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THE LAW OF THE SEA TREATY:

WHERE IT STANDS AND WHAT IT MEANS

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The Third United Nations Conference on the Law of the Sea (UNCLOS-3), once described as the world's longest floating crap game, may be coming to a conclusion very shortly. The Conference, which is considering such questions as deep seabed mining, fishing, the continental shelf, oceanographic research, marine pollution, military use of the sea, and ocean energy, was formally begun in December 1973 following six years of preparatory work. After nearly seven years of negotiating in UNCLOS-3, however, no treaty has been adopted and little has been produced by way of new international law that would not have developed through unilateral state action in any event.

Nevertheless, the more than 150 nations which have participated in the negotiations have indicated that reaching written accord on more than 100 agenda items dealing with the use of ocean space and the exploitation of ocean resources will have benefits in terms of international cooperation far beyond the scope of the law of the sea. Thus there has been a sustained effort by United States representatives to UNCLOS-3 not only to preserve National interests in the negotiation, but also to obtain a treaty even if some of those interests must, to some degree, be sacrificed to the general international welfare.

On February 27, 1980, UNCLOS-3 will reconvene, perhaps for the last time. It will have before it the "Informal Composite Negotiating Text (Revision 1)" which, though not a draft treaty as such, reflects consensus agreement on many of the dozens of questions under consideration. If

agreement can be reached on the still outstanding issues during the February-April session, it is conceivable that a treaty could be adopted and sent to nations for ratification sometime in 1981. Should UNCLOS-3 fail to resolve these remaining issues, it seems extremely likely that formal international conference efforts will terminate, and that the law of the sea will continue to evolve on the basis of state practices and customs. As the delegates approach this crucial session, then, here are the major issues and impacts involved:

1. Deep Seabed Mining

Lying on the deep ocean floor, beyond the continental shelf and therefore outside the jurisdiction of any nation, are fist-sized metallic nodules containing high concentrations of copper, cobalt, nickel, manganese, and other industrially valuable minerals. In recent years technologies have been developed permitting the recovery of these nodules from substantial ocean water depths (up to 15,000') and the refining of various metals from the nodules. Since the industrialized nations import substantial quantities of most of these minerals from underdeveloped countries, the seabed provides an attractive alternative source of materials that play an important role in their economy and national security.

Through a 1970 United Nations resolution, the underdeveloped countries of Asia, Africa, and Latin America succeeded in having these resources denominated to the

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"common heritage of mankind." UNCLOS-3 has had considerable difficulty in defining that phrase. On the one hand, the industrially developed countries wish it to reflect only an obligation to share profits from the exploitation of seabed resources with underdeveloped countries, while having freedom of access to such resources on a nondiscriminatory basis. On the other hand, the underdeveloped countries, which are without the present *technological* freedom of access, regard the "common heritage of mankind" concept as giving every nation an undivided property interest in the resources, such that no exploitation can be undertaken without the consent of all.

These nations have further proposed-- and their proposal has been embodied in the current negotiating text--that an International Seabed Agency (ISA) be created which would be politically dominated by the underdeveloped countries and which would have complete licensing and regulatory control over the mining of deep seabed resources. Needless to say, this approach collides with free market economy concepts of the industrialized nations. They would prefer a regime similar to that applicable to the United States outer continental shelf, namely that the rules for acquiring leases be set forth in advance, that bids be submitted, and that the highest bidder be awarded the right to extract the resource. The underdeveloped countries prefer a system in which the rules are made after the concession has been granted, those rules being the outcome of the negotiating process between a prospective miner and the ISA.

To further complicate matters, the underdeveloped countries have insisted on such additional benefits as transfer of technology and production controls. On the first issue, they wish to make it a requirement of granting a concession that the mining company turn over to the ISA all of its technological information, including proprietary data and techniques, concerning the mining operation. This information would, as the negotiating text now stands, not only be given to the ISA so that it could shortly begin to mine in competition with private companies, but also to the individual underdeveloped country members of the ISA so that they, too, could compete with the firms repre-

sented industrial nations. Proponents view this benefit as a deserved handicap in these countries' efforts to narrow the technological gap that exists between them and the developed nations.

