10-1-1980

Oceans

Burt L. Saunders

Oceans Report

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I. INTRODUCTION

The first part of the Ninth Session of the Third United Nations Conference on the Law of the Sea (UNCLOS) convened in New York City, New York, on March 3, 1980. The largest number of states, 152, since the beginning of the conference in 1973, participated in this session. This was considered by many as an indication of the tremendous progress that has been made towards the resolution of all outstanding "hardcore" issues, as well as an indication that the conference work was rapidly being concluded.

At the final meeting of the conference on April 4, 1980, the conference agreed on a timetable for the resumption of the Ninth Session in Geneva. The schedule called for the completion of negotiations on unsettled issues within the first two weeks of the resumed Ninth Session. The third week was to be devoted to a general debate, at which time delegations would be able to comment on the entire range of issues covered in the draft convention and would be able to address specific suggestions for change. It was hoped that during the third week in Geneva, another revision of the Informal Composite Negotiating Text (ICNT) would be prepared. Conference President H. Shirley Amerasinghe suggested that this new text be called a "Basic Proposal" to which delegations would be permitted to introduce formal amendments no later than the second day of the fifth week of the resumed session. Adherence to this schedule would permit a draft convention to be adopted by the conference and signed in Caracas in 1981.[1]

Though there has been much progress towards resolution of the so-called "hardcore" issues during the last two years of debate, many intractable issues remain, such as the delimitation of maritime boundaries between opposite and adjacent States, composition of and voting on the Council, and the function and operation of the Preparatory Commission pending implementation of the treaty. These must be settled prior to the successful completion of negotiations by the con-

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1. *See* U.N. Doc. SEA/396 (April 4, 1980).

ference. In addition to the conclusion of substantive negotiations, the delegates must come to grips with the issues of amendments, reservations, the relation of the treaty to other conventions, entry into force, transitional provisions, denunciation, and participation in the conference.[2] All of these have been debated and discussed at length, but none have been fully resolved.

Many conference participants fully realize the damage that could result from a prolonged and extensive amendment, reservation and denunciation process. At the same time, delegates realize that it is not politically feasible to eliminate all amendments and reservations, and that some abbreviated procedure must be developed for them. The greatest fear is that some delegations may demand a section-by-section vote and debate prior to acceptance of a draft convention. This could result in a prolonged process of amendments and reservations that could destroy the "package deal" concept of this convention, thus undermining the overall goal of the convention to develop a uniform and comprehensive law of the sea.

Potentially complicating this situation is the new Deep Seabed Hard Mineral Resources Act of 1980.[3] Many developing States, primarily those in the Group of 77,[4] see this as a threat to the delicate balance achieved thus far. As discussed *infra*, however, this should not pose a serious roadbloack to continued progress.

II. Status of the UNCLOS Negotiations

As during the last several sessions of the Conference, the issues requiring the most extensive debate were deep seabed mining, voting on and composition of the international Council, delimitation of the Continental Shelf between adjacent and opposite States, and marine scientific research. With the issuance of Revision II of the Informal

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2. The specific task of the Preparatory Commission is to prepare for the establishment of the International Seabed Authority and its various organs. It is likely to be a number of years between the date of acceptance by the negotiators of a Draft Convention and its entry into force. The Preparatory Commission is to begin the process of rule-making and preparation for the establishment of the Authority and its associated organs.

3. The Act establishes a mechanism for the regulation of the exploration and exploitation of the hard mineral resources of the deep seabed area, beyond the jurisdiction of any nation.

4. As a means of facilitating negotiations various special interest groups were formed. One such group was the group of developing States, now composed of over 100 States and referred to as the Group of 77.

Composite Negotiating Text[5] (hereinafter referred to as the INCT/Rev. 2), final substantive negotiations should be completed in 1980. The provisions contained in the ICNT/Rev. 2, concerning the above issues, are an improvement over the ICNT/Rev. 1,[6] and provide a significantly improved prospect of consensus and should serve as the framework of an acceptable comprehensive Law of the Sea Treaty.

