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TOWARD DENUCLEARIZATION OF THE OCEAN FLOOR

Stephen Gorove*

The idea of an arms control agreement for the seabed is, in a sense, a response to recent technological developments which are making the environment of the seabed increasingly accessible to men. As the technical and scientific capabilities develop and improve, the chances for the use of the ocean floor as a new area for the emplacement of nuclear weapons and other weapons of mass destruction will correspondingly increase.

The significance of reaching an agreement on arms control for the seabed has grown out of several basic considerations. First, in line with the idea of preventive disarmanent or nonarmanent, it was thought that there was intrinsic merit in seeking an agreement to forestall a nuclear arms race on the seabed before it developed. Second, even if such an agreement did not eliminate existing military competition, it was hoped that it would have certain positive psychological and political effects upon the international scene.¹ Also, such agreement was regarded as a logical follow-up to the treaties on the Antarctica² and Outer Space.³ For these reasons the United States was interested in working out an international agreement that would prohibit the emplacement or fixing of nuclear weapons or other weapons of mass destruction on the seabed.⁴

International negotiations regarding an arms control agreement for the seabed have taken place in the Eighteen-Nation

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¹. See the statement made before the conference of the Committee on Disarmament at Geneva on March 25, 1969, by Gerard Smith, head of the U.S. Delegation to the Conference. 60 DEP'T STATE BULL. 333, 335 (1969).


Disarmament Committee in Geneva. In addition, the United Nations Committee on Peaceful Uses of the Seabed and Ocean Floor Beyond the Limit of National Jurisdiction has also been requested to study the problem of reservation exclusively for peaceful purposes of the seabed, taking into account the ongoing international negotiations on disarmament.

The arms control discussions before the Disarmament Committee led to a Draft Treaty submitted jointly by the United States and the Soviet Union on October 7, 1969. Following further deliberations and suggestions a revised Draft Treaty was submitted for approval to the United Nations General Assembly which—after some heated debates—sent the revised Draft Treaty (hereinafter referred to as “revised Draft”) back to the Disarmament Committee for reconsideration.

The purpose of this inquiry is to analyze the provisions of the revised Draft with special regard to the surrounding policy objectives, expectations and criticisms. The various provisions may be conveniently scrutinized under the general headings of (I) scope and geographical coverage of the prohibition, (II) verification procedures, and (III) miscellaneous provisions relating to amendment, review, and entry into force.

I. Prohibition: Scope and Geographical Coverage

The first paragraph of Article I of the revised Draft Treaty prohibits any party from emplanting or emplacing any objects with nuclear weapons or other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof beyond the maximum contiguous zone provided for in the 1958 Geneva

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5. Id. The Committee's membership rose from 18 to 25 but in view of France's refusal to take her seat only 24 countries participated.


8. See Revised Draft Treaty (Doc. CCD/269/Rev.).

Convention on the Territorial Sea and the Contiguous Zone.\(^10\) The prohibition extends to structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons. In addition, the third paragraph of the same article prohibits each party from assisting, encouraging, or inducing any state to commit actions outlawed by the treaty and from participating in any other way in such actions. Several observations may be made with respect to the scope and geographical coverage of this prohibition.

\section*{A. Scope}

The prohibition incorporated in Article I does not involve a ban on all military activities on the seabed but relates only to nuclear weapons and other weapons of mass destruction, or structures associated with such weapons. In the course of the negotiations many nations have criticized this limitation and called for a broader agreement prohibiting the use of the ocean floor for all military activities in order to attain a wider realization of the objective of reserving the ocean floor exclusively for peaceful purposes. It was felt by a number of nations that the ocean floor beyond national jurisdiction was a common heritage of mankind and as such it was to be used for the benefit of all mankind and reserved exclusively for peaceful purposes.\(^11\)

