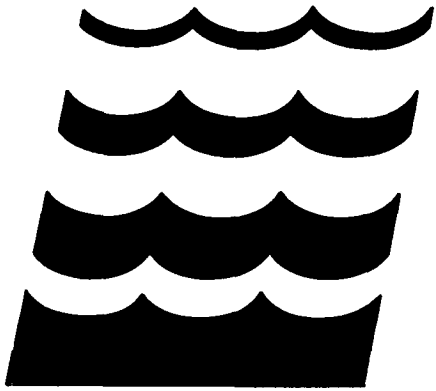
William R. Hawkins

REAFFIRMING FREEDOM OF THE SEAS



FREEDOM OF THE SEAS is one of the oldest principles of international law. It is the right to navigate through the global expanse of the oceans as one sees fit, carrying what cargo one wishes. It is also the right to extract resources from the seas by one's own efforts. Though not fully articulated until the publication of Hugo Grotius' *De Jure Belli ac Pacis* in 1625, it was a principle that had been evolving since ancient times wherever commerce flourished. It is a principle based soundly on property rights. Beyond a narrow strip of coastal waters (traditionally set by another Dutch jurist, Cornelius von Bynkershoek as three miles—the effective range of a 17th-century cannon) the only claim to ownership is the private ownership of vessel, cargo and equipment. No government claim of territoriality or sovereignty is considered legitimate.

This concept of freedom was ideally suited to the requirements of commerce and economic progress and was the sea-going equivalent of the liberal principles of free trade and free enterprise. These three freedoms provided the triad upon which European liberty and advancement was built. As Robert Gilpin has observed in this regard:[1]

> In contrast to the cities of Asia and other continents, European cities have tended to be commercial centers rather than administrative capitals of great states and empires. As a consequence, the commercial and trading cities of Renaissance Italy, the Hanseatic League, the Low Lands and Rhineland Germany enjoyed a degree of autonomy unknown to non-European cities. They became the strongholds of merchants and bankers and protected this rising class against predatory feudal aristocracies.

William R. Hawkins is Assistant Professor of Economics, Radford University, Radford, Virginia.

It was a principle that took root early in American history and became a basic tenet of United States foreign policy. Protection of the right of Americans to enjoy the free use of the oceans without molestation provided the reason for President Thomas Jefferson to send the first regular Navy patrols to the Mediterranean to combat piracy. It was the primary reason why the U.S. declared war on England in 1812 and on Germany in 1917.

Today, this principle of freedom is under attack in ways which are far more systematic than in the past when assaults were generally confined to piracy or periods of war. Today the very basis of international law is being challenged in ways that could permanently end all individual rights on the oceans.

Expanded Claims

The threat comes in two main forms. The first is the steady encroachment of national territorial claims. In 1958, only 18 states claimed waters off their coasts beyond the standard three-mile limit, but by 1968 this number had grown to 43 nations claiming 12 or more miles. By 1978, this number had grown further to 69, eleven of which claimed territorial waters of 200 miles. The U.S. has viewed this trend with alarm for it obviously restricts movement at sea and threatens the free passage of commerce through vital straits and narrow seas which may be entirely swallowed up as closed national preserves.

The United States has refused to recognize such inflated claims. It has protested seizure of American fishing boats off the coasts of Latin America and has preferred to pay ransom for the release of such ships than to permit American captains to buy licenses which would legitimize these new territorial claims. But the U.S. has not always used merely passive methods of protest. In August, 1981, U.S. Navy fighters shot down two Libyan jets over waters which Libya claims but which the U.S. does not recognize as anything other than open seas. As yet, most of the coastal states that have extended their claims lack the means to enforce them against determined opposition from a maritime power.

Of more serious import are attempts to establish an international agency to whom control of the presently open sealanes would be transferred. Unfortunately, the U.S. government has been a party to this effort.

At the root of this new and serious threat is a philosophical twisting of the traditional concept of the nonterritoriality of the oceans. Under this new approach, anything that is not claimed by a national government must fall under the control of a supranational governing body, for it is inconceivable to the minds of

reformers and bureaucrats that anything can fall completely out of the jurisdiction of some sort of government regulation.

