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THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: THE TENTH SESSION (1981)

By Bernard H. Oxman*

I. INTRODUCTION

The tenth session of the Third United Nations Conference on the Law of the Sea met in New York from March 9 to April 24, 1981 and resumed in Geneva from August 3 to August 28, 1981. The Drafting Committee and its organs also met from January 12 to February 27 in New York and from June 29 to July 31 in Geneva.¹

The ninth session had ended a year earlier with the issuance of a revised text by the collegium² of the conference entitled Draft Convention on the Law of the Sea (Informal Text).³ The concluding procedural note⁴ by the President contained the following observations:

The programme of work for the tenth session must provide for the adoption of the Convention during 1981 and the signature of the Final Act at a date to be determined in consultation with the Government of Venezuela.

When the Conference resumes its work at the tenth session, some remaining questions will have to be considered, among them:

- (a) participation;
- (b) the mandate of the Preparatory Commission, including recommendations that would enable the system of exploration and exploitation to be initiated and also ensure that the Enterprise operate efficiently as early as possible after the Convention enters into force; and
- (c) the treatment to be accorded to preparatory investments made before

* Professor of Law, University of Miami School of Law; United States Representative and Vice Chairman of the U.S. delegation, and Chairman of the English Language Group of the Drafting Committee, at the tenth session of the Law of the Sea Conference. The views expressed herein are those of the author and do not necessarily represent the views of the Department of State, the U.S. Government, or the English Language Group or Drafting Committee of the Conference.

¹ This article is a sequel to Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AJIL 1 (1974); *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AJIL 1 (1975);—*The 1975 Geneva Session*, 69 AJIL 763 (1975); and Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Session*, 71 AJIL 247 (1977);—*The 1977 New York Sessions*, 72 AJIL 57 (1978);—*The Seventh Session (1978)*, 73 AJIL 1 (1979);—*The Eighth Session (1979)*, 74 AJIL 1 (1980);—*The Ninth Session (1980)*, 75 AJIL 211 (1981).

² The collegium consists of the President of the conference, the Chairmen of the three main committees, the Rapporteur-General, and the Chairman of the Drafting Committee.

³ UN Doc. A/CONF.62/WP.10/Rev.3 (1980) [hereinafter cited as DC(IT)]. The procedure is set forth in UN Doc. A/CONF.62/62 (1978), 10 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 6 (1978) [hereinafter cited as OFF. REC.], discussed in 73 AJIL at 3-5 and 74 *id.* at 2. The ninth session is discussed by the author at 75 AJIL 211, note 1 *supra*.

⁴ UN Doc. A/CONF.62/BUR.13/Rev.1 (1980).

the Convention enters into force, provided that such investments are compatible with the Convention and would not defeat its object and purpose.

During the same period, the three Main Committees and the Plenary will have to examine the recommendations of the Drafting Committee.

At the same time, consultations will have to take place between delegations in an effort to bring the Conference as close as possible to consensus on issues that have not found adequate solution in the text as revised.

It was contemplated in this regard that consultations would continue on the question of delimitation between states with opposite or adjacent coasts.⁵

The story of the tenth session of the conference is almost entirely the story of the consequences of events that occurred after the end of the ninth session:

- In December 1980, Ambassador Hamilton Shirley Amerasinghe of Sri Lanka, President of the conference since its inception, and President of the UN Sea-bed Committee that prepared for it, died.

- In January 1981, the Reagan administration took office and Republicans assumed majority control of the U.S. Senate.

- On March 2, 1981, the following statement was issued by the U.S. Department of State:

After consultations with the other interested Departments and Agencies of the United States Government, the Secretary of State has instructed our representative to the UN Law of the Sea Conference to seek to ensure that the negotiations do not end at the present session of the Conference, pending a policy review by the United States Government. The interested Departments and Agencies have begun studies of the serious problems raised by the Draft Convention, and these will be the subject of a thorough review which will determine our position toward the negotiations.⁶

- On March 7, 1981, Ambassador James L. Malone was named Special Representative of the President for the Law of the Sea Conference, leading a new U.S. delegation on which several officials were replaced by the new administration.

When the tenth session began, principal responsibility fell on the Asian Group to present an acceptable nominee to replace Ambassador Amerasinghe. By the end of the first week, after some straw polls within the group, Ambassadors Nandan of Fiji and Pinto of Sri Lanka withdrew, and the Asian Group nominated Ambassador T. T. B. Koh of Singapore.⁶ He was elected by acclamation on March 13.

II. THE REVIEW

The U.S. policy review posed questions of both process and substance. A commonly repeated reaction, "We cannot turn back the clock to 1974," reveals the extent to which these questions are interrelated.⁷

⁵ See DC(IT) Arts. 15, 74, 83, 121, 298(1)(a), and 309.

⁶ Soviet allies in the Asian Group expressed reservations but did not prevent the nomination by consensus.

⁷ This reaction is mistakenly perceived by some as merely a reference to personalities.

The Chairman of the Group of 77 summarized the reaction to the new United States position as follows:⁸

The Conference concluded its 9th resumed session with the hope that the long and costly process of negotiating the Law of the Sea Convention both in terms of manpower and finances was nearing an end and that a new chapter of international understanding and cooperation was about to be written. It was with disbelief and consternation therefore that the group received the news just before the beginning of the 10th, and what was to have been the last negotiating session of the Conference, that the new U.S. administration had decided to undertake a "comprehensive policy review" relating to the Law of the Sea Convention and had instructed its delegation to ensure that the negotiations would not be concluded at that session.

In testimony before Congress, Ambassador Malone summarized the reasons for the U.S. actions:⁹

When this Administration took office, it was confronted with an Informal Draft Convention on the Law of the Sea containing a number of provisions raising concerns on which I shall elaborate shortly. We were informed that the Conference was on the verge of finalizing this text and that there was an expectation that the negotiations would conclude in 1981.

Many of the provisions of the draft convention prompted substantial criticism from industry, Congress, and the American public. There was also some question whether this draft Convention was consistent with the stated goals of the Reagan Administration. Therefore, the Administration decided that it would be better to face criticism in the U.N. than to proceed prematurely to finalize a treaty that might fail to further our national interests. Many comments were made by foreign delegates and in the U.S. press about the manner in which we announced our decision to conduct a policy review and to appoint a new chief negotiator. Let me report . . . that the decision to conduct the review was made as rapidly as possible, consistent with the many burdens and competing priorities faced by any new Administration. A change in the leadership of the American delegation was essential, in order to ensure that other countries clearly understood our seriousness of purpose with respect to the review. That action was also necessary in order to send the signal to other delegations that the U.S. could not be induced to return immediately, and thus prematurely, to the bargaining table by offers of minor technical changes to the draft convention. I am sure you can also appreciate that it would be less difficult for a new head of delegation to adhere to a negotiating posture that diverged from our past approach.

