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THE DEEP SEABED HARD MINERAL
RESOURCES ACT AND THE THIRD
UNITED NATIONS CONFERENCE
ON THE LAW OF THE SEA:
CAN THE CONFERENCE MEET THE MANDATE
EMBODIED IN THE ACT?

On June 28, 1980, President Carter signed the Deep Seabed Hard Mineral Resources Act. With the enactment of this domestic seabed mining legislation, it is now practical to evaluate whether UNCLOS III negotiations propose an international seabed mining regime acceptable to the United States. This Comment will analyze the composition and decision-making procedures of the proposed International Seabed Authority with respect to access to the seabed; security of tenure for United States citizens who begin exploration for, or commercial recovery of minerals before the Law of the Sea Treaty enters into force; and the economic feasibility of seabed mining under the proposed treaty in an effort to determine the treaty's acceptability to the United States.

INTRODUCTION

In 1974, the Third United Nations Conference on the Law of the Sea (UNCLOS III) began work on creating a body of law designed to govern the use of the oceans and the ocean's resources by mankind.¹ One of the most difficult tasks for UNCLOS III negotiators has been reaching agreement on the appropriate legal machinery necessary to govern the exploitation of the mineral resources of the deep seabed.² For some time many Nations have recognized that there are manganese nodules containing minerals necessary for modern industry on the ocean floor beneath certain depths.³

1. Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1 (1975).

2. *The History of Negotiations Concerning the System of Exploitation of the International Seabed*, 9 N.Y.U. J. INT'L L. & POL. 483 (1977).

3. Manganese Nodules are oval rocks generally found at depths between 3,200 and 6,000 meters. These nodules contain over 20 elements. Of principle eco-

The United States and other industrialized nations now possess the technology necessary for commercial recovery of these minerals.⁴

Each year since 1971, legislation has been introduced in the United States Congress to create a domestic regime for the exploration and commercial recovery of manganese nodules by United States citizens.⁵ Until this year, the President had vetoed the legislation stating that unilateral legislation might endanger the chances for a successful conclusion of UNCLOS III negotiations.⁶ Still, seabed mining legislation was introduced again in 1980.

On June 28, 1980, President Carter signed the Deep Seabed Hard Mineral Resources Act (the Act).⁷ The Act performs four primary functions. First, the Act creates a temporary legal framework that regulates seabed mining by United States citizens during the period after passage of the Act and before ratification of the Law of the Sea Treaty.⁸ Second, in the event negotiations fail to produce a treaty acceptable to the United States, the regulatory framework established by the Act can become permanent. Third, the Act is a set of instructions for Law of the Sea negotiators regarding the general policies Congress intends the final text of any Law of the Sea Treaty to contain.⁹ Finally, the Act may be viewed as a measuring rod by which the Senate will evaluate a treaty submitted to it for ratification.¹⁰ The first and second purposes of the Act are contained in the substantive provisions of Title I.¹¹ The third and fourth functions, the mandates embodied in the Act, are found in Title II.¹²

Two principal factors influenced President Carter's decision to support unilateral seabed mining legislation. One was the deadlock in negotiations concerning the decision-making procedures of the proposed International Seabed Authority.¹³ The other was the fear that the American seabed mining industry might aban-

omic interest today are manganese, nickel, copper and cobalt. Murphy, *The Politics of Manganese Nodules: International Considerations and Domestic Legislation*, 16 SAN DIEGO L. REV. 531, 533-34 (1979).

4. *Id.*

5. 126 CONG. REC. H4641 (daily ed. June 9, 1981) (remarks of Rep. Murphy).

6. *Id.*

7. 16 WEEKLY COMP. OF PRES. DOC. 1284 (July 3, 1980).

8. The Deep Seabed Hard Mineral Resources Act, Pub. L. No. 96-283, Title I, 94 Stat. 553 (1980) [hereinafter cited as "the Act"].

9. 126 CONG. REC. H4655 (daily ed. June 9, 1980) (remarks of Rep. Santini).

10. *Id.*

11. The Act, *supra* note 8, at Title I.

12. *Id.* Title II.

13. Synopsis, *Recent Developments in the Law of the Sea, 1977-1978*, 16 SAN DIEGO L. REV. 705, 718 (1979).

don the development of seabed mining technology.¹⁴ The seabed mining industry has expressed dissatisfaction with the possibility of agreement within the foreseeable future, and the economic feasibility of seabed mining under the international regime being designed by UNCLOS III.¹⁵

From July 28, to August 29, 1980, the Ninth Session of UNCLOS III met in Geneva, Switzerland. In the wake of the Ninth Session, and with the enactment of domestic seabed mining legislation, it is now practical to evaluate whether the UNCLOS III negotiations propose an international seabed mining regime acceptable to the United States.

This Comment will discuss the composition and decision-making procedures of the International Seabed Authority. To determine whether the proposed international regime is acceptable to the United States, this Comment will analyze access to the seabed; security of tenure for United States citizens who begin exploration for, or commercial recovery of, minerals before the Law of the Sea Treaty enters into force; and the economic feasibility of seabed mining under the proposed treaty.

THE LEGISLATIVE MANDATE

Title II of the Act declares the intention of Congress that any international agreement to which the United States becomes a party should provide: assured and nondiscriminatory access to the hard mineral resources of the deep seabed;¹⁶ security of tenure to United States citizens who have undertaken exploration or commercial recovery under the Act before the international treaty enters into force;¹⁷ and continuation of seabed mining operations under terms, conditions and restrictions which do not impose significant new economic burdens on seabed miners operating pursuant to the Act.¹⁸ Whether an international agreement conforms to the guidelines of Title II will be determined by consideration of the totality of the provisions of such agreement.¹⁹ Before ratification of any international agreement, the Senate will consider the discretionary powers granted to the International Seabed Author-

14. 126 CONG. REC. H4642 (daily ed. June 9, 1980) (remarks of Rep. Murphy).

15. *Id.*

16. The Act, *supra* note 8, § 201(1)(A).

17. *Id.* § 201(1)(B).

18. *Id.*

19. *Id.* § 201(2).

ity and the practical implications for the security of tenure that such discretionary power will entail.²⁰ In determining the implications of such discretionary power the Senate should consider the structures and decision-making procedures of the International Seabed Authority, the availability of impartial and effective procedures for the settlement of disputes; and any other relevant features that may tend to discriminate against exploration and commercial recovery activities undertaken by United States citizens.²¹

THE PROPOSED INTERNATIONAL REGIME

The currently proposed Law of the Sea Treaty would establish the "International Sea-Bed Authority"²² (Authority) to govern mining activities in "the Area."²³ The Authority would consist of an Assembly, a Council, and a Secretariat.²⁴ Policy-making functions would be shared by the Assembly and Council.²⁵

The allocation of power between the Assembly and Council has been a source of much conflict.²⁶ The Group of 77,²⁷ representing the interests of the developing nations, consistently pushed for the Assembly as the supreme policy-making body. The industrialized countries insisted that the bulk of discretionary power be vested in the Council. The reasons for these divergent views are the relative composition and decision-making procedures of each body.

