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THE LAW OF THE SEA TREATY: A REVIEW OF THE ISSUES

INTRODUCTION

On March 9, 1981, the Third United Nations Conference on the Law of the Sea reconvened in New York City, anxious to complete seven years of delicate seabed negotiations. Before this tenth session began, however, the Reagan Administration announced its intention to extend negotiations through the upcoming session in order that a full "policy review by the United States Government" could be conducted.

The U.S. decision to continue negotiations is, in part, a response to criticisms raised by the public and private sector which question the ability of the treaty to adequately defend vital U.S. economic interests in deep seabed mining as well as to protect sensitive technology necessary in accessing mineral nodules from the ocean floor. Additionally, critics have charged that the proposed text appears to contradict fundamental free market principles advocated by the United States, while favoring least-developed and Socialist bloc countries with capital and political advantages over Western signatories.

The current negotiations, therefore, are in a state of diplomatic flux. Participating nations have registered concern over the decision by the United States to extend the seabed talks, but the current session is moving ahead under the direction of T.T.B. Koh of Singapore, elected as president of this session on March 13, 1981.

The purpose of this paper is to briefly review past negotiations and examine the basic controversies involving the current Law of the Sea Convention Text as prepared by the Ninth Session of the Third United Nations Conference on the Law of the Sea held last summer in Geneva, Switzerland.

BACKGROUND

The earliest U.N.-sponsored Conference on the Law of the Sea was held in 1958 under the direction of the International Law Commission. This conference dealt principally with the question of seabed mineral exploitation, recognizing the freedom of states "to explore and to exploit the seabed and subsoil in all areas seaward of territorial waters."[1]

The legal discussion surrounding deep seabed exploitation began in earnest with a 1967 proposal by the Maltese ambassador to the U.N, requesting that the issue of deep seabed regulation be included on the agenda of the General Assembly.

The Note Verable submitted by the ambassador warned that uncontrolled exploitation of the seabed would lead to eventual militarization of the ocean floor and allow the more technologically advanced nations greater access to the seabed at the expense of their less-developed counterparts. Malta further proposed that the ocean's floor and its wealth was the "common heritage" of all mankind and, therefore, should be protected by international treaty from division among the states.

The primary desire of the United States at this time was to stave off the mounting wave of "creeping jurisdiction" -- the expanding claims of coastal states to increasingly larger territorial jurisdictions seaward. Continued expansion threatened the closure of over one hundred vital straits to free passage, thereby disrupting customary law regarding freedom of the seas.

Resolution 2467, passed on December 21, 1968, officially established the Standing Committee on Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction. This Committee was charged with insuring that exploitation of the ocean's floor "should be carried out for the benefit of mankind as a whole...taking into account the special interests of the developing countries...."[2]

The Committee was further instructed to investigate and study the means whereby the ocean's wealth could be successfully accessed and developed. This mandate has largely been abandoned as the ongoing economic and political debate between the developed nations of the "North" and the less-developed nations of the "South" has superseded the desire for an open development of the ocean floor.

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1 Theodore G. Kronmiller, The Lawfulness of Deep Seabed Mining, The National Oceanic and Atmospheric Administration, Department of Commerce, Washington, D.C., 1979, p. 19.

2 U.N. Resolution 2467 as quoted in Kronmiller, p. 25.

On December 17, 1970, the General Assembly of the United Nations voted 106 to 7, with 6 abstentions, to convene an official Law of the Sea Conference charged with:

> ...a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial seas..., international straits, fishing and conservation of the marine environment, the prevention of pollution and the [promotion] of scientific research....[3]

Over the next eleven years, the conference became clearly polarized between the bloc of developing nations -- the Group of 77 -- and the industrially developed nations of the West. This diplomatic struggle centered around the previously introduced notion of mankind's "common heritage" to the resources of the ocean's floor. The South maintained that the more technologically advanced nations of the North would "disinherit" the less-developed nations through exclusive exploitation of the seabed. Consequently the "disadvantaged" countries favored the establishment of a deep seabed authority empowered to oversee and regulate every aspect of seabed development, insuring that profits be transferred to the developing nations.[4]

The United States and other developed countries have constantly reaffirmed the notion of "common heritage," but have insisted that access to the seabed be assured for both public and private mining interests, arguing that the free market system must be allowed to operate on the ocean's floor unfettered by artificial quotas and production constraints.

