

EDITORIAL COMMENTS

AN ALTERNATIVE TO THE LAW OF THE SEA CONVENTION

Concomitant with its decision not to sign the Law of the Sea Convention in December 1982, the Reagan administration has proposed to some of the other 22 nonsignatory countries, including Great Britain and West Germany, a "mini-treaty" regarding deep seabed mining. The mini-treaty presumably would omit the controversial provisions of the Convention that create an international regime with powers to regulate seabed mining and independently exploit suboceanic resources.

The mini-treaty only makes sense if it will enhance the international legal position of the nonsignatories to the LOS Convention. Let us consider their position first with respect to the nonseabed mining provisions of the Convention and second with respect to its seabed mining provisions.

On the first question, if the mini-treaty contains provisions only regarding deep seabed mining, then the LOS Convention will have "third-party" effects upon the parties to the mini-treaty according to the general principles of international law. Further study on these principles would certainly be welcome. Since some of these third-party effects are controversial under present international customary law, and since the nonsignatories to the Convention presumably wish to have most of its nonseabed mining provisions apply generally, there may be a better way to ensure the universality of desirable Convention norms such as those relating to navigation through international straits, limits of the territorial sea and economic zone, and marine environmental safeguards. Accordingly, I have proposed that the mini-treaty be expanded to include provisions similar, if not identical, to those desirable provisions contained in the Convention.¹

Such an alternate treaty (it probably would not continue to be referred to as a "mini" treaty) will ensure that nearly every nation in the world will have signed one of two treaties, each containing equivalent provisions regarding the nonseabed issues. Those provisions will therefore constitute an almost universal conventional law, and it would follow that general customary law would be similarly thus constituted. To be sure, parties to the Convention may argue that its benefits (nonseabed provisions) are available only to themselves because they have accepted its burdens (seabed provisions): this is the "package deal" theory. As I have earlier argued, the intention of parties to a treaty to retain as exclusive some or all of the norms of a treaty is irrelevant to the use the international community wishes to make of the effect of those norms upon general custom.² As I have tried to show, historically, and without significant exception, the international community has accepted a constitutive

¹ D'Amato, letter to the editor, N.Y. Times, Dec. 29, 1982, at A28, col. 3.

² See A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 150-60 (1971).

rule to the effect that generalizable norms in treaties generate equivalent norms of customary law.³

The second question deals with the relation of the seabed mining provisions of the LOS Convention to the legal position of nonsignatories. Let us begin by considering their position if they do not enter into an alternate or mini-treaty.

If the International Court of Justice were asked to give an advisory opinion on whether nonsignatories may legally engage in deep seabed mining activities without contributing to the regulatory regime set up by the Convention, the Court would have to consider whether the Convention contains generalizable norms relating to the deep seabed that can have an impact upon customary international law.⁴ Of course, one can only speculate about the factors the Court would take into account, but several lines of argument seem discernible at present. One approach would be to contend that the Convention sets up a generalizable international norm to the effect that no nation may take for itself the mineral resources of the ocean floor. Under this interpretation, that generalizable norm would transmute into a customary norm to the same effect. However, the position is easily countered by the observation that the Convention does not quite bar national exploitation of the deep seabed, but rather makes such exploitation subject to specified contributions to the Convention's regulatory regime, which regime in turn may restrict the monetary value of the minerals mined in any given period of time.

The question then presents itself: is mining-subject-to-Convention-regulation a generalizable norm that is capable of becoming a customary norm binding upon all nations? In one sense it is, because all nations are free to become a party to the LOS Convention if they wish to engage in mining on the same terms as every other nation that is a party to it. On the other hand, if a nation exercises its prerogative *not* to join the Convention, then that nation would in effect have to pay a tariff to the nations that are party to it and control its regulatory regime. Looked at in this light, the regulatory regime set up by the Convention does not appear to be assimilable to a norm of law that can be generalizable and hence can become part of customary law. For customary law is by definition universally binding; yet the nation that wants to go it alone would have a lesser legal position with respect to the regulatory regime set up by the Convention than would the nations party to it. Hence, it would follow from this argument that mining-subject-to-Convention-regulation is not a generalizable norm.

