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The New Law of the Sea

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By Bernard H. Oxman

ON December 10, 1982, a new United Nations Convention on the Law of the Sea was opened for signature in Jamaica, the climax of 15 years of treaty negotiations among the nations of the world in a special committee of the United Nations and, since 1973, at the Third U N Conference on the Law of the Sea.

Although President Reagan found that the "navigation and overflight" and most other provisions of the convention "are consistent with U.S. interests" and "serve well the interests of all nations," he, along with the governments of Belgium, Great Britain, Italy, Luxembourg, and West Germany, declined to authorize signature of the convention because of its deep seabed mining provisions. The five other members of the European Common Market, most other Western countries, the Soviet bloc, China, and most African, Asian, and Latin American countries signed the convention on December 10. More signatures are expected within the next two years. There is a substantial possibility that more than the necessary 60 states will ratify the convention and bring it into force in the 1980s.

Except for those on deep seabed mining and settlement of disputes, the provisions of the convention are already regarded by some government and private experts, including the authors of the new draft *Restatement of the Foreign Relations Law of the United States*, as generally authoritative statements of existing "customary" international law applicable to all states. The president of the conference, however, joined many of his colleagues in warning that other countries will not necessarily accord Americans their *quids* if the United States stays out and denies them their *quos*.

There are many facets to the current debate regarding the convention, a treaty of some 200 single spaced pages whose 446 articles describe the basic rights and duties of states in connection with all activities at sea. Broad issues of process, principle, and precedent are invoked with respect to matters as varied as defense, ecology, economics, ethics, oceanography, politics, and (sometimes) law.

It is not my purpose to rehearse the debate but merely to give a brief summary of its object: the convention. Still, every sentence and omission reflects some professional judgment with which others might reasonably differ.

The third time at bat

As its title indicates, the recent conference was not the first effort to lay down the rules of the law of the sea by universal agreement. Efforts to codify the law of the sea began under the League of Nations, culminating in the adoption by the first U N. conference of four conventions in 1958. Although ratified by the United States and many other maritime countries, these conventions did not fully achieve the objectives of a modern, universally respected body of law. Negotiated before almost half the current community of nations won independence, they were not ratified by a substantial majority of states, failed to resolve certain important issues (for example, the breadth of the territorial sea), and did not deal in detail with certain new problems (for example, environmental protection and deep seabed mining).

The second conference was called in 1960 to try again to fix a maximum limit for the territorial sea, but it failed. There

remained no sufficiently reliable basis for predicting or restraining the increasingly conflicting claims of states to use and control the sea.

The third conference was charged by the U.N. General Assembly with preparing a new and comprehensive convention on the law of the sea, by consensus if at all possible. Its aim was to achieve a degree of universal agreement on the rules of behavior at sea that, since World War II, had eluded both the earlier conferences and the processes of customary international law. Beginning in 1975, the officers of the conference combined texts and ideas that emerged from informal negotiations and submitted them as an informal negotiating text at the end of a session. Delegations returned to the next session with a clearer idea of what they were prepared to accept. The final text emerged from the eighth iteration in this process. The few substantive amendments pressed to a vote were defeated.

Following the U.S. request for a record vote, on April 30, 1982, the conference adopted the text by a vote of 130 delegations in favor, including Canada, France, and Japan, and four against, including the United States, with 18 abstentions and 18 unrecorded.

The legal map of the sea

The convention applies to the "sea." Oceans, gulfs, bays, and "seas" are part of the sea; lakes and rivers are not. It long has been accepted that the sea may not be claimed in the same manner as land areas. Some parts are allocated to adjacent coastal states. The rest is open to all.

The convention seeks to accommodate the interests of a state:

(1) by giving it and its nationals freedom to act in pursuit of those interests (for example, navigation rights and high seas freedoms); and

(2) by limiting the freedom of others to act in a manner adverse to those interests

(a) by imposing a duty on foreign states and their nationals to act in a prescribed manner (for example, safety and environmental restrictions), or

(b) by giving a state the right to prevent or control activities of foreign states and their nationals (for example, territorial sovereignty or coastal state jurisdiction over mining or fishing).

