LAW OF THE SEA TREATY - CURRENT STATUS

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I. BACKGROUND

A. U.N. CONFERENCE ON LAW OF THE SEA IN 1958 AND 1960

B. DECEMBER 17, 1970 - U.N. GENERAL ASSEMBLY DECLARED "THE AREA OF THE SEA-BED AND OCEAN FLOOR AND THE SUBSOIL THEREOF, BEYOND THE LIMITS OF NATIONAL JURISDICTION, AS WELL AS ITS RESOURCES, IS THE COMMON HERITAGE OF MANKIND, THE EXPLORATION AND EXPLOITATION OF WHICH SHALL BE CARRIED OUT FOR THE BENEFIT OF MANKIND AS A WHOLE, IRRESPECTIVE OF THE GEOGRAPHICAL LOCATION OF STATES."

C. NEGOTIATIONS BEGAN IN 1974, WITH FINAL NEGOTIATIONS BEING CONTEMPLATED IN THE SPRING OF 1981 IN NEW YORK, WITH THE FINAL DRAFT BEING PRESENTED IN CARACAS LATER IN 1981.

D. LES, APLA, PIPA, ABA/PTC LEARNED OF THESE CLAUSES AND EXPRESSED CONCERN.

E. HOWEVER, REAGAN ADMINISTRATION REPLACED U.S. NEGOTIATORS EARLY IN 1981.

F. U.S. ANNOUNCED IT WOULD REVIEW WHOLE SITUATION AND WOULD NOT AGREE TO CONCLUDE NEGOTIATIONS UNTIL REVIEW HAD BEEN COMPLETED. DRAFT PAPER CIRCULATING WITHIN GOVERNMENT.

G. NEW U.S. POSITION HAS NOT YET BEEN ANNOUNCED.

II. TRANSFER OF TECHNOLOGY

A. ANNEX III

1. SETS FORTH CONDITIONS OF PROSPECTING, EXPLORATION AND EXPLOITATION
2. ORGANIZATION MUST APPLY TO THE AUTHORITY FOR A CONTRACT, SIMILAR TO U.S. GOVERNMENT CONTRACTING PROCEDURES, EXCEPT THAT U.N. IS NOT GIVING YOU MONEY TO PERFORM.

B. ARTICLE 5 (ANNEX III) - TRANSFER OF TECHNOLOGY

1. READ 3, 3(A), 3(B), 3(C), 3(D), 3(E) (P. 5-6 SPEECH: P. 132, TREATY)
2. ALSO 5, (P. 6 SPEECH, P. 133-4 TREATY)
3. ALSO 8, (P. 137 TREATY)
4. ABOVE PROVISIONS APPARENTLY NEGOTIATED WITH NO CONSULTATION OR REFERENCE TO PRIVATE SECTOR TRANSFER OF TECHNOLOGY EXPERTS.

C. RESERVATION OF SITES (ANNEX III, ARTICLE 8)

1. APPLICANT MUST SUBMIT TWO EQUAL SITES TO AUTHORITY
2. AUTHORITY WILL SELECT
   A. ONE SITE TO BE DEVELOPED BY APPLICANT AND
   B. ONE SITE WHICH WILL BE DEVELOPED BY THE ENTERPRISE BY DEVELOPING COUNTRIES

D. ARTICLE 13 (ANNEX III) FINANCIAL TERMS OF CONTRACTS

1. ONE OBJECTIVE IS TO STIMULATE TRANSFER OF TECHNOLOGY TO THE ENTERPRISE
2. ANOTHER OBJECTIVE IS TO ENABLE THE ENTERPRISE TO ENGAGE IN SEA-BED MINING EFFECTIVELY "AT THE SAME TIME" AS THE CONTRACTOR.
3. ADMINISTRATIVE COSTS IN PROCESSING AN APPLICATION FOR A CONTRACT IS $500,000. IF COST IS LESS, EXCESS IS REFUNDED.
4. ANNUAL FIXED FEE OF $1,000,000 TO AUTHORITY
5. ROYALTY OF 5% OF MARKET VALUE OF THE PROCESSED METALS EXTRACTED
   A. FOR FIRST 10 YEARS

