The Role of the International Seabed Authority in the 1980's

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The most important contribution of the Law of the Sea Conference to the building of a new international economic order is the proposal for the establishment of an International Seabed Authority. However, many of the provisions for the Authority's activities are made inoperable by developments partly beyond the control of the Law of the Sea Conference. This article proposes ways and means to adjust the activities of the Authority to this new situation, within the terms of the Draft Convention itself and building further upon them.

From the very outset the concept of the common heritage of mankind integrated the goals of disarmament and development. As originally proposed by the delegation of Malta in 1967 and subsequently developed through the various negotiating texts, the international seabed has been reserved exclusively for peaceful purposes. Its resources are to be utilized for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing countries.

Although today it seems obvious, in the sixties nobody thought of joining disarmament and development goals and means, and thus it was natural that the United Nations quickly disjoined the disarmament and development aspects which Ambassador Pardo had joined in the common heritage concept. The disarmament aspect of the concept, derived from the reservation of the seabed exclusively for peaceful purposes, was assigned to the Disarmament Committee. The development aspect of the concept, derived from the requirement that resources be exploited for the benefit

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of mankind as a whole, was assigned to the Third United Nations Conference on the Law of the Sea. Both committees have more or less completed their assignments. In 1971 the Disarmament Committee produced the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof (Seabed Disarmament Treaty).\(^1\) In 1980 the Third United Nations Conference on the Law of the Sea produced the Draft Convention on the Law of the Sea\(^2\) which was to be signed in 1981.

Significant developments have taken place in the last ten years at both the conceptual and the technical level. The purpose of this paper is to show that the time has come to integrate disarmament and development goals in the new international order of the oceans. In addition this paper will suggest some means to achieve this integration.

**LAW OF THE SEA AND THE SEABED DISARMAMENT TREATY**

The Seabed Disarmament Treaty has been criticized on many grounds. Its scope, being limited to nuclear weapons and weapons of mass destruction, has been found inadequate. The area to which it was to apply has been considered insufficient, both horizontally (since it excludes a twelve-mile zone seaward of the baseline from which the territorial sea is measured) and vertically (since it permits atomic weapons on “crawlers” a few inches above the seafloor, as well as on submarines).

The most heated debates have focused on the problem of verification of compliance with treaty requirements. Article III assigns to “each State party, to the treaty the right to verify through observation the activities of other States parties to the treaty on the seabed and the ocean floor and in the subsoil thereof beyond the zones of national jurisdiction.” This provision was difficult to accept for States that did not possess the requisite technologies for such inspections. The subsequent long, drawn-out procedures for consultation and cooperation among State parties, and the eventual recourse to the Security Council, appeared inadequate to secure the purposes of the treaty.\(^3\)

During the negotiations preceding the adoption of the treaty, the majority of states pressed for the internationalization of con-

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trols. A number of proposals were advanced, including the proposal of a special body responsible for the surveillance of seabed installations and for monitoring compliance with the prescriptions of the treaty. Others suggested that existing international organizations could be entrusted with that task. Canada proposed that the Secretary-General of the United Nations be given a major role in controlling verification procedures.

Both the United States and the Soviet Union objected to the internationalization of verification procedures. They considered it unnecessary, premature, and costly to establish a special body and equip it with the necessary technology. The Seabed Authority did not exist at that time, and nobody could predict what form it would take. In 1981 the situation is entirely different. The International Seabed Authority is being established by the Convention on the Law of the Sea. Its responsibilities are wide-ranging, its structure is elaborate. Among other things, it is endowed with specific organs and powers for monitoring, surveillance, and verification. Article 165 of the Draft Convention provides that the Legal and Technical Commission shall:

Make recommendations to the Council regarding the establishment of a monitoring programme which shall observe, measure, evaluate and analyze by recognized scientific methods on a regular basis the risks and effects of activities in the Area with respect to pollution of the marine environment, ensure that existing regulations are adequate and complied with and co-ordinate the implementation of the monitoring programme approved by the Council.

