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The Convention on the Law of the Sea: A Preliminary Appraisal

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The author of the Maltese Resolution conducts an in-depth analysis of the United Nations Convention on the Law of the Sea, which was recently signed by 119 nations on December 10, 1982. He concludes that in certain areas, the Convention does not reflect true compromise but rather vague drafting which masks continued disparate positions among the signing States.

The most ambitious example of global negotiations under United Nations auspices came to an end on April 30, 1982 when the Third United Nations Conference on the Law of the Sea (UNCLOS III) concluded its substantive work by adopting the text of a Convention¹ by a vote of 130 to 4 with 17 abstentions.² The Convention, with its nearly 200 pages, 320 articles in 17 parts, and 9 annexes, is certainly one of the most—if not the most—exhaustive and complex documents ever drafted by an international conference. It is intended to constitute a comprehensive legal framework for man's activities in the marine environment and it reflects

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1. United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982) [hereinafter cited as Convention].

2. U.N. Dep't of Pub. Information, Press Release SEA/494, at 1 (Apr. 30, 1982). The four States rejecting the treaty were Israel, Turkey, United States and Venezuela. Those abstaining included: Belgium, Bulgaria, Byelorussia, Czechoslovakia, German Democratic Republic, Federal Republic of Germany, Hungary, Italy, Luxembourg, Mongolia, Netherlands, Poland, Spain, Thailand, Ukraine, USSR and United Kingdom. *Id.* Nearly all these States are members of NATO or of the Warsaw Pact.

the contrasting trends—innovative and conservative, nationalist and internationalist—in the world and at the conference.

There can be no doubt that the preparation and near unanimous approval of the Convention on the Law of the Sea is in itself a major achievement. For the first time in history, a heterogeneous and bitterly divided international community has attempted to establish an all-inclusive conventional framework for man's activities in the marine environment, instead of leaving the development of law to the practice of States and to the traditional process of claim and counterclaim supplemented by treaties dealing with a limited subject matter.

The Convention reflects the contemporary need for resource management and regulation of activities in wide areas of the marine environment, which is the inevitable consequence of technological advance and of our intensified and ever more diversified uses of ocean space. Hence, adoption of the Convention marks a radical change in the structure of traditional law of the sea. Important innovations are almost too numerous to list. They include, among others:

1. Substantial change in the concept of innocent passage;³
2. Introduction of the concept of transit passage of straits used for international navigation;⁴
3. The concept of archipelagic water;⁵
4. The concept of the exclusive economic zone;⁶
5. Fundamental change in the definition of the legal continental shelf;⁷
6. Recognition of the right to conduct scientific research and to construct artificial islands as additional freedoms of the high seas together with a number of significant developments of traditional law relating to the high seas;⁸
7. The concept of a general environmental law of the sea based on the obligation of all States to protect and preserve the marine environment and to control all sources of marine pollution;⁹
8. Provisions establishing a comprehensive regime for marine scientific research and creating the obligation to cooperate in the development and transfer of marine science and

3. Convention, *supra* note 1, art. 19.

4. *Id.* arts. 37-44.

5. *Id.* art. 49; see Richardson, *Law of the Sea: Navigation and other Traditional National Security Considerations*, 19 SAN DIEGO L. REV. 553, 566-68 (1982).

6. See Convention, *supra* note 1, arts. 55-75.

7. *Id.* art. 76.

8. *Id.* art. 87, para. 1.

9. *Id.* arts. 192, 207, 237.

technology.¹⁰

These and other provisions both technical and substantive, in themselves sufficient to transform traditional law of the sea, are complemented by two far-reaching innovations which, if effectively implemented, could mark a revolution not merely in the law of the sea but also in international law. These are (a) the dispute settlement system,¹¹ which is the most flexible, comprehensive and binding system of dispute settlement contained in any general international convention, and (b) international recognition that the seabed and its resources beyond national jurisdiction are the common heritage of mankind, with implementation of this principle through the establishment of an international institution—the International Sea-Bed Authority¹²—specifically created to regulate and manage the mineral resources of the deep seabed for the benefit of all mankind. This could be a precedent of incalculable importance for the future.

