RECENT DEVELOPMENT

LAW OF THE SEA - DEEP SEABED MINING - United States Position in Light of Recent Agreement and Exchange of Notes with Five Countries Involved in Preparatory Commission of United Nations Convention on the Law of the Sea

FACTS

On August 14, 1987, Belgium, Canada, Italy, the Netherlands, and the Soviet Union signed the Agreement on the Resolution of Practical Problems with respect to Deep Seabed Mining Areas (the "Agreement") in an attempt to eliminate overlapping deep seabed mining sites.[1] Subsequently, the United States undertook a bilateral exchange of Notes with the Soviet Union,[2] through which the United States became "bound by the provisions of the above Agreement in the same manner as other Parties to that Agreement are bound by its provisions to the Soviet Party."[3] The United States also exchanged Notes bilaterally with Belgium, Canada, Italy, and the Netherlands.[4] These latter exchanges merely affirm that no Party to the Agreement will terminate its adherence to the Agreement without the others' concurrence.

The Agreement and the corresponding exchanges of Notes represent the culmination of several years of negotiations to settle disputes regarding the overlapping deep seabed mining sites of several signatory—and some non-signatory—states to the United Nations Law of the Sea Convention (the "LOS Convention").[5] The five original parties to the Agreement joined with the interim governing body of

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[1] Belgium-Canada-Italy-Netherlands-Union of Soviet Socialist Republics: Agreement on the Resolution of Practical Problems with respect to Deep Seabed Mining Areas, *reprinted in* 26 I.L.M. 1502 (1987) [hereinafter Agreement].

[2] Exchange of Notes between the United States (with consortia interest and LOS non-signatory) and the Soviet Union (LOS signatory), 26 I.L.M. 1510 (1987).

[3] *Id.* The Soviet Union also exchanged Notes with the United Kingdom and the Federal Republic of Germany.

[4] An example of these Notes appears in 26 I.L.M. 1513, 1514-15 (1987).

[5] United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter LOS Convention]. *See generally* U.N. DEP'T OF PUBLIC INFORMATION, A QUIET REVOLUTION: THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, U.N. Sales No. E.83.V.7 (1984).

the LOS Convention, the Preparatory Commission,[6] to accelerate the appointment of pioneer investors[7] and to protect the interests of four multinational consortia.[8] The Agreement and the Notes represent positive changes in the positions of both the United States and the parties to the LOS Convention as both entities "cooperate" to advance deep seabed mining operations in international waters. In particular, the exchange of Notes eliminates the possibility that mining sites of United States nationals will overlap the sites of certain LOS Convention signatories, and thus the United States achieves its most favorable diplomatic and economic position in the area of deep seabed mining since early 1982.

LEGAL BACKGROUND

When scientists realized that manganese nodules located on the ocean floor could produce a previously unknown source of mineral wealth for the world, a new subject area of international law emerged—deep seabed mining. As various states sought to exploit the deep seabed, three theories developed regarding the control of this exploitation. First is the theory of *res communes*, which views the ocean bed as the common heritage of mankind, and therefore proposes that states which exploit the resources beneath international waters should equitably divide the resulting proceeds among all the nations of the world.[9] The developing countries are the most forceful proponents of this theory, and the United Nations General Assembly endorsed this theory by resolution.[10] The second theory is that the deep seabed may be explored and exploited as a freedom of the high seas pursuant

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[6] *See infra* note 20 and accompanying text.

[7] *See infra* note 21 and accompanying text.

[8] *See infra* notes 43 and 44 and accompanying text. The consortia represented investors from the United States, Belgium, Italy, the Netherlands, Canada, Japan, the United Kingdom, and the Federal Republic of Germany.

[9] Van Dyke and Yuen, *"Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?* 19 SAN DIEGO L. REV. 493, 497 (1982).

[10] In 1970, the United Nations adopted a resolution which proclaimed the deep seabed as the common heritage of mankind. *Declaration of Principles Governing the Seabed and the Ocean Floor, and Subsoil Thereof, Beyond the Limits of National Jurisdiction*, G.A. Res. 2749 (XXV), 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8028 (1970). Although the United States voted in favor of this resolution, the United States also issued a statement in which it declared the resolution was not binding and that the United States reserved its right to explore and exploit the deep seabed until it became a party to an international law of the sea treaty. U.N. Doc.A/C.1/PV.1799, at 20-21, 28 (1970).

to customary international law. Although states may not claim sovereignty over specific areas of the seabed, they may decide among themselves to be bound by others' claims. States should at all times exercise a reasonable regard for others' rights to explore and exploit the deep seabed. The United States and many of the developed countries advocate this view.[11] A third minority theory is that of *res nullius*. The proponents of this theory believe that the deep seabed belongs to no one, and that a state may exercise sovereignty over a particular area based solely on appropriation.[12]

The Third United Nations Conference on the Law of the Sea (the "Conference") faced the resolution of these competing theories in 1974 when it met to begin devising a treaty on the international law of the sea. The idea of a new international economic order[13] considerably influenced the delegates, but the Conference also recognized states' sovereignty over the subsoil and the seabeds along their coastlines.[14] The resulting LOS Convention, approved by the Conference on April 30, 1982, ultimately embraced the common heritage of mankind theory.[15] In doing so, the LOS Convention codified some norms[16] viewed as already-existing customary international law, and also promulgated new rules in other areas.[17]

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[11] Van Dyke and Yuen, *supra* note 9, at 501-08.

