

Chapter 12

Law of the Sea—What Now?*

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On 30 April 1982, following nearly fifteen years of preparations and formal deliberations, The Third United Nations Conference on the Law of the Sea (UNCLOS III) finally adopted a new, comprehensive treaty on the Law of the Sea. The vote was 130 nations in favor, 4 opposed, and 17 abstentions. The United States cast one of the four negative votes.

On 10 December 1982, the new treaty, officially known as the 1982 Convention on the Law of the Sea,¹ was opened for signature in Montego Bay, Jamaica. On that first day (of a two-year signature period), 117 nations signed. Signers included most of the Third World, several Western European countries, and the Soviet bloc.

The United States refused to sign. So did 23 or so other nations, but the United States was the only nation to announce that it would never sign or ratify or otherwise participate in the treaty. Japan and several other countries have since signed, although ratifications (the formal indications of intent to be bound by the treaty) have been slow in coming.

The United States' objections to the 1982 Convention are leveled solely at the treaty provisions that would establish and define an International Seabed Authority to oversee mining of the deep seabed beyond national jurisdiction. Yet—as President Reagan conceded in his 9 July 1982 statement rejecting the treaty²—the non-seabed portions of the treaty are more than acceptable to the United States. In fact, its provisions on transit passage through international straits and on preservation of navigation and overflight freedoms within 200-mile offshore zones are quite favorable to the United States as a global naval power.

So the question arises: is the United States, in rejecting the treaty, tossing out the baby with the bathwater, or, in this case, throwing out the sea with the seabed? The answer to that question, and to the question of where we go from here, might be assisted by an initial inquiry: how did we get into this situation? And to approach this question, we need to examine recent trends in the international law of the sea and some of the causes for these trends.

The crucial date is 1945. For approximately 300 years prior to 1945, the world ocean was considered (at least by the dominant Western colonial powers) to be

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divided into basically two zones: (1) The vast majority of the ocean was deemed *high seas*, where “freedom of the seas” reigned. That is, the high seas were not subjectable to any nation’s sovereignty. Each nation was free to use the world ocean for vessel (and, in this century, aircraft) navigation and its “inexhaustible” resources (usually fish) without interference or regulation by any other nation. (2) The other zone of ocean space was the *territorial sea*, a narrow border of ocean along the shores of each coastal nation within which that nation could exercise a sovereignty almost as absolute as it exercised over its land territory and its internal waters. The only real exception to absolute sovereignty was the right of every other nation’s surface vessels to “innocent passage” through the territorial sea. Passage was “innocent” so long as it was not prejudicial to the peace, good order, or security of the coastal nation. Until nearly the mid-20th century, moreover, the maximum allowable breadth of the territorial sea was generally considered to be three nautical miles, as a matter of customary international law.

This two-zone concept—combining an almost unimaginably large area of free-navigation space with narrow areas of innocent passage space—was, of course, a very convenient setup for any naval or maritime power. So thought the United States in 1945 as it emerged from World War II as the global naval power. Unfortunately for the United States and other maritime nations, 1945 is the year that the old two-zone setup began to change: the fingers of coastal nation sovereignty began to reach seaward. What happened to cause this new development?

The first thing that happened was that President Truman issued two proclamations that had been in the works since the early presidential years of Franklin Roosevelt. The first Truman Proclamation³ claimed for the United States sovereign rights to the natural resources of the continental shelves adjacent to U.S. shores. This meant that the United States was staking a unilateral claim to valuable resources, oil and gas in particular, beyond its three-mile territorial sea out to an average distance from shore of 40–50 miles. The second Proclamation,⁴ issued the same day in September of 1945, seemed to assert U.S. regulatory authority over fisheries in the high seas beyond the U.S. territorial sea; actually it did not do so, but what was important was the perception by others of yet another unilateral extraterritorial claim. Both Truman proclamations made a special point of reaffirming freedom of high seas navigation in the waters beyond the three-mile limit.

The international response to the claims of the 1945 Truman proclamations, especially to the continental shelf claim was extremely favorable: coastal nations thought it a good idea, and many followed suit. Others, apparently reasoning that there is no good idea that cannot be made better, asserted broader and more inclusive jurisdictions over sea and seabed areas off their shores. In 1947, Chile made the first claim to a 200-mile resource zone—principally to protect the Chilean whaling industry. Also in 1947, Peru asserted what is now viewed as a

200-mile *territorial sea*. Other Latin American countries followed the lead of Chile and Peru, claiming either 200-mile resource zones or territorial seas out to 200 miles from shore. Meanwhile, twelve-mile territorial seas and extraterritorial fishing zones were becoming increasingly popular around the globe.

In the midst of this expansionist trend, in the mid-1950s, the UN's International Law Commission—a group of international law specialists charged with the codification and progressive development of international law—began preparing draft treaties on the law of the sea. The result: the First United Nations Conference on the Law of the Sea (UNCLOS I), held in Geneva in 1958. The Conference adopted four new treaties, widely viewed at the time as “codifications” or restatements of the customary law of the sea. Figure 1 presents a profile view of the basic jurisdictional scheme drawn by that package of treaties. The United States is a party to each of the Geneva Conventions of the Law of the Sea. Certain aspects of these treaties are significant to the present discussion.

