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INTRODUCTION

The fifth and most recent session of the United Nations Conference on the Law of the Sea (UNCLOS) was, as were previous sessions, unable to produce a solution to the deadlock over deep-seabed mining. The tentative steps toward accommodation developed during the fourth UNCLOS session were brushed aside, and polarization again characterized the proceedings. As a result of this stalemate, strong pressure will grow within the United States Congress to abstain from further international negotiations and instead to establish a domestic regulatory system for deep-seabed mining.

For the past few years influential members of Congress have shown their impatience with the slow pace of UNCLOS in general and with the even slower pace of deep-seabed mining negotiations

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in particular. From the beginning Congress has viewed U.N. Seabed Committee meetings and UNCLOS sessions with a great deal of ambivalence.[1] Because of the willingness and presumed ability of domestic mining companies to raise seabed minerals and transport them to the United States, Congress is hard-pressed to refrain from acting unilaterally. The situation is aggravated by the fact that the U.S. must currently import these minerals to meet its needs.

Congressmen will, no doubt, point to the intransigence of the Group of 77(G-77)[2] as the culprit in the negotiations. There is no question that some members of the G-77 will not compromise when the resources that they deem the common heritage of mankind are at issue. These members were able to prevail in the fifth UNCLOS session over the more moderate G-77 members who had influenced much of the fourth session. The sentiment in this country simply to consider international regulation of seabed mining a lost cause is understandable.

Before policy-makers succumb to such sentiment and bear the serious foreign policy consequences of implementation, it would be wise to take a hard look at our own negotiating performance at UNCLOS. We must ask, "Did the U.S. negotiating team make a determined and reasonable effort to reach agreement on deep-seabed mining? Did the U.S. team explore all possible avenues leading to agreement?" This article posits that the U.S. performance at UNCLOS has left much to be desired and that breaking off negotiation now would mean, in effect, forsaking international mediation before having seriously pursued the option.

The U.S. negotiating team, assembled by the Ford administration, can be faulted on several grounds. Immediately prior to the fifth UNCLOS session, controversy over the adequacy of our negotiating team (which for some time had raged within the government) became public.[3] Certainly, the choice of a Department of Interior official, whom foreign delegates identified as representing narrow U.S. mining interests, to head seabed negotiations was unfortunate. However, the negotiating problems were more substantive than personal. In other words, given the policy with which the U.S.

1. *E.g.*, Ambassador Pardo's 1967 U.N. declaration. For an analysis of congressional reaction to Ambassador Pardo's declaration, see Kelley, *International Control of the Ocean Floor*, in CONGRESS AND THE ENVIRONMENT (R. Cooley & G. Wandersforde-Smith eds. 1970).

2. Now consisting of approximately 106 developing nations.

3. N.Y. Times, July 20, 1976, at 4, col. 1, & Washington Post, July 25, 1976, § A, at 2, col. 3.

team had to work, virtually no negotiator, no matter how skillful or respected, could have achieved success. Indeed, even when Secretary of State Henry Kissinger, a most able and respected negotiator, entered UNCLOS negotiations, there was no movement toward agreement. Thus, we must look beyond individuals to perceive the flaws in United States policy.

The most fundamental mistake committed by U.S. policy-makers was to never directly address the central objective of the G-77 in the seabed area. This objective is *to gain an indeterminate amount of international political control over ocean mining activities beyond national jurisdictions.* The background to the formation of this objective deserves elaboration.

If Ambassador Pardo's original proposals had been accepted by the international community as a whole, there would have been a considerable amount of potentially exploitable oil and gas reserved to the international community. When Pardo spoke of the "common heritage of mankind," he meant the considerable economic rewards from resource exploitation in the international area. The distribution of these rewards on a basis of national need rather than on national technical capability struck a responsive chord among the developing countries. However, coastal nations' insistence upon placing virtually all ocean oil and gas resources within national jurisdiction prevailed. Consequently, the only economic treasure left to the international community was manganese nodules. Despite the abundance of manganese nodules, representatives of developing nations soon determined that these resources did not present the cornucopia they had once envisioned.

