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LAW OF THE SEA CONFERENCE: OTHER ALTERNATIVES FOR SEABED MINING?

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The Law of the Sea negotiations have been taking place for over ten years. The negotiations were started in 1967 by the United Nations in an Ad Hoc Committee[1] and continued by the United Nations Seabed Committee[2] whose membership was subsequently enlarged several times until it reached almost one hundred member states. The formal conference began with a procedural conference in 1973, which was followed by a substantive conference in Caracas in 1974.[3] Unlike the 1958 and 1960 Law of the Sea Conferences, which were prepared by the International Law Commission over a period of ten years, the current Law of the Sea negotiations were initiated by the United Nations Committee consisting of its member states.[4]

It is clear, therefore, that the results of the Law of the Sea Conference represents a universality of opinion and compromise reached by both members and non-members of the United Nations. This fact is extremely important in assessing the results of the Conference. While

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1. G.A. Res. 2340, 22 U.N. GAOR Supp. (No. 16) at 14, U.N. Doc. A/6964 (1967).

2. The United Nations Committee on the Peaceful Uses of the Sea and the Ocean Floor beyond the Limits of National Jurisdiction was created by G.A. Res. 2467, 23 U.N. GAOR Supp. (No. 18) at 15, U.N. Doc. A/7477 (1968) to continue the work of the Ad Hoc Committee on a permanent basis.

3. G.A. Res. 3067, 28 U.N. GAOR Supp. (No. 30A), U.N. Doc. A/9278 (1973), *reprinted in* THIRD UNITED NATIONAL CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS VII (1975). Procedural matters (such as the election of officers, agenda, etc.) were dealt with during the First Session of the Third United Nations Conference on the Law of the Sea held in New York from December 3-14, 1973. *Id.* Substantive matters were dealt with during the Second Session of the Third United Nations Conference on the Law of the Sea, held in Caracas from June 20 to August 29, 1974. *Id.*

4. C. RHYNE, INTERNATIONAL LAW THE SUBSTANCE, PROCESSES, PROCEDURES AND INSTITUTIONS FOR WORLD PEACE WITH JUSTICE 140-41 (1971). The International Law Commission is composed of twenty-one members of recognized competence in international law, elected by the United Nations General Assembly for a term of three years. The members are not representatives of their respective countries, but rather serve in their individual capacities as experts in international law. As a result of the work done by the Commission, international conventions have been signed and entered into force concerning the territorial sea and contiguous zone, the high seas, fishing and conservation of the living resources of the high seas and the continental shelf. *Id.*

the preparatory works of the previous conferences can arguably be called the mere opinions of the limited members of the International Law Commission, the result of the Law of the Sea negotiations cannot be attributed to any individual state or group of states participating in the Conference. The results and the compromises achieved during the current Law of the Sea negotiations must be regarded as representing the view of the world community and thus, as indicative of the type of International Law of the Sea that will be acceptable to the vast majority of states in the world. It cannot be regarded as merely reflecting the views of a limited forum.

The mandate of the current Law of the Sea negotiations was established by the General Assembly in 1970,[5] expressing the intent of the Law of the Sea Conference to "deal with all matters relating to the Law of the Sea."[6] The intent was to create a comprehensive set of rules and regulations covering as many matters of importance as possible. Due to the complexity of the topics, the sheer number of problems and issues presented, and the competing interests involved, these negotiations have been extended to the present time. The Conference, so far, has been faithful in its objective of seeking to conclude a comprehensive treaty. The importance of this treaty makes partial or piecemeal solutions to Law of the Sea issues undesirable, adverse to the best interests of the world community and contrary to the General Assembly Resolution of 1970.