[12] *Id.* at 514-19.

[13] The proponents of the new international economic order favored the *res communes* theory of control of the deep seabed.

[14] LOS Convention, *supra* note 5, arts. 55-58.

[15] LOS Convention, *supra* note 5, art. 136.

[16] Reiley, *Introduction to a Tempest: The Legal Technological and Political Dimensions of the 1984 Law of the Sea Conference in San Francisco*, 18 U.S.F. L. REV. 415, 416 (1984). The provisions incorporated in the treaty included a 12-mile limit to the territorial seas of coastal states and the right of others to innocent passage through these states' territorial waters. Further, the treaty established innocent passage rights for the high seas and for transit though narrow straits. The treaty also established an exclusive economic zone (EEZ) for each coastal state, which provided for exclusive mineral rights and virtually exclusive economic rights, in conjunction with environmental restrictions, to the waters and subsoil 200 miles off their coastlines.

[17] In defining "customary international law," Reiley noted:

> It is generally recognized that principles of international law may develop through custom. Complete agreement does not exist on the means to establish customary international law and on how long a custom must exist before it approaches the status of law. It has been suggested that widespread adoption of the treaty may establish "instant" customary international law. It this is so, it provides a theory (one of several) for the LOS Convention to affect non-signers.

Id. at 419.

The LOS Convention contains a complex set of provisions designed to regulate the international community's exploitation of the deep seabed. The LOS Convention establishes two entities to monitor deep seabed mining activity, an International Seabed Authority (the "Authority")[18] and an International Tribunal on the Law of the Sea.[19] An interim governing body, the Preparatory Commission,[20] is responsible for formulating the rules and regulations of these two institutions and for registering pioneer seabed mining investors.[21] The

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[18] LOS Convention, *supra* note 5, arts. 156-85. The Authority is the regulatory body of the LOS Convention and is responsible for the deep seabed mining policies and activities of the LOS Convention.

[19] LOS Convention, *supra* note 5, arts. 186-91. The International Tribunal on the Law of the Sea will include a Seabed Disputes Chamber, an eleven member group which will decide most of the disputes relating to seabed mining. This group may decide disputes between states as well as disputes between a state and the Authority.

[20] *Draft Final Act of the Third United Nations Conference on the Law of the Sea*, U.N. Doc. A/CONF. 62/121 (1982), *reprinted in* 21 I.L.M. 1245 (1982) [hereinafter *Draft Final Act*]. Resolution I of the Final Act provides for the establishment of the Preparatory Commission. The Commission is composed of 159 members. Representatives of the first fifty states which signed or acceded to the Convention have voting power, but representatives of later signatories participate as observers. The Commission will surrender its control to the Authority as soon as the Convention is ratified. *See* 24 U.N. CHRONICLE 40 (Aug. 1987).

[21] *Draft Final Act*, *supra*. *See also infra* notes 43-46 and accompanying text. By creating the special status of "pioneer investor," the Convention recognized those states and related enterprises which had begun exploration in the deep seabed prior to the signing of the Convention. Those who qualify as pioneer investors are:

> (i) France, India, Japan and the [Soviet Union], or a state enterprise of each of those states or one natural or juridical person which possesses the nationality of or is effectively controlled by each of those states, or their nationals, provided that the state concerned signs the Convention and the State or state enterprise or natural or juridical person has expended, before 1 January 1983, an amount equivalent to at least $US 30 million (United States dollars calculated in constant dollars relative to 1982) in pioneer activities and has expended no less than 10 per cent of that amount in the location, survey and evaluation of the area referred to in paragraph 3(a);
> (ii) four entities, whose components being natural or juridical persons possess the nationality of one or more of the following states, or are effectively controlled by one or more of them or their nationals: Belgium, Canada, the Federal Republic of Germany, Italy, Japan, the Netherlands, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, provided that the certifying state or states sign the Convention and the entity concerned has expended, before 1 January 1983, the levels of expenditure for the purpose stated in subparagraph (i);
> (iii) any developing state which signs the Convention or any state enterprise or natural or juridical person which possesses the nationality of such state or is effectively controlled by it or its nationals, or any group of the foregoing, which, before 1 January 1985, has expended the levels of expenditure for the purpose stated in subparagraph (i);

Authority must approve all exploration and exploitation of the deep seabed, and controls all such activity "on behalf of mankind as a whole . . . ."[22] To begin mining, miners must apply to the Authority by providing a proposed work plan.[23] The work plan must indicate two equally workable mine sites. Once the plan is approved, the Authority will mine one of the sites through its own mining group, the Enterprise,[24] while the applicant will mine the other site under the Authority's regulations and production limits.[25] This proportionate sharing of mine sites is known as the parallel system. The applicant incurs financial responsibilities to the Authority,[26] as well as the obligation to transfer its technology to the Authority if comparable technology is not available.[27]

Throughout the Conference negotiations, the United States consistently opposed the LOS Convention's provisions on deep seabed mining, although it accepted most other portions of the treaty.[28] In particular, the United States objected to (1) provisions that would allow amendments to enter into force without its approval; (2) the absence of assured access for future qualified deep seabed miners as

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[22] LOS Convention, *supra* note 5, art. 153, para. 1.

[23] LOS Convention, *supra* note 5, art. 153, para. 3.

[24] LOS Convention, *supra* note 5, art. 170. This is the "organ of the Authority which shall carry out activities in the Area [defined by art. 1 of the LOS Convention as 'the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'] directly . . . , as well as the transporting, processing and marketing of minerals recovered from the Area."