B. AFTER THAN, ROYALTY IS 12%

6. ALTERNATIVELY, CONTRACTOR CAN GIVE A SHARE OF THE PROCEEDS TO THE AUTHORITY

III. INTERNATIONAL SEA-BED AUTHORITY

A. COUNCIL

1. EXECUTIVE ORGAN OF THE AUTHORITY

2. 36 MEMBER COUNTRIES (SEE P. 33 SPEECH: P. 65-66 TREATY)

A. 4 OF 8 COUNTRIES HAVING LARGEST INVESTMENTS IN SEA, INCLUDING AT LEAST ONE EASTERN EUROPEAN SOCIALIST COUNTRY.

B. 4 COUNTRIES WHO HAVE CONSUMED OR IMPORTED MOST MINERALS FROM SEA INCLUDING AT LEAST ONE EASTERN SOCIALIST COUNTRY.

C. 4 COUNTRIES WHO ARE MAJOR EXPORTERS OF MINERALS FROM SEA, INCLUDING AT LEAST TWO DEVELOPING COUNTRIES.

D. 6 DEVELOPING COUNTRIES.

E. 18 GEOGRAPHICALLY DISTRIBUTED COUNTRIES INCLUDING AT LEAST ONE FROM EACH OF THE FOLLOWING GEOGRAPHICAL REGIONS: AFRICA, ASIA, EASTERN EUROPE (SOCIALIST), LATIN AMERICA, WESTERN EUROPE AND OTHERS.

3. SUMMARY

A. AT LEAST 3 EASTERN EUROPE (SOCIALIST) COUNTRIES

B. AT LEAST 8 DEVELOPING COUNTRIES

C. NO MENTION OF U.S. OR CANADA

B. THE ENTERPRISE

1. "ORGAN OF THE AUTHORITY WHICH SHALL CARRY OUT THE ACTIVITIES IN THE AREA DIRECTLY: INCLUDING "TRANSPORTATION, PROCESSING AND MARKETING OF MINERALS RECOVERED FROM THE AREA."

IV. RECENT U.S. GOVERNMENT VIEWS

1. U.S. ROLE IN DECISION-MAKING SYSTEM OF THE AUTHORITY SHOULD APPROXIMATE U.S. ECONOMIC STAKE IN SEA-BED AND HAS A MAJOR CONTRIBUTOR TO AUTHORITY. PRESENT LANGUAGE DOES NOT DO SO.
2. U.S. AND OTHERS UNDERSTOOD COUNCIL AND NOT ASSEMBLY WOULD EXERCISE PRINCIPAL POLICY-MAKING POWERS. ALSO COUNCIL VOTING SYSTEM SHOULD BE CHANGED.
3. TREATY SHOULD ESTABLISH REGIME WHICH HAS MAIN OBJECTIVE OF ENCOURAGING DEVELOPMENT OF MINERAL RESOURCES. ARTICLE 150 AND 151 DO NOT DO THIS.
4. COMPANIES WITH CAPACITY AND QUALIFICATIONS TO DEVELOP MINERAL RESOURCES SHOULD NOT FACE OBSTACLES IN OBTAINING AUTHORITY'S PERMISSION. PRESENT TREATY IS UNSATISFACTORY IN THIS REGARD.
5. U.S. OBJECTIVE IS A SYSTEM WHICH PROVIDES FOR NON-DISCRIMINATORY AND CERTAIN ACCESS TO SEA-BED. IN PRESENT TREATY ENTERPRISE HAS ADVANTAGES AND LOWER COSTS. MANDATORY TRANSFER OF TECHNOLOGY PRESENTS PROBLEM OF PRINCIPLE THAT IS OF MAJOR POLITICAL IMPORTANCE.
6. U.S. SEEKS A REGIME WHICH CANNOT BE CHANGED EXCEPT BY AN AMENDMENT TO THE CONVENTION WHICH U.S. CAN SUBMIT TO SENATE. PRESENT REVIEW CONFERENCE PROCEDURE COULD CHANGE TREATY.
7. DISCRETIONARY PROVISIONS ALLOW AUTHORITY TO TRANSFER PRODUCTION OF MINERAL RESOURCES AFTER CONTRACT HAS BEEN OBTAINED. AUTHORITY CAN ORDER CESSATION OF WORK OR MAINTENANCE OF LEVELS OF PRODUCTION WHICH ARE NOT ECONOMICALLY FEASIBLE.
8. BUDGETARY IMPACT MUST BE MINIMIZED. PRESENT DRAFT WILL REQUIRE WESTERN COMPANIES TO SEEK SPECIAL TAX RELIEF. TREATY ALSO PLACES CONTINGENT OBLIGATIONS ON STATES TO SUPPORT ENTERPRISE.

