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Where Are We on the Law of the Sea?

ROBERT B. KRUEGER*

For some time there has been a consensus that the old rules for the oceans are inadequate. They do not adequately protect the world's fish supply. For example, Japan, the Soviet Union and other nations with large foreign fishing fleets conduct massive sweeps through the coastal waters of other countries, including the United States, and cause grave damage to their stocks. There is overfishing on the high seas. A number of species of whales are threatened with extinction. Rules for conservation are obviously needed.

Manganese nodules that contain commercial and seemingly inexhaustible quantities of copper, nickel, and other minerals can be

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found in many parts of the oceans. Companies in the industrialized countries have the technology to recover and process these nodules. Furthermore, man now has the ability to drill for oil in the deep waters of the continental shelf and slope. The wealth generated from the recovery of these resources in part could be used to redress the imbalance between industrialized and developing nations as part of the new economic order. It follows that we should have rules to encourage deep water drilling and mineral recovery.

Pollution spirals upward with development and technology. The massive impact that production and transportation of offshore oil can have was demonstrated by the Torrey Canyon accident and the Santa Barbara Channel blowout. The need for a coastal State to protect itself with a wider contiguous zone than the traditional three-mile territorial sea has been apparent. We need rules to protect the marine environment and to establish new zones of national jurisdiction.

Why have we not adopted these much-needed new rules? In 1967 when the United Nations began its work on these issues, there was the promise of a comprehensive treaty that would make the oceans "the common heritage of mankind," a principle in fact overwhelmingly approved by the United Nations in 1970. In 1970, also, the United States proposed a far-reaching oceans regime that would have reduced the extent of national jurisdiction over coastal resources and created a wide offshore "Trusteeship Zone," the revenues from which would be earmarked for ocean research and for use by developing nations. The proposal would have effectively internationalized many potential petroleum resources, and was criticized both in the United States and abroad as naive and a "U.N. give-away."

The proposal had a number of defects and some of the criticism was warranted. But, in hindsight, the sheer generosity of its provision identified a fact which has been central to the law of the sea negotiations: neither the industrialized nor the developing nations of the world are ready to commit their potential coastal resources to an international order. While they are willing to give lip service to the concept of a "common heritage," their actions will be guided by what they believe will serve their greatest national interest, and
a national interest that appears to have been viewed in a relatively short time frame. The 1970 United States proposal was the high-water mark of internationalization in law of the sea negotiations against which the essentially nationally-oriented maneuvering which has followed can be measured.

A consensus among nations emerged that there should be an “economic zone” of at least 200 miles in which the coastal State would control both living and nonliving resources—fishing and oil. There was no opposition to the concept of the regulation of pollution by coastal States as long as it met the double standard requirement of developing nations: they should be permitted to pollute if necessary for their economic development, although industrialized nations could not. A 12-mile territorial sea was agreed upon, but there was disagreement as to conditions which could be imposed upon transit through the many international straits, such as Gibraltar and Malacca, that would be enveloped by coastal jurisdiction. The United States and the Soviet Union opposed the “innocent passage” concept because they wanted a right of free transit for military vessels, notably nuclear submarines.

A major area of disagreement was the administration for the deeps, the areas beyond limits of national jurisdiction. The developing countries have neither the technological nor financial ability to mine the manganese nodules and have worked for a regime that would minimize the advantage of the industrialized nations in this respect. They seek to establish an authority which could authorize the development of the nodules but would discriminate in favor of developing countries, control production for the benefit of present producer nations, mine the nodules for itself and be governed by bodies controlled by the developing nations. This arrangement is, of course, unattractive to the industrialized nations. They have only to look to OPEC to know what to expect.

Certain of these issues are difficult to frame, but it has been the way in which they have been framed in United Nations negotiations that has made them particularly difficult to resolve. At Geneva in 1973, and the following year in Caracas at the first working session of the Third United Nations Law of the Sea Conference, no drafting committee was designated. Instead, each of the delegations was permitted to submit draft articles and working papers, resulting in hundreds of alternative provisions of varying shades and differences. In fact, it was considered one of the major accomplishments of Caracas that these myriad proposals were collated and pieced together, a fact which illustrates the quality of the meeting as much as any other. Virtually no progress was made on
substantive issues in the ten-week session with most of the time being absorbed by the contentious rhetoric of representatives of developing nations. An additional deterrent to progress was the pure administrative burden of managing a conference of 150 nations, each with a seat on the three main committees, the working groups for which met simultaneously.

It was not until the 1975 session of the Conference in Geneva also appeared to be on the road to failure that the chairman, Shirley Amerasinghe of Sri Lanka, requested that the chairman of each of the three committees prepare a "single negotiating text" so that the Conference could move in some direction. The result was a draft of three conventions: the first, dealing with the deep seabed authority; the second, largely with zones of national jurisdiction; and the third, with pollution and scientific research. They proved to be a decided step forward.

