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Some Basic US Conditions for a Law of the Sea Treaty

by W. J. Feuerlein, Boca Raton, Florida *

Already in 1972 legislation for the exploration and subsequent exploitation of the resources of the deep ocean bed was first introduced in the USA. However, action was postponed each year in order to give the UN Law of the Sea Conference an opportunity to come forth with an acceptable treaty draft. This attitude changed drastically since the Sixth Session of the Conference in 1977. Professor Feuerlein explains the present US position and its background.

The oceans are one of the few areas of the world that so far have not been subjected to comprehensive international controls or regulations. In fact, the concept of "freedom of the seas" has been a major world ideal for the last two hundred years. That does not mean, though, that there has been no regulation at all. A three-mile territorial limit was recognized a long time ago; international agreements for the protection of the fish resources of the world have been concluded; and some pollution controls have been introduced in recent years. As the world develops and as new technologies increase the use of the oceans and permit the exploitation of the resources of the oceans' bottoms and below, the necessity of more and better international supervision and regulations over the international waters has become desirable and in some cases necessary. Some bilateral or multilateral conventions have been negotiated, but in view of the complexities of the problems and the large numbers of nations which now take an interest in the oceans, a more broadly based treaty or system of regulation is probably in order.

The United Nations began to act in the field in 1958 when it convened the First United Nations Conference on the Law of the Sea (LOS). This Conference and also the Second Law of the Sea Conference in 1960 had as its major purpose the codification of international agreements then in existence, and to outline rights and privileges existing with respect to the oceans. The concept of "freedom of the seas" was included among the then accepted basic concepts.

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It soon became apparent that the resolutions and conventions then adopted were not nearly sufficient to take account of the various problems confronting potential users of the oceans, particularly the mining of the deep seabeds.

A new proposal was submitted to the United Nations in 1967, by the Malta Ambassador, Mr. Pardo, proposing that the resources of the ocean floor be regarded as "common heritage of mankind", and be used with special benefits to the less developed nations of the world. The UN General Assembly in 1970 adopted a general resolution on the concept of "common heritage of mankind", without spelling out any details.

The Third United Nations Conference on the Law of the Sea was called in 1973. Its purpose was to prepare and draft an LOS treaty in order to define the many issues confronting both the developed and less developed worlds in relation to the use and development of ocean resources. So far, six sessions have been held and the seventh is now in progress in New York. During the various conferences, several proposed texts emerged slowly. The latest one was the "informal composite negotiating text," adopted on July 15, 1977 (ICNT). It contains in Part XI detailed provisions concerning deep seabed mining; these provisions are basically opposed by the United States. The current session of the LOS Conference is attempting to find solutions to these fundamental differences.

The "Common Heritage of Mankind" Concept

The principle of the "common heritage of mankind" as is now used in many UN declarations is based on the proposal made in 1967 by the then

representative of Malta to the United Nations, Ambassador Pardo. Although not specifically defining this concept, he urged that the resources of the ocean be developed keeping in mind the following general principles:

- ☐ The area subject to the common heritage of mankind are the seabeds and the ocean floor underlying the seas beyond the limits of national jurisdictions; this area should not be subject to national appropriation;
- ☐ The exploitation of the area should be undertaken in a manner consistent with the principles and purposes of the UN Charter;
- ☐ The area is to be used and exploited for the benefit of mankind as a whole, giving preferential assistance to that part of mankind which needs special assistance;
- ☐ An international agency should be created to assume jurisdiction over the area and to serve as a trustee for all countries.

In 1967, no specific action was taken by the United Nations on this proposal. However, in 1969, the UN adapted a resolution calling for a moratorium on deep seabed developments; this resolution was opposed by the United States Government as not in harmony with the 1958 Geneva Convention. The United States Government maintained that the principle of "freedom of the seas" as adopted in that Convention was binding, whereas the resolution of 1969 was not. In 1970, the United Nations formally adopted a resolution accepting the "common heritage of mankind" concept; however, it contained no legal definition nor any precise description as to what was meant by this concept. The United States supported this resolution.

