Freedom of the seas was practiced as early as 1300 A.D. in the Indian Ocean region among the Indo-Asian peoples. It is believed that Grotius drew from their maritime customs to formulate his doctrine of freedom of the seas published in Mare Liberum. R. ANAND, ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA: HISTORY OF INTERNATIONAL LAW REVISITED (1983); JOYNER, supra note 6 at 61; A. PARDO, An Opportunity Lost in LAW OF THE SEA 13 (Oxman, Caron, Buderi ed. 1983); Richardson, Power, Mobility, and the Law of the Sea, 58 FOREIGN AFF. 902 (1980). Mare Clausum, a formidable rebuttal to Mare Liberum, was written by John Seldon at the command of the English crown. It defended sovereignty over the sea in order to, inter alia, exclusively exploit its resources. ANAND at 105-106.

mile territorial sea.[11]

Growing commercial demands, expanding both the ocean's use and resource exploitation strained against the traditional concept of free seas. Following World War II, Grotian and Seldonian concepts clashed again, and the concept of the closed sea, enclosure,[12] emerged the victor.[13] The springboard was the Truman Proclamation of 1945. Claiming jurisdiction over the minerals of the seabed adjacent to the coasts of the United States, the proclamation revived the long-standing conflict of enclosure

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[11]From approximately 1703-1945, there was disagreement over a precise delimitation of the territorial sea. Disputes centered on a desire for a contiguous zone to enforce customs, fiscal, and sanitary regulations on the one hand, and a desire for a zone wider than three miles for fisheries regulation and for national security on the other. Despite strong support by the maritime powers for a three mile limit and its common, albeit reluctant, acceptance by many smaller States, the League of Nations Codification Conference at The Hague in 1930 failed to adopt a three mile territorial sea as a general rule. Many smaller coastal States deviated from the three mile territorial sea ostensibly in the interests of national security, and even those deviations were not uniform. For example, Norway, Sweden, and Denmark claimed four miles; Spain and Portugal claimed six miles; Italy claimed between three and ten miles; and Russia at one time claimed 100 "'Italian'" miles (later reduced to 12 miles). Throughout the 19th and 20th centuries, disagreement continued over a three mile territorial sea delimitation, with countries adopting whatever limits suited them. Consequently, some writers concluded that the three mile limit did not become established in international law as a general principle despite its common acceptance. The salient fact is there was a uniform range of delimitation claims along with a lack of widespread serious conflict over such claims. ANAND, <u>supra</u> note 8 at 137-149.

[12]Enclosure is a functional or territorial maritime jurisdictional claim over certain ocean areas. R. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES (1979).

[13]<u>Id.</u> at 165.

and delimitation despite its simultaneous announcement that the waters above remained high seas.[14]

That assumption of jurisdiction was accepted by the international community without demur. Many States rapidly followed the lead of the U.S. and asserted similar and, in some cases, excessive unilateral claims to maritime zones. Those proclamations, claiming jurisdiction over renewable and non-renewable resources of the continental shelf or in its absence over a stretch of ocean, in some instances also asserted jurisdiction over the water column and air space above. There was no commonly accepted outer limit to the continental shelf.[15]

That disparity in the nature of maritime claims and their

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[14]Proclamation No. 2667, 10 Fed. Reg. 12303; RICHARDSON, supra note 8 at 904; FLEMING, supra note 7 at 497; OGLEY, supra note 1 at 104. There were other, scattered, disputes just prior to the Proclamation (some caused by overlapping claims of jurisdiction) such as that resolved by the Gulf of Paria Treaty between Great Britain and Venezuela in 1942. OGLEY, supra note 1 at 104. Some believe a unilateral declaration like the Truman Proclamation is a better base than a bilateral treaty for an emergent regime. M. EVANS, RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION (1989).

[15]The most common examples of excessive maritime claims are those by some Latin American nations, lacking a continental shelf, to a territorial sea of 200 nautical miles. Despite repeated protests by the United States and Great Britain, those states persist in their claims. ANAND, supra note 8 at 164-165. See Agreements on the Exploitation and Conservation of the Maritime Resources of the South Pacific August 18, 1952, Chile-Ecuador-Peru, reprinted in Laws and Regulations on the Regime of the Territorial Sea, U.N. Doc. ST/LEG/SER. B/6 (1956) at 723. Mexico Presidential Declaration of October 29, 1945, U.N. Doc. ST/LEG/SER. B/1 at 16; Argentina Decree No. 14708 of Oct 11, 1946, U.N. Doc. ST/LEG/SER. B/1 at 4; Chile Presidential Declaration of June 23, 1947, U.N. Doc. ST/LEG/SER. B/1 at 6. EVANS, supra note 12 at 1.

delimitation is the genesis of current uncertainty. The comments of one writer in 1956 remain relevant today:

> The so-called "doctrine and practice of the continental shelf", hardly more than ten years old, through many unilateral proclamations different in character and contents, led at this time to a situation which can only be characterized as one of confusion and abuse.[16]

B. 1950-1956

Dispute resolution was difficult, and a uniform method of delimitation nonexistent going into the 1950's. Curbing the growing trend of expansive maritime claims thus became a prominent topic of the International Law Commission (ILC) from 1950-1956.[17] Extensive studies revealed the inherent complexity of the problem, the broad disagreement over delimitation principles, and a perceived need for universal rules.

Delimitation concerns were threefold: continental shelf claims, territorial sea claims, and total ocean enclosure. First, conflicting claims to the continental shelf between opposite or adjacent States were on the rise and complicated the search for a uniform delimitation method. Second,

[16]Kunz, Continental Shelf and International Law: Confusion and Abuse, 50 AM. J. INT'L L. 8.