United Nations Control

In 1965 the Commission to Study the Organization of Peace, a research affiliate of the United Nations Association (a lobbying group of "idealists" who work to extend the authority of the U.N.) recommended that the ownership of the oceans and their seabeds be vested in the U.N. as an alternative to the extension of territorial claims by states. With typical socialist logic, the Commission also concluded that the U.N. could more efficiently develop the resources of the oceans than could private enterprise.[2]

The following year, President Lyndon Johnson surprised both the U.S. and the world diplomatic community by describing the seas as the "legacy of all human beings," a phrase which would be modified by successive statements by Washington and U.N. officials to become "the common heritage of mankind"—the central term used to justify all negotiations on the subject since. Common heritage has come to imply the need for common ownership, a need to be met by some international body which will presume to speak for all mankind.

Proposals followed in the United Nations, with most of the Third World hopping on the bandwagon. Vesting control of the oceans in the U.N. offered the less developed nations the opportunity to counter what they considered to be an inequitable advantage possessed by the technologically advanced Western states in terms of access to the seas. However, the initial reaction of the Congress was negative to such an expansion of U.N. authority. The State Department, though it favored movement toward international regulation, attempted to side-step the issue so as not to provoke a nationalistic reaction which would halt all movement toward an agreement[3]

Opposition also came from the Commerce and Defense Departments. The former sought to protect the interests of the oil industry which wanted free access to drilling on the seabed, while the latter was concerned about possible restrictions on military uses of the oceans, particularly as missile-equipped nuclear submarines became a vital part of the nation's deterrent force.

Common Heritage of Mankind

Policy was thus blurred in the late 1960s, though trends were taking shape that would become ominous in the 1970s. On May 23, 1970, President Richard Nixon proposed that a treaty be adopted that would renounce all territorial claims to the resources of the oceans in favor of regarding these resources as "the

common heritage of mankind." The President called for the establishment of an "international regime" which would collect revenues from ocean operations for use by the developing countries. This suggested regime was not to operate on the one-nation, one-vote model of the General Assembly but was to reflect a balance of interests.[4] This statement of official policy opened a Pandora's box.

In 1973, the Law of the Sea Conference was opened under the auspices of the United Nations to draw up a treaty in the general form outlined by Nixon. Providing the muscle at the U.N. for the conference was the Group of 77, a bloc of Third World nations which actually numbers 114 members. This is the same bloc which, in 1974, pushed for the Declaration for the Establishment of a New International Economic Order. The Group of 77 has never hidden the fact that it sees the U.N. as a device for redistributing wealth and power from the Western capitalist nations to the Third World.

After eight years of negotiations, the rough form of the proposed treaty has become visible. Its centerpiece is the creation of a new supranational agency, the Seabed Authority which would be modeled on the U.N. General Assembly. It would thus operate on the principle of one nation, one vote and be guaranteed a permanent Third World majority hostile to the West. The Authority would have exclusive control over the issuance of licenses for the exploitation of the deep seabed beyond territorial waters. The Authority would also have the power to tax companies engaged in ocean development, the revenues collected to go to the support of the Authority and to projects for Third World economic development. The Authority would also have the power to fix prices, set limits on production and control the marketing of ocean resources. There would also be programs for the mandatory transfer of technology from multinational corporations operating at sea to the Third World.

A Seabed Authority

The result would be the creation of a vast, unprecedented power in the hands of an international government agency in which the U.S. and other industrial countries would have minimal influence. The Authority would be self-supporting from its taxing power and would thus be largely immune from the only leverage that the Western states now have over supranational organizations: control of the purse strings [5] (though initially the U.S. is to provide $250 million in interest-free loans and loan guarantees in order to establish the Authority). It would be the ultimate redistributive mechanism. A Third World majority would be enthroned in a position to tax and regulate the

corporate entities of the "haves" in the interests of the "have-nots."

Even proponents of the treaty, such as Richard A. Frank who served the Carter Administration as head of the National Oceanic and Atmospheric Administration, have conceded that "even if amended by the United States, the treaty would represent U.S. acquiescence in multilateral and fairly democratic decision-making on resources and abandonment—in the first serious encounter over the new international economic order—of U.S. control commensurate with its interests as a producer, consumer and donor. The treaty would place restrictions on a previously free market and require U.S. financing of a multilateral competitor."[6]

The multilateral competitor referred to is the Enterprise. The Enterprise would be a supranational mining corporation established by the Seabed Authority which would operate in competition with private corporations to develop the oceans. It would provide another source of income and control to the Seabed Authority. It is envisioned that the Authority will require that private companies share their mining technology with the Enterprise and also do most of the exploration work for it.

