Chapter 5

Attempts Undertaken to Solve the Problems

I. Past Efforts.

The problems of the seas now seem very urgent. They deserve higher priority and they need some effective solutions and means to meet and grip the problems. The Geneva Convention of 1958 which sought to establish guidelines on the exploitation of the continental shelf, are already under pressure as ambitions for wider exploitation mount, and as the developed nations, especially the coastal states, look to the sea to satisfy their wants. As to the concept of territorial waters, the "expansive" school, comprised of nations which would have a limit of 12 miles or further, seems to be making head-way. But a 12-mile limit all around the globe would reduce the "high seas" by some 3 million square miles. Beyond territorial waters and the shelf, a great international debate is looming on the issue of the regime to govern exploitation of the resources of the ocean bed. And since the world community should not tolerate a race among nations to seize the wealth of the deep ocean bed, it is asserted that there should be some attempts to tackle the problems.

In this matter, there were at least two passing endeavors proposing to meet the problems. First came the Pardo proposal in 1960 with stirrings of interest by lesser developed countries

suddenly switched to broader political questions on the potential of marine resources for accelerating their economic growth. The small island nation of Malta has focussed new attention of all member states of the United Nations on the international control and regulation of ocean bottom resources by a specific proposal: that by treaty the seabed... beyond national jurisdiction, shall be reserved for peaceful purposes in perpetuity; that the economic benefits from the exploitation of the seabed beyond present national juridiction shall be used to promote the development of poorer countries; and that the seabed beyond the limits of present national jurisdiction is not subject to appropriation in any manner whatsoever. Then followed the Nixon's announcement in 1970 regarding United States ocean policy. (The two proposals are discussed in detail in Chapter 3). Proposals were tabled both to study the questions of benefits and to buy time to rationalize the associated legal regime for the seabed.

These proposals triggered the General Assembly of the United Nations to begin considering the general question of juridiction over the deep ocean seabed and undertook and examination of the question. At the conclusion of debate on December 1967, the General Assembly unanimously adopted Resolution 2340, establishing an Ad Hoc Committee of 35 states to prepare a study on various aspects of the seabed beyond national jurisdiction for consideration by the Assembly. The study would examine (i) activities of the UN and its specialized agencies related to the

seabed; (ii) relevant international agreements; (iii) scientific, technical, economic, legal, and other aspects of the question; and (iv) suggestions regarding practical ways of promoting international cooperation in the exploration, conservation, and use of the seabed and its resources.

During 1968 the General Assembly reviewed the study and after extensive debate in the Political Committee of the General Assembly adopted 4 resolutions, three cosponsored by the United States. The 4 propositions were packaged as Resolution 2467 which resolved to:

1. Replace the ad hoc arrangement with a 42-member standing Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, to expand the studies carried out earlier by the Ad Hoc Committee;

2. Urge measures to prevent pollution of the oceans;

3. Support the US. proposal for an International Decade of Ocean Exploration within the framework of a comprehensive long-term program of scientific investigation and call on the Intergovernmental Oceanographic Commission (IOC) to play a leading role in coordinating the program; and

4. Request the Secretary General to study the question of establishing international machinery to promote exploration and exploitation of seabed resources and their use.[1]

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[1]Wenk Jr., op cit., p. 238.

Here was the primary, albeit untried, political theatre to consider the International Decade of Ocean Exploration (IDOE) which was generated in the No. 3 of the Resolution as another effort apart from Pardo and Nixon's proposals to solve the problem proposed by President Johnson of the United States. President Johnson was aware that as other nations wakened to an interest in the oceans, the same conflicts and rivalries that marked the attack on land frontiers would certainly follow. To stave off such a collision, President Johnson signaled his position on July 13, 1966, in a speech commissioning the Oceanographer, when he said: "Truly great accomplishments in oceanography will require the cooperation of all the maritime nations of the world... I (am)... calling for such cooperation, requesting it, and urging it... The sea, in the words of Longfellow, 'divides and yet unites mankind'"[2] And in 1968, it was to be a proposal by President Johnson for an "International Decade of Ocean Exploration."

In 1969, the United States formally announced its initial plans for participation in the International Decade of Ocean Exploration, culminating 2 years of intensive planning in national and international forums; and the international community moved ahead in outlining and shaping the multinational framework for planning and coordination.

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[2] Ibid., p. 123.

The US. had proposed the IDOE in March 1968 as a program of intensified international collaboration to plan, develop, and carry out research to increase understanding of the ocean and its mineral and living resources. Later in the year the United Nations General Assembly welcomed the proposal as an important element of a "United Nations Long-term and Expanded Program of Oceanic Exploration and Research."

The Decade concept anticipates sustained international planning and coordination to identify the most promising geographic areas and lines of scientific and engineering inquiry, set priorities, and agree on the sharing and distribution of effort. It is oriented toward learning more about the ocean environment, and places new emphasis on standardized data collection and dissemination techniques, expanded involvement of a large number of nations, and stronger coordination among the many international bodies concerned with the sea. The Decade was thus envisioned as a period of intensified collaborative planning among nations and the expansion of exploration capabilities by individual nations, followed by execution of systematic and integrated, national and international, programs of oceanic research and resource exploration.

On October 19 the Vice President announced the initial US. Decade plans as one of the areas of the President's five-point marine science program, stating that the US. would propose international emphasis on goals to -

(1) Preserve the ocean environment by accelerating scientific observation of the natural state of the ocean and its interactions with the coastal margin -- to provide a basis for (a) assessing and predicting man-induced and natural modifications of the character of the oceans; (b) identifying damaging or irreversible effects of waste disposal at sea; and (c) comprehending the interaction of various levels of marine life to permit steps to prevent depletion of extinction of valuable species as a result of man's activities;

(2) Improve environmental forecasting to help reduce hazards to life and property and permit more efficient use of marine resources -- by improving physical and mathematical models of the ocean and atmosphere which will provide the basis for increased accuracy, timeliness, and geographic precision of environmental forecasts;

(3) Expand seabed assessment activities to permit better management -- domestically and internationally -- of marine mineral exploration and exploitation by acquiring needed knowledge of seabed topography, structure, physical and dynamic properties, and resource potential, and to assist industry in planning more detailed investigation;

(4) Develop an ocean monitoring system to facilitate prediction of oceanographic and atmospheric conditions -- through design and deployment of oceanographic data buoys and other remote sensing platforms;

(5) Improve worldwide data exchange through modernizing and standardizing national and international marine data collection, processing, and distribution; and

(6) Accelerate Decade planning to increase opportunities for international sharing of responsibilities and costs for ocean exploration, and to assure better use of limited exploration capabilities.[3]

These US. proposals are compatible with the outline of the program developed by the Intergovernmental Oceanographic Commission. The National Science Foundation has been assigned initial, lead agency responsibility for the planning and coordination of the US. contribution to the Decade. Federal funding of $ 15 million is being requested for Decade programs in the fiscal year 1971 budget. In addition, many ongoing federally funded ocean exploration and research activities are related to the Decade. The extent and nature of future US. contributions will depend on the participation of other nations in the Decade program.

