THE VOICE OF SCIENCE ON CAPITOL HILL

F.A.S. NEWSLETTER

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SPECIAL ISSUE ON
LAW OF THE SEA

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FAS OPPOSES AMERICAN MINING CONGRESS BILL

The United Nations, through its Third Law of the Sea Conference, is moving toward a treaty on the international seabed area that would cover such diverse activities as outer continental margin oil wells, deep seabed hard mineral mining, fishing rights, pollution control, scientific research and the limits of territorial waters. A recent unanimous General Assembly resolution—supported, in particular, by the United States—set forth agreed principles for the forthcoming treaty: seabed resources were to be the common heritage of mankind and to be exploited for the benefit of mankind with particular consideration to be given to developing countries; no State was to exercise rights incompatible with the international regime to be established.

With a view to implementing these principles, the United States has adopted an enlightened policy in a statement made by President Nixon on May 23, 1970. Our proposed treaty would have coastal States renounce claims to seabed resources beyond 200 meters depth and would set up an international regime to exploit seabed resources beyond that limit. But coastal States would act as internationally supervised trustees for the seabed resources on that continental margin between the 200 meter depth isobath and the abyssal deep ocean bottom. The agreed international machinery would completely regulate seabed resources beyond the continental margin on the ocean floor.

Through the good offices of Congressmen, the American Mining Congress has submitted a bill, H.R. 9, that would supplant this international machinery for mining the ocean bottom. Under this bill, the United States would unilaterally proclaim certain regulations for mining the ocean bottom and then classify as "reciprocating" states all others nations who would cooperate and adopt similar legislation. In order to secure the agreement of other states, the bill would prohibit American citizens and corporations from engaging in seabed mining for those states that did not cooperate. As the Administration has noted, this bill has become a "symbol to many countries of defiance of the multilateral negotiating process." Worse, the bill may become an excuse for those states who wish to press their preferred unilateral claims in other areas and some who may even wish to scuttle this treaty.

At stake are a number of matters vital to our national interests and to the hope of humanity. While the American Mining Congress bill relates only to ocean bed mining, the treaty that its existence

See **FAS OPPOSES,** page 2

Approved by the Federation Executive Committee, the above statement was reviewed and endorsed by the following FAS members or outside consultants whose experience and expertise bear on various aspects of this problem. (Their credentials appear on page 3).

Judge Philip C. Jessup Professor John J. Logue
Professor Roger Revelle Professor Warren S. Wooster

HISTORY

On September 28, 1945, President Harry S Truman laid claim to the resources of the seabed and subsoil of the continental shelf lying outside the historic three-mile limit; thus began a scramble for ocean resources that now threatens to carve up the entire ocean floor and one-third of the oceans themselves.

Truman argued that the continental shelf was just an extension of the land mass, that the resources under the shelf might be part of a pool extending under the land, that utilization of the resources would require cooperation from the coastal state anyway, and that self-protection required the coastal state to watch off-shore activities closely. He did not, however, question the international character of the high seas above the continental shelf; within a short period, more than twenty other coastal states made analogous claims over their continental shelves.

Truman's proclamation of sovereignty over the continental shelf was followed by so many corresponding claims by other maritime states that it became a fait accompli in international law. The International Law Commission of the United Nations quickly began work on a convention to formally regularize the situation. It produced the 1958 Convention on the Continental Shelf which the United States signed. This convention confirmed, for all

See **HISTORY,** page 3

FAS OPPOSES, from page 1

may unsettle covers a multitude of U.S. interests.

We are a major maritime power but three hundred years of freedom of the seas, beyond narrow territorial limits, may be lost if coastal states are further encouraged to claim large national jurisdictions over the seabed—creeping jurisdictional claims excited by interests in fishing may then lead to claims for controlling the water column above. In this way, as much as one-third of the ocean might be claimed if the Law of the Sea Conference fails. No wonder the Defense Department strongly urges the widest possible international jurisdiction.

We are a nation increasingly short of oil supplies. Yet the American Mining Congress bill may unsettle a treaty that would substitute international jurisdiction over continental margin seabed oil for national jurisdiction, thereby improving the climate for U.S. investment.