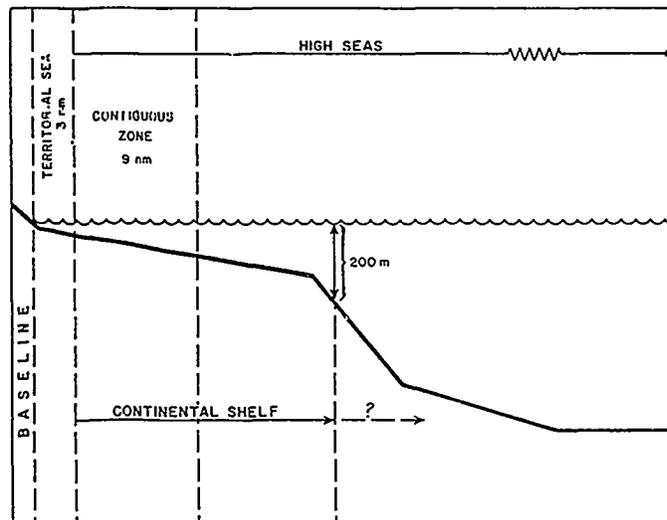


Figure 1

The *Territorial Sea and Contiguous Zone Convention*⁵ reaffirmed the concept that coastal nations have sovereignty over their territorial seas, subject to the innocent passage doctrine. Passage of foreign submarines, however, is not “innocent” unless the submarine is on the surface and flying its flag. Furthermore, passage of aircraft over the territorial sea is never considered innocent passage. Thus, special permission from the territorial sea sovereign is required for overflight or submerged passage.

The delegations to UNCLOS I were unable to agree on a maximum breadth for the territorial sea. Naval and maritime powers preferred a narrow, three-nautical-mile limit in order to allow the greatest degree of mobility for vessels

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and aircraft on, under and over the ocean. Coastal nations, emphasizing offshore resource management, preferred broader limits. The impasse in 1958 led to the Second UN Conference on the Law of the Sea (UNCLOS II), which met in Geneva in 1960. Again, the delegations failed, albeit narrowly, to agree on a maximum breadth for the territorial sea. The 1958 Convention on the Territorial Sea and Contiguous Zone⁶ avoids the maximum breadth issue, saying nothing at all about it.⁷

The *High Seas Convention*,⁸ another of the four treaties adopted in Geneva in 1958, spelled out the “freedoms of the high seas.” After defining “high seas” essentially as all waters seaward of the territorial sea, the High Seas Convention lists four specific high seas freedoms: (1) freedom of vessel navigation (including submerged navigation); (2) freedom of overflight; (3) freedom to fish; and (4) freedom to lay submarine cables and pipelines. The High Seas Convention makes it clear, however, that international law might recognize other high seas freedoms in addition to the listed four. The best candidate in 1958 for a “fifth freedom” was the freedom of scientific research. The High Seas Convention also contains several rules on such matters as flag-state jurisdiction, piracy, etc.

The *Continental Shelf Convention*⁹ codified the principle sparked by the first Truman Proclamation in 1945, that coastal nations had sovereign rights over the natural resources of their adjacent continental shelves.¹⁰ However, this treaty also reaffirmed that the waters above the continental shelves would not be affected and, therefore, such freedoms as navigation and overflight continued to exist in high seas above the continental shelves.

The fourth 1958 Geneva Convention on the Law of the Sea was the *Convention on Fishing and Conservation of the Living Resources of the High Seas*,¹¹ or the Fishing Convention. This treaty was designed both to preserve important high seas freedoms and to respond to at least a part of the concern of many coastal nations about foreign fishing outside their territorial seas. It provided that, under carefully delineated circumstances, a coastal nation could unilaterally adopt temporary, nondiscriminatory conservation regulations for endangered fisheries in adjacent areas of the high seas, pending agreed-upon or arbitrated international conservation rules. Although this treaty was not exactly a failure—it was adopted in Geneva by a two-thirds majority and did receive enough ratifications to enter into force for those who ratified—it was never a success. First of all, the major distant-water fishing nations, such as Japan and the Soviet Union, never became parties and were thus never bound. Second, the Fishing Convention did not really respond well to all the reasons for the trend toward broader coastal nation jurisdiction.

Through clear hindsight, we can now see that UNCLOS I and II were, in many respects, nonsuccesses. The failure of UNCLOS II to establish a maximum breadth for the territorial sea was indicative of the more general failure of the International Law Commission and the two conferences to

consider the significance and staying power of the trend toward coastal nation expansionism. The 1958 treaties were, as it turned out, too backward-looking.

In the 1960s and '70s, despite the existence of the Geneva Conventions, the trend favoring broader coastal nation jurisdiction continued, and pressures for a new oceanic order mounted. The sources of these pressures are several:

- New ocean technologies have meant that more people have been engaged in more new and different activities farther from shore—e.g., drilling for oil and gas; fishing in large modern fleets thousands of miles from home and, significantly, very close to the shores of other nations; transporting huge quantities of crude oil in enormous, thin-skinned tankers that only roughly resemble traditional ships. These new-technology-supported activities have caused coastal nations to become more aware of the opportunities, controversies, and dangers that were developing in their offshore waters.

