

THE PROPOSED NEW CONVENTION ON THE LAW OF THE SEA—A CANDID APPRAISAL

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I. INTRODUCTION

At the conclusion of the Ninth Session of the Third United Nations Conference on the Law of the Sea (UNCLOS—III) on August 29, 1980, the chief American delegate, Ambassador Elliott L. Richardson, stated that it was "all but certain" that the text of a convention would be ready for signing in 1981. He added that, "historians looking back on this session of the conference are likely to see it as the most significant single development of the rule of law since the founding of the United Nations itself."¹ In its lead editorial of September 6, 1980, "Taming the Oceans With Law," *The New York Times* expressed its full agreement that, if the final hurdles could be crossed, the prospective treaty "would signal a global victory for the rule of reason and the dominion of law."²

In reading these and similar glowing accounts of the progress being made in UNCLOS-III, this writer could not erase from his memory the warning sounded in 1967 in the following words by one of the world's leading authorities on the law of the sea, Professor Myres S. McDougal: "I think it may take a hundred years for the law of the sea to recover from the last two conferences which dealt with it, and I would regard the immediate call of another conference as an unmitigated disaster."³

The purpose of this article is to analyze certain of the more critical aspects of the Draft Convention of September 22, 1980⁴ in an effort to determine where the truth lies between these two sharply contrasting points of view. At the American Bar Association National Institute on Marine Resources in June of 1967, Professor McDougal pointed out that the international law of the sea, which to him was the most effective part of all the international

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1. N.Y. TIMES, Aug. 30, 1980, at 4, col. 1.

2. N.Y. TIMES, Sept. 6, 1980, at 20, col. 1.

3. THE LAW OF THE SEA 3 (L. Alexander ed. 1967). The reference to the last two conferences was to those of 1958 (UNCLOS-I) and 1960 (UNCLOS-II).

4. U.N. DOC. A/CONF. 62/WP.10/REV.3, (22 Sept., 1980), reprinted in XIX INT'L LEGAL MATLS 1129 *et seq.* (1980).

law that the world enjoys today, had taken several centuries to evolve. He then summarized his views of the law of the sea as follows:

It is . . . a simple system whereby with a few fundamental policies accepted in high degree by everybody we have been able to maintain to the inestimable benefit of the whole of mankind, an international and cooperative exploitation of the great sharable resources of the oceans. These simple policies have been that everybody has access and nobody can deny anybody else access; that everybody makes and applies law to his own ships, his own craft; and that nobody makes and applies laws to the craft of other states except for violations of international law, or of national law as authorized by international law. . . .

This inherited law of the sea is not a static thing. It is dynamic. There is a constitutional process that works with respect to it just as in any national community. This law is made and remade by custom—by people cooperating, working together for common ends, clarifying their common interests as they engage in cooperative activity.⁵

His objection to international conferences as a source of law was that

[w]hen the representatives of the different peoples meet in these great conferences the officials come not only concerned to clarify common interests in the law of the sea, but also as representatives of the total policies of their states. . . . In the light of experience, we might, thus, be forgiven a great reluctance to recommend anything other than reliance upon the habitual, customary processes in which impurities of claims of special interest work themselves clean.⁶

II. THE EVOLUTION OF THE UNCLOS—III CONVENTION

What Professor McDougal feared is exactly what has come to pass. The 1958 conventions on the law of the sea, with all their shortcomings from Professor McDougal's point of view, at least had the benefit of long and careful work by the International Law Commission, which had been charged by the General Assembly of the United Nations with the codification of the customary inter-

5. McDougal, *Revision of the Geneva Conventions on the Law of the Sea—The Views of a Commentator*, 1 NAT. RES. LAW. 19, 20, 21 (1968).