V. CONCLUSION

A. WILL THE COMPULSORY TECHNOLOGY TRANSFER OF THE LAW OF THE SEA TREATY BE ADOPTED FOR OTHER TREATIES TO BE NEGOTIATED?

1. TREATY ON THE SOUTHERN POLAR REGION
2. WORLD CONFERENCE ON RADIO TRANSMISSION

B. LAW OF SEA TREATY IS DISINCENTIVE TO TRANSFER TECHNOLOGY

C. DEVELOPING NATIONS WILL NOT BE ASSISTED BY THIS CODE

D. DEVELOPING NATIONS SHOULD INSTITUTE
1. STRONG PATENT SYSTEM
2. STRICT LAWS PROTECTING PROPRIETARY INFORMATION

LAW OF THE SEA TREATY - CURRENT STATUS

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Before

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Pacific Industrial Property Association

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Last year at the Eleventh Annual PIPA Congress in Tokyo, Jack Maurer introduced you to the Law of the Sea Treaty and pointed out a number of the problems that Jack and others have recognized in the present draft.[1] I will briefly review some of the background of the treaty for those of you who were not present to hear Jack's speech.

Background

The United Nations held conferences on the Law of the Sea in Geneva in 1958 and 1960. On December 17, 1970, the United Nations General Assembly declared that "the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of

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[1] Law of the Sea Treaty: A Constitution for the Seas, John E. Maurer, Pacific Industrial Property Association Presentation, Eleventh International Congress, Tokyo, October 22-24, 1980, pp. 608-620

national jurisdiction, as well as its resources, is the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States".[2]

Since that date, negotiations have taken place in an effort to develop a global treaty on the use of the world's oceans and the law governing them. Negotiations began in 1974 on the Law of the Sea (LOS) Treaty with final negotiations being contemplated in March-April 1981 in New York, with the final draft being presented at Caracas later in 1981. The latest draft[3] is 180 pages long, most of which I will not touch upon in this paper.

When the Reagan Administration took over early in 1981, there was considerable unhappiness in the United States with the terms of the treaty which had been drafted up to that time. Part of the unhappiness was due to the transfer of technology provisions, of which no one in the patent, licensing and technology transfer community in the United States was aware or had been consulted about during the negotiations. Late in 1980, Alan Swabey, a Canadian member of LES USA/Canada, alerted some of us in the U.S. to these problems. As a result, the U.S. Chapter of AIPPI, the American Patent Law Association, LES USA/Canada, PIPA, the Patent, Trademark and Copyright Section of the American Bar Association and others reviewed the treaty and made their

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[2] Resolution 2749 (XXV).

[3] "Third Conference on the Law of the Sea", United Nations, A/CONF. 62/WP. 10/Rev. 3, 27 August 1980. One free copy can be obtained by writing the United Nations in New York or by telephoning (212) 754-4475 (Public Inquiries) in New York.

opinions known to various Government circles and elsewhere in speeches, articles, etc.[4]

As a result of these concerns, the Reagan Administration replaced the entire U.S. negotiating team and informed the United Nations that the United States would not complete negotiations on the treaty until it had completely reviewed the background of the proposed treaty and the entire situation relating to the Law of the Sea.

Thus, while the United States has participated in the negotiations that took place in April 1981 and August 1981, nothing of substance has happened in these negotiations, awaiting the determination of the United States Government position.

[4a] Technology Transfer as an Issue in North/South Negotiations, Homer O. Blair, Vanderbilt Journal of Transnational Law, Vol. 14, No. 2, Spring 1981, pp. 301-326 (Law of the Sea Treaty discussed briefly on pp. 318-319.).

[4b] International Technology Transfer: United Nations Code of Conduct and Law of the Sea Treaty, Homer O. Blair, John Marshall Law School 25th Intellectual Property Law Seminar, February 1981 (to be published later this year).

[4c] Statement of George W. Whitney, President, American Patent Law Association before the Committee on Foreign Relations, United States Senate, March 5, 1981 on Law of the Sea Treaty negotiations.

[4d] Position Paper on Law of the Sea Treaty, Technology Transfer Task Force, Chamber of Commerce of the United States, Aug. 5, 1981.