As bad as this seems, it was initially to have been worse. The Group of 77 originally wanted to freeze private enterprise out of the oceans entirely. In their proposal, the Enterprise would have been a monopoly with competition banned by treaty. It was not until 1976 that then Secretary of State Henry Kissinger persuaded the Group to compromise and allow both private companies and the Enterprise to operate side by side. Yet, the Seabed Authority could very easily rig the game so that private companies could not compete on equal or even profitable grounds thus creating a de facto Enterprise monopoly.

Unlimited Powers

Certainly the existence of the Enterprise will provide a constant temptation to the Seabed Authority to use its taxing and regulatory powers in such a discriminatory manner. For instance, despite a proposed fee of $100,000 for a license and another $1 million per year for the right of exploration, plus additional fees and profit-sharing schemes should commercial development begin, there is nothing in the treaty that requires the Seabed Authority to ever grant a single license. If licenses are granted, one can well imagine what political terms the Seabed Authority might insist upon in addition to monetary payments. Corporations might be required to halt trade with South Africa or Israel or some other nation out of favor with the Third World majority

or be required to take on joint-ventures with state enterprises of Third World nations.

The Seabed Authority would also be a ready-made cartel. It is assumed that the Seabed Authority would use its power to limit production and control prices so as to protect underdeveloped nations, which presently mine minerals for export, from competition from new mining operations in the oceans.

It is highly unlikely that in any of these situations the bureaucrats who would inhabit the Seabed Authority would take the side of the Western corporations. At the core of the elite which staffs the complex of international organizations is, according to Richard G. Darman, a "profound aversion to unilateralism within the community of individuals (not states) involved in multilateral negotiations." Darman was Vice-Chairman of the U.S. delegation to the Third Session of the Law of the Sea Conference. He found that:[7]

> It was particularly characteristic of the Law of the Sea Conference community peopled as it is predominantly by internationalist lawyer-codifiers. The internationalist tendency to favor collective over individual actions is combined with the codifier's tendency to see the world in neat, static terms. Above and beyond practical considerations, there is an aesthetic antipathy toward the disorder of non-conformity and a general distrust of the possible benignness of self-regulating, dynamic processes.

This tendency of international bureaucrats has been remarked upon by others, most notably by economist P. T. Bauer who concluded that[8]

> International agencies have consistently favored Third World governments who try to establish state-controlled economies and they have also often supplied to these governments personnel for running state export monopolies, state trading companies and state-run cooperatives. . . . The international organizations also systematically attempt to unite less-developed countries into a bloc in opposition to representatives of the market economy.

The Seabed Authority would be the ultimate expression of this tendency.

Problems of Security

It was intended that the Tenth Session of the Law of the Sea Conference would be able to reach formal agreement on a treaty by the end of 1981. However, the Reagan Administration, led by Secretary of State Alexander Haig on this issue, sent instructions to the U.S. delegation not to allow an agreement to be finalized that year. The rationale for this action was that the incoming Administration needed time to become familiar with the negotiations and to appoint its own team of delegates to the Conference. However, several factors would indicate that more than patronage was at work.

The Republican Platform adopted

at the 1980 convention stated that "Multilateral negotiations have thus far insufficiently focused attention on the United States' long-term security requirements" and specifically listed the Law of the Sea Conference as one of the problem areas which has "served to inhibit United States exploration of the seabed for its abundant natural resources." Furthermore it is known that Secretary Haig is concerned with the possibility of a future Resource War which would threaten the American economy. Access to new supplies of vital resources is thus an important factor in the Secretary's thinking.

Also the philosophical disposition of President Reagan on issues of international economics is important to note. At the recent Cancún conference, which brought together leaders from both advanced and underdeveloped nations in Mexico, the President made known his preference for private investment and trade and his opposition to any new international bureaucracies being created to regulate economic activity. Certainly something like the Seabed Authority would run counter to President Reagan's announced attitude.

