June 7, 1982

THE LAW OF THE SEA TREATY: CAN THE U.S. AFFORD TO SIGN?

INTRODUCTION

After participating in eight years of negotiations over eleven different sessions, the U.S. Delegation to the Third United Nations Law of the Sea Conference (UNCLOS III) on April 30, 1982, refused to approve the Draft Convention of the Law of the Sea Treaty. The U.S. was joined in this action by Venezuela, Turkey, and Israel. Seventeen countries, including most of the industrial countries of Western Europe and the Eastern bloc, abstained. Signing the treaty draft were 130 countries, almost all from the Third World, but with significant votes from France, Canada, and Japan.

From the start, the negotiations were an arena for deep philosophical conflict. The developing nations of the U.N., represented by a coalition commonly referred to as the Group of 77 or G-77, used the negotiations as part of their general effort to establish the "New International Economic Order" (NIEO). They insisted that the Sea Law Treaty be based on the notion that resources of the earth, particularly the deep seabed mineral deposits, were the "Common Heritage of Mankind," to be exploited and enjoyed by all. The U.S. delegation could not accept this notion, nor implicitly the NIEO's attempts to effect a massive redistribution of wealth and technology, because of the basic conflict with American concepts of private property, free enterprise, and competition.

Treaty proponents at the final session of UNCLOS III, as well as treaty supporters within the United States, argue that the rationale for U.S. opposition to the treaty has been mainly philosophical, and not practical or pragmatic. They have also maintained that, under a different Administration, the U.S. will eventually return to the negotiating table and will sign the treaty.

There are, however, practical as well as philosophical arguments against the Draft Convention, which are held by the Reagan Administration, its supporters in private industry, and public interest groups.

The first philosophical argument is that the Third World concept of the "Common Heritage of Mankind," as stated in the Draft Convention, is antithetical to the American belief that the ownership of property devolves on those who take risks to identify natural resources and mix their labor with them.[1]

Second, in creating the "Enterprise" as an operating unit for seabed explorations, with such economic advantages as a high level of ensured funding and technology transfer, the Convention transgresses the general American principles of opposition to monopolies and governmental discrimination.[2]

Finally, the current Draft Convention would establish the International Seabed Authority ("the Authority"), a seabed mining regime, to be controlled and administered by the same developing nations that have negotiated the Convention. As a spearhead for the establishment of the NIEO, such a regime would stifle and restrict, rather than encourage, mineral production in the deep seabed. This is the price demanded by the G-77 for the "advances" on territorial restrictions, which, at most, may be termed modest.

In summary, the practical arguments against the Draft Convention are:

1) that the draft treaty restricts the world supply of minerals, and U.S. access to strategic minerals; especially the seabed mining articles, as they would create a bias against production; mandate technology transfer; prevent assured and non-discriminatory access; discriminate in favor of the Enterprise; stipulate large costs to support the Authority; and create a hostile investment climate.[3]

2) that the concessions made by the developed nations within the articles of the Draft Convention create a harmful precedent for future negotiations in the international arena; and

3) that customary international law already provides the U.S. with navigation rights, fishing privileges, and jurisdiction over the continental shelf, for some of which, in the non-seabed areas, the U.S. would have to pay for rights that it already enjoys.

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1 Vesting ownership of previously unowned resources in producers has substantial historical support, particularly in the Spitzbergen Archipelago case. See: Doug Bandow, "UNCLOS III: A Flawed Treaty," San Diego Law Review, Volume 19, April 1982, p. 478, at note 15.

2 Ibid., p. 480.

3 Ibid., pp. 481-487.

Neither during the first seven years of treaty negotiations nor during the past year has the U.S. ever veered from its intent to negotiate honestly and forthrightly for a settlement that could be agreed upon by the developing and industrial nations alike. Both President Reagan and the U.S. Delegation to the eleventh session of the Conference have stated that the U.S. might accept an agreement that did not deter development of seabed mineral resources to meet national and world demands and did not deny access to these resources by present or future qualified entities. The Reagan Administration has likewise maintained that, if these objectives cannot be reached within the negotiating process, the U.S. will seek reciprocal agreements with any country that is truly interested in maintaining freedom of access, transit, exploration, and exploitation of the world's oceans, rather than bargain endlessly for compromise and concessions within the forum of the Sea Law Conference.

The U.S. Delegation was justified in refusing to approve the Draft Convention of the Sea Law treaty, and in declining to concede damaging, and what eventually would have been unacceptable, compromise in the Convention. Now that the Delegation has made its stand, the Administration should hold its ground against those who will be pressuring the U.S. to reconsider and sign the treaty.

BACKGROUND

The current U.N. Conference on Law of the Sea began in 1973 as an outgrowth of two historic developments. The first was the trend among both developed and developing nations to expand territorial and economic claims on the continental shelf. Territorial waters were moved from the traditional three miles to twelve miles from each nation's coastline, while Exclusive Economic Zones (EEZs) were set at 200 miles. Between 1958 and 1968, the proportion of coastal states claiming territorial extensions of twelve miles or more increased from 18 to 43 percent[4] and today stands at more than two-thirds.

