COMMENT

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I
INTRODUCTION

The position of the Reagan administration on the U.N. Convention on the Law of the Sea is clear and unequivocal. It is categorically "NO": "NO" to the Convention as adopted in New York on April 30; "NO" to any effort to change or improve it; and "NO" to any further participation in the ongoing U.N. process of endeavoring to achieve a consensus for a generally acceptable law of the sea. Thus, U.S. policy, pursued for more than thirty years, in trying to reach multilateral agreement on uses of the oceans through the United Nations has been reversed—and completely.

Just when the administration decided to oppose the U.N. Convention on the Law of the Sea is not clear. In any event, it is clear that our efforts, in the closing days of the final session, to induce our friends and allies to join us in opposing the Convention, frustrated any further meaningful negotiations and prevented any "last minute" compromises or changes to improve the text that might otherwise have been possible. Our opposition was conspicuous and uncompromising—the only major nation to vote "NO." And our opposition continues today with high-level interventions in the foreign ministries of our friends and allies seeking to induce them likewise not to sign the Convention.

Having now excluded ourselves from the lawmaking process in which we have been a principal leader for so many years, we must now be concerned with formulating, finding, or divining a law for our uses of the oceans generally acceptable to other nations. The process of building a universally acceptable law for the sea has never been easy and certainly has not been made easier by our apostasy at the United Nations. In any event, the need for an acceptable law of the sea regime is now stronger than ever, and it will become increasingly so as other nations follow our new leadership in asserting new self-interest claims or rules for governance of the oceans, the seabed below, and the airspace above.

Ambassador Malone has given us a glimpse of the new oceans policy being formulated by the Reagan administration. We are assured that it will be based on the reality of the critical importance of the world's oceans to mankind, but there are few specifics.

Any comment with respect to our emerging national oceans policy should start with President Reagan's statement of July 9 in which he announced that the United States would not sign the U.N. Convention as adopted by the Conference.

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He said, however, that the administration had completed a review of the Convention and recognized "that it contains many positive and very significant accomplishments."[1] He continued:

> Those extensive parts dealing with navigation and overflight and most other provisions of the convention are consistent with United States interests and, in our view, serve well the interests of all nations . . . . Our review recognizes, however, that the deep seabed mining part of the convention does not meet United States objectives. For this reason, . . . the United States will not sign the convention . . . ."[2]

Thus, sixteen of the seventeen parts and the bulk of the provisions of the Convention were found acceptable, positive, and very significant accomplishments—all but Part XI and its Annexes dealing with deep seabed mining. Where then do we stand with the bulk of the provisions, those dealing with the mobility of air and naval forces, commercial navigation, fisheries, environmental protection, scientific research, the conservation of marine mammals, dispute settlement, and more? Those provisions were not easily attained, and they represented extraordinary achievements by the Conference and, in large measure, by our successive delegations.

Accordingly, I assume that the administration's new oceans policy will be, in substance, one way or another and insofar as possible, to accept, adopt, espouse, or proclaim all the good parts of the Convention (i.e., all except Part XI) and to renounce, condemn, and abjure Part XI—the deep seabed mining provisions. At least this would seem to be the course if the new oceans policy follows the President's statement of July 9. I suspect, however, that the President has not had the last word and that the task of implementing his policy will be burdened by new unilateral jurisdictional assertions by Congress and/or the bureaus over the sea and seabed beyond our territorial margins.

II
POLICY ON DEEP SEABED MINING

Ambassador Malone advises us that "a primary objective of our oceans policy . . . [will be p]romoting deep seabed mining under the U.S. flag . . . guided by market forces . . . ."[3] As authority for the feasibility of this program he cites a statement of the American Mining Congress. Of course, it is and has been the objective of the American Mining Congress to have seabed mining available to its members without the strictures of the U.N. Convention, and for that reason it has strongly opposed the Convention for years, judging any benefits or advantages to the country from the other provisions of the Convention as subordinate to mining rights. Weighing and balancing competing national interests and those of individual groups or business associations in any complicated international negotiation, such as the Law of the Sea Conference, is an impossible and unrewarding

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1. President's Statement on the Convention on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887, 887 (July 9, 1982) [hereinafter cited as President's Statement].

