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Introduction: On Evaluating the Draft Convention on the Law of the Sea

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There is more than a play on words in the suggestion that "evaluation" constitutes a reference to values. The worth of a thing depends on the values of the appraiser.

Questions have been raised as to whether the Draft Convention on the Law of the Sea[1] is consistent with American values.[2] The questions are entirely appropriate. Nations may be a long way from applying the golden rule in international politics with any consistency. Still, when a nation acts with respect to other nations, it is projecting an image of its values not only abroad but at home.

Thus, when the Reagan administration decided to scrutinize the Draft Convention in the light of the values of which it is trustee, it did the right thing. It deserves no blame for being caught at an awkward time. Foreigners and Americans alike were aware in the

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1. U.N. Doc. A/CONF.62/L.78 (1981) [hereinafter cited as Draft Convention].

2. While it is frequently not clear whether this means American values as they are or as they should be, we can put that question aside and look upon values, at least to some extent, in their aspirational mode for present purposes. Similarly, we need not, for these limited purposes, worry too much about the distinction between values and interests.

summer of 1980 that there could be a new administration just taking office in early 1981 that might be unprepared to make final decisions and unwilling to make hasty ones.

The salient question is: what are the important values relevant to a Convention that deals with virtually all activities at sea?

If we could identify all relevant values and agree on their relative weight or priority, those given to "mathematical" formulae might try to quantify the "total value" (V_T) of the Convention as follows:

$$V_T = P_1 \cdot V_1 \cdot E_1 + P_2 \cdot V_2 \cdot E_2 + \ldots + P_n \cdot V_n \cdot E_n$$

where V is a particular value, P is the relative priority we attach to that value, and E is the magnitude of the effect (positive or negative) of a Convention on the promotion of that value relative to the situation likely to obtain in its absence.

The formula does have the merit of emphasizing that the "output"—the evaluation—is a direct function of the "input," in particular the values we bring to the process. If only one value is used, its relative priority will be 100%. The effect of the Draft Convention on the promotion of that value then determines the decision.

Much of the debate in the United States regarding the Draft Convention has come to be dominated by economists, more precisely the disciples of economists that may loosely be described as belonging to the "free market" school. This is largely a manifestation of the more general emergence of these political economists, in both senses of the term, as a major force in the formulation of American public policy, including foreign policy. The unifying denominator of the values they bring to the policy process is the maximization of aggregate material wealth, generally by encouraging individuals or groups to strive to maximize their own wealth in a competitive environment.

The serious economic scholar, of the free market school or any other, is usually quite candid in pointing out that his definition of wealth is limited and is by no means the aggregate of all human values an individual or society might rationally strive to promote. He also notes that his profession's understanding of economic processes and the ways to influence them is imperfect. His converted disciples—especially some lawyers and other "generalists"—are rarely heard repeating these caveats.

In many "third world" countries, a parallel development has occurred. Debate about the Draft Convention, and much of foreign policy in general, is increasingly dominated by the disparity in wealth between the "north" and the "south." The unifying denominator of the value that developing country spokesmen bring

to the policy process is the redistribution of material wealth, including the means of producing wealth, from the "north" to the "south." They argue that emphasis on increasing aggregate wealth will not narrow, and may in fact widen, the gap between rich and poor nations; their free market counterparts argue that forced redistribution will slow, and possibly even reverse, the increase in aggregate wealth to the detriment of all.

The depth of feeling that each "economic" school brings to the Draft Convention is in part fueled by a conviction (if not resentment) that the value it is promoting was almost completely ignored in the past and that the Draft Convention should not merely strike a proper balance but correct previous errors. Free market economists believe that American foreign policy has too long been dominated by geo-political and strategic considerations, as well as by the same confidence in the efficacy of governmental regulation that has characterized domestic policy. Advocates of redistribution of control over wealth to developing countries believe that a few industrial countries have too long dominated the world economy, ignoring the interests (and pride) of most of the peoples of the world.