Inevitably, an extremely complex Convention dealing with many highly controversial political matters cannot be expected to be without shortcomings. Many provisions could be considered superfluous or undesirable, but they should not bring us to question the remarkable work of UNCLOS III, unless we have reason to believe that the Convention is flawed in some fundamental way.

The Convention may be evaluated from a variety of sectoral points of view; analysis based on a perceived national interest could lead to different conclusions depending on the nation concerned. It is accordingly necessary to seek to appraise the Convention from a non-national, non-sectoral point of view. The first question which arises in this context is whether the Convention serves the functions which a comprehensive law of the sea treaty should serve. According to former Ambassador Stevenson, these functions include: 1) accommodation of interests; 2) prevention of conflict; 3) predictability or ability to foresee what activities can be undertaken with reasonable assurance that other States will acquiesce; and, finally, 4) promotion of common or community objectives.¹³

10. *Id.* arts. 238-278.

11. *Id.* arts. 186-191.

12. *Id.* art. 156.

13. Address by John R. Stevenson before the Philadelphia World Affairs

With respect to the first point, there can be no doubt that the Convention evidences throughout the mark of accommodation of interests, for without such accommodation, it would have been impossible to compose a text which will undoubtedly be signed by the great majority of States. The real question, however, is whether the accommodation of interests and political compromises of the Convention reflect substantive accommodation of interests between the States concerned or whether these apparent compromises are, in fact, only carefully drafted formulations designed to mask continued fundamental disagreement on basic issues. In the latter case, of course, no substantive accommodation of interests has occurred and conflict is not avoided, but merely postponed.

Each issue must be examined individually for the evidence of this accommodation; generalization is impossible. In some cases, as for instance with respect to the limits of the territorial sea, the provisions of the Convention undoubtedly reflect substantive agreement on the part of the overwhelming majority of the international community. In other far more numerous cases, however, there are strong grounds for believing that representatives at the Conference, having ascertained the impossibility of reaching agreement on the substance of an issue, mainly searched thereafter for formulae sufficiently vague or ambiguous to permit all the significant States concerned to claim that their policy objectives have been accommodated in a more or less acceptable way. For instance, article 76 enables States that argued for a clearly defined maximum limit to the so-called continental shelf to claim that the international community has adopted such a limit—"350 nautical miles from the baselines from which the breadth of the territorial sea is measured or . . . 100 nautical miles from the 2500 metre isobath."¹⁴ At the same time, mid-ocean archipelagic States and States with long coastlines fronting on the open oceans, that strongly supported a very flexible definition of the area which they euphemistically describe as the continental shelf, feel quite satisfied. They are well aware that straight baselines can be established at the discretion of the coastal State within the broad guidelines of article 7 of the Convention and that the wording of article 76 is such as to provide the coastal State with ample arguments to support very expansive claims.¹⁵

Council and the Philadelphia Bar Association, 64 *AM. J. INT'L L.* 634, 634-35 (1970) [hereinafter cited as *Address* by John R. Stevenson].

14. Convention, *supra* note 1, art. 76, paras. 5, 6.

15. *Id.* Annex II. Establishment of the proposed Commission on the limits of the continental shelf (Annex II) is unlikely to significantly hamper most coastal States with appropriate geographical characteristics from claiming very wide legal

Article 74 on the delimitation of the exclusive economic zone between States with opposite or adjacent coasts is another of many examples of a formula designed to satisfy the requirements of States with diametrically opposed views.¹⁶ A further interesting example of purely formal accommodation of diametrically opposed viewpoints is the phrase "exclusively for peaceful purposes" which recurs with a certain frequency in the Convention.¹⁷ The meaning of the phrase is not defined and there may be some question as to whether it has a definable meaning.¹⁸ The phrase, however, is useful in that it accommodates those States that would wish to see most military uses of ocean space strictly limited and at the same time it does not seriously inconvenience States that believe extensive military use of ocean space is a regrettable necessity.