As for production controls, the ISA would have the power to impose both price and production controls on all mining operations. The justification in theory for such authority is to avoid adverse price effects resulting from seabed production which might affect underdeveloped country land-based producers of the same minerals. In fact, this could put the underdeveloped countries in the same position with respect to deep seabed minerals as the OPEC countries are with respect to oil.

Needless to say the negotiators for the United States Government have strongly opposed many facets of the seabed regime proposed by the underdeveloped countries. However, the U.S. has simply been worn down by the protracted nature of the negotiations, by the stubbornness of the underdeveloped country representatives, and by their sheer numbers in terms of voting power. It therefore seems extremely likely that in the end the U.S. will acquiesce in most if not all of these provisions which constitute a disincentive to the fledgling domestic deep seabed mining industry and which will probably prevent any effective mining by companies or consortia from industrially developed nations.

While the negotiations on the seabed question were proceeding in UNCLOS-3, the United States Congress took legislation under consideration which would provide for licensing and regulation of United States citizens and companies wishing to engage in deep seabed mining. Such legislation could not give the miners an exclusive claim against citizens of other nations, but would make their claims exclusive as against other U.S. companies. Since no underdeveloped nations possess the technology to mine deep seabed minerals, it should be a relatively easy task for the few nations possessing such capabilities to agree on a "clearing house" procedure to avoid overlapping claims or claim jumping. The legislation seems likely to pass and be signed into law sometime during 1980, thus providing the necessary security of title to permit development of these resources in the absence of a treaty on the subject.

2. The Exclusive Economic Zone.

One concept which served as a major catalyst for convening UNCLOS-3 was the idea that coastal states ought to have substantial, if not exclusive, control over all resources of economic value in their adjacent ocean areas. Some developments in this regard had occurred prior to 1970, principally the concept of the continental shelf which accorded to each coastal state exclusive access to the oil, gas, and other minerals in the submerged continental platform extending from the land mass into the ocean. Even here, however, there were unresolved issues such as the seaward extent of such jurisdiction. Further, some nations had attempted to assert exclusive authority over fishery resources beyond their territorial waters to distances of 20, 50, and even 200 miles. These extensions resulted in severe political conflicts, most notably in the case of the "tuna wars" involving the United States, on the one hand, and Chile, Ecuador, and Peru, on the other hand.

As it crystallized in the early stages of UNCLOS-3, the exclusive economic zone (EEZ) would extend 200 miles from a nation's coast. Within this area the coastal state would have exclusive jurisdiction over all resources of economic value, including the traditional oil, gas, and fishery resources, as well as newer uses of the ocean such as extraction of energy from the sun, wind, and currents. This proposal won wide approval in UNCLOS-3, though it caused great concern for the United States, Japan, the Soviet Union, and some Western European countries.

The Soviet Union and Japan opposed the EEZ primarily because of its potential adverse impact on their distant water fishing fleets which worked far within the 200-mile limit off the coasts of foreign nations. Since both nations' economies were substantially dependent on such distant water fishing enterprises, the prospect of having to buy their way into EEZ's of unfriendly or semi-friendly nations did not appeal.

The United States and some Western European countries' opposition was based on military considerations. In order to effectively carry out its assigned missions, the United States Navy must have the maximum amount of ocean space in which it can exercise rights of freedom of the high

seas. Naval strategists feared that if 200-mile EEZs were extended on a worldwide basis, nations would soon claim additional competences in that area with the end result that 200-mile *territorial seas* would ring all of the Earth's land masses thereby severely curtailing the right of ships to maneuver on the high seas.

In the end, Japan and the Soviet Union bowed before the overwhelming majority in favor of the EEZ, and the United States and Western European countries negotiated arrangements they felt would be satisfactory to protect the interests of their navies. In fact, most of these nations, including the United States, established 200-mile exclusive fishery management zones without waiting for UNCLOS-3 to produce agreement on the substance of such zones.

The underdeveloped countries have not stopped with the resource issue in seeking substantial control over activities taking place within 200 miles of their coasts. For example, the current negotiating text provides near absolute discretion in the coastal state to admit or reject applications to conduct scientific research within its EEZ. Because this discretion is perceived as a threat to freedom of research and the development of scientific knowledge about the ocean and its resources, the oceanographic communities of the United States and other industrially developed nations have fought a hard but losing battle against the underdeveloped nations on this issue.

