Chapter - V

LAW OF THE SEA CONTROVERSY
Another important issue which affected the US-Indonesian relationship was their differing view on the Law of the Sea Treaty. During the long and protracted discussions at several United Nations Conferences on the Law of the Sea, beginning from 1974 to 1982, the United States and Indonesia respected two ends of the spectrum. Whereas, the United States and other developed nations showed their keen interest in retaining the old concept of the Freedom of the Seas, Indonesia and other developing countries struggled hard to change and overhaul the outdated maritime law and to develop a new law of the sea, in order to reconcile conflicting national interests of various countries. Indonesia, being the largest archipelagic nation of the world assumed special responsibility in this regard.

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1It may be of some interest to recall that it was in search of the spice islands of the Indies, now called Indonesia, that Christopher Columbus discovered America and Hugo Grotius, a young Dutch Jurist, later on championed the cause of the freedom of navigation justifying the right of the Dutch to sail to the Indies, thereby laying down the foundation for a debate which has engaged the mankind up to the present day. See Ann L.Hollick and Robert E. Osgood, New era of Ocean Politics (Baltimore: John Hopkins University Press, 1974); R.P.Anand, Law of the Sea: Caracas and Beyond (New Delhi: Radiant, 1978); Ken Booth, Law Force and Diplomacy at Sea (London: George Allen and Unwin, 1985); and Edward Miles and John King Gamble, Jr; Law of the Sea: Conference outcomes and problems of implementation (Cambridge: Baltinger Publishing Co., 1971).
Indonesia's interest:-

It had been a long standing Indonesian belief that the rich natural resources and the strategic position of their archipelago state were of interest to other countries. The geographical position of Indonesia assigned to it special needs and imperatives relating to its national existence, while at the same time bringing with it some responsibilities relating to the interests of the international community. It was because of these imperatives that on 13 December 1957, the Indonesian government proclaimed itself an archipelagic state. It stated among others, that "all waters around, between and connecting the islands of the Republic of Indonesia, regardless of their width, are the natural appurtenances of its land territory, and therefore, form part of the internal or national waters under its absolute sovereignty." The concept emphasized the unity of the land and water territories of Indonesia.


The special responsibilities of Indonesia towards the interests of the international community, especially in the maintenance of international maritime traffic were also clearly outlined in the Declaration of 1957. The Declaration stated, "inter alia, that innocent passage of foreign vessels in the internal waters enclosed by the new method of drawing straight baselines (now called archipelagic waters) is guaranteed as long as and as far as it is not contrary to or disturb the sovereignty or the security of the Republic of Indonesia".  

That policy position was maintained by the Indonesian government at the First International Conference on the Law of the Sea held in Geneva under the UN auspices in 1958. In February 1960, the declaration was incorporated within Indonesia's municipal law. In 1970, the archipelagic principle was interpreted to mean that the seas and the straits must be utilized to bridge the physical separations between the islands, regions, and the manifold ethnic groups. This was also the case with its air space. 

The Indonesian act provoked a strong response from the major maritime powers, particularly the United

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5The Indonesian News (Jakarta), 15 May 1975.
States. The Americans showed their unwillingness to accept that principle because they viewed that claim as an additional hindrance to the navigational freedoms of their vessels passing through Indonesian waters.⁶

However, despite the evident opposition of the major maritime powers Indonesia persisted with advocating its claim regarding ocean jurisdiction before the Third UN Conference on the Law of the Sea which began in the middle of 1974 (from June 20-August 29), in Caracas, Venezuela, following a preliminary session in New York.⁷

The major issues over which the US and Indonesian interests differed were: international navigation and territorial sea; the preservation of marine environment; scientific research; the economic zone, living resources, and the continental shelf, and the mining of deep-seabed minerals.

**International Navigation and the Territorial Sea**

The Leader of the Indonesian delegation, Professor Mochtar Kusumaatmadja placed emphasis on Indonesia's


attachment to the Archipelagic principle. In his report he opposed the free and unhindered passage of warships through Indonesian waters arguing, "if warships and submarines of foreign contending powers have the fullest freedom in navigating through our waters, what would happen not only to our national security but also to the aspirations of the Southeast Asian nations to establish a zone of peace, freedom, and neutrality in their area?". The head of the Indonesian delegation stated, "their country has no intention to prevent the passage of commercial shipping because, it is by its very nature innocent, and should always enjoy unhindered passage. But it is most distressing when this interest of commercial shipping is used to disguise the intentions of those who have military purpose in mind." Indonesia argued, "the passage of such types of ships concerns the security of their country and needs to be restricted". Therefore, the Indonesian government sought to restrict the right of navigation through its vital waterways to innocent passage, which required the submarines to

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8UNGA Official Record, 42nd meeting, 2nd session, 15 July 1974, p.187.
9Ibid.
navigate on the surface to show their flag, and 
aircrafts to receive prior permission for overflight.\textsuperscript{10}

In order to achieve that goal, together with other 
archipelagic nations (Fiji, Malaysia, Mauritius and the 
Philippines), Indonesia issued draft articles concerning 
navigation through territorial seas and international 
straits at the 1975 Geneva session. These states wanted 
to maintain the concept of "innocent passage" and stated 
in their draft proposal that maritime safety and coastal 
state security would be served best "by the reasonable 
and adequate exercise by the coastal state of its right 
to regulate navigation through its territorial sea, 
since the purpose of the regulation is not to prevent or 
hamper passage but to facilitate it without causing any 
adverse effects to the coastal state".\textsuperscript{11}

Archipelagic states sought a regime in which they 
would draw straight baselines between their outermost 
islands and enclose "archipelagic waters" within, and 
insisted that a twelve-mile territorial sea be combined 
with coastal state jurisdiction over offshore resources 
to 200 miles.

\textsuperscript{10}St Munadjat Danusaputro, "The international sea system 
in Perspective", \textit{The Indonesian Quarterly}, vol. 3, no.4, 
July 1975, p.33.