This trend has had clear military implications, particularly in the Middle East where most of the critical narrow straits are found. Richard Darman, a U.S. official involved in the Law of the Sea negotiations since their beginning, has written:

> Expansion of the territorialist claims of 12 miles or more, if accepted, threatened to "close" more than 100 straits, removing from the traditional high seas freedom of transit, and imposing instead the restrictions of "innocent passage." In particular, imposition of an

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[4] Richard G. Darman, "The Law of the Sea: Re-thinking U.S. Interests," Foreign Affairs, January 1978, Vol. 56, No. 2, p. 375.

innocent passage regime could require submarines to surface when passing through straits, and could seriously limit air overflight in crisis situations.[5]

The second development involved technological advances in the extraction of minerals from the seabed. It has been estimated that 1.5 trillion tons of manganese, nickel, copper, and cobalt in the form of nodules lie on the seabed, mainly in the Pacific Ocean.[6] Since the U.S. is critically deficient in domestic supplies of all these minerals but copper, the capability of American industries to mine the seabed has important ramifications for those industries and the country as a whole.

Concern over these basic flaws in the Convention led the U.S. in March 1981, only a few days before the opening of the ninth UNCLOS session, to announce its intention to conduct a "policy review" before concluding negotiations and to remove the delegation leaders held over from the Carter Administration.[7]

In calling for the policy review, the Reagan Administration adhered to the GOP platform plank emphasizing that multilateral negotiations had not focused enough attention on the long-term security requirements of the United States.[8] The Republican Party maintained that the oceans have the potential to help meet the U.S. need to develop new sources of minerals as well as energy, and that negotiations prior to 1981 had served to "inhibit United States exploration of the seabed for its abundant natural resources."[9]

Moreover, the principles of the NIEO are in deep disagreement with the Administration's view on foreign assistance -- that "the key to national development and human progress is individual freedom, both political and economic."[10] This disagreement forms a major aspect of the Administration's philosophical objections to the Draft Convention, as well as the rationale for the 1981 policy review.

As a precedent for international negotiations, the Law of the Sea Treaty is extremely important to the G-77 in its attempt to legitimize the concept of the NIEO. In the words of a prominent critic of the Treaty, the Sea Law Treaty would be:

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5 Ibid., p. 375.
6 Stephen Chapman, "Underwater Plunder," The New Republic, April 21, 1982, p. 17.
7 Bandow, op. cit., p. 476.
8 William R. Hawkins, "How to Give Away Your Future: Law of the Sea," National Review, April 16, 1982, p. 410.
9 Quoted in ibid., p. 410.
10 Remarks by President Ronald Reagan to the Opening Session of the Annual Meeting of the Boards of Directors of the World Bank and the I.M.F. at Cancun, Mexico, September 29, 1981.

> ...the leading edge of the attempt to instill NIEO principles in all international organizations and institutions, and over other global problems, including energy, Antarctica, and outerspace.[11]

During the tenth UNCLOS session in August 1981, negotiations again were not finalized, since the policy review had not been completed. The Conference then established a "final" eight-week session to begin in March 1982 in New York. The U.S. decided to continue negotiations, in part, because valid questions had been raised about the ability of the treaty to adequately defend vital U.S. economic interests in deep seabed mining, and to protect the technology necessary to perform the mining.[12]

Before the final eight-week session began, President Reagan outlined six points which he maintained required attention, if an acceptable Sea Treaty were to be achieved. The President called for a treaty that:

1) will not deter development of any seabed mineral resources to meet national and world demands;

2) will assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the International Authority, and to promote the economic development of the resources;

3) will provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;

4) will not allow for amendments to come into force without approval of the participating states, including the advice and consent of the U.S. Senate;

5) will not set other undesirable precedents for international organizations; and

6) will be likely to receive the advice and consent of the Senate. In this regard, the Convention should not contain provi-

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11 Gary Knight, "Legal Aspects of Current United States Law of the Sea Policy," p. 5 (Paper presented to an AEI Conference: United States Interest in the Law of the Sea: Review and Analysis, October 19, 1981). The principles of the NIEO and the concept of the Common Heritage of Mankind have already found their way into the basis for negotiations at the U.N. Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE).

12 Guy M. Hicks, "The Law of the Sea Treaty: A Review of the Issues," Heritage Backgrounder No. 138, April 28, 1981, p. 1.

sions for the mandatory transfer of private technology and participation by and funding for national liberation movements.[13]

THE FINAL SESSION OF UNCLOS III

In describing the rationale for the continuing objections of the U.S. Delegation at the end of the eleventh session, the chief U.S. Delegate, James L. Malone, explained that, although modest improvements had been made in the treaty text, there continued to be an "unyielding refusal" on the part of some of the delegates "to engage in real negotiations on most of the major concerns."[14] These concerns involved, at least in part, the following provisions of the draft treaty:

The Decision-Making Process

The first objection is to the decision-making process (Draft Convention, Section 4). The Authority, designed to be supported with funding from the industrial countries (25 percent by the United States alone), was given almost unlimited control over the world's oceans. It would establish its own mining concern, the Enterprise, and would answer to a 36-nation governing council and assembly modeled on the U.N. Security Council and General Assembly, respectively. Unlike the Security Council, however, in which the five permanent members have the power of veto, the Authority's governing council would require a three-fourths majority vote to adopt major decisions with no veto power, thus not providing a proportionate voice to those countries most affected by the decisions. The Authority would be empowered to deny permission to mine, and would be specifically charged to favor the interests of the developing and the "other so-called disadvantaged States."[15] The United States and its mining industries would thereby be placed in an extremely precarious position.