The discussions in 1969 and 1970 clearly showed the difficulties with a general concept such as "common heritage of mankind". It can be interpreted in different ways depending on the legal framework in use by various countries. In the American and English tradition and their legal framework, the term "heritage" is a very general concept, including the whole scale of human values, human rights, history, tradition, etc. In other systems the term "heritage" is interpreted as meaning government ownership; this is true especially in the Spanish legal system, where the translation of the word heritage is "patrimonio". This fundamental difference in the concept has been one of the major problems confronted by the United Nations Law of the Sea Conferences. The 1958 Convention embodied the concept of "freedom of the seas for all men" and there was no attempt to vest the ownership of deep seabeds in governments. Any change from this would be a radical departure from earlier thinking.

In these several sessions of the Third Law of the Sea Conference of the United Nations, no agreement on the fundamental principles relating to deep seabed mining has been reached. From the United States Government point of view, the several documents issued, and particularly the ICNT of 1977 are unacceptable, because it contains the concept giving ownership rights to the United Nations. The United States is taking a very determined stand against this principle in the present session of the LOS meeting in New York. As Ambassador Richardson recently stated, the United States cannot agree to "a regime which would unnecessarily inhibit, and perhaps even prevent, deep seabed development. To do so would make a mockery of the Common Heritage of Mankind and reduce to a pitiful trickle the benefits that could otherwise accrue, not only to the entrepreneurs who will risk their capital, but also to mankind as a whole, in particular the developing countries."

Basically, the United States Government is opposed to an *exclusive* principle of ownership of the deep seabed resources by governments. The ownership belongs to mankind as a whole. Thus the United States in no way asserts any territorial claims or sovereignty to these resources, nor does it assert an exclusive right to mine the ocean's resources. On the other hand, the United States Government would not oppose a parallel system with specific safeguards which would permit the development of the resources by an international authority as well as by the "free enterprise system" prevailing in the Western industrialized nations. This would provide the opportunity for all countries including the developing world to participate.

Protection of the Free Enterprise Principle

Another key issue of concern to the United States is the protection of the free enterprise principle. United States enterprises are convinced that private initiative and the free market economy should be given the opportunity to assist in the development of the world's resources, including the resources of the deep seabeds. So far this concept has not been included in the UN documents pertaining to deep seabed mining and thus an ideological conflict has arisen.

A large number of Conference participants, including most of the less developed countries, seem to be in favor of an international authority with sovereign powers and a monopoly over all future operations in connection with the deep seabed development. This is especially significant because the suggested International Seabed Authority would be the first international organi-

zation that would have real power in the world government structure. The danger is even deeper than merely a sovereign international organization, because the ICNT calls for the new authority to have a monopolistic position molded after state enterprises now existing in socialist countries based on the principles of planned economic development. Furthermore, the International Seabed Authority would, according to the proposed treaty, operate with the basic provision of "one nation, one vote," and use principles opposed to the free market system; thus the free enterprise world would be practically precluded from playing a significant role in deep seabed development.

The governments of the US and other Western industrialized countries are convinced that a public monopoly, or state enterprise, cannot effectively and profitably carry out any large economic operation, least of all new type of venture, such as the development of the deep seabed resources. The task involves large amounts of investment capital and the application of newly developed modern technology. There must be incentives to induce these investments and the use of technology and so far only the free enterprise, or the market system, has shown itself capable of providing these two major ingredients for any major development. During the last two hundred years, it has been the free enterprise system which has produced the large quantity of worldly goods for individuals and society. The free enterprise system has offered unlimited opportunities for individual progress and development, in contrast to any other type of economic system. The Western world feels strongly that any official exclusion of the free enterprise system from the development of the ocean resources would erode permanently this principle without any major offsetting advantages. The preservation of the free market or free enterprise principle therefore must be a key provision in any LOS treaty to which the United States becomes a party.