Although the diminished pot of resources available to the developing world lowered expectations of economic reward, allegiance to the common-heritage-of-mankind principle never wavered because of the evolving interpretation of the concept itself. This changing interpretation is revealed in a paper delivered in 1973 by the Venezuelan representative to UNCLOS who stated: "To developing nations the concept of common heritage implies not only sharing in the benefits to be obtained from the exploitation of the resources of the Area, but also, *and above all,* an effective and total *participation in all aspects of the management of this common heritage.*"[4]

4. Aguilar, *How Will the Future Deep Seabed Regime be Organized?,*

The key phrase to note is "total participation in all aspects of the management of this common heritage." After boundary consensus was attained, the focus of developing nations shifted from concern over the magnitude of rewards to concern over the role the developing world would play in the actual exploitation of the area. In subsequent years of seabed deliberations, attention shifted from the emphasis upon the resources themselves to a concern for desirable and appropriate management of the deep seabed. Developing nations came to insist that only through their participation in management could resource exploitation, regardless of its magnitude, be regulated on behalf of the international community.

However, several developing nations demanded not only participation but also direct and effective *control* over all deep-seabed exploitation. This demand was to be manifested primarily (1) through international control over state and private mining enterprise activities on the deep seabed through the creating of a strong international regulatory organization referred to in this paper as the "authority" and (2) through substantial involvement of developing nations in the key management organs of the authority.

Because of events both internal and external to UNCLOS negotiations, political goals replaced economic goals as the prime interest developing nations have in the deep seabed. However, instead of facing the G-77 demands directly and searching for a reasonable basis of accommodation, United States policy-makers have consistently taken a hard line on political compromise. Moreover, the mistaken belief of U.S. policy-makers that they would never have to come to terms with the political goals of the G-77 contributed substantially to the UNCLOS deadlock.

The Strategy of the United States Negotiating Policy

The following section of this paper details the four distinct premises which guided U.S. policy-makers and led them to believe political compromise was unnecessary. These four premises are: (1) a sense that coastal developing nations would trade the more ephemeral political and ideological goals sought in Committee I for the hard economic rewards which could be gained in Committee II negotiations; (2) a sense that Committee I negotiations were being stalled, not over political disputes, but rather by the substantive economic interests of a few mineral-exporting developing nations; (3) a sense that the manifestation of strong congressional pressure

in Law of the Sea: The Emerging Regime of the Oceans 43, 47 (J. Gamble & G. Pontecorvo eds. 1974) (emphasis added).

for unilateral mining legislation would lead developing nations to accede to the U.S. position; (4) a sense that if all else failed, high-level U.S. government officials could intercede and thereby demonstrate to other nations the seriousness with which the U.S. approached the negotiations.

In short, U.S. policy-makers assumed that the combination of the foregoing factors would lead the G-77 to accept whatever the U.S. offered. This assumption was incorrect. Although the failure of this strategy is now evident, it is worth examining in detail the premises upon which the strategy was based.

National v. International Goals

In private discussions the opinion has often been expressed that Committee II and not Committee I is "where the action is." This belief stems from the predominant focus of coastal nation representatives throughout UNCLOS sessions upon the extension of national boundaries to enclose the vast resources of the ocean. Thus far the predominant characteristic of UNCLOS negotiations has been the rampant nationalization of ocean space. After initial doubts, the U.S. too acceded to this movement by acknowledging its acceptance of the 200-mile economic zone at the Caracas UNCLOS session in 1974. In general representatives believed that if tradeoffs were to be made among the various issue-areas being negotiated at UNCLOS, the G-77 would view Committee I issues as more expendable than the economically substantive issues of Committee II. Few believed that the G-77 would risk sacrificing the economic gains made in Committee II for the broad, ideological goals expressed in Committee I.