\textsuperscript{11}UNGA, A/9021, Supplement No. 21, vol. III, p.4.
The Indonesian claim, however, was not acceptable to the major maritime powers because it was not only a restriction on long enjoyed freedom of navigation but indicated the prospect of a denial of that freedom altogether. In May 1975, the US representative Bernard H. Oxman, in Committee II of the Law of the Sea Conference stated at the Geneva Session that, Indonesia's interpretation of the archipelagic principle of enclosed waters and its claim for the adoption of a twelve nautical mile territorial sea would put five strategically important straits (Malacca, Makassar, Sunda, Lombok and Ombai Wetar) under national control which would ultimately restrict the free passage of submerged nuclear-powered and nuclear-armed submarines, moving from their bases on Guam through the Makassar and Lombok straits into the Indian Ocean.¹²

Without submerged passage through them, the United States would have to circumnavigate Australia or double

back to one of the entrances to the Timor Sea, 180 to 500 miles east of Ombai Wetar, which would still require passage through Indonesian waters. 13

Thus, realizing the grave consequence of archipelagic nations claim of enclosed waters and twelve nautical miles territorial sea, the maritime states linked their acceptance of a twelve-mile territorial sea to a regime of unimpeded transit through and over straits, that would be covered by territorial seas of twelve miles. But the proposal was instantly rejected by the archipelagic group of nations:

In the course of negotiation, the 1975 Geneva Session on the Law of the Sea offered a new and unique opportunity to resolve the issue. 14 In order to win the support of archipelagic states, the US was prepared to meet many of the demands of Fiji, Indonesia, Malaysia, Mauritius, and the Philippines. The final articles concerning international navigation through the straits supported the archipelagic group. They were allowed to

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draw straight baselines linking the outermost points of their outermost islands, and drying reefs, to enclose archipelagic waters. In the area of innocent passage, there was support for a more precise definition of what constituted passage that was prejudicial to the "peace, good order, and security" of the coastal state. There were also agreements on a number of items relating to the security concerns of the coastal states.

The Preservation of Marine Environment

Another important issue over which the Indonesian representative expressed concern at the conference was the danger to its marine environment. This arose from two factors: pollution introduced in the process of exploitation of the non-living resources of the seabed and subsoil; and pollution introduced from deliberate and accidental discharges from the ship.

One may ask what were the environmental implications of deep-sea mining? In an article on "Environmental Consequences of deep-sea mining, Richard Frank, Director of the Centre for Law and Social Policy, Washington, D.C., divided the environmental impacts of deep-sea mining into three parts: impacts on the bottom;
in the water column and on the surface, and from processing which may take place on land or at sea.\textsuperscript{15}

In the first place, extraction of nodule from the ocean bottom would disturb and displace the sediments. The use of sophisticated dredging device in the scrapping process would destroy various species of flora and fauna on the bottom of the ocean floor.

The second impact was much more dangerous than the first one. The lifting of nodules to the surface would also bring with it some sediment and deep ocean water. When the nodule would be loaded into the transport vessels there would be a discharge into the water consisting of bottom water, sediments, and scrapping of nodules, including trace metals. The plume that would be created from this discharge, described as one of the most dangerous aspects of deep-sea mining. According to some scientists, the plume may impair light penetration which would have a detrimental effect on the plants and wild life, and then on the whole food chain.

The third area of environmental harm would come from processing. The processing of nodules, either on

land or at sea would require the utilization of several power plants. These power plants would emit effluent which would in turn, create a profound environmental problem.

Indonesia had long realized the dangerous consequence of sea-bed mining. Since, the modern discoveries had confirmed Indonesia to be a country having immense natural resources, especially manganese nodules at the bottom of its ocean floor, it was well aware of the impact, the deep sea mining was likely to inflict upon its marine environment.

Because of these dangerous consequence of deep-sea mining, the Indonesian delegation opposed the developed countries proposal that minimum international standard should be applied to the coastal state activities in the economic zone. It supported the proposal offered by the developing countries that economic development should be accorded priority over protection of the marine environment in areas of national jurisdiction. The proposal stated that suggestions concerning restrictions of industrial development for the purpose of protecting the environment would reduce growth rates in the developing countries.\textsuperscript{16} Indonesian's, and developing countries, stand was not different from the one taken by

the developed countries when they themselves were industrializing. The developing countries, therefore, sought to have separate provisions regarding development activities in the economic zone to which the Indonesian delegation extended full support.

To Indonesia, the second factor of marine pollution was more dangerous. It was the fear of damage to the marine environment by deliberate and accidental discharges from the ship. The fear was accentuated by the fact that, the Straits of Malacca, a shallow and virtually closed sea, being heavily used by commercial shipping.17

The Indonesian representative Mochtar Kusumaatmadja said in the UN General Assembly that, "even the simple use of the straits have already caused damage to the marine environment. This damage would affect not only the Straits of Malacca, but equally the Straits of Singapore and the whole area facing the South China Sea".18 As the volume of world shipping was certain to

17 It is important to note that on the average, about 4,500 vessels ply through the Straits of Malacca each month; this averages about 150 vessels per day, a very large proportion of which are oil tankers carrying crude oil. See: John W. Garver, "The Reagan Administration's Southeast Asia Policy", in James C. Hsiung ed., US-Asian relations: The National Security paradox (New York: Praeger, 1983), pp.86-88.

18 UNGA Official Record, n.9, p.188.
expand in future, the Indonesian ambassador Mochtar Kusumaatmadja said, "this would necessarily increase the burdens of the straits and those of coastal states. The sealanes would be crowded with much bigger and faster vessels, carrying larger amounts of energy products, raw materials and other bulk cargoes which would badly affect the beaches of the straits." The Indonesian concern mainly revolved around the fact that if any super tanker met with an accident, it would pollute the marine atmosphere which would in turn affect the fishing industries of the states bordering the Straits of Malacca upon which a large section of their population depended for their livelihood. Most of the super tankers, any way were made without the requisite safety standard and were prone to frequent accidents.

