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The International Legal Status of the Contractual Rights of Contractors under the Deep Sea-Bed Mining Provisions (Part XI) of the Third United Nations Convention on the Law of the Sea

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I. INTRODUCTION

On December 10, 1982, the Third United Nations Convention on the Law of the Sea[1] was opened for signature at Montego Bay, Jamaica,[2] fourteen years after the United Nations initiated this massive codification effort.[3] The Convention enters into force twelve months after the sixtieth ratification[4] and supersedes the 1958 Geneva Conventions on the Law of the Sea as between states parties.[5] The Convention was negotiated by over 150 states[6] and consists of the treaty, accompanied by nine annexes, which together embrace 446 articles.

The aim of the Convention is to establish a comprehensive regime

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1. *Opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982)[hereinafter cited as Convention].

2. *Id.* art. 320.

3. The Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction was established by the U.N. General Assembly in 1967. G.A. Res. 2340, 22 U.N. GAOR (1639th plen. mtg.), Supp. (No. 16) at 14-15, U.N. Doc. A/6716 (1967). The permanent Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, composed of 42 states, was established the following year. G.A. Res. 2467, 23 U.N. GAOR (1752nd plen. mtg.), Supp. (No. 18) at 15, U.N. Doc. A/7218 (1968). The Committee's work and recommendations led the General Assembly in 1970 to convene the law of the sea in 1973. G.A. Res. 2749, 25 U.N. GAOR (1933rd plen. mtg.), Supp. (No. 28) at 24, U.N. Doc. A/8028 (1970) and G.A. Res. 2750, 25 U.N. GAOR (1933rd plen. mtg.), Supp. (No. 28) at 25, U.N. Doc. A/8028 (1970).

4. Convention, *supra* note 1, art. 308.

5. *Id.* art. 311.

6. White House Fact Sheet, 82 DEP'T. ST. BULL. 54 (1982).

governing the use of the seas. Some observers and governments, including the United States, believe that in most respects the Convention reflects customary international law.[7] Nevertheless, the addition of Part XI of the treaty, which deals with the exploitation of minerals on the seabed, is controversial and has, in large measure, led the United States to vote against the Convention.[8] Moreover, the United States has, under its cur-

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7. Malone, *Who Needs the Sea Treaty?*, 54 FOREIGN POL'Y 44, 56, 60 (1984). *See also* Oxman, *Summary of the Law of the Sea Convention*, in LAW OF THE SEA: U.S. POLICY DILEMMA 147, 148 (Oxman, Caron & Buderi eds. 1983); MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 CAL. W. INT'L L. J. 181 (1983); L. SOHN & K. GUSTAFSON, THE LAW OF THE SEA xix-xx (1984); Breen, *The 1982 Dispute Resolving Agreement: The First Step Toward Unilateral Mining Outside the Law of the Sea Convention*, 14 OCEAN DEV. & INT'L L. 201, 220 (1984).

8. Part XI of the Convention seems to have played a major, if not decisive, role in the United States' decision not to sign the text. *See* White House Fact Sheet, *supra* note 6, at 54-55. According to the White House Fact Sheet, dated Jan. 29, 1982, the United States had eight general objections to Part XI which stood in the way of acceptance of the Convention. They are:

> * Policymaking in the seabed authority would be carried out by a one-nation, one-vote assembly;
> * The executive council which would make the day-to-day decisions affecting access of U.S. miners to deep seabed minerals would not have permanent or guaranteed representation by the United States, and the United States would not have influence on the council commensurate with its economic and political interests;
> * A review conference would have the power to impose treaty amendments on the United States without its consent;
> * The treaty would impose artificial limitations on seabed mineral production;
> * The treaty would give substantial competitive advantages to a supranational mining company — the Enterprise;
> * Private deep seabed miners would be subject to a mandatory requirement for the transfer of technology to the Enterprise and to developing countries;
> * The new international organization would have discretion to interfere unreasonably with the conduct of mining operations, and it could impose potentially burdensome regulations on an infant industry; and
> * The treaty would impose large financial burdens on industrialized countries whose nationals are engaged in deep seabed mining and financial terms and conditions which would significantly increase the costs of mineral production.

Id. at 55.

On July 9, 1982, President Reagan announced that the United States would vote against adoption of the Convention. The President stated "that the deep seabed mining part of the [C]onvention does not meet U.S. objectives. *For this reason*, I am announcing today that the United States will not sign the [C]onvention as adopted by the conference . . . ." President's Statement of July 9, 1982, *U.S. Votes Against Law of the Sea Treaty*, 82 DEP'T. ST. BULL. 71 (1982)(emphasis added). President Reagan went on to list five specific areas of concern to the United States:

> * Provisions that would actually deter future development of deep seabed mineral resources, when such development should serve the interest of all countries;
> * A decision-making process that would not give the United States or others a role that fairly reflects and protects their interests;
> * Provisions that would allow amendments to enter into force for the United States without its approval; this is clearly incompatible with the U.S. approach to such treaties;

rent national policy, refused to become a party to the Convention.[9]

This article examines the contractual rights of contractors[10] under the Convention. The study begins with an analysis of the structure of the International Sea-Bed Authority,[11] the international organization solely responsible for regulating the exploration and exploitation of the deep seabed. It then examines the provisions relating to private contractors within the Convention. These provisions will be reexamined in light of Article 155 of the Convention, which provides for review after 20 years, to determine whether commercial activities have resulted in the "equitable exploitation" of the seabed.[12]

While the Convention seemingly provides for the security of the con-

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* Stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits; and
* The absence of assured access for future generations of qualified deep seabed miners to promote the development of these resources.

Id.

See also Malone, *The United States and the Law of the Sea*, 24 VA. J. INT'L L. 785, 785-86, 789-90 (1984); Bandow, *UNCLOS III: A Flawed Treaty*, 19 SAN DIEGO L. REV. 475, 477 (1982); Oxman, *The Third United Nations Conference On the Law of the Sea: The Tenth Session (1981)*, 76 AM. J. INT'L L. 1, 10 (1982); L. SOHN & K. GUSTAFSON, *supra* note 7, at xix.

9. *See generally* Malone, *supra* note 7 *passim*. The United States, Great Britain and the Federal Republic of Germany are among 15 states which did not sign the Convention. *Sea Law Oddfellows*, THE ECONOMIST, Dec. 22, 1984, at 29-30.

So far, only 14 states have ratified the Convention. Gamble, *Assessing the Reality of the Deep Seabed Regime*, 22 SAN DIEGO L. REV. 779, 789 (1985). Sixty ratifications are necessary for the Convention to enter into force. Convention art. 308(1), *supra* note 1. No Western states and no Warsaw Pact states have ratified the Convention. *Sea Law Oddfellows*, *supra*, at 30. Further, the United States, the Federal Republic of Germany, Great Britain, France, the Soviet Union and Japan have enacted "interim" legislation, governing the exploration and exploitation of the seabed, while Belgium and Italy are in the process of drafting such legislation. *See generally* Mahayekhi, *The Present Legal Status of Deep Sea-Bed Mining*, 19 J. WORLD TRADE L. 229 (1985) and L. SOHN & K. GUSTAFSON, *supra* note 7, at 176-77.

10. "Contractors" is used throughout the Convention to denote entities other than the Enterprise that are approved by the International Seabed Authority to exploit the ocean's mineral resources. Art. 153(2)(b) provides that contracts are to be made

> in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III.

The term "operators" appears to denote contractors whose final plan of work has not been approved. *See, e.g., id.* art. 151(2)(a).

As is well known, the Enterprise and private contractors will mine (separate) sites in what has come to be known as the "parallel system." Although agreements to be made between entities other than the Enterprise and the International Sea-Bed Authority resemble license agreements in Anglo-American law, they are specifically referred to as "contracts" in the Convention. *See id.* art. 153(3).

11. *Id.* art. 156 [hereinafter cited as Authority].

