Ocean and Coastal Law Center · School of Law · University of Oregon · Eugene 97403

Ocean Law Memo

Issue 20 September, 1981

IN DANGEROUS WATERS

Will the Law of the Sea Treaty Founder Under the Reagan Administration ?

Jonathan I. Charney

[Editor's introduction:
Ocean Law Memo is pleased to present the following article by Law Professor Jonathan I. Charney of the Vanderbilt Law School. Professor Charney has been a member of the U.S. Advisory Committee on the Law of the Sea since 1973 and is widely known as a Law of the Sea expert. This article first appeared in the Summer 1981 issue of The Vanderbilt Lawyer. We are grateful to Professor Charney and The Vanderbilt Lawyer for permission to reprint the article.]

The Third United Nations Conference on the Law of the Sea has been engaged in the negotiation of an international agreement to govern all aspects of nations' activities in the oceans. The session that commenced earlier this spring at the United Nations in New York was supposed to conclude the negotiations paving the way for a formal signing ceremony this fall in Caracas. Just before this session commenced, the Reagan administration announced that it was not prepared to conclude the negotiations and would defer its decision pending a complete review of the entire subject. To add emphasis to this announcement it replaced the top level of the United States delegation two days before the negotiations were to resume. This led one former head of the United States delegation, Elliot Richardson, to dub this action as the "second Saturday night massacre." Others have lauded the administration's actions for preventing a give-away to the Third World that would prejudice our national interests. The situation is far more complicated than either of these statements would imply.

When the Reagan administration took office it assumed responsibility for these negotiations that have been in various stages of progress since the late 1960s. While the representative of Malta formally initiated international discussion of the matter at the United Nations General Assembly, the United States and the Soviet Union had already begun discussions on the Law of the Sea due to their mutual concern that their military mobility was being jeopardized by expanding claims of national jurisdiction. They were particularly concerned about the closure of international straits, the chokepoints for international navigation. When the issue did arise at the United Nations those two countries and their allies were the strongest supporters of the initiative. President Nixon's administration formally developed the basic United States position for the negotiations, and Presidents Ford and Carter continued to press forward.

As matters evolved a multitude of subjects were placed on the agenda of the conference. They include, among others:

1. The delimitation of maritime boundaries for the territorial sea, exclusive economic zone, continental shelf, and archipelagoes;

2. the navigation and overflight of the high seas, territorial sea, exclusive economic zone as well as straits used for international navigation;

3. the exploitation of marine living resources;

4. the conduct of marine scientific research;

5. the protection of the marine environment;

6. the rights of the landlocked and geographically disadvantaged states; and

7. the regime for the exploitation of deep seabed manganese nodules.

The resulting working draft of the conference contains 320 articles and eight

detailed annexes. It is the product of a most difficult negotiation involving the participation of delegations from over 150 nations. Consequently, all participants have had to modify their positions during the course of those negotiations, including the United States.

It is eminently reasonable for the new administration to conduct a thorough review of the subject before participating in the conclusion of the negotiations. This became imperative due to complaints by some deep seabed mining companies and various representatives of the political right that the treaty prejudices United States interests. Since the prospect for Senate advice and consent to the ratification of the agreement would be bleak if there was not strong support from the administration, it was important that a review take place so that the administration could decide whether or not to give the resulting agreement its full support. While the timing and mode of announcing the review process was regrettable, it is clear that the review itself at this time was absolutely required and that the momentum of the negotiations had to be slowed. On the other hand, there is no ground for concluding that the administration has made a decision to change fundamentally the United States' negotiating position. Administration spokesmen continue to state that a complete review is underway and that no substantial decisions have been made.

Most attention has focused on the regime for the mining of metal-rich manganese nodules located on the floor of the deep seabed beyond national jurisdiction. The text of the working document would establish an international organization that would regulate this activity within the very detailed guidelines set out in the text. The political structure of the organization provides for varying levels of participation by all nations of the world. The text also has numerous statements which would appear to conform to the call of the Third World for a new international economic order. It is these statements and the international participation in the regime which have given rise to cries of a give-away. Many of the critics of the negotiations maintain that the mineral-rich nodules of the deep seabed are freely available to any who appropriates them, that the International Seabed Authority presents an obstacle to United States access to critical minerals, and that the text represents an unnecessary surrender to the pressures of the Third World.

If it had only been that simple, the United States and its deep seabed mining companies would have abandoned the negotiations long ago and proceeded to mine the deep seabed. Unfortunately, the situation is much more complicated. The international law for deep seabed mining is unclear. Many nations claim that those resources are not free for the taking, being the "common heritage of mankind." Deep seabed mining itself is a highly risky venture economically and technologically. In order to commence operations, more than one billion dollars would have to be invested by the mining companies in each venture, and it is necessary that there be clear rights to exploit a specific seabed area. Without a clarified legal system and the acquiescence of the international community the risks and costs of deep seabed mining would escalate. Furthermore, most deep seabed mining companies are actually consortia with participation by companies having multiple interests worldwide. They simply cannot afford to be the focus of adverse attention by the Third World and those developed countries that would oppose unilateral deep seabed mining at this time.