Prevention of conflict and predictability—that is, the ability to foresee what activities can be undertaken with reasonable assurance that other States will acquiesce—are two other identified functions of a comprehensive law of the sea. Here again it is impossible to generalize. It is certainly true that the rights of coastal States are described in considerable detail in the Convention and to this extent predictability is enhanced. On the other hand, it would be difficult to assert that in other matters the Convention consistently furthers the objectives of conflict prevention and predictability. Many of the most important definitions—such as those concerning the legal continental shelf,¹⁹ the meaning of

continental shelves since the functions of the Commission are limited to providing scientific and technical advice, and to making recommendations on the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles from the appropriate baselines.

16. For a criticism of this formula, see Oxman, *The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)*, 76 AM. J. INT'L L. 1, 14-15 (1982).

17. For instance, marine scientific research must be conducted exclusively for peaceful purposes; the international seabed area must be used exclusively for peaceful purposes, etc. See Convention, *supra* note 1, arts. 88, 141, 301.

18. The words "exclusively for peaceful purposes" convey the vague, misleading, but useful, impression that the Convention will somehow reverse the ongoing process of intensive militarization of ocean space.

19. Convention, *supra* note 1, art. 76. The definition, which replaces that contained in the 1958 Geneva Convention on the Continental Shelf, states that the continental shelf of a coastal State extends "throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured . . ." *Id.* art. 76, para. 1. The outer edge of the continental margin,

innocent passage²⁰ and of straits used for international navigation²¹—are unacceptably vague. In other cases, the drafters of the Convention have preferred to avoid all mention of a problem considered to be delicate or excessively controversial. Thus, for instance, the Convention does not mention any of the problems which are known to exist with regard to the polar regions.²² Silence of the Convention with regard to these problems may be understandable since many of them do not necessarily require immediate determination. Less understandable, however, is the total silence of the Convention on all military uses of the marine environment. It is known that the legality of many of these uses is controverted²³ and it is also clear that in the present tense in-

when more than 200 nautical miles from the baselines, is determined either by a line based on the thickness of sedimentary rocks or by a line delineated "by reference to fixed points not more than 60 nautical miles from the foot of the continental slope." *Id.* art. 76, para. 4(ii). In any case, the outer limits of the continental slope "either shall not exceed 350 nautical miles from the baselines . . . or . . . 100 nautical miles from the 2500 metre isobath . . ." On submarine ridges, "the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines . . ." *Id.* art. 76, para. 6. But this provision "does not apply to submarine elevations that are natural components of the continental margin, such as its plateaus, rises, caps, banks and spurs." *Id.*

20. *Id.* art. 19. Under this article, passage of a foreign vessel in the territorial sea is considered prejudicial to the peace, good order, or security of the coastal State if it engages in a dozen or so enumerated activities, including "any other activity not having a direct bearing on passage." *Id.* para. 2(l). But the article does *not* state that a ship complying in every way with the provisions of article 19 enjoys the right of innocent passage. In other words, a coastal State still enjoys the discretionary power to decide whether passage of a foreign vessel in a particular case is or is not prejudicial to its peace, good order or security.

21. *Id.* arts. 34-36. The major maritime powers have repeatedly stressed the importance of unhampered passage through straits used for international navigation, yet the Convention contains no useful definition of such straits. *See* Address by John R. Stevenson, *supra* note 13, at 636-39. It is therefore difficult to ascertain whether the new principle of transit passage is applicable to straits which are infrequently transited by foreign vessels. Bearing in mind that controversies can arise even in such heavily traveled straits as those of Malacca, it would have been useful to include in an annex to the Convention a list of straits recognized as used for international navigation. It would have also been useful to prescribe compulsory and binding settlement of any dispute on whether a particular strait is or is not a strait used for international navigation.