Costs of the Authority and the Enterprise

Another serious objection to the Draft Convention lies in the exorbitant costs that would be incurred by the United States and other industrialized nations, if they were to sign the treaty. The United States would be committed to administrative costs of approximately $20 to $40 million a year to finance the Authority until it became "self-financing" from revenues generated from private mining corporations. And the U.S. would have little control over the Authority's budgeting of these funds.

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13 U.S. Chamber of Commerce, International Business Review, Volume I, No. 1, April 30, 1982, p. 6.

14 Quoted in The Washington Post, Saturday, May 1, 1982, p. A16.

15 Bandow, op. cit., p. 477.

Secondly, the U.S. would be obliged to provide 25 percent of the costs of the initially integrated mining operations of the Enterprise, which have been estimated at $1.2 billion in 1979 dollars, 50 percent of which would be provided in interest-free, long-term loans and 50 percent in debt guarantees.[16] The U.S would have no control over when the interest-free loans might be called or the pay-back schedule for the loans. Furthermore, the U.S. would be obliged to provide 25 percent of the operating costs of the Enterprise per annum, a cost that has not yet been determined.

Third, considering the restrictions that would be placed on their operations, the cost to U.S. private corporations would not be worth their investment. Each company involved in seabed mining operations would be required to pay the Authority an initial license application fee of $500,000 and a fixed annual fee of $1,000,000 for exploration rights (there is nothing in the treaty that requires the Authority ever to grant a license, however). Under two different systems for the levying of production charges, it has been estimated that, over a 25-year, life-of-contract period, payments from private corporations to the Authority would range between $250 million and $2 billion, and that each 25-year contract would generate approximately $400 to $800 million over that period for the Authority. After assuming these costs, each company would have to incur the costs of starting up an operation, which could run as high as $1.5 billion.

Fourth, although figures on the potential revenues from hyrdocarbons extracted from beyond the 200-mile EEZ are imprecise at the present time, it has been estimated that the long-term costs to private oil companies would be two to three percent of the value of the oil extracted in each field. After the sixth year of operations, payments to the Authority would be one percent of the value of production, and would increase by one percent per annum until reaching seven percent. In summary, these costs would seem an extremely high price for the U.S. government and American industry to pay in exchange for the uncertainty of U.S. influence over the Authority and for the sacrifice of the principles of free enterprise and competition.

The Pioneer Mining Provisions

The third objectionable aspect of the Draft Convention is in the pioneer mining provisions of the Preparatory Investment Proposal (PIP).[17] The PIP is a "grandfather" clause that allows industrial nations to explore ocean mineral sites before treaty

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16 Figures provided by the U.S. Department of the Treasury, May 5, 1982, based on U.N. estimates. See also: Draft Convention, Annex III, Article 13.

17 Draft Convention, Annex III, Article 2.

ratification. The PIP would be directed by a council of four members -- the Soviet Union, the United States, and two other developed countries. One specific problem for the U.S. is that it is unclear how much power this council would have over the Authority, and how long the U.S. would retain its membership. Secondly, the U.S. would have to garner the vote of one other member on the council to disapprove any action of the Authority. This would create a situation in which the U.S. could be outvoted if the Soviet Union were able to form a coalition with the other members of the council on such critical questions as technology transfer.

Although the PIP would provide access to pioneer mining firms and allow them to keep the site that they had explored before treaty ratification, it would not ensure that other qualified miners from the private sector would have access to future mine sites. U.S. acceptance of this position would be completely contrary to U.S. domestic laws on competition, and would pave the way for the establishment of a monopoly in seabed mining production.

Treaty Amendment

The fourth major objection to the draft treaty lies in the provision to allow the treaty to be opened to amendment after twenty years.[18] Not only does it ensure that the treaty would be amended after the necessary period had elapsed, if the G-77 decided that the NIEO were not progressing fast enough, but it would do so without a provision to allow the U.S. to prevent unwanted changes in mining procedures.[19] Theoretically, the G-77 could decide at the end of this period to deny U.S. mining ventures full return on their investments or to eliminate their participation completely.[20] The chief American delegate to the eleventh session understated this as "clearly incompatible with United States processes for incurring treaty obligations."[21]

Mandatory Technology Transfer

A fifth objection is in the provision mandating transfer of mining technology from private firms to the Enterprise.[22] The

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18 Draft Convention, Section 3, Article 155.

19 A compromise was effected in New York in April 1982 so that the 20-year revisions will have to be decided by consensus, and not by three-fourths vote of the council. However, if consensus was not reached within five years, the council would revert to the "three-fourths" rule.