What is at issue in this treaty—as the President has noted—is whether the oceans will be used for the benefit of mankind or whether they will become "an arena of unrestrained exploitation and conflicting jurisdictions." Economic conflicts are sharpening in the world, both between states of the same level of development and between states of different levels of development. It would be a catastrophe pregnant with possibilities for war, if the oceans were to be carved up on a first-come, first-served basis, as was colonial Africa in the 19th century. Moreover, if ocean pollution and over-fishing is to be prevented, the exploitation of ocean resources must be organized and guided on an international basis.

Finally, the international ocean authority on which the U.N. nations are agreed in principle, would represent a giant step forward in the rule of law. Ruled by a council in which neither developed nor developing nations could overrule the other, it would—unlike the United Nations—have stable and growing revenues provided by its own resources. Indeed, as these revenues grew, they would become a source of support for projects in the developing world. Since, in this era, there is a clear and probably growing correlation between the poverty of states and the origins of state conflict, it is in our own national interest, as well as in our moral interest, to provide developing states with an ample share of those resources of the sea that are now agreed to belong to all mankind.

The American Mining Congress bill is not, as it pretends to be, a national interest bill pitted against anti-American developing states and internationalist forces at home. It is simply a mining industry bill drafted by that industry in such a way as to benefit itself first and foremost.

The bill would permit small states to provide our mining industry with incentives to work under the flags of other nations—much as ships sail under the flags of Liberia or Panama. In disregard of the U.N. resolution cited above, the bill provides for only the most rudimentary income for the international authority and for developing countries.

The treaty permits a single firm to lay claim to areas several times larger than the United States; it requires no competitive bidding on royalties—of the kind we require today for offshore oil—but only small license fees given on a first-come, first-served basis; it asks the government to provide licenses good for so long as production continues; and it wants indemnity for 40 years if the international treaty to be agreed upon should reduce the profit expected under its very favorable terms.

In any case, the minerals involved are not currently important to the national interest either in quantity or kind. Certainly there is no urgent need to mine magnanese, copper, nickel or cobalt that would compare with any one of the major stakes which the United States has in the successful outcome of the Law of the Sea Conference.

In short, the American Mining Congress bill is simply a special-interest bill drafted by special-interest lawyers. It deserves little faith and credit from Congressmen. At best, it is a sell-out to a particular industry. At worst, it can begin to unravel the hopes of our nation for international agreement on all of the several important interests we have in the oceans.□

HISTORY, from page 1

coastal states, the claims which the U.S. had made for its continental shelf.

However, after prolonged debate and some vacillation, the drafters of the convention adopted a questionable definition of the limits of the continental shelf. They probably should have, and could have, defined the continental shelf as those lands under less than 200 meters of water—the 200 meter isobath. Instead, the convention referred to the waters "to a depth of 200 meters or, beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources . . .".

The failure to be explicit about the continental shelf has permitted mining interests, and some related Congressional interests, to substitute the notion of the continental "margin" for the continental shelf, which, would enormously increase the land alloted for national sovereignty—about 15% of the ocean floor would then be covered, rather than about 8% at the 200 meter isobath.

A decade after the 1958 convention, the Permanent Mission of Malta proposed to the U.N. General Assembly that a treaty be drafted declaring the ocean bottom and the seabed to be the "common heritage of mankind." By 1968, the U.N. had established a standing "Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction." □

MOST RECENT DEVELOPMENTS

At the 27th General Assembly, a Law of the Sea Conference Resolution was adopted unanimously which established a schedule for the Law of the Sea Conference and preparatory negotiations. It called for preparatory conferences in March in New York, in July in Geneva, and for an organizational session in New York in November, followed by a substantive meeting of the Conference in April, 1974, in Santiago, Chile. The Conference resolution expresses an expectation of completing work in 1974 or, if necessary, no later than 1975.

On March 1, the Administration testified in opposition to H.R. 9, the American Mining Congress Bill. Arguing that the negotiations were "moving into a critical stage," it cautioned against perturbing the negotiating atmosphere and noted that H.R. 9 had become a "symbol to many countries of defiance of the multilateral negotiating process." It warned that other nations—upon whom we have been urging restraint in pressing unilateral claims during the negotiating process—might take H.R. 9 as justification for their own preemption of the treaty process.