12. *Id.* art. 155(2). For a discussion of the Review Conference, see *infra* text accompanying notes 92-109.

tractual rights of contractors,[13] there is reason to doubt whether, in the event of a conflict between the overall purpose of the Convention[14] and the maintenance of existing contracts, the contracts would remain unaltered.[15] Indeed, the Convention provides for the restructuring of existing economic relationships within the framework of the Review Conference.[16] The Review Conference is empowered to amend Part XI by a three-fourths vote, with the amended Convention binding on all states parties.[17] It has been suggested that the purpose of the Review Conference is to define the regime that will apply following the initial system of exploitation.[18]

This article concludes by proposing a method of reconciling the Convention's Review Conference provisions with the objections stated by the Reagan administration.[19] This proposal is aimed at avoiding a potentially serious conflict in the future, if changes made by the Review Conference were to affect adversely contractors' rights. It is suggested that the Convention and the International Sea-Bed Authority do guarantee the economic value of the mining contracts, even should it become necessary to restructure the existing contracts for political reasons.[20] If this thesis is accepted, Western mining consortia could invest in this capital-intensive area with the guarantee that their investments would not be jeopardized by the Review Conference.

The method proposed to ascertain the economic value of the mining contracts is to draw an analogy to general principles of United States

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13. Art. 155(5) states: "Amendments adopted by the Review Conference pursuant to this article shall not affect rights acquired under existing contracts." *See also* Convention annex III, art. 18(1), *quoted infra* at note 85.

14. Art. 136 declares that "[t]he Area and its resources are the common heritage of mankind." Essentially, Part XI attempts to establish the legal right of all states to share the benefits of the deep seabed. *See also* art. 153(1) requiring the Authority to ensure that activities involving the deep seabed be carried out on behalf of "mankind as a whole". In this way, "the longstanding demand of the developing countries for the new international economic order is apparently recognized." J.S. PATIL, LEGAL REGIME OF THE SEABED 68 (1981).

15. *See infra* note 82. *Contra* Bandow, *supra* note 8, at 486.

16. *See generally* Convention, *supra* note 1, art. 155.

17. *Id.* art. 155(4).

18. Engo, Issues of First Committee at UNCLOS III, in THE 1982 CONVENTION ON THE LAW OF THE SEA: PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE, 17TH ANNUAL CONFERENCE (Oslo, Norway) 33, 44 (1984).

19. *See supra* note 7.

20. Convention, *supra* note 1, art. 150(i). The question arises as to the outcome of a perceived conflict between the goals and purposes of the Convention, i.e., to ensure the equitable distribution of the seabed's resources, with contracts whose sanctity is guaranteed by article 155(5) of the Convention. Thus, there appears to be a built-in tension in the Convention based on ideological differences between developed and developing states. For an overview of these differences, see, *e.g.*, Henkin, *Politics and the Changing Law of the Sea*, 89 POL. SCI. Q. 46, 53-55 (1974). This tension is underscored by the fact that "the [common] heritage of mankind should be exploited only by an international operating agency, run by the community of states on the basis of equal voting, with all the revenue going to develop poor states." *Id.* at 63.

bankruptcy law.[21] With this method, if the International Sea-Bed Authority was seen as a "failed" enterprise at the time of the Review Conference, it could be reorganized.[22] Part of the reorganization process would be to provide for the payment of creditors. It is here that the analogy to U.S. bankruptcy law becomes helpful, as it provides a mechanism for the valuation of creditors' claims.

II. THE STRUCTURE OF THE AUTHORITY

The impetus for the Convention's regime governing the exploitation of minerals on the seabed has been traced[23] to the government of Malta's[24] *note verbale* on August 17, 1967. This was sent to the United Nations Secretary General, requesting consideration of a Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and of the Ocean Floor, Underlying the Sea beyond the limits of present National Jurisdiction, and the Use of their Resources in the Interest of Mankind.[25] Part XI of the Convention concerns the "Area," which is defined as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."[26] The Area is important because it is where the polymetallic nodules[27] are located. It is the Authority

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21. If the contracts between the Authority and contractors are altered or abrogated, this proposal is aimed at protecting creditors' rights to the greatest extent possible. *See* text accompanying notes 147-156.

22. There is virtually no international precedent to support the adoption of municipal bankruptcy principles to secure the economic sanctity of contracts with an international organization. The analogy to U.S. bankruptcy law is intended to serve as an established and readily accepted example of an institution of municipal law from which an international solution to the present impasse might be drawn. As the U.S. Supreme Court has observed, bankruptcy laws are "recognized by all civilized nations." Canada S. R.R. v. Gebhard, 109 U.S. 527, 539 (1883).

The international precedent which seems to provide the closest analogy to the potential "reorganization" of the Authority is the transfer which took place between the League of Nations and the United Nations in the summer of 1946. *See generally* The League Hands Over, League of Nations Pub. Gen. 1946.1. This analogy, however, is of limited value in that the transfer which occurred was done in a spirit of friendly cooperation. *See, e.g.*, Minutes of the 7th Plen. Mtg., 21st Sess., LEAGUE OF NATIONS O.J. Spec. Supp. 194, at 57-58 (1946).

23. *See, e.g.*, Larschan & Brennan, *The Common Heritage of Mankind Principle in International Law*, 21 COLUM. J. TRANSNAT'L L. 305, 306-312 (1983).

24. For a discussion of Malta's rationale in seeking international action, *see* Pardo, *The Emerging Law of the Sea*, in THE LAW OF THE SEA: ISSUES IN OCEAN RESOURCE MANAGEMENT 33, 36 (Walsh ed. 1977).

25. 22 U.N. GAOR Annex 3 (Agenda Item 92) at 1, U.N. Doc. A/6695 (1967).

26. Convention, *supra* note 1, art. 1(1)(1).

27. Polymetallic nodules are "one of the resources of the Area consisting of any deposit or accretion of nodules, on or just below the surface of the deep sea-bed, which contain manganese, nickel, cobalt and copper." Annex I, Resolution II(1)(d), Draft Final Act of the Third United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.62/121, at 27 (1982). These nodules were discovered by the Challenger during its expedition of 1873-1876. Prescott, *The Deep Seabed*, in THE MARITIME DIMENSION 54, 55 (Barston & Birnie eds. 1980). It was not until the last quarter century, however, that technology has advanced to the point that industry has been able to consider commercial mining of this resource. L.

"through which states parties shall . . . organize and control activities in the Area . . . ."[28] This presents a unique situation in that an international organization may have at its disposal a substantial stream of revenue[29] not tied to state contributions, if the Authority and Enterprise can be made to work.[30]

The Authority is composed of three principal organs: the Assembly, a Council and a Secretariat,[31] and is loosely patterned after the United Nations.[32] The Assembly is nominally the "supreme organ of the Authority to which the other principal organs shall be accountable."[33] The Assembly is to consist of one representative from each state party to the Convention.[34] As in the United Nations General Assembly,[35] each member of the Assembly is to have one vote,[36] with a quorum consisting of a majority of the Assembly's members.[37] Thus, the Assembly, like the U.N. General Assembly, will likely be dominated by the developing states.[38] The Assembly is intended to serve as the general policy-making organ of the Authority,[39] to elect Council members,[40] and to appoint the Secretary-

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SOHN & K. GUSTAFSON, *supra* note 7, at 172-73. Since the 1960s the question of the ownership of these nodules has stirred considerable debate. *Id.*

For a discussion of the nodules and their potential strategic importance to the United States, see 1 T. G. KRONMILLER, THE LAWFULNESS OF DEEP SEABED MINING 13-16 (1980).

28. Convention, *supra* note 1, art. 157(1).

29. Jones, *The International Sea-Bed Authority Without U.S. Participation*, 12 OCEAN DEV. & INT'L L. 151, 152-53 (1983).

30. The Authority is to obtain its initial operating capital through the traditional method of assessing contributions from states parties in the same proportion that states contribute to the United Nations. *See* Convention, *supra* note 1, arts. 171(a) & 160(2)(e). However, once mining operations get under way, the Authority may become self-sufficient. For instance, the Authority is to charge a $500,000 application fee for each mine site. *Id.* art. 171(b); annex III, art. 13. If the Enterprise becomes profitable, it is to make payments to the Authority in the same way commercial ventures do. *Id.* annex IV, art. 10; art. 171(c). The Authority may even borrow money. *Id.* arts. 174 & 171(d). Most interesting, perhaps, is the fact that a one million dollar yearly rental fee is charged for each mining site, *Id.* annex III, art. 13(3), and each venture is taxed at a relatively substantial rate. *Id.* annex III, art. 13(4)-(6).