The most significant changes are those dealing with the Committee I deep seabed mining issues. The moratorium provision in former Article 155 was very troubling to deep seabed mining industries. It empowered the Assembly to impose a moratorium on mining activities after twenty-five years from the implementation of the Treaty if the review conference fails to reach an agreement on the system of exploration and exploitation. The moratorium provision has been deleted, and Article 155(5) now provides that if within five years of the commencement of the review conference no agreement is reached on the system of exploration and exploitation, the conference may decide by a two-thirds majority vote of the States Parties to the Convention to adopt amendments to the system as necessary. Though review of the system of exploration and exploitation is assured, deep seabed mining industries are now also assured that no moratorium will be imposed pending the results of the review conference.[7]

A second area in which significant progress has been made is the transfer of technology provisions of Annex 3, Article 5. Article 5 now provides that when submitting a proposed plan of work, applicants are to make available to the Authority a general description of the equipment and methods to be used. It is made clear, however, that this is to be non-proprietary information. Article 5 also provides that the obligation to transfer technology be made a condition of every contract for the conduct of activities in the Area.[8]

If the Authority so requests, operators are obliged to make available to the Enterprise, *on fair and reasonable commercial terms and conditions*, the technology which is used by the operator in the international Area, and which he is legally entitled to transfer. "This commitment may be invoked only if the Enterprise finds that it is

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5. The ICNT/Rev. 2 was distributed shortly after the close of negotiations in New York. *See* U.N. Document A/CONF.62/WP.10/Rev. 2 (April 11, 1980).

6. U.N. Doc. A/CONF.62/WP.10/Rev. 1 (1979). Section 155 establishes the Review Conference and provides the mechanism for amending the system of exploration and exploitation of the international Area.

7. *See* ICNT/Rev. 2, Annex 3, art. 5 (1980).

8. The Area is defined as "the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction."

unable to obtain the same or equally efficient and useful technology on the open-market and on fair and reasonable commercial terms and conditions."[9] Article 5 also provides that technology that cannot be legally transferred is not to be used by the operator in the Area. Article 5, Section 3(b) provides that an operator is:

> To obtain a written assurance from the owner of any technology not covered under subparagraph (a) that the operator uses in carrying out activities in the Area and which is not generally available on the open market that the owner will, if and when the Authority so requests, make available to the Enterprise to the same extent as made available to the operator, that technology under license of other appropriate arrangements and on fair and reasonable commercial terms and conditions. If such assurance is not obtained, the technology in question shall not be used by the operator in carrying out activities in the Area. This assurance shall be made legally binding and enforceable whenever it is possible to do so without additional cost to the contractor.[10]

Operators are required to take all feasible measures to acquire the legal right to transfer technology that the operator is not legally entitled to transfer, and which is not generally available on the open market. If there is a close corporate relationship between the operator and the owner of the technology, and the operator refuses to transfer such technology, then his failure to do so shall be considered relevant to the contractor's qualifications for subsequent contracts. Additionally, the Enterprise is authorized to negotiate directly with the owner of the technology rather than through a contract with the operator. The blacklisting provisions of the ICNT/Rev. 2[11] to prevent this type of refusal are eliminated. Now there is an obligation on States Parties having access to such technology to ensure its transfer on fair and reasonable commercial terms and conditions.[12] Paragraph 7 now provides that the obligation of operators to transfer technology may be invoked until ten years after the Enterprise has begun commercial production. Earlier drafts containing no such time limitation on the obligation to transfer technology were troublesome to mining industries.

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9. *See* ICNT/Rev. 2, Annex 3, art. 5 (1980).

10. *Id.*

11. To prevent the unlikely situation where a contractor might refuse to transfer technology to the Enterprise, the ICNT/Rev. I contained a blacklisting provision, whereby such a contractor could not use such technology in the mining operation. *See* U.N. Doc. A/CONF.62/WP.10/Rev. 1, Annex 3, art. 5 (1979).