There is a vast potential in the oceans. Attention has focused in the past on the drilling of oil and natural gas on the continental shelf. More recently attention has been drawn to the mining of manganese nodules in the deep seabeds beyond the shelf. It is believed that there may be two million square miles of shelf area where oil and gas might be found. Estimates of 500 billion barrels of oil and 1.5 quadrillion cubic feet of natural gas are not uncommon. Manganese nodules formed from manganese oxide precipitate contain about 30 percent manganese but also nickel (1.4%), copper (1.2%) and cobalt (0.25%). While these percentages may seem small, they become quite significant when the volume of nodules that are believed to exist is taken into account. Estimates run as high as 1,600 billion tons of nodules in the Pacific Ocean. Nodules also are known to exist in the Atlantic and Indian Oceans.[9]

Production Thwarted

The U.S. is dependent on imports for 98% of its manganese, 94% of its cobalt and 73% of its nickel. Manganese is an important industrial metal used in steel making. Manganese alloys are used in aircraft components and the manufacture of mining machinery, railroad track and heavy equipment of all kinds. Presently there is no satisfactory substitute for manganese. Nickel is also an important metal for steel alloys as is cobalt. Cobalt is often used in conjunction with chromium to produce heat-resistant alloys used in jet engines. Presently, Zaire has a near monopoly on the export of co-

balt. However, Soviet-armed guerrillas have been mounting raids to disrupt Zaire's production.

Even without the problems of the Seabed Authority and the Enterprise, the proposed sea treaty infringes on ocean development. The treaty recognizes a 12-mile limit for territorial waters for all coastal states. This has been considered acceptable to the United States as the best limitation on territorial expansion possible. However, the treaty recognizes an economic zone of 200 miles. In this zone, the coastal state will exercise sovereignty over all resources, living and non-living. Freedom of navigation through this zone is still allowed, but neither fishing nor mining will be allowed without the permission of the coastal state. While this would appear to give the United States many benefits due to its long coastlines, the advanced state of American technology is such that these benefits would be gained just as well under a system of complete ocean freedom. The effect of the treaty is to close off other areas or hold any investments in the continental shelf ransom to the capricious and heavy-handed politics of Third World coastal states.

The fundamental error in the American approach to these negotiations has been the belief that the only alternative to the expansion of territorial claims was the creation of an international claim administered by a supranational body. Yet, these are not really opposite alternatives because both are rooted in the concept that the oceans can be (and/or should be) government controlled.

Limits on Governments

If we return to the original concept of freedom of the sea as expounded by Grotius we can find the source of this problem. According to Grotius, governments could not exercise *dominium* (ownership) over property on land or sea. Governments could exercise *imperium* (sovereignty) over defined parts of the land and over narrow coastal waters. They could not exercise *imperium* over the oceans beyond. What a government cannot do in its own name, it cannot delegate to be done by an international agency. The Sea Conference is nothing more than a meeting of national governments and cannot claim rights collectively greater than they can claim separately. Grotius would no more have recognized the Seabed Authority's claim to regulate the oceans than he would have recognized a claim by Spain or England to do so.

This is the paradox. For the nations of the world to turn over to an international agency control of the oceans, they must first claim that control themselves as individual states. But once having done this, those states best able to make their

claims effective would have little or no reason to turn them over to the U.N., the Seabed Authority or anyone else. If territorial claims to the oceans are to be avoided, the only logical course is to return to the true meaning of freedom of the seas as understood in international law up to the present day.

Safeguarding Property

It is vital that a sound principle of law be articulated and enforced in regard to the seas. Commerce and fishing have always been important economic activities requiring the safeguarding of property afloat, but mining the material resources of the seabed makes such safeguards even more necessary. The amount of capital that will have to be invested to develop ocean mining sites is of such a magnitude that it is unlikely to attract very many entrepreneurs unless assurances are forthcoming that the mining property worked will be secure.

A maritime code recognized by the international community codifying property rights and giving legal protection to ocean mining companies so that they could proceed with confidence would be highly desirable. Unfortunately, it would be unlikely for such a code to emerge in the current environment. Certainly the proposed Law of the Sea Conference treaty does not fit this description.

Operations through corporations can yield the same effects as territorial claims in regard to the rights of property and law without violating the traditional freedom of the seas ban on the exercise of sovereignty. However, these concepts of private property rights which have a long tradition in Western law are alien in outlook to most Third World and socialist states. There is no prospect that the world community will come together in a philosophical agreement on this matter. That is why the world community is not really a community at all. There is an insufficient body of common beliefs and values to form a true community.

Therefore, if mining operations are to commence in the oceans, those doing the mining will have to be assured of their rights by the United States and other maritime nations. This could either be done on a unilateral basis with each nation providing protection for the operations of its own citizens or by a convention among the maritime states. It is, after all, the Western maritime nations whose citizens will be both the principal producers and consumers of ocean resources. Either alternative would be preferable to the sacrifice of the interests of the Western Industrial nations to a treaty and to a supranational organization dominated by states and values hostile to capitalism.