[4e] Law of the Sea Treaty, Statement by Richard A. Legatski, National Ocean Industries Association, Hearing before the Subcommittee on Oceanography, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, October 22, 1981.

[4f] Letter from Richard A. Legatski, National Ocean Industries Association to the Honorable Larry Pressler, Chairman, Subcommittee on Arms Control, Oceans, International Operations and Environment, Committee on Foreign Relations, United States Senate, Oct. 6, 1981.

I am informed that a draft paper embodying a new position for the United States Government has been prepared and is being reviewed in various levels of the United States Government, but it is not yet available for comments by non-governmental people. Some feel this paper will be available in November 1981 while others feel it might be sometime thereafter.

In any event, I would like to review with you briefly some aspects of the technology transfer provisions of this treaty, a few of the other provisions of this treaty, and some comments made by U.S. Ambassador James L. Malone, who is chairman of the U.S. Delegation to the Law of the Sea Treaty Conference.

Technology Transfer

In order to give you the full flavor of some of the technology transfer provisions of the treaty, I have set forth in the footnotes, Article 5 of Annex III of the treaty which relates to technology transfer as it applies to underwater mineral-containing nodules.[5]

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[5] Annex III - Basic Conditions of Prospecting, Exploration and Exploitation, p. 130ff., Article 5, p. 132ff.

Article 5

Transfer of Technology

1. When submitting a proposed plan of work, every applicant shall make available to the Authority a general description of the equipment and methods to be used in carrying out activities in the Area, as well as other relevant non-proprietary information about the characteristics of such technology, and information as to where such technology is available.

2. Every operator under an approved plan of work shall inform the Authority of revisions in the description and information required by paragraph 1 whenever a substantial technological change or innovation is introduced.

5 (cont'd.)

3. Every contract for the conduct of activities in the Area entered into by the Authority shall contain the following undertakings by the operator:

(a) To make available to the Enterprise, if and when the Authority shall so request and on fair and reasonable commercial terms and conditions, the technology which he uses in carrying out activities in the Area under the contract and which he is legally entitled to transfer. This shall be done by means of license or other appropriate arrangements which the operator shall negotiate with the Enterprise and which shall be set forth in a special agreement supplementary to the contract. This commitment may be invoked only if the Enterprise finds that it is unable to obtain the same or equally efficient and useful technology on the open market and on fair and reasonable commercial terms and conditions;

(b) To obtain a written assurance from the owner of any technology not covered under subparagraph (a) that the operator uses in carrying out activities in the Area under the contract and which is not generally available on the open market that the owner will, if and when the Authority so requests, make available to the Enterprise to the same extent as made available to the operator, that technology under license or other appropriate arrangements and on fair and reasonable commercial terms and conditions. If such assurance is not obtained, the technology in question shall not be used by the operator in carrying out activities in the Area;

(c) To acquire, if and when requested to do so by the Enterprise and whenever it is possible to do so without substantial cost to the contractor, a legally binding and enforceable right to transfer to the Enterprise in accordance with subparagraph (a) any technology he uses in carrying out activities in the Area under the contract which he is not legally entitled to transfer and which is not generally available on the open market. In cases where there is a substantial corporate relationship between the operator and the owner of the technology, the closeness of this relationship and the degree of control or influence shall be relevant to the determination whether all feasible measures have been taken. In cases where the operator exercises effective control over the owner, failure to acquire the legal rights from the owner shall be considered relevant to the applicant's qualifications for any subsequent proposed plan of work;

(d) To facilitate the acquisition by the Enterprise under license or other appropriate arrangements and on fair and reasonable commercial terms and conditions any technology covered by subparagraph (b) should the Enterprise decide to negotiate directly with the owner of the technology and request such facilitation;

5 (cont'd.)

(e) To take the same measures as those prescribed in subparagraphs (a), (b), (c) and (d) for the benefit of a developing State or group of developing States which has applied for a contract under article 9, provided that these measures shall be limited to the exploitation of the part of the area proposed by the contractor which has been reserved pursuant to article 8 and provided that activities under the contract sought by the developing State or group of developing States would not involve transfer of technology to a third State or the nationals of a third State. Obligations under this provision shall only apply with respect to any given contractor where technology has not been requested or transferred by him to the Enterprise.