20 Miners granted licenses by the Authority must make payments to the Enterprise ranging from 35 to 70 percent of any return on investment. See: W. Scott Burke and Frank Brokaw, "Law at Sea," Policy Review No. 20, Spring 1982, p. 74.

21 Quoted in The Washington Post, Saturday, May 1, 1982, p. A16.

22 Draft Convention, Annex III, Article 5.

U.S. Delegation answered this at the final session with an option paper that called for the removal of the requirements for mandatory private technology transfer and the "Green Book," which contained U.S. amendments to the Draft Convention. These amendments proposed, in addition to the option paper, that, if technology were to be transferred, it would become the responsibility of governments, not private companies. The G-77 and the Eastern bloc nations rejected these proposals "out of hand."[23]

According to the Draft Convention, the Authority would assign sites and approve the contracts of private firms applying to mine seabed minerals. The Enterprise, the actual mining arm of the Authority, would extract seabed resources on behalf of the developing countries. In summary, there are three basic problems with this organizational structure of the technology transfer provisions of the Convention:

First, the Authority may enforce compliance with its technology transfer rules by revoking mining contracts;

Second, if the Authority wishes, it can pass technology on to underdeveloped third parties, which could include the Soviet Union and Eastern bloc nations or Third World countries within the Soviet "orbit." This would present national security problems, since the U.S. restricts transfer of security sensitive technology to potential adversaries.[24]

Third, there is little or no protection of intellectual property rights, and the Authority remains the only recourse to judicial arbitration in this area.[25]

Production Limitations

The sixth major objection to the Draft Convention stems from the provision that limits production from seabed mining operations and provides for commodity agreements.[26] These restrictions are part of an attempt to protect land-based producers in both industrialized and developing nations, and are particularly important to such sub-Saharan African countries as Zimbabwe, Zambia, and Zaire. The establishment of production ceilings represents a

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23 U.S. Chamber of Commerce, op. cit., p. 6.

24 Several "Black-box" technologies used in deep seabed mining are unique to the U.S. They include such items as: subsea robotics; shipboard computers; low-light television, and others. The treaty prevents Western industries from using any technologies, even if they had been developed and produced by those industries, in the exploration or exploitation of the seabed if that technology cannot be transferred to the Enterprise. This clause by itself could either stymie seabed mining by preventing the use of restricted technologies, or invite violations of U.S. national security laws.

25 U.S. Chamber of Commerce, op. cit., p. 5.

26 Draft Convention, Article 151.

further example of the bias against production, brought to the conference table by the majority of delegates to UNCLOS III. According to the chief U.S. delegate to the final session, this anti-production bias should be of primary concern to the U.S. Congress.

Benefits to National Liberation Groups

The seventh major objection arises from the stipulation for the provision of benefits to national liberation groups and a guarantee to the developing nations of a disproportionate share of the production of the industrialized countries.

The participation of national liberation movements within the scope of this treaty and the distribution of benefits to them was opposed by the United States throughout the final session of UNCLOS III. These groups do not represent entire nations or even their own sizable ethnic groups. Their political and economic goals are antithetical to those of the United States and its allies.[27]

Overall, the redistribution of wealth and benefits, envisioned by the G-77 as an objective of the Seabed Authority and the Enterprise, will give rise to three major problems:

First, it will discourage real economic development by making parasitism comparatively more profitable than self-sufficiency.

Second, redistribution of wealth in this manner will channel money, not to the billions of starving and destitute in the Third World, but to their governments, few of which are democratic, and many of which are corrupt and self-serving.

Third, it will eliminate most prospective mining, with the result that there will be very little revenue to divide among the nations who are signatories to the treaty.[28]

Nearly all the preceding objections were raised by the U.S. Delegation during the final session in March and April 1982. These objections certainly go beyond merely philosophical exceptions that the Delegation had posed during the negotiations. The Delegation also proposed modifications to the provisions, almost all of which were found unacceptable by the G-77 and the Eastern

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27 In a recent Heritage Foundation Backgrounder, Policy Analyst Thomas Gulick traces both the indirect and direct support which the United Nations has provided to Marxist-oriented, Soviet-backed guerrilla or liberation groups, such as SWAPO and the PLO. See: "How the U.N. Aids Marxist Guerrilla Groups," Backgrounder No. 177, The Heritage Foundation, April 8, 1982.

28 Stephen Chapman, op. cit., p. 18.

bloc nations.[29] Under the circumstances, the U.S. had little choice but to insist on a vote and vote against treaty adoption.

NON-SEABED ARTICLES: DOUBTS ABOUT THE TREATY

The Draft Convention encompasses subjects other than seabed mining, including the establishment of Exclusive Economic Zones (EEZs), marine research, environmental protection, and navigation. Many treaty proponents in the United States have argued that, even though the mining provisions for the seabed are flawed, the benefits that the U.S. could gain from other parts of the treaty, particularly the navigation provisions, would make the proposed treaty worthwhile. If this is the case, and if the economic interests of the United States are not going to be "sacrificed in the perceived furtherance of narrow politico-military objectives and amorphous foreign policy goals,"[30] the benefits of other portions of the treaty must significantly outweigh the severe costs imposed by the seabed mining provisions.