[25] LOS Convention, *supra* note 5, arts. 150-51. To protect the economies of those developing countries which derive the same minerals from terrestrial mining, the Convention has the right to control the activities of deep seabed miners through production controls, the granting of economic support, and through participation in commodity agreements.

[26] LOS Convention, *supra* note 5, Annex III, art. 13. The Commission charges a fee of $US 500,000 for the administrative costs of processing an application. After the Commission accepts the application and the contract enters into force, the contractor will pay a fee of $US 1 million. Thereafter, the contractor will make an annual financial contribution to the Authority in the form of a production charge, or a combination of a production charge and a share of the net proceeds. The amount of the contribution is a percentage of the market value of the processed metals produced from the polymetallic nodules recovered from the contractor's area. The contractor's annual amount may be altered to reflect a decline in the contractor's return of investment.

[27] LOS Convention, *supra* note 5, Annex III, art. 5.

[28] President's Statement on the Convention on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887 (July 9, 1982), *reprinted in* 82 DEP'T ST. BULL., No. 2065, at 71 (Aug. 1982). *See* Larson, *The Reagan Rejection of the U.N. Convention*, 14 OCEAN DEV. & INT'L L. 337 (1985).

a result of the Authority's regulatory power;[29] (3) a decision-making process that the United States felt would not give it a role that fairly and adequately protected its interests; (4) provisions that it felt would deter the future development of deep seabed resources;[30] and (5) the mandatory transfer of technology and the possibility of national liberation movements sharing in the benefits.[31] Thus, upon the incorporation of the objectionable provisions into the final version of the treaty, the United States voted against the treaty.[32]

The United States had already acted unilaterally to codify its views. Prior to the completion of the LOS Convention, the United States enacted the Deep Seabed Hard Mineral Resources Act[33] in an effort to reassure private investors and to inform the United Nations of its position with regard to the proposed international seabed regime.[34] The United States anticipated that LOS Convention framers would not re-write the deep seabed provisions,[35] and therefore countered with this national legislation which embodied its interpretation of the

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[29] Larson, *supra* note 28, at 340-41.

[30] *See supra* note 25.

[31] President's Statement on the Convention on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887 (July 9, 1982), *reprinted in* 82 DEP'T ST. BULL., No. 2065, at 71 (Aug. 1982).

[32] On April 10, 1982, 130 participants voted in favor of adopting the treaty, four voted against (United States, Turkey, Israel, and Venezuela), and seventeen abstained (Belgium, Bulgaria, the Byelorussian S.S.R., Czechoslovakia, the German Democratic Republic, the Federal Republic of Germany, Hungary, Italy, Luxembourg, Mongolia, the Netherlands, Poland, Spain, Thailand, the Ukrainian S.S.R., the U.S.S.R., and the United Kingdom). K. SIMMONDS, THE U.N. CONVENTION OF THE LAW OF THE SEA vii (1983).

[33] 30 U.S.C. §§ 1401-1473 (1982). Congress enacted the Act with a view toward encouraging a "widely acceptable Law of the Sea Treaty, which will provide 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." 30 U.S.C. § 1401(a)(8) (1982).

[34] 30 U.S.C. § 1401(a)(13), (15) and (b)(5) (1982). Congress stated that "the uncertainty among potential investors [was] . . . likely to discourage or prevent the investments necessary to develop deep seabed mining technology" and that a Law of the Sea Treaty was "likely to establish financial arrangements which obligate[d] the United States or United States citizens to make payments to an international organization." Thus, one of Congress' purposes in creating the Act was to "encourage the continued development of technology to recover the hard mineral resources of the deep seabed."

[35] 30 U.S.C. § 1401(a)(9), (10) (1982). Congress noted that "the negotiations to conclude such a Treaty . . . are in progress but may not be concluded in the near future" and that "even if such negotiations are completed promptly, much time will elapse before such an international regime is established and in operation."

law of the sea.[36] Under this legislation, the United States issues permits and licenses to entities seeking to explore the deep seabed, although explorers could not exploit the deep seabed until January 1, 1988.[37] The Act also includes requirements for conferring reciprocal state status,[38] provisions for monitoring the activities of permitees and licensees,[39] and provisions for protection of the environment.[40]

The Soviet Union also passed national legislation[41] in an effort to promote continued involvement in deep seabed exploration while

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[36] 30 U.S.C. § 1401(a)(12) (1982).

> It is the legal opinion of the U.S. that exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas subject to a duty of reasonable regard to the interests of other states in their exercise of those and other freedoms recognized by general principles of international law.

This legal opinion, however, is not as unyielding as the literal language of the statute suggests:

> The United States, which first developed the technology to exploit the resources, consistently took the position in adopted policy that these resources were to be developed under the auspices of international control . . . . The United States, despite its national legislation covering national control, has consistently argued that control over the resources of the high seas and sea bed beyond the continental shelf should be internationally controlled. A close reading of the legislation adopted by the United States governing sea bed development supports the argument that we are still committed to this view.

MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 CAL. W. INT'L L. J. 181, 220-21 (1983).

[37] 30 U.S.C. § 1412(c)(D) (1982).

[38] 30 U.S.C. § 1428 (1982). Reciprocal state status means that states must have enacted deep seabed mining legislation similar to that enacted in the United States to request that the United States recognize their mine sites.

