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“[T]he deep seas and ocean bottoms are, and remain, the legacy of all human beings.” These words spoken by President Lyndon Johnson in 1966 foreshadowed an international movement to protect the oceans. Sixteen years later the movement culminated in a comprehensive Convention on the Law of the Sea—a treaty grounded upon the principle that oceans beyond the limits of national jurisdiction are the “common heritage of mankind.”

Despite nearly two decades of United States support for the “common heritage” principle, and the efforts behind the Convention, the Reagan Administration rejected the treaty in 1982. The following year the President initiated his unilateral ocean policy with a Proclamation and an adjoining statement calling for the establishment of a 200-mile Exclusive Economic Zone and reiterating his view that deep seabed mining is a high seas freedom. Defending the rejection of the Convention, Reagan’s ambassador to the United Nations Conference on the Law of the Sea (UNCLOS) declared: “[T]he political, economic and ideological assumptions which underlay the treaty are essentially antithetical to American values [and promote] a thinly disguised world collectivism.”


5. Remarks of James Malone, Assistant Secretary of State and the United States Representative to UNCLOS under Reagan, quoted by Curtis, Sign the Sea-Law Treaty, N.Y. Times, Feb. 21, 1983, at A17, col. 4. According to Curtis, Malone said: Put directly, the principle objection [to the UNCLOS Convention] was that the political, economic and ideological assumptions which underlay the treaty are essentially an-
These comments are emblematic of the deeply imbedded philosophical opposition to international regulation and control that prompted the Reagan reaction. Such ideological rigidity justifies close scrutiny. As Leigh Ratiner, an UNCLOS negotiator under Nixon, Ford and Reagan, said, "the guardians of pure conservative ideology may have won a battle when the United States stood alone at the Law of the Sea Convention, but the United States may lose a very important war."

This Note discusses the political implications of U.S. opposition to the Convention and critiques its legal support. An alternative response is proposed which calls for adoption of a pragmatic and flexible approach with particular emphasis on the long-term credibility of the United States as a member of the world community.

I. An Historical Overview

The Third United Nations Conference on the Law of the Sea was convened in 1973. These negotiations received continuous U.S. support throughout the Administrations of Presidents Nixon, Ford and Carter. By 1980, U.S. officials were predicting that a treaty effectively protecting U.S. interests could soon be adopted.

President Reagan's election, however, frustrated these predictions. Fearing that his new Administration would be forced to vote on an unacceptable treaty, President Reagan took the unprecedented step of withdrawing the United States from UNCLOS in March 1981 to allow a thorough review of the Convention. By January 29, 1982 the review...
had been completed, and the President announced that the U.S. was ready to return to negotiations.\textsuperscript{10}

The Reagan Administration response to the treaty draft, presented in a 68-page booklet on March 19, suggested amendments to more than half of the seabed provisions. The proposed changes were so radical they were generally ignored.\textsuperscript{11} The U.S. finally introduced a streamlined 24-page set of formal amendments one month before the negotiating sessions were to end. By that time, however, the negotiations were effectively over.\textsuperscript{12} Nations which had previously joined the U.S. in opposition to various provisions of the treaty could not support Reagan's actions. The U.S. became isolated in its intransigence.\textsuperscript{13} The Reagan Administration's announced opposition to significant portions of the Convention that had been proposed or supported by prior U.S. negotiators demonstrated a fundamental shift in philosophical orientation.\textsuperscript{14} A U.S. rejection of the Convention as a whole seemed inevitable. Under these conditions, further U.S. negotiating efforts were futile.

though the Conference was coming to a close, the U.S. could have obtained a continuance in the negotiations to delay final consideration of the Convention, while Reagan was reviewing his law of the sea policy. The U.S. had done just this in previous presidential transitions. The decision to withdraw was a surprise to most other nations as well as to the U.S. negotiating team.

12. \textit{Id.} The Reagan Administration's inability to effect the negotiations may have been more from design than lack of planning. According to Whitaker, "[k]nowledgeable observers speculate . . . that hard-liners in the administration didn't want the concessions that the Third World was willing to give, because such improvement would strengthen the treaty's attractions for the Europeans."
13. Wertenbaker, \textit{supra} note 9, at 45.
14. \textit{See} Jacobson, \textit{Sea Changes} (Book Review), \textit{91 Yale L. J.} 842, 848 (1982), citing A. Hollick, \textit{United States Foreign Policy and the Law of the Sea} 356 (1981). In her detailed history of the U.S. involvement in the UNCLOS negotiations, Hollick described the concessions presented to the Conference in 1976 by then Secretary of State Henry Kissinger. The U.S. was seeking to reach a compromise with the Third World, especially with regard to navigation rights. Hollick summarized Kissinger's proposals:

The first concern was that an international Enterprise would be given the right to mine the seabed under equal conditions. The second was that each prospective miner was to propose two sites to the [International Seabed Authority], one of which could be reserved for mining by the Enterprise or by developing countries. In addition, revenues would be generated for the poorest countries based either on royalties or on a system of profit sharing. [Further], Kissinger proposed that incentives should be established for private companies to share technology with and train personnel from developing countries that mined the seabed. . . . He [also] indicated U.S. willingness to agree to a means of financing the Enterprise so that it could begin mining concurrently with states. And, as a further inducement, he proposed periodic review conferences where the mining system might be reexamined. A final area in which Kissinger made new proposals was on limiting production of seabed minerals.

\textit{See also} Wertenbaker, \textit{supra} note 9, at 60; \textit{infra} note 126 and accompanying text (outlining the Reagan objections to the Convention, most of which concerned provisions similar to the Kissinger proposals).
On April 30, 1982 UNCLOS member nations adopted the Convention by a vote of 130-4, with 17 abstentions.\textsuperscript{15} Breaking from the traditional reliance in the Conference on consensus in decision-making, the U.S. asked for a recorded vote. Subsequently, it voted “no,” along with Israel, Venezuela and Turkey.\textsuperscript{16} When the Convention was opened for signature on December 10, 117 nations signed on the first day — a record number, according to the General Counsel to the U.N.,\textsuperscript{17} and a level of support unexpected by the Reagan Administration.\textsuperscript{18}

The Convention on the Law of the Sea contains 17 main parts and 320 articles, covering virtually all aspects of ocean use.\textsuperscript{19} Under the treaty, coastal states may exercise sovereign control over a territorial sea of up to 12 miles, while being required to guarantee foreign vessels “innocent passage.” In addition, coastal states acquire jurisdiction over the natural resources of the continental shelf out to 350 miles, or over a 200-mile exclusive economic zone (EEZ). The rights of other states to navigate, overfly, and lay submarine cables and pipes are preserved.

In the area beyond national jurisdiction, the Convention protects all traditional high seas freedoms, including the right to fish and conduct scientific research, not preserved within the EEZ. Land-locked states are granted the right of access to and from the sea. Moreover, “transit passage” through international straits is guaranteed to all states.

Expansion of the territorial sea, creation of the EEZ, and protection of high seas freedoms, including navigation rights, are generally not controversial.\textsuperscript{20} U.S. opposition to the Convention focuses on the regulation

\begin{itemize}
\item \textsuperscript{15} U.N. CHRONICLE, June 1982, at 3. As of November 1983, there were 131 signatories to the Convention and 9 ratifications. The Convention will enter into force 12 months after ratification by the 60th nation. Kimball, \textit{PrepCom Concludes First Session}, 8 SOUNDINGS 2 (Nov. 1982).
\item \textsuperscript{17} N.Y. Times, Dec. 11, 1982, at 6, col. 4.
\item \textsuperscript{18} Fiji became the first nation to ratify the treaty when it presented the necessary ratification documents on the day the Convention opened for signatures. Its representative stated: The world is ready to show we can do without the overbearing attitudes of the super-powers. In April, when we adopted the treaty, we didn’t think we could get fifty signatures. This is a big blow to the U.S. position.
\item \textit{Id.} at 1, col. 1.
\item \textsuperscript{20} Statement on the Law of the Sea, \textit{supra} note 3, at 92 (“We have now completed a review of that Convention and recognize that it contains many positive and very significant accomplishments. Those extensive parts dealing with navigation and overflight and most other provisions of the Convention are consistent with U.S. interests and, in our view, serve well the interests of all nations.”).
\end{itemize}
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and use of the deep seabed beyond national jurisdiction. All activities in this area are to be regulated by the International Sea-Bed Authority (ISA), empowered to grant mining rights to both public and private ventures. An organization called the Enterprise will operate a “parallel system” for exploring and exploiting the ocean resources. Because the seabed is recognized as a “common heritage,” all mining operators will be expected to contribute a portion of their revenues to the ISA. This is in addition to revenues expected from the states for resource development beyond 200 miles but within the continental shelf, and thus under national jurisdiction. To ensure international access to ocean resources, the Convention further requires mining contractors to sell to the ISA technology that cannot be obtained on the open market. The regulations for mining the deep seabed beyond national jurisdiction, and the procedures under which the Authority and the Enterprise will operate, are left to be developed by a Preparatory Commission (PrepCom). Although the U.S., despite its opposition to the treaty, is entitled to become involved in the PrepCom negotiations, the Reagan Administration has refused to participate.

The broad range of responsibilities placed on the PrepCom provides an opportunity to strengthen the Convention. A study of the role of the PrepCom by the Citizens for Ocean Law concluded that most of the objections to the treaty could be met if only the Reagan Administration would take advantage of its opportunity to negotiate. At the very earliest, several years will be required to complete the Commission’s work.

21. Id. (“Our review recognizes . . . that the deep seabed mining part of the Convention does not meet U.S. objectives. For this reason, I am announcing today that the U.S. will not sign the Convention as adopted at the conference.”).


23. Id.

24. Citizens for Ocean Law, Recent Events in the Law of the Sea 2 (Spring/Summer 1982) [hereinafter Spring/Summer Recent Events]. The first meeting of the PrepCom was held on March 15 - April 8, 1983, during which six topics were identified as areas for future sessions to consider:

The rules, regulations and procedures on administrative, financial and budgetary matters of the Authority;
Measures necessary for the Enterprise to begin early and effective operations;
Problems of land-based developing nation producers of seabed minerals;
Rules, regulations and procedures for the exploration and exploitation of the seabed;
Implementation of Resolution II on pioneer investors (PIP); and
Arrangements for the establishment of the International Tribunal on the Law of the Sea.

25. U.S. Options, supra note 22, at 3 (“[A]n examination of the criticisms set forth by the President reveals all but one of these [the review conference] could be significantly addressed within the mandate of the PrepCom without actually changing the language of the treaty itself.”).

26. Id.
especially considering the depressed mineral demand reducing the urgency of the task.\textsuperscript{27} Therefore, it is not too late for U.S. participation. Additionally, the rules drafted in the PrepCom—which are "likely to govern deep seabed mining for the first generation of these activities"—may be altered only "by consensus in the 36-member executive Council of the International Seabed Authority."\textsuperscript{28} If the U.S. took its guaranteed seat on the Council, its interests could be secure.\textsuperscript{29}

\section*{II. Policy Options}

The United States can respond to the UNCLOS Convention in a variety of ways. The main options include:

1. Signing the Convention as it is currently drafted;
2. Directly opposing the Convention, and pursuing unilateral ocean policy through
   a) national legislation, and
   b) private contractual arrangements; or
3. Working to improve the Convention before signing, while demonstrating good faith support for its principles.