Interestingly enough, the most significant economic effect of the Draft Convention—the allocation to the coastal States of virtually all hydrocarbons, fish, and other natural resources likely to be exploited in this century and well into the next[3]—satisfies many people on both sides. Developing countries that acquire jurisdiction over substantial resources off their coast see this as a redistribution of high seas wealth that would otherwise be the plunder of the mobile rich. Free market economists argue that each individual coastal State will be motivated to maximize the production of wealth from its jurisdictional zones. The first group seems undeterred by the fact that a large chunk of oil and fish will be allocated to industrial and proto-industrial States with long and exposed coastlines, and none to the poorest landlocked States. The second group seems undeterred by the fact that few coastal States have offshore resource development laws that would come close to meeting "free market" models for maximizing efficient development of the resources. So be it. On their value scales, many on each side see this aspect of the Draft Convention as a

3. *See* Draft Convention, *supra* note 1, arts. 2-14, 46-49, 55-57, 62, 66, 67, 76, 77, 142.

"plus," albeit a "plus" that has already been realized in large measure by implementation of the Draft Convention's rules by individual coastal States.

The argument is over the seabed resources that are not allocated to coastal States.[4] The principal resource of interest in the near term consists of vast quantities of polymetallic nodules lying free at or near the surface of the ocean beds, particularly in the South Pacific and to some degree in the Indian Ocean. The nodules contain manganese, nickel, copper, cobalt, and traces of other metals.

Since coastal State rapaciousness has been one of the major characteristics of the Third United Nations Conference on the Law of the Sea, one might assume that what coastal States did not allocate to themselves is not regarded by them as having a particularly great present value. One of the minor ironies of the debate over the Draft Convention is that it is at this point that the disciples of "present value" analysis on both sides peer through their diaphanous veil and speak of precedents and of unknown treasures beneath the surface of the deep seabeds.[5] One might ask if the Law of the Sea Convention is the object or the occasion of the debate.

Suffice it to say that the existing text on deep seabed mining reflects the clash of "economic" values. Measured against the paradigms of the opposing values, the effect of the deep seabed mining text is a "minus" for each side. However, measured against the past—measured in terms of direction—many would agree that the deep seabed mining portion of the Draft Convention represents a movement in the direction of the distributional goals of the developing countries. This movement does not automatically mean that it must be a "minus" in terms of direction on the question of maximizing aggregate wealth. The confluence of attitudes on allocation of resources to coastal States demonstrates that the two values are not necessarily antithetical.

Many disciples of the free market school nevertheless believe that the present deep seabed mining texts inadequately accommodate free market values and encourage the developing countries to press in other fora, with greater expectations of success, for distributional values at the expense of expansion of aggregate wealth. They believe that an alternative regime formulated by

4. *Id.* arts. 1(1)-(3), 133-191; *Id.* Annexes III, IV, & VI, § 4.

5. To suggest, for example, that the United States Government should make a policy decision of international significance on the basis of whether the deep seabed mining texts conform to scripture according to John Locke is an astonishing departure from our polyvalent and pragmatic traditions. *See* Goldwin, *Locke and the Law of the Sea*, COMMENTARY 46-50 (June 1981).

likeminded Western industrial States can encourage the production of greater aggregate wealth from the deep seabeds than the current deep seabed mining text. Since it is difficult to maximize production of resources where new investment is deterred by controversy or uncertainty, they also seem to believe that the alternative regime would enjoy adequate acquiescence in fact, even if widely rejected in word by the developing countries, the USSR, and some others.

Let us accept these conclusions, *arguendo* if need be. That is not where an evaluation ends. There are values other than maximization of efficient production of deep seabed wealth that are important in the formulation of American foreign policy.