The Administration suggested that a successful conference might be followed by immediate provisional entry into force of some aspects of the international seabed regime. If the success of the Conference on a timely basis seemed impossible and its ultimate success unpredictable, the Government would look toward ways of protecting American investments but would do so after discussions with other interested nations. In short, the Administration does not intend, if it can help it, to take the American Mining Congress route of pressing forward on a unilateral basis, and coercing other nations to accept the approach proffered.

A week later, on March 8, Senator Metcalf reintroduced the American Mining Congress bill, now S.1134. He suggested that we had just about reached the point in time "so far as ocean mining legislation is concerned, where we fish, cut bait, or haul for shore." In an interesting insight into the attitudes of all concerned, he said:

> "Evidently to enhance its bargaining position in the preparatory talks for the 1974 Law of the Sea Conference, the State Department continues to advise the Congress: Now let us just wait and see how well negotiations proceed toward development of an acceptable seabed treaty. We are being advised not to pass legislation but not to forget the legislation. This may well be the ideal position for the Congress . . . but I think the time has come to give this bill, or any substitute legislation offered a fair hearing and then decide whether we want to pass legislation and if so, what that legislation should contain." □

H.R. 9 IS A PRE-EMPTIVE ACT

As a general proposition, H.R. 9, if passed would put the U.S. Government in the business of regulating deep seabed mineral resource development and of encouraging other industrialized countries to join us in that venture. Should we engage in such an action, it would be the functional equivalent of pre-empting the Law of the Sea Conference on this issue. We do not believe that language to the contrary in Section 10a of H.R. 9 would avoid this problem. The international reaction might well be severe and any hope we and many other countries have for creating a stable and rational legal order for the development of ocean mineral resources and other ocean uses could be destroyed. Some nations that do not wish to negotiate the substance of their unilateral claims could more easily achieve their objectives while arguing that it is the U.S. that bears full responsibility for disrupting the negotiations."

Leigh S. Ratiner, Director for Ocean Resources, Department of the Interior on behalf of the Interagency Task Force on the Law of the Sea March 1, 1973, submission to Senator Fulbright

CREDENTIALS OF CONSULTANTS FOR FAS STATEMENT (Page 1)

Judge Philip Jessup: Judge, International Court of Justice, 1961-71, Columbia University Professor of International Law and Diplomacy, 1946-61; U.S. Representative to U.N. General Assembly, 1948-52.

Professor Roger Revelle: Director, Harvard Center for Population Studies 1964-present; President-elect, American Association for the Advancement of Science (AAAS); former President of the Oceanography section of the American Geophysical Union.

Professor John J. Logue: Director, World Order Research Institute, Villanova University.

Professor Warren S. Wooster: Director, Center for Marine Affairs, Scripps Institute of Oceanography; Past President, Scientific Committee on Oceanic Research, International Council of Scientific Unions (ICSU).

U.S. POSITION

The United States has always been a strong defender of freedom of the seas and has supported, since the time Jefferson was Secretary of State, a narrow three-mile limit for the size of territorial seas. Many other nations have claimed twelve, however, and some two hundred.

The United States is therefore prepared to acquiesce in ratifying an international convention with a twelve-mile limit, so long as it can negotiate continued rights of free transit through those 6 to 24-mile-wide straits that would otherwise suddenly become closed. The Defense Department, especially, wants to be sure that its warships and submarines can use these straits without qualifying for the otherwise necessary "innocent passage" applied to territorial seas. The right of planes to overfly the straits is also at issue.

The U.S. proposal envisages coastal state jurisdiction over the seabeds of the continental shelf proper. The resources of the rest of the continental slope and rise—i.e. the rest of the continental margin—would be administered by the coastal state as part of an international area. (See the schematic representation on this page.) An international authority would be constructed to share jurisdiction in this "Trusteeship Zone" and to administer, by itself, the exploitation of the deep ocean floor.

In the Trusteeship Zone (also called the economic or intermediate zone), the coastal state would regulate exploration and exploitation under international standards, and under rules for compulsory settlement of disputes. These standards would prevent resource exploitation on the seabed from polluting the marine environment. And there would be sharing of revenues with the international community. U.S.-suggested drafts would allot 50% to 66⅔% to the international authority.