The Commission shall also:

Make recommendations to the Council regarding the direction and supervision of a staff of inspectors who shall inspect activities in the Area to determine whether the provisions of this Part, the rules, regulations and procedures prescribed thereunder, and the terms and conditions of any contract with the Authority are being complied with.

Finally, “[t]he members of the Commission shall, upon request by any State party or other party concerned, be accompanied by a representative of such State Party or other party concerned when

6. Id. These activities include: marine scientific research (art. 143); transfer of technology (art. 144); protection of human life (art. 146); accommodation of activities in the Area and in the marine environment (art. 147); participation of developing States in the activities in the Area (art. 149); and archaeological and historical objects (art. 149).
7. Id. art. 165(2)(h).
8. Id. art. 165(2)(m).
carrying out their function of supervision and inspection."

It is true that the Authority's functions of monitoring, surveillance, and verification are restricted to "activities of exploration for, and exploitation of, the resources of the Area." But since the Convention provides among the basic "Principles Governing the Area" for the "use of the Area exclusively for peaceful purposes," it would be logical to extend verification powers to make sure that this principle is in fact complied with.

At Pacem in Maribus proposals were put forward to utilize the elaborate machinery of the Seabed Authority and the technologies which, under the Convention on the Law of the Sea, will be transferred to it, for the purpose of monitoring, surveillance, and verification of compliance with the prohibitions of the Seabed Disarmament Treaty. It was pointed out that multi-purpose systems of monitoring and surveillance are far more economical and effective than specialized systems.

Luigi Migliorino of Italy, who introduced the proposal, wrote:

... it is certainly desirable that the International Seabed Authority, which is supposed to be impartial, assume verifying powers according to the Seabed (Disarmament) Treaty. This new power could come either through an amendment to the 1971 Seabed (Disarmament) Treaty, as the present formulation does not permit it, or through the recognition of the International Seabed Authority as a subsidiary organ of the General Assembly of the United Nations, in accordance with art. III, para. 4, of the Seabed (Disarmament) Treaty.

Dr. Migliorino also indicated a second point of entry for integrating development and disarmament functions of the Seabed Authority:

Military activities conducted in the seas can produce pollution. Theoretically at least, it is not excluded that nuclear weapons or weapons of mass destruction, or other military installations considered in the Seabed (Disarmament) Treaty, could cause accidents resulting in the contamination of the marine environment. In this case, there would be the problem of seeing whether the mechanism for the prevention, control, and intervention foreseen by international law, particularly by the new international law of the sea (art. 199 and 221 of the ICNT/Rev.1) affects, and to what extent, the provisions of the Seabed (Disarmament) Treaty, especially those concerning the verification powers of the States Parties. In other words, in the case of imminent danger of pollution caused by a weapon or nuclear installation placed on the seabed, will the States threatened be able, as foreseen in art. 199 and 221 of the ICNT/Rev.1, to take the necessary measures for coming to grips with the danger, or will they have to follow the long and complicated procedure foreseen in art. III of the Seabed Disarmament Treaty? The answer certainly lies in recognizing the pre-em-
nence of the provisions of the ICNT/Rev.1. The purpose of the Seabed
[Disarmament] Treaty is to prohibit nuclear weapons and weapons of
mass destruction on the seabed and not to provide a juridical regula-
tions of the complex subject of pollution caused by radioactive substance. In
fact, the Treaty does not refer to this problem at all. The subject is, in-
stead, regulated by the provisions of the ICNT/Rev.1 which are general
and can also apply to the problem of military pollution.\textsuperscript{14}

The procedure to achieve this integration between the two trea-
ties, and to build a cost-effective multi-purpose system of monitor-
ing and surveillance in the international Area, is easily
imaginable. As a first step, at the national level, it would be nec-
essary for the law of the sea teams and the disarmament teams
within ministries of foreign affairs of interested states to get to-
gether and form a common working group. This group should
elaborate a draft amendment to be submitted to the 1982 Review
Conference of the Seabed Disarmament Treaty. At the same
time, it should prepare proposals for the Preparatory Commission
of the Convention on the Law of the Sea.\textsuperscript{15} The Preparatory Com-
mision has a mandate to prepare the institutional aspects of the
Seabed Authority. The mandate includes the structuring of the
Legal and Technical Commission. The Preparatory Commission
should be instructed to structure the Legal and Technical Com-
mision in such a way that the monitoring and surveillance func-
tions described above insure compliance with the terms of the
Seabed Disarmament Treaty.

