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COMMENTS ON JUDGE ODA'S APPROACH TO THE COMMON HERITAGE OF MANKIND

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In Part V of his paper, Judge Oda deals with the problem, facing the international community, of how the marine resources of one-third of the globe should be treated under international law.[1] Although Judge Oda deals with both the mineral resources lying beyond the continental margins and the living resources in the waters beyond the exclusive economic zones, the following comments deal only with the former.

Judge Oda says that, with respect to mineral resources, "the concept of the common heritage of mankind is now being suggested" as the basis for building a deep seabed regime.[2] After tracing the history of this characterization, including the 1970 declaration by the U.N. General Assembly,[3] he asks whether this concept produces a solution for the problem before the Law of the Sea Conference (UNCLOS III). He suggests that it does not, the words by themselves being "pious but empty."[4] In general, he reports that efforts so far to reach agreement on seabed mining issues have "run onto the rocks."[5]

Even the most superficial observer must admit that the Conference is in serious danger. Nevertheless, present indications are that the United States will make a determined effort during the session of March/April 1982 to negotiate amendments to the current text[6] that will meet current concerns. Such concerns were indicated in general terms in August, 1980 at the Tenth Session of the Conference in Geneva, during informal meetings and discussions with Third World (Group of Seventy-Seven) representatives[7] and others.

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1. Oda, *Sharing of Ocean Resources - Unresolved Issues in the Law of the Sea*, 3 N.Y.J. INT'L & COMP. L. 1 (1981).

2. *Id.* at 9.

3. G. A. Res. 2749, 2750, 13 U.N. GAOR Series 1 (1970-1971). Resolution 2750 contains the following phrase: "Reaffirming that the area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, and its resources are the common heritage of mankind . . . ." *Id.*

4. Oda, *supra* note 1, at 13.

5. *Id.* at 9.

6. Third United Nations Conference on the Law of the Sea: Draft Convention of the Law of the Sea, U.N. Doc. A/Conf. 62/L.78 (1981) [hereinafter cited as Draft Convention].

7. The Group of Seventy-Seven is a block of Latin American, Asian, and African

The stage has been passed at the Conference where the need for an elaborate organizational structure can be questioned. It would be difficult, in any case, for the United States to insist on unraveling an organization constructed along the lines proposed by it in 1970. The draft treaty then submitted by the United States, however, limited the functions of the "Authority" to the licensing of qualified mining applicants on a first-come, first-served basis.[8] This limited role was emphatically rejected by the Group of Seventy-Seven in Caracas in 1974.[9] Since then, the Conference has attempted, year after year, to find some way of accommodating the needs of the Developed Countries for access to the "common heritage" with a minimum of red tape, and the desire of the Group of Seventy-Seven delegations to maximize control by the Authority and to ensure exploitation by its operating arm - the Enterprise. The "parallel system,"[10] which is designed to satisfy both points of view, is still dependent for its success on the proper exercise by the Authority of its broad discretionary powers. The scope of these powers and the limited role that the United States might be able to play in their exercise are currently the cause of great concern.

Such concern cannot be met by merely providing the United

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states that banded together in order to more effectively promote their interests as developing countries. Although originally consisting of some seventy-five nations at the 1963 General Assembly, it was not until the 1964 United Nations Conference on Trade and Development (UNCTAD) in Geneva, and the issuance of the *Joint Declaration of the Seventy-Seven Developing Countries*, that they emerged as a consolidated political force. *See generally* Friedman & Williams, *The Group of 77 at the United Nations: An Emergent Force in the Law of the Seas*, 16 SAN DIEGO L. REV. 555-74 (1979).

8. United States Draft of U.N. Convention on International Seabed Area, 9 I.L.M. 1046 (1970).

9. Several Third-World countries made speeches delineating their opposition to the United States' proposed limitation on the Authority's functions. *See* T. KRONMILLER, THE LAWFULNESS OF DEEP SEABED MINING 54 (1980). "The international authority, in the Tanzanian view, would have to 'control' deep seabed activities and to exploit the resources itself. Otherwise, mankind would be 'disinherited' by the technologically advanced States." *Id.* at 54. Peru stated:

> The ideas of international social property, service rather than profit, a cooperative system, full-participation by all States, and democratic management and control constituted the firmest guarantee that the common heritage of mankind would really benefit all peoples . . . .