22. In the Arctic, the legal status of the so-called sector principle remains undetermined. According to this theory, nations facing the Arctic "may project their territorial sovereignty into this region in terms of geographical determined sectors." O. SAVARLIEN, *THE EASTERN GREENLAND CASE IN HISTORICAL PERSPECTIVE* 60-61 (U. Fla. Monographs—Soc. Sci.—No. 21, Winter 1964), *cited in* Note, *Delimiting Continental Shelf Boundaries in the Arctic: The United States-Canada Beaufort Sea Boundary*, 22 VA. J. INT'L L. 221, 229 (1982). There are many legal questions relating to the seas surrounding Antarctica. None have been addressed at the Conference on the Law of the Sea.

23. The legality of the following, among many other, military uses of the marine environment remains undetermined: (a) transit of foreign warships in the territorial sea without notification to, or the consent of, the coastal State; (b) reservation of vast areas of the high seas for significant periods of time for

ternational climate certain legally doubtful military uses of the marine environment could give rise to dangerous incidents.

The last of the objectives mentioned by Ambassador Stevenson as proper for a comprehensive Law of the Sea Convention is the promotion of community objectives such as "the need to assure that the environment of this planet remains hospitable to human life."²⁴ There can be no doubt that Committee III has done remarkable work in Part XII of the Convention in developing international law on the protection and preservation of the marine environment. But even here there are serious deficiencies. The major concern in Part XII is the control of vessel source pollution²⁵ and this has caused some imbalance in the text since vessel source pollution, while certainly important, is seldom as injurious to the marine environment as other sources of pollution which have received far less detailed treatment in the Convention.

Another omission in Part XII is quite deplorable. The present Convention totally ignores the question of nuclear waste disposal in the marine environment, the importance of which has been recognized for at least twenty-five years.²⁶ The present Convention

missile testing or other security purposes; and (c) emplacement of anti-submarine warfare devices on the continental shelf of another State, without the latter's consent. Most powers usually go to considerable lengths to avoid confrontations in the marine environment; yet confrontations will be increasingly difficult to avoid precisely because the rights and duties of States with regard to the military uses of the seas are so controverted. The Convention contains recommendations and exhortations on a number of subjects of varying importance; it would have been useful had the Convention had something to say on this very important subject.

24. Address by John R. Stevenson, *supra* note 13, at 635.

25. Convention, *supra* note 1, art. 211. In this connection the Convention is important not so much because of its concern with vessel source pollution—a subject which has been the object of international negotiations and agreements for at least thirty years—but rather because it recognizes the competence of coastal (and port) States to deal with vessels suspected of causing such pollution outside the territorial sea. The newly recognized competence of coastal (and port) States not only limits the previously exclusive competence of the flag State but could perhaps in the future be used to exercise indirect control over foreign vessels transiting in the exclusive economic zone. The danger was recognized at the Conference and the text contains several balancing provisions designed to protect freedom of navigation. We must hope that these provisions and the vigilance of the maritime powers will effectively contain the aspirations of some coastal States to exercise a measure of control over foreign vessels in all marine areas under some form of coastal State jurisdiction.