United States policy-makers, however, consistently underestimated the symbolic value of the authority and the depth of allegiance it commands from G-77 nations. This allegiance was forged by political events occurring outside the UNCLOS, notably the action taken in 1973-1974 by the Organization of Petroleum Exporting Countries (OPEC) and subsequent U.N. sessions calling for a New International Economic Order. It was primarily at the 1975 Geneva UNCLOS session that the link between the authority and the New International Economic Order was joined in practice. Through the urgings of delegates from nations such as Algeria and Tanzania, other G-77 delegates began to place the seabed in a new

context.[5] Paul Engo, delegate from Cameroon and Committee I Chairman, openly acknowledged his debt to the U.N. Declaration of a New International Economic Order in his formulation of part I of the Single Negotiating Text (SNT).[6]

The pronouncements of G-77 delegates which emphasized the seabed link to broader Third World goals were viewed by U.S. policy-makers essentially as mere rhetoric, designed to impress other G-77 delegates but not necessarily reflecting their true or hard negotiating positions. Even Engo's formulation at Geneva of part I of the SNT text was widely believed not to reflect an accurate state of Committee I negotiations. It was thought that nations were closer to agreement than appeared.[7] The SNT was seen as the personal position paper of Chairman Engo, representing only the views of a few radical nations.

Perhaps United States policy-makers had a difficult time accepting the SNT seriously because they believed that the G-77 simply had no alternative but to reach an accommodation with the U.S. and other industrial nations. Because only industrial nations possess the ability to mine and process nodules, the G-77 could presumably find themselves locked out of the mining enterprise altogether. In congressional testimony the chief U.S. negotiator for Committee I clarified this point when he stated, "I think most of the developing countries realize that without the highly industrialized countries being accommodated in this negotiation, it is not likely that there will be a treaty which will be of any use to the developing countries."[8]

Thus, United States policy-makers did not perceive the need to make political compromises in Committee I because they questioned the depth of G-77 commitment to their political goals, particularly if such commitment meant jeopardizing the economic gains they could expect from Committee II consensus and because they also believed that the G-77 ultimately had no other choice except agreeing to a formula acceptable to the industrial nations possessing the necessary technology.

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5. Miles, *An Interpretation of the Geneva Proceedings—Part I*, 3 OCEAN DEV. & INT'L L. 187 (1976).

6. *Status Report on Law of the Sea Conference: Hearing Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess., pt. 3, at 1271 (1975) (statement of Paul B. Engo).

7. *Id.* pt. 4, at 1449 (1975) (statement of Leigh Ratiner).

8. *Id.* at 1457.

Mineral-Exporting Developing Nations

The second mistaken premise of United States policy was the belief that only a small band of land-based mineral producers among the G-77 were obstructing progress in Committee I. In particular, it was thought that the copper exporting nations among the G-77, notably Peru and Chile, were the chief antagonists. Their purpose in stalling negotiations was clear—a fear that imminent seabed mining would seriously erode their position as exporters and result in grave foreign exchange problems. United States officials took the opposition of these countries seriously, for obvious substantive economic interests were at stake. It was also deemed significant that the Peruvian delegate held an important position in the negotiations (as the Coordinator for the Committee I Contact Group of the larger G-77). The Caracas UNCLOS session may have contributed substantially to overestimating the power of land-based mineral producers because negotiations during the session focused upon the economic implications of deep-seabed mining for land-based mineral producers.

Throughout UNCLOS sessions the G-77 mineral producers have insisted that the authority be endowed with powers to place price and production controls on seabed mineral exploitation. Until the first 1976 New York UNCLOS session, the United States took the opposite position. However, during the New York session Secretary of State Kissinger announced a major U.S. compromise. Dr. Kissinger stated that the U.S. was willing to put temporary limits on mineral production from the seabed. The proposal was eagerly accepted by the G-77 mineral exporters and elaborated upon in the Revised Single Negotiating Text (RSNT).

Nevertheless, the intended effect of the U.S. compromise was never realized. Although the G-77 mineral exporters were now willing to negotiate a complete treaty, they could not convince their G-77 colleagues to be equally enthusiastic. The reason for this lack of enthusiasm is clear. The United States simply presented no political incentives for the vast majority of G-77 nations equivalent to the economic incentives offered the mineral producers. In fact, U.S. policy-makers actually sought to toughen their political stand, viewing it as a logical *quid pro quo* to the economic concessions. The futility of this strategy is apparent from the continuing negotiating deadlock. Clearly, it was simplistic of U.S. policy-makers

to believe that a few mineral exporting nations could dominate the thinking of approximately 100 other nations. Interestingly the delegate from Peru had publically stated that G-77 mineral producers had no dominance over the G-77 position. However, U.S. policy-makers apparently preferred not to believe him.[9]