- Who were these coastal nations? In the wake of global decolonization, they were, more and more frequently, new nations, part of the “population boom” in the Global Village. They were nations basically poor, with sea boundaries but no great global navies, merchant fleets, or distant-water fishing fleets. They were, and are, nations of the Third World.

- These nations have been participants in the quest for a *New International Economic Order* (NIEO), which seeks a redistribution of resources and wealth on the planet. This search for a NIEO found coastal nation expansionism—especially the claims by poor nations to nearby ocean resources and uses that otherwise might be grabbed by the few technologically rich nations—to be consistent with NIEO goals.

- The mid-1960s revelation that the manganese nodules of the deep seabed contained such valuable minerals as nickel, cobalt, and copper—together with the growing technological capability for their commercial recovery—provided the final incentive for a new approach to the international law of the sea. The miners needed a security-of-tenure system as a prerequisite to profitable mining, and the Third World nations saw an opportunity for an equitable allocation of a new source of wealth.

The call for a new United Nations Conference on the Law of the Sea—the third conference—came in the late 1960s and was triggered by a series of General Assembly resolutions and declarations. These proclaimed the deep seabed beyond nation jurisdiction as “the common heritage of mankind,”¹² purported to establish a moratorium on seabed mining while a new international conference established a mining regime,¹³ and set 1973 as the target year for the new conference to begin.¹⁴

The conference, UNCLOS III, did begin in December 1973, after several years of preparatory meetings of a special UN Seabed Committee, and finally adopted its new treaty in April 1982.

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It has been something to behold! UNCLOS III can justifiably lay claim to having been the most significant attempt at truly global cooperation ever. Its task was awesome. Three numbers—150, 85, and 70—set the challenge: more than 150 nations (virtually the entire world community) gathered together to address 85 agenda items,¹⁵ with a view to negotiating a comprehensive set of legal principles to govern nearly every aspect of use of 70 percent of the planet's surface. Perhaps most astounding of all, the entire set of 85 issues had to be negotiated as a package.

The outcome: a comprehensive, very complex treaty of 440 provisions, covering 200 single-spaced pages, resulting—until the April 1982 adoption of the final text—entirely from consensus. Not a single vote was taken until the vote on the adoption of the treaty as a whole. (Whether the new treaty ever becomes binding international law or not, students of international politics and diplomacy will be studying UNCLOS III's process for decades.)

Figure 2 shows a cross-section of the new oceanic order embodied in the 1982 Convention of the Law of the Sea. A comparison of this figure with Figure 1 will demonstrate that the most striking development in the past 25 years has been the recognition of vastly extended coastal-nation competence to regulate and affect ocean activities in broad offshore zones.

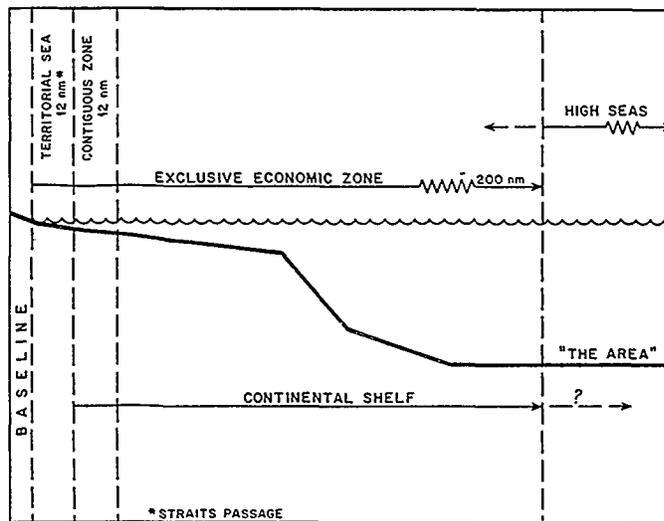


Figure 2

The *Exclusive Economic Zone (EEZ)*¹⁶ is a new concept, based on the original Latin American 200-mile claims. Within its EEZ, each coastal country has, in the phrase of the new treaty, “sovereign rights” over all resources, living and mineral. It is also allowed extensive jurisdictional authority over scientific research and is granted certain controls over marine pollution. The EEZ extends

beyond the territorial sea to a maximum of 200 nautical miles from shore. Since most islands, as well as the continents, can form the bases for EEZs, worldwide EEZs will blanket about forty percent of the world ocean.

But, given the proper geological circumstances, a coastal nation's resource jurisdiction can extend even further seaward: the new treaty's legal definition of *continental shelf*¹⁷ covers the entire geological continental *margin* (with some extreme outer limits), which means that some nations will have jurisdiction over natural resources of the seabed one hundred or more miles beyond the outer edge of the EEZ. However, the 1982 Convention also explicitly guarantees freedom of navigation and overflight within EEZs and in the waters above the "continental shelf."