12. ICNT/Rev. 2, Annex 3, art. 5, ¶ 5 (1980).

Much progress is also evident in the new technology transfer dispute settlement procedures in Article 5, Annex 3. The dispute settlement mechanisms are greatly simplified. Disputes are now subject to compulsory procedures in accordance with Part II. Questions as to whether technology transfer offers are within the range of what are fair and reasonable commercial terms and conditions may now be submitted by either party to binding commercial arbitration.[13] Finally, to clarify an operator's transfer obligations, paragraph 8 defines technology as "the specialized equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis."

These provisions provide a greatly improved prospect of consensus. They are more effective in assuring that needed technology is transferred to the Enterprise. According to the United States Delegation Report,[14] however, the United States and many other developed countries find some difficulties with paragraph 3(e) which requires an operator to transfer to a developing State the technology that is required to be transferred to the Enterprise in the event that the developing State has applied for a contract. It is stipulated in paragraph 3(e) that this transfer of technology is not to involve a transfer of technology to a third State or its nationals. Though this provision is troublesome, it is one that the United States and other developed countries can live with.

Most of the provisions dealing with financial arrangements that were negotiated during the resumed Eighth Session remain substantially intact. The same is true for those provisions dealing with the financing of the Enterprise. However, in reference to financing the Enterprise, there are several defects which may be considered major by developed States. Chief among these is the procedure to be followed in the event that some States do not become parties to the Convention. It is provided that developed States are to provide financing to the Enterprise and a schedule of the amounts required from each is to be specified in the rules and regulations of the Authority to be drafted by the Preparatory Commission prior to the ratification process. In the event that certain States do not become parties or they do not adhere to the provisions of the convention,

13. *Id.* at ¶ 4.

14. *See* U.S. Delegation Report, Ninth Session of the Third United Nations Conference on the Law of the Sea, New York, February 27-April 4, 1980, at 21-23.

other States may find that the amount of their obligation towards financing of the Enterprise would be greatly increased. The new text provides that there may be additional assessments in the event of insufficient funds for the above reasons, but such additional assessments are limited to a total of twenty-five percent (25%) of the cost of one fully integrated project, and these costs are to be apportioned on the United Nation's scale of assessments. The current text also requires States to make a decision on whether to ratify the convention without complete knowledge as to what the repayment schedule of the interest-free loans will be. According to the United States delegation, both these defects must be considered major and must be resolved in future negotiations.[15]

As in the past, one of the most troubling issues deals with the composition of, and voting on, the Council. The text found in ICNT/Rev. 1 is maintained in the second revision even though this is not considered an acceptable procedure. It is clear that the United States and other developed nations whose nationals will engage in deep seabed mining activities will not agree to a voting mechanism on the Council under which their interests would not be adequately represented. These nations continue to insist that they must be able to prevent decisions in the Council that are adverse to their major economic interests, and that there must be a mechanism to prevent discriminatory actions by the Council. Closely associated with the question of voting on the Council is the question of composition of the Council. Little debate took place concerning this issue, and it is felt that this question will also present continued difficulties for the negotiators.[16]

Substantive negotiations in Committee II, under the Chairmanship of Ambassador Andres Aguilar, of Venezuela, focused primarily on the definition of the outer limit of the continental shelf, the question of payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles from the baseline and revenue sharing of the wealth recovered therefrom (Negotiating Group 6), the delimitation of maritime boundaries between adjacent and opposite states, and the settlement of delimitation disputes (Negotiating Group 7). The Committee II text incorporated in the ICNT/Rev. 2 is substantially complete and offers a significant improvement over the provisions in the first revision of the ICNT. On the question of the definition of the outer limits of the continental

15. *Id.* at 23.
16. *See supra* note 2.

