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FINANCIAL ACCOUNTABILITY OF PROPOSED INTERNATIONAL SEABED ORGANIZATION

Case Study by FRANK C. CONAHAN

FIFTEENTH SESSION

SENIOR SEMINAR IN FOREIGN POLICY

DEPARTMENT OF STATE

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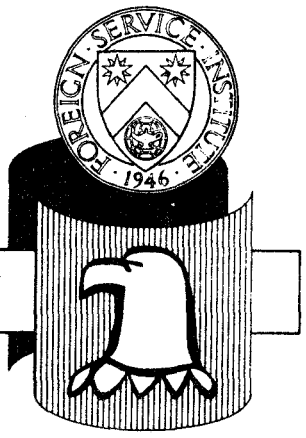

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SUMMARY

Under the auspices of the United Nations Seabed Committee, the United States and other nations are preparing for a conference to be held in 1974 which will address a variety of important issues relating to the oceans that surround them. One of the key issues concerns a proposal to establish an international regime and machinery with authority over the area and the resources of the seabed beyond the limits of national jurisdiction (to be defined by the conference).

In this case study, I have attempted to focus on certain factors which, I believe, need to be considered in establishing such machinery. These factors relate to the relative strength of nations to influence future decisions and directions of such machinery as is established and the mechanisms for keeping member nations adequately informed on the activity and performance of the machinery.

The purpose of this case study is to remind U. S. negotiators of the importance of these factors and urge that such factors not be overlooked in the negotiators' zeal to attain agreement on what they may consider to be overriding issues from the viewpoint of U.S. interests.

TRADITIONAL LAW OF THE SEA DOCTRINE CHALLENGED

The oceans cover some 70 percent of our planet's surface. The rules governing the activities of men and nations in this vast area are known as the Law of the Sea. The basic premise of the law--freedom of the seas--is traced to the 17th Century. Essentially, the freedom of the seas doctrine has been that all nations have equal rights to use the high seas so long as they have reasonable regard for each other's use, and that the establishment of national sovereignty over the high seas is prohibited. This doctrine has not been applied right up to the shoreline. Statesmen and international lawyers agree that there is a territorial sea that extends along all coastlines of all maritime states, in which the coastal state may without interference carry out littoral functions essential to national welfare, including security. The United States has traditionally recognized this zone as being no more than 3 miles in breadth.

Before World War II, navigation and fishing were the principal uses of the sea and, except for some dispute over the breadth of the territorial sea, the law of the sea remained relatively stable. Since then, technology has advanced to the point where we have the capacity to employ the oceans for an increasing variety of uses. Offshore oil and gas production has become a significant source of energy. It is expected that within this decade, there will be extraction on a commercial basis of hard minerals from the ocean floor. Nuclear submarines and super-tankers have become important users of the oceans. Scientific research in the ocean is of growing importance and we are developing new and better methods of fishing. At the same time, we have seen actual and potential threats to marine environment.

Since World War II, efforts have been made to develop and codify the Law of the Sea. In 1958, the United Nations Conference on the Law of Sea considered conventions concerning the territorial sea, the high seas, the continental shelf, and fisheries conservation. Although it adopted four conventions, this Conference, as well as a session held in 1960, failed to settle a number of outstanding questions regarding the sea and the seabed.

Today, the law of the seas doctrine is under severe strain. Among other things several developing country coastal states have asserted territorial sea claims up to 200 miles. The consequence of such claims, as expressed by the Department of State Legal Advisor, in February 1972, is:

> "*** if 200 mile territorial seas were accepted world-wide, more than 30%-up to 50%, according to the Soviet geographers-of our oceans would cease to be high seas and would be subject to coastal State sovereignty. In this huge area foreign states would enjoy only the right of innocent passage: that is, without the consent of coastal States, there would be no right in this area to overfly or transit submerged; there would be no right to fish or conduct scientific research;

and no right to engage in exploitation of petroleum and other mineral resources under an international regime."

In response to a mounting concern over these issues, the United Nations General Assembly, in December 1970, called for a law of the sea conference to deal with the establishment of an international regime for the seabeds, and a broad range of related issues including the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the seas, the preservation of marine environment, and scientific research.