Under the Draft Convention on the Law of the Sea (Informal Text) (Draft Convention), the Assembly would have the power to establish general policies affecting activities in the Area.²⁸ But the Assembly is composed of one member from each State that is

20. *Id.*

21. *Id.*

22. The most recent negotiating text is the Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/CONF.62/WP.10/Rev.3 (1980) [hereinafter cited as "DCLOS/IT"].

23. "The Area" refers to the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. *Id.* art. 1, para. 1.

24. *Id.* art. 158, para. 1. The Secretariat would be comprised of a Secretary-General and staff. The Secretary-General would be the chief administrative officer of the Authority, presiding over all meetings of the Assembly and of the Council. *Id.* art. 166.

25. *Id.* arts. 160 and 162.

26. See text accompanying notes 37-50 *infra*.

27. The Group of 77 is an alliance of developing nations formed at the first United Nations Conference on Trade and Development in 1964. The Group of 77 now has over 100 members. *The History of Negotiations Concerning the System of Exploitation of the International Seabed*, 9 N.Y.U. J. INT'L L. 483, 486 n.18 (1977). [hereinafter cited as "*The History*"].

28. DCLOS/IT, *supra* note 22, art. 160, para. 1.

a party to the agreement.²⁹ For example, if 150 States ratify the treaty, then the Assembly would have 150 members. Each member of the Assembly would have one vote on any question before it.³⁰ Thus, the one-member one-vote system effectively grants policy-making power to a special interest group³¹ only if that group can gather the required number of votes to pass a substantive measure, or if the group can collect enough votes to block action.³² This system will inure to the benefit of the developing countries because of their substantial numbers.³³ The United States and other industrialized nations have understandably refused to rely on the benevolence of the Group of 77 to protect private miners or state-sponsored mining interests. Rather, the industrialized nations have insisted on effective representation and security for their mining interests.³⁴ This representation is found in the composition and voting procedures of the Council.

The Council is the executive organ of the Authority.³⁵ It is empowered to establish the Authority's *specific* policies in conformance with the general policies established by the Assembly.³⁶ The significance of the Council's power can be illustrated by briefly considering the evolution of the negotiations on the allocation of power between the Assembly and the Council. The developing countries wanted the Assembly to have supreme policy-making power.³⁷ Under such a system the developing countries

29. *Id.* art. 159, para. 1.

30. *Id.* para. 5.

31. For the purposes of this discussion seabed miners, other than the Enterprise, will be considered as a special interest group.

32. The number of votes necessary for passage of substantive issues is a two-thirds majority, provided that such a majority constitutes at least a majority of the members participating in that session of the Assembly. As a direct corollary, it would require one-third, plus one, of the members to block a measure. DCLOS/IT, *supra* note 22, art. 159, para. 6.

33. The Group of 77's over 100 members has stood as a unified block since the early stages of the Conference. Since a one-member one-vote system would clearly benefit a large unified group, the Group of 77 may be able to effectively control the Assembly. Thus, as a block, the Group has lent its full support to the proposition that representation and decision-making in all organs of the Authority should be based on the principle of sovereign equality of all nations. The composition and voting procedures of the Assembly mirror this view. For a discussion of the evolution of the Group's position on this subject, see Adede, *The Group of 77 and the Establishment of the International Sea-Bed Authority*, 7 OCEAN DEV. & INT'L L. 31 (1979).

34. See, e.g., *The History*, *supra* note 27.

35. DCLOS/IT, *supra* note 22, art. 162, para. 1.

36. *Id.*

37. See text accompanying notes 28-34 *supra*.

would benefit, because the Assembly will be composed of one member from each State and policy decisions will be made by a one-member one-vote system.³⁸ Since there are more developing nations than developed nations, the developing countries would control the Assembly. Thus, the developing nations fought for the Assembly as the policy-making organ of the Authority with the Council as a clearly subordinate executive organ primarily "responsible for the execution and implementation of the policies emanating from the Assembly."³⁹

The first negotiating text issued by UNCLOS III, the Informal Single Negotiating Text (SNT),⁴⁰ provided that the Assembly would be "the supreme policy-making organ of the Authority"⁴¹ whereas the Council was to "act in a manner consistent with [the] general guidelines and policy directions laid down by the Assembly."⁴² This language was unacceptable to the developed nations. It implied that policy decisions would be made in the Assembly, where the developed countries would have little power. The Council would act merely as an executive organ responsible for implementing the directives of the Assembly. The SNT also provided no assurance that Council decisions would not be overruled by the Assembly on a one-nation one-vote basis.⁴³ Thus, any protection of industrialized country interests built into the composition and procedures of the Council were tenuous at best.⁴⁴

The Revised Single Negotiating Text⁴⁵ (RSNT), issued after the 1976 Geneva session, reflected a significant shift in the balance of power between the Assembly and Council.⁴⁶ Rather than being the "supreme policy-making organ of the Authority"⁴⁷ the Assembly became the "supreme organ . . . with power to prescribe the general policies to be pursued by the Authority. . . ."⁴⁸ The Council was to have the power "to prescribe the specific policies

38. *Id.*

39. Adede, *The Group of 77 and the Establishment of the International Sea-Bed Authority*, 7 OCEAN DEV. & INT'L L. 31, 35 (1979).

40. Informal Single Negotiating Text, A/CONF.62/WP.8/Part 1, (1975) [hereinafter cited as "SNT"], partially reprinted in Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AM. J. INT'L L. 763 (1975) [hereinafter cited as "Oxman"].

41. *Id.* art. 26, para. 1, reprinted in Oxman, *supra* note 40, at 768.

42. *Id.* art. 28, reprinted in Oxman, *supra* note 40, at 768.

43. *Id.*

44. Oxman, *supra* note 40, at 768.

45. U.N. Doc. A/CONF.62/WP.8/Rev.1/Part 1 (1976) [hereinafter cited as "RSNT"].

46. Compare SNT, *supra* note 40, art. 26, para. 1, [and] art. 28, para. 1, with RSNT, *supra* note 45, art. 26, para. 1, [and] art. 28, para. 1.

47. SNT, *supra* note 40, art. 26, para. 1.

48. RSNT, *supra* note 45, art. 26, para. 1.

to be pursued by the Authority"⁴⁹ rather than to "act in a manner consistent with the general guidelines and policy directions laid down by the Assembly."⁵⁰ In addition, the RSNT specifically warned the Assembly to "avoid taking any actions which may impede the exercise of specific powers and functions entrusted to another organ."⁵¹ All of the subsequent negotiating texts have incorporated these changes.⁵²

The practical effect of these changes is to make the Council the dominant policy-making organ of the Authority. The Council will be able to implement the general policies established by the Assembly in such a way as to temper or negate their impact. Since the Council's function is to prescribe the specific policies pursued by the Authority⁵³ and the Assembly may not impede the exercise of those specific powers,⁵⁴ the Council will be able to act without fear of reversal by the Assembly. Thus, to determine whether the Law of the Sea Treaty can meet the mandate of Title II of the Act, it is necessary to consider whether the Council will adequately represent the interests of the United States. This requires an analysis of the composition and voting procedures of the Council.

