

## RECENT DEVELOPMENT

### REFLECTIONS ON UNCLOS III

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*"We cannot strengthen international law by ignoring the realities that determine the operation of power."<sup>1</sup>*

On April 30, 1982, the final day of the United Nations Conference of the Law of the Sea, twenty-one nations either abstained from voting, or voted against the adoption of the Law of the Sea Convention (UNCLOS III).<sup>2</sup> These twenty-one nations included most of the highly industrialized countries, most of the maritime powers and all those countries engaged in the development of the technology of deep seabed mining and the exploration of the mineral deposits beyond the limits of the continental shelf. Those lacking enthusiasm for the new code for the oceans included countries from both East and West.

At the time when the vote was taken, only the United States delegation gave a reasoned explanation for its position. Speaking for the United States, Mr. Malone cited a number of reasons.<sup>3</sup> In the first place, the regime for deep seabed mining would determine the development of deep seabed resources. The United States opposed the provisions of the Convention which provided for a so-called Review Conference in which a three-fourths majority of the signatories could approve amendments modifying the mining regime.<sup>4</sup> The United States also opposed the revision which gave the International Deep Seabed Authority the power to set prices<sup>5</sup> and to order the transfer of technology developed by United States companies to foreign and international interests.<sup>6</sup>

United States objections rested upon both practical and constitu-

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1. C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* viii (1968).

2. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf. 62/122.

3. N.Y. Times, May 1, 1982, at 9, col. 1.

4. See U.N. Convention on the Law of the Sea, *supra* note 2, art. 155(4).

5. *Id.* arts. 150(f), 150(h) & 151.

6. *Id.* art. 144.

tional grounds. Provisions of the Convention offended some of the basic ideas about the free play of economic forces, the role of the market place and the respect for property rights guaranteed by the American Constitution. In addition, delegation to an international agency of the right to expropriate patents, "know-how" and American technology was legally impossible.

Several months later, the government of the United Kingdom associated itself with the United States position voicing similar objections. In a communique, the United Kingdom declared itself unable to join the Convention for two reasons: the organization and the prerogatives of the Deep Seabed Authority, and its right to order the transfer of technology to benefit foreign and international interests. Obviously, as in the American case, property rights of British subjects cannot be subject to controls vested in an international agency.

At the Montego Bay, Jamaica session of UNCLOS III, the situation changed. One hundred seventeen nations signed the Convention while twenty-three declined to sign. In addition, twenty-four nations did not attend the Conference. While during the spring session the Soviet Bloc had abstained from voting, this time it joined the majority. Among those who refused to sign were Japan and all the major industrial powers of the West with the exception of France.<sup>7</sup>

The industrial and maritime powers' dissatisfaction with the deep seabed mining provisions of Part XI beclouds the prospect of the general adoption of the Convention. However, nearly twelve years of negotiations and the aborted Second United Nations Conference on the Law of the Sea have not been an altogether wasted effort. With the exception of Part XI, the Convention is a sound body of law and a welcome systematization of the law of the sea and of institutions generally recognized either in earlier agreements or in judicial precedent and state practice. High sea navigation,<sup>8</sup> the protection of marine life and of the environment,<sup>9</sup> the law of the flag,<sup>10</sup> the status of government ships,<sup>11</sup> the status of ships engaged in maritime commerce<sup>12</sup> and the prevention of piracy<sup>13</sup> are among the areas that have been felicitously codified, and will be—whether the Convention is formally adopted or not—a ready source of reference for legal and diplomatic practice.

Even where new situations and innovations were necessary, the

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7. N.Y. Times, Dec. 1, 1982, at A1, col. 2.

8. U.N. Convention on the Law of the Sea, *supra* note 2, arts. 87-90.

9. *Id.* pt. XII.

10. *Id.* arts. 90-99.

11. *Id.* pt. II §§ 3B, 3C.

12. *Id.* pt. II § 3B.

13. *Id.* arts. 100-107.

Conference was able to devise solutions which cannot be challenged. These new situations and innovations include the exclusive economic zone,<sup>14</sup> the regime of waters of the archipelagoes,<sup>15</sup> international straits<sup>16</sup> and scientific research in waters subject to coastal states' control.<sup>17</sup> They were approved by a large number of state-members of the international community and were a logical consequence of the application of the generally recognized principle of innocent passage to novel situations. Under the doctrine of *opinio juris sive necessitatis*, regimes of international straits and of the archipelagoes, as provided for in the Convention, seem to be a part of the traditional law of the sea.

While the task of codification of the general regime of the law of the oceans was within the mandate received from the United Nations,<sup>18</sup> the Conference overstepped the limits of discretion with regard to the design for the International Deep Seabed Authority. In its final draft, the Convention provided for an international organization<sup>19</sup> which was given direct powers over matters which traditionally, and under the United Nations charter, were clearly within the compass of domestic jurisdiction.