[39] 30 U.S.C. § 1424 (1982). As reasonably necessary, the Administrator of the National Oceanic and Atmospheric Administration may place federal officials aboard vessels engaged in exploration or commercial recovery. These officials will ensure that those engaged in mining activities comply with the environmental restrictions issued by the Administrator, and will recommend methods of mitigation for possible environmental effects.

[40] 30 U.S.C. § 1419 (1982). These provisions provide for study of the effects of deep seabed mining, as well as the effects of sea-based processing and disposal at sea of processing wastes. The Act also requires those who engage in exploration or exploitation to use "The best available technologies for the protection of safety, health and the environment . . . ."

[41] Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources, 21 I.L.M. 551 (1982) [translated from the Russian text in *Izvestiia*, April 18, 1982, pp. 1-2]. The Federal Republic of Germany, 19 I.L.M. 1330 (1980); the United Kingdom, 20 I.L.M. 1217 (1981); France, 21 I.L.M. 808 (1982); Italy, 24 I.L.M. 983 (1985); and Japan, 22 I.L.M. 102 (1983), also enacted legislation on deep seabed mining. The legislation of some of these

maintaining a commitment to the success of the LOS Convention. Like that of the United States, the Soviet legislation prohibits exploitation of the deep seabed until after January 1, 1988. The legislation also provides for the issuance of licenses and permits, the recognition of the status of reciprocal states,632 and the establishment of a general sharing trust fund.[42]

Four private multinational consortia had begun exploration of the deep seabed prior to the adoption of the LOS Convention. Those consortia were Ocean Mining Associates, which included investors from the United States, Belgium, and Italy; Ocean Minerals Company, which included investors from the United States and the Netherlands; Ocean Management, Inc., comprised of investors from Canada, the United States, Japan, and the Federal Republic of Germany; and the Kennecott Consortium, comprised of investors from the United States, the United Kingdom, Canada, and Japan.[43] The four consortia originally began mining under permits issued by individual states whose investors were included in the consortia.[44] Later, however, the consortia sought to preserve their rights as pioneer investors[45] through

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states is quite similar to that enacted in the United States and the Soviet Union. Further, some of the national legislation contains provisions similar to provisions in the LOS Convention. For example, the French legislation requires permits and allows for the recognition of reciprocal state mine sites. Japanese legislation includes requirements that a miner submit a proposed work plan and settle any problems of overlapping claims before mining begins.

[42] Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources, *supra* note 41.

[43] Ocean Mining Associates began work in 1968, Kennecott began in 1974, Ocean Management began in 1975, and Ocean Minerals Company began in 1977. Also involved in deep seabed mining were Association Francais pour L'Etude et la Recherche des Nodules (AFERNOD), a state and private enterprise from France; Deep Ocean Minerals Association (DOMA), a Japanese project; and three state-sponsored enterprises from the Soviet Union, India, and China. Briscoe and Lambert, *Seabed Mineral Discoveries Within National Jurisdiction and the Future of the Sea*, 18 U.S.F. L. REV. 433, 445, n.50 (1984).

[44] The United States issued permits under the Hard Mineral Resources Act to Ocean Management, Inc., Ocean Mining Associates, Ocean Minerals Company, and the Kennecott Consortium. The Federal Republic of Germany issued a permit to Ocean Management, Inc., and the United Kingdom issued two permits to the Kennecott Consortium. Larson, *Deep Seabed Mining: A Definition of the Problem*, 17 OCEAN DEV. & INT'L L. 271, 281 (1986).

[45] The Convention "provides for the favorable treatment of entities that would register as pioneer investors (immediate allocation of area, guaranteed issuing of contract following the entry into force of the Convention, priority with regard to production authorisations)." Stephanou, *A European Perception of the Attitude of the United States at the Final Stage of UNCLOS III With Respect to the Exploration of the Deep Sea-Bed* in THE NEW LAW OF THE SEA 259, 266 (Rozakis & Stephanou 1983).

representation in the Preparatory Commission and explicit recognition in the section of the Draft Final Act of the Convention dealing with pioneer investors.[46]

Eventually, France, India, Japan, and the Soviet Union applied to the Preparatory Commission for registration as pioneer investors.[47] To obtain pioneer investor status, these states had to "*ensure, before making applications to the Commission . . . , that areas in respect of which applications are made do not overlap one another . . . .*"[48] Although the site chosen by India did not overlap any other sites, the sites of both Japan and France overlapped the site chosen by the Soviet Union, and the Soviet Union's site also overlapped the sites of three of the four multinational consortia.[49] Under paragraph 5, the Parties were required to resolve these overlap conflicts before the Commission could accept their applications.[50]

While France, Japan, and the Soviet Union were working with the Preparatory Commission to resolve the problem of overlapping mine sites, nationals of France, Japan, and the Netherlands were seeking a way to protect their investments in the multinational consortia.[51] On August 3, 1984, the governments of France, Japan, and the Netherlands, without the consent or guidance of the Preparatory Commission, reached a Provisional Understanding Regarding Deep

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[46] *See supra* notes 20-21.

[47] The Preparatory Commission received applications from the Soviet Union on October 24, 1983 (U.N. Doc. LOS/PCN/30), from India on February 14, 1984 (U.N. Doc LOS/PCN/32), from Japan on August 22, 1984 (U.N. Doc. LOS/PCN/50), and from France on August 23, 1984 (U.N. Doc. LOS/PCN/51).