6. *Id.*

national law on the subject. On this occasion, the International Law Commission was bypassed. The Group of 77 insisted, instead, that the matter be referred directly to a general international conference on the ground that the developing countries had had little or no part in the formulation of the existing international law of the sea, that that law was the handmaiden of the former colonial powers, and that the developing countries wanted an across-the-board reexamination of the subject with their particular needs and interests in mind.⁷

As a result of developments since the utterance of Professor McDougal's remarks in 1967, the negotiations in UNCLOS-III may have become even more politicized than he anticipated. The ever-growing number of developing countries in the United Nations have pressed, with increasing emphasis, for the management of international economic affairs on a one-country, one-vote basis. A major goal in this effort is the establishment of a New International Economic Order under which the wealth of the world would be redistributed to their particular benefit.⁸

Of the present 154 member countries in the United Nations, 120 or more are developing countries. As former colonies, dependencies and trust territories become independent nations and join the United Nations, both the total number of developing countries in the United Nations and the size of their voting majority in the General Assembly steadily increase. Even a tiny island republic with a population of less than 100,000 and a minuscule GNP has the same voting power in that body as does the United States. This is in line with the recognition in the United Nations Charter of the principle of sovereign equality of states.⁹ The Charter also recognizes, however, that particular states are entitled to a special role based on the importance of the contributions that they are able to make to world affairs. It is for this reason that a

7. An Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction created by G.A. RES. 2340 (XXII) (Dec. 18, 1967) submitted its report in 1968; U.N. Doc. A/7230 (1968). It was followed by the Committee on Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction appointed by G.A. RES. 2467 A (XXIII) (Dec. 21, 1968) which submitted its final report in six volumes in 1973; U.N. Doc. A/9021 (1973). UNCLOS-III was convened for its first organizational meeting in December, 1973 by G.A. RES. 3067 (XXVIII) (Nov. 16, 1973) and has thus far held eight subsequent sessions, the latest ones in two parts.

8. See Bauer and Yamey, *East-West/North-South—Peace and Prosperity?*, COMMENTARY, 57 *et seq.* (Sept. 1980).

9. U.N. CHARTER, arts. 2.1, 10.1.

predominant role is assigned to the Security Council and a veto power over its actions on matters of substance is vested in each of its five permanent members.¹⁰

If the United Nations were to be reconstituted on the basis of a one-country, one-vote determination of all matters within its competence, it would fly apart at the seams. Yet, the Group of 77 has been undaunted in pressing this concept to the utmost in UNCLOS-III. UNCLOS-III has, in fact, provided the arena for the Group of 77's most important campaign to date for the New International Economic Order and, if a final text remotely approaching the Draft Convention in certain of its aspects ever enters into force, it will have won a signal victory.

On certain issues to be resolved in UNCLOS-III, particularly those relating to national security, the United States and other developed countries would not yield to any amount of pressure from the Group of 77. Freedom of transit and overflight of straits and archipelagic sea lanes used for international navigation was one of these issues. As a consequence, this freedom has been preserved¹¹ despite the abandonment of the traditional three-nautical mile territorial sea in favor of a twelve-nautical mile territorial sea and the recognition of the concept of archipelagic waters encompassing, as internal waters, vast expanses of what has heretofore been regarded as high seas.¹²

Similarly, coastal states are required under the Draft Convention to adhere to international standards with respect to the construction, design, manning and equipment of foreign vessels merely exercising the right of innocent passage of their territorial seas.¹³

The Group of 77 was also required to accept freedom of navigation and overflight and the freedom to lay submarine cables and pipelines in the 200-nautical mile exclusive economic zone as a condition to agreement that this zone is not a part of the high seas

10. See Goodrich, Hambro and Simons, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 37 (1969).

11. Note 3, *supra*, arts. 38, 53. This writer cautions the reader that, in arriving at his views regarding the acceptability of these articles, he was judging them exclusively from the standpoint of the needs of merchant shipping. For a strong view *contra*, primarily from the standpoint of military uses of the seas, see Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48 (1980).

12. Note 3, *supra*, arts. 3, 49, 50.

13. *Id.* art. 21.2.

but has a special status of its own.¹⁴ It may be noted in this connection that, though the developing countries took the lead in forcing acceptance of the exclusive economic zone, not all developed countries were opposed to it. For example, the coastal fishermen in the United States had been subjected to such increasing harassment at the hands of Soviet and other distant-water fishing fleets that they induced Congress and the President to anticipate the entry into force of this portion of the Draft Convention by enacting and signing into law the Fishery Conservation and Management Act of 1976.¹⁵ To the surprise of this writer,¹⁶ the acceptance of the inevitability of a 200-nautical mile exclusive economic zone as the wave of the future was so general that this unilateral action created hardly a ripple, despite the fact that it was in clear violation of our obligations under the 1958 Convention on the High Seas.¹⁷

As freedom of fishing beyond the limits of the territorial sea has been a high seas freedom ever since the time when Hugo Grotius's theory of *mare liberum* first gained the ascendancy over John Selden's theory of *mare clausum*,¹⁸ UNCLOS-III has had to devote much attention to such matters as the conservation of fisheries resources in the exclusive economic zone, maximum sustainable yield and allowable catch, and the obligation of coastal states to make available to fishermen of other countries, and in what priorities, the portion of the allowable catch that is in excess of their own national fishing capabilities.¹⁹ The implementation of these provisions over the years can be expected to be a source of heated controversy in view of the historic rights that are being set aside.