COMPOSITION OF THE COUNCIL

The Council is to be composed of thirty-six members.⁵⁵ The Draft Convention provides for the selection of eighteen members on the basis of equitable geographic distribution,⁵⁶ and eighteen members as representatives of special interests.⁵⁷ The eighteen members representing special interests will be composed of: four

49. *Id.* art. 28, para. 1.

50. SNT, *supra* note 40, art. 28, para. 1.

51. RSNT, *supra* note 45, arts. 24, para. 4 and 26, para. 3.

52. Informal Composite Negotiating Text, U.N. Doc. A/CONF.62/WP.10, art. 156, para. 4 (1977) [hereinafter cited as "ICNT"]; Informal Composite Negotiating Text (Revision 1), U.N. Doc. A/CONF.62/WP.10/Rev.1, art. 158, para. 4 (1979) [hereinafter cited as "ICNT/R1"]; Informal Composite Negotiating Text (Revision 2), U.N. Doc. A/CONF.62/WP.10/Rev. 2, art. 158, para. 4 (1980) [hereinafter cited as "ICNT/R2"]; DCLOS/IT, *supra* note 22, art. 158, para. 4.

53. DCLOS/IT, *supra* note 22, art. 158, para. 4.

54. *Id.*

55. *Id.* art. 161, para. 1.

56. *Id.* para. 1(e).

57. *Id.* paras. 1(a)-(d). Under the SNT and the RSNT only 12 members of the Council are chosen with the view toward representation of special interests. Six members would represent the industrialized nations' views and six representing

members chosen from the eight States Parties with the largest preparatory investments in deep seabed mining;⁵⁸ four members selected from the major importers of commodities produced from minerals to be derived from the Area;⁵⁹ four members from the major exporters of the minerals to be found in the Area;⁶⁰ and six members chosen from a category including developing States with large populations, landlocked or geographically disadvantaged states, major importers of the minerals to be acquired from the Area, states which are potential producers of the minerals found in the Area, and least developed States.⁶¹

The Western industrialized nations could control three of the four seats on the Council reserved for the States with the largest preparatory investments in deep seabed mining.⁶² Presently the nations most involved in the development of seabed mining technology are Australia, Belgium, Canada, the Federal Republic of Germany, France, Great Britain, Japan, the Netherlands, New Zealand, the Soviet Union and the United States.⁶³ The Socialist countries of Eastern Europe are guaranteed one seat from this group.⁶⁴ The three remaining seats would be filled by nations sharing the same basic interests in seabed mining as the United States except for the Soviet Union. With the exception of Australia, all of these countries are heavily dependent upon foreign supplies of the minerals to be derived from the Area.⁶⁵ All have invested large amounts of money in the development of seabed mining technology. It should therefore be in their common interest to vote as a block in the Council.

The United States and its allies could control three of the four seats in the Council allocated to the nations which are the major

the interests of the States. See SNT, *supra* note 40, art. 27, para. 1; RSNT, *supra* note 45, art. 27, para. 1.

The ICNT increased the Council members representing special interests to its present level of 18. See ICNT, *supra* note 52, art. 159, para. 1.

58. DCLOS/IT, *supra* note 22, art. 161, para. 1(a). Of these four members at least one shall be chosen from the Eastern (Socialist) European region. *Id.*

59. *Id.* para. 1(b). One of the four selected under this criteria will be from the Eastern (Socialist) European region. *Id.*

60. *Id.* para. 1(c). At least two of these four members will be selected from developing countries whose exports of the minerals derived from the Area substantially impact their economies. *Id.*

61. *Id.* para. 1(d). Granting representation to developing states which are potential land-based producers of the minerals to be found in the Area represents a change from previous negotiating texts. Compare ICNT/R2, *supra* note 52, art. 161, para. 1(d), with DCLOS/IT, *supra* note 22, art. 161, para. 1(d).

62. DCLOS/IT, *supra* note 22, art. 161, para. 1(a).

63. J. SULLIVAN, PACIFIC BASIN ENTERPRISE AND THE CHANGING LAW OF THE SEA 57-61 (1977).

64. DCLOS/IT, *supra* note 22, art. 161, para. 1(a).

65. J. SULLIVAN, PACIFIC BASIN ENTERPRISE AND THE CHANGING LAW OF THE SEA 57-61 (1977).

consumers or importers of the minerals to be derived from the Area.⁶⁶ With the exception of the Soviet Union, the nations qualifying as major importers or consumers are all Western industrialized nations.⁶⁷ The Socialist countries of Eastern Europe are guaranteed one seat of the four, thus the Western industrialized nations will be assured of three additional seats in the Council.

The nations occupying the ten remaining Council seats allocated to special interest groups⁶⁸ cannot be expected to protect United States interests. Four members are to be selected from States that are major land based exporters of the minerals acquired from the Area.⁶⁹ It would be unreasonable to expect these land based exporters to protect the interests of the seabed miners when they will be in direct competition for the world minerals market. Six members of the Council are to be chosen from developing countries with special interests.⁷⁰ Representatives from developing nations cannot be expected to protect United States interests. Thus, the remaining industrialized nations representatives must come from the eighteen seats allocated on the basis of equitable geographical distribution.⁷¹

Eighteen members of the Council are elected to ensure an equitable geographical distribution in the Council as a whole.⁷² The geographical regions from which members will be chosen are "Africa, Asia, Eastern Europe, Latin America, and Western Europe and others."⁷³ The number of seats allocated to each region under this section will depend upon how the principle of equitable geographical distribution is defined. One commentator has estimated that the United States and its close allies will be able to control either three or four of the Council seats allocated to "Western Europe and others."⁷⁴

66. DCLOS/IT, *supra* note 22, art. 161, para. 1(b).

67. *Commodity Research Bureau*, [1980] COMMODITY YEARBOOK 119. Major importers were ascertained by comparing the Table listing the largest producers of copper with the Table listing largest consumers of copper, on the rationale that those countries consuming, but not producing, are importing.

68. DCLOS/IT, *supra* note 22, art. 161, paras. 1(c)-(d).

69. *Id.* para. 1(c).

70. *Id.* para. 1(d).

71. *Id.* para. 1(e).

72. *Id.*

73. *Id.*

74. *The History*, *supra* note 27, at 499-500 n.69. For the purpose of this discussion it will be assumed that only three seats on the Council will be controlled by the United States and its allies on the basis of equitable geographical distribution.