SORTING OUT THE ISSUES

There are a number of inter-related issues and sub-issues, some more important than others, that must be dealt with in preparing for the law of sea conference which is now scheduled to be held in Santiago, Chile in April 1974. As background for this case study and to better understand these inter-relationships, a brief discussion of the major issues follows.

On May 23, 1970, President Nixon announced a U. S. oceans policy designed to accommodate a wide variety of interests. As modified and elaborated, the basic components of this policy, in capsule, are:

The Territorial Sea and Straits

The U. S. in August 1971 submitted to the U. N. Seabed Committee draft treaty articles on territorial seas and straits which provide that the territorial sea would be fixed at a maximum breadth of 12 nautical miles and that there would be free transit through and over international straits, subject to reasonable traffic safety regulations. The U. S. insistence on free transit through and over straits stems from the fact that with a move from a 3 to a 12 mile territorial sea, international straits between 6 and 24 miles would have the right only of innocent passage. Some coastal states have interpreted innocent passage to mean that the flag, cargo, or destination of a vessel is a relevant consideration in determinations of passage. This is unacceptable to U. S. interests. Moreover, under the 1958 Convention on the Territorial Sea, innocent passage does not include submerged transit by submarine or overflight by military aircraft.

Fisheries

Revised draft treaty articles which the U. S. submitted to the U. N. Seabed Committee in August 1972 would give coastal states the right to regulate the fish stocks inhabiting the coastal waters off its shores as well as its anadromous resources (e.g. salmon). The authority delegated to the coastal state would be subject to international standards. The management of highly migratory species (e.g. tuna) would be left to international bodies.

Exploitation of Seabed Resources

U. S. recommendations for an international regime for the seabed are contained in a draft U. N. Convention on the International Seabed Area submitted to the U. N. Seabed Committee in August 1970. Essential elements are:

1. Limitation of all national claims over natural resources of the seabed from the coastline to where the water reaches a depth of 200 meters. This distance varies from several miles to several hundred miles but averages less than 50 miles.

2. Establishment of an intermediate, or economic zone, from the 200-meter depth line to a boundary to be determined. Within this zone, exploration and exploitation of seabed mineral resources would be licensed by coastal states as trustees for the international regime.

3. Establishment of international machinery which would license exploration and exploitation in the area beyond the intermediate zone.

4. The international regime would provide for the collection of revenues derived from seabed exploration and exploitation both in the intermediate zone and seaward. These revenues would be used for international purposes, particularily for economic assistance to developing countries, as well as to finance the activities of the international machinery.

Marine Pollution and Scientific Research

The U. S. has proposed that there be general treaty articles to ensure the preservation of marine environment. The U. S. has also been addressing the problem of ocean pollution in other forums; i.e., the International Maritime Consultative Organization and the 1972 Stockholm Conference on the Human Environment. The U. S. has made proposals designed to ensure the maximum freedom of scientific research in the oceans and to provide for access to the results of this research by developing countries.

STATUS OF NEGOTIATIONS ON THE ISSUES

The seabed question was first introduced into the U.N. General Assembly by Malta in 1967. Specific U. S. proposals for an international regime and machinery were initially submitted to the U.N. Seabed Committee in August 1970. In addition to Malta and the U. S., various other countries and groupings of countries have presented detailed proposals covering law of the sea issues. These have served as the basis for the discussions that have taken place over the past several years.

Although not easily discernible from Seabed Committee reports and related material, observers see general agreement emerging on some issues. In testifying before a subcommittee of the House Foreign Affairs Committee in April 1972, a Department of State witness said:

> "*** the discussions to date indicate at least the broad parameters of a possible eventual agreement consisting of the following elements:
>
> "First, a 12-mile territorial sea, with freedom of navigation and overflight beyond that limit;
>
> "Second, coastal state economic controls over fisheries and seabed resources beyond 12 miles;
>
> "Third, an international regime for the seabed beyond the area of coastal state economic jurisdiction.
>
> "The key unsettled issues on which the success or failure of the 1973 law of the Sea Conference will doubtless hinge are the following:
>
> "First, how far beyond 12 miles should coastal state economic jurisdiction extend and should it be exclusive or subject to international standards and accountability?
>
> "Second, free transit through and over international straits.
>
> "Third, the nature of the international regime and machinery in the area beyond coastal state economic jurisdiction.
>
> "Finally, the nature of the legal regime for the control of marine pollution beyond 12 miles."