14. *Id.* arts. 58, 59, 86. It is to be noted that article 58 narrows the "other" freedoms of the 1958 Convention on the High Seas to "other internationally lawful uses of the sea related to" the freedoms of navigation and overflight and of the laying of submarine cables and pipelines. [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, art. 2. This contraction of present high seas freedoms might have serious adverse consequences with respect to matters not specifically guarded against in the Draft Convention.

15. Pub. L. No. 94-265, 90 Stat. 331 (1976).

16. See Finlay, *United States Policy with Respect to High Seas Fisheries and Deep Seabed Minerals—A Study in Contrasts*, 9 NAT. RESOURCES LAW. 629 (1976).

17. Note 12, *supra*, art. 2(2).

18. See SWARTZTRAUER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* 18-22 (1972).

19. Note, *supra* arts. 61-63, 69-72. This portion of the Draft Convention also includes provisions regarding highly migratory species, art. 64, marine mammals, art. 65, and anadromous and catadromous species arts. 66 and 67.

After a fortunately abortive and short-lived proposal by the United States that coastal countries should renounce their sovereignty over seabed resources beyond the 200-meter isobath in exchange for a trusteeship for the international community over the balance of the margin,²⁰ broad-margin states, both developed and developing, have stood together on their retention of seabed-resource jurisdiction over their entire continental margins where they extend beyond the exclusive economic zone. They have gained recognition in the Draft Convention of the pronouncement of the International Court of Justice in the *North Sea Continental Shelf Cases* that the natural prolongation of the land territory of a state into and under the sea is the juridical basis of such jurisdiction.²¹ Article 76 codifies this concept and prescribes the so-called Irish formula, with specified limitations, for the precise delineation of the boundary of national jurisdiction where it extends more than 200-nautical miles from shore.²² In exchange for the clarification of the uncertain boundary of national jurisdiction under the "adjacency" and "exploitability" tests of the 1958 Convention on the Continental Shelf,²³ the coastal states are required, however, to make a contribution for international community purposes with respect to production beyond the 200-nautical mile limit. This contribution starts at one percent of value or volume of production beginning in the sixth year of production and rises to seven percent in the twelfth and subsequent years of production.²⁴

A reasonable compromise has been attained between the interests of coastal countries in the protection of their environment and the interest of the community of nations as a whole in freedom of navigation.²⁵ In the field of marine scientific research, the United States scientific community has not attained the degree of freedom that it sought on the continental shelf and in the ex-

20. See, U.N. Doc. A/AC. 138.22 (1970); 9 INT'L LEGAL MATL'S 806 (1970). The drastic rise in oil prices following the 1973 war in the Middle East hastened the demise of this ill-advised proposal.

21. [1969] I.C.J. 3, 22; 8 INT'L. LEGAL MATL'S 340, 357 (1969).

22. Note 3, *supra* art. 76.4(a) as qualified by arts. 76.5, 76.6.

23. [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311, art. 1.

24. Note 3, *supra*, art. 82. Under para. 3 of this article, a developing country that is net importer of the mineral resource involved is exempt from the obligation of this article with respect to that resource.

25. *Id.* Part XII.

clusive economic zone. This is not surprising, however, in view of the precedent set, with United States concurrence, in the 1958 Convention on the Continental Shelf. Under that convention, the consent of the coastal state to research on its continental shelf must be obtained but may not unreasonably be withheld.²⁶ This is basically what is prescribed in the Draft Convention for both the continental shelf and the exclusive economic zone but in considerably greater detail.²⁷

The three areas in which the developing countries have gained the greatest concessions from the developed countries are the provisions for the settlement of disputes, provisions relating to activities in the international seabed area (the Area), and provisions relating to amendments to the portions of the Convention dealing with activities in the Area.