This course of action would remedy the lack of effective verifica-
tion powers under the Seabed Disarmament Treaty. It would also
set an important precedent for the establishment of international
verification procedures in other sectors of disarmament and arms
control. At the same time, it would serve to strengthen the Inter-
national Seabed Authority by assigning to it a concrete task for
the 1980’s. This would come at a time when the purposes and
functions of the International Seabed Authority may have to be
re-examined in view of recent unanticipated developments in sea-
bed prospecting and exploration.

\textsuperscript{14} Id. at 190.

\textsuperscript{15} See Report of the President on the Work of the Informal Plenary on the
Preparatory Commission, U.N. Doc. A/CONF.62/L.55 (1980); Note by the President
on the Proposed Preparatory Commission, PC/1 of Mar. 3, 1980; and Informal Pro-
posal of the President of the Conference, PC/2 of Mar. 14, 1980.
Chile now has concrete plans to extract manganese nodules from the seabed in the economic zone of the Juan Fernandez archipelago, which belongs to its South Pacific territories. These plans were announced recently by the Chilean Minister of Mines.\textsuperscript{16} The Minister indicated that the field was one of the largest undersea mineral reserves in the world. The nodules are of commercial grade and contain cobalt, copper, nickel, and manganese. The Chilean Government, according to the Minister's statement, will probably call world-wide tenders for involvement in the project. The Government would be looking for partners with a high level of technical expertise in mineral extraction. In the meantime, the National Science Foundation of the United States is planning an expedition in 1981, in which two Chilean experts will participate.

The news came as a surprise to many who, through years of painstaking work, had based the entire structure of their reasoning on the assumption that commercially exploitable manganese nodules were to be found only in the Area beyond any possible claim of national jurisdiction and that therefore the Authority was in a monopoly position in negotiating the terms of any agreement for manganese nodule mining with companies and States.

Yet Chile is not the only country that will mine nodules in areas under national jurisdiction. The exclusive economic zone of Clarion Island, a possession of Mexico, contains nodules of prime quality. This zone, thought until recently to belong to "the Area" under the jurisdiction of the International Authority, is the Region that has been most thoroughly explored and offers the best possibilities for commercial exploitation. It is more than likely that Ecuador has nodules in its offshore areas and that France has manganese nodules in the economic zones of its Polynesian offshore possessions. The United States, already involved in Chile, may have nodules in the Hawaiian zone.

Mining companies have made it clear that they prefer to mine in areas under national jurisdiction. In such areas, mining contracts or licenses can be obtained from individual governments along traditional and well established lines. This is more attractive than having to deal with the International Seabed Authority which, to them, is an unknown entity of cumbersome interna-

\textsuperscript{16} Chile Plans Seabed Mine, PAC. ISLANDS MONTHLY Aug. 1980, at 158.
Because of the world economic situation, including the oversupply of land-based resources, the depression of prices, and the instability of metal markets, seabed mining will get off to a slow start. There will not be a rush of contracts before the end of the century. If the few contracts that will be made are made with coastal States, there may be very little left for the International Seabed Authority, at least until the end of the century. Thus a unique opportunity to create new forms of international economic cooperation between North and South and new instruments for technology transfer would be lost.

All this could and should have been predicted. This writer has in fact predicted it ever since 1974. It was also clear that structural bureaucracy. The possibilities of bilateral collaboration with coastal States are becoming increasingly important in view of the continuing legal uncertainties with regard to the high seas. The 200-mile EEZ opens the possibility of bilateral cooperation in the exploitation of all mineral resources in offshore areas. As far as manganese nodules are concerned, the 200-mile limit is somewhat narrow, only in exceptional cases are deep sea nodules likely to be found within the 200-mile EEZ.