Yet the evidence clearly shows that purported benefits are not significant enough to outweigh the latter costs. In some cases, they do not provide benefits at all, but impose additional costs on the U.S. It is, in fact, possible that the U.S. would fare better in respect to each of these areas of the draft treaty either with a treaty on the terms made available through UNCLOS III, or with no treaty at all.

Navigation Articles

The provisions for navigation in the Draft Convention would allow the U.S., at best, ambiguous rights of freedom of navigation in the EEZs and submerged transit through straits.[31] Existing customary international law for navigation, however, allows the U.S. unrestricted navigation ("freedom of the high seas") in the EEZs and the right of submerged transit through straits consisting entirely of territorial waters.[32]

Even if the U.S. were to accept the establishment of a 12-mile territorial sea, those straits consisting entirely of territorial waters would still be subject to free passage, includ-

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29 See: UNCLOS III, A/CONF. 62/L141/ADD1/28, April 1982, Report to the President of the Conference.

30 Remarks by Theodore Kronmiller before the Conference on the Economic Aspects of National Security and Foreign Policy: the Challenge to a Free Enterprise Society (December 13, 1981), p. 3.

31 Knight, op. cit., p. 9.

32 Although 200-mile exclusive fishing zones are a part of the body of customary international law, the more sophisticated notion of an EEZ, with potential regulatory powers over navigation by coastal states, has not been incorporated as international law.

ing submerged transit. The point is well-established in customary international law and state practice.[33]

Two additional points concern transit passage through straits and the ability of the U.S. to ensure this passage without a Law of the Sea Treaty. First of all, significant protection for the few straits that involve U.S. national security would probably be available through bilateral or regional treaties or informal arrangements.[34] The ability and willingness of the participants in such arrangements, as well as the nature of their bilateral relations with the U.S., would constitute the most important factors for compliance.

Secondly, if U.S. national interests appeared to be in jeopardy with or without a Sea Law Treaty, the U.S. would not allow theoretical international law claims to stand in the way of protecting vital national needs. Likewise, if a coastal state believed that the interdiction of U.S. shipping was in its national interest, and that U.S. military power would or could not prevent such interdiction, the coastal state would be unlikely to hesitate because of a general treaty signed by 150 nations during the past year.[35]

Continental Shelf Jurisdiction

In the area of continental shelf jurisdiction, the goal of the United States continues to be unrestricted access to hydrocarbon deposits anywhere along the natural projection of the North American land mass, subject only to "lateral and opposite state boundary agreements."[36] These rights are provided to the United States under existing international law. Under the provisions of the Draft Convention, the U.S. would retain jurisdiction over the Continental Shelf, but only at the price of "revenue sharing," which would require the payment of royalties to the Authority on oil and gas production from the continental shelf located more than 200 miles from the coast. Thus, the U.S. would not really gain anything in terms of jurisdiction by signing the treaty, and would have to assume an extra cost burden.

Scientific Marine Research

The U.S. now possesses the following rights for scientific marine research:

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33 Knight, op. cit., p. 9.
34 Bandow, op. cit., p. 490.
35 Robert Eckert, "United States Interests and Law of the Sea Treaty: Myths versus Reality" (paper presented at the AEI Conference, October 19, 1981), p. 8, cited in Bandow, op. cit., p. 490, note 91.
36 Knight, op. cit., p. 10.

1) unrestricted research rights in the water column, on the surface, and in the atmosphere of ocean areas outside territorial waters, and

2) a "consent" regime for continental shelf research as provided by Article 5 (8) of the 1958 Convention on the Continental Shelf.[37]

Under the terms of the Draft Convention, U.S. scientists would have to obtain advance permission before undertaking scientific investigation anywhere within the 200-mile EEZs. This permission could, of course, be denied if the G-77 or its supporters within the regime desired to prevent such investigation. Thus, the treaty would be detrimental to U.S. marine research.

Fisheries Management

In the area of fisheries management, the U.S. requires a system that offers protection to coastal fishery resources and regulates access by foreign fisherman, in addition to non-discriminatory access on acceptable terms for the national distant-water tuna and shrimp fleets operating off the coasts of other countries.[38]

At the present time, under the Magnuson Fishing Conservation and Management Act of 1976 (MFCMA), the U.S. has exclusive fishery management authority over all fish within a fishery conservation zone (FCZ) extending 200 miles from the U.S. coastline. The MFCMA represents a sophisticated system for managing fisheries by regional fishery management councils. The MFCMA determines the optimum yield for each fishery on an annual basis and provides a recommendation, based on that figure, as to the Total Allowable Level of Foreign Fishing (TALFF). Under the Draft Convention, the councils's determination of the optimum yield for a given fishery or fisheries -- and thus too the TALFF -- may be brought under severe questioning and even changed arbitrarily. The draft treaty could also seriously inhibit the U.S. tuna fleet's pursuit of migratory schools of tuna into foreign waters, and, in such cases, would deny reimbursement or retribution for seizure of U.S. tuna vessels.