Process

The review was announced:

- almost 15 years after three separate events that eventually led to the

⁸ Statement by Mr. Inam Ul-Haque (Pakistan) on behalf of the Group of 77, Informal Plenary, Aug. 10, 1981 (copy supplied by the speaker).

⁹ Testimony by Ambassador James L. Malone before the Subcommittee on Oceanography of the House Merchant Marine and Fisheries Committee, April 28, 1981 (copy circulated by the Department of State).

conference: the circulation of a Soviet note to 60 countries inquiring about the possibility of a new conference on the law of the sea to fix the breadth of the territorial sea at 12 nautical miles; the subsequent circulation of draft articles on the territorial sea and straits by the United States and the USSR, and on fisheries by the United States; and the statements in the United Nations by James Roosevelt of the United States and Arvid Pardo of Malta regarding the establishment of an international regime for the seabeds beyond the limits of coastal state jurisdiction, which captured the attention of many nonexperts;

- over 10 years after the UN General Assembly decided to convene a comprehensive conference on the law of the sea and requested its Sea-bed Committee to prepare for it; and

- over 7 years after the conference was convened, during which time its annual and semi-annual sessions have themselves totaled more than 1 year of meetings (excluding numerous intersessional meetings).

Throughout this period the conference endeavored to elaborate by consensus a single comprehensive "package deal" of disparate and complex elements. "As the conference progressed it was heralded by world opinion as a new ingenious approach to the decision-making process in the UN machinery which in politically loaded UN conferences would give new vitality and possibilities to the United Nations and thus to the world as a whole."¹⁰ The author of this statement, Ambassador Evensen of Norway, outlined his view of the problem as follows:¹¹

We all accepted as self-evident that a conference of this magnitude and complexity would be time-consuming. We wanted to have all states in on the final result. It is a conference where we had to find acceptable compromises between the super-powers, between East and West, between the developing countries and the industrialized countries, between neighbours with fundamentally opposite views in actual disputes. . . . It was equally clear that we could not deal with all of the hundreds and hundreds of issues at once.

We had to proceed from issue to issue, from chapter to chapter. We had to work in main committees, in all types of formal and informal groups in order to build with infinite care, a compromise package comprising the totality. In this stepwise approach we also had to build up confidence based on the self-evident assumption that delegations and states, although not formally bound would stand by their express or tacit commitments. If one main state or group of states rescind one main element of the package, the whole package would fall apart and the compromise package elaborated with such finesse, perhaps even ingenuity, over the years would collapse like a house of cards. A lack of understanding of this main element of the gentleman's agreement accepted by *all* in 1973, would spell disaster for the consensus principle.

If this was not the case the whole consensus principle would be so

¹⁰ Statement by Ambassador Jens Evensen (Norway), Informal Plenary, Aug. 10, 1981 (copy supplied by the speaker).

¹¹ *Ibid.*

discredited that it would be hopelessly doomed as a viable procedure in protracted multilateral negotiation, especially in the UN framework.

Some sympathetic delegates felt, however, that the argument was pressed a bit far when Ambassador Evensen drew analogies from the rules in Articles 7 and 18 of the Vienna Convention on the Law of Treaties.¹²

Nevertheless, the Soviet Union itself pressed the theme of obligations arising out of the structural imperatives alluded to by Ambassador Evensen. Referring to the right to conduct a review, the Soviet Deputy Foreign Minister observed with characteristic acerbity:

True, newly-established governments in all countries have such a right. Throughout the work of the Conference new governments in a number of countries succeeded the former ones. However, they conducted such "reviews" observing the elementary norms of international courtesy and the fundamental principles of succession and fulfilling in good faith the obligations assumed. It is easy to imagine where international conferences would be if every new government considered itself entitled to conduct similar endless "reviews" of the previously reached agreements and to make all other participants in international forums wait till such "reviews" are completed.¹³

The Chairman of the Group of 77 sharpened and narrowed the issues to those of "realism" and "good faith negotiations":¹⁴

Even if the United States had not participated in the Conference for all these years, and was a newcomer to the negotiations, it would be unrealistic for it to seek to undo what had been achieved already, as a condition for its participation in the treaty. The United States government cannot reject the work of over 150 nations including its own predecessor governments for almost a decade, for in doing so it would be destroying the principle of good faith negotiations. There have been scores of changes in regimes

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I believe that analogies from the aforementioned Vienna Convention on the Law of Treaties are helpful in this connection. During our negotiations for a package-deal our states were represented by their respective ambassadors to the United Nations or with specially appointed heads of delegation who had full powers to negotiate, of course with the limitation this entails as to adoption, signature and ratification. But at least there were widespread assumptions and expectations that states would stand by their commitments given in compromise negotiations. If not the whole package-deal principle would be a hoax. Thus, in a sense the Vienna Convention art. 7 on full powers is applicable to the package deal negotiations. We who represented our respective Governments had full powers in relation to the package-deal commitments.

I feel that analogies from art. 18 of the Vienna Convention likewise are appropriate. Article 18 states that when a state has signed a treaty it is obligated to refrain from acts that "defeat the object and purpose" of that treaty. Would not similar consideration of equitable behavior entail that wholesale renunciation of perhaps the most essential part of the package-deal, namely part XI, should be considered to defeat "the object and purpose" of the gentleman's agreement we arrived at in 1973?

Ibid. Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), *entered into force* Jan. 27, 1980, *reprinted in* 63 AJIL 875 (1969), 8 ILM 679 (1969).

¹³ Statement by Deputy Foreign Minister Semyon P. Kozyrev (USSR), General Committee, Aug. 3, 1981 (informal English translation supplied by Soviet delegation).

¹⁴ Statement by Mr. Ul-Haque, note 8 *supra*.

in different countries since the work on the treaty was started, but no new regime had so far disowned what its predecessors had striven to achieve in the field of international cooperation for the exploitation of the resources of the seabed which have been universally recognized as being the Common Heritage of Mankind.

I would like to reiterate on behalf of the group its firm and unequivocal position that the Convention on the Law of the Sea must be adopted. We cannot allow the work of so many nations over so many years to be scuttled. Neither our desire for universality, nor our preference for consensus should be construed to mean that any one country or a group of countries, large or small, weak or powerful will be allowed to detract from the basic objective that the sea and its resources must be governed by international law and regulations which are fair and equitable.

The Soviet Union and its East European allies finally carried their lines of argument to an unexpected conclusion, arguably abandoning the consistent adherence to the principle of consensus that has characterized Soviet multilateral diplomacy for decades, albeit in language carefully limited to adopting the Convention "as a whole" and "on the basis of the existing draft".¹⁵

The Group continues to come out for the adoption of the convention by consensus. However, if some delegations continue to oppose adopting the convention on the basis of the existing draft and thus to impede achieving a consensus, the Group of Socialist Countries of Eastern Europe will be prepared to cooperate with the majority in the Conference and to adopt the convention as a whole by a vote.

