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**The Regime for the Exploitation
of the Seabed Mineral Resources
and the Quest for a New International
Economic Order of the Oceans: A Latin-American View**

FRANCISCO ORREGO VICUÑA*

1. Significance of the present negotiations.

The significance of the negotiations of the Third United Nations Conference on the Law of the Sea lies much beyond the formal aspects of reviewing some classic definitions about jurisdiction over the seas or drafting treaty articles which might improve prior conventions or existing customary rules. The fundamental issues under negotiation refer to the policies on natural resources and raw materials, thereby appertaining to the broader field of international economic relations and the most complex rearrangements being sought in terms of the New International Economic Order and related developments.

Moreover, it can be argued that the Law of the Sea has become the first specific instance in which the new principles, institutions and goals of a renewed economic order could be agreed on, enacted and implemented at the international level. This means that the outcome of the Conference will also influence other negotiations and processes currently under development in a variety of forms.

Two substantive issues are predominant in the above mentioned context. The first issue refers to the economic jurisdiction of the coastal state over the natural resources of the 200 mile Exclusive Economic Zone and the continental shelf. The second, and most important issue, refers to the exploitation of the seabed mineral resources beyond the limits of national jurisdiction. Only the latter will be discussed in this article.

2. The seabed mineral exploitation: the experience of Latin America and other developing countries.

The exploitation of the seabed resources has become the most important issue presently being discussed in concrete terms in the international economic arena, partly because of the importance of the minerals involved and partly because of the influence which the re-

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sulting solutions will have as a precedent for many other definitions and subjects still to come.

In this field, the experience of Latin American and other developing countries has been a decisive factor in the negotiation process, since each region has contributed its unique experience in mining and oil production and in the complex problems relating to its management, investments, negotiation, commercialization, taxation, and other facets. The international regime being discussed with regard to the seabed is the most extensive mineral operation ever undertaken, and therefore reproduces in a larger and more difficult scale all the problems and situations which have been given at the national level.

Resolution 2749 (XXV), passed by the U.N. General Assembly in 1970 solved the first basic question which lay at the heart of any acceptable regime, by declaring the seabed area beyond the limits of national jurisdiction and its resources the common heritage of mankind. For the first time, the concept of a common property in resources was thereby introduced in the international community. It followed that the management and exploitation of such resources could only be organized under an international regime, thus posing the very complex question of how and under what rules this regime should be established and developed.

Although technical factors to some extent explain the difficulties and complexities of this effort, the fundamental problems are related to the different interests which developed and developing countries have in the matter. Developed countries have a major strategic interest in the minerals from the seabed in order to ensure sources of supply and diminish their growing deficits in raw materials. This interest, which is even stronger than the interest in expected profitability of investments, is clearly revealed by the following table:¹

Table 1: Industrialized countries: imports as a percentage of consumption of four basic minerals.

	U.S.A.	E.E.C. ²	JAPAN
Manganese	98	99	86
Nickel	72	100	100
Copper	6	96	83
Cobalt	96	100	100

1. H. KAHN, *THE NEXT 200 YEARS* 97, fig. 7 (1976).

2. European Economic Community.

It is in relation to this strategic approach that industrialized countries have sought a free and unimpeded access to such minerals, restricting the role of an international Authority³ to the very minimum. In a sense, the same economic philosophy on which these nations base their national economies is projected towards the seabed regime.

For developing countries the nature of the problem is entirely different. The exploitation of a common heritage of mankind must benefit mankind as a whole and not only those nations which have the capital and the technology to undertake mining. Therefore, the international regime must provide the specific conditions and requirements which will govern exploitation, and necessarily the Seabed Authority must be able to effectively control activities in the Area.⁴

The national experience of developing countries in the field of mining and resource exploitation has determined a fundamental evolution in types of mining contracts and conditions;⁵ a fact which must also be taken into account by the seabed regime. It would be simply absurd to base a new and pioneering international regime on concession models of mining which have been broadly surpassed in international and domestic practice.⁶ Also, many developing countries are present or potential landbased producers of the minerals concerned and can be faced with a serious competition from seabed exploitation which would adversely affect their exports and earnings. Therefore, production controls are also an essential element of the international regime; a proposition which in turn collides with the unrestricted freedom sought by industrialized nations.

These important differences are evident in the discussion of three basic issues: the system of exploitation, the resource policy, and the financial arrangements of contracts. These issues, which will be examined next, are closely related to the problems of a New International Economic Order.