He complained, "when it comes to using the Straits of Malacca, many people are eager to speak of the interests of the international community as a whole. But when it comes to the maintenance and cleaning-up of the straits, it is left entirely to the coastal states".

Therefore, the Indonesian government requested the International Maritime Community to recognize the legitimate interests of the coastal states and suggested

19Ibid.
20Ibid.
holding a convention, in conformity with the: *United Nations Declaration of Principles Governing the Seabed and Ocean Floor and the Subsoil Thereof*. Indonesia reasoned that such a convention would contain regulations to ensure unhindered passage for commercial shipping, adequate safety and pollution prevention standards, liability and compensation for damage, and passage for military vessels. It proposed that not only pollution resulting from sea-bed resources development should be controlled by the coastal state, but the vessel-source pollution should also be regulated and controlled by them within the proposed economic zone. They should have complete sovereignty for the protection of the marine environment in internal waters, archipelagic waters and the territorial sea, and a special jurisdiction for the preservation of the marine environment in the area beyond the territorial sea but within the limits of national jurisdiction.\(^{21}\)

**US Position**

The US, on the other hand, proposed that pollution resulting from the exploration and exploitation of seabed resources should be treated differently from vessel source pollution. On 10 May 1975, the special representative of the President for the Law of the Sea

Conference, and chief of US delegation John R. Stevenson stated, the former should fall under the jurisdiction of the coastal state and the latter should be subject to international standards and regulation. He said, the US feared that coastal state jurisdiction over vessel-source pollution would lead to different sets of standards for coastal states, which in turn would affect freedom of navigation. The United States maintained that even within the economic zone, there should be minimum international standards with respect to the production of liquid hydrocarbons, and in addition to the minimum international standards a coastal state might have the right to impose stricter standards. The US favoured international regulations for the control of vessel-source pollution, and proposed a "continuation of Flag state-Port state-Coastal state regulatory system" which provided that:

The Flag State would continue to have enforcement responsibilities over its vessels, although such an authority would not be exclusive, and would assume a specific obligation to enforce international standards in the case of vessels flying its flag, subject to the right of other states to have recourse to compulsory dispute settlement procedures to ensure that the obligation was

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fully discharged. The Port State would be able to enforce pollution control standards in the case of vessels using international ports regardless of where violation took place.... The coastal state would have rights and remedies that would fully protect its environmental interests.\textsuperscript{24}

Provision was also made for dealing with the four major maritime pollution problems facing the coastal state; serious maritime casualties of its coast, violations of international standards, imminent dangers of major harmful consequences, persistent and unreasonable failure of a state to enforce the international standards with respect to vessels flying its flag, and general violations of the standards.

In the course of preparation of a revised text on marine environment, the negotiations in Geneva and New York introduced a series of amendments which substantially improved the prospect for consensus over the issue. On coastal state standard setting in the territorial sea, the amendment permitted the coastal state "to establish and enforce national standards in the territorial sea regarding vessel source pollution but not to fix design, construction, manning and equipment standards."\textsuperscript{25} The new proposals clarified and


expanded the coastal state's powers to aboard, inspect, and detain ships for violating international pollution standards in the territorial sea or economic zone, where there was "clear objective evidence" of a violation that resulted in a discharge causing or threatening major damage to the coast. The amendment permitted the coastal state to impose any penalty in "case of a wilful and serious act of pollution" in the territorial sea.²⁶

**Marine Scientific Research**

The question of marine scientific research received considerable attention during the conference. The contentious issue was the conditions under which scientific research could be conducted in the economic zone. Developed states sought to preserve free access for the vessels to conduct research in the economic zone of other states. Developing coastal states, including Indonesia, on the other hand insisted that all research should be subject to the prior consent of the coastal states.

Maritime nations like the United States argued that, "the economic research has benefited all mankind

by providing the scientific community with information which has led to better management of ocean resources, better weather forecasting, understanding the regulation of pollution, and so on and so forth. As most of the interesting scientific research at sea is conducted within the proposed economic zone of 200 nautical miles, marine scientists maintained that much vital research would be impaired by the coastal state restrictions if the latter were granted their right to regulate scientific research within that area.\textsuperscript{27} The United States, therefore, proposed a regime under which coastal state consent was not required but the researcher had to meet a number of obligation including advance notification, right of the coastal state to participate, sharing of data and samples, assistance in interpreting the research results, open publication of findings, compliance with international environmental standards, and flag-state certification of the researching institution. The developing coastal states, on the other hand, wanted to have control over all scientific research within the proposed economic zone. They gave the following reasons for their position.

Firstly, the developing states argued that, control over all economic activities, including scientific

research within the proposed economic zone would make the coastal state the final judge of the kind of research they believe, would be of benefit for them. Secondly, they feared that unregulated research within the proposed zone would widen the technological gap between the developed and the developing nations, because, only advanced countries could translate scientific research into economic benefits. Thirdly, control of coastal state would reduce the espionage activities by research vessels. And lastly, freedom to conduct scientific research within the economic zone would not provide the developing coastal states with a quid pro quo, which they expect in return for allowing foreigners to conduct oceanic research within their coastal waters. 28

The negotiations at the Geneva session of 1975, reviewed the legal status of scientific installations and state liability for damage caused by scientific research. Several new proposals were introduced to alter the original draft. The maritime countries proposal specified that research would be conducted in the economic zone if a list of internationally accepted obligations were fulfilled and subject to dispute settlement provisions. The developing countries

continued to insist that all scientific research in areas under coastal-state jurisdiction would be conducted only with the explicit consent of the coastal state. In the international area, the Seabed Authority would conduct all research.\textsuperscript{29}

The Geneva session provided for two categories of research: resource related and fundamental. It stated that the coastal state consent would be required only for the former which did not reconcile the conflicting interests of the coastal and maritime countries.

Therefore, in 1976 New York session, many developing coastal states argued that it was virtually impossible to distinguish between resource related and other research, and that a consent regime should apply to all research in the economic zone. Developed world, especially western countries, defended the distinction as a means of finding a compromise over the issue.

