

## The Public Order of Ocean Resources: A Critique of the Contemporary Law of the Sea by P. Sreenivasa Rao

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**The Public Order of Ocean Resources: A Critique of the Contemporary Law of the Sea**, by P. Sreenivasa Rao. Cambridge, Mass., MIT Press, 1975.

The Law of the Sea needs all the help it can get. The massive United Nations-sponsored effort to revise the law that governs 70 percent of our planet is fast becoming the victim of ideological stalemate, superficial journalism, inadequate attention at high levels of government, and the sheer fatigue that is bound to plague any effort combining 150 nations and 400 to 600 separate treaty articles. Add to these troubles the intense political pressures that surround particular issues in most countries, the inchoate notion of the "common heritage of mankind" that bubbles through the deliberations, and the new political alignments that the negotiations have generated, and you have a conception of the predicament of that immense enterprise known as the Third United Nations Conference on the Law of the Sea (UNCLOS III). You also have a better understanding of the task confronting any "critique of the contemporary law of the sea." Both

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erudition and imagination must be tempered by an informed grasp of the political context.

Dr. Rao's book went to press soon after the first substantive session of UNCLOS III at Caracas in 1974. As of this writing, the fourth such session (August-September 1976) concluded recently in New York after an especially disappointing showing. In contrast to the substantial progress of the intervening period — which produced a skeleton-like "Single Negotiating Text" — the latest New York session served mainly to illustrate the strength of the impediments to further progress.

Above all, the deep seabed negotiations in Committee I retain their ominous prominence and intractability — despite the relatively minor significance of deepsea minerals when compared with the larger range of ocean uses, and despite a series of major concessions by the United States without real reciprocity (concessions that have attracted considerable opposition in the U.S. Senate and private industry, sometimes unfortunately extending to the Conference in toto). Somehow, the notion that the seabeds should belong to mankind as a whole has captured the imagination of the developing world — and many in the developed — to such an extent that anything short of total control by the former is regarded as a "sell-out" of the "common heritage." What began as an admirable sentiment in search of political expression has become a questionable slogan in need of political compromise.

The two years of negotiations might be taken as confirming Senator Lee Metcalf's early justification for unilateral U.S. legislation (which Rao roundly condemns) that "some of the more militant nations . . . would deny U.S. industry effective access to the minerals of the deep seabed."<sup>1</sup> The possibility that more moderate members of the "Group of 77" might seize the initiative from these "militants" at the recent New York session apparently did not materialize. At the same time, U.S. emphasis on cultivating the latter group to the exclusion of others — including our interested Allies — may not have helped matters. Eventually, it may require negotiations at the highest international levels to resolve this dispute — that is, if interim U.S. legislation does not kill all prospects of a multilateral solution.

Rao also could not foresee the importance of the bloc known as "landlocked and geographically disadvantaged states" (Land-

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1. Rao, pp. 91-92.

locked — GDS).<sup>2</sup> With an effective voting third of the participating countries, the GDS group may ultimately exercise a veto on treaty outcomes. That they also represent one of the strangest coalitions in the history of international negotiations greatly complicates the problem of satisfying each of them that a comprehensive oceans treaty is in their interest. However, this is the one area in which some progress was made at the most recent session (on matters of shared access in the economic zones of adjacent states).

Finally, the strength of the pressure for coastal state extensions of jurisdiction was probably not foreseeable even two years earlier. Whereas the idea of a 200-mile economic zone with 12-mile territorial seas was only slowly conceded by many countries, including our own, today the United States must fight hard to retain the status as "high seas" of the waters between 12 and 200 nautical miles. Likewise, the idea of international jurisdiction over continental shelf areas beyond 200 miles was the casualty of vast coastal country's claims out to the limits of the continental margins, with certain key countries advocating the most expansive possible definitions of that limit.