Because rules generally apply to all, states must balance their desire to maximize their own freedom of action with their desire to limit the freedom of action of others. A typical coastal state might prefer a broad territorial sea for itself and a narrow one for everyone else. Sometimes it can be more complicated than that. A government may seek to control the foreign or domestic pressure on itself or its successors to behave in a particular way by limiting its freedom of action. Law that is difficult to change, such as constitutional law or treaty law, is one way to achieve this.

Internal waters

Not only lakes and rivers, but harbors and other parts of the sea are so much enclosed by the land that they are, in effect, internal. An example is a small bay. Emergencies aside, the use of internal waters, including their seabed and airspace, generally requires coastal state consent. Because they are more open and useful to navigation, however, in those internal waters, which are established by a "system of straight baselines" connecting coastal or insular promontories, foreign states enjoy the same passage rights as in the territorial sea. The convention contains a number of technical rules on how to establish baselines delimiting internal waters. These are largely drawn from the 1958 Territorial Sea Convention.

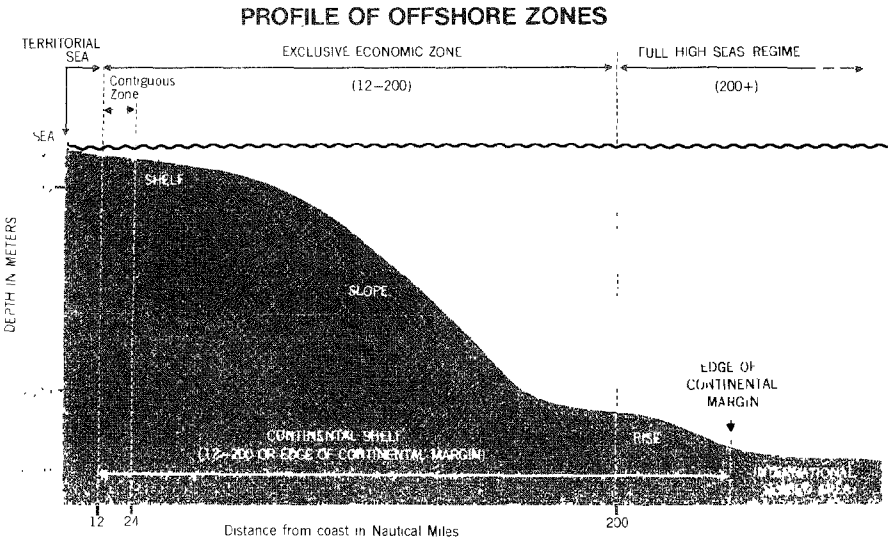
One innovative provision permits a state to investigate and try foreign ships visiting its ports for discharging pollutants in violation of international rules and standards virtually anywhere at sea.

The territorial sea

Every coastal state is entitled to exercise sovereignty over a belt of sea adjacent to the coast, including its seabed and airspace. This "territorial sea" is measured seaward from the coast or baselines delimiting internal waters.

One of the reasons for calling the third conference was that the two earlier conferences failed to reach agreement on the maximum permissible breadth of the territorial sea and, accordingly, on the extent of the free high seas. Respect for the old three-mile limit had eroded. Some territorial sea claims extended as far as 200 miles. The new convention establishes 12 nautical miles as the maximum permissible breadth of the territorial sea.

The sovereignty of the coastal state in the territorial sea is subject to a right of "innocent passage" for foreign ships but not aircraft or submerged submarines. The question of what constitutes "innocence," as well as the extent of coastal state regulatory power over ships in passage, remained in dispute following the 1958 conference. While repeating the provisions on innocent passage of the 1958 convention, the new convention adds a list of activities that are not "innocent passage," prohibits discrimination based on the flag or destination of a



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ship, and clarifies the right of the coastal state to establish sealanes and traffic separation schemes and to control pollution.

Straits

Any extension of the geographic area in which a coastal state exercises sovereignty at sea reduces the area in which the freedoms of sea, including freedom of navigation and overflight, may be exercised. In narrow straits, extension of the territorial sea or the establishment of straight baselines may eliminate any (or any usable) high seas passage through the area. At the same time, states bordering straits may be subject to political pressures to assert control over transit for reasons of national defense or environmental protection, not to mention the dream of a sultan's ransom in tolls and tribute.