Unlike the 1958 Convention on the Territorial Sea and the Contiguous Zone, the UNCLOS III treaty does set a maximum breadth for the *territorial sea*:¹⁸ twelve nautical miles. Within this zone, innocent passage (defined at considerable length in the new treaty) by foreign vessels is allowed. Again, as in 1958, submerged passage and overflight are noninnocent. The impact on maritime nations of these rules is crucial. Universal recognition of twelve-mile territorial seas would mean that more than 100 straits—several of them such vital chokepoints as Gibraltar and Malacca—will be subject to the innocent passage regime; submarines would be required to surface and show their flags and aircraft could not overfly without permission of at least one of the states bordering the strait. The 1982 treaty, however, recognizes important exceptional *rules for straits*,¹⁹ including Gibraltar and Malacca, that are "used for international navigation." For these straits, the treaty would establish transit passage rights for foreign traffic. These rights, which the treaty balances against the interests of the strait-bordering nations, would include the right of submerged transit and of overflight.

A similar accommodation of international and local interests was accomplished by UNCLOS III for archipelago nations. These States, composed entirely of island groupings, prefer to draw baselines around the outer edges of their outermost islands and claim the waters thus enclosed as internal waters. The 1982 Convention creates the concept of *archipelagic waters*²⁰ for these areas. The archipelagic state will have sovereignty over its enclosed waters, but foreign vessels and aircraft will be allowed transit rights (termed the "right of archipelagic sealanes passage") nearly identical to the rights of transit passage through straits used for international navigation.

The *high seas*, shrunken in the 1982 treaty to a mere 60 percent of its early 20th-century existence, continues to exhibit its traditional characteristics—at least in the water column above the seafloor. Beyond the territorial sea, beyond the EEZ, beyond the legally defined continental shelf and beneath the planet's deep waters, lies *The Area*.²¹ This is the deep seabed beyond national jurisdiction, the vast submerged realm that, according to the 1982 Convention of the Law of the Sea, is the "common heritage of mankind." The new treaty would establish

a virtual government for this realm. It would be known as the International Sea-Bed Authority (ISA). Like many governments, the ISA would be composed of a sort of legislative branch (the one-nation-one-vote-Assembly), an executive branch (the Council, with weighted representation), a judicial branch (the Sea-Bed Chamber of the International Tribunal for the Law of the Sea), and a bureaucracy. The ISA would also include a controversial operating arm to be known as "the Enterprise."

The primary purpose of the ISA, as envisioned early in the Conference, would be management of manganese-nodule mining on the deep seabed. The ISA would grant exploratory and production licenses to miners, collect royalties and other fees, and make disbursements of revenue to the poorer members of the world community, in accordance with the common-heritage principle.²²

When President Reagan announced his decision to reject the 1982 Convention, he cited as the reasons for rejection only aspects of the treaty that dealt with the ISA and deep seabed mining. The significant reasons for rejection include the following:

- Access to seabed minerals by private mining companies of the United States and other industrialized countries would be hampered by the treaty's so-called "parallel system." Each private applicant would be required to submit two mine sites of similar value. The ISA would be allowed to choose one of the two sites for its "bank" and could allow the private applicant to mine the other site. The "banked" mine site would be available for mining by the ISA's operating arm, the Enterprise, or by a developing country. The U.S. miners and the Reagan administration thus viewed the Enterprise, with some justification, as a favored competitor in the fledgling seabed business.

- To ensure that the Enterprise and any developing-nation miners have the necessary technology for mining their shares of the seabed, the 1982 Convention would require that private applicants, who have spent years developing seabed technology sell their know-how to the ISA on fair terms. This mandatory transfer-of-technology provision is especially irksome to the Reagan people.

- Another galling requirement in the seabed part of the new treaty concerns financing the Enterprise's operations. Obviously, even with a promising mine site and equipped with seabed technology, the Enterprise will not be able to conduct mining operations without sufficient financial backing to cover the enormous costs involved (now estimated to be nearly two billion dollars per mine site). The new treaty would require that the richer, industrialized nations provide loans on easy terms, with each lending nation's obligations proportional to its share of the UN budget. Thus, the United States' loan share, at 25 percent, would be the highest if the United States were to become a party to the treaty.

- The 1982 Convention also places production ceilings on seabed minerals, another feature the Reagan administration found objectionable. The limits were

placed in the treaty at the instigation of those countries, mostly of the Third World, who are currently producing the same minerals from land-based sources and who thus feel threatened by the prospective seabed competition. As it turned out, the negotiations led to very high production limits that do not pose serious restrictions on seabed miners; nevertheless, the United States objects in principle to production ceilings.

- Another cited reason for U.S. rejection of the UNCLOS III treaty was the failure to guarantee to the United States a seat on the ISA's Council. This was especially irritating in light of the treaty's guarantee of three Council seats to states from "the Eastern European (Socialist) region," all of whom would probably be controlled by the Soviet Union. Actually, a last-minute change in the draft treaty led to a provision that now guarantees a Council seat to the "the largest consumer [of seabed minerals]," a phrase understood to refer euphemistically to the United States.