SCOPE OF THIS CASE STUDY

The balance of this paper discusses some factors which should be considered concerning the third item enumerated above; namely, the establishment of the international regime and machinery. Although there are indications that some sort of international regime

can be agreed upon for the seabed beyond-coastal state jurisdiction, the precise scope and nature of such a regime and machinery is anyone's guess at this point.

For purpose of this paper, we might think in terms of an international mechanism having certain authority over the resources of a yet-to-be defined expanse of the ocean bottom which we will henceforth refer to as the "International Seabed Area." Broadly speaking this mechanism would regulate or control the exploration and exploitation of the resources to be found in the International Seabed Area. It would derive revenues from its activities. These revenues, after covering costs of administration, would be available for assisting in the development of the less developed countries. These revenues might also be used for certain other purposes, such as marine research and technical assistance.

POTENTIAL REVENUES FOR INTERNATIONAL COMMUNITY PURPOSES

The U. S. proposal asserts that the (yet-to-be defined) International Seabed Area shall be the common heritage of all mankind. The U. S. proposes that the Area comprise the seabed and subsoil of the high seas seaward of the 200 meter depth. The U. S. further proposes that, that part of the Area from the 200 meter depth seaward to a point to be determined be designated as the International Trusteeship Area over which a coastal state would have certain exclusive rights. All exploration and exploitation of the mineral deposits of the whole of the International Seabed Area would be licensed by the proposed international machinery or, with respect to the International Trusteeship Area, by the appropriate coastal state as trustee for the international machinery. Fees would be charged for such licenses and additional annual payments would be required throughout the periods of both exploration and exploitation. Coastal states could retain a part (the U. S. proposes between 1/3 and 1/2) of the fees and payments collected as trustee for the international machinery. The balance of the fees and payments would be transferred to the international machinery.

Suffice it to note here that this paper takes no position, per se, with respect to the U. S. proposals. Suffice it to note also that the participants in the U. N. Seabed Committee are far from agreement on the proposals. It is significant to note one important counter proposal--principally from some of the less developed countries--i.e., that the international machinery, itself, have the power to explore and exploit the International Seabed Area, for example, through a corporation or enterprise which would be part of the machinery and which could use contractors or participate in joint ventures.

It is clear that the ultimate agreements reached on the limits of the International Seabed Area (whether or not there will be exclusive, or even non-exclusive, coastal state jurisdiction over part of it) and the nature (regulatory or operating, or both) of the international machinery will be significant determinants of the magnitude of revenues which will accrue to the international machinery. It is equally clear that it is difficult to speculate on this until such agreements are reached.

The U. S. has explicitly stated that payments to the international machinery should be established at levels designed to ensure that they make a continuing and substantial contribution to the economic advancement of less developed countries, bearing in mind the need to encourage investment in exploration and exploitation. This principal is likewise inherent in the proposals and statements made by other nations--both developed and developing.

If the agreements ultimately reached contain provisions for revenue sharing by the international community from exploration and exploitation of the Seabed Area beyond the 200 meter depth, revenues accruing to the international machinery could be extremely significant. It is estimated that offshore production of petroleum will

probably furnish 30 to 40 percent of the world's consumption by 1980 and probably 50 percent by the year 2000. It is estimated also that one-half of this petroleum lies in the continental margin beyond the 200 meter depth.

In the deep seabeds, beyond the edge of the continental margin known resources are limited to metal-rich nodules. Although present day technology permits economic recovery of these nodules, it is estimated that recovery operations in the near future would result in only modest revenues to the international machinery. If the U. S. proposal prevails, the international machinery would clearly have a very substantial and sustained source of revenues for years to come.

USE OF REVENUES

There has been a wide range of suggestions concerning the use of revenues which may accrue to the international machinery. There seems to be a good deal of support for the proposal that, after administrative costs of the machinery are met, revenues will be used principally for the benefit of the less developed member nations.

The U. S. proposal calls for revenues to be divided among a number of international development organizations in percentages to be agreed upon. The United Kingdom suggested that revenues be automatically paid into an agreed United Nations Fund or, alternatively, into a distribution agency to be established by the international seabed machinery.