The US Secretary of State, Henry A. Kissinger, who was present at the Conference stressed the importance to his country of marine science, and indicated its

willingness to accept such a distinction, if it were coupled with compulsory dispute settlement.\textsuperscript{30}

However, a formula was finally agreed upon at the 1977 New York session which strengthened the coastal states power over scientific research. The coastal state could grant consent "in normal circumstances" to projects in the economic zone or on the continental shelf that were consistent with the convention. The coastal states could withhold their consent:

If the project in question was directly significant for resource exploitation;

Involved drilling into the continental shelf, the use of explosives, or the introduction of harmful substances into the environment;

Involved the use of artificial island or structures;

Supplied inaccurate information regarding its nature or objectives;

or If the researching state or sponsoring international organization had outstanding obligations to the coastal state from a prior research project.\textsuperscript{31}


The controversy over the economic zone derived from coastal state concern to control the living resources of the economic zone and the mineral resources of the continental shelf.

**Continental Shelf**

The continental shelf was defined as "the seabed and subsoil of the submarine areas adjacent to, and beyond the territorial sea, to the limit of the economic zone, or, beyond that limit, throughout the submerged natural prolongation of the land territory of the coastal state to the outer limit of its continental margin".  

In case of the continental shelf, there was a clear division among groups according to their geographical interests. Broad margin developing state like Indonesia, with margins extending beyond 200 miles promoted coastal state jurisdiction over the resources of the margin to the point where it meets abysmal point. While maritime states like USA, seeking a compromise between these two

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positions argued for revenue sharing on the margin beyond 200 miles.\textsuperscript{33}

There was also the issue of how the edge of the continental margin would be defined if a broad limit were accepted. The US proposed that, a state be granted an additional sixty miles beyond the foot of the continental slope. Others sought a formula that would allow them to claim the entire continental rise, that is, all sedimentary materials that had washed off the continental margin.\textsuperscript{34}

On the question of revenue sharing, the US offered a specific proposal under which the coastal state would contribute one per cent of the value of production after five years of operation at a site. The proposal was instantly rejected by the broad margin developing coastal states like Indonesia. These states insisted on an exemption from revenue sharing.


In the course of discussion, at the 1977 session, there was partial agreement on a coastal state obligation to pay one per cent of the value of production beginning in the sixth year of commercial production after which it would rise to a maximum of five per cent by the tenth year.\textsuperscript{35} The agreement was again objected to by the broad margin developing coastal states. The question of revenue sharing remained unresolved even in the 1978 session due to their determination not to accept the agreement.\textsuperscript{36}

At the 1979 session, the wide-margin developing countries finally succeeded in seeking an exemption from revenue sharing. The US representative to the law of the Sea Conference Richard S. Eliot supported those states in the belief that "their support was essential to any treaty regarding the continental shelf".\textsuperscript{37} The United States proposed a formula that allowed the broad margin developing countries (which were net importers of hydrocarbons) to opt in, or out of the revenue-sharing system.

\textsuperscript{35} Oxman, 31, p.81.


Though the problem of revenue sharing was resolved satisfactorily, the question on delimiting the outer boundary remained the most sticking point. At the 1980 New York and Geneva session, the outer edge of the continental shelf was further revised to limit jurisdiction over submarine ridges to 350 miles when they were not "natural components of the continental margin (Art.76)." The revised definition again implied that coastal states would claim areas at greater distance if they were "natural components" of the continental margin.

**Freedom of Fishing**

It had been a long standing belief of the developing coastal countries that the existing rules regarding fishery rights generally favoured the developed nations. As time passed, it became clear that if the present system continued, fishery resources of the seas would completely fall into the hands of the "long distance fishing interests" of the maritime states where the fishery interests were mainly commercial. The developing countries apprehended that the developed nations with their increasingly larger and sophisticated ships would indulge in massive over-fishing which would

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in turn threaten the already inadequate protein and foreign exchange resources of the poor coastal states.\textsuperscript{39}

Indonesia, like many other developing coastal countries, viewed with serious concern the increasing exploitation of the living resources of the sea along its coast by distant advanced countries. The Indonesian representative Mochtar Kusumaatmadja stated:

We consider that this unfettered freedom of the sea, particularly relating to the exploitation of its resources has given more advantages to those countries with advanced technological and scientific capability that it has to the developing countries, which have a greater and more urgent need for those resources. It is therefore appropriate that the use of the resources of the sea should be made more equitable between far distant advanced states and the developing coastal countries.\textsuperscript{40}

Therefore, the question of fishery rights received adequate attention during the conference. The developing


\textsuperscript{40}The US decision to pass the Fishery Conservation and Management Bill unilaterally in the near future unless a final agreement is reached in the Caracas session strengthened the developing countries concern. See, Congress and the Nation, 1977, vol.4, 1973-76 (Washington, D.C. Congressional Quarterly Inc.), 1977, p.864.
coastal states sought exclusive jurisdiction over the resources of their zone and the right to permit foreign fishing only at their own discretion where the coastal state did not have the capacity to harvest the total allowable catch.\textsuperscript{41} Distant water fishing states were willing to concede only preferential rights to the coastal state.\textsuperscript{42} The coastal developing states recognised that neighbouring states might have an interest, but opposed the concept of preferential rights.\textsuperscript{43}

In the course of negotiation, it was decided that the coastal states would be given unequivocal fishery rights in their proposed economic zone.\textsuperscript{44} The coastal states were permitted to determine the allowable catch of fisheries in their economic zone.

\textsuperscript{41}Statement by the Indonesian delegation Professor Mochtar Kusumaatmaddja at the Caracas session, See, UNGA Official Records, 42nd Meeting, 2nd Session, 15 July 1974.

\textsuperscript{42}US Congress, Congress and the Nation, n.40, p.887.