The Law of the Sea negotiations have been able to resolve many of the problems presented, resulting in the formulation of articles on most issues.[7] The Conference has practically solved issues relating to the limit of territorial seas,[8] regime of straits used for international navigation,[9] archipelagic states,[10] exclusive economic zone,[11] continental shelf,[12] high seas,[13] islands,[14] enclosed and semi-enclosed seas,[15] landlocked states,[16] marine scientific research,[17] pollution control,[18]

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5. G.A. Res. 2750, 25 U.N. GAOR Supp. (No. 28) at 25, U.N. Doc. A/8097 (1970).
6. *Id.*
7. Third United Nations Conference on the Law of the Sea: Draft Convention on the Law of the Sea, U.N. Doc. A/Conf. 62/L.78 (1981) [hereinafter cited as Draft Convention].
8. *Id.* arts. 3-16.
9. *Id.* arts. 34-45.
10. *Id.* arts. 46-54.
11. *Id.* arts. 55-75.
12. *Id.* arts. 76-85.
13. *Id.* arts. 86-120.
14. *Id.* art. 121.
15. *Id.* arts. 122, 123.
16. *Id.* arts. 124-132.
17. *Id.* arts. 238-265.
18. *Id.* arts. 207-237.

transfer of technology,[19] dispute settlements[20] and various aspects relating to deep seabed mining.[21] These monumental achievements were the results of hard work and honest attempts by participating states to reach compromises in the Conference.

Admittedly, there are still some issues that need to be resolved. All participants in the Conference are currently giving their utmost efforts to seek solutions to those pending issues, hoping that the Law of the Sea Conference can be brought to a successful end as soon as possible. Given the seriousness with which the participants of the conference have tackled their problems during the last several years, there is no reason to doubt that the few remaining issues will be solved. In fact, as late as 1980, all concerned were optimistic that those issues would be resolved in 1981 so that the comprehensive treaty could be signed in Caracas before the end of 1981.

It was, therefore, a shock to the Conference and to the world community that precisely during this most optimistic period in the Law of the Sea negotiations, the United States announced that it was reviewing the results of the Conference and would not be prepared to conclude the negotations as agreed and as scheduled.[22] The United States review process has resulted in the stalling of negotiations on the various other unresolved issues.

The reasons for the United States decision to review the previous results of the Conference are, to say the least, enigmatic and perplexing. First, if as claimed, the review was necessitated by the change of administrations in the United States, then why have the many changes of administrations that have taken place throughout the world during the process of treaty negotiations not resulted in similar review? In fact, during the last ten or twelve years, there have been a number of

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19. *Id.* arts. 266-278.

20. *Id.* arts. 279-299.

21. *Id.* arts. 133-191.

22. *Third United Nations Conference on the Law of the Sea Before the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. (April 29, 1982) (testimony of James Malone). Representing the views of the Reagan Administration, Mr. Malone testified that the Administration would delay progress toward consummation of the treaty pending an inter-agency review. This review will be conducted at a high governmental level and will include representatives from the State Department, Defense Department, Commerce Department, Interior Department and the Environmental Protection Agency. *Id.* at 8. Declining to state how long the review would last, Mr. Malone announced that the Administration was primarily concerned with the activities of the Enterprise, contending that it may, in the future, monopolize production of seabed minerals. *Id.* at 4. The Administration is also concerned that the Draft Convention could lead to compulsory transfers of technology from private companies to the Enterprise, as well as to the developing countries, at inadequate compensation rates. Further, the Administration fears that revenue sharing provisions could lead to the receipts of funds by national liberation organizations including the Palestine Liberation Organization. *Id.* at 4.

changes in the United States' administrations (1969, 1974 and 1977) without causing any serious problems for the Law of the Sea negotiations. The negotiations have been conducted by the United States on a seemingly non-partisan basis by both Democratic and Republican administrations, with members of both parties as delegation heads. Furthermore, a review process is not something that is unique to the United States. Practically all states participating in the Conference usually conduct a review before every new session.

Second, the United States has claimed that the review process was required to enable the legislature to debate the treaty. This reason is also difficult to understand. The need for the representative organs of a state to agree on an international treaty through a process of ratification is also not unique to the United States. It is the practice in virtually all countries. In fact, the United States Senate, at least as far as most member states have been led to believe, has been constantly informed and consulted by the members of the United States delegation during the process of treaty negotiation. The United States Senate is, in fact, the most consulted national institution on the Law of the Sea negotiations, when compared to its counterparts in other participating states.