31. *Id.* art. 158(1).

32. Jones, *supra* note 29, at 152. The U.N. Charter art. 7(1) mentions as a principal organ the International Court of Justice, which has its equivalent in the International Tribunal for the Law of the Sea. Convention art. 186 & annex VI, art.1(1), *supra* note 1. For a brief discussion of the Tribunal, see *infra* note 152 and sources cited therein.

33. Convention, *supra* note 1, art. 160(1).

34. *Id.* art. 159(1).

35. U.N. CHARTER art. 18(1).

36. Convention, *supra* note 1, art. 159(6).

37. *Id.* art. 159(5).

38. One representative of the American mining industry has stated that the Authority "could be expected to vote the same way" as the U.N. General Assembly. *Hearing before the Subcomm. on Arms Control, Oceans, Int'l Operations and Environment of the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. (1981) (statement of Marne A. Dubs, Chairman, American Mining Congress).

39. Convention, *supra* note 1, art. 160(1).

40. *Id.* art. 160(2)(a).

General.[41]

The Council is composed of 36 members,[42] with members elected to four-year terms[43] according to a formula[44] which assures the Soviet Union and its allies three representatives, Western states between seven and nine seats, and developing countries the remaining seats.[45] Each Council member has one vote,[46] so that a two-thirds majority of Council votes will likely be held by developing states.

The Council is the executive arm of the Authority, and is given a mandate to implement the general policies established by the Assembly.[47] It appears that the most critical powers of the Authority will be lodged in or acquired by the Council,[48] for as a smaller group, the Council may be able to acquire virtually all of the political and decision-making power it chooses.[49] This is especially likely if the Council is dominated by a group of powerful individuals acting in concert or though an executive committee. This conclusion is reinforced by the fact that while the Council may function continuously,[50] the Assembly will meet only annually[51] with few specific tasks[52] other than its overall supervisory function.[53]

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41. *Id.* art. 160(2)(b).

42. *Id.* art. 161(1).

43. *Id.* ¶ (3).

44. *Id.* art. 161(1)(a)-(c), 161(2).

45. Oxman, *supra* note 7, at 158. *See also* Comment, *The International Sea-Bed Authority Decision-Making Process: Does It Give a Proportionate Voice to the Participant's Interests in Deep Sea Mining?*, 20 SAN DIEGO L. REV. 659, 672-73 (1983). Hauser contends that the West can expect 8 seats, and the Socialist states 3-4 seats, with 24-25 going to developing states. 7 HAUSER, THE LEGAL REGIME FOR DEEP SEABED MINING UNDER THE LAW OF THE SEA CONVENTION 41 (Dielman trans. 1983).

46. Convention, *supra* note 1, art. 161(7). Weighted voting in the Council was suggested by Western states but encountered the "strong ideological opposition of the African group" and other developing states. Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 AM. J. INT'L L. 211, 220 (1981).

47. Convention, *supra* note 1, art. 162(1).

48. Larschan & Brennan, *supra* note 23, at 322-23; Lee, *Deep Seabed Mining and Developing Countries*, 6 SYRACUSE J. INT'L L. & COM. 213, 218 (1978-1979). *See generally* HAUSER, *supra* note 45, at 45-46.

49. Convention, *supra* note 1, art. 161(5). The Convention requires only that the Council meet at least three times a year.

50. In the same vein, few specific powers are given to the President under article II of the U.S. Constitution and yet vast powers (arguably belonging to the Congress) are acquired by the President because of the Executive's ability to act quickly and decisively. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37-38 (1972). With funds at his disposal, a Secretary-General will be in a far more independent position than his counterparts in other international organizations, including Director-General Amadou Mahtar M'Bow of UNESCO. *See, e.g., Bloody but M'Bowed*, THE ECONOMIST, Jan. 5, 1985, at 29-30; *The Battle for Unesco*, AFRICA (No. 161) Jan. 1985, at 31-34; *Quit Unesco Now*, THE ECONOMIST, Nov. 17, 1984, at 12-13; Lewis, *Western Efforts Thwarted at Unesco Parley*, N.Y. Times, Feb. 17, 1985, at 8, col. 1.

51. Convention, *supra* note 1, art. 159(2).

52. *Id.* art. 160(2)(a)-(e).

53. *Id.* ¶ (1).

The enormous potential power of the Council was recognized during the negotiations and some difficulty arose over the decision-making procedures to be employed by its members.[54] It was finally agreed that the Council should operate by consensus,[55] which means by unanimity,[56] except in certain situations requiring a two-thirds[57] or three-fourths[58] vote, depending on the importance of the matter.[59]

Finally, the Secretariat will be the administrative organ of the Authority.[60] The Secretariat is to be headed by a Secretary-General[61] who will be elected to a four-year term by the Assembly from among the candidates nominated by the Council.[62] The power of the Secretary-General is a source of uncertainty in the political dynamics of the Authority, based upon the fact that the Authority may ultimately have access to its own funds and not have to depend upon the contributions of state members,[63] thus giving the Secretary-General unprecedented power for an international organization.

The Secretary-General will certainly be responsible to the Council. The Council, however, will probably be dominated by a developing state majority.[64] A strong and determined Secretary-General could find support for his action in this majority. Ultimately, the Secretary-General would be responsible to the Assembly, but the Assembly will also be dominated by a majority of Third World countries. The Secretary-General could, therefore, emerge as the strongest political actor in the Authority's constitutional structure, accompanied by the financial support to implement policies unpopular with or even hostile to the interests of developed states.[65]

The Authority will have international legal personality,[66] and will be

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54. Richardson, *The Politics of the Law of the Sea*, 11 OCEAN DEV. & INT'L L. 9, 16-17 (1982).

55. *Id.* at 17.

56. Convention, *supra* note 1, art. 161(8)(e).

57. *Id.* art. 161(8)(b).

58. *Id.* art. 161(8)(c).

59. *See id.* art. 161(8)(a)-(d). *See also* Richardson, *supra* note 54, at 17.

60. Convention, *supra* note 1, art. 166(3).

61. *Id.* ¶ (1).

62. *Id.* ¶ (2).

63. *Id.* art. 171.

64. *See supra* text accompanying notes 42-46.

65. One observer has noted that "[t]here is no reason to believe that the Authority will ultimately march to a different drummer than does, say, UNESCO or the WHO." Jones, *supra* note 29, at 153. *See also Bloody but M'Bowed*, *supra* note 50, at 29-30. Even this assertion might fall short of the mark since both UNESCO and WHO depend upon the contributions of state members for support.

66. Convention, *supra* note 1, art. 176. It is customary for international organizations to be accorded some degree of international legal personality. K. AHLUWALIA, THE LEGAL STATUS, PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES OF THE UNITED NATIONS AND CERTAIN OTHER INTERNATIONAL ORGANIZATIONS 65 (1964).

empowered both to borrow funds[67] and to issue securities.[68] The Authority is to enjoy state-like privileges and immunities throughout the international community.[69] For example, the property and assets of the Authority are to "be exempt from restrictions, regulations, controls and moratoria of any nature."[70] The property and assets of the Authority, as well as the Authority itself, are to be immune "from legal process except to the extent that the Authority expressly waives" such immunity.[71] Since the Area and its resources are said to be the common heritage of mankind,[72] it is the Authority, acting through the Council, which has the power to enter into contracts for the exploitation of minerals from the deep seabed.[73] It is this regime for the exploitation of the mineral resources of the Area that is the heart of Part XI.[74]

III. PROVISIONS RELATING TO THE INTERNATIONAL LEGAL STATUS OF CONTRACTS WITHIN THE CONVENTION

The Convention declares that no state or national[75] of a state may exploit the seabed minerals unless under contract[76] from the Authority.[77] Contractors seeking approval of a plan of work[78] must be sponsored by a state party to the Convention.[79] The contract, however, is between the contractor and the Authority.[80]

The Convention attempts to assure contractors, who would have to

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67. Convention, *supra* note 1, art. 174(1).