The international commitment to an International Decade of Ocean Exploration was realized in UN. General Assembly Resolution 2467 D (XXIII), proposed by the United States and adopted on December 21, 1968. General Assembly Resolution 2414

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[3]Marine Science Affair - Selecting Priority Programs, op. cit., pp. 195-196.

(XXIII) also endorsed the concept of a long-term and expanded program of oceanographic research including the Decade. The intergovernmental planning phase of the Expanded Program and Decade began in June 1969 when a 17-nation Working Group of the IOC prepared a draft comprehensive outline of the scope of the UN's long-term program of oceanic research, in accordance with the UN resolution identifying the IOC as a focal point for planning. The Working Group proposed that the Decade would be the acceleration phase of the long-term program.

Concerning the benefits of the Decade, the knowledge which will evolve during the Decade will assist nations individually to plan ocean related investment and collectively to develop arrangements for managing ocean resources, to establish baselines as a step toward preserving the quality of the oceanic environment, and to improve forecasting of ocean and weather conditions.

Most important, the Decade was not to be merely a continuation of past efforts, but had several unique efforts. The proposal anticipated a sustained, long-term exploration of the sea, planned and coordinated on a global basis, in contrast to the sporadic efforts of the past, which were developed project by project and comprised a loose collection of national efforts. It envisaged more deliberate coordination of the many interested international organizations, such as the IMCO, FAO, and the WMO to gain the benefit of specialized competences and capabilities.

And it looked toward more systematic collection of data and prompt availability, with the adoption of internationally agreed-upon standards for data collection and compability of processing techniques. Finally, participation in ocean exploration by a large number of countries would be encouraged, especially those having maritime geography but which might have previously lacked interest, trained manpower, or capabilities to explore the oceans, even in the areas close to their own shores. In this way, developing nations could share the capabilities of the more developed nations, acquire contemporary technology for their own use, and increase opportunities to identify contiguous marine resources.

However, the Decade does not contemplate exploration of every square mile of the world's ocean nor investigation of every conceivable ocean phenomenon. But it emphasizes that, collectively, the nations of the world can identify the most promising geographical areas and lines of scientific inquiry, and by careful selection focus emphasis on inquiries of greatest promise. The implementation of this major international undertaking in 1970 marks a significant step forward an international cooperative use of the world ocean.

II. Necessity for the Modification of International Law of the Sea.

There is a recommendation that the future national effort be guided by two means : a new law, or a new independent agency

concerned with ocean engineering and resource development, the protection and improvement of the marine environment, and the promotion of new technologies and activities. It is hope that they would promote a more effective "clustering" of operations and might serve to help correct an imbalance, which seems to worry some people, between the oceanographic activities and research and all other efforts.

Proposals for a new law have been cropping up with increasing frequency, differing widely in basic philosophy, in scope, and in the core and detail with which they have been prepared. There is widespread discontent with the existing legal regime in the seas. It is the belief of some countries that their present or anticipated interests are not adequately protected by the present regime. The law of the sea is, from this perspective, a flow of particular decisions, projected by the larger constitutive processes of the world arena, designed to establish an ordered, economic, effective way for the peoples of the world most fully to exploit the oceans of the world in their common interest. International law as a whole is composed of the two kinds of decisions, both these that set up the process of authoritative decision and the particular decisions emerging from the process and establishing a public order. The law of the sea, as important as it is, is merely a part of these latter or public order decisions.

As Morgenthau once pointed out that "law in general, and especially international law, is primarily a static social force"[4], and that the static character of international law makes it the natural ideological ally of the "status quo", is a more or less accurate interpretation of the traditional international law of coexistence.

There can be no doubt that international law was, and still is shockingly defective. To admit its defects is not to deny its value, but merely to say that international law, like all other law, is the product of evolution. Development of law and government and technology must necessarily proceed at a more rapid pace in the future.

International law has been defective in many ways. It has had neither judge, nor legislator, nor policeman. It covered only the more unimportant matters, and did not attempt to deal with questions of most vital importance to humanity. It has been too much interested in the so-called fundamental rights of that certificial personification, the metaphysical state. Its rules have not always been precisely stated, nor have been universely accepted. Law, as was said earlier, is a product of social consciousness. It does not just grow itself; it is not to be chided if it fails. Its failure is the failure of those who fail to

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[4]Quoted from Friedmann, The Changing Structure of International Law, op. cit., p. 58.

give in the support which would make it strong and effective.

It may be said now, without undue optimism, that such defects are recognized, and that successful efforts are being made to remedy them. Machinery for legislation is being rapidly developed through conferences, multilateral treaties, and even official codification. Ordinary human beings are becoming interested, and are supporting international law with more vigor in order to solve problems which they now know require international solution.

The present view held by various countries is that there is a need for through revision of the question of the legal regime of the sea, and that the present Conventions be amended and supplemented by new Conventions. The view that centuries of legal development formalized in the Geneva Conventions cannot be disregarded is countered by the argument that a "large number of countries were unable to participate fully in that development and should not be compelled to live with the results."[5] This is, in particular, the view held by the African states as can be seen in the preamble to their Declaration on Issues of the Law of the Sea in 1974.

Besides, there may be situations in which the idealized diagram of the high seas, a narrow territorial belt, and the

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[5]Singh, op. cit., p. 112.

internal waters, might justifiably be modified. For instance, the zones of a particular country's sovereignty might be enlarged due to peculiar geographic or historical conditions to fisheries control beyond territorial limits might be extended. But such situations should be the rare exception, rather than the rule, and the burden of proof of the need for such rights should rest with the nation which seeks them and not with the world community. We must avoid such rigid adherence to the "free seas" concept that in the light of changing conditions the law of the sea, as it now stands, becomes hopelessly outmoded. Every year sees the creation of new independent states, new technological advances in the use of the sea, new additions to the world's population, and new demands by segments of that population for a better way of life. As a political reality the law of the sea cannot remain static; but we must also avoid the haphazard partitioning of the oceans into a mosaic of national zones of control.