The treatment of the "free enterprise" principle in any LOS treaty may also become precedent-setting for provisions in other international treaties which are in the offing, such as a treaty concerning "space," or "international air," etc. Thus particularly careful attention should be given to any restrictive provisions in the LOS negotiations.

The motivation of many less developed countries including the "Group of '77" is quite different from that of the developed world. They feel that a new international economic order has to be created which would transfer large amounts of resources from the now developed world to those areas of the world that have not benefited from development during the last two hundred years. They be-

lieve they are entitled to this wealth because of "colonial exploitation." They feel that the creation of an International Seabed Authority as an international public monopoly or state enterprise, governed largely by them, could be so managed that they, namely the less developed countries, would reap the benefits of the deep seabed developments. Since these less developed countries are also aware of the fact that the Western world may need in the long run the raw materials from the ocean, the development and exploitation of the ocean resources according to the monopoly principles could lead to a far larger benefit to the less developed countries than through a free market and profit-motivated system.

The less developed countries are not truly interested in the operations of the market system where profit potential would bring about development, or where the tendency would be to provide the minerals from the ocean bottoms at competitive prices. They prefer controlled prices, a planned system of development irrespective of profits. This would enable them to protect existing markets for their mineral products which might be in competition with those from the deep oceans, especially manganese, cobalt, nickel and copper.

In line with the above reasoning, the less developed countries, under the leadership of the Group of '77, have been successful in inserting into the ICNT many specific provisions which will limit and restrict the access to deep seabed resources by any concern other than those specifically authorized by the International Seabed Authority. Furthermore, specific planning (monopoly) provisions, which are contrary to the principles generally used in free enterprise operations, have also been included. Four of the most important powers which the International Seabed Authority would have are:

- ☐ Require the transfer to the "Authority" of technology relating to exploration and exploitation of the seabed resources, presumably without any compensation;
- ☐ Require in some or all cases joint venture operations generally with firms or entities in the less developed countries with no experience;
- ☐ Require adherence to the seabed authority's plan of production controls by agreeing to limit the production of specified minerals from the deep seabeds;
- ☐ Require the payment of unspecified amounts of royalties or fees to the "Authority"; this could lead to discrimination, overlapping or obstructionist types of tactics to prevent exploitation of the resources from the deep oceans by any except "favored" types of enterprises.

The provisions proposed in the ICNT and desired by the less developed world are certainly not acceptable to the Western industrialized nations who still rely heavily on their market economies to providing growth and development. Therefore, in order to develop a LOS treaty acceptable to the Western industrialized world, four fundamental changes need to be introduced into the presently existing ICNT. They are:

- ☐ Eliminate the exclusive "monopoly" character of the International Seabed Authority.
- ☐ Change the voting procedure, namely by substituting for the "one nation, one vote" principle a system of voting giving adequate assurance to all so that through the management or control of the agency, the monopoly character of the agency cannot be reintroduced.
- ☐ Include specific rights of the free market system so that free enterprise can participate in the development of the deep seabed resources without monopoly restraints of the "Authority".
- ☐ Eliminate all specific treaty provisions which run counter to the free market principle.

US Deep Seabed Mining Legislation

The exploration and subsequent exploitation of the resources of the deep ocean beds is now taken very seriously by the American mining interests, the US Congress, and also the Carter Administration. Although legislation for this purpose was first introduced in 1972 and then in subsequent Congressional sessions, action each year was postponed in order to give the LOS Conference an opportunity to come forth with an acceptable treaty draft. This attitude changed drastically in 1977, when the sixth session of the Third LOS Conference brought forth the ICNT which is unacceptable to the US. Partly as a result of this, the Murphy Bill in the House of Representatives, namely HR 3350, has since that time been actively discussed in various committees. The US delegate to the LOS Conference, Ambassador Richardson, has testified several times before Congressional committees and then indicated that the Carter Administration supports the efforts towards legislation calling for licensing of explorations and exploitations of the deep seabeds. This positive attitude by the Carter Administration was taken partly, at least, to show to the world and especially to the delegates from the less developed countries, that the US economic interests seriously desire to push forward with the development of the resources of deep oceans. This message undoubtedly has been received by the delegates to the seventh session now meeting in New York.