The motivations for these arguments are generally the same as those that underlie the "delicate balance" argument whenever it is made in defense of hard-won compromise: genuine belief that the compromise is the best attainable, fatigue and impatience resulting from the time and effort devoted to working out the compromise, and tactical resistance to demands for new concessions. Since the "delicate balance" argument is invariably made in the face of reluctance by a party to accept the compromise, it is frequently accompanied by appeals to protect the integrity of the negotiating process, intimations that the negotiator has somehow bound his principal to accept the result, and threats to exclude the reluctant party from the club.¹⁶

In response, the United States strongly reaffirmed its support for the process of consensus. That support was echoed by virtually all of its allies.

Some delegations have said to us that one of the principal values of the

¹⁵ Letter from Dr. Andrzej Olszowka (Poland) on behalf of the Group of Socialist Countries of Eastern Europe, Aug. 20, 1981, forwarding the decision by the group adopted at its meeting on Aug. 18, 1981. UN Doc. A/CONF.62/L.77 (1981).

¹⁶ The logic of these arguments tends to restrain the temptation to threaten to change the substance of the compromise in a manner detrimental to the reluctant party. In this case, the temptation is further reduced by the knowledge that, in terms of altering substantive articles, it is virtually impossible to shoot at the United States without hitting the Soviet Union, major U.S. allies, and powerful developing countries. Nevertheless, as the East European statement on voting demonstrates, it is not inconceivable that the Soviet Union would—in "zero-sum" terms—accept some injury for the sake of inflicting greater harm on its adversaries. It did exactly that on the issue of marine scientific research in a fit of pique at the United States; the same could happen again.

Law of the Sea Conference is that it has established the rule of consensus as a precedent for global conferences. We share that view. To the extent it has been possible to make great progress in these negotiations and in other forums where the rule of consensus was used, it is because States with vital interests knew that their views would not be over-ridden by a large majority of States seeking to protect contrary interests.¹⁷

The United States made clear that it was not bound by the text, while at the same time demonstrating sensitivity to the underlying structural concerns of other delegations:

No nation is committed to the text in the sense that it is bound by it. In this regard, I would like to quote from the Conference President's preparatory note to the draft convention: "This text like its predecessor will be informal in character. It is a negotiating text and not a negotiated text, and does not prejudice the position of any delegation."¹⁸

We have nevertheless tried to be mindful of the fact that a great deal of work has been done by this Conference over the last decade. As we conduct the review, we are therefore making every effort to avoid burdening the Conference with issues that are not vitally important to the acceptability of a treaty to the United States Administration or the United States Senate.¹⁹

Mr. President, several speakers have placed great emphasis on the importance of continuity in the conduct of long-term international negotiations. We recognize this. But there are other values that are also relevant. One of them is the right of the people in a democratic society to elect a new government. We do not expect the world to come to a halt because we have a new President and a new majority in the Senate. But it would be fundamentally unfair and unproductive were we to shirk our responsibility to ascertain the relationship between this Draft Convention and the policies and goals of the United States Government in the coming years.²⁰

On the issue of participation in the Convention, the United States was equally forthright:

Mr. Chairman, on the basis of the foregoing difficulties and others that I have not taken the time to mention, it is the best judgment of this Administration that this draft convention would not obtain the advice and consent of the Senate. Of course, since the treaty would require implementing legislation, the House would also have a major role that must be considered. We have reason to doubt that the House of Representatives would pass the necessary legislation to give effect to a treaty containing provisions such as these. The provisions I have mentioned raise questions for this Administration. We must seriously consider whether those provi-

¹⁷ Statement by Ambassador James L. Malone (U.S.), Informal Plenary, Aug. 5, 1981 (copy circulated by U.S. delegation).

¹⁸ Testimony by Ambassador Malone, note 9 *supra*.

¹⁹ Statement by Ambassador Malone, note 17 *supra*.

²⁰ Statement by Ambassador Malone, Plenary, March 17, 1981 (copy circulated by U.S. delegation).

sions should be included in a treaty to which the U.S. would become a party, unless there were a countervailing national policy interest.²¹

Our review of the Draft Convention has revealed that Part XI of the text would, in its present form, be a stumbling block to treaty ratification.²²

The United States delegation did not favor holding a resumed session in the summer, and made clear that its policy review would not be completed by then.²³

Thus, at the start of the resumed session, Ambassador Malone stated:²⁴

The review of the Draft Convention has not been completed. Indeed, it is now entering its most crucial stage.

Substantial time has been devoted to identifying those areas which give us concern. Most of that work has been completed. We do not believe, however, that it would be prudent for us to recommend that the President make decisions about our final position without fully understanding how other nations feel about the issues raised by these areas of concern.

He stressed his conviction "that this Conference can benefit most from structured and sober discussion of these matters in a series of informal meetings."

The idea of special meetings to consider U.S. concerns aroused considerable debate, in large measure because many delegations wished to avoid an open-ended commitment to renegotiate when the United States had not affirmed its support for a treaty in principle and was not in a position to make concrete proposals or to give an exhaustive list of its problems. This brought into sharp focus the underlying issue of process raised by the U.S. review. Professor Rip-hagen of the Netherlands attempted to synthesize these considerations as follows:

Doubts have been expressed in various quarters about the utility of the dialogue on which we have recently embarked. Mr. President, let me state at the outset that I do *not* share those doubts. Most of us have gone through all those years of negotiations and consultations, and it is understandable that many of us feel that the results achieved up to now are, if not perfect from any point of view, indeed the best results we could ever achieve.

²¹ Testimony by Ambassador Malone, note 9 *supra*.

²² Statement by Ambassador Malone, note 17 *supra*.

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Mr. Oxman (United States of America) said that his Government was certain that its policy review would not be completed before the autumn of 1981 and felt that it would be advantageous if all delegations were to engage in bilateral and multilateral consultations before taking a final position. Accordingly, the United States believed it would be preferable to delay the next session until early in 1982; at that time his Government would be able to state its definitive views. However, it had become clear to his delegation that others wished to have a session of the Conference in August. While his delegation had taken those views into account, it was not prepared to regard the August session as the final one. . . . An August session for the purpose of informal consultation could contribute to an understanding of the views of others before final decisions were made. The review would be completed after that. . . .

General Committee, Apr. 14, 1981, UN Doc. A/CONF.62/BUR/SR.62 (1981) (prov.).

²⁴ Statement by Ambassador Malone, note 17 *supra*.

But, Mr. President, we remain under the duty to strive for a *generally* acceptable regime of the seas, in other words towards consensus.