The United States and its close allies can thus expect to control nine of the thirty-six Council seats.⁷⁵ Therefore, nine members of the Council may be reasonably relied upon to support the principles of assured and nondiscriminatory access to the minerals of the deep seabed, and security of tenure under reasonable terms, conditions and restrictions for those States or their nationals who have begun seabed mining activities before the International Seabed Authority comes into being. The influence that nine members may have on policy emanating from the Council is contingent upon the number of votes necessary to pass or block a measure before the Council.⁷⁶

DECISION-MAKING IN THE COUNCIL

The most significant obstacle to completion of the seabed mining negotiations has been the impasse over Council voting procedures.⁷⁷ The means by which special interest groups can insure that important decisions will not be made contrary to their interests is by possessing sufficient voting strength in the Council or by limiting the discretion of the Authority in the provisions of the treaty itself.⁷⁸ Each of the three main groups in the negotiations—developing countries, Western industrialized countries, and the Socialist countries of Eastern Europe—has insisted on a voting formula that would protect its own vital interests while still enabling the Council to function.⁷⁹

Early attempts to develop a voting formula acceptable to all the interests had little success. The first negotiating text,⁸⁰ issued at the end of the 1975 Geneva session, provided that voting on sub-

Where it would make a difference whether three or four seats are controlled, the implications of both will be discussed.

75. Three of the seats will come from those allocated to the nations with the largest investments in seabed mining. *See* text accompanying notes 62-64 *supra*. Three Council seats will come from those reserved for the major importers and consumers of the minerals to be obtained from the Area. *See* text accompanying notes 65-67 *supra*. Three seats in the Council will be based on the principle of equitable geographical distribution. *See* text accompanying notes 72-74 *supra*.

76. *See* text accompanying notes 80-120 *infra*.

77. Paul Engo is the chairman of Negotiating Group 3. The group is concerned with the negotiations relating to the composition, powers and functions of the organs of the Authority. Mr. Engo has said: "The key to success in the negotiations lay in finding a formula for decisionmaking in the Council. . . ." U.N. Press Release SEA/422, at 5 (Sept. 2, 1980). *See, e.g.,* Richardson, *Introduction*, 16 SAN DIEGO L. REV. 451, 452 (1979).

78. Richardson, *Introduction*, 16 SAN DIEGO L. REV. 451, 452 (1979). Ambassador Richardson states that: "It is not at all clear, however, that sufficient details could be included in such a treaty to overcome a failure to secure a mutually acceptable and workable decisionmaking structure." *Id. Cf.* U.N. Press Release SEA/422, at 5 (Sept. 2, 1980).

79. U.N. Press Release, SEA/422, at 5 (Sept. 2, 1980).

80. SNT, *supra* note 40.

stantive questions in the Council would be by two-thirds-plus-one of the quorum.⁸¹ This system was unacceptable to the Western industrialized nations because twelve votes would be required for a veto and the Western industrialized nations could only expect to control nine Council votes, leaving them with no effective veto.⁸² Later versions of the negotiating texts required a three-quarters majority on substantive questions.⁸³ This opened the possibility of a developed nation veto in the Council, if ten votes could be gathered.⁸⁴ The Group of 77 was firmly opposed to the idea of giving any special interest group veto power in the Council.⁸⁵

During the most recent session of UNCLOS III,⁸⁶ the highest priority was given to the question of decision-making in the Council.⁸⁷ The Group of 77 remained adamantly opposed to any voting mechanism based on weighed voting or a veto for any interest or geographical group.⁸⁸ The Western industrialized countries remained firmly committed to a mechanism that offered protection for potential seabed miners and consumers against decisions adverse to their major economic interests.⁸⁹ The Soviet Union emphasized that any formulation that accorded the desired protection for the Western industrialized countries must also accord similar protection to the Eastern European Socialist countries.⁹⁰ Nevertheless, two themes emerged from the early discussions; both offered hope for an acceptable solution to the impasse. First, that the voting mechanism should be determined by the importance of the specific issue to be decided.⁹¹ Alternatively, that de-

81. *Id.* art. 27, para. 6.

82. *The History, supra* note 27, at 499-500.

83. ICNT, *supra* note 52, art. 159, paras. 6-8; ICNT/R1, *supra* note 52, art. 161, paras. 6-7; ICNT/R2, *supra* note 52, art. 161, paras. 6-7.

84. This voting structure emphasizes the need to develop a meaningful definition of "equitable geographical distribution." See text accompanying notes 72-74 *supra*.

85. Adede, *The Group of 77 and the Establishment of the International Sea-Bed Authority*, 7 OCEAN DEV. & INT'L L. 31, 57 (1979).

86. The resumed ninth session of the UNCLOS III was held in Geneva beginning on July 28 to August 29, 1980.

87. United States Delegation Report, at 16 (on file with the San Diego Law Review).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 17.

cision-making by consensus is desirable.⁹²

The formula that emerged from the negotiations is a three-tiered system that divides substantive issues into three categories. The decisions on the most sensitive issues are decided by consensus,⁹³ issues of lesser importance may be decided by a three-fourths,⁹⁴ or two-thirds majority.⁹⁵

Decision-making by consensus gives every member of the Council the power to defeat a proposal.⁹⁶ The consensus procedure is acceptable to the Group of 77 because it does not discriminate among nations.⁹⁷ It is a democratic procedure that does not acknowledge that some members of the Council ought to have greater power in the decision-making process than others. Rather than giving a few powerful nations the strength to defeat a proposal by a negative vote, as in the traditional veto system,⁹⁸ the consensus system gives every member of the Council the power to defeat a proposal. The power is therefore distributed equally among all the members of the Council.

The consensus procedure should be acceptable to nations whose companies and consortia will be making a substantial investment in deep seabed mining. Developed nations have insisted upon a decision-making process that would allow them to defeat a proposal injurious to their interests.⁹⁹ The proposed system grants that veto power. The consensus system grants the industrialized nations exactly the kind of protection they have negotiated for.

Council decisions that are subject to consensus agreement fall into three basic categories: 1) adoption of the rules, regulations, and procedures of the Authority;¹⁰⁰ 2) adoption of measures to protect land based mineral producers from adverse economic effects caused by seabed mining;¹⁰¹ and 3) adoption of amendments to any part of the Convention dealing explicitly with

92. *Id.*

93. For purposes of this discussion the term consensus means the absence of any formal objection. DCLOS/IT, *supra* note 22, art. 161, para. 7(e).

94. *Id.* para. 7(c).

95. *Id.* para. 7(b).

96. *Id.* paras. 7(d)-(e).

97. For a discussion of the reasons other voting procedures were unacceptable to the Group of 77, see generally, Adede, *The Group of 77 and the Establishment of the International Sea-Bed Authority*, 7 OCEAN DEV. & INT'L L. 31 (1979).

98. An example of a veto system which gives a few powerful nations the strength to defeat a proposal by a negative vote is the United Nations Security Council.