An extension of the 200-mile limit, no matter how problematic it might be under other aspects, would transfer large portions of manganese nodules from the realm of legal uncertainty into areas of individual State jurisdiction. In view of the vague provisions of the ICNT, we cannot help noting that, as far as deep sea mining is concerned, the farther the EEZ is extended into the deep oceans, the better it will be.

U. BoIn, PROTOKOL DES MEERSsymposium KIEL 1980.

18. However, it has not been clearly pointed out that, as a result of present trends in delimiting national jurisdiction, it may be anticipated that a substantial part of the manganese nodules of the abyss would either pass immediately under national jurisdiction or could be claimed by a coastal State through appropriate adjustments within the baseline and other delimitation provisions likely to be included in any treaty adopted by the Conference. Hence prospective exploiters of manganese nodules would, in many cases, have the choice of exploitation either in the international seabed area or within national jurisdiction. Thus the proposed international seabed authority, in the event of a licensing or service contract system of exploitation being adopted, would not be able freely to determine royalty provisions within the international area nor would it be able to adopt effective arrangements to ensure that mineral output from the seabed will not result in prices which are not equitable to land-based producers, since attempts to impose conditions not acceptable to the limited number of consortia interested in deep seabed exploitation would merely result in most cases in such exploitation taking place within national jurisdiction.


The basic assumptions underlying the establishment of an international
tural measures had to be taken to prevent the Authority from becoming a paper tiger. Such measures should consist in the designing of a flexible joint venture system of exploitation, capable of operating in areas under both international and national jurisdiction. The controlling shares would be held by the Authority in the international Area and by the coastal State in areas under national jurisdiction. This would be a true parallel system, not

authority with the functions proposed are that the authority would enjoy a virtual monopoly, at least in the exploration of the manganese nodules of the abyss . . . . These assumptions, however, are now incorrect. Straight baselines of unlimited length and acceptance of the archipelagic principles permit States to enclose extensive areas some of which contain manganese nodules. . . . The proposed international Authority will not have anything approaching a monopoly of manganese nodule exploration: manganese nodules can, and will, be exploited within national jurisdiction. From this basic fact flow a number of conclusions, inter alia:

(a) Whatever the norms contained in the proposed convention, the Authority will not have the power to determine, at its discretion, the conditions of manganese nodule exploration. The Authority will have to offer conditions of exploration and exploitation no less favorable than those offered by national authorities. . . .

(c) Exploitation of significant quantities of manganese nodules will inevitably seriously affect the price of cobalt and of manganese and may have some effect on the price of other minerals. But, since manganese nodules may be exploited both within and outside national jurisdiction, the Authority will not be able to sustain prices merely by curtailing exploitation in the international area. Curtailment of exploitation in the international area, while reducing the revenue of the Authority, could easily be compensated by increased production from areas under national jurisdiction.

Id. at 98-99.

19. Such a system was proposed in E. BORGESE, THE ENTERPRISES 4 (International Ocean Institute Occasional Paper No. 6, 1978). One of the purposes of the system would be, to cope with the eventuality, or certainty, that nodules will be exploited, not only in the international area but also in areas under national jurisdiction. "For Enterprises operating in areas under national jurisdiction, the coastal State shall provide 52 percent of the investment capital while the International Seabed Authority shall provide at least 24 percent and the remaining 24 percent or less may be provided by other Signatories." The comment to this proposed article points out that this article has been;

added for the case, very likely to arise, that a substantial portion of manganese nodules will in fact be mined in areas under national jurisdiction. If this contingency is not considered, it might, in time, leave the Authority without any business. Cooperation between the coastal State having jurisdiction over nodule sites and the Authority's enterprises must of course be voluntary. For developing countries it certainly would be more beneficial to cooperate with the Authority's Enterprises than to deal with individual industrial States or private consortia. Developing States might, through their appropriate forums, resolve to adopt such a policy. It would of course be preferable if enough public pressure could be built to make of this policy international good practice. In other words, the manganese nodules of the deep ocean floor should be considered common heritage of mankind, no matter on which side of the limit of national jurisdiction they happen to lie. This could be achieved through a non-binding recommendation by the Council or the Assembly.