This is not merely so because our rules of procedure so prescribe, but far more important, because the subject matter itself—the legal regime of the seas—so requires. Ever since the idea—if not the word—that the seas are the common heritage of mankind has come to be accepted—and we commemorate in the year after next that one of the greatest proponents of that idea, Hugo Grotius, was born 400 years ago—the necessity of a *general* regime to be complied with by *all* states was implied. Now that we are in the process of a new progressive development of such a general regime, we should not lose sight of this goal. We are not drafting a *manifesto*, to which some may attach their signature and others not, but we are trying to lay down a legal regime, which by that very token must *work* in the present-day world, which means that it must be accepted by all concerned.

On the other hand, Mr. President, this selfsame object and purpose of our conference, the elaboration of a new and detailed regime for the oceans, also imposes *restraints* upon all of us. We do not start from scratch but have to fill in, as it were, a pre-existing framework.²⁵

Substance

The first concrete indication of various concerns identified in the review came in a nonexhaustive enumeration presented in congressional testimony in the spring:

—The Draft Convention places under burdensome international regulation the development of all of the resources of the seabed and subsoil beyond the limits of national jurisdiction, representing approximately two-thirds of the earth's submerged lands. These resources include polymetallic nodules. They also include mineral deposits beneath the surface of the seabed about which nothing is known today, but which may be of very substantial economic importance in the future.

—The Draft Convention would establish a supranational mining company, called the Enterprise, which would benefit from significant discriminatory advantages relative to the companies of industrialized countries. Arguably, it could eventually monopolize production of seabed minerals. Moreover, the Draft Convention requires the U.S. and other nations to fund the initial capitalization of the Enterprise, in proportion to their contributions to the U.N.

—Through its transfer of technology provisions, the Draft Convention compels the sale of proprietary information and technology now largely in U.S. hands. Under the Draft Convention, with certain restrictions, the Enterprise, through mandatory transfer, is guaranteed access on request to the seabed mining technology owned by private companies and also technology used by them but owned by others. The text further guarantees similar access to privately-owned technology by any developing country

²⁵ Statement by Professor Riphagen (Netherlands), Informal Meeting, Aug. 17, 1981 (copy supplied by speaker).

planning to go into seabed mining. We must also carefully consider how such provisions relate to security-related technology.

—The Draft Convention limits the annual production of manganese nodules from the deep seabed, as well as the amount which any one company can mine for the first twenty years of production. The stated purpose of these controls is to avoid damaging the economy of any country which produces the same commodities on land. In short, it attempts to insulate land-based producers from competition with seabed mining. In doing so, the draft treaty could discourage potential investors, thereby creating artificial scarcities. In allocating seabed production, the International Seabed Authority is granted substantial discretion to select among competing applicants. Such discretion could be used to deny contracts to qualified American companies.

—The Draft Convention creates a one-nation, one-vote international organization which is governed by an Assembly and a 36-member Executive Council. In the Council, the Soviet Union and its allies have three guaranteed seats, but the U.S. must compete with its allies for any representation. The Assembly is characterized as the “supreme” organ and the specific policy decisions of the Council must conform to the general policies of the Assembly.

—The Draft Convention provides that, after fifteen years of production, the provisions of the treaty will be reviewed to determine whether it has fulfilled overriding policy considerations, such as protection of land-based producers, promotion of Enterprise operations and equitable distribution of mining rights. If two-thirds of the States Parties to the treaty wish to amend provisions concerning the system of exploitation, they may do so after five years of negotiation and after ratification by two-thirds of the States Parties. If the U.S. were to disagree with duly ratified changes, it would be bound by them nevertheless, unless it exercised its option to denounce the entire treaty.

—The Draft Convention imposes revenue-sharing obligations on seabed mining corporations which would significantly increase the costs of seabed mining.

—The Draft Convention imposes an international revenue-sharing obligation on the production of hydrocarbons from the continental shelf beyond the 200-mile limit. Developing countries that are net-importers of hydrocarbons are exempt from the obligation.

—The Draft Convention contains provisions concerning liberation movements, like the PLO, and their eligibility to obtain a share of the revenues of the Seabed Authority.

—The Draft Convention lacks any provisions for protecting investments made prior to entry into force of the Convention.²⁶

Ambassador Elliot L. Richardson, the Public Chairman of the Department of State's Advisory Committee on the Law of the Sea and former head of the

²⁶ Testimony by Ambassador Malone, note 9 *supra*.

U.S. delegation, while decrying "the remarkable persistence of distortions of the Draft Convention,"²⁷ himself outlined the following areas for improvement:

In the case, for example, of U.S. membership on the Council of the Authority, the provision for the selection by each interest-group of its own representatives was put forward by the U.S. delegation last year in the belief that this would solve the problem. It was accepted by the Group of 77 with the same understanding. Having thus in substance already acquiesced in a "guaranteed seat for the United States," it is likely that the 77 would now agree to make the guarantee more explicit.

Again, take the allegation that liberation movements like the PLO would be eligible for a share of the net revenues of the Seabed Authority. Although, as noted above, we have in fact secured effective means of preventing such an outcome, this too is a result that could be reinforced, if not in the text, at least in the official record at the final stage of the Conference.

Not all criticisms of the Draft Convention are distortions, of course. The Interdepartmental Group on the Law of the Sea had already targeted a number of needed improvements even before the review was announced. The IG proposals would have addressed most of the concerns identified by Assistant Secretary Malone when he testified on April 28 before the Subcommittee on Oceanography of the House Merchant Marine and Fish-

²⁷ Testimony by Ambassador Elliot L. Richardson, House Foreign Affairs Committee, May 14, 1981 (copy supplied by witness). He identified the following as the "most frequently repeated misstatements":

1. That the treaty would not give the U.S. assured access to seabed minerals. In fact, the text expressly gives companies sponsored by a member state the right to apply for a "plan of work," spells out the qualifications of applicants in clear, objective terms, and directs the International Seabed Authority to approve a plan of work proposed by an applicant meeting the specified financial and technical standards.

2. That the U.S. would not be assured of a seat on the Council of the Authority although the Eastern bloc would be guaranteed three seats. Actually, the provisions for membership on the Council would assure the Western industrial countries six to nine seats; each interest group whose representation is required would designate its own representatives. The United States, either as the probably largest investor in deep-seabed mining (one of the represented interest groups) or as the largest importer or consumer of deep seabed minerals (a second interest group), would have as much practical assurance of being named to one of these groups as would the Soviet Union of being named as one of the Eastern bloc representatives.

3. That U.S. companies would be required to sell sensitive national-security-related technology. On the contrary, the U.S. Government would presumably deny an export license for any such sale. The text provides that "nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under the relevant provisions of this Convention, to supply information the disclosure of which is contrary to the essential interests of its security."