Finally, the deep seabed mining regime has been linked to the other law of the sea subjects listed earlier. While there have been compromises along the way, the non-deep seabed portions of the text could be of particular value to the United States due to the rights they guarantee and the legal and political stability that they would provide. The navigational protections to be secured by the agreement would be most difficult to obtain otherwise. The possible alternatives of bilateral arrangements and aggressive demonstrations of military strength in contested waters would be risky and costly.

It is unquestionable that in order to obtain these objectives the United States did sacrifice in the past some deep seabed mining objectives and that the text could be improved. It is clear, however, that what the United States did was to accept the political rhetoric of the Third World as it applied to the deep seabed mining regime. What it did not do was surrender the substantive interests of the United States in deep seabed mining. In fact the resulting mining regime is an extraordinarily tight legal document providing an unusual degree of protection for deep seabed miners; to some extent it is more protective of the industry than many other commercial mining agreements.

The problem facing the Reagan administration is not a give-away of substance to the Third World, but, at most, the acceptance of Third World political rhetoric and form as a quid pro quo for acquiring certain substantive objectives of the United States. Since this administration has a large investment in ideology it will be difficult for it to accept a document that on the surface appears to be contrary to its positions. Furthermore, the inexpert reader and commentator, and there are many in the press and Congress, will have little patience for detailed analyses that might

justify the United States acceptance of the document. Coming at an early stage of the Reagan administration this issue will be the first test of whether it will engage in the realpolitik of international diplomacy or will place the ideological objectives above substantive objectives.

If realpolitik wins out, the administration will go back to the bargaining table with a position that demands a number of "critical" but obtainable changes in the text. By obtaining those changes it would be able to put its stamp of approval on the text. It could then go to the United States Senate with a "vastly improved agreement that protects the vital interests of the United States."

Alternatively, the administration could decide to seek a substantially revised international agreement, particularly in the deep seabed mining area. It is the position of most participants and observers of the negotiations that substantial changes in the text could not be obtained in the short period of time, if at all. Furthermore, there is a substantial risk that attempts to obtain substantial changes in the deep seabed mining regime would result in the erosion of other parts of the text. Such a situation could jeopardize the entire negotiations or at the least other United States objectives.

If the administration decides to scrap the treaty, it will have to devise a strategy to disengage with minimum political damage. This will be difficult. Having gone public on the issue, it will be very difficult for the United States to avoid the blame for its demise. In fact, the reaction of the other participants, particularly from the Third World and, perhaps, the socialist countries might be to produce an agreement on their own that ignores, if it is not contrary to, United States interests. It is more likely, however, that all efforts to produce a universally acceptable agreement will fail and the United States would be cast as the wrongdoer. If the demise of the agreement is sought or inadvertently produced, the ramifications can be severe, particularly to our interests in international peace and stability, commercial and military mobility on the oceans and, in early seabed mining. I think it is clear that there will be no deep seabed mining in the foreseeable future by private companies without an international agreement produced by this conference. The majority of the industry realizes this and has begun to work totowards getting the United States back to the bargaining table, nothwithstanding its past rhetoric to the contrary and interest in improving the text. They know that a stable international legal regime that could be provided by the agreement would be more beneficial to their interests than an unstable, highly politicized situation in which they would have only their ideological purity to console them. They know that a stable situation would permit the necessary planning and the effective use of lawyers, lobbyists, and diplomats to produce a healthy environment for their industry. That is the message being presented to the administration at this time. Consequently, it is clear that the reports of the demise of the Law of the Sea Conference have been greatly exaggerated.

Jonathan I. Charney
Summer, 1981

[Editor's note:

Subsequent to the publication of Professor Charney's article, the Law of the Sea Conference met in its "resumed Tenth Session" for several weeks this Summer in Geneva. At that meeting, the U.S. representative stated that the Reagan Administration had not yet completed its policy review of the "draft treaty." However, the U.S. did outline some of its problems and concerns with the draft text. Despite strong criticism of the U.S. posture from the Third World and the Soviet Union, the Conference delegations have agreed to meet yet again next Spring at U.N. Headquarters in New York. Because of the U.S. position, no major progress on the remaining substantive issues was achieved in Geneva. The U.S. has indicated that its review of the draft treaty will be completed before the New York session. Whether the U.S. will re-enter the active bargaining arena at that meeting is not yet known.]

Ocean Law Memo is an aperiodic publication of the University of Oregon Ocean and Coastal Law Center (OCLC) and is distributed by the OSU Extension Service's Sea Grant Marine Advisory Program. OCLC is supported in part by the U.S. Department of Commerce, National Oceanic & Atmospheric Administration, Sea Grant Program through the Sea Grant College Program, Oregon State University, Corvallis, Oregon.

For further information on subjects covered in the Ocean Law Memo, contact Professor Jon Jacobson, Ocean & Coastal Law Center, University of Oregon Law School, Eugene. OR 97403. Tel. (503) 686-3845.

Sea Grant College Program
Oregon State University
Corvallis, Oregon 97331