Each alternative is described below, followed by a discussion of the corresponding policy implications.

\subsection*{A. Signing the Treaty}

Although Reagan has rejected the Convention, the United States retains the option to sign it at any time. Support for the Convention comes from two perspectives: those who view it as an effective compromise enhancing United States interests; and those who see it as the least harmful option. The first view is articulated by Elliot Richardson, the U.S. negotiator under Carter, who stated that as a result of "fair and workable compromises," the Conference had been "an unprecedented achievement for multilateral negotiations" and had developed a treaty that "the deep seabed mining industry and American industry in general should wish to see ratified."\textsuperscript{30} The second approach is propounded by Leigh Ratiner, who maintains that the United States should sign the treaty—even though it is flawed—since the United States could otherwise "suffer a significant, long-term foreign policy setback with grave implications for United States influence in global economic and political

\textsuperscript{27} Spring/Summer Recent Events, \textit{supra} note 24, at 2.
\textsuperscript{28} U.S. Options, \textit{supra} note 22, at 4.
\textsuperscript{29} For discussion of the U.S. seat on the Council, see \textit{infra} notes 132-134 and accompanying text.
\textsuperscript{30} Address by Elliot Richardson before the American Mining Congress (Sept. 24, 1980), \textit{reprinted in} \textsc{Dept. St. Bull.}, Dec. 1980, at 60.
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affairs.\textsuperscript{31}

Both positions share the view that the treaty represents a “package deal” in which the United States has compromised in some areas (such as mining) so as to gain in others (such as navigation rights).

B. Unilateral ocean policy

A unilateral ocean policy consisting of domestic legislation and multinational agreements has been the chosen policy of the Reagan Administration. These two components are integrally linked since the latter is necessary for the former to be effective.

(1) Domestic Legislation

Legislation aimed at implementing the President’s Proclamation was introduced by Senator Ted Stevens (R-Alaska) and Representative John Breaux (D-La). The Stevens/Breaux bill continues to represent the basic policy of the Reagan Administration on the law of the sea.\textsuperscript{32}

The bill amends the Outer Continental Shelf Lands Act\textsuperscript{33} to define the outer boundary of the continental shelf and establish the EEZ.\textsuperscript{34} On the whole, these changes are not controversial.\textsuperscript{35}

\textsuperscript{31} Ratiner, supra note 6, at 24. Ratiner is an especially good source for defense of the treaty since he is a conservative and, while a lobbyist for a mining company, “[was] called the single most effective influence in arousing Congressional hostility to the Law of the Sea treaty.” Wertenbaker, supra note 9, at 45. Thus, it is difficult for conservative opponents of the Convention to attack Ratiner’s politics.

\textsuperscript{32} The bills are labelled S. 750 (introduced March 10) and H.R. 2061 (introduced March 11) (on file with YALE LAW & POLICY REVIEW). They will be the model for the discussion of the President’s proposed option. In general, the legislation will not be specifically cited to when referring to various provisions.

Serious consideration of the Stevens/Breaux bill has for the time being been preempted by Congressional study of the possible creation of a National Oceans Policy Commission (NOPC). Supported by both sympathizers with and critics of the Convention, the NOPC would evaluate and assess U.S. ocean policy in light of President Reagan’s decision not to participate in UNCLOS. The Reagan Administration seeks rapid adoption of the NOPC as a means of spurring action on the Stevens/Breaux bill. Paterson & Kimball, U.S. Congress Looks at Oceans, 8 SOUNDINGS 3 (Nov. 1983).


\textsuperscript{34} The proposed bill generally conforms to Article 76 of the UNCLOS Convention in its definition of the outer boundary of the continental shelf, although the bill does not specify a maximum limit of 350 nautical miles as does Article 76(6). The bill’s description of the outer boundary of the EEZ is virtually identical to that specified in Article 57 of the Convention.

\textsuperscript{35} Although the U.S. jurisdictional claims to the EEZ (listed in Title 1, Sec. 101 of the bill) in general conform to Article 56 of the Convention, there are some key differences. The bill includes marine scientific research as a “high seas freedom,” open to other nations in the superjacent waters of the EEZ. In contrast, Article 56(6) of the Convention lists such research as one of the areas in the EEZ subject to national jurisdiction. In addition, the bill excludes “highly migratory” species of fish, defined in Sec. 102 of Title 1 as species of tuna (which cycle, spawn and migrate over long distances) from exclusive national jurisdiction. This is consistent with the Presidential Statement, supra note 4, which emphasizes the U.S. policy that highly migratory species of tuna are not subject to national control. The Convention, on the other hand, does not exclude such species of fish from coastal jurisdiction in Article 56,
More importantly, the legislation amends the Deep Seabed Hard Minerals Resources Act (Mining Act). Under the current law only ocean nodules lying on or just below the surface can be mined. The bill deletes the depth restrictions and increase the variety of minerals open to exploitation.

In addition, any language supporting the UNCLOS Convention or the "common heritage" principle is removed from the Mining Act. The current law refers to the UNCLOS negotiations throughout its findings and purposes, and acknowledges the deep seabed as a "common heritage." The law also states that it is in the national interest to develop "a new legal order for the oceans covering a broad range of ocean interests, including exploration for and commercial recovery of hard mineral resources of the deep seabed." This express support for a "new legal order" is deleted by the proposed legislation, which calls instead for "an international agreement" to assure development of ocean resource "for the benefit of mankind."

Furthermore, instead of encouraging the Secretary of State to "negotiate successfully" a comprehensive treaty to give "legal definition" to the "common heritage," the Stevens/Breaux proposal merely calls for "international agreements" that can "assure the development of mineral resources." Whereas the original language implies a common property but instead maintains, in Article 64, that there should be international cooperation and management of fish. Most coastal states interpret the Convention as granting exclusive rights over highly migratory species within the fishery zones of each nation. See, e.g., Extract from Communiqué of Thirteenth South Pacific Forum (Aug. 9-10) (on file with the YALE LAW & POLICY REVIEW). The bill also conflicts with the Convention with regard to foreign allocations of excess fishery resources, by giving the Secretary of State greater discretion to refuse such allocations.

For discussion of possible problems with and conflicts resulting from the Presidential Proclamation, supra note 4, see Pierce, Selective Adoption of the New Law of the Sea, 23 VA. J. INT'L. L. 581 (1983). For a detailed discussion of the Stevens/Breaux bill and its effects on domestic and foreign policy, see Hufford, A Legal Analysis of the "Exclusive Economic Zone Implementation Act" (Jan. 1984) (on file with Yale Legislative Services).

37. The current Act limits the depth of exploitation to 10 meters. 30 U.S.C. Sec. 1403 (4) (Supp. V 1981) This is deleted from the Act by Section 202(11) of the Stevens/Breaux bill. In addition, in Section 202(b)(12) the bill expands the definition of minerals which can be exploited to include "oil, gas, sulphur, geopressed - geothermal and associated resources, and all other minerals which are authorized by an Act of Congress." This contrasts with the current Act's definition of "hard mineral resources" as including "any deposit or accretion on, or just below, the surface of the deep seabed of nodules which include one or more minerals, at least one of which contains manganese, nickel, cobalt or copper." 30 U.S.C. Sec. 1403(6) (Supp. V 1981).
38. For those subsections in which the UNCLOS negotiations are referred to directly, see 30 U.S.C. Sec. 1401 (a)(7)-(9), (10), (14), (16), (b)(1)-(3) (Supp. V 1981).
interest in the oceans, the proposed amendments encourage resource development that generally benefits the world through economic growth, without granting any "right" to the resources or recognizing eventual international regulation. While the present law limits its function to "interim" legislation, preempted once an international treaty is approved, the proposed changes place the national program as paramount, accepting international agreements only to the extent they advance the national plan.

The bill also abolishes an international trust fund established in the Mining Act through a 3.75% tax on the imputed value of seabed resources removed by mining companies. The current law targets the fund for use under any international treaty to which the United States might become party. This fund was set up to "bolster the principles of the 'common heritage of mankind'," and was considered large enough to "demonstrate the United States' commitment to this principle." In contrast, the Stevens/Breaux bill maintains the trust fund only for use in national marine environmental protection programs. This clear divergence from the goals enunciated in the Mining Act's legislative history emphasizes the current Administration's antipathy toward international involvement in the exploitation of ocean resources.

(2) Reciprocal Agreements

Before investing in ocean mining projects or obtaining financing for exploration, mining companies require assurances that their investments will be secure. The Reagan Administration has initiated efforts to negotiate multilateral treaties that would recognize mine sites on a reciprocal basis with other industrialized nations to obtain that security. An interim Agreement was concluded by the United States on September 2, 1982, with France, the Federal Republic of Germany and the United Kingdom, in which parties agreed to consult on overlapping seabed mine-site claims.

45. See infra notes 79, 80, 161, 162 and accompanying text.
Responding to criticism, the Federal Republic of Germany attempted to reconcile the Agreement with the Convention by emphasizing that it was merely a consultation mechanism to encourage dispute settlements when necessary, and did not call for reciprocal recognition of claims. The United States, however, has not even attempted reconciliation. Instead, Deputy Assistant Secretary of State Theodore Kronmiller lauded the Agreement as a potential “first step” in creating an alternative to the Convention.

Whether the Agreement will serve as a “first step” toward developing a mini-treaty outside the Convention depends on the success of United States efforts to persuade its allies to reject the Convention. Thus far, all mining states except the United States are maintaining their option to sign the treaty, and are taking actions that will allow them to proceed under the Convention if, and when, it goes into effect.

C. A Compromise—Philosophical Support

A compromise alternative, and this Note argues a superior one, is to retain the portions of the Reagan strategy in accord with the Convention and international law, such as the EEZ, but to refrain from enacting legislation that explicitly violates the treaty provisions. In addition, the U.S. should continue to recognize the Convention’s principles, while endeavoring to secure its own interests through participation in the PrepCom and in collateral negotiations.

In reviewing the efforts of the Administration, Ambassador Ratiner concludes that “had the [Reagan] Administration been less ideologically rigid in its approach,” the treaty “would have better satisfied United States’ interests.” Ambassador Richardson adds that “significant additional concessions” might have been gained from the Third World if the U.S. had sincerely sought an acceptable treaty. Because of his outspoken conservatism, combined with the desire of other nations to complete the Convention, Reagan was probably in the best position of any American President to achieve major gains. This advantage could yet have been exploited had “the Administration been less ideologically rigid in its approach.”

47. In a statement endorsed by the Soviet Bloc, the Group of 77 (the developing nations) responded to the Agreement at a September meeting of UNCLOS. They claimed that any unilateral or multilateral action on seabed resources “would have no international validity and would lead to the adoption of appropriate measures to defend the interests of all States.” Id. See also U.N. CHRONICLE, Nov. 1982, at 27.
48. Id.
49. Id.
50. See infra note 167 and accompanying text.
51. See infra note 166 and accompanying text.
52. Ratiner, supra note 6, at 26.
53. Address by Elliot Richardson before the House Committee on Merchant Marine and Fisheries (July 26, 1982), reprinted in 62 CONG. DIG. 18, 18 (1983). See also address by Senator Claiborne Pell before the U.S. Senate (May 6, 1982), reprinted in 62 CONG. DIG. 10, 12 (1983).
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be regained through active involvement in the UNCLOS process—an option that will be developed further in Parts III and IV of this discussion.