99. See text accompanying notes 77-88 *supra*.

100. See DCLOS/IT, *supra* note 22, art. 161, para. 7(d); *id.* art. 162, para. 2(n)(i)(ii).

101. *Id.* art. 161, para. 7(d), art. 162, para. 2(1), art. 150, para. (g), art. 151.

exploitation of the Area.¹⁰²

With regard to the interests of the United States, the most important issues requiring consensus are decisions on the rules, regulations and procedures constituting the basic framework for the exploration and exploitation of the deep seabed.¹⁰³ These decisions are crucial because they shall determine the specific policies of the Authority concerning prospecting, exploration, and exploitation in the Area.¹⁰⁴ Decisions on rules, regulations, and procedures shall also determine the financial management and internal administration of the Authority,¹⁰⁵ as well as the methods of promoting the equitable sharing of benefits derived from the activities in the Area.¹⁰⁶ The consensus requirement will ensure the United States and its allies a meaningful role in the rule-making process.¹⁰⁷

A number of developing countries have expressed skepticism as to the expedience of the consensus procedure. In the plenary debate some developing countries argued that granting a veto to each member of the Council threatened to make the Council inefficient and ineffective.¹⁰⁸ It was feared that the Council might fail to act on matters affecting the developing countries in particular, the most important of which are to be subject to the consensus requirement.¹⁰⁹

These doubts expressed by the developing nations concerning the consensus procedures are well-founded. The ideological and

102. *Id.* art. 161, para. 7(d).

103. *Id.* art. 162, para. 2(n).

104. *Id.* para. 2(n) (ii).

105. *Id.*

106. *Id.* para. 2(n) (i).

107. DCLOS/IT, *supra* note 22, art. 161, para. 7(e). For an illustration of the effect that consensus procedure will have with regard to protection of United States interests see notes 123-42 *infra* and accompanying text.

108. U.N. Press Release, SEA/422, at 8 (Sept. 2, 1980).

109. *Id.* This argument could also be advanced by the industrialized nations because the most important issues dealing with their interests are also subject to the consensus requirement. See text accompanying notes 103-07 *supra*.

The main difference between the consensus procedure and the earlier proposals calling for a three-fourths or two-thirds majority is that the consensus procedure increases the risk of a veto to a proposal concerning the developing country's interests. Under earlier proposals, a veto may not have been possible. Thus, the concern is not that the consensus procedure discriminates unfairly against the developing countries, but that unlike the three-fourths or two-thirds voting requirements, the consensus requirement does not discriminate against any interest, which, with respect to the earlier proposals, is a loss of power to the developing countries.

economic difference between the developing nations, the Western industrialized nations, and the Socialist nations of Eastern Europe are so significant as to make consensus on any significant issue extremely difficult.¹¹⁰ Because of these great differences, the number of issues subject to the consensus requirement are few.¹¹¹ The issues subject to decision by consensus, with the exception of the approval of work plans,¹¹² do not deal with the daily business of the Council.¹¹³ The issues subject to the consensus requirement are of the type that will arise rarely, usually upon the occurrence of a predetermined event.¹¹⁴ Thus, while decision-making by consensus may not be the most efficient procedure, it may be the only procedure acceptable to all concerned. Furthermore, no other approach yet considered has commanded the same general support,¹¹⁵ and no other approach can in fact protect the interests of all concerned.

To reduce the fear that the consensus procedure could be abused and the Council paralyzed, a conciliation procedure was added to the Draft Convention.¹¹⁶ If a member of the Council formally objects to a proposal requiring consensus, the President of the Council would set up a Conciliation Committee "for the purpose of reconciling the differences and producing a proposal which could be adopted by consensus."¹¹⁷ The Conciliation Committee would then have fourteen days to reconcile the disagreement and report back to the Council.¹¹⁸ If the Conciliation Committee is unable to recommend a proposal which could be adopted by consensus, it would set forth the grounds on which the proposal was being opposed.¹¹⁹ The purpose of this procedure is "to impose pressure on the members of the Council to reconcile their differences, to accommodate each other and to come to an agreement."¹²⁰

The importance of the consensus procedure in protecting United States interests cannot be overstated. Title II of the Act

110. The negotiations leading to the voting procedure in the Council is a prime example of the difficulties faced in trying to accommodate divergent interests and still come up with a workable solution. See generally *The History*, *supra* note 27.

111. See text accompanying notes 100-102 *supra*.

112. For a discussion of the procedure concerning the approval of work plans see text accompanying notes 123-42 *infra*.

113. See DCLOS/TT, *supra* note 22, art. 162, paras. 2(1), 2(n)(i)-(ii).

114. *Id.*

115. See *The History*, *supra* note 27; Adede, *The Group of 77 and the Establishment of the International Sea-Bed Authority*, 7 OCEAN DEV. & INT'L L. 31 (1979).

116. DCLOS/TT, *supra* note 22, art. 161, para. 7(e).

117. *Id.*

118. *Id.*

119. *Id.*

120. U.N. Press Release, SEA/422, at 9 (Sept. 2, 1980).

declares in part, "that any international agreement to which the United States becomes a party should . . . provide assured and nondiscriminatory access . . . to the hard mineral resources of the deep seabed . . ."¹²¹ The extent to which such an agreement conforms to this objective is determined in part by examining "the structures and decision-making procedures" of the proposed international regulatory body.¹²² The decision-making process for approval of the work plans submitted by prospective seabed miners illustrates the significance of the consensus procedure with regard to Title II's mandate.

ACCESS TO THE DEEP SEABED UNDER THE CONSENSUS PROCEDURE

To gain access to the minerals of the Area, the Draft Convention would require the prospective miner to submit a work plan to the Council's Legal and Technical Commission.¹²³ The required contents of the work plan would be determined by the terms of the Draft Convention and the uniform and nondiscriminatory requirements established by the *rules, regulations and procedures of the Authority*.¹²⁴ The Draft Convention requires that a work plan submitted to the Legal and Technical Commission: be in the form of a contract;¹²⁵ contain a declaration of sponsorship by an appropriate State;¹²⁶ contain an assurance that the applicant will comply with the provisions for transfer of technology to the Authority;¹²⁷ and accept as enforceable the rules and regulations of the Authority.¹²⁸ These requirements will not be difficult to satisfy. Any significant and required contents of work plans will be established by the rules, regulations and procedures of the Authority.¹²⁹ As discussed earlier, the rules, regulations and procedures of the Authority would be determined by the Council in compliance with the consensus procedures.¹³⁰ The United States, therefore, will be able to influence the required content of the work plans, and thus protect United States' interests.

121. The Act, *supra* note 8, § 201(1)(A).

122. *Id.* § 201(2).

123. See DCLOS/IT, *supra* note 22, art. 153, para. 3.

124. *Id.* Annex III, art. 6, para. 3.

125. *Id.* art. 153, para. 3.

126. *Id.* Annex III, art. 4, para. 1.

127. *Id.* Annex III, art. 5, para. 1. See notes 178-84 *infra* and accompanying text.

