Law of the Sea: Its Impact on the Pacific Community

by Mr. Gerald Sumida
Attorney at Law
Carlsmith, Carlsmith, Wichman and Case

When one mentions the Law of the Sea -- and it's been mentioned quite a bit lately -- the focus is on the Law of the Sea treaty now being considered by the 10th session of the United Nations Conference on the Law of the Sea. This is a treaty which is supposed to be a comprehensive legal regime for the uses, management, protection and study of the world's oceans and ocean resources. The oceans cover two-thirds of our globe's surface and aside from outer space, it is the last unconquered frontier. When one mentions the oceans, one thinks of deep sea mining, deep sea minerals or manganese nodules, and equates them with the phrase "the common heritage of mankind." This is, in effect, the current focus of our Law of the Sea negotiations.

There is now a draft Convention on the Law of the Sea that the current session of the Law of the Sea negotiations is considering. This is a package of compromises and trade-offs which has been reached as a result of 7 to 8 years of discussions involving approximately 158 nations. It is a negotiating text, not a negotiated treaty. In other words, it is a package-deal and when it is completed, the parties will see if they agree with the final package. If they agree, then there is a chance that a treaty will result and be signed. The draft Convention is an extremely complex document; it has 17 parts 320 articles, 8 annexes and its status at this point is somewhat uncertain. The expectations were that when the 10th session convenes shortly in New York City, the result would be final approval and perhaps signature.

However, on the eve of the opening session, the United States' chief negotiator and his deputy were fired. When the session convened, the U.S. announced that it was undertaking a thorough policy review of the draft text. This will probably take three or four months before the U.S. will decide exactly what it wants to do.

At the same time that the Law of the Sea negotiations were being held, other developments were occuring. In December 1978, the West German Government became the first country in the world to pass legislation that would specifically license West German nationals to conduct deep sea mining activities in the world's oceans. Two years later, in July 1980, the U.S. passed a similar act. Today, other industrialized nations, primarily Japan

There are two inherent competing principles: one is that the seas are available to be used and exploited by whomever gets there first; the second is that the seas, as much as possible, will be open to the use of all nations and no one nation can exploit or claim exclusive jurisdiction or rights over the seas. These two competing principles underlie the present negotiations.

The present Law of the Sea Conference itself has a long history. The first United Nations Conference on the Law of the Sea (UNCLOS), held in 1958, resulted in four conventions or treaties that form the current existing Law of the Sea. These deal with the territorial sea and contiguous zone, the continental shelf, the high seas and fisheries, and conservation of living resources in the high seas.

The second conference was convened in 1960 specifically to determine the extent of the territorial sea, i.e., the sea area of a coast outward to the ocean before entering the high seas. That conference failed to attain any particular results. In 1970, the U.N. general assembly adopted a resolution which dealt with the oceans (especially deep sea mining) and declared that the mineral resources of the deep sea area are "the common heritage of mankind." In other words, they are not available for the exploitation by any one nation, but the wealth and resources are available for the benefit and wellbeing of all mankind. Shortly thereafter, in 1973, the Third Law of the Sea Conference was convened and has continued in numerous sessions, sometimes moving forward, sometimes moving backwards.

Let me summarize, very briefly, two subjects: first, what is in the present convention, and second, where does the draft treaty stand during the 10th session of these current negotiations?

The draft convention's informal text has about 14 substantive parts. The following list of areas covered in this text gives an idea of the comprehensive scope of what is being attempted:

1. The Territorial sea and the contiguous zone
2. Straits to be used for international navigation, including both military as well as non-military navigation
3. Archipelagic states
4. Exclusive Economic Zones (EEZ) (200 nautical-mile zones)
5. Continental shelf
6. High seas
7. Regime of islands
8. Enclosed or semi-enclosed areas
9. The right of access of land-locked states to and from the sea as well as the freedom of transit
10. The area which is called the deep sea bed area
11. The protection and preservation of the marine environment
12. Marine scientific research
13. Development and transfer of marine technology
14. Dispute settlement

Six of the 320 articles and their critical points include the following:

1. Boundaries. The treaty basically recognizes the territorial sea of 12 nautical miles and acknowledges the 200-mile Exclusive Economic Zone (EEZ) for each coastal state. Each coastal state would have jurisdiction over marine resources in its EEZ and on continental shelves if they extend beyond 200-nautical miles.
2. Ocean transit. The treaty would reaffirm the right of passage on the high seas and within the 12-mile limit of coastal states under certain conditions. It would also guarantee transit through straits for international navigation of all ships.
3. Deep sea mining. This is the most controversial issue. The draft convention would set up a system to cover both the private and the international exploitation of seabed minerals. It would

and several Western European countries are on the verge of passing similar types of legislation. In addition, running throughout the negotiations are the cross-cutting currents of "the New Economic Order," or stated more basically, the tensions between the industrialized world and the claims, demands and aspirations of the so-called third-world or developing countries.