3. The sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. Informal Composite Negotiating Text, U.N.Doc. A/Conf. 62/WP10 and ADD. 1, 23 May—15 July 1977 (hereinafter ICNT), Part XI, Art. 1 (1).

4. The International Seabed Authority, ICNT, Part XI, Art. 1 (2).

5. See generally D. SMITH & L. WELLS, *NEGOTIATING THIRD WORLD MINERAL AGREEMENTS* (1975).

6. For this changing practices, see H. CATTAN, *THE EVOLUTION OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA* (1967).

3. *The system of exploitation: modern contracts versus traditional concessions.*

The first attitude of industrialized nations with regard to the system of exploitation was to conceive an international Authority whose powers would be limited to the granting and registration of mining licences, under a procedure of automatic processing and results. This was equivalent to the classic model of mining concession, with a strong resemblance to colonial mining rights.⁷ On the other hand, developing countries supported a system in which exploitation would be directly undertaken by the Authority through the Enterprise as its operational body. Within its discretionary powers the Authority could authorize operations by private or state entities in the Area. From this point of view, the Authority would become the functional equivalent of a State administering mining operations in its territory under the concept of permanent sovereignty over natural resources.⁸

The compromise formula presently being discussed, calls for the establishment of a "parallel system," in which both the Authority and private or state operators would be entitled to undertake mining activities in the Area. Under this system, private and state operators would have a guaranteed access to the resources of the Area if they qualify in terms of technical, operational, financial, and other requirements. However, this access would not be automatic since applicants would have to negotiate with the Authority certain key aspects of contracts, including financial contributions and transfer of technology.

The operation of the system would require that each applicant for a contract propose to the Authority two mining sites of equivalent commercial value. The Authority would grant one as the contract area and reserve the other for its own direct exploitation or for preferential exploitation by developing countries. Joint ventures, service contracts, production sharing schemes, and other forms of association would also be possible with regard to one site or the other.⁹

Although the proposed compromise is certainly imaginative in its effort to accommodate the basic interests of developed and develop-

7. On traditional concessions, see generally D. SMITH & L. WELLS, *supra* note 5, particularly 31 et seq.

8. U.N. Resolution 1803 (XVII). December 14, 1962.

9. For the new kind of agreements, particularly in the oil industry, see D. SMITH & L. WELLS, *supra* note 5, 37 et seq. See also R. Fabrikant, *Production Sharing Contracts in the Indonesian Petroleum Industry*, 16 HARV. INT'L L.J. 303 (1975).

ing countries, many issues are still to be solved before it becomes an acceptable solution. Of these, the most important is how to ensure that the Enterprise¹⁰ will in fact become an operational reality and be able to undertake mining activities from the beginning.

The financing of the Enterprise is the first important question. In this regard, ideas have ranged from compulsory contributions by states to state guaranteed indebtedness and other means of capital formation. Furthermore, while it is not difficult to secure financing for the first operation of the Enterprise, the question remains open as to how to finance the following operations in order to keep the system really parallel.

A second important question relates to the technological capability of the Enterprise, where again ideas have ranged from compulsory transfer of technology as a condition for the award of a contract, to the enactment of programs which would encourage transfer on a voluntary basis and which could eventually provide financial incentives. In any event, it is an inescapable fact that the Enterprise will need the necessary technology to operate.

Many other problems remain unsolved. The degree of information with which the applicant should propose the parallel sites to the Authority has proven to be an important factor. Developing countries have insisted that such sites should be previously explored by the applicant, while developed countries are only willing to prospect before the contract is actually awarded. Antimonopoly clauses, and

10. ICNT, Part XI, 35 (5), Art. 169 provides:

1. The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to subparagraph (i) of paragraph 2 of article 15 and in accordance with the general policies laid down by the Assembly. Activities conducted by the Enterprise shall be subject to the directives and control of the Council.

2. The Enterprise shall, within the framework of the international legal personality of the Authority, have such legal capacity and functions as provided for in the Statute set forth in annex III to the present Convention, and shall in all respects be governed by the provisions of this Part of the present Convention. Appointment of the members of the Governing Board shall be made in accordance with the provisions of the Statute set forth in annex III.

3. The Enterprise shall have its principal place of business in the seat of the Authority.

4. The Enterprise shall in accordance with paragraph 3 of article 173 and paragraph 10 of annex III, be provided with such funds as it may require to carry out its functions, and shall receive technology as provided in article 144, and other relevant provisions of the present Convention.

eventually a system of quotas, are yet to be discussed as another important issue, among many others.

