

THE LAW OF THE SEA: AN HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES by James B Morell, Jefferson, North Carolina, McFarland & Co, 1992, xiv + 482pp, ISBN 0 89950 634 8, US\$50.

The Third United Nations Conference on the Law of the Sea first met in New York in December 1973. It eventually concluded in December 1982 in Montego Bay, Jamaica with the signing of the United Nations Convention on the Law of the Sea (UNCLOS). The Conference, which lasted 585 days in session, still represents the largest multilateral treaty-making conference in history from the perspective of length of time taken and the end result — a Convention of more than 400 articles, including nine annexes. Yet while the Conference and the resulting Convention are considered one of the great successes in international law making, the actions of one state are seen to have substantially affected these successes and to even have placed in jeopardy the eventual entry into force of the Convention (at the time of writing 51 of the necessary 60 ratifications for eventual entry into force of UNCLOS had been received). Following the election in 1980 of President Reagan the United States called for a substantial review of the then draft provisions of UNCLOS. Of especial concern were those provisions dealing with the mining of the deep seabed which were seen to substantially affect the interests of US mining corporations. After a thorough review of the deep seabed provisions of the Convention, which constituted a fundamental aspect of the Convention's implementation of the "common heritage of mankind" concept benefiting developing countries, President Reagan announced in July 1982 that the US would not sign UNCLOS. Since that time the US has continued to reject UNCLOS and reaffirmed its opposition to the seabed mining provisions of the Convention.

James Morell sets out in this book to review the stand taken by the US towards UNCLOS, critically assessing its reasons for rejection of the Convention while at the same time reviewing the status of UNCLOS's Part XI provisions dealing with the deep seabed. He approaches this task by taking an historical look at the development of the law of the sea (Chapter 1) and then delves into the preparations for the Conference (Chapter 2) before reviewing on a session by session basis the actual conduct of the Conference (Chapter 3). This section of the book, which constitutes nearly one half of the written text, essentially revisits ground which has been covered by many law of the sea commentators since the conclusion of the Conference. Morell's style here is descriptive with little considered analysis of the events taking place. This approach, while being informative, does create frustration for the reader who is often left with little explanation for some of the amazing about-turns in US policy taken during the period between 1979-1981. During these crucial years, when a fundamental review of the Convention was being undertaken by the new Reagan administration at the very time Conference negotiators were seeking to finalise the Convention text in preparation for signature, a more detailed discussion of some of the reasoning behind the changes in US policy would have been helpful.

The second half of the book though does give way to a much more considered analysis of the US position and it is here that the greatest strength of this work is found. Chapter 4 is a considered review of the various stated objections of the US to Part XI of the Convention. These include issues such as Technology Transfer, Revenue Sharing, Production Controls, Supranationality, Decisionmaking Procedures, Assured Access, and Competitive Balance. Each of the various Convention provisions dealing with these questions are discussed and their operative effect considered. The dichotomy between the pre and post-Reagan US policy towards these questions are also often discussed with the polar distinctions between the negotiating views of various US representatives to the Conference only serving to further highlight the virtual overnight reversal in US policy towards Part XI of the Convention. However, even at this stage the author does not allow himself to be too involved in the debate, preferring instead to allow the events to speak for themselves.

Chapter 5 reviews the status of the current legal regime of the deep seabed in light of US arguments, the UNCLOS regime, and customary international law. Morell sums up the US position towards the deep seabed as follows:

The United States contends that deep seabed mining is a freedom of the high seas under customary international law, that US nationals enjoy a right of access to seabed minerals under an existing *res communis* regime, and that this right may only be altered by US acceptance of a different legal regime through processes of conventional or customary international law (p 155).

He then contrasts this with his own views on the current deep seabed mining regime. Morell argues that even if it can not be accepted that UNCLOS represents the current state of the law for the deep seabed, either because it has not entered into force or does not as yet represent customary international law, there are strong arguments to be made that at a minimum the deep seabed is not *res nullius* but rather *res communis* and not subject to unilateral exploitation by any one state. Morell's thesis then is that despite the stand taken by the US it has been unable to halt the development of a regime for the deep seabed which is substantially based on the concepts of *res communis* — the same concepts of resource sharing and development championed by the US during the late 1960s and in the early years of the Conference.

Morell's consideration of the current regime of the deep seabed launches him into a review of the Grotian freedom of the sea argument, whether the resources of the seabed are akin to marine living resources, and the status of the *res communis* doctrine. He concludes with the bold argument that *res communis* could be considered a peremptory norm of international law. All of these are issues of great complexity and it is regrettable that more effort was not taken to develop some of these questions further. While the doctrine of *res communis* was adopted without great controversy for the moon and outer space, its application to the deep seabed and Antarctica has been the subject of much debate. Unfortunately, Morell's rather brief discussion of whether the doctrine constitutes customary international law, or, whether it can be considered a peremptory norm of international law, does not do justice to the very complex international law arguments which must be presented to comprehensively make his case. However, what he does achieve is to demonstrate that given the substantial acceptance by many states of the provisions of Part XI of UNCLOS and the overwhelming support for the

common heritage/*res communis* doctrine prior to and during the Conference, the US argument for the application of an alternate regime for the deep seabed is extremely weak.

Morell has produced a very well written and researched book which is extensively referenced and footnoted. At times this is a distraction, not only because these notes are at the rear, but also because on occasion very substantive argument which has not been made in the text is to be found in the accompanying footnotes. By relying on this practice the author at times inadequately pursues his line of argument so that the reader is left pondering a series of complex international law questions. The criticism then is that while the book is evenly divided between details on US policy at the Conference and a review of that policy and the legal status of the deep seabed, the second half of the book deals with so many complex questions of not only the deep seabed regime but also of fundamental questions of international law that justice is not done to the subject matter in what amounts to only 110 pages of text. The short review of the current US attitude to the whole UNCLOS Convention is an example. Despite rejecting Part XI of UNCLOS the US has continued to assert that it is able to enjoy the benefits of other provisions of the Convention. However, the analysis as to whether the US can select and reject major provisions of UNCLOS, and the consequence this has for other states which have ratified the Convention, falls short of comprehensively dealing with the complicated questions of treaty and customary international law that this approach raises.

Overall, though the question of balance is a minor criticism in what amounts to a most valuable contribution to the law of the sea literature on the question of the current status of the deep seabed regime and whether the US can continue to reject UNCLOS in the face of increasing international acceptance. With the conclusion of the Reagan-Bush era in the White House, it now remains to be seen whether the administration of President Clinton will bring about a substantial change in US policy towards UNCLOS and the deep seabed regime.

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**RESPONSIVE REGULATION: TRANSCENDING THE
DEREGULATION DEBATE** by Ian Ayres and John
Braithwaite, Oxford, Oxford University Press, 1992,
205pp, ISBN 0 19 507070 4.

Ayres and Braithwaite is a challenging book. Despite a title redolent of European theories of law, it avoids an excess of high theory: instead it joins the search for an escape from the ideologically grid locked debate between advocates of the free market and that of "command economy" state regulation. They argue that there is a middle way — indeed that there is a

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