Under the 1958 convention a coastal state may not suspend innocent passage in a strait used for international navigation. The new convention establishes a more liberal right of "transit passage" in straits for aircraft and submerged submarines as well as surface ships. Among those are the straits of Dover, Gibraltar, Bab-el-Mandeb, Hormuz, and Malacca. The debate about whether warship passage is "innocent" is rendered irrelevant. There is no right to stop a ship in transit passage, unless a merchant ship's violation of internationally approved regulations threatens major damage to the marine environment of the strait.

Special long-standing treaty regimes for particular straits (such as the Turkish straits), rights under the peace treaty between Egypt and Israel, and artificial canals are unaffected by the convention.

Archipelagic waters

The new convention generally validates the sovereignty claims of some independent island nations (for instance, the Bahamas, Indonesia, and the Philippines) over all waters within their archipelagos, subject to a right of "archipelagic sealanes passage," similar to transit passage, through the archipelago for all ships and aircraft, including submerged submarines. Specific criteria are established for limiting the situations in which archipelagic baselines may be drawn around an island group and how far they may extend.

The contiguous zone

The coastal state may take enforcement measures in a contiguous zone adjacent to its territorial sea to prevent or punish infringement of its customs, fiscal, immigration, or sanitary laws in its territory or territorial sea. The new convention extends the 1958 limit of this contiguous zone from 12 to 24 nautical miles from the coast (baseline). It also permits the coastal state to take special measures to protect archeological treasures.

The continental shelf

It is now generally accepted that the coastal state has exclusive "sovereign rights" to explore and exploit the natural resources of the seabed and subsoil of the continental shelf adjacent to its coast and seaward of its territorial sea. The questions are where, and for what other activities, is coastal state authorization needed.

The coastal state has exclusive sovereign rights to the natural resources of the continental shelf adjacent to its coast. The questions are where and for what activities is coastal state authorization needed.

The 1958 Convention on the Continental Shelf defines the continental shelf as the area of seabed and subsoil adjacent to the coast and extending from the territorial sea to where the waters reach a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil.

The new convention permits the coastal state to establish the permanent outer limit of its continental shelf at either 200 nautical miles from the coast (baseline) or the outer edge of the continental margin (the submerged prolongation of the land mass), whichever is further seaward. Its elaborate criteria for locating the edge of the continental margin are designed to allocate virtually all seabed oil and gas to coastal states. Once approved by an international commission of experts, the coastal state's charts showing the location of the outer edge of its continental margin are final and binding on the rest of the world (at least the other parties to the convention). This *ex parte* procedure is intended to lower the risk of investment in a manner similar to the action to quiet title.

In addition to control of natural resources and installations used to exploit them, the 1958 convention gave the coastal state effective control over scientific research on the continental shelf. Some coastal states claim a right to control all uses of the continental shelf. The issue may arise in discussions of new fixed uses, such as offshore military structures, ports, airports, power plants, or even pirate broadcasting schemes and gambling casinos. Or it may arise in the context of international monitoring efforts for purposes such as arms control, navigation safety, weather prediction, or environmental protection.

Under the new convention the coastal state, with respect to the continental shelf, has not only sovereign rights over the natural resources of the seabed and subsoil but also the exclusive right to authorize and regulate drilling for all purposes and the right to consent to the course for pipelines. Its newly elaborated rights regarding installations and marine scientific research on the continental shelf are generally the same as its rights in the exclusive economic zone.

The new convention specifies three new duties of the coastal state. The first, applicable to the entire continental shelf, requires every coastal state to establish environmental standards for all activities and installations under its jurisdiction that are no less effective than those contained in international standards. At the same time the rigid petroleum installation removal regulations of the 1958 convention were relaxed in response to the concerns of oil companies.

The other new duties are applicable only to that part of the continental shelf that is seaward of 200 nautical miles from the coast. One requires the coastal state to pay a small percentage of the value of mineral production from the area into an international fund to be distributed to parties to the convention, particularly

developing countries. Another prohibits the coastal state from withholding consent for marine scientific research outside specific areas under development.

The exclusive economic zone

The provisions on the exclusive economic zone are all new law. Measured by any yardstick — political, military, economic, scientific, environmental, or recreational—the overwhelming proportion of activities and interests in the sea is affected by this new regime.

