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The State of the Negotiations on the Law of the Sea

By THE HONORABLE ARTHUR J. GOLDBERG*

The basic principle of the Law of the Sea Conference of 158 nations derives from the 1970 United Nations declaration which states that the "seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction . . . as well as the resources of the area, are the common heritage of mankind."¹ Declarations voicing a similar principle relating to the Antarctic and Outer Space² were adopted many years ago by the United Nations.

In the latter two cases, after prolonged negotiations, treaties were concluded and approved by the United Nations³ which for all practical effects put flesh on the bones of these United Nations resolutions. The Law of the Sea Conference has proved to be more intractable. This author has been told that 90% of the draft treaty provisions have been agreed to and that only 10% remain unresolved.

For the most part, the unresolved issues relate to the legal regime under which valuable minerals such as nickel, copper, cobalt, and manganese will be extracted from the ocean bottom.⁴ As I understand the

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1. G.A. Res. 2749, U.N. GAOR, Supp. (No. 28) 24, U.N. Doc. A/8097 (1970).

2. The preamble to the United Nations treaty on the Antarctica begins: "Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord" The Antarctic Treaty, *came into force* June 23, 1961, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. Similarly, article I of the treaty on outer space reads: "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind." Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, *came into force* Oct. 10, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

3. The Antarctic Treaty, *came into force* June 23, 1961, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, *came into force* Oct. 10, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

4. Telephone conversation with George Taft, Alternate Representative, United States

situation from reading the record of the negotiations, the developing countries are insisting that exploration and exploitation of these mineral resources be placed under the exclusive jurisdiction of an international seabed Authority.⁵ The current negotiating text stipulates that this Authority shall have two major bodies: an Assembly of the 158 participating nations organized on the "one nation, one vote" principle and a much smaller Council with perhaps 36 seats.⁶

It was the position of the developing countries in the early sessions (there have been eight)⁷ that the Assembly should be the decisionmaking body with respect to the method and character of reclaiming the sea's mineral resources.⁸ It was and is the position of the United States and other developed countries that the Council should be the executive agency of the Authority, thereby effectively permitting the developed countries with their high technology in this specific area to have a blocking vote.⁹ In the more recent sessions, the third world has agreed that the Council should have the managerial rule but has insisted that a majority of seats be allocated on a geographical, regional, or developing countries basis.¹⁰ The developed countries insist that this is a distinction without a difference, for in their view the end result would be the same; the third world, under the proposal, would control "the common heritage."

The United States recently proposed a compromise that the International Authority shall have broad authority with respect to one-half of the potential mineral resources. The other half would be subject to exploration and development by the private interests of the developed countries, who would operate under permit and be required to pay to the Authority a reasonable share of the profits derived from their activities.¹¹ The objection to this proposal by the developing countries thus

Delegation to the Ninth Session of the Third United Nations Law of the Sea Conference (Mar. 5, 1980).

5. 2 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 5 [hereinafter cited as OFFICIAL RECORDS].

6. 8 OFFICIAL RECORDS, *supra* note 5, at 27-31.

7. The eight sessions were held: December 3-15, 1973 (1st Sess.); June 20-August 29, 1974 (2d Sess.); March 17-May 9, 1975 (3d Sess.); March 15-May 7, 1976 (4th Sess.); August 2-September 17, 1976 (5th Sess.); May 23-July 15, 1977 (6th Sess.); March 28-September 15, 1978 (7th Sess.); and March 19-April 27 and July 19-August 24, 1979 (8th Sess.).

8. 2 OFFICIAL RECORDS, *supra* note 5, at 5.

9. 10 OFFICIAL RECORDS, *supra* note 5, at 79.

10. *Id.* at 75.

11. Telephone conversation with George Taft, Alternate Representative, United States Delegation to the Ninth Session of the Third United Nations Law of the Sea Conference (Mar. 5, 1980).

far has been that this scarcely effectuates the United Nations resolution that the resources of the seabed are a "common heritage."¹²

A complicating factor in the negotiations is that, as a product of intensive lobbying by mining interests, Congress is considering the enactment of legislation authorizing companies possessing the necessary capital to proceed with mining activities not only in research but in operations, pending the conclusion of a treaty and subject to a "reasonable" fee which is to be placed in escrow for payment to the future Authority.¹³

This legislation passed the Senate on December 14, 1979.¹⁴ Legislation currently is before the House of Representatives where it has been agreed that no action will be taken on the bill pending the outcome of the ninth session of the third Law of the Sea Conference.¹⁵

This development has aroused vigorous protest on the part of the third world, particularly in light of administration approval of the proposed law. I regard passage of this legislation to be detrimental to the best interests of the United States and to the successful outcome of the protracted negotiations relating to the seabed. At the minimum, it seems to be pressure tactics bound to create resentment, as it has. At the maximum, it is strong evidence of a desire on our part to go it alone and, at a convenient time, to declare an impasse in the negotiations for a Law of the Sea treaty.

The proponents of this legislation argue that the length of time consumed in the negotiations without a successful outcome proves the negotiations to be nothing more than a talk fest. Let us examine the validity of this position.

The negotiations commenced more than six years ago and have not yet been concluded. While it is possible that consensus will be reached at the next session,¹⁶ it is far from certain. More than six years is a long time indeed, but important international affairs negotiations, history teaches, are not easily consummated.

By way of illustration, the United Nations resolution declaring the principles for the negotiation of a Covenant on Outer Space was

12. *Id.*

13. S. 493, 96th Cong., 1st Sess. (1979); H.R. 2759, 96th Cong., 1st Sess. (1979).

14. S. 493, 96th Cong., 1st Sess. (1979), 125 CONG. REC. 18554 (1979).

15. Conversation with George Taft, Alternate Representative, United States Delegation to the Ninth Session of the Third United Nations Law of the Sea Conference (Mar. 5, 1980).