As Quincy Wright has pointed out in his The Study of International Relations that, international law as an intellectual discipline has reached the crisis stage.[6] The concepts of traditionalists are obsolete, and replacements worked out by modernists may be "premature". Efforts have been made recent-

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[6]Alexander (ed.), op. cit., p. 47.

to modernize and change international law to fit contemporary circumstances. But the substance of law can itself be subject to conflict, although many lawyers think of it as the chief means of settling conflict.

Negotiations at the two UN Law of the Sea Conferences, 1958 and 1960 are a case in point. At Geneva, traditionalists and modernists alike worked assidously to mold the conference results -- in the form of conventions -- to their liking. But the results were conventions fully satisfactory to no one. Failing to settle the key problem -- breadth of the territorial sea and contiguous zone -- the conferences left a critical gap in the law of the sea. But more important to those who wanted to link the new concepts of the law to the old was the attack on traditional concepts by the "dissatisfied" states at the conferences. This attack, in the opinion of many Western delegates who were themselves eminent traditional international lawyers or trained by them, if continued in the future, will destroy the very foundations of the law.

If international law is to be salvaged, not only might it be necessary to restructure the law but tailor it to the particular economic, and social context in which it might be expected to operate. The past and the present should contain some useful clues on what might be appropriate for the future.

With this result, there is some talk of a new comprehensive law of the sea, and outer space is sometimes invol d

as a model of a law of "hydrospace" or such a new analogy like so-called "Wet NASA."[7] In fact, outer space is not a precedent in point and deems not afford an apt analogy for a law of the deep sea. Outer space is a new environment, separate and isolable, without vested national interests or other national commitments. Rather, as Senator Claiborne Pell of the US. has pointed out, "in some ways the oceans may deserve higher priority because while we are not about to farm the moon, we can and must farm the sea."[8] The nations presently interested in space are few and its used are hypothetical and uncertain. By contrast, the sea has a long history of various uses by a hundred nations, and used and nations increase steadily. A new law of the sea would challenge old accepted ways and modify old accepted laws.

It is time to eliminate such old law of nuisances and it is time to consider a law of nuisances that obligates an individual state not to create nuisances and that grants it some authority in their eradication. There is a need for systematic preliminary study in this regard. Such a nuisance law could set up criteria of reasonable care and every type of activities might, with proper definition, be reconsidered under nuisance law.

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[7]Gullion (ed.), op. cit., p. 9.

[8]Ibid., p. 10.

Many lawyers believe that a new law must be built up gradually with court cases that establish precedents. They feel that such written law as the Geneva Conventions of 1958 is too rigid and artificial for nations that struggle over world power. But law makers must also not underestimate the rapid growth of technology. Courts move slowly. The old system of precedents is too slow to avoid major conflicts over ocean use or a dangerous waste of resources. Laws agreed upon by national representatives and backed by the weight of world opinion can establish guidelines before events take place. International agreements about Antarctica and peaceful use of outer space are examples of useful legal documents that guide world conduct.

It may be time now to deal anew with segments of the law of the sea where the need for new law is clear and the problems visible. Nations may be reluctant to jeopardize the general principle of freedom or to tamper with particular uses such as the military uses, but may readily see the desirability of some new principle of new regulation as regards, say, mining of the sea's resources. At the same time, it is important to consider the consequences that law for some uses may have on others. Thus, expectation for a new law is one thing but the actual reality is another.

III. Development of International Machinery

The sea had long been an arena for international cooperation, but over the centuries, primarily in the development of public and admiralty law to protect property rights and preserve order. There were innumerable conventions, treaties, bilateral and multilateral agreements. International machinery had also evolved quietly and unsystematically, function by function, and geographic sector by sector. The development of international machinery to meet the problems of sea law takes many forms, ranging from simple bilateral agreements to the creation of supranational institutions.

Types of International Machinery

In principle, a nation can choose among four paths in the development of international authority over the oceans. It can follow a path of resistance to all but the barest minimum of international rules. That is the easy but selfish policy which most favors the advanced nations in the best position to exploit ocean resources. Or it can elect a second path leading through a series of bilateral agreements which might keep the complications of international organization to a minimum, but would also tend to favor the wealthier nations. A third path is toward vesting a measure of control in some kind of international organization. The fourth and perhaps most venturesome path would be toward actual ownership of land or resources by

an international organization. The latter two choices, of course, favor the development of independent power in international organizations, and by implication some attrition or limitation of national power and freedom of action.

Yet, the four choices are not mutually exclusive. Clearly a nation at any given time may be exploring all four paths simultaneously. How a nation decides and law it defines its long-term objectives with regard to the oceans may well shape in basic ways its whole attitude toward the development of the international community.

Apart from this, the Secretary-General at the request of the UN General Assembly also published a "Study on International Machinery" on May 26, 1970. It reflects the rather diverse views of the member states. It distinguishes four basic types of international oceanbed control:

1. International machinery for exchange of information and preparation of studies.

2. International machinery with intermediate powers.

3. International machinery for registration and licensing.

4. International machinery having comprehensive powers.

The first type of organization would limit an international agency strictly to dissemination of information and the preparation of studies. While one should not underestimate the usefulness of this type of international agency of which the

Intergovernmental Oceanographic Commission (IOC) and the Intergovernmental Maritime Consultative Organization (IMCO) are examples, an organization with these functions alone represents a virtual abandoning of any effective international control and an almost total acceptance of a national grab race for control of the oceanbed.

The second type would have slightly more extended functions, such as the preparation of solutions, the encouragement of scientific research, and the preparation of conventions and international regulations. "The machinery would not, in principle, itself have direct powers but would provide a means whereby states could discuss the issues and adopt certain common solutions, as well as receiving assistance on some of the technical questions involved."[9]

The third proposal would confer the functions of registration and licensing upon an international authority, with separate legal status.

The fourth type of international machinery occupies much the longest part of the report. It would have two types of function which should be more distinguished : licensing and direct operational involvement. This kind of comprehensive regulatory type of international authority poses certain problems.

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[9]Friedmann, The Future of the Oceans, op. cit., p. 85.

First, there is the question of the scope of authority. Should an international seabed regime have control over living as well as mineral resources ?

There are only two alternatives : either an international oceanbed regime with authority both in regard to mineral and living resources, or close co-ordination between an international oceanbed regime for minerals, and an international fisheries organization -- neither of which exists at this time.