THE LAW OF THE SEA TREATY AND THE ASSAULT ON MNCS

Through its rules for mandatory technology transfer and production limitations, the Law of the Sea Treaty draft represents an important vehicle with which the U.N.'s G-77 hopes to regulate and restrict the activities of multinational corporations (MNCs) that comprise the various mining consortia.

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37 Knight, op. cit.. p. 11.

38 Interview with Lucy Stone, Executive Director, National Federation of Fishermen, May 3, 1982. See also: Knight, op. cit., p. 11.

Assault on the MNCs includes other U.N. bodies, such as the World Intellectual Property Organization (WIPO), through which the G-77 has attempted to revise provisions within the Paris Convention on Patents to require automatic forfeiture of patent rights and compulsory licensing by the MNCs. In an equally significant attempt to restrict the activities of MNCs, the developing nations have, through the Commission on Transnational Corporations, which reports to the U.N. Economic and Social Council (ECOSOC), formulated a "Code of Conduct" for the MNCs. This code would:

-- uphold the absolute power of a state over its wealth, natural resources, and economic activities exclusively according to national law;

-- allow that the responsibilities of enterprises need not be balanced by any government responsibilities;

-- link the negotiation of the Code of Conduct and the Illicit Payments Treaty;

-- assist developing nations in reaching their objectives of an increased flow of technology through regulation of the activities of the MNCs and significant alteration of the current commercial methods of technology transfer.[39]

FOR THE U.S., WHAT NEXT?

Overall, few U.S. interests would be protected by the Law of the Sea treaty in its present form that would not be protected just as well without a treaty. Notes Richard Darman:

> ...the notion of conceding (the negative international precedents set by the proposed treaty) to avoid the precedent of Conference "failure" (meaning "lack of agreement") seems absurd. It would be to trade long-term substantive failure for avoidance of temporary procedural failure. Trading these objectionable elements for marginal gains in the system of environmental protection and dispute settlement seems out of proportion. Trading them for questionable interests in treaty protection of distant-water military mobility seems a tie to the past at the expense of the future.[40]

Among the questions that the United States must now ask are:

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39 U.S. Department of State, EB/IFD/OIA, "Current Status of International Activities Relating to Transnational Enterprises (TNEs) as of September 1980," September 16, 1980.

40 Darman, op. cit., p. 375.

1) Can the U.S. survive in an often unfriendly global environment, avoid isolation within that environment, and ensure future independence of critical mineral supply, if it does not sign the Law of the Sea treaty?

2) Under these same circumstances, will U.S. industry be able to exercise a market approach to deep seabed mining, with incentives rather than disincentives for producing minerals from the deep seabed?

Although the U.S. faces potential problems by not signing the treaty, it does not find itself alone in having raised serious and justifiable questions concerning the provisions of the document, particularly in the seabed mining area. If the U.S. can continue to find support and cooperation among those countries who raised objections to the treaty throughout the course of the negotiations, the answer to both these questions should be "yes."

THE RECIPROCATING STATES AGREEMENT

The most practical alternative to the seabed mining structure established within the Draft Convention would be the Reciprocating States Agreement (RSA). This agreement, though not a treaty in itself, could form the basis of a "mini-treaty" among both signatories and non-signatories to the Law of the Sea treaty. As a mutual claims agreement, the RSA would allow its signatories to harmonize their national ocean mining legislation and to prevent overlapping of mine sites. France, the Federal Republic of Germany, the United Kingdom, and the United States drew up the agreement in the early part of 1982. Although it is too early to say which, if any, of these countries will sign the RSA with the United States, it offers a reasonable opportunity to establish a viable alternative to the Sea Law treaty. Efforts to convince American allies of this will be facilitated if the President steadfastly supports the decision of the U.S. Delegation to UNCLOS III and avoids postponing a final statment of opposition to the Draft Convention.

Based on customary international law, the RSA could be signed by any nation, industrial or developing. A developing nation could contract with a Western company to identify a mining site, and could claim and mine it under the agreement. Developing nations could participate in joint ventures, apply to governments, or to the International Monetary Fund, for loans to purchase mining equipment to mine their sites, or they could join a consortium of western mining companies.[41]

The RSA would not attempt to regulate the mining of the seabed as would the Sea Treaty through the establishment of the

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[41] U.S. Chamber of Commerce, op. cit., p. 7.

Authority and the Enterprise. The RSA would allow companies to obtain exploration licenses as a necessary step in determining that their exploration sites could be transformed into mining sites, and that they would be able to produce the quantities of minerals necessary to realize a return on their investment. After exploration had begun, the activities of the companies would be regulated by respective national laws.

It is the consensus among government officials who have negotiated in the UNCLOS forum for the past several years, as well as among industry representatives who have monitored the progress of the negotiations for the same period, that, once the RSA has been signed between the United States and other industrial nations, the differences between the various national laws governing mining operations will become less distinct and more compatible with one another without a great deal of bilateral pressure being applied to effect that change.