The Soviet Union also strongly advocated a ban on all military activities and, in furtherance of its view, asked the United Nations Committee on the Seabed to request the United Nations General Assembly to call upon all states to use the seabed and the ocean floor beyond the limits of territorial waters exclusively for peaceful purposes. In addition, Moscow also proposed that the General Assembly request the Disarmament Committee to consider the question of the prohibition of the use of the seabed beyond the limits of territorial waters for military purposes.\(^12\)

Opposed to a general ban on all military activities was the view of the United States government. Washington believed that

\(^{12}\) See address made at Newport, R.I., on July 12, 1968, before the Symposium on Mineral Resources of the World Ocean by David H. Popper, 59 DEP'T STATE BULL. 171, 176 (1968).
the Soviet proposal was a deceptively simple approach to what was anything but a simple problem. The United States felt that the meaning of the words "for peaceful purposes" and "of prohibiting the use for military purposes" was far from clear.\textsuperscript{13} Thus, for instance, there was doubt whether or not sensing devices would be regarded as military and whether or not any activity carried out by the armed forces, such as naval research, would be regarded as a military activity irrespective of its purpose. Inasmuch as it was the view of the United States that the term "peaceful purposes" did not preclude military activity generally, Washington felt that specific limitations on certain military activities would require negotiation of a detailed arms control agreement.\textsuperscript{14}

The United States’ opposition to the idea of the prohibition to use the ocean floor for military activities also stemmed from the fact that for some purposes, such as communication and navigation aids, the seabed is being utilized for both military and nonmilitary ends. Also, the existence of submarine forces requires states to take defensive measures against such forces through warning systems that use the seabed. Furthermore, military personnel are frequently engaged in scientific research on the seabed using military equipment which are not weapons. Thus, complete demilitarization would have an effect of prohibiting certain necessary and desirable activities. With respect to a blanket prohibition of conventional weapons on the seabed the United States also felt that it would raise insuperable verification problems.\textsuperscript{15}

Above all, Washington believed that arms control agreements must be the product of thorough study, taking into account both the preservation of national security interests and the particular problems of verification and control.\textsuperscript{16} The United States saw the main danger of an arms race on the seabed in the possibility that it might become a new environment in which weapons of mass

\textsuperscript{13} Id.
deSTRUCTION would be emplaced. Thus, the purpose of the United States was to reach an agreement which would enable states under conditions of mutual confidence to refrain from emplacing weapons of mass destruction on the deep ocean floor in the secure knowledge that they would not thereby be placed at a military disadvantage.\footnote{See statement made on October 29, 1968, before Committee I of the U.N. General Assembly by U.S. representative James Russell Wiggins, 59 DEP'T STATE BULL. 554, 557 (1968).}

The eventual text of the revised Draft was in line with the United States position. The prohibition included in Article I did not extend to military activities but only to the emplanting or emplacing of nuclear weapons and other weapons of mass destruction such as, for instance, biological or chemical weapons. The ban was not intended in any way to effect the conduct of peaceful nuclear explosions or to affect applications of nuclear reactors, scientific research, or other nonweapons applications of nuclear energy. Structures, launching installations or any other facilities specifically designed for storing, testing or use of such weapons were included in the ban. Thus the prohibition would apply to launching platforms or delivery vehicles associated with nuclear weapons or other weapons of mass destruction whether or not a missile or a warhead containing a nuclear weapon or other weapon of mass destruction was actually in place.\footnote{See statement made before the conference of the Committee on Disarmament at Geneva on May 22, 1969, by U.S. representative Adrian S. Fisher, 60 DEP'T STATE BULL. 520, 521 (1969). See also statement made on March 28, 1969, before U.N. Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction by David H. Popper, U.S. representative to the Committee, 60 DEP'T STATE BULL. 342, 343 (1969).} However, it would not be applicable to research facilities or facilities for commercial exploration that might somehow be able to accommodate or contain a nuclear weapon. The prohibition would most definitely apply to facilities designed to accommodate both nuclear and nonnuclear weapons such as launching facilities capable of firing either nuclear or conventional weapons.\footnote{Statement made before the conference of the Committee on Disarmament at Geneva on October 7, 1969, by U.S. representative James F. Leonard, 61 DEP'T STATE BULL. 365 (1969).}