shelf, the Chairman of Committee II recommends an addition to paragraph 5 providing that:

> Notwithstanding the provisions of paragraph 5, on submarine ridges the outer limit of the continental shelf shall not exceed 350 miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.[17]

This recommendation is incorporated in Revision 2 as paragraph 6 of Article 76. Paragraph 7 provides that the coastal state must delineate where its shelf extends beyond 200 nautical miles from its baseline. The commission on the limits of the continental shelf, pursuant to paragraph 8, "shall make recommendations to coastal states on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by the coastal state taking into account these recommendations shall be final and binding."[18]

Article 82, dealing with payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles, is essentially the same as found in the ICNT/Rev. 2. The sharing of revenues from resources recovered beyond 200 nautical miles from the baseline, presents several questions. It is important that the amount to be paid to the international community, through the international Authority, is not so great as to discourage exploitation and exploration of those resources. Paragraph 2 of Article 82 sets out the rate to be charged to the States Parties that are obligated to share the revenues from those resources. Paragraph 3 provides that a developing State which is a net importer of those resources is exempt from making such payments to the international Authority.

The questions of who must pay and who is entitled to receive those payments must be addressed. This is a difficult issue for both developed and developing States since it appears likely that both will have to contribute to the Authority under Article 82. This fact tends to eliminate the ideological arguments that are evident in the discussions dealing with the resources of the deep seabed, and reduces these arguments to primarily economic ones. This situation should facilitate reaching agreement to some degree. The negotiations are

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17. U.N. Doc. A/CONF.62/L.51 (March 29, 1980) at 2.
18. *See* ICNT/Rev. 2, art. 76 (1980).

already substantially complete and the proposed articles should command wide-spread support.

One of the most difficult issues faced in any international negotiation is the question of delimitating boundaries. The question of delimitation of maritime boundaries is no exception to that rule. In order for compromise solutions to be accepted States Parties must be willing to compromise their positions regarding the marine territory that is to be included within the confines of their contintental shelves. The same is true for the delimitation of the exclusive economic zone between opposite and adjacent States. If one opposite or adjacent State perceives that it is gaining territory, then there is certainly going to be another opposite or adjacent State that feels that it is giving up territory. This makes the negotiations on the delimitation of maritime boundaries extremely difficult.

Closely associated with this difficult issue is the issue of dispute settlement on questions of delimitation of maritime boundaries. It is extremely difficult to negotiate a compulsory boundary dispute settlement mechanism in a treaty such as this. Because the provisions of the ICNT/Rev. 1 could not form the basis of a consensus, the Chairman of Negotiating Group 7, Chairman Manner of Finland, offered the following as an attempt to work towards consensus:

> The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.[19]

The reference in Article 83 to an agreement in conformance with international law is characteristic of an attempt by the negotiators to delay the finalization of provisions that have proved to be unsolvable. Therefore, the delimitation of the continental shelf between opposite and adjacent states will be delayed until a time after Treaty ratification.

The Third Committee, under the Chairmanship of Ambassador A. Yankow, of Bulgaria, concentrated its efforts on marine scientific research. According to the Chairman, the main problem areas are the legal regime for the conduct of scientific research on the continental shelf beyond 200 nautical miles from the baseline, the suspension of

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19. ICNT/Rev. 2, art. 83 (1980).

cessation of such research activities, and the settlement of disputes relating to the interpretation or implementation of the provisions of the Convention. The rights of landlocked and geographically disadvantaged States with regard to marine scientific research were also addressed. According to the Chairman, the Third Committee made substantial progress in all of those areas; on all outstanding issues, the negotiations resulted in compromise proposals on which consensus has been achieved. Accordingly, the Chairman concluded that the Third Committee completed its consideration of Part 13 of the Informal Composite Negotiating Text on marine scientific research. [20]