There is also the question of what type of organization should be held qualified to apply for a license. Within the continental shelf zone, and also within the international trusteeship zone proposed by the US draft convention, obviously only the coastal state concerned can have the authority to grant licenses to public or private enterprises, or to consortia, as the case may be. There has been some debate whether only states or other groups as well should be entitled to apply for a license in the international zone proper -- that area which would be under the restricted control of the international seabed authority. The US draft permits any kind of enterprise to apply for exploration or exploitation licenses from the authority, if they are sponsored by one of the member states to the convention. An alternative, and perhaps a simpler solution, would be to confine applications to member states and leave it to the latter to sublicense enterprises within their jurisdiction. This would clearly place the administrative and legal responsibility upon

the member states, which is probably a more practical solution in the present state of international society.

One of the most crucial questions would be the elaboration of an equitable allocation of licenses. The Secretary - General's report mentions as alternative criteria, "a first come first served basis, the drawing of lots, grants on the basis of the merits of the applicants, and competitive bidding."[10] It also stresses that "Consideration would have to be given to the needs of developing nations bearing in mind the exploitation of the seabed resources for the benefit of mankind as a whole."[11] All this, of course, will be one of the principal objects of negotiation in establishing the terms of the seabed treaty. Foremost among the consideration must be not only the equitable distribution and principles of nondiscrimination but also the prevention of overcrowding, which would increase pollution dangers, and other threats to ocean ecology.

In conclusion, whether these proposals will be able to solve or at least to lessen the problems or not, it is left to be questioned as none of these kinds of organizations exist.

Suggestions for Establishing International Institution

A review of the results already achieved for the unification of the rules of the sea shows how efficient international

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[10] Ibid., p. 87.

[11] Loc. cit.

conferences can prove when properly organized and prepared in advance. A good deal, of course, remains to be done, and the success of international agreements would be better ensured if a permanent body composed of the delegates of the principal maritime states were to be set up in the near future. At present, the work is divided amongst several government departments and unofficial legal or technical institutions, most of them working independently and without any control, cooperation or direction. However, it may be desirable in this connection to make brief appraisal of recent proposals for new international institutions to cope with the advanced problems of the legal regime and the law of the seas.

(i) A Tribunal of the Seas

There are a number of reasons that suggest creation of a new law-of-the-sea tribunal instead of relying primarily on the International Court of Justice (ICJ). There might be some interrelation between the two. One of those reasons is that under the Statute of the International Court of Justice, private parties do not have access to the Court. We felt that an advance in international law in this area suggests that it should not be just states that have access to compulsory dispute settlement; it should also be private parties that may be affected by the decision.

In addition to that, we felt that there is some merit in having an expert body that deals with the complex issues

in ocean law and becomes a specialist in that. So that there are at least two substantive reasons that influenced thinking on the new law-of-the-sea tribunal.

(ii) An International Sea Commission

The International Law Association in its Draft Convention on the "Laws of Maritime Jurisdiction in Time of Peace," which was adopted at its Vienna Conference of 1926, advocated the creation of an "International Sea Commission" to assist in furthering the objects of the Convention, to settle disputes amicably, and to promote the international adoption of further Conventions or regulations which could usefully be made to secure "the more effective user of the seas, whether in navigation, transport, communications, industry or science."[12] The Institute of International Law at its Paris Session, in 1934, also adopted the following Resolution:

> Considering that the continous increase in the utilization of the sea renders necessary the creation of an international organization engaged in the study of all question of an international order, recommends the conclusion of an agreement between states based on the following principles: Article 1 : A permanent organization should be set up entrusted with the following tasks: (a) to contribute to the establishment of a general legal regime of the sea in conformity with the common interests of the international collectivity; (b) to facilitate the

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[12] Colombos, op. cit., p. 398.

> solution of differences which may arise in this connection between states; Article 2 : This organization should consist of : (a) a general Conference composed of the representatives of the members of the organization; (b) the international Bureau of the Sea; (c) a special permanent Committee. The Bureau of the Sea should be devoted to study, inquiry and examination. It should serve as an intermediary between the various members of the organization on all questions falling within its functions. The special permanent Committee, composed of persons particularly conversant with international maritime law, would act as a Conciliation Commission on any disputes that may arise between the members of the Organization.[13]

(iii) A United Nations Marine Resources Agency.

The Commission to Study the Organization of Peace in its 17th Report, published in May 1966, recommends that the title to the entire ocean "be vested in the international community through its agency, the United Nations."[14] The reasons offered in support of this are : the avoidance of controversy arising from competing claims, the assurance of "economically effective use" of ocean resources, the prevention of military uses, the avoidance of →

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[13] Ibid., pp. 398-399.

[14] Alexander (ed.), op cit., p. 222.

contamination from various sources, the more equitable allocation of profits from ocean exploitation, and the provision of an independent income for the UN. In implementation of this "title" the Commission recommends the establishment of a UN Marine Resources Agency with the following functions and duties:

> It should control and administer international marine resources; hold ownership rights; and grant, lease or use these rights in accordance with the principles of economic efficiency. It should function with the independence and efficiency of the International Bank. However, it should distribute the returns in accordance with directives issued by the United Nation General Assembly. Such an agency would present a viable alternative to the anarchy that now prevails and it would, therefore, be in the legitimate interest of most nations to encourage and support the UN Marine Resources Agency.[15]

With reference to the members of the eminent group sponsoring this proposal, it appears to the author to suffer the common malady of attempting to divorce the treatment of a complex problem from the social and political environment which affects it and which accounts for its difficulty. No doubt many will willingly concede the wisdom of the long-range objective of complete internationalization of the better part of the means of organized management, control, and even operation, but, unfortunately, the bare recommendation of this objective

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[15] Loc. cit.

hardly advances the prospect of achieving it. Serious recommendations of this sort would gain far greater influence if accompanied both by acknowledgement of the obstacles which must be surmounted and by suggested strategies which the campaign can be conducted. In this specific connection, for example, the commission's report can be searched in vain for acknowledgement of one obstacle that seems perfectly apparent, namely that the proposed UN Marine Resources Agency has very little, if any, chance of birth unless the General Assembly is itself reconstituted.

One final comment concerns the frequent references in the Report to the desiderata of economic efficiency in exploitation of ocean resources. The assumption is made that the proposed Marine Resources Agency is the institutional modality by which this goal can be attained. Perhaps in the long run this is so, but the minimal effort now devoted to inquiry into economic criteria for the exploitation of fishery resources suggests that present prospects for successful international administration of the high sea fisheries of the entire ocean are dim, to say the least. Although unified management schemes are desirable, a more productive approach would probably entail less comprehensive management efforts, aimed at regional groupings rather than a universal system.

