One OPEC Is Enough!

Northcutt Ely

THE PROPOSED LAW of the sea treaty can be fully understood only if it is first recognized for what it is—the most ambitious transfer of jurisdiction in history, affecting three-quarters of the world's surface. It would put an end to the freedom of the seas with respect to the use of the seabed, now freely available to all nations, and vest "full control" of that vast area in a new entity called the Seabed Authority, a kind of supergovernment answerable to no one (see box, page 20). As someone put it, the treaty is the greatest land grab since Genghis Khan.

To some commentators, the treaty's seabed provisions represent a "compromise" between third world demands and American interests. On the surface, there might even appear to be a parallel system at work: half the seabed mining sites would be reserved by the third world–controlled Authority for the use of its exploration and mining company, the Enterprise, and half would be at least theoretically open to Western miners. Since there are hundreds of years' worth of mineral nodules on the ocean floor, it would seem like no great problem to set aside half of them for less developed countries.

Even the blatantly biased nature of the Enterprise, which would be created with Western funds and technology but controlled by the third world, is not enough to discourage some observers. Dutch journalist Maks Westerman, writing in the *New York Times* December 8, argues that the Enterprise would be a "bureaucratic monster" unable, for all its special advantages, to compete effectively with private seabed miners. This line of thought implies that while the less-developed countries are enjoying their new plaything, the West will be getting on with the business of seabed mining.

In reality, most of the treaty's dangers would remain even if the Enterprise never got off the ground (and down to the seabed). The treaty goes to great lengths to put Western access to seabed minerals completely at the mercy of the new Authority the treaty would create. If by some miracle any private miners did succeed in producing seabed minerals, their investment would fall prey to easy expropriation by the Authority. The Authority and its Enterprise would be an OPEC of the oceans and, in the fashion of OPEC, they would do the most harm not to the producers of metals but to the consumers—including most of this country's strategic industries.

Running a Gauntlet

The potential seabed miner that prospected a likely site and then applied, first, for the right to explore it and, second, for the right to mine it would be at risk every step of the way.

In applying for the exploration contract, the would-be miner would have to tender two mine sites that it had already prospected (undoubtedly at the cost of many millions of dollars), without in return getting any protection

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at all for its investment. The Authority would set aside one of the sites (the better one, naturally) for its own use "through the Enterprise or in association with developing states." The Enterprise would not be limited, however, to operating in "reserved areas" donated for its use; it could operate anywhere.

The applicant could be denied exploration rights to the second site—and end up with nothing—on any of several grounds.

- The Enterprise would receive preference if it applied to explore the site, and any less-developed country that applied would also get "special consideration."

The Seabed Authority—Who Would Rule?

The governing structure that the Law of the Sea Treaty would create would be known as the Seabed Authority. Its plan of organization, while superficially reminiscent of that of the United Nations, differs drastically in at least three ways. First, its Assembly, in which the United States would have one vote among 155, would have lawmaking powers. Second, its executive Council would have no permanent members, and there would be no Great Power veto, in the Council or anywhere else. Third, there would be a judiciary, the International Tribunal for the Law of the Sea, which would consist of various "chambers" including a Seabed Disputes Chamber.

The Council would be served by a variety of specialized units, including an Economic Planning Commission, a Legal and Technical Commission, and, of course, a Secretariat. Members of all organs would be elected by the Assembly, and could be expected to reflect the views of the majority there. The judicial tribunals, moreover, would be forbidden to strike down any act of the Assembly as beyond its powers, or to review any exercise of discretion by an administrative officer of the Authority.

The treaty could be amended at any time by a three-fourths vote of its members with respect to seabed matters and, after ten years, by as little as a two-thirds vote with respect to all other matters—including rights of navigation.

The thirty-six members of the Council would serve four-year terms and would be eligible for reelection ("but due regard should be paid to the desirability of rotating seats"). They would be elected as follows:

- Four from among the eight states with the largest investments in the seabed, "including at least one State from the Eastern (Socialist) European region."
- Four from among states that, during the last five years, accounted for more than 2 percent of total world consumption or imports of minerals derived from the seabed, including "in any case one State from the Eastern (Socialist) European region." East Germany and Poland apparently exceed the 2 percent benchmark.
- Four from countries that are net exporters of these minerals, including at least two developing countries.
- Six from developing states with special interests, including those that have large populations, or are land-locked, geographically disadvantaged, major importers of seabed minerals, and least-developed states.
- Eighteen elected to secure an "equitable geographical distribution" among regions in the Council as a whole, including at least one member from each of the five officially designated geographical regions: Africa, Asia, Eastern Europe (Socialist), Latin America, and Western Europe-and-others. The United States would be among the "others," an ill-assorted but large residue.