\textsuperscript{44}Department of State Bulletin (Washington, D.C.), vol.80, October 1980, p.71.
Exclusive Economic Zone

During the discussion on the juridical status of the economic zone, the maritime nations spoke in favour of retaining the status of the zone as high seas except for the resource rights specifically accorded to coastal states. The developing coastal states, on the other hand, opposed it. In their view apart from rights delegated to third parties for purposes of navigation, overflight and communication, residual rights to the economic zone should be vested in the coastal state.

In the course of debate, an attempt was made to reconcile those seemingly irreconcilable positions. The New York session of 1976 declared the economic zone as neither the high nor the territorial sea but a zone sui generis. The decision was not acceptable to the big maritime powers like the United States.

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The US remained strongly opposed to the provisions of the New York session on the juridical status of the economic zone. During his visit to the conference, the US Secretary of State Henry Kissinger stressed that the zone must be explicitly recognized as high seas, except for coastal-state resource rights.48

Further discussions on the same issue at the subsequent sessions revealed a persistent dichotomy between the maritime states on the one hand and territorialists on the other. As the impasse continued, a representative of fifteen-state negotiating group was established to discuss the matter. The group produced texts on the economic zone that were deliberately ambiguous.49 The text allowed each side to claim a victory. The US could argue that it had maintained high seas freedoms in the zone while the patrimonialists and territorialists could claim that the zone was not high seas.

Deep Seabed Mining

The question of seabed mining proved to be the most controversial issue before the Conference as the nations, in spite of their relentless effort, could not find a final solution to the problem. There had been much discussion and less compromise as to how the seabed resources, mainly Potato sized nodules (containing valuable manganese, copper, cobalt and nickel) which were available under the high seas, far from any nation’s territorial waters should be exploited for the benefit of the mankind as a whole. A number of proposals had been made both by the developed, and the developing countries, in several sessions of the Conference to solve the matter satisfactorily. In all these meetings, the nations disagreed mostly on three related issues i.e., the question of who may exploit the area, the condition of exploitation (i.e., rules and regulations to govern mining), and the economic implications of seabed mining for land-based producers.

On the issue of who may exploit the deep seabed, head of the US team John R. Stevenson, at the Conference session envisioned a seabed authority that would issue licenses to states or companies to explore and exploit seabed resources. The spokesmen for the developing nations, on the other hand proposed that the exploration
and exploitation of the resources of the area should be conducted directly by the seabed authority.

There were wide differences of view regarding the rules and regulations of seabed mining. The developed nations pressed for a detailed "mining code" that would be incorporated in the treaty. The United States was particularly eager to limit the power of the authority to discriminate among ocean miners or to impose unreasonable terms and conditions. The developing countries preferred to accord the authority maximum flexibility, to determine rules and regulations and wished to insert only general guidelines in the treaty.

The third area of contention was the economic implications of seabed mining for the land based producers of copper, cobalt, nickel and manganese. Indonesia which was a good reservoir of all these mineral resources, was particularly fearful that seabed mining would lead to price reductions for its mineral exports. According to the head of the Indonesian delegation, Mochtar Kusumaatmadja such price reductions might have a harmful effect on the economies of land-based producers because of their heavy dependence on mineral exports. Indonesia, therefore, demanded that the seabed authority should be given the right, directly or
indirectly to determine production as well as price of deep-sea mineral resources.

But the United States was opposed to granting the seabed authority the right to production or price controls on seabed mining. Instead, the benefits to all consumers of increased supply of seabed minerals were stressed. The United States further stated that seabed production would have minor economic impact on land-based production and this would be limited to the producers of cobalt (Zaire) only. When, in spite of much discussion on the question of deep sea mining no decision could be reached at the meeting, the matter was deferred to the next session.

The 1975 Geneva session commenced in a conciliatory mood. The developing countries took the view that they had made an important concession at Caracas in agreeing to include basic conditions of exploitation in the treaty. Moreover, its leadership indicated that there might be some new flexibility on decision making and other issues, related to the structure and procedures of the international authority.50

The US delegation expressed its willingness to consider basic conditions in the treaty as opposed to

detailed regulatory provisions. The United States also agreed to consider a system of joint ventures as the single method of exploitation. The system would include profit sharing and the reservation of banking sites for the authority. Each applicant would submit two sites of which the authority would select one as a reserved area. In these areas the authority would negotiate with applicants for the best financial arrangements and transfer of technology.

On the basis of accommodations made by both sides, a new draft on basic conditions of exploitation was produced.\(^{51}\) It sought to accommodate developed countries through a parallel system of contractual joint ventures where sites would be reserved for states as well as for direct exploitation by the authority. But the new text was not acceptable to the United States.\(^{52}\) When the proposal was disowned by the developed countries, the developing countries returned to their original position on direct and effective control of seabed mining by the authority.

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\(^{51}\)UNCP/Cab. 12/C.1, issued on 9 April 1975.

The deliberations on seabed mining took on a new importance by 1976. Several developments in the United States affected the 1976 negotiations directly or indirectly. For example, on 13 April 1976, the US Congress established a 200 mile Fishery Conservation and Management Zone to become effective on 1 March 1977. President Ford approved this action, over the opposition of the State and Defence Department, principally because of election year politics. The bill not only reduced the support of US coastal fishermen for a treaty, but also alerted other nations to the fact that the US would move unilaterally if the conference failed to move toward agreement. This fact stimulated the land-based mineral producers to undertake negotiations. After reviewing the new draft, which was adopted at the end of the Geneva session, Many members of the developing world did not view the draft favourably.

During the course of 1976 negotiations, the United States proffered a number of compromises at the spring session. They included the right of the Enterprise to mine; a system for banking sites; transfer of mining technology to the authority; financing of the authority;

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a production control formula; and periodic review conferences. The US Secretary of State Henry Kissinger stated at the spring session of the Conference that, "As part of a parallel system that includes assured access for states and their nationals, the United States would be willing to help the enterprise get into business simultaneously or virtually simultaneously with other miners and support a review of the system of exploitation after about twenty five years".