[17]The ILC listed topics whose codification was deemed necessary and feasible; among them was the regime of the territorial sea and the regime of the high seas. It gave priority consideration to the regime of the high seas. ANAND, supra, note 8 at 175; EVANS, supra note 12 at 8; FLEMING, supra note 7 at 498-499; OGLEY, supra note 1 at 108-109.

extensive claims to territorial seas threatened traditional high seas navigation and fisheries rights, which the maritime powers wished to preserve. Finally, seaward extensions of national jurisdictional boundaries adumbrated total enclosure of the ocean.[18]

In response to the first concern, agreement on delimitation methods applicable to States with opposite or adjacent coasts eluded the ILC. Dissimilar coasts meant no one method of delimitation would be equitable; further hindering agreement was the lack of a uniform method to establish baselines. In some cases, national interests prompted the selection of a particular baseline method, in other cases greed was the motivator, while in still other cases, coastal configurations made certain baseline methods impractical.[19]

The second concern involved claims to extensive territorial seas. Claims ranged from four nautical miles to 200 nautical miles with 12 nautical miles the most common. The most notably outrageous claims were those by certain Latin American States to a 200 mile territorial sea. Consistently resisted by the maritime powers, those Latin American claims

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[18]ANAND, supra note 8 at 176-177; EVANS, supra note 12 at 8; FLEMING, supra note 7 at 498-500; OGLEY, supra note 1 at 108-109; D. Johnson, Extended Jurisdiction: The Impact of UNCLOS III on Coastal State Practice in LAW OF THE SEA: STATE PRACTICE IN ZONES OF SPECIAL JURISDICTION 3 (T. Clingan ed. 1982).

[19]ANAND, supra note 8 at 176-177; EVANS, supra note 12 at 9; FLEMING, supra note 7 at 498-500; OGLEY, supra note 1 at 108-109; JOHNSON, supra note 16 at 3-5.

have been a continuous source of conflict.[20]

Finally, delimitation of the outer continental shelf could be premised on any one of four methods. Because of dissimilar geologies, no one method is equitable. Of the four methods, only two, distance and sea floor characteristics, are widely and regularly used and consequently are the only two considered here. Each criteria has advantages and disadvantages with no single method suitable for all coastal configurations.

Depth is the most popular sea floor characteristic used for delimitation. Precision is probably the chief advantage of a depth criterion; its main disadvantage is a lack of uniform boundaries caused principally by dissimilar shelf formation. Using other sea floor characteristics to delimit the continental shelf will also result in a lack of uniform boundaries for that same reason. Depth criterion is inherently arbitrary, but it does allow a tidy distribution of seabed minerals between national and international areas.[21]

A distance criterion has two primary advantages: boundary uniformity and protection of State interests in close proximity to its shores. Its main disadvantage is imprecision caused principally by the lack of generally accepted rules for

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[20] OGLEY, _supra_ note 1 at 109-111; Johnson, _supra_ note 16 at 9-11.

[21] OGLEY, _supra_ note 1 at 99-103.

establishing baselines.[22]

The distribution of natural resources on the continental shelf under various delimitation methods helps one understand the interests at stake. The distribution of total oil and gas resources between national and international areas was determined for a 40 mile, a 200 mile, a 200 meter, and a 3000 meter limit. Resource distribution was as follows: 59% by a 40 mile limit; 68% by a 200 meter limit; 87% by a 200 mile limit; and 93% by a 3000 meter limit. A similar breakdown of "proved reserves and immediate prospects" of oil and gas resulted in the following: all such reserves were located within a 200 mile or 3000 meter limit; almost all reserves were located in a 200 meter limit; and 90% were located in a 40 mile limit. All known mine grade deposits of manganese nodules would be located in an international area, provided a 40 mile, 200 meter, or 3000 meter boundary was established, while a 200 mile boundary would locate some minesites in national waters. Obviously, States were eclectic in selecting a delimitation method.[23]

When the question was taken up by the ILC, a depth criterion had wide support by coastal States. For reasons not fully explained, an alternative criterion of exploitability, which faced substantial opposition because of its ambiguity,

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[22]OGLEY, supra note 1 at 99-103.

[23]OGLEY, supra note 1 at 99-103.

was coupled to depth. Insufficient support for the depth criterion alone threatened the adoption of any method until the 1956 Resolution of Ciudad Trujillo's endorsement of the exploitability criterion toppled remaining opposition and brought about its endorsement by the ILC.[24]

C. 1958-1960

Against that backdrop UNCLOS I was convened in 1958. Convened to codify or make new international law, representatives of 86 States and observers from inter-governmental bodies and specialized agencies of the United Nations attended the conference. Fifty-four delegates represented States from Third World nations in Africa, Asia and Latin America. For the first time in history, Third World representatives were a majority at a multilateral conference.[25]

Maritime powers, concerned by threats to the exercise of high seas freedoms (among which they included the right to exploit ocean resources) urged narrow territorial boundaries. Developing countries, fearing preclusion from exploiting those resources, urged expansive territorial boundaries.

With their anti-colonial rhetoric supported by the USSR, developing States resolved to either change or modify tradi-

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[24]The ILC endorsed the exploitability criterion believing an emphasis on language such as shelf and adjacency heavily qualified it. It was also generally believed that exploitation at depths beyond 200 meters would not be possible for many years. OGLEY, supra note 1 at 105.