26. See Convention on the High Seas, Apr. 29, 1958, art. 25, 13 U.S.T. 2312, 2319, T.I.A.S. No. 5200, 450 U.N.T.S. 82, 96. The International Atomic Energy Agency has been conducting studies on nuclear waste disposal for at least twenty years but these have not led to much effective action. Some regional conventions prohibit

refers in general to the "release of toxic, harmful or noxious substances, especially those which are persistent . . . by dumping."²⁷ Radioactive wastes may be one of the toxic, harmful or noxious substances referred to in the Convention; nevertheless, it is unfortunate that they are not specifically mentioned, as was done in the 1958 Convention on the High Seas,²⁸ since the expanding use of nuclear power for the purpose of energy generation is rapidly increasing the quantities of radioactive wastes being produced. The Convention, without taking a position on whether or not radioactive wastes should be disposed of in the marine environment, could usefully have suggested the observance of special precautionary measures similar to those in article 23 of the Convention in the event of such disposal.²⁹

We may thus not unfairly conclude that the present Convention, to some extent at least, does not serve the function which a comprehensive law of the sea treaty should serve. The Convention, however, should not be evaluated in isolation; even a document of limited value in itself could be extremely valuable if it strengthens world order or cooperation within the United Nations system or if it furthers equity between States or solutions to global problems relating to resource management and utilization. Does the Convention do this?

I shall confine my comments to two questions. First, does the present Convention strengthen world order by furthering equity between States in ocean space? Second, do the provisions of the Convention promote rational solutions of global management and utilization problems by establishing legal regimes appropriate to this purpose in marine areas both within and outside national jurisdiction?

With regard to the first question, there can be no doubt that the Convention reflects primarily the highly acquisitive aspirations of many coastal States, particularly of those developed and developing States with long coastlines fronting on the open ocean and of mid-ocean archipelagic States. Perhaps as much as forty percent

the disposal of high-level wastes in the marine environment; however, little has been done at the international level to restrict disposal of low-level wastes in the seas.

27. Convention, *supra* note 1, art. 194, para. 3(a).

28. Convention on the High Seas, *supra* note 26, art. 25.

29. Article 23 of the Convention states that "ships carrying nuclear or other inherently dangerous or noxious substances shall . . . carry documents and observe special precautionary measures . . ." Convention, *supra* note 1, art. 23. In the case of nuclear waste disposal in the marine environment, siting and packaging precautions are particularly important.

of ocean space,³⁰ by far the most valuable in terms of economic uses and accessible resources, is placed under some form of national control. This means that all exploitable offshore hydrocarbons; all commercial exploitable minerals in unconsolidated sediments—from sand and gravel to tin, most phosphorite nodules, a significant proportion of the recently discovered polymetallic sulphide deposits and cobalt crusts, and several manganese nodule deposits; over ninety percent of commercially exploited living resources of the sea,³¹ nearly all marine plants; and all known sites suitable to the production of energy from the sea are recognized as the exclusive property of coastal States. The value of these resources must be estimated at many trillions of dollars. The magnitude of this appropriation, in terms both of area and of resources, is unprecedented in history.

Nor is this all. Since the limits of national jurisdiction are not clearly defined in the Convention, coastal States fronting on the open ocean can continue, within broad limits, to extend their control in the marine environment as their marine capabilities increase and their national interests appear to dictate. Despite some attempt at compensation,³² it is clear that this basic aspect of the Convention is grossly inequitable not only as between coastal States and landlocked and geographically disadvantaged States, but also as between coastal States themselves: only ten of these in fact obtain more than half the marine area which the Convention places under national control.³³

On the other hand, it would appear at first sight that the Con-

30. It is recalled that: (a) vast areas of the marine environment may now be enclosed by archipelagic baselines; (b) the Convention sets no limit to the length of straight baselines, apart from archipelagic baselines; (c) the continental shelf may now extend in some cases up to (and even beyond) 350 miles from the appropriate baselines; and (d) the definition of islands in the Convention permits rocks (and probably sandbanks) which can "sustain human habitation" to claim a legal continental shelf and an exclusive economic zone.