2. *Id.*

3. Malone, *The United States and the Law of the Sea after UNCLOS III,* LAW AND CONTEMP. PROBS., Spring 1983, at 29, 32.

task for the executive branch. In this case, however, the metal miners won the day—or did they? And, if so, will it prove a pyrrhic victory?

President Reagan in his statement of July 9 noted that "world demand and markets currently do not justify commercial development of deep seabed mineral resources, and it is not clear when such development will be justified."[4] He further noted that "When such factors become favorable, however, the deep seabed represents a potentially important source of strategic and other minerals."[5]

There is little agreement among the experts as to when, if ever, and by whom seabed mining will take place. All seem to agree, however, that for the foreseeable future seabed mining is uneconomical and will not take place on a commercial scale. On the other hand, conceivably the nodules of the deep seabed may one day be critical to our need for cobalt and manganese. Having excluded ourselves from the right to mine under the Law of the Sea Convention, and assuming we cannot purchase the metals from land-based sources or others having mining rights under the Convention, we will have to face the hard issue of whether we have the right, once the Law of the Sea Convention comes into force, to mine those choice sites 500 miles southwest of Hawaii—particularly if they already have been licensed to others by the U.N. Seabed Authority. Fortunately for us, the issue is not likely to arise in the lifetime of any of us here today.

I have long believed and argued that "freedom of the high seas"—that vague and general principle heretofore universally accepted—included the right for anyone to take nodules or fly his kite anywhere on the high seas so long as he did not impinge upon the like right of others. In so doing I have also recognized that it was, in a sense, a hollow assertion of right, incapable of monopolization because, by hypothesis, all others had the same right. Certainly no one seriously claims that any individual, corporation, consortium, or government has a right under customary international law to lay a valid claim to any part of the deep seabed for his or its own use to the exclusion of all others. Nevertheless, in years past the high seas in various coastal areas, and the assumed freedoms therein, were being seriously adversely affected by coastal state encroachments and annexations. To bring order to this law of the jungle at sea was a particular reason for the Law of the Sea Conference, especially insofar as the United States was concerned.

Now, perhaps, we may well be back to square one and the scramble for staking claims, but possibly with a new player, the U.N. Seabed Authority, backed by a majority of the nations of the world, including a majority of the coastal states, asserting a new "rule of law." The conflicts and debates will be intense and not without interest, but hopefully confined to another—the fourth—law of the sea conference.

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4. President's Statement, *supra* note 1, at 888.
5. *Id.*

III
POLICY ABOVE THE SEABED AND UNCUSTOMARY INTERNATIONAL LAW

It is a fallacy to assume that we can pick and choose among the clauses and provisions of the U.N. Convention, adopting those we like under the rubric of "customary international law" and rejecting those we do not choose to accept. On the other hand, quite clearly some provisions of the Convention do reflect customary international law as it now stands, while others, including some most important areas, equally clearly do not.

Unfortunately, our saying something is customary international law does not make it so. Congress can pass laws and the President can issue proclamations concerning uses of the seas, and they will be binding on American companies and our nationals; but, without more, those laws and proclamations have no effect as to others outside our jurisdiction unless and until the pronouncements become generally accepted by other nations. Similarly, we lawyers can adopt or restate so-called Foreign Relations Law of the United States, but its reach is no greater (heaven forbid) than that of an Act of Congress or an Executive Proclamation. And, again, those acts (by themselves) do not make international law, at least insofar as other nations are concerned.