4. Disputes concerning the undertakings required by paragraph 3, like other provisions of the contracts, shall be subject to compulsory dispute settlement in accordance with Part XI, and monetary penalties, suspension, or termination of contract as provided in article 18. Disputes as to whether offers made by the contractor are within the range of fair and reasonable commercial terms and conditions may be submitted by either party to binding commercial arbitration in accordance with the UNCITRAL Arbitration Rules or other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority. In any case in which the finding is negative, the contractor shall be given 45 days to revise his offer to bring it within that range before the Authority makes any determinations with respect to violation of the contract and the imposition of penalties, as provided in article 18.

5. In the event that the Enterprise is unable to obtain appropriate technology on fair and reasonable commercial terms and conditions to commence in a timely manner the recovery and processing of minerals from the Area, either the Council or the Assembly may convene a group of States Parties composed of those which are engaged in activities in the Area, those which have sponsored entities which are engaged in activities in the Area and other States Parties having access to such technology. This group shall consult together and shall take effective measures to ensure that such technology is made available to the Enterprise on fair and reasonable commercial terms and conditions. Each such State Party shall take all feasible measures to this end within its own legal system.

6. In the case of joint ventures with the Enterprise, technology transfer will be in accordance with the terms of the joint venture agreement.

7. The undertakings required by paragraph 3 shall be included in each contract for the conduct of activities in the Area until 10 years after the Enterprise has begun commercial production of minerals from the resources of the Area and may be invoked during that period.

8. For the purposes of this article, "technology" means the specialized equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis.

Article 5 of Annex III provides, among other things, that every contract for the conduct of activities in the Area entered into by the Authority shall contain a number of undertakings by the operator including (3a) "to make available to the Enterprise, if and when the Authority shall so request and on fair and reasonable commercial terms and conditions, the technology which he uses in carrying out activities in the Area under the contract". Thus, this is a compulsory license and provides that anyone operating in the area of the sea must agree to make their technology available to the Enterprise in order to obtain the contract.

This provision, which is far stronger than the normal government contracting activities of the United States, apparently was negotiated with no consultation or reference to private sector transfer of technology experts and has just recently come to light.

In addition, Section 3b of Article 5 provides that if the proposed contractor is not the owner of the technology required to be licensed to the Enterprise, the contractor must "obtain a written assurance from the owner of the technology.." that the owner will make this technology available "under license or other appropriate arrangements" if necessary. If such written assurance is not obtained from the owner of the technology, "the technology in question should not be used by the operator in carrying out activities in the Area."

Section 3d of Article 5 provides that if the Enterprise decides to negotiate directly with the owner of the technology, the contractor must agree to "facilitate the acquisition of technology by the Enterprise..."

Article 5, Section 3e, obligates the contractor to take the same measures as mentioned above in connection with paragraphs a-d "for the benefit of any developing State" that wishes to acquire this technology. The treaty also provides[6] that disputes concerning these above undertakings shall be subject to compulsory dispute settlement as provided in various sections of the Treaty.

Reservation of Sites for Development by the Enterprises

Annex III also provides[7] that each application submitted to the Authority shall cover a total area, which need not be a single continuous area, sufficiently large and of sufficient estimated commercial value to allow two mining operations. The applicant shall divide the area in two parts of equal estimated value and submit all the data obtained by him. The Authority shall designate the part which may be developed by the applicant, and the other part is to be reserved solely for the conduct of activities by the Authority through the Enterprise or in association with developing countries. Thus, the applicant does not know which of the two areas he will be permitted to develop, and the Enterprise and/or developing countries will be encouraged to compete with the applicant on the other site.

Financial Terms of Contracts

Article 13[8] of Annex III relates to the financial terms of contracts for exploitation, etc. The Authority shall be

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[6]Annex III, Article 5 (4), p. 133.

[7]Article 8, Reservation of Sites.

[8]Annex III, Article 13, p. 139ff.

guided by a number of objectives including stimulation of the transfer of technology to the Enterprise[9]. Another objective is to enable the Enterprise to engage in sea-bed mining[10] effectively "at the same time" as the contractors.

Apparently, the Law of the Sea is not contemplating any activity by small or medium size businesses because the fee[11] for the administrative costs of processing an application for a contract of exploration and exploitation is $500,000 (this is not a typographical error) per application. Fortunately, if the cost incurred by the Authority in processing the application is less than $500,000, the Authority shall refund the difference to the applicant.