Moreover, assuming the United States review process was intended to question the Law of the Sea negotiation process, and the compromise and consensus achieved to date, then the review has caused significant apprehension and fear of negotiation failure due to the possibility of private negotiation and argument outside of the United Nations forum. The Law of the Sea negotiations, as stated earlier, have been conducted by sovereign and independent states through the United Nations, which is perhaps the best means and the most effective forum available today for reaching agreement among states in order to safeguard world peace and security, as well as to promote cooperation and development among states. Negotiating on such a wide-ranging and important issue as the Law of the Sea, outside the context of the United Nations, would only perpetuate confusion. It is, therefore, to be profoundly regretted if the United States review process resulted from a lack of confidence in the United Nations process of negotiation. If this is the reason behind the United States review, then it might possibly lead to the seeking of solutions to the Law of the Sea issues outside the forum of the United Nations, a possibility that must be strongly resisted.

There was a confusion for a while as to just what would be the scope of the United States review. Some indications were that it would be limited to the results previously achieved by the Law of the Sea Conference on seabed mining. Other indications were that it would cover all subjects in the Law of the Sea Conference, including navigation and other issues. Whatever the scope of review, many hoped that

the United States review process would conclude that the Law of the Sea Conference had solved major international issues to the satisfaction and advantage of the United States. It seems almost inconceivable that the United States would regard the issue of seabed mining, which is only a small fraction of the whole range of Law of the Sea issues, as an issue that would make or break the Conference, yet this appears to be the case.

During the long years of negotiations, both progress and compromise have been achieved with regard to seabed mining. The conflict between the developing countries[23] and the industrial countries[24] has been settled through a compromise devising a parallel system of resource access.[25] The parallel system would enable the exploitation of seabed resources by the international community through a supranational mining company called the "Enterprise,"[26] and by private companies through various alternative arrangements. This hard won compromise must be maintained and must be made workable if the seabed regime is going to benefit mankind as a whole.

It is no longer possible to regard the seabed resources as free for all under the disguise of the freedom of the sea. In fact, it has never been regarded as such. No past practices, with regard to the exploitation of the international seabed resources beyond the limits of national jurisdiction, indicate any precedent for the freedom of the sea argument. In fact, the United Nations General Assembly declared in 1970, without any objection, that the seabed and its resources beyond the limits of national jurisdiction were the "common heritage of mankind"[27] and were to be exploited only for the "benefit of mankind as a whole,"[28] taking into particular consideration "the interest and needs of the developing countries."[29]

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23. Less developed countries believe that the Enterprise, a public international mining company, should both supervise and implement activities in the Area. Adede, *Developing Countries' Expectations for and Responses to the Seabed Mining Regimes Proposed by the Law of the Sea Conference*, in DEEPSEA MINING 193 (J. Kildow ed. 1980).

24. The industralized countries wish to limit the role of the Enterprise. They are concerned that the Authority will be dominated by the less developed countries that will direct the Enterprise to make policy based on non-economic criteria. Kobler, *Governmental Treatment of Ocean Mining Investment*, in DEEPSEA MINING 151 (J. Kildow ed. 1980).

25. Draft Convention, *supra* note 7, Annex III, arts. 8, 9.

26. *Id.* Annex IV.

27. Declaration of Principles Governing the Seabed and the Ocean Floor, and the 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 (1971). *See also* Pardo, *Panel: Whose is the Bed of the Sea*, 62 AM. SOC'Y INT'L L. 16, 225 (1967).

28. Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction, *supra* note 27.

29. *Id.*

To contend that the principles of the common heritage of mankind permits the exploitation of the deep seabed only by those who are capable of exploiting it is, to say the least, illogical and unjust. Such a contention would lead to the colonization of the international seabed and its resources solely by those who currently have the technology, financial capacity and organizational ability to do so. This interpretation would obviously only benefit private companies and industrialized countries, thereby making a mockery of the principle of common heritage of mankind. Included in the principle of common heritage are the following:

> (1) such resources should be exploited only under authorization of the international regime to be established;[30]
> (2) the "common heritage" should benefit "mankind as a whole";[31]
> (3) "the interests and the needs of the developing countries" would be given particular consideration;[32]
> (4) "[n]o State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area"[33] incompatible with the international regime to be established.