It is hardly a fatal weakness of Dr. Rao's study that he did not entirely foresee the future; in fact, he mentions each of these issues and his judgment is generally reliable. But the political history of the last two years of UNCLOS III does highlight the problem that confronts all analyses of contemporary law of the sea: that of weighing the issues against each other and establishing certain criteria of importance for distinguishing the most critical from the remainder. It is true, of course, that priorities will be different according to where one sits; but so long as such complex negotiations are depicted by analysts as an undifferentiated whole, the necessary compromises will not emerge and the lesser interests will not give way to the greater. Dr. Rao is not unmindful of this need for proportion, but in purporting to be comprehensive in viewpoint, while limiting his substantive coverage in execution, the result is not the balanced, integrated portrayal of the stakes in oceans law that we need.

Dr. Rao's organization is a bit confusing. He delimits for himself "the problems relating to marine mineral resource exploitation," then repeatedly but inadequately departs from that limitation and eventually concludes by tacking on an otherwise

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2. See Rao, pp. 3, 70-73.

very thoughtful chapter on "Security and Disarmament in the Sea." That chapter, in turn, has an excellent discussion of the problem of "innocent passage" for military vessels, but elsewhere we find little reference to the problems of straits passage or pollution controls for non-military ships, even though the transportation of ocean minerals, especially oil and gas from the continental shelf, is one of the major problems "relating to marine mineral resource exploitation." Also lacking in this context is a discussion of the strategic (security) significance of access to such mineral resources — a significance hardly lost on the developed countries. Finally, there is no treatment of another major issue, the impact of marine mineral production on land-based producers, which has proved especially serious in recent negotiations. In short, Dr. Rao's framework has not satisfactorily mapped out the range of issues he needs to address.

Such omissions are hardly unique to this study. In many respects, Dr. Rao is better in setting the stage than most other recent commentators on the law of the sea, particularly if his lengthy footnotes are consulted carefully. The chapter on "Competing Uses of the Sea" is a good example of the holistic perspective to which he aspires. It is also much too easy for a reviewer merely to criticize gaps in someone else's coverage. For two reasons, however, I respectfully urge Dr. Rao to give us a later and fuller study of the contemporary law of the sea.

The first reason is a methodological one. Dr. Rao opens the book with explicit mention of his debts to the "policy-oriented approach" of Myres S. McDougal and Harold D. Lasswell at the Yale Law School. Indeed, this reviewer first heard him present his views on deep seabed resources in a McDougal-Lasswell seminar of 1970, when they formed part of the dissertation on which this book is based. Many readers will recognize in Dr. Rao's organization of the issues the general framework of McDougal and Burke's *The Public Order of the Oceans* (1962).<sup>3</sup> To some extent Rao's book acts as a kind of supplement to the McDougal-Burke study, which gave relatively little attention to the deep seabed mineral issue. However, comparison with that work will also show that it is difficult to take McDougal halfway on matters of organization. One strives either to be truly comprehensive in discussing the context and interrelationship of the issues, or to

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delimit the boundaries of the study carefully and stick to them. Barring those alternatives, the policy-oriented framework had better be dispensed with. Otherwise, it conveys an aura of thoroughness without the requisite performance.

The second reason that a fuller study is needed relates to the contemporary nature of the law of the sea itself. In part because of UNCLOS III, which has tied the entire package of issues into a political bundle, and in part because of the inherent nature of the oceans regime, these issues are in fact virtually inextricable for the time being. The Law of the Sea is now a problem of international politics. Compromises on one set of issues are necessarily tied to bargains on another set in the interests of achieving consensus on the whole. Separate consideration and resolution of each issue is simply not the contemporary strategy.<sup>4</sup> If the effort at a comprehensive agreement should fail, many of these understandings would undoubtedly fall apart. Even then, the interrelation of the various issues would have to be reconsidered in a comprehensive and balanced fashion by each country and by regional groupings. For that reason, policy-oriented discussions of the law of the sea should deal with the issues as they have evolved in a comprehensive context. It is only in such a context that political proportion can be maintained and effective trade-offs negotiated. Leaving out important issues distorts the larger picture.

We are currently entering a period in which large multilateral bargains will repeatedly have to be struck. The UNCLOS III approach admittedly may not work. But the alternative is probably greatly increased conflict, waste, and pollution in the oceans and a general loss of control over human affairs on some two-thirds of the planet.

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4. Rao, p. 203.

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