The notion of an intermediate zone is a shrewd compromise. Some developing states, and American commercial interests, want wide national control over those seabeds near them. In effect, the trusteeship zone gives those states many such benefits. On the other hand, the proposal keeps the area beyond 200-meters depth formally within an international framework thereby preventing such activities as expropriation, permitting the international authority to protect against pollution, and, of course, providing for revenue sharing with the international authority.

Who would control the international overseer—dubbed the International Seabed Resource Authority? The U.S. draft convention would provide for an "Assembly" in which all would have one vote and a "Council" of 24 states—the six most advanced industrial states, at least 12 developing states, and at least two landlocked or shelflocked states. Decisions by the council would require that a majority of both the 6 major industrialized states and of the 18 remaining states approve each decision. Thus the convention seeks to balance the disparate economic interests of the parties to the treaty in the resources at issue. The draft convention also provides for a Tribunal to decide and advise on dispute under the convention.□

PRESIDENT NIXON'S ANNOUNCEMENT ON U.S. OCEANS POLICY—1970

. . . the stark fact is that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community. If it is not modernized multilaterally, unilateral action and international conflict are inevitable.

. . . I am today proposing that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters and would agree to regard these resources as the common heritage of mankind.

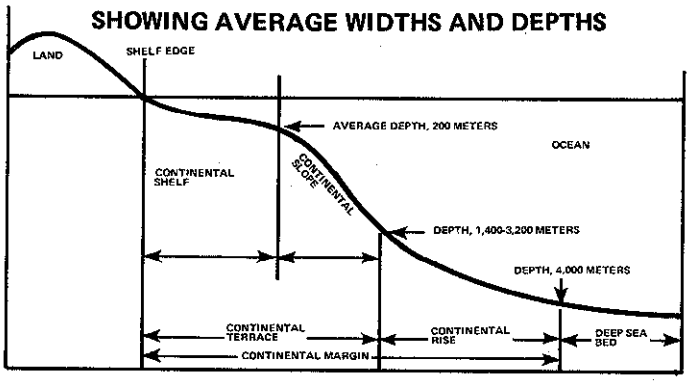
The treaty should establish an international regime for the exploitation of seabed resources beyond this limit. The regime should provide for the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries. It should also establish general rules to prevent unreasonable interference with other uses of the ocean, to protect the ocean from pollution, to assure the integrity of the investment necessary for such exploitation and to provide for peaceful and compulsory settlement of disputes.

ECONOMIC IMPACT OF SEABED PRODUCTION

The United Nations Secretariat and U.S. Government experts believe that seabed production of oil and gas beyond the 200-meter isobath will produce no adverse effects on land producers because it will constitute only a fraction of new demand in a steadily increasing market. The higher costs of deep water exploration and production further eliminate any possibility that deep seabed petroleum production will depress prices. By 1980, about 500 million barrels of petroleum might arise from beyond the 200-meter limit—2 or 3% of world production of liquid fuels. Production of gas beyond this limit is likely to grow even more slowly. No country has been identified that might suffer economically as a result of the competition induced. A few countries might suffer ill effects from the economic competition produced by mining nodules but none of them seem likely to suffer badly.□

DIAGRAMMATIC PROFILE OF CONTINENTAL MARGIN

SHOWING AVERAGE WIDTHS AND DEPTHS



PROVISIONS OF THE METCALF-AMERICAN MINING CONGRESS BILL

The bill would instruct the Secretary of the Interior to issue an exclusive license to exploit either the surface or the subsurface of the seabed. Surface blocks would be up to 40,000 kilometers and ten meters deep. Subsurface blocks would be up to 500 square kilometers and would extend downward without limitation.

Unlike the law governing the continental shelf which calls for bids including both downpayment and royalties, the bill would require only $5,000 for a license. The Secretary would be required to give the license to the first qualified person who requested it. The license would be good for so long as commercial recovery of the minerals continued—and fifteen years at least. Scientific research would not be precluded by the license—unless it interfered with the mining of the developer!