68. This is implied by article 174 of the Convention.

69. *Id.* art. 177.

70. *Id.* art. 180.

71. *Id.* art. 178.

72. For a discussion of the common heritage of mankind principle, see Larschan & Brennan, *supra* note 23.

73. Convention, *supra* note 1, art. 162(2)(j)(1) and annex III.

74. The Enterprise, established in art. 170, is to exploit the seabed on behalf of the Authority and is to operate (functionally) in much the same way as a private producer. *See generally* Convention annex IV (Statute of the Enterprise).

75. The Convention provides that contractors may be states, natural or juridical persons of a state, a group of states, persons of different nationalities, art. 153(2)(b) and annex III, art. 4(3), or a joint venture between any of the foregoing and the Enterprise. annex III, art. 11(1).

76. *Id.* annex III, art. 3(5).

77. *Id.* art. 153(2).

78. *Id.* art. 153(3).

79. *Id.* annex III, art. 4(3). The sponsoring state is under an obligation to ensure that the private producer will "carry out activities in the Area in conformity with the terms of its contract and its obligations under" the Convention. *Id.* subparagraph (4). The sponsoring state does not, however, incur financial liability "for damage caused by any failure of a [private producer] sponsored by it to comply with its obligations if that state party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction." *Id.* It is not at all clear what the liability of a sponsoring state would be if it failed to adopt the measures required by annex III, art. 4(4).

80. *Id.* art. 153.

invest very large sums of money to exploit the seabed,[81] that contracts with the Authority will be honored regardless of subsequent political developments.[82] The question of subsequent political stability has not been adequately explored, although there have been enough expressions on the subject to raise serious questions for potential investors. There are two primary aspects to the potential political instability: the Authority and Enterprise may not generate (or may be perceived as not generating) sufficient revenue to meet the expectations of developing states or contractors may earn (or may be perceived as earning) more than a reasonable return on their investment. In either event, this could present serious difficulties for the sanctity of contractors' rights during the Review

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81. It was estimated in 1981 that the cost to develop the technology to mine the seabed floor would be between one billion and 1.25 billion dollars. *Hearing Before the Subcomm. on Arms Control, Oceans, Int'l Operations and Environment of the Sen. Foreign Relations Comm.*, 97th Cong., 1st Sess. (1981) (statement of William P. Pendley, Dep. Ass't Sec. for Energy and Mines, Dep't. of Interior); Gillis, *Exploration for and Exploitation of Deep Seabed Hard Mineral Resources: A Deep Seabed Mining Industry Perspective*, in PROCEEDINGS OF CONFERENCE ON DEEP SEABED MINING AND FREEDOM OF THE SEAS 44, 45 (Chen ed. 1981).

82. For instance, one high ranking African government official, who was intimately involved in the negotiations leading to the creation of the Review Conference provisions of the Convention, explained that the developing countries view mining by contractors:

> as an experimental system which would be given a fair chance to see whether it could provide a fair alternative during a reasonable period of the life of a minesite — 20 to 25 years. After such a period a review of the system would be held to establish whether the parallel system is indeed a viable system, whether it should be changed or discarded, and if so what new system should replace it on a permanent basis.

Njenga, *The System of Exploitation and Exploration of the Deep Seabed Resources and the Developing Countries*, in THE DEEP SEABED AND ITS MINERAL RESOURCES, PROCEEDINGS OF THE 3RD INTERNATIONAL OCEAN SYMPOSIUM 6, 7 (1979)[hereinafter cited as THE DEEP SEABED AND ITS MINERAL RESOURCES]. It has also been noted that,

> [t]he developing countries understood the parallel system to mean a package deal under which the private entities and State parties would be guaranteed access to the resources of deep seabed [sic] while at the same time conditions would be created to enable the Authority through the Enterprise also to engage directly in deep seabed mining. This was absolutely fundamental for the acceptance of the parallel system, that the Enterprise shall not only have the theoretical right to engage in deep seabed mining, but it would be guaranteed of [sic] effective operations as a mining entity within the same time frame as the private entities or State Parties during the initial period of the parallel system.

Id. at 7. Thus, if the existing parallel structure, including the contractors' activities, are seen as impinging upon the ability to equitably exploit the Area's resources, then the contracts might be altered as the existing system has failed in its fundamental political purpose.

There are enough similarities between the mining of land-based resources in developing countries and the mining of the deep seabed to raise questions over parallel outcomes for a Review Conference dominated by developing states. *See* Kusumaatmadja, *On the Negotiations of the Conference on the Law of the Sea Concerning the Deep Seabed*, in UTILIZATION AND DEVELOPMENT OF THE PACIFIC OCEAN: FUTURE PROSPECTS FOR INTERNATIONAL PACIFIC COOPERATION, PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON THE PACIFIC OCEAN 40, 42-43 (1977).

Conference.

Article 151(1)(c) provides that in attempting to further the political aspirations of the Convention, "[t]he Authority shall act in a manner consistent with the terms of existing contracts . . . ."[83] Article 153(6) reinforces these contractual rights by providing for "security of tenure," as it states that a "contract shall not be revised, suspended or terminated," except in certain circumstances.[84]

One of the circumstances in which the contractor's rights might be modified under the Convention is Article 18 of annex III's penalty provisions.[85] Pursuant to this article, the Authority may act through an administrative procedure to impose sanctions against a contractor.[86] Once a penalty is imposed, the contractor is given a "reasonable opportunity" to pursue judicial remedies.[87] Thus, contractors are to some extent dependent upon the goodwill and good faith of the administrative apparatus of the Authority, which will probably be controlled by the Secretary-General.[88]

More troublesome is Article 19 of annex III which contemplates the need to revise contracts. It states:

> 1. When circumstances have arisen or are likely to arise which, in the opinion of either party, would render the contract inequitable or make it impracticable or impossible to achieve the objectives set out in the contract or in Part XI, the parties shall enter into negotiations to revise it accordingly.
> 2. Any contract entered into . . . may be revised only with the consent of the parties.[89]

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83. Convention, *supra* note 1, art. 151(c).

84. *Id.* art. 153(b).

85. *Id.* annex III, art. 18 provides in part:

> Penalty Provisions:
> 1. A contractor's rights under the contract may be suspended or terminated only in the following cases:
> (a) if, in spite of warning by the Authority, the contractor has conducted his activities in such a way as to result in serious, persistent and wilful violations of the fundamental terms of the contract, Part XI and the rules, regulations and procedures of the Authority; or
> (b) if the contractor has failed to comply with a final binding decision of the dispute settlement body applicable to him.
> 2. In the case of any violation of the contract not covered by paragraph 1(a), or in lieu of suspension or termination under paragraph 1(a), the Authority may impose upon the contractor monetary penalties proportionate to the seriousness of the violation.

86. *Id.*

87. Section(3) of this article provides that "[e]xcept for emergency orders under article 162, paragraph 2(w), the Authority may not execute a decision involving monetary penalties, suspension or termination until the contractor has been accorded a reasonable opportunity to exhaust the judicial remedies available to him pursuant to Part XI, section 5."

88. *See supra* text accompanying notes 42-46.