[25]ANAND, supra note 8 at 176.

tional, "Western-oriented" law to suit their needs. Accusing the maritime powers of abusing the free seas doctrine, the developing countries rejected it as sacrosanct and argued for protection of the rights and duties of the coastal States. Demands included wider territorial seas and expanded continental shelf jurisdiction. Although unable to agree among themselves on a uniform limit for maritime claims, the developing States did not hesitate to accuse the maritime powers of invoking freedom of the seas to create hegemony of the high seas. Despite those acrimonious accusations, peaceful freedom of navigation continued to have universal support.[26]

That delimitation of both the territorial sea and continental shelf was the single, most important issue considered by UNCLOS I is apparent from its failure to establish a uniform delimitation of either. The breadth of the territorial sea remained unresolved, while efforts to agree upon the outer limits of the continental shelf were only slightly more successful.

Although conferees agreed to a criterion of depth and exploitability to delimit the continental shelf, the problem of delimitation between States with opposite or adjacent coasts complicated its universal applicability and highlighted both the severity and importance of those complex conflicts and the

[26] Id. at 176-177; OGLEY, supra note 1 at 105-111.

need for a general principle to govern those circumstances. Unfortunately, the ILC was unable to agree on a general rule for such delimitations and finally recommended fixing boundaries by agreement, by the median line or principle of equidistance, or by alternate methods justified by special circumstances.[27]

That proposal, promising to create yet more problems, was adopted at UNCLOS I and became Article 6 of the 1958 Geneva Convention on the Continental Shelf.[28] Meanwhile boundary disputes continued to arise. In an attempt to resolve the ambiguities created by the Continental Shelf Convention, the International Court of Justice (ICJ) declared in a series of cases that delimitation should occur by agreement on the basis of equitable principles or failing that by recourse to a competent third party.[29] In sum, neither the Convention nor the Court's decisions established definitive principles of

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[27]Commentaries reveal the ILC had no illusions of formulating a universal method of delimitation. Even the adoption of equidistance as a general rule was accompanied by doubt and considerable uncertainty. Hostility toward any seemingly inflexible general principle, caused by dissimilar coastal configurations, was defused by the elasticity of the special circumstances exception. Consequent objection was not against the exception _per se_ but its ambiguity. That the special circumstances (islands, coastal configurations, or navigable channels) were meant to be comprehensive, and that coastal configuration was the predominant preoccupation of the ILC is implicit in the commentary. Practically oriented, the ILC assumed that the general rule should result in a cartographic line and, therefore, never considered a criterion of equitable principles. EVANS, _supra_ note 12 at 10-11.

[28]_Id._ at 12.

[29]ANAND, _supra_ note 8 at 176.

delimitation for the continental shelf.

Even though the Continental Shelf Convention did not establish an unequivocal delimitation principle, it did contribute to an unprecedented submarine land grab between 1958-1967. :any States claimed jurisdiction to the edge of the margin, thereby more than doubling their jurisdictional area. Their impetus was technology advances that revealed not only vast ocean resources but their nascent ability to profitably harvest those resources. Advances that rendered the ocean floor susceptible to exploitation at greater depths.[30]

D. 1960-1967

UNCLOS II was convened to consider only the delimitation of the territorial sea and was equally unsuccessful. Unilateral extensions of the territorial sea continued, and by 1965, 56 States claimed a territorial sea in excess of the traditional three mile limit. Almost half of those States claimed a sea of 12 miles.

Negotiations during UNCLOS II revealed that nations supporting a "traditional" three mile territorial sea were quickly becoming a minority. By the close of UNCLOS II, it was evident that the majority of States favored a 12 mile territorial sea. How did they align on the issue? Northern States continued to support the traditional three mile territorial sea, while southern and equatorial States sup-

[30]OGLEY, supra note 1 at 105-106.

ported expanding maritime boundaries.[31]

III. UNCLOSIII

Disputes over the limit of both the territorial sea and the continental shelf continued following UNCLOS II. However in 1967, attention began to shift and to focus on deep seabed mining when Arvid Pardo, in a speech to the United Nations, expressed concern over the nationalization and militarization of the ocean floor.[32] In addition to urging the creation of an international agency to assume jurisdiction over the deep ocean floor, he proposed a treaty that would contain the following principles: 1. that the ocean floor seaward of the outer limits of national jurisdiction may not be appropriated by any State; 2. that exploratory activities in that area be conducted in a manner consistent with the principles and purposes of the United Nations Charter; 3. that the area's use and economic exploitation be conducted to protect mankind's interests, with the benefits used mainly to promote development in poor nations; and 4. that the area be used exclusively for peaceful purposes. He also called for a United Nations resolution declaring the deep seabed was the common heritage of mankind to be peacefully exploited to benefit mankind as a whole; to establish a moratorium on sovereignty

[31]Northern states generally have the largest naval, maritime shipping, and distant water fishing fleets. OGLEY, supra note 1 at 109-111; Johnson, supra note 16 at 8-9.

[32]S. ODA, THE UNITED NATIONS SEABED COMMITTEE 1968-1973; OGLEY, supra note 1 at 1-2.

claims in the area pending a clear definition of the continental shelf; and to create a committee to study the issues incident to creating such an agency.[33] The pre-emptory nature of his proposal is clear: continental shelf delimitation would not include the deep ocean floor. Developing States' support of his proposal is not at all inconsistent with or antithetical to their earlier expansive maritime claims. Their goal remained unchanged: their exploitation of ocean resources. Shifting gears, they attempted to backdoor their efforts by creating a deep seabed mining regime to serve their interests.