An important question which may be raised relates to the interpretation of the meaning of the words "emplanting" or "emplacing." More specifically, for example, should the
prohibition apply only to permanent installations affixed to or emplaced into the seabed or should it also apply to containers or carriers whose principal mode of deployment or operation requires actual physical contact with the seabed? In relation to the former it would appear that the prohibition would cover nuclear mines that were anchored to or emplaced on the seabed. With respect to the latter it may be assumed that underwater nuclear barges or crawlers would be free to move on the ocean floor beyond the contiguous zone inasmuch as the language of the prohibition seems to cover only nuclear installations that are positioned permanently on the seafloor. Thus, if a nuclear installation weighing thousands of tons were able to crawl on the ocean floor it would seem to be exempt from the treaty.20

By the same line of reasoning, since the revised Draft Treaty is concerned with the use of the seabed, vehicles which can navigate in the water above the seabed, that is submersible vehicles, would most likely be viewed in the same way as any other ships. Thus, there would appear to be no violation of the prohibition if such vehicles were either anchored to or resting on the seabed.21 This interpretation is in line with the United States position, namely, that the prohibition applies to activities on or under the seabed and not in waters above the seabed where the problem is complicated by already existing armament and by the need to avoid infringement of the traditional principles of the freedom of the seas.22

B. Geographical Coverage

One of the most difficult questions facing the various delegations at the negotiation of the revised Draft concerned the geographical coverage of the proposed treaty. Nearly all members of the Disarmament Committee shared the view of the United States that the prohibition should apply to the broadest practical area of the seabed, excluding only a narrow band with respect to

the coastal state. Accordingly, paragraph 2 of Article I of the revised Draft makes the prohibition extend also to the narrow band, except that within that zone, it does not apply to the coastal state.

While there were several methods by which this narrow band could be determined, it was felt that the prospects for broad acceptance of the treaty would be much greater if the treaty were in line with the existing international law of the sea. Thus, the solution incorporated in the revised Draft takes the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (hereinafter referred to as "Convention") as the basis for measuring the land. The suggested method is covered in two provisions of the revised Draft. First, paragraph 1 of Article I extends the treaty prohibitions to the entire seabed and ocean floor "beyond the maximum contiguous zone" provided for in the Convention. The maximum seabed limit of the contiguous zone adopted in the Convention is twelve miles. Second, under paragraph 1 of Article II, the outer limit of this contiguous zone must be measured from baselines drawn in accordance with the detailed rules provided in Section II of Part I of the Convention and "in accordance with international law."

The inclusion of the phrase "in accordance with international law" was intended to cover such situations as "historic" bays. Such bays would have been expressly excluded under Section II of the Convention without this additional reference to international law.

Initially, the United States took the view that large bays and estuaries, such as Hudson Bay, should be considered part of the open sea and, therefore, subject to the ban on nuclear weapons. The Soviet Union, however, insisted on the exemption of such large bodies of water as the sea of Okhotsk, off the east coast of Siberia, on the ground that as "historic" bays they had been recognized as within the territorial sea.


The ultimate acceptance of the Soviet view by the United States regarding the exclusion of historic bays from the ban was due in a large measure to the fact that Moscow dropped its demand for a complete demilitarization of the ocean floor and accepted, in turn, the United States' proposal that the ban be limited to nuclear weapons and installations. Thus, the net result was that in those situations where Section II rules are expressly inapplicable under the terms of the 1958 Convention, the rules of customary international law will govern the location of the baseline for the purposes of the revised Draft. Therefore the twelve mile contiguous zone would be measured from the closing line across an historic bay only if the waters are regarded as internal waters under the rules of customary international law.\footnote{26}

