DEEP SEABED MINING AND DEVELOPING COUNTRIES

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I must begin by admitting to certain limitations in making a presentation of this precise issue. As Mr. Hull has mentioned, I am a member of the United Nations Secretariat, not a delegate of a developing country. Therefore, I am in a difficult position either to defend or to advocate the positions of developing countries. Instead, I will act as a reporter summarizing the views of the developing countries on the various issues of seabed mining which have been expressed during the last few years at different times and in different forums.

Also, I ought to mention that although the 120 developing countries act as a group in expressing some of the basic policy issues at public meetings or in private consultations, there are differences of opinion regarding detailed provisions. Sometimes it is difficult to identify clearly the view of the group as a whole. In these cases, I think we will have to refer to the views as expressed by some of the developing countries.

For the sake of convenience, I will present the views of the developing countries on the following group of issues: first, the Declaration of Principles and the value of seabed mining; second, the role of the Enterprise; and third, the institutional arrangements. I will present the views as best as I understand them and as objectively as possible.

Earlier, I commented on the Declaration, but here my task is to present you with the view of the Group of 77 regarding the Declaration of Principles. This declaration is extremely important for the developing countries because it lays the foundation for the promotion of peaceful uses of the international seabed and its resources. It establishes the principles of common heritage of mankind, nonappropriation, joint exploitation of seabed resources for the benefit of all, and equitable sharing of the benefit by all. Furthermore, the Declaration on the basis of these principles, commits the international community to the establishment of an international regime and a machinery applicable to the area and its resources.

At the last session in September, the chairman of the Group of

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77 made a statement on the issue of unilateral legislative action. I will now paraphrase some of the points made at that session. First, the Declaration is a solemn pronouncement by the most representative organ of the international community. The General Assembly proclaimed that the resources of the seabed beyond national jurisdiction were the common heritage of mankind. While such resources could be exploited under an international regime, they could not be unilaterally appropriated nor could they be exploited by an individual nation.

Second, all states, by adopting the Declaration without dissent, had accepted the common heritage principle, the international character of the seabed and its resources, and the inevitable legal consequences. Unilateral exploitation was incompatable with these principles.

Third, the Declaration was the result of several years of preparatory work and intensive negotiations in the General Assembly and in the committee in which all states participated. The Declaration, therefore, is a text which establishes a principle of international law precisely within the meaning of article 38 of the Statute of the International Court of Justice.[1] It expresses the opinion of the international community and embodies current international law regarding the regime of the seabed.

Fourth, unilateral legislative action, by a state or a group of states, regarding exploitation of the international seabed before a universally agreed international regime was established, would be contrary to the Declaration. It would also be contrary to international law.

Fifth, as was agreed at the beginning of the conference, the present negotiations on the seabed regime and machinery constitute an integral part of a package deal upon which the whole treaty of the law of the sea is to be constructed. The Group of 77 reaffirmed the inseparability and interrelatedness of the different aspects of the law of the sea currently being negotiated at the Conference in the various committees. Unilateral legislative action would, therefore, prejudice present negotiations, and might well precipitate a chaotic situation with regard to law of the sea. The failure of such an important conference would adversely affect the whole system of multilateral negotiations and would result in repercussions within the United Nations for generations to come.

1. I.C.J. Stat., art. 38.

After this statement was reaffirmed by the Group of 77, it was supported by several developed countries including: Sweden, Norway, Finland, the Netherlands, New Zealand, and Australia. The United States also issued a supporting statement which was endorsed by France, the Federal Republic of Germany, Italy, Belgium, and Japan.

It is necessary to emphasize that while the industrial countries have one very clear and concrete objective, seabed mining, the developing countries have much broader and more general goals. In the following illustrations, I will explain how the developing countries perceive the issue of seabed mining. It is hoped that this will make their position more understandable and will facilitate negotiations.