A. The Seabed Committees

Creating another United Nations body was theoretically supported, but comments suggested a concern over duplication of effort.[34] An Ad Hoc Seabed Committee, succeeded by a Permanent Seabed Committee, was nonetheless established to study Pardo's proposals. The following issues were identified as the most important: a precise delimitation of the continental shelf; an iteration that the deep seabed was not

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[33]ODA, supra note 30 at 3-7.

[34]The UNESCO observer rejected the proposal to create another UN body; the United States favored a "Committee on the Ocean" to assist the General Assembly to promote long-term international cooperation in marine science; the USSR expressed concern over duplication of effort considering existing organizations and suggested the Inter-Governmental Oceanographic Commission might be used more effectively. Developed countries on the whole considered the Eighteen-Nation Disarmament Committee more appropriate to consider the militarization of the deep seabed. Id. at 6-7. Johnson, supra note 16 at 12-13.

susceptible of national appropriation but was the common heritage of mankind; and the prohibition of militarization of the deep seabed. Also important was the international management of deep seabed resources. States not a party to the 1958 Geneva Convention on the Continental Shelf did not dispute its validity as international law; however, its principles of delimitation were not considered dispositive.[35] Thus began the pre-emption of more expansive continental shelf claims, at least for the life of the treaty.

The work of the Ad Hoc and Permanent Committees spanned six years and revealed the growing polarization between industrial and developing countries.[36] As developing countries learned of the mineral wealth lying on or beneath the deep seabed [37] they began to support more precise delimitation of the outer limits of the continental shelf. Pending that, the developing countries urged a moratorium on exploitation of the deep ocean floor, a move strongly opposed by the industrial countries.[38] While both groups supported the concept of an international agency to oversee exploitation of the ocean's

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[35]ODA, supra note 30 at 8-10.

[36]Id. at 18-237; OGLEY, supra note 1 at 105-116; ANAND, supra note 8 at 176-180.

[37]OGLEY, supra note 1 at 2.

[38]ODA, supra note 30 at 18-237. Ocean law historically is premised upon two fundamental principles: first, the oceans should be used to generate wealth, and, second, access for that purpose should be unimpeded outside narrow territorial seas. ECKERT, supra note 10 at 14.

mineral deposits, there was serious disagreement over the appropriate international machinery to regulate such exploitation. Underscoring that conflict were their divergent views on the outermost limits of the continental shelf.[39]

Although the fight over deep seabed resources has been given an ideological cast, it is essentially the ageless struggle for riches. Ideological slogans cloaked in legal principles were used to camouflage a competitive scramble for ocean resources by the developing countries in a manner reminiscent of the colonialism they despised.[40]

Fearing the developed countries would strip the ocean of its resources and prevent them from reaping its wealth, the developing countries joined in a loose association known as the Group of 77.[41] Its aim was to monopolize the ocean's

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[39]ODA, supra note 30 at 18-237; ECKERT, supra note 10 at 12-15.

[40]JOYNER, supra note 6 at 66. One theory postulates that the "Eurocentrically-derived notion of freedom of the seas" contributed to the instigation and growth of colonialism in the 'backward' nations of Asia and Africa. The need for both new sources of raw materials and new commercial markets required the formulation of new, more comprehensive legal norms, specifically, the freedom of the seas doctrine. The European powers' rejection of the African and Asian states as legitimate subjects of the international legal system fostered a "new imperialism" blandly accepted by European nations. The result was a growth of protectorates, colonial possessions, and spheres of influence over African and Asian peoples. That politico-economic colonization was dependent upon and abetted by international trade guaranteed by free transit on the high sea. Colonialism's legacy of resentment appears to have manifested during UNCLOS III and may explain many provisions of the treaty. Id. at 66. ANAND, supra note 8 at 124-135.

[41]One Third World diplomat observed that developed countries with less than one third the World's population took 60% of the world's catch of fish in 1970, while the developing countries took only 40 percent. There was widespread belief that practice would

wealth. It sought to accomplish that by pre-empting claims of maritime development rights made by industrialized nations. Through skillful rhetoric and a growing tide of nationalism, it proved capable of dictating the regime to regulate deep seabed mining and wasted no time pursuing its goals.[42]

B. The Conference

Interestingly, the enclosure trend was accepted without question. The debates over delimitation begun in UNCLOS I and II continued unabated without noticeable realignment of States.

Industrial countries continued their support of free seas; developing countries continued to push for expansive maritime zones that stopped short of complete enclosure. Eight arduous years of negotiations brought about a compromise on nonseabed issues satisfactory to the parties. In contrast, deep seabed mining negotiations proved to be highly unsatisfactory to industrial countries and the crown jewel for developing countries. The developing countries managed to achieve their goal to monopolize ocean resource exploitation through an onerous deep seabed mining regime. That regime is examined below.

IV. THE INTERNATIONAL SEABED AUTHORITY

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be repeated in exploiting seabed minerals. Today, the Group of 77 numbers over 119 members. ANAND, supra note 8 at 194-201.

[42] Id. at 194.

The Authority[43] was created to administer and control exploitation and exploration of seabed resources[44] in the Area.[45] It is a two chambered organ consisting of an Assembly and a Council. The Assembly formulates policy, and the Council executes it. It is administered by a Secretariat, and has its own mining company called the Enterprise.[46]

Budget items include its administrative costs, Enterprise funding, and subsidies for developing countries adversely affected by activities in the Area.[47]

Funding comes from members' assessments, royalties and taxes from activities in the Area, income transfers from the Enterprise, loans, voluntary contributions, and periodic special assessments. The Assembly determines the Authority's credit limit; the Council exercises the power to borrow.[48]

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[43]Art. 1; Art. 156.