4. That a company seeking an ocean-mining contract would be required to transfer its technology without adequate compensation. In fact, the technology-transfer obligation applies "only if the Enterprise finds that it is unable to obtain the same or equally efficient and useful technology on the open market" and then only on "fair and reasonable commercial terms and conditions," subject to binding commercial arbitration of any dispute as to those terms and conditions. In passing, I would note that a number of companies have already come forward to offer seabed mining systems to the future Enterprise.

eries Committee. The most important of these proposals—and concerns—was the protection of investments made prior to the Draft Conventions's entry into force. Other such matters were the transfer of technology owned by subcontractors, the "Brazil clause," the number of ratifications required for the entry into force of amendments emanating from the Review Conference, and the exemption of net importers from sharing the revenue from the exploitation of hydrocarbons in the continental shelf beyond the 200-mile limit. Although not on either Mr. Malone's or the IG's list, other desirable changes which the Conference would undoubtedly agree to put on its agenda would be a clause more positively encouraging the exploitation of seabed resources and a fixed date for the start-up of the production-ceiling formula.

Although Mr. Malone also referred to the burden imposed on seabed-mining corporations by the Convention's revenue-sharing provisions, this is a concern which should, in all fairness, be dealt with under domestic law. All that is necessary is to give revenue-sharing payments to the Authority the same treatment as taxes paid to a foreign government. Indeed, this has all along been advocated by the State Department. If this were done, the present text [on financial arrangements] is likely to be acceptable to U.S. mining companies.

During the resumed tenth session, the United States delegation spelled out its concerns with the deep seabed mining regime in greater detail in various ad hoc meetings scheduled to avoid the appearance of interference with the regular schedule of the conference. The Chairman of the Group of 77 defended the texts as representing maximal concessions of his group. From these and other exchanges, all concerned will now have to decide on the negotiability of a package of changes that is sufficient for the United States and its allies.

In this regard, the author would offer certain personal observations:

- Adoption of the Convention as is, without significant negotiation and substantial improvement, increases the likelihood that it will never enter into force for the United States and a considerable number of other important countries.
- The credibility of any package of improvements may depend on whether it is perceived that negotiation of the package can be completed in 1982, albeit with intense effort, goodwill, and some luck.
- Pressure for significant changes in texts other than those concerning deep seabed mining may stimulate or heighten pressure for the definitive termination of all negotiation by influential developing countries and the USSR with the acquiescence or support of a significant number of U.S. allies, and may increase the risk of retaliatory changes in substantive texts that can affect customary law.
- The U.S. concerns about certain aspects of representation, voting, and independence of the Council; production policy and controls; the review clause; lacunae in the contract approval system; technology transfer; resources other than nodules; settlement of deep seabed disputes; and preparatory investment protection enjoy significant, if inchoate, sympathy among developing countries. But this sympathy relates almost exclusively to practical, not philosophical, problems.
- Since all concerned are in a political position where they cannot afford

too much loss of face, technical changes drafted in a manner intelligible mainly to competent lawyers and diplomats may be the only way to achieve improvements on some issues.

- There is no reason whatsoever why consumers and miners should have to worry about the scores of provisions whose main problem is not the intended content of the package but the opaque, grudging, or legally defective manner in which they are drafted. If the conference is unwilling to entrust a Drafting Committee with improving the ratifiability of the Convention in this regard, some simple mechanism should be devised for the specific purpose of making changes (of substance, if need be) to conform the text rapidly to what is manifestly intended and sensible.

- Political issues relating to dependencies and liberation movements, including the so-called transitional provision, will be resolved in a manner fully acceptable to the Western powers so long as ratification by them is perceived to be an attainable goal.

III. EFFORTS TO SHOW PROGRESS

The resumed tenth session was marked by considerable effort to show tangible progress. Aside from the perceived need of some delegates to explain the time and expense devoted to the session, the main purpose was to demonstrate a determination to press ahead to completion of the Convention. The results of these efforts include the following:

- the conference, by indicative vote, selected Jamaica as the site of the Sea-Bed Authority and the Federal Republic of Germany as the site of the Tribunal on the Law of the Sea;
- a new, altered provision on delimitation of the economic zone and the continental shelf between states with opposite or adjacent coasts was inserted in the text by the collegium despite significant criticism and hesitation;
- the President issued a report containing a new proposed text on participation by international organizations;
- the Drafting Committee pressed ahead at great speed and “deferred” almost all efforts to correct the more serious errors in the text, leaving those who have not participated in its work with the superficial impression that most of the Convention is “finished”;
- the Working Group of 21 continued its work on the resolution to establish a Preparatory Commission; and
- the Draft Convention was revised and reissued with a “higher status.”

Site Selection

For some time now, Fiji, Jamaica, and Malta have been candidates for the site of the proposed Sea-Bed Authority, and the Federal Republic of Germany, Portugal, and Yugoslavia have been candidates for the site of the proposed Tribunal on the Law of the Sea. During the first part of the tenth session, the

six candidates decided that the matter would be resolved during the third week of the resumed session.

On August 22, in accordance with the decision of the candidates, the Plenary held an indicative vote by secret ballot on both sites pursuant to which the losing candidates would withdraw. A preliminary effort to postpone the voting failed narrowly in a roll-call vote marked by unusual confusion among the East Europeans. Prior to the voting, it was made clear that the site selection will apply only if the state selected is a party to the Convention when it enters into force.²⁸

In both elections, no candidate received an absolute majority on the first ballot. On each second ballot, the candidate that won a plurality on the first ballot was elected: Jamaica for the Authority and the Federal Republic of Germany for the Tribunal.²⁹

Delimitation of the Economic Zone and the Continental Shelf Between States with Opposite or Adjacent Coasts

The normative provisions on delimitation of the economic zone and the continental shelf have been replaced by the following: "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."³⁰

The specific reference to delimitation in the footnote to Article 309 on the possible need for reservations has been deleted. Oddly enough, this deletion merely makes the footnote more open-ended.

The proposed text, worked out in secret by Ireland and Spain representing their respective groups, and Fiji representing the President, was available even in private only for a few days. Its hasty insertion in the Draft Convention was questioned publicly by Arab countries, Iran, Israel, the United States, and Venezuela, and privately by others.

The main pressure for some change in the text came from the advocates of emphasis on equitable principles rather than equidistance.³¹ Among other things, with this text they have achieved the elimination of any express reference to equidistance, and the limitation of the entire provision to a rule of delimitation by agreement that does not, as such, purport to lay down a normative rule to be applied in the absence of agreement. In return, they changed the reference to "equitable principles" to a vaguer notion that agreements should achieve an

²⁸ Ambassador Evensen added the point that the selection should cease to apply if the state denounces the Convention.

²⁹ For the Sea-Bed Authority, the votes on the first ballot were: Fiji, 14; Jamaica, 69; Malta, 56; abstentions, 5; blank, 1; on the second ballot: Jamaica, 76; Malta, 66; abstentions, 5. For the Tribunal, the votes on the first ballot were: FRG, 67; Portugal, 15; Yugoslavia, 59; abstentions, 3; blank, 1; on the second ballot: FRG, 78; Yugoslavia, 61; absentions, 4; blank, 2.