16. *Wall Street Journal*, April 7, 1980, at 20, col 3. Ambassador Elliot Richardson, the U.S. delegate, stated that it is "distinctly possible that our work can be completed next summer in Geneva." *Id.*

adopted by the General Assembly in 1963;¹⁷ the Treaty was signed and entered into effect in 1967.¹⁸ Thus, the important Outer Space Treaty, which does not contain the complexities of the proposed treaty on the seabeds, took four years to negotiate. But this is not all. The Outer Space Treaty required supplemental treaties, such as the Damage Treaty, which was negotiated for several years after the Outer Space Treaty was ratified and came into force only in 1972.¹⁹ The Astronaut Rescue Agreement likewise was negotiated over a period of time and came into force in 1968.²⁰ The Outer Space Registration Convention similarly took time to negotiate and was ratified only in 1976.²¹

I repeat that all of these treaties, while important, do not deal with problems as difficult as the unresolved problems in the Law of the Sea negotiations. Patience and perseverance are essential for diplomatic solutions of great problems.

The Seabed Treaty, of course, is not comparable to the negotiations on the status of Berlin—a flash point for World War III. Nevertheless, it is well to recall that negotiations with respect to Berlin took place more or less continuously from the end of World War II in 1945 until a modus vivendi was reached in the Quadripartite Agreement concluded in 1971.²² The Israeli-Egyptian Peace Treaty is another example demonstrating that time is required to negotiate agreement on difficult international problems. Negotiations commenced in 1948.²³ They were stalemated by periodic conflicts and resumed only in 1977 when President Sadat, at the invitation of Prime Minister Begin, made his dramatic and courageous visit to Israel. The Egyptian-Israeli Peace Treaty was signed on March 26, 1979.²⁴ And very difficult problems

17. G.A. Res. 1884, U.N. GAOR, Supp. (No. 15) 13, U.N. Doc. A/5515 (1963).

18. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, *came into force* Oct. 10, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

19. Convention on International Liability for Damage Caused by Space Objects, *done* Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762 (treaty came into force for the United States on October 9, 1973).

20. Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, *opened for signature* Apr. 22, 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599, 672 U.N.T.S. 120 (treaty came into force for the United States on December 3, 1968).

21. Registration of Objects Launched into Outer Space, *opened for signature* Jan. 14, 1975, 28 U.S.T. 695, T.I.A.S. No. 8480 (treaty came into force for the United States on September 15, 1976).

22. Quadripartite Agreement on Berlin, *signed* Sept. 3, 1971, 24 U.S.T. 283, T.I.A.S. No. 7551 (treaty came into force for the United States on June 3, 1972).

23. New York Times, July 17, 1948, at 14, col. 1.

24. New York Times, March 27, 1979, at 1, col. 6.

relating to the Peace Treaty are still to be negotiated.

It is my sincere hope that if a consensus is not reached at the next session of the Law of the Sea Conference, negotiations will not be broken off but will continue. It is also my conviction that if the United States, the Western powers, the Soviet Union and its allies, and the developing countries do not act impatiently and rashly, an acceptable Law of the Sea treaty can and will be concluded given time and diplomatic skill.

Underlying the unresolved issues is the fact, which must be realistically acknowledged, that developed countries have the high technology and capital to mine the seabeds and that developing countries do not. This high technology is very esoteric and expensive; the capital required for both exploration and mining is enormous, amounting to billions of dollars.²⁵ It is also a fact that the developing countries consisting of both coastal and non-coastal states have a legitimate interest in the resources of the sea.

It was my experience at the United Nations that despite rhetoric on the part of nations of the third world which is sometimes agonizingly irresponsible, they are not totally devoid of realism. They do feel deeply that, particularly with respect to mineral and energy resources in their own countries, they were taken advantage of during the period of colonialism. And who can deny that this was the case? They do not want the seas similarly colonized. We should agree that they should not be.

Private interests in the developed countries have the technology to proceed on their own in the exploration and mining of the metals in the seabed—in other words, to colonize the seabeds as the Western countries did in the past in Africa, Asia, and other continents. Who is there to stop them? If the West is foolish enough to permit their private interests to do so, the developed countries will pay a political price of great magnitude, dwarfing the benefits which they will derive from the metals their companies or enterprises mine.

I do not have a ready formula to provide a perfect solution to resolve the conflicting claims of the North and the South. I would, however, remind the West that developing countries with "radical" ideologies possessing natural resources have found ways to do business with the West and, with rare exceptions, for practical reasons have not denied developed countries access to these resources on sensible terms. The exception, the OPEC countries which have raised prices beyond

25. Flipse, *The Business of Deep Sea Mining*, in *THE LAW OF THE SEA* 63 (1978).

reason, are succeeding, in my view, because of Western ill-conceived energy programs. Further, the West has been unable to agree upon the necessary peaceful measures to cope with this intolerable situation.

I conclude with this observation. Surely, it is not beyond the diplomatic capacity of the North and the South, given political will, patience, perseverance, and the willingness to recognize the equities of all concerned, to find a global solution which will be realistic and which will prevent the emergence of a new colonialism in the waters, repeating the tragedies and mistakes of the colonialism which has occurred on land in times past.

President Kennedy once said of world poverty: We cannot long survive on an island of affluence in oceans of poverty. I would paraphrase this statement: We cannot long survive in oceans exploited by the affluent, leaving islands of poverty.