On the other hand, it has been argued that revenues should not be distributed in the form of aid, but directly to participating states for use as they desire. Various criteria have been suggested for determining the amount of revenues to be distributed to individual member nations.

During discussions in the Seabed Committee, the point was made that benefits to be derived from the seabeds comprised more than financial benefits, or revenues. It was felt that benefits encompassed such things as access to raw materials and scientific information. In this connection, the U. S. draft treaty articles propose that a portion of the revenues be used to promote economic exploitation of seabed minerals, to promote research and advance other efforts designed to protect the marine environment, to promote development of knowledge of the seabed, and to provide technical assistance to member nations. The U. S. has also proposed the establishment of an emergency fund to provide relief and assistance in the event of a disaster to the marine environment resulting from exploration or exploitation activities.

It is clear that the range of possible uses of revenues from the seabed is quite large. It is doubtful that many would argue with the statement that the larger the magnitude of available revenues, the greater the propensity to undertake new and different activities, particularily in an international bureaucracy consisting of 100 or more disparate member nations.

In commenting on the U. S. proposals for the seabed machinery in April 1971, the Department of State Legal Advisor said:

> "The organizational machinery proposed by the United States draft convention would be separately established from the United Nations structure and would rely in large part on coastal state machinery in the trusteeship zone. Revenues not utilized in accordance with carefully drafted regulations in the convention would be transferred to economic programs in developing countries. Consequently, there would be no incentive to create a huge inefficient international bureaucracy which would leave no funds for economic development."

The Legal Advisor added that the machinery proposed by the U. S. could be put into operation by about 50 employees.

The Legal Advisor's model is certainly to be applauded. At the same time it should be mentioned that there has been some argument in the Seabed Committee for a formal linkage of the seabed machinery with the United Nations system. Carried far enough, such a linkage could possibly make the seabed machinery eligible to receive allocations of funds from the U. N. Development Program. This additional source of funding had been one element in altering the character and direction of some U. N. affiliated organizations and has permitted them to grow into sprawling bureaucracies. U. N. Development Program Funds now account for something on the order of two-thirds of total funds spent by one U. N. specialized agency.

In the author's view participation of the seabed machinery in the U. N. Development Program should be weighed very carefully. U. N. Development Program Funded activities which might be considered appropriate for implementation by the seabed machinery in the future could likely be handled by existing U. N. affiliated organizations.

The above observations are made simply to reflect on the potential breadth and diversity of activities and revenue uses that could develop.

DECISION MAKING BY THE PROPOSED INTERNATIONAL MACHINERY

After over two years of debate in the U. N. Seabed Committee, there seems to be emerging a common view that the international machinery should consist of an assembly (plenary body), a council (executive organ), and a secretariat (administrative arm). These would be supplemented by various commissions having designated power. This follows the structure of a number of United Nations agencies and other international organizations.

The assembly would be the organ where all parties to the Seabed Treaty would be represented. There seems to be general favor for giving each member of the assembly one vote, but agreement does not exist on how decisions should be taken. The powers of the assembly are yet to be agreed upon, but many of the proposals would have the assembly elect or appoint, members of the council and consider matters referred to it by the council and/or the secretariat. One important power of the assembly that runs through most of the proposals is the approval of the budgets of the machinery.

The council issue is much more sensitive. There are widespread differences regarding basic elements of the council, such as the number of members, the interests to be represented, its powers and functions, how it should be composed, and the decision making process. From the U. S. viewpoint, the council is the key organ. The U. S. proposed a council of 24 members, including the 6 most industrially advanced states, at least 12 developing countries, and at least 2 land-locked states. The council would make decisions only with the approval of a majority of both the 6 most industrially advanced states and of the 18 other states. Among other things, the council would appoint certain commissions, submit budgets to the assembly, and propose to the assembly any changes in the allocation of the machinery's net revenues.

Other proposals for the council also call for various distributions of membership. However, none of the other formal proposals, take on the bicameral voting arrangements embodied in the U. S. proposal. The Soviet proposal calls for consensus on questions of substance; other proposals call for a simple or two-thirds majority. As noted above, the U. N. Seabed Committee has a long way to go in reaching agreement on these matters and I would not presume to speculate in the outcome. (Although I do not see much precedent for the U. S. proposal.) I believe it would be useful, however, to reflect on some experiences in international organizations where nations do not have a voice comensurate with their economic or financial standing in the organization.