[44]Article 133 defines resources as "all solid, liquid or gaseous mineral resources <u>in situ</u> in the Area at or beneath the sea-bed, including poly-metallic nodules; (b) resources, when recovered from the Area, are referred to as 'minerals'."

[45]Article 1 defines the Area as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." Baselines and the outermost limits of the different maritime zones are established by other treaty articles. <u>See</u> Part 2 sections 2 and 4; Part 4; and Part 6.

[46]Art. 158; Art. 160; Art. 162. Although the Authority may regulate exploitation of any resource in the Area, this paper is limited to the mining of polymetallic nodules.

[47]Art. 173.

[48]Art. 151; Art. 171.

A. The Assembly

The Assembly, the Authority's supreme body, consists of all States party to the Convention. A two-tiered voting system distinguishes between procedural and substantive matters and requires a three-fourths majority for the former and a two-thirds majority for the later.[49]

The Assembly formulates general policy for any matter within the jurisdiction of the Authority. Its enumerated powers include, inter alia, electing members to the Council and to the Governing Board of the Enterprise; assessing members' financial contributions; approving or formulating an equitable distribution of mining income with special consideration for developing countries and liberation movements; and protecting the interests of developing countries and land-locked and geographically disadvantaged States affected by activities in the Area. It must also act upon the following Council recommendations: the distribution of payments and contributions made pursuant to Article 82, and rules and regulations to govern activities in the Area.[50]

B. The Council

The Council consists of 36 members representing consumer nations, investor nations, land-based producers of seabed minerals, developing countries, and certain geographical

[49]Art. 159.

[50]Id.

regions.[51]

Four Council members represent consumer nations with one seat reserved for the largest consumer, and one for the Eastern European (Socialist) region. Four Council members selected from among the eight States parties with the largest investment activities in the Area represent investor nations with one seat reserved for the Eastern European (Socialist) region.[52]

Four Council members represent land-based mining states with at least two from developing States whose mineral exports have a substantial impact upon their economy. Six Council members represent other special interests of developing countries. And, eighteen Council members represent designated geographical regions.[53] The Assembly is required to ensure that Council representation of land-locked and gecgraphically disadvantaged States and developing coastal States is reasonably proportionate to their representation in the Assembly.[54]

1. Voting

Like the Assembly, the Council's voting system distinguishes between procedural and substantive matters. Unlike

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[51]Art. 161

[52]Id.

[53]Id. The designated regions are Africa, Asia, Eastern Europe (Socialist), Latin America, and Western Europe and Others. Those eighteen at-large members are intended to ensure an equitable distribution of Council membership. Id.

[54]Id.

the Assembly, the Council's system requires different majorities. Procedural matters require a simple majority. Substantive matters require either a two-thirds majority, a three-fourths majority, or a consensus.[55]

The three-tiered voting system for substantive matters was designed to compensate for the absence of a veto. Routine administrative matters require only a two-thirds majority. Sensitive matters, depending upon their degree of sensitivity, require either a three-fourths majority or a consensus. Examples of the latter include implementing rules and regulations governing activities in the Area; distributions of income generated by mining and revenue-sharing under Article 82; and subsidies to developing countries whose minerals industry is adversely affected by market conditions caused by mining in the Area.[56]

Observers may participate in Council deliberations, but may not vote.

2. Council Powers

The Council promulgates specific policy for matters under the Authority's jurisdiction. It approves or disapproves all plans of work submitted for mining in the Area.[57]

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[55] Id.

[56] Id.

[57] Art. 162. Plans of work are deemed approved unless a written objection is filed within 14 days of their consideration. A consensus is required to uphold an objection and disapprove a plan of work. If the Legal or Technical Commission recommends disapproving a plan of work or fails to make any recommendation,

C. The Enterprise

The Enterprise may engage in all phases of mining in the Area. Its initial funding must enable it to mine one site.[58] Financing comes from members' assessments (other than those targeted for the Authority's administration), loans, voluntary contributions, or other available funds. It may also obtain loans secured by its property and assets. States parties are required to make "every reasonable effort to support" its loan applications to international financial institutions and capital markets. The Enterprise is supposed to become self-supporting.[59] One-half the initial funding will be collected from States Parties in the form of an interest-free, long-term, loan. The balance will be obtained through loans guaranteed by States Parties.[60]

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approval requires a three-fourths majority of the Council. Id.

[58]Art. 151; Art. 171; Art. 174.

[59]Art. 173(2)(b); Art. 171(a); Art. 160(2)(e); Annex III, Art. 11. The Preparatory Commission determines the amount initially needed to mine one site. Annex III, Art. 11(3)(a).

[60]Annex III, Art. 11. Each State Party must deposit an irrevocable, non-negotiable, interest-free promissory note with the Enterprise in the amount of its share of start-up funding. Interest-bearing loans and the Enterprise's solvency both have priority over repaying interest-free loans. With no repayment obligation, the Enterprise cannot default on such loans. Even if default occurred, the Authority is not liable for repayments since its obligations, assets, and funds will be segregated from the Enterprise's. Annex III, Art. 11(4). Additionally, the Enterprise is immune from seizure, attachment, or execution before final judgment; from requisition, confiscation, expropriation, or any other form of executive or legislative seizure; from discriminatory restrictions, regulations, controls, and moratoria of any kind. It must receive treatment accorded domestic corporations, however, it may also receive special incentives, rights, privileges, and

Unlike commercial miners, the Enterprise is not subject to national or international taxes, or royalties during the first ten years of commercial production. Standards for approving its plans of work differ from those for commercial miners. Whatever necessary goods and services it lacks upon submitting a plan of work may be procured following its approval. Developing countries are the preferred suppliers of those items.[61] It may exploit a minesite individually or in a joint venture, or allow a developing country to do likewise.[62]

D. Access to the Area

To qualify for access to the Area, an applicant must be a national of a State Party and possess financial and technical capabilities to profitably exploit its minesite.[63] It must submit an application fee of (US) $500,000 and a plan of work containing two mine sites equal in size and estimated commercial value. During review of the plan of work, the Authority selects and reserves one minesite for exploitation by the Enterprise.[64]

Applicants may request authorization to either explore,

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immunities. Annex III, Art. 13.

