DOMESTIC LEGISLATION AND THE LAW OF THE SEA CONFERENCE

Congressman Paul N. McCloskey, Jr.*

Mr. Chairman, I have been intrigued for many years over the question: Is the cause of international peace advanced best by diplomats negotiating treaties *or* by commercial interests broadening their commercial trade and investments in other countries?

A fair case can be made, I think, that commercial enterprises do a better job than diplomats in bringing the nations of the world closer together, and in lessening, or at least inhibiting the forces that lead nations into warfare. When one nation's businesses have substantial investments in foreign countries, there certainly seems to be a certain reluctance to bomb those countries back into the stone age. The broadening of trade relationships, increased interdependency on materials and products, international monetary exchanges and loan guarantees, airline landing rights, and steamship transportation rights — all commercial relationships — may often be more helpful to world peace than the painful pace of diplomatic negotiations amongst sovereign nations.

This question squarely underlies an issue now facing the United States Congress: Should the Congress unilaterally enact a law encouraging United States industry, in partnership with foreign corporations, to mine the seabed? Or should Congress hold legislation pending the conclusion of the current negotiations? Since unilateral action by the United States may scuttle the current treaty negotiations, this question involves a major choice: Whether to maintain the momentum of continuing United States leadership in deep seabed mining technology development or to support the significant, but slow, progress we have made in negotiating a far-reaching and historic new international law of the sea treaty.

The benefits of a treaty cannot be understated. In our own history as a nation, disputes on the oceans have often led us into war. Consider the following: Privateering against United States shipping by Great Britain was a contributing cause of our Revolutionary War, and probably the *major* cause of the War of 1812. In our Civil War, the naval blockade against the Confederacy — and

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European acceptance of that blockade — was probably the key factor which prevented the South from permanently dividing the nation. The sinking of the *Maine* in Havana Harbor in 1898 triggered the Spanish American War. The sinking of the *Lusitania* and U-boat activity against United States ships was a material factor in moving us towards involvement in World War I. More recently we see cases like that of the *Pueblo* and the *Mayaguez* bringing us close to confrontation. In the case of the *Pueblo*, for example, our Navy, in its wisdom and with a certain propensity to test the will of foreign nations, chose to deliberately send the *Pueblo* within the claimed territorial sea of Korea — a claim which we did not recognize as valid under international law. We should not forget how close we Americans came to going to war rather than accept that seizure and the later humiliation of the United States Navy crew. When the Cambodians seized the *Mayaguez*, again in disputed waters, President Ford did commit marines to recover the crew. And finally, there is the famous Gulf of Tonkin Resolution.[1] This fatal mistake by Congress, which permitted us to later become involved in a major and disasterous war without the Declaration of War required by the Constitution, resulted from the Navy's decision to send two destroyers, the *C. Turner Joy* and the *Maddox*, within a 12-mile limit claimed by North Vietnam, and within a few hours steaming distance of an ongoing amphibious operation by our allies, the South Vietnamese.

So we have a great deal to gain from a treaty: Finalizing of territorial seas at twelve miles; guarantees of free transit through and over straits; agreement on firm definitions of the rights of all countries within a 200-mile economic zone; and, perhaps most important, establishment of a system of dispute settlement for conflicts involving ocean issues. Establishment of these principles would constitute a tremendous step towards reducing conflict and tension on over two-thirds of the earth's surface.

On the other hand, should the Congress give up on the slow pace of the Law of the Sea Conference negotiations, now stretching into their sixth year?

Congressional impatience stems not only from the slow pace of the negotiations but also from the recognition that after the successive unproductive negotiating sessions on the deep seabed portion of the treaty, agreement on language acceptable to the United

1. Pub. L. No. 88-408, 78 Stat. 384 (1964).

States Senate is now regarded as unlikely, if not impossible, by most Members of Congress who have followed the negotiations, as well as by the White House. Unilateral legislative action that will permit United States corporations to proceed with deep seabed mining, therefore, is inevitable during this Congress. That this will have a significant international impact, similar to the impact of the unilateral action of the United States in establishing a 200-mile zone for fishing conservation,[2] is clear. But will legislative action in fact destroy the substantial progress that the Law of the Sea Conference has made to date? A good case can be made that it will. Delegates to the Conference who would like to disrupt the proceedings could use the United States action for that purpose.