31. Gulland, *FAO Fisheries Tech. Paper 206 at 1, U.N. FAO Doc. FIRM/T206 (1980)*.

32. *See Convention, supra note 1, arts. 69, 70, 82.*

33. *See, e.g., Villanova Colloquium on Peace, Justice and the Law of the Sea, Paper No. 3 (1977)*. It should be noted that adequate scientific capability, appropriate technology and substantial financial resources are required to effectively develop offshore resources, particularly mineral resources; thus, only wealthy countries and a few large developing countries such as China, Brazil, India and a few others have the means themselves to engage in significant offshore development. This could mean that marine areas under the jurisdiction of many small developing countries, such as the mid-ocean archipelagic States in the Pacific Ocean,

vention seriously addresses the difficult problems of marine resource management. Thus the Convention obligates States to "promote and facilitate the development and conduct of marine scientific research"³⁴ which is the indispensable prerequisite to rational resource management.³⁵ States are enjoined to cooperate with each other and with "competent" international organizations to this end.³⁶ Additionally, elaborate provision is made for international management of the mineral resources of the seabed beyond national jurisdiction.³⁷

Nevertheless, the approach of the Convention to problems of marine resource management appears seriously deficient in many respects. A fundamental deficiency is the unstated assumption that all coastal States are both willing and capable to effectively administer living marine resources within their jurisdiction, an assumption which patently does not correspond to reality. Even if all coastal States did have this capability, however, rational living resource management would be impossible in the small marine areas allocated to the majority of coastal States. Hence, most of the injunctions contained in article 61 of the Convention are likely to remain a dead letter in many parts of the world.³⁸ At the same time, despite the provisions of article 239³⁹ and others, marine scientific research related to natural resources in marine areas under coastal State jurisdiction is subjected to a discretionary consent regime, which in many cases is likely to prove burdensome. Thus the Convention cannot be said to encourage in

could be exploited in practice predominantly for the benefit of technologically advanced countries with far-reaching political consequences.

34. Convention, *supra* note 1, art. 239. The Convention contains a number of additional articles stressing the importance of scientific research.

35. Within the exclusive economic zone "[t]he coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources . . . is not endangered by over-exploitation." *Id.* art. 61, para. 2.

36. *Id.* Beyond national jurisdiction, "all States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas," *id.* art. 117, an obligation identical to the one already affirmed in the 1958 Geneva Convention on Fisheries. *See* Convention on Fishing and Conservation of Living Resources of the High Seas, Apr. 29, 1958, art. 1(2), 17 U.S.T. 138, 140, T.I.A.S. No. 5969, 559 U.N.T.S. 285, 288. In addition, the Convention obligates States to adopt conservation measures with respect to the living resources of the high seas. *See* Convention, *supra* note 1, art. 119.

37. *See* Convention, *supra* note 1, arts. 133-191, Annex III.

38. *See id.* art. 61. It should also be noted that under the Convention the coastal State assumes no resource management obligations, even in theory, with respect to resources in archipelagic waters, the legal continental shelf, and the territorial sea.

39. *Id.* art. 239.

practice either marine scientific research or rational management of marine resources.

While the provisions of the Convention would appear, in theory, to somewhat improve living resource management and conservation in the high seas,⁴⁰ the common heritage regime established for the international seabed area is little short of a disaster. The future international Authority⁴¹ plays no role whatsoever in the determination of the limits of the international seabed;⁴² the competence of the Authority is limited strictly to the exploration and exploitation of mineral resources;⁴³ the decision-making procedures of the Council of the Authority—ranging, according to the nature of the question, from a two-thirds majority to a consensus⁴⁴—are such as to render unlikely appropriate and timely decisions on important questions.

Finally, the fact that the Authority is based on the erroneous assumption that it would have a virtual monopoly of exploitable manganese nodule deposits has had highly unfortunate conse-

40. See, e.g., *id.* arts. 118, 119, which enjoin cooperation and exchange of information between States and the adoption by them of measures designed, among other things, "to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors . . ." *Id.* art. 119, para. 1(a). The Convention, however, is studded with similar general injunctions on a variety of subjects. It remains to be seen whether the rhetoric of the Convention will be effective in reversing contemporary trends, which, in some instances, seem to suggest the likelihood of less, rather than more, intergovernmental cooperation in the conservation and management of the living resources of the sea, as pressures on these resources increase.