The capital investment necessary to develop ocean mining sites is of such magnitude that it is unlikely to attract many entrepreneurs unless assurances are forthcoming that the mining property worked will be secure, particularly against opposing claims. Observed Conrad Welling, the senior vice president of Ocean Minerals Company, one of three U.S.-based consortia that have been set up to mine the seabed:

> It will take ten years and a billion and a half dollars to get the industry started up, but it is not possible to start it until a company is absolutely sure it has a mine site and a production quota.[42]

If ocean operations are to commence, the companies doing the mining will have to be assured of their rights to mine by the United States and other maritime nations. Such assurance could be provided on a unilateral basis with each nation protecting the operations of its own citizens or by a convention among maritime states.[43] Certainly, the current Draft Convention does not provide such protection. The RSA, on the other hand, establishes provisions for such protection on a bilateral basis between the U.S. and other nations as well as for the resolution of claims and the harmonization of national laws.

It is uncertain at the present time as to who will sign the RSA. Industry circles speculate, however, that even the Soviets and the Eastern bloc nations may approach the U.S. to sign the RSA, since the protection of their mining interests and the resolution of mutual claims are clearly matters of fundamental concern.[44]

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42 Quoted in The Journal of Commerce, April 28, 1982, p. 1.

43 William R. Hawkins, "Reaffirming Freedom of the Seas," The Freeman, March 1982, p. 184.

44 The Journal of Commerce, op. cit., p. 1.

As mentioned previously, the "grandfather clause" of the Draft Convention would allow mining companies to explore the seabed in an effort to determine whether their exploration sites could be transformed into mining sites, and whether they would be able to produce the quantities of minerals necessary to realize a return on their investment. However, the Sea Law treaty would guarantee only one of the identified sites to each respective company or consortium for mining purposes. Any other identified sites could be handed over to the Enterprise or to a Third World country which might have contracted with another mining firm that had not invested anything in the exploration of the site. Furthermore, the mining firm or consortium initially undertaking the exploration would have to meet all the other conditions for exploration dictated by the Authority under the terms of the treaty, including: front-end financing, mandatory training of Enterprise personnel, mandatory technology transfer, and parallel exploration by the Enterprise. The RSA, would impose no such restrictions and would, in particular, place no ceiling on the number of sites that the U.S. company could mine.

The RSA is a significant means of providing Western industries with the opportunity to mine the seabed on a profitable basis, and, at the same time, satisfy the interests of the developing nations in the distribution of the oceans' resources and a share of their profits.

The Question of "Bankability" of U.S. Mining Firms

Critics of U.S. opposition to the treaty have raised the fear among those who oppose the treaty for valid and substantive reasons that, in the absence of the U.S. signature on the final document, the banking industry would not lend the U.S. companies the cash necessary for the start-up of mining operations since they would lack clear title to the sites. There is a significant opinion among industry representatives and officials that:

First, it is doubtful that the banking industry would fully support those companies whose mining activities would be regulated by a Sea Law regime that had not been signed by several, if not all, of the major industrial powers.

One banker with an expertise in funding seabed mining projects maintains that, under the present terms of the Sea Law treaty, U.S. mining operations would not be "bankable," simply because of the restrictions that would be placed on them within the Law of the Sea regime. As mentioned previously, the Authority's requirement for technology transfer, and limitation on mining to one explored site only, would make it difficult for these firms to realize a return on investment.[45]

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[45] C. Richard Tinsley, Mining Division, Continental Bank of Chicago, "The Financing of Deep Sea Mining" (Paper presented at the AEI Conference, October 19, 1981).

Second, for many of the companies involved in seabed mining, it is likely that there would, at least for the present time, be enough "in-house funding" to allow those companies to begin operations, even if they were not otherwise "bankable." This would be particularly true under present financial conditions, in which the cost of borrowing money is exceedingly high, and the cost of funding an operation -- estimated to be between $1.25 and $1.5 billion -- could be stretched out over several years.

Finally, with or without a Law of the Sea Treaty, it would be unlikely that a U.S. mining firm would ask a bank for 100 percent financing on a mining operation. A firm might ask for the support of a capital base or line of credit for several million dollars over several years. The line of credit would not represent a loan, and would not be contingent upon the firm's ability to produce minerals from the seabed, but on the soundness of the existent assets of the company. Therefore, the argument that under a treaty-less regime, mining companies will not be "bankable" is not totally relevant in this instance. Conventional banking terms will, in all likelihood, not be offered to mining companies, whether or not the U.S. signs the treaty.

In addition to the banking question, the mining firms would have to face the possibility that their regular suppliers might be less than willing to provide them with necessary mining technology and equipment if they were operating under the Law of the Sea regime. At least four major suppliers of mining technology have declared in writing to the National Ocean Industries Association that they will not supply their technology to the consortia involved in seabed mining because of the inadequate protection that would be afforded such technology.[46] Under the terms of an RSA, the odious burden of mandatory technology transfer would be lifted, as would the hesitancy of suppliers to provide the consortia with the technology necessary to mine the seabed.

