Whose ocean is it anyway?

A PARTING OF THE WAVES

by Ved P. Nanda

When, on April 30, the United States rejected the Law of the Sea Convention, it dealt a blow to its own best interest: the orderly development of rules to govern navigation and exploitation of the oceans.

During the last days of an eight-week session of the third United Nations conference on the Law of the Sea, the Third World majority had made a last-ditch effort to obtain U.S. approval of the treaty. The U.S. delegate, James Malone, acknowledged that their concessions offered "modest improvements" but also that they failed to satisfy U.S. demands on the mining of highly valued manganese nodules. Whatever hope remained for a consensus on the draft treaty was shattered when the U.S. pressed for a formal roll call vote on the final day. Disappointment, frustration, and even shock was registered by many of the assembled delegates. In the vote that followed, the United States was joined by Venezuela, Turkey, and Israel in opposing the majority 130 countries that approved the Convention; seventeen nations, among them the Soviet Union, England, and West Germany, abstained.

When the Reagan administration took office in 1981, it deferred action on the treaty, which had been looked upon with favor by the previous administration. After a year's "extensive and thorough" policy review, it presented a detailed list of demands at the New York session of the conference in March. Initial response to the so-called Green Book of U.S. proposals was one of disbelief. But the president of the conference, T. B. Koh of Singapore, skillfully turned the conference in the direction of compromise, and several changes were made in the draft to meet the U.S. demands. Among these changes were:

- The guarantee of a U.S. seat on the proposed thirty-six-member council of the International Seabed Authority that will set policy on seabed mining.
- The granting of priority in obtaining contracts from the Authority for mining the seabed to four international consortiums led by (1) U.S. companies, (2) a French group, (3) Japan, and (4) the Soviet Union and India.
- A provision for protecting the investments of American and other companies already at work.
- A revision of the procedure for amending the treaty. (At a review conference twenty years hence, revisions would be accepted by consensus. Upon the failure to reach a consensus within five years, a three-fourths vote—the original draft called for two-thirds—would be required to amend the treaty, then binding on all signatories.)
- A revision of the terms of technology transfer to the Authority. (The original draft required aspiring ocean mining companies to sell their technological know-how to the treaty's international mining enterprise at fair and reasonable terms negotiated with the Authority. Under the compromise plan, if the company were unwilling to sell its technology, its home government would take the necessary steps within its own legal system to obtain the technology for the U.N. body.)

The Carter administration's chief delegate to the Law of the Sea conference had called the Convention "a good treaty and an historic achievement." The new administration has appraised it quite differently. The recent concessions notwithstanding, it perceives the treaty as establishing a restrictive, centrally planned, and therefore inefficient system for developing and marketing seabed minerals. To accept the regime, it feels, is to surrender political control and funds to a supranational bureaucratic body. As U.S. delegate Malone put it, the treaty would "deter the development of the deep seabed resources."

Among the specific provisions to which the United States objects are the treaty revision procedure and the required technology transfers. The U.S. administration is also uncomfortable with features of the treaty that limit the volume of minerals to be extracted from the seabed in the interest of protecting land-based producers of the same minerals—although earlier, in order to get concessions on other issues, the U.S. had conceded the principle of a production ceiling.

The U.S. objects to the treaty revision procedure on the ground that any amendment would render it effectively a new treaty, which, as the U.S. Constitution demands, must be resubmitted to the Senate for ratification. Thus the United States could not give its approval in advance to amendments that required a senatorial mandate. As for the mandatory technology transfer provisions, these are rejected as being contrary to America's laissez-faire philosophy. In all, the treaty is considered as setting undesirable precedents,

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and Mr. Malone ventured that the U.S. Congress was sure to find the production ceiling a major problem.

These objections notwithstanding, a careful reading of the convention's major provisions would lead most observers to question America's wisdom in opposing it. In fact, the results of these eight years of conference negotiations are impressive indeed.