As a condition of the license, the firms must make minimum annual expenditures which grow from $100,000 per year originally to $700,000 per year in the fifteenth year. But off-site development expenditures are not only counted toward these expenses but even carried over from earlier years to be credited against later ones.

The bill would designate as a "reciprocating state" other nations who accepted the bill's approach to the problem and adopted similar practices. No American citizen or company would be permitted to work on mining the deep seabed for states who were not designated as reciprocating states. Thus, the bill would seek to pre-emptively establish at a stroke, a regime in which the ocean would be carved up in such fashion as the licensees lined up at the window of the Secretary of the Interior (and the windows of analogous officials in "reciprocating states"). The licenses offered by non-reciprocating states would, presumably, be ignored by the reciprocating states.

Developing Nations Get Little

The developing nations would not get very much under this bill. In the first place, only developing "reciprocating" nations would get anything .And they would get only a percentage of the $5,000 fees—not likely to add up to much—and a percentage of the income taxes resulting from mining the seabed. The percentages would be decided upon by Congress. And, since the percent would come out of taxes, it would hardly be very large.

The bill is also careful to provide that the minerals mined should not be subject to import duties and should be treated as if mined domestically.

The bill is obviously designed to permit companies to stake out very large areas initially and—through subsequent further exploration—to zero in on more valuable sites. The amount of territory that could be claimed in this fashion, under the American Mining Congress bill, is fantastic. For example, it is widely asserted by the mining interests that $250,000,000 would be required to prepare for ocean bed mining. This sum would permit the claiming and holding onto an area the size of the United States for five years or ten times the size of the United States for one year.□

ATTITUDES OF THE SENATE INTERIOR COMMITTEE

In 1969, the Senate Interior Committee, chaired by Senator Henry M. Jackson (D., Wash.) organized a special subcommittee on the Outer Continental Shelf, under the Chairmanship of Senator Lee Metcalf (D., Mont.). These two Senators, and some other members of the subcommittee and staff involved, take a dim view of certain aspects of the U.S. position on the seabed, and of the U.N. approach to the deliberations leading to another Law of the Sea Conference.

Faced with varying interpretations, the Subcommittee interprets the 1958 Convention on the Continental Shelf to mean that the area we own "extends to the limit of exploitability then existing, within an ultimate limit . . . of the natural prolongation of the submerged land continent." This position is also termed "consistent with the wisest of policy preferences."

However, this still leaves problems. The Subcommittee wants to argue against the idea of a trusteeship zone over the continental slope on the grounds that it would involve giving up something to international ownership which was ours. Since the waters beyond 200 meters are not yet subject to exploitation, the committee also adopted the notion that our rights to the entire continental margin were vested "by virtue of the natural extension beneath the sea of our sovereign land territory." (pg. 30, "Outer Continental Shelf" report) (If 146 other nations were to assert similar claims, 25% of the entire ocean bottom would be claimed and a large number of boundaries would have to be solved where overlapping claims were asserted.)

Interior Committee Sends Observers

The Interior Committee staff has twice sent observers to the U.N. deliberations and returned with reports sharply critical of the activities there. The first was prepared by Senator Metcalf's Administrative Assistant, Mr. Merrill Englund, and the Interior Committee's minority counsel, Mr. Charles F. Cook, Jr.—who is now Assistant General Counsel for Government Affairs for the American Mining Congress. The second was prepared by Mr. Englund and Mr. David P. Stang of the Committee staff. The tone of these reports is indicated by the summary of the second report here provided in full:

> "The developments [at the United Nations Seabed Committee] have led us to the conclusion that present U.S. rights to mine the ocean floor are in jeopardy due to the increasing militance of the Group of 77, the private policy caucus of the developing countries of Africa, Asia and Latin America.
>
> These countries, through a concerted effort, are taking active steps to deny the United States and other maritime powers the freedom of the seas, including effective present and future access to the minerals of the ocean floor. They are being assisted in their efforts by the full support of China.
>
> Legislation, now pending before this committee, may soon need to be acted upon in order to prevent U.S. forfeiture of our freedom of the seas including our right to mine minerals of the seabed lying beyond our continental margin." (The Law of the Sea Crisis, Part 2, May 1972)

Part of the "concerted effort" to deny the U.S. "freedom of the seas" was the 1969 U.N. resolution calling for a moratorium on seabed mining; the Committee refers to it repeatedly as a resolution that "purported to declare" a moratorium passed by a "paper majority" in a "spirit of confrontation." The State Department agrees that General Assembly resolutions are not binding and that it does not intend to try to discourage its nationals from violating the moratorium. But the United States Government did subsequently join in a unanimous U.N. vote on certain principles that were similar—precluding states, in particular, from asserting rights "incompatible with the international regime to be established."