Special provisions are made for the settlement of disputes in the Area, as will be discussed shortly. For other disputes, with the exception of the limited categories excluded from compulsory settlement,²⁸ states parties to the Convention are given a choice between a new International Tribunal for the Law of the Sea (the Tribunal), the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII and, for special categories of disputes, a special arbitral tribunal constituted in accordance with Annex VIII.²⁹ In the absence of agreement of both parties to a dispute on the same method of settlement, the provisions for arbitration under Annex VII will govern.³⁰

The Tribunal is composed of twenty-one judges and has a Sea-Bed Disputes Chamber of eleven members elected by the twenty-one from among their own number.³¹ With three exceptions, the Sea-Bed Disputes Chamber has exclusive jurisdiction over all disputes with respect to activities in the Area.³² Two of the exceptions are helpful ones that provide for arbitration under the rules of the United Nations Commission on International Trade Law of disputes between a contractor and the International Sea-Bed

26. Note 21, *supra* art. 5.1, 5.8.

27. Note 3, *supra* Part XIII.

28. *See id.* arts. 297, 298.

29. *Id.* art. 287.

30. *Id.*

31. *Id.* Annex VI, arts. 2, 36.1.

32. *Id.* art. 187.

Authority³³ (the Authority) and disputes between a prospective contractor and the Authority regarding the extent of his obligation to provide technology to the Enterprise or to developing countries.³⁴ Only the Sea-Bed Disputes Chamber, however, has jurisdiction to interpret the meaning or application of Part XI of the Draft Convention and the related annexes dealing with activities in the Area. If such a question exists at the outset of, or arises during, an arbitration proceeding, it must be submitted to the Sea-Bed Disputes Chamber, and its decision is binding on the arbitration tribunal in arriving at its own decision.³⁵

The third exception is a highly undesirable one which excludes from the jurisdiction of the Sea-Bed Disputes Chamber the power to find either that the rules, regulations and procedures adopted by the Authority are not in conformity with the provisions of the Convention or that they are invalid.³⁶ If this is not clarified, the Authority can become a law unto itself.

The provisions for the election of members of the Tribunal and its Sea-Bed Disputes Chamber are such as to assure a heavy preponderance of nationals of the developing countries. The Western European and Other Group in the United Nations and the Eastern European (Soviet) group are assured of no more than three members each and neither group may realistically expect to have more than four members.³⁷ This means that thirteen to fifteen members will be from the developing countries. A comparable composition of the eleven members of the Sea-Bed Disputes Chamber must be anticipated.

It is common knowledge in our own country that judges bring their personal philosophies with them to the bench. It is hardly conceivable that the developing country nationals constituting a substantial majority on the Tribunal would ever have been nominated if they did not share their respective national philosophies on the New International Economic Order. It is only natural, therefore, that the market-oriented countries of the West and their nationals would have little confidence in the impartiality of a tribunal so constituted.

33. *Id.* art. 188.2.

34. *Id.* Annex III, art. 5.4.

35. *Id.* art. 188.2(b).

36. *Id.* art. 190.

37. *Id.* arts. 2-4.

The same objection applies to the designation of the President of the Tribunal, who may be expected to be a developing-country national, as the official to select the neutral arbitrators in arbitration proceedings under Annex VII of the Draft Convention when the parties to the dispute cannot themselves agree on the selection.³⁸ As a consequence, the option given parties to the Convention to select arbitration tribunals as the only means of settling disputes other than those relating to activities in the Area to which they are a party does not give them the assured impartiality of adjudication that Ambassador Richardson and the editor of *The New York Times* seem to assume. This is further supported in that even an impartially selected arbitration tribunal, as a one-time body, would have every inclination to follow the lead of the Tribunal on any issue on which it had already ruled in another case unless its ruling was so outrageous as to destroy its credibility.

The fact that an arbitration tribunal under Annex VII can deal with the most critical issues of interpretation and application of all parts of the Convention except Part XI and related annexes dealing with activities in the Area, whereas even the most trivial question of interpretation or application of Part XI and the related annexes must be submitted to the Sea-Bed Disputes Chamber, is one of many indications of the degree to which activities in the Area have been accepted in UNCLOS-III as the special domain of the developing countries. It is with respect to these activities that the Group of 77 has exacted the greatest concessions from the developed countries, with Canada, the principal producer of nickel, as their active collaborator in the demand for protection of land-based production of the minerals to be found in the Area.