The complexity of any such system requires a strong Authority with all necessary powers to regulate operations, control activities, and ensure compliance with the applicable rules. Important differences are also evident in this regard, particularly in terms of the discussion about the composition of the organs and their respective powers.

Whichever the final solution may be, one fundamental policy is already firmly established: the system of exploitation will not constitute a mining concession, and to a large extent will incorporate the modern view of mining contracts which developing countries have developed through their experience.

It is possible that any agreed system might be conceived as a provisional regime with a duration from twenty to twenty-five years, at the end of which the regime would be modified as dictated by evaluation of the experience. In one suggested alternative, the right of exploitation would revert to the Authority at the end of such period, following the precedent of some oil exploitation contracts.

4. The adverse effects upon landbased mining.

One of the most difficult issues under consideration is the resource policy of the Authority, with particular reference to the prevention of adverse economic effects for landbased producers of the minerals concerned. Since production controls are an essential element of this policy, which also requires some degree of planning, this approach has collided with the economic philosophy of industrialized nations.

For many years, industrialized nations have argued that no adverse economic effects would result from seabed mining. However, evidence to the contrary is alarmingly strong today. In a recent U.N. study it is shown that by the year 2000, 60.6 percent of the world nickel demand would be supplied by seabed mining, these percentages being fifteen percent for cobalt and 93.7 percent for manganese.¹¹

In the case of copper, seven percent of world demand could be supplied by seabed mining, but since developing countries supply

11. J. P. Levy, Importancia de los Recursos Minerales de los Fondos Marinos y Estado de la Tecnología de la Minería en Aguas Profundas, in *Economía de los Océanos* 123, Table 7 (U.N. Economic Commission for Latin America 1977).

thirty nine percent of world demand, the impact has to be measured with regard to the latter's share of the market, in which case seabed mining could represent eighteen percent. Because of this situation, the adverse effect on prices and other negative impacts, a recent United Nations Conference on Trade and Development (UNCTAD) study has estimated that exports income of developing copper producers would diminish by the year 2000 by about 2,400 million dollars.¹²

This explains why, since the beginning of negotiations, developing countries, in a most impressive demonstration of solidarity with landbased producers, have insisted on the inclusion of appropriate measures for the prevention of such adverse effects. Resolution 2749, several UNCTAD resolutions and declarations of all regional groups of developing countries, have reaffirmed the principle of prevention.

Three specific mechanisms of protection have been generally agreed upon so far, although many important details are still pending negotiation. The first such mechanism is the conclusion of long term commodity agreements on the minerals concerned which would regulate the whole of the international market for such minerals, ensuring stability of prices, adequate supplies, limits on production, and eventually regulatory stocks. The Authority would participate in such agreements on behalf of seabed production, although the extent of such participation is still a matter of controversy. UNCTAD would be the appropriate body for the negotiation of these agreements.

The second and most important mechanism is the limit on seabed production, which would be extant until the long term commodity agreements referred to above enter into force. Industrialized nations have strongly opposed this mechanism as a matter of principle. Since 1976, however, where agreement has not yet been reached, they have accepted the discussion of the particulars of such limit.

Some proposals suggested as a limit the whole projected cumulative growth segment of the world nickel market, which in fact meant that landbased production would have no share in the growth of the world market. The Group of 77¹³ has suggested as a limit a fifty percent of such growth, and other proposals have mentioned figures between zero and fifty percent.

12. B. MARIN-CURTOUD, *CONSECUENCIAS ECONOMICAS DE LA EXPORTACION DE LOS RECURSOS MINERALES DE LOS OCEANOS* 144.

13. The Group of 77 now consists of 114 countries including nearly all the states of Africa, Asia, and Latin America. They are primarily lesser-developed countries

Although the nickel standard also protects the situation of copper, it does not necessarily cover manganese, cobalt or other minerals which could be produced from the seabed. In this regard, the Group of 77 has suggested the establishment of separate limits for each mineral, in order to take care case by case of the different situations which might arise. In all cases, an Economic Planning Commission would intervene by carrying out studies and by recommending measures.

In spite of the fact that the appropriate limit of production is still being negotiated, and that many technical details for its calculation and operation are also being discussed, it is now clear that there will be a limit on ocean production and that this limit will have to protect effectively against adverse economic effects for land based producers.