A different argument that might be made to the International Court is that the Convention establishes the principle that deep seabed minerals are the common heritage of mankind, and that proceeds from their exploitation should be shared by all nations, including those that do not engage in mining activities. This principle, I believe, states a generalizable norm. More than

³ See D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1130-46 (1982).

⁴ See A. D'AMATO, *supra* note 2, at 105-07; North Sea Continental Shelf Cases, 1969 ICJ REP. 3, 43 (test is whether the provision "should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law").

that, I think it already is a norm of customary law, to judge by the consensus on the "common heritage" concept in the long negotiations leading to the Convention as well as in those on mining activities in outer space. Partial confirmation of this norm is found in the Deep Seabed Hard Mineral Resources Act of 1980,⁵ which sets up a tax of 3.75 percent of the imputed value of mineral resources mined from the deep seabed.⁶ This tax is to be transferred to a trust fund called the Deep Seabed Revenue Sharing Trust Fund, which would be paid into any law of the sea treaty ratified by the United States prior to June 28, 1990, "for the purposes of the sharing among nations of the revenues from deep seabed mining."⁷ However, if the United States does not enter into such a treaty within the allotted time, the amounts in the trust fund "shall be available for such purposes as Congress may hereafter provide by law."⁸ While the Act of course does not say that other nations are entitled to the amounts in the trust fund in the absence of a treaty, the Act at least recognizes and gives material content to the notion of sharing. Certainly, a later Congress could make the trust fund available to other nations if it believed that that was a requirement of international law.

Thus, in the absence of an alternate treaty, a nonsignatory to the LOS Convention should expect at minimum that the International Court of Justice might advise that the Convention either confirms or generates a norm of customary law requiring some sharing of the proceeds from deep seabed mining. At worst, the nonsignatory might face exclusion from mining on the ground that the regulatory regime set up by the Convention is somehow generalizable into a customary norm.

A separate and distinct possibility is that the Court might find that the Convention has no impact upon the customary law of deep seabed mining, in which case the international community would be relegated to the underlying customary rule. That rule may either prevent all mining activities or allow them subject to some reasonable provision for the "common heritage." Which of these two positions reflects customary law requires a vast historical and legal determination beyond the scope of the present essay. Good arguments can be made for either view.

It would clearly be in the interests of nonsignatories to the Law of the Sea Convention to set up an alternate treaty of their own. Then, if an international tribunal were called upon to assess the legal consequences of two conflicting multilateral treaties on the law of deep seabed mining, at least the parties to the alternate treaty would have a valid international instrument of their own to cite against the Convention. Moreover, they would argue that there is no principle of majority rule in international law that would make the Convention more significant than their own alternate treaty. And they would add that there is no principle of priority in time that would favor the Convention because it was concluded first. Finally, in the event that a tribunal might hold that the provisions of the Convention relating to seabed mining are not gen-

⁵ 94 Stat. 553, 30 U.S.C. §§1401-1473 (1980).

⁶ 94 Stat. 582, 26 U.S.C. §4495 (1980).

⁷ *Supra* note 5, §1472(d).

⁸ *Supra* note 5, §1472(e). See Moore, *Progress of U.S. Deep Seabed Mineral Resources Bill*, 73 AJIL 525 (1979).

eralizable norms, the new alternate treaty—by carefully couching its seabed mining provisions so as to be generalizable—might actually have an impact upon customary law that would even apply to the parties to the Convention irrespective of the Convention.

What, then, would the international law on the seabed be if an alternate treaty were concluded that conflicted with the Law of the Sea Convention? How, for example, would the International Court of Justice decide a case where the complaining state or states cite one treaty and the responding state the other?

It is too early, of course, to predict with any reasonable assurance how such a case would be decided, but some speculations may be ventured.