The Soviet bloc would thus be assured of three seats by name. The less-developed countries would have a minimum of eight, would doubtless obtain many of the eighteen seats elected on a geographical basis, and hence would practically be sure to have a majority in the Council, as they would in the Assembly. The United States would not be assured of any Council seat at all, although it might well be elected to one from time to time, either by the votes of its competitors, the other industrial nations, or as a geographical representative of the catchall Western Europe-and-others category. If the latter should occur, a miscellaneous group of large and small countries from every corner of the world, including Fiji and the Seychelles Islands, would presumably have the expectation (reasonable or not) that we would represent their "regional interest."

The Authority would have jurisdiction over the deep seabed, including the operations there of all signatory nations and their nationals and of the Authority's own mining arm, the Enterprise. Future amendments to the treaty could extend this jurisdiction to other matters involving the high seas, such as navigation.

- Other competitors could also apply. Such a competitor might win the site if its application were filed first (which could happen, since the miner's prospecting activities would have been highly visible), or if it offered to pay the Authority more money, enter a joint venture with the Enterprise, or transfer more or better technology to the Enterprise or developing countries.
- The application could be denied because another company sponsored by the same nation already had a contract on some other site within a given distance.

The Authority's Legal and Technical Commission would recommend whether or not to award contracts, and the present draft treaty would give enormous weight to its recommendations. There would be no time schedule or deadline that might encourage the Legal and Technical Commission to keep delay to a minimum.

The applicant who did obtain an exploration contract would still not be entitled to produce any minerals from the site in question. It would first have to obtain another piece of paper, called a production authorization, which would permit production at a specified rate. The miner could not apply for this unless it promised to be in production within five years. Since gearing up for production could well take more than five years, the miner might have to pour scores of millions annually into developing a project *before* even applying for the approval needed to render that expenditure productive.

Even at that point, however—as in the case of the exploration contract—the miner still would not have any assurance of getting its production authorization. Indeed, the draft treaty explicitly warns that not all companies with exploration contracts will be awarded production authorizations. If selection among applicants were required because of the treaty's global production limitation or a cartel agreement (discussed below), the Authority would make its awards "taking into account the need to enhance opportunities for all states . . . irrespective of their social and economic systems or geographical locations." As before, an application could be defeated by that of a competitor who offered better financial terms or was sponsored by a less-developed nation, since "monopolization" by the United States (though not by the Enterprise) must be prevented. And even if a production authorization were granted, it might be for a later date or lesser rate of production than the miner had applied for, because of global production limitations.

As another condition for a production authorization, the miner would have to agree to surrender its technology. Indeed, the theme of compulsory technology transfer to and on behalf of less-developed states recurs in more than a dozen places throughout the draft treaty. For the first ten years, the private miner would have to transfer to the Enterprise its mining technology, with compensation to be determined by negotiation or arbitration. If the technology were not transferred, the miner's contract could be revoked. The miner would be forbidden to use technology that it did not transfer, even if the technology were owned by third parties who refused to consent.

Beyond this, "production authorization with respect to reserved areas shall have priority whenever fewer reserved sites than nonreserved sites are under exploitation." This means that as soon as the first authorization on a nonreserved area was awarded to anyone, an imbalance would be created: further private applicants might have little chance of approval until a production authorization was awarded to the Enterprise for a reserved area, at which point one more private applicant might get through, and so on ad infinitum. But it is quite possible that the Enterprise would decide to devote its own resources to joint ventures in nonreserved areas. If so, it could maintain its preferred status indefinitely. Meanwhile, the investments of the excluded U.S. companies would stand idle.

If the miner did succeed in obtaining an authorization to produce, it would have to accept the Seabed Authority's control of all mining operations. The restrictions on this control are scanty, and are so couched as to maximize the Authority's discretionary powers, which are expressly excluded from judicial review.

Protection for Land-based Mining

There would be some inherent check on the Authority's abuse of this control if the Authority turned out to be genuinely interested in fostering seabed mining (if only for the sake of maximizing its own royalties). The treaty's gen-

eral policy, however, as expressed in repeated cross-references, is opposed to production. Note, for example, this objective: "The protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of that mineral exported, to the extent that such reductions are caused by activities in the Area, as provided in Article 151." (This article contains production limitations.) Quite inconsistently, the draft treaty calls for maximizing the Authority's revenues from the seabed.