These even include distributional values. Here, we will frequently be asked for too much, and perhaps the seabed mining texts are "too much." Moreover, imprudent aid may in fact prevent people from doing what is necessary to stand on their own feet. But do we completely reject distributional values as a positive factor? There is no doubt that we can both tend to our souls and reject the Draft Convention. Yet there is cause for concern about the effect of the kind of rhetoric being used by some rejectionists on our perception of ourselves, not to mention the perceptions others have of us.

More importantly, values associated with production and distribution of wealth are not the only ones. Before making a complete evaluation, it is essential that the Draft Convention be considered in light of other values.

As lawyers, we should doubtless suggest order and stability (as some would put it) or peace and cooperation (as others would put it) as the first set of values relevant to an assessment of a convention on the *law* of the sea. Because it reduces the chances of conflicting claims of right, because it narrows the scope of those that do occur, because it establishes a common conceptual and rhetorical base for resolution of conflicts, and because, at least in some cases, it provides commonly accepted authoritative third-party procedures for dispute settlement, there is intrinsic value in a treaty that can be widely accepted independent of its substantive content. While the end product of a direct struggle among States with competing interests—customary law—might in some cases be as efficacious as (or even more efficacious than) the end product of a procedural and rhetorical struggle at a diplomatic confer-

ence—conventional law—the former entails some risk of violence and a willingness to assume other collateral costs, may not yield a reliable synthesis for quite some time, if at all, and may be incapable of supplying desired levels of technical detail and precision.

In this connection, we must weigh the effect of a failure of the largest, longest, and most ambitious international lawmaking effort ever undertaken on our capacity to promote this set of values in other contexts. If not only caution (which is certainly merited) but despair and cynicism come to be associated with suggestions that problems can be resolved at lawmaking conferences functioning by consensus, what are the alternatives and their effects?

Like the disciples of other callings, we should point out that the realization of *our* set of values—law generally accepted as such—is a *sine qua non* for the realization of other relevant values on an advanced scale, if at all. Indeed, since the sea is a vast area that is not for all purposes partitioned in advance among different nations with different interests and ideologies, but rather one which each may lay claim to use for one or more purposes, it would seem that a high degree of stability and predictability in the international law of the sea may be particularly important if we are to encourage and rely on unsubsidized private investment for economic development.

We should recall that after decades of largely unsuccessful efforts by the bar in other international fora, there is value in setting a precedent for compulsory and binding third-party settlement of disputes as an integral part of a major global lawmaking treaty,[6] including at least a modest opening of the system to private parties when they are the real parties in interest.[7] Not all would agree, but as lawyers the least we can do is insist that this be considered, even by economists.[8]

This is not to say these "intrinsic" values should obscure all others or that any country or group should be asked to pay a disproportionate price for their promotion. It may be that the effect of the Draft Convention on the promotion of this set of values, although positive, is not equivalent to the negative effect on other important values. But this should be weighed, soberly. In this regard, lawyers must begin to consider what values may be engaged by an unwelcome opinion of the International Court of Justice on one of the matters in controversy under customary law.

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6. Draft Convention, *supra* note 1, arts. 286, 296, 297, 309; more generally, *id.* pt. XI, § 5, pt. XV, Annexes V-VIII.

7. *Id.* arts. 187, 291(2); *id.* Annex VI, arts. 20-22, 33, 38; *id.* Annex VII, art. 13.

8. Some "deregulators" may see access to courts by aggrieved parties as a preferable alternative to detailed regulation.

Protection of the environment is certainly another important value. Because pollutants are carried by winds and currents, because animals migrate, and because environmental restraints can impair competitiveness, promotion of environmental values frequently requires international standards that will be widely respected. On the other hand, because environmental regulation may impair other values such as free communication by ship, a treaty may also limit or complicate promotion of environmental values in an attempt to strike a balance. The Draft Convention contains elaborate environmental provisions that both expand environmental rights and obligations and limit certain unilateral environmental actions, with the rights, obligations and limitations subject to third-party adjudication or arbitration.[9] The effect on the promotion of environmental values should be weighed.