III. A Legal and Political Analysis

The policy options available to the U.S. for responding to the Convention on the Law of the Sea should be assessed on the degree to which each alternative:
1. Conforms to principles of international law;
2. Provides incentives for U.S. mining companies;
3. Incurs risks of retaliation on other issues; and
4. Enhances or detracts from long-term international stature.

These considerations provide the best means for analyzing the appropriateness of U.S. ocean law policy and tailoring an American response to the Convention.

A. International Legality

A major legal question raised by the debate over the law of the sea is whether a nation can legally mine the deep seabed without international approval. In analyzing this question, this Note first reviews the various theories justifying the legality of unilateral mining and then considers whether the deep seabed has become subject to international regulation through the development of the “common heritage” as a customary rule.

(1) The Defense of Unilateral Mining

Three theories have been advanced to defend unilateral mining. Each one suffers from inadequate legal support.

Res Nullius and the right to exclusive claims

Some proponents of unilateral mining contend that the deep seabed is a res nullius, “open to exploitation and exclusive claims by the first occupant.” That which is res nullius is subject to control of the first occupier; that which is res communis cannot be claimed.

The res nullius theory was first proposed in the 1940's to justify national claims over the resources of the continental shelf. These claims were recognized under international law on other grounds, however.

54. See Van Dyke & Yuen, supra note 8, at 514, 518 (discussing Kronmiller, Ely and Goldie). According to Van Dyke and Yuen, Kronmiller justifies deep seabed mining under either high seas freedom or res nullius; Ely and Goldie claim that nodules are res nullius.

55. Id. at 515.
The 1958 Convention on the Continental Shelf granted coastal States sovereign rights over the resources of their shelves, but explicitly stated that these rights did "not depend on occupation, effective or notional, or on any express proclamation." Furthermore, the International Court of Justice (ICJ) held in the North Sea Continental Shelf cases that the right of a coastal State over its continental shelf was an "inherent right," based on the "natural prolongation of its land territory into and under the sea," and was not a right which could be lost by foreign occupation. Without the continental shelf examples, few supporting precedents remain, and numerous contrary examples deny the right to make exclusive claims to the seabed.

In 1970 the U.N. voted unanimously that the seabed was not subject to national claims, and this became a universally accepted provision in the UNCLOS Convention. All nations, the U.S. among them, have endorsed this conclusion. When Deepseas Ventures, a U.S. corporation, filed a claim in 1974 with the Department of State for exclusive rights to a 60,000 square mile area of the deep seabed, there was a rapid and unanimous rejection from the international community.

56. Convention on the Continental Shelf, Art. 2(3), reprinted in Franklin, supra note 7, at 221.
58. The sources defending the applicability of res nullius rely either on examples of claims in the continental shelf, such claims no longer being defensible, see supra notes 56 and 57 and accompanying text, or on the analogy of the seabed to unclaimed land, which is unconvincing since the seabed cannot be inhabited in the same manner that land can be. Furthermore, the rejection of claims to Antarctica and outer space demonstrate the international community's rejection of res nullius. Van Dyke & Yuen, supra note 8, at 517-9.
59. On December 17, 1970, the U.N. unanimously passed the "Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction" [hereinafter Declaration of Principles]. Clause 2 of the Declaration states:

The area [beyond national jurisdiction] shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

Declaration of Principles reprinted in II New Directions in the Law of the Sea 740 (S.H. Lay, R. Chruchill, M. Nordquist eds. 1973) [hereinafter New Directions II]. The vote on the Declaration was 108 - 0, with 14 Eastern European abstentions. The Soviet bloc has since endorsed it.
60. UNCLOS Convention, Art. 137(1), supra note 19 ("No State shall claim or exercise sovereignty or sovereign rights over any part of the Area [the deep seabed beyond national jurisdiction] or its resources, nor shall any State or natural or juridical person appropriate any part thereof.").
61. Van Dyke & Yuen, supra note 8, at 519 ("Since 1967, the international community, including the United States, has emphatically rejected the proposition that the deep seabed is a res nullius.") The rejection of sovereign claims is recognized by the U.S. in the Mining Act, supra note 36, and the Stevens/Breaux bill, supra note 32, both of which deny making any sovereign claims to the seabed.
62. McDougall & Reisman, International Law in Contemporary Perspective 441 (1981). The U.S. State Department issued a statement declaring: "The Department of
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is generally accepted that res nullius is inapplicable to the deep seabed. Even the Reagan Administration has implicitly denied the validity of exclusive claims.

Ocean mining as a high seas freedom

The U.S. currently maintains that deep seabed mining is a high seas freedom any nation may exercise so long as it does not interfere with the high seas freedom of other nations. The 1958 Geneva Convention on the High Seas enumerated such freedom to include: (1) freedom of navigation, (2) freedom of fishing, (3) freedom to lay submarine cables and pipes, (4) freedom to fly over the high seas, and "other [freedoms] which are recognized by the general principles of international law." Because the Convention neither specifically included nor excluded deep seabed mining, the United States and some authorities maintain that mining falls under the residual category of "other freedoms."

This position is based on language in the 1955 Commentaries of the International Law Commission (ILC) to drafts of the Geneva convention, which seems to support the U.S. position:

The list of freedoms of the high seas contained in this article is not restrictive; the Commission has merely specified four of the main freedoms. It is aware that there are other freedoms, such as freedom to explore or exploit the subsoil of the high seas and freedom to engage in scientific research therein. . . .

A year later, however, the ILC changed its interpretation. In its definitive 1956 report to the General Assembly the ILC stated, "[a]ny freedom that is to be exercised in the interest of all entitled to enjoy it, must be regulated. . . ." But it added:

The Commission has not made specific mention of the freedom to explore

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State does not grant or recognize exclusive mining rights to the mineral resources of an area beyond national jurisdiction.

63. Van Dyke & Yuen, supra note 8, at 518 ("Because the continental shelf did not become a res nullius zone, virtually no authority supports the proposition that the deep seabed should be considered as such a zone.").

64. See Presidential Statement, supra note 4 (referring to deep seabed mining as a "lawful exercise of the freedom of the high seas open to all nations.") (emphasis added).

65. Id.


67. According to Van Dyke and Yuen, this language is the "key" to arguments made by most supporters of unilateral ocean mining, including Kronmiller, Burgon, Ely, former Congressman John Murphy, and the U.S. Department of State, all who defend mining as a "high seas freedom." Van Dyke & Yuen, supra note 8, at 502.

68. Id. at 501, n. 28. The U.N. established the ILC as an advisory body to promote the progressive development and codification of international law. The ILC prepared draft articles for the 1958 Conference to help explain the meaning of the Conventions.


or exploit the subsoil of the high seas. It considered that apart from the case of the exploitation or exploration of the soil or subsoil of a continental shelf, . . . such exploitation had not yet assumed sufficient practical importance to justify special regulation.71

In this final report the ILC made no attempt to evaluate mining. Instead it left the determination for the future, implying that while mining was not prohibited or controlled by the 1958 Convention, regulation could be justified once mining became economically feasible. If mining was to be a freedom which should be “exercised in the interests of all,” then it necessarily “must be regulated.”

Even if the first Commentaries were dispositive, there is no reason for considering them as representing international law, or as an implicit part of the Convention.72 Moreover, the 1955 Commentaries refer only to freedom to exploit the “subsoil” of the high seas, not to the “seabed.” In contrast, the 1956 report referred to the “soil and subsoil” of the continental shelf, and the Convention on the Continental shelf specifically defined the shelf as including “the seabed and subsoil.”73 In the 19th century the extension of undersea mines into the high seas became an acceptable practice. But this acceptance was based “upon the recognized right of a coastal state to occupy the subsoil under the high seas by the extension of mining installations whose entrance was located on the coastal state or in the territorial waters thereof.”74 Thus, whatever high seas freedom might have existed was only in relation to mines extending from the national territory, and did not approve direct exploitation of the seabed beyond national jurisdiction.

When the implications of deep seabed mining are reviewed, the conclusion is also reached that characterizing mining as a high seas freedom creates an internally inconsistent claim. If mining is a freedom of the high seas the deep seabed cannot be subject to exclusive claims, but must be openly available to all nations.75 Yet, unilateral mining of the

71. See Van Dyke & Yuen, supra note 8, at 504-06. Van Dyke and Yuen conclude that the Commentaries were the product of the efforts of one ILC member, Professor Georges Scelle, to limit the effects of the continental shelf doctrine. He had earlier proposed “an international administrative authority . . . to govern the exploitation of submerged areas beyond the territorial sea” as an alternative to allowing the expanded claims over the continental shelf. The question of mining was left open to satisfy this concern, not to ensure “high seas” access to the oceans. In fact, if the ILC had decided to “regulate” the deep seabed, it could easily have chosen a concept similar to the “common heritage,” and not the “high seas.”

72. See 1956 ILC Report, supra note 70; Convention on the Continental Shelf, Art. 1, reprinted in Franklin, supra note 7, at 221 (emphasis added).

73. See Convention on the High Seas, Art. 2, reprinted in Franklin, supra note 7, at 203.
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seabed would seem to presuppose exclusive claims. This argument is made by Goldie, a defender of the legality of unilateral mining. Without exclusivity, according to Goldie, there would be no protection from "free riders." A free market regime is thereby ensured of "its own defeat." As a result, he sees "the right to mine, exclusively, a reasonably sized tract" as a necessary component of deep seabed mining.

To maintain that exclusive claims are not required to support high seas mining efforts, ocean minerals would have to be available to all nations on a first-come, first-serve basis. Resources could, then, be gathered from the seabed without a claim to the ocean floor. Yet this is an untenable position. In practice, an exclusive claim is necessary before mining companies or investors will take the risks inherent in an ocean mining project, a fact the U.S. has recognized. A theoretical defense of a legal position which does not take this reality into account rises to the level of sophistry, and cannot be seriously considered.

This practical linkage of unilateral mining with exclusivity conforms to a legal analysis as well. Unlike fishing, navigation, or other freedoms of the high seas, setting up an operation over an area of the seabed to remove minerals necessitates occupying the land itself. Rights of resource exploitation emanate from sovereign control over the land. The ICJ concluded in the Aegean Sea continental shelf case that coastal states have a right to exploit the resources of the shelf because of their sovereign rights over the land extensions:

[I]t is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, ipso jure, under international law.

The same would seem to be true for the deep seabed. Thus, a state cannot claim the right to explore the resources of a land area without also having a right to the land. If national claims to the deep seabed

("The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty.") See also Presidential Statement, supra note 64.


77. Id.

78. Id. at 334.

79. L. HENKIN, LAW FOR THE SEA'S MINERAL RESOURCES 25 (1968) ("Realistically, effective and economical exploitation of the resources of the deep sea would require that he who digs have exclusive rights to explore a sizeable area of sea-bed, to follow fruitful exploration with extensive mining operations, and to pursue them indefinitely, or at least for a long term of years.").