It is regrettable that these unprecedented negotiations might come to a halt at the eleventh hour. The people of the world share a common interest in conserving and utilizing the resources of the oceans, in protecting freedom of navigation, in protecting the marine environment from pollution, and in enhancing scientific knowledge of the oceans. Failure to achieve agreement can exacerbate the same tensions and ambiguities which have so often led to conflict in the past. Failure will also hurt those nations which can least afford it, namely those which cannot defend their interests. Adoption of a new dispute-settlement mechanism covering two-thirds of the world's surface could be the most significant step towards peace in this century.

I personally have opposed unilateral action to date because of my view that a new comprehensive international law of the sea is far more valuable to the United States than is the early use of United States technology to obtain a new source of nickel, cobalt, and copper. I view the dispute settlement procedures in the treaty *alone* as being of far greater ultimate worth to the people of the United States than a guaranteed source of these particular metals. After all, there are at least ten other essential metals (with an import dependence of greater than 80 percent) upon which we *will always* require foreign developing countries for sources.

But my view is not the majority view of my colleagues in the House and Senate. The clear majority view is that any Law of the Sea Treaty negotiated by the United States must *guarantee access* to the deep seabed for United States companies. Without clearly guaranteed access for United States companies, there is simply no

2. Fishery Conservation Zone, 16 U.S.C. § 1811 (1976).

hope that the United States Senate will ever ratify a Law of the Sea Treaty. That majority view of the House of Representatives, and I believe the Senate as well, is probably fairly accurately set forth in the following letter sent to President Carter on January 29, 1979, by Chairman Murphy and Breaux of the House Merchant Marine and Fisheries Committee and Oceanography Subcommittee, respectively:

January 29, 1979

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

We are compelled to raise a matter about which we are gravely concerned. The United States delegation to the Third United Nations Conference on the Law of the Sea appears to be engaged in a headlong rush to the conclusion of a comprehensive oceans treaty which is inimical to critically important interests of the United States. This effort is being undertaken without adequate consideration of Congressional opinion. Indeed, we are convinced that, unless remedied, this defect in the process is likely to lead to the conclusion of a treaty which will be signed by the United States, ratified by more than 100 foreign States, but which will fail to obtain Senate approval. We hardly need point out the international consequences.

A major, long-standing policy of the United States at the Law of the Sea negotiations has been to achieve assured access by this nation to the minerals of the international deep seabed. Those minerals include, among others, cobalt, manganese, and nickel, each of which is essential to the production of high quality steel and specialized alloys for high technology items. Commercially attractive quantities of copper are also on the deep seabed.

It is clear that the United States and other western industrialized countries, whose economic and political interests are very different from those of the Third World and East Bloc, would be in a distinct minority in the International Seabed Authority which would supervise and control ocean mining under the treaty regime. Consequently, until recently, the United States has sought to negotiate at the Law of the Sea Conference a detailed mining code clearly setting forth reasonable conditions of access and carefully circumscribing the rulemaking and discretionary powers of the Authority.

There is at present, however, a movement by the delegation to consider a simplified treaty text. The theory is that the complexities of the detailed approach are too great to permit the resolution of major outstanding issues by the Conference in a viable time frame. The developing countries are calling for an early end to these protracted negotiations. What is contemplated, therefore, on both sides is a negotiation at the Conference of relatively undetailed treaty provisions which would be fleshed out by an interim organization prior to ratification.

The difficulty is that this approach would call upon the United States to sign a treaty without knowing whether access to ocean minerals would be assured; it would be, in essence, a blank check. The argument that we would insist upon an interim organization structured to protect our interests in developing rules and a permanent procedure which would not allow the rules to be undone against our interests is unpersuasive. The Third World will not accept that kind of situation. The long history of negotiations and the ideological nature of the Third World position make this abundantly clear. At best, our ability to protect our interests would have to be ambiguous to be widely acceptable among the developing countries. Once signed by more than 150 nations, the treaty would change the political and legal equation greatly. If the interim oranization failed to produce assured access in the detailed regime, and the United States failed to ratify, the cost would be far higher to this country than if the treaty were not concluded in the first instance. Realizing that, the Third World would apply greater pressure in the interim organization to achieve its aims. Our ability to protect our interests would be substantially diminished.

There are other grave problems, insofar as the delegation has developed an unclassified, officially uncontrolled document reflecting not only the simplification approach, but also numerous substantive provisions highly prejudicial to United States interests.

Mandatory transfer of technology as a practical condition of access; a seabed mining production ceiling, which while time limited on its face, would insure politically that the ceiling would be renegotiated to become indefinite; a national quota system for mine site allocation; a system of selection of applicants for mine sites badly tilted toward joint ventures which would benefit the Third World and not the United States; a moratorium on ocean mining of manganese nodules twenty-five years after the treaty enters into force, which while not legally automatic, would be politically inevitable precisely at the time the national need for the minerals became acute; a moratorium on all mining of non-manganese nodule minerals, pending adoption of a regime for them; and a system of governance for the Authority which would fail to protect U.S. interests adequately.

In short, access would not be assured. Moreover, mandatory transfer of technology and a production ceiling violate clear, long-standing United States policy on technology transfer and commodity arrangements. The results of these two features, alone, are bound to be adverse in terms of technological innovation, inflation, national balance of payments, and jobs.

As a whole, the provisions in the delegation document would deny the United States security of supply of vital seabed minerals for the indefinite future. The delegation denies that the document reflects a United States position, but the impression of foreign States is to the contrary and delegation testimony on key issues during Congressional hearings indicates that those States are correct.

The balance of the treaty offers the United States little if any, advantage over customary law, so far as the continental shelf and fisheries are concerned. The treaty regime for marine scientific research is highly restrictive. The navigation regime contains dangerous ambiguities which almost certainly would be interpreted to the disadvantage of our maritime interests, notwithstanding the fact that global commercial and military interests dictate relative freedom of movement on the seas. As far as the system of dispute settlement under the treaty is concerned, it is so complex and fraught with exceptions that it is likely to be of little practical value. In short, the abandonment of deep ocean minerals cannot be justified on the basis of benefits to be derived from other elements of the treaty.

Mr. President, we urge your personal intervention to assure that the Congress is heard and its views properly taken into account before the United States delegation places the nation in a seriously

adverse position. Implementation of the Panama Canal treaties and the ratification of SALT II already promise to place a severe strain on the ability of the Congress to accommodate Administration foreign policy. We are convinced that a Law of the Sea treaty such as that which the delegation is apparently prepared to accept—notwithstanding unconvincing caveats to the contrary—would be more than the political traffic could bear.

Sincerely,

JOHN B. BREAUX
Chairman
Subcommittee on Oceanography

JOHN M. MURPHY
Chairman
Committee on Merchant Marine
and Fisheries

I disagree with the letter, and particularly with its criticism of the United States Delegation to the Law of the Sea Conference. Again, I believe it is inevitable that an impatient Congress will pass deep seabed mining legislation during this Congress. The question then is, what should this historic and precedent-setting legislation contain? Our experience with legislation of international impact has taught us that clear and careful draftsmanship is rquired. The Fishery Conservation and Management Act[3] provides a good example. Our self-serving exception regarding tuna has resulted in bad relations with many developing countries whose expanded economic zones can be the source of productive tuna fishing. These countries refuse to recognize our provincial position that we will not regulate tuna fishing in our 200-mile zone (where tuna rarely go), and they cannot regulate tuna fishing in their 200-mile zones (where tuna *do* go). These countries have understandably excluded the United States from recent negotiations to establish regional management schemes.

In addition, it is clear that after the United States enacts a deep seabed mining bill other countries of the world will use that bill as a model and will enact similar legislation. This being so, our bill should at a minimum include the following concepts:

3. Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801-1882 (1976)).

(1) Recognition of the "common heritage of mankind" and the anticipated conclusion of a fair treaty.
(2) Establishment of a revenue sharing fund for distribution to the entire international community when a suitable treaty can be negotiated.
(3) Preservation of the concept of freedom of the seas.
(4) No appearance of an assertion of sovereignty over any portion of the seabed.
(5) Comprehensive environmental protection, resource management, and safety.
(6) Acceptable provision for international tax and customs policy.
(7) Free location of processing plants.
(8) Free choice of construction and flag of mining, processing, and transportation vessels.
(9) Antitrust review prior to license issuance.
(10) Reasonably precise definition of the terms, conditions, and restrictions on licensing.

I believe that the language of H.R. 3350, reported out of this Committee by unanimous voice vote in 1977,[4] can be easily amended to reflect the recommendations I have offered above. I will shortly introduce, for the Committee's consideration, a series of amendments to H.R. 3350 which would accomplish these purposes.

4. H.R. 3350, 95th Cong., 1st Sess. (1977).

PANEL DISCUSSION

MR. HULL: Thank you very much Congressman McCloskey. We will now receive questions from the panel.

PROF. GOLDIE: Congressman, I feel very supportive of your view about a simplified treaty. However, there is one further problem that could arise. Julius Stone, my former professor at the law school in Sidney, Australia and also my professor at Harvard, has recently published a book called *Conflict Through Consensus.*[1] I do remember it as one of the most sophisticated analyses of consensus politics that I have ever read. The case study that this book emphasizes is that of the definition of aggression. Stone pointed out that the final G.A. resolution on the definition of aggression[2] is so broad that it lets anybody interpret it more or less as they please. He is thereby following his own philosophy about the mutability of words. But there is more to it than that. There are compromises of opposites in many of the key phrases. I think one concern that one should have with regard to a more generalized format is that a consensus that has led to these generalizations is simply a disguise for linguistic gymnastics and for political warfare, which Julius also calls the conflict situation. If agreement of opposites is achieved by general phrasiology, then I think that such a convention as you have envisioned could not, because of its very nature, assure the freedom of access to which I think there is American consensus on all sides.

CONGRESSMAN MCCLOSKEY: I am not sure I understand what you said in your conclusion. What do you mean by "there is an American consensus on all sides?"

PROF. GOLDIE: I think that most Americans, whether they have opposed or supported the deep seabed mining bill since the first one was brought forward in 1972, would not argue that access to seabed resources should be denied. That is, they would argue that there should be freedom of access. The question has been one of modalities through a universal organ or an international organization. People who have opposed the bill have largely done so on the basis that it will stultify the Third United Nations Conference on Law of the Sea.[3] Or they oppose it for other reasons that are similar, such as

1. J. STONE, CONFLICT THROUGH CONSENSUS (1977).

2. G.A. Res. 3314 (XXIX), 1 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1974).

3. The deep seabed mining bills proposed since 1972 are: H.R. 3350, 95th Cong., 1st Sess. (1977); S. 2085, 95th Cong., 1st Sess. (1977); S. 2053, 95th Cong., 1st Sess. (1977); H.R. 11879, 94th Cong., 2nd Sess. (1976); S. 713, 94th Cong., 2nd Sess. (1976); H.R. 12233, 93rd Cong., 2nd Sess. (1974); H.R. 9, 93rd Cong., 1st Sess. (1973); S. 1134, 93rd Cong., 1st Sess. (1973);

environmental reasons. But it seems to me that offhand I do not recall anybody who has said that the seas are inviolate and that no one should have access to them, more or less on a basis of right rather than a basis of concession.

CONGRESSMAN MCCLOSKEY: You have further confused me. I had thought that it was the American concensus, it certainly is not the concensus of the Congress, that we have the right of access at this point and that we have delayed it only because we anticipated, within a reasonable period of time, an international regime could be worked out. We now find that the nine years from 1970 to 1979 does not constitute a reasonable period of time and that what is coming out of the treaty text does not give guaranteed access.

PROF. GOLDIE: That is exactly what I was saying. What I was really stressing, however, was not concern for right of access as such, taking that as a given, but rather the question of sufficient clarity of draftsmanship. The conflict through consensus, to use a shorthand phrase, is not inherent in the short form of a convention.

AMBASSADOR ALDRICH: Mr. Congressman, I would like to note that the letter which you quoted from has been answered by Secretary Vance on behalf of the President. Since Elliott wrote the answer, you will understand that it does not take too kindly to the letter's characterization of the delegation and its irresponsible attitude. Rather, in summary, it accuses Congressman Murphy and Breaux of distorting the facts in terms of what our positions have been, what we are trying to do, and to some extent, the judgments on the consequences of action. I would note that I think it is entirely possible that those, who in the past, moved us into the channel of negotiating endless detail did so in order to insure that we did not end up with a treaty. I have felt that anybody with experience in international law, the development of international law and negotiation of treaties who looks at the kinds of details that we have been trying to include in the treaty over recent years, would have to say that we are going against all tradition. We are failing to recognize that international law is opposed to any of our national legal systems and is a very primative system. You cannot do the kinds of fine tuning that those drafts have tried to do. Namely, fine tuning what various international organs cannot do, what their interrelations are, and where they can issue regulations and where they cannot.

The simplified text to which Congressmen Murphy and Breaux

H.R. 14918, 92nd Cong., 2nd Sess. (1972); H.R. 13076, 92nd Cong., 2nd Sess. (1972); S. 2801, 92nd Cong., 1st Sess. (1972).

take such exception in my judgment frightens them, and frightens the mining industry, not because it falls short in terms of giving assurances of access but rather because it is within the scope of what we might in fact be able to negotiate. It looks like a real treaty. They suddenly see it for the first time and they get worried that we might in fact be about to conclude a treaty. And that is why they are nervous about it. Actually I hope they are nervous on that ground because I think they are going to have to reconsider the value of a treaty as opposed to the value of an embittered and prolonged impass in the international society.

I would say that much of the detail which is in the present text is probably necessary and non-controversial. But the text which they criticize states clearly and in workable terms, things which are unworkable and poorly stated in the text before the Conference. The simplified text also recognizes the inevitability of negotiating many more details to make, what we call, the rules and regulations of this international authority. It proposes that this be done essentially between the signature of the treaty and the entry into force of the treaty. It has been my assumption, and Elliot's assumption, that we cannot expect the Senate of the United States to give its approval to the Law of the Sea Treaty unless it can see what it means in detail. But this does not seem to us to be the same thing as saying that all these terms have to be in the treaty. It may mean that we have to work out rules and regulations before codification. But under any practice of recent years, there is a period of years between signature and entry into force of a treaty of this sort, and that time can be utilized to work out the rules and regulations. I would suggest that we would never have better leverage than in a situation where it was clear that the Senate's willingness to give its advice and consent to the treaty depended on these rules and regulations implementing the treaty in a responsible fashion which made mining economical and possible. This would not be done in a politicized conference of ambassadors to the United Nations but rather in a continuous twelve-month a year working group from the various mining democracies around the world. So, at any rate, it may be harsh of me to suspect the motives of some of these people. I certainly do not know and would not want to say that Congressmen Murphy and Breaux in fact do not want a treaty. But some of the people who are pushing them and some of the people representing the mining industry misguidedly do not want a treaty. And I think that is mainly what is behind it.

MR. HULL: George, I would like to pick up on your point in order

to underscore the one that Congressman McCloskey made earlier. If one has a generalized treaty which contains dispute settlement provisions, the advancement of international law will be great and the whole issue that we are dealing with will be pushed forward to a point where, I think, we would all be very proud and feel very secure. I want to state as a footnote what I have always found is both a paradox and a potential parade of horribles. It relates back to the earlier comment that was made about the hypothetical fishing vessels and the rule of the road that Fred referred to. We all assume that without a treaty there will be seabed mining solely by the United States and that we will be able to mine as we wish. In point of fact, that may be the way it is now, but we must bear in mind the history of the United States. If there is a challenge we are not about to begin an undeclared war, that Pete referred to earlier. We have the potential situation of the United States Congress passing a deep seabed mining bill and everyone wanting to go out and mine the deep seabed. We have at the same time the possibility that the rest of the world will continue negotiating and come up with a convention which says there can be no mining without the consent of the international authority. We would then be left with a rather difficult problem. However, it is one for which history provides a very clear answer in terms of what the United States would do in such a situation. Would we go ahead and mine, thus risking conflict and setting in motion that undeclared state of war? Or would we submit as was the case, for instance, in Ecuador? I pose this as a footnote but if someone would like to respond to it that would be fine with me.

CONGRESSMAN MCCLOSKEY: I think that the State Department rather than the Congress ought to respond to that question. I did not mean by my earlier comments to say that the State Department was limited by what Congress might do. But the Defense Department will certainly be limited by what Congress does or does not require for the protection of United States seabed mining claims or operations.

MR. YOUNG: I would like to make comment on George Aldrich's remark from the point of view of industry of which I am not a spokesman. He said there are those in the industry who do not want a treaty. That may be so. But I would be inclined to say that the more accurate statement would be that the industry, in general, would prefer a treaty of a kind that would be acceptable to it. It does not want what industry would call a bad treaty and there are things about the draft which make it a bad treaty from that point of view.

I did have one other question for Congressman McCloskey. Mr. Herman, a little while ago, referred to the political repercussions that might ensue on the international scene if national legislation were to be adopted. Looking forward to congressional action on this issue, do you think that anticipation of repercussions is likely to be an influential factor on the congressional debate?

CONGRESSMAN MCCLOSKEY: I do not think so. Congress at one time had a kind of bi-partisan support of an administration of either party in matters of foreign policy. But ever since Ambassador Moynahan at the United Nations spoke out in condemnation of the rhetoric that came from the Third World at the General Assembly, and received the broad approval of the American public, it has been politic for Members of Congress to not indicate a strong support of the United Nations that as might cause them to be defeated by their electorate. This is an unfortunate reality. There are two aspects of this that should be understood fully by the public and by those with whom we negotiate. First the attention of the American people today is turned entirely inward upon inflation, taxes, and what they perceive as over-regulation by government. Second, the regulation that will be imposed by the new Deep Seabed Authority will be perceived by many of my colleagues in the Congress as the same type of over-regulation of business that occurs domestically, for example, the Securities and Exchange Commission or the environmental regulations. We have seen with Proposition 13 in California[4] a rise against over regulation. This will be a potent argument in the Congress against accepting a treaty which appears to have a complex and hardly understandable regulation of the businesses which conduct deep seabed mining.

A third point that ought to be clearly understood is that because of Vietnam, because of an arrogance of executive power, because of a feeling that we in the Congress unduly delegated our power to declare war to the President, and because of our ability to determine the truth from diplomats over a period of years, most of my colleagues, including the two-thirds that have been elected in the last six years, have run on the platform and strongly believe that the Congress should be independent of the Executive Branch in matters of foreign policy. In this principle they are strongly supported by their constituants. It has been only by fairly narrow margins that a President has been able to obtain ratification of the

4. CAL. CONST. art. 13A (West Supp. 1979).

Panama Canal Treaty,[5] been able to obtain congressional support of the sanctions on Rhodesian chrome,[6] has been able to obtain congressional support for the balanced sale of weapons to Saudi Arabia, Egypt, as well as Israel. The Congress is skeptical as to whether or not it supports the Executive Branch in the negotiation of treaties which may or may not, be perceived by the American people to be advantageous. This is no idle threat. The final paragraph of the Murphy-Breaux letter where they point out that SALT II and the implementation of the Panama Canal Treaty might be about all the Congress can be expected to bear in going along with the Executive Branch and that this kind of a deep seabed regime would just be the final straw that broke the camel's back is not what some of us might call an attempt at blackmail. I am not at all sure, for example, that the Senate is prepared to ratify SALT II. Further, it is going to be a very close question whether we pass legislation on the Panama Canal treaties in the House. But this new relationship between Congress and the Executive ought to be fully understood by the negotiating parties at Geneva. We quite often find that foreign nations believe that what Congress is doing is essentially a rubber stamp of the administration's effort. Thus, this Murphy-Breaux letter may have been triggered, for example, by the administration in an attempt to use it as a bargaining tool in the negotiations by showing their fellow negotiators that they cannot negotiate with them because Congress forbids it. But I can assure you that the sentiments in the Breaux-Murphy letter with which I disagree are the true sentiments of the Congress and could be reflected in a vote which would overwhelm the best intentions of this administration to negotiate a fair treaty.

I want to say that of all of the foreign policy actions conducted by this administration, many of which appear to be in confusion, I think that the effort they have made in the law of the sea negotiations demonstrates the best craftsmanship and the best correlation of the always differing views of the many officers of the United States Government, that it has made to date. Ambassador Richardson and Ambassador Aldrich have done a superb job in what they are attempting to do. But what they are attempting to do may plainly be impossible, and that is the concern that I have. I am

5. For the issues and controversies surrounding the ratification of the Panama Canal Treaties, see Rugin, *The Panama Canal Treaties: Keys to the Locks*, 4 BROOKLYN J. INT'L L. 159 (1978).

6. 22 U.S.C. § 287(c) (1976).

afraid that this impossibility will reflect on the passage of this legislation.

MR. HERMAN: Mr. Chairman, I am somewhat hesitant to get involved in a discussion of the internal legislative processes of the United States as I represent a foreign government. Consequently, I would not want to comment on the specifics of proposals that were before the Congress. I just think it is worth noting that while action on the part of a national legislature with respect to seabed mining can be justified in terms of the domestic law as a freedom of the high seas, I think what I said before is worth bearing in mind. It is by no means certain that, under conventional and customary international law, seabed mining is supportive as a freedom of the high seas. Nor in my view is it certain that traditional concepts of *res nullius* with respect to the seabed as opposed to the water column admits of activity which purports to exercise some measure of exclusivity over an area or the resources. All that means is that the reaction of the international community to legislation on the part of one or another municipal legislature is hard to gauge. It is possible that the reaction would be manifested in a number of ways, all political, before a variety of bodies, such as the United Nations Conference on Trade and Development which will be meeting in May, 1979, in the United Nations General Assembly. There is also the possibility of some attempt by the General Assembly to ultimately refer the matter to the International Court of Justice. That does not mean that freedom of the high seas would not be vindicated ultimately. But it strikes me that in the short term or the medium term there are going to be a lot of uncertainties. And if the International Court of Justice is eventually seized of this matter, these uncertainties could continue for some time. We have to ask ourselves what the result might be on the viability of the International Court of Justice as an ultimate dispute settling body in the case of an issue as contentious as this one. What happens to the respect of that body if it decides an issue which is highly contentious and which does not meet the major preoccupations of one or another major State? I only hope that if the Congress is going to pass legislation in 1979, it almost did in 1978, that it is doing so because there is a demonstrated legislative gap that is necessary to be filled to meet the concerns of United States citizens.

Finally I think it is incumbent on me to point out that, while suggestions have been made that present seabed provisions are terrible, concession to the treaty under these conditions would not overcome its advantages. While it is difficult to analyze all the

provisions of the law of the sea treaty or the treaty reflected in the Informal Composit Negotiating Text (ICNT)[7] with respect to every nations expectations and interests, I think we have to recognize that if nothing else, leaving aside the seabed provisions and Part XI of the ICNT, we are very close to agreement on a number of other provisions. Those provisions would define the limits of the territorial sea,[8] would enshrine the right of virtually unfettered passage through the territorial sea,[9] would fix limits to continental shelf claims,[10] would provide for unimpeded transit through straits,[11] would allow submarines to transit international straits underwater,[12] and would allow for overflight over those straits.[13] We do not have that in conventional or customary international law but the ICNT would provide it. It would do a range of things to avoid conflicts in fishery matters. I think it is a bit simplistic to suggest that there are no advantages to be gained by the current provisions in the ICNT in areas other than the seabed treaty and that conventional or customary international law will answer all the needs of maritime states. I think that needs a hard and close look before such a conclusion can be reached. I have some particular comments on the House version of the bill but I will leave those and, if we have time, I would like to get back to them. Thank you.

CONGRESSMAN MCCLOSKEY: Mr. Chairman, I would like to say that I agree completely with Mr. Herman's statement. I am also in strong disagreement with the Murphy-Breaux letter which contends that there are not valuable protections to the United States interests in the provisions other than the deep seabed provision. I think that the treaty in nearly every respect, except for the deep seabed question, does represent an advancement to the interests of the United States. Perhaps the single exception is the scientific research provision. There I accept that it is inevitable that since we have claimed fishery jurisdiction out to 200 miles,[14] other nations are going to claim scientific research jurisdiction out to 200 miles. With that exception, I think that you are absolutely correct and that the

7. 8 Third United Nations Conference on the Law of the Sea (6th Sess.) 1, U.N. Doc. A/Conf.62/WP.10 (1977).

8. *Id.* at 6 (Part II, 2 of the Informal Composit Negotiating Text).

9. *Id.* at 7 (Part II, 3 of the Informal Composit Negotiating Text).

10. *Id.* at 16 (Part VI of the Informal Composit Negotiating Text).

11. *Id.* at 10 (Part III of the Informal Composit Negotiating Text).

12. *Id.*

13. *Id.*

14. Fishery Conservation Zone, 16 U.S.C. § 1811 (1976).

Murphy-Breaux position is wrong. But if we enact this legislation, in my judgment it will not be because of a demonstrated need for the deep seabed minerals. I agree with what Ambassador Aldrich said earlier: That while there is a need in the future, there is no immediate need for the passage of this legislation to get these minerals before the end of the century. If we pass the law, as I expect we will, it will be because of impatience with two things: First, the slow pace of negotiations and second, the perceived lack of leadership by the President in this area, similar to his perceived lack of leadership this year in other areas of foreign affairs. But the real reason that we will enact this legislation will be due to the conviction of Congress. If after the May negotiations it appears that an ultimate treaty will not be ratifiable by the Senate, then I would have a hard time arguing that we should defer legislation of this kind because of some possibility that the international community will rise in armed rebellion.

MR. LEE: Mr. Chairman, in my presentation[15] I did not refer to the developing countries' view regarding the question of assured access. I think perhaps I should be allowed to make a supplementary statement.

In the last session, after the chairman of Negotiating Group I, Ambassador Njenga from Kenya, presented what he referred to as the compromise formula on Annex II relating to additions for exploration and exploitation of minerals in the deep seabed,[16] the Group of Seventy-seven had a meeting. After three hours of debate, the general view that emerged was that the text assured guaranteed access to private firms and companies. This is their interpretation. You have pointed out that the industries and the Congress find it difficult after reading the complicated versions of the treaty to clearly conclude whether or not there is assured access. I think this illustrates a difficulty that is inherent in international legislation. You cannot expect a piece of international legislation to be written in clear terms. The reason for this is that it involves over 150 countries which present many different views and often have diametrically opposed interests and concerns. The provisions always give a little in one place just to take it back somewhere else. The developing countries examine these provisions and draw one clear conclu-

15. Lee, *Developing Countries and the Law of the Sea Conference*, 6 SYR. J. INT'L L. & COM. 213.

16. 10 Third United Nations Conference on the Law of the Sea (7th Sess.) 126, at 137-43, U.N. Doc. A/Conf.62/RCNG/2.

sion. Namely, that the treaty provides for assured access. We will have to recognize this inherent difficulty in international legislation.

You also refer to the slow pace of negotiations. I think we all recognize that this Conference is dealing with over 100 sub-items and twenty-five major items, and it has taken us about ten years. Perhaps from that point of view it appears to be a long process. But if we look at our daily life, there are so many decisions which cannot be made in a very short time. When we are negotiating with 150 different states, with such complex and complicated issues, perhaps the process is not that unduly long. What I think we have to recognize is that the solutions we are contemplating will be reasonable and will achieve the objectives we intend to obtain. Thank you.

CONGRESSMAN MCCLOSKEY: I have to concede that the Congress is often guilty of writing ambiguous legislation with some deliberation which takes the courts years to resolve. We sometimes try to cure that by including a legislative history which is clear in terms of the debates that this language means a certain thing. I think we could probably have a treaty tomorrow if the Group of Seventy-seven issued a clear statement that they interpret the language of this agreement to allow United States companies, each of which offers reasonable opportunity for consortia partnership participation to any company in the Third World, to have the right to proceed with deep seabed mining by the year 1986. If that kind of a clear statement were made interpreting this language, ambiguous though it may be, so that a court would have clear guidance, I think that would probably end the danger of United States legislation this year. If Mr. Lee's optimism is correct and the leader of the Group of Seventy-seven can issue such a statement, perhaps we will have a treaty. I would be interested in Ambassador Aldrich's comments on that.

AMBASSADOR ALDRICH: Well, I would like to reinforce the optimistic side of your nature, Congressman, because your pessimism is all too well counted on past experience. I do think that inevitably in treaties, even with the best of goodwill and in fact without great differences of meaning behind them, the text often does not say as clearly as we would like what we intend it to say. This is true, in part, because you have to negotiate the treaty in so many different languages and they do not all fit together. But as important as any other single thing we can do in the Law of the Sea Conference, I think we should obtain agreement on rewriting a number of provisions in ways that make their meanings clearer. I think the procedure by which the law of the sea draft treaty was put together, with

various individual committee chairmen doing their own drafting, was almost guaranteed to create a text that does not hold together as a whole, has internal inconsistancies beyond the norm, and will create unnecessary problems if allowed to go forward that way. But I think we will find that if we can solve most of the substantive issues then there will be the desire in the Conference to produce a much better text for signature than the one we see today.

CONGRESSMAN MCCLOSKEY: In that connection, might I ask if there is any consensus in the Conference of establishing a draftsmanship committee which might be delegated to cleanup and clarify the language of the present text. This was the procedure used for the United States Constitution in order to place it in a condition which finally led to its ratification by nine states. If a draftsmanship committee could be agreed upon by the Conference at this spring meeting to clarify the treaty text so that the Senate of the United States could perceive that the guaranteed access was, as Mr. Lee suggested, indeed the intention of the Group of Seventy-seven, I would think that we could reach a treaty. Is there any hope of a draftsmanship committee procedurally accomplishing that essential result?

AMBASSADOR ALDRICH: I think there is considerable hope of that. It comes in really several stages. First, improvements can be made by the various negotiating groups themselves which are in the process of revising parts of this language. I know that the chairman of the first negotiating group, for example, has already told us that he plans to point out at the outset of the aid session that Annex II needs to be rewritten in a clearer form. Then when the discussion is finished, he intends to produce a revised text that will be clearer. The second stage involves the drafting committee. Fortunately we do have a drafting committee in the Conference and it is chaired by the most able representative of Canada, Allen Beasly. They have not had enough to do and it is about time we put them to work.

MR. HERMAN: George, I agree with you wholeheartedly on that last point. One of the problems at the Conference is that the texts which are produced have, in some respects, little chance of being altered by the drafting committee. This is because the texts are essentially the product of political process and while we have not tested the scope of the mandate of the drafting committee, it could be fairly restricted under the present process of negotiations.

I think this afternoon, if we get the opportunity, we should come back to the simplification exercise because I personally believe

that is the key to the future of the Conference. I know that there are participants here that also have views on that score.

MR. HULL: Thank you very much.