[61]Annex III, Art. 12

[62]Annex III, Art. 9.

[63]Annex III, Art. 4.

[64]Annex III, Art. 13.

mine, or do both. More than one application for exploration may be approved for each minesite. Priority among applicants is determined by their application's filing date. Neither exploration nor mining can begin until the Authority issues an applicant an exploration or a production authorization. Explorers' claims are protected from poachers through two treaty provisions. Under one, those explorers with an approved plan of work for exploration have priority over other applicants for that site. Under the second, an explorer with the most resources and effort invested in a site has a priority over all other applicants.

Although the treaty protects investors against poachers, it does not protect them from adverse production policies of the Authority.[65] A production limit, commodity agreement, or other arrangement to which the Authority is a party may deny an investor access to a site.[66]

An anti-monopolization policy threatens access to sites by controlling the selection of applicants to ensure equitable access to all States. An anti-density policy threatens access by prohibiting a State Party from exploiting more than 30 percent of a 400,000 square kilometer circle in non-reserved areas, or more than 2 percent of the total non-reserved seabed

[65] Annex III, Art. 7 and Art. 10.

[66] Id.

area.[67]

An annual fee of $1 million is levied upon execution of a contract for mining. Once commercial production begins, a miner must pay the greater of either the annual fee or a production charge.[68]

E. Technology Transfer

Applicants must agree to transfer mining technology to the Enterprise and developing countries on fair and reasonable terms, if the technology is not available on the open market. If an applicant is not legally entitled to transfer its technology, it must obtain a written assurance of transfer upon fair and reasonable commercial terms. An applicant refusing to do either may not use its technology in the Area.[69]

F. Production Policies

Mining activities may be conducted in the Area only if they contribute to the social, technological, and economic development of Third World countries. Adverse economic impact on the economies or markets of those countries may result in production controls which do not apply to the Enterprise for the first 25 years of commercial mining.[70] As a result, the

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[67]Annex III, Art. 6 and Art. 7.

[68]Annex III, Art. 13. A combination of the production charge and a share of net proceeds may be paid in lieu of the production charge.

[69]Art. 144; Annex III, Art. 5.

[70]Art. 151.

Authority regulates the global minerals market in order to protect developing countries.[71] Notwithstanding a duty of nondiscrimination, the Authority may give special consideration to developing countries in formulating production policies. Those policies most strikingly reveal the discriminatory intent and impact of Part 11: only investments by nationals of developed countries appear at risk.[72]

Life, though, is not so easily compartmentalized. How will production controls affect a joint venture between mining companies of a developed and a developing country? What if one partner is a mining company of a developing country which is either expanding its operations to seabed mining or formed to engage in deep seabed mining? Which developing country will production controls protect: the land-based or sea-based producer?[73]

G. Review Conference

Fifteen years from the date of the earliest commercial production a conference will convene to conduct a comprehensive review of Part 11. It must consider six items in detail to determine whether the treaty's goals are being met. Those items are as follows:

(a) whether the provisions of this Part [Part

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[71]Art. 151.

[72]Art. 150; Art. 152.

[73]As unlikely as those events may seem, they are not that far-fetched. If the treaty enters into force without changes to Part 11, a mining company may seek out such a partner.

11] govern the system of exploration and exploitation of the resources of the Area have achieved their aims in all respects, including whether they have benefited mankind as a whole;

(b) whether, during the 15-year period, reserved areas have been exploited in an effective and balanced manner in comparison with non-reserved areas;

(c) whether the development and use of the Area and its resources have been undertaken in such a manner as to foster healthy development of the world economy and balanced growth of international trade;

(d) whether monopolization of activities in the Area has been prevented;

(e) whether the policies set forth in articles 150 and 151 have been fulfilled; and

(f) whether the system has resulted in the equitable sharing of benefits derived from activities in the Area, taking into particular consideration the in interests and needs of the developing States.[74]

During the first five years of the Review conference, revision of Part 11 requires a consensus. If a consensus can not be reached within that period, amendments adopted and ratified by three-fourths of the States Parties will bind all Parties to the convention.[75]

V. UNITED STATES' OBJECTIONS

The United States consistently objected to Part 11 provisions during the Conference. Consequently, the Reagan

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[74]Art. 155.

[75]Art. 155.

Administration's review in 1981 of the draft convention has been justified as a culmination of U.S. resistance to Part 11 and as a policy decision squarely within the mandate from the American public that put President Reagan in office. The U.S. objections follow.[76]

Two fundamental objections to Part 11 on the part of the U.S. are its failure to guarantee nondiscriminatory access to minesites and its inequitable decision making system.[77] The Council's decision making system is the main focus of concern. Other U.S. objections include the binding power of the review conference; production policies; mandatory technology transfers; Enterprise management and its preferential treatment; and funding of liberation movements.[78]

A. The Decision Making System

Identified as the "single most important deficiency" of Part 11, three areas of the Authority's decision making system were targeted as particularly troublesome: the Council's composition; its decision making process; and its relationship to the Assembly.[79]

1. The Council's Compostion

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[76]Malone, supra note 3 at 45-46, 49.