80. Informal Working Paper IA/2 submitted by the United States at the 9th session of UNCLOS III, under the title, "An approach to interim protection of investment," (April 1980), quoted in Biggs, supra note 70, at 253, n. 10 ("[N]one of the really major pre-production investments . . . will be undertaken until the company concerned has a legally secured right to a mine site. This is, of course, the traditional practice of the mining industry.").

cannot be recognized, neither can claims to the minerals.\footnote{82}{See Biggs, supra note 70, at 226 ("Exploitation is the final act of disposal exercised by someone with absolute and exclusive rights to the corresponding land and resources. Exploitation presupposes, then, prior title to the land which is inseparable from the corresponding mineral resources.").}

Opponents of this thesis contend in rebuttal that mining rights, by analogy to fishing rights, can be claimed without prior stake in the land.\footnote{83}{See Arrow, The Proposed Regime for the Unilateral Exploitation of Deep Seabed Mineral Resources by the United States, 21 Harv. Int'l L.J. 337, 364-65 (1980) ("Like fish, nodules may be harvested by anyone, as long as the exploitation does not unreasonably interfere with the exercise by others of their respective freedoms of the seas."). See also T. Kronmiller, The Lawfulness of Deep Seabed Mining 176 (1980).}

The fishing analogy fails to take into account that nodules are part of the land itself. In addition, minerals are "nonrenewable on any human time frame," and "[i]f exploited vigorously could be completely exhausted within a few decades."\footnote{84}{Van Dyke & Yuen, supra note 8, at 509-10.}

The possibility of "exhaustion" of resources was never seriously considered during the development of fishing as a high seas freedom,\footnote{85}{Once the international community recognized that exploitation of the deep seabed was feasible it began treating mining differently from fishing, by acknowledging the importance of international regulation of deep seabed mining. In contrast, a broad-based movement to internationalize fishing never developed. See McRae, supra note 16, at 220. Fishing gained general acceptance as a high seas freedom as a result of the prevailing political philosophies and powers of the 17th century. There is no reason to assume it would be treated in the same manner if it was being considered for the first time today. See Goldie, supra note 76, at 325. Goldie uses this argument to defend the right to make exclusive claims, but the same concept can be applied to defend application of a "common heritage" principle, especially considering that exclusive claims are disallowed under international law.}

and it is only now beginning to be addressed in the international community.\footnote{86}{Kronmiller also makes analogies between mining and laying submarine cables, conducting marine scientific research, using the seabed for certain military purposes, dumping wastes in the ocean (specifically radioactive wastes), and conducting gunnery and bombing practice and large-scale naval exercises on the high seas. Kronmiller, supra note 83, cited in Goldie, supra note 76, at 324-6. Note that none of the cited activities involve actual exploitation or exhaustion of ocean resources. Instead, the ocean space is merely used for the activity. In addition, none of them were part of international movements to create a "common heritage," although there may be some efforts to prevent use of the seabed for military purposes. There is little that logically relates mining to these examples, given the clear international consensus to treat mining of deep seabed minerals differently.}

Other analogies used to justify unilateral mining fail for the same reasons.\footnote{87}{See Arrow, supra note 83. A parallel argument is that exclusive claims to the ocean should be allowed since states are to show "reasonable regard" for other states' use of of the ocean. See Nyhart, The Interplay of Law and Technology in Deep Seabed Mining Issues, 15 V.A. J. Int'l L. 827, 865 (1975). The basis for the "reasonable use" argument is Article 2 of the 1958 Convention on the High Seas, which specifies that freedoms of the high seas "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." Convention on the High Seas, Art. 2, reprinted in Franklin,}

Even those who maintain that mining is a high seas freedom recognize limits whenever mining "unjustifiably interferes" with other uses of the ocean.\footnote{88}{See Arrow, supra note 83. A parallel argument is that exclusive claims to the ocean should be allowed since states are to show "reasonable regard" for other states' use of of the ocean. See Nyhart, The Interplay of Law and Technology in Deep Seabed Mining Issues, 15 V.A. J. Int'l L. 827, 865 (1975). The basis for the "reasonable use" argument is Article 2 of the 1958 Convention on the High Seas, which specifies that freedoms of the high seas "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." Convention on the High Seas, Art. 2, reprinted in Franklin,
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"interferes" with the rights of other nations to exploit ocean resources.

Furthermore, successfully mining the ocean floor will require long-term projects which could significantly displace the seabed. This more permanent occupation suggests greater rights in the ocean than is consistent with a view of the seabed as being subject to freedoms of the high seas. If nations are allowed to mine and to protect their exploitation of the ocean, "they would thereby be endowed de facto with sovereign rights over the high seas"—rights that are not permitted under accepted norms of international law.

Existing Conventions do not support a recognition of unilateral mining as a high seas freedom. Additionally, mining inherently contradicts such a freedom since it presupposes exclusive claims over the ocean bottom. Because the international community—including the U.S.—has rejected exclusive claims, unilateral mining of ocean minerals cannot reasonably be justified as a high seas freedom.

Necessity of a Prohibitory Rule

A corollary to the argument that mining is specifically allowed under existing norms is the contention that mining is permitted so long as it has not been prohibited by definite rules of international law. The origin of this contention is the 1927 S.S. Lotus case in which a split court of the Permanent Court of International Justice stated that "restrictions upon the independence of nations cannot . . . be presumed." The ICJ applied a somewhat similar rationale in the 1951 Fisheries Case. Applying this dicta, proponents of the corollary argue that absent express prohibitory rules seabed mining must be presumed to be lawful.

Both of these cases, accepted as "good law", would have been decided supra note 7, at 203. It is difficult to understand why a nation should feel compelled to allow another nation to make an exclusive claim in order to show "reasonable regard." Allowing minerals to be picked up without direct interference would seem to be the most that could be expected. Nor can it be ignored that mining states must also show "reasonable regard," which may be mutually exclusive with unilateral mining.

89. Mining vehicles used for obtaining ocean nodules will be 100 feet wide, reaching to the seabed through pipes. Companies expect to have the vehicles remain on station for five years at a time, working around the clock and transferring minerals to auxiliary ships once the resources are brought up. Wertenbaker, supra note 9, at 59-60.

90. [1955] Y.B. INT'L L. COMM'N 4, U.N. Doc. A/C.N/SER.A/1955 (statement of Scelle, arguing that the right to "construct installations on the continental shelf and to protect them" allows de facto sovereign control over the high seas to be exercised).

91. Supra notes 59-64 and accompanying text.


93. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 143 [hereinafter Fisheries Case]. In the Fisheries Case the Court relied on the fact that the act of Norway in using straight baselines was "not contrary to international law," implying the presumptive argument.

94. See Arrow, supra note 83, at 353.
the same way whether or not a prohibitory rule existed. Neither case unequivocally recognized the principle that the law permits whatever is not prohibited. In *S.S. Lotus*, the justices were evenly split with the presiding judge casting a second vote to decide the issue. In the *Fisheries Case*, Judge Alvarez emphasized in a concurring opinion that the prohibitory rule, "though formerly correct in the days of absolute national sovereignty, is no longer so at the present day."

The point made by Alvarez has considerable merit. The prohibitory rule doctrine contradicts the system of international law that is exemplified by the U.N. and the ICJ. Requiring a demonstration of a prohibitory rule before any national action is disallowed sets up a burden of proof requirement in international adjudications. Placing such a burden on any party is inconsistent with the developing norms of conflict resolution, and is "inimical to the settlement of international disputes by law."

Even if the doctrine is accepted, it can be demonstrated that "prohibitory rules" regarding deep seabed mining do exist. It has already been maintained that ocean resources cannot be subject to exclusive claims. To the extent unilateral mining presupposes such claims, it is therefore prohibited. Additionally, if the "common heritage" principle is viewed as a customary norm, it too would limit unilateral activities in the seabed. The debate over the prohibitory rule requirement becomes irrelevant under these conditions.

(2) The Common Heritage Principle as a Rule of Customary International Law

The preceding sections have demonstrated that unilateral deep seabed mining cannot be justified by *res nullius*, has not been recognized under international law as a high seas freedom, and is not approved simply because it is not expressly prohibited. But other than the contention that mining illegally requires exclusive sites, none of these arguments explain what the law is, only what it is not.

What these arguments do reveal is that before the recent developments leading up to the UNCLOS Convention there had been no law for deep seabed mining. In effect, the Conference was an attempt to "create law in a vacuum." This "vacuum" has been filled by the

95. Van Dyke & Yuen, supra note 8, at 520.
96. Id. at 520, n. 121.
98. Van Dyke & Yuen, supra note 8, at 520.
99. Supra notes 81, 82 and accompanying text.
100. Van Dyke & Yuen, supra note 8, at 521.
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development of the "common heritage" as a norm of international law. If it is demonstrated that the "common heritage" has become a customary norm it will be the dispositive factor in judging the legality of unilateral mining. For even if any of the defenses of unilateral mining were once true, they would be superceded by any new principle declaring the deep seabed to be a common heritage of humankind. The first step in this analysis is to consider how customary international law develops.

The ICJ stated in the North Seas Continental Shelf Cases that to become part of customary international law, state practices, "including that of States whose interests are specially affected," must be "both extensive and virtually uniform," while showing "a general recognition that a rule of law or legal obligation is involved." Thus, in order to rise to the stature of international law, any rule which regulates deep seabed mining must be accepted as law by those nations technologically able to exploit the ocean resources, i.e., those that are specially affected. This acceptance may be shown by explicit affirmation, or by implicit acknowledgment. As one authority has pointed out, "a state will be bound by a customary rule if it has not adopted an attitude of persistent opposition during the period of its formation." Once the formation of the rule is completed, a nation is not then permitted to retract its support. "[W]hen a custom has duly crystallized no State can be allowed to rebut the presumption, or to contend that it does not accept what it has allowed to come into existence without protest."

An analysis of the growth of the "common heritage" principle demonstrates that it meets these standards, binding all nations, including the U.S. The principle was initially espoused in 1967 and was a motivating factor in the Conference negotiations. In 1970 the U.N. General Assembly (G.A.) unanimously adopted Declaration of Principles for the deep seabed. Carefully worded to gain consensus, this document proclaimed the deep seabed to be the "common heritage of mankind," and stated that the seabeds could not be subject to national appropriation.

Although G.A. resolutions can only recommend actions and do not by themselves create new law, they can significantly affect the formation of international norms. Specifically, when resolutions represent the general consensus of the international community, they serve to exemplify and strengthen customary international law. This would seem to be

101. North Seas Cases, supra note 57, at 43.
102. Virally, The Sources of International Law, in MANUAL OF PUBLIC INTERNATIONAL LAW 137 (M. Sorenson ed. 1968), quoted in Biggs, supra note 70, at 240.
103. Id. at 256, n. 60.
104. Declaration of Principles, supra note 59.
105. O. Lissitzyn, INTERNATIONAL LAW TODAY AND TOMORROW 34 (1965), quoted in Van Dyke & Yuen, supra note 8, at 525.
106. See generally Van Dyke & Yuen, supra note 8, at 524-6 (discussing memorandum of
true for the Declaration of Principles. To analyze this contention, special attention should be focused on actions of the U.S., as the only nation to explicitly reject the principle and the one most affected by it.