Part XI and Annexes III and IV of the Draft Convention provide a comprehensive regime for the development, under the control of the Authority, of the mineral resources of the Area. The principal organs of the Authority are an Assembly, a Council and a Secretariat. There are also an Enterprise, through which the Authority itself will engage in exploration and exploitation of the resources of the Area in competition with those it regulates, an Economic Planning Commission and a Legal and Technical Commission, together with provisions for such other subordinate organs as may be needed. The Assembly, made up of all the state

38. *Id.* Annex VII, art.3(e).

parties and organized on a one-country, one-vote basis, continues to be designated as the "supreme organ" of the Authority,³⁹ a designation that may some day serve to unravel some of the safeguards that the U.S. Delegation has sought to write into Part XI.

The Council, made up of thirty-six members, is designated as the executive organ of the Authority. Its members are to be selected on the basis of (a) investments in preparation for and conduct of activities in the Area (four members), (b) importation or consumption of commodities produced from the categories of minerals to be derived from the Area (four members), (c) exportation of land-based production of such minerals (four members), (d) special interests such as countries of large populations, those which are land-locked or geographically disadvantaged, those which are major importers or potential producers of the minerals in question and those which are the least developed (six members), and (e) equitable geographic distribution of seats, with no more than a single seat to a country (eighteen members).⁴⁰

To prevent the developed countries and their nationals from being at the mercy of developing-country majorities in both the Assembly and the Council, many compromise provisions have been worked out after long and persistent effort. Some of them give the Council, not the Assembly, the final say on such matters as the rules, regulations and procedures of the Authority.⁴¹ Another provision prescribes voting rules for the Council under which the majority required for the Council to act varies with the importance of the matter to be acted upon and ranges from the requirement of a simple majority on procedural matters to the requirement of a consensus on the most delicate matters such as adoption or revision of the rules, regulations and procedures of the Authority and amendment of the provisions of the Convention relating to activities in the Area.⁴² As a further safeguard, the U.S. Delegation has proposed that interim rules, regulations and procedures drafted by a Preparatory Commission be effective on a provisional basis until adopted or modified by the Council by consensus and that the United States not ratify the Convention until

39. *Id.* arts. 159, 160.1.

40. *Id.* art. 161.1.

41. *Id.* art. 162.2(n)(ii).

42. *Id.* art. 161.7.

it has had the opportunity to review the report of the Preparatory Commission.⁴³

A cardinal flaw in this elaborately designed mechanism for the attainment of a balancing of interests is that, after a relatively brief period of years, the mechanism may be discarded by the developing countries and revised to suit their tastes. This is the effect of Article 155 which calls for a review conference to be convened fifteen years after the first of January of the year in which commercial production in the Area under the terms of the Convention commences. The conferees have sweeping powers to modify Part XI and the related annexes by amendments that will be binding on all states parties if approved and ratified by three-fourths of them during the first five years of the conference, or by two-thirds of them during the sixth year.⁴⁴ As this is a vote that the developing countries can easily muster, this means, in effect, that after a brief transitional period of about twenty years, the development of the mineral resources of the Area will be surrendered to world government under developing country control. The only answer that the U.S. Delegation has offered to this alarming prospect is that, if the review conference acts in an extreme manner, the United States could denounce the Convention.⁴⁵ Denunciation would have to be of the Convention as a whole and not of Part XI alone. It seems self-evident that the availability of the right of denunciation, with all the consequences which that action would entail, is a grossly inadequate substitute for acceptable treaty provisions of a durable nature.

Even during the interim period, access of American contractors to the Area would be severely limited. Until the conclusion of the deliberations of the review conference, production controls geared to world demand for nickel are imposed by Article 151.2 for the protection of the countries producing the key minerals to

43. *Seabed Mining and Law of the Sea*, Current Policy No. 233, U.S. State Department, Sept. 24, 1980 at 2.