In the course of the negotiations the United States made it clear that the revised Draft's reference to the 1958 Convention to define baselines in the outer limit of the exempted coastal area in no way implied that any party to the proposed treaty which is not a party to the Convention would find itself bound by or adhering to that Convention. Therefore, a party to the proposed seabed treaty would accept only that the outer limits of the geographical area exempted from the ban would be determined in accordance with the Convention. For this reason, the party to the proposed treaty would not accept these 1958 rules for any purpose other than that of determining the geographical area to which the agreement would apply.\footnote{27} Nonetheless, the legal implications of the revised Draft arising from what some delegations regarded as an unnecessary reference to the 1958 Convention which, up to the present time had not been adhered to by a majority of countries, remained a somewhat bothersome issue even after the inclusion of a so-called "disclaimer" clause in the proposed treaty.\footnote{28} Under the disclaimer clause of the revised Draft nothing in the proposed treaty must be interpreted as supporting or prejudicing the position of any party with respect to the rights or claims which such party may assert, or with respect to recognition or

27. Id. at 482.  
28. 6 U.N. Chronicle 79 (1969).}
nonrecognition of rights of claims asserted by any other state, related to waters off its coasts, or to the seabed and the ocean floor.  

With reference to the disclaimer clause the United States delegate stated that his country recognized that there were differing positions among states with respect to such matters as, for example, the proper breadth of the territorial sea and that the proposed treaty did not intend to settle such issues. Furthermore, it was not the purpose of the treaty to give one state or another state, or any group of states, an advantage vis-a-vis any other state or group of states regarding law of the sea issues. That was the reason why the United States regarded the disclaimer clause the best that it had been possible for the authors of the revised Draft to devise.

II. VERIFICATION

The purpose of a genuine verification scheme is to provide adequate assurance to the participating countries that all parties to the agreement are fulfilling their obligations. The question of what constitutes adequate verification in the light of present and developing potentials, especially in view of the large scale technical problems connected with operating in a hostile seabed environment, carries no simple answer.

At the initial stages of the negotiations on verification procedures both the United States and the Soviet Union believed that it would be desirable to draw on the useful precedent of the Outer Space Treaty to provide for a right of access based on reasonable advance notice and reciprocity. Later on it was realized, particularly by the United States, that it was difficult to attempt to transplant the legal regime applicable to the moon which is not subject to national appropriation, to the seabed which is subject to existing claims of national jurisdiction and an increasing array of scientific and commercial uses. Furthermore,
it was also realized that the entry of an observer into any installation on the seabed, at great depth or pressure, in addition to being hazardous, would likely be expensive in view of the lengthy preparation and special equipment needed to enter each particular type of facility. In order to avoid these difficulties, the United States proposed a simple verification system based on observation and consultation to resolve any questions as to compliance with the proposed treaty which the observation might raise. The United States felt that if it could freely observe the activities of other states on the ocean floor, such observation would provide adequate assurance that a violation would not go undetected.

A. Observation

With respect to the relative value of observation as an effective tool in detecting violations, the United States was of the opinion that the emplanting or emplacing on the ocean floor of an installation that was part of an effective weapons system involving nuclear or other weapons of mass destruction would be unlikely to escape the attention of other maritime nations. Thus installations, for instance, which had the capacity to accommodate a missile for delivery of a nuclear weapon and apertures from which such a missile could be launched, or which had the capability to house a sophisticated control system, or contained an airlock to permit entry of personnel, or contained large parts, which could be detached for maintenance, would all be observable with relative ease.

Furthermore, the United States believed that the vast majority of states had ships and planes that could and did consistently carry out surveillance of their territorial waters. Photographs could be taken and data collected to evaluate the particular activity and determine whether or not the ban had been violated. Since the activities of states on and over the high seas

32. Such right to direct access was proposed in paragraph 4 of the Canadian working paper. See Draft Treaty; U.N. Doc. A/7741.

