Current
Policy No. 255

Seabed Resources

Law of the Sea

December 9, 1980

United States Department of State
Bureau of Public Affairs
Washington, D.C.

Following is an address by Ambassador George H. Aldrich, Acting Special Representative of the President for the Law of the Sea Conference, before the National Association of Manufacturers in San Francisco on December 9, 1980.

In the course of my present assignment, I have met many Americans who are involved in one way or another with our mineral industry or are concerned about our future access to minerals. These have not all been the most friendly of encounters, despite the fact that I share many of these concerns. Often I find myself facing questions as to why we have permitted our future access to the mineral resources of the deep seabeds to become hostage to a U.N. Conference on the Law of the Sea. The clear implication of many of these questions and the comments that often accompany them is that our government, either through naivete or duplicity, is playing fast and loose with our economic security in order to curry favor with the Third World. While I am sure that none of you share any of these delusions, the purpose of my remarks today is to explain why they are delusions—just in case.

To understand the effort in which we are engaged in the Law of the Sea Conference and our goals with respect to deep seabed mining, it is necessary to review, at least briefly, both the history of the efforts since the Second World War to codify and develop the international law governing uses of the oceans and the legal problems and requirements of a pioneer industry facing up to the task of exploiting the mineral resources of one of the world's common areas, the seabeds beyond the limits of national jurisdiction. In a very real sense, it is the interaction of these two lines of development and their not easily compatible imperatives that defines our present struggle to obtain assured access to seabed resources as part of a comprehensive treaty on the law of the sea.

Historical Background

Postwar efforts to develop and codify the international law of the sea have resulted in three U.N. conferences. The first produced four conventions adopted in 1958—one concerning the high seas; another the continental shelf; a third, the territorial sea and contiguous zone; and the fourth, fishing and the conservation of the living resources of the high seas. The second U.N. conference failed, in 1960, to reach agreement on the major question before it—the maximum permissible breadth of the territorial sea. The third conference is now in its eighth year and, if successful, will establish a new and comprehensive legal regime for the oceans.

Let us pause a moment to consider why the nations of the world have needed three successive conferences and why, even after all this effort, success, although likely, is still in the future.

The 1958 conventions were designed in part to bring an end to "creeping jurisdiction," the steady expansion of claims by coastal states to exercise jurisdiction off their coasts. To be successful, they would have to have been generally accepted or at least complied with by most, if not all, coastal states, and they would have to have imposed limits on the breadth of the territorial

sea and on the extent of the jurisdiction that could be exercised by coastal states. Unfortunately, they failed on all counts, and the years since 1958 have seen a steady growth of coastal state claims of sovereign rights, particularly over offshore resources.

The High Seas Convention, which was the most widely accepted of the four 1958 conventions, has only 56 states party to it, whereas there are 158 states participating in the third U.N. conference. Almost all of the major maritime powers became party to that convention, but most of the coastal states stayed out and led the fight for expanded jurisdiction.

For the United States, maritime freedoms have historically been more important than offshore resources. In the past 35 years, however, the United States has become increasingly aware of the importance of the natural resources off its coasts: first, of the oil and gas under the continental shelf and, more recently, of the coastal fisheries. Nevertheless, despite these increasing concerns with our offshore resources, the United States remained very much aware of its dependence on the unimpeded passage of ocean commerce and of its security needs for freedom of naval navigation and overflight throughout the oceans, including the transit of straits. Our increasing and unfortunate dependence on imports of foreign oil have reinforced these needs.

In the late 1960s, the United States joined with the Soviet Union and some other major maritime powers to promote renewed efforts by the United Nations to develop and codify the law of the sea in ways that would be universally accepted and would effectively bring to an end the rapid expansion of coastal state jurisdiction. Simultaneously, other voices in the United Nations were calling for internationalization of ocean space beyond national jurisdiction. These separate efforts resulted in the establishment, first, of a U.N. Seabed Committee and, subsequently, of the Third U.N. Conference on the Law of the Sea.