[48] *Draft Final Act*, *supra* note 20 (emphasis added).

[49] *Registration of Pioneer Investors in the International Sea-Bed Area In Accordance With Resolution II of the Third United Nations Conference on the Law of the Sea*, LAW OF THE SEA BULLETIN, Special Issue II, April 1988, at 5. Such a situation was not unexpected:

> The potential for overlapping claims was high, owing to two factors stemming from the nature of the resource itself. First, although there are extensive deposits of nodules throughout the world's oceans, scientific indicators had pointed quite early to one region of the north-eastern Pacific in which the nodules were of economic interest - an area running east to west from Hawaii to Baja California, and north to south between the Clarion and Clipperton fracture zones. Secondly, nodules lie in a monolayer, and therefore the claim sites must be extensive in two directions.

[50] The four countries exchanged the coordinates of their claimed mine sites for the first time in December 1984. *Report on the Fifth Session of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea*, LAW OF THE SEA BULLETIN, Nov. 1987, at 115-16.

[51] *See supra* note 43 and accompanying text.

Seabed Mining (the "Provisional Understanding")[52] with Belgium, the Federal Republic of Germany, Italy, the United Kingdom, and the United States.[53] The Provisional Understanding did not provide for actual recognition of claimed mine sites, but simply provided that the eight states would consult one another in regard to authorization and development of mine sites. It also included the January 1, 1988 date for the beginning of exploitation, which is the date included in the national legislation enacted by the United States, the Federal Republic of Germany, the United Kingdom, and France.[54] France, Japan, and the Netherlands stated that they were furthering the goals of the Commission by taking early notice of potential future conflicts regarding overlapping mine sites and agreeing on a way to resolve such conflicts.[55]

Other members of the LOS Convention saw the Provisional Understanding as a direct threat to the goals of the Convention. The Group of 77[56] stated that the Provisional Understanding violated the United Nations principle that the seabed was the common heritage of mankind and that since the Convention was the only authority governing the deep seabed, the Provisional Understanding was "wholly illegal."[57] The Eastern European States viewed the Understanding as a "mini-treaty" designed to undermine the efforts of the LOS Con-

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[52] Provisional Understanding Regarding Deep Seabed Mining, *reprinted in* 23 I.L.M. 1354 (1984) [hereinafter Provisional Understanding].

[53] A forerunner to the Provisional Understanding was the Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed, *reprinted in* 21 I.L.M. 950 (1982), signed by the United States, the United Kingdom, the Federal Republic of Germany, and France on September 2, 1982.

[54] *See supra* note 41 and accompanying text.

[55] U.N. Doc. LOS/PCN/45 (1984) (Japan); U.N. Doc. LOS/PCN/46 (1984) (the Netherlands); U.N. Doc. LOS/PCN/47 (1984) (France).

[56] U.N. Doc. LOS/PCN/48 (1984). The Group of 77 is a group of developing nations which believes that moral and legal principles impose upon the international community the obligation to share the resources of the deep seabed. Larson, *supra* note 44, at 275.

[57] U.N. Doc. LOS/PCN/48 (1984). Larson, however, concluded that the Provisional Understanding was not illegal:

> In respect to the legal status of the Provisional Understanding, there seems to be little doubt that it is consistent with the U.N. Convention notwithstanding the objections of the G-77 and the G-EESS [Group of Eastern European Socialist States]. Sovereign states are free, moreover, to conclude whatever international agreements they desire so long as they do not conflict with any principles of customary or conventional international law. The Provisional Understanding would seem to meet this test.

Larson, *supra* note 44, at 282.

vention. They claimed that it was an attempt by western consortia "to act without control in exploring and exploiting the resources of the deep seabed."[58] This group pointed specifically to the United States, calling the Provisional Understanding "blatant evidence of the hegemonistic, imperialistic policy of the current United States administration, which is aimed against equitable international cooperation among States in the exploitation of the world's oceans, against the Convention and the Preparatory Commission."[59]

On behalf of the parties to the Provisional Understanding, the Chairman of the delegation of the Netherlands issued a statement to explain why the Understanding was not illegal or in conflict with the Draft Final Act and the ideals of the Convention.[60] The parties relied on their initial statements that the Understanding "was without prejudice [or effect] to . . . the positions of the parties, or any obligations assumed by any of the parties, in respect of the United Nations Convention on the Law of the Sea," and maintained that the Understanding was essentially concerned with conflict resolution.[61]

Meanwhile, the United States continued to issue licenses for exploration.[62] This action by the United States, in light of the earlier discontent of several LOS signatories with the Provisional Understanding, prompted the Preparatory Commission to issue a Declaration condemning the actions of all states under national legislation.[63] The Preparatory Commission stated that the only regime for the exploration and exploitation of the deep seabed was that established by the Convention. Thus, any action undertaken outside the Preparatory Commission which was incompatible with the LOS Convention and its related resolutions was illegal and would not be recognized. The Declaration called upon all states to desist from

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[58] U.N. Doc. LOS/PCN/49 (1984).

[59] *Id.*

[60] *Statement by the Chairman of the Delegation of the Netherlands on Behalf of the Delegations of Belgium, France, Germany, Federal Republic of, Italy, Japan, and the United Kingdom of Great Britain and Northern Ireland Delivered on 14 August 1984*, U.N. Doc. LOS/PCN/52 (1984).

[61] *Id.*

[62] *See* U.N. Doc. LOS/PCN/65 (1985).

