

THE INTERNATIONAL SEA-BED AUTHORITY  
DECISION-MAKING PROCESS: DOES IT  
GIVE A PROPORTIONATE VOICE  
TO THE PARTICIPANT'S  
INTERESTS IN DEEP SEA MINING?

*This Comment focuses on the United States contention that the International Sea-Bed Authority (ISA) decision-making process fails to protect proportionately the interests involved in deep sea mining. This examination includes the underlying purposes of UNCLOS III and the divergent political and economic interests of Conference participants in deep sea mining. Analyzing the contention with respect to international economic and political realities reveals its inadequacy as justification for treaty rejection.*

INTRODUCTION

The Third United Nations Conference on the Law of the Sea (UNCLOS III) first met in 1973.<sup>1</sup> The delegates attempted to draft a comprehensive Convention<sup>2</sup> covering all uses of the sea which would be acceptable to the 150 participating nations.<sup>3</sup> After nine years of negotiations, the goal of reaching agreement on the convention by consensus was blocked.<sup>4</sup> In April 1982, the United States called for a vote during the session which had been set as the final Conference.<sup>5</sup> The United States voted against the treaty

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1. H. BOKOR-SZEGO, THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION 112 (1978).

2. The final results are embodied in the United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982) [hereinafter cited as Convention].

3. N.Y. Times, May 1, 1982, at 9, col. 1.

4. Through the consensus method, all attempts to reach agreement through negotiations must be exhausted before a vote is taken. Consensus has been used recently because economic and political power and population are not evenly distributed among nations. B. Oxman, A Summary of the Draft Convention on the Law of the Sea (Feb. 20, 1982) (unpublished manuscript on file with author).

5. STAFF OF HOUSE COMM. ON MERCHANT MARINES AND FISHERIES, 97TH CONG.,

in a vote of 130 in favor, 4 opposed, with 17 abstentions.<sup>6</sup>

Essentially, the United States delegation rejected the Convention because provisions establishing the International Sea-Bed Authority (ISA), governing deep sea mining, were considered inconsistent with United States objectives.<sup>7</sup> One criticism of the Convention enumerated by former Ambassador Malone was that the ISA failed to give a proportionate voice to the nations most affected by the decisions.<sup>8</sup> He stated that as a result these countries' interests would not be fairly reflected or effectively protected by the Convention.<sup>9</sup> Malone had previously insisted that the ISA decision-making system reflect what he referred to as the "realities" of the far-reaching political and economic interests of the United States in the ISA.<sup>10</sup> These interests stem from the United States potential position as the largest consumer of seabed minerals, the largest contributor to the ISA, and the base of several private firms desiring to invest substantial capital in seabed mining.<sup>11</sup> In addition, he claimed President Reagan's objectives could not be met if access to the seabed minerals depended on the voting power of the nation's competitors or those who do not wish mining to commence.<sup>12</sup>

The purpose of this Comment is to evaluate the United States contention that the decision-making process in the ISA fails to protect proportionately the interests involved. By balancing the relative interests of the various participants with the current international political climate and the Convention's objectives, it is clear that the United States was unjustified in rejecting the Convention on this point.

Analysis of the validity of the United States claim requires examination of several factors. First, the background of UNCLOS III must be viewed to focus on the underlying purposes of the Convention. Second, various interests of Conference participants

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2D SESS., REPORT ON UNITED STATES OCEAN POLICY SINCE WORLD WAR II: THE DEBATE OVER A "LAW OF THE SEA" 24 (Comm. Print 1982) [hereinafter cited as MERCHANT MARINE REPORT].

6. United States Delegation Report, Eleventh Session of the Third United Nations Conference on the Law of the Sea, New York, March 8 - April 30, 1982, app. H [hereinafter cited as United States Delegation Report].

7. *Id.* app. I (statement by James Malone, special representative of the President for the Law of the Sea).

8. The other criticisms were that the seabed mining provisions would deter seabed development; the provisions did not provide assured access for qualified future miners; amendments could come into force for a State without its consent; and, the seabed regime creates inappropriate precedents. *Id.*

9. *Id.*

10. *Id.* app. B.

11. *Id.*

12. *Id.*

in deep seabed mining should be described to isolate conflicting economic and political interests. Finally, the structure of the ISA decision-making procedures must be analyzed to determine what interests are represented and protected by the system. A comparison to related organs of the United Nations is useful to draw analogies between the relative representation and protection of interests in a functioning entity. Since the underlying objectives of the ISA and the United Nations are not the same, decision-making procedures may require different techniques to protect the corresponding interests involved. In conclusion, since United States interests will be better served within the ISA framework rather than through reliance on bilateral agreements and obsolete customary law,<sup>13</sup> the United States should sign the Convention.

### THE FACTORS COMPRISING UNCLOS III

UNCLOS III developed as a result of changes in political forces<sup>14</sup> and their effect on customary international law.<sup>15</sup> Established maritime powers were concerned about rights of navigation.<sup>16</sup> Developing nations desired recognized rights to ocean resources<sup>17</sup> and input in formulating international law.<sup>18</sup>

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13. *Law of the Sea Negotiations: Hearings Before the Subcomm. on Arms Control, Oceans, International Operations and Environment of the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 26 (1981) (statement of Elliot Richardson, former representative of the President to the Law of the Sea Conference) [hereinafter cited as *Foreign Relations Hearings*]. An international convention signed by the majority of nations could become a major extension of the rule of law. *Id.*

14. In 1945, President Truman issued the first major proclamation expanding coastal state jurisdiction. Pres. Proc. No. 2667, 3 C.F.R. 67 (1943-1948 Compilation), reprinted in [1951] 1 UNITED NATIONS LEGISLATIVE SERIES, LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS 38. This led to similar unilateral actions by many other coastal States resulting in disputes. MERCHANT MARINE REPORT, *supra* note 5, at 3-4.