128. DCLOS/IT, *supra* note 22, Annex III, art. 3, para. 4(b), art. 4, para. 6(a).

129. *Id.* Annex III, art. 6.

130. *Id.* art. 162, para. 2(n)(ii).

Upon receipt of the work plan the Council's Legal and Technical Commission must recommend that the Council approve or reject the plan.¹³¹ The procedures employed by the Legal and Technical Commission in making this decision are to be established by the rules, regulations and procedures of the Authority.¹³² The industrialized nations have consistently argued that the work plan approval process must be as automatic as possible if the applicant is qualified.¹³³ By use of the consensus procedure in formulating the rules, regulations and procedures of the Authority, the industrialized nations may effectively influence the decision-making procedures to be employed by the Legal and Technical Commission, and thus protect their interests.

If the Legal and Technical Commission recommends approval of the work plan, the plan will be deemed approved by the Council unless a Council member submits a specific written objection, alleging noncompliance with the terms of the Convention.¹³⁴ In the event that an objection is filed, the dispute will be subjected to the conciliation procedures discussed above.¹³⁵ If at the end of the conciliation process the objection is still maintained, the work plan will be deemed to have been approved by the Council unless the Council disapproves the plan by consensus.¹³⁶

The practical implication of this procedure is to virtually guarantee access to the deep seabed if the Legal and Technical Commission approves the work plan. Access could be denied only if the Council unanimously rejected the work plan.¹³⁷ Excepting the situation where rejection of a plan is clearly justified, the chances of unanimous disapproval of a work plan are essentially nonexistent because of the likely composition of the Council.¹³⁸

Does this procedure constitute assured and nondiscriminatory

131. *Id.* art. 165, para. 2(b).

132. *Id.* art. 163, para. 11. This represents a change from the previous text. The second revision of the Informal Composite Negotiating Text provided for decision-making in the Commissions of the Council on the basis of a two-thirds majority of the members. ICNT/R2, *supra* note 52, art. 163, para. 10.

133. U.N. Press Release, SEA/422, at 9 (Sept. 2, 1980).

134. DCLOS/TT, *supra* note 22, art. 162, para. 2(j) (i).

135. *Id.* For a discussion of the conciliation process see text accompanying notes 110-20 *supra*.

136. DCLOS/TT, *supra* note 22, art. 162, para. 2(j) (i). Consensus under this section excludes the State or States sponsoring the applicant, otherwise the sponsoring State could block disapproval by the Council (under these circumstances) merely by casting its vote in favor of approval. *Id.*

137. *Id.* The use of "unanimous" here assumes that the sponsoring State will not participate in the voting.

138. See text accompanying notes 55-76 *supra*. The sponsoring State, because of the representation of special interests in the Council, is virtually assured of at least one ally. This would effectively block disapproval because of the consensus requirement.

access to the hard mineral resources of the deep seabed? If the decision-making criteria of the Legal and Technical Commission are nondiscriminatory then access to the Area is assured.

The Draft Convention contains a specific caveat to the Authority that the granting of opportunities for activities in the Area should be exercised so as to avoid discrimination.¹³⁹ The Draft Convention directs the Legal and Technical Commission to make its recommendation to approve or reject a work plan only upon the terms of the Draft Convention and the rules, regulations and procedures of the Authority.¹⁴⁰ The substantive requirements of the Draft Convention are neutral on their face¹⁴¹ and the rules, regulations and procedures of the Authority are to be established by consensus in the Council.¹⁴² The proposed international agreement provides for assured and nondiscriminatory access to the hard minerals of the deep seabed to as great an extent as the United States can reasonably expect. Therefore, Title II's mandate concerning assured and nondiscriminatory access to the hard mineral resources of the deep seabed will be satisfied under the Draft Convention.

Title II of the Act also prescribes that access to the seabed should be attained under reasonable terms and conditions,¹⁴³ and that the proposed international agreement should provide security of tenure to those United States citizens that have undertaken mining activities before the ratification and entry into force of such agreement.¹⁴⁴ Title II also demands the right to continue mining operations under terms and conditions which do not impose significant new economic burdens upon United States citizens.¹⁴⁵ The intent of the provision is to ensure the continuation of mining operations on a viable economic basis.¹⁴⁶

SECURITY OF TENURE

Representatives of the seabed mining industry have consist-

139. DCLOS/IT, *supra* note 22, art. 152, para. 1.

140. *Id.* art. 165, para. 2(b).

141. For a discussion of the Draft Convention's requirement see text accompanying notes 55-76 *supra*.

142. DCLOS/IT, *supra* note 22, art. 161, para. 7(d).

143. The Act, *supra* note 8, § 201(1)(A).

144. *Id.* § 201(1)(B).

145. *Id.*

146. 126 CONG. REC. H4644 (daily ed. June 9, 1980) (excerpts from the American Mining Congress Analysis, *reprinted in* the remarks of Rep. Derwinski).

ently argued that they cannot prudently make the substantial investment in exploration and exploitation of the seabed unless the terms of the proposed international agreement assures security of tenure to qualified miners.¹⁴⁷ The mining consortia fears that substantial investments made in surveying and mining a seabed site under domestic legislation may be lost if a subsequently ratified international agreement does not guarantee access to the same site.¹⁴⁸

In response to concerns of American mining interests, Ambassador Richardson initiated negotiations to insure the text of the international agreement incorporated provisions protecting the preparatory investment.¹⁴⁹ The negotiations have thus far been unsuccessful. In the most recent session of the Conference, it became clear that passage of the Act by the United States and passage of similar legislation by the Federal Republic of Germany had complicated the negotiations.¹⁵⁰ A meeting on the subject, sponsored by the United States, failed to attract a significant number of participants from the Group of 77.¹⁵¹ Moreover, the American Mining Congress has stated its dissatisfaction with the United States' proposal for the protection of interim investment.¹⁵²

The Group of 77 is opposed to the inclusion of preparatory investment protection in the Law of the Sea Treaty. The developing countries have continuously opposed deep seabed mining in the absence of a Law of the Sea Treaty arguing that such action would violate existing International Law.¹⁵³ They have also expressed concern "that treaty provisions aimed at protecting the continuity of operations of existing private ventures would serve to move these activities even farther out in front of the Enter-

147. *Id.*

148. Testimony by Ambassador Richardson before the House Foreign Affairs Committee, April 17, 1980, *reprinted in* 126 CONG. REC. H4665 (daily ed. June 9, 1980) (remarks of Rep. Bedell).

149. *United States Delegation Report, Third United Nations Conference on the Law of the Sea, resumed ninth session—Geneva*, at 38 (August 29, 1980) [hereinafter cited as *Delegation Report*].

150. *Id.*

151. *Id.*

152. See the American Mining Congress analysis of the State Department proposal, *reprinted in* 126 CONG. REC. H4643-45 (daily ed. June 9, 1980) (remarks of Rep. Derwinski).