41. Convention, *supra* note 1, arts. 156, 157.

42. *Id.* art. 134. Article 134 is cryptic, but it seems that the future Authority (a) must passively await notification by coastal States of the limits of their continental shelves; (b) may not question in any way the limits notified to it; (c) may not remind any coastal State of its obligation to establish firm limits to its continental shelf; and (d) may not establish provisional boundaries for the International Seabed Area in the event that coastal State notifications are delayed.

43. *Id.* art. 1, para. 3. Questions relating to the transfer of technology or to the protection of human life in the marine environment concern the future Authority only insofar as they are directly related to seabed mineral resource exploration and exploitation. The Authority has no competence with respect to the living resources of the International Seabed Area.

It should be noted that although the Convention refers in general to exploration and exploitation of mineral resources, its provisions focus in practice only on manganese nodule exploration and exploitation. This is due to the erroneous assumption that manganese nodules are the only minerals of economic interest for the foreseeable future in the International Seabed Area.

44. *Id.* art. 161.

quences. Thus it was considered unnecessary to pay much attention to the efficiency of mineral resource exploitation in the international seabed area. Only this, and perhaps hopes of more or less permanent subsidies by developed countries, can explain general acceptance of the enormously inefficient "parallel system"⁴⁵ and the unimaginative way in which the structure of the future Authority and the related Enterprise have been conceived.⁴⁶ As a result it will be difficult for the Enterprise to harvest manganese nodules at competitive prices without continuing subsidies and for the foreseeable future there will be no financial benefits from the operations of the Authority to be shared by developing countries. At the same time, the belief that the Authority would have a monopoly of exploitable manganese nodule deposits largely explains the complex production limitation provisions introduced in Part XI of the Convention. These limitations were to protect developing countries from adverse effects on their economies or on their export earnings resulting from reductions in the prices of minerals contained in manganese nodules caused by exploitation in the international seabed area. Since manganese nodule deposits are known to exist within national jurisdiction because of the expansive provisions on jurisdictional limits contained in other parts of the Convention, the only effect of production limitations in the international area alone is to further complicate manganese nodule mining beyond national jurisdiction and to further undermine the viability of the Authority.⁴⁷

45. In my view, the parallel system is a disastrous political compromise. It was totally unnecessary for developing countries to insist on the creation of a monopolistic and bureaucratic Enterprise in order to maintain international control of operations in the seabed beyond national jurisdiction. It was equally unnecessary for developed countries to insist on a licensing system. In any case, the obvious compromise should have been a system of joint ventures on an equal basis between the Authority and entities wishing to engage in manganese nodule mining. The specific conditions of each joint venture could have been negotiated on an ad hoc basis within general treaty guidelines. A flexible joint venture system would have avoided most of the complexities, costs and inefficiencies which are embodied in the Convention.

46. The Authority and the related Enterprise are established on the model of certain large specialized agencies, such as the Food and Agriculture Organization of the United Nations (FAO), despite their different functions. Among other things, provision is made for heavy bureaucratic superstructures—the *initial* annual costs of which are estimated to range from \$145 to \$280 million, to which should be added \$350 to \$700 million in loans required to permit the future Enterprise to begin operations. U.N. Doc. A/CONF.62/L.65 (1982).

47. It is obvious, other things being equal, that there will be an incentive to exploit manganese nodules within national jurisdiction if production controls are enforced only in the International Seabed Area. Negotiation of global commodity arrangements would probably be the most practical way to attempt to protect developing countries' producers of the minerals contained in the nodules. It should be realized, however, that present land producers cannot realistically expect indef-

Thus, there arises the unpleasant prospect of the establishment of new and expensive international organizations incapable of effectively performing the functions for which they were created. However, implementation of much of Part XI of the Convention and related annexes has been indefinitely postponed by the adoption of resolutions I and II at the spring 1982 session of the Conference.⁴⁸ These resolutions confer upon the Preparatory Commission of the Authority some powers that it might not otherwise have received. Thus it may be possible for the Commission to draft rules and regulations which adjust some of the provisions of the Convention to realities; whether this can be done under a strict interpretation of the terms of the resolutions concerned is, however, uncertain.

