

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE
REPORT TO THE HOUSE OF DELEGATES
RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that the United States become a party to the 1982 United Nations Convention on the Law of the Sea and to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, dated July 29, 1994.

REPORT

For the United States and the world, widespread adoption of a codified rule of law for the oceans is of paramount importance. The 1982 Convention on the Law of the Sea, which has now been accepted by over 60 nations and will enter into force November 16, 1994, will provide a stable framework for the interaction of nations on oceans issues. Concerns of the United States and other major industrialized nations with certain technical and institutional features of Part XI of the Convention, relating to deep seabed mining, have been addressed in a July 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, which will be interpreted and applied together with Part XI as a single instrument. The United States signed the 1994 Agreement on July 29, 1994.

The 1982 United Nations Convention on the Law of the Sea defines rights and duties with respect to uses of the oceans. The Convention guarantees transit passage through straits, the right of overflight over straits, the right of sea lanes passage through archipelagic waters, and other navigational freedoms important to the United States. The Convention provides a comprehensive framework of rules and principles relating to the protection of the marine environment. The Convention also satisfies important United States interests by establishing wide limits to the continental shelf regime and defining the regime of the 200-mile exclusive economic zone. With respect to other issues as well -- marine scientific research, management of fisheries and other marine resources, maritime jurisdiction and boundaries, and other lawful uses of the oceans -- the Convention will be particularly important to nations such as the United States whose public and private interests benefit from a stable legal framework within which to conduct their activities.

Particularly in an era with new threats to United States security posed by the end of the Cold War and by the rise of new nations and regional powers, it is important to seek long-term stability of rules related to the oceans. Unilateral claims of coastal nations can undermine and change rules of the customary law of the sea. Unilateral assertions of extensive national jurisdiction over the oceans can disrupt the balance of rights and duties agreed upon in the 1982 Convention. The Convention provides treaty rules that are hard to change unilaterally.

The Convention contains institutional features that can help to promote compliance with Convention norms and thus to stabilize the law of the sea. The Convention includes provisions for obligatory third-party adjudication of many issues. The United States could choose to have a tribunal review and pronounce on whether another nation's actions were legal under the Convention. The presence of a comprehensive dispute settlement system also will help to deter violations and unreasonable unilateral

interpretations of Convention norms. These dispute settlement mechanisms will not likely be available to the United States if it does not become a party to the Convention.

Although the United States was not among the 159 signatories of the 1982 Convention on the Law of the Sea, its concerns with the Convention have been tied only to certain technical and institutional features of the seabed mining regime of Part XI. With regard to other issues, the United States has supported the norms contained in the Convention. The President invoked the Convention and international law in 1983 when he proclaimed a United States exclusive economic zone extending 200 miles from the United States coastline and encompassing over 2,000,000 square miles. He also stated that "international law, as reflected in the applicable provisions of the 1982 Convention on the Law of the Sea" supported a broader jurisdiction over the territorial sea when, in 1988, he extended United States territorial waters from 3 to 12 miles. United States representatives to the United Nations have noted that the United Nations Convention on the Law of the Sea represents a major accomplishment in the development of the international law affecting the oceans. The Convention was negotiated with the support of the U.S. Executive Branch and the Congress through four Democratic and Republican presidential administrations.

The American Bar Association recognized the difficulties contained in the Convention's deep seabed mining regime in a 1983 report. The concerns included:

- Provisions that would actually deter future development of deep seabed minerals resources when such development should serve the interests 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;
- Stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits; and
- The absence of assured access and security of tenure for future qualified deep seabed miners to promote the development of these resources. (American Bar Association Section of International Law and Practice Report to the House of Delegates, August 1983, p. 5.)

The American Bar Association also, in 1990, emphasized the importance of a widely accepted Convention and urged that a high-

level working group be established to determine what changes affecting Part XI were needed in order to gain the support of the United States. (American Bar Association Section of International Law and Practice and Standing Committee on World Order Under Law Report to the House of Delegates, February 1990.)

The United States government has never disputed the desirability of an international agreement that retains other basic features of Part XI. Section 3 of the 1980 Deep Seabed Hard Mineral Resources Act, for example, stated that the United States "does not . . . assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas of resources in the deep seabed" and urged the Secretary of State to negotiate a comprehensive law of the sea treaty to "give[] legal definition to the principle that the resources of the deep seabed are the common heritage of mankind." A widely accepted international regime for the deep seabed can provide stable rules for future mining operations and can deter unilateral coastal state expansion into international common areas.