89. Convention, *supra* note 1, annex III, art. 19.

While paragraph one mandates that both parties shall enter into negotiations to revise their contracts according to perceived inequities, paragraph two attempts to rule out unilateral revisions. It leaves unanswered, however, the issue of what happens if negotiations are fruitless in bringing about an agreement. Further, the international legal significance of the provision is unclear. It can be argued that the provision contemplates situations which may arise in the future that necessitate the revision of contracts, such as the Review Conference.[90] Article 19 is, therefore, unclear and raises more questions than it solves. The Convention apparently safeguards contracts between contractors and the Authority. The question remaining is the status of contracts twenty years after the first commercial mining begins when the second phase of the Review Conference is held.[91]

IV. THE REVIEW CONFERENCE

Contained within Part XI is a provision requiring a Review Conference of all states parties to the Convention to reflect upon the provisions of Part XI in light of experience gained over time, and to assess whether the goals of Part XI have been or are in the process of being achieved.[92] The concept of a Review Conference was originally suggested by U.S. Secretary of State Henry Kissinger.[93] The purpose of the Review Conference, as envisioned by then Secretary Kissinger, was to evaluate "the methods by which mining in the deep seabeds takes place and the apportionment between various sectors could be periodically reviewed."[94] This laudable suggestion may not be entirely embodied in the Convention,[95] as Article 155 provides that the Review Conference is to be held in two phases, the first of which is to begin 15 years after the commencement of commercial exploitation.[96] In essence, states parties then have five years to reach agreement by consensus as to what amendments, if any, are to be made in Part XI and relevant annexes of the Convention.[97] If no amendment can be achieved by consensus (unanimity) after the twentieth year of commercial exploitation, the Review Conference moves into Phase Two.[98]

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90. *See infra* text accompanying notes 110-125.

91. Convention, *supra* note 1, art. 155.

92. *Id.*

93. Kissinger, *Secretary Kissinger Discusses U.S. Position on Law of the Sea Conference*, 75 DEP'T. ST. BULL. 395, 398 (1976).

94. *Id.* Kissinger explained that the U.S. had "taken into account the views that have been expressed by some delegates that it might be premature to establish a permanent regime for the deep seabeds . . . at the beginning of a process of technology and to freeze it for an indefinite period of time." *Id.*

95. It seems clear that Secretary Kissinger believed the Review Conference was largely aimed at ensuring the survivability of the Enterprise and to perpetuate it as a competitor to contractors. Kissinger, *Secretary Kissinger Meets With U.N. Secretary General Waldheim*, 75 DEP'T. ST. BULL. 399, 400 (1976).

96. Convention, *supra* note 1, art. 155(1).

97. *Id.* ¶ (3).

98. *Id.* ¶ (4).

During this phase, the Review Conference, acting as a constitutional convention, has twelve months to adopt an amended Convention by a three-fourths vote and to submit it to states parties. The amended text is to be binding on *all* states parties twelve months[99] after ratification by three-fourths of the states parties.[100] Presumably if three-fourths of the states parties fail to adopt the amendment for ratification between the beginning of the twentieth and twenty-first years, the Review Conference provision lapses. If a state disagrees with the amendment, to avoid being bound it must withdraw from the entire Convention, not just Part XI.[101]

The Review Conference is to be held to "ensure the maintenance of the principle of the common heritage of mankind,"[102] and to see to it that the resources of the seabed are equitably exploited "for the benefit of all countries, especially the developing States."[103]

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99. The one year delay corresponds with the one year waiting period required for withdrawal under article 317's denunciation provision. Oxman, *supra* note 46, at 217.

100. Convention, *supra* note 1, art. 155(4). However, the Convention provides a somewhat more difficult general amendment procedure for provisions relating exclusively to activities in the Area in article 314, which also requires ratification by a three-fourths majority to enter into force for all states parties. *Id.* art. 316(5). Under article 314, any state party may submit an amendment to the Secretary-General who shall circulate it to all states parties and transmit it to the Council for approval. If the Council endorses the proposed amendment, it is then sent to the Assembly for its approval. Article 314(2) provides that "[b]efore approving any amendment . . ., the Council and the Assembly shall ensure that it does not prejudice the system of exploration for and exploitation of the resources of the Area, pending the Review Conference . . . ." The amendment is then considered "adopted" but must be ratified by three-fourths of all states parties to the Convention. *See* art. 316(5). Such an amendment enters into force for all states parties one year later. The primary distinction between the two amendment procedures, however, is that the Review Conference provides a forum and political focal point for initiating change.

The concept of an amendment procedure binding all states parties, whether or not a state ratifies the amendment, is not new in international law, but it goes beyond existing practice. Article 108 of the U.N. Charter provides for amendments binding all states after ratification by two-thirds of the states parties, *including all of the permanent Security Council members*. Thus, in the United Nations, the U.S. (and each of the other permanent members of the Security Council) can veto an amendment. In the law of the sea constitutional scheme, there is no such veto.

101. *Id.* art. 317. This would not mean that the state which denounces the Convention could unilaterally continue to mine the Area, for the remaining states parties would undoubtedly contend that mining outside the Convention's regime was forbidden by customary international law. *See* HAUSER, *supra* note 45, at 130; Moore, *Charting a New Course in the Law of the Sea Negotiations*, 10 DEN. J. INT'L L. & POL'Y 207, 215 (1981). How any such dispute would be resolved in practice is impossible to predict; it is not self-evident that withdrawal from the overall regime voids a contract concluded prior to that withdrawal. Indeed, as will be argued below, if amendments cannot affect rights acquired under prior contracts, it is hard to see how the refusal by a state to accept these amendments can affect these contracts (to which the state may not even be a party).

102. Convention, *supra* note 1, art. 155(2).

103. *Id.* The text of this article provides:

> The Review Conference shall ensure the maintenance of the principle of the common heritage of mankind, the international regime designed to ensure equitable exploitation of the resources of the Area for the benefit of all countries, especially the developing States, and an Authority to organize, conduct and

Article 155, which provides the constitutional framework for the Review Conference, contains two potentially conflicting principles: that contracts will be honored, and that the Review Conference will be guided by the general purposes of the Conference. One observer of the Third World's view of the Convention has noted that,

> [t]he concept of the common heritage of mankind is considered by [the developing states] as the point of departure in the creation of a new law of the sea . . . . Moreover, it is regarded as the starting point in the creation of a more just and equitable system of distribution of the resources of the deep seabed within the context of the New International Economic Order.[104]

Of course, it is not precise to speak of the Third World as a monolithic bloc having a single voice, a common goal and a united position for a future course of action. On the contrary, many differences exist among Third World states' interests in the Convention.[105] Nevertheless, there are enough commonalities which have united developing states on the issue of redistribution of the wealth of the Area.[106]

The Review Conference is considered by many Third World states as an essential ingredient—the *sine qua non*—of the Convention.[107] These states were concerned that the actual exploitation of the Area's resources would not further their long-term interests.[108] It is apparent that Third World countries placed a premium on the ability to reshape the Convention to ensure equitable exploitation, and that this, in turn, is fundamental to the constitutional structure of the Convention. Thus, Western states, such as the Federal Republic of Germany, Great Britain and the United States, cannot be criticized as being entirely without justification for seeking assurances that their interests will be guaranteed in the future.

If the Review Conference finds that the contracts entered into by the

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control activities in the Area. It shall also ensure the maintenance of the principles laid down in the Part with regard to the exclusion of claims or exercise of sovereignty over any part of the Area, the rights of States and their general conduct in relation to the Area and their participation in activities in the Area in conformity with this Convention, the prevention of monopolization of activities in the Area, the use of the Area exclusively for peaceful purposes, economic aspects of activities in the Area, marine scientific research, transfer of technology, protection of the marine environment, protection of human life, rights of coastal States, the legal status of the waters superjacent to the Area and that of the air space above those waters and accomodation between activities in the Area and other activities in the marine environment.