This third conference quickly decided that the convention it hoped to produce would be comprehensive—treating all aspects of the law of the oceans. Unlike the conventions of 1958, which divided the subject into discrete categories, the new law was to be a "package deal" dealing with navigation, resources, pollution, and international questions. While this made the negotiating task harder by requiring success on all fronts, it tended to insure that the results would be accepted universally. The coastal states would agree to the navigational protections and the limitation of territorial seas to 12 miles in breadth in return for the recognition by all other states of 200-mile economic zones; and all states would feel compelled to become parties in order to participate in the new international organization created to manage the resources of the deep seabeds, which were beyond the national jurisdiction and which had been declared by the U.N. General Assembly in December 1970, by unanimous resolution, to be "the common heritage of mankind." This is how the search began for the comprehensive "package deal."

Seabed Mining's Special Problems

Now, let us turn our attention to the special problems of resource recovery from an area beyond national jurisdiction and the alternatives available to us in dealing with such an area, which we may refer to as a part of the commons of the world—that is, those areas beyond the jurisdiction of any nation state available for the use of all.

These commons are: first, the oceans, including the bottom of the oceans—that is the seabeds—beyond the limit of national jurisdiction; second, outer space, above the limits of national jurisdiction (wherever that may be); and third, Antarctica, although one must note that some states have still preserved their territorial claims to parts of Antarctica under the Antarctic Treaty regime which has made it possible to continue scientific activity in Antarctica without resolving disputes over the legal status of that territory. These common areas, particularly the oceans and outer space, have been referred to as the "common heritage of mankind," but there is nothing magic in the name; it is their location beyond the jurisdiction of any nation that gives them their special characteristics.

There are, in my judgment, only two ways of treating these common areas for legal purposes: Either we can consider them available for national appropriation, like North and South America in the 15th to 18th centuries, and Africa in the 19th century, or we must consider them not available for national appropriation, like the high seas since at least the days of Hugo Grotius.

The United States, along with virtually all other states, has given consistent support to the second of these legal approaches during all the years since the end of the Second World War. We have done this, it is fair to say, because we were convinced that this was the better approach in our own interests and in the interests of world order and the avoidance of unnecessary conflict.

Difficulties in the use of the world's commons are likely to arise only when some states want to exploit some of the resources of these common areas. There has been exploitation of the living resources of the high seas for many years without major difficulty, although it has been found necessary to create a number of international organizations to coordinate conservation efforts such as the protection of marine mammals. Significant problems, however, arise wherever exclusivity of access to a particular site becomes necessary. By definition, an area beyond national jurisdiction is one to which no national authority can accord such exclusive rights. With respect to the resources of the seabeds, although in our view they are available, like fish, to all states on a first-come, first-served basis, as a practical, economic matter, that simply isn't good enough for seabed miners. Miners the world over and their bankers require an exclusive right to an ore body before investing in the recovery and processing of the ore. It seems clear that considerations of this type would force the deferral of mining activities in these seabed areas until exclusive access to particular sites could be accorded. I think it is self-evident that where exclusivity of access is essential in areas beyond national jurisdiction it can only be conferred by international agreement among at least most of the interested states.

This fundamental point may have been somewhat obscured by the congressional debates of recent years on seabed mining legislation; and there may be some, particularly in the Congress, who really believe that the enactment of the legislation in June of this year will result, without more, in a rush of investment and the early exploitation of deep seabed resources. Certainly the enactment of the legislation gave an important psychological boost to the fledgling industry, and we are hopeful it will encourage the continuation of further necessary research and development efforts. But I have seen nothing to indicate that this legislation—even when supplemented by similar and reciprocal legislation by other states with the greatest present interest in seabed mining—would provide a sufficient legal framework to permit the industry to move forward

quickly to commercial production. This is not to suggest that commercial recovery of deep seabed mineral resources will never occur if an international regime capable of granting exclusive licenses is not created. Never is a long time. But it does seem almost certain to me that the failure to create such an international regime would long delay seabed mining, perhaps by a quarter century or more. If there is a substantial risk that this judgment is correct, then there should be no doubt about the urgent need for an acceptable international legal regime for the exploitation of deep seabed minerals.