The exploitation of seabed resources by private companies alone, on a simple profit motive, can hardly be regarded as being for the benefit of mankind as a whole, much less taking into particular consideration the interests and needs of the developing countries. It is imperative, in order to give meaning to the concept of the common heritage of mankind, that the International Authority through the Enterprise be able to oversee the exploitation of the seabed resources.

In order to create a workable and viable Enterprise that would benefit mankind as a whole, with particular consideration being given to the interests and needs of developing countries, it is essential that various factors be considered. First, the Enterprise must have sufficient funding, manpower and technology. Without these elements, the Enterprise would not be able to compete with private companies of the industrialized countries who already possess these assets. For this reason, satisfactory financial arrangement for the Enterprise,[34] as well as the adequate transfers of technology,[35] are essential. Otherwise, the ex-

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30. Draft Convention, *supra* note 7, art. 137(2).
31. *Id.* art. 140.
32. *Id.* art. 148.
33. *Id.* art. 137(3).
34. *Id.* art. 170(4) provides that "[t]he Enterprise shall . . . be provided with such funds as it may require to carry out its functions." *Id.*
35. *Id.* art. 144(2). "[T]he Authority and States Parties shall co-operate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so

ploitation of seabed resources could only be facilitated by private companies and highly developed industralized countries, thus negating the basic principle of the common heritage of mankind.

The argument that the exploitation of seabed resources by private companies on a purely commercial basis will benefit mankind as a whole, due to the international access to a previously untapped source of minerals, is not convincing.[36] This is due to the fact that companies would seek as much profit as possible for their own shareholders which, in practice, would conflict with the principle of common heritage. Furthermore, the companies, for obvious reasons, would be reluctant to agree to more generous financial arrangements with the International Authority.

Second, the companies would, due to their own self-interest, be less sensitive to the negative effects of their seabed mining on the efforts of many developing countries who are also attempting to produce the same minerals from their land-based resources. The unregulated exploitation of the mineral resources from the seabed area could destroy the economies of countries that produce the same minerals from their land-based deposits.[37] Unhealthy and devastating competition for certain mineral markets might occur. It should be noted that most of the current producers of the minerals that would also be produced from the seabed are developing countries. The economic contribution of these mineral deposits to the developing countries, although varied among countries, is extremely important.

Thus, protection is necessary for the developing countries and some kind of production limitations[38] for seabed mineral mining is essential if the exploitation of these minerals is going to benefit mankind as a whole, with particular consideration given to the interests and needs of the developing countries. Otherwise, the exploitation of these

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that the Enterprise and all States Parties may benefit therefrom." *Id.*

36. *See* E. BROWN, THE LEGAL REGIME OF HYDROSPACE 110 (1971). Technologically advanced states with the proper skills and funds will be the only states that may be able to engage in deep seabed mining on any appreciable scale. Underdeveloped states, in the absence of a special provision, are unlikely to derive any benefit from the exploitation of the deep seabed. *Id.*

37. *See* Collins, *Mineral Exploitation of the Seabed: Problems, Progress, and Alternatives*, 12 NAT. RESOURCES L. 599, 644 (1979). Many Third World mineral producing nations fear that the rapid and unrestricted exploitation of the resources of the deep seabed will have a devastating price effect on their own economies. These nations, therefore, desire a strong international seabed regime that could regulate mineral production since seabed mineral production would cause price fluctuations and loss of much needed revenue.

38. Draft Convention, *supra* note 7, art. 151(1) - (4). "The Authority shall have the power to limit the level of production of minerals from the Area . . . ." *Id.* art. 151(3). *See generally* Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 AM. J. INT'L L. 211, 215 (1981).

minerals would, in practice, benefit only the private companies and the industrialized countries to the detriment of the developing countries producing the same minerals from land-based resources. The benefits to the other, non-mineral producing developing countries, under such circumstances, would only be marginal and perhaps even fictional.