104. Evriviades, *The Third World's Approach to the Deep Seabed*, 11 OCEAN DEV. & INT'L L. 201, 215 (1982).

105. Juda, *UNCLOS III and the New International Economic Order*, 7 OCEAN DEV. & INT'L L. 221, 222 (1979).

106. Y.S. MATHUR, INTERNATIONAL CONTROL OF THE SEAS: CONFLICTS AND CO-OPERATIONS 21 (1982).

107. Oxman, *supra* note 46, at 217; Njenga, *supra* note 82, at 7.

108. Njenga, *supra* note 82, at 7.

Authority have detracted from the principle of the common heritage of mankind and have resulted in inequitable exploitation, the question left to be answered is whether these contracts may be abrogated or unilaterally modified.[109]

V. THE LEGAL STATUS OF CONTRACTS AFTER THE REVIEW CONFERENCE

The legal status of contracts between contractors and the Authority was directly addressed in the final paragraph of article 155, which states that "[a]mendments adopted by the Review Conference shall not affect rights acquired under existing contracts."[110] It is clear, however, that the Review Conference has as its goal, at least in part, the implementation of the New International Economic Order,[111] as reflected in the provisions mandating the exploitation of the Area for the "benefit of mankind"[112] by "equitable exploitation"[113] of natural resources. This presents an interesting dilemma because sovereign attributes and important public purposes may conflict with contractual rights.[114]

The thorny question is the effect of amendments to Part XI which could potentially require alteration of existing contracts between the Authority and the contractors. While Article 155(5) seems to hold inviolable the rights acquired prior to the Review Conference, in fact this conclusion is less than certain in view of the negotiating history of the provision and the importance developing states place on the capacity of the Review

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109. This might occur, for instance, if the Enterprise finds itself unable to compete effectively with the contractors. *See* Larschan & Brennan, *supra* note 23, at 325.

110. Convention, *supra* note 1, art. 155(5).

111. One high ranking African government official who played a decisive role in the creation of the Review Conference has explained that "[t]he developing countries make no secret of the linkage as between the Common Heritage Concept [embodied in the Convention] and the New International Economic Order, both with respect to the goals to be achieved and the rationale behind the two concepts." Njenga, *supra* note 82, at 7; *See also* Juda, *supra* note 105, at 226; J.S. PATIL, *supra* note 14, at 68.

112. Convention, *supra* note 1, art. 140.

113. *Id.* art. 155(2).

114. This argument was forcefully presented by the defendant-appellees in Allied Bank Int'l v. Banco Credito Agricola de Cartago, 733 F.2d 23 (2d Cir. 1984), *withdrawn & reh'g granted*, 733 F.2d 23 (2d Cir. 1984), *rev'd*, 757 F.2d 516 (2d Cir. 1985), *reprinted in* 23 I.L.M. 742 (1984). In the original Allied Bank decision, the Second Circuit accepted the decree of the Government of Costa Rica placing a moratorium on the remittance abroad of foreign currency. 23 I.L.M. at 747. The court observed that Costa Rica was in a "severe economic crisis" and was renegotiating its external debt. *Id.* at 744. The court likened the repayment moratorium "to the reorganization of a business pursuant to Chapter 11 of our Bankruptcy Code . . . ." *Id.* at 746. Thus, the court followed the principle set forth by the Supreme Court in Home Builders & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), East New York Savings Bank v. Hahn, 326 U.S. 230 (1945), Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983), and Exxon Corp. v. Eagerton, 462 U.S. 176 (1983), by allowing the public policy purpose of Costa Rica to rise above the sanctity of that particular contract.

The bankruptcy analogy in *Allied Bank* has been criticized in a recent article. *See* Zaitzeff & Kunz, *The Act of State Doctrine and the Allied Bank Case*, 40 BUS. LAW. 449 (1985).

Conference to correct any perceived shortcomings in the operation of the mining system. Third World states could argue that, to the extent Article 155(5) is perceived to be a self-contained set of prescriptions, the meaning of any individual provision must be read against the interpretative background provided by Article 155(1)-(4) and Part XI as a whole.[115] The dilemma lies in the language of Article 155 calling for the reassessment of Part XI in light of equitable principles relating to the distribution of wealth exploited from the Area.[116]

The Review Conference may find itself confronted with a mandate to reshape Part XI and a prohibition to leave untouched the contracts which, *arguendo*, have resulted in the inequitable distribution of the benefits of the Area.[117] In such a situation it is unlikely the Review Conference, composed of all states parties and thus dominated by Third World countries, would feel itself bound by the proscription of Article 155(5). This is especially so since the Council, which contracts with contractors on behalf of the Authority and which is dominated by developing states, will be the center of power in the Authority.[118]

It is quite clear that developing states conditioned their acceptance of the Convention based on the fundamental assumption that the Area's resources would be equitably distributed.[119] The Review Conference provision was created precisely to determine whether equitable distribution was taking place.[120] Some developing states view the current regime for mining of the Area as merely "experimental."[121] This raises the question

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115. *See generally* Separate Opinion of Judge Sir Hersch Lauterpacht in Admissibility of Hearings of Petitioners by the Committee on South West Africa, 1962 I.C.J. 151, 185-86 (Advisory Opinion).

116. Convention, *supra* note 1, art. 155(1)(a)-(f) & 2. Mr. Elliot L. Richardson, who was for many years the U.S. ambassador to the Law of the Sea Conference, disagrees with this interpretation. He observes that:

> article 155(5) was viewed as absolutely fundamental by the U.S. and the prospective deep sea-bed mining countries. It was, in any case, declaratory of article 19 of annex III, whose provisions were firmly in place long before the definitive negotiation of article 155(5). The same is true of article 153(6). It was well recognized by the Group of 77 that without these guarantees, no agreement on a review conference — and no serious prospect of investment — would have been possible.

Letter to the author of April 19, 1985.

117. Sir Hersch Lauterpacht has observed that there are cases where a "treaty — far from giving expression to any common intention of the parties — actually registers the absence of any common intention . . . or contains provisions which are mutually inconsistent and which the creative work of interpretation must reduce to some coherent meaning." Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48, 52 (1949). In this event, he notes, the issue becomes one of treaty interpretation. For a discussion of the forum which would be called upon to interpret the Convention in the event of such a dispute, *see infra* note 152 and sources cited therein.

118. *See supra* text accompanying notes 42-53.

119. *See, e.g.*, Njenga, *supra* note 82.

120. *Id.*

121. *Id.*

of whether the Review Conference can alter the constitutional aspects of Part XI in such a manner as to require the Authority unilaterally to alter or abrogate existing contracts, either by eliminating article 155's paragraph 5 or by inserting a specific set of constitutional guidelines which would have the effect of forcing the cancellation or modification of some contracts. Alternatively, the Review Conference could set up a successor in interest to the Authority and require the transfer of contracts to the new entity under significantly different terms. In either event, the international legal status of contractors' rights would assume a dominant role in the resolution of the economic issues involved.

One useful way to attempt to analyze this question is by analogy to American law; to compare the Review Conference's restructuring powers to those exercised under United States bankruptcy law[122] in a corporate reorganization, and to consider the effect such action would have on contracts between the Authority and the contractors. Does the Authority possess sovereign rights over the Area such as a sovereign state possesses over its natural resources?[123] Does the Authority have rights as a trustee for a public trust which, under general principles of international law, would allow it to exercise the equivalent of permanent sovereignty over the resources of the Area?[124] Can it nationalize the Area or exercise power similar to eminent domain over the mine sites in order to provide a more equitable distribution of benefits?[125]

VI. THE ANALOGY OF THE REVIEW CONFERENCE TO CORPORATE REORGANIZATION UNDER UNITED STATES BANKRUPTCY LAW

One of the fundamental difficulties in analyzing the Convention is that disputes arising under it must be addressed within the Convention's framework and supplemented where necessary by general principles of international law. It is not only useless but potentially misleading to analyze the Convention (which is a unique, self-contained constitutional system), in terms of the United Nations and other international organizations.[126] A more appropriate analogy may be to corporate reor-

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122. *See generally* Title 11, United States Code.

123. Convention, *supra* note 1, art. 157;. *Cf.* Reparations For Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 178-89 (Advisory Opinion).

124. *See* Brewer, *Deep Seabed Mining: Can an Acceptable Regime Ever Be Found?* 11 OCEAN DEV. & INT'L L. 25, 50 (1982); Varadhan, *Management of Resources of the International Seabed: Recent Trends*, in LAW OF THE SEA: CARACAS AND BEYOND 263, 274 (Anand ed. 1978); Anand, *Exploitation of Deep Seabed Resources: Interests of the Developing Countries*, in THE DEEP SEABED AND ITS MINERAL RESOURCES, *supra* note 82, at 25, 28.