[63] *Declaration Adopted by the Preparatory Commission on 30 August, 1985*, U.N. Doc. LOS/PCN/72 (1985). The Soviet Union assumed essentially the same position as the Group of 77 and its sister states in the Group of Eastern European Socialist States, criticizing the unilateral action of the United States and denouncing any action taken outside the Convention as illegal.

taking actions which were contrary to the aims of the Preparatory Commission.[64]

The Federal Republic of Germany, an observer to the LOS Convention and a party to the Provisional Understanding, denounced the Preparatory Commission's Declaration.[65] It viewed the Declaration as a political move which would be ultimately detrimental to the overall goals of the Commission. It reminded the Commission that since the LOS Convention had not been completely ratified, any action taken outside the realm of the Convention was not illegal. The Federal Republic of Germany viewed the goals of the Commission as including the coordination of a system of deep seabed mining that all interested countries could accept, and saw the Provisional Understanding as a step in that direction.[66]

In 1986, the Soviet Union, France, and Japan still had not gained pioneer investor status because they could not resolve the problem of the overlapping mine sites.[67] In a renewed effort to resolve the difficulties, Japan, France, and the Soviet Union met in Arusha, Tanzania in February, 1986. Under the guidance of Preparatory Commission chairman Joseph Warioba, the three countries agreed upon a method of resolution for the problem of overlapping mine sites through a settlement process known as the "Arusha Understanding."[68]

Chairman Warioba and the Commission achieved resolution of the immediate conflict by asking France, Japan, and the Soviet Union to voluntarily relinquish portions of the contested areas. The Commission then divided these relinquished portions equally between France and the Soviet Union and Japan and the Soviet Union.[69] Chairman Warioba's method of resolution also provided that these three countries, and specifically the Soviet Union, would relinquish further areas in advance of actual disputes so that "certain practical problems [could be resolved] as well as to facilitate the resolution of conflicts between the claim of the USSR and some of the potential appli-

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[64] *Id.*

[65] U.N. Doc. LOS/PCN/73 (1986).

[66] *Id.*

[67] Japan and the Soviet Union had tentatively resolved their conflict before the February 1986 meeting. LAW OF THE SEA BULLETIN, Special Issue II, *supra* note 49, at 6.

[68] U.N. Doc. LOS/PCN/34/Rev.1 (1986).

[69] LAW OF THE SEA BULLETIN, Special Issue II, *supra* note 49, at 6.

cants."[70] Thus, the "Arusha Understanding" successfully protected the interests of the pioneer applicants France, Japan, the Soviet Union, and India while also protecting the interests of those concerned with safeguarding the Convention's ideals and the interests of the signatory and non-signatory consortia members.[71]

As a result of the "Arusha Understanding," the Preparatory Commission also produced an Understanding for Proceeding With Deep Seabed Mining Applications and Overlapping Claims of Mine Sites on September 5, 1986 (the New York Understanding).[72] This Understanding, unanimously adopted by the Preparatory Commission, provided for the use of the method of resolution devised at Arusha and set up a timetable and procedures for France, India, Japan, and the Soviet Union to re-submit their applications[73] for pioneer status. The Commission encouraged these states to use the mechanism of voluntarily relinquishing mine sites through "free and frank discussions, making available to each other at these discussions the necessary data and information."[74] Significantly, the Commission addressed the probability that the Soviet Union would have claims which overlapped with United States consortia claims when it encouraged Belgium, Canada, Italy, and the Netherlands, acting as representatives of the multinational consortia, to file for pioneer status pursuant to the timetable set up by the New York Understanding.[75]

The representatives of France, Japan, and the Soviet Union did not meet the March 1987 deadline for the re-submission of applications for pioneer investor status. These parties formulated a State-

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[70] *Id.* The term "'potential applicant' is used to designate the Western multinational consortia which possess the nationality or are controlled by the nations of the following states: Belgium, Canada, Germany, Federal Republic of, Italy, Japan, Netherlands, United Kingdom, and United States of America."

[71] *Id.* France, Japan, and the Soviet Union also relinquished areas which would suffice for the Authority under the parallel system.

[72] U.N. Doc. LOS/PCN/L.41/Rev.1 (1986), *reprinted in* 25 I.L.M. 1326 (1986) [hereinafter New York Understanding].

[73] The Preparatory Commission required that France, India, Japan, and the Soviet Union re-submit applications by March 25, 1987.

[74] New York Understanding, *supra* note 72.

[75] "The negotiations involved all the traditional regional and interest groups and included both signatories and non-signatories with the indirect participation of US-based consortia (through Belgium, Canada, Italy, the Netherlands, the Federal Republic of Germany and the United Kingdom)." Report on the Meeting of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea New York, 11 August - 5 September 1986, LAW OF THE SEA BULLETIN, Nov. 1986, at 38. *See also supra* note 72.

ment of Understanding for Proceeding With Deep Sea-Bed Mining Applications on April 19, 1987 (the "Statement").[76] This Statement extended the original deadline until the next meeting of the Preparatory Commission, then scheduled for summer 1987, and established that France, Japan, and the Soviet Union would be registered and considered as pioneer investors jointly.[77]

ANALYSIS

On August 3, 1987, the Soviet Union and the representatives of the multinational consortia also reached a settlement, which was finalized in the Agreement on the Resolution of Practical Problems with respect to Deep Seabed Mining Areas (the "Agreement")[78] concluded on August 14, and which ultimately resolved the difficulties between the Soviet Union and the representatives of the various multinational consortia by utilizing the mechanism originally developed at Arusha. The Agreement, combined with the Statement and the New York Understanding, reconciles the previously conflicting goals of the Preparatory Commission and the multinational consortia while taking into account the prior multilateral agreements reached among the industrialized nations.