Congress and the Use of Pressure as a Strategy

Although the initiative in ocean policy-making lies with the executive, various congressional committees have consistently made their policy preferences known. This attitude is proper, for the Senate ultimately must approve a law of the sea treaty, and both branches of Congress will have to pass implementing legislation. The congressional figure most prominent on deep-seabed mining issues has been Senator Lee Metcalf, Chairperson of the Minerals, Materials and Fuels Subcommittee of the Senate Committee on Interior and Insular Affairs. Since the early 1970's, Senator Metcalf has held hearings on bills which would bypass continuing UNCLOS negotiations and lay a regulatory framework for domestic mining firms to begin seabed exploitation. United States UNCLOS negotiators have consistently opposed this legislation.

Despite the lack of full congressional action on the Metcalf bill, both Senator Metcalf and U.S. negotiators have said that pressure for unilateral action in the Congress would have a positive effect upon the U.S. negotiating position. It was thought that such efforts would demonstrate to the G-77 that the United States was prepared to act unilaterally if its essential interests were not met in UNCLOS negotiations. The Metcalf legislation was viewed as a potentially valuable catalyst in promoting agreement or in encouraging other nations to accept the U.S. position. One observer of this strategy noted: "Negotiators gain certain bargaining advantages internationally from having this 'club in the closet.' Foreign delegations know there is a segment of the U.S. government that wishes to proceed with unilateral solutions to what it views as pressing problems and that has no faith in the international negotiating process."[10]

The "club" was virtually brought out of the closet during the first week of the initial 1976 New York UNCLOS session. During that period, Senator Metcalf had his bill reported to the Senate Commit-

9. Statement by Alvaro de Soto, *reprinted in* LAW OF THE SEA: CARACAS AND BEYOND 157 (F. Christy, Jr., *et al.* eds. 1975).

10. Kolb, *Congress and the Ocean Policy Process*, 3 OCEAN DEV. & INT'L L. 261, 277 (1976).

tee on Interior and Insular Affairs. A similar bill sponsored by Congressman John M. Murphy, Chairperson of the House Oceanography Subcommittee, was at the same time reported to the House Merchant Marine Fisheries Committee. Congressman Murphy went even further by issuing a press release to Law of the Sea delegates at the U.N. in which he labeled UNCLOS a "sham" and stated his intention of moving ahead with unilateral mining legislation.

These congressional pressure tactics may have influenced some G-77 delegates, but the number was not sufficient to produce the desired result. Again the U.S. policy-makers' mistaken perception of the G-77 position led them to believe that such pressure could be effective.[11] The fact that congressional pressure did not have a perceptible influence on UNCLOS delegates did not lead the Ford administration to seek a new substantive basis for accommodation. Instead, the situation encouraged the administration to apply its own form of pressure.

High-Level Involvement

A lack of continuous, high-level administrative involvement in the formation of international ocean policy has been a prominent characteristic of the United States ocean policy process.[12] Lower-level bureaucrats have been the primary ocean policy-makers. High-level administrative officials have been called in only to resolve disputes that arise among the lower-level bureaucrats. The two main reasons for high officials delegating their policy-making responsibilities are that they perceive issues other than ocean mat-

11. In the early 1970's representatives of Summa Corporation unintentionally produced the same sort of pressure. Officials of Summa Corporation, a part of the large Howard Hughes empire, frequently repeated their intention to mine for manganese nodules with or without new domestic or international regulations. The G-77 was deeply concerned that such precipitous action would foreclose, or at least make difficult, an international approach to the seabed. Prior to 1975, the international community did not know that Summa Corporation pronouncements were a subterfuge for its real mission of raising a sunken Soviet submarine from the seabed. When, during the Geneva UNCLOS session, the news of Summa's real mission broke, there was little negative response to the covert activities, partly because of the relief G-77 nations felt in knowing that Summa was not interested in raising manganese nodules.