44. Note 3 *supra* arts. 155.4, 316.5.

45. This is the implication of the U.S. Delegation Reports of the Feb. 27-April 4, 1980 and July 28-Aug. 29, 1980 meetings of the Ninth Session of UNCLOS-III, at 10 and 6, respectively. The U.S. Delegation views the provision for binding revisions of Part XI by the majority vote prescribed in articles 155.4 and 316.5 as an improvement over the earlier provision for a moratorium on contracts if the review conference failed to reach agreement. It also seems content with the current text, as revised, to harmonize the time lag for entry into effect of amendments approved at the review conference with the time lag for the effectiveness of a denunciation of the Convention under article 321.7.

be found in polymetallic nodules: manganese, nickel, copper and cobalt.⁴⁶ The conferees in UNCLOS-III have blithely assumed that land-based production of these minerals will always be in adequate supply at reasonable prices and have provided no safeguards against the contrary, notwithstanding the dramatic increase that took place in the price of cobalt, for example, when a single mine in Zaire was seized by Katangese irregulars in 1978.⁴⁷

As a safeguard against adverse majority action in the Council, the Draft Convention calls for virtually automatic issuance of contracts to qualified applicants provided only that the Legal and Technical Commission discharges its responsibilities in an objective manner.⁴⁸ During the years that a production ceiling is in effect—and there is no assurance under Article 151.2 that this will not be forever despite the fact that it is described as being for an “interim period”—a contractor must, however, also have a production authorization; this requires a three-fourths majority vote of the Council.⁴⁹ Based on the Bureau of Mines’ mid-range projection of 3.4% per annum growth in nickel demand for the balance of the century, only five production authorizations of from 38,000 to 46,500 tons of nickel per annum (for a maximum total of 200,000 tons) could be issued through the year 1988, and only three additional authorizations averaging 40,000 tons per annum each could

46. Secretary of State Kissinger agreed in the spring of 1976 to production controls for the protection of land-based producers for a temporary period and to the Authority's representation of “the amount of production for which it is directly responsible” in the negotiation of international commodity agreements. Bureau of Public Affairs, Department of State, PR 162, Apr. 8, 1976 at 7. Article 151.2(a) of the Draft Convention is so worded as to guard against any lapse in the “temporary” production controls should the review conference convened under article 155 decide to continue them. Article 151.1 is so worded that the Authority will represent not only the production in the Area for which it is “directly” responsible, but also in all production in the Area during the negotiation of international commodity agreements.

47. According to the William G. Shepherd, Jr. column, *Investing*, in the Financial Section of the *New York Times*, Nov. 2, 1980, the price of cobalt escalated from \$6.40 per pound to \$45 per pound, receding only to around \$25 per pound after the invaders were driven off. This effectively demonstrates that the post-1973 OPEC experience is not necessarily unique to oil.

48. Note *supra* 3, art. 162.2(j). If the Legal and Technical Commission, which is charged with making recommendations to the Council, recommends approval of the plan of work and issuance of a contract, it requires a consensus decision of the Council to overrule this recommendation, with the state party or parties making or sponsoring the application not participating in the decision. If the Legal and Technical Commission fails to recommend approval, however, it requires a three-fourths majority vote of the Council to approve it.

49. *Id.* arts. 162.2(p), 161.7(c).

be issued during the ensuing three years.⁵⁰ Under the provisions of Article 7.6 of Annex III, the Enterprise would have priority for at least one-half the available quota for itself and those participating in joint ventures with it.⁵¹ Under Article 7.5 of the same annex there would be no reasonable prospect of more than one American contractor obtaining a production authorization as long as there were competing applications for production authorizations from countries of which no national had yet received an authorization.

Ambassador Richardson has expressed the view that, "[N]otwithstanding the share of production taken up by the Enterprise, acting alone or in joint ventures, there would still be sufficient tonnage under any reasonable set of assumptions to insure that private miners would get their authorizations when they need them."⁵² This writer has difficulty understanding how this can be true unless one of the assumptions is that the attractiveness of the final terms prescribed in the Convention for contracts in the Area will be so marginal that there will be a dearth of applicants willing to take the chance during the early years of the interim period.

What is in prospect under the Draft Convention is a far cry from the freedom of access for all that Professor McDougal described as the essential spirit of current international law and that he felt was attainable, even as regards polymetallic nodules, without the need of an elaborate treaty regime. As he put it in 1967:

We already have an internationalized system for development of the resources of the oceans, this flagship system. If we add the rich experience whereby the continents of the world were allocated among territorial communities by policies emphasizing notice of claim, effective occupation, actual use and enjoyment (policies entirely parallel to those by which mineral resources have been allocated within our national communities), I believe that we could have an internationalized system that would bring the utmost capital to bear upon this exploitation as it becomes technologically and commercially feasible. Such an interna-

50. Note 40, *supra*, at 3.

51. Though the Enterprise will be provided with financing only for a single project under art. 11.3 of Annex IV, the availability of special financial inducements under arts. 11 and 13 of Annex III for those participating in joint ventures with it might well induce them to provide the entire startup capital for the joint ventures.

