COMMON HERITAGE OR COMMON BURDEN?

THE UNITED STATES POSITION ON THE DEVELOPMENT OF A REGIME FOR DEAP SEA-BED MINING IN THE LAW OF THE SEA CONVENTION

Markus G. Schmidt

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Foreword

The 1982 Law of the Sea Convention is a precedent-setting document. By far the most complex and comprehensive multilateral agreement ever negotiated, it emerged from more than a decade of hard bargaining in which the entire membership of the United Nations as well as several other nations were engaged. The Convention's 17 parts and 9 annexes embrace every human concern with more than two-thirds of the earth's surface. Nearly all of its provisions for the use, management, protection, exploration, and exploitation of the oceans and their resources have already been assimilated into the body of customary international law. A handful of large industrial countries, however, are still holding out against several features of the part regulating the exploration and exploitation of the deep seabed beyond the limits of national jurisdiction. This is Part XI, the subject addressed by this balanced and informative book.

In August 1980 when the Ninth Session of the Third United Nations Conference on the Law of the Sea came to an end, most of us left for home confident that only a few residual seabed-mining issues remained to be resolved. We reckoned without the outcome of the November election in the United States and the opportunity thereby opened up for hard-line conservatives to persuade the new administration to undertake a wholesale review of Part XI. Compromises painstakingly put together over a seven-year period were challenged and rejected. As a consequence of demanding too much, the United States ended up with little or nothing. This, no doubt, was what the conservatives had in mind.

After the conference ended, President Reagan, although endorsing the rest of the Convention, cited the defects of Part XI as justification for refusing to join the Convention's 159 other signatories. This was disappointing, of course, to delegates who had devoted years of effort to negotiating the compromises embodied in Part XI, and their disappointment was heightened by awareness that some of these same compromises had been

foreshadowed in proposals put forward by earlier Republican administrations.

Since 1982 the recognition has been growing that the objections of the US and its industrial friends may have some merit after all. Given a spirit of practical accommodation, it should now be possible to work out modifications of Part XI that overcame these objections while preserving its core concept—the 'common heritage of mankind'. And since the resources of the deep seabed will never be exploited except within the framework of a broad-based international treaty, it is only a matter of time before some accommodation will have to be worked out. Meanwhile, the Preparatory Commission for the Law of the Sea Convention, meeting twice a year without benefit of US participation, continues to hammer out a deep-seabed mining code.

Mr Schmidt has given us not only a thorough and accurate but a readable and timely account of the seabed negotiations and the US role in them. His book is unique in that it draws on material obtained from interviews with most of the Law of the Sea Conference's key negotiators. This material has been woven knowledgeably and with balanced judgement into an enlightened scholarly study which explains the shifts in US negotiating strategy and sheds light on the dilemmas of recent US maritime policy. The author also suggests possible improvements in Part XI that could prove useful whenever a new round of talks gets under way. It is ironic but not surprising that the elements of an American solution should come from a non-American. Whether for purposes of the final stage of sea-bed mining negotiations or in the context of some other such manifestations of the world's systemic interrelatedness as global warming, this book can be a valuable source of ideas and experience. I commend it both to the specialist whose knowledge will be enlarged and to the layman whose interest will be enlisted.

Washington, DC Elliot L. Richardson
June 1989

Preface and Acknowledgements

This book examines the United States role in the dispute over deep sea-bed resources at the Third UN Conference on the Law of the Sea (UNCLOS) and United States sea-bed politics covering the period from 1973 to 1988. The reluctance of the United States to meet developing countries' demands for a strong international sea-bed regime and domestic pressures urging the United States to implement unilateral options are analysed, as well as the responses of developing countries to United States proposals, tabled in Committee I at UNCLOS, dealing with sea-bed issues.

Despite its title, this is a study in International Relations. It is concerned with the political implications of the sea-bed negotiations for the United States and for international relations. Sources have been a problem, not because there are too few but because there are too many. A particular problem has been that the *Official Records* of UNCLOS are not verbatim records of the Conference meetings. Many of the Conference's most critical compromises were achieved informally, without official records being kept. Some records, therefore, are private notes of informal meetings, for example, by Committee or Working Group chairmen.

This is why extensive use was made of transcripts from interviews that dealt with the history of the LOS negotiations; I hope that the use of such transcripts provides a useful contribution to a subject which remains in constant flux. To the greatest extent possible, however, public sources were used, such as UNCLOS *Official Records*, United States Congressional Records, and delegation and press reports.

I was fortunate in that I was able to interview many of the United States and UN officials involved in the LOS and sea-bed negotiations. Discussions with them, as well as with representatives of the mining industry, non-governmental organizations, and Government officials of several other countries, provided me with

many interesting insights. Their names are listed in Appendix I. I found almost everyone to be encouraging, generous with scarce time, and willing to speak their mind freely; I am grateful to all of them.