According to the United States Delegation, marine scientific research beyond 200 nautical miles from the baseline on the continental shelf is the most contentious of all issues addressed by the Third Committee. Article 246, paragraph 2, provides that "marine scientific research activities in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State." Paragraph 5 of Article 246 delineates the circumstances under which a coastal State may properly refuse to permit the conduct of the marine scientific research in its exclusive economic zone, or on its continental shelf. The coastal State may withhold its consent if the project: (a) is of direct significance for the exploration and exploitation of natural resources; (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the environment; (c) involves the construction, operation or use of artificial islands, installations and structures; (d) contains information regarding the nature and objectives of the project which is inaccurate; or (e) the researching State has outstanding obligations to the coastal State to provide information under Article 248. However, pursuant to paragraph 6, a coastal State cannot exercise its discretion under subparagraph (a) to withhold consent where the project is of direct significance for the exploration and exploitation of natural resources and the project is beyond 200 nautical miles from the baseline.[21]

Most substantive issues have been debated at length and equitable compromise solutions have been reached. Though tough negotiations still remain, the spirit and will to succeed should provide the impetus to conclude negotiations on the few remaining hard-core issues. Procedural questions concerning ratification, amendments, reservations, denunciations, and entry into force still remain and pose the most difficult problems for the future of UNCLOS.

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20. *See* U.N. Doc. A/CONF.62/L.50 (March 28, 1980).
21. ICNT/Rev. 2, art. 246 (1980).

III. The United States' Deep Seabed Mining Legislation

A. *Introduction*

In June 1980, President Carter signed into law the much awaited Deep Seabed Hard Mineral Resources Act[22] (hereinafter referred to as the Act). The expressed purpose of the Act is to encourage the successful conclusion of a comprehensive Law of the Sea Treaty. Pending ratification of the comprehensive Treaty, however, and prior to its entry into force with respect to the United States, this Act is to provide "an interim program to regulate the exploration for and commercial recovery of hard mineral resources of the deep seabed by United States citizens."[23]

It is clear from even a casual reading of the Act that the drafters were conscious of the delicate negotiations currently being conducted by the United Nations Conference on the Law of the Sea. Congress is fully aware of the significance to the world's developing nations (the so-called Group of 77) of the legal regime that is being negotiated by the United Nations Conference. The concept of the "common heritage of mankind", as far as the developing nations of the world are concerned, is a clear expression of existing customary international law. Spokesmen for these nations have stressed over and over during the United Nations debate that any exploration or exploitation of the international area that is not conducted pursuant to a license from an international "authority" representing all of the world's nations would be a clear violation of international law. Moreover, such violators would be considered international outlaws, according to the Group of 77. They have frequently stressed that enactment of unilateral legislation by the United States, or any other nation, and the activities conducted by nationals of those nations pursuant thereto, would greatly jeopardize the delicate balance that has been achieved thus far. Many have predicted that such legislation and such activities would raise world tensions to such a level that there would be no possibility of success for the Conference.

Notwithstanding the Group of 77's position, the United States Congress saw a need to enact this unilateral legislation. At the same time, however, Congress has been very careful to assure the world community that the legislation is only an interim procedure that

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22. Deep Seabed Hard Mineral Resources Act of June 28, 1980, Pub. L. 96-283, 94 Stat. 553 (1980).

23. *Id.* at § 2(b)(3).

would give way to any international treaty that becomes effective as to the United States. This raises several questions; such as what happens if United States nationals obtain mining rights and begin commercial activities in a particular area pursuant to this Act, and subsequently, the United States becomes a party to an international Law of the Sea Treaty. This also raises the question of what would happen if the general world community adopts such a Treaty, but the United States does not become a party. This, of course, would raise an additional interesting question since the United States has adopted in principle the concept of the "common heritage of mankind," but would be in a position of permitting its nationals to conduct activities in the international area that would appear to be in conflict with that concept. In order to better understand the significance of the Act and its possible impact upon the current United Nations' negotiations, an analysis of the major provisions follows.