The U.S. was an important force behind the development of the concept of the "common heritage," and strongly endorsed it following the Maltese proposal. As early as 1968, a U.S. congressional study of the continental shelf emphasized that there was a consensus that the area beyond national jurisdiction "should be the subject of a presently agreed regime or set of principles." In 1970 the U.S. position was solidified when President Nixon called for recognition of the deep seabed as the "common heritage for mankind," and for the formation of an international regime to regulate the area. His statement included a specification that exclusive claims over the deep seabed should not be allowed and that revenues from mineral production both before and after the creation of a regime should be shared with the international community. Subsequently, the U.S. voted in favor of the Declaration, and thereafter continued to support its basic premises.

U.S. support was only one part of a growing worldwide movement. Numerous national proposals submitted to the U.N. called for establishment of the international regime suggested by the Declaration of Principles. A review of these proposals demonstrates that there was virtually no disagreement over the "common heritage principle," the need for an international regime to regulate the deep seabed, the rejection of claims to ocean resources which were incompatible with the regime or the Declaration, or requirements of equitable sharing of benefits. All of these proposals were based on a consensus that the resources of the deep seabed are in a real sense the legacy of mankind. Such resources should not, in their opinion, be appropriated or exploited by those nations rich or fortunate enough to be able to operate in the ocean depths - at least, not unless the stake of other nations in this great reservoir is recognized.

107. See supra note 1 and accompanying text; See also infra notes 109, 110 and accompanying text.
108. The U.S. Deputy Representative to the Seabed Ad-Hoc Committee (established in response to Ambassador Pardo's call for U.N. consideration of the oceans, supra note 2) stated on March 20, 1968:
Yet as the great majority of States view the situation, the resources of the deep seabed are in a real sense the legacy of mankind. Such resources should not, in their opinion, be appropriated or exploited by those nations rich or fortunate enough to be able to operate in the ocean depths - at least, not unless the stake of other nations in this great reservoir is recognized.

110. Statement on United States Oceans Policy, 1 Pub. Papers Richard Nixon 454 (May 23, 1970). John Stevenson, the Legal Advisor to the State Department under Nixon, followed up the President's Statement with a detailed U.S. draft of a "United Nations Convention on the International Seabed Area." New Directions II, supra note 59, at 753. It is interesting to see how this compares with the UNCLOS Convention, especially considering the negative reaction of the Reagan Administration to the treaty.
111. Alexander, supra note 2, at 122. Alexander compared the 11 proposals which had
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concepts were eventually incorporated into the UNCLOS Convention. The unanimity of the support for the "common heritage" ideal has created customary norms of conduct. The consensus which emerged from the negotiations served to crystallize these norms as rules of customary international law, with the Conference having a "constitutive or generating legal effect."112

The United States cannot ignore the implications of this development. Throughout the UNCLOS negotiations the U.S. maintained its acceptance of the "common heritage," and "committed itself" to an international regime that "in particular would be of benefit to the developing nations."113 This position was codified through the passage of the 1980 Mining Act, which demonstrated the U.S. "commitment to the principle that deep seabed resources are part of the common heritage of mankind."114 Although the U.S. defended mining as a high seas freedom, it was only in terms of interim legislation to be superseded by an international regime.115 The continuous U.S. support for the principle, the national legislation codifying that support, and the rejection of unilateral efforts to claim portions of the seabed for mining projects,116 evince U.S. acquiescence to the development of the common heritage principle as a norm of international law and its recognition of the binding nature of the norm.

It remains to be said, however, what is required under the norm of the "common heritage." The U.S. will not accept being bound to a specific

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112. This same language was used by Judge Jimenez de Arechega in the Case Concerning the Continental Shelf (Tunisia v. Libya) 1982 I.C.J. 18, 115 (Sep. Op. Jimenez de Arechega) to defend the EEZ as a norm of customary international law: "The provisions of the negotiating texts and of the draft convention, and the consensus which emerged at the Conference, have had . . . a constitutive or generating legal effect, serving as the focal point for and as the authoritative guide to a consistent and uniform practice of States." Identical conclusions apply to the "common heritage" principle, and the way it has become an accepted norm.

113. Statement by Ratiner, as Deputy Chairman of the U.S. Delegation to UNCLOS III, to the Subcommittee on Oceanography of the Committee on Merchant Marine and Fisheries of the House (March 1, 1973), quoted in Biggs, supra note 70, at 245 ("The United States has committed itself to the proposition that the regulation and use of deep ocean mineral resources should be accomplished under an international agreement which in particular would be of benefit to the developing nations.")


115. See supra note 41 and accompanying text.

116. See supra note 62 and accompanying text (discussing the rejection of the 1974 claim to a portion of the seabed by Deepseas Ventures, Inc.). By refusing to recognize any exclusive claims to the seabed, the State Department implicitly committed itself to some sort of international regulation of deep seabed mining. For without such exclusive claims, realistically there could be no effective mining projects. See supra notes 79-80 and accompanying text.
treaty which it has not signed, especially considering that the principle—as is true for most norms of international law—is not precisely defined.\footnote{117} Attempts to apply a moratorium on seabed mining until a universally accepted regime is implemented have failed to gain the consensus necessary to represent a customary norm.\footnote{118} This allows the U.S. to claim, with some legitimacy, that carefully planned national ocean mining projects are legal. But this does not license the U.S. to avoid responsibility for fulfilling the requirements of the common heritage in implementing such projects.

In considering what national behavior is consistent with the principle, three guidelines are especially important: exclusive claims to the seabed are invalid; exploration and exploitation of the ocean resources are to be governed by an international regime; and the resources are to be developed to benefit all nations—with equitable sharing of mining revenues. These criteria are implicit in the principle, and have been accepted by the U.S. and reinforced through legislation.\footnote{119} They constitute the minimum requirements if contemplated actions are to be deemed “legal.”\footnote{120}

Being bound by the “common heritage” and these corollary guidelines, a nation must recognize that the international community has a say in the disposition of the resources of the deep seabed. Thus, both the claim that mining is a high seas freedom and the contention that nations can unilaterally exert exclusive control over areas of the seabed are unacceptable.\footnote{121} This inconsistency has been recognized by the Reagan

\footnote{117} But see Van Dyke & Yuen, supra note 8, at 536 (“A Law of the Sea Convention could have a ‘constitutive’ effect in that nonparties could be forced to recognize the international legal personality of the International Seabed Authority established by the treaty.”).

\footnote{118} In an effort to impose a moratorium on ocean mining until an international regime over the oceans could be established, in 1969 the General Assembly passed the “Moratorium” resolution, officially entitled, “Question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind.” Reprinted in New Directions II, supra note 59, at 737. The Resolution was only passed by a vote of 62-28 with 28 abstentions. The negative votes included a number of what would be the “specially affected” states (i.e., those with potential ocean mining capabilities), such as Canada, France, Japan, the Netherlands, Norway, the Soviet Union, the U.K., and the U.S., see Arrow, supra note 83, at 373-45, and thus it would be difficult to argue that it has acquired the status of a generally accepted international norm. See supra note 101 and accompanying text (discussing what is required for something to become part of customary law).

\footnote{119} See supra notes 113-116 and accompanying text.

\footnote{120} Most nations conclude that this “minimum” would still not be enough. In 1979 the Trade and Development Board of the U.N. Conference on Trade and Development (UNCTAD) passed a resolution which reiterated the “Moratorium” resolution, supra note 118, and concluded that unilateral ocean mining action “would be invalid according to international law.” This passed by a vote of 107-9, with 13 abstentions. In general, only western nations opposed it. See Van Dyke & Yuen, supra note 8, at 498, n. 20.

\footnote{121} The Deep Sea Mining Committee of the International Law Association, which included members from the U.S. and other developed nations, made the point clearly in its 1970 Report:

That the mineral resources of the ocean floor should be developed “for the benefit of
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Administration, even in its rejection of the Convention.\(^{122}\)

To the extent unilateral action is desired, it must remain consistent with the guidelines in order to fulfill the "common heritage" principle. First, it must be recognized that nations cannot make exclusive claims to the deep seabed. The language of the existing U.S. law meets this standard, as does the Reagan proposal, although it might be argued that unilateral mining is nevertheless illegal since it has the effect of exclusive claims.\(^{123}\) Second, any national program would have to be "interim" in nature, and recognize the need for an international regime to regulate the seabed as the "common heritage" of all people. This is an explicit purpose of the current Mining Act that is rejected in the Reagan bill. Finally, nations must commit themselves to develop the minerals of the seabed in a manner which will benefit all States, especially the developing nations. This can be demonstrated, in part, by sharing the revenues of profits made through unilateral mining. The Reagan proposal would deny this commitment while deleting the 1980 Mining Act's international trust fund and rhetorical support for the principle.

While meeting these requirements in national legislation will allow a nation to be in theoretical compliance with the "common heritage" principle, in practice a nation must go beyond mere rhetoric. If a national regime is truly "interim" and an eventual international organization is supported, the nation must demonstrate good faith in trying to attain agreement on such an organization. Otherwise, the "common heritage" principle would be meaningless. An obligation to conduct

mankind as a whole" [as called for in the Declaration of Principles] means a definite rejection of the following concepts:

(i) Application of the principle of the freedom of the seas to the exploration and exploitation of minerals of the ocean floor.

(ii) Application of the "flag-state" approach which is based on the assumption that the State whose vessels have actually undertaken the exploration and exploitation of a certain area of the ocean floor should be regarded as acquiring a right to jurisdiction and control over the sea-bed and subsoil of that particular area.


\(^{122}\) Edwin Meese, 3d (counselor to President Reagan) wrote:

The Law of the Sea Treaty ... asserts that the seabed's minerals are "the common heritage of mankind," meaning that they belong collectively to all nations. While the notion sounds noble, in practice it implies that no nation has the right to mine without permission from the "body of the whole"—effectively repealing "freedom of the seas" as it applies to ocean mining.


Although this statement was made as an attack on the treaty, it is basically correct about the implications of the "common heritage" principle. The Administration's antipathy toward the principle does not alter the conclusion that the "common heritage" has become a customary norm, binding the U.S. \(\text{Supra}\) notes 113-116 and accompanying text.

\(^{123}\) \text{See supra} notes 90 and 91 and accompanying text.
good faith negotiations is recognized as an important tenet of international law.\textsuperscript{124} Under such an obligation, a nation is expected to "enter into negotiations with a view of arriving at an agreement."\textsuperscript{125} Although this standard has heretofore been applied by the ICJ only in settlement of bilateral disputes, it seems to be applicable to a situation in which unilateral action is expected to conform with a future international regime. While the standard is not easy to apply, it generates a means for judging national conduct with regard to ocean policy.

\textit{Conclusion}

Arguments presented to support national mining—\textit{res nullius}, high seas freedom, and the absence of prohibitory rule—lack validity upon close inspection. Thus, signing the treaty most clearly comports to standards of international law. Reagan's unilateral action, on the other hand, unambiguously violates the standards imposed by international norms. Through deletion of support for the "common heritage", rejection of an "interim" national program and the international trust fund, and removal of any pressure to develop an international regime to regulate the seabed, the Reagan proposal exemplifies illegitimate unilateral policy.

This analysis suggests a means for pursuing unilateral action while, at least arguably, complying with international norms. Such a compromise solution involves following the "common heritage" principle without signing the Convention, as good faith negotiations continue. This latter approach is the only means—short of signing the treaty—that is generally consistent with international principles while also providing possible incentives for the development of a national seabed mining industry.