The Committee's approach to the problem seems to emphasize short run national interests only. For example, one witness noted that the Committee claim to the Continental Margin would simply produce analogous world claims by other coastal states and, as a result, would restrict U.S. nationals from a comparably larger area. The Committee said it could not "see the logic" of this because policies precluding U.S. nationals "would not be consistent with the desire of such countries in developing greater exports."

This is a delicate reference to the fact that, at present, only the U.S. and a few other countries have the technology to do the mining. But, in time, developing nations will develop the technology; they will then expropriate our installations and deny our nationals the access we would otherwise have had. The developing nations might also discriminate in favor of the nationals of some other industrialized nation—the Japanese or the Germans, for example. By contrast, under the U.S. proposals, although coastal states would have exclusive rights to manage the offshore resources, they would have to agree to international standards that would protect foreign investment.

Committee Double Standard

Sometimes, however, the Committee takes the view that the developing Nations *do* have the capacity to go it alone. A Subcommittee staff report charges that the developing nations want "to deny effective commercial access by the technologically advanced states" to the ocean bottom minerals by controlling the international regime to be set up. According to the Committee's earlier analysis above, this would be foolish since only the technologically advanced states can do the work. If denied "effective commercial access" there would be no revenues.

A further example of the Subcommittee's temper is reflected in a U.N. mention of the American Mining Congress bill. The Chilian delegate noted the Moratorium resolution—and the Declaration of Principles, for which the U.S. voted and which expressed similar ideas—and raised questions about the bill. He noted accurately that the bill "apparently envisaged a situation in which States would grant each other exclusive rights to the international area," and noted politely that "obviously the submission of the bill did not reflect the view of the U.S. Government." Among other things, he suggested that the United States delegation be "invited to provide further information" on the bill and some specific on-going deepsea mining activities.

Subsequently, one Senator spoke of this as an effort to "intimidate the U.S. Senate" and another said that the Chilean delegate had referred to the bill "in the most derogatory terms" and had "demanded" of the U.S. Government "all the information at its disposal" about deepsea mining and had threatened a "resolution condemning the legislation."

1969 MORATORIUM RESOLUTION OF THE GENERAL ASSEMBLY (2574-D)

. . . pending the establishment of the aforementioned international regime:

a) States and persons, physical and juridicial, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

b) No claim to any part of that area or its resources shall be recognized.

Unfortunately, the conclusions of the staff report on the March 1972 conference do make the "threats, claims and demands" charged to the developing countries. The developing coastal countries are said to be playing a "dangerous game" of delay, looking toward a fait accompli in which a proposed economic zone might be established without need for a treaty. In such case, they may be faced with "countersanctions" by the developed countries who have the "greatest strength" including ships, technology, capital, and the option to refuse to ratify a deep sea regime.

As for derogatory remarks and inflammatory language, the staff likens the developing nations Group of 77 to a Samson in the temple who "felt that there was no hope of tailoring circumstances exclusively to his liking, so he tore loose the pillars of the temple, causing the roof to collapse and kill nearly everyone."

Some nations are referred to as "puerile." Others "apparently believe that, because they may have the majority of the votes in the U.N. Seabed Committee, they can overturn international law merely by threats or by making demands."

Finally, suggesting that it may take "years before these nations "return to reality," the committee staff report proposes legislation which "could set a practicable precedent, a model for a future treaty, after which the rules governing ocean mining could be patterned."