15. *Id.* at 2. Since the seventeenth century, the fundamental principle of the freedom of the high seas was the basis of customary maritime law. Under this principle the seas and their resources are open to use and exploitation by all countries, subject only to a three-mile area adjacent to nations which was considered their sovereign territory. *Id.*

16. *Id.* at 9-10. The unilateral expansion of coastal jurisdiction had the effect of closing certain straits which are crucial to navigation. The United States and Soviet Union were concerned about passage through these straits. *Id.*

17. Djalal, *The Developing Countries and the Law of the Sea Conference*, 15 COLUM. J. WORLD BUS. 22 (1980).

18. Juda, *UNCLOS III and the New International Economic Order*, 7 OCEAN DEV. & INT'L L. 221, 225 (1979).

## *Concern of Maritime Powers*

UNCLOS I and II were held in an attempt to re-establish order in customary international law.<sup>19</sup> In these conferences, the United States negotiated to protect its interests in ocean fishing, commercial navigation and military security through unimpeded passage of warships.<sup>20</sup>

The delegates of UNCLOS I and II failed to agree on the breadth of the territorial sea.<sup>21</sup> This omission resulted in continued unilateral expansion of coastal state jurisdiction,<sup>22</sup> protest by the maritime powers,<sup>23</sup> and conflicts over fishing rights.<sup>24</sup> Concern about questions of passage through straits led to discussions between the United States and the Soviet Union in 1967.<sup>25</sup> These two States perceived the need to engage in a Third United Nations Conference to settle issues of territorial limits, passage through straits, and jurisdiction over fisheries and continental shelf resources.<sup>26</sup>

## *The Common Heritage of Mankind*

That the seabeds of the world are the "common heritage of mankind" is a general premise first stated by President Johnson.<sup>27</sup> Maltese Ambassador Arvid Pardo developed the concept and introduced a draft agenda item based on it to the United Nations in 1967.<sup>28</sup> He proposed that the seabed and ocean floor beyond the limits of national jurisdiction be declared the common heritage of mankind, and that an international conference be held to update the law of the sea. He asked that an international authority be established to control, regulate and supervise the "Area."<sup>29</sup> The organization would protect the interests of man-

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19. UNCLOS I met for two months in Geneva in 1958. In four conventions it codified many areas of the law of the sea. The conventions were: the Territorial Sea and Contiguous Zone, the High Seas, Fishing and Conservation of Living Resources of the High Seas, and the Continental Shelf. H. BOKOR-SZEGO, *supra* note 1, at 107-08.

20. MERCHANT MARINE REPORT, *supra* note 5, at 5.

21. H. BOKOR-SZEGO, *supra* note 1, at 108.

22. *Foreign Relations Hearings*, *supra* note 13, at 7 (statement by Franklin D. Kramer).

23. MERCHANT MARINE REPORT, *supra* note 5, at 10.

24. *Id.* at 9.

25. *Id.* at 10.

26. Djalal, *supra* note 17, at 22.

27. *Foreign Relations Hearings*, *supra* note 13, at 295.

28. 22 U.N. GAOR Annex 1 (Agenda Item 92), U.N. Doc. A/6695 (1967).

29. The international seabed beyond the jurisdiction of States is referred to as the "Area." It constitutes the subsoil and seabed beyond the limits of the continental shelf. The Area and its resources have been declared the common heritage of mankind. B. Oxman, *supra* note 4, at 14.

kind and use benefits derived from activities in the Area to promote the growth of less developed countries.<sup>30</sup>

The United Nations Ad Hoc Seabed Committee emerged from this proposal.<sup>31</sup> The committee was the forum for negotiations until 1973 when UNCLOS III first convened. A draft resolution delineating the governing principles of the committee was adopted by the United Nations General Assembly in 1970.<sup>32</sup> This "Declaration of Principles" established seabed resources as the common heritage of mankind.<sup>33</sup> Although the common heritage concept was overwhelmingly adopted, it became subject to varied interpretations by industrialized and developing nations participating in UNCLOS III. The "common heritage" has been interpreted by developing states to incorporate the Declaration of Principles and the Moratorium Resolutions passed by the General Assembly.<sup>34</sup> The Moratorium Resolution states that in view of the common heritage of mankind, States are to refrain from exploring and exploiting the seabed until an international regime is established for regulating the seabed.<sup>35</sup> Developing nations consider exploitation illegal absent an international regime.<sup>36</sup> The United States views General Assembly resolutions, including the Moratorium Resolution, merely as recommendations without binding legal effect.<sup>37</sup>

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30. 22 U.N. GAOR Annex 1 (Agenda Item 92), U.N. Doc. A/6695 (1967).

31. 1 T. KRONMILLER, *THE LAWFULNESS OF DEEP SEABED MINING* 23 (1980). The committee was established in 1968 to examine the question of preservation of the seabed and ocean floor beyond the limits of national jurisdiction for peaceful purposes. It would evaluate the use of the seabeds' resources in the interests of mankind. *Id.* at 23-52.

32. Declaration of Principles Governing the Seabed and the Ocean Floor, and Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8028 (1970). It was the result of informal consultations by committee chairman Amerasinghe. He attempted to find a common ground for the principles because the committee was unable to reach a consensus in formulating principles for the seabed as the General Assembly had requested. The resolution was passed by a vote of 108-0-14. 1 T. KRONMILLER, *supra* note 31, at 36-37.

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

34. G.A. Res. 2574, 24 U.N. GAOR Supp. (No. 30) at 10-11, U.N. Doc. A/7834 (1969).

35. 1 T. KRONMILLER, *supra* note 31, at 217.

36. *Id.* at 207.

37. *Id.* at 217-220.