- One of the most serious U.S. objections to the 1982 treaty concerns amendment of the seabed mining provisions. The treaty provides for a Review Conference 15 years after the start of commercial operations, and a three-fourths majority vote can eventually be used to change the structure of the seabed regime. Since the seabed regime could thereby be amended without U.S. concurrence, much less with Senate advice and consent, the procedure raises U.S. constitutional questions in addition to international political questions. A U.S. fear is that these amendment procedures will be used in the future to change the "parallel system"—in which private miners are granted some access to seabed minerals—to an ISA-Enterprise monopoly dominated by Third World interests. Although other analysts argue that this fear is exaggerated or unwarranted, it remains a primary basis for U.S. rejection of the treaty.²³

At base, the Reagan rejection of the 1982 Convention on the Law of the Sea rests on ideological underpinnings, principally a fervent belief in the free market system. It is felt, with clear justification, that the deep seabed provisions of the new treaty not only fail to uphold the free-enterprise philosophy in its rules for the seabed mining industry, but are also part of a general Third World, NEIO-inspired attack on that philosophy.²⁴

This list of principal U.S. objections to the new treaty—if viewed in isolation from the rest of the treaty—clearly demonstrates to many, even most Americans, that the treaty is indeed flawed in light of U.S. seabed interests. If, however, the treaty is so flawed, so objectionable from a U.S. perspective, we should ask the obvious next question: how did we get into this mess? The United States has not been standing on the Conference sidelines, gaping in horror as the eventual treaty materialized. We have been a primary "mover and shaker" in UNCLOS III. What were we doing all this time?

To a large extent, we have been busy creating the very treaty we now reject. Let's look at the U.S. record during the emergence of the new law of the sea picture.²⁵

1945—The Truman proclamations on the continental shelf and on fisheries (conceived in pre-WWII days but issued at the beginning of U.S. tenure as a global naval superpower) instigate, or at least accelerate, coastal nation expansionism.

Mid-1960s—The trend toward seaward expansionism of coastal-state sovereignty and jurisdiction so concerns the United States as a global ocean power that it enters into discussions with the other global naval power—the USSR—on what to do about the impending threat to free navigation, especially through straits. The two superpowers determine that international agreement with coastal nations is the best means to approach the problem. Offshore fisheries jurisdiction was to be the trade-off for coastal nations. However, the interest in deep seabed minerals enters the picture as a new bargaining chip.

1970—President Richard Nixon presents a detailed proposal for an International Sea-Bed Resource Authority, based on the “common heritage” concept. The Nixon proposal is such a generous concession to landlocked and Third World states that, had it been accepted and adopted outright, it would have been considerably more objectionable to the current U.S. administration.²⁶ In any case, the proposal is rejected by the Third World nations, largely because it is a U.S. proposal. Again, the United States is willing at this time to make such a large concession in the interest of preserving unrestricted rights of vessel navigation and overflight in the face of expanding jurisdictional claims by coastal nations. Although the Nixon proposal is rejected, it thereafter provides the framework for negotiations on a seabed mining regime.

1976—By now, UNCLOS III is well under way. Favorable navigation and overflight rights, including straits passage rights for aircraft and submerged submarines, are part of the package thus far negotiated, but the Conference is bogged down on the deep seabed mining regime. Basically, the nations representing private miners—the United States and a few other industrialized states—want relatively unrestricted access to seabed minerals by private miners. The Group of 77, a bloc of about 120 nations of the Third World, prefers a new International Sea-Bed Authority that would *itself* mine the seabed. A third, but overlapping group—producers of minerals from land-based sources—want the treaty to protect them from competition from seabed minerals.

Enter Henry Kissinger, U.S. Secretary of State, who wants the Conference to move through its seabed-regime impasse and adopt a new treaty so that the United States can feel more secure about its crucial national security interest in wide freedoms of navigation and overflight. Here is what Secretary Kissinger proposes in 1976 at UNCLOS III:

- A “parallel” system of mining, whereby private-miner applicants would present two substantially identical mine sites to the International Seabed Authority. The ISA would keep one for itself, to be mined by its operating arm “the Enterprise” or by a developing country.

- The Enterprise would be financed by loans, with easy terms, from the industrialized countries.

- The developed, industrialized countries and their private miners would be encouraged to transfer the necessary technology to the Enterprise and developing-State miners.

- Production limits would be set on behalf of those States whose land-based miners would suffer competition from the production of seabed minerals.

- Periodic review conferences should be held to amend the seabed mining regime as necessary or appropriate.

1976—a big year—over the objections of the United States UNCLOS III negotiators, the U.S. Congress finally adopts its own 200-mile zone—limited to fisheries management jurisdiction.²⁷ This is quickly followed by the proclamation of a similar Soviet zone and, after a time, by a Japanese 200-mile zone. Many other nations also follow suit, thereby solidifying the 200-mile zone concept as a *fait accompli* of customary international law²⁸ and depriving the U.S. UNCLOS III negotiators of an important bargaining chip.

1980—Congress again steps in, this time with the acquiescence of the U.S. negotiators, and passes the Deep Seabed Hard Mineral Resources Act.²⁹ This law purports to be interim legislation designed to license U.S. miners to mine the deep seabed and to encourage other mining countries (such as Japan, the United Kingdom, West Germany, Belgium, the Netherlands, and Italy) to do the same and to reciprocate, pending adoption of an UNCLOS treaty. Our negotiators acquiesce because the Conference is again deadlocked and it is felt that the congressional initiative will get it moving again. It does, and consensus agreement on virtually all aspects is achieved in the Conference’s 1980 Geneva session. One more session in early 1982 is all that is needed to wrap up the few remaining details.