Under the convention every coastal state has the right to establish an exclusive economic zone seaward of its territorial sea and extending up to 200 nautical miles from its coast (baseline). Seabed areas beyond the territorial sea and within 200 miles of the coast are therefore subject to the continental shelf and economic zone regimes.

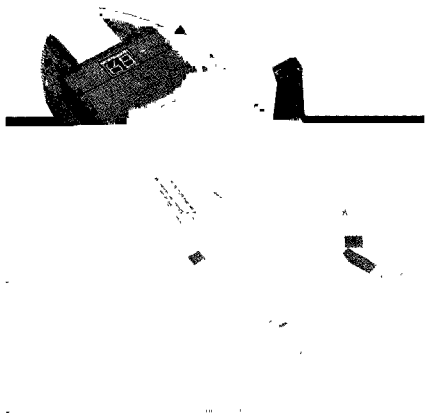
Two separate sets of rights exist in the economic zone: those enjoyed exclusively by the coastal state and those that may be exercised by all states. The division is by activity, not area or ship.

The rights of the coastal state in the economic zone are:

- exclusive sovereign rights to control the exploration, exploitation, conservation, and management of living and nonliving natural resources in the waters and the seabed and subsoil;
- exclusive sovereign rights to control other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds;
- the exclusive right to control the construction and use of all artificial islands and installations and structures that are used for economic purposes or may interfere with the coastal state's exercise of its rights in the zone (for example, an oil rig or offshore tanker depot);
- the right to be informed of and participate in proposed marine scientific research projects and to withhold consent for a project in a timely manner under specified circumstances;
- the right to control the dumping of wastes; and
- the right to board, inspect, and, when there is threat of major damage, arrest a merchant ship suspected of discharging pollutants in the zone in violation of internationally approved standards. This right is subject to substantial safeguards to protect shippers, sailors, and consumers. Even if investigation indicates a violation, the ship must be released promptly on reasonable bond. If release is not obtained within ten days, an international court may set the bond and order release "without delay." If so authorized, a private party may seek this release order on behalf of the flag state. The convention establishes a time limit for prosecution, requires that the coastal state observe "recognized rights of the accused," prohibits punishments other than monetary fines, and restricts successive trials by different states for the same offense.

The rights of all states in the economic zone are:

- the high seas freedoms of navigation, overflight, and the laying of submarine cables and pipelines; and



- other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines. This category may cover a gamut of uses—for example, recreational swimming, weather monitoring, and various naval operations.

This allocation of rights is accompanied by extensive duties.

Because both the coastal state and other states have independent rights to use the economic zone, each is required to ensure that its rights are exercised with "due regard" to the rights and duties of the other.

Flag states must ensure that their ships observe generally accepted international antipollution regulations.

The coastal state must take measures to ensure that activities under its jurisdiction or control do not cause pollution damage to other states.

The coastal state is required to ensure the conservation of living resources in the waters of the economic zone. Except with respect to marine mammals, it also must promote the optimum utilization of these resources by determining its harvesting capacity and granting access under reasonable conditions to foreign vessels to fish for the surplus, if any, that remains under its conservation limits. Neighboring states with small enclosed coastlines, or none at all, enjoy some priority of access to this surplus. International protection of whales and other marine mammals is required, as is regional regulation of migratory species.

If the economic zones or continental shelves of neighboring coastal states overlap, they are to be delimited by agreement between those states on the basis of international law in order to achieve an equitable solution. This general provision should be read against the background of an increasing number of bilateral agreements and international judicial and arbitral decisions on offshore boundary delimitation.

The high seas

Like the 1958 Convention on the High Seas, the new convention does not contain an exhaustive list of the freedoms of the high seas. Both expressly name the freedoms of navigation, overflight, fishing, and laying of submarine cables and pipelines. The new convention also lists freedom of scientific research and freedom to construct artificial islands and other installations permitted under international law.

Largely copied from the 1958 convention, the new high seas regime has been augmented by stronger safety and environmental obligations of the flag state and special provisions on the suppression of pirate broadcasting and illicit traffic in drugs. Freedom to fish on the high seas is subject to specific conservation and ecological requirements. Free high seas fishing is eliminated for salmon and can be eliminated or restricted for whales and other marine mammals.