## *The Scope of UNCLOS III*

As a result of the divergent objectives of Conference participants, UNCLOS III became the most complex and prolonged international deliberation in history.<sup>38</sup> The United Nations required that the Conference formulate a Convention, and enumerated several items for inclusion.<sup>39</sup> The items concerned the respective rights and duties of States regarding virtually all activities at sea.<sup>40</sup> These activities include navigation, research, pollution, exploration and exploitation of both living and non-living resources occurring in the newly defined territorial sea,<sup>41</sup> continental shelf,<sup>42</sup> exclusive economic zone,<sup>43</sup> high seas,<sup>44</sup> and seabed beyond national jurisdiction.<sup>45</sup>

### THE CONFERENCE PARTICIPANTS AND THEIR INTERESTS IN THE ISA

The interests of UNCLOS III participants in the ISA vary drastically. Industrialized nations desire unimpeded, recognized access to seabed resources. Conversely, developing nations seek to enforce their definition of the common heritage principle so that exploitation of seabed resources benefits mankind as a whole.

#### *The United States and Other Industrialized Nations*

Current interest in seabed resources centers around potential mining of an estimated 1.5 trillion tons<sup>46</sup> of manganese nodules which lie on the ocean floor. The nodules contain significant

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38. MERCHANT MARINE REPORT, *supra* note 5, at 12.

39. 1 T. KRONMILLER, *supra* note 31, at 41-42.

40. B. Oxman, *supra* note 4, at 2.

41. The territorial sea is a belt of sea adjacent to a nation over which it has sovereignty, including the seabed and airspace. The breadth of this area has been set at twelve nautical miles by the Convention. The coastal States' sovereignty is subject to the right of innocent passage for foreign ships. *Id.* at 5-6.

42. The treaty will allow coastal States exclusive sovereign rights to explore and exploit resources of the seabed and subsoil of the continental shelf. The outer limit is set at either 200 nautical miles or the edge of the continental margin. *Id.* at 8-9.

43. The exclusive economic zone (EEZ) is set at 200 nautical miles from a States' coast. In this area, the coastal State has exclusive sovereign rights to control exploitation of all natural resources and control pollution. Other States have rights of navigation, overflight, laying of cables and pipelines, and other internationally lawful uses. *Id.* at 9-12.

44. The high seas articles apply to all parts of the sea beyond the EEZ. States are allowed freedoms of navigation, overflight, fishing (subject to conservation requirements) and laying of submarine cables and pipelines. *Id.* at 13.

45. The international seabed beyond the jurisdiction of states is the Area. *Id.* at 14.

46. 1 T. KRONMILLER, *supra* note 31, at 14.

amounts of nickel, cobalt, copper and manganese.<sup>47</sup> Industrialized nations are particularly interested in obtaining these minerals because they are necessary for production of strategically significant materials including steel and space-age alloys.<sup>48</sup> Several companies from various States are developing technology for mining and extracting minerals from manganese nodules.<sup>49</sup>

The success of deep sea mining by these companies has important economic implications for industrialized nations. The United States is dependent on imported nickel, cobalt, and manganese,<sup>50</sup> and currently imports over one billion dollars worth annually.<sup>51</sup> This expenditure is expected to increase to seven billion by the year 2000 in the absence of deep sea mining.<sup>52</sup> Deep sea mining would have an important positive effect on the nation's balance of payments. It would also promote independence from price fluctuations and supply restrictions of land-based producers either imposed unilaterally or through a cartel.<sup>53</sup>

The Convention creates an Enterprise which is the mining organ of the ISA.<sup>54</sup> Parties to the Convention are obligated to finance the initial administrative costs and mining operation of the Enterprise.<sup>55</sup> Although the exact amount of funding necessary will be determined by the Preparatory Commission,<sup>56</sup> it will

47. McKelvey, *Seabed Minerals and the Law of the Sea*, 209 SCIENCE 464, 465 (1980).

48. *Foreign Relations Hearings*, *supra* note 13, at 5. (statement of William P. Pendley, Deputy Assistant Secretary of Energy and Minerals, Dep't of the Interior). Manganese is essential to the production of steel. Cobalt is a hardener of steel and is critical in the production of high-speed, high-performance aircraft. *Id.*

49. 1 T. KRONMILLER, *supra* note 31, at 16. The companies are situated in the United States, Canada, the United Kingdom, Japan, West Germany, France, Belgium, Netherlands, Sweden and the Soviet Union. Many have combined to form international consortia. *Id.*

50. *Foreign Relations Hearings*, *supra* note 13, at 5. The United States currently imports 100 percent of its manganese and cobalt, 95 percent of its nickel and 15 percent of its copper. The majority of its suppliers are developing nations which are not perceived to be particularly stable sources. *Id.*

51. 2 T. KRONMILLER, *THE LAWFULNESS OF DEEP SEABED MINING* 211, 255 (1980).

52. *Mineral Resources of the Deep Seabed: Hearing on H.R. 11879 Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. 327 (1976) (statement of Conrad Welling, Lockheed Missiles & Space Co.) [hereinafter cited as *Hearings on H.R. 11879*].

53. Comment, *The Future of United States Deep Seabed Mining: Still in the Hands of Congress*, 19 SAN DIEGO L. REV. 613, 620-22 (1981).

54. Convention, *supra* note 2, art. 13, para. 2.

55. *Id.* art. 11, para. 3(d).

56. The Preparatory Commission will develop the rules and regulations for deep seabed mining. The Commission will begin meeting 60 to 90 days after 50

be approximately \$1 billion.<sup>57</sup> Half the funds will be provided through long term interest-free loans and the remainder through loans guaranteed by the Enterprise.<sup>58</sup> The United States contribution would be 25 percent,<sup>59</sup> or about \$250 million. This one-time fee is considerably less than current annual United States expenditures for imported minerals.<sup>60</sup> In addition, if the Enterprise is successful, the principal on these loans will be repaid.