Id. at 4.

For enterprises operating in areas under national jurisdiction, the Board shall be composed of (a) 13 representatives of Signatories [board members] designated by the coastal State having jurisdiction in the area; (b)
polarized between the interests of the North and those of the South. Based on a functional rather than a territorial interpretation of the "limits of national jurisdiction," and safeguarding the principle that the resources of the seabed are the common heritage of mankind and must be exploited for the benefit of mankind as a whole, with special consideration for the needs and interests of developing countries.

It is not too late to adopt a workable solution to this problem. Most mining contracts will not be made before the late 1980's. In addition to market constraints, companies are still struggling with technological constraints, including the extensive research and development required before the nodule mining industry can be fully commercialized. Companies in West Germany, the United States, and Canada are hesitant to make the necessary investments without government subsidies. Consortia are being dissolved and seabed mining capacity is being dismantled and placed "on the back-burner." When the world picture changes and the resources are needed, the whole machinery will have to be re-assembled at a considerable loss of time and money. Only Japan is far-sighted enough to subsidize its deep-sea mining industry and keep it in readiness.

What should be proposed is a joint venture on research, development, exploration, and the establishment of a pilot processing plant between the International Seabed Authority and any companies and States that desire to participate. Only half of the investment cost should be borne by industry. The other half could be divided between the home States of the participating compa-

20. The fate of coal mines in West Germany was similar. Only a decade ago these rich mines were abandoned and coal gasification technologies were put on the back burner. Now these mines and technologies have to be restored at a considerable loss of time and money.

21. Seabed mining is not the only sector in which Japanese industry and government show an almost unique sense of foresight. The computer industry, especially in the robot sector, is another area where Japan has an incredible lead. Japan presently has about 10,000 robots in action while the United States has 3,000 and West Germany 850. See TIME, Dec. 8, 1980, at 75.
nies, who would thus subsidize their industries collectively through the Authority. This system would considerably reduce costs and could be supplemented by funding from public international organizations such as the World Bank.

The advantages of this system for the industrialized mining States would be considerable. They would be supporting their ailing mining industries while providing an opportunity for spin-offs to other industries. They would maintain continuity in preparing for commercial production. In addition, they would develop and utilize their technologies while enhancing international trade in these technologies.

This system would give smaller industrial States an opportunity to participate in seabed mining which they otherwise would not have had. These smaller industrial States could become partners in such a joint venture, while developing countries would be represented by the Authority. The developing States would benefit through technology transfers to the Authority as well as from participation in the management of a scientific technological venture. This would provide developing States an opportunity to begin developing their own internal seabed mining infrastructure. Countries like Chile, Ecuador, and Mexico who intended to exploit nodules in areas under their national jurisdiction would probably be the first ones to join such a venture.

The preparation of a joint venture on research, development, and exploration would be justified on the basis of article 143 of the Draft Convention on the Law of the Sea. The Preparatory Commission should be instructed to initiate preparations for cooperative arrangements for this kind of applied scientific research and development under article 143.

A joint venture on research and development, at this stage,

   The Authority may carry out marine scientific research concerning the Area and its resources, and may enter into contracts for that purpose. The Authority shall promote and encourage the conduct of marine scientific research in the Area, and shall coordinate and disseminate the results of such research and analysis when available.

23. The resolution to be adopted by the Conference providing interim arrangements for the International Seabed Authority and the Law of the Sea Tribunal provides in para. 5 that “[t]he Commission shall make studies, prepare and draft rules, regulations and procedures relating to Article 16 of Annex II to the Convention, as it deems necessary to enable the Authority to initiate activities in the international seabed area.” Informal Proposal by the President of the Conference, Pc 12 of Mar. 14, 1980. Article 16 refers to the “Exclusive right to explore and exploit,” and guarantees security of tenure to contractors. Id. art. 16. There is nothing in the Draft Treaty that would prevent the preparations for a joint venture as proposed here.
would in no way prejudice the organization of commercial exploitation at a later stage, whether under national or international jurisdiction. If the venture is successful, however, the chances for continuing the joint venture system, as already provided for in the Draft Convention, will increase considerably, and thus the problem of exploitation of nodules in areas under national jurisdiction will be minimized.