The Promise of Alternative Mineral Sources

The prospect of finding other minerals in the seabed that would help the United States become more self-sufficient in the critical minerals of manganese, cobalt, copper, and nickel has also given the U.S. pause in evaluating the Draft Convention of the Law of the Sea treaty. One promise of alternative sources lies in the further exploration and exploitation of polymetallic sulphide ore deposits, mostly along the continental shelf. These ores are metal-bearing minerals from which it is believed a metal or metallic compound can be extracted commercially. Although these minerals were discovered only in 1978 along the Inner Rift Valley of the East Pacific Rise off the southern tip of the Baja

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[46] Conversation with Richard Legatsky, Attorney, National Ocean Industries Association (NOIA), May 13, 1982.

Peninsula in Mexico by a U.S.-French submersible-based expedition, there is widespread belief that the sulphide deposits may be able to provide some of the same critical minerals that can be extracted from the deep seabed. Not only may such extraction be technically possible, but these minerals are likely to be found in higher concentrations than the nodules, and closer to or on the continental shelf. For example, to produce one ton of manganese nodules from the deep seabed, approximately five acres of the seabed would have to be mined. In contrast, mining one ton of polymetallic sulphides would require only about two cubic feet.

More needs to be known about these sulphides, for it is certain that they could be mined more efficiently than nodules, and that they may contain some of the same mineral deposits. If the U.S. were to sign the Law of the Sea Treaty, it is probable that a regime as unacceptable as the one represented by the current treaty draft would eventually be imposed upon the mining of sulphide deposits by which the Authority would exercise the same onerous control over the mining of those deposits that it now proposes for the mining of the deep seabed.

Treaty opponents are not the only group to have raised the possibility of conducting seabed mining in a "treaty-less" environment. Elliott Richardson, himself former Ambassador to UNCLOS III, and a steadfast proponent of the treaty, told the U.S. Congress in 1978:

> Seabed mining can and will go forward with or without a treaty....We have the means at our disposal to protect our ocean interests....And we will protect these interests if a comprehensive treaty eludes us.[47]

We had the means at our disposal in 1978, and we certainly have the means today. A comprehensive treaty, as was presented at the eleventh session of UNCLOS III, has not eluded us; we have, it is hoped, eluded it.

CONCLUSION

Given the refusal of many delegates to UNCLOS III, particularly among the developing nations, to negotiate in earnest toward fulfilling the six objectives of the Reagan Administration, the decision of the U.S. Delegation not to approve the Sea Law Treaty is justified. It should be supported not only by those who had urged the Reagan Administration to reconsider the direction of the negotiations during the past decade, but also by those concerned with maintaining freedom to transit and explore the oceans and to develop the oceans' resources. For these groups, and for

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56 Department of State Bulletin (Washington, D.C.: Government Printing Office, February 1981), p. 57.

the Reagan Administration itself, however, several immediate, challenging tasks remain. Among them:

-- Demonstrating clear support for the rationale and decision of the U.S. Delegation to cast a negative vote on the Draft Commission;

-- Demonstrating to the American public and to the rest of the world community through all available media why approving the treaty in its present form fails to serve the best interests of either the U.S. or the developing nations;

-- Presenting equally clear reasoning, based on the above, why the U.S. should not sign the treaty, and why the President should not ratify it;

-- Demonstrating that both the ideological and practical objections to the Draft Convention are shared by a large, diverse body of public and private interest groups, politicians, businessmen, and concerned citizens, and that these objections will neither diminish nor disappear with a change in the political power structure in Washington;

-- Stressing the willingness of the United States to enter into reciprocal arrangements with its allies and with any other nation who wishes to cooperate in acknowledging mutual recognition of claims and ensuring a market approach to the mining of minerals within the seabed.

In summary, the main philosophical argument against the current Draft Convention of the Sea Law treaty is that it is based on the concept of property that the seabed is the "Common Heritage of Mankind," which is antithetical to the American belief that property ownership devolves on those who take risks to identify natural resources and mix their labor with them. Secondly, the concept of the "Common Heritage of Mankind" has been used by the U.N.'s G-77 as a vehicle to establish the "New International Economic Order," a massive redistribution of wealth from the developed to the undeveloped nations of the world. Such direct transfer of wealth and resources is certainly not in the best interests of the United States or its industrial allies, nor would it ultimately benefit those nations who seek it. The NIEO has already been identified as antithetical to the long-term goal of improving the social and economic ills within the Third World. The Reagan Administration has proposed more workable solutions that would rely on self-sufficiency, supply-side economics, and "bottom-up" development initiatives.

From the practical point of view, the current draft of the Sea Law treaty is objectionable because its anti-production bias would restrict the world supply of minerals and U.S. access to strategic minerals; and because it contains concessions to the

developing nations that would create a disastrous precedent for future international negotiations.

Finally, since all maritime states already enjoy through accepted international law the privileges that would supposedly be granted in the non-seabed articles of the treaty, it offers no additional benefits to its potential signatories. In certain instances, the non-seabed articles may demand that the major maritime states give up much of what they now enjoy in such areas as fisheries management.

For these many practical and philosophical reasons, the United States should refuse to become a signatory of the Draft Convention of the Sea Law treaty as it now stands, and should actively seek an alternative regime that would allow, in cooperation with other nations, true freedom of access to the sea and its many valuable resources.

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