The United States also circulated an informal text on composition and voting of the Council which gave special protection to a variety of interests, particularly consumers and land-based producers. In turn, the US sought guaranteed non-discriminatory access for states and state parties and suitable provisions for the composition of the proposed Council, and the method of voting which was not acceptable to the developing world.

Therefore, at the beginning of the 1977 New York Session, it was widely perceived that negotiations on the deep seabed constituted the principal obstacle to a

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56 Ibid.
57 Congress and the Nation, no.54, p.563.
law of the Sea treaty. There were, however, a few factors that provided some occasion for optimism with respect to the possibility of reaching an agreement. In the first place, the US Secretary of State Henry Kissinger had made a number of proposals, and the 1976 sessions provided the bases for a fruitful discussion. In the second place, the developing countries hoped that the new Carter Administration might offer some additional compromises. Thirdly, a number of developing countries were ready to begin serious negotiations because they feared that further impasse would thwart a treaty and provoke unilateral mining by developed countries. And finally, the intercessional discussions held in Geneva from 24 February to 11 March, had reflected a growing acceptance of an ill-defined system of parallel access to the seabed mining.58

In the light of these expectations, the sixth session proved disappointing. The new draft proposed that two-thirds of the growth in the nickel market should be reserved for seabed mining rather than the 100 per cent sought by the US or the 50 per cent proposed by the developing world.

Similarly, on the question of voting in the Council, the text arrived at a middle ground. The US had

58UN Doc. A/CONF.10, 10 July 1977.
proposed weighted voting for producers and consumers of seabed minerals. The developing countries, on the other hand, sought a strictly geographic or regional distribution of Council membership.

Whereas most of the proposals of the working group were acceptable to the United States. The Committee's technique of splitting the difference between opposing views were unacceptable, and on that particular clause the Americans sought revisions. The quick and firm US response came as a surprise to the members of the developing world. Because, under the former Interior Department negotiator, they had grown accustomed to a more accommodating US policy and kept expecting that the new administration would offer some more compromises. The US negotiators, on the other hand, changed the previous pattern of negotiations and reduced the range of further US compromises.

One may ask why the US policy changed so suddenly? The change was perhaps due to several factors. In the first place, for the United States, the period after 1976 marked a change as well. The departure of the

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Nixon-Ford Administration brought a change in the principal US negotiators, adding a different Congressional Executive relationship. Throughout the Nixon-Ford years, the administration had a relatively free hand to determine US policy. The passage of the US claim to a 200 mile fisheries zone by the Congress marked the end of unchallenged executive branch ascendancy.

Apart from the discontinuities between 1976 and 1977, the international politics of the Carter years also affected the Law of the Sea negotiations. The new administration's emphasis on human rights and non-proliferation not only troubled its relations with traditional US allies, but also embittered its relations with the Soviet Union. While US policies on the Panama Canal Treaty, human rights, and civil strife in other countries, were more congenial to the Group of 77, the US continued to hold stricter economic policies in a number of North-South negotiations. The preoccupation of the period, mainly OPEC's oil price increase and its impact on the US economy forced the United States to pursue a restricted seabed mineral commodity policy.

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However, the US rejection forced the developing countries to adopt a new text. The revised draft contained certain points which were not acceptable to the United States again. The new draft, instead of providing assured access for private or state firms, asked provided for technology transfer by contractors. Moreover, the text did not include limits on the financial burdens to be borne by contractors. It set a more stringent limit on seabed production than had the previous text and granted the seabed authority the power to regulate all mineral production from the seabed. Other problems included reduced voting protection for the developed countries in the Council, allocation of benefits from seabed mining to states and people that were not party to the convention, and the provision that the mining regime would become a "unitary" system after twenty-five years if the review conference was unable to reach agreement. The United States protested the revisions as unacceptable in both content and in process. As a result the US ambassador to the UN, Eliot Richardson indicated at the Conference that the US would undertake a most serious and searching review of both the substance and procedures of the Conference.

In a statement to the press in New York on 20 July 1977, Richardson stated that the new text concerning the deep seabed-mining deviated markedly from the previous
text which had been prepared on the basis of "full, fair and open discussions", was inconsistent with the US interest. He said that, the new draft can not be viewed as a substantive contribution to further negotiations as it was released only after the session got terminated without having discussion with other representatives.61

In his testimony before the House Committee on Commerce, Science and Transportation and the Subcommittee on Public Lands and Resources of the House Committee on Energy and Natural resources on 4 October 1977, Richardson stated:

What is involved here is the establishment of a regime for half of the Earth's surface. While today's technology points only to manganese nodules, there is no telling what lies ahead in the future. We simply cannot agree to a regime which would unnecessarily inhibit, and perhaps even prevent, deep seabed development. To do so would make a mockery of the "common heritage of mankind" and reduce to a pitiful trickle to benefits that could otherwise accrue - not only to the entrepreneurs who will risk their capital but also to mankind as a whole, in particular the developing countries.62


The US decision to review the whole draft made the issue more complex and technical as a result of which no decision could be taken even at the following session. The 1978 session proved to be a total failure because of the US and other developed countries opposition to the new formulations produced by the Negotiating Group I. The new draft provided that the Contractor would transfer technology to the Enterprise, upon the award of a contract, on reasonable commercial terms that would be subject to compulsory conciliation and arbitration. A requirement for the transfer of technology to developing countries on similar terms was also included. It also provided that if the review conference failed to reach an agreement after five years, eliminating the earlier provision for automatic conversion to a unitary system. On the question of the composition of the Council and its voting, minor changes were made.

Among the difficulties noted were: the obligation on the part of the miners to transfer technology for the benefit of the Enterprise to continue indefinitely, long beyond the time needed to put the Enterprise in business and an obligation on miners to transfer technology to developing countries that desired to exploit reserved

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sites in place of Enterprise. The moratorium provision in the review clause came under heavy attack. Also criticized were the interim production limitation and the failure to improve adequately the previous provisions regarding commodity agreements.