Seabeds and the "Package Deal"

Since 1970, a key part of the search for the "package deal" in the Seabed Committee and in the conference itself has been the terribly complex effort to create a new international organization—the International Seabed Authority—to regulate access to seabed mineral resources and to provide the exclusive legal right that prospective miners need. In fact, this turned out to be the most elusive of the necessary elements of an acceptable "package deal." The vital freedoms of navigation and overflight in straits, exclusive economic zones, and archipelagic waters have been agreed for years. The final compromises on the nature and limits of coastal state jurisdiction over the resources of the 200-mile economic zone and the continental shelf and the control of marine pollution were hammered out sometime ago. However, only last summer were the last major issues settled with respect to the seabed mining regime. Only now is it possible to reach meaningful conclusions about the emerging seabed regime.

The time available today does not permit me to summarize all of the elements of the seabed regime as found in the new draft convention. I have decided to concentrate on those provisions dealing with access to seabed mineral resources—the provisions that tell the potential investor what steps he would have to take, and the provisions he must analyze to determine what risks he would run and what are the chances of something going wrong with his access.

There is one point I must emphasize at the outset of this summary. It is patently impossible to negotiate at a conference of some 150 countries and to include in a treaty all the detailed rules and regulations necessary to insure the proper functioning of the International Seabed Authority. The preparation of these rules, regulations, and procedures will be the task of a Preparatory Commission, to be established soon after the treaty is signed and to work full time for several years. Industry will have to be intimately involved in this process, and the work done by industry and the Department of Commerce during the coming year under our recently enacted Deep Seabed Hard Minerals Act should give us a great advantage in that Preparatory Commission. The rules developed there can be changed by the Authority later only if there is a consensus in the 36-nation Council. Any final judgments by the United States on the acceptability and viability of the treaty's mining regime must await these rules.

Assured Access

To be assured of access to the opportunity to engage in deep seabed mining, a prospective miner who has the necessary capital and know-how must be assured that the International Seabed Authority's contract approval process is fair, clear, and well-nigh automatic. The criteria spelled out in Annex III of the treaty satisfy this requirement. An applicant has only to be sponsored by a state party and to satisfy the financial and technical qualifications spelled out in the regulations. His plan of work must fulfill the specifications with respect to such matters as size of area, diligence requirements, and mining standards and practices, including those relevant to protection of the marine environment, that will also be set forth in the regulations. If these requirements are met, his plan of work *must* be approved; there is no discretionary basis for its rejection.

The determination that the applicant and his plan of work do in fact comply with these criteria is the job of the Legal and Technical Commission. The Commission will have 15 members elected to 5-year terms by a three-fourths vote of the 36-member Council from among candidates nominated by states parties who meet the "highest standard of competence and integrity with qualifications in relevant fields." The Commission is obligated to base its recommendations solely on the provisions of Annex III and to report fully to the Council. The majority required for decisions by the Commission is to be established in the rules, regulations, and procedures of the Authority, and I expect our representatives on the Preparatory Commission to insist that this must be no more than a simple majority.

Any plan of work which the Commission finds consistent with the requirements of Annex III will be deemed approved by the Council within a fixed time unless the Council decides—by consensus—to disapprove it. While we would have preferred the "deeming" device to apply regardless of the Commission's findings, the Conference—understandably, I think—felt that some organ of the Authority would have to attest to conformity with the applicable standards of Annex III. Doubtless this would also have been true of the simple licensing system originally advocated by the industrial countries. The automaticity of the system could only be frustrated if three-fourths of the members of the Council make a conscious and determined effort to elect unsuitable Commission members who will ignore the requirements of the treaty.