The free pursuit of knowledge by men and women of science and learning is a value of long and significant history. Unhappily, it was consistently promoted at the Third United Nations Conference on the Law of the Sea by only Japan, the United States, and a minority of other Western States.[10] The result is on balance disheartening. However, it is arguably better than the situation that is likely to obtain in coastal areas without a Convention.[11]

Promotion of free international communication is another relevant value, indeed the dominant value influencing the law of the sea for centuries. Few would disagree with the value of promoting free civil communication. While promotion of free military communication may be more controversial, it is persuasively argued that this promotes peace and stability, deters States from dominating weaker neighbors in their immediate region, and avoids intensifying the competitive and expensive race for control over strategic routes. Is free communication better promoted with or without widespread adherence to the Draft Convention?[12] How significant is the difference?

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9. Draft Convention, *supra* note 1, arts. 19, 21-23, 39, 41-43, 54, 61, 63-67, 79, 81, 116-120, 123, 145, 150(a), 162(2)(v), (w), (y), 165(2)(d), (e), (f), (h), (k), (l), (m), 192-237, 240(d), 246(5)(b), 286, 290(1), 292, 296, 297(1), (3), 298(1)(b), 300, 304, 309, Annex III, art. 17(1)(b)(xii) & (2)(f).

10. *See id.* arts. 19, 21, 40, 54, 56, 78(2), 87(1)(f), 141, 143, 149, 194(5), 238-265, 286, 296, 297(2), 303.

11. *See id.* arts. 200, 204, 205, 238, 239, 242-244, 246(3), (6), 247, 252, 253(5), 255, 286, 296, 297(2), 300.

12. *See id.* arts. 1(3), 2-60, 75-81, 84, 86-115, 121-132, 137, 141, 147, 210, 211, 216-236, 286, 296, 297(1), 298(1), 300-303, 309, 316(3).

Turning to some "substantive" values American lawyers traditionally promote, we might note the values inherent in protecting the rights of individuals. Most public law treaties outside the human rights field ignore these values. The Draft Convention takes some modest steps to promote them.[13] One ought to consider what these provisions may be worth in and of themselves, and as precedent.

Some see intrinsic value in experimenting with novel solutions to problems in limited-risk situations. To the extent the experiment works, it can be copied. To the extent it fails, the pressure for similar solutions to other problems will subside or be more effectively resisted. A twenty-year deep seabed mining regime, subject to denunciation prior to that time, can be seen as such an experiment both in terms of finding workable systems of governance for joint undertakings and in terms of the possibilities for joint resource management. Two pertinent questions are whether we would be risking too much and whether we trust our successors to have the courage of their (not to mention our) convictions.

Sometimes we see value in the community spirit built when people go along with what others want. At other times, we see value in being firm in resisting an escalation of expectations that cannot be fulfilled. Timing—the most delicate of political judgments—may be crucial.

One does not have to come to the conclusion that the Draft Convention is desirable because of non-economic values any more than one must come to the conclusion that it is undesirable because of economic values. Many values not mentioned may be relevant. This is by no means an attempt to state an exhaustive list, but merely a brief introduction. As we are all taught, the important thing is to ask the right questions. If that is not done, and if our values are the issue, we risk not only a wrong conclusion, but a right conclusion for the wrong reasons.

13. Vessels and crews arrested for fishing or pollution violations must be released on reasonable bond or other financial security. *Id.* arts. 73(2), 226(1)(b). In trials for pollution offenses by foreign ships, "recognized rights of the accused" must be respected, with the possibility of compulsory third-party review. *Id.* arts. 230(3), 286, 296, 297(1). There are "statutes of limitation" and restraints on multiple trials by different States for the same offense. *Id.* art. 228(2), (3). Corporal punishment and imprisonment of foreign seamen and fishermen is prohibited in certain situations. *Id.* arts. 73(3), 230(1), (2). A mining contract may be revised "only with the consent of the parties." *Id.* Annex III, art. 19(2).