153. For the views of both sides on the issue of the legality of unilateral seabed mining, compare U.N. Doc. A/CONF.62/77 (April 25, 1979), *reprinted in* 2 T. KRONMILLER, *THE LAWFULNESS OF DEEP SEABED MINING* 59 (1st ed. 1980) with Murphy, *The Politics of Manganese Nodules: International Considerations and Domestic Legislation*, 16 SAN DIEGO L. REV. 531 (1979).

prise¹⁵⁴ than they are already."¹⁵⁵ The Soviet Union has also suggested that if preparatory investment protection were to be incorporated into the treaty, early applicants could monopolize the best mining sites to the disadvantage of later applicants.¹⁵⁶ To ease the fears that preparatory investment protection would give interim seabed miners an unfair competitive advantage over the Enterprise, the suggestion has been made to create a Preparatory Commission which would prepare for a correspondingly early start by the Enterprise.¹⁵⁷

Under the Act, no permit for commercial recovery may be issued which authorizes recovery to commence before January 1, 1988.¹⁵⁸ The restriction on commercial recovery until 1988 represents a significant change from prior legislative proposals.¹⁵⁹ Previous versions of the bill authorized commercial recovery to begin after July 1, 1982.¹⁶⁰ The significance of this delay in terms of the negotiations for preparatory investment protection are two-fold. First, the delay until 1988 should give UNCLOS III sufficient time to negotiate and enter into force a Law of the Sea Treaty. Second, the delay should ease fears that interim miners under domestic legislation would gain an insurmountable advantage over the Enterprise, particularly if the Conference adopted provisions creating a Preparatory Commission and preparatory investment protection concurrently. Representatives of the seabed mining industry have conceded that the delay will not harm them.¹⁶¹

The Draft Convention contains no provision for security of tenure. It can only be hoped that the barriers to an acceptable provi-

154. The Enterprise is the organ of the International Seabed Authority that would carry out mining activities in the Area on behalf of the Authority. DCLOS/IT, *supra* note 22, art. 170, para. 1.

155. *Delegation Report*, *supra* note 150, at 38.

156. *Id.* *But cf.* the anti-monopoly language contained in the Draft Convention which should alleviate this concern. DCLOS/IT, *supra* note 22, Annex III, art. 6.

157. Compare Plenary Statement by Ambassador Richardson during the General Debate 3 (Aug. 26, 1980) (on file with the San Diego Law Review) with Statement by the Ambassador at large, Elliot L. Richardson 2 (Aug. 29, 1980) (on file with the San Diego Law Review).

158. The Act, *supra* note 8, § 102(c)(1)(D). This section does not preclude issuance of a permit for commercial recovery before 1988. Nevertheless, the permit does restrict commercial recovery until January 1, 1988. See H.R. REP. NO. 411 P. II, 96th Cong., 1st Sess. 51 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 3059, 3085.

159. H.R. REP. NO. 411 P. II, 96th Cong., 1st Sess. 51 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 3059, 3085.

160. 126 CONG. REC. H4642 (daily ed. June 9, 1980) (remarks by Rep. McCloskey).

161. *Id.* at H4665 (remarks by Rep. Bedell).

sion providing protection for interim investment can be overcome. Considering all of the factors the outlook is favorable. Before the recently concluded ninth session in Geneva, Ambassador Richardson expressed optimism,¹⁶² that optimism should not yet be abandoned.

ECONOMIC FEASIBILITY OF SEABED MINING UNDER THE LAW OF THE SEA TREATY

The economic burdens experienced by seabed miners under the Draft Convention would probably be greater than those imposed under the Act. This development would not be surprising.¹⁶³ Whether the burdens imposed under the international regime envisioned by the Draft Convention are reasonable or would allow mining operations to be exercised on a viable economic basis are questions upon which reasonable minds may differ. A detailed analysis of the economic conditions imposed under a regime adopted on the basis of the Draft Convention is not possible, because many of the economic requirements have not yet been established.¹⁶⁴ Nevertheless, a few general comments can be made.

The financial terms of mining contracts between State Sponsored miners and the Authority have generally been agreed upon.¹⁶⁵ The system, as envisioned by the Draft Convention, requires any one holding a mining contract from the Authority to

162. Ambassador Richardson has stated that he has "had the opportunity to develop among delegations of developing countries an understanding of the need for preparatory investment protection and an appreciation of the desirability of clearing the way for seabed mining to get underway . . . as soon as possible following entry into force of the treaty." Testimony before the House Foreign Affairs Committee, April 17, 1980, *reprinted in* 126 CONG. REC. H4665 (daily ed. June 9, 1980) (remarks by Rep. Bedell).

163. It was argued in the House debates, that § 201(1)(B) of the Act was drafted with the understanding that the terms of an international regime would probably be less favorable to United States interests than the Act. *Id.* at H4665 (remarks of Rep. Bedell). Alternate language was suggested for § 201(1)(B) that would have required that treaty terms be "substantially the same" as those in the Act rather than requiring that treaty provisions "do not impose significant new economic burdens . . . with the effect of preventing the continuation of such operations on a viable economic basis." It was argued that this language recognized that economic terms under an international regime could be less attractive than those imposed by the Act, while still satisfying the Congressional mandate of Title II. 126 CONG. REC. H4649 (daily ed. June 9, 1980) (remarks of Rep. Bingham); 126 CONG. REC. H4665 (daily ed. June 9, 1980) (remarks of Rep. Bedell).

164. *See*, DCLOS/IT, *supra* note 22, Annex III, art. 13.

165. Ambassador Koh, chairman of the negotiating group dealing with the financial concerns of seabed mining, reported that "the Group of 77, the Socialist countries of Eastern Europe, the United States, the United Kingdom, and several other industrialized nations have expressed their ability to live with this proposal." U.N. Press Release, SEA/422, at 15 (Sept. 2, 1980).

pay an initial \$500,000 application fee covering the administrative cost of processing the application;¹⁶⁶ an annual fixed fee of \$1 million;¹⁶⁷ and periodic payments to the Authority based on the value of production and/or the financial return from mining activities.¹⁶⁸ Additional financial terms are to be adopted in the rules, regulations and procedures of the Authority.¹⁶⁹ These additional financial terms are to be adopted with the aim of ensuring optimum revenues for the Authority while stimulating investment by States or State sponsored miners and are to be applied on a uniform and nondiscriminatory basis.¹⁷⁰

Indirect financial conditions will also affect the feasibility of seabed mining under the Draft Convention. One of the most contested economic issues discussed in the Conference has been how to promote seabed mining without wreaking havoc on the economies of the land-based producers of the same minerals.¹⁷¹ The main opponents in the controversy are the major mineral consumers on one side and the land-based producers of the minerals on the other.¹⁷² The production formula proposed by the Draft Convention would allow seabed miners to produce up to sixty percent of the projected annual increase in the world's demand for nickel,¹⁷³ leaving the remaining forty percent to be produced

166. DCLOS/IT, *supra* note 22, Annex III, art. 13, para. 2. If the cost of processing the application is less than \$500,000, the difference would be refunded to the applicant. *Id.*

167. *Id.* para. 3.