52. Note 40, *supra*, at 3.

tionalization would not freeze any kind of monopoly, such as division among coastal states or control by some intergovernmental organization might entail, and would appear most compatible with the basic policies of greatest aggregate production and widest distribution. . . . If this kind of internationalization worked—and if exploitation does become feasible in high degree—then perhaps some of the riches obtained could be taxed by the United Nations or some of the profits could be allocated to support international government and development, or for other purposes.⁵³

Professor McDougal's views in this regard have found support in the writings of Professor L.F.E. Goldie in which he has pointed out, *inter alia*, the comparability of mining the poly-metallic nodules of the international seabed area to that of mining the coal of Spitzbergen at a time when it was not subject to any claim of national sovereignty.⁵⁴

What is in prospect under the Draft Convention is also a far cry from the guaranty of continuing access to deep seabed minerals by U.S. pioneer investors that Title II of the Deep Seabed Hard Mineral Resources Act would seem to call for.⁵⁵

It is worthy of note that, due to its preoccupation with poly-metallic nodules, UNCLOS-III has come up with a text that would seem to preclude development of hydrocarbons or other non-nodule minerals in the Area. This results from the combination of Article 137, which prevents the development of any category of minerals in the Area except pursuant to the terms of the Convention, and the total absence of financial provisions for any category of minerals other than polymetallic nodules.⁵⁶ Article 151.3 recognizes that the production controls prescribed in Article 151.2 are applicable only to nodules and authorizes the Authority to limit the production of non-nodule minerals in such manner as may be appropriate. There is, however, no comparable provision with respect to any other matter; this is a critical flaw that requires correction. Only the Enterprise, which needs no contract, would

53. Note 4, *supra* at 27.

54. Goldie, *A General International Law Doctrine for Seabed Regimes*, 7 INT'L LAW. 796 (1973); Goldie, *Mining Rights and the General International Law Regime of the Deep Ocean Floor*, II BROOKLYN J. INT'L L. 1 (1975); Goldie, *Customary International Law and Deep Seabed Mining*, 6 SYR. J. INT'L L. & COM. 173 (1978).

55. Pub. L. No. 96-283 (1980).

56. Article 13 of Annex III deals exclusively with polymetallic nodules and is not adaptable to any other category of minerals.

seem to be free to proceed with the development of non-nodule minerals of the Area.⁵⁷

There was a persistent drive on the part of a number of developing countries during the early sessions of UNCLOS-III to vest in the Authority a monopoly of production in the Area. In an effort to break the deadlock on this and other points, Secretary of State Kissinger in 1975 and 1976 agreed that, in exchange for meaningful, nondiscriminatory access for states and their nationals to deep-seabed resources, the United States would, *inter alia*, (a) accept a system under which each individual contractor would propose two mine sites, of which the Authority would select one for itself or in its discretion for developing countries, and the other of which would be assigned to the contractor; (b) make a major effort to provide training opportunities and advanced technology to the Authority and the developing countries; and (c) agree to a means of financing the Enterprise.⁵⁸

The subsequent negotiations have led to a text under which an American contractor would have to fend for himself in today's difficult capital market while the Enterprise would receive from the United States and other states capital of approximately \$1 billion required for its first project. The United States' share of this total would be approximately \$250 billion, one half in the form of long-term, interest-free loans and one half in the form of loan guarantees.⁵⁹

Under the parallel system, the American contractor would not only have to bear the cost of prospecting his own contract area but also the cost of prospecting the reserved area to be exploited by the Enterprise acting alone or in association with others.⁶⁰ The added cost to the contractor of this obligation, and the reciprocal benefit to the Enterprise and those acting in association with it, are estimated at from \$5 to \$10 million.

The financial charges which the contractor must pay, but from which the Enterprise is exempt for up to 10 years after com-

57. Note 3, *supra*, Annex III, art. 3.5. Article 10 of Annex IV eventually obligates the Enterprise to make financial payments comparable to those required of contractors under article 13 of Annex III, but it is given a grace period of up to ten years from its commencement of production as determined by the Assembly.