You may recall that in 1967 a large sector of the international community expressed anxiety over the competitive military exploitation of the strategic potential of the seabed and the ocean floor beyond national jurisdiction. A U.N. Committee was established in order to divert this trend. Its initial purpose was to exclude military uses of the seabed and to promote peaceful uses. It was against this historical background that the present First Committee of the law of the sea conference executed their tasks. This represents a commitment on the part of the developing countries and the international community, as a whole, to devote the potential of the seabed and its resources to peaceful uses.

The question of seabed mining is not just a simple problem of money; it goes far beyond the issue of sharing the financial benefit. For the developing countries, the question is how to implement faithfully the international seabed regime and machinery which were proclaimed by the Declaration. In their view, seabed mining must be conducted in conformity with the principles already declared by the General Assembly, particularly the principle of the common heritage of mankind. To them, this principle means that exploitation of resources must be a joint operation by all who are interested. Developing countries are opposed to the idea of leaving exploitation of the seabed resources to a few private firms and companies. All activities must be carried out by an internationalized agency on behalf of mankind. It is mankind, through whatever agency it may decide to appoint, that has the right to dispose of the resources in one way or another. According to the developing countries, the Authority cannot be just an administrative body, it must have the discretionary power to select its agencies.

Many developing countries recognize that this is the first time

that property will be entrusted to an international organization which will administer and manage the area and its resources on behalf of mankind. Therefore, seabed mining provides a unique opportunity for the world community to share in the benefits of resource exploitation. This is why developing nations prefer an international exploitation system.

Some of the developing countries view the forthcoming international regime machinery as an example of measures which may be taken in the context of the establishment of a new international economic order. This is the reason why they have insisted that the treaty embody some general economic policies. However, for some developed countries this is not relevant, and it simply presents an obstacle to the negotiations.

In multilateral negotiations, all these views are equally valid and cannot be disregarded. They must be respected and taken into account. I do not think this is different from any other democratic decision making processes. I understand that in Syracuse you are facing a controversial issue concerning the building of a new stadium. In the last four years, various views have been expressed. However radical they may seem, the viewpoints put forth by one side have to be respected by the other side in the process of decision making.

As Mr. Young mentioned, some of the developing countries have also emphasized the question of technology transfer. I think it should be made clear that these countries are not only interested in the recovery system or the processing techniques. Instead, as in the area of space exploration, they are interested in the potential application of seabed technology. Overemphasis on the questions of patents and propriety rights would miss the point completely. Such an interpretation would not be conducive to a general understanding of the broader issues that are at the heart of the negotiations.

Perhaps this shows that it would be wrong to view seabed mining purely as a commercial operation of economic interests. I hope these examples illustrate the fact that developing countries see the issue of seabed mining in a broad perspective. Perhaps, they will help to explain the positions taken by the developing countries on the issues of the exploitation system, the production ceilings, and the institutional arrangements.

My next topic concerns the views of developing countries on the role of the Enterprise. The above presentation should clearly explain why the developing countries cannot accept a licensing or a concession approach to seabed mining. Instead, they are now con-

sidering a parallel system. For some developing countries the parallel exploitation system would entail the acceptance of state companies and multinationals as cutthroat competitors. This would create a drastic change in the developing nations' conception of the Enterprise's role. Previously, these countries viewed the Enterprise as the sole and exclusive operational arm of the Authority. Therefore, acceptance of a parallel system is viewed as a great concession since it would place the Enterprise in the disadvantageous position of competing with private firms and state companies which have advanced technology and management experience. This explains why the developing countries think that the treaty should give the Enterprise certain favorable conditions in terms of financing and technology. I believe we will hear more on these issues from Ambassador Aldrich.

Another concern of some of the developing countries is the absence of a guaranteed market for the Enterprise. In the present text, the Enterprise has to submit a workable plan for the approval by the Legal and Technical Commission. As we shall see, the developing nations believe that the Legal and Technical Commission is under the control of the industrial countries, and, therefore, it would not allow the Enterprise to have an effective role.