Third, in order to further the development of a viable Enterprise, to safeguard the economic position of the developing nations' mineral producers, and to maintain the economic stability of the industrialized countries, the stability of markets for all such minerals must be safeguarded. If private companies of the industrialized countries are given access to exploit the seabed resources, the market for such minerals in these countries would then be split among the private companies, the Enterprise, and the developing countries. Under such a situation, it would not be difficult to foresee that the mineral productions of the Enterprise and of the developing countries' would face severe competition from the productions of private companies of the industrialized countries. Here again, something must be done to make the Enterprise workable and viable and to prevent the developing countries mineral producers from being economically destroyed by private seabed mining activities.

Fortunately, the Law of the Sea Conference has been able to bring these conflicting interests somewhat closer together. Various compromise provisions have been reached with regard to financial arrangements,[39] transfer of technology,[40] production policies for the seabed minerals such as the production limitation formula[41] and many other related issues. If the review process of the United States threatens these delicately balanced compromises achieved during several years of negotiation, the prospect of success for the Law of the Sea Conference with United States participation would be very bleak indeed.

Various possibilities now seem open to the United States. I hope that the United States review process will result in a better appreciation for the objective of the global negotiation process through the United Nations system to achieve peace, stability, cooperation and development in ocean affairs. I also hope that the United States will understand that it too has a great deal at stake in ocean affairs and that its interest would be better protected through a global multilateral arrangement, mutually agreed upon rather than imposed by sheer force. Consequently, the United States should conclude that the Law of the

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39. Draft Convention, *supra* note 7, Annex III, art. 13(1)-(15).

40. Draft Convention, *supra* note 7, art. 144; Annex III art. 5(1)-(8). *See generally* Silverstein, *Propriety Protection For Deepsea Mining Technology In Return For Technology Transfer: New Approach To The Seabeds Controversy*, 60 J. PAT. OFF. SOC'Y 135 (1978).

41. Collins, *supra* note 37.

Sea treaty will bring great benefits to the United States in many fields including free navigation, access to resources, and the protection of the environment. Also, the United States should understand that the Law of the Sea Conference will provide the best protection for an orderly development of the seabed resources, thus guaranteeing the stability and continuity of the raw materials for the expanding industries of the industrialized countries. Whatever compromises the United States has to give in order to develop a viable Enterprise and to prevent the collapse of the economy of many developing countries, those compromises would be a small price for the United States to pay for the enormous benefits it would reap as a result of the Law of the Sea Convention.

Moreover, should the United States decide that it is prepared to abandon the Conference, if the Conference does not concur with its extremely nationalistic demands on a few seabed mining issues, then various consequences might follow. I doubt that the United States would be able to benefit from other provisions in the Convention that are favorable to it without becoming a party to the Convention as a whole. It has always been understood that the Convention would contain a comprehensive, grand package. It has never been understood that the package would contain only those provisions that are advantageous to one country, while leaving out others that are not.

The United States might contemplate the creation of various mini-treaties, with like-minded states, on various subjects of the Law of the Sea. Such mini-treaties — the reciprocal states agreements — would not only be contrary to the general understanding of the 1970 General Assembly Resolution, but would also be unworkable. Various mini-treaties among like-minded states on various issues would simply bring us back to square one, and would unnecessarily result in total confusion and chaos in ocean affairs. For instance, who could prevent like-minded states from developing mini-treaties of their own, and opposing the mini-treaties of the others? This is a real possibility for seabed mineral mining in view of the fact that the seabed area is beyond the limit of national jurisdiction and its resources have already been declared to be the common heritage of mankind. Thus, there could be no monopoly of mini-treaties in this area. I find it difficult to see how such a situation could safeguard the interests of the United States and other industrialized powers who have great interests in all parts of the world.