One of the main causes of this unhappy outcome seems to be the absence of proper preparatory work for the diplomatic negotiations at UNCLOS III. The Conference labored without the benefit of a draft prepared by experts. All major pieces of legislation, beginning with the Code of Justinian and ending with modern codes and international treaties, are usually the product of an expert or a small group of experts. Invariably, codification, whether national or international, gives shape to earlier social and political transformations which were already a reality. For example, the Code of Napoleon, the Code of Justinian, Soviet codes and those of Fascist Italy reflected the actual state of affairs and were neither socially nor politically innovative.

Seen in the light of the traditional functions of international organizations, the powers of the International Deep Seabed Authority are clearly revolutionary. Part XI of the Convention proposes to give to the Authority direct administrative control over certain uses of the open seas<sup>20</sup> similar to those exercised by the governments in state terri-

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14. *Id.* pt. V.

15. *Id.* pt. IV.

16. *Id.* pt. III.

17. *Id.* pt. XIII.

18. 18 G.A. Res. 2750 C, 25 U.N. GAOR Supp. (No. 28) at 26, U.N. Doc. A/8208 (1971).

19. U.N. Convention on the Law of the Sea, *supra* note 2, pt. XI, § 4.

20. *Id.* art. 160.

tory. Indeed, in many respects this control is broader than the federal government's control of mining in the United States. The Authority is given power to license deep seabed exploration and extraction of minerals beyond the limits of the continental shelf,<sup>21</sup> to obtain property rights in the share of the mineral deposits discovered by the nationals of parties to the Convention,<sup>22</sup> to mine these deposits on its own account<sup>23</sup> and to tax the proceeds of the industrial activity of the national deep seabed mining companies.<sup>24</sup> By fixing prices of the extracted minerals, the Authority would control the mineral market on a worldwide scale. In addition, the Authority has the right to order the transfer of technology owned by deep seabed mining interests either to develop its own mining activities or to develop those of the third-world countries. The design for the international organization to control deep seabed mining exceeds all past attempts in its scope. It is clear that the provisions of the Convention are unacceptable to all those countries whose national constitutions vest the power of taxation in the representative bodies and guarantee property rights.

To handle the enormous and complex tasks of the Authority, the Convention proposes to establish a vast bureaucratic organization staffed, at the instar of the United Nations Secretariat, by a throng of international civil servants drafted from the member countries.<sup>25</sup> Furthermore, since at the present level of technology it will be decades before extraction of minerals from the oceans becomes economically feasible,<sup>26</sup> the Authority and its bureaucracy are to be financed by the industrialized countries which would have to bear the main financial burden of the proposed organization.<sup>27</sup> From the American perspective, the Convention demonstrates a lack of understanding of what is really achievable. United States Senators can hardly be expected to advise and consent to the ratification of a document which would restrict so severely the powers of the United States government and the prerogatives of Congress.

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21. *Id.* arts. 152(2)(a), 153 & Annex III, art. 3.

22. *Id.* arts. 137(2), 160(2)(f)(i) & 160(2)(g).

23. *Id.* arts. 151(5) & 153(2)(a).

24. *Id.* art. 171.

25. *Id.* art. 167.

26. See generally R. ECKERT, *THE ENCLOSURE OF OCEAN RESOURCES* 215-38 (1979). In a discussion of current experimental and future technologies for deep seabed mineral extraction, Eckert argues that projections indicate an eight-fold increase in the yields of certain minerals by the year 2000. Given the high initial capital investments required, however, it will not be until after this date that deep seabed mining will become economically feasible. *Id.*

27. U.N. Convention on the Law of the Sea, *supra* note 2, art. 160(3). The United States was to contribute 25% of the budget. *Id.*

Many treaties far less offensive to the prerogatives of the United States Congress have died in committee in spite of strong support from the administration. The International Trade Organization, an initiative of President Truman, and the Trade Cooperation Treaty, a replacement for the unsuccessful International Trade Organization, shared the same fate as they both sought to limit congressional power to control foreign trade. Similarly, SALT II and the 1972 Soviet-American Trade Agreement were rejected in spite of strong administration urgings. It was certainly presumptuous to hope that American Senators would consent to the creation of another international organization at the expense of the American taxpayer. There is no climate for such a proposal. It is dubious whether the United States Congress, or any other parliament in an industrialized country, would seriously consider adding another level of industrial regulation which would be exercised by an international organization.

Some of the inability to comprehend legal limitations upon the diplomatic process must be credited to the fact that the majority of diplomats representing the vast host of countries participating in UNCLOS III have had little, if any, parliamentary or diplomatic experience. The Conference was aware of the difficulties it faced in its gigantic task. It had to devise a legal response to a change in international relations occasioned by new technology affecting maritime industries and uses of the seas. It set out to prepare a Convention which would be supported by all. Despite the resolution on consensus, the Conference failed in its resolve. This is another aspect of UNCLOS III which must be examined.