The ninth session commenced in the face of a difficult negotiating situation. Several developments in the United States affected the 1979 negotiations directly or indirectly. On 14 December 1979, the US passed, and sent to the House of Representatives, a bill regarding deep seabed mining that would not, however, allow mineral recovery to commence before 1982. (In the 95th Congress, 2nd Session, deep seabed mining legislation was passed by the House of Representatives but was not voted upon by the Senate before adjournment). The bill alerted other nations to the fact that the US would move unilaterally if the


67Congress and the Nation, n.54, p.588.

68Congressional Record, 1979, p.18554.

69Ibid., 1978, p.7341 and 7382.
conference failed to move toward agreement. The developing countries apprehended that such unilateral measures would prejudice negotiations and would have a negative impact on them.

On 23 August 1979, the Chairman of the Group of 77 made a statement that challenged the legality of national legislation authorizing deep seabed mining. He argued that its enactment would violate the rules of good faith in negotiations and have an impact on economic co-operation between developing and developed countries. Speaking on behalf of the Chairman of the Group of 77, Hamilton Shirley Amarasinghe of Sri Lanka stated:

The dark cloud created over this Conference by these actions would not only jeopardize the conclusion of the treaty as a whole, but may well precipitate a chaotic situation with regard to the Law of the Oceans. The consequences would be far-reaching. No one can expect in such a situation, to enjoy all the guarantees regarding international uses of the oceans which have already been so arduously negotiated at this conference. Indeed, the failure of these most important Conference in the history of the United Nations would have a disastrous effect on the entire system of multilateral negotiations under the aegis of the United Nations.70

70Letter of 23 August 1979 from Chairman of Group of 77, UN Doc. A/Conf. 62/89.
The developing countries viewed the unilateral legislation as illegal, and expressed their unwillingness to accept it. The Chairman further added:

The Group of 77 cannot accept that any rights may be acquired by any state, person or entity by virtue of such unilateral measures. Those who through their own actions would create a situation which impels them to seek a recognition of such rights at this conference must clearly know from now that they will be creating an additional obstacle to the conclusion of a treaty. The Group cannot be expected to alter its long-standing and well-stated position rejecting the recognition of acquired rights. We cannot be expected to give a cloak of legality to what is illegal ab initio.71

The Foreign Ministers of the Group of 77, meeting in New York adopted a resolution on 29 September 1979 in which they declared that any unilateral measures, legislation or agreement restricted to a limited number of states on seabed mining, were unlawful and violate well-established rules of international laws. Such unilateral acts would not be recognized by the international community. The resolution also urged all states to refrain from taking any unilateral action on seabed mining and appealed to them to bring the Third UN Conference on the Law of the Sea to a successful and early conclusion.72

The US representative Eliot Richardson on the other hand argued that mining of deep seabed was an exercise of the freedom of the high seas and any restraints on that could only be imposed by agreement, and neither the Declaration of Principles nor the convention of the Conference could alter or eliminate these freedoms. 73

The US action prompted the developing countries to stand firm in their approach with the hope that if the group simply stood firm, more concessions would be forthcoming. Therefore, during the intercessional discussions in the 9th session the developing countries had no intention to change most of the provisions of the pervious draft. With regard to payment by contractors, the developing countries sought a flexible formula for revenue sharing. Provisions for financing the Enterprise were changed little. The United States continued to oppose the formula whereby state parties would provide half of the Enterprise's financing for its first site in interest free loans, and the other half in loan guarantees. Similarly, on the question of transfer of


technology little improvement was made and other remained unchanged.\textsuperscript{74}

The ninth session commenced in a conciliatory mood. Despite previous setbacks and the passage of US Mining Legislation, some negotiations took place.\textsuperscript{75} Important among them was the modification of anti-monopoly provisions of the Review Conference\textsuperscript{76}

In the light of these negotiations a consensus seemed within reach and it was expected that a final agreement would be arrived at in the coming session. But to the disappointment of every participant, the US State Department unexpectedly issued a statement and asked for more time to study the accord.\textsuperscript{77}

On 2 March 1981, the following statement was issued by the US Department of State:

After consultations with the other interested Departments and Agencies of the United States Government, the Secretary of State has instructed our representative to the UN Law of the Sea Conference to seek to ensure that the negotiations do not end at the present session of the Conference, pending a policy review by the United States Government. The

\textsuperscript{74}UN Doc.A/Conf. 62/SR. 118 (Provisional), 30 August 1979.

\textsuperscript{75}Congress and the Nation 1981-84, vol.6, p.437.

\textsuperscript{76}UN Doc. A/Conf. 62/100, 28 July 1980.

interested Departments and Agencies have begun studies of the serious problems raised by the Draft Convention, and these will be the subject of a thorough review which will determine our position toward the negotiations.  

Why the US policy changed so suddenly? This was perhaps due to the unexpected defeat of President Carter at the hustings. With the coming of the Reagan Administration the US policy became more assertive and aggressive, in order to recover America's lost power and prestige in the face of growing threat of communism. This led the United States to change its view on the question of deep sea mining.

In his testimony before Congress, Ambassador James L. Malone summarized the reasons for the US action. He said, "since many of the provisions of the draft are inconsistent with the interests of the United States, the administration has decided to review the text."
The US policy review stunned the developing countries as they expected that an accord would be reached in the tenth session. The Chairman of the Group of 77 Inam ul-Haque summarized the reaction of the developing countries in the following words:

Even if the United States had not participated in the Conference for all these years, and was a new comer to the negotiations, it would be unrealistic for it to seek and do what had been achieved already, as a condition for its participation in the treaty. The US Government cannot reject the work of over 150 nations including its own predecessor governments for almost a decade, for in doing so it would be destroying the principle of good faith negotiations.