Throughout three separate conferences, issues of discussion have been couched in terms of the greater North-South debate. Though both sides have sought compromises throughout, the Reagan Administration's decision to forestall further negotiations reflects the concern expressed by many that the current agreement makes too many concessions to the Third World at the expense of developed nations.

GUARANTEED ACCESS

The United States is critically deficient in domestic supplies of manganese, nickel and cobalt -- materials vital in the production of steel, and consequently important to the nation's economy and security. Traditional land-based sources of these precious minerals are politically unstable and subject to increased international demand, causing shortages and ever-increasing prices.

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3 U.N. Resolution 2750 as quoted in Kronmiller, p. 42.

4 See Third United Nations Conference on the Law of the Sea, Official Records (1974), Art. 20, in Kronmiller, p. 54.

Indeed, current producers may exhaust all known land-based supplies of these minerals within the next fifty years.

The deep seabed regime currently under consideration does not guarantee U.S. access to these vital mineral resources and may ultimately deny their availability. The International Sea-Bed Authority would have sole responsibility in administering mining rights, a decision-making process which is likely to be highly politicized.[5] Consequently, a state's ability to secure mining plots is in direct relation to its position of influence in the Assembly and among its members.[6] The current one vote-one nation clause in the Assembly effectively eliminates any veto from the developed nations, thereby casting "serious doubt on assured access by developed states."[7]

Secondly, the principal appendage of the Authority, the Enterprise, would operate in direct competition with private and state companies in a parallel system, further inhibiting free access to seabed minerals:

> The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2(a), as well as transportation, processing and marketing of minerals recovered from the Area (art. 170, para. 1).

This dual structure would appear to encourage competition between the Enterprise and the private mining sector, but in reality it acts to ensure the Enterprise's competitive superiority. The Enterprise would operate under Convention authority, making it the beneficiary of mandatory transfers of technology and funds from the states and the inevitable recipient of political and economic favoritism vis-a-vis its institutional relationship with the Sea-Bed Authority (art. 144, art. 171, para. (a)).

Additionally, the countries of the Third World have introduced and supported placing a production ceiling on the amount of seabed minerals which may be extracted from the ocean's floor (art. 151, para. 2(b)). This plank of the Convention text is aimed at protecting land-based mineral producers, but it also ensures continued U.S. dependence on foreign supplies of strategic minerals by blocking open access to the seabed. Finally, the

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5 The International Sea-Bed Authority is the organization through which deep seabed mining would be administered and regulated. See the Draft Convention on The Law of the Sea-Informal Text, 2 September, 1980, Section 5, articles 156-158 (hereafter referred to as the DCLOS).

6 The Assembly would be the supreme legislative organ of the Authority to which all signatories belong. See DCLOS, articles 159 and 160.

7 John Breaux, "The Diminishing Prospects for an Acceptable Law of the Sea Treaty," Virginia Journal of International Law, Winter 1979, Vol. 2, p. 259.

text prevents any exploitation of non-manganese nodules until a comprehensive regime can be agreed upon in the distant future (art. 151, para. 3 and 4). In effect, the Group of 77 wishes to deny developed nations access to any additional mineral resources until an agreement satisfactory to the Third World can be constructed.

It is questionable, therefore, whether the current Convention text protects the United States' and other developed nations' right of access to the minerals of the seabed, now or in the future.

MANDATORY TECHNOLOGICAL TRANSFERS

At the fifth session of the Conference, held in New York during 1976, Secretary of State Henry Kissinger agreed to the transfer of technology to the Sea-Bed Authority on three conditions:

1. That the United States be guaranteed access to the seabed and the mineral nodules thereon.

2. "Suitable representation" in the Authority and its various decision-making bodies be assured.

3. Production controls on deep sea mining be eliminated from the convention text.[8]

Kissinger warned at that time that the United States:

> is many years ahead of any other [country] in the technology of deep seabed mining, and we are in all respects prepared to protect our interests. If the seabeds are not subject to international agreement the United States can and will proceed to explore and mine on its own.[9]

Though Kissinger's conditions were largely ignored, the notion of technological transfer was seized upon by the South and made a precondition to any development of the seabed. Representatives of the Third World maintain that mandatory transfers of technology are necessary if the poorer countries are to share in

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8 "Law of the Sea: A Test of International Cooperation," Address by the Honorable Henry A. Kissinger, Secretary of State, Before the Foreign Policy Association, U.S. Council of the International Chamber of Commerce, and U.N. Association of the U.S.A., New York City, April 8, 1976 (State Department Press Release No. 162, April 8, 1976) as quoted in Kronmiller, p. 72.