There are a number of complex provisions for establishing the financial terms of the contract including an annual fixed fee of $1,000,000[12], a royalty[13] of five percent of the market value of the processed metals produced from nodules extracted from the contract area for the first ten years of commercial production and a royalty of 12% for years thereafter, if that is the way the contractor chooses to make a financial contribution to the Authority. There are other provisions if the contractor would prefer to give a share of his net proceeds to the Authority, etc.

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[9] Annex III, Article 13 (1d), p. 139.

[10] Ibid, Article 13, (1e), p. 139.

[11] Ibid, Article 13, (2), p. 139.

[12] Ibid, Article 13, (3), p. 139.

[13] Ibid, Article 13 (5), p. 140.

There are a number of other provisions relating to technology and technology transfer but we don't have time to go into them today. Suffice it to say that while some of them are phrased in innocuous ways, others have been objected to by those of us in the technology transfer and licensing professions.

Other Treaty Provisions

To give you more of a flavor for some other parts of the treaty which do not specifically relate to technology transfer but show the kind of negotiations which are performed by the United States delegation, I will briefly discuss the structure of the United Nations organizations which will administer the Law of the Sea Treaty.

The International Sea-Bed Authority[14]

The treaty establishes the International Sea-Bed Authority (The Authority) which is the organization through which the States shall organize and control activities in the area, particularly with a view toward administering the resources.[15]

The Authority includes[16] an Assembly, a Council and a Secretariat. Also established is an Enterprise,[17] the organ through which the Authority carries out its functions.

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[14] See Section 5 of draft LOS Treaty, p. 61ff.

[15] Ibid., Article 157 (1), p. 61.

[16] Ibid., Article 158 (1), p. 61.

[17] Ibid., Article 158 (2), p. 61.

The Council

The Council is the executive organ[18] of the Authority and has a wide number of powers. The Council consists of thirty-six members (each member is a different country). There has been considerable concern expressed about the provision for determining these thirty-six member countries.

As can be seen for the provision governing this election[19],

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[18]Ibid, Article 162 (1), p. 67.

[19]Ibid, Article 161, Composition, Procedure and Voting, p. 65.

1. The Council shall consist of 36 members of the Authority elected by the Assembly, the election to take place in the following order:

(a) Four members from among the eight States Parties which have the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals, including at least one State from the Eastern (Socialist) European region;

(b) Four members from among those States Parties which, during the last five years for which statistics are available, have either consumed more than two per cent of total world imports of the commodities produced from the categories of minerals to be derived from the Area, and in any case one State from the Eastern (Socialist) European region;

(c) Four members from among countries which on the basis of production in areas under their jurisdiction are major net exporters of the categories of minerals to be derived from the Area, including at least two developing countries whose exports of such minerals have a substantial bearing upon their economies;

(d) Six members from among developing States, representing special interests. The special interests to be represented shall include those of States with large populations, States which are land-locked or geographically disadvantaged, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals, and least developed States;

(d) Eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this subparagraph. For this purpose the geographical regions shall be Africa, Asia, Eastern Europe (Socialist), Latin America, Western Europe & others.

neither the United States nor Canada are guaranteed a seat on the council even though they are two of the most active countries in sea-bed activity and have very large coast lines. On the other hand, category (a) and (b) each provide for at least one State from the Eastern (Socialist) European region, category (c) must include two developing countries and category (d) provides that all six members in this category must be from developing states. Category (e) provides that "eighteen members are elected according to the principle of insuring an equitable geographical distribution of seats" and provides that each geographical region shall have at least one member. The geographical regions are set forth as being "Africa, Asia, Eastern Europe (Socialist), Latin America, Western Europe and others". There are no provisions that North America is a geographical region.

Thus, of the thirty-six members, at least three must be from the Eastern Europe (Socialist) region and at least eight must be from developing countries, not including additional members from each of Africa, Asia, and Latin America, which probably would be three more developing countries. There is no requirement that either the United States or Canada, or any nation in North America, must be included. Also, Japan is not specifically included, but may have a chance to be included as a country from Asia. Some have expressed concern that our negotiators did not represent the United States very well in this portion of the treaty.

The treaty also provides that, in the Council, decisions

on questions of substance[20] under various provisions shall be made by a two-thirds majority of the members present and voting or a three-fourths majority of the members present and voting, providing that such majority includes a majority of the members of the Council.

The Enterprise

The treaty provides for an Enterprise which is[21] "the organ of the Authority which shall carry out the activities in the area directly", including "transportation, processing and marketing of minerals recovered from the Area".