I will now discuss the views of the developing nations on some of the institutional arrangements. First, although the treaty characterizes the Assembly as the supreme organ of the Authority, some of the developing countries believe that such a characterization is purely cosmetic. Their reasoning is that a careful examination would indicate that the substantive powers and functions are allocated to the Council and some of the functional commissions. The Assembly, like the General Assembly, functions as a forum for views and policy statements. The actual control remains in the hands of the Council and the functional commissions. Furthermore, most of the functions entrusted to the Assembly cannot be exercised unless a recommendation has been made by the council. There is also a provision in Article 156[2] regarding noninterference between the

2. United Nations Conference on the Law of the Sea, Sixth Session, Informal Composite Negotiating Text, U.N. Doc. A/Conf. 52/WP.10 (1977), *reprinted in* 16 INT'L LEGAL MAT'L 1108 (1977). Section 5, article 156, paragraph 4 in speaking of organs of the authority states:

> the principal organs shall each be responsible for exercising those powers and functions which have been conferred on them. In exercising such powers and functions, each organ shall act in a manner compatible with the distrubution of powers and functions among the various organs of the authority as provided for in this part of the present convention.

id.

major organs of the Authority. According to this provision, no organ is allowed to interfere with another organ.

There are these built-in constitutional constraints as well as certain procedural constraints. According to the present text, the decisions of the Assembly must be made by a two-thirds majority, present and voting. However, there is another provision whereby one-fifth of the members, when considering an issue for the first time, may defer a decision. There is also a provision that one-quarter of the members may request an advisory opinion after a decision has been made. In the view of some of the developing countries, these provisions will inevitably delay the decision-making process and thereby affect the effectiveness of the Assembly. In other words, it is their opinion that the Assembly is not going to be as effective as some other advocates have claimed.

Now I will discuss the Council, which is the executive organ. It is composed of thirty-six members, eighteen of which will be allocated for interest groups and the remainder will be allocated according to geographical distribution. Decisions are to be made by a three-quarter majority of the members present and voting provided that such a majority includes a majority of the members participating in that session. According to some of the developing countries, under the present composition and decision making procedures, the Council will be more readily influenced by the developed countries than by the developing nations.

Developing countries view the Council as the most powerful organ because of its great variety of powers. For example, it may issue directives to the Enterprise and examine control over its activities; it may adopt and apply rules, regulations, and procedures; it may initiate proceedings before the seabed dispute chamber; and it may issue emergency orders. The power of the Council is in article 160, paragraph 2, subitem 10.[3] Under subparagraph 10, a recommendation from the Legal and Technical Commission on the issuance of a contract would remain valid, if, after sixty days the Council has not adopted a different decision. In other words, once the

3. *id.* Section 5, article 160, paragraph 2, subitem 10 states:
In addition the Council shall . . . approve on behalf of the Authority, after review by the Technical Commission, formal written plans of work, for the conduct of activities in the Area, drawn up in accordance with paragraph 3 of Article 151. In so doing the Council shall act expeditiously. The plan of work shall be deemed to have been approved, unless a decision to disapprove it is taken within 60 days of its submission by the Technical Commission.
id., Section 5, article 160, paragraph 2, subitem x.

Technical and Legal Commission made a recommendation, it would be very difficult for the Council to change the Commission's decision. In the view of developing nations, this provision anticipates a situation of paralysis in the Council. In the event of such a situation, the recommendation by the Technical and Legal Commission could still be implemented even though the Council would be paralyzed.

Finally I will discuss the Legal and Technical Commission. Some of the developing countries believe that the Legal and Technical Commission is the most important commission, because, as I have already mentioned, it approves or disapproves of plans of work submitted by a private contractor or by an enterprise. Under the present text, the developing countries fear that because of the requirement of qualification of the members of the Legal and Technical Commission, the commission would be more readily influenced by the developed countries. This is because the members will be composed of delegates largely from the developed nations. These members are nominated by state party, and are elected by the Council.