The third mechanism being discussed is of a compensatory nature. It operates on the principle of indemnity of landbased producers who would actually suffer losses because of seabed production where preventive measures would not be effective. As was mentioned above, the solidarity of the Group of 77 has been the key element in the success of this policy. Most developing countries are present or potential producers of the minerals concerned, and therefore are actually or potentially menaced by the adverse effects of seabed mining. The minerals involved today may be nickel, copper, manganese, or cobalt, but a similar fate may await any other mineral that the seabed can produce.

5. Financial provisions: influence of the oil and mining experience.

The financial arrangement of contracts is the third major issue which has divided developed and developing countries. The fundamental problems underlying this matter are almost identical to the kind of problems which exist in the relations between a State and foreign investors in the mining sector.¹⁴

It is now firmly established as a basic principle that contractors will be required to share part of their profits with the seabed Authority. In this regard, an international taxation policy is being developed in this field. It would be desirable that financial terms of contracts be

which have been a vocal force in the General Assembly. The Group of 77 is a driving force behind the "common heritage of mankind" approach to the seabeds issue.

14. See D. SMITH & L. WELLS, *supra* note 5, particularly ch. 3, Financial Provisions. See also C. J. Lipton, *Fiscal Aspects of Negotiating Third World Mineral Development Agreements*. U.N.C.T.C., U.N. Doc. 8 (1977).

defined case by case through negotiations, since the experience of developing countries indicates that each multinational corporation has a different motive for investing and, therefore, its financial contribution might be higher or lower. Also, the debt-equity ratio is different in each case, as is the expected discounted cash flow, among other factors which justify different financial treatments.

However, industrialized countries have argued in favor of defining financial arrangements in the convention itself. This proposition would result in avoiding competition among applicants and would also restrict the power of negotiation of the Authority, which would be limited to the negotiation of joint-ventures, incentives for the transfer of technology, and other specific aspects.

In general, there is agreement about a profit sharing scheme in which the percentage of the Authority's participation would increase along with the profits, thus taking care of wind-fall profits situations.¹⁵ However, the specific figures have not yet been agreed upon. Furthermore, developing countries, in view of the experience gained in oil exploitation, have also required additional financial charges, such as:

(i) royalties, which are collected independently from profits and which assign a value to the resource *in situ*; the preferred modality would be a percentage of the value of processed metals in the market, and

(ii) site rentals and equivalent charges, in order to avoid speculation with site holdings.

Beyond the specific level of financial charges and their modalities, a number of other important aspects require detailed consideration:

(i) The Authority will have to strictly control accounting practices, in order to eliminate overvaluation and overpricing of given factors, such as technology, or underpricing of sales between subsidiaries.¹⁶

(ii) The case of socialist countries, where no market prices or profit concepts are used, will make a profit sharing scheme difficult.

15. On this kind of scheme, see S. Zorn, *Renegotiating Mining Agreements: the Case of Bougainville Copper*, U.N.C.T.C., U.N. Doc. 15 (1977).

16. *The Impact of Multinational Corporations on Development and on International Relations*, U.N.E.C., E/5500/Rev. 1 (St./ESA/6), Sales No.: E.74. II.A.5. May, 1974.

A posted price system, such as the one used in oil exploitation,¹⁷ has been suggested as a solution.

(iii) The most difficult problem relates to the stages that would be subject to any such scheme of profit-sharing. The process of exploitation is conceived by developing countries as an indivisible whole, including the processing of minerals and the sale of the resulting metals, and therefore, all profits obtained during the process are subject to share or taxation. Developed countries, on the other hand, have argued that only the stage of extraction is subject to this scheme, processing and following phases being subject to domestic taxation under national jurisdiction. In the latter view, it follows that the Authority would be deprived of sharing in the most significant profits, which are those produced at the end of the process.

The aggregate of financial charges should certainly be defined in such a way as not to discourage production, but neither should it be so generous as to deprive the Authority of its legitimate share, or as to provoke a situation of imbalance with regard to the financial conditions generally prevailing in land based mining, in which case investments would all go to seabed mining in prejudice of land production.

6. Conclusion.

An entirely new model of resource development is being defined at the Law of the Sea Conference as a first important step towards the New International Economic Order. Latin American and other nations have contributed their experience in the field which, together with safeguarding the rights of the owner of such resources, has allowed for a fair treatment of those investing their capitals and technology in the exploitation.

Notwithstanding the efforts to ensure a balanced and just system, some powerful corporate and political interests of certain industrialized countries are pursuing the enactment of unilateral legislations in order to undertake exploitation on their own without regard to international negotiations or agreed solutions. Any such step would constitute a serious violation of international law and would irreparably damage the progress of the Conference.

17. See generally H. CATTAN, *supra*, note 6.