[77]Address by Wesley Scholz, U.S. Department of State, at University of Virginia Seminar on the Law of the Sea (April 1,1989).

[78]Id. at 2, 3, 7, 10, 11, 13, 14.

[79]Id. at 3.

The constitutional structure of the Council fails to provide reasonable representation of industrialized countries. With over two-thirds of its seats guaranteed to developing countries and the Soviet bloc, representation is obviously skewed. Industrialized countries are nonetheless required to provide the bulk of funding to the Authority and to the Enterprise.[80] The United States' believes that imbalance could be corrected with two changes: through a redistribution of Council seats to increase the overall representation of industrialized countries and through a guaranteed seat for the United States on the Council. Some have argued that the "largest consumer" seat guarantees a U.S. presence on the Council. While the "largest consumer" seat may initially ensure a U.S. presence, it does not guarantee continuity/encumbency/retention/perpetuity. In light of its financial contributions and a continued Soviet presence on the Council, is it reasonable to reject a continued U.S. presence on the Council?[81]

2. The Council's Voting System

One cannot discuss the Council's composition without also discussing its voting system.[82] In a tacit admission of

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[80]In 1984, U.S. government officials estimated industry and government liability for direct costs and loan guarantees at $1 billion for initial and continuing operating costs. That liability is considered "unconscionable." MALONE, <u>supra</u> note 3 at 47.

[81]SCHOLZ, <u>supra</u> note 74 at 5.

[82]<u>Id.</u> at 5.

unbalanced representation, the treaty establishes a three-tiered voting system and distinguishes between routine and sensitive substantive matters. Although consensus establishes a veto of sorts, it also risks inaction; consequently, it is reserved for the most sensitive issues. A common institutional device used mainly for budgetary matters, consensus will be used here to determine matters directly affecting mining. Two concerns arise. The first is its potential to interrupt mining operations; the second is its power to prevent the mining of other minerals.[83]

A three-fourths majority on other important matters may also frustrate timely decisions thereby adversely affecting mining operations. Blocking decisions inimical to certain interests is an important management tool, but should be used in the best interests of the international community. The present system has a high risk of parochial political abuse. Because mining operations are controlled by the Council, its voting system must be reasonably capable of sustaining a smooth flow of business. Its present system invites delay in part because of its high majorities and in part by preventing or unreasonably delaying positive decisions. Those defects make the system particularly unsuited to industrial management decisions.

The U.S. believes those defects could be corrected

[83] Id. at 6.

without affecting the veto interest. A more balanced Council composition with weighted or chambered voting and overall lower majorities is essential.[84] That modification would permit negotiation and avoid deadlocks in the Council. An inability to negotiate ensures a deadlocked Council. If a Council system is to succeed, the treaty must be sufficiently flexible to allow the Council to adopt rules of procedure to avoid deadlocks. As an example, it could establish that voting will not be used until other delineated methods are tried with no success.

3. Council and Assembly Relationship

Part 11 fails to clearly establish the relationship between the Council and the Assembly. As a plenary body requiring only two-thirds majority, the Assembly can be expected to reflect developing country interests. Its unchecked plenary powers enable it to encroach upon Council functions; a possibility enhanced by a functional overlap between the two bodies. Merely clarifying that either body may only exercise its respective enumerated powers and those incidental powers necessary to their performance does not preclude the possibility of encroachment. Nor will modifications to Council composition and voting arrangements prevent Assembly intrusion into or dominance over Council affairs.[85]

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[84] Id. at 6.

[85] Id. at 7.

B. Review Conference

Rejecting the notion that major treaty amendments could bind the U.S. without its concurrence, the review conference was identified as a significant impediment to treaty ratification. Authorized to conduct a comprehensive review of Part 11, the review conference deviates from commonly accepted norms by permitting amendments to bind a State whether or not it concurs. Major amendments are likely to occur since many developing countries openly stated they viewed the conference as an opportunity to replace the parallel system with a unitary system of direct exploitation by the Authority.[86]

C. Access

A major U.S. objective during negotiations was guaranteed, nondiscriminatory access to minesites. Decision making inadequacies previously mentioned coupled with broad discretionary powers fail to provide such a guarantee. The following areas create a climate of uncertainty inimical to investment: contract approval; regulatory interference; discrimination among miners; and access to other minerals. Other areas which also require modification to safeguard investments include the following: broad, open-ended discretionary powers for decision making; review under dispute settlement procedures that is too narrow in scope;[87] the anti-monopoly

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[86] Id. at 8.

[87] Id. at 8-9.

provision; the anti-density provision; and most importantly production controls.[88]

D. Production Policies

Modeled on a centrally planned market, the Authority's production policies have always caused the United States heartburn.[89]

The antithesis of the free enterprise system, Part 11's production policies and formulae are inherently incapable of creating a secure investment climate for successful deep seabed mining. Production controls inhibit investment through an inherent uncertainty in return on investment. Production controls can be expected to hinder exploitation unless politically or strategically motivated; to primarily protect a few land-based producers in developed countries; and to create a conflict of interest for the Authority. The U.S. also objects to the power to bind it to commodity agreements or arrangements negotiated on behalf of all States Parties by the Authority.[90]

E. Technology Transfer

Conditioning continued access to minesites on mandatory technology transfers is so inimical to U.S. commercial and economic interests that its elimination is a fundamental

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[88] Id. at 9.

[89] Id. at 10-11.