January 1981—The presidential administration of Ronald Reagan comes to Washington. At the instigation of the new president’s UNCLOS appointees, the Conference is put on hold while the draft treaty is subjected to a year-long policy review. When the United States returns to the bargaining table in early 1982, its demands that substantive parts of the already-negotiated package be reopened and its perceived unwillingness to bend on hardly any point lead to the adoption of the new treaty over U.S. objections and its negative vote.³⁰

Thus it is clear that U.S. actions have been, in large measure, responsible for the new shape of the international law of the sea, and for the structure of the 1982 Convention as well. Many of the now-objectionable parts of the new treaty began as concessions by U.S. negotiators, who, until 1981, were primarily

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concerned with the adverse national security implications inherent in the perceived global trend toward inhibiting freedom of ocean navigation and overflight.

The United States does indeed have a national interest in access to seabed minerals; it also has an important interest in preserving freedoms of the high seas in as broad an area as possible. In fact, the United States has important national interests in virtually every aspect of ocean use. It is not only a major maritime power, but it is also one of the most important coastal nations and thus shares with all coastal nations the interests and concerns regarding use of the seas off its coasts. A scorecard that lists all U.S. interests in the seas, one that does not focus on the deep seabed regime to the virtual exclusion of other ocean interests, shows that the United States would not fare badly at all as a party to the 1982 treaty:

- Living and nonliving resources off U.S. coasts are vast and valuable. The new treaty's EEZ would confirm U.S. sovereign rights to those resources in the largest EEZ space, more than 2.2 million square nautical miles, assigned to any single nation. (The recent Presidential Proclamation of a U.S. EEZ attempts to lay claim to these resources unilaterally,³¹ but other nations assert that the United States cannot claim the benefits of the new treaty without becoming a treaty party and recognizing the negotiated concessions.)
- Significant environmental protections are granted by the new treaty to coastal nations, and the United States, as a major port state and importer of shipborne oil, could benefit a great deal from these.
- Freedom of navigation and overflight is, for all practical purposes, guaranteed beyond twelve miles everywhere, and rights of passage through international straits, including submerged passage and overflight, are allowed even within twelve-mile territorial seas. Similar passage rights are also allowed through archipelagic sea lanes.
- Freedom of scientific research, clearly in the U.S. national interest, is seriously impeded within EEZs under the 1982 treaty's provisions. Our oceanographers, however, generally prefer the treaty to the alternative, which they rightly feel will soon be (or is now) a customary law of absolute exclusion.³²
- Dispute settlement mechanisms for nearly all types of future ocean controversies are part of the 1982 treaty, largely due to U.S. efforts. Even the Soviet Union, for one of the first times in its negotiating history, went along with the consensus of the conference that most ocean law disputes should be submitted to compulsory dispute settlement before a special International Tribunal for the Law of the Sea, or the International Court of Justice, or an arbitration board.
- International legal stability would, of course, be enhanced by a successful, widely ratified Law of the Sea Treaty, and the United States, with the greatest

interest in the many uses of the world ocean and as a traditional adherent to the rule of law, would benefit from such stability in ocean law.

- The deep seabed mining regime, the focus of current U.S. objections to the treaty, is a minus on any U.S.-interests scoreboard. All the reasons for rejecting *that regime* cited by the Reagan administration *are valid*. But one might question whether these reasons are sufficiently serious that they outweigh the clear advantages for the United States in the rest of the treaty. Those who still urge the United States to retract its rejection of the treaty point out that, because of inflation and the present and projected state of global metals markets, commercial seabed mining is not likely to occur until well into the next century. They also note that because of UNCLOS III's eleventh-hour adoption of a Pioneer Investors Protection Resolution (the PIP Resolution), U.S. miners and those of the other industrialized countries would be likely to enjoy a virtual seabed mining monopoly under the new treaty for several decades.

Despite these arguments and others that emphasize the treaty's net benefits for the United States, it probably must be admitted that the United States is committed to nonparticipation in the treaty. Certainly the Reagan administration is adamant in its rejection. True, a future president could sign the 1982 treaty and submit it to the Senate for its advice and consent to ratification. But the Senate, which must approve by a two-thirds majority, is considered unlikely to consent to ratification.

So, where do we go from here? The United States still has the whole array of national interests and concerns regarding uses of the seas by us and by others. How do we protect those interests in the current state of confusion?

First, we should remind ourselves that the ocean-use problems that instigated UNCLOS III still exist and that international rules concerning uses of the sea also exist and will continue to develop, in one way or another. By rejecting the UNCLOS III treaty, the United States has simply rejected a previously selected means for controlling the rule-development.

Second, we should remember that rules of international law come about in essentially two ways: (1) By State practice—the national claims and responses to claims and the many other expressions of international practice that reflect relatively uniform recognition of proper norms for behavior of nation States—which is referred to as customary law. (2) By international agreement, or treaty, which creates contractual rules binding only on treaty parties. The international legal system recognizes no legislature but sometimes, as in the case of UNCLOS III, something like legislation is attempted through the device of a treaty or set of treaties. In these instances, broad consensus by those to be governed by the rules is obviously necessary for their effectiveness.