The Convention also creates a parallel system which allows entities other than the Enterprise to mine.<sup>61</sup> Companies will be granted exclusive rights to mine an area after approval by the ISA.<sup>62</sup> Capital expenditures necessary to establish the initial mining operations have been estimated at between \$300 million<sup>63</sup> and \$750 million.<sup>64</sup> To justify these expenditures, mining companies require assurance of exclusive rights to mine sites and a sufficient return on investment.<sup>65</sup> In addition to the capital needed for mining, the companies must make payments to the ISA. These include a processing charge of \$500,000<sup>66</sup> and an annual fee plus production payments after approval of the mine site.<sup>67</sup> Taxes will have a large effect on the profitability of deep sea mining. Of course, incentives will have to be determined by the individual governments involved.

To summarize, the interests of the developed nations in deep sea mining are essentially economic. They seek unimpeded access to the manganese nodules for production by mining companies, and for consumption by industry at the lowest possible prices. They have the ability to invest large sums of money and to reap huge benefits from deep sea mining. From this perspec-

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States sign the Convention. Only States which sign the Convention can be members and take part in its decisions. Those which sign the Final Act of the conference only, may participate as observers. *United States Delegation Report, supra* note 6, at 11-12.

57. 2 T. KRONMILLER, *supra* note 51, at 133.

58. MERCHANT MARINE REPORT, *supra* note 5, at 36.

59. Assessment of contributions will be based on the United Nations scale for its budget. The United States percentage is the maximum of 25 percent. T. HOVET JR. & E. HOVET, ANNUAL REVIEW OF UNITED NATIONS AFFAIRS, A CHRONOLOGY AND FACT BOOK OF THE UNITED NATIONS 1941-1979, at 279 (6th ed. 1979).

60. See *supra* text accompanying note 51.

61. Convention, *supra* note 2, art. 153, para. 2(b).

62. *Id.* Annex III, art. 16.

63. *Hearings on H.R. 11879, supra* note 52, at 322.

64. *Hearings on H.R. 3350 and H.R. 4582 Before the Subcomm. on Oceanography and the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 215 (1977) (statement of James G. Wenzel).

65. *Foreign Relations Hearings, supra* note 13, at 31 (statement by United States Ambassador Richardson).

66. Convention, *supra* note 2, Annex III, art. 13, para. 2.

67. *Id.*



tive, an ISA with minimal regulatory control to interfere with mining is seen as the most desirable.

### *The Soviet Bloc*

The Soviet States have mixed interests in deep sea mining. They are currently established land-based producers and consumers of the metals.<sup>68</sup> In addition, they are developing seabed mining technology and desire access to the nodules.<sup>69</sup> As industrial nations, they are closer to the United States than they are to developing nations. However, politically they may wish to ingratiate themselves to less developed States,<sup>70</sup> so that their ultimate interests are presently difficult to determine.

### *The Group of 77*

Compared to the industrialized nations, developing States have broader and more general interests in the ISA. These countries were suspicious of existing rules of international law which were established before many of these nations gained their independence.<sup>71</sup> They especially focus on the freedom of the high seas, which has been interpreted to allow those with navies to control the oceans, and therefore the world.<sup>72</sup> The developing nations contend that their previous colonization was "facilitated by these principles."<sup>73</sup> They viewed UNCLOS III as a forum to discuss all aspects of the law of the sea and to establish their share of the oceans' wealth as a matter of legal right.<sup>74</sup>

In 1964, these developing nations formed a caucus referred to as the Group of 77 (G-77).<sup>75</sup> The G-77 presently consists of over 120 nations from Africa, Asia, Latin America and Oceania.<sup>76</sup> The G-77

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68. 2 T. KRONMILLER, *supra* note 51, at 411-415, 417.

69. E. LUARD, *THE CONTROL OF THE SEA-BED 200* (1977).

70. Charney, *United States Interests in a Convention on the Law of the Sea: The Case for Continued Efforts*, 11 VAND. J. TRANSNAT'L L. 39, 66 (1978).

71. Juda, *supra* note 18, at 225.

72. Djalal, *supra* note 17, at 22.

73. *Id.*

74. Pinto, *The Developing Countries and the Exploitation of the Deep Seabed*, 15 COLUM. J. WORLD BUS. 30, 30-31 (1980).

75. K. SAUVANT, *THE GROUP OF 77: EVOLUTION, STRUCTURE, ORGANIZATION* (1981). The member nations issued a statement entitled the "Joint Declaration of the Seventy-Seven," which depicted their unity and conviction to develop new policies for international trade and development. *Id.* at 1.

76. *Id.* at 2.

successfully proposed a United Nations resolution<sup>77</sup> recognizing their goal of establishing a new international economic order (NIEO).<sup>78</sup> The principles involved can be summarized as a demand to redistribute the world's wealth and political influence in a more equitable manner.<sup>79</sup> To become viable economic entities, these nations require the technology and financial assistance of developed countries.<sup>80</sup>

To the G-77, the Enterprise represents principles of cooperation and interdependence which are the bases of the NIEO.<sup>81</sup> These nations view the Enterprise as a funnel for both financial aid and the transfer of technology, as well as a method for gaining technical and managerial experience.<sup>82</sup> In addition, the G-77 wishes to protect member nations whose economies are dependent on exporting minerals contained in nodules.<sup>83</sup>

Consistent with this view is the G-77's strong support for the Declaration of Principles.<sup>84</sup> Member nations interpret the Declaration to mean that under the common heritage principle, exploitation of the nodules must be a joint operation by all who are interested under international authority.<sup>85</sup> Based on this premise, they envisioned the Enterprise as the sole mining entity. The G-77 perceived a parallel system with private firms as a concession.<sup>86</sup>

Although unified in its ultimate goal of the NIEO, the G-77 is not a cohesive unit, as exemplified by diverse cultural elements in their societies.<sup>87</sup> These nations are at various stages of develop-

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77. G.A. Res. 3201 (S/VI), 29 U.N. GAOR (Supp. 1), U.N. Doc. A/9959 (1974) [hereinafter cited as NIEO].