B. *Intent of Congress*

In section 2(a) of the Act, Congress finds that it is in the national interest of the United States to ensure the availability of certain hard mineral resources, such as those found within the international area. Though the United Nations Conference appears to be nearing the end of the protracted negotiations, it is likely to be many years before a comprehensive Law of the Sea Treaty becomes effective as to the United States, and thus Congress finds "legislation is required to establish an interim legal regime under which technology can be developed in the exploration and recovery of the hard mineral resources of the deep seabed can take place until such time as a Law of the Sea Treaty enters into force with respect to the United States."[24] Further, pending entry into force of such a Treaty, and absent any other international agreement, the existing uncertainty among potential deep seabed mining industries as to what the future legal regime is likely to be will discourage or prevent the investments that are necessary to develop deep seabed mining technology.

Congress further finds that the United States supported the United Nations General Assembly resolution, which declared in part that the mineral resources of the deep seabed area are the "common heritage of mankind," but did so "with the expectation that this principle would be legally defined under the terms of a comprehensive international Law of the Sea Treaty yet to be agreed upon."[25] This

24. *Id.* at § 2(a)(16).
25. *Id.* at § 2(a)(7).

may be an attempt by the United States to avoid being placed in the position of violating international law. As justification for this legislation, the United States Congress further finds that "it is the legal opinion of the United States that exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas, subject to a duty of reasonable regard to the interest of other States in their exercise of those and other freedoms recognized by general principles of international law."[26]

It is clear from the expressed findings of Congress that the United States is attempting to assure the world community that it is not in violation of international law. The world community, however, is not likely to accept the position that the "common heritage of mankind" was established with the expectation that that principle would be further defined in a comprehensive treaty. It is the position of the world community in general that the concept of the "common heritage of mankind" is an expression of customary international law, whether or not it is further defined by any international treaty. Also, it is clear that the world community, in particular the Group of 77, will dispute the position of the United States that commercial recovery of hard mineral resources in the international area is a freedom of the high seas.

In a further attempt to minimize the impact of this legislation upon the current negotiations, Congress included a provision that establishes an international revenue sharing fund, the proceeds of which are to be shared with the international community pursuant to a Law of the Sea Treaty effective as to the United States.[27] There is no indication within the Act as to how much money must be placed

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26. *Id.* at § 2(a)(12).

27. *Id.*, § 2(b)(2). Section 403 of the Deep Seabed Hard Minerals Removal Tax Act of 1979 creates the Deep Seabed Revenue Sharing Trust Fund, and provides that:

> (d) Expenditures From Trust Fund—If an international deep seabed treaty is ratified by and in effect with respect to the United States on or before the date of the enactment of this Act, amounts in the Trust Fund shall be available, as provided by approriations Acts, for making contributions required under such treaty for purposes of the sharing among nations of the revenues from deep seabed mining. Nothing in this subsection shall be deemed to authorize any program or other activity not otherwise authorized by law.
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> (e) Use of Funds—If an international deep seabed treaty is not in effect with respect to the United States on or before the date ten years after the date of the enactment of this Act, amounts in the Trust Fund shall be available for such purposes as Congress may hereafter provide by law.

in the fund, and this raises questions as to what would happen if the international authority established by a comprehensive treaty were to determine that the fund is not large enough. The United States also clearly states that by the enactment of this Act, the United States is only exercising jurisdiction over those United States citizens and vessels, and those foreign citizens and vessels, that are otherwise subject to the jurisdiction of the United States. Under the Act, the United States does not "assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed."[28] In section 3(b) the Secretary of State is encouraged to negotiate a comprehensive Law of the Sea Treaty providing nondiscriminatory access to the mineral resources of the international area for all nations, and which "gives legal definition to the principle that the resources of the deep seabed are the common heritage of mankind."[29]