In view of the repeated emphasis upon protecting the rights accorded in the interim regime, this is clearly a call for a U.S. fait accompli pre-empting the treaty process —precisely what the developing nations are said to be doing with regard to an economic zone. Indeed, the report ends by urging a continued watch on the U.N. deliberations:

> "to ascertain whether there is any chance that there may be a future international seabed treaty to supersede the legislation, or whether the legislation, and possible similar legislation enacted by other countries will provide the only rules and develop the only revenues related to the mining of minerals on the deep ocean floor for decades to come." □

LEGAL EXPERTS WITH INTERESTED CLIENTS: HOW THEY PLAY THE GAME

In reviewing testimony on the American Mining Congress bill, one is startled at the conflicts of interest of the lawyers testifying and at their casual approach to the problem.

For example, in 1969, Mr. John G. Laylin, a distinguished lawyer from Covington & Burling, was a natural witness for the Committee to call. He was, after all, on the Committees on Oceanography and Treaty Law of the American Bar Association. He was also on the Committee on Deep Sea Mining—and even on the Executive Council—of the American Branch of the International Law Association. With a seeming deep sense of propriety, he prefaced his testimony with a comment about possible conflicts of interest:

> "I should mention that the law firm to which I belong, Covington & Burling, advises clients that have long mined for copper on land and are now interested in recovering from the deep seabed nodules containing manganese, copper, nickel, and cobalt."

Would you believe, on the basis of that paragraph, that Mr. Laylin is the chief architect of the American Mining Congress bill—the only bill before the Committee in the hearings in which he is testifying? Apparently, he is. On page 45 of the hearings, there is this initial clue:

> "*Mr. Downing.* Now, tell me this, would there be coordination of the several reciprocal states in the granting of these leases?
>
> *Mr. Laylin.* Well, that would be very desirable, but *we* have set up the legislation so it is not a deciding one, no. (italics added)

A second clue occurs in connection with May, 1972 hearings in the House, where Mr. Laylin filed—apparently on his own initiative—two letters of detailed rebuttal of attacks on the American Mining Congress bill; in one of these, he actually spoke for the sponsors of the bill, as if their lawyer, saying:

> "Professor Friedman prefers 'an international order for the oceans' but *so do the sponsors* of H.R. 13904. It is their belief that passage of the bill . . ." (italics added)

At the end of his testimony, Mr. Laylin submitted, for the record, his scholarly article entitled "Past, Present and Future Development of the Customary International Law of the Sea and Deep Seabed." The article sets forth the detailed principles and identical tactics upon which the American Mining Congress bill is based; it has a tiny footnote saying:

> "The American Mining Congress Committee on Underseas Mineral Resources on January 27, 1971 submitted a statement containing in an attachment suggestions for legislation for the interim period along the lines here proposed. The report was submitted to the Departments of State and the Interior."

Was Mr. Laylin retained by the American Mining Congress or one of its industrial members to actually draft the American Mining Congress bill (or the above referenced attachment out of which the bill obviously sprang)? He does not say.

These matters take on special importance because international law is susceptible to so many interpretations that lawyers can be influenced by what they think desirable—or what their clients tell them is in the national interest. Thus, on another occasion, Mr. Laylin told the subcommittee:

> "I must say that I have much more interest in what is the desirable line rather than a lot of argument about interpretation of something that admittedly permits of more than one interpretation." (December 17, 1969)

Applying the view that the problem was not solely legal, Mr. Laylin testified that the proper limits of the legal Continental Shelf can be established "only after we know what sort of a regime is to prevail beyond the Continental Shelf." He suggested the tactics the Government should follow:

> "We should stand on the right we now have to hold out for an outer boundary that moves with each new demonstration of exploitability—deeper and deeper, until the exploitability limit and the adjacency limit coincide. The understanding that we will hold out for this could encourage other nations to agree upon a satisfactory deep sea regime." (December 21, 1970)

This position would obviously help the mining companies since it offers to trade claims to oil in the Continental Margin for a more "satisfactory" situation on deep ocean mining. But it cannot be based on any conceivable "legal" theory.

Oil Opposes Mining

In opposition to Mr. Laylin is Mr. Northcutt Ely—whose credentials on international law committees of the American Bar Association and the International Law Association are in no way inferior.

Like Mr. Laylin, Mr. Ely is moved by his own considerations of what is good public policy; he describes the U.S. draft treaty contemptuously as calling for "a sort of floating Chinese pagoda."