78. The G-77 goals are for the member nations to lift themselves from an impoverished level to one of economic independence. They challenge the right of developed States to use the world's limited resources disproportionately to world population, at the expense of the developing nations and the environment. *Juda, supra* note 18, at 224.

79. *Id.*

80. Pinto, *supra* note 74, at 33.

81. *Id.* at 37.

82. Lee, *Deep Seabed Mining and Developing Countries*, 6 SYRACUSE J. INT'L L. & COM. 213, 216 (1978).

83. Ferreira, *The Role of African States in the Development of the Law of the Sea at the Third United Nations Conference*, 7 OCEAN DEV. & INT'L L. 89, 91 (1979). Copper comprised 93 percent of Zambia's total exports in 1978. In 1979, cobalt accounted for 46 percent and copper for 36 percent of Zaire's total exports. THE ECONOMIST NEWSPAPER LTD., ENGLAND; THE WORLD IN FIGURES 104-105 (1981). In 1979, manganese was 8 percent of Gabon's exports. *Id.* at 69.

84. Lee, *supra* note 82, at 215-216.

85. *Id.* at 214.

86. *Id.* at 217. Conversely, the United States wanted the ISA to be merely a licensing authority, and private companies as the sole miners. Aldrich, *A System of Exploitation*, 6 SYRACUSE J. INT'L L. & COM. 245 (1978).

87. The G-77 consists of three distinct cultural groups. The Latin American

ment which could affect their economic priorities.<sup>88</sup> The more developed G-77 countries are or will be consumers of minerals,<sup>89</sup> placing their interests in opposition to member land-based producers. These factors may result in the disintegration of a unified G-77. NIEO principles could be subordinated to the individual interests of the nations involved. When an UNCLOS III issue was not delineated by north-south conflict and NIEO rhetoric, G-77 members had difficulty in formulating the group position.<sup>90</sup> They were especially divided on the representation and rights of land-locked nations to the exploitation of ocean resources.<sup>91</sup>

In summary, interests of the G-77 in the ISA go far beyond potential economic gain. These interests include recognition of their legal right in ocean resources and in international political decisions.<sup>92</sup> They wish to further the NIEO principle of international cooperation through seabed mining by the Enterprise.<sup>93</sup> Although presently united, these nations' individual interests may emerge, deteriorating the cohesiveness of the group.<sup>94</sup> In turn, this could lead to a cross section of support for issues rather than a strict north-south split as the United States fears will result.<sup>95</sup>

#### THE ISA DECISION-MAKING PROCESS

An examination of the composition, functions and voting procedures in the ISA's decision-making organs is required to analyze the relative representation of the participants' interests. A comparison to the structure and recent voting records in the United Nations is used as an aid to determine the validity of the United States claim of disproportionate representation.

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countries have a common language as well as historical and cultural ties. The African nations are unified on the basis of their new independence and African Solidarity, but there remains distrust between the Anglophone and Francophone States. The Asian members of the G-77 are the least homogeneous. Friedman & Williams, *The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea*, 16 SAN DIEGO L. REV. 555, 559 (1979).

88. *Id.* at 558.

89. *Id.* at 556.

90. Friedman & Williams, *supra* note 87, at 564-70.

91. *See* Ferreira, *supra* note 83, at 99-108.

92. Juda, *supra* note 18, at 224.

93. Pinto, *supra* note 74, at 33.

94. Friedman & Williams, *supra* note 87, at 574.

95. *Id.* at 573.

One result of protracted negotiations and ultimate compromises is an ISA characterized by a complex organization and voting structure. Many of the rules, regulations, and procedures remain to be determined by the Preparatory Commission.<sup>96</sup> The principal decision-making organs of the ISA are the Assembly and Council.

### The Assembly

The Assembly is the supreme organ of the ISA<sup>97</sup> with the power to establish general policies governing seabed exploitation. Because the Assembly is the plenary body, all parties to the Convention are members.<sup>98</sup> The Assembly, based on the principle of the sovereign equality of nations, gives each member one vote.<sup>99</sup>

Although the G-77 could dominate the Assembly by numerical superiority, the Convention includes constitutional safeguards limiting the scope of decisions.<sup>100</sup> This protects special interests involved. The policies established by the Assembly must be made in conformity with relevant provisions of the Convention,<sup>101</sup> including the Sea-Bed Policies.<sup>102</sup> The first enumerated objective is the orderly development of resources in the Area.<sup>103</sup> Thus, if the Assembly attempted to make policies limiting mining companies' access to nodules, industrialized nations could invoke this clause to block a decision.

The Assembly is also given power to elect members to the Council and to other ISA organs. Selection of Council members is governed by a formula set forth in the Convention. It requires representation of special interests including consumers of and investors in deep seabed mining,<sup>104</sup> both categories where predominant United States interests lie.

The power to assess member contributions for the budget is also conferred upon the Assembly.<sup>105</sup> Contributions are based on the proportionate scale used for the United Nations budget.<sup>106</sup>

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96. See *supra* note 56.

97. Convention, *supra* note 2, art. 160, para. 1.

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

99. *Id.* para. 5.

100. *Id.* art. 158, para. 4.

101. *Id.* art. 160, para. 1.

102. The Sea-Bed Policies state that activities in the Area shall be carried out as specifically provided in article 150, in a manner to foster the healthy development of world economy and trade. *Id.* art. 150.