The text of Committee II, prepared by Galindo Pohl of El Salvador, consists of 137 articles and covers the territorial sea and contiguous zone, international straits, the 200-mile economic zone, the continental shelf, high seas, archipelagos and islands, enclosed and semi-enclosed seas and the rights of land-locked States. In short, it covers every subject dealt with by the four 1958 Geneva conventions adopted at the First United Nations Law of the Sea Conference plus a number of other complex subjects. While it contains some drafting defects and points on which there will need to be further negotiation, the Committee II text is a surprisingly balanced document considering the circumstances under which it was produced. It is consistent in most respects with the 1958 conventions and on the important points involved, such as the establishment of the 200-mile economic zone and a 12-mile territorial sea, the draft is quite adequate. It would clearly authorize a 200-mile fishery zone of the type proposed in H.R. 200 which was recently adopted by Congress and would preserve rights of free transit for ships and aircraft through international straits.

The Committee III text prepared by Alexander Yankov of Bulgaria consists of 92 articles dealing with the protection of the marine environment, scientific research and the development and transfer of technology, some of which were actually negotiated in the working groups on these subjects. It, too, will require revisions, but as a negotiating document, it is a quite balanced one which
predictably can be brought into acceptable form. It contains the
dual standard permitting developing countries to pollute, and deals
generally with subjects that do not have a high degree of interest
to them.

Looking solely at the products of Committees II and III of the
Conference, then, one should be reasonably optimistic about the
ability of the Conference to bring them to a successful conclusion in
the foreseeable future. An element which complicates any such
analysis, however, is the fact that the Committee I single negotiat-
ing text prepared by Paul Enge of Cameroon, dealing with deep
seabed resources, is totally imbalanced in favor of the developing
countries, and may not serve as a viable base for negotiations. The
draft, consisting of 75 articles, would create an International Seabed
Authority having exclusive jurisdiction over the seabed and ocean
floor beyond limits of national jurisdiction. It would have the au-
thority to enter into “service contracts, or joint ventures or any
other such form of association which ensures [its] direct and ef-
fective control at all times over . . . activities.” The Authority is
required to avoid discrimination except that “[s]pecial considera-
tion by the Authority . . . for the interests and needs of the devel-
oping countries, and particularly the land-locked among them, shall
not be deemed to be discrimination.” The supreme governing body
of the Authority would be an Assembly on which all states ratify-
ing the convention would have equal representation. A Council
would be elected by the Assembly to act as an executive authority.
Both, therefore, would be controlled by the developing countries.
Finally, an organ of the Authority would be an Enterprise which
could be granted mining rights by the Authority. The implications
of this are apparent. The framework is based upon the stated prin-
ciple that the seabed and subsoil of deep ocean areas and their re-
sources “are the common heritage of mankind,” but clearly its
function is to award them and revenues from them to the develop-
ing countries as part of the “new economic order.”

While the United States in Geneva did not accept the concept
of the Enterprise, Secretary of State Kissinger during his speech
to the American Bar Association in Montreal in the summer of 1975,
expressed acceptance of it in principle, if it were to be operated
without discrimination as against competing national entities. Even
with this concession, however, it is questionable whether the Com-
mittee I text can be appropriately amended. The very political dy-
namics that lead to the creation of a draft in the first place—the in-
transigent demands of the Third World for a redistribution of the
world’s wealth—militate against the acceptance of the comprehe-
sive changes that are needed to make this an acceptable document.
There are those who argue that the United States should enact into law the 200-mile fishery bill and the proposed Deep Seabed Hard Minerals Act which would authorize deep seabed mining by our nationals to show the Third World that we “mean business” in our negotiations, even prior to the next session of the Conference in New York in the spring of 1976. While this point of view is not without some merit, the passage of this type of legislation could very well impinge upon the negotiating climate. Arguably this action would be contrary to customary international law or the Declaration of Principles enacted by the United Nations General Assembly in 1970. A much more important point, however, is that this type of action could be used as an excuse for delaying or diverting negotiations. The law of the sea negotiations have been underway for eight years and at various times during that period pressures for unilateral action have been cited as one of the excuses for a lack of progress. We should not provide either our own delegation or any other with an excuse for failure in the important negotiations now underway. If they fail, as they probably will with respect to the deep seabeds, we should hopefully have a record that will show that we carefully exhausted every reasonable negotiating opportunity. At that time, careful national action will be appropriate. The game is in overtime; it should be played out.

But will we have a new order for the oceans? Yes, definitely. If we are very lucky, we may be able to make a breakthrough with the developing nations on the deeps and obtain a convention in all areas. Even if we do not, however, we should be able to make the negotiating progress on the other two negotiating texts that would permit them to become effective. It is, of course, possible that the developing countries would refuse to ratify these conventions unless their demands for the deeps were met, but this is unlikely if all of the industrialized nations are in accord and the conventions are balanced in content. In any case, history makes it predictable that as to areas in which we do not achieve an agreement by consensus, the needed new order will evolve through the process of customary international law by the acts of individual nations, possibly acting in concert. The order of international law has always followed the need. The new order of the oceans will follow the new needs.