Of the 127 members of the United Nations, only about 20 are considered "developed". They contribute the bulk of the financing. Over 60 of the "poor" countries contribute to the U. N. budget at the minimum assessment rate of 0.04 percent. All have sovereign equality and one-vote in the U. N. General Assembly. It is extremely difficult for those nations which possess significant economic and technological power to exert anything like a commensurate influence in the organization.

Many unrealistic resolutions are adopted and budgets of the U. N. and the U. N. specialized agencies are voted by majorities made up of those who pay very little to the total. This, moreover, has been the case for some time.

For example, the voting strength of the less developed countries led to the establishment of the U. N. Capital Development Fund in December 1966 over the opposition of the U. S. and other major U. N. donors. The U. S. also opposed establishment of the U. N. Industrial Development Organization; but when it became evident that the less developed countries would override any objection to its establishment, the U. S. did not vote against it. Just recently, the decision was taken, over the major U. N. donor's opposition, to locate the headquarters of the new UN environmental agency in Kenya rather than in close proximity with European-based organizations with which the new agency will be working.

In recent years, the budgets of some of the international organizations have soared over the objections of the major contributors. The U. N. itself, is virtually bankrupt, in part, because of the adoption of unrealistic budgets.

It has been suggested that the less developed countries will have greater motivation in seeing efficient and effective use of revenues which will become available to the proposed seabed machinery than they might in the case of other international organization. It is argued that in the case of the latter, the less developed countries contribute very little; it is said, however, that in the case of the former, the revenues will derive from assets owned by all mankind and hence the less developed countries themselves.

Although this suggestion is conceptually creditable, under current proposals, the overwhelming percentage of actual revenues which will accrue to the seabed machinery will derive from the nationals and/or technology of the most econmmically advanced nations of the world, including the United States.

Alternatives to a one-nation one-vote system

There have been some suggestions that the U.N. adopt a weighted voting system, such as is employed by the World Bank and other international financial institutions, whereby a member's voting strength is approximately commensurate with its financial support of the institution. The impediment to the introduction of weighted voting into the U.N. General Assembly is that it would require an amendment to the U.N. charter and, therefore, approval of the Security Council and two-thirds of the membership of the General Assembly.

This impediment does not obtain in the case of the proposed seabed machinery where negotiation is still possible. Even in the case of the U.N., some observers believe that the solution lies in first reducing the importance of voting and relying more on consensus procedures. On the other hand, in commenting specifically on the proposed seabed machinery, the representative of one less developed country asserted that no international organization with real powers of administration and management can be created unless a flexible equitably balanced system of voting is also created. Another observer proposed a procedure which would maximize consensus without allowing vetoes or weighted voting.

There would seem to be another alternative voting scheme for the seabed machinery i.e. in making decisions with respect to budgets of the machinery and distribution of its net revenues, each member state have voting power approximately commensurate with its financial support of the machinery. This scheme envisions each member having nominal voting power plus additional voting power commensurate with the ratio of its nationals' total fees and payments to total fees and payments made to the international machinery.

There are other models which could be suggested. It is hoped that U.S. negotiators will have such alternative models available for consideration if the current U.S. bicameral council proposal is found to be lacking in support as negotiations proceed. I have not found much attention being given to this matter to date.

BUDGETING PROCESSES AND REPORTING REQUIREMENTS

The various proposals for the international seabed machinery call for the establishment of a secretariat, consisting of a Secretary-General, as chief administrative officer of the machinery, and his staff. Among other things, the Secretary-General would prepare and submit budgets to the council, report on the work of the machinery, and perform other functions as directed by the Council or Assembly. Since formal presentation of the various proposals, there has been virtually no discussion of these matters in the Seabed Committee, or indeed, as best as I can determine, within the U. S. Executive Branch. There seems to be a feeling that these kinds of matters will either fall into place after the major negotiating issues are settled on they should be tended to after the machinery becomes operational.

In view of U. S. experiences with other international organizations, these matters should be given attention from the outset.