103. *Id.* art. 150(a).

104. *Id.* art. 161.

105. *Id.* art. 160, para. 2(e).

106. *Id.*

In addition, the Assembly has the ultimate power to consider and approve rules, regulations, and procedures recommended by the Council.<sup>107</sup> A separation of powers clause<sup>108</sup> prevents the Assembly from impeding the exercise of powers conferred upon other organs. Therefore, the G-77-dominated Assembly cannot interfere with decisions by the Council authorizing companies to mine seabed nodules.

### The Council

The Council is the executive organ of the ISA with power to establish specific policies governing exploration, exploitation, financial management and administration of the ISA.<sup>109</sup> It may also approve work plans submitted by companies wishing to mine nodules.<sup>110</sup> The Convention establishes two subsidiaries of the Council: the Legal and Technical Commission and the Economic Planning Commission.<sup>111</sup>

The Legal and Technical Commission is required to make recommendations for the approval of work plans which satisfy relevant requirements.<sup>112</sup> By attempting to set forth objective requirements, the Convention will ensure fair consideration of industrialized states' mining applications rather than leaving decisions to be made in a more politicized environment. There are also provisions designed to protect investments of "pioneer investors" who have spent over \$30 million in pioneer activities of deep sea mining.<sup>113</sup>

The second Council subsidiary, the Economic Planning Commission, makes determinations regarding supply, demand and prices of minerals obtained from the Area.<sup>114</sup> This commission will propose compensation systems for developing States which suffer adverse effects from seabed mining.<sup>115</sup> This will probably be limited to land-based producers whose economies are heavily

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107. *Id.* art. 160, para. 2(f).

108. *Id.* art. 158, para. 4.

109. *Id.* art. 162.

110. *Id.* para. 2(j).

111. *Id.* art. 163, para. 1.

112. *Id.* art. 165, para. 2(b). These determinations are to be made solely on the grounds stated in Annex III of the Convention. *Id.*

113. Draft Final Act of the Third United Nations Conference on the Law of the Sea, Annex I, res. II, U.N. Doc. A/CONF.62/121 (1982).

114. Convention, *supra* note 2, art. 164, para. 2(b).

115. *Id.* para. 2(d).

influenced by exporting the minerals.<sup>116</sup>

Both commissions are to be composed of fifteen members selected by the Council.<sup>117</sup> Members must have appropriate qualifications relevant to their functions.<sup>118</sup> The United States and other industrialized nations will most likely have significant input on the commissions by virtue of the large number of their nationals possessing these qualifications.<sup>119</sup> Developing nations view these committees as powerful, but subject to strong influence by developed states. This view is held because industrialized nations have many personnel experienced in management of mineral resource activities, international trade and economics, and processing mineral resources, which are included in the requisite qualifications.<sup>120</sup>

The overall Council is composed of thirty-six members elected from five categories.<sup>121</sup> Each member has one vote. The categories include: four of the eight States with the largest investments in the Area,<sup>122</sup> four of the largest consumers or net importers of the nodule minerals,<sup>123</sup> four major net exporters of the minerals,<sup>124</sup> and six developing States with special interests.<sup>125</sup> The remaining eighteen seats are filled on the basis of equitable geographic distribution, with at least one representative from each enumerated region.<sup>126</sup> The Soviet States are guaranteed a seat in both the investor<sup>127</sup> and consumer<sup>128</sup> categories. The United States protested against this arrangement, claiming that the Soviet Union and its allies were guaranteed three seats while the United States had to compete with its allies for representation.<sup>129</sup> A final concession to the United States was express inclusion of the largest consumer in the consumer category.<sup>130</sup> The

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116. *See supra* note 83.

117. Convention, *supra* note 2, art. 163, para. 2.

118. *Id.* para. 3.

119. Lee, *supra* note 82, at 219.

120. *Id.* at 218-19.

121. Convention, *supra* note 2, art. 161, para. 1.

122. *Id.* para. 1(b).

123. *Id.* para. 1(a).

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

125. *Id.* para. 1(d). These special interests include large populations, nations which are land-locked or have short coastlines, major importers of the minerals to be derived from the Area, potential producers of such minerals, and least developed States. *Id.*

126. The regions are: Africa, Asia, Eastern (Socialist) Europe, Latin America, and "Western Europe and others." The last category includes the United States, Canada and Japan. *Id.*

127. *Id.* para. 1(b).

128. *Id.* para. 1(a).

129. Oxman, *The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)* 76 AM. J. INT'L L. 1, 10 (1982).

130. MERCHANT MARINE REPORT, *supra* note 5, at 23.

United States presently fits this criterion. As the Convention now stands, Council composition would probably include three Soviet States, nine industrialized nations (including the United States), and twenty-four developing States.<sup>131</sup>

The Council has a three-tiered voting system. Consensus<sup>132</sup> is required for the most important decisions, which include adopting measures recommended by the Economic Planning Commission to protect land-based mineral producers, or rejection of work plans recommended by the Legal and Technical Commission.<sup>133</sup> Consensus is also required for amending rules, regulations, and procedures in the ISA or activities in the Area.<sup>134</sup> Most other substantive issues require a three-fourths majority vote.<sup>135</sup> Less controversial matters, such as examination of and recommendation on reports, require a two-thirds majority for approval.<sup>136</sup>

Once initial rules are established by the Preparatory Commission, this voting structure prevents the G-77 from manipulating the Council and adversely affecting industrial economic interests. Consensus is required on decisions that have the greatest effect on seabed mining nations. Therefore, each Council member will have a veto power<sup>137</sup> on decisions such as contract denial to a qualified mining applicant or amendments to the ISA structure. If the rules provided by the Preparatory Commission are acceptable, industrialized nations will be protected by them.<sup>138</sup> The United States could be very influential on the Preparatory Commission because the same issues have already been considered in the United States own deep sea mining legislation.<sup>139</sup>

With nine members, the industrialized nations will require only one additional vote to block adverse decisions requiring three-

131. Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*. 75 AM. J. INT'L L. 211, 218-19 (1981).