A few of those interviewed spoke freely only on the understanding that the source of information would not be identified. I have endeavoured to use this evidence in a way that meets required standards for research while honouring the pledge of confidentiality. Wherever permission was granted (the vast majority of cases), I cite a named individual. In the remaining instances where the supporting evidence for a statement is the transcript of an interview conducted on a non-attributable basis, I cite it as an interview with the relevant class of individuals, for example, a 'State Department official' or 'UN official', with the class specified as narrowly as possible. I felt obliged to refrain from citing or attributing statements that include personal characterizations, unless attribution was specifically permitted. No person interviewed should be held responsible for my statements of fact or my conclusions. Moreover, the views expressed hereafter are those of the author and not those of the United Nations Organization, where the author is currently employed.

My thanks go to the staffs of: the Library of Congress, Washington; the Widener Library at Harvard University; the Department of External Affairs Library, Ottawa; the Official Publications Section of the British Library, London; the Institute for Advanced Legal Studies, London; the International Institute for Strategic Studies, London; the European Court of Justice Library, Luxembourg; and the UN Office for Ocean Affairs and the Law of the Sea, New York. I am grateful to Arthur Paterson for his help in Washington, to Professor Adam Roberts at Oxford University for his comments on earlier drafts, and in particular to Dr Patricia Birnie of the London School of Economics, who supervised the thesis at Oxford of which this book is an updated version; she read and criticized earlier drafts of the manuscript and was always helpful with suggestions.

Finally, I should not forget to thank my parents. Without their support, this study would not have been carried out.

M. G. S.

Geneva
September 1988

Abbreviations

AAP	Alternative Approaches Paper
AJIL	*American Journal of International Law*
AMC	American Mining Congress
ANP	Attributable Net Proceeds
CHOM	Common Heritage of Mankind
Cong. Rec.	(United States Congress) Congressional Records
DC	Developing Country
D/LOS	Department of State Law of the Sea Office
D.o.D.	Department of Defense
DSHMRA	Deep Sea-bed Hard Minerals Resources Act
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishery Zone
FRG	Federal Republic of Germany
FTOC	Financial Terms of Contract
GA	(United Nations) General Assembly
GAOR	Official Records of the United Nations General Assembly
G77	Group of 77
HR	(United States Congress) House of Representatives
IATF	(National Security Council) Interagency Task Force on the Law of the Sea
ICA	International Commodity Agreement
ICJ	International Court of Justice
ICNT	Informal Composite Negotiating Text
ILA	International Law Association
ILC	International Law Commission
ILM	*International Legal Materials*
Int. Her. Trib.	*International Herald Tribune*
IROR	Internal Rate of Return
ISA	International Sea-bed Authority
ISNT	Informal Single Negotiating Text
JCS	Joint Chiefs of Staff
LA Times	*Los Angeles Times*
LBP	Land-based producer
LOS	Law of the Sea

LOSAC	(United States) Law of the Sea Advisory Committee
LOSC	Convention on the Law of the Sea
MPS	Marine polymetallic sulphides
NG	Negotiating Group
NGO	Non-governmental organization
NIEO	New International Economic Order
NOAA	(United States) National Oceanic and Atmospheric Administration
NSC	National Security Council
NY Times	*New York Times*
ODILJ	*Ocean Development and International Law* (Journal of Marine Affairs)
OMA	Ocean Mining Associates
OMCO	Ocean Minerals Company
OMI	Ocean Management Incorporated
OPS	Ocean Policy Statement
PIP	Preparatory Investment Protection
PrepCom	Preparatory Commission for the International Sea-bed Authority
RCADI	Recueil des cours de l'académie de droit international, The Hague
R/D	Research and Development
RGDIP	Revue générale de droit international public
RSA	Reciprocating States Agreement
RSNT	Revised Single Negotiating Text
S	(United States Congress) Senate
SCN	Special Commission
SIG	Senior Interagency Group
SMTF	Strategic Mineral Task Force
UNCLOS	Third United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development

SEEK NOT TO PRESENT A PERFECT WORK

(The Lady Julian of Norwich))

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Introduction

> We all should remember that, try as we may
> Though inspired by the noblest intention,
> There's no guarantee that at the end of the day,
> We'll all like the final Convention.[1]

This poem, written by a British delegate to the Third United Nations Conference on the Law of the Sea (UNCLOS), provides an apt post-mortem on the negotiations leading up to perhaps the most complex document ever drawn up under the auspices of the United Nations: the 1982 Convention on the Law of the Sea. For most of the nine years that it took delegates from over 150 states to reach an agreement on a new global legal order for the oceans, the negotiations on a regime governing the mining of the deep sea-bed beyond national jurisdiction occupied the centre stage, and the United States was the most visible actor in them. When Washington voted against the Convention in April 1982 and shortly afterwards decided to reject it, many countries reacted with consternation: they had not expected that the United States would repudiate the result of this protracted and contentious negotiation. As so often happens, they allowed the wish to be the father of the thought, for it had been apparent for some time that the United States had serious difficulties with the emerging sea-bed regime.