³⁰ Draft Convention, note 43 *infra*, Art. 74(1). Art. 83(1) contains an identical provision on the continental shelf.

³¹ In part because of the U.S. policy review, and in part because of concerns regarding Canadian reaction on the collegium, these advocates encouraged the appearance of distance between themselves and a U.S. delegation sympathetic to their substantive attitudes.

equitable solution. One can hardly imagine that the parties would characterize their agreements otherwise.

Since both Ireland and Spain are involved in delimitation disputes, their respective neighbors naturally watched the negotiations closely; they presumably concluded that their opponents were forced to concede as much as, if not more than, they gained. It was inevitable, of course, that any resultant text would have to be accepted by both sides. Still, one might have expected more than a text that says nothing of significance while, worse still, trying to give a contrary impression by introducing unnecessary language and avoiding recognized terminology associated with the jurisprudence and scholarship on the subject.

If "the main purpose of a Convention on the Law of the Sea is to reduce the possibility of disputes and conflict between States, and to help resolve differences that do arise by narrowing and reformulating them in generally acceptable legal terms," the U.S. representative observed, then this is not the time for the conference "to give up and move forward with an anodyne text that cannot achieve these purposes and that may indeed have the opposite effect of adding confusion to the law, . . . a text that delegations on both sides privately look upon with embarrassment."³²

There is perhaps no better evidence of the failure of the conference to think about this text than the inclusion of an express cross-reference to Article 38 of the Statute of the International Court of Justice. That article contains the 60-year-old reference to "civilized" nations that is regarded by some developing-country lawyers as a product of colonialist attitudes. Such an express cross-reference would surely have encountered difficulty if it had been closely scrutinized at a conference that even refused to use the word "customary" to preface a reference to international law in the Preamble.

If inclusion of this text is illustrative of the lengths the conference is willing to go to appear to "make progress," there is little ground for optimism about either the process or the result. One must hope it is an isolated aberration that will be corrected, and that will not be repeated.

Participation of International Organizations

As a result of several meetings held on the subject, the President issued a new text on participation of international organizations³³ "constituted by States to which such member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of such matters." His report makes clear that this excludes "agencies of the United Nations System."³⁴

The European Economic Community was the principal organization in mind. It is doubtful, however, whether equally complex problems of divided competence and responsibility, coupled with third-party dispute settlement, were previously encountered in the negotiation of other treaties to which the Eu-

³² Statement by Ambassador Malone, Plenary, Aug. 28, 1981 (copy supplied by speaker).

³³ Conf. Doc. FC/27 (1981) (new text in Ann. 2).

³⁴ *Id.* at 1.

ropean Economic Community is authorized to become party. Certainly, no such treaty has the scope of the Draft Convention on the Law of the Sea.

For an organization to become a party to the Convention, a majority of states members must be parties.³⁵ In its instrument of acceptance, the organization must file a declaration "specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its members which are State Parties." States parties that are members of the organization must do the same. The declarations must be kept up to date.

An organization is a party "to the extent that it has competence in accordance with the declarations" and certain supplementary information; states members may not exercise that competence. Thus, the organization takes the place of states parties with respect to matters on which they have transferred competence to it. It may not "implement the Convention in such a manner as to benefit a State member which is not a party to the Convention," and its participation may not "entail an increase of the representation that . . . member States which are States Parties would otherwise be entitled to, including rights in decision-making."

Responsibility for failure to comply with obligations under the Convention is divided between the organization and its members on the basis of the allocation of competence or by agreement between them. However, failure to provide information on request as to who has responsibility in respect of any specific matter, or the provision of contradictory information by the organization and the state concerned, results in joint and several responsibility. The obligations of the organization under the Convention to "third States"—that is, states that are not members of the organization—prevail over its obligations under the agreement establishing the organization.

Provision is made for situations where the organization and a member state "are joint parties to a dispute, or [presumably separate] parties in the same interest." Were they allowed to be separate parties *not* in the same interest, the odd arithmetic of Annex VII, Article 3(g) would give the organization and its members more arbitrators than a single adversary. This is one example of the overall difficulty with that article, which can accidentally produce arbitration panels tilted against one of the parties in disputes involving more than two parties who assert they are not in the same interest. (This in a treaty where arbitration would be the residual compulsory dispute settlement mechanism.) The English Language Group of the Drafting Committee has recommended a technical solution,³⁶ but some delegation may regard the effort to find an obviously needed correction as a substantive endeavor beyond the competence of the committee. Nevertheless, it is a hopeful sign that the Drafting Committee was able—albeit obliquely—to deal in part with a similar problem in Annex V, Article 3(g) on compulsory conciliation by eliminating the reference to the

³⁵ It becomes a party by signature followed by an "act of formal confirmation," or by accession. The term "act of formal confirmation" is used in the International Law Commission's Draft Articles on Treaties Concluded Between States and International Organizations or Between International Organizations.

³⁶ Conf. Doc. ELGDC/26 (1981).

possibility of expanding the conciliation panel to accommodate parties not in the same interest.³⁷ This is significant because of the provision for compulsory conciliation of certain delimitation, fisheries, and marine scientific research disputes that might involve more than two parties.³⁸

The Drafting Committee

The new text issued by the collegium contains over fifteen hundred changes in the six language texts recommended by the Drafting Committee and approved by the Informal Plenary. They cover all Second and Third Committee texts, and some First Committee and dispute settlement texts.

The unusually long hours and intense efforts of participants in the work of the Drafting Committee have resulted in a text that is significantly better drafted and more internally consistent within each language and among the six language versions. It is impossible to summarize such an exercise. It may be useful, however, both to observers of the Law of the Sea Conference and to others to reflect on the strengths and weaknesses of the procedures employed. The principal source of concern in this regard is not the work that the Drafting Committee has done, which has been almost universally welcomed, but the kind of work that the Drafting Committee has not been able to do.

The most novel procedure is the use of six open-ended language groups that meet separately, but simultaneously, on the same articles to make proposals in their respective languages and to consider the proposals of other language groups. This reduces the need for simultaneous interpretation, allows states not members of the committee and Secretariat experts to participate actively, and expedites consideration of proposals in a given language. Moreover, it channels most joint discussion (with simultaneous interpretation) to open meetings of the coordinators where virtually all debate is limited in fact to the six coordinators and the Chairman, arguably to advantage. However, it also reduces regular contact among those who attend different language group meetings. Given the difficulties of eliminating misunderstandings about drafting proposals across the barrier of simultaneous interpretation, this has necessitated informal consultations without interpreters, which the Chairman rightly encourages.

Most proposals of most language groups affect only the text in their language, although this is least true of the English Language Group. In practice, the system frequently approximates the more traditional approach in which one text—usually the English text—is drafted for meaning, and the remaining texts are then brought into conformity with it.