He went on to say:

We cannot allow the work of so many nations over so many years to be scuttled. Neither our desire for universe nor our preference for consensus should be construed to mean that only one country or a group of countries, large or small, weak or powerful will be allowed to distract from the basic objective that the sea and its resources must be governed by international law and regulations which are fair and equitable.80

The Chairman of the Group of 77 strongly asserted that all States are bound by the treaty and requested the United States to participate in the forthcoming session. But the US responded by saying that it was not

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bound by the text and on the question of participation in the forthcoming convention it showed its unwillingness to take part. Addressing the conference, the US head of the delegation, James L. Malone stated:

Our review of the draft convention has revealed that Part XI of the text; would, in its present form, be a stumbling block to treaty ratification. The US chief of the delegation said that his government was certain that its policy review would not be completed before the autumn of 1981 and felt that it would be advantageous if all delegations were to engage in bilateral and multilateral consultations before taking a final position. Accordingly, the United States believed it would be preferable to delay the next session until early in 1982, at that time his government would be able to state its definitive views.81

The US decision to stay away from the Conference created dissatisfaction among the developing countries, and they looked forward eagerly for the forthcoming review report. When the US President indicated on 29 January 1982 that the United States would return to the negotiating table and work with other countries to achieve an acceptable treaty, the Chairman of the Group of 77 welcomed the US decision and appealed to it not to proceed with its plan for a separate treaty.

When informal consultations resumed in New York with the United States on 24 February 1982, the Conference was again confronted by a new US proposal on

the fourth day of the session. On 28 February 1982, the US President again viewed the previous draft as favourable to the developing world and proposed more than 230 changes on provisions relating to mining of the ocean floor.\(^8^2\) He also warned that unless the US proposal was accepted by the Group of 77, the five potential deep seabed powers would be forced to sign a "mini treaty" bypassing the conference.\(^8^3\)

The US proposal angered most of the developing countries. Reacting to the US view, the Chairman of the developing countries Alvaro de Soto of Peru stated: "We had hoped that the proposals the US would make, would be within the framework of the draft convention and would take into account the legitimate interests of other countries."\(^8^4\)

In his view it was wrong for the US to think that the treaty draft reflected only the views of the Third World as opposed to its own. The Group warned that if attempts were made to reopen the package, which had been reached after nine years of search and compromise all

\(^{8^2}\) *Public Papers of the Presidents of the United States: Ronald Reagan, Book-I - 1 January to 29 June 1982, p.92.*

\(^{8^3}\) *Department of State Bulletin, vol.82, no.2060, March 1982, pp.54-55.*

\(^{8^4}\) *UN Doc. A/Conf. 62/L. 145/Add. I, 29 April 1982.*
around, would dissolve and the total package would unravel. He further said that any to attempt at conciliation of the new amendments with existing agreements would set the negotiations back to the early 1970s and the beginning of a new bargaining round, which would take another five years with no greater likelihood of success. He also expressed that it was not possible on their part to accept the US proposal. Any expectation that the Group of 77 would be prepared to discuss the range of options contained in the US paper of 24 February, would be unrealistic and unrealisable.

The Group of 77 then decided to take the decision by vote instead of consensus in the next meeting which was supposed to take place at Venezuela. When the new rounds of talks advanced on 30 April 1982 at Venezuela, the Conference passed the Law of the Sea Convention with 130 countries in favour, 4 against and 17 abstentions. (Those voting "no" or abstaining appear small in number but represent countries which produce more than 60 per cent of the world's GNP and provide more than 60 per cent of the contributions to the UN.)

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85Public Papers of the Presidents of the United States: Ronald Reagan, Book-II, 1 July to 31 December, 1982, p.911.
Reacting to the developing countries decision of 30 April 1982, the President of the United States Ronald P. Reagan stated on 9 July 1982:

Our review of the Convention recognizes, however, that the deep seabed mining part of the convention does not meet US objectives. For this reason, I am announcing today that the US will not sign the convention as adopted by the Conference, and our participation in the remaining Conference process will be at the technical level and will involve only those provisions that serve US interests. 86

In his testimony before the House Foreign Affairs Committee on 12 August 1982 Ambassador Malone stated: "These decisions reflect the deep conviction that the United States cannot support a deep seabed mining regime with such major problem". 87

The US decision not to participate in the forthcoming sessions created disappointment among the developing countries. The delegation from Indonesia shared this feeling of frustration. Its leader Mochtar Kusumaatmaja in a statement said:

It is a disappointment that the US is not to participate in the coming Convention. It is a very difficult problem which could only be solved by both the developing and developed countries after years. It is the sincere hope of the developing world that all states should become parties to the forthcoming

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87 Ibid., vol.82, no.2067, October 1982, pp.48-49.
To the utter surprise of every participant, the leader of the US delegation to the final session Thomas Clingan, again defended his decision not to sign the treaty. This policy position was maintained by the United States throughout the Reagan Administration. While declaring a new Ocean Policy for the United States, the President emphatically stated: "The US cannot and will not sign the UN Convention on the Law of the Sea."  

In a testimony before the Congress on 24 September 1984, the US Assistant Secretary for Oceans and International Environmental and Scientific Affairs, James L. Malone declared the convention as "totally flawed" and expressed his government's inability to support the document in its present form. In addition

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89 Public Papers of the Presidents of the United States, n.90, p.1652.

90 Ibid., p.379.

to that several Congressional hearings of the following years repeatedly supported the US position on the law of the Sea.

Based on the preceding discussion, one gets an inescapable impression that the United States was not very co-operative with the developing countries in understanding their interests and aspirations. This was evident from the fact that whenever an attempt was made by them to arrive at a satisfactory conclusion, the proposal was rejected by the US and other developed countries on some pretext or the other. The interests of the Third World was hampered to a great extent because of this inconsistent behaviour of the United States. Being an archipelagic developing country Jakarta's interests were equally suffered. Indonesia and other developing countries also realized that full American co-operation was necessary for the successful conclusion of a comprehensive treaty regarding the Law of the Sea. They, therefore, appealed that the US should in the coming years review its position and accept the convention as a global and legal working framework for cooperation in maritime affairs.