The Conference was an enormous assemblage of diplomats, representing in its final stages 157 countries. Acting under the United Nations mandate,<sup>28</sup> it was a special edition of the United Nations General Assembly with powers far exceeding those accorded under the United Nations Charter which concentrates substantive competencies in the Security Council dominated by the principal great powers. Due to its size, the Conference was forced to develop a unique style of diplomacy, frequently pitting the interests of the users of the oceans (maritime countries with large fishing fleets and real interests in freedom of navigation, protection of marine environment and fishery conservation) against countries which had no real maritime interests. The latter group, the "Group of 77,"<sup>29</sup> bargained in order to obtain advantages

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28. 18 G.A. Res. 2750 C, 25 U.N. GAOR Supp. (No. 28) at 26, U.N. Doc. A/8208 (1971).

29. See Adede, *The Group of 77 and the Establishment of the International Sea-Bed Authority*, 7 OCEAN DEV. & INT'L L. 31, 61 n.7 (1979). The name "Group of 77" refers to the original 77 developing countries which joined together and pursued their

which had little or no connection with the real objective of the Conference. This peculiar style of diplomacy, featuring trade-offs and package deals, wasted time and opportunity.

On several occasions the United States Secretary of State urged the Conference to proceed expeditiously. Secretary Kissinger, long before the Conference completed its task, sounded a note of alarm and deep disappointment with the pace of the Conference's progress. In his speech on April 8, 1976 before the members of the Foreign Policy Association, the United States Council of the International Chamber of Commerce and the United Nations Association of the United States, Secretary Kissinger urged the Conference to proceed expeditiously, and he stated that should another session of UNCLOS III be needed, it should be the last.<sup>30</sup> While the Conference disregarded these warnings, the United States Congress proceeded with legislation, without the support of the Administration, to protect American fisheries.<sup>31</sup> Some

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interests within the United Nations Conference on Trade and Development (UNCTAD).  
*Id.*

30. N.Y. Times, Apr. 9, 1976, at A1, col. 4.

31. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. 1812 (1976)). During the hearings on the bill the House consulted the Departments of Commerce, State, Interior, Justice, Treasury, Defense and Transportation. House requests were referred to the National Security Interagency Taskforce on the Law of the Sea, which raised important objections to the bill. These objections were set forth in the report as follows:

1. Unilateral action now could seriously undermine U.S. efforts in the Law of the Sea Conference and hamper chances for a satisfactory multilateral settlement of the fisheries question.
2. Such unilateral action runs counter to established fundamental principles of international law and would encourage similar jurisdictional claims by other countries, thereby prejudicing U.S. distant water fishing interests such as tuna and shrimp.
3. Serious foreign policy and enforcement problems would result if other distant-water fishing nations refused to recognize our unilateral claims.
4. The bill lacks certain provisions contained in the U.S. proposal for a 200-mile economic zone at the Law of the Sea Conference, which are necessary to protect the interests of all States and the international community in general. These include consideration of the diverse interests of the international community, compulsory dispute settlement, and the payment of reasonable fees to defray regulatory costs.

H.R. REP. No. 445, 94th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 593, 595.

As the House Report indicates, Congressional policy was directly opposed to the line followed by the Executive:

As a matter of policy, for the last several years the United States has been adamantly opposed to any extension of fishery jurisdiction beyond 12 miles. In fact, the Executive Branch of the Government has generally supported the principle of unlimited freedom of the seas as being in the best interest of the Nation. This

time later, in view of the fact that American citizens began seriously exploring opportunities for mineral extractions from the deep seabed, Congress enacted a law to protect American interests.<sup>32</sup>

Clearly, another format for the law of the sea was preferable to that adopted by UNCLOS III. For example, the Non-Proliferation

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is attributable to strong naval interest, the need to import large amounts of energy and raw materials by water, and distant water fishing interests, notably tuna and shrimp.

*Id.* at 599. American foreign policy regarding the protection and regulation of international fisheries was "the so-called 'species' approach, designed to assert no geographical fisheries jurisdiction." *Id.* The Report continued:

Under this proposal, coastal nations would be given regulatory jurisdiction over coastal and anadromous species of fish, together with preferential rights to such fish up to the level of their capacity. The actual limit of coastal jurisdiction over these species would be determined by their location, not by any arbitrary geographical line.

*Id.*

32. See H.R. REP. NO. 411, Part I, 96th Cong., 2d Sess. 1-2, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 1600, 1600-01.