This Agreement and the corresponding exchange of Notes produce a favorable situation for both the United States and the parties to the LOS Convention. The United States gains political, diplomatic, and economic advantages with the Preparatory Commission and the Convention signatories without compromising its ideological position on the issue of seabed mining, and the Convention signatories obtain the resolution of some long-lasting conflicts.

Through the Notes, the United States agreed to respect the Soviet Union's position as delineated in the Agreement.[79] The Agreement, unlike the 1984 Provisional Understanding[80] signed by some of the same states, provides that the countries recognize each others' claims

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[76] U.N. Doc. LOS/PCN/L.43/Rev.1 (1987), *reprinted in* 26 I.L.M. 1725 (1987) [hereinafter Statement].

[77] LAW OF THE SEA BULLETIN, Special Issue II, *supra* note 49, at 6.

[78] Agreement, *supra* note 1.

[79] *Id.*

[80] *See supra* note 52 and accompanying text. The Provisional Understanding did not recognize specific claims. It provided only that the states would consult one another in regard to potential overlapping mine sites.

and respect the boundaries of these claims.[81] The Agreement also states that the parties shall not prevent registration of the others' applications with the Preparatory Commission and that they will consult with one another on related issues.[82] Further, under the Agreement the parties must conform to international law and existing legislation to ensure that there is no physical interference with the individual exploration and exploitation activities in the deep seabed mining areas.[83]

The Notes serve a dual purpose while the United States continues mining under national legislation. First, they provide for recognition of United States mine sites and mining enterprises by the Soviet Union. This recognition ultimately weakens the Soviet Union's opposition to the United States theory on freedom of the seas. Second, the silence of the Preparatory Commission toward the exchange of Notes, coupled with the fact that the Notes were exchanged on the day that the Preparatory Commission assisted the five nations in signing the Agreement to resolve their overlapping mine sites, suggests that the Preparatory Commission has implicitly recognized the United States position. Thus, the Agreement and Notes indicate that the LOS Convention regime for deep seabed mining can exist alongside the regime advocated by the United States.[84]

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[81] Agreement, *supra* note 1, art. 1, at 1505.

> (1) The Parties have agreed on lines the coordinates of which are shown in Annexes II, III, and IV to this Agreement for the purpose of resolving practical problems with respect to deep seabed mining areas, the coordinates of which were exchanged by the Parties in Moscow on December 6, 1986, and are shown in Annex I.
>
> (2) In this Agreement, "deep seabed mining areas" means areas of the deep seabed intended for the conduct of exploration and exploitation of hard mineral resources.

[82] Agreement, *supra* note 1, arts. 3 and 6, at 1506-07.

> The Parties shall not act, themselves or in association with third parties, in a manner that could prevent registration of an application which is submitted by a Party to the Preparatory Commission . . . [and] [w]hen necessary, the Parties will consult on the questions connected with the implementation of this Agreement.

[83] Agreement, *supra* note 1, art. 5, at 1507.

> The Parties shall take all measures in conformity with international law and existing legislation to ensure that there is no physical interference with the activities of each other related to exploration and exploitation of hard mineral resources in the deep seabed mining areas referred to in the Annexes to this Agreement.

[84] The Convention framers did not intend such a situation, as they fully expected the LOS regime to be the only authority governing the international waters. Kimball, *Turning Points in the Future of Deep Seabed Mining*, 17 OCEAN DEV. & INT'L L. 367, 371-72 (1986).

The Notes also indicate that the Soviet Union has altered its political position regarding the United States unilateral mining policy. In 1985 and 1986, the Soviet Union fully supported the Preparatory Commission[85] when the Commission condemned the issuance of licenses under national legislation. Now, because the Commission has, on behalf of the Soviet Union, successfully negotiated a resolution to the problem of overlapping mine sites which the Soviet Union had with France, Japan, and the multinational consortia, the Soviet Union[86] will be likely to support the Commission's altered position toward the United States. As the Commission pursues the goal of harmony among the deep seabed miners, the Soviet Union will acquiesce so as to protect its own interests, even if such action implies recognition of United States political ideology.

Moreover, the United States has improved its diplomatic relationship with the Preparatory Commission. The Agreement and the Notes suggest the restoration of a degree of trust in the United States on the part of the Preparatory Commission. Both the Preparatory Commission, through its assistance in negotiations surrounding the Agreement, and the United States, through obligations it assumed under the Notes, have taken steps in the creation of a relationship of harmonious co-existence in the deep seabed.

Signatory countries to the Convention will probably follow the Preparatory Commission's lead in recognizing United States involvement in deep seabed mining, though some countries are certain to see the Preparatory Commission's actions as traitorous to the idea of a new international economic order. Both the Group of 77 and the Eastern European Socialist States, excluding the Soviet Union, will probably denounce the Notes as yet another United States attempt to destroy equitable international cooperation.[87]

Its involvement in the negotiations surrounding the Agreement also indicate that the Preparatory Commission has effectively reversed the

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[85] *See supra* note 63 and U.N. Doc. LOS/PCN/76 (1986).