The developing countries also have very specific views on the question of production policy, financial arrangements, and the system of exploitation. However, we have other distinguished speakers who will deal with these topics this afternoon.

In conclusion, I believe that we are facing a Solomon-type situation in which two women claimed the same child as their own. The solution was to cut the child in half. From the above presentation it should be clear that developing countries think that the Assembly will be paralyzed. Others also believe that the Council will be paralyzed. Now what is next? Are we going to paralyze the functional commissions as well, simply because of the divergent interests? I think the trend is very discouraging. While all interests and concerns should be taken into account and protected, the solution we are seeking must protect the basic objective that we are looking for in this area.

PANEL DISCUSSION

MR. HULL: Thank you, Roy. Before I turn the discussion to the panelists, let me try to clarify a couple of terms that you have heard today, probably for the first time in some instances. When we talk about the Enterprise, the Assembly, the Council, the Seabed Dispute Chamber, and the Legal and Technical Commission, we are talking about segments of the International Authority. The Authority is the overall body which is recognized as playing an important role in the exploitation of the deep seabed. The second term that you have heard just now is the Group of 77. I am not sure, at this point, if the Group of 77 is up to 116, 118, or 120 today. What the term refers to is a group that was first formed in Caracas in 1974. At that time there were some seventy-seven countries in the developing world which banded together to develop what was viewed as a common position. The differences between today and 1974 are: first, instead of seventy-seven countries there are 120, and second, there is no common position. With that clarification, I would like to turn the discussion over to the speakers.

MR. HERMAN: I would like to ask Roy Lee a couple of questions. Before doing so, I should preface what I have to say by stating that these are my personal comments and reflections. They do not represent the views of the Canadian government.

Let us assume that there are real problems with the Law of the Sea Conference and that those problems involve both process and substance. I have proposals for dealing with the process, but let us look at the substance. In my view, the substance is too complex to be resolved in the next few years. If we could improve on the substance by simplification of the issues in a way which did not meet with every preoccupation of the developing countries, but which would pretty well insure that we got a treaty tomorrow, then I think it is possible. Perhaps it would be politically difficult, but I think it possible. What would be the advantages? I must speak very generally because of the time limitations.

It seems to me that we could get a treaty if we organized a council system which provided for some type of concurrent majority, which admittedly the developing countries do not like; if we abolished some of the transfer of technology provisions; if we provided for a fairly simplified and unstructured system of financial obligations; and if we provided assurances that the Enterprise would have some means of getting into business. I want to leave aside the question of production ceilings because I have not quite figured out how that would work into this structure. I may be oversimplifying, but I

think we could get a treaty. The result would be a tremendous symbolic achievement for the United Nations system. We would have an international body which, for the first time, would have some sort of regulatory authority over resources. I cannot think of anything in the long term which is more important than that. I wondered if you had any thoughts from the standpoint of the developing countries and from the point of view of a United Nations civil servant on that kind of approach, an approach which admittedly would not meet many of the preoccupations of the developing countries.

MR. LEE: Yes; as I mentioned in the beginning, I am not a delegate from the developing countries. Therefore, it would be inappropriate for me to answer as to what position they would take. But I am glad you asked me about my views as a member of the United Nations Secretariat. I could not agree with you more on the general outline you just gave. I think it would be very significant to reach such an agreement.

CONGRESSMAN MCCLOSKEY: Mr. Lee, you stated at the beginning of your remarks that the United Nations General Assembly resolutions oppose unilateral exploitation of the deep seabed. Could you comment on whether or not it would constitute unilateral exploitation of the deep seabed if one country proceeded with deep seabed mining but set aside a reasonably determined percentage of its revenues for distribution to mankind rather than for the benefit of that individual nation? In other words, if the United States were to set aside, say five percent of the profits from deep seabed mining operations for distribution to mankind under such basis as a treaty might develop, would that constitute exploitation in your judgment?

MR. LEE: It would have been a very difficult question to answer had not the Group of 77 made a clear statement on that issue. I have told you what they have said and it is up to you to interpret their opinion from that statement. I think that would constitute exploitation.