9 Ibid., p. 73.

the resources of the sea. More importantly, inexpensive technological transfers are a vital component of the LOS agreement itself and underpin the developing world's plan for a "New International Economic Order."[10]

The North maintains that seabed technologies would be made available to Third World nations through the international marketplace. Even so, the U.S. delegation has conceded mandatory transfers to the Enterprise with the stipulation that seabed technologies not be made directly available to the developing nations (art. 144, para. 2(b)). However, Third World and Eastern Socialist-bloc countries, through their participation in and control of the Authority will have indirect access to all transferred technologies, far below the market price. It is unclear, therefore, how these transfers can be made "on fair and reasonable terms" as stipulated by the United States under the current agreement and still protect producer rights of proprietorship (art. 144, para. 2(b)). Additionally, the nature of mandatory transfers would have a profoundly negative impact on technological development in the seabed field, thereby undermining a major U.S. interest in the development and protection of such high level technologies.

Finally, any mandatory transfer of technology in the regime would have a long-range and pervasive impact on future dealings with Third World countries in other, non-seabed related areas. The Group of 77 considers technology to fall within the common heritage of mankind and hence all nations "have the right of access to technology in order to improve the standard of living of their people...."[11]

Any agreement by the United States to such an open-ended technological transfer sets the stage for a gradual eroding of the right to protect and competitively market highly valuable technologies in the future. Such a precedent could prove costly to the U.S. due to the nation's economic reliance on technological development and foreign sales, and could undermine the negotiating position of the United States in similar conferences in the future.

PRODUCTION CEILINGS

It is in the interest of land-based producers to seek limits on the amounts of minerals which may be extracted from the ocean's

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10 See Susan P. Woodard, "The Third World: New Realities and Old Myths," Backgrounder No. 114, The Heritage Foundation, March 18, 1980, p. 5.

11 See United Nations Conference on Trade and Development, Report of the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology on its Fifth Session, Annex I, U.N. Document TD/AC.1/15 (1978), Preamble, art. 2 (hereinafter cited as Code), as quoted in Breaux, p. 263.

floor. Less-developed, primary producers fear that uncontrolled seabed mining would have a significant impact on their economies as markets for mineral commodities became more competitive, and sales to previously larger consumer-states fall off.

Mandatory production ceilings run contrary to stated U.S. objectives for several reasons: first, availability of vital minerals would be artificially limited, leaving the notion of guaranteed access seriously flawed. Second, with a reduced number of mine sites available, selection would be left to the Authority; the selection would then be highly politicized and weighted in favor of Third World nations (arts. 148, 159, 160, 161, 162). Third, the maintenance of international production ceilings in this area could set a precedent on raw material production quotas contrary to U.S. interests. As the largest consumer of raw materials in the world, the United States could face artificial shortages of other important resources as producers attempt to manipulate the market to their advantage.

By severely restricting the amount of minerals which may be removed from the seabed, the United States will not be able to make significant advances toward global resource independence. Rather, the U.S. will institutionalize its continued dependence on Third World and potentially unstable producers of strategic minerals.

With the number of mine sites limited by the production ceiling, applicants will inevitably be screened and selected by the Authority based on criteria slanted in favor of the Third World. The "effective participation of developing states" is to be ensured by the Authority and the selection of mining sites and contractors would reflect that directive, thereby running contrary to the U.S.-held policy of unrestricted access to the seabed (art. 148).

Thirdly, the instituting of international production ceilings in the seabed regime sets a potentially dangerous precedence which may have spillover effects in other, non-seabed areas. There is little to support the notion that the seabed regime will be viewed as a unique international agreement by the Third World. To the contrary, developing nations view the seabed regime as a legitimate precedence on which to base demands for similar multi-national agreements in other areas.[12]

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[12] Richard G. Darman, "Precedential Implications of a Deep Seabed Mining Regime," Testimony before the Subcommittee on Oceanography of the U.S. House of Representatives, Committee on Merchant Marine and Fisheries, August 17, 1978, p. 5.