First, the Court or other tribunal might place considerable weight on the practice of states under the two treaties. If, for example, an American firm engaged in deep seabed mining according to the alternate treaty I have described, and there were no other mining activities by any of the countries party to the Convention, the very practice of such a firm would tend to reinforce the norms of the alternate treaty. Conversely, if deep seabed mining activities were first begun by states party to the Convention, then it would tend to be reinforced by the practice. Naturally, the Court would be greatly influenced by the reaction of states to the early mining activities. The firms engaging in the mining would be able to cite either the Convention or the alternate treaty as legal support for their activities, so that the mining would be carried out under a claim of right. In this respect, therefore, mere protest would not carry much weight.⁹ Moreover, to the extent that the mining activities were protected by the host states, the “burden of proof” mechanism of the *Anglo-Norwegian Fisheries* case¹⁰ might serve to create a presumption in favor of the international legality of the activities of the pioneer mining firms.¹¹

A future tribunal, therefore, might accord great weight to whichever treaty is first implemented by actual mining practice. More conservatively, and perhaps more foreseeably, the tribunal may simply recognize two competing regimes for seabed mining. It may hold that mining activities may be carried on under either treaty, perhaps with a prohibition on staking out any seabed claim for exploration; or the mining companies may be confined to a reasonable radius of mines or mining activities actually in place.

Second, however, the way a future tribunal will decide any of the preceding considerations may be a function of the substantive provisions of the proposed alternate treaty. If the alternate treaty did not contain any provisions for sharing, or contained provisions that required sharing at such a low level as to be nearly frivolous, the International Court of Justice in a future case might look on the alternate treaty as a mere cover for self-interested exploitation rather than as a legitimate treaty giving effect to the interests of the “common

⁹ Indeed, protest might serve to call attention to, and thus help articulate, the norm being protested. See A. D'AMATO, *supra* note 2, at 101–02.

¹⁰ 1951 ICJ REP. 116.

¹¹ See A. D'AMATO, *supra* note 2, at 180–86; D'Amato, *Judicial Legislation*, 1 CARDOZO L. REV. 63, 78–80 (1979).

heritage of mankind." The "sharing" level would probably have to be somewhere between the 3.75 percent set up by the U.S. Congress and a figure constituting a rough average of the percentages usually paid to a private owner of mineral resources where there is a very substantial investment in exploitation technology. In addition, the figure should not act as a disincentive to potential mining companies. Therefore, the percentage might start low and increase over time after exploitation investments are recouped and later mining companies have cheaper entry. Since the signatories to the alternate treaty would presumably include the nations best equipped to be the first to engage in deep seabed mining, it would be interesting to see how they would resolve the competing interests of exploiter motivation and "common heritage" in attempting to fashion a credible alternative to the Law of the Sea Convention.

ANTHONY D'AMATO

ALWYN FREEMAN (1910–1983)

The editors of the *Journal* note with deep regret the untimely death of Alwyn Freeman on March 1, 1983. Mr. Freeman's association with the *Journal* as contributor and editor extended for almost half a century. He was a member of the Board of Editors from 1955 to 1972, an honorary editor since 1976. His career in international law was richly diversified. He had an active role in international claims cases while in the State Department, and served in the Army Judge Advocate General's Office in World War II, on the staff of the Senate Committee on Foreign Relations, and as an official of the International Atomic Energy Agency. He represented the United States in 1949–1950 on the Inter-American Juridical Commission and twice was a U.S. delegate to the Inter-American Council of Jurists. Mr. Freeman taught international law in several law schools, lectured at the Hague Academy, and was the editor of *International Lawyer* from 1975 to 1978.

While Alwyn Freeman had a wide knowledge of international law, he had a special and, one might say, passionate interest in the subject of state responsibility. His comprehensive work, *The International Responsibility of States for Denial of Justice*, begun while a graduate student in Geneva, appeared in 1938 and was widely praised. After his wartime service, he wrote authoritatively on responsibility of military personnel and on war crimes. His interest in these subjects was marked by both scholarly thoroughness and a strong commitment to the maintenance of international standards of law and justice. He took international law seriously and did not hesitate to express his strong feelings when he considered that it was ignored or abused for political reasons. His many friends in the international law community remember fondly his personal warmth and generous spirit. He will be greatly missed.

OSCAR SCHACHTER