AMBASSADOR ALDRICH: Rather than asking Roy a question, because, as he said, he cannot speak for the Group of 77, I would simply make a comment which, I think, might be helpful to the audience. That is, of all the issues which Roy mentioned, I think the single most important one is the issue of decision making—how decisions are made within the International Seabed Authority. This issue involves the roles and organs of the Council, the Assembly, their composition, and their voting structure. What we find is that

developing countries, in general, wish to see the new international organization represent the principle of one nation, one vote, and to the extent that there are any limited bodies such as the Council, the developing nations think that such bodies should take into account and give at least as much emphasis as possible to the concept of equitable geographic representation. What the industrial countries are saying, on the other hand, is that geographic representation has absolutely no relation to anything that makes any sense in the world. It does not have any relation to political questions, and more importantly, for an organization which is going to control access to what will eventually become a very important mineral resource, it has no relation to economic interests. While we must, in the late twentieth century, take into account and pay respect to the sovereign equality of states and the concept of one state, one vote, we have to temper that respect with provisions which will recognize real economic interests and which will try to give them at least a minimum degree of protection. Otherwise, industrialized nations cannot be expected to agree to the treaty. I think this question may be the most important single issue on which the possible success of the Conference depends. How many of the key representatives of the developing countries have really accepted the fact that if there is going to be an International Seabed Authority, it is going to have to give some deference to the recognition of real economic interests? It is obvious that even when economics are ignored, the issue is seen in terms of human democracy, there is no relation between one state—one vote and the representation of people. It is, in any democratic sense, an absurdity.

The real economic interests are very narrowly limited in this negotiation. I think the primary interests of the developing nations concern assurance that the organization sets a precedent for movement toward the new economic international order by trying to take a resource which is beyond national jurisdiction and seeing that it is administered in a fashion that recognizes the developing nation's interests, not simply the interests of those who are producers and consumers. These nations also have a monetary interest in sharing revenues, but realistically speaking, division of revenues amongst 120 developing countries cannot amount to more than a pittance in the end.

Certainly, there is potential for larger shares of revenues from petroleum production on the outer continental shelf than there is from deep seabed mining. So, these nations do not very heavily weigh the respective economic inflow of money from seabed mining.

They have some interest in the technical education of their people who will have jobs in the International Authority of the seabed enterprise. They also have an interest in the people from their countries who will gain experience in the management of a large operational and regulatory body. But I think it is demonstratively clear that no developing country is willing to allocate funds for seabed mining. They have got more important priorities for their money, and they are not about to invest anything in seabed mining. Very few of the developing nations have significant markets for the minerals. The nickel, manganese, and cobalt from the seabed will go to a handful of industrialized countries which need it for their industries. The capital to exploit the resources will come from an even smaller number of industrialized countries.

The other major economic interests come from the countries which produce the same metals from land sources. Ninety or ninety-five percent of the real economic interest at stake rests with approximately twenty countries. Now, in my judgment, unless the developing countries recognize that the ninety or ninety-five percent economic interest has to be given reasonable assurances that actions will not be taken by a body which is totally controlled through one nation—one vote by a large majority of states which have a very small economic interest and a high ideological interest, there will not be any organization. That has been the toughest, longest fought, and, perhaps, the least productive issue thus far in the negotiations. It may be the last issue to be settled but it will have to be settled, and these realities will have to be recognized if this organization is going to be created. Thank you.

DR. MCKELVEY: Roy you did an admirable job of technically reporting the views of the developing countries. But I wonder if it would not be fair and objective also to report that seabed resources are the common heritage of mankind and should be developed for the benefit of all mankind, especially with regard to the needs of the developing countries. That phrase, I think, is one commonly used throughout the Conference and I think it should be kept in mind in explaining the views of the developing nations.

MR. LEE: Yes, I agree with you.

MR. HULL: Thank you very much, Roy.