\textbf{B. Effect on the U.S. mining industry}

Since the primary objection to the UNCLOS Convention relates to the mining provisions, the policy options available to the United States

\textsuperscript{124} \textit{See} North Seas Cases, \textit{supra} note 57, at 47 (The obligation to negotiate "merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes."). \textit{See also} Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 3, 33 ("The task before [the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other.").

\textsuperscript{125} North Seas Cases, \textit{supra} note 57, at 47 (Parties to a dispute are "under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.").
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should be evaluated according to how they may affect the domestic mining industry.

(1) **Signing the UNCLOS Convention**

Treaty opponents maintain that signing the Convention would deter investment in ocean mining for five reasons: (1) uncertainty in obtaining mining contracts; (2) required formation of a parallel mining regime, imposing financial obligations on contractors; (3) mandatory technology transfers; (4) limitations on mining production; and, (5) potential for amendments without U.S. approval.\(^{126}\)

**Uncertainty in obtaining contracts**

To obtain a mining contract under the treaty a nation or private entity must receive authorization from the ISA.\(^{127}\) The highly politicized nature of the U.N. raises fears that contracts will be awarded politically rather than on merit.

The proponents of the treaty recognize this possibility, but emphasize existing safeguards. Under a Preparatory Investment Protection (PIP) resolution passed in conjunction with the Convention to secure the rights of companies that have already invested in the oceans, current U.S. mining companies have gained guaranteed access to the seabed. This guarantee protects access for the first generation of seabed mining, or well into the 21st century, by which time improvements could be

\(^{126}\) See statement by James Malone, Special Representative to UNCLOS III for President Reagan, to the House Foreign Affairs Committee (Aug. 12, 1982), DEP'T ST. BULL., Oct. 1982, at 48 (outlining the Reagan Administration's objections to the UNCLOS Convention).

\(^{127}\) Bernard Oxman, who served as vice-chairman of the U.S. delegation to UNCLOS III under Ford, Carter and Reagan, and as chairman of the English Language Group of the Conference Drafting Committee, provides a summary of the contract provisions of the Convention:

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 mining 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.

negotiated.128

The PIP resolution named as pioneer investors, India, France, Japan, and the Soviet Union, as well as four multinational consortia dominated by U.S. concerns and including investors from Belgium, Canada, the F.R.G., Italy, Japan, the Netherlands, and the U.K.129 All pioneer nations except the U.S. have reserved their rights under the PIP.130 Registration will entitle a pioneer investor to:

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.131

Along with the PIP, the guaranteed U.S. seat on the Executive Council of the ISA can ensure equitable implementation of the contracting provisions.132 Although treaty opponents complain that the influence of the U.S. in the Executive Council is insufficient in comparison to the Soviet bloc's three guaranteed seats,133 this perception is based on a misunderstanding of the political dynamics involved. As one authority described the process:

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 to the largest consumer, which would be the U.S. should it become a party.134

Finally, the PrepCom could be especially effective in improving the contracting process. It is to develop administrative procedures for the exploration and exploitation of seabed minerals, and under its guidelines has an opportunity to define more precisely the procedural steps for considering applications to mine. Qualification standards for mining applicants are also part of the PrepCom's mandate, allowing specific criteria for the awarding of mining contracts to be taken up.135

128. Ratiner, supra note 6, at 24 (The seabed mining entities "are entitled to all of the mineral production likely or possible from the seabed for the next 30 to 50 years.").
130. See infra notes 166 and 167 and accompanying text.
131. Oxman, supra note 127, at 162.
132. See U.S. Options, supra note 22 (discussing the need for unanimity in the Council before the PrepCom results can be modified); Address by Representative Lee H. Hamilton to the U.S. House of Representatives (Sept. 8, 1982), reprinted in 62 CONG. DIG. 14, 16 (1983).
134. Oxman, supra note 127, at 160.
135. U.S. Options, supra note 22, at 3.
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Through careful treatment of these issues, problems with the treaty's contract provisions can be significantly mitigated.

Parallel mining and financial obligations

Under the Convention, in order to gain approval for a mining contract a company must investigate and prepare plans for two mine sites, one to be exploited by the company and the other by the Enterprise. By taxing the revenues of the company in one site and operating in the other, the ISA and the Enterprise allow the international community to participate in the mining activities and to share in the profits.

Parallel mining is deemed to be patently unfair by treaty opponents. The root of this opposition is philosophical, and cannot be addressed without a fundamental change in the structure of the Convention. The parallel mining system was a significant component of the United States' compromises offered in exchange for third world concessions in other areas. Moreover, it is an inevitable outgrowth of the belief that the deep seabed is a "common heritage" to be internationally regulated. For this principle to be more than rhetoric, there must be some means for the international community to have real access to the oceans. This realization justifies the parallel system and revenue sharing requirements of the Convention. Unless such provisions are incorporated into an ocean regime, only wealthy powers realistically will be able to exploit and benefit directly from seabed minerals, and the work of UNCLOS largely would be undone.

The financial obligations assumed by contractors under the Convention, as well as the PIP, may seem high, but when considered in context the demands are not unreasonable. An MIT study, relied upon by pro-Convention negotiators, showed that a seabed mining project would require start-up costs of three-quarter of a billion dollars, with annual

136. See Ely, supra note 133, at 31. See also address by Representative Ronald E. Paul to the U.S. House of Representatives (April 28, 1982), reprinted in 62 CONG. DIG. 23, 25 (1983) ("The law of the sea negotiations . . . is [sic] part of the larger scheme designed to create a new international economic order. This new order consists of robbing from those who have produced and earned their wealth and transferring it to the Marxist governments of the Third World.").

137. See supra note 14 and accompanying text.

138. The Convention and the PIP each have an application fee of $500,000. See UNCLOS Convention, Annex III, Art. 13(2), supra note 19; Draft Resolution Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules, Art. 7(a), U.N. Doc. A/Conf.62/C.1/L.30. Under the PIP, a company must guarantee to incur expenses of at least $1 million each year until its plan of work is approved and it begins exploitation under the Convention. The Convention requires an annual $1 million fee once a contract enters into force, creditable against the royalties to be paid to the Authority. For a description of the financial requirements, see Richardson, supra note 28, at 63.
expenses of $220 million. In a period of ten years, the study predicted, the investment could be paid back, with profits ranging from 15 - 22%,\textsuperscript{139} although recent predictions have lowered this estimate.\textsuperscript{140} The Convention calls for royalties of 2% in lean years and 4% in good years, which could garner payments over a 20-year period of between $200 million and $2 billion, depending on a project’s success. Yet, despite the apparent significance of these numbers, the royalties are less than many of those required of multinationals investing in developing nations today.\textsuperscript{141} Thus, the Convention does not make unusual or unreasonable demands. Considering the cost of investing in the ocean, these financial obligations are unlikely to deter investors.

\textit{Technology transfers}

Coinciding with the parallel mining system is a requirement in the Convention that for a period of ten years after the Enterprise begins operation all mining contractors must make available for sale the mining technology necessary for exploiting the seabed.\textsuperscript{142} This provision was included out of the belief that without access to such technology the international community would be unable to implement its proper rights in the oceans.

The philosophical arguments supporting or criticizing mining rights also apply to the transfers. While companies might prefer not to be forced to sell technology, withholding it could potentially exclude a majority of the international community from the ocean resources. The U.S. recognized this concern when it first proposed the transfers, along with the parallel mining system, as a compromise with the Third World.\textsuperscript{143}

Technology transfers are not unique to the Law of the Sea treaty but

\begin{itemize}
\item \textsuperscript{139} Wertenbaker, supra note 9, at 62.
\item \textsuperscript{140} Id. at 60. An analysis by Lockheed, using estimates from the MIT study, predicted that the rate of financial return from seabed mining projects will be 9 1/2% as opposed to the previously anticipated 18%.
\item \textsuperscript{141} Id. at 62.
\item \textsuperscript{142} Oxman, supra note 127, at 160. Oxman explains the technology transfer procedure as follows:
\begin{quote}
 Until 10 years after the Enterprise first begins production, [a mining company] 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.
\end{quote}
\item \textsuperscript{143} Richardson, supra note 30, at 63 (“Originally proposed by Secretary of State Henry Kissinger in 1976 as part of the package designed to win support for the ‘parallel system,’ some form of assistance to the Enterprise in acquiring technology has ever since been integral to any seabed mining deal.”). See supra note 14 and accompanying text.
\end{itemize}
have become part of the normal requests made by developing countries when allowing investment and resource exploitation in their nation. In general, corporations and the developed nations understand that this "near-universal demand for technology transfer by the developing nations" is "an inevitable and reasonable byproduct of investment." Making such a demand in the case of ocean mineral production, therefore, seems perfectly natural and expected.

While the opposition to the technology transfers is emphatic, the actual economic implications of the provisions are less important than the public is often led to believe. Under the Convention, transfers will be required only if the necessary information is unavailable in the open market. U.S. Department of Interior studies have indicated that most technology is already publicly obtainable—or will be—and thus companies will not generally be forced to sell. In addition, by creating a ready market for mining technology, the treaty may allow companies an opportunity to offset some of the enormous costs of ocean mineral development.

If the Reagan Administration accepted the need for these provisions, equitable implementation could be assured through the PrepCom. These PrepCom negotiations can clarify the provisions defining technology, specify what constitutes "fair and reasonable commercial terms and conditions" as called for in the Convention, detail the obligations of third-party technology suppliers, and address the implications of article 302 of the treaty, allowing for non-disclosure of information "essential" to national security.

On the whole, there is little to fear from the technology transfers.

144. Van Dyke & Teichman, supra note 129, at 431.
145. See address by Sen. Larry Pressler to the U.S. Senate (March 8, 1982) reprinted in 62 Cong. Dig. 11, 12 (1983) ("The requirement of the sharing of our mining technology is another and perhaps insurmountable difficulty with the treaty.").
146. Whitaker, supra note 11, at 22.
149. See Pressler, supra note 145, at 11, 12 ("The fact of the matter is that once that treaty came into effect, our military and our Pentagon and our CIA would object to a sharing of a lot of that technology because it is related to national security. We would be entering a very complicated and nightmarish set of international agreements that no one in this country has really thought through carefully.").
150. U.S. Options, supra note 22, at 3.
fer provisions.

Production limits

The UNCLOS Convention allows the ISA to set limits on ocean mineral production levels if necessary to avoid major disruption of the market of land-based producers. Opponents of the treaty object to the control this grants to the international organization over the private investors. Yet, such control is implicit in the common heritage.

Consideration of the needs of the developing nations in the management of ocean resources was an important part of the United Nation’s evaluation of the seabed leading to UNCLOS III. The U.S. has long accepted the importance of this concern and initiated proposals including production limits in its package of compromises. If the deep seabed is to benefit all nations, as a common heritage, then its exploration should be managed in such a manner as to avoid adverse consequences for land-based markets. Until now, there has been little dispute over this conclusion.

Realistically, the production limits, as defined in the Convention, cause few concerns for ocean mining investors in the immediate future. The limits are so high that they probably will not be relevant “before the middle of the 21st century.” By that time, conditions may change and the need for minerals could overcome the desire to avoid market disruptions. A philosophical opposition to production restrictions should not be the basis for rejecting the Convention.