33. See the statement made before the conference of the Committee on Disarmament at Geneva on May 22, 1969 by U.S. representative Adrian S. Fisher, 60 DEP'T STATE BULL. 521-22 (1969).

were not subject to the kind of restrictions that applied in the case of inspections conducted within national territory, so long as such activities took place within the area subject to the ban and did not interfere with the activities of the other states concerned, observation could be carried out as frequently and as closely as the circumstances warranted. Such procedures would not conflict with the traditional principles of the freedom of the seas and other prevailing rules of international law.35

It may be pointed out that the 500-meter safety zone permitted under the Geneva Convention on the Continental Shelf36 would not necessarily frustrate any attempt at verification by precluding an examination within 500 meters of a particular installation inasmuch as a relatively close and continuous observation would still be possible beyond the 500-meter distance. Also, it would be unlikely that a potential violator of the proposed ban would reveal the precise location of his planned violation by giving due notice of the installation and its safety zone as provided in the aforementioned convention.37

The revised Draft does not specify observation as a means by which verification could be carried out but there is no doubt that any meaningful right to verify would include the right to observe. Thus paragraph 1 of Article III of the revised Draft simply states that the parties shall have the right to verify the activities of the other parties to the proposed treaty on the seabed and the ocean floor and subsoil thereof beyond the 12-mile limit, without interfering with such activities or otherwise infringing rights recognized under international law, including the freedom of the high seas.

B. Assistance and Consultation

In the course of the negotiations a number of delegations felt that in view of the differences in technological developments among states, provisions should be made to enable less advanced states to obtain assistance from technologically more advanced nations in carrying out verification.

37. Id. at 427.
The United States believed that efforts to work out specific procedures for assistance would be premature, in view of uncertainty about what was involved, and would also raise severe problems of resource allocation in view of the shortage of equipment and personnel for the highly specialized activities required on the seabed. With respect to a Canadian suggestion that states should have "the right" to apply to another state party for assistance, thereby implying that another state party may have a corresponding duty to provide assistance, the United States felt that it could not in good faith accept such obligation largely because of the existing state of technology and the ever-shifting political relations among the large number of countries that might become party to the proposed treaty.\footnote{38}

In the course of the deliberations it has also been suggested that the United Nations might be a possible source or channel of assistance. The United Nations' role in verification seemed logical since this is the organization charged with the responsibility of maintaining international peace and security. However, it was the view of the United States that the Charter of the United Nations already contained provisions for dealing with possible threats to peace and that it would be a mistake to attempt to turn the question of verification over to the United Nations. Instead, recourse should be had to informal procedures involving consultation and cooperation among states that share common interests in certain areas of the seabed. Such states could work out their own arrangements within the framework of routine diplomacy.\footnote{39}

Since some delegations expressed doubt about the efficacy of such procedures, the United States' representative gave assurance that if the United States were to ask for consultations, it would not propose to let the consultations drop until all queries were resolved to its satisfaction. The United States stressed that this procedure involving verification by observation and consultation would be open to all signatories to the proposed treaty. Thus, international consultation would have a major role to play in

\footnotesize{38. Id.}
\footnotesize{39. Id.}
verifying compliance, without the necessity of resorting to an international verification organization, which the United States regarded as premature and wasteful of resources.40

In those relatively few cases where consultations might not lead to fruitful results, or where a party might have serious doubts about the observance of the prohibitions, the United States felt that existing United Nations’ procedures were sufficient without any additional stipulation for bringing such questions to the attention of the Security Council. Nonetheless, after taking into consideration the arguments and criticisms advanced by other delegations, the United States’ representative expressed his readiness to examine how the Charter of the United Nations might be used to reinforce the provisions of the proposed treaty.41

As provided in paragraph 2 of Article III, the revised Draft permits verification to be carried out by a party either by its own means or with the assistance of any other party. The verification article also includes a commitment by the parties to consult and cooperate in order to clear up questions that might arise about fulfillment of the obligations of the proposed treaty. In the event that consultation and cooperation have not removed the doubts concerning the fulfillment of the assumed obligations, the parties may, in accordance with the United Nations Charter, refer the matter to the Security Council.42