THE ACHIEVEMENT

The treaty is unprecedented in its comprehensiveness, regulating as it does all anticipated uses of the oceans: fish and marine resources; energy; maritime boundary delimitations; transportation, communications, and freedom of navigation; economic and environmental issues; and maritime research. Just consider some of the important questions on which the conference was able to reach consensus:

- A twelve-mile zone of territorial waters over which coastal states have sovereignty.
- A two hundred-mile "exclusive economic zone" (EEZ) over which coastal states have exclusive rights to explore and exploit fish and other marine life.
- A 350-mile zone over which coastal states have exclusive rights to the rich oil and gas reserves on their continental shelves.
- The freedom of commercial and military navigation and overflight in the new EEZ and through, over, and under straits and archipelagic waters (including Gibraltar, which gives access to the Mediterranean, and Hormuz, at the mouth of the Persian Gulf).
- The assignment of national responsibility for environmental matters, including a coastal nation's obligation to take measures to prevent ocean pollution by its vessels and from its shores.
- Agreement on procedures for the compulsory settlement of disputes concerning nations or individuals by a new International Tribunal for the Law of the Sea, by arbitration, or by the World Court.

The treaty also provides a "parallel system" for mining those manganese nodules (containing nickel, cobalt, copper, manganese, and other minerals) that are of such concern to the United States. Under this system, half the deep seabed mining is to be done by national operators licensed by the global authority and half by the Authority itself with financial support from private industry. Profits from such ventures will be shared between the private companies and the Authority; the taxes and royalties the Authority is to receive from private companies and the profits it makes on seabed mining will be used to further Third World development.

Experts contend that the high cost of seabed mining, the low market price for metal, and legal, political, and technological uncertainties will make ocean mining feasible only when metal prices rise substantially—an unlikely prospect for another decade. Despite this prognosis, it is U.S. dependence on such strategic metals as manganese, cobalt, and nickel that is cited as an important reason for its contention that the treaty places unreasonable constraints upon deep seabed mining.

In fact, many Third World countries already impose conditions on mining operations within their borders that are no less stringent than the ones in the new treaty. Mining companies willingly comply with such conditions as technology transfers, production ceilings, and locally imposed payments that are much the same as those due the Authority under the treaty. It is a tenuous argument that *those* are undertaken voluntarily and are therefore more acceptable.

The treaty reflects any number of compromises between the position advocated by the Third World and that of the developed countries and their mining companies. For example, the Third World has departed radically from its initial insistence that the "common heritage of mankind" principle means granting exclusive rights to the Authority to exploit the oceans' riches solely for the benefit of the developing countries. The industrial countries were equally assertive in maintaining that the traditional international law principle of freedom of the high seas authorized them to conduct deep seabed mining free of restriction.

The treaty serves a salutary purpose too in providing a framework through which conflicts can be limited, managed, and resolved, all under a rule of law. If the key conflicts of 1982 related to seabed resources and freedom of navigation, these do not come close to exhausting the sources of international conflict on use of the seas. And as those memorable tuna and cod wars illustrate, such conflicts have an enormous potential for escalation.

But how effective will the treaty be if the United States and some other developed countries stand aloof? Will American companies be able to obtain, and secure, access to the oceans' wealth as outsiders to the international treaty regime? Perhaps there will be an attempt at a mini-treaty among industrialized nations, whereby the claims of each would be recognized. Some people actually consider likely an agreement among Paris, London, Washington, and Bonn. But Paris is a signatory to the treaty, and as to the rest, they would do well to anticipate the risks in such an endeavor. For example, Third World nations are sure to challenge in international courts any mining that is undertaken outside the treaty, and mining companies will doubtless fear being tied up in lawsuits. The companies might also find it difficult to obtain the necessary financial backing, credits, and insurance because of uncertainty about the validity of their claims. Without the assurance of protection for U.S. mining interests—under emerging international law practices they may indeed be seen to possess *no* legal right and to be able to acquire none to explore the seabed—the United States would do well to reconsider its objections and join the treaty-signing in Caracas next December.

By touching on the interests of all nations—great and small, rich and poor, coastal and landlocked—and affecting both North-South and East-West relations, the treaty takes a giant step in developing and extending the rule of law and in building institutions that help to ensure a peaceful resolution of conflicts. In its role as the leader of the free world, the United States can ill afford to place its narrowly conceived self-interest above the broad interest of the community whose standard it claims to bear. WV