It has been the position of the United States that the compromise positions that have been arrived at thus far by the United Nations Conference are not expressions of existing customary international law, and can only become law if a comprehensive Law of the Sea Treaty is adopted. As evidence of this, the United States Congress, in section 4 of the Act, retained many of the old definitions that are clearly to be changed in the event that the comprehensive Treaty becomes effective. The clearest example of this is the definition of the "Continental Shelf", which is defined in the Act as the seabed and subsoil of submarine areas adjacent to the coast of a nation, but outside its territorial sea, to a depth of 200 meters or, beyond that depth, to where the depth of the waters admits of the exploitation of the natural resources of that area.[30]

C. *Provisions of the Act*

The Act provides that to engage in exploration or commercial recovery within the area, a United States citizen must have a license or permit issued pursuant to the Act, a license or permit or equivalent authorization issued by a reciprocating state, or be authorized pursuant to an international agreement in force with respect to the United States. Section 102(b)(3) provides that a permit issued pursuant to the Act gives the holder of the permit the right to recover

28. *Id.* at § 3(b).
29. *Id.* at § 3(c).
30. *Id.* at § 4(2).

mineral resources and to "own, transport, use, and sell minerals recovered under the permit."

It is noteworthy that the Act does not provide for exclusive ownership by deep seabed miners of the minerals in a particular area of the deep seabed covered by their permit, prior to the recovery from the seabed of those minerals. Though the Act does provide for certain property rights in recovered minerals, it is questionable whether the Act goes far enough to assure potential investors that a stable legal regime for the international area is being established by the Act. Section 102(b)(2) does provide, however, that a license or permit issued under the Act is exclusive with respect to the holder thereof, as against all other United States citizens; and section 102(b)(4) provides that in the event of interference with the exploration or commercial recovery activities of a licensee or permittee by the nationals of other States, "the Secretary of State shall use all peaceful means to resolve the controversy by negotiation, conciliation, arbitration, or resort to agreed tribunals."[31] It is clear that the deep seabed mining industry would prefer to have exclusive ownership of minerals in a designated area, as opposed to ownership of *recovered* resources only. Nevertheless, it is believed that the combination of these provisions should be sufficient to encourage deep seabed mining industries to commit the necessary capital to develop technology and to continue the process of exploration for mining sites.

Title II of the Act deals with transition to an international agreement. Pursuant to section 201 of the Act, it is the expressed intent of Congress that any international agreement must:

> (A) provide assured and non-discriminatory access, under reasonable terms and conditions, to the hard mineral resources of the deep seabed . . .
>
> (B) provide security of tenure by recognizing the rights of the United States citizens who have undertaken exploration or commercial recovery under title I before such agreement enters into force with respect to the United States to continue their operation under terms, conditions, and restrictions which do not impose significant new economic burdens upon such citizens with respect to such operations with the effect of preventing the continuation of such operations on a viable economic basis.[32]

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31. *Id.* at § 102(b)(4).
32. *Id.* at § 201(1)(A)-(B).

D. *Impact of the Act on the UNCLOS Negotiations*

In determining whether an international agreement is in conformance with the above, one must consider, among other things, the discretionary powers granted to an international regulatory body, the decision-making process of such body, the availability of impartial and effective settlement of dispute mechanisms, and any other features that tend to discriminate against exploration and commercial recovery activities undertaken by United States citizens. It is further the expressed intent of Congress that this Act is transitional only and shall be effective only until the adoption of a comprehensive United Nations Law of the Sea Treaty, or some other treaty that is effective as to the United States. The provisions in Section 201 appear to be a direct result of the difficult negotiations that have occurred concerning the make-up and voting on the proposed international council, the powers and duties of the international authority, and the proposed economic provisions of Revision 2 of the Informal Composite Negotiating Text.