Unlike the 1958 convention, the new convention does not contain a definition of the high seas. Rather it says that its articles on the high seas apply to all parts of the sea beyond the economic zone,

and that most of those high seas articles also apply within the economic zone to the extent they are not incompatible with the articles on the economic zone. Thus, for example, the rules of navigation for ships and the law of piracy continue unchanged in the economic zone.

The international seabed area

The "international seabed area" comprises the seabed and subsoil "beyond the limits of national jurisdiction"—that is, beyond the limits of the continental shelf subject to coastal state jurisdiction. This area is declared to be the common heritage of mankind. Its principal resource of current interest consists of polymetallic nodules lying at or near the surface of the deep ocean beds, particularly in the Pacific and to a lesser degree in the Indian Ocean. The nodules contain nickel, manganese, cobalt, copper, and traces of other metals.

Nonresource uses, including scientific research, are free, and prospecting is almost as free. On the other hand, mining requires a contract from an International Seabed Authority. Parties to the convention are prohibited from recognizing mining rights asserted outside the convention system.

To obtain a contract conferring the exclusive right to explore and mine a particular area with security of tenure for a fixed term of years, a company must be "sponsored" by a state party. It must propose two mining areas, one to be awarded to the company and the other to be "reserved" by the Seabed Authority for exploration and exploitation by its own commercial mining company, the Enterprise, or by a developing country.

Assuming that procedural requirements are met, the Seabed Authority may refuse to issue the contract to a qualified applicant in essentially four circumstances:

- if the applicant has a poor record of compliance under a previous contract;
- if the particular area has been closed to mining because of special environmental problems;
- if a single sponsoring state thereby would acquire more active mine sites, particularly in the same general area, than are permissible under fairly broad geographic and numerical limits; or
- if there is already a contract or application for all or part of the same area.

Before beginning commercial production, a miner must obtain a production authorization from the Seabed Authority. This must be issued so long as the aggregate authorized production from the international seabed area would not thereby exceed a 20-year interim ceiling that, in the absence of an applicable commodity agreement, limits total production of nodules to an amount that would generate by any given year no more than the cumulative increase in world demand for nickel in the five years before the first mine begins commercial production, plus 60 per cent of the cumulative projected increase in total world demand for nickel thereafter.

In exchange for mining rights in a contract that may not be modified without its agreement, the mining company assumes three basic obligations:

The Seabed Authority may refuse to issue a contract conferring the exclusive right to explore and mine an area for a fixed term of years if any of four specific circumstances are present.

- It must abide by various performance, safety, environmental, and other technical ground rules.
- It must pay to the Seabed Authority a specified proportion of the value of production or, at its election, a smaller proportion of production coupled with a specified proportion of profits. The Seabed Authority must use the funds to cover its administrative expenses and may then distribute the remainder to developing countries and peoples designated by regulation.
- Until ten years after the Enterprise first begins commercial production, it must be willing to sell to the Enterprise, on fair and reasonable commercial terms and conditions determined by agreement or commercial arbitration, mining, but not processing, technology being used at the site, if equivalent technology is not available on the open market. Alternatively, it would have the same obligation to a developing country planning to exploit the "reserved" site submitted by that company.

The International Seabed Authority

If Jamaica ratifies the convention, it will be the site of the International Seabed Authority established to administer the system for mining in the international seabed area, which will have the standard structure of an intergovernmental organization—an assembly of all states parties, a council of greater limited membership, and a secretariat.

The 36-member council must include four of the largest consumers and four of the largest (land-based) producers of the types of resources produced from the deep seabed, as well as four of the states whose nationals have made the largest investment in mining the international seabed area. The Soviet bloc obtained an express guarantee of three council seats in exchange for effectively conceding at least seven, and probably eight or nine, to the West, including a guaranteed seat for the largest consumer, which would be the United States should it become a party. Developing countries will hold most of the remaining seats.

Although the assembly is referred to as the supreme organ of the Seabed Authority, the adoption of legally binding mining rules and regulations, restrictive environmental orders, and proposed amendments to the provisions of the convention regarding mining in the international seabed area requires a consensus decision of the council. Other substantive decisions, depending on their importance, require a three-fourths or two-thirds vote in the council. A technical commission is required to recommend council approval of applications for mining contracts if they satisfy the relevant requirements of the convention and the rules and regulations. That recommendation may be rejected only by consensus, excluding the applicant's sponsoring state.