58. Department of State, Bureau of Public Affairs, Office of Media Services, P.R. 408(75) (Aug. 11, 1975), 162 (76) (April 18, 1976), P.R. USUN-99(76) (Sept. 2, 1976).

59. Note 3, *supra*, Annex IV, art. 11.3.

60. *Id.* Annex IV, art. 8.

mencement of commercial production,⁶¹ are (a) the cost of processing his application, initially estimated at \$500,000 but subject to change in the light of experience; and (b) an annual fixed fee of \$1 million up to the commencement of commercial production.⁶² Thereafter, the contractor must pay the greater of \$1 million per annum or a financial contribution that, at the contractor's option, may either be a production charge alone (ranging up to 12% of the market value of the processed metals produced from the nodules extracted from the contract area) or a combination of a lesser production charge (ranging up to 4% of the market value of the processed metals) and a share (ranging up to 70%) of the contractor's net proceeds attributable to his mining operations in the contract area. Factors such as whether commercial production has continued for more or less than ten years and the profitability of the mining operation are used in determining the exact percentages to be applied up to the indicated maximums.⁶³

The contractor must also provide training opportunities for the personnel of the Enterprise and developing countries in all phases of the operations covered by his contract.⁶⁴ If the Enterprise finds that it cannot obtain the technology to be used by the contractor or equally efficient technology in the open market on fair and reasonable commercial terms and conditions, the contractor must offer his own technology to the Enterprise on fair and reasonable commercial terms and conditions. If the technology belongs to an independent licensor, the contractor may not use it unless the licensor is willing to offer a written assurance to the Enterprise to the same effect. In certain circumstances, these requirements extend to the benefit of developing countries or groups of developing countries that have applied for a contract for the reserved site tendered by the contractor.⁶⁵ The traditional right of an inventor to reserve unto himself the fruits of his invention would become a thing of the past as far as activities in the Area are concerned.

A contractor preferring to go it alone must forfeit the financial incentives that are offered to those participating in joint ven-

61. *Id.* Annex III, art. 10.3.

62. *Id.* Annex III, art. 13.2.

63. *Id.* Annex III, art. 13.3 *et seq.*

64. *Id.* Annex III, art. 15.

65. *Id.* Annex III, art. 5.

tures with the Enterprise.⁶⁶ The participants in UNCLOS-III have reflected their concern for the competitive status of land-based miners by prescribing that these incentives and those that may be provided through revision of a contract under Article 19 of Annex III in cases of hardship may not result in subsidizing contractors with a view to placing them at an artificially competitive advantage relative to land-based miners.⁶⁷ No concern whatever is reflected, however, for the competitive status of the contractor who elects to go it alone in the development of the resources of the Area.

The outlook for such a contractor is in sorry contrast to the right of unimpeded access to the resources of the Area. Such access would be accompanied by security of tenure under reasonable terms and conditions designed to assure the development of resources of the Area for the benefit of consumers throughout the world put forward as the negotiating objective of the United States in UNCLOS-III. The crowning blow would come if the contractor were denied a production authorization because of lack of quota at the time that the priority provisions of Article 7.6 of Annex III were applied to give the Enterprise or one or more developing countries acting under Article 9.4 of that annex a production authorization for the reserved area stemming from the contractor's own application.⁶⁸

III. CONCLUSION

This is the startling extent to which the traditional concept of freedom of the seas in the international seabed area and the concomitant encouragement that its preservation would give to the development of the resources of the Area for the benefit of the world community as a whole have been suppressed. Certainly, there are better methods of providing economic assistance to the developing countries than that devised in UNCLOS-III. The aggregate of the benefits for the Enterprise and those operating in association with it is such that, with a modicum of efficiency on their part, they might well be able to obtain *de facto* the monopoly

66. *Id.* Annex III, arts. 11.2, 13.1(d), 13.14.

67. *Id.*, Annex III, art. 13.1(f).

68. A reserved area becomes such under article 8 of Annex III upon approval of the contractor's plan of work and the signing of his contract and is not dependent upon the issuance of a production authorization. Therefore, article 7.6 applies.

of production in the Area that the Group of 77 long sought *de jure*. This writer can only conclude that Professor McDougal was in much closer touch with the realities of the world than are Ambassador Richardson and the editor *The New York Times*.