151. Oxman, supra note 127, at 160. Oxman summarizes the production control provisions:

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% of the cumulative projected increase in total world demand for nickel production.

152. The 9th operative paragraph of the Declaration of Principles declares:

The regime shall, inter alia, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.

Declaration of Principles, supra note 59.

153. See supra note 14 and accompanying text.

154. Ratiner, supra note 6, at 24 (“Metal market projections indicate that demand for manganese, copper, cobalt and nickel from the seabed is unlikely to reach, much less exceed, the production capacity of these grandfathered miners during that period, nor will it exceed the production ceiling in the treaty which could accommodate more than 20 such mine sites in the same period.”).
The solution to the complaints raised by treaty opponents is not to reject production limitation mechanisms, since they are an important function of international regulation. Instead, the U.S. should work to ensure such limits are applied fairly and economically. The PrepCom, for example, is to draft objective and non-discriminatory standards for the award of authorizations if selection among competing applicants becomes necessary under a production ceiling. As is true for the other complaints, production limits do not justify a rejection of the Convention.

Amendments to the Convention

The treaty provides for a "review conference" to be held 15 years after the date of the earliest commencement of commercial production. After five years of negotiation the conference may adopt amendments to the mining regime which will enter into force for all members upon approval of ratification of three-quarters of the party States, with no nation having an explicit veto power.

The fear of treaty opponents is that this provision would allow the potentially political ISA to take advantage of the U.S., and implement policies which would be unacceptable. Although this is one objection which cannot be handled in the PrepCom, other factors limit its significance. The effect of the amendment provision will not be felt for years, allowing the U.S. to negotiate Protocols, interpretive understandings, or proposed amendments of its own prior to the final ratification. Additionally, it is unlikely that three-quarters of the other nations would implement amendments opposed by the U.S. and its allies for fear of destroying any effectiveness of the treaty. Ultimately, the U.S. could withdraw from the Convention if amendments are adopted threatening national security. This threat, combined with effective diplomacy, should be adequate to protect American interests. It is inconsistent for treaty opponents to maintain that the U.S.—by rejecting the Convention—can turn its back on a decade of negotiations and near international unanimity without cost, yet argue that if it signed the treaty the U.S. would be forced to give in to outrageous future amendments. In reality, a U.S. presence in the Convention would most likely deter such provisions from ever being adopted.

155. U.S. Options, supra note 22, at 3.
156. See Malone supra note 126, at 49.
158. Whitaker, supra note 11, at 23. Citing Bernard Oxman, Whitaker writes that "radical changes would call into question the workability of the whole seabed compact, and therefore they are unlikely to happen."
Overall, the complaints to the mining provisions of the Convention have little significance in light of broader international concerns and the ability of the PrepCom to correct nearly all the major problems. To forego the opportunity to influence the rules and regulations of the deep seabed makes little sense, and is politically irresponsible.

(2) A Non-Treaty Option

The primary disadvantage of any policy that avoids treaty signature is that the U.S. will forfeit the approval of the international community and the protection offered by the Convention. In order to induce unilateral seabed mining the U.S. will have to provide adequate incentives and security for mining companies. But neither unilateral legislation nor limited reciprocal agreements can secure a legal right to exploit a defined area of the seabed. Without such a right, the risks are too great.

While the Reagan Administration recognizes that national legislation alone cannot sufficiently protect mining interests, it believes that reciprocal agreements would be an effective alternative to the Convention. Ratiner has noted that the decision to reject the treaty "was founded on an assumption that after the Conference ended, the Western industrialized countries would ignore the law of the sea treaty and set up an alternate mini-treaty." However, completion of a successful alternative regime is unlikely.

Any alternative treaty would inevitably be challenged before the

159. See supra notes 24 and 25 and accompanying text.
160. Richardson, supra note 53, at 22 ("It is certainly not too late, in any case, to decide to participate in the work of the Preparatory Commission that will draft the rules and regulations for deep-seabed mining. . . . [O]ur participation would give us some influence over the content of the rules and regulations. . . . [W]e would be foolish to renounce that influence."). See Whitaker, supra note 11, at 26 ("[P]ossible participants in the regime—and particularly potential miners—ought to keep a hand in until the last ‘t’ is crossed.").
161. Richardson, supra note 53, at 18, 20 ("Domestic U.S. law cannot give anyone a secure legal right to exploit a defined area of the seabed. Without such a right good for at least 20 years, no rational investor will gamble $1.5 billion on a deep-seabed mining project. It will not suffice for seabed-mining claims to be recognized by a handful of like-minded countries. And even the seabed-mining states concede that international law would not require non-members to respect the reciprocal regime.").

The House Committee on Foreign Affairs noted the same factor when reviewing the 1980 Mining Act. See H.R. REP. No. 411(IV), 96th Cong., 2d Sess. 29, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 1714, 1717 ("Unless the international community recognizes the right of U.S. firms to have assured and nondiscriminatory access to seabed mine sites, the security of industry investments will always be in doubt. . . . The committee finds that assured access for U.S. citizens to seabed mine sites would be best achieved if such access were universally recognized in an acceptable comprehensive Law of the Sea Treaty.").
162. Reagan's efforts to attract our allies to an extra-treaty regime demonstrates his recognition of the need for some amount of international support. See note 46 and accompanying text.
163. Ratiner, supra note 6, at 26.
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U.N. General Assembly and the ICJ as in conflict with the Convention. The resulting "protracted litigation would have a chilling effect on seabed mineral investment." Therefore, according to Ratiner, "Japan, France, Germany, Britain and most other potential seabed mining nations ultimately will sign the law of the sea treaty," thereby excluding U.S. participation in deep seabed mining.

States named as pioneer investors—except for the U.S.—are already working to resolve overlapping mine site claims as called for in the PIP. Once this is done, sites can be registered with the PrepCom. Even though the western states—other than Canada—are also maintaining contact with the U.S. with regard to potential reciprocal agreements, they continue to preserve their options to sign the treaty and to mine under it once it enters into force. Surveys by the U.S. Government, including a recent report of the GAO, concluded that a "mini-treaty" to replace the Convention will fail for lack of support.

Because U.S. rejection of the Convention precludes international recognition of U.S. claims, companies would be discouraged from seeking licenses under the American flag. Instead, they could reincorporate under the auspices of a nation that has signed the treaty. Such a possibility is enhanced by the fact that the main consortia investing in seabed mining are made up of companies from more than one nation, prompting one commentator to conclude, "the concept of 'national companies' being disadvantaged by the lack of national legislation is largely absurd." As a result, "the U.S. is likely to be left without any deep seabed mining industry."

Although U.S. mining companies claim they cannot mine under the Convention, this stance may be motivated in part by a desire to strengthen the bargaining position of the U.S. and out of hopes a mini-treaty will be successful. In the event alternatives are not adopted, and the treaty remains the only source of security, companies will have overwhelming incentive to mine under the provisions of the Convention, if they mine at all. Extra-treaty mining would be too risky. Even a regime recognizing a high seas freedom to mine would be inadequate since it would "merely protect everyone's right to jump anybody else's claim."
Potentially, the U.S. could authorize financial and military support or underwrite investments, to provide the security the U.S.-based companies would need. But companies would still be risking too much for unilateral mining to be a sound investment. International boycotts of minerals sold by a particular company, or other products produced by it, might be threatened, or foreign assets could be seized in retaliation. Or, and far more likely, the company could lose business opportunities through lost bids to companies from signatory states. These possibilities will deter investment from outside the Convention regardless of the incentives granted nationally or through reciprocal agreements.

(3) The Compromise

Objections to the mining provisions of the treaty are not without merit and must be taken into account. Yet, the fears of treaty opponents appear to be theoretical and philosophical rather than practical. The disadvantages of the Convention can largely be mitigated through active U.S. participation in the PrepCom.

In addition, virtually the entire opposition to the treaty has focused on the deep seabed mining provisions. It should be recognized that this focus is improper. Current economic conditions have so depressed demand for minerals that the development of seabed mining projects in the near future is unlikely. Various consortia involved with deep seabed mining investigations have begun to pull back, and the demand for the ocean minerals is much less than anticipated.

Throughout the UNCLOS negotiations, the seabed mining question was of "secondary importance" to most of the delegations, even while it was causing highly publicized disputes. In general, the debate became part of an emotional and rhetorical battle in the "North-South" dialogue without considerable practical implications. Awareness of this fact undermines much of the basis for treaty opposition, especially in light of more critical concerns, such as the freedom of navigation.

The compromise solution—supporting the Convention in principle while working toward improvements—allows continued recognition of the need for international consensus in ocean policy. At the same time, the possibility of gaining the necessary legal security for U.S. mining

172. Wertenbaker, supra note 9, at 65.
173. Spring/Summer Recent Events, supra note 24, at 2 ("Deepseas Ventures, Inc., which sought in 1974 to file a claim to the international seabed with the U.S. State Department, now forecasts commercial mining operations in the late 1990's. The Kennecott Consortium may end efforts to mine manganese nodules altogether, and at least one Dutch company reportedly wants to withdraw from the Lockheed consortium.").
174. Id. See Wertenbaker, supra note 9, at 60.
175. Wertenbaker, supra note 9, at 59.
176. Id. at 61.
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claims is enhanced. Thus, the compromise provides a more proper balance, and is the solution best protecting U.S. interests.

C. Retaliatory Risks

The Convention is a comprehensive treaty over the sea, offering a "package" of benefits. By rejecting the treaty the U.S. may lose important privileges which were granted by the Third World in exchange for "objectionable" mining provisions.

Expanding the territorial sea from 3 to up to 12 miles, the Convention potentially places 116 international straits which are less than 24 miles wide within national jurisdiction. These straits include virtually all of those strategically significant to the U.S. Parties to the Convention are granted rights of "transit passage" through the straits, allowing free movement of submerged submarines and overflight, and assuring unimpeded navigation. But non-parties are not guaranteed such passage rights. "Transit passage" was negotiated into the treaty as part of a series of trade-offs, and cannot be considered separate from the "package deal." Thus, most nations do not recognize transit passage as part of customary international law, and non-signatories could lose the protections.