The dispute over deep sea-bed mining is perhaps unique in the sense that the resources at stake—manganese or, more precisely, polymetallic nodules—are not scarce but abundant, and that their commercial exploitation has yet to begin—indeed, it is unlikely to start before the next century. Why, therefore, did the nodules command such attention at the longest conference held under UN auspices and one of the most remarkable international negotiations in history? An answer has to be sought along two lines.

First, deep sea-bed mining is an issue where complex questions of law, politics, economics, and technology intersect—questions that cause sharply diverging opinions not only between the members of the international system but also within them. The

[1] Cited in Platzöder (1976), 45.

United States provides the most illuminating example of the latter. It will be shown that United States sea-bed politics are the product of contention—within different Administrations; between government agencies, the Congress, and mining industry lobbies; between domestic and foreign interests—and not of a well-balanced, rational decision-making process. The changes of direction in United States sea-bed politics over the period covered in this study reflect changes in Administration or the declining influence of some bureaucratic actors shaping US policy and the concomitant rising influence of others, all defending different interests or adhering to different ideologies.

Secondly, the Law of the Sea and deep sea-bed mining epitomize the world's interdependencies. Since World War II there has been an unparalleled increase in international economic interchanges, especially among Western industrialized states. The world economy has become interlocked, which has redistributed international bargaining power on a number of key issues. Increased awareness of the imperatives of interdependence has influenced the thinking of some United States officials directly involved in the LOS negotiations. Thus, Elliot Richardson, President Carter's Special Representative for the LOS, has described this particular appointment as his most challenging, since he considered the LOS negotiations to be 'the most ambitious attempt yet undertaken to create a new body of law for a global commons'.[2] Similarly, in 1976, Henry Kissinger argued that the establishment of an international sea-bed regime would 'turn the world's interdependence from a slogan into reality'.[3]

Furthermore, the sea-bed negotiations were perceived by all participants to establish significant precedents for future multilateral negotiations.[4] The creation of an International Sea-bed Authority with autonomous powers could emit positive or negative signals, depending on one's viewpoint, whether from that of the developing countries or of the United States.

Four United States Administrations were involved in the sea-bed negotiations from 1973 to 1982. The Nixon and Ford Administration and, to a lesser extent, the Carter Administration, were as concerned as President Reagan about protecting United

[2] Interview with E. Richardson.
[3] *US Information Service*, 9 Apr. 1976, p. 14.
[4] e.g. negotiations on future Antarctic mineral regimes.

States interests in deep sea-bed mining against the inordinate control of an international regulatory mechanism. They, too, worried about United States import dependence on some of the strategic minerals contained in the nodules which are produced mainly by developing countries. Cyclical 'mineral scares' after the first and second oil shock triggered by OPEC actions affected the United States position in the sea-bed negotiations, and the effect was apparent even when the mineral markets were characterized by a glut in the late 1970s.

Administrations before Reagan's were responsive to the idea that the UNCLOS negotiations required some give and take on the part of both the industrialized states and the developing countries. In this context, the notion of the 'package deal' becomes relevant: Reagan's predecessors believed that a broader perspective on the whole gamut of ocean issues and a compromise with the developing countries was more likely to protect national interests than a narrower focus on the negative aspects of the Convention's deep sea-bed mining regime. But all this changed with the advent of President Reagan, as evidenced by his statement of 9 July 1982:

> We . . . recognize that [the Convention] contains many positive and very significant accomplishments. However . . . the deep seabed mining part . . . does not meet US objectives. For that reason . . . the United States will not sign the Convention as adopted by the Conference.[5]

So as to assess the changes in United States sea-bed politics, it is appropriate to provide some analytical guidance. For two reasons, this guidance will be short: first, this book is primarily descriptive and only secondarily analytical and prescriptive; secondly, previous years have seen several fruitful attempts to illuminate United States ocean and sea-bed politics through application of models.[6] It is submitted here that not much can be added to them, other than by duplicating many of their findings.

Before trying to understand United States sea-bed politics *qua* models, we ought to bear in mind the following: LOS and deep sea-bed mining raise many issues that simultaneously have domestic and international repercussions—hence the term 'intermestic' occasionally applied to such issues.[7] In the case of deep

[5] Dept. of State, *Current Policy*, No. 416 (July–Aug. 1982).
[6] e.g. Laursen (1980), ch. 2; id. (1982*b*), 197–229; id. (1983), 15–29.
[7] Manning (1977), 306–24.