Recent U.S. Government Views

Recently, Ambassador James L. Malone has made a statement which sets forth a number of the concerns which the United States has with the Law of the Sea Treaty.[22] According to Ambassador Malone, the United States' objectives in the Law of the Sea Treaty negotiations are as follows:

1. The U.S. role in the decision making system of the Sea-Bed Authority ought to approximate the economic stake which the United States has as a major contributor to the Authority and the Enterprise. As presently constructed, the Assembly and the Council do not meet this objective.

2. It has been the U.S. understanding, and those of others, that the Council, and not the Assembly, would exercise

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[20] Ibid, Article 161 (7b, c), p. 66.

[21] Ibid, Article 170 (1), p. 74.

[22] Statement by Ambassador James L. Malone, Special Representative of the U.S., to an informal meeting convened by the President of the Law of the Sea Conference and the Chairman of the First Committee, August 13, 1981.

the principal policy-making powers of the Authority. The current draft must be modified to reflect this concern. Also, the composition and voting arrangement for the Council need to be modified.

3. The treaty should establish a regime which has as its overriding objective encouraging the development of mineral resources for worldwide consumption. The United States feels that Articles 150 and 151 do not do this and actually express a clear preference for limitations on the production of sea-bed mineral resources as well as other objectives which are designed to limit the access of the United States and others to deep sea-bed resources.

4. The United States feels that U.S. companies with the capacity and qualifications to develop the mineral resources of the area should not face obstacles in obtaining the Authority's permission. As the treaty is presently drafted, the complex approvals and lack of objective criteria for these approvals do not make it clear that a qualified applicant will be granted permission to develop the resources.

5. The U.S. objective with respect to the exploitation of the resources is to institute a system which provides for non-discriminatory and certain access to the resources. As the Enterprise has significantly lower operating costs than any other operator in the area, certain financial advantages and the benefit of free prospecting done by others at many of its sites, it will have a distinct advantage over private organizations. The Enterprise will also not have to develop its own technology, and it will have a right to demand the technology of others at whatever price forced sales produce.

6. The United States seeks a regime which cannot be changed except by an amendment to the basic Law of the Sea Treaty which can be submitted to the United States Senate for its advice and consent in the same manner as the treaty itself. However, the treaty provides for a review conference in the future which can alter the treaty by an action of 2/3 of the States who are party to the treaty. Such an arrangement is unacceptable.

7. It is one of the objectives of the United States to avoid unreasonable interference with the conduct of mining operations by private organizations. The draft Law of the Sea Treaty at present provides many discretionary provisions and therefore allows for operational interference by various organs of the Authority. Operators could be ordered, for example, to cease work entirely or to maintain levels of commercial production which under the economic circumstances prevailing might ruin the contractor. It is not at all clear that once an operator has a contract that operator will be able to conduct his activities so as to realize the fruits of the prior investment necessary to obtain this contract.

8. Another U.S. objective is to minimize the budgetary impact of international agreements. The present treaty is structured in such a way that the companies of most Western industrialized countries have said that special tax relief would be essential from their Government if they were going to function under the Law of the Sea Treaty. Also, the convention places substantial continued obligations on the States to support the Enterprise.

Apparently, these concerns are being addressed in the new position being developed by the U.S. Delegation.

Conclusion

Many have expressed concern that if the principles for compulsory technology transfer proposed in the present draft of the Law of the Sea Treaty are accepted, these principles will be adopted into other treaties dealing with new frontiers of technology. For example, there are rich mineral sources lying beneath the Antartic ice surface. The Treaty on the Southern Polar Region, currently governed by twelve countries, is expected to come up for negotiation in the near future. Also, there is a World Conference on Radio Transmission that will take place within the next two years. Thus, the airwaves may come under the jurisdiction of the U.N. governing body which might provide for compulsory technology transfer.

Of course, the major concern in this treaty, as well as the Unctad Code of Conduct, is that the rules and codes governing transfer of technology may be such disincentives to investment in innovation that the practical effects will be that there will not be sufficient incentive to encourage those with competence to develop these resources, as they may decide to spend their efforts elsewhere. Certainly, it would appear that developing nations will not be assisted by restrictive Codes.

Frankly, the most practical way to assist technology transfer to developing nations would be for the developing nations to institute a very strong patent system which would give protection to inventions and innovations. Also, strict laws respecting the confidentiality of proprietary information should be passed and enforced.