Exploration for mineral resources under the sovereignty of developing countries through public international organizations rather than through private multinational companies appears to be in line with current developments in the building of a new international economic order. In many instances private industry shows little inclination to bear the costs of mineral exploration in the least developed countries. Profits are not high enough. For such contingencies, the Government of Canada has recently established a new State-controlled company, Petrocanada International. This company has the specific task of exploring for petroleum in joint venture with some of the least developed countries. Canada has already initiated discussions with Mexico and Venezuela to join in this new form of international development cooperation. If this is possible in the case of oil exploration, it should be all the more so in the case of nodule exploration. To link such ventures to the Authority would seem to be the most logical and efficient way to proceed.

The Preparatory Commission could be instructed to proceed along these lines. In this context, it might be advisable to amend subparagraph (e) of paragraph 4 of the "Resolution to be Adopted

25. Because of this sense of interdependence in the face of the world energy problem, the government's National Energy Program, which I tabled with my recent Budget, contained an important initiative to help oil importing developing countries. A new firm, Petro-Canada International, will be created to explore for oil solely in developing areas, where multinational companies are often reluctant to invest. Preliminary discussions have already taken place with the state oil companies of Mexico and Venezuela, in connection with a major joint effort to assist petroleum development in Latin America and the Caribbean. Some $250 million has been allocated to this program. The program will reflect our development assistance objectives. It will be aimed at finding oil in countries which now must import it.

Address by the Hon. Allan J. MacEachen, Deputy Prime Minister and Minister of Finance, Government of Canada, Third Annual Session of the North South Round Table (November 16, 1980).
by the Conference Providing Interim Arrangements for the International Sea-Bed Authority and the Law of the Sea Tribunal" to the effect that the Commission shall "prepare recommendations concerning the relationship" not only "between the United Nations, its specialized organizations and agencies, and the Authority," but also between States and mining companies and the Authority. Unless the Commission can deal, in a provisional and recommendatory manner, with States and mining companies, its preparatory work will remain incomplete.

CONCLUSIONS

Recent developments make it probable that the International Seabed Authority will not be able to perform the main function for which it is being established. Seabed mining will most likely be carried out in areas under national jurisdiction in accordance with the preferences of coastal States and private companies. A unique opportunity for creating new forms of North-South economic cooperation would thus be lost. To avoid this danger it is suggested that the Preparatory Commission be instructed to examine and, as far as possible, strengthen the other functions of the Authority, as provided for in the Draft Convention. Particular attention should be given to monitoring and surveillance and to scientific research and development.

The scope of the monitoring and surveillance activities of the Seabed Authority should be expanded so as to include verification of compliance with the terms of the Seabed Disarmament Treaty and enforcement of the Draft Convention's principle of the reservation of the Area exclusively for peaceful purposes. The Seabed Disarmament Treaty should be amended accordingly at the forthcoming Review Conference in 1982. The Preparatory Commission should be instructed to prepare the necessary institutional arrangements within the Authority in order to take over the monitoring and surveillance activities required by the Seabed Disarmament Treaty.

With regard to scientific research, it is suggested that a joint venture for research, development, exploration, and the construction of a processing pilot plant should be established as quickly as possible between the Authority, States and mining companies that wish to participate. The Preparatory Commission should be instructed to make the necessary preparations in accordance with article 143 of the Draft Convention.

To facilitate the work of the Preparatory Commission in these fields, it is suggested that subparagraph (e) of paragraph 4 of the Resolution Establishing the Preparatory Commission be amended so as to cover the relations between the Authority and States and mining companies. Such a course of action would ensure that the Authority has concrete tasks and functions in the 1980's. It would enhance new forms of economic cooperation between the North and the South, and it would simultaneously strengthen the causes of development, disarmament, and environment.