The purposes of H.R. 2759, as amended, are to establish an interim program to encourage and regulate the development of hard mineral resources of the deep seabed by United States citizens; to insure that the development of hard mineral resources of the deep seabed are conducted in a manner which will encourage the orderly and efficient development of such resources, will protect the environment, and will promote the safety of life and property at sea; to encourage the successful negotiation of a comprehensive international Law of the Sea Treaty which will give legal definition to the principle that the mineral resources of the deep seabed are the common heritage of mankind, and pending the entering into force of such a Treaty, to provide for the establishment of a special fund the proceeds of which shall be used for sharing with the international community pursuant to such Treaty; and to allow the continued development of technology necessary to develop the hard mineral resources of the deep seabed as soon as possible.

The United States supported the United Nations Geneva Assembly Resolution 2749 (XXV) of December 17, 1970, which declared the principle that the mineral resources of the deep seabed are the common heritage of mankind, but recognized that this principle would be legally defined under the terms of a comprehensive Law of the Sea Treaty to be agreed upon in the future.

Since 1967, efforts have been underway in the United Nations to establish an international regime governing exploitation of the deep seabed. To date those efforts have been unsuccessful. Most recently the 8th Session of the Third United Nations Conference on the Law of the Sea in Geneva, Switzerland, which completed business on April 28, adjourned without a final agreement. A summer session in New York reconvened on July 16, 1979.

The Administration, realizing the ongoing difficulty of the Law of the Sea Treaty negotiations, has indicated its support for legislation establishing a domestic regime for deep seabed mining whether or not there is an international treaty.

*Id.*

Treaty,<sup>33</sup> which finally was adopted by over a hundred countries, was the work of the nuclear club. The Space Treaty,<sup>34</sup> also widely adopted, was based upon the agreement between the Soviet Union and the United States.

In his April 8, 1976 speech, Secretary Kissinger proposed that the suggested International Deep Seabed Authority should be comprised of an assembly of all member-states to give general policy guidance; an executive, decision-making council; a tribunal to resolve disputes through legal processes; and an administrative secretariat. In order that all nations, developed and developing, should have adequate access to seabed mining, Dr. Kissinger proposed that non-discriminatory access be guaranteed for states and their nationals to deep seabed resources under specified and reasonable conditions. Further, he proposed that the Authority supervise a system of revenue-sharing from mining activities for the use of the international community, primarily for the needs of the poorest countries. Under this system some of the international revenue from deep seabed mining would be used for "adjustment assistance." Those producer countries injured by the competition from seabed production would be aided by compensating them for loss of sales, by stabilizing their earnings and, in some cases, by helping them to diversify their economies. Mr. Kissinger's plan clearly envisaged the organization of the Authority according to the United Nations pattern, i.e., placing actual policy implementation in the hands of the technologically advanced countries. This pattern was clearly unacceptable.

The Convention on International Civil Aviation<sup>35</sup> and the International Maritime Satellite Organization<sup>36</sup> offer more practical and acceptable models for the international management of deep seabed mining. Both of these agreements provide for two levels of international cooperation. In the Convention, matters of policy and international regulation are the responsibility of the Civil Aviation Organization, while the business aspects of civil aviation belong to the association of

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33. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161. This treaty was mainly the product of negotiations between the two major nuclear powers, the United States and the U.S.S.R. See generally Willrich, *The Treaty on Non-Proliferation of Nuclear Weapons: Nuclear Technology Confronts World Politics*, 77 YALE L.J. 1447 (1968).

34. Treaty on Principles Governing the Acts of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347.

35. Convention on International Civil Aviation, Dec. 7, 1944, 61 STAT. 1180, T.I.A.S. No. 1591.

36. International Maritime Satellite Organization (INMARST), Feb. 15, 1979, 31 U.S.T. 1, T.I.A.S. No. 9605.



carriers. Similarly, in the International Maritime Satellite Organization, the management of the affairs of the Organization is the responsibility of the individual governments as partners, while the technical and business aspects of satellite operations are the responsibility of private business groups. Perhaps this latter model could be effectively adapted to the needs of the organization and management of deep seabed mining.

One final observation must be made. It would be far more expeditious to deal with discrete issues in the law of the sea severally, dealing with more urgent matters first and with those that could wait at a later date. Certainly, deep seabed mining could have been more effectively handled in a separate conference and agreement.

As matters stand at present, one can see that an independent deep seabed mining regime is emerging. Following the American example, a number of industrialized countries have enacted legislation on licensing and regulation of deep seabed mining. The United States, the United Kingdom, West Germany, the Soviet Union, France and Italy are already in the deep seabed mining club, at least in terms of their national legislation, and there seems to be a strong likelihood that Japan will also join. Lesser industrial countries would be able to participate in these mining activities under the flag of a major industrialized state, and they could participate either in joint ventures or in international consortia to finance such activities. While earlier American legislation was of an interim character, bills have been introduced in both the House and the Senate which no longer envisage the operation of American mining interests within the framework provided by the Convention and they may set the trend towards the development of a new arrangement.