Section 202 provides that the provisions of this Act that are not inconsistent with any treaty effective as to the United States, shall continue in effect with respect to United States citizens. In the event of such an international treaty, the Secretary of State is directed to "make every effort, to the maximum extent practicable consistent with the provisions of that agreement, to provide for the continued operation of exploration and commercial recovery activities undertaken by United States citizens prior to the entry into force of the agreement."[33]

Another provision of the Act which may have impact upon the current United Nations negotiations is section 118 dealing with reciprocating States. A reciprocating State is defined as a foreign nation that regulates its citizens and others subject to its jurisdiction engaged in exploration for and commercial recovery of deep seabed mineral resources in a manner compatible with that provided in this Act. It is further required that such foreign nation provide adequate measures for the protection of the environment and that such nation recognize "priorities of right, consistent with those provided in this Act and the regulations issued under this Act, for applications for licenses for exploration or permits for commercial recovery, which applications are made either under its procedures or under this Act."[34] Upon such designation, section 118 provides that there shall

33. *Id.* at § 202.
34. *Id.* at § 118(a)(3).

be no license or permit issued under the Act permitting any activities that are in conflict with any license, permit or equivalent authorization issued by a reciprocating foreign nation.

The Act provides for the issuance of permits and licenses and for the review and amendment of those licenses and permits. Pursuant to section 105, prior to the issuance of a license for exploration or a permit for commercial recovery, the administrator must find that such exploration or commercial recovery:

> (1) will not unreasonably interfere with the exercise of the freedoms of the high seas by other states, as recognized under general principles of international law;
>
> (2) will not conflict with any international obligation of the United States established by any treaty or international convention in force with respect to the United States;
>
> (3) will not create a situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict;
>
> (4) cannot reasonably be expected to result in a significant adverse effect on the quality of the environment, taking into account the analyses and information in any applicable environmental impact statement prepared pursuant to section 109(c) or 109(d); and
>
> (5) will not pose an inordinate threat to the safety of life and property at sea. [35]

Section 109 of the Act provides extensive protections for the marine environment. The Act directs the administrator to expand and accelerate programs for assessing the effects on the environment from commercial recovery activities, including processing at land and at sea, so as to provide an assessment of the environmental impact of such activities. Each license and permit issued under this Act shall contain conditions and restrictions to ensure protection of the marine environment. The Act provides for the preparation of a programmatic environmental impact statement. An environmental impact statement is required prior to the issuance of any permit or license since such issuance is considered to be a major federal action significantly affecting the quality of the human environment under section 102 of the National Environmental Policy Act of 1969.[36]

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35. *Id.* at § 105(a).
36. The National Environmental Policy Act of 1969, 42 U.S.C.A. 4321 (1969).

IV. Conclusion

There are sure to be strong statements denouncing the unilateral United States mining legislation at the remaining United Nations negotiating sessions on the Law of the Sea. Though the United States Congress was careful to ensure that the Act be viewed as only an interim procedure, there are many provisions which are sure to provoke angry rebukes to the United States. Included among these are the provisions in the Act that state that the concept of the "common heritage of mankind" is one that needs legal definition in a comprehensive international Treaty; and also those sections providing for the protection of mining rights established pursuant to this Act.

It is felt by many, however, that the passage of this legislation should have the effect of encouraging a more rapid conclusion to negotiations since it is now clear that the United States and its nationals will engage in deep seabed mining with or without an international Law of the Sea Treaty. It is significant that the United States Congress provided in section 102(c)(1)(d) that no exploration licenses shall be issued prior to July 1, 1981, and no permit shall be issued authorizing commercial recovery prior to January 1, 1988. The Act, in effect, establishes a mechanism by which United States nationals, and others subject to the jurisdiction of the United States, may engage in exploration after January 1, 1981, and may commence commercial operations after January 1, 1988. It also provides for the orderly regulation of said activities. Now it is incumbent upon the international community to conclude negotiations and begin the ratification process of an acceptable comprehensive international Law of the Sea Treaty. The Deep Seabed Hard Mineral Resources Act should provide the impetus for the rapid conclusion of this process.