125. Presumably the measure of compensation here would be that required by international law. For a discussion of the apparent international law requirement for compensation, see American Int'l Group, Inc. v. Islamic Republic of Iran, 23 I.L.M. 1, 9-10 (1984).

126. The Convention is a constitutive treaty which has no equivalent. It most closely resembles the United Nations Charter, but is sufficiently different in key aspects, such as widely divergent functional purposes, lack of a Big Five veto provision and greater power for the Secretary-General. *See generally* Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AM. J. INT'L L. 794 (1965).

ganization under United States bankruptcy laws, where the Authority is treated by the Review Conference as a failed enterprise — if not in the economic, then in the political sense. The bankruptcy analogy appears to be appropriate because one of the primary purposes of the U.S. law is to protect the rights of creditors while ensuring that insolvent essential industries, such as railroads, continue to provide service to the public.[127] Thus, economic rights and the public interest are balanced and protected.[128] The bankruptcy analogy, of course, is merely intended to serve as a model upon which consensus may be reached on the acceptability of Part XI of the Convention. The analogy is used to demonstrate a principle of law which, although not necessarily a general principle of international law,[129] is recognized in the municipal law of many states.[130]

The United States bankruptcy laws are a privilege granted to persons within American jurisdiction by the Congress under the authority of the U.S. Constitution,[131] just as the Review Conference is authorized by Article 155 to reexamine the exploitation of the resources of the Area. Much like the proceedings of the Review Conference under the Convention,[132] U.S. bankruptcy proceedings are grounded in equity.[133] The purpose of corporate restructuring is to make a failed essential industry profitable.[134] This is most important in cases where the insolvent essential industry serves an important public purpose.[135] The reorganization thus focuses on the need to restructure the entity to allow it to continue to serve the public interest.[136]

The Review Conference will likely be most concerned with the effectiveness of the regime in distributing the wealth derived from the Area.[137] If the Review Conference concludes that the Authority has failed in its political mission, and has resulted in the inequitable distribution of wealth, the Authority could be likened to an insolvent essential industry under the U.S. bankruptcy law.[138] In this event, the Review Conference would act in a capacity resembling a constitutional convention, in the

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127. *See, e.g.*, 11 U.S.C. § 1165(1978).

128. *Id.*

129. *See supra* note 22.

130. *Canada S. R.R.*, 109 U.S. at 539.

131. U.S. CONST. art. 1, § 8, cl. 4.

132. Convention, *supra* note 1, art. 155(1)(a)-(f) & 2.

133. Pepper v. Litton, 308 U.S. 295, 304 (1939); Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934); Matter of Commonwealth, 617 F.2d 415, 421 (5th Cir. 1980).

134. *See, e.g.*, New Haven Inclusion Cases, 399 U.S. 392, 432 (1970).

135. *Id.*

136. *Id.*

137. *See supra* text accompanying notes 111-113.

138. The analogy is not unthinkable. The purpose of a U.S. business enterprise serving an important public purpose, as recognized by the bankruptcy law, is to (1) make a profit or (2) continue to operate without incurring loss. *See, e.g., New Haven Inclusion Cases*, 399 U.S. at 432. The purpose of the Authority is to "ensure equitable exploitation of the resources of the Area for the benefit of all countries." Convention, *supra* note 1, art. 155(2). *See supra* note 21.

sense that the group was meeting to amend the constitutional structure of the Authority. The Review Conference's mandate under Article 155(1)(a)-(f) and (2) would be to revise Part XI to correct the regime's perceived inequities. Thus, the possible actions open to the Review Conference are, from an international legal perspective, actually wider than the language of Article 155(5) suggests on its face.[139]

In the event the Review Conference terminates the Authority and liquidates its assets[140] after creating a new vehicle to manage the Area and its resources,[141] it appears that the terms of contracts previously entered into between the Authority and the contractors could continue in force, notwithstanding Article 137(2)'s prohibition of the exploitation of the Area's resources in the absence of the Authority's approval.[142] Although it could be argued that the absence of the Authority would impose a moratorium on mining by entities other than the Enterprise, this result was explicitly rejected by industrialized countries during the negotiations and was acquiesced in by developing states.[143] Thus, even if the Authority were liquidated, the contractors could continue operating[144] while making payments to a liquidation trustee[145] until a new and acceptable[146] entity

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139. It should be noted, however, that whatever actions are to be undertaken involving the contractors, the principle of non-discrimination would be applicable as among classes of them. 11 U.S.C. § 1123(a)(4)(1978); Convention, *supra* note 1, art. 152(1). But even this latter provision does not guarantee non-discrimination, as a qualification was inserted in article 152(2) which provides: "special consideration for the land-locked and geographically disadvantaged among them, specifically provided for in this Part shall be permitted."

140. Certainly, the Authority's assets are of a different nature than those typically involved in corporate reorganizations. The Authority's assets consist of its physical plant and offices worldwide, whatever equipment it may own either independently or in conjunction with the Enterprise, as well as the rights to license mine sites.

141. There is no requirement that the Review Conference create a new international organization to succeed the Authority or any of its constituent parts, but certain parallels are apparent with the League of Nations Mandate system and the question of South West Africa (Namibia).

142. Article 137(2) provides that "[a]ll rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority."

143. Evriviades, *supra* note 104, at 222. Evriviades notes that the present Convention's language in article 155 was modified "to allay the fears of some industrialized countries which considered the possibility of a moratorium as potentially destructive to ocean mining activities at a time when their dependence on seabed mineral resources would have increased significantly." *Id. See also* Oxman, *supra* note 46, at 217.

144. *See* 11 U.S.C. §§ 1108, 1165(1978). This principle is also found in Spanish bankruptcy law, embodied in the commercial code, article 931 (dealing with railroads as an insolvent essential industry), which provides: "Por ninguna accion judicial ni administrativa podra interrumpirse el servicio de explotacion de los ferrocarriles ni de ninguna otra obra publica." Codigo de Comercio (Aug. 22, 1885) art. 931.

145. *See* 11 U.S.C. §§ 704(1), 1108(1978). This principle is also contained in Spanish bankruptcy law. *See* Codigo de Comercio, art. 940.

146. Presumably, states which refused to join the successor in interest to the Authority would not be bound by its decisions, just as states refusing to ratify the Convention could not be bound by its terms under the guise of customary international law. *See* North Sea

emerges to take the place of the Authority. In this way, the contractors' rights would remain unchanged.

Two basic options are open to reorganized enterprises under U.S. bankruptcy law with respect to the impairment of rights of parties in the position of the contractors.[147] Under the first alternative, the reorganization plan must not alter "the legal, equitable and contractual rights to which such claim or interest entitles the holder of such claim or interest."[148] This option would appear to be inapplicable, however, in that it is the contracts themselves which have led to the perceived failure of the Authority.

The other alternative and the method proposed by this paper to reconcile the interests of industrialized and developing states is that the Review Conference interpret Article 155(5) to mean that the rights acquired under existing contracts have a monetary value as their equivalent.[149] If participation of the industrialized states in the Convention were conditioned upon acceptance of this interpretation of Article 155, the fears of the mining consortia that contractors would receive short shrift at the hands of developing countries might be allayed. At the same time, developing states will have achieved their primary objective, which is to retain control over the resources of the Area in order to prevent their exploitation by a handful of highly industrialized states.[150] The issue of valuation would then be subject to negotiation[151] as to the precise amount of compensation owed or, in the event of a deadlock, to the dispute settlement mechanisms of the Convention.[152]

Continental Shelf Case (Fed. Rep. Ger. v. Den. & Neth.), 1969 I.C.J. 4, 25 (Judgment); Vienna Convention on the Law of Treaties, arts. 26 & 34, U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 8 I.L.M. 679 (1979). *But see* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Advisory Opinion).

147. *See* 11 U.S.C. § 1124(1978).

148. *Id.* ¶ (1).