It has been shown time and again that information made available by the secretariats of many existing international organizations in connection with budget review processes has not been in sufficient depth or scope to permit the legislative bodies of the organizations to assess the justification for the proposed programs, their priorities or the economic feasibility of their implementation.

Associated closely with the weaknesses in the budgeting processes, is the lack of meaningful information on the actual operation and results of activities carried out by many existing international organizations. Many of the organizations lack effective mechanisms for retrieving, analyzing, and disseminating information on the organizations' activities as a basis for making decisions aimed at improving future operations.

Like the proposed draft treaty articles for the seabed machinery, the treaty, charter, convention, etc., articles of existing international organizations call for the various secretariats to prepare and submit budgets and report on the work of the organization. In large measure, the shortcomings in existing organizations stem from a failure at the outset, to have prescribed systems and standards for carrying out the treaty articles with the resultant ad hoc adoption of practices and procedures in response to immediate and disparate needs over a long period of time.

With a view toward minimizing the problems discussed above, U. S. negotiators should consult with like-minded governments and develop definitive guidelines to govern the seabed machinery's budgeting processes and reporting requirements. While such guidelines would not necessarily be contained in the treaty articles, they would be appended to a basic package with which all governments should agree.

REVIEW AND EVALUATION OF OPERATIONS AND RESULTS

The U.S. proposal for the seabed machinery calls for periodic inspections of the activities licensed under the convention in order to ascertain that licensed operations are being conducted in accordance with the convention. The United Kingdom proposal calls for the establishment within the secretariat of a Corps of Inspectors for this purpose. It seems clear that an inspection function is necessary to determine whether the pertinent standards and requirements of the convention are being met and, if not, to have a basis for corrective action.

It seems similarly clear that a review and evaluation function is necessary to determine whether the international machinery, itself, is complying with the pertinent standards and requirements of the convention and whether it is operating efficiently and effectively to accomplish intended objectives. In the deliberations to date, I have not seen any proposals for such a review and evaluation function.

This is not surprising. With few notable exceptions, member governments of most international organizations do not receive sufficient evaluative information on the operations of the organizations to gain the assurances noted above. Elements of our government have been concerned about this for some time. However, because appropriate mechanisms were not provided for when the organizations were created and improvements in management systems generally in the international organizations come about ever so slowly, the situation remains.

If the activities of the seabed machinery were restricted to licensing operations, the review and evaluation function could be modest. On the other hand, as the machinery undertakes to provide technical assistance and/or some of the other functions discussed earlier in this paper and , particularly if it has the authority to exploit the seabed itself, the need for a top-quality review and evaluation function is increasingly indicated.

The seabed machinery, like all international organizations, will have been created by governments. It will derive its authority from the agreements reached by governments, and exist to fulfill the objectives of such governments as expressed in the treaty or convention ultimately agreed upon. The machinery is thus accountable to member governments.

Accordingly, any mechanism established to review and evaluate the operations and accomplishments of the machinery should report to member governments. In the context of the proposed seabed machinery, this would be the council, or possibly the assembly. It should be a small, professionally qualified staff independent of the management officials of the machinery. It should take its direction from and report to the council (or assembly).

The function need not become operational, nor the staff hired, until an appropriate time certain after the machinery itself becomes operational. The function, however, should be provided for as part of the initial agreements on the seabed machinery.

CONCLUSIONS

A great deal of effort has gone into the preparations for the law of the sea conference. Much has been written and much has been said about a broad spectrum of issues relating to the law of the sea and the proposed seabed machinery. Little has been written and little has been said, however, about the factors which I have attempted to address in this paper.

There can be no doubt of the importance to our government of such factors as the breadth of the territorial seas, freedom of transit through straits, the ability to make decisions regarding the issuance of licenses, etc. Once the standards and conditions relating to the factors have been fixed by treaty or convention, however, member governments are going to have to live for a long time with whatever attendant machinery is created.

Although member nations of the machinery will have to deal with any number of complex questions in years to come, few will be significantly more difficult of equitable resolution than those dealing with future programs, their direction, and the budgetary resources to carry them out. They will be even more difficult of resolution in the absence of management tools which can and should now be devised, including a mechanism for assessing operational efficiency of the machinery and results achieved.