The Production Ceiling

Although we were able to get agreement in Geneva that approval of a plan of work should no longer be tied to the availability of a nickel production allotment, the timing of access still depends on the authorization of production under the ceiling. Certainly from an economic point of view it makes no sense to limit arbitrarily production of a mineral from one source and not from others. There is no reason to believe that seabed resources will be cheaper to recover and refine than land-based resources—quite the opposite, at least during the first several decades in which the seabed minerals industry is developing. But even if they were cheaper, why shouldn't we let them take over markets from the more expensive competition? Consumers deserve a break; they seem to get few enough these days.

Unfortunately, however, we are trying to produce a universal treaty—one that will be accepted by virtually all coastal and maritime nations, and that large group includes a number of countries that produce either nickel, copper, cobalt, or manganese, and an additional number that think they might become producers in the not-too-distant future. Those countries must, if they are to accept the Law of the Sea Convention, be able to show that their producer interests are protected, at least for an interim period. Moreover, the interest of most developing countries as consumers is minimal, for they

do not yet have the industry to be major consumers. Most developing countries tend to sympathize with and be protective of raw material producers, a tendency that has been encouraged artfully by Canada, the leading nickel producer. Thus, it has long been clear that there could not be a generally accepted Law of the Sea Convention that does not contain an interim production ceiling. As now formulated, the production ceiling is not likely to bar access for any qualified miner. The amount of permitted production is substantial, a "floor" has been added, and the constraint on seabed production is limited in duration.

Because the formula in the text is based on a projection forward of past trends, it is impossible to predict exactly what level of production will be allowed during the 15 years the limit will, in effect, apply. But on the basis of the Bureau of Mines' mid-range projection of the growth in nickel consumption during the balance of this century (3.4%) and the earliest practicable start-up date for commercial production (1988), the first group of miners to apply for production authorizations could produce annually an aggregate of about 200,000 tons of nickel. Thereafter, the limit for the industry as a whole would increase so that after 5 years, in 1992, 320,000 tons could be produced; after 10 years, 490,000 tons; and after 15 years, 590,000.

In fact, the 15-year trend line growth rate for nickel consumption is currently about 3.9%, and if that rate were extended into the future, the tonnage allowed to seabed mining would be considerably higher. If future growth should turn out to be lower than anticipated, the full effect of the drop would not be felt because of the "floor" provision in the formula. This substitutes a minimum 3% growth rate for any actual rate lower than 3%. Even if the growth rate fell as low as 2.2%, seabed miners could—if they thought they could make money in the kind of economic climate implied by such a discouraging trend—still supply up to 18% of the nickel market in the first year of production and up to 36% by the 15th year. Notwithstanding the share of production taken up by the Enterprise, acting alone or in joint ventures, there would still be sufficient tonnage under any reasonable set of assumptions to insure that private miners would get their authorizations when they need them. It is thus probable that market forces, not the production limitation formula, will determine how much nickel and, therefore, how much copper, cobalt, and manganese, will be produced by the first generation of seabed mining projects.

Seabed mining is a pioneering venture. So too is the effort of the world community to base the structure of a new international seabed regime on the proposition that the global commons are not subject to the jurisdiction of any state. It has been a difficult undertaking, the building of this structure, the most difficult I have ever been a part of. But the same pioneering spirit and the same confidence in the future that have brought seabed mining and the seabed mining regime so close to reality can also assure a harmonious relationship between the two. And we must not forget that the recovery of seabed mineral resources is not only important as a potential source of minerals; it is also the remaining linchpin in the whole Law of the Sea Convention—the last major item in the long sought "package deal." Given the distance we have come and the interests at stake in the success of this vast undertaking, we cannot fail to finish the job. Pioneering ventures are difficult enough in a stable legal order. Without law—without this new comprehensive legal system for the oceans—seabed mining will be only one of the victims of the more chaotic and dangerous world that would result. This we cannot permit. ■

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