NEED FOR A TREATY

Now, in the light of all this publicity and controversy, why is such a treaty important. We have gone for a number of centuries without this treaty, and wouldn't some other arrangement, perhaps through national legislation, offer a viable alternative? This basic question forces us to look at the world as it is evolving today. We are very familiar with the term global interdependence. The world is a very small place in which resources are becoming more and more exploitable and exploited. Pollution found in the air and on land, as well as in the oceans, is not by any means limited to one country or one seashore or one region of the world. What happens someplace across the Pacific can reach us in Hawaii or the West coast of the U.S. This interdependence includes increasing demands on the world's oceans for food and for ocean transit, which has become particularly critical since energy supplies must travel in vast quantities to the nations of the world.

Ocean resources are a particularly critical element in our increasingly interdependent world. A major focus is on deep sea minerals. For example, current estimates indicate that there are about 1½ trillion tons of manganese nodules on the ocean floor, i.e., some 3 to 5 miles below the ocean's surface. The copper, nickel, cobalt and manganese contained in these nodules are worth, in today's dollars, about $3 trillion. In fact, one of the richest of such deposits currently discovered lies about 800 - 1200 miles southeast of Hawaii.

Hawaii has been seeking to become a major center for manganese nodule developments. So far, some four to five consortia have invested about $250 million to develop the technology to mine the manganese nodules on the deep ocean floor. It is also estimated that should it become legally possible to develop an ocean mining site, it would cost approximately one billion dollars per site.

Why are these potato-shaped nodules so difficult to get? Why are they so important to us? The reasons are fairly simple. The U.S. imports 90% of its nickel, 15% of its copper, 70% of its cobalt and 98% of its manganese. All of these minerals are components of the manganese nodules found on the ocean floor. Obviously, we know that copper is essential in almost anything electric or electronic. Cobalt is essential in manufacturing jet aircraft engines and computer hardware and steel cannot be made without manganese. Therefore, consider what we use everyday and the importance of these minerals becomes quite evident.

The land-based sources of these minerals happens to be in less-than-fully-politically-stable-countries' in third world areas. Therefore, security of supply is less than fully guaranteed. Beyond this, there are other kinds of ocean resources such as fisheries and off-shore energy resources.

The 200-miles zones have now been adopted by most countries. The 200-miles zones are, in effect, limits around coastal states within which that coastal state has virtually exclusive jurisdiction over what happens in those areas or what can be taken out from or developed there. A foreign country can enter and use or exploit those resources only with the permission of the coastal nation. These are some of the current points of interest in the treaty.

HISTORICAL PERSPECTIVE

The treaty and the negotiations have a very long history. We are basically dealing with the same kinds of issues that originated about three to four hundred years ago: Who will use the seas and how will they be used?

establish a United Nations-chartered mining company called "the Enterprise" to share in the exploration and mining of these mineral resources. The revenues that would be derived from permitting the mining under U.N. auspices would be allocated in some way yet to be determined.

4. Fishing. Fishing is particularly critical for us in the Pacific. Coastal states will have absolute control over fishing in their EEZ and the right, of course, to sell fish as well as fishing interests to other nations.
5. The marine environment. The treaty would provide for environmental safeguards to protect the seas from contamination.
6. Certain agencies. This includes agencies that will be established by the convention, and relates primarily but not exclusively to deep sea mining. There will be an International Seabed Authority which will control and manage the exploration and exploitation of deep seabed resources. The Authority will have a policy-making Assembly as well as a 36-member Executive Council which will oversee the Enterprise. The second new agency will be a supranational Law of the Sea Tribunal to arbitrate any dispute that might arise under the convention if it does become a treaty.

THE TREATY'S PACIFIC IMPACT

Very briefly, what is the impact of all of this on the Pacific? I would just mention three particular areas. The first is the EEZ which is now in existance, but which would be established formally by the convention. What this means, for example, is that under the Fishery Conservation and Management Act, our State's jurisdiction would increase from 6,425 square statute miles to 833,000 square statute miles.

Let's look at another island group, the Cook Islands. The surface land area of the Cook Islands comprises 149 square miles. With the 200 nautical mile EEZ in effect, its 15 islands can now lay claim to one and a half million square miles; most of it, of course, is ocean.

Together, the Pacific microstates lay claim to six million square miles of ocean surface space. This becomes highly significant when you realize that the Pacific Ocean is the home of one of the world's largest and most used fisheries, tuna. If all of this area is now under national jurisdiction, one can imagine the kinds of claims, permissions and disputes that are possible. Realizing that the countries involved in fishing these areas include Japan, the U.S., the USSR, Korea, Taiwan, and others, the possibilities for conflict become staggering. After oil, fish is one of the United State's biggest imports.