In addition, the negotiating text accords substantial control over environmental protection in the EEZ to coastal states. This also has raised some concern on the part of naval strategists who fear that unnecessary environmental restrictions designed solely to harass or even exclude U.S. naval vessels from 200-mile zones could result from these provisions.

Still another contentious issue dealt with in the context of the EEZ is the extent to which coastal nations should have exclusive jurisdiction over oil, gas, and other minerals in the seabed extending from the land mass out into the ocean. The Arab nations proposed equating continental shelf jurisdiction with the 200-mile EEZ in hopes of placing more remote continental shelf oil and gas resources in the area governed by the ISA and thus subject to the same cartel-like arrangements intended for deep sea-

bed minerals and land-based oil supplies. This would result in substantial future oil and gas resources off the United States coast coming under the jurisdiction of the ISA.

The United States and several other nations have pressed the view that a coastal state's jurisdiction over its continental shelf resources ought to extend throughout the geologic continental margin even where that area extends beyond 200 miles from the coast. It appears at the present time that this position will prevail; however, the price of its success is an agreement that any industrially developed country (such as the United States) producing oil and gas resources from the continental shelf more than 200 miles from the coast would pay a percentage of revenues derived from such operations to the ISA. Several United States Senators have indicated their concern with this concept. As they see it, this concept would result in the United States paying to the ISA--whose members include OPEC nations such as Iran and Saudi Arabia--revenues for the right to produce oil and gas from our own coastal areas. The political unacceptability of such a concept could impair chances for ratification of the treaty should such provision be contained in the text ultimately submitted by the President to the Senate for its advice and consent.

The Importance of UNCLOS-3

Considering all of the above, one may well wonder if perhaps something more than meets the eye might be going on in the UNCLOS-3 negotiations. Such an inquiry would be well placed. In fact, UNCLOS-3 has never been singly focused on the development of rational rules to facilitate the exploitation of ocean resources and the use of ocean space. Instead, UNCLOS-3 has been foremost a forum for the enunciation of the so-called "new international economic order" of the underdeveloped countries. This NIEO, promulgated in United Nations resolutions a half-dozen years ago, is aimed at achieving a substantial transfer of political and economic power from the industrial democracies to the underdeveloped world. The law of the sea negotiations are but one facet of this NIEO thrust.

This becomes apparent when one looks at underdeveloped countries' attitudes toward

deep seabed mining and the EEZ. They wish primarily to manage production of every available resource by way of a cartel-like organization in order to gain economic leverage vis-a-vis the industrialized nations which need the resources to sustain their economies. Further, they wish to extend their authority over large areas of the ocean in order to put themselves in a position of political bargaining power with respect to the military operations of the industrialized nations. None of this has anything to do directly with obtaining benefits from the ocean. In fact, a great deal of the current negotiating text would serve only to inhibit the use of the ocean and the exploitation of ocean resources, but one must realize that this is precisely the objective of the underdeveloped countries.

Of greater consequence, however, would be the value of such an agreement as precedent. Should the negotiating text produced by UNCLOS-3 become a treaty, it could be promoted as a model on which international regimes for other subjects such as energy, environment, food, population, and Antarctica would be based. In outer space matters, this is already happening. In July of last year, a United Nations committee approved a draft treaty concerning the exploitation of moon resources. This document stated that the mineral resources on the moon and other celestial bodies constitute the "common heritage of mankind," a term taken directly from the law of the sea negotiations. Although it is probably true that the exploitation of moon-based natural resources is further down the line than the exploitation of deep seabed minerals, still the underdeveloped countries can be seen as using the UNCLOS-3 negotiations as precedent for establishing a similar or identical regime for the mineral wealth of outer space.

Thus, in making the ultimate decision whether to ratify a law of the sea treaty should one be adopted this spring by UNCLOS-3, the United States Government must look not only at the substance of the treaty, but also its role in the context of the NIEO struggle and the precedent it may set for dealing with other international issues of great importance to the United States.