GOVERNING THE SEABED REGIME

One of the most questionable aspects of the proposed convention is the Treaty's system of governance. The basic ideological/economic battle between the North and South which permeates the negotiations becomes most apparent in this portion of the accord.

The developing nations of the world view a realignment of political power as absolutely essential in bringing about the "New International Economic Order." Much of the current leadership of the Third World maintains that representation based on economic or technological contributions should be rejected and that a "true democracy" among nations should take its place.

The North is willing to provide poorer nations with economic assistance through bilateral aid, but remain opposed to any compulsory measures as imposed by an international regime. In particular, developed nations do not favor a binding agreement at the international level which would reduce their sovereign political power vis-a-vis the South or remove the opportunity to "veto" unfavorable policies contrary to their national interests.

The Law of the Sea conference text proposes establishment of a bicameral system within the Authority: an Assembly made up of all participating states and an Executive Council chosen among the Assembly and representing the various political/economic/geographic groups found within the Assembly (art. 158, para. 1).

As outlined in article 159, the Assembly will operate on a one member-one vote basis with decisions made by a two-thirds majority of the members present and voting (art. 159, paras. 5 and 6).

> The Assembly, as the sole organ of the Authority consisting of all the members, shall be considered the supreme organ of the Authority to which the other principal organs shall be accountable (art. 160, para. 1).

The Assembly is empowered to elect the members of the Council, set policy for the Authority and its operating appendage, the Enterprise, as well as determine the "Assessment of the contributions of members...to the Authority...based upon the scale used for the regular budget of the United Nations" (art. 160, para. 1(a), (e)).

The United States and its allies will face a body dominated by countries of the Third World without the opportunity to exercise any veto power (as is the case currently in the United Nations), while at the same time providing a majority of the technology and a large share of the capital necessary to operate the Authority and the Enterprise.

Representation on the Council, which acts as the executive chamber of the Authority, is clearly designed to benefit Third

World and Socialist-bloc countries at the expense of the developed world. The United States is not guaranteed a permanent seat on the Council, but must compete with the other developed nations for representation, seriously jeopardizing Western attempts at collective action on the Council.

The Council membership is elected out of the Assembly body and divided into four categories of representation totaling 36 members:

1. Four members from among the eight states which invested the largest amounts of capital, "including at least one nation from the Eastern (Socialist) European region."

2. Four members from among the largest consumers of land-based raw materials to be derived from seabed mining, "and in any case one state from the Eastern (Socialist) European region."

3. Four members from among the major exporters of the affected minerals, including two developing nations whose economy is heavily dependent on the affected minerals.

4. "Six members from among the developing States."

5. Eighteen members selected geographically to include: "Africa, Asia, Eastern Europe (Socialist), Latin America, Western Europe, and others" (art. 161, para. 1).

Clearly, the United States and other developed nations are disproportionately underrepresented vis-a-vis the developing and Socialist-bloc nations. This distorted formula of representation is codified by the Treaty and will continue unchanged into the future. By failing to secure permanent representation on the Council, the United States has agreed to provide capital and technology to an organization in which it will be unable, now or in the future, to exert proportional influence.

Equally disturbing is the automatic review to be conducted "fifteen years from 1 January of the year in which the earliest commercial production commences..." (art. 155, para. 1, 2.). The purpose of this review conference is to ascertain whether the policies initiated in the previous fifteen years have successfully achieved the goals of the convention as interpreted by the Assembly. If not, the Assembly is empowered to revise the system of seabed management, binding upon all parties by a two-thirds majority vote of the Members (art. 155, para. 4). Not only is this potentially disastrous for the United States and its allies, but it sets an international precedence by eliminating the right of preemptive veto and encroaches on the doctrine of national sovereignty.

This proposed system of governance fails to provide the United States with adequate representation in either of the two governing bodies and endangers future U.S. access to vital seabed minerals.

ECONOMIC REDISTRIBUTION THROUGH THE AUTHORITY

President Boumedienne of Algeria officially voiced the Third World's call for a "New International Economic Order" at the Sixth Special Assembly of the United Nations in 1974. The intent of this "new order" is to facilitate a global redistribution of wealth from the developed nations of the North to the less-developed nations of the South through the restructuring of present international political, commercial and economic organizations, giving the poorer nations preferential treatment as well as access to advanced technologies and commodities protection.