[90] Id. at 10-11.

objective.[91]

If the concern underlying the transfer provisions is a monopolization of mining technology, assisting the Enterprise in securing technology and avoiding concerted refusals to sell adequately ensure its acquisition of the necessary technology. Many believe that since 1982 the availability of mining technology on the open market has been increasingly obvious and that the only dilemma facing the Enterprise will be choosing between competing suppliers.[92]

F. The Enterprise

There is an obvious difference in treatment of commercial miners and the Enterprise. Provisions favoring the Enterprise create an uncertain investment climate through their potential to disrupt private sector mining. Examples of such provisions include the following: concessionary financing; exemption from national and international taxes; exemption from royalties and production controls; and the restriction of financial incentives to joint ventures with the Enterprise.

Another serious impediment to U.S. ratification of the treaty is the exclusion of the United States and other industrialized countries from fiscal decisions concerning the Enterprise. The United States believes those countries must

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[91]Id. at 11-13. The convention's failure to ensure that dissemination of seabed mining technology would occur under conditions that would not compromise national security is also objectionable.

[92]Id. at 11-13.

be guaranteed an adequate voice in determining the terms and conditions of financing, the level of financing, call up procedures, repayment schedules, and default procedures. And, that such participation is particularly necessary in the absence of adequate loan repayment guarantees.[93]

G. Funding Liberation Movements

An inherently unacceptable principle is the potential dis-
tribution of mining income to liberations movements. Although such distributions require a consensus and could be prevented, those provisions remain fundamentally objectionable to the United States.[94]

VI. REFORMATION

The United States has no official reformation policy, and appears unlikely to formulate one in the absence widespread support to reform Part 11. One may always speculate, however, and that topic is particularly challenging. If the U.S. had a policy to reform Part 11, what should it be, and how should it be done?

A. Foundations for Reform

Before negotiations could resume, some preliminary work must be done. First, the Soviet Foreign Minister must raise with the U.S. Secretary of State the possibility of opening

[93] Id. at 13-14.

[94] Id. at 14-15.

discussions on reforming Part 11. The Soviets must urge the U.S. to reconsider its unwillingness to consider reformation of Part 11. Assuming the U.S. responds favorably, a series of meetings with the USSR to compare positions, resolve differences, and agree upon desired reforms would be necessary. Once the two countries establish similar positions on the issues, a series of meetings with their respective allies would be necessary to elicit support for the desired reforms.

If such meetings are successful, similar meetings with lesser developed countries should take place followed by, if successful, meetings with a select group of developing countries. To restrict negotiations to Part 11 matters, all meetings should be held only during sessions of the Preparatory Commission (PREPCOM). Much like Part 11's review conference, other treaty provisions should not be discussed at those meetings. Because PREPCOM staff would be an integral part of such negotiations, experienced negotiators would be a necessary staff addition.

B. Reformation Methods

Several methods could be used to implement reforms. Those considered are a protocol to the treaty, a private agreement, and a memorandum of understanding (MOU).

1. A Protocol

The preferred method to implement reforms is a protocol designed to enter into force simultaneous to the treaty. Because it creates binding obligations, a protocol is by far

the best and most reliable instrument to institute reforms. In the event a protocol is not possible, the following options exist.

2. A Private Agreement

Negotiation of a private agreement containing the necessary changes and a commitment to begin the amendment process at the first session of the Authority is another option. Shortly after executing the agreement, the treaty should be signed, ratified, and enter into force. This approach is highly risky because of the absence of a formal international obligation binding the parties. Delay, inevitable while the Authority becomes fully staffed and operational, could be detrimental if prolonged, since parties might be tempted to recant earlier promises.

3. A Memorandum of Understanding

The treaty could also be partially implemented and a memorandum of understanding executed to suspend implementation of certain provisions until reforms could be negotiated. The difficulties mentioned above also apply here. In addition, this method would be difficult because the organization of the Authority would be suspended by the MOU pending reforms.

4. Suspending Provsions

The parties could agree not to implement provisions that no longer have significant impact on mining but are more in the nature of objections on principle. Included would be provisions on production controls, technology transfers, and

funding liberation movements. By agreeing not to implement certain provisions, dis-agreements over principle could be avoided.

VII. CLOSING

Although debate over the pros and cons of the 1982 Law of the Sea Convention has somewhat subsided, deep seabed mining issues continue to spark interest. Third World nations proved themselves capable of allying for a multilateral conference and of tough international negotiations. The 1982 Convention, particularly Part 11, is evidence of that. But their negotiating skills in that context lack sophistication and simple common sense. Of what use is toughness if it leads to a breakdown in international relations?

With the majority of States claiming and recognizing a 12 nautical mile territorial sea, the breadth of the territorial sea is no longer an issue. The delimitation conflict today is over abuse of the straight baseline method and an uncertainty of the outermost limits of the continental shelf. Therein lies the need for the 1982 Law of the Sea Convention. It creates stability in those regimes. Freedom of navigation and other traditional high seas freedoms are threatened only when delimitation is uncertain and lacks uniformity. When delimitation is no longer in issue, free seas are no longer in jeopardy. States' desires for uniform boundary methods reflect their desire to keep the seas free for navigation and communication. The nonseabed portions of the convention

evidence the international community's commitment to free seas.

Refusing to reform Part 11 invites and fosters instability and conflict. Economic, political, and social issues have changed dramatically since 1982. The world is now a little older and hopefully a little wiser; reform is possible now or never.

The law of the sea remains the most important international legal regime. With time-tested principles, it continues to shape global events. Much like the inception of the free seas doctrine, the 1982 Law of the Sea Convention signifies a crossroads in the evolution of maritime law. Mankind wisely chose its nonseabed provisions. It behooves us to reconsider the seabed mining provisions and thereby elect a reasoned evolution of the law of the sea.