The second is, of course, deep sea mineral mining. The third, which involves a very complicated subject, encompasses the national security considerations primarily involving straits-passage in the Pacific Ocean. Not only the U.S.' national security considerations are involved, but also the national security considerations of each of the Pacific Rim and Pacific Basin countries. Aside from Western Europe, that includes every major industrialized nation in the world.

This is basically a very brief review of the negotiations of the draft convention on the Law of the Sea and its potential implications for the Pacific Ocean Community.

Law of the Sea: Part II

by Dr. John Craven
Director
Law of the Sea Institute

To appreciate the effect the Law of the Sea has had on the Pacific since ancient times one must look at the Code of Rhodes which dominated the behavior of transit on the Mediterranean Ocean. We should then trace this code in the development of Moslem sea power and the establishment of the Koran. Under the guidance of the Koran and Code of Rhodes from the 8th century to the end of the 10th century there was a great sea migration of the Moslems into the Pacific. This is evidenced today by the Moslems in Pakistan and Indonesia and the Moslem influence in the Philippines. This was the first sea law influence in the Pacific or Western world.

The second influence came in 1492 when the Pope declared that the oceans of the world were capable of sovereign domination. He divided the world between Spain and Portugal. The net result was that the Portuguese paralleled the Moslem migration and established the colonies of Macao and Formosa, finally ending with the Spanish migration into the Philippines. The Philippines were actually in the Portuguese side of the world, but since determining longitude was unknown in those days the Spanish were able to make their indelible mark which persists in the cultural characteristics and government today in the Philippine Islands.

The next great sea enactment or change in sea law came around 1600 and is characterised by the so-called battle of the books: The doctrines of Grotius and the doctrines of Wellwood and Seldon. This came at a time when the British had successfully challenged the sovereign nations of Spain. The British envisioned a form of limited sovereignty, similar to an economic zone, and the Dutch and other Europeans were talking about an ocean which was completely free to all.

There emerged a notion of what can be termed a quasi-free ocean as a result of the battle of the books. This would be an ocean which was competitive and free as long as you were not engaged in belligerency. It was an ocean in which privateering and forms of piracy were considered fair game between nations that were serving the commerce and trade of those that were belligerent. Under that doctrine we saw the movement of the great international Dutch East Indies Company and the British movement into the Pacific. The British movement into the Pacific resulted in the discovery by the Western World of the Hawaiian Islands.

MANIFEST DESTINY

The Treaty of Paris in 1863 was essentially a treaty that embodied the concept, "free ships carry free goods" and changed the nature of competition on the high seas. This now moved into the period of manifest destiny. Under this notion of free ocean, military might and strength was used to exploit the ocean and to move into the Pacific. The result is the very situation we have today. The Regionalism that constitutes U.S. flag islands in the Pacific is nothing more than the fact that they're all coaling stations of the U.S. They're most properly described as a consortium of coaling stations facing life in a society in which coal has become temporarily obsolete.

This expansion was not only that of the U.S., but also that of the Germans who had the same notion of manifest destiny. Mahan and Makinder were trying to emulate each other, so we have the movement of Germany into the Marshall, the Caroline, and the Mariana Islands. The movement of the French into French Polynesia and into the New Hebrides is another thread of Western powers coming into the Pacific. Although their sovereignty is gone, the Western colonial powers have left their culture, economic and sociological stamp that exists today, affecting the perception of each of the island states. What will their future be and what will their relationship be under the Law of the Sea Regime?

A previous Law of the Sea act was the Washington London Naval Conference which came after WWI. This conference established the ratio of naval power between the U.S. and Japan in the Pacific and allowed Japanese naval power to grow to the point where they attempted their own version of that which the Pope had attempted in 1492. Their view was that Europe was to be dominated by German/Italian ocean access, and the Pacific would be dominated by Japan in the famous doctrine of the co-prosperity spheres. The significance of the movement of Japan into the Pacific, which is now benign, but nonetheless competitive, is still a major factor as we see in the developing economic regimes of the region, which was sparked and stimulated as a result of that particular Law of the Sea Treaty.

PRESENT GLOBAL DEBATE

We come to the present global debate on the Law of the Sea which also presents a very different viewpoint for the Pacific, a viewpoint which derives from the cultural and historical routes which have been based on previous sea law. Let's just touch on the highlights of these viewpoints. There are essentially 3 different viewpoints regarding fisheries. We have the U.S. viewpoint on fisheries which is unique. For example, the U.S. has the notion that the highly migratory species of tuna shall remain a species not under control of any coastal state. It will be controlled, if at all, by international commissions and compacts. To that end, the U.S. enacted the 200-mile fishing conservation act which is unusual in that it not only excludes tuna, but also allows the local commission control of tuna fishing and excludes Japan from fishing tuna in our area. This is done by controlling the bilateral catch. If we can control the amount of billfish which are caught in the 200-mile zone and forbid foreigners from catching any, we can then say they're violating the law if they catch any billfish in their tuna haul.