The basic problem is the limitation of the mandate accorded the Drafting Committee, which has discouraged some delegations from sending their most experienced personnel. Proposals to correct serious defects in the text are met with objections that they affect substance or will take too long to consider.

³⁷ The addenda to UN Docs. A/CONF.62/L.67 and L.75 contain the recommendations of the Drafting Committee presented during the tenth session. The proposal in question is in UN Doc. L.75/Add.10, and was incorporated into the new text, note 43 *infra*.

³⁸ DC(IT) Arts. 297 and 298.

When this occurs in conjunction with a strict and very rapid "no objection" procedure for dealing with proposals, the chances of making an important correction are seriously reduced. All too frequently, highly skilled and respected participants—especially present and former members of the International Law Commission—easily agree on a drafting improvement among themselves, only to see their suggestions blocked by a young delegate who will rarely, if ever, be blamed by his government for refusing to accept a drafting change in a text that his principals negotiated.

A typical example of the problems facing the Drafting Committee can be found in the very first article, which defines the "Area" as the seabed and subsoil and the ocean floor "beyond the limits of national jurisdiction." This definition was drawn from the Declaration of Principles on the Sea-bed³⁹ and, indeed, from the name of the committee that prepared the Declaration. The language was vague because, prior to the conference, there was no agreement on the names, nature, or limits of coastal zones.

The Draft Convention describes precise coastal zones with precise limits, in particular the territorial sea, the exclusive economic zone, and the continental shelf. Not one of the provisions regarding these areas uses the term "national jurisdiction." *Expressis verbis*, there are no "limits of national jurisdiction" in the Convention. Indeed, flag states exercise "national" jurisdiction wherever their ships go.

One would have thought it an easy matter to revise the definition of the Area to cross-reference the coastal limits established by the Convention itself. The work of the English Language Group on the matter—a group that functions by consensus and includes a large number of delegates from Asia, Africa, and the Caribbean—however, aroused such a storm of protest from Spanish-speaking delegations—particularly those whose countries face the rich nodule deposits of the Pacific—that all discussion had to cease. Thus, for all the attention being paid to the content of the common heritage principle, the Draft Convention does not contain a correct definition of the limits of the "Area" that is the common heritage, and accordingly does not contain a properly drafted prohibition on claims beyond 200 miles or the continental margin.

Another example concerns texts copied from earlier documents that are now utterly without rational meaning. What is the function of saying the continental shelf texts are without prejudice to tunneling from land in a convention that does not contain a depth-of-exploitability criterion and that establishes a definitive limit of the continental shelf?⁴⁰ What is the function of a paragraph that permits submission of a dispute to settlement procedures "specified" in a declaration, when there is no provision for choosing—only for excluding—dispute settlement procedures in the declaration concerned?⁴¹ Proposals to correct these errors in the Drafting Committee failed.

³⁹ Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Sub-soil thereof, beyond the Limits of National Jurisdiction, UNGA Res. 2749 (XXV) (1970).

⁴⁰ DC(IT) Art. 85, derived from Art. 7 of the Convention on the Continental Shelf, 1958, 15 UST 471, TIAS No. 5578, 499 UNTS 311, reprinted in 52 AJIL 858 (1958). Compare Art. 76 of the Draft Convention with Art. 1 of the Convention on the Continental Shelf.

⁴¹ DC(IT) Art. 298, para. 4. Art. 298(1)(a) of the ICNT had contained a requirement that a state indicate an alternative procedure that it would accept for settling delimitation disputes. This was eliminated in the ICNT/Rev.2 and subsequent texts.

A further example concerns internal consistency of texts. Article 297(1) excludes from compulsory jurisdiction the exercise by a coastal state of its sovereign rights, and thus embraces the continental shelf as well as the economic zone. Paragraph 3(a) of the same article refers to compulsory jurisdiction over all fisheries disputes, and then excludes sovereign rights only with respect to the living resources in the economic zone. Is it conceivable that paragraph 3 subjects continental shelf fishing rights to compulsory jurisdiction, when the substantive articles themselves exclude sedentary species from the obligation to give access to foreign states?⁴² Again the effort to correct an obvious error failed.

One could understand a narrow reading of the mandate of the Drafting Committee if the substantive committees had, or desired to establish, a procedure for technical correction of the text. In reality, most delegations fear that meetings of substantive organs could reopen more than just technical problems. The result thus far is that failure to correct a technical problem in the Drafting Committee means it will not be corrected. If the conference is serious about creating a legally binding treaty, this situation needs to be changed, with all texts—including those already dealt with by the Drafting Committee—subject to an efficient system for technical correction. The strict “no objection” procedure—in each language group, in the committee, and in Informal Plenary—should be adequate guarantee that no delegation thereby risks a detrimental change in any aspect of the package (the true meaning of a “substantive” change).

The New Text

At the conclusion of the tenth session, the conference took a measured step in the direction both of negotiation with the United States and of final adoption of a text. It revised the text essentially to incorporate over fifteen hundred Drafting Committee changes. Without making it a formal text closed to negotiation and open to formal amendment, the conference gave the text a “higher status” by deleting the words “informal text” in its title and giving it an official limited document number.⁴³ The existing procedure for changing the text is retained, namely, a finding of a substantially improved prospect of consensus.

It will be the official draft convention of the Law of the Sea of the Conference subject, however, to the following three conditions:

First, the door would be kept open for the continuation of consultations and negotiations on certain outstanding issues. The results of these consultations and negotiations, if they satisfy the criterion in A/CONF.62/62,⁴⁴ will be incorporated in the Draft Convention by the collegium without the need for formal amendments.

Secondly, the Drafting Committee will complete its work, and its further recommendations, approved by the Informal Plenary, will be incorporated in the text.

⁴² DC(IT) Arts. 68 and 77.

⁴³ UN Doc. A/CONF.62/L.78 (1981).

⁴⁴ UN Doc. A/CONF.62/62, 10 OFF. REC. 6 (1978); relevant texts and author's comments are in 73 AJIL at 4-5.

Thirdly, in view of the fact that the process of consultations and negotiations on certain outstanding issues will continue, the time has, therefore, not arrived for the application of rule 33 of the Rules of Procedure of the Conference. At this stage, delegations will not be permitted to submit amendments. Formal amendments may only be submitted after the termination of all negotiations.⁴⁵

IV. CONCLUSION

The conference decided to hold its "final decision-making session for the adoption of the Convention" in New York for 8 or 9 weeks in March–April 1982, a schedule intended to allow time for negotiation with the United States⁴⁶ and completion of work on outstanding issues. A "final intersessional meeting" of the Drafting Committee is planned for 6 weeks in January–February 1982 "to complete its work." The conference called for arrangements to be made with Venezuela "for the signature of the Final Act and the opening of the Convention for signature in Caracas in early September 1982."⁴⁷

The author doubts that the problems facing the Law of the Sea Conference can be resolved properly without intensified assistance from the bar, a profession whose leading members are uniquely sensitive to the difficulties of building and sustaining a public order whose existence many others merely take for granted.