AQUACULTURE AND FEDERAL FOOD AND DRUG REGULATION

Aquaculture and mariculture, the growing of freshwater and marine organisms in a controlled or enclosed system, have existed in one form or another for hundreds of years. Problems of pollution, sanitation, disease, and competing demands for the natural environment have compelled the evolution of aquaculture from reliance on fenced estuarine areas and ponds to a completely closed-cycle factory environment, depending of course upon the species being cultured. As aquaculture has become more sophisticated and closer akin to the traditional food preparing and processing industries, the relevance and applicability of federal food and drug laws has increased.

While the applicable statute, the Food, Drug, and Cosmetic Act and its attendant regulations are several thousands of pages in length, the basic regulatory structure can be outlined.

Food is deemed to be adulterated if it has been "prepared, packed, or held under conditions whereby it may have become contaminated or injurious to health." It is not required that the food actually have become injurious to health. This requirement has been implemented by the good manufacturing practice regulations of which there are two types. The so-called umbrella good manufacturing practices regulate food industry personnel, plant and ground conditions, sanitary facilities, equipment maintenance, record keeping, and product coding. Specific industry good manufacturing practices exist for more than twenty different food industries including those producing shucked oysters and some canned fish. These more specific regulations deal primarily with size requirements and the amount and composition of the saltwater with which shucked oysters come in contact.

The Food, Drug, and Cosmetic Act also declares adulterated a food which "consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food." Even if the product itself is not unfit for food, it is adulterated if it contains a filthy, putrid, or decomposed substance, and the product need not be shown to be injurious to health. One of the first cases involving this section of the statute dealt with oysters

which, without any manufacture or treatment, were sold in the living state, but allegedly were adulterated because they contained bacteria absorbed during the process of growth and from the liquid which they consumed in their natural function. A number of court cases have considered the "decomposed" language with respect to seafood. Living organisms begin to decompose immediately upon their death, and classifications utilized both by the Food and Drug Administration and the fish industry to measure decomposition exist. Seafood is also deemed adulterated if it is otherwise unfit for food; any food which because of odor, taste, color, or consistency is such that the average, normal person would not eat it may be barred.

Anything that an aquaculturist adds to his pond or facility, the intended use of which either results in its becoming a component or otherwise affects the characteristics of food, is considered a food additive and may be used only by permission (except in the case of pesticide chemicals or new animal drugs which are regulated separately). Food additive regulations are extremely complex and specific, and the addition of any substance to a food producing enterprise should be looked at with care. The addition to food of any substance which is a known carcinogen is strictly prohibited, and the introduction of known carcinogens to animal feed is subject to strict conditions.

The definition of food additives excludes substances added to food which are generally recognized to be safe among experts qualified by scientific training and experience to evaluate their safety, or that have been adequately shown through scientific procedures to be safe under the conditions of intended use. The Food and Drug Administration has promulgated a list of substances which are generally recognized as safe for use in human food and animal feed. Since it is not possible to list all substances that are generally recognized as safe for their intended use, a food ingredient of natural biological origin that has been widely consumed for its nutrient property prior to January 1, 1958, without known

detrimental effect and for which no safety hazard exists, will ordinarily be regarded as generally recognized as safe without specific inclusion on the list.

The food and drug laws were designed primarily with the food processor in mind, but as aquaculture becomes more sophisticated and more attempts to modify or enhance the animal's habitat through feeds, growth inducements, pesticides, and the like occur, the likelihood of Food and Drug Administration involvement in aquaculture increases. As recently as February 12, 1980, the Food and Drug Administration sponsored a symposium on Aquaculture, Public Health, Regulatory, and Management Aspects in New Orleans. Thus, the need for the aquaculturist to be aware of Food and Drug Administration operations is clear.

For further information on the impact of the Food, Drug, and Cosmetic Act on aquaculture, please feel free to contact:

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NEW PAMPHLET AVAILABLE

"Federal Disaster Assistance Programs," a pamphlet describing various government relief programs available to victims of floods, hurricanes, tornadoes, droughts, etc. can be obtained free of charge by writing Sea Grant Legal Program at the above mentioned address.

Readers are also reminded that "Louisiana Boating Laws," a pamphlet describing boating laws applicable in state waters is also available for distribution at no charge.

UPCOMING IN THE LCL

Future issues of the LCL will feature discussion of natural resource issues facing the upcoming 1980 state legislative session, a report on recent court actions concerning wetland protection, and a continuation of the evaluation of the legal problems involved in the controversy over future management of the Atchafalaya Basin.

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