III. MISCELLANEOUS PROVISIONS

Additional administrative provisions of the revised Draft deal with such matters as amendment, review, withdrawal, signature, entry into force, and the like.43

41. In the course of the deliberations several delegations have advocated notification and participation or association of the coastal state which is a party to the proposed treaty in verification activities in the vicinity of its continental shelf. While the United States understood that the coastal states did not wish to see verification utilized somehow to prejudice their exclusive right to exploit the resources of their own continental shelves, it felt that the suggested procedures would be an unnecessary and undesirable restriction on the right of a party to verify the activities of others. See paragraph 6(c) of the Canadian working paper (Doc. CCD/270) and the statement made before the conference of the Committee on Disarmament at Geneva on October 16, 1969 by U.S. representative James F. Leonard, 61 DEP’T STATE BULL. 425,428 et seq. (1969).
With respect to amendment, any state party to the proposed treaty may propose amendments. For entry into force of the amendments, acceptance by a majority of all parties is required. The amendments shall be binding only on those parties who have accepted them. These provisions are aimed to assure that all parties will have an equal voice in deciding which amendments will become parts of the proposed treaty.

During the deliberations of the Disarmament Committee, many delegations supported the idea of a review conference so that if technological and other developments would warrant revision of the verification procedures, they could be considered at such meeting. Accordingly, the revised Draft provides that five years after the entry into force of the proposed treaty a conference would be held to review the operation of the proposed treaty taking account of any relevant technological developments.

The withdrawal provision of the revised Draft is patterned after paragraph 1, Article X of the Nonproliferation Treaty. It provides that each party shall have the right to withdraw if it decides that extraordinary events related to the subject matter of the proposed treaty have jeopardized its supreme interests. A notice of such withdrawal, including a statement of the extraordinary events, must be given to all other parties and to the United Nations Security Council three months in advance.

Finally, with respect to signature and entry into force, the revised Draft provides that the proposed treaty shall be open for signature (accession) to all states and shall enter into force after 22 countries had ratified it. In this connection, the United States wished to make clear that accession by an unrecognized regime or entity to the proposed treaty, would in no way affect the recognition or status of such regime vis-a-vis the other parties.

44. It may be noted that Article XV of the Outer Space Treaty provides for amendments to that treaty in language identical to that used in Article IV of the revised Draft.
47. Art. VI, Revised Draft Treaty (Doc. CCD/269/Rev.).
48. Id. at VII, paras. 1 and 3. It may be noted that the ratification procedure follows the provisions set forth in the 1958 Geneva Convention on the Law of the Sea.
IV. SOME FINAL OBSERVATIONS

There can be little doubt that a widely accepted treaty meaningfully restricting the deployment of nuclear and other weapons of mass destruction on the ocean floor would substantially contribute to the security of all nations. It is somewhat unfortunate, therefore, that the carefully drafted provisions—which were agreed upon by the United States and the Soviet Union and were subsequently revised by them in the light of comments and criticisms by other countries—have failed to elicit sufficient support from the United Nations to receive the latter's endorsement.

As we have seen, most of the major concerns of other nations centered around three major areas. First, there was the concern that the proposed treaty should not be limited to nuclear and other weapons of mass destruction but should reflect a broader agreement and progress toward arms control. Second, there was the fear that the revised Draft did not sufficiently serve to protect the security interests of all parties and particularly those of the coastal states. Third, there was a strong desire that the proposed treaty should more clearly reflect that it in no way prejudices or infringes on existing rights recognized under international law, except for the limitations regarding arms deployment on activities falling within the scope of the proposed treaty.

It is hoped that in the new round of negotiations a formula will be found which will be able to satisfy the most pressing demands of other nations and which will be acceptable to the United States and the Soviet Union. It is also hoped that the agreement on such formula will be reached quickly since it might be much more difficult, if not impossible, to reach an understanding once nuclear deployments on the ocean floor have started.