The Enterprise—an intergovernmental mining company—is the most unusual feature of the Seabed Authority. Its initial capitalization target is the cost of developing one mine site, now estimated at well over $1 billion. Half will be in the form of private loans guaranteed by the states parties and half in the form of

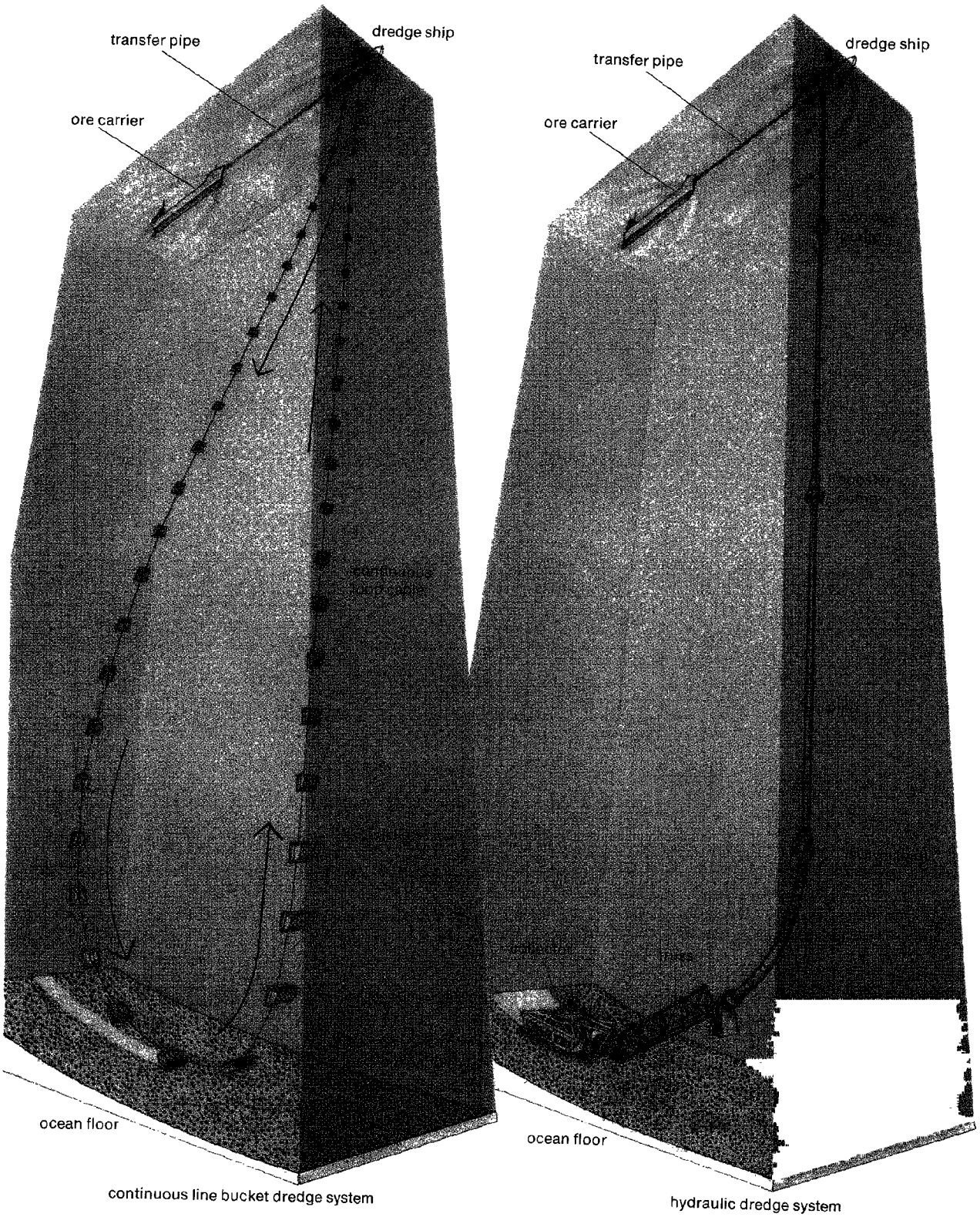


Illustration courtesy Encyclopedia Britannica, 1980 Yearbook of Science

private loans guaranteed by the states parties and half in the form of interest-free loans from the states parties.