Because of its objections to the 1982 UNCLOS III treaty, the United States has determined to upset the broad consensus that had been developing in that Conference, to thus cause the new treaty to fail and, presumable, to adopt a new

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strategy for controlling the development of ocean law rules. The thrusts of this new strategy appear to be twofold: (1) To influence or direct the present understanding of customary law and its future course. (2) To enter into discussions and negotiations with appropriate nations with a view toward achieving agreements or understandings favorable to U.S. ocean interests. Let's briefly examine some aspects of these two approaches.

Control of customary law: The United States continues to assert that: The deep seabed beyond national jurisdiction is "free high seas" as a matter of customary international law; thus, deep seabed minerals are free for the taking by any nation which does not bind itself contractually to the 1982 treaty's deep seabed regime. (Third World nations, and some others, disagree, relying principally upon the UN General Assembly Resolutions declaring the deep seabed the "common heritage of mankind" and purporting to impose a ban on mining the seabed outside the international system now described in the new treaty.)

Freedom of navigation and overflight for all vessels and aircraft—including military vehicles and submerged submarines—is recognized by custom everywhere beyond the territorial sea, even within 200-mile zones. The United States will continue to assert this principle by words and deeds. On 10 March 1983, President Reagan proclaimed an Exclusive Economic Zone for the United States and used the occasion also to proclaim, in no uncertain terms, the U.S. view that customary international law—as reflected and articulated, but not created, in the 1982 treaty—includes the rule of freedom of navigation and overflight everywhere seaward of territorial seas.³³ (Some nations, exemplified by Brazil,³⁴ disagree.)

Rights of transit passage for submerged submarines and for aircraft through and over straits, even those blanketed by territorial seas, exist as a matter of historical practice, which customary law recognizes and which, again, is articulated but not established in the UNCLOS III treaty. (Many nations, and not just Third World countries, disagree.)

Similar rights of transit passage are recognized through and over the waters of archipelagic states. (Some nations disagree.)

Discussions and negotiations: While it tries to affect customary law trends, the United States will also continue to conduct talks and negotiations with other states regarding various American ocean interests.

As to deep seabed mining, the United States is not only attempting to ensure that the 1982 treaty fails, but that the mining nations enter into their own "mini-treaty" to establish a deep seabed mining regime more compatible with free enterprise precepts. Since several of these mining nations have signed (but not yet ratified) the 1982 Convention, chances for U.S. success in this venture remain questionable.

As to the other major U.S. ocean interest—navigation and overflight—the United States is trying to achieve understandings with such important straits states as Spain and Indonesia (also an archipelagic state) concerning U.S. positions on customary law and on rights of passage.

Other U.S. interests will be pursued along similar paths, although it appears likely that, for these interests, the United States will be careful to make sure its positions track the 1982 treaty's provisions as closely as possible. Thus, for example, the President's EEZ proclamation and its accompanying policy statement indicate that the United States will abide by assertions of jurisdiction over scientific research by other nations in the EEZs, if such jurisdictional claims comply with the "customary" rules articulated in the UNCLOS III treaty.³⁵

What does all this confusion and maneuvering mean for the Navy? First of all, it should be apparent that "freedom of the high seas"—an international-law citadel that has stood for centuries—is under siege. In the absence of the 1982 treaty, or something like it, the 200-mile zone concept is likely to continue to evolve in directions that will impose further restrictions on navigation and overflight, and this will be especially true for military vessels and aircraft. The simple fact is that most nations are coastal nations who have no global navies and therefore no perceived interest in keeping their offshore waters free for passage and military maneuvers by superpower forces. Indeed, the 200-mile "barrier" could soon be breached.

Passage through straits less than 24 miles wide (i.e., those covered by one or more nations' twelve-mile territorial seas) could be increasingly hampered by legal objections of the straits States and by others anxious to make sure that the United States, in remaining outside the 1982 treaty, is deprived of the "benefits" of the UNCLOS III package deal. Similar challenges could meet American attempts to exercise transit passage rights through and over archipelagic waters.

Second, the defense of the free-seas citadel could be costly in several ways. Costs of achieving understandings or agreements with other nations could be significant. For example, it is not unlikely that Spain will place U.S. overtures regarding passage through the Strait of Gibraltar in a package with U.S. concerns on Spain's relationship to NATO and the renegotiation of U.S. bases agreements.

The United States could, of course, play the tough guy and simply go it alone—do what it wants to do anywhere in the ocean—without obtaining the consent of other affected and objecting nations. This approach, however, could be costly in several ways:

- It could mean incurring the ill will of allies, friends and nonaligneds.
- It would certainly further alienate Third World nations.
- It could precipitate an acceleration of the pendulum swing toward further coastal nation expansionism, making the job that much more difficult.

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- It would mean taking military risks—for example, in challenging assertions of coastal-nation restrictions on offshore naval movement, or in protecting U.S. seabed miners.
- There would certainly be legal challenges in the International Court of Justice.