At various times during the Con-

ference, American diplomats have made veiled threats to do just this. In 1978, Elliot Richardson told Congress that "Seabed mining can and will go forward with or without a treaty. . . . We have the means at our disposal to protect our ocean interests. . . . And we will protect those interests if a comprehensive treaty eludes us."[10]

As Robert W. Tucker warned in his important book *The Inequality of Nations,* "Either the old order will be reaffirmed by those who for the time continue to hold predominant power or a new order will be established by those seeking to displace the established power holders."[11]

—FOOTNOTES—

[1]Robert Gilpin, "Economic Interdependence and National Security in Historical Perspective," *Economic Issues and National Security,* Klaus Knorr and Frank N. Trager, eds. (Lawrence: Regents Press of Kansas, 1979), p. 25.

[2]Edward Wenk, Jr., *The Politics of the Ocean* (Seattle: Univ. of Washington Press, 1972), p. 259.

[3]*Ibid.*, p. 267.

[4]*Marine Science Affairs* (Wash.: Government Printing Office, 1971), 5th Report, pp. 81–82.

[5]"While serving as a U.S. delegate to the UN (Senator Frank Church) prepared a report for the Senate Foreign Relations Committee, released February 20, 1967, suggesting that the UN be made financially independent through ownership of the ocean's mineral resources." Wenk, *Politics,* p. 259.

[6]Richard A. Frank, "Jumping Ship," *Foreign Policy* (#43, Summer 1981), p. 135.

[7]Richard G. Darman, "Law of the Sea: Rethinking U.S. Interests," *Foreign Affairs* (Jan. 1978), p. 381.

[8]P. T. Bauer, "Hostility to the Market in Less-Developed Countries," *The First World and the Third World,* Karl Brunner, ed. (New York: Univ. of Rochester Policy Center Publications, 1978), p. 177.

[9]George A. Doumani, *Ocean Wealth: Policy and Potential* (Rochelle Park: Hayden Book Co., 1973), Chapter 3.

[10]*Department of State Bulletin* (Wash: Government Printing Office, Feb. 1981), p. 57.

[11]Robert W. Tucker, *The Inequality of Nations* (New York: Basic Books, 1977), p. 96.

Why Not Try Freedom?

IDEAS ON LIBERTY

IN MOST spheres of human action, the state is already firmly established, with its vast array of rules and regulations, layers of bureaucracy, and well-established penalties for transgressors. With the seabed, however, the state is very late in catching on to what technology is making possible. . . .

The statists have had their chance: they have spread their coercive bureaucracies over every square mile of land on earth. The oceans represent man's second chance—perhaps his last—to solve the environmental problems that, unchecked, threaten his extinction. It is time—past time—that men of integrity stood up and said, "Enough!" Laissez-faire: hands off the sea.

ROBERT POOLE, JR., "The Wealth of the Oceans"

No Way to Run a Railroad

Stephen Salsbury's *No Way to Run a Railroad: The Untold Story of the Penn Central Crisis* (McGraw-Hill Book Company, 1221 Avenue of the Americas, New York, N.Y., 10020, 363 pp., $19.95) is a story within a story. The author defines his fascinating and tortuous book as a business biography of David Bevan, the chief financial officer of the Penn Central Railroad who struggled against a thousand odds to avert America's largest business failure. Most of the time Mr. Salsbury, who once taught at the University of Delaware and now teaches in Australia, manages the perspective of a close-up. You see Mr. Bevan, the common sense protagonist, as a legitimate tragic hero who might have saved the railroad if only he had had more understanding superiors.

The perspective doesn't hold when, at odd moments, Mr. Salsbury looks at the bigger picture. Sensible though he may have been, David Bevan's efforts to stave off the bankruptcy of the Penn Central merger were doomed by a mind-set that took hold in the United States before he was born. Nobody could have saved the Penn Central as long as our Statist philosophy of regulation prevailed. Mr. Salsbury casts the two chief officers of the merged railroads, Stuart Saunders of the Pennsy and Alfred Perlman of the New York Central, as obstructionist villains. But they were not villains, they were merely men who lacked the tools to reverse an historic situation. If they had listened to Bevan they might have failed with at least a show of honor. But they would still have been un-