12. Hollick, *The Clash of U.S. Interests: How U.S. Policy Evolved*, MARINE TECH. SOC'Y J., July 1974, at 16.

ters as more important and hence more worthy of their full attention and that the legal, political, and economic complexity of ocean issues are overwhelming, given the time constraints within which these officials operate.[13]

The lack of high-level administration attention to ocean issues has been perceived as a mistake by several observers, including Senator Claiborne Pell. Senator Pell has long urged the administration to place either the Vice President or the Secretary of State in direct charge of UNCLOS negotiations. The rationale behind such a policy is demonstrating to other nations the seriousness and importance the United States attaches to the negotiations. Members of the U.S. UNCLOS negotiationg team urged Secretary of State Kissinger to take an active role in the negotiations. However, until the 1976 sessions he resisted.

During the first 1976 New York UNCLOS session, Kissinger made a dramatic intervention in the negotiations. In his New York speech on April 8, Kissinger assessed in some depth the nature of UNCLOS negotiations and made proposals to move the negotiations forward. The speech was a marvelous example of offering carrots with one hand while holding a stick in the other. The carrot was offered to elicit the support of mineral-producing developing nations by proposing a temporary limit on seabed mineral production which would be tied to the projected growth in the world nickel market. The stick was intended to have an effect upon all nations because it was the threat to move ahead unilaterally. Kissinger stated:

> We strongly prefer an international agreement to provide a stable legal environment before [mining] development begins, one that ensures that all resources are managed for the good of the global community and that all can participate. But if an agreement is not reached this year it will be increasingly difficult to resist pressure to proceed unilaterally.[14]

Dr. Kissinger's message to foreign delegates, emphasizing that the United States would not wait much longer for a seabed treaty, was clear even if couched in conciliatory language. The essential purpose of his speech was to make the threat of unilateral action more credible. It was thought that a threat made by the highest U.S.

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13. *Id.*

14. Address by Secretary of State Henry Kissinger, The Law of the Sea: A Test of International Cooperation (April 8, 1976), *reprinted in* 74 DEP'T STATE BULL. 541 (1976). The U.S. delegation did pursue other initiatives at the New York UNCLOS sessions—that is, the banking system and a new plan for financing the Enterprise—but these proposals did not address the major outstanding political issues.

foreign policy official would have a greater impact upon delegate thinking than one delivered by U.S. UNCLOS negotiators. Moreover, Kissinger announced that President Ford had asked him to head the negotiating team during a second 1976 UNCLOS session. This announcement was intended to demonstrate a new seriousness which the President attached to UNCLOS negotiations. Dr. Kissinger's entrance into UNCLOS negotiations did not portend any far-reaching shift in United States policy; rather it signalled a new importance that the administration attached to producing *the desired* seabed treaty.

However, the impact of Kissinger's involvement in UNCLOS negotiations was negligible. The carrots were distributed to too few G-77 nations, and the obvious stick did not frighten the majority of delegates. In fact, Dr. Kissinger's participation in the two 1976 New York UNCLOS sessions was extremely limited, amounting to perhaps four full days of negotiating. Because United States policy remained basically the same during the sessions, no discernible progress was made in reaching an international consensus.

Ironically, just when Secretary of State Kissinger entered the negotiations to add credibility to the United States position, his own credibility was undermined by the presidential elections. Foreign delegates, suspecting that a new administration might adopt a new seabed policy, were unwilling to make compromises with a Secretary of State whose term of office was possibly limited.

CONCLUSION

The thesis of this article has been that the failure of United States policy-makers to seriously address the political goals of the G-77 has substantially contributed to the deadlock in current UNCLOS negotiations. Clearly no amount of negotiating pressure will force G-77 nations to adopt the vision of a seabed regime preferred by the U.S. Equally as clear is the fact that if the U.S. seriously desires an international solution to the seabed dispute, it will have to make political as well as economic compromises. Admittedly, it is much more difficult for U.S. policy-makers to make political rather than economic concessions without jeopardizing basic national interests. If the negotiations were a question of creating formulae to divide economic resources, consensus would have been obtained long ago. But when polarization occurs, political control is less divisible than

are resources. Thus, the question of political control permeates the major issues being debated—that is, the system of exploitation and the decisionmaking structure of the authority.