[86] In 1986, the Soviet Union found itself in an "unexpected position of having applied for registration as a pioneer investor under Resolution II [of the Draft Final Act of the convention] but being potentially subject to a blocking vote [on the Preparatory Commission] by the BINC states (Belgium, Italy, the Netherlands, and Canada)." Kimball, *supra* note 84, at 381. The Soviet Union apparently considered the importance of the consortia to the BINC states and opted to work out an agreement concerning the overlapping mine sites rather than risk the rejection of its pioneer investor application. *See id.* at 382.

[87] *See supra* notes 56-58 and accompanying text.

position it took in the 1985 Declaration condemning the actions of the United States and other countries in forming collateral agreements. As late as April 1986, the Commission had "reaffirm[ed] its declaration adopted on 30 August 1985 [and] reiterate[d] its rejection of any claim, agreement or action, including the aforementioned purported issuing of licenses, undertaken outside the Preparatory Commission which is incompatible with the United Nations Convention of the Law of the Sea and related resolutions, and regards them as wholly illegal and devoid of any basis for creating legal rights."[88] Today, the Preparatory Commission is participating in, and thus apparently supporting, the type of agreement it previously condemned.

Furthermore, the Agreement appears to be a gesture of congeniality by the Preparatory Commission as the representative of the LOS Convention signtory states. The Preparatory Commission's implicit acceptance of United States policy should lead to more congenial dealings in other areas of international concern such as military and commercial navigational uses of the sea, and protection of the environment.

The Commission's alteration in its position may be attributed to several factors. The overall mission and purpose of the Commission is to register pioneer investors and begin exploration and exploitation of the deep seabed.[89] The Agreement will further this purpose by resolving the current problems of overlapping mine sites and preventing future overlaps.[90]

The Commission, presently funded through United Nations general funds, also needs more money to begin exploration and exploitation of the deep seabed.[91] The money that state enterprise pioneer investors must pay to the Commission once their applications are accepted should be forthcoming now that the problems of the overlapping sites have been solved by the Agreement. Likewise, the United States involvement in the exchange of the Notes should promote among the

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[88] U.N. Doc. LOS/PCN/78 (1986).

[89] *See supra* notes 21 and 22 and accompanying text.

[90] LAW OF THE SEA BULLETIN, Special Issue II, *supra* note 49, at 7-8.
The Secretary General [of the United Nations] hailed the resolution of conflicts between the first group of applicants and the potential applicants [the Western multinational consortia which possess the nationality or are controlled by the nationals of the following states: Belgium, Canada, the Federal Republic of Germany, Italy, Japan, Netherlands, United Kingdom, and United States of America] as "one of the most significant developments in the law of the sea since the adoption of the Convention."

[91] *See* 23 U.N. CHRONICLE 66, 67 (Feb. 1986).

multinational consortia a favorable view of the Preparatory Commission, and further financial pledges should materialize in the near future.

The LOS Convention now stands a better chance of ratification by those countries who have signed but not yet ratified. The Preparatory Commission was offered an opportunity to overcome obstacles between some of the most active members of the Convention, as well as an opportunity to gain the trust of a powerful opponent of action taken under the auspices of the Convention.[92] By assisting in the negotiations for the Agreement, advancing the interests of four United States allies, and including the United States in the negotiations, the Preparatory Commission has generated a vote of confidence for itself, furthered its purpose of registering pioneer investors and promoting the treaty for ratification, and increased funding.[93] The disappointment felt by delegates from the Third World and the Preparatory Commission at the delay of the implementation of the Draft Final Act should be alleviated by the probable acceleration of the pioneer investor registration.[94] Additionally, the solution to the problem of the overlapping mine sites may provoke more of the major non-member states[95] to ratify the Convention, thus indicating to smaller states their support of the international regime.

Despite these compromises, the United States has not capitulated to the LOS Convention philosophy or compromised its ideological position. It still views the right to mine the resources of the deep seabed as a freedom of the high seas. The United States has not recognized any parts of the Convention other than those which codify

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[92] In 1986, Larson wrote, "[considering] the present ideological and political antipathy that exists between the U.S. and the G-77 over such things as the New International Economic Order, the Common Heritage of Mankind, the International Seabed Authority . . . it is rather doubtful that the political future of deep seabed mining will be stable and predictable for the next several years." Larson, *supra* note 44, at 279.

[93] Thus, the question of ". . . whether the Preparatory Commission [could] implement the Convention deep seabed mining regime in a manner that will clarify and modify the mining provisions sufficiently to make it acceptable to the major mining states" appears to have been partially resolved. Kimball, *supra* note 84, at 373.

[94] *Id.* at 390.

[95] As of 8 April 1988, 35 states had ratified the Convention. *Sixth Session of Preparatory Commission for International Sea-Bed Authority and International Tribunal for Law of the Sea*, U.N. Doc. Press Release, U.N. Doc. SEA/936, 11 April 1988. Sixty ratifications are necessary for the treaty's entry into force. LOS Convention, *supra* note 5, art. 308(1).

customary international law of the sea or reflect United States policy. Thus, the exchange of Notes does not bind the United States to any part of the Convention.

The relationship between the United States and the Soviet Union should improve as a result of the Agreement and the exchange of Notes, as should the relationship between the United States and the Preparatory Commission. The Notes provide a mechanism for the parties to achieve their collective objective of mining the deep seabed with a minimum of conflict. The parties have maintained their basic legal and political convictions while furthering economic interests, and the success of these negotiations should promote future negotiations regarding other aspects of the law of the sea.

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