149. *Id.* ¶ (3). The question of valuation is beyond the scope of this paper. It should be noted, however, that *New Haven Inclusion Cases* raises several possibilities for valuation. 399 U.S. at 435-482. Value may be based on (1) the physical assets of the enterprise sold as scrap, or (2) the sale of the enterprise as a going concern, or (3) a combination of the foregoing. *Id.* For a recent case indicating that international law requires compensation for the going concern value, see *American Int'l Group*, 23 I.L.M. 1 (1984).

150. *See, e.g.*, Njenga, *supra* note 82, at 7.

151. This is consistent with U.S. bankruptcy law, which contemplates "that there shall be some giving and taking by all concerned." In re Atlas Pipeline Corp., 39 F. Supp. 846, 848 (W.D. La. 1941).

152. *See generally* Convention, *supra* note 1, Part XI, § 5, arts. 186-191; Part XV and annex VI. The Convention's dispute settlement mechanisms are extremely complex and may not be entirely satisfactory to developed states and potential investors.

There are, theoretically, seven dispute settlement procedures which may be applied to conflicts involving the Area: (1) the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea, *id.* arts. 186-187 (Chamber); (2) the International Tribunal for the Law of the Sea, *id.* annex VI (Tribunal); (3-4) special ad hoc panels of the Chamber, *id.* art. 188(1)(b), or the Tribunal, *id.* art. 188(1)(a); (5) conciliation, *id.* art. 284 & annex V; (6)

This approach is analogous to the U.S. bankruptcy law, which provides that, on the effective date of the reorganization plan, the holder of such claim or interest receives, on account of such claim or interest, cash equal to,

> (A) with respect to a claim, the allowed amount of such claim; or
> (B) with respect to an interest, if applicable, the greater of
>
> (i) any fixed liquidation preference to which the terms of any security representing such interest entitle the holder of such interest; and
>
> (ii) any fixed price at which the debtor, under the terms of such security, may redeem such security from such holder.[153]

Under this alternative, the Authority could cancel its contracts with contractors if the Authority provided compensation.[154] The value of the compensation would likely be determined by general principles of international law,[155] taking into account the equitable interests[156] of the con-

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binding commercial arbitration, *id.* art. 188(2) & annex VII; and, (7) resort to the International Court of Justice, *id.* art. 287(1)(b).

It appears that despite the existence of these seven alternative dispute settlement procedures, the Chamber will play the principal, if not exclusive, role in resolving disputes between contractors and the Authority. *Id.* art. 287(2). *See* Gaertner, *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*, 19 SAN DIEGO L. REV. 577, 584 (1982); *But see* Burnhardt, *Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment*, 19 VA. J. INT'L L. 69, n.9 and accompanying text (1978).

While private parties to a dispute involving the Area may avoid the Chamber, *see* Convention, *supra* note 1, art. 287(3)-(5), difficulties may arise if the Chamber develops a biased personality and the dispute involves the Authority. Gaertner, *supra*, at 591. In this case, "the Authority may refuse to submit to alternative fora, thereby forcing the settlement of the dispute into the nonobjective Chamber." *Id.* (citation omitted). *See* Convention, *supra* note 1, art. 287(2).

This appears to be an unfavorable result since the Chamber will likely be dominated by judges from developing states. The Chamber is composed of 11 members, chosen by a majority of the Tribunal's judges from among its ranks. Although there is no specific requirement regarding representation in the Chamber, Convention, *supra* note 1, annex VI, art. 36(2) "assures" that "the principal legal systems of the world and equitable geographical distribution shall be assured." Thus, it is likely that the Chamber will be dominated by judges from and sympathetic to the position of developing states.

153. 11 U.S.C. § 1124(3)(1978).

This principle is also embodied in the Spanish Commercial Code, *see* Codigo de Comercio, art. 883, and the Italian Commercial Code. *See* Regio Decreto, Marso 16, 1942, No. 267, "Disciplina del fallimento . . .," art. 59.

154. The question of adequate compensation remains a controversial topic among governments. *See, e.g.*, Alberti v. Empresa Nicaraguaonese de la Carne, 705 F.2d 250, 255 (7th Cir. 1983); Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 888-893 (2d Cir. 1981), *cert. denied*, 459 U.S. 942 (1983). Although central to the issue of cancellation of the contracts of contractors, the question of compensation is beyond the scope of this article.

155. The Iran-U.S. Claims Tribunal recently held that the appropriate method for valuation of an expropriated business under international law, at least in some circumstances, is as a "going concern." *See American Int'l Group*, 23 I.L.M at 9-10.

For a different view of the currrent status of international law relating to compensation,

tractors. This provision is reasonable in the context of a reorganized essential industry which must be freed from burdensome contracts in order to fulfill its fundamental public purpose and succeed, while recognizing the contractual rights of private parties. This alternative makes even more sense in the context of contracts between the Authority and contractors, where the contractors' rights might be reduced but not wholly eliminated. It might be added that if agreement were reached *a priori* between industrialized states and the developing states on this method of valuation, it would pose a strong disincentive to abrogate contractors' rights under the Convention because of the predictably huge cost of providing compensation. Thus, agreement on this principle could provide moderation in the Review Conference, where the cost of such a decision would have to be weighed. On the other hand, if such an arrangement proved satisfactory to private mining consortia in the developed states, their conduct might be influenced to the extent that they would be prepared to invest the billions of dollars necessary to begin commercial exploitation of the seabed. Once the investment was made, the contractors would have a powerful incentive to remain on the best possible terms with the Authority in order to prolong their tenure. On balance, this proposal is intended to diminish the dividing lines between north and south, which were dramatically underscored during the course of the sometimes arduous UNCLOS III negotiations.

VII. CONCLUSION

Part XI of the Convention is the result of political compromise[157] which is nowhere reflected more clearly than in the provisions relating to the exploitation of the resources of the Area. These provisions support contradictory political, economic, and legal positions involving the international legal status of contracts between the Authority and the contractors. While the Convention appears adequately to safeguard the rights of contractors for the first twenty years of commercial exploitation of the seabed, it is not at all certain that contracts will remain unimpaired after the Review Conference.

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see Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 121-130 (1984), *Compensation Cases — Leading and Misleading*, 79 AM. J. INT'L L. 420 (1985). *But see* Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176 (1984) and Mendelson, *What Price Expropriation*, 79 AM. J. INT'L L. 414 (1985).

156. The equitable interests of the contractors include not only investment less depreciation, but also future income. Justice Douglas observed in Consol. Rock Prod. v. DuBois, 312 U.S. 510 (1940), that "[a] sum of values based on physical factors and assigned to separate units of the property without regard to the earnings capacity of the whole enterprise is plainly inadequate." *Id.* at 526. This presumes, of course, that the sites are being operated profitably by the contractors, and have not been allowed to sit idle or abandoned. *Cf. New Haven Inclusion Cases*, 399 U.S. at 436 (Interstate Commerce Commission acted properly in approving sale of bankrupt railroad with " 'neither earning power nor the prospect of earning power' " based on the value of its physical assets).

157. *See, e.g.*, Richardson, *Seabed Mining and the Law of the Sea*, 80 DEP'T. ST. BULL. 60, 60-64 (1980).

This article has attempted to demonstrate that contracts between the Authority and the contractors may be altered consistent with the Convention, despite the language of Article 155(5) providing for the sanctity of contracts. This aspect of the Convention has received little attention and could be a potentially important stumbling block to the participation of the U.S. and other developed countries in the Convention. This article suggested that one method for reconciling the differences between developed and developing states was to negotiate a compromise agreement to protect the economic rights of contractors who participate in seabed mining. The method suggested is to find an analogy for the valuation of the important interests involved, taking into consideration the need to provide security for the contracts and, at the same time, assuring developing states that they would retain an acceptable measure of international control over the Area and its resources. This article suggested that such an analogy can be found in U.S. bankruptcy law, in which the Authority is viewed as a (politically) failed essential industry. It was suggested that this analogy may be useful in narrowing the gap between developed and developing states with respect to participation in seabed mining, and to avoid the potentially serious consequences which could stem from the Review Conference. Whether the Review Conference will in fact require the abrogation or alteration of these contracts will be determined by international politics and a world economy in the twenty-first year of commercial exploitation of the seabed.