United States policy-makers legitimately fear several consequences which could result from large political concessions and the relinquishment of a high degree of control over seabed activities. These consequences are four in number. (1) As a matter of policy, an authority could discriminate against U.S. mining enterprises. Policies designed to limit U.S. corporate entry into seabed mining could arise from a G-77 desire to preserve mining sites until more developing nation enterprises are capable of mining. Such policies might also come about as a result of U.S. foreign policies exogenous to seabed matters. (2) An embargo could be placed on seabed minerals destined for the U.S. This result could occur if future actions were taken in concert with land-based mineral producers and exporters. (3) A truly international authority might impinge upon future military alternatives related to the seabed. The fear is that a seabed authority, originally established for mineral exploitation, might subsequently claim jurisdiction over military activities. This is a concern often attributed to Soviet as well as to U.S. policy-makers. (4) An undesirable precedent could be set in the establishment of international organizations. The creation of a strong authority could have a domino effect upon the structure and restructure of other international organizations and could present problems for United States policy-makers in other situations, under different circumstances.

Although fear of the above consequences is legitimate, there is no reason that undesirable consequences must be a part of any international solution. United States policy-makers need not waive basic U.S. interests to reach a seabed accord. Instead what is needed is a careful policy examination of how the U.S. can make political compromises without causing the undesirable consequences. What institutional alternatives can accommodate both the interests of the U.S. and the G-77? With some thought and imagination devising an acceptable formula should not be difficult.

In other articles[15] I have presented the framework of one such institutional alternative. This alternative involves the creation of a phased or evolving authority. According to an agreed-to plan, this

15. *E.g.*, Barkenbus, *Deep Seabed Mining: An Examination in International Organization*, in OCCASIONAL PAPER SERIES 15-18 (Johns Hopkins University, Ocean Policy Project Pub. No. 5, 1975); Barkenbus, *How to Make Peace on the Seabed*, 25 FOREIGN POL'Y, winter 1976-1977, at 211-20.

authority would change its nature over time. During Phase I, the authority would be established in accord with the desires of technologically advanced countries. The basic purpose of the first phase would be to test the commercial feasibility of mining and to determine the appropriate regulatory structure. Phase II would commence ten to fifteen years after the establishment of the authority and would accommodate the basic interests of the G-77. However, certain guarantees protecting the integrity of investment would be an essential feature of Phase II. Negotiations over a subsequent phase could take place during Phase II. Because global relationships are likely to change in the future and to produce entirely new perspectives on seabed exploitation, planning for more than one phase in advance would be unwise. Precedent for such an authority already exists in the form of the International Communications Satellite Organization (INTELSAT), which was originally structured to change over time and has done so successfully.

The concept of an evolving authority is only one alternative for policy-makers to consider. There may be any number of other acceptable alternatives, each involving a degree of political compromise, which could bring about an international settlement at minimum costs to national interest. The key point in this process is not discerning alternative scenarios and institutions but rather convincing policy-makers that they indeed must make some political compromise. It is a widely held misconception in Washington that unilateral United States sanctioning of mining would occasion few, if any, political costs. What is not properly appreciated is the degree to which the substantial U.S. ocean activities are dependent upon a stable international climate in general and a uniform sea law in particular[16] and the range of actions G-77 nations could conceivably take in retaliation for unilateral mining of the deep seabed.[17]

A substantial number of reasons exist for the United States to continue to seek an international settlement on deep-seabed re-

16. Address by John Norton Moore, *Neglect of the Oceans*, to the World Affairs Council of Northern California and the Bar Association of San Francisco, in San Francisco, Ca. (Aug. 18, 1976) (transcript on file with the office of The *San Diego Law Review*).

17. Bergsten, *The Threat from the Third World*, 11 FOREIGN POL'Y 102 (1973).

sources. And it is time for policy-makers to recognize that such a settlement cannot be reached without some political compromise. This fact does not mean that the U.S. must forego its immediate national interests in the seabed. It does mean, however, that U.S. policy-makers must be prepared to seriously consider essential G-77 interests and attempt to incorporate all interests within a settlement. Only if these steps are taken, can we truly speak of the resources of the deep seabed as "the common heritage of mankind."