The deep seabed mining system is subject to review 15 years after commercial production begins. Should the review conference be unable to reach agreement on amendments within five years after it is convened, it may adopt amendments to the mining system by a three-fourths vote. These would enter into force for all parties a year after ratification by three fourths of the parties but would not affect mining under contracts already issued.

General duties

The convention specifies a number of duties that apply to all or almost all of the sea. The most developed are the strong new duties to protect and preserve the marine environment. There also are duties to promote marine scientific research and dissemination of scientific knowledge, to protect archeological treasures found at sea, to use the seas for peaceful purposes, to refrain from any threat or use of force contrary to the U.N. Charter, and to settle disputes peacefully. There is a special chapter guaranteeing landlocked states access to the sea. Abuse of rights is prohibited.

Settlement of disputes

The convention is the first global treaty of its kind to require, without a right of reservation, that an unresolved dispute between states parties concerning its interpretation or application be submitted at the request of either party to the dispute to arbitration or adjudication for a decision binding on the other party. There are, however, important exceptions to this rule:

- disputes concerning the rights of the coastal state in the economic zone or the continental shelf may be submitted by another state only in cases of interference with navigation, overflight, the laying of submarine cables and pipelines, and related rights, or in cases of violation of specified international environmental standards;
- disputes regarding historic bays and maritime boundary delimitation between states with opposite or adjacent coasts, disputes concerning military activities, and disputes that are before the U.N. Security Council may be excluded by unilateral declaration.

Arbitration is the applicable procedure unless:

- emergency measures (for example, vessel release) are necessary before an arbitral panel has been constituted;
- both the "defendant" and the "plaintiff" have accepted the jurisdiction of the International Court of Justice in The Hague or the new Tribunal on the Law of the Sea, to be established in Hamburg if West Germany becomes a party to the treaty; or
- the dispute concerns exploration or exploitation of the resources of the international seabed area. In this event, the case may be brought to a chamber of the Tribunal on the Law of the Sea or commercial arbitration, depending on the circumstances. These fora are open to states parties and to the deep seabed mining companies sponsored by them.

Unresolved disputes between states parties concerning the interpretation of the application of the convention must be submitted to binding arbitration or adjudication at the request of either party to the dispute

Preparatory commission and pioneer investors

This spring a preparatory commission of treaty signatories will commence drafting provisional mining regulations for the international seabed area that will interpret, clarify, and apply the convention text with greater precision. Only when the regulations are drafted will the lawyer be able to know the exact nature of a miner's rights and obligations under the deep seabed mining system and the mining contracts to be issued. These regulations will enter into force automatically with the convention a year after 60 states have ratified the convention.

A conference resolution authorizes the preparatory commission to register the deep seabed mining companies that made substantial investments before 1983 as pioneer investors, each with the exclusive right to carry out exploration and testing in a registered area of 150,000 square kilometers at the start. Once the convention enters into force, a qualified pioneer investor sponsored by a state party must be granted a mining contract for that half of the original registered area selected by the investor if the preparatory commission has certified compliance with the conference resolution.

Great Britain, France, the United States, and West Germany signed an agreement in September, 1982, to deal with applications for overlapping areas previously filed under their respective deep seabed mining laws by explorers who engaged in substantial surveys of the area applied for prior to June 28, 1980. This agreement is envisaged by and consistent with the conference resolution on pioneer investment, although some individuals prefer to regard it as a first step in establishing an international arrangement for deep seabed mining outside the convention.

The convention does not permit reservations, but it does permit other declarations and statements. Amendment is possible, but difficult.

A party has the right to withdraw from the convention at any time on one year's notice.

Not all good or bad

No compromise document of the complexity of the new Convention on the Law of the Sea can be all good or all bad from anyone's perspective. It is, however, for some time to come the only basis for achieving a body of rules for using the sea whose legitimacy is globally recognized. In that sense, the choice is between imperfect law and no law.

—Journal

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