US legislation in the House of Representatives is now nearing final action. In the Senate work has

been delayed partly because of other urgent matters and partly awaiting the outcome of the extensive debates in the House of Representatives. In rough outline the legislation has been proposed to:

- ☐ Create a regulatory and administrative system to allow the US Government to exercise jurisdiction with respect to activities of US citizens' enterprises, together with their foreign partners, to develop the hard mineral resources of the deep seabeds beyond the national jurisdiction of the US; the legislation specifically disclaims any assertion of sovereign rights over the deep seabeds.
- ☐ Require each firm to obtain licenses which would authorize exploration and exploitation of a specified area; no license may be issued for the same area to more than one application.
- ☐ Require applicants for licenses to pay a small fee, mostly for the cost of the administration of the application and subsequent supervision.
- ☐ Require licensees to observe appropriate environmental safeguards.
- ☐ Authorize the issuance of investment guarantees to American firms and their international partners insuring them against losses resulting from the acceptance by the US Government of an LOS Treaty with provisions contrary to their licenses as obtained from the US Government.
- ☐ Establish a Revenue Sharing Fund for the purpose of showing US commitment to the principle of "Heritage of Mankind" so that some proceeds from the exploitation of the minerals from the deep seabed can be made available to the international community.

Many of the above provisions in HR 3350 are generally acceptable to the members of Congress except for precise legal wording or presentation of details. Congress in general seems to be favorable towards deep seabed mining legislation and is supported in this by the Carter Administration. Item 5 above, however, is controversial. The investment guarantee feature may be eliminated in final action as contrary to the best interest of the US. The House of Representatives may prefer a so-called "Grandfather" clause to be included in any LOS treaty. Since Congress cannot demand inclusion of such a clause in the treaty, it may include in its legislation a "declaration of policy" which would state that it is a policy of Congress that in negotiating an international agreement on deep seabed mining, the US negotiators should to the extent possible take into consideration the protection of the integrity of any license or permit issued pursuant to the Act of Congress. Such a policy statement will bring to the attention of the US negotiators that large sums of money will

probably be invested in deep seabed mining ventures during the next few years and that the future treaty which may still take years to conclude or to ratify should protect those firms from contrary treaty provisions.

Item 6 above has also stirred up some controversy, not so much because of its concept but because of the structure of potential payments. Contributions to a Revenue Sharing Fund would reaffirm US adherence to the "Heritage of Mankind" concept. The Carter Administration and many legislators in Congress feel that a special fund should be created and have suggested a payment of 3.75% of the imputed value of the hard mineral resources mined by the US licensee; the imputed value would be computed at 20% of the proceeds of sales. Actually, payments by the US mining companies would not start until actual mining operations begin, which may be well into the 1980s.

The concept of revenue sharing is not fundamentally opposed by US mining interests. However, they consider a flat amount, namely 3.75%, or any other percentage, to be too rigid and not related to profits they may have or not earned from their mining operations. Although the suggested percentage, 3.75%, is very low, it still may

be substantial in case mining does not become profitable for many years after mining actually starts. For this purpose, the mining companies are inclined to support a system based on profit-sharing similar to a progressive income tax. If there are no profits or very low profits, the payments would be small or non-existent. On the other hand, if profits should be high, considerable revenues could be raised for the international community.

Free Enterprise Concept No Bargaining Item

From the above discussion, it should be evident that from the US point of view, there must be at least one broad condition in any proposed LOS treaty, namely, guaranteed access to the mining of the ocean bottoms for firms from the free enterprise countries. This is so fundamental that it cannot be used as a bargaining item as many less developed nations and especially the "Group of 77" have asked the Western world to do. The free enterprise concept in the field of world development is so essential that it cannot serve as an offset to other concessions. Guaranteed access for free enterprise firms does not mean an exclusive position, but the right to participate in the future development of the ocean's resources.

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