168. *Id.* paras. 4-6.

169. *Id.* para. 1. The rules, regulations and procedures are to be adopted by consensus in the Council and approved by the Assembly. The industrialized nations should therefore be able to ensure the reasonableness of any additional financial terms and conditions. *See* text accompanying notes 93-107 *supra*.

170. DCLOS/IT, *supra* note 22, Annex III, art. 13, para. 1. The additional financial terms and condition will also: attract investments and technology; ensure equality of financial treatment to all States or State sponsored miners; provide incentives on a uniform and nondiscriminatory basis for contractors to undertake joint ventures with the Enterprise or developing nations; enable the Enterprise to engage in seabed mining at the same time as State sponsored miners; and ensure that financial incentives provided to contractors shall not result in subsidizing contractors with the effect of placing them at an artificially competitive advantage relative to land-based producers. *Id.* paras. 1(a)-(f).

171. U.N. Press Release, SEA/422, at 11 (Sept. 2, 1980).

172. *Id.* The interests are actually more varied than this statement suggests. Additionally, consideration must be accorded to the interests of newcomers to the land-based mining industry, to potential land-based miners, consumer nations that plan to invest in seabed mining soon and to consumer nations which do not plan to invest in seabed mining. *Id.*

173. The production control formula linked to nickel would allow seabed pro-

by land-based miners.¹⁷⁴

Even though seabed production is limited by this formula, the land-based mineral producers argue that they need greater protection against what they view as "potentially unfair competition."¹⁷⁵ The consuming nations argue that the Draft Convention goes as far as they can allow in protecting land-based miners.¹⁷⁶ Consumer nations contend that any stricter production limitations would threaten the economic viability of seabed mining.¹⁷⁷

Another condition affecting the economic feasibility of mining activities in the Area is a provision requiring, under specified circumstances, the transfer of the technology used in seabed operations¹⁷⁸ from the State sponsored seabed miner to the Authority.¹⁷⁹ Unlike the economic conditions discussed above, the provision requiring the transfer of technology could enhance the economic feasibility of seabed mining.

Under the Draft Convention, the Enterprise, when seeking required technology, must make a good faith effort to obtain the technology it requires on the open market.¹⁸⁰ Only if the Enterprise is "unable to obtain the same or equally efficient and useful technology on the open market on fair and reasonable commercial terms and conditions," may the Enterprise invoke the technology transfer provisions.¹⁸¹ In the event the Enterprise determined that it must turn to the contractor for the required technology, the contractor and the Enterprise would negotiate for the transfer on fair and reasonable commercial terms and conditions.¹⁸²

Although the seabed mining companies have been critical of the requirements transferring technology, the practical effects of the provisions would be to enhance the profitability of seabed

duction of the other minerals to be derived from the Area, principally cobalt and manganese in excess of the growth in demand for these minerals. *Id.*

174. DCLOS/IT, *supra* note 22, art. 151, para. 2(b)(ii).

175. U.N. Press Release, SEA/422, at 11 (Sept. 2, 1980).

176. *Id.*

177. *Id.* at 11.

178. DCLOS/IT, *supra* note 22, Annex III, art. 5, para. 8. Under this provision "technology" is defined as "the specialized equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use those items for that purpose on a non-exclusive basis." *Id.* Many developing nations have called for a more specific definition that would cover mineral processing, transportation and even marketing. Industrialized nations have opposed any change, arguing that the types of technology referred to by the developing countries are not specific to seabed mining and are readily available on the open market. U.N. Press Release, SEA/422, at 14. (Sept. 2, 1980).

179. DCLOS/IT, *supra* note 22, Annex III, art. 5.

180. *Id.* para. 5.

181. *Id.*

182. *Id.*

mining. Seabed mining technology has been developed at an enormous cost¹⁸³ that will continue into the foreseeable future.¹⁸⁴ The provisions for the transfer of technology to the Enterprise under reasonable terms and conditions could considerably ease the burden of the enormous expense required to develop this technology. The result would be that the mining companies would have someone to help share these expenses, thus making mining under the international regime proposed by the Draft Convention a little less economically burdensome.

CONCLUSION

Title II of the Deep Seabed Hard Mineral Resources Act is intended to perform two functions. First, it is a set of instructions by Congress to the Law of the Sea negotiators regarding general policies that Congress intends to be in the final text of any Law of the Sea Treaty. Secondly, Title II may be viewed as a measuring rod by which the Senate should evaluate a treaty submitted to it for ratification.

It was argued in the Congressional debates that Title II was drafted with the understanding that the terms of an international regime would most likely be less favorable to United States interests than the Act.¹⁸⁵ Alternative language was suggested that would have required that treaty terms be "substantially the same" as those in the Act rather than requiring that treaty provisions "do not impose significant new economic burdens . . . with the effect of preventing the continuation of such operations on a viable economic basis."¹⁸⁶ According to some, this provision does not *require* guaranteed access or security of tenure under terms, conditions and restrictions which do not impose significant new economic burdens because any international agreement should be viewed with respect to the totality of its provisions in order to assure a balanced assessment of the entire treaty with respect to the national interest.¹⁸⁷ A literal reading of Title II supports this assertion.

The composition of the Council and the decision-making pro-

183. The Act, *supra* note 8, § 2(a)(11).

184. *Id.*

185. 126 CONG. REC. H4665 (daily ed. June 9, 1980) (remarks of Rep. Bedell).

186. *Id.*

187. *Id.* at H4649; (remarks of Rep. Bingham); *id.* at H4665 (remarks of Rep. Bedell).

cess entailed in the Draft Convention effectively grant access to the hard mineral resources of the deep seabed on a nondiscriminatory basis. The mandate of Title II in this respect is satisfied.

The present Draft Convention contains no provisions granting security of tenure. Without protection for investments made during the interim between enactment of the legislation and ratification of a Law of the Sea Treaty, domestic mining companies cannot prudently make the huge investment necessary to carry on the progress towards exploitation of the seabed. Failure to provide for security of tenure in an international agreement could become the basis for the Senate's refusal to ratify a proposed treaty.¹⁸⁸

The economic burdens experienced by seabed miners under the international regime proposed by the Draft Convention would probably be more severe than those imposed under the Act. But the Act was designed almost exclusively for the protection of United States' interests, whereas the Law of the Sea Treaty is being designed for the benefit of all of mankind. Whether the economic burdens sustained under an international agreement proposed by the Draft Convention would be too severe for State sponsored miners to operate on a viable economic basis, cannot yet be determined. Provisions in the Draft Convention for the transfer of technology should make the economic yoke easier for the State sponsored miner to bear.

The mandate of Title II has not yet been realized, but satisfaction of the intent embodied in the Act is within reach.

F. PATTERSON WILLSEY

188. *Id.* at H4667 (remarks of Rep. Symms).