The Reagan Administration maintains that the rules of customary international law allow U.S. passage through the straits and guarantee protection in other areas. Most developing nations disagree, as do many of our allies. All of the European delegates at a July, 1983, NATO meeting on the Convention "expressed real doubts that the U.S.—as a non-signatory—could rely on customary law." In a speech before the

177. Id. at 52. See Richardson, supra note 53, at 20; Whitaker, supra note 11, at 24.
178. Pell, Introduction to Special Law of the Sea Issue, 18 SAN DIEGO L. REV. 387, 391 (1981). Examples of strategically important straits of less than 24 miles in width are: the Strait of Gibraltar, separating the Atlantic Ocean from the Mediterranean Sea; the Strait of Hormuz, in the Persian Gulf; and the Straits of Malacca and Singapore, linking the Pacific and Indian Oceans.
179. Whitaker, supra note 11, at 18. There is some dispute over whether the Convention goes far enough in protecting navigation rights, especially with reference to the submerged passage of submarines through international straits. Compare Reisman, The Regime of Straits and International Security: An Appraisal of International Lawmaking, 74 AM. J. INT'L 48 (1980) (arguing that the Convention is too ambiguous, providing insufficient recognition of the importance of submerged passage of submarines) with Moore, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, 74 AM. J. INT'L L. 77 (1980) (maintaining that, in context, the Convention is adequate to protect submerged passage of submarines). The two authors agree on the importance of unhindered navigation rights through straits. Even if Reisman's assessment is correct, and the Convention is not specific enough, it will still provide much more security for parties than for non-parties.
180. Whitaker, supra note 11, at 24, 26. See Richardson, supra note 53, at 20 ("We succeeded in persuading other countries to address our navigational concerns only by agreeing to address their resource interests. It was therefore understood from the outset that the objectives of UNCLOS III was a 'package deal.' Exactly that was accomplished on April 30.").
181. Id. at 24. This view coincides with that of the developing nations. During the first
U.N., Alan Beesley, head of the Canadian delegation, warned that the new navigation rights provided in the Convention would have to be regarded as subject to the law of treaties rather than customary norms. 182

Although the Convention preserves the freedom of navigation and overflight, "[w]ithout UNCLOS III, the United States would have great difficulty maintaining these freedoms and rights in the face of emerging customary law trends toward restricting navigation within the expanding zones of coastal nation jurisdictions." 183 Since most nations should become parties to the Convention, broad national claims will be limited, but this does not protect the U.S. from retaliation as a non-party. At best, "the results will be uncertain, time consuming, and the diplomatic costs potentially high." 184

While the U.S. may be able to bilaterally or multilaterally protect its interests from outside the Convention, the difficulty—as well as the cost—will be greatly increased. States controlling important straits, such as Spain and Indonesia, could use U.S. non-participation in the Convention "as a pretext for exacting a higher price during negotiations for, say, base rights, reciprocal taxation, or consular agreements." 185 As a result, "U.S. commercial ships might be forced to pay large tolls to navigate other states' coastal waters." 186 One source has estimated that the political, economic and military costs of negotiating "a number of satisfactory agreements would far outstrip the costs and concessions involved in the UNCLOS III agreement." 187

Military priorities could be especially vulnerable to exploitation. In certain military supply actions, such as resupply missions to Israel, politics could force the U.S. to yield to virtual extortion, with the costs easily exceeding the value of deep seabed minerals. 188 And the need to protect submerged passage of submarines, a vital part of our nuclear deter-

182. Id.
184. Pell, supra note 178, at 391.
185. Whitaker, supra note 11, at 26.
186. Id.
188. Whitaker, supra note 11, at 26.
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could place the U.S. in a very difficult bargaining position.

Additional problems could occur with regard to agreements in the Convention governing marine scientific research, management of fisheries, protection of the marine environment, or limitations on interference with shipping to protect a coastal state's environment. By losing out on the "package deal," the U.S. might also forfeit the benefits many of these provisions could provide.

The more directly the U.S. opposes the treaty and the "common heritage" principle, the greater the risks of retaliation it incurs. Unlike the 1980 Mining Act, the Stevens/Breaux bill contains few mitigating factors to defuse opposition to U.S. actions. With the Convention now completed, and the U.S. withdrawn from participation, there is no reason for other nations to seek further U.S. support or concessions. The bill also makes no effort to hide the rejection of the principles behind the treaty, and thus does not reveal itself to be a "reasonable measure." Therefore, the incentives are there for retaliation against the U.S. The threat of retaliation against non-signatories adds to the pressure on U.S. allies to ignore the Reagan position, and to join the Convention. In such a scenario, the U.S. will become even more isolated and vulnerable to exploitation.

D. Long-Term Strategic Concerns

Treaty opponents charge that signing the Convention would threaten

189. See Reisman, supra note 179; Moore, supra note 179.
190. Whitaker, supra note 11, at 24.
191. Caron, Municipal Legislation for Exploitation of the Deep Seabed, 18 OCEAN DEV. & INT’L L. J. 259, 285 (1980) (discusses the 1980 Mining Act, and concludes that significant mitigating factors existed to minimize adverse reactions, including that: “the bill will not authorize actual commercial recovery for several years, thereby preempting confrontation”; “the desire of many nations to reach a successful conclusion to UNCLOS III will limit the strength of the opposition”; and “close scrutiny of the Act reveals it overall to be a reasonable measure, grounded in existing principles of international law, committed to protection of the marine environment and conservation of resources, and providing recognition, in both a legal and a financial sense, of the status of deep seabed minerals as the common heritage of mankind.” (emphasis added)). In general, the factors noted by Caron are not present in the Stevens/Breaux bill to mitigate opposition.
192. Id.
193. Watt explains the significance limitations on navigation rights could have on the western powers:

These developments [of the expanded territorial seas] have meant the virtual disappearance of vital sectors of the world's normal high-sea routes into the jurisdiction of single states. The continuance of the principle of freedom of navigation (and overflight) is essential to the major sea-using powers both for military and commercial shipping purposes. It is essential for the deployment of their naval forces, and for the free transport of oil and goods. And it is nowhere more important than to the NATO powers for whom the Atlantic and the Mediterranean represent their internal lines of communication, and who draw most of their energy supplies in tanker-carried crude oil from the Gulf.

Watt, supra note 169, at 80.
national sovereignty by subjecting the U.S. to political pressure from the ISA. Such fears are unfounded. If actions are proposed that would seriously endanger the U.S., it ultimately has the option of pulling out, possibly joined by many of its allies. The threat of a withdrawal in and of itself could minimize the possibility or effectiveness of ISA political pressure. Moreover, as a positive response, the U.S. could apply its diplomatic influence to deter such actions.

U.S. influence would be greater as a member than as an outsider. The effectiveness of U.S. leverage against Third World efforts to impose an international monopoly through the Convention would depend on how well the U.S. could work with its co-signatory allies. If all the major seabed miners cooperated, they could resist unreasonable proposals. If the U.S. rejects the treaty, however, and becomes isolated in ocean policy, it would not have the means to elicit cooperation.

While the U.S. would risk little diminution in its power and influence by becoming a party to the treaty, it loses substantial credibility by refusing to sign. The Convention is a major element in the development of the New International Economic Order, seen by the developing nations as the way to overcome the economic and financial barriers that confront them. Repudiation of the treaty and the “common heritage” is perceived by many as another example of 19th century colonialism. Thus, U.S. influence in future “global dialogue[s]” will diminish, and its denunciation of international law violations by the Soviet Union or other significant actors in world politics will be viewed with greater suspicion by the world community.

If the Convention succeeds without U.S. support, the American position and future credibility would be even more severely damaged. The developing nations would see that the U.S. is not needed for significant advances to be made. In such a situation, Ratiner claims, the U.S. would “suffer a much more serious adverse precedent that any of the adverse precedents we fought against in the treaty negotiation itself. . . . We will stand as the emperor without clothes. . . .”

U.S. opposition to the treaty harms the stature of international law and world order. The Convention stands as a “model for other large

194. See, e.g., Pressler, supra note 145, at 17; Address by Sen. Donald Young before the House Committee on Foreign Affairs (June 17, 1982), reprinted in 62 CONG. Dig. 21 (1983).

195. Whitaker, supra note 9, at 23 (“In the future, as now, U.S. leverage will depend on how cohesively this county works with its allies. If a Third World cabal tries to impose an international monopoly [through the Convention] several decades hence, the U.S. and the other seabed miners can resist if they work together.”).

196. Watt supra note 169, at 85.

197. See Wertenbaker, supra note 9, at 61.

198. Richardson, supra note 53, at 22.

199. See Whitaker, supra note 11, 26.

200. Ratiner, supra note 6, at 28.
assemblages of countries seeking to deal with complex problems." The Convention also demonstrates the ability of nations to accept restraints on their freedom in the interest of promoting world order. By establishing a “hierarchy of new international courts to rule on disputes” and various other mechanisms for settling problems, the Convention holds out hopes for peaceful international dispute resolution. Whether or not the treaty succeeds without U.S. participation, American opposition to the Convention could limit the treaty’s impact on the development of international law, to the detriment of all nations. As the Chairman of the First Committee of UNCLOS III said, “it is through international law universally recognized that each one of our nations may hope to survive.”

IV. Conclusions and Recommendations

The completion of the UNCLOS Convention was a major event in the history of international relations, and represents “a victory for the principles of peaceful cooperation and the rule of law.” Given the significance of the treaty, the U.S. should reconsider its refusal to sign, and its opposition to the Convention principles.

Future U.S. ocean policy can take a number of forms. This Note has evaluated three available policy options by reviewing their international legality, the effect on the domestic ocean mining industry, the potential for prompting retaliation by other nations and the consequences on the long-term credibility of the U.S. in global dialogues.

Based on this analysis, this Note has concluded that, to be legitimate, ocean mining efforts must be consistent with the “common heritage” principle—a generally accepted norm of customary international law. If the U.S. denies this principle through implementation of a unilateral mining program, it risks the loss of any domestic ocean mining industry. At the same time, as a non-signatory the U.S. would be forced to pay a high premium for guaranteed access to important areas of the world and it would lose the benefit of a number of important provisions in the Convention “package.” These retaliatory effects could far exceed the cost of any hoped for benefits of ocean mining. The U.S. would also

201. Wertenbaker, supra note 9, at 39.
202. Id. See Oxman, supra note 127, at 162.
204. Canada’s Alan Beasley, chairman of the Convention’s drafting committee, called the treaty “the most significant achievement in international relations since the U.N. Charter. It is indeed a constitution for the seas.” Johnson, A Constitution for the Seas, TIME, Sept. 8, 1980, at 42.
205. Richardson, supra note 8, at 3.
diminish its ability to adapt to the long-term needs of an increasingly interdependent world, while weakening the development of international law.

The Reagan Administration has failed to appreciate the effects of its policy on the law of the sea because of its ideologically rigid philosophy. Rather than attempting to negotiate improvements in the treaty before passage, or continuing to work to correct imperfections through the PrepCom negotiations, the Administration has remained unalterably committed to a free market regime over the oceans—an option unacceptable to the international community. Too much is at stake to allow such ideological rigidity to continue to dictate U.S. foreign policy.

A superior ocean strategy, and one which can balance the desire to improve the terms of the Convention with the vital need for international consensus on ocean policy, is for the U.S. to rely on a flexible approach. Adopting the provisions of the Convention which are not objectionable, while continuing to stay involved in the UNCLOS process, allows the U.S. to best protect its national interests.

To implement this strategy, the Stevens/Breaux bill should be replaced or significantly amended. The following outline provides the framework for more appropriate legislation.

1. Adopt a 200-mile EEZ and other provisions of the Convention which are not disputed.

2. Acknowledge the importance of an international regime over the oceans, and the legitimacy of the “common heritage” principle.

3. Call for renewed efforts to negotiate an acceptable international regime under U.N. auspices, and encourage U.S. participation in the PrepCom.

4. Implement an “interim” unilateral program consistent with an eventual international regime and the “common heritage” principle.

Accepting the premises behind these recommendations is crucial if the U.S. is to develop an ocean policy which suits the political realities of our time. Negotiating a comprehensive treaty covering three-quarters of the world’s surface is a vital step for international law and security. To reject that opportunity due to an ill-advised and ideologically rigid philosophy is to deny our moral, political, and legal responsibilities.