The invisible hand that makes productive private activity possible is law. Some commentators seem hardly to comprehend that there is more to international law than mere advocacy. A government may be able to stop or slow the emergence of a new rule, but it is difficult for any government on its own to impose a new rule that serves the functions of law, or to stop an existing rule from collapsing.

It may be useful in this regard to remind the public in all countries that the law of the sea and the proposed Convention deal with much more than the philosophy of regulating manganese nodule mining. They deal with military and commercial navigation, overflight, and communications (as the successful exercise by the U.S. Navy of the freedoms of the sea in the Gulf of Sidra during the resumed tenth session made clear); fisheries; continental shelf gas and oil; prevention of pollution; marine scientific research; and settlement of disputes; as well as important practical questions of real concern to prospective seabed miners.

Before resuming negotiations, all countries need to weigh the relative costs of abandoning the possibility of a convention that can be widely accepted as

⁴⁵ UN Doc. A/CONF.62/BUR.14 (1981). The President commented that the outstanding issues were those referred to in UN Docs. A/CONF.62/BUR.13 and A/CONF.62/WP.10/Rev.3* (arguably the introductory note), both of which contain open-ended references to issues of concern to delegations. Rule 33 of the Rules of Procedure deals with amendments to proposals.

⁴⁶ Needless to say, the effort would lack credibility if the conference in fact proceeded, as currently projected, to apply rule 33—that is, to take up formal amendments—after the first 3 weeks. As for the dangers of voting on formal amendments, they are if anything greater than those previously described by the author. See 74 AJIL at 46–47; 75 *id.* at 212.

⁴⁷ UN Doc. A/CONF.62/BUR.14, note 45 *supra*.

against making the changes necessary to accommodate the United States and other Western countries. Too much emphasis on the problem of process is self-defeating. One must consider dispassionately the value in their present form of provisions found offensive by the U.S. Government because, if necessary changes are not made, those provisions may never apply to the states from whom the relevant concessions were sought. Could there be an effective Enterprise or production limitation? Whose technology would be transferred? Whose activities would be organized and controlled? Who would be affected by the review conference?

Ambassador Koh has stated that the Convention would be adopted, preferably with, but if necessary, without the United States. Implicit in this remark may be an assumption, at times articulated by developing country representatives, that major Western countries, including Japan and the states of the European Community, will ratify a law of the sea convention over the opposition of the United States. What is remarkable about some discussions of this hypothesis is the lack of appreciation of the extent of public opposition to certain aspects of the Draft Convention in Western countries outside the United States.

One need identify but a few factors:

- The inclusion of any so-called transitional provision regarding dependencies or disputed areas, or a provision on participation of so-called national liberation movements, would eliminate virtually any possibility of significant acceptance.
- Financing the Enterprise is disliked by almost all Western treasuries and economists; both land-based producers and potential seabed producers believe they are in effect being asked to finance a competitor.
- Agencies concerned with assistance to developing countries share that dislike; they see few benefits to the least developed countries flowing from the Enterprise, and are fearful of competition for funds and loan guarantees in a period of shrinking budgets.
- Other aspects of the deep seabed mining regime that trouble the United States also trouble other potential deep seabed mining states. Even France's new Socialist Government has approved deep seabed mining legislation.⁴⁸
- The provision for revenue sharing from the continental shelf beyond 200 miles is much less popular in the Western broad margin states than their Governments—ever fearful of provoking a reaction at the conference on the outer limits of the continental shelf—are saying.
- There is pressure on some governments not to forgo the option of claiming broader environmental and fisheries rights, including control over stocks of coastal species that extend beyond 200 miles.
- Not all Western Governments share the general enthusiasm for the articles on straits or the economic zone, while many states that approve of those articles regard the rights elaborated as already established and vested under customary law.

⁴⁸ [1981-82] J.O. 1902 (Oct. 9, 1981, Senate text).

- For at least some countries, one incentive for the treaty would be the substantive and dispute settlement rights they would acquire vis-à-vis the United States only if it were a party.

In general, a state is likely to be reluctant to assume obligations that another similarly situated state is not assuming. This is so sometimes because the absolute burdens—be they monetary or be they duties to others such as landlocked and geographically disadvantaged countries—may thus be increased, and sometimes because those obligations may put the state or its nationals at a relative disadvantage with respect to another state.

The failure of the United States to accept the obligations of the Law of the Sea Convention would inevitably affect the ability of others to persuade their constituencies to accept them. It would give rise to political restraints on ratification by major allies, as well as misgivings of principle regarding the entry into force of a treaty that, without the world's major power, cannot purport to establish a global regime.

Moreover, the member states of the European Community have made clear that concurrent acceptance of the Convention by the Community itself is a legal necessity for them. If a decision by the Council of Ministers of the Community to accept the Convention in practice requires a consensus of the ten member states,⁴⁹ and if such acceptance is a prerequisite to ratification by any member state, widespread Western adherence over the objections of the United States becomes ever more problematical.

Public threats to adopt the Convention and isolate the United States from its principal allies are neither credible (in part because of their premature publicity) nor conducive to the completion of a "convention on the law of the sea" in any meaningful sense of the word, namely, one accepted by the major Western industrial and maritime powers. Such threats have the decided disadvantage of making treaty supporters appear to be timorous and weak. Worse still, they risk coloring the treaty so strongly as a (Soviet-promoted) act of defiance of the United States as to doom any real political possibility of substantial Western ratification under any circumstances. This is particularly true if, as the Secretary of State advised the Senate Foreign Relations Committee less than a month after the end of the tenth session, "the United States does intend to continue to participate fully in this Conference with the clear objective of bringing it to a successful conclusion."⁵⁰

It is possible, of course, to imagine a process of negotiation with the United States and its principal allies that is sufficiently sensitive, intense, and flexible to persuade significant Western opinion-leaders that the results should be acceptable. At that time, Western Governments would have to make a decision. If the negotiating process had itself encouraged concerted action by the United States and its allies all along, the probability of a concerted positive decision

⁴⁹ There might in fact be more than ten EEC members by the time the issue arises, including Spain, a straits state with major fishing interests, which is not generally noted for its enthusiasm for the Convention.

⁵⁰ Secretary of State Alexander M. Haig, Senate Foreign Relations Committee Hearing, Sept. 17, 1981 (preliminary transcript).

would be increased. In any event, the credibility—in a real sense, the legitimacy—of action taken in that situation would be far different.

It is not productive to argue about who gains or loses most from the treaty as a whole. That question turns on a subjective evaluation of priorities about which no two individuals, not to mention states, would agree. The main point is that no one can gain and retain the benefits of a convention on the law of the sea unless it is widely ratified.