Id.

10. *See generally* Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session*, 75 AM. J. INT'L L. 211 (1981). The parallel system provides the opportunity to State-sponsored private companies and the new international Enterprise to mine the deep seabeds on a somewhat comparable basis. A private applicant must propose two sites, one of which is to be reserved for use by the Enterprise or developing countries. Additionally, the Enterprise has the right to obtain mining technology on reasonable commercial terms from the private companies. The resulting agreement is designed to balance the interests of developed countries and private companies against the ambitions of the developing countries and the Enterprise. *Id.* at 214.

States with a guaranteed seat on the Council.[11] The outcry against guarantees for the Soviet bloc has been a red herring that has diverted attention from the substance of voting problems in international organizations. The efforts to protect American interests against large voting majorities have led to the requirement in the Draft Treaty that certain key issues shall require a consensus for their adoption and others a three-quarters vote.[12] But the list of consensus items is far too short and the three-fourths vote requirement woefully inadequate in a world of 160 nations in which the United States and its allies number less than ten percent. This is a problem that exists in many other international areas and calls for a solution that avoids the unpopular veto, while adequately protecting minority interests. At the same time, the United States may frequently wish to obtain support for affirmative action. There may, therefore, be situations where too large a measure of protection for minority interests may be undesirable.

These structural difficulties obscure the basic problems of deep seabed nodule mining. It has been assumed that the enormous nodule mineral wealth lying at great depths in the Pacific and elsewhere could readily be brought to the surface. Exploratory work so far undertaken by five consortia in this country and Europe indicates tremendous difficulties and capital outlays in translating nodule contents on the ocean floor into marketable metals. How long the process might take cannot be determined at this stage, particularly in view of current political uncertainties. What is clear is that, if further progress is to be made at all, pioneer developers must be protected with regard to the investments already made and the huge outlays that lie ahead. At this writing, there are prospects of obtaining mining rights under legislation in force in France, Germany, the United Kingdom and the United States which will be recognized on a reciprocal basis by these States.[13] The next stage is for such rights to be translated into contracts with the Authority once the treaty enters into force. As that event is likely to be many years in the future, an immediate concern is the negotiation of firm rights with the Preparatory Commission that will be established by the Conference to deal with transitional matters such as the drafting of provisional mining rules and regulations that would operate un-

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11. The Council consists of thirty-six members of the Authority elected by the Assembly. The election is carried out by a five-step process. The bases on which the seats are filled, in order of priority, are: 1) size of investment; 2) consumption; 3) production; 4) special interests; and 5) equitable distribution of seats. *See* Draft Convention, *supra* note 6, art. 161.

12. *Id.* art. 161(7)(c).

13. *See* Deep Seabed Hard Mineral Resources Act of 1980, Pub. L. No. 96-283, § 118, 94 Stat. 553 (1980) (to be codified in 30 U.S.C. § 1428); Collins, *Deep Seabed Hard Mineral Resources Act - Matrix for United States Deep Seabed Mining*, 13 NAT. RESOURCES LAW. 571, 580 (1981).

til their formal adoption by the Council and Assembly.[14]

Firm contracts would not, however, be sufficient in view of the complex provisions of the Draft Treaty for the limitation of nickel production to a percentage of the growth rate in the annual consumption of nickel.[15] Pioneer developers would at least have to be assured of production authorizations under the ceiling in effect, when the treaty enters into force. The question arises, however, why production should be limited at all in view of growing world demand for the metals involved, notably cobalt and nickel. The answer lies, unfortunately, in the resistance of States in which the metals are produced and exported in significant quantities. These land-based producers, ably led by Canada, have succeeded in imposing major limitations on seabed production and, in effect, establishing an antiproduction treaty. Not only must pro-production policies be written into the treaty, but the production limitation itself must either be scrapped, or its negative effect drastically limited.