The difficulties of the United States and other industrialized nations with certain technical and institutional provisions of Part XI were discussed at a series of consultations that began in 1990, undertaken at the initiative of the United Nations Secretary-General. The Secretary-General's consultations sought to develop a way to achieve widespread acceptance of the 1982 Convention by the time it entered into force. They led to the Agreement Relating to the Implementation of Part XI, which was adopted and opened for signature at the United Nations on July 29, 1994. The Agreement makes the following fundamental changes to the seabed mining regime of Part XI that are responsive to the concerns of industrialized nations:

-- Improves the prospects for future development of deep seabed minerals resources, when such development becomes economically feasible, by (1) eliminating large annual fees miners would have to pay prior to commercial production, (2) eliminating production limitations (replacing such limitations with restrictions on the subsidization of seabed mining, based on the General Agreement on Tariffs and Trade), (3) subjecting the Enterprise, the mining arm of the International Seabed Authority, to the same obligations as other commercial mining enterprises, and (4) eliminating the requirement that parties fund the Enterprise's mining operations;

-- Provides the United States with a greater role in the decision-making process, including decisions concerning the sharing of benefits derived from seabed mining, by (1) guaranteeing it a seat in the Council of the Authority, (2) allowing industrialized nations acting in concert to block

decisions in the Council when it proves impossible to arrive at a consensus, (3) ensuring that the Assembly of the Authority will be able to act only upon Council recommendations, and (4) allowing the United States to block decisions on important financial or budgetary matters in the Finance Committee;

-- Ensures that future amendments to the seabed mining regime could not be adopted over United States objections;

-- Eliminates any requirement that would compel the transfer of private technology, and requires the Enterprise and developing nations to "seek to obtain such technology on fair and reasonable commercial terms and conditions on the open market, or through joint venture arrangements"; and

-- Promotes access to seabed mining by U.S.-licensed multinational consortia on terms "no less favorable than" terms given to entities whose mine site claims have already been registered by the Law of the Sea Preparatory Commission.

In recognition of the fact that deep seabed mining operations are not now commercially feasible, and are not expected to become so in the next several decades, the Agreement acknowledges the need to establish and run international institutions only on an evolutionary, cost-effective basis. Thus, for example, the Enterprise will not become operational until the Council so decides.

The 1994 Agreement Relating to the Implementation of Part XI includes procedural devices that seek to promote widespread acceptance of the 1982 Convention along with the new Agreement. Nations that in the future accept the 1982 Convention on the Law of the Sea must also accept the Agreement, which is to be interpreted and applied together with the Convention as a single instrument. Nations that have already ratified the Convention will be bound by the Agreement by signing it, unless they take affirmative steps to indicate their intent not to be bound. In order to enter into force, the Agreement must be accepted by 40 nations, including 7 developed nations. The Agreement will apply provisionally for up to four years if it has not entered into force by November 16, 1994, in order to give nations time to accept it.

The Section of International Law and Practice, in pursuance of Goal VIII and the establishment of a rule of law in relations among nations, strongly recommends that the United States become a party to the 1982 United Nations Convention on the Law of the Sea along with the 1994 Agreement Relating to the Implementation of Part XI.

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law & Practice

Submitted By: James H. Carter, Chair

1. Summary of Recommendation(s):

That the American Bar Association recommends that the U.S. become a party of the 1982 United Nations Convention on the Law of the Sea and to the Agreement Relating to the Implementation of Part XI of the Convention, dated July 29, 1994.

2. Approval by Submitting Entity:

This Report with Recommendation was approved by the Council of the Section of International Law & Practice at its meeting on August 6, 1994.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The following related recommendations have previously been approved by the House of Delegates:

1990 Midyear Meeting: "That the American Bar Association recommends that a special high-level working group...be established by the President...to determine: (a) what changes and clarifications would make Part XI of the 1982 Convention on the Law of the Sea acceptable to the United States; (b) what steps should be taken to make these changes and clarifications acceptable to other nations; and (c) by what procedures these changes and clarifications can best be introduced into or attached to the Convention."

1983 Annual Meeting: "That the American Bar Association:

1. Supports the position that...deep seabed mining remains a freedom of the high seas....;
2. Supports United States efforts at coordination...to establish a framework that would encourage exploration and development of deep seabed mineral resources....
3. Supports amendment of the Law of the Sea Convention deep seabed mining regime to provide assured access...for all mineral resources of the deep seabed....;
4. Supports the view that the substantive provisions of the Law of the Sea Convention--other than those relating to deep sea mining--have been accepted by

general consensus...; and

5. Supports...acceptance by the United States...of the provisions of the Convention relating to the settlement of disputes.....

1980 Midyear Meeting: [T]he American Bar Association endorses the long standing policy of the United States Government that any future comprehensive Law of the Sea Treaty to which the United States becomes a party must provide assured access for the United States and its citizens to the resources at the seabed....; and...endorses efforts directed toward the enactment of interim domestic legislation to promote the orderly development of mineral resources in the seabed....

5. What urgency exists which requires action at this meeting of the House?

The Law of the Sea Convention, along with the 1994 Agreement, will be submitted this fall to the U.S. Senate for its advice and consent to ratification. Accordingly, action by the House of Delegates at this meeting is necessary.

6. Status of Legislation. (If applicable.)

The Convention, including the 1994 Agreement, is expected to be submitted this fall to the U.S. Senate for its advice and consent to ratification.

7. Cost to the Association:

None.

8. Disclosure of Interest. (If applicable.)

There is no known conflict of interest.

9. Referrals:

Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the House of Delegates agenda, it has been provided to:

The Section of Business Law

The Section of Natural Resources, Energy, & Environmental Law

The Section of Science and Technology

The Standing Committee on World Order Under Law

The Standing Committee on Law & National Security