132. Consensus is defined as the absence of any formal objection. Convention, *supra* note 2, art. 161, para. 7(e).

133. *Id.* art. 162, para. 2(i), (j).

134. *Id.*

135. *Id.* art. 161, para. 7(c). These decisions include establishing specific policies and recommendations to the Assembly of candidates for election to the Enterprise and Secretariat. *Id.*

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

137. Under the consensus requirement, a dissenting Council member can block a decision by formally objecting. *Id.* para. 7(e).

138. *Foreign Relations Hearings*, *supra* note 13, at 24 (statement of Elliot Richardson).

139. *Id.* at 34.

fourths majority of the thirty-six members. However, they will require the support of fifteen to eighteen members of the Soviet bloc and G-77 to obtain a requisite majority to pass decisions they desire. Mustering this support is not necessarily difficult. As discussed earlier, some Soviet interests<sup>140</sup> and some interests of G-77 members are consistent with those of Western nations.<sup>141</sup>

Thus, the initial rules established by the Preparatory Commission will determine effective guidelines to be followed in decision-making. Industrialized nations can protect their deep sea mining investments and secure access to the nodules by signing the Convention<sup>142</sup> and participating in the Preparatory Commission. Through the constitutional safeguards and large majorities required for decisions in the ISA, their special interests are protected by the Convention.

### *Comparison to the United Nations: A Structure and Policy Analysis*

Examination of the decision-making organs in the United Nations which parallel the ISA's Assembly and Council reveals both similarities and variations in their structures. However, analysis of the fundamental purposes of the two helps explain that different decision-making systems may be appropriate in each. The underlying bases and constitutional limitations of the two entities are varied. Parameters set forth by the Convention should help quell the United States fears that the G-77 will rule the ISA to the detriment of the United States interests in deep sea mining.

The United Nations organs which parallel the ISA's are the General Assembly and the Security Council. The General Assembly is the United Nation's plenary body recognizing the sovereign equality of member nations.<sup>143</sup> Each member has one vote.<sup>144</sup> Resolutions are passed by a two-thirds majority.<sup>145</sup> These resolutions have no binding legal effect, but they are influential as an expression of world opinion.<sup>146</sup>

An examination of recent voting in the General Assembly exemplifies the industrialized nations' concern that their interests

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140. Byrum, *An International Seabed Authority: The Impossible Dream?* 10 CASE W. RES. J. INT'L L. 621, 641 (1978).

141. Friedman & Williams, *supra* note 87, at 563-72.

142. If the industrial nations do not sign the Convention, they will not have a vote in the Preparatory Commission. MERCHANT MARINE REPORT, *supra* note 5, at 44.

143. U.N. CHARTER, art. 2, para. 1.

144. *Id.* art. 18, para. 1.

145. *Id.* para. 2. Questions on important matters require a two-thirds majority, other decisions only call for a simple majority. *Id.*

146. Charney, *supra* note 70, at 55.



will not be protected by the ISA Assembly.<sup>147</sup> Resolutions supporting the G-77 goal of the NIEO have been adopted over the opposition or abstention of developed nations.<sup>148</sup> These resolutions include the moratorium on deep sea mining<sup>149</sup> and others pertaining to the economic rights and duties of States.<sup>150</sup> The G-77 and Soviet bloc generally voted in favor of such resolutions,<sup>151</sup> whereas, the United States often voted against them.<sup>152</sup> Other industrialized nations, including Japan, Australia, and Western European nations, usually abstained.<sup>153</sup>

However, these resolutions have been within the rationale which underlies the United Nations establishment. The United Nations Charter includes in its purposes international cooperation in solving international economic and social problems,<sup>154</sup> a category which arguably includes the resolutions discussed.

147. The author examined resolutions and decisions adopted by the General Assembly's second committee, which is concerned with economic and financial matters. Most of these decisions were made without a vote. See U.N. Dep't of Pub. Information, Press Release GA/6375 (Jan. 21, 1981) [hereinafter cited as Press Release GA/6375]; U.N. Dep't of Pub. Information, Press Release GA/6546 (Jan. 4, 1982) [hereinafter cited as Press Release GA/6546].

148. See, e.g., Resolution on the Transfer of Technology, G.A. Res. 34/199, 34 U.N. GAOR Supp. (No. 46) at 137, U.N. Doc. A/34/46 (1980); U.N. Conference of Trade and Development (UNCTAD) decisions, Press Release GA/6375, *supra* note 147, at 201; GA/6546 *supra* note 147, at 213; problems of remnants of war, Press Release GA/6546 *supra* note 147, at 240.

149. G.A. Res. 2574, 24 U.N. GAOR Supp. (No. 30) at 10-11, U.N. Doc. A/7630 (1969).

150. NIEO, *supra* note 78; Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50-1, U.N. Doc. A/9946 (1974).

151. Press Release GA/6546, *supra* note 147, at 226. The Soviet Union voted against the Moratorium Resolution in conjunction with the United States and other industrialized nations. Israel, Ivory Coast, Malawi, Morocco, Niger, New Zealand, Senegal, and Upper Volta abstained in the vote on problems of remnants of war. *Id.*

152. See *id.* The United States voted against the transfer of technology, the Moratorium Resolution, the Charter of Economic Rights and Duties, and abstained in the remainder of the votes. See Press Release GA/6546, *supra* note 147, at 215, 226; Press Release GA/6375, *supra* note 149, at 198, 202.

