LAW OF THE SEA TREATY - CURRENT STATUS

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You might wonder why an article in the IPO Newsletter deals with the Law of the Sea Treaty. However, there are some very disturbing clauses in the proposed treaty relating to technology transfer.

A two month negotiating session has just been completed at the United Nations in New York, which was supposed to result in a final adoption of the treaty. On April 30, 1982, 130 nations voted in favor of adopting this treaty, 4 voted against and 17 nations abstained. The four against were the United States, Turkey, Venezuela, and Israel. The seventeen who abstained included a number of European Economic Community countries, and the Soviet bloc.

Thus, a treaty to which the United States is not a party has been negotiated. It includes some very onerous technology transfer clauses. This in itself is bad enough, but there is considerable concern that similar technology transfer clauses will be attempted to be used in future United Nations negotiations.

I am not going to discuss the treaty in general except to say that it establishes an "Authority" which will administer all activity on, in and under the ocean. Under this Authority an "Enterprise" is established which will actually operate commercially on, in and under the ocean.

Background

United Nations first held conferences relating to the Law of the Sea in Geneva in 1958 and 1960. On December 17, 1970, the United Nations General Assembly declared that "the area of the sea-bed and ocean floor and the sub-soil thereof, beyond the limits of national jurisdiction, as well as its resources, is the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States".[1]

Negotiations began in 1974, and it was contemplated that final negotiations would take place in 1981. The latest draft[2] of the treaty is 180 pages long, most of which I will not touch upon in this paper.

When the Reagan Administration took over early in 1981, there was considerable unhappiness in the United States with the terms of the treaty which had been drafted up to that time. Part of the unhappiness was due to the transfer of technology provisions, of which no one in the patent, licensing and technology transfer community in the United States was aware, or had been consulted about, during the negotiations. Late in 1980, Alan Swabey, a Canadian member of LES USA/Canada, alerted some of us in the U.S. to these problems. As a result, IPO, the U.S. Chapter of AIPPI, the American Patent Law Association, LES USA/Canada, PIPA, the Patent, Trademark and Copyright Section of the American Bar Association and others reviewed the treaty and made their opinions known to various Government circles and elsewhere in

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[1] Resolution 2749 (XXV).

[2] "Third Conference on the Law of the Sea", United Nations, A/CONF. 62/WP. 10/Rev. 3, 27 August 1980. One free copy can bee obtained by writing the United Nations in New York or by telephoning (212) 754-4475 (Public Inquiries) in New York.

speeches, articles, etc.[3]

As a result of these concerns, the Reagan Administration, in an unprecedented move, replaced the U.S. negotiating team and informed the United Nations that the United States would not complete negotiations on the treaty until it had completely reviewed the background of the proposed treaty and the entire situation relating to the Law of the Sea.

Early this year, the Administration announced that it would participate in negotiations of the treaty to see if a number of provisions could be changed so that the United States could support it. In addition to a number of problems with the Law of the Sea Treaty, President Reagan stated that one of the goals of the United States was to achieve a treaty that "will be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology..."

Shortly before the negotiations started at the United Nations in March, George Whitney, Past President of the American Patent Law Association, and I were selected to be advisers to the delegation with respect to the technology transfer provisions.

The treaty provides that in order to operate on, in or under the ocean, a contract must be obtained from the Authority. The treaty provides, in Annex III, Article 5, that the contract shall contain certain clauses relating to

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[3a] "International Technology Transfer: United Nations Code of Conduct and Law of the Sea Treaty," Homer O. Blair, John Marshall Law School 25th Intellectual Property Law Seminar, February 1981, included in Intellectual Property Review 1981, Clark Boardman Company, New York, pp. 81-112.

[3b] Statement of George W. Whitney, President, American Patent Law Association before the Committee on Foreign Relations, United States Senate, March 5, 1981 on Law of the Sea Treaty negotiations.

technology transfer. The first of these provides that the operator under the contract must agree "to make available to the Enterprise, if and when the Authority shall so request and on fair and reasonable commercial terms and conditions, the technology which he uses in carrying out activities in the Area under the contract in which he is legally entitled to transfer."

The contractor must also "obtain a written assurance from the owner of any technology not covered under subparagraph (a) that the operator uses in carrying out activities in the area under the contract and which is not generally available on the open market that the owner will, if and when the Authority so requests, make available to the Enterprise...that technology under license or other appropriate arrrangements and on fair and reasonable commercial terms and conditions. If such assurance is not obtained, the technology in question will not be used by the operator in carrying out activities in the area."

There are a number of other technology transfer provisions. As you can see from the two items mentioned above, the treaty provides for a mandatory transfer of technology to the Enterprise which, in effect, will be a competitor of the contractor. This was considered unacceptable by the United States.

During the last two months of the negotiations, there were a number of modifications proposed in the technology transfer provisions. One proposal brought forth by a Group of 11 comparatively small developed countries provided that a contractor would not be required to license technology to the Enterprise if he did not wish to do so, and if he had not already licensed someone else. However, if he had licensed someone else he would have to make the technology available to the Enterprise under a most favored licensee clause.

While the United States and some of the other countries felt this proposal, with a few modifications, might be something that could be lived with, if necessary, there were enough other problems with the treaty that, on balance, the United States voted against the treaty.

What will happen now is the subject of considerable speculation. Possibly the United States might decide to ignore the treaty and operate under the sea-bed anyway. Another possibility is to negotiate a number of bilateral treaties, or a multilateral treaty, with a number of other developed countries to establish a Law of the Sea.

However, some have said that, if the U.S. should do so, suit might be filed in the World Court challenging the legality of such a move toward a separate Law of the Sea pact. What the basis for such suit would be or whether such a suit would be successful if filed can only be the subject of pure speculation at this time.

In any event, at present, the United States is not a party to the Law of the Sea Treaty. While it is possible that there may be informal discussions with other countries or groups of countries about possibly revising the present treaty, I expect most will wait for the dust to settle to see what happens next.

There will be a number of meetings of drafting committees over the next several months to correlate translations, tighten up certain language of a non-substantial nature, etc.

A three-day planning session will be held late this year to approve the efforts of the drafting committee usually a routine matter.

Finally the treaty will be officially signed in Caracas, Venezuela in December 1982 or January 1983.

Whatever happens, there is still significant concern that similar mandatory technology transfer clauses may be attempted to be utilized in the next negotiations on other subjects which take place within the United Nations, particularly if the United Nations should attempt to establish other Enterprises in other parts of the world or to operate in other technological areas.