It is true, however, that some of our past unilateral assertions of jurisdiction over portions of the seas have been accepted and adopted by other states to the point that they have become accepted as international law. Examples include the Truman Proclamation claiming U.S. rights to mine "our" continental shelf.[6] But it took a multilateral agreement in a U.N. convention to wrap it up, with any lingering doubts being attended to in the present Law of the Sea Convention.

Our own excursions into the high seas (e.g., our declaration of a right to search vessels for rum runners in a 50-mile zone during Prohibition and our 300-mile security zone in the years immediately preceding World War II) only encouraged other nations to go and do likewise and to make their own unilateral declarations over coastal zones, much to our discomfort. It was, in part, to meet these situations that we strongly supported the Third U.N. Conference on the Law of the Sea. I hope we will not set off another rash of coastal and archipelagic state claims on and into the oceans.

The reality we face today is that we are not a party to the U.N. Law of the Sea Convention and will not become a party, at least not in the foreseeable future. Accordingly, we will not enjoy the benefits of the Convention nor be bound by its limitations and obligations. Further, the coming into force of the Convention cannot and will not alter or change our position under international law (as a nonparty) vis-a-vis all other countries whether or not they are parties to the Convention.

There are, of course, monstrous differences and disagreements among nations, and among the authorities, as to the rights and duties of nations under customary

6. Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 3 C.F.R. 67 (1943-48 Compilation).

international law with respect to the oceans—otherwise the long ordeal at the Third U.N. Conference on the Law of the Sea would not have been necessary. On the other hand, as noted above, many generally accepted principles of customary international law are reflected in the U.N. Convention, some interpreted, some amplified, and some restated. And there are numerous provisions not, heretofore at least, generally accepted as customary international law—some of which in time may well become generally accepted by nonparty nations so that they too will become customary international law for all nations.

Our problem today, for the United States, it seems to me, is to state (or restate) customary international law as it applies to us without benefit or burden of the new Law of the Sea Convention. And I suggest that this should be the course in defining the administration's new oceans policy. That does not mean picking or choosing from among the numerous provisions of the Convention or adopting those to our liking and blessing them accordingly. On the other hand, it does not preclude us from acquiescing in interpretations or restatements of existing law labored over and enshrined in the Convention text. In fact, we might be well advised to give the Convention text the benefit of any doubt on the fine points and whenever possible.

Where then do we stand on the fundamental and basic issues of our use of the high seas? Certainly, neither the adoption of the Convention nor its coming into force has or will have any effect as to the presently existing navigational rights of nations not parties thereto, ours included. Our ships may sail the seas and transit seaways and straits, or overfly or go submerged, just as they did or could do a year ago; in my view, they will continue to have those rights, such as they are, if and when and whether or not the Convention comes into force.

Stated differently, nonparties to the Law of the Sea Convention will neither gain rights nor lose rights by virtue of the Convention. It is, I think, a fundamental principle of international law that states cannot be deprived of theretofore generally recognized rights without their consent. It is analogous to constitutional principles that prevent disenfranchisement or divestiture, or akin to grandfather rights. Some analogies may also be drawn from the Articles of the Vienna Convention dealing with third-party rights under treaties.

Again, I suggest that in formulating our oceans policy we should define our customary international law rights in realistic terms based upon the consensus prior to the adoption of the U.N. Convention. Further, our policy so defined should be confined within the reaches of those provisions of the Convention which attempt to codify or restate the applicable principles.

IV
CONCLUSION

It is a pity that after years of enormous effort, and having come so close, the Third U.N. Conference on the Law of the Sea failed to achieve its impossible goal—a universally acceptable means of establishing peace in and about the oceans. Yet, I think we have come a long way, notwithstanding the present shambles, in achieving that goal. We must not delude ourselves, however, that we are

through with or can disregard the Law of the Sea Convention. When it enters into force (which now appears a certainty) the Convention will govern the majority of oceans users and uses, and we can still play a constructive role in its implementation and in the evolution of international ocean law.