At the request of Canada and other metals producers, there would be stringent output limitations, determined according to a formula so complicated as to be impossible to explain in layman's language. It involves calculating the difference, from time to time, between two trend lines derived from a "linear regression of the logarithm of actual nickel production for the most recent 15 year period for which such data are available, time being the independent variable," these two trend lines having different commencement dates. Experts differ in translating the formula into hard numbers. The restrictions would be global; that is, an application for a production authorization could be denied or deferred if other production authorizations in any of the world's oceans had cumulatively preempted the total world production permitted by the ceiling. The treaty is not clear as to whether the worldwide ceiling would be pro-rated among applicants, or whether some would get full allocations and others be sent away with empty bowls. In any event the draft sets a production ceiling for each private contractor of 46,500 tons of nickel a year, with ceilings for other metals calculated on a parallel basis (using the proportion in which each is found in a typical seabed nodule). The Enterprise, however, would not be subject to any special ceilings and would be guaranteed an annual production *floor* of 38,000 tons for nickel (and proportionate amounts for other metals) in the allocation of the overall production ceiling.

The Authority is actually encouraged to enter, or help organize, metals cartels to keep prices high and production low. Such arrangements could reduce seabed production even below the regular formula. When the Authority signed a cartel agreement to cut back production, that agreement would bind every seabed miner, regardless of whether the miner's own nation had ratified or rejected it.

If the production of seabed minerals did inadvertently impair the economy or diminish the export earnings of currently producing countries, compensation would have to be paid them. This is as if the United States should promise to reimburse OPEC countries for any loss of export earnings they might sustain as the result of our attaining self-sufficiency in oil production. The draft is silent on how the money would be raised or, if it were not paid, whether seabed operations would be curtailed.

Fees, Royalties, and Taxes

At various stages during this ordeal, the miner would have to pay several different kinds of charges: to begin with, an application fee of $500,000; then a fixed annual fee of $1,000,000 a year until commercial production began; and thereafter, the greater of that amount or, at the miner's election, either a production royalty calculated on the gross value of processed metals or a combination of a lower royalty and a tax on the net proceeds attributable to mining. The latter tax would be graduated, reaching punitive levels if the miner's rate of return exceeded 20 percent, even though investors in a risky field like mining frequently reject any proposed investment whose expected rate of return is not at least that high. The royalties are even more interesting: they would be calculated on the final sales value of processed metals, not on the value of the crude minerals recovered from the seabed. Thus the Authority would secure a share of the value added after the minerals reached land. It is as if Saudi Arabia were to calculate royalties, not on the value of crude oil at the Arabian port of export, but on the price of gasoline and fuel oil at the pump in the United States, ignoring the intervening costs of transportation, refining, and marketing.

This is insupportable. What business is it of the Authority to go about collecting royalties on the operations of an on-shore smelter or refiner in the United States, built here with American capital, and having no direct connection with the Authority at all? Why should the Authority presume, as it does, to fix that plant's permissible "debt-equity ratio" and the rates

of interest it must pay for the capital that it borrows? The draft never makes clear whether the Authority could approve or reject plans for a processing plant, or require their modification, but it is arguable that such power is implicit in the text's references to the Authority's interest in processing, including an interest in the efficiency with which refiners recover metals from seabed ore.

All this is quite aside from taxation by the nation in which the miner's processing plant or marine terminal is located, and taxation by the nation having tax jurisdiction over the private mining company. The draft treaty explicitly forbids crediting national taxes against amounts due the Authority, exposing the private miner to double or triple taxation. Perhaps the negotiators tacitly expect the U.S. government to forgo the taxes it would ordinarily collect on the income of American ocean miners, thus increasing a miner's net revenue and boosting the Authority's take still further.

Were the Authority chiefly interested in gaining as much revenue as it could, one might expect it to seek favorable tariff treatment for seabed minerals. In fact, it would do precisely the reverse. "Conditions of access to markets for the import of commodities produced from such minerals shall not be more favorable than the most favorable applied to imports from other sources." That is, the United States would have to impose the same custom duties on minerals won from the sea by its own citizens that it collected on similar minerals produced in foreign countries. The purpose, quite clearly, is to protect those metal-producing countries from seabed competition.

Dispute Settlement and Amendment

The mechanism for resolving disputes between miners and the Authority is meaningless. While the treaty provides for binding arbitration under current UN arbitration rules, it also contemplates the possible replacement of these rules by future rules and regulations of the Authority. Moreover, no arbitration panel would be allowed to consider any question of interpretation of the treaty's provisions. Such questions would be sent to the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. That tribunal, in turn, would be forbidden to question the exercise by the Authority of discretionary powers, or even to declare that any rules, regulations, or procedures adopted by the Authority went beyond its legal powers. These restraints on the judiciary are probably redundant, for two reasons: First, the makeup of the Tribunal and its Seabed Disputes Chamber can be expected to reflect the overwhelming majority of third-world votes plus Soviet bloc votes in the Assembly, and thus to be thoroughly biased against the private miner. Second, the treaty explicitly calls for preference to be extended for the interests of developing states and for "peoples who have not attained full independence or self-governing status"—a turn of phrase used in UN contexts to refer to such groups as the Palestine Liberation Organization.