Mr. Ely repeatedly sought to advance the idea that the United States already had the right to claim the entire continental margin and he sought skillfully to associate the American Bar Association with his preference.

Thus he answered Mr. Laylin's advocacy of territorial rights that expand with exploitability as follows:

> "The decision to stand unequivocally on our *present rights* under the Convention on the Outer Continental Shelf, and *to assert those rights as including the whole submerged continental landmass,* irrespective of depth or distance, should not be influenced at all by decision of the separate question as to what kind of international regime should be created to function seaward of this area of exclusive national jurisdiction." (ibid) (italics added)

The subcommittee report notes that:

> "Cecil J. Olmstead, representing the position of the National Petroleum Council, concurred with the *American Bar Association's position as presented by Mr. Ely.*" (italics added)

Certainly, the National Petroleum Council would agree with this position since it ignores the "exploitability" clause in the 1958 convention and claims that the entire source of off-shore oil in the Continental Margin is *already* ours.

But the fact of the matter is that the American Bar Association did not take this position although casual readers of the testimony—much less listening Congressmen—would certainly have thought they had from the way in which Mr. Ely presented ABA views.

A careful examination of the annexes supplied by Mr. Ely shows that the American Bar Association as a whole simply called on the United States to consult with others to get "an agreed interpretation" of rights under the 1958 convention. It urged the United States to fully protect its rights and—taking a leap into the extra-legal—noted that it believed the "long-range goal" was not the creation of a "supersovereignty" but rather "agreement upon norms of conduct designed to minimize conflicts." The ABA did *not* conclude that we already owned the Continental Margin.

Nevertheless, Mr. Ely had called himself a "spokesman for the American Bar Association," adding quickly a caveat which, if read closely—but not otherwise—reveals that he was speaking only for the Section of the ABA on Natural Resources Law which, with two other sections, had produced certain joint reports. (Pg. 25, Hearings of December 17, 1969)

Unfortunately, the reports of these sections also failed to claim that we already owned the Continental margin. Thus their report of 1969 said only "in the view of a significant number of our members, any part of this land mass will come within national jurisdiction as soon as it becomes accessible to exploitation." In other words, these sections had adopted "rolling jurisdiction."

In short, although the Subcommittee summary report repeatedly refers to Mr. Ely as the American Bar Association witness—and refers approvingly to his view that the Continental Margin is already under our jurisdiction whether presently exploited or not—neither the ABA nor the various ABA committees in question for which he claimed to speak reached that conclusion, the conclusion most favorable to the oil interests.

The testimony of Mr. Laylin and Mr. Ely shows that each is aware that the other represents a different interest —mining for Mr. Laylin and oil for Mr. Ely. When the Subcommittee called these witnesses on September 22, 1970, it even referred to their exchanges as having been part of an "adversary proceedings." During these proceedings, Mr. Laylin had said of Mr. Ely:

> "From my point of view, my colleague is shortsighted to only see out to the edge of the continental margin. *He thinks mainly of one resource.* Our country has many interests beyond the margin, and we have many interest besides *petroleum,* as great as that is." (italics added)

Mr. Ely responded by admitting, in effect, that his legal views were influenced by his conception of the importance of oil:

> "Where Mr. Laylin's testimony and mine differ is that I am primarily concerned with the renunciation of our rights in the continental margin . . . because we will be dependent upon these resources in the very near future, perhaps another decade, for our liquid fuels." (pg. 21, ibid)

In a clear reference to Mr. Ely, Mr. Laylin chided "people who" misrepresented the American Bar Association by implying that ABA had supported an existing claim to the whole Continental Margin. Mr. Ely responded by commenting forcefully on a related, but irrelevant, point.

Mr. Laylin acknowledged his own primary interest in deep seabed minerals by saying:

> "My own interest has been primarily in the regime to regulate exploitation of the hard minerals found to lie on the surface of the deep seabed beyond the outer edge of the Continental Shelf, however that is defined. . . . There are a number of suggestions for improvement which those interested in mining on the deep seabed would like to see made. These will doubtless be made by the witness you have invited to speak for the American Mining Congress." (pg. 14, hearings of September 22)□

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