The impact of these uncertainties will fall, in the first instance, on those charged with planning the movement of military ships and aircraft on, under, and over the sea. There will be added political and, perhaps, military risks in, e.g., sending aircraft or submerged submarines through straits bordered by one or more states that object to such passage on a legal ground or in carrying out maneuvers within 200 nautical miles of those coastal nations who might challenge freedom of navigation in their EEZs. While these risks will, in some cases, suggest that alternative routes or sea areas be selected, in other cases the planners might well decide to challenge the assertions of illegality by doing just the opposite: that is, by sending ships and aircraft into the disputed areas to prevent the perception of acquiescence in the claims of the coastal States.

For the officers on the bridges and in the cockpits, the present and future uncertainties concerning the military uses of the seas will translate into a somewhat greater risk of challenge and confrontation in disputed straits, archipelagic waters, and EEZs. These officers, as representatives of the U.S. Government, will be on the cutting edge of the further development of ocean law rules. Their missions should be carefully planned and executed so that, in concert with ongoing diplomatic efforts, their actions will help to ensure that the broadest possible freedom of ocean navigation and overflight will continue to be part of the fabric of the international law of the sea for decades to come.

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Notes

1. United Nations Convention on the Law of the Sea, opened for signature at Montego Bay, Jamaica, on 10 December 1982, U.N. Doc. A/CONF. 62/122(1982) [hereinafter cited as 1982 Convention].
2. *Department of State Bulletin*, August 1982, p. 71.
3. Proclamation No. 2667, 10 Fed. Reg. 12, 303 (1945).
4. Proclamation No. 2668, 10 Fed. Reg. 12, 304 (1945).
5. Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.
6. The "contiguous zone" to which the treaty's title refers is a zone of special jurisdiction beyond a coastal State's territorial sea. Article 24, in the zone, the coastal State is authorized to prevent and punish violation of its regulations concerning customs, immigrations, fiscal matters, and sanitary measures. The maximum limit for the contiguous zone is twelve nautical miles from shore.

7. The Territorial Sea and Contiguous Zone Convention also includes several complex provisions on establishing baselines from which the territorial sea and other zones are measured and rules for setting boundaries between the seas of opposite and adjacent States.

8. Convention on the High Seas, 29 April 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

9. Convention on the Continental Shelf, 29 April 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

10. See *North Sea Continental Shelf Cases*, [1969] I.C.J. 4, 23.

11. 29 April 1958, 17 U.S.T. 138, T.I.A.S. No. 5959, 559 U.N.T.S. 285.

12. G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28), at 24, U.N. Doc. A/8028 (1970).

13. G.A. Res. 2574D, 24 U.N. GAOR Supp. (No. 30), at 11, U.N. Doc. A/7630 (1969).

14. G.A. Res. 2750C, 25 GAOR Supp. (No. 28), at 26, U.N. Doc. A/8028 (1970).

15. Although the official agenda of the Third Conference lists only 25 major items, the major items are further subdivided. The total number of items thus listed is approximately 85.

16. See arts. 55-75 of the 1982 Convention.

17. See arts. 76-85 of the 1982 Convention.

18. See arts. 2-32 of the 1982 Convention.

19. See arts. 34-45 of the 1982 Convention.

20. See arts. 46-54 of the 1982 Convention.

21. See arts. 133-191 of the 1982 Convention and Annexes III & IV.

22. The 1982 Convention, an extraordinarily complete document, also contains detailed provisions on several topics not mentioned in the text of the article—e.g., marine pollution, scientific research at sea, the status of islands, marine mammals, access by landlocked nations, settlement of ocean disputes, etc.

23. The United States also charges that the common-heritage proceeds of seabed mining might be distributed to such objectionable recipients as the PLO and other national liberation groups.

24. The counterargument points out that U.S. companies frequently put up with even more restrictive, antifree enterprise schemes in resource-extraction deal with Third World countries. See Katz, *A Method for Evaluating the Deep Seabed Mining Provisions of the Law of the Sea Treaty*, Yale J. World Pub Order 114 (1980).

25. The historical record is set forth with great clarity in HOLLICK, *UNITED STATES FOREIGN POLICY AND THE LAW OF THE SEA* (1981).

26. For example, the Nixon proposal would have designated all seabed space seaward of the 200-meter isobath (depth line) as common heritage space. See Comment, *The Nixon Proposal for an International Seabed Authority*, 50 Or. L. Rev. 599 (1971).

27. Fishery Conservation and Management Act of 1976, 16 U.S.C. §1801-1802.

28. But arguably only for the common-core assertion of fisheries management jurisdiction.

29. U.S.C. §1401-1473.

30. Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, Foreign Affairs 1006 (Summer 1982).

31. Proclamation 5030, 48 Fed. Reg. 10,605 (Mar. 14, 1983). A policy statement by the President accompanied the EEZ Proclamation and can be found in *Weekly Comp. Pres. Docs.*, 14 March 1983, at 383.

32. See Wooster, *Research in Troubled Waters: U.S. Research Vessel Clearance Experience, 1972-1978*, in *Science, Technology, and Ocean Development*, 9 Ocean Dev. Int'l L. 219 (Jacobson ed. 1981).

33. *Supra* n. 31.

34. Ambassador Thompson Flores of Brazil recently stated that, according to his country's interpretation, the 1982 Convention on the Law of the Sea [does] not authorize other States to carry out military maneuvers within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives, without the prior knowledge and consent of the coastal State."

35. *Supra* n. 31.