We have regionally attempted to bring the 200-mile zone into conformance with the rest of the Pacific. Controlling fish within the 200-mile zone is very appealing to the South Pacific Forum, when one takes into account the fact that free-swimming tuna are really free-swimming only in a very small hole in the center of a large donut. The extent to which Japan acquieses in this depends on the speed with which the Japanese fishing industry, along with the Japanese government, can move around the Pacific Island area and negotiate to buy up access to the 200-mile fishing

resources. If they're successful in doing this they will be very happy to see an enclosed 200-mile fishing resource.

DEEP SEA BED RESOURCES

The next item of concern, has to do with the deep sea bed nodules. Here we have a very interesting situation involving three competing views on manganese. The United States, for example, wants to preserve its own control of strategic minerals and metals. We then have the view of land-based producers. They would prefer to keep their tacit cartel alive until the year 2000 because there will be enough land-based minerals and metals albeit at a high price to meet world needs until that year. Therefore they would prefer not to have the competition from the deep sea bed resources until the year 2000.

There would then be a split between those developing nations which have mineral resources who would join the community that would like to delay the exploitation of the deep sea bed resources, and the rest of the nations that would view the new economic order as one in which profit from the deep sea bed resources should be made available as the common heritage of mankind.

The net result of all of this has, in my view, favored those who would defer the mining of the deep sea bed resources until the turn of the century. Already, U.S. law does not allow the mining of deep sea bed minerals until the year 1988 at the earliest. We're, therefore, just 12 years away from the magic date when the land-based resources become in very short or scarce supply.

Next we come to the area of energy. The United Nations treaty essentially sets aside the oil and gas on the continental shelf for the coastal states. This is not a major concern to Hawaii or to the island communities that we're focusing on. We don't have a continental shelf and we don't have any oil and gas. Basically our concerns in oil and gas parallel concerns of the mainland. This concern is to preserve oil and gas from the Middle East and Indonesia pipelines. This leads to the text in the treaty that provides for free access between straits and international waterways.

Looking at a map of the ocean there appears to be many ways of water voyage past Indonesia. Upon consulting a bathometric map, however, you discover about it's all very shallow. The only way a tanker can successfully get through Indonesia is through the Strait of Malacca. There is a great U.S. interest on the part of the treaty which preserves the right of passage. Indeed, this may be one of the dominant features as far as the Reagan Administration is concerned.

OTEC

Another question in which the treaty has not focused on and which may perhaps be a significant source of energy in the future: ocean thermal energy. The reason they've not paid attention may be that the technology of OTEC is brand new. In my view, it's going to be a major issue as far as the Law of the Sea is concerned in the future, only because the resources are so large.

Every island nation in the Pacific that has a 200-mile zone automatically has 5 quads of resource. Let me explain a quad...the world uses 300 quads of energy per year. The U.S. imports 15 quads per year from the Middle East. The U.S. uses a total of 80 quads of energy every year, Japan uses 35 quads and Oceania 1/1000 of a quad or less. Every island in Oceania will have associated with it about 1/3 of the Middle East's energy resources on an annual basis when OTEC is developed. The treaty is very silent on that particular issue.

We have fisheries, we have the military, and the energy use of the sea. We have also the manganese nodule resources and the aspiration for independence throughout the Pacific. Against that we have the current impact of the Reagan Administration on the U.N.

THE U.S.: CONFUSING SIGNALS

In many ways the impact of the Law of the Sea is a spillover from a more fundamental argument or concern within the Administration. The Reagan Administration is sharply divided within its own ranks. There are those who have been associated in the past with the trilateral commission and those who favor a unilateral notion, that is, the view that the salvation of the U.S. and its economic problems will come from unilateral access by the U.S. to world resources and by military protection as well as political protection of the supplies of oil from the Middle East. This split has its spillover to the Law of the Sea meeting and was really the basis for determining which delegates to discharge. Those who were discharged were associated with a trilateral view of the world and those who remain are heavily identified with a U.S. go-it-alone policy.

There may be some confusion in the international community because the message conveyed indicated that the U.S. intends to torpedo the treaty because of the great significance in assuring military use of the Pacific Ocean.

I might summarize by saying that we have a very complex situation regarding the use and development of the seas and that we have a very complex treaty which unfortunately was developed without the Pacific very much in mind. The treaty is based upon Mainland perceptions of what the world is, and those perceptions of the world are either that the world borders between the East and West coast of the U.S. or that the world is Europe, the U.S. and Japan. Unfortunately, it's going to be a few years before there is recognition that the world is much larger than that or that there is a total Pacific Community that will require a legal regime which is probably very different than that which we can even contemplate at the present time.