It is significant that the draft treaty does not attempt to employ the many arbitration panels that exist already, such as that attached to the International Court of Justice or the arbitration machinery of the World Bank. These panels are broadly representative of the world's major legal systems; the Authority would be free to run its courts on any legal principles it pleased, or no principles at all.

Finally, the duration of the miner's production right would not be fixed. It would be related to the economic life of the mining project, but short enough "to give the Authority an opportunity to amend the terms and conditions of the plan of work at the time it considers renewal. . . ." In any event, the production right would last only during an "interim period" that would run not more than twenty-five years or until "new arrangements" entered into force. These new arrangements could result either from a cartel agreement by the Authority to limit production, which could occur at any time, or from a "review conference" of the treaty's signatory states, which would be convened fifteen years after the date on which commercial production (by anyone) had begun. This conference would draw up treaty amendments to determine what would happen after the "interim period." If these amendments were ratified by two-thirds of the member states, they could go into effect five years after the conference had been convened, that is, twenty years after the first commercial production by anyone.

Other amendments to the treaty could be adopted at any time, but amendments relating

to seabed activities could not prejudice the "system of exploration and exploitation" that the treaty sets up, could not do damage to the principle that the oceans are the "common heritage of mankind," and would require ratification by three-fourths of the member states. Amendments not related to the seabed would require ratification by only two-thirds of the states or by sixty states, whichever were greater.

There would be one apparent, but illusory, escape hatch. A party could denounce the treaty on one year's notice, but the denunciation "shall not in any way affect the duty of any State party to fulfill any obligation embodied in this Convention to which it would be subject under international law independently of this Convention." It can be anticipated, with some confidence, that some signatory nations would argue that the freedom of the seas principle no longer applied to seabed mining as a matter of customary law, as evidenced by the agreement of over sixty states; and that the seabed provision were thus binding on non-parties, including any former parties who might have denounced the treaty.

The Enterprise's Advantages

While private miners were running this gauntlet, the Authority's own Enterprise would be having a much easier time. The Enterprise would have vast competitive advantages, even aside from being owned by the regulator of its competitors. These include:

- *Free prospected sites.* As we have seen, the Enterprise would get a fully prospected (and perhaps partly explored) mine site with each application for a contract. Each site might represent several years and several million dollars worth of work. It is also important to note that the Enterprise would not be restricted to operating in the areas reserved exclusively to it. It would be perfectly free to apply for an exploration contract or a production authorization anywhere, and could give financial incentives to cooperating companies who entered into joint ventures with it.
- *Free transfer of technology.* The Enterprise would enjoy access to any technology used by the private miners.
- *Subsidized financing.* The nations ratifying the treaty would furnish the Enterprise with enough start-up financing for it to exploit one site. (This amount is thought to approximate $1.25 billion.) Half of this would be in non-interest-bearing loans and half in loan guarantees, made by member states in accordance with the United Nations scale of assessments (meaning the United States would pay roughly 25 percent).
- *Exemption from payments to the Authority.* In contrast to the heavy fees levied on private miners, the Enterprise could be freed by vote of the Assembly from having to make any payments at all to the Authority for the first ten years.
- *Tax exemption.* The Enterprise would be authorized, indeed encouraged, to negotiate with the countries in which it operated for tax-exempt status. Obviously, the private miner would enjoy no such favored status—but to the contrary would face double taxation on income by states and the Authority.

THE COMPLEX TREATY JARGON can all be compressed into a single warning to U.S. entrepreneurs: Watch out. We are going to get rid of you, and substitute a worldwide monopoly by the Enterprise, as soon as we have picked your brains and your pocket. You are here at our sufferance for twenty-five years at most.

The ploy may not work as intended, since the American Mining Congress has said that its member firms would be unable to finance or conduct operations under the terms of the proposed treaty. If the Reagan administration were to sign a treaty like the present draft, U.S. companies could be expected either to cut their losses and get out of the business altogether, or to rent out their technology to the new masters of the seabed, as oil companies do in the OPEC countries.

But while individual companies can save themselves to some extent in this manner, the American public cannot. If the U.S. companies leave the field, the United States would lose its last chance for independent, self-determined access to manganese, cobalt, and nickel. We are now almost totally dependent on foreign countries, most of them unstable, for these three minerals, so vital to our economy and our national defense. The seabed offers us a final opportunity to convert a resource, discovered and produced by American technology, into a reserve of critical minerals, free of foreign domination. One OPEC is enough! ■