153. Press Release GA/6546, *supra* note 147, at 215, 226; Press Release GA/6375 *supra* note 147, at 198, 202. The nations abstaining in the Charter of Economic Rights and Duties were: Belgium, Canada, Denmark, France, Federal Republic of Germany, Ireland, Italy, Greece, Japan, Luxembourg, Netherlands, and the United Kingdom. These nations were joined by Australia, Austria, Finland, New Zealand, Portugal, Spain, and Switzerland by abstaining in the United Nations Conference on Trade and Development and remnants of war votes. *Id.*

154. U.N. CHARTER Preamble, art. 1, para. 2.

These principles were established in 1945,<sup>155</sup> before many G-77 nations had gained their independence. Therefore, these less developed states did not negotiate to embody these purposes in the United Nations. However, these principles initiated by the United States and other United Nations founders<sup>156</sup> are relevant to current NIEO objectives. The apparent rejection by the United States of these principles appears contradictory.

The ISA was established to promote rational development of the seabed resources, while simultaneously protecting the economies of land-based suppliers.<sup>157</sup> Decisions made by the ISA must be consistent with its framework. In addition to constitutional protections, the schism of thinking in the G-77 and ambivalence of the Soviet States referred to earlier may result in voting by them that is consistent with industrial nations' objectives.

An analogy can be drawn from the United Nations organization. That body was conceived during World War II, with a principal goal of preventing future suffering from war-related atrocities.<sup>158</sup> The United Nations Security Council has ten non-permanent members and five permanent members.<sup>159</sup> Concurring votes of all five permanent members is required for decisions on substantive matters.<sup>160</sup> The United States would like a similar veto power to protect its interest in the ISA Council.<sup>161</sup> However, there are fundamental differences in the purposes of the two councils. The United Nations founders delegated the responsibility for maintaining international peace to the Security Council.<sup>162</sup> The five permanent member nations were perceived to be the countries most capable of maintaining world peace through their military and navigational strength and advanced industries.<sup>163</sup> The veto power was viewed as an aid to fostering world peace since decisions would be agreed to by all permanent members.<sup>164</sup>

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155. U.N. DEP'T OF PUB. INFORMATION, BASIC FACTS ABOUT THE UNITED NATIONS 2 (1980). The United Nations officially came into existence on October 24, 1945. *Id.*

156. The founders included the Soviet Union, United Kingdom, China, France, the United States and other nations involved in World War II. Japan and Germany were not admitted until 1956 and 1973 respectively. T. HOVET, *supra* note 59, at 244-47.

157. Convention, *supra* note 2, art. 156, para. 2.

158. REPORT TO THE PRESIDENT, CHARTER OF THE UNITED NATIONS 9-10 (1945) (reprint 1969).

159. U.N. CHARTER art. 23, para. 1. The five permanent members are China, France, the Soviet Union, the United Kingdom and the United States. *Id.*

160. *Id.* art. 27, para. 3.

161. Zamora, *Voting in International Economic Organizations*, AM. J. INT'L L. 566, 586 (1980).

162. U.N. CHARTER art. 24, para. 1.

163. REPORT TO THE PRESIDENT, *supra* note 158, at 68-69.

164. *Id.*

The United States interests in deep sea mining are basically economic. Furtherance of United States economic interests would not benefit other nations as do attempts by the Security Council to maintain world peace. There is no compelling reason to favor industrialized nations' mining interests over the interests of other nations as there was in the formation of the Security Council. Deep sea mining is a new international venture. Although mining companies have spent several hundred million dollars developing technology, no country has a legal claim to an exclusive area of the seabed as yet.<sup>165</sup> While the United States will have large investments at stake, other nations have valid economic concerns which may have a greater proportionate effect on their economies.<sup>166</sup> Some developing nations' economies are dependent on mineral exports. To deprive them of this income could result in increased poverty. The G-77 members also have justifiable aspirations of increased political recognition and economic independence,<sup>167</sup> which they hope to advance through the Enterprise.

Although the G-77 opposed veto power for any special interest group,<sup>168</sup> it agreed to the more democratic method of consensus on the most important issues.<sup>169</sup> As the largest consumer, the United States would have a guaranteed seat on the ISA Council and veto power on decisions requiring consensus, those most pertinent to its interests. With these powers, and in light of the varied interests involved in deep sea mining, it is difficult to justify the United States position that its interests are not being proportionately represented.

#### CONCLUSION

The United States contention that the ISA fails to protect proportionately the interests involved is inaccurate. If analysis of relevant concerns is examined on a strictly economic basis, industrialized nations will have the largest capital investment in the

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165. *Foreign Relations Hearings*, *supra* note 13, at 9 (statement of Elliot Richardson, former special representative to the President).

166. *See supra* note 83.

167. *See Pinto*, *supra* note 74, at 36.

168. Adede, *The Group of 77 and the Establishment of the International Sea-Bed Authority*, 7 OCEAN DEV. & INT'L L. 31, 48 (1979).

169. Convention, *supra* note 2, art. 161, para. 7(d).

ISA. However, the value of G-77 political aspirations and *relative* economic concerns should be considered in this determination.

The United States can best protect its overall interests from within the framework of UNCLOS III. By signing the Convention, the United States will have a more influential impact on the Preparatory Commission in determining rules and regulations for deep sea mining. Acceptance of the treaty will also increase United States economic interests in the exploitation of ocean resources in the exclusive economic zone, the continental shelf, and the deep seabed. Strategic and military interests in navigation and foreign relations will be enhanced by cooperation in an international legal regime. Only by signature and active participation in the Preparatory Commission can the United States fully protect its deep sea mining interests. The negative economic and socio-political ramifications will be much greater for the United States by remaining outside the international framework established by the Convention than the effects of embracing the Convention perceived by the Reagan administration.

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