The United States and other industrialized countries have contemplated the enactment of unilateral legislation regarding deep seabed mining. In fact, the United States has already enacted such legislation[42] and the other industrialized countries are not far behind.[43] It is,

42. The Deep Seabed Hard Minerals Resources Act, Pub. L. No. 96-283, 94 Stat. 553 (1980) [hereinafter cited as the Act]. The developed countries, contending that the rule of the Authority should be minimized, enacted unilateral national legislation on the basis

however, more difficult to comprehend why unilateral legislation on seabed mining issues should be a more viable alternative. The developing countries have clearly indicated that unilateral legislation and limited agreements (mini-treaties) are illegal as violations of the principle of the common heritage of mankind.[44] It is inconceivable that the exploitation of seabed minerals under unilateral legislation would be considered a secure basis for the supply of minerals to the industrial countries, especially since it has been challenged as illegal by the world community. Like the mini-treaties approach, the unilateral legislation approach would be equally unworkable and would only create confusion and conflict. Who would prevent states that oppose the unilateral legislation from enacting their own national legislation to deny the validity of the other national legislation? Unilateral legislation and mini-treaties, therefore, are not, and cannot be viable alternatives in seeking a regime for seabed mining. Most important of all, no private company is likely to invest in a confusing and conflicting regime of unilateral legislations and mini-treaties, since the security of their investment would not be assured and the risk would be too high.

CONCLUSION

It is imperative that the Law of the Sea Conference be concluded as soon as possible. This conclusion must be in line with principles outlined earlier in the treaty negotiations, namely, to conclude a comperhensive treaty covering all topics of ocean affairs, including seabed mining. The Conference to date has achieved enormous results and compromises on many complex issues, which would promote stability and progress in ocean affairs. The adoption of the important principle of the common heritage of mankind for the seabed areas beyond the

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of the principle of the freedom of the seas. The developing countries found it inconceivable that the developed countries could take unilateral action after acknowledging the principle of Common Heritage of Mankind. Djalal, *The Developing Countries and the Law of the Sea Conference*, 15 COLUM. J. WORLD BUS. 22, 28 (1980).

43. *E.g.*, Federal Republic of Germany: Act of August 17, 1980 on Interim Regulation of Deep Seabed Mining, *reprinted in* 19 I.L.M. 1330 (1980). The German law provides a licensing system whereby the holders of the license are given exclusive right to acquire ownership and explore the seabed resources. But upon Germany's entry into any international agreement on deep seabed mining, all license holders will have to re-apply for twenty year permits, acceptance being based on the amount of investment already made into the seabed and when the exploration of the resources began. *Id.* at 1331.

44. *See* Declaration of the Group of 77, U.N. Docs. A/34/611 (Oct. 23, 1979), A/Conf.62/94 (Oct. 19, 1979). *See also* Vicuna, *The Regime For the Exploitation of the Seabed Mineral Resources and the Quest For a New International Economic Order of the Oceans: A Latin-American View*, 10 LAW AM. 774 (1978). Vicuna points out the developing countries' view that the exploitation of a common heritage of mankind must benefit mankind as a whole and not those nations that have the capital and the technology to undertake mining. *Id.* at 776.

limits of national jursdiction will result in an international regime on the seabed that will benefit mankind as a whole as well as protect the interest and needs of the developing countries. A great deal of progress and many compromises have been achieved in translating these principles into treaty provisions. The few remaining issues must not be allowed to disrupt the goal of concluding the Law of the Sea Convention on a comprehensive basis.

Unilateral leglsiation of mini-treaties among like-minded states are not viable or workable alternatives for the regime of the international seabed and its resources. These alternatives would only lead to chaos, confusion and conflicts. It is clear that such a situation of conflict would not be conducive to rational management and development of seabed mineral resources.

The review process in the United States has caused anxiety in the Conference. I hope, however, that through its review process, the United States will gain a deeper appreciation of how its interests will be better served and protected by the Law of the Sea Conference. I further hope that the United States will return to the Conference and be prepared to conclude negotations on the remaining issues as soon as possible. Whatever the motives of the Reagan administration for conducting the review at this late stage of negotiation, the net result has been a near-total isolation of the United States in the world community of nations. This in turn has cuased deep misgivings about the United States' intentions and its negotiating techniques. In view of its global role, it is difficult to comprehend why such an isolation is in the interest of the United States.