The proposed Law of the Sea text is viewed by nations of the Third World as the primary vehicle through which this redistribution of wealth may be initiated. In 1974, at the U.N. Conference on the Law of the Sea, Colombia maintained:

> The International Authority should be a democratic body responsible for bridging the gap between the rich countries and the poor countries and establishing a fairer and more just system of international relations (Annex III, art. 13, para. 2).

As outlined in Annex III, Article 12, the Draft text requires private companies to provide the Enterprise with a large amount of entry capital, filing fees, and a substantial annual "financial contribution" for every year the particular company operates on the seabed.

> A fee shall be levied for the administrative cost of processing an application for a contract of exploration and exploitation and shall be fixed at an amount of $50,000 per application....
>
> A contractor shall pay an annual fixed fee of $1 million from the date of entry into force of the contract... (Annex III, art. 13, para. 3).

In addition, the Authority is empowered to tax the profits of these private mining concerns up to seventy percent of net profits during the second year of operation; these funds would earmarked to finance Enterprise operations conducted in tandem with developing countries (Annex III, art. 13. para. 4). The Group of 77 maintains that these transfers are the means through which the notion of common heritage of the seabed may be protected by allowing all states "fair and equal" access to the ocean floor, thus avoiding any technical or economic advantage by the developed

nations. In reality, these transfers represent a major step forward in the Third World's quest for an arbitrary redistribution of global wealth.

The system of taxation as outlined by the text could have serious repercussions for the United States in several areas. First, the excessive use of corporate taxes by the Authority may discourage private development of the seabed floor, jeopardizing U.S. access to the strategic minerals found in the ocean and perpetuating the nation's dependence on unstable foreign sources.

Secondly, the international precedence set by the Treaty's tax provisions is extremely dangerous. Allowing the Seabed Authority to tax U.S. companies operating on the seabed will have a spillover effect in non-seabed development areas where the Third World has a growing interest, such as the Antarctic and outer space.

Third, by codifying the right of an international organization to tax private companies, the Western concept of the free market is seriously jeopardized and may lead to similar taxation procedures in other U.N. bodies like UNESCO and WHO, two organizations dominated by the Third World which have considered similar taxation schemes.

ACHIEVING L.O.S. GAINS

The current Law of the Sea proposal contains several positive aspects with regard to protection of navigation rights through international straits, setting territorial limits at twelve miles and establishing economic zones to 200 miles. Additionally, the Treaty provides for a cooperative international fisheries regime aimed at safeguarding and conserving migratory and endangered species as well as providing protection for marine mammals and other components of the fragile marine environment.[13]

The above benefits can be equally obtained through bilateral relationships with the affected nations or by negotiating specific agreements through the U.N. General Assembly or existing organizations such as the U.N. Environmental Programme, the International Civil Aviation Organization, and the Inter-Governmental Marine Consultive Organization to name a few. To base approval of the Treaty on fears of losing few benefits while accepting a number of potentially harmful provisions would be ill-advised and possibly worse than no treaty at all.

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[13] See DCLOS text, Parts II-VII and XIII-XIV.

CONCLUSION

The proposed Law of the Sea Convention is an ambitious attempt to administer, regulate and adjudicate two-thirds of the earth's surface, with correspondingly profound impact on the nations' commercial, environmental, and defense communities. As such, it deserves a careful review by the new Administration.

The present Treaty text contains a number of benefits, but does not justify the disadvantages accrued through its implementation. At a time when continued access to strategic minerals is questionable, the United States should support a regime which encourages fair and open exploitation of the seabed floor rather than one which penalizes private investment and development.

Moreover, the political and economic implications of the agreement will have a long-term, negative effect on the United States' growing relationship with the countries of the Third World. An international agreement on seabed mining is necessary and long overdue. But the risk of losing this particular treaty does not outweigh the future implications of an agreement unfairly constructed in favor of one portion of the international community at the expense of another.

Any precedence set in the Law of the Sea negotiations may have sweeping impact on other, non-seabed related negotiations in the future. It would be naive to assume that a concessionary approach to the Third World by the United States would be viewed as unique to the Law of the Sea. Rather, it may set the tone of international negotiations for years to come.

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