CONCLUSION

Although the present Convention reproduces, almost without change, most of the definitions and technical rules contained in the 1958 Geneva Conventions and adds a few more, it is—to a far greater extent than these Conventions—a political document. As such, the present Convention is truly a “package deal” containing innumerable bilateral and multilateral political compromises. Many of the legal rules established are sometimes based on nothing more substantial than political deals designed to accommodate the parochial interests of individual States.⁴⁹ As a political document, the present Convention reflects—although to a different extent and in different ways—both the predominant interests of politically ascendant States and the general aspirations of the contemporary world community.

Politically ascendant States are no longer merely the traditional maritime powers or the so-called super-powers, but comprise also States, both developed and developing, with long coastlines fronting on the open oceans. These are the States which are now, or

initely to avoid all adverse effects on their economies or export earnings caused by the recent discoveries of seabed minerals—manganese nodules, polymetallic sulphides, cobalt crusts, etc.—whether within or outside national jurisdiction.

48. Resolution I established a Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea. Draft Final Act of the Third United Nations Conference on the Law of the Sea, Annex I, res. 1, U.N. Doc. A/CONF.62/121 (1982). Resolution II governs pioneer mining activities. *Id.* res. 2.

49. See, e.g., Convention, *supra* note 1, art. 7, para. 2; art. 47, paras. 2, 8.

have the potential of becoming, global powers. Traditional maritime powers no longer view navigation as their overwhelmingly predominant interest in the marine environment, but only as an important interest largely balanced by the increasing value of ocean space for resource exploitation purposes. States with long coastlines fronting on the open ocean—some of which, such as the United States, are also traditional maritime powers—necessarily have increasing navigational interests in addition to their interest in the exploitation of the resources of the sea. In this context, the Convention is essentially concerned first, in the allocation to coastal States of the largest possible areas of ocean space; second, in making sure that coastal State control over resources and other uses of the sea, except navigation and communications, is essentially discretionary in areas claimed to be under national jurisdiction;⁵⁰ and, third, that freedom of navigation, overflight and the laying of submarine cables and pipelines within national jurisdiction is maintained to the greatest possible extent.⁵¹ Thus, from this point of view, the importance of the Convention resides principally in the official recognition by the majority of the international community of the results of the ongoing enclosure movement in ocean space.

It would not be right, however, to view the Convention as reflecting only the perceived national interests of a relatively small group of States. Much of the rhetoric of the Convention, several general provisions and some whole sections, such as the dispute settlement provisions and Part XI on the international seabed area, reflect—imperfectly or vaguely—general aspirations for a new order in the seas, based on international cooperation in meeting the needs of mankind as a whole rather than on international competition in the satisfaction of national interests. It is a pity that this side of the Convention has not been developed in a practical way. Instead a truly historic opportunity to mold the legal framework governing human activities in the marine environment in such a way as to contribute effectively to the realization

50. It is probably a mistake to take too seriously the concern for management of living resources expressed in article 61 or the rhetoric of international cooperation expressed in many parts of the text. More reflective of realities are provisions, such as article 63, paragraph 2, which make abundantly clear that the principle of cooperative management of resources is applicable only in marine areas beyond national jurisdiction.

51. However, maritime powers and those States with long coastlines which are not maritime powers disagree on military uses of the sea, hence silence on these questions.

of a just and equitable international order in the seas, responsive to the vital need for harmonization of marine uses and management of marine resources for the benefit of all, has been lost.