Another area of negotiation will concern changes in the provisions for mandatory transfers of technology. Technology is defined as "the specialized equipment and technical know-how . . . necessary to assemble, maintain and operate a viable system."[16] This definition contains three elements: (a) specialized equipment (i.e. hardware); (b) technical know-how; and (c) the stated objective of assembling, maintaining and operating "a viable system." Apart from the extremely broad nature of the definition, it might imply a guarantee that a particular system, still in a pioneer pre-prototype stage, will be workable or "viable" at any point in its development. No pioneer operator at the present time could provide any such guarantee. Nor would it be easy to identify either the equipment or the know-how, when both are rapidly changing, sometimes evolving, sometimes being discarded. In any case, it would be the intention to make the hardware itself available, such as the mining vessel, the miner itself, miles of pipe and wiring and so on. What must surely be intended is a license of software necessary to enable the licensee to build its own system through the construction and purchase of equipment. There cannot, however, be guarantees as to viability. And there must be provisions for the protection of proprietary data and for compensation where such data is disclosed contrary to the terms on which it was licensed. Other changes will be necessary, including the provision for an undertaking that third-party suppliers provide assurances that they will supply what they have provided to contractors with the Authority. The most that should be expected of such contractors is that they make good faith efforts to obtain assur-

14. *See generally* DEEPSEA MINING (J.T. Kildow ed. 1980).
15. Draft Convention, *supra* note 6, art. 151.
16. *Id.* Annex III, art. 5(8).

ances where these cannot be directly obtained by the Enterprise.

Another outstanding difficulty with the present Draft Convention is the provision for a review conference fifteen years after the year in which the earliest commercial production commences, where it would be possible to amend the system of exploration and exploitation by the vote and ratification of two-thirds of the States parties.[17] If such a provision were retained, changes in the system could be imposed on the United States and other non-consenting States without ratification by them. The only defense against such imposition would be withdrawal from the treaty regime. Where would this leave nodule mining? It has always been the aim of the Group of Seventy-Seven to establish a unitary system of mining under the Authority and through the Enterprise once the necessary financing and technology has been obtained. While mining operations at the time a new system was adopted could continue under existing contracts, future operations would be conducted by the Enterprise or pursuant to joint venture, service or other contracts with the Enterprise. Presumably, a major effort will be made by the United States at the Conference to alter the provisions for review and amendment in order to protect the rights of non-consenting States.

Other changes in the treaty are necessary in order to protect minority and private enterprise rights. These include provisions for the arbitration of claims where the Legal and Technical Commission has improperly failed to recommend applications by qualified applicants for approval[18] and provisions containing prohibitions against changes in rules and regulations that alter essential rights set out in contracts.[19]

These negotiations, if they take place, will make some contribution toward finding a meaning for the "common heritage of mankind." Nevertheless, the "high level of responsibility or harmony"[20] to which Judge Oda refers, as necessary for a common understanding of the concept, may still have eluded the international community. Access under the treaty would always require the approval of an international organization, and this is perceived as a major hazard where the organization is managed and controlled by developing countries dedicated to state enterprise and a new international economic order. Although the treaty text aspires to a high degree of automaticity in the granting of mining contracts, there is inevitably a measure of discretion available to administrators even where allocations or selections are not compelled by

17. *Id.* art. 151(2)(b).

18. *Id.* art. 165 and Annex III, art. 6.

19. *Id.* art. 153(6) and Annex III, art. 4(6). The question here is whether the applicant's undertaking to be bound by rules and regulations commits it to changes that impair the fundamental relationship between the applicant and the Authority.

20. Oda, *supra* note 1, at 14.

the production ceiling or anti-density provisions. This discretion could take the form of delaying the processing of applications in conducting investigations, calling for detailed reports and otherwise harassing those applicants whose submissions are politically unacceptable. There are safeguards in the availability of dispute settlement provisions where charges of "misuse of power" are raised, but the tribunals themselves might be uncertain quantities where the good faith of the Authority is in issue.

Nevertheless, legal powers are being established for the protection of individual rights. It is possible that the existence of these processes, as well as the terms of the treaty itself and the exercise of efficient, impartial administration, will in time develop the common understanding that Judge Oda considers necessary if the concept of the "common heritage of mankind" is to play a significant role in sharing the benefit of ocean resources as well as the sacrifices and burdens of economic development.