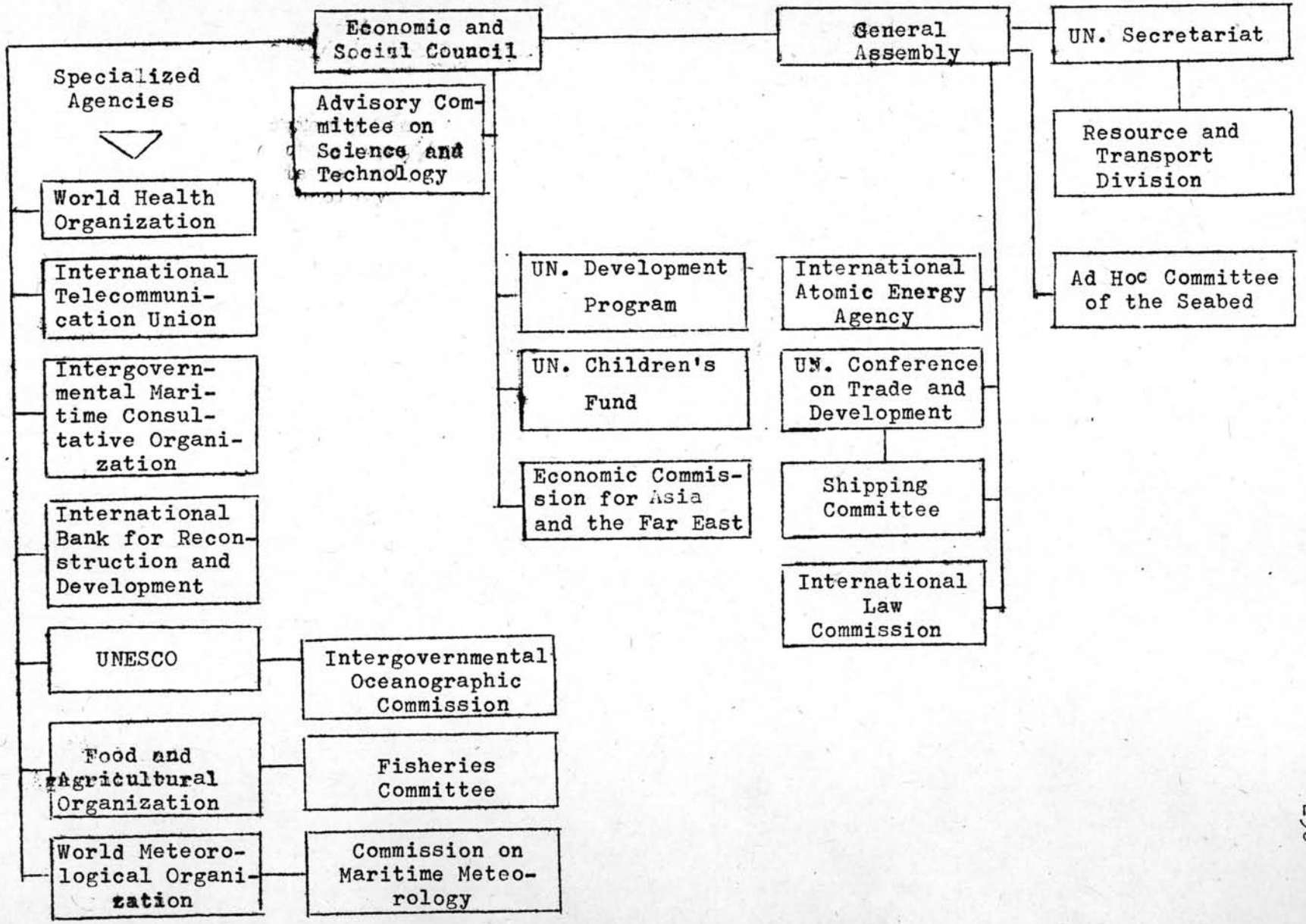
Shortly speaking, although there is an evident need for establishing international institutions, endowed with

adequate authority, policies, and procedures for coping with a rapidly changing situation, it would be a mistake to attempt to place too much confidence in the capacity of the international political system to respond to the new demands. This does not mean that progress in creating new international institutions, and improving those already operative, is beyond achievement, but it does mean that recommendations for improvement should take careful account of the many social, political, economic, and military factors that will very likely shape international decisions in this matter.

Marine Science Activities of the United Nations Agencies.

In the United Nations, the General Assembly, the Economic and Social Council, and a number of Specialized bodies are responsible for various aspects of marine science affairs. The United Nations and specialized agencies of the UN system have continued to expand their activities in marine sciences on a worldwide basis. No single international organization provides a complete overview of ocean activities. But over the past years, cooperation and coordination among the various UN organizations involved in ocean affairs have improved significantly. The UN General Assembly has maintained continuing interest in marine science activities and has encouraged close working relations among agencies in the UN family. Chart 2 identifies UN bodies with major responsibilities in the marine science, and gives an indication of the number of different organizations involved in the UN family alone.

Chart 2 : UN Bodies with Responsibilities in the Marine Science



Already there have been proposals, within and without the United Nations, that the General Assembly should adopt governing principles and proceed to implement them. There is stronger support to give the "authorization legislation" to the Assembly to determine the legal regime under which the resources should be exploited. On the other hand, the General Assembly might declare that the seas (including the seabed) and not subject to national acquisition and sovereignty. Such a declaration, if accepted overwhelmingly and without opposition by major powers would be deemed declaratory of existing law and have great weight. It is thought, moreover, that states would be required to obtain a license if they wish to utilize from the ocean. The authority might issue licenses on the basis of competitive bidding or on some principle of allocation and preference. Those states would have been asked to pay some revenues for other special rights in regard to the resources and simultaneously, these revenues could resolve the finance issue that has threatened to tear the Organization apart.

Besides, the Secretary General also takes part in the marine activities. The Economic and Social Council Resolution 112 (XI) of March 7, 1966, had requested the Secretary General to make a survey of the present state of the knowledge of the resources of the sea beyond the continental shelf excluding fish and of techniques for exploiting this research. The United Nations General Assembly Resolution 2172 (XXI) of December 6,

1966, requested the Secretary General to survey marine science and technology activities by members of the UN family of organizations, member states, intergovernmental and nongovernmental bodies, and to formulate proposals as to the most effective arrangements for an expanded program of international cooperation. The focus of the attention was scientific and technical.

Apart from the General Assembly and the Secretary General, almost every specialized agency of the UN has some involvement with the oceans. The UN specialized agencies generally view their individual involvements in the ocean from the perspective of their primary purpose, whether it is agriculture, health, or meteorology. The UN family is involved in economic assistance programs related to the seas through the World Bank and the UN Development program. The following specialized agencies and other bodies of the United Nations undertook a veriety of new cooperative programs with active participation by the United States:

United Nations Educational, Scientific, and Cultural Organization (UNESCO) and its Intergovernmental Oceanographic Commission (IOC)

World Meteorological Organization (WMO)

International Telecommunication Union (ITU)

Food and Agriculture Organization (FAO)

United Nations Development Program (UNDP)

Intergovernmental Maritime Consultative Organization (IMCO)

Economic and Social Commission for Asia and Pacific (ESCAP)

United Nations Children's Fund (UNICEF)

International Bank for Reconstruction and Development (IBRD)

Some of the programs of particular interest are:

- International oceanographic surveys will be conducted in the Mediterranean and Caribbean Seas, the North Atlantic, and the Southern Ocean (IOC)

- Consideration is being given to a West African marine science center (IOC)

- Attention is being given to the legal impediments to scientific research (IOC)

- Organizational arrangements are being developed for the planning of an Integrated Global Ocean Station System (IOC - WMO).

- Radio frequencies were set aside for exclusive use in the transmission of oceanographic data (ITU)

- The number of UN. - supported assistance programs in fisheries and maritime safety is being increased. (IBRD - UNDP - FAO - IMCO)

- International measures are under consideration to prevent disasters involving hazardous ship cargoes such as the Torrey Canyon oil pollution spill near the United Kingdom (IMCO).

- Fire safety standards for new ship designs were adopted (IMCO).

- Assistance is increasing to developing nations for their port and coastal development (IBRD).

- Ships are being encouraged to participate in a voluntary weather observation program as part of the World Weather Watch (IMCO-WMO).

- Cooperative offshore geophysical surveys are being expanded in East Asia (ESCAP).

- International quality standards for fish protein concentrate are being developed (UNICEF-WHO-FAO).[16]

Additionally, the UN. 24th General Assembly also adopted three resolutions concerning marine science. A resolution on marine pollution requested a review of the harmful, chemical, radioactive, and waste substances in the ocean; a report on national and international efforts to prevent and control marine pollution; and a survey of the views of member states on whether international treaties on marine pollution are desirable and feasible. A resolution on marine coordination suggested that the Economic and Social Council's (ECOSOC) committee for program and coordination might examine the need for a comprehensive review of UN. activities relating to the oceans, including marine science activities. The General Assembly also adopted a resolution expessing appreciation for the Intergovernmental

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[16]Marine Science Affairs - A Year of Plans and Progress, op. cit., pp. 25-26.

Oceanographic Commission's (IOC) Comprehensive Outline of the Scope of the Long-Term and Expanded Program of Oceanic Exploration and Research. The resolution commended past cooperation among UN. organizations in implementing the program outlined by the IOC.

During the debate on the latter report, the cooperation which has developed in the UN. family relating to the Expanded Program was emphasized, and it was announced that the UN. was joining with UNESCO, the World Meteorological Organization (WMO), the Intergovernmental Maritime Consultative Organization (IMCO) and the Food and Agriculture Organization (FAO) in creating an Intersecretariat Committee on Scientific Programs Relating to Oceanography.

During 1969 the IOC increased its activities in cooperation with other UN. agencies to fulfill its role as a focal point for planning and coordinating the Expanded Program. A Joint Working Party nominated by the WMO, the Scientific Committee for Oceanic Research (SCOR) of the International Council of Scientific Unions (ICSU) and the Advisory Committee on Marine Resources Research (ACMRR) of the FAO met in 1969 and drafted a comprehensive scientific report entitled "Global Ocean Research." This report served as a base for IOC preparation in June and approval in September of the Expanded Program outline. To equip itself better to handle its expanded marine science activities and responsibilities, the IOC adopted revised statutes and recommended increases in its level of support. It also decided to

accept an appropriate WMO scientific advisory body to the IOC and to establish a group of scientific experts to assist in developing and implementing the Expanded Program.

In the field of marine pollution, a Joint IMCO, FAO, UNESCO, WMO Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP) was established in 1969 to advise the sponsoring organizations and the IOC on the scientific and technical aspects of marine pollution problems. This group plans to develop and propose joint programs of action in marine pollution. The GESAMP may also provide, on request, specialized advice to governments in cases of incidents involving marine pollution.

The Intergovernmental Maritime Consultative Organization (IMCO) met in 1969 and adopted a number of amendments to the 1960 Convention on Safety of Life at Sea pertaining to safety equipment aboard ships. IMCO also adopted a number of amendments to the Convention on Prevention of Pollution of the Sea by Oil of 1954. The IMCO Assembly called for convening an international conference in 1973 on Marine Pollution and an international conference on revision of the Rules for Prevention of Collision at Sea in 1972. Under the auspices of IMCO the International Legal Conference adopted two conventions in November dealing with the legal problems of marine pollution by oil. One convention deals with the right of a coastal state to take action on the high seas against a vessel that is pollution or in danger of polluting by oil, the other convention deals with liability with tanker owners

for pollution damage by oil to a coastal state or coastal victims.

The Food and Agriculture Organization (FAO) supports a broad range of fishery projects in developing countries, far exceeding the scope of similar projects supported through bilateral and other multilateral channels.

The UN. Economic and Social Commission for Asia and Pacific (ESCAP) continued its investigations on the continental shelves of four East Asian nations including serveys carried out with the assistance of US. Navy ships and aircraft as part of the Navy's worldwide survey program. In addition, intitial, steps were taken to establish a separate coordinating committee for offshore prospecting in areas bordering the Indian Ocean.

Outside UN. family, regional bodies such as North American Treaty Organization (NATO) and the Organization of American States (OAS) are interested in expanding research and development related to the oceans, or in exploiting the resources of the oceans for the benefit of member states. Fisheries commissions are organized normally on a regional basis around the problems of specific fish or mammal varieties (See Table 6). Selected international organizations active in the marine sciences are shown in Table 7.

304 Could have been properly in Appendix

Table 7 : Selected International Organizations Active in the Marine Sciences.

United Nations

General

General Assembly.

Economic and Social Council.

UN. Development Program.

UN. Children's Fund.

International Atomic Energy Agency.

Protein Advisory Group.

International Court of Justice.

International Law Commission.

UN. Conference on Trade and Development.

Specialized Agencies

Food and Agriculture Organization.

UNESCO - Intergovernmental Oceanographic Commission.

Intergovernmental Maritime Consultative Organization.

World Meteorological Organization.

World Health Organization.

International Civil Aviation Organization.

International Telecommunication Union.

International Bank for Reconstruction and Development.

Intergovernmental Organizations

International Hydrographic Bureau.

International Council for the Exploration of the Sea.

Permanent International Association of Navigation Congress.

North Atlantic Treaty Organization.

Organization for Economic Cooperation and Development.

International Commission for the Scientific Exploration of the Mediterranean Sea.

Central Treaty Organization.

South Pacific Commission.

Indo-Pacific Fisheries Council.

Colombo Plan Council for Technical Cooperation in South and Southeast Asia.

Organization of American States.

Inter-American Development Bank.

Pan American Health Organization.

Pan American Institute of Geography and History.

Great Lakes Fishery Commission.

Inter-American Tropical Tuna Commission.

North Pacific Fur Seal Commission.

International North Pacific Fisheries Commission.

International Pacific Salmon Fisheries Commission.

International Pacific Halibut Commission.

International Commission for Northwest Atlantic Fisheries.

International Whaling Commission.

Nongovernmental Organizations

International Council of Scientific Unions.

Internation Union of Geodesy and Geophysics.

International Association for the Physical Sciences of the Ocean.

International Union of Geological Sciences.

Commission on Marine Geology.

International Geographical Union.

International Union of Biological Sciences.

International Association of Biological Oceanography.

Special Committee for the International Biological Program.

Scientific Committee on Oceanic Research.

Scientific Committee on Antarctic Research.

International Geophysical Committee.

International Union for Conservation of Nature and Natural Resources.

Pacific Science Association.

Federation of Astronomical and Geophysical Services.

Permanent Service for Mean Sea Level.

Scientific Committee on Water Research.

Mediterranean Association of Marine Biology and Oceanography

Association of Island Marine Laboratories of the Caribbean.

Inter-American Geodetic Society.

Union of International Engineering Organizations.

Pan American Congress of Naval Engineering and Maritime Transport.

International Ship Structure Congress.

International Cable Protection Committee.

International Institute of Welding.

International Association of Lighthouse Authorities.

International Association of Ports and Harbors.

International Lifeboat Conference.

International Commission on Illumination.

International Maritime Radio Association.

International Radio Consultative Committee.

International Chamber of Commeres.

International Chamber of Shipping.

International Union of Marine Insurance.

International Maritime Committee.

International Gas Union.

Permanent Council of World Petroleum Congress.

Offshore Exploration Congress.

World Underwater Federation.

Source: US. Department of State.

Finally, the author should like to comment on the achievement of the activities of the UN. The need for international authority cannot really be considered without reference to the means of achieving it. It is possible that the costs of achieving

international high seas regime may outweigh the benefits to be obtained. In large measure, the objectors to the UN. approach have taken this position. The difficulties are, indeed, great. As some critics have pointed out, not a single state of the US. has been able to achieve a rationalized fishery. How then, can we hope to rationalize international fisheries where the obstacles are so much greater ? As Lewis M. Alexander has criticized the proposals by the Commission to Study the Organization of Peace, by Christy and Scott, in their book The Common Wealth in Ocean Resources, and others, suggesting that either the mineral or fishery resources of the sea, or both, be turned over to the United Nations or some other international organization. Although some of the objectives of these proposals are widely lauded, Alexander is convinced that unless the proposals themselves are made more realistic they will never be anything more than "pie in the sky".[17]

Professor William Burke has carefully described the existing political and power structure in the world and demonstrated why these proposals are quite unrealistic at the present time. He states that "although there is an evident need for establishing international institutions, endowed with adequate authority, policies, and procedures for coping with a rapidly changing

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[17]Alexander (ed.), op. cit., p. 270.

situation, it would be a mistake to attempt to place too much confidence in the capacity of the international political system to respond to the new demands."[18]

However, this is not to say that the political and power structure of the world cannot change. In the past, we have seen such changes brought about by wars, by industrial expansion, by changes in the population, and similar major events; such events may again occur, or may now be taking place. Man's attitude toward the United Nations, or to the distribution of the resources of the sea may undergo a significant change when it appears that 10 or 20 million people, or more are likely to starve in a given year.

The goals of these several proposals appear to be:

1. To encourage production of the greatest possible amount of food and other resources from the sea.

2. To cause a larger share of these resources to be distributed to the less developed countries.

3. To prevent overcapitalization of high seas fishing and mineral extraction capacity by the various nations involved in ocean resource development.

4. To provide the United Nations with a reliable source of funds for its budget.[19]

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[18] Ibid., p. 307.

[19] Ibid., p. 270.

Goal No. 2, providing a greater percentage of the ocean's resources for the less developed countries, appears to be either implicit or explicit in all of the proposals. Apparently, this goal is to be achieved by giving the United Nations control over the resources of the sea along with the power to issue licenses for substantial fees, or tax the profits made from ocean resources development. As if this were not difficult enough in itself, the area of yet greater difficulty concerns how these profits might be distributed by the United Nations after they are collected. It is one thing to say that the UN. ought to collect or receive such profits, but it is quite another to design an acceptable distribution system of those profits after they are in hand. What criteria would be used ? Would this wealth be used only for emergency donations ? Would it be distributed on the basis of gross national product per number of citizens ? Would it be distributed on the basis of "need" and if so how would this be determined ? Would it be turned over to some administrative agency under the authority of the General Assembly to hand out as their discretion dictated ? Would the General Assembly itself acting something as the Congress of the US. make the distribution as they saw fit ? These are exceedingly difficult questions.

It seems that this distribution problem is one of the most troublesome points in the whole proposal, however, none of the proposals has made any attempt to solve it. It is one of the very early subjects which must be taken up if these ideas are to get any further than mere speculation.

A second problem that is basic to the various proposals concerns the distinction between those resources that are already being exploited, and to which the nations of the world would claim "vested rights", and those that are not yet claimed or vested. It would seem extremely improbable to think the fishery or mineral resources of the sea that are now being exploited would voluntarily be turned over by the nations of the world to some international agency. As an outside possibility one might think that the yet unexploited or unclaimed resources might be turned over. Then the question is, what resources are now subject to vested rights or claims and what not ? The question is not yet answered.

Additionally, Professor Burke specifies three of the major obstacles that would have to be overcome: the necessity for reconstituting the General Assembly of the UN. so that it will more accurately reflect the distribution of power, wealth, and skill, and thereby be able to deal more adequately with the problems of international ocean authority; the difficulties of accommodating military uses of the ocean and, as urged in the Report of the Commission to Study the Organization of Peace, of preventing military appropriation of the sea bottom; and the fact that there is "minimal effort now devoted to inquiry into economic criteria for the exploitation of fishery resources."[20]

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[20] Ibid., p. 308.

These obstacles are certainly difficult, but they are not insurmountable. The Commission to Study the Organization of Peace has recommended reconstitution of the General Assembly, and will be working toward this goal. Military uses of the sea bottom will, of course, be difficult to accommodate, but that does not mean that the machines of war should be condoned. It may be true, as Mr. Burke states, that the "prohibition of military activity hardly seems to be a necessary consequence of organized international exploitation of the ocean,"[21] but it is clear that military uses, potential or actual, have considerable influence on national policy; viz, the military objections to extensions of the three mile limit. One of the major, and most irreconcilable, problems in the study of ocean policy is that the military "requirements" are not made public. This means that the evaluation of alternative regimes must proceed as if there were no military uses.

But Burke's major objection appears to be one of strategy -- that "the bare recommendation of this objective (internalization) hardly advances the prospect of achieving it. Serious recommendation of this sort would gain far greater influence if accompanied both by acknowledgement of the obstacles which must be surmounted and by suggested strategies by which the campaign

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[21] Loc. cit.

must be conducted."[22] This would, of course, be desirable, but the advancement of the principles and the delineation of the need without presentation of the details is hardly a sufficient basis for discarding the suggestions as "blueprints for utopia."

However, in the writer's opinion, she believes that an international approach through the UN. is both necessary and desirable. Others hold contrary views. But all who seek to exploit the oceans and all who look forward to the orderly, rational, and beneficial development of ocean resources should make every effort to explore and discuss as openly as possible, the alternative goals, the methods of achieving these, and the difficulties that will have to be overcome.

IV. New Trends Emerging from The Third United Nations Conference on the Law of the Sea, 1973-1976

In considering the problems of the law of the sea, the United Nations General Assembly has convened a new Conference on the Law of the Sea. Its object is to achieve comprehensive agreement on the international law of the sea. The Conference must likewise take into account the four Conventions adopted by the 1958 Conference on the Law of the Sea on the basis of texts prepared by the International Law Commission; relevant decisions of the International Court of Justice; the Declaration of Prin-

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[22] Loc. cit.

ciples regarding the deep seabeds adopted by the UN. General Assembly in 1970; and a vast array of official statement and scholarly writings regarding the nature and content of the existing law of the sea.

The Conference will have before it the results of the work of the 91-member UN. Seabed Committee which has been carrying on preparations for the Conference since 1970. The UN. Seabed Committee* which has held six sessions since its formation, was charged with preparations for a conference to deal with a multilateral treaty regime for the breadth of the territorial sea, unimpeded transit through and over international straits, living resources, mineral resources of the continental shelf and margins, mineral resources of the deep seabed, protection of the marine environment, marine scientific research, and settlement of disputes.

The Committee's reports include draft texts, usually in the form of alternatives, notably with respect to the question of the legal regime for the deep seabeds and the prevention of ocean pollution; proposals made by a large number of states on one or more issues; and a comprehensive list of subject and issues.

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*The formal name of the UN. Seabed Committee is the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.

Several states pointed out that the preparation required for the Conference was not the same as that which preceded the 1958 and 1960 Conferences on the Law of the Sea, which were primarily for the purpose of codification of existing laws. The Third Conference would be essentially one of political negotiation for the progressive development of the law of the sea.

The most important reason why states are pressing forward with the Conference is easily understandable. There are positive incentives for a timely and successful conference which significantly affect the situation, and lead most if not all countries to believe that a timely and successful Law of the Sea Conference is in their interest. There is widespread dissatisfaction with the existing legal regime or lack of it in the oceans. Some believe that respect for certain aspects of the traditional law of the sea is breaking down, and that interests protected by that traditional law are being jeopardized. This has been the reaction, for example, to unilateral extension of the territorial sea and other forms of coastal state jurisdiction. Some believe that the traditional law does not adequately protect current or anticipated interests. This has been the reaction by many states to the conservation and economic problems created by the development of large and highly mobile distant-water fishing fleets. Some believe that the absence of suffifiently precise legal rules to deal with new or newly perceived problems and uses,

such as pollution of the marine environment and the development of technology to exploit the deep seabeds, could prejudice their interests.

A great deal of political and legal argumentation is heard in defense of each of these perspectives. On the one hand, it is asserted that centuries of legal development cannot be disregarded. Or the other hand, it is said that a large number of countries were unable to participate fully in that development and should not be compelled to live with the results. In fact, however, few if any delegations believe that all of existing law should either be retained or discarded at the Conference.

Dissatisfaction with the existing situation, does not, of course, mean that the only solution is a new comprehensive multilateral treaty on the law of the sea. However, a number of factors have combined to persuade most governments that it is the best available solution.

(1) The number of states involved in resolving a particular problem may be large and may in fact present an unbalanced "regional" negotiating situation. A coastal state interested in protecting its fishing interests off its coast can only be assured of such protection of all actual or potential users are bound by the measures taken. At a Law of the Sea Conference, it can seek communities of interest with other coastal states and work out a solution acceptable to both coastal and distant-water fishing states.

(2) In many situations, the problem is itself of global or nearly global magnitude. For example, passage through an important international strait affects the coastal state or states, a large number of states with vessels using the strait, and an even larger number of states with security or economic interests in the use of the strait by foreign vessels or aircraft.

(3) The interrelationship of issues further complicates attempts at isolated solutions. For example, the US. and other nations are prepared to agree to a universal extension of the territorial sea to 12 miles provided there is adequate agreement on free transit of straits used for international navigation. Concomitantly, many coastal nations have stated that a commitment to limit their territorial sea to 12 miles would not be desirable without special provision to protect their interests in living and non-living resources beyond that limit.[23]

A further incentive for agreement derives from the international community's general interest in the success of these negotiations. While it would not be accurate or helpful to regard the Law of the Sea Conference, or any other UN. effort,

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[23]John R. Stevenson and Bernard H. Oxman, "The Preparations for the Law of the Sea Conference." American Journal of International Law. