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BACKGROUNDER

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The U.S. Can Mine the Deep Seabed Without Joining the U.N. Convention on the Law of the Sea

Steven Groves

Abstract
The United States can mine the deep seabed without acceding to the United Nations Convention on the Law of the Sea (UNCLOS). For more than 30 years, through domestic law and bilateral agreements, the U.S. has established a legal framework for deep seabed mining. In fact, U.S. accession would penalize U.S. companies by subjecting them to the whims of an unelected and unaccountable international bureaucracy. U.S. companies would be forced to pay excessive fees, costs, and royalties to the International Seabed Authority for redistribution to developing countries. U.S. interests are better served by not acceding to UNCLOS.

This paper, in its entirety, can be found at **http://report.heritage.org/bg2746**

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Proponents of U.S. accession to the United Nations Convention on the Law of the Sea (UNCLOS) maintain that the United States may not engage in deep seabed mining unless and until it joins the convention. That is not the case. The United States has a sovereign and inherent right to mine the deep seabed and has successfully secured that right in the past through bilateral and multilateral agreements with other nations that also engaged in seabed exploration.

Accession to UNCLOS is simply not a viable option. The philosophical basis of the convention, in the words of the preamble, is to "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries."[1] The convention declares that the deep seabed and its resources are the "common heritage of mankind" and may be mined only "for the benefit of mankind as a whole, irrespective of the geographical location of States."[2]

The resulting UNCLOS deep seabed mining regime, designed on that philosophical basis and negotiated during the 1970s at the Third

Key Points

- The United States has a sovereign and inherent right to mine the deep seabed. This right is not dependent on membership in the United Nations Convention on the Law of the Sea.
- In the past, the U.S. has successfully secured its rights to mine the deep seabed through bilateral and multilateral agreements with other deep seabed mining nations.
- The UNCLOS mining regime is based on the philosophy that the deep seabed is the "common heritage of mankind" and that the profits generated from mining must be shared with developing and landlocked countries.
- By acceding to UNCLOS, the United States would place itself and its mining companies under the regulatory power and control of the International Seabed Authority, an international organization created by the convention, and U.S. companies would be forced to pay excessive fees, costs, and royalties to the Authority for redistribution to developing countries.

U.N. Conference on the Law of the Sea (UNCLOS III), is, unsurprisingly, anachronistic—an international Rube Goldberg contraption conceived in another time and place when the United States and the Soviet Union were engaged in a global military and ideological contest.[3] The revisions to the seabed mining provisions negotiated by the Clinton Administration in 1994 did not and could not correct the convention's fundamental flaws.[4]

By acceding to UNCLOS, the United States would place itself and its seabed mining companies under the regulatory power and control of the International Seabed Authority, an international organization created by the convention. U.S. companies would be forced to pay excessive fees, costs, and an as yet undetermined percentage of royalties to the Authority to fund its operations and to be redistributed to developing countries. In short, U.S. accession would represent a radical sea change because it would create an unprecedented layer of international bureaucratic authority, oversight, and regulatory burden on American companies.

However, the United States may advance its national interests without acceding to the archaic and needlessly complex regime established by UNCLOS. Mining the deep seabed is and always has been a high seas freedom that every nation may exercise regardless of membership in any treaty.

Deep Seabed Mining: A High Seas Freedom Available to All Nations

> It is a basic principle of law that parties may not, by agreement among themselves, impair the rights of third parties or their obligations to third parties. Neither the [Law of the Sea] Conference nor the States indicating an intention to become parties to the Convention have been granted global legislative power.
>
> —U.S. Delegation at UNCLOS III (1983)[5]

No legal barriers prohibit U.S. access, exploration, or exploitation of the resources of the deep seabed. Deep seabed mining is a "high seas freedom" that all nations may engage in regardless of their membership or non-membership in UNCLOS or any other treaty. Like other high seas freedoms, the right to engage in deep seabed mining is inherent to all sovereign nations under customary international law. Rather, it is the convention that attempts to restrict access to the deep seabed and infringe on the intrinsic rights of the United States and other nations that have chosen to remain non-parties.

NO LEGAL BARRIERS PROHIBIT U.S. ACCESS, EXPLORATION, OR EXPLOITATION OF THE RESOURCES OF THE DEEP SEABED.

High seas freedoms are not conditional on membership in a treaty. Neither the United States nor any other nation need be party to UNCLOS to exercise them. While the convention addressed and "codified" various high seas freedoms, enjoyment of those freedoms is not conditional on membership. Rather, high seas freedoms—including freedom of navigation and overflight, freedom of fishing, freedom to lay submarine cables, and freedom to engage in marine scientific research—are enjoyed and exercised regularly by the United States and other UNCLOS non-parties based on their status as sovereign and independent nations.

More than 160 nations have chosen to ratify UNCLOS for their own reasons and ostensibly for the purpose of advancing their particular national interests. The United States and more than 30 other nations—including Colombia, Israel, Peru, and Turkey—have chosen not to ratify the convention. The nations that have joined UNCLOS cannot prevent the United States or any other nation

1. United Nations Convention on the Law of the Sea (UNCLOS), Preamble, December 10, 1982, http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm. UNCLOS is also commonly referred to as the Law of the Sea Treaty (LOST).
2. UNCLOS, Preamble and Arts. 136 and 140.
3. Doug Bandow, "Developing the Mineral Resources of the Seabed," *Cato Journal*, Vol. 2, No. 3 (Winter 1982), http://www.cato.org/pubs/journal/cj2n3/cj2n3-7.pdf (accessed November 9, 2012).
4. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994 Agreement), July 28, 1994, http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindxAgree.htm (accessed November 15, 2012), and Peter M. Leitner, *Reforming the Law of the Sea Treaty* (Lanham, MD: University Press of America, 1996).
5. Statement by the United States of America, March 8, 1983, in "Note by the Secretariat," extract from *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. 17, A/CONF.62/WS/37, p. 243, http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_ws_37%20and%20add-1%20and%202.pdf (accessed November 9, 2012).

from mining the seabed any more than they can prevent the U.S. from exercising the freedom of navigation and overflight, the freedom of fishing, or any other high seas freedom.

The fact that a substantial majority of nations are parties to UNCLOS does not, as some have suggested, mean that the deep seabed provisions of the convention have attained the status of customary international law. Even if those provisions had attained such status, the regime "would not apply to a state, such as the United States, that had rejected it and had insisted on its right to mine the deep sea-bed under present rules of customary international law."[6] The long-held U.S. legal position regarding deep seabed mining and UNCLOS is unequivocal.

The U.S. Legal Position on Deep Seabed Mining

Simply because most nations have ratified UNCLOS does not mean that those nations or any international organization, such as the Authority, may deny a right to the United States that it enjoys under international law. One set of nations cannot annul the rights of another set of nations by drafting a treaty that the second set of nations chooses not to join. For example, 75 nations are party to the Convention on Cluster Munitions and 160 nations are party to the Anti-Personnel Landmines Convention, but these facts do not obligate the United States or any other non-party to ban cluster munitions or anti-personnel landmines.[7]

The United States made its position on the unconditional legality of deep seabed mining very clear at UNCLOS III, the negotiating conference that resulted in the adoption of UNCLOS. In March 1983, during the final days of the conference, a member of the U.S. delegation rejected statements made by other delegations that only parties to UNCLOS could exercise the rights within the convention:

> Some speakers discussed the legal question of the rights and duties of States which do not become party to the Convention adopted by the Conference. Some of these speakers alleged that such States must either accept the provisions of the Convention as a "package deal" or forgo all of the rights referred to in the Convention. This supposed election is without foundation or precedent in international law. It is a basic principle of law that parties may not, by agreement among themselves, impair the rights of third parties or their obligations to third parties. Neither the Conference nor the States indicating an intention to become parties to the Convention have been granted global legislative power.[8]

The United States went on to state its official position that U.S. citizens and corporations specifically have the right to mine the deep seabed and may do so whether or not the United States is an UNCLOS member. The U.S. statement affirmed that deep seabed mining is a high seas freedom open to all nations regardless of whether they are party to the convention:

> Some speakers asserted that existing principles of international law, or the Convention, prohibit any State, including a non-party, from exploring for and exploiting the mineral resources of the deep sea-bed except in accordance with the Convention. The United States does not believe that such assertions have any merit. The deep sea-bed mining regime of the Convention adopted by the Conference is purely contractual in character. The United States and other non-parties do not incur the obligations provided for therein to which they object.
>
> Article 137 of the Convention [forbidding claims of sovereignty over the deep seabed or its resources] may not as a matter of law prohibit sea-bed mining activities by non-parties to the Convention; nor may it relieve a party from the duty to respect the exercise of high seas freedoms, including the exploration for and exploitation of deep sea-bed minerals, by non-parties. Mining of the sea-bed is a lawful use of the high seas open to all States....

6. American Law Institute, *Restatement of the Law, Third, of the Foreign Relations Law of the United States*, Vol. 2 (St. Paul, MN: American Law Institute Publishers, 1987), § 523, cmt. e.
7. Steven Groves and Theodore R. Bromund, "The United States Should Not Join the Convention on Cluster Munitions," Heritage Foundation *Backgrounder* No. 2550, April 28, 2011, http://www.heritage.org/research/reports/2011/04/the-united-states-should-not-join-the-convention-on-cluster-munitions, and Steven Groves and Theodore R. Bromund, "The Ottawa Mine Ban Convention: Unacceptable on Substance and Process," Heritage Foundation *Backgrounder* No. 2496, December 13, 2010, http://www.heritage.org/research/reports/2010/12/the-ottawa-mine-ban-convention-unacceptable-on-substance-and-process.
8. Statement by the United States of America, p. 243.

> The practice of the United States and the other States principally interested in sea-bed mining makes it clear that sea-bed mining continues to be a lawful use of the high seas within the traditional meaning of the freedom of the high seas.[9]

Indeed, this was the U.S. position prior to UNCLOS III. Years earlier, Congress made clear the U.S. position on the legality of deep seabed mining in the Deep Seabed Hard Mineral Resources Act of 1980 (DSHMRA):

> [I]t is the legal opinion of the United States that exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas subject to a duty of reasonable regard to the interests of other states in their exercise of those and other freedoms recognized by general principles of international law.[10]

The U.S. position set forth in 1980 in DSHMRA and again in 1983 at UNCLOS III remains the same today. According to the *Restatement of the Law, Third, of the Foreign Relations Law of the United States*, U.S. citizens and corporations may engage in seabed mining regardless of whether the U.S. accedes to UNCLOS, provided that they conduct such mining without claiming sovereignty over any part of the seabed and as long as the mining activities are exercised with due regard to the rights of other nations engaged in mining.[11] As related by the *Restatement*, "like the fish of the high seas the minerals of the deep sea-bed are open to anyone to take."[12]

Exercising U.S. Rights to Mine the Deep Seabed

Even though the U.S. is not a party to UNCLOS and may never be, it has an interest in securing the ability for itself and its corporations to engage in deep seabed mining. It may secure that interest in the traditional manner by making claims to seabed areas pursuant to domestic law (DSHMRA); giving notice to the international community regarding U.S. claims; and, when necessary, signing bilateral or multilateral agreements with other nations to ensure mutual respect for each other's seabed claims.

Deep Seabed Hard Mineral Resources Act. Under customary international law, the United States may authorize U.S. citizens to explore and exploit the seabed as long as (1) the U.S. does not claim sovereign rights to the seabed and (2) exploration and mining is conducted with reasonable regard for the rights of other nations to engage in the same activities.[13]

More than 30 years ago, the United States established a domestic statutory and regulatory framework to govern U.S. claims to the deep seabed. Specifically, in June 1980, Congress enacted DSHMRA to provide a legal regime under which U.S. citizens may explore for and mine deep seabed minerals. Under DSHMRA, U.S. citizens and corporations may apply to the Administrator of the National Oceanic and Atmospheric Administration (NOAA) for 10-year licenses to explore and 20-year permits to mine the deep seabed for hard mineral resources—specifically, for polymetallic nodules containing minerals such as manganese, nickel, cobalt, or copper.[14]

To be certified by the NOAA administrator, applicants must be financially capable of exploring and recovering the resources.[15] DSHMRA requires that exploration and mining activities must be carried out under strict environmental controls, and environmental impact assessments must be conducted in connection with each license and permit.[16] To provide additional legal guidance to U.S. citizens, NOAA issued detailed regulations regarding the granting of exploration licenses and permits for commercial recovery.[17]

In 1984, NOAA issued 10-year exploration licenses to four multinational private-sector mining

9. Ibid.
10. Deep Seabed Hard Mineral Resources Act (DSHMRA), 30 U.S. Code § 1401(12).
11. American Law Institute, *Restatement of the Law, Third*, § 523(1).
12. Ibid., § 523, reporter's note 2.
13. Ibid., § 523(1).
14. DSHMRA, §§ 1403, 1412, and 1417.
15. Ibid., § 1413(c).
16. Ibid., § 1419.
17. 15 Code of Federal Regulations § 970.100 *et seq.* (regarding exploration licenses), and 15 Code of Federal Regulations, § 971.100 *et seq.* (regarding commercial recovery).

consortia: Ocean Minerals Company (OMCO); Ocean Management, Inc. (OMI); Ocean Mining Associates (OMA); and Kennecott Consortium (KCON). The licenses authorized these consortia to explore the seabed in the Clarion–Clipperton Zone (CCZ), a region of the eastern Pacific Ocean midway between Hawaii and Mexico. Each of the four consortia had U.S. and foreign ownership interests. For example, OMA interests were divided between two American companies—U.S. Steel (25 percent) and Sun Company (25 percent)—and their Belgian and Italian partners (25 percent each). OMCO members included major U.S. companies, including Standard Oil Company and Lockheed Corporation, and the Netherlands' Royal Dutch Shell. The OMI and KCON consortia included British, Canadian, Japanese, and German interests.[18]

Although under no obligation to do so, after NOAA issued the four exploration licenses, the United States provided formal notice to the international community. Specifically, in January 1986, the U.S. Mission to the United Nations delivered a note to the U.N. Secretary-General that, pursuant to DSHMRA, the U.S. government had issued "four licenses authorizing deep sea-bed hard mineral resource exploration" in the CCZ. The note provided the longitudinal and latitudinal coordinates for the areas of seabed that had been licensed to the U.S. consortia. The United Nations published the U.S. note in the April 1986 issue of its *Law of the Sea Bulletin*.[19]

U.S. Seabed Mining Agreements with Other Nations. Critically, DSHMRA contemplated that negotiations would occur between the United States and other nations to establish mutual recognition for exploration licenses and mining permits, and it authorized the NOAA administrator to designate such nations as "reciprocating states."[20] In this way various nations could issue licenses and permits to their citizens in a manner compatible with DSHMRA, and vice versa. Several nations, including France, Italy, Japan, the United Kingdom, and West Germany, enacted domestic seabed mining legislation during 1981–1983 and were subsequently designated by NOAA as reciprocating states.[21]

During 1982–1991, the United States and the four U.S. consortia negotiated a series of multilateral agreements and bilateral exchanges of notes with reciprocating states to further secure U.S. claims in the CCZ. This series of agreements established mutual recognition of mining claims, committed the respective nations and consortia not to interfere with one another's exploration and mining activities, set minimum standards that mining companies must meet, and provided procedures for resolving any overlapping claims.

- In September 1982, the United States, France, West Germany, and the United Kingdom adopted an agreement "to facilitate the identification and resolution of conflicts" that may arise between the four nations in regard to overlapping claims to the seabed.[22] The agreement required the exchange of information between the nations on claims to the seabed, including the coordinates of those claims, for the purpose of identifying conflicts. In the event of overlapping claims, the agreement provided detailed procedures for resolving conflicts through binding arbitration.

- In May 1983, the four U.S. consortia and Association Française d'Etude et de Recherche des Nodules océaniques (AFERNOD), a French consortium of government and industry, acting in conformity with a private arbitration agreement, reached a settlement that successfully resolved conflicts from their overlapping claims in the CCZ.[23]

- In September 1983, the four U.S. consortia, AFERNOD, and Deep

18. National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1983, p. 6, http://www.gc.noaa.gov/documents/gcil_dsm_1983_2011-06-13-113448.pdf (accessed November 9, 2012).
19. U.S. Mission to the United Nations, note to the Secretary-General of the United Nations, January 13, 1986, in Office of the Special Representative of the Secretary-General for the Law of the Sea, *Law of the Sea Bulletin*, No. 7, April 1986, pp. 74–86, http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE7.pdf (accessed November 9, 2012).
20. DSHMRA, § 1428. The designation is made in consultation with the Secretary of State.
21. National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1989, pp. 11–12, http://www.gc.noaa.gov/documents/gcil_dsm_89_20110607085546.pdf (accessed November 9, 2012).
22. 1982 Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules on the Deep Sea Bed Between France, the Federal Republic of Germany, the United Kingdom, and the United States, September 2, 1982.
23. National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1983, p. 11.

Ocean Resources Development Company (DORD), a Japanese consortium of government and industry, signed an arbitration agreement on resolving overlapping claims.[24]

- In August 1984, the four parties to the September 1982 agreement and Belgium, Italy, Japan, and the Netherlands adopted an agreement that further elaborated on mutual cooperation regarding the deep seabed.[25] Similar to the 1982 agreement, the 1984 agreement required the eight nations to notify one another when exploration applications had been approved at the national level, to exchange coordinates to avoid overlapping claims, and to resolve any disputes that arose from conflicting claims. A memorandum attached to the agreement outlined minimum requirements that mining companies must meet to receive approval to explore the seabed, including financial and technological capability. The memorandum also set basic standards that companies must meet during mining operations.
- In August 1987, the United States, Belgium, Canada, Italy, the United Kingdom, the Soviet Union, and West Germany adopted a final settlement agreement that officially recognized the coordinates of each other's claims to seabed areas in the CCZ.[26] The agreement listed sets of coordinates for each nation's claims in the CCZ, including the coordinates for the areas claimed by the four U.S. consortia.
- In February 1991, the United States, Belgium, Canada, Germany, Italy, the Netherlands, and the United Kingdom entered into a memorandum of understanding with China "on the avoidance of overlaps and conflicts relating to the deep sea-bed areas." The parties to the memorandum made mutual commitments to respect the claims made by all other parties in the CCZ.[27]
- In August 1991, the United States and the other nations party to the February 1991 agreement entered into an identical memorandum of understanding with the Soviet Union, which was the certifying state of an Eastern European consortium called Interoceanmetal Joint Organization.[28]

In sum, the United States has agreements with almost every nation that the Authority has licensed to explore the CCZ (Belgium, China, France, Germany, Japan, Russia, and the United Kingdom), all of which remain in force and effect at the present day.[29] Those nations have made a commitment to the United States that they will not interfere with or infringe on the claims by the United States or its companies in the CCZ. None of the nations has denounced or withdrawn from the agreements or has otherwise indicated that it does not respect its international commitments to recognize U.S. claims in the CCZ.

Among the nations that have sponsored claimants in the CCZ, only four—Nauru, Kiribati, South Korea, and Tonga—are not party to a seabed agreement with the United States. The U.S. should remedy this by negotiating memoranda of understanding with those nations along the same lines as the 1991 agreements with China and the Soviet Union. Although

24. Ibid.
25. Provisional Understanding Regarding Deep Seabed Matters (with appendices and memorandum of application), August 3, 1984.
26. Agreement on the Resolution of Practical Problems with Respect to Deep Seabed Mining Areas (with annexes), August 14, 1987. The 1987 agreement was adopted by Belgium, Canada, Italy, and the Soviet Union, all of which were signatories to UNCLOS. The United States and two other non-UNCLOS-signatories (West Germany and the U.K.) adopted the 1987 agreement by exchanging a series of diplomatic notes with the four UNCLOS signatories. See Lee A. Kimball, "Belgium–Canada–Italy–Netherlands–Union of Soviet Socialist Republics: Agreement on the Resolution of Practical Problems with Respect to Deep Seabed Mining Areas, and Exchange of Notes Between the United States and the Parties to the Agreement," *International Legal Materials*, Vol. 26, No. 6 (November 1987), pp. 1502–1515.
27. Memorandum of Understanding on the Avoidance of Overlaps and Conflicts Relating to Deep Seabed Areas, February 22, 1991, and National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1991, p. 14, http://www.gc.noaa.gov/documents/gcil_dsm_1991_20110607090801.pdf (accessed November 13, 2012).
28. Memorandum of Understanding on the Avoidance of Overlaps and Conflicts Relating to Deep Sea-Bed Areas, August 20, 1991. Other parties to the memorandum of understanding included Bulgaria, Czechoslovakia, and Poland. The nations that currently hold an interest in Interoceanmetal are Bulgaria, Cuba, the Czech Republic, Poland, Russia, and Slovakia. Interoceanmetal Joint Organization, website, http://www.iom.gov.pl/welcome.htm (accessed November 13, 2012).
29. U.S. Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2011*, pp. 22, 45, 143, 200, 285, and 457, http://www.state.gov/s/l/treaty/tif/index.htm (accessed November 15, 2012).

the claims of Nauru, Kiribati, South Korea, and Tonga do not overlap the areas currently claimed by the United States, the agreements would establish a bilateral commitment from each of those nations not to infringe on U.S. claims in the CCZ and to cooperate in the event of a dispute.

In addition, U.S. mining companies may pursue private arbitration agreements with the companies sponsored by those nations—Nauru Ocean Resources Inc. (NORI); Tonga Offshore Mining Limited (TOML); and Marawa Research and Exploration Ltd. (Kiribati)—in the same manner that U.S. consortia adopted such agreements with AFERNOD and DORD in 1983.

Current Status of U.S. Deep Seabed Claims. Over the past decades, the status of exploration licenses in the CCZ issued pursuant to DSHMRA has evolved significantly.

In 1992, the KCON consortium evaluated the long-term viability of deep seabed mining and "concluded that there is no justification for continuing investment in manganese nodule development."[30] KCON subsequently notified NOAA of its intent to surrender its license to explore the USA-4 area of the CCZ. About the same time, OMCO applied for and received a license from NOAA to explore USA-4.

OMI relinquished its license to explore the USA-2 area in 1999, and OMA surrendered its license to explore USA-3 in 1997.[31] One reason that OMI and OMA surrendered their licenses was their disappointment over the 1994 amendments to UNCLOS. In their annual reports to NOAA, the two consortia stated "that the changes made [in the 1994 Agreement] are not sufficient in terms of being able to attract private sector investment in deep seabed mining." The reports further stated that the mining regime adopted in the 1994 Agreement presented "economic and political risks that they do not face under [DSHMRA]."[32]

The remaining U.S. claims on the USA-1 and USA-4 areas are currently licensed to OMCO.[33] In May 2012, G-TEC Sea Minerals Resources NV, a Belgian company, applied for and was granted a license by the Authority to explore the USA-3 area relinquished by OMA.[34] The USA-2 area remains intact and is not currently licensed to any claimant.

As Map 1 illustrates, no foreign nation has made any claim in the CCZ that overlaps the areas currently claimed by the United States (USA-1 and USA-4). Nor has the Authority issued any exploration license that would overlap with those areas. Indeed, the Authority has not issued any license that overlaps with the two CCZ areas that were relinquished by the United States (i.e., USA-2 and USA-3). In addition, none of the areas in the CCZ reserved by the Authority for exploration by developing countries overlaps with USA-1, USA-2, USA-3, or USA-4.

The forbearance displayed by all foreign nations, their sponsored companies, and the Authority itself indicates a tacit, if not explicit, concession that the U.S.-sponsored claims in the CCZ are valid and may continue to be held by OMCO to the exclusion of all other parties. Although the Belgian-sponsored G-TEC was recently granted a license to explore the area formerly known as USA-3, the USA-2 area remains intact and available for the United States to reclaim.

In sum, acting under the authority of DSHMRA, customary international law, and multilateral agreements with foreign countries and companies, the United States has successfully claimed and maintained security of tenure over vast tracts of the deep seabed. The U.S. has done so as an independent sovereign nation exercising its inherent rights.

The UNCLOS Regime: International Regulation and Control

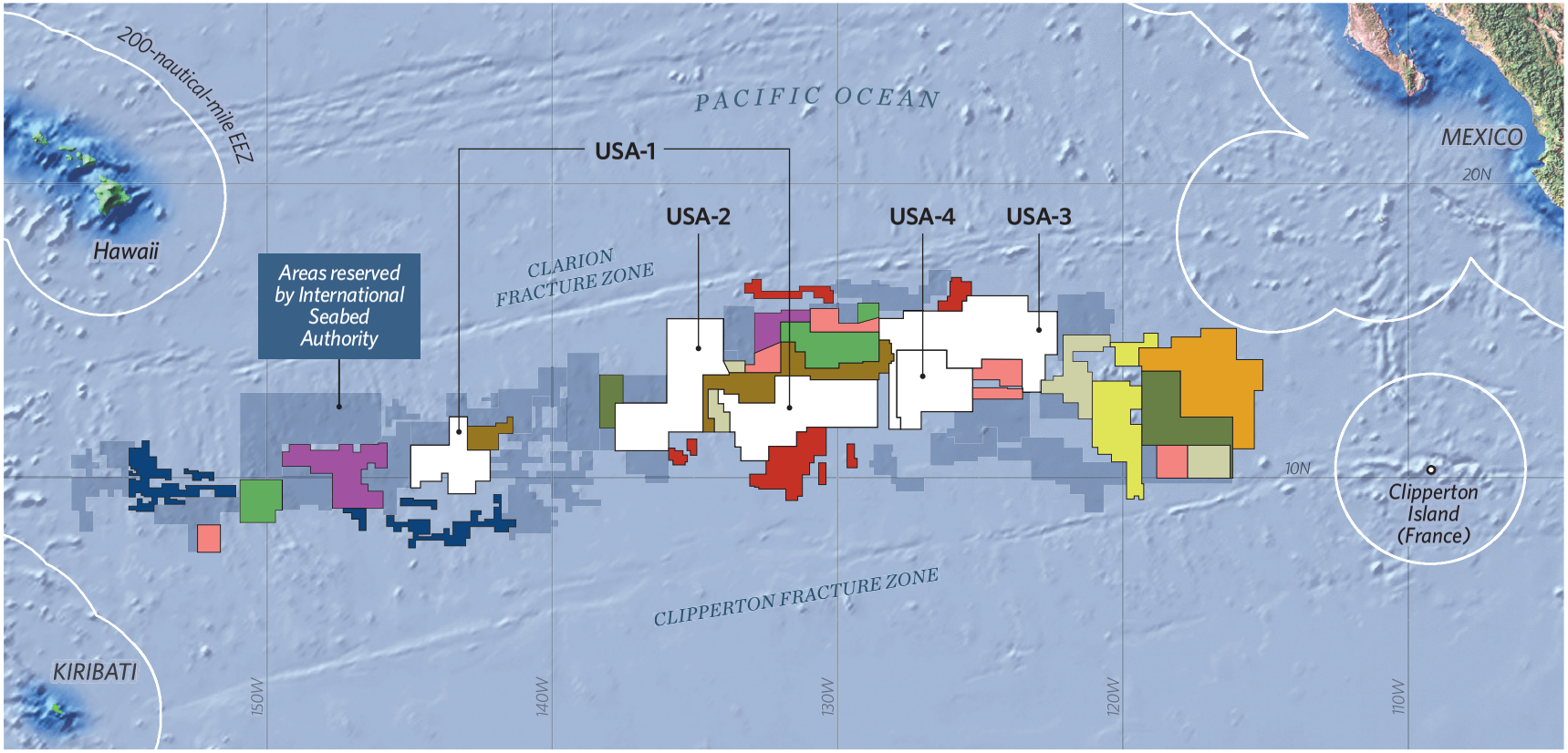
The United States and U.S. mining companies may lawfully engage in deep seabed mining pursuant to DSHMRA and customary international law. The alternative route—U.S. accession to UNCLOS—would place the United States, its citizens, and its mining interests under the

30. National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1993, p. 11, http://www.gc.noaa.gov/documents/gcil_dsm_1993_20110607091635.pdf (accessed November 13, 2012).
31. "Deep Seabed Mining: Lapse of Exploration License," *Federal Register*, Vol. 64, No. 126 (July 1, 1999).
32. National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1995, p. 5, http://www.gc.noaa.gov/documents/gcil_dsm_1995_report.pdf (accessed November 13, 2012).
33. OMCO Seabed Exploration LLC, a wholly owned subsidiary of Lockheed Martin Corporation, is the successor in interest to OMCO and holds the licenses to USA-1 and USA-4. National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1995, p. 1; Lockheed Martin Corporation, letter to National Oceanic and Atmospheric Administration, August 2, 2011 (on file with author).
34. International Seabed Authority, Legal and Technical Commission, "Application for Approval of a Plan of Work for Exploration for Polymetallic Nodules," ISBA/18/LTC/L.4, June 6, 2012, http://www.isa.org.jm/en/sessions/2012/documents (accessed November 13, 2012).

MAP 1

U.S. Claims in the Clarion-Clipperton Zone (CCZ)

Regardless of not having acceded to UNCLOS, the United States has retained rights to mine vast areas of the deep seabed in the CCZ. The areas known as "USA-1" and "USA-4" are currently licensed to OMCO Seabed Exploration LLC, a wholly-owned subsidiary of Lockheed Martin Corporation. The "USA-2" area remains unclaimed, while the "USA-3" area was recently leased by the Authority to G-TEC Sea Minerals Resources NV, a Belgian company.



Sources: International Seabed Authority, "Polymetallic Nodules Exploration Areas in the Pacific Ocean," http://www.isa.org.jm/en/scientific/exploration/maps (accessed October 31, 2012), and National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1995, p. 6, http://www.gc.noaa.gov/documents/gcil_dsm_1995_report.pdf (accessed October 31, 2012).

regulatory power of the institutions created by the convention, particularly the Authority and the Council. Joining the convention would radically change the traditional high seas freedoms currently enjoyed by the United States and would create an unprecedented new layer of international authority, oversight, and regulatory burden on U.S. mining interests.

The Regulatory Authority. If the United States accedes to UNCLOS, American companies will be required to adhere to all the Authority's rules, regulations, and dictates. In matters concerning deep seabed mining, UNCLOS leaves no doubt where the power lies. The convention states that all activities in the seabed "shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole" and that the Authority "shall have the right to take at any time any measures...to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract."[35]

The Authority has exercised these general grants of power in a number of specific ways, notably by creating the "Mining Code," a "comprehensive set of rules, regulations and procedures issued by the International Seabed Authority to regulate prospecting, exploration and exploitation of marine minerals in the international seabed Area."[36]

IF THE UNITED STATES ACCEDES TO UNCLOS, AMERICAN COMPANIES WILL BE REQUIRED TO ADHERE TO THE AUTHORITY'S RULES, REGULATIONS, AND DICTATES.

Among the regulations thus far enacted by the Authority are the procedures regarding exploration for polymetallic nodules.[37] These regulations, when read in conjunction with the Authority's standard clauses for exploration contracts[38] and the Legal and Technical Commission's environmental regulations,[39] create a regulatory regime without precedent in international law. If the United States accedes to UNCLOS, U.S. seabed mining companies will be subject to that regime.

Total Control. UNCLOS leaves no doubt that all seabed mining activities are subject to the Authority's control. Any U.S. company applying to explore the seabed "without exception, shall as part of his application undertake...to accept control by the Authority of the activities in the Area."[40] To drive home the point, the subordination undertaking is repeated in the exploration regulations as well as the standard contract clauses.[41]

Once mining activities commence, the Authority may send international inspectors to board the vessels and installations of American companies to monitor their compliance with its regulations and the convention.[42] These inspectors have the right to examine a company's "log, equipment, records, facilities, [and] all other recorded data and any relevant documents which are necessary to monitor the Contractor's compliance."[43]

U.S. companies would be required to submit annual reports to the Secretary-General of the Authority detailing their progress, expenditures, and other aspects of their operations.[44] Every five years, companies are required to undertake a joint review of their progress with

35. UNCLOS, Art. 153(1) and (5).
36. International Seabed Authority, "Mining Code," http://www.isa.org.jm/en/mcode (accessed November 13, 2012).
37. International Seabed Authority, "Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," July 13, 2000, http://www.isa.org.jm/files/documents/EN/Regs/PN-en.pdf (accessed November 13, 2012). The Authority has also enacted similar regulations on polymetallic sulfides and is drafting regulations on cobalt-rich crusts.
38. International Seabed Authority, "Standard Clauses for Exploration Contract," http://www.isa.org.jm/files/documents/EN/Regs/Code-Annex4.pdf (accessed November 13, 2012).
39. International Seabed Authority, Legal and Technical Commission, "Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area," February 13, 2002, http://www.isa.org.jm/files/documents/EN/7Sess/LTC/isba_7ltc_1Rev1.pdf (accessed November 13, 2012).
40. UNCLOS, Annex III, Art. 4(6)(b).
41. International Seabed Authority, "Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," 14(b), and International Seabed Authority, "Standard Clauses for Exploration Contract," § 13.2(c).
42. UNCLOS, Art. 153(5).
43. International Seabed Authority, "Standard Clauses for Exploration Contract," § 14.3.
44. Ibid., § 10.

the Secretary-General, who will in turn report to the Council.[45]

Burdensome Environmental Regulations. If the United States joins UNCLOS, U.S. companies engaging in seabed exploration will be subject to a rigorous environmental regime administered by the Authority. The Authority has the power to adopt "rules, regulations and procedures" for the protection of the marine environment, with "particular attention being paid" to harm caused by drilling, dredging, and excavation.[46] One regulation requires companies to apply a "precautionary approach" in regard to the marine environment "as reflected in principle 15 of the Rio Declaration."[47] This is notable, given that neither UNCLOS nor the 1994 Agreement even mentions the controversial "precautionary approach"—a principle that requires absolute scientific certainty that an action will not cause environmental harm.

U.S. companies would be required to establish an environmental "baseline" at the outset of their contracts and continually monitor and report the impact of their activities on the marine environment.[48] To establish a baseline, U.S. companies would be required to collect data "on the seafloor communities specifically relating to megafauna, macrofauna, meiofauna, microfauna, nodule fauna and demersal scavengers" (bottom feeders) and "record sightings of marine mammals, identifying the relevant species and behavior."[49] Before engaging even in preliminary testing activities, companies would have to submit a site-specific environmental impact statement to the Authority, as well as a contingency plan to respond to environmental incidents.[50]

Control over U.S. Exploration Areas. Under an UNCLOS regime, a U.S. company would have limited control over the area licensed to it for exploration. Once a U.S. company identifies an area of the seabed that it wants to explore, it must divide the area into two halves of equal estimated commercial value and share its data on the area with the Authority.[51] Thereafter, the Council reserves one half of the area for exploration by developing countries or the Enterprise, the Authority's mining arm.[52] The remaining half would be licensed to the U.S. company for exploration. The size of the U.S. company's half is effectively limited to only 75,000 square kilometers.[53] (By comparison, the USA-1 exploration area is almost 169,000 square kilometers.)[54] Finally, a U.S. company would not have exclusive access to its half because the Authority has the right to enter into contracts with third parties to explore and mine the U.S. half for resources other than polymetallic nodules.[55]

U.S. Mining Companies Forced to Train Their Competition. In addition to requiring a U.S. company to give the Authority access to its logs, equipment, records, facilities, data, and documents, UNCLOS would require the company to provide training in seabed mining to personnel who are not employees of the U.S. company—specifically, nationals from developing countries and personnel employed by the Authority

45. International Seabed Authority, "Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," § 28, and International Seabed Authority, "Standard Clauses for Exploration Contract," § 4.4.
46. UNCLOS, Art. 145(a).
47. International Seabed Authority, "Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," § 31(2). Principle 15 of the 1992 Rio Declaration states: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Rio Declaration on Environment and Development, http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163 (accessed November 13, 2012).
48. International Seabed Authority, "Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," § 31(4), and International Seabed Authority, "Standard Clauses for Exploration Contract," §§ 5.2 and 5.3.
49. International Seabed Authority, "Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area," ¶¶ 8(d)(ii) and (v).
50. International Seabed Authority, "Standard Clauses for Exploration Contract," §§ 5.5 and 6.
51. UNCLOS, Annex III, Art. 8, Reg. 15.
52. International Seabed Authority, "Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," § 16.2.
53. The exploration regulations permit contracts for an area up to 150,000 square kilometers, but half of that area is rapidly relinquished—20 percent at the end of the third year of the contract, an additional 10 percent after the fifth year, and a final 20 percent after the eighth year. International Seabed Authority, "Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," § 25.
54. National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1989, p. 12.
55. International Seabed Authority, "Standard Clauses for Exploration Contract," § 2.4.

and the Enterprise.[56] The stated purpose for the training mandate is to facilitate the "transfer of technology and scientific knowledge" to the trainees.[57]

The U.S. company must draw up the training programs in cooperation with the Authority, and it "shall focus on training in the conduct of exploration, and shall provide for full participation by such personnel in all activities covered by the contract."[58] The company must submit the training program to the Authority for approval before the commencement of exploration.[59] Given the presence of proprietary information, equipment, trade secrets, and business know-how involved in a seabed mining operation and the competitive nature of any capital-intensive industry, forcing a U.S. company to train personnel who will likely work for a competitor one day is particularly onerous.

Never in its history has the United States consensually placed its own interests or the operations of its private sector under the complete control of an international regulatory regime such as that established by UNCLOS. At the center of this regime is the Council, which serves as the executive body of the Authority and gatekeeper to the deep seabed.

The Gatekeeper Council. The Council is the key decision-making body that would decide the fate of U.S. mining companies. It is composed of 37 member states representing five geographic regions: Africa (10 member states); Asia (9); Western Europe and "Others" (8); Latin America and the Caribbean (7); and Eastern Europe (3).[60]

NEVER IN ITS HISTORY HAS THE UNITED STATES CONSENSUALLY PLACED ITS OWN INTERESTS OR THE OPERATIONS OF ITS PRIVATE SECTOR UNDER THE COMPLETE CONTROL OF AN INTERNATIONAL REGULATORY REGIME SUCH AS THAT ESTABLISHED BY UNCLOS.

The Council's membership must reflect "equitable geographic distribution," resulting in a body that is controlled by developing nations. Of the Council's current members, 23 (62 percent) are also members of the Group of 77 organization of developing countries. This disparity is of crucial importance because developed and developing countries often have divergent interests within the international system.

If the U.S. accedes to UNCLOS, the Council's control over U.S. access to the deep seabed will be absolute. Among its other powers, the Council could:

- Disapprove any U.S. application to explore and mine the deep seabed.[61]
- Disapprove mining activities by U.S. companies that, in the Council's opinion, would cause harm to the marine environment.[62]
- Suspend or terminate a contract with any U.S. company if the Council believes that the company has violated the terms of UNCLOS or the Authority's rules, regulations, or procedures.[63]
- Impose on a U.S. company, in lieu of suspension or termination of a contract, "monetary penalties proportionate to the seriousness of the violation" of UNCLOS or the Authority's rules and regulations.[64]
- Suspend or modify a U.S. company's exploration or mining operations if the Council judges that there is a threat of harm to the marine environment.[65]
- Suspend or terminate a U.S.

56. UNCLOS, Annex III, Art. 15.
57. Article 15 of Annex III specifically cites paragraph 2 of Article 144 of UNCLOS, "Transfer of technology."
58. International Seabed Authority, "Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," § 27(1).
59. International Seabed Authority, "Standard Clauses for Exploration Contract," § 8.1.
60. International Seabed Authority, "Composition of the Council," http://www.isa.org.jm/en/about/members/council/composition (accessed November 14, 2012). Although UNCLOS set the size of the Council at 36 member states, it was later determined that 37 seats were necessary to achieve equitable geographic representation. However, only 36 members of the Council are permitted to vote.
61. UNCLOS, Art. 153(3).
62. Ibid., Art. 162(2)(x).
63. International Seabed Authority, "Standard Clauses for Exploration Contract," § 21.1(a).
64. Ibid., § 21.5.
65. International Seabed Authority, "Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," 32(5).

company's contract if the company "has failed to comply with a final binding decision of the dispute settlement body," such as the Seabed Disputes Chamber.[66]

Proponents of U.S. membership in UNCLOS claim that, if the United States joins the convention, it will have the power to prevent adverse decisions against U.S. companies because the U.S. will hold a permanent seat on the Council.[67] Yet a permanent seat is of questionable utility because the United States would have only one vote on the Council, and none of the aforementioned decisions requires consensus.[68] For example, the Council may deny an application for an exploration license submitted by a U.S. company, even over the recommendation of the Legal and Technical Commission, if two-thirds of the Council objects to the application.[69]

Granting an international organization the power to restrict and regulate U.S. access to polymetallic nodules and sulfides, cobalt-rich crusts, and rare earths will not advance U.S. national interests. Joining UNCLOS, however, would do just that by placing the interests and operations of U.S. mining companies at the discretion and control of the Authority and the Council.

Unfair Fees and Unknown Royalties on U.S. Companies

In addition to being under the Authority's regulatory thumb and the Council's control, if the U.S. joins UNCLOS, its seabed mining companies will be forced to pay unreasonable costs, fees, and an as yet unknown percentage of profits and royalties to the Authority.

Royalty Rate "To Be Determined." Neither the convention nor the 1994 Agreement establishes the mining royalties that U.S. companies would be required to pay to the Authority. As originally drafted, the convention required mining companies to pay a "production charge" royalty ranging from 5 percent to 12 percent of the value of the processed metals. In the alternative, companies could pay a combination of a production charge and a share of the net proceeds from the sale of the processed metals.[70] In any event, each company must pay the Authority a minimum of $1 million per year once commercial production has commenced.[71]

The 1994 Agreement revised the convention's specific royalty range and minimum payment scheme,[72] but the 1994 revisions left more questions than answers. Essentially, the 1994 Agreement left the seabed mining compensation scheme "to be determined" with the notion that the details would be negotiated within the Authority at some future date when commercial production is imminent. That date has not yet arrived, even though UNCLOS was adopted 30 years ago, and the Authority has yet to begin drafting regulations to establish the financial obligations of mining companies to the Authority.

Thus, if the U.S. accedes to the convention, it will be making an uninformed decision based on incomplete information. The 1994 Agreement refers only to a vague "system of payments" that U.S. mining companies would be required to pay to the Authority, stating that "Consideration should be given to the adoption of a royalty system or a combination of a royalty and profit-sharing system."[73]

Instead of a range of set royalty rates, the agreement states only that payments to the Authority "shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals."[74] The agreement retains the requirement that mining companies must pay an annual fixed fee to the Authority upon the commencement of production but states that the amount of that fee "shall be established by the Council,"[75] which may revise this

66. International Seabed Authority, "Standard Clauses for Exploration Contract," § 21.1(b).
67. 1994 Agreement, Annex, § 3(15)(a).
68. UNCLOS, Art. 161(8)(d).
69. "The Council shall approve a recommendation by the Legal and Technical Commission for approval of a plan of work unless by a two-thirds majority of its members present and voting, including a majority of members present and voting in each of the chambers of the Council, the Council decides to disapprove a plan of work." 1994 Agreement, Annex, § 3(11)(a).
70. UNCLOS, Annex III, Art. 13(4)–(5).
71. Ibid., Art. 13(3).
72. 1994 Agreement, Annex, § 8(2).
73. Ibid., § 8(1)(c).
74. Ibid., § 8(1)(b).
75. Ibid., § 8(1)(d).

vague system of payments periodically "in the light of changing circumstances."[76]

In short, the 1994 Agreement merely transformed UNCLOS's exorbitant fee and royalty rate scheme into a vague and as yet undetermined payment system regime that mining companies should apparently accept on blind faith. The convention clearly defines the Authority's role in future negotiations regarding those fees and royalty rates: "In adopting rules, regulations and procedures concerning the financial terms of a contract... the Authority shall be guided by the following objectives: to ensure optimum revenues for the Authority from the proceeds of commercial production."[77]

Application "Processing Fee" Doubled to $500,000. Under the 1994 revisions to the convention, the processing fee for a contract to explore the seabed was reduced from $500,000 to $250,000.[78] However, the agreement failed to close a loophole in the convention that allows the Authority to raise that fee as it sees fit from time to time.[79] Accordingly, in July 2012, the Authority doubled the fee back to $500,000.[80] The Authority's stated justification was that the administrative cost of processing an application was greater than $250,000 and that the fee must therefore be doubled. The Authority cited its supposed costs for processing the NORI and TOML applications at $447,690 and $425,710, respectively.[81]

Although the Authority did not provide a breakdown of these costs, on the surface, it seems excessive to charge a mining company almost half a million dollars merely to "process" its application. Nothing in the convention or the 1994 Agreement prevents the Authority from raising the processing fee in the future to $750,000, $1,000,000, or even higher as it sees fit.

Moreover, mining companies will be required to pay a second "application processing fee" at the completion of the exploration phase when they apply for a separate contract to commence commercial production. In line with the Authority's recent actions, the application fee for the "exploitation phase" contract will likely be $500,000 as well, at least for now.[82]

Authority in Process of Shifting Major Costs to Companies. Under Article 160 of UNCLOS, member states bear the administrative costs of the Authority, including the costs of monitoring approved exploration contracts, until the Authority has sufficient income (e.g., from mining royalties) to satisfy those costs.[83] The convention places those costs on the member states through the Authority's administrative budget, for which all states are responsible through their annually assessed dues. However, the Authority plans to shift those costs onto the mining companies in clear violation of the convention.

In an April 2012 report, the Secretary-General of the Authority griped that the Authority was incurring significant administrative costs for monitoring the existing exploration contracts, reviewing the annual reports, analyzing the environmental data submitted by companies, and providing meeting services for the Legal and Technical Commission.[84] The report lamented that, as a result of the 1994 Agreement, mining companies are not required to pay a minimum annual fee of $1,000,000 to the Authority.[85] The Secretary-General urged the Council to develop a "user pays" system of cost recovery that would require the mining companies to pay for the Authority's administrative costs rather than spreading the costs among all member states as

76. Ibid., § 8(1)(e).
77. UNCLOS, Annex III, Art. 13(1)(a).
78. Ibid., Art. 13(2), and 1994 Agreement, Annex, § 8(3).
79. "The amount of the fee shall be reviewed from time to time by the Council in order to ensure that it covers the administrative cost incurred." UNCLOS, Annex III, Art. 13(2).
80. International Seabed Authority, Assembly, "Decision of the Assembly of the International Seabed Authority relating to the budget of the Authority for the financial period 2013–2014," ISBA/18/A/7, July 27, 2012, http://www.isa.org.jm/files/documents/EN/18Sess/Assembly/ISBA-18A-7.pdf (accessed November 14, 2012).
81. International Seabed Authority, Council, "Status of Fees Paid for Processing Applications for Approval of Plans of Work for Exploration and Related Matters," ISBA/18/C/3, April 19, 2012, ¶ 7, http://www.isa.org.jm/files/documents/EN/18Sess/Council/ISBA-18C-3.pdf (accessed November 14, 2012).
82. For example, see 1994 Agreement, Annex, § 8(3).
83. UNCLOS, Art. 160(2)(e).
84. International Seabed Authority, Council, "Status of Fees Paid for Processing Applications," ¶ 11.
85. Ibid., ¶ 12. Article 13(3) of Annex III to UNCLOS mandated the $1,000,000 annual fixed fee, which was negated by Section 8(2) of the Annex to the 1994 Agreement.

contemplated by the convention.[86]

The Finance Committee—yet another arm of the UNCLOS bureaucracy—agreed with the Secretary-General and directed the latter to report "on possible measures to ensure that the cost of administration and supervision of contracts between the Authority and the contractors is not borne by member states." The Council, in turn, tasked the Finance Committee to report in July 2013 at the Authority's next session on establishing "a system of cost recovery" based on the Secretary-General's report.[87]

Unlike the loophole that the Authority recently exploited to double the application fee for exploration contracts to $500,000, no loophole in either UNCLOS or the 1994 Agreement permits the Authority to impose the costs of monitoring contracts on the mining companies. The Authority's willingness to disregard the plain terms and intent of the convention and the 1994 Agreement, which was adopted specifically to enhance the economic feasibility of deep seabed mining, is telling and should give pause to any U.S. mining company that believes the rules of the UNCLOS regime are immutable.

Free-Rider Developing Countries. The Authority may be keen to shift administrative costs onto the mining companies instead of satisfying them through the Authority's regular budget because a significant percentage of UNCLOS members regularly fail to pay their annual assessed contributions. At present, 42 of the Authority's 164 member states (more than 25 percent) have been in arrears on their annual dues for two years or more.[88] All but two of the nations in arrears are members of the G-77 group of developing countries.

THE AUTHORITY'S WILLINGNESS TO DISREGARD THE PLAIN TERMS AND INTENT OF THE CONVENTION AND THE 1994 AGREEMENT…IS TELLING AND SHOULD GIVE PAUSE TO ANY U.S. MINING COMPANY THAT BELIEVES THE RULES OF THE UNCLOS REGIME ARE IMMUTABLE.

Developing countries that are party to the convention will receive royalties and profits derived from seabed mining.[89] The substantial financial investment, technological expertise, economic risks, and sheer effort expended in mining the deep seabed will be borne entirely by mining companies and the states that sponsor them, including the United States if it joins UNCLOS. The free-rider countries, which take no risk and will reap rewards, have nothing to lose and much to gain from their UNCLOS membership. Yet they consistently fail to pay their relatively small dues as required under the convention.

U.S. Companies May Operate Through Foreign Subsidiaries

If a U.S. company insists on engaging in mining only under the convention's auspices despite the inequities associated with the UNCLOS regime, it may do so. Specifically, if the United States continues to remain a non-member of UNCLOS, a U.S. seabed mining company may incorporate a subsidiary entity in a country that is party to the convention. In this manner, the U.S. entity's subsidiary may apply for an exploration contract under the sponsorship of the foreign country and engage in seabed mining through the convention's regime.

The practice of U.S. companies partnering with foreign entities in seabed mining ventures has precedent. As previously noted, all four U.S. private-sector mining consortia originally included foreign partners or ownership interests: KCON had Canadian, Japanese, and British interests; OMA had Belgian and Italian interests; OMI had Canadian, Japanese, and German interests; and OMCO had Dutch interests.[90]

Under UNCLOS, a U.S. company's foreign subsidiary may apply for a license through the host nation. Indeed, there are already precedents for such an arrangement.

- In January 2012, the Authority signed a 15-year exploration contract with Tonga Offshore Mining Limited, a company incorporated

86. International Seabed Authority, Council, "Status of Fees Paid for Processing Applications," ¶ 13.
87. International Seabed Authority, Council, "Decision of the Council of the International Seabed Authority Relating to the Status of Fees Paid for Processing of Applications for Approval of Plans of Work for Exploration and Related Matters," ISBA/18/C/29, July 26, 2012, http://www.isa.org.jm/files/documents/EN/18Sess/Council/ISBA-18C-29.pdf (accessed November 14, 2012).
88. International Seabed Authority, Assembly, "Report of the Secretary-General of the International Seabed Authority," June 8, 2012, ¶ 40, http://www.isa.org.jm/files/documents/EN/18Sess/Assembly/ISBA-18A-2.pdf (accessed November 14, 2012).
89. See UNCLOS, Arts. 160(2)(f)(i) and 162(2)(o)(i).
90. National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1981, p. 10, http://www.gc.noaa.gov/documents/gcil_dsm_1981_report.pdf (accessed November 14, 2012).

within the jurisdiction of Tonga, under the sponsorship of Tonga. TOML is a wholly owned subsidiary of Nautilus Minerals Incorporated, a Canadian seabed mining company headquartered in Toronto. The TOML license authorizes it to explore more than 74,000 square kilometers in six separate areas of the CCZ reserved by the Authority for developing countries.[91] It is unclear why Nautilus, which could have attained Canadian sponsorship, chose to pursue this arrangement with Tonga. One possible explanation is that by applying under Tongan sponsorship, Nautilus could gain access to reserved areas of the CCZ available only to developing nations.

- In July 2012, the Council approved a license to explore an area of the CCZ to UK Seabed Resources Ltd (UKSRL) under the sponsorship of the United Kingdom.[92] UKSRL is a wholly owned subsidiary of Lockheed Martin UK Holdings Ltd, a corporation formed in 1999 under the laws of England. According to its application, UKSRL "holds rights granting it access to certain data, resources and subject matter expertise of Lockheed Martin Corporation...related to polymetallic nodule resource surveying, analysis and recovery methods."[93] In this manner, Lockheed Martin Corporation, a U.S. company, has essentially been granted a license to explore the deep seabed through its British subsidiary.

If a U.S. company maintains that the only practical way to engage in seabed mining is under the UNCLOS regime, the practices of companies like Nautilus and Lockheed Martin, acting through their foreign subsidiaries, are instructive. However, to best advance U.S. national interests and promote seabed mining in the years ahead, the U.S. government must provide U.S. mining companies with the maximum possible certainty and security of tenure over claims in the CCZ and any other area of the deep seabed.

Providing Certainty to U.S. Mining Interests

The United States is well within its rights to engage in deep seabed mining and sponsor U.S. companies' efforts to do so. The challenge lies in fostering mining by American companies in the current international environment, given the widespread acceptance of UNCLOS by other nations, and to counter any potential reluctance among these nations to recognize U.S. claims.

The United States should take steps to provide additional certainty and security of tenure to U.S. mining companies. To this end, the United States should:

- "Unsign" the 1994 Agreement,
- Claim the USA-2 area in the CCZ,
- Strengthen its bilateral and multilateral agreements regarding the deep seabed,
- Establish a task force on deep seabed mining, and
- Modernize DSHMRA for the 21st century.

"Unsigning" the 1994 Agreement. When the Clinton Administration signed the 1994 Agreement in July 1994, it arguably obliged the United States to refrain from committing any act that would defeat the agreement's "object and purpose," even though the United States has ratified neither the agreement nor UNCLOS.[94] The United States should therefore "unsign" the 1994 Agreement to resolve any legal ambiguity regarding U.S. intentions to explore and mine the deep seabed.

In May 2002, the Administration of President George W. Bush delivered a letter to the U.N. Secretary-General regarding the Rome Statute of the International Criminal Court (ICC), which the Clinton Administration had signed in December 2000. The letter stated that the United States "does not intend to become a party" to the Rome Statute and accordingly "has no legal obligations arising from its

91. International Seabed Authority, Council, "Report and Recommendations to the Council of the International Seabed Authority Relating to an Application for the Approval of a Plan of Work for Exploration for Polymetallic Nodules by Tonga Offshore Mining Limited," July 8, 2011, ISBA/17/C/10, ¶ 20, http://www.isa.org.jm/files/documents/EN/17Sess/Council/ISBA-17C-10.pdf (accessed November 14, 2012).
92. International Seabed Authority, Council, "Decision of the Council Relating to a Request for Approval of a Plan of Work for Exploration for Polymetallic Nodules Submitted by UK Seabed Resources Ltd.," July 26, 2012, ISBA/18/C/27, http://www.isa.org.jm/files/documents/EN/18Sess/Council/ISBA-18C-27.pdf (accessed November 14, 2012).
93. International Seabed Authority, Legal and Technical Commission, "Application for Approval of a Plan of Work for Exploration for Polymetallic Nodules," June 6, 2012, http://www.isa.org.jm/files/documents/EN/18Sess/LTC/ISBA-18LTC-L4.pdf (accessed November 14, 2012).
94. See, generally, Vienna Convention on the Law of Treaties, May 22, 1969.

signature on December 31, 2000."[95]

This "unsigning" of the Rome Statute made clear to the international community that the United States has no intention of joining the ICC, and it enabled the Bush Administration to secure pledges from other nations that they would not surrender U.S. military personnel to the ICC for prosecution.[96] Since securing such pledges would arguably defeat the object and purpose of the Rome Statute, the unsigning letter was necessary to clarify that the U.S. no longer had an obligation to adhere to the terms of the Rome Statute.

The United States should unsign the 1994 Agreement to resolve any legal ambiguity regarding U.S. actions that may be seen as violating the agreement's object and purpose. Since the United States never signed UNCLOS, it is unnecessary to unsign the convention.

Claiming USA-2. The USA-2 area, comprising 112,500 square kilometers in the CCZ, has lain dormant and undisturbed since the OMI consortium relinquished its DSHMRA exploration license in 1999. The United States is well within its rights to lay claim to this area. Other nations have made claims to the deep seabed on behalf of their national governments rather than through private entities. Among the nations that currently claim areas of the deep seabed in their own right are South Korea (in the CCZ) and India (in the Indian Ocean).[97]

Other licenses to explore the CCZ are held by entities that are wholly owned and controlled by national governments, such as Yuzmorgeologiya (Russia); China Ocean Mineral Resources Research and Development Association; the Federal Institute for Geosciences and Natural Resources (Germany); and Marawa Research and Exploration Ltd. (Kiribati).

Although no other nation has attempted to claim the USA-2 area under the UNCLOS regime, states party to the convention may do so at any time. As previously noted, in May 2012, the Authority granted a license to Belgium's G-TEC Sea Minerals Resources to explore the USA-3 area (the OMA consortium relinquished its U.S. license for this area in 1997). The United States should act quickly before the Authority attempts to license the USA-2 area under the convention's regime.

The United States should claim the USA-2 area by informing the U.N. Secretary-General via diplomatic note, which should be published in the *Law of the Sea Bulletin*. The United States should give specific notice to other nations and companies that hold licenses in the CCZ, including Germany, Nauru, South Korea, and Russia, all four of which have sponsored claims bordering on the USA-2 area. The U.S. should also notify the Authority because the USA-2 area abuts areas reserved by the Authority for exploration by developing countries.

Strengthening Bilateral and Multilateral Agreements. The United States should notify every nation with which it has an agreement regarding the deep seabed that the U.S. considers all such agreements to be in force and effect. Although such notification is not legally necessary, it will provide additional clarification that the United States will hold its treaty partners accountable for their international commitments. The United States has such agreements with Belgium, China, France, Germany, Japan, Russia, and the United Kingdom.

The United States should also negotiate new bilateral agreements with the governments of Kiribati, Nauru, South Korea, and Tonga to establish mutual recognition and respect for one another's claims in the CCZ. Although the claims of those four nations do not overlap the areas currently claimed by the United States, the agreements will establish a bilateral commitment from each of those nations not to infringe on U.S. claims in the CCZ and to cooperate in the event of a dispute.

Convening a Task Force on Deep Seabed Mining. The political conditions and economic assumptions that existed when UNCLOS was adopted in 1982 are antiquated, to say the least. The U.S. should convene a public–private task force to conduct a new study on the current and future viability of deep seabed mining.

The issues surrounding the determination of U.S. interests in the deep seabed and the economics of seabed mining are highly complex and require a *de novo* review. Since the 1970s, mining technology has

95. John R. Bolton, letter to U.N. Secretary-General Kofi Annan, May 5, 2002.

96. See Brett D. Schaefer, "The Bush Administration's Policy on the International Criminal Court Is Correct," Heritage Foundation *Backgrounder* No. 1830, March 8, 2005, http://www.heritage.org/research/reports/2005/03/the-bush-administrations-policy-on-the-international-criminal-court-is-correct.

97. Article 153(2)(b) of UNCLOS expressly permits states parties to carry out exploration and mining activities in the deep seabed.

98. National Oceanic and Atmospheric Administration, "Deep Seabed Mining," December 1981, p. 1.

improved, the availability of seabed minerals from land-based sources has changed, and globalization has altered U.S. economic practices and trading partners. In addition, the assumptions prevailing at the time the convention was negotiated are very different from today's reality. For example, a 1981 report by NOAA on deep seabed mining stated: "By the end of the century, the Soviet Union and South Africa are expected to control virtually all the world's manganese resources."[98] The specter of the Soviet Union controlling a strategic metal was certainly alarming during the Cold War. However, that projection and many others have failed the test of time: The top national producers of manganese ore currently include Australia, Brazil, China, Gabon, and India.[99]

The task force should perform several key analyses, including analyses of how the seabed mining industry has evolved since 1980; whether seabed mining technology has advanced significantly; whether the U.S. government should provide financial incentives to engage in seabed mining; and, if so, what kind of incentives it should provide. All of these analyses should be directed toward answering the central question of whether deep seabed mining is economically viable at present and, if not, whether it ever will be.

The task force should assess whether these changes have altered U.S. assumptions regarding deep seabed mining and provide its findings to the Senate to permit that body to make a more informed decision.

Modernizing DSHMRA. One focus of the task force study should be whether DSHMRA should be updated to reflect current conditions and to promote U.S. seabed mining activities. Like UNCLOS, DSHMRA reflects the technological, economic, environmental, and political realities of the 1970s and early 1980s. If it is to continue to serve as the domestic legal and regulatory framework for U.S. seabed mining interests, its provisions should reflect the world as it exists today.

The central objective of modernizing DSHMRA would be to provide U.S. seabed mining companies with the necessary security of tenure and legal certainty to engage in deep seabed exploration and mining. To that end, Congress should amend the law to:

- **Set reasonable administration fees.** The administrative fee for processing an application for exploration under DSHMRA is currently set at $100,000.[100] That fee should be eliminated, made subject to waiver, or at a minimum kept at its current level to promote seabed mining by American companies.

- **Reduce litigation exposure for U.S. companies.** American companies lawfully engaged in seabed mining under U.S. law must be shielded from any legal actions brought by foreign nations and companies. U.S. companies have voiced concerns that they may face some type of unspecified litigation in foreign courts if they engage in seabed mining without the United States being a party to UNCLOS. Whether or not such concerns are warranted, Congress should amend DSHMRA to jurisdictionally bar the recognition or enforcement of any judgment entered by a foreign court against a U.S. mining company on the grounds that the United States is not a party to the convention.

  The United States may prevent the recognition of foreign judgments in U.S. courts when "the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States."[101] For instance, in 2010, Congress enacted the Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act to prevent the domestic enforcement of foreign libel judgments that contravene the First Amendment to the U.S. Constitution.[102] While U.S. courts already have the discretion not to recognize such judgments, amending DSHMRA so that it explicitly bars judgments based on U.S. non-membership in UNCLOS will provide additional assurances to U.S. mining companies that fear such litigation.

- **Enhance legal remedies for U.S. companies.** U.S. mining companies should be provided an avenue of legal recourse in the event that a foreign company infringes on an

99. International Manganese Institute, "Production," http://www.manganese.org/about_mn/production (accessed November 14, 2012).

100. DSHMRA, § 970.208(b).

101. American Law Institute, *Restatement of the Law, Third*, § 482(2)(d).

102. Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act, Public Law 111–223, August 10, 2010.

area claimed by the company in the CCZ or anywhere else in the deep seabed. DSHMRA should be amended to grant jurisdiction to U.S. district courts to provide injunctive relief and monetary damages in the event of trespassing on or interference with a U.S.-sponsored claim.

- **Expand the scope of minerals that may be mined.** At present, U.S. companies may apply to NOAA to explore and mine only polymetallic nodules.[103] The definition of "hard mineral resource" under DSHMRA should be expanded to include polymetallic sulphides, cobalt-rich crusts, and any other mineral resource found on the deep seabed.

Conclusion

The United States should not cede regulatory authority and bureaucratic control over the attainment of any national interest to an international organization. International organizations should not have the power to deny American companies access to the deep seabed or the authority to regulate exploration and mining activities.

If the United States chooses to engage in deep seabed mining, it should do so on its own terms. Rather than submitting itself and its private mining companies to the whims of an unelected and unaccountable international bureaucracy, the United States should provide the private sector with the legal certainty and financial incentives necessary to pursue deep seabed mining activities.

*—**Steven Groves** is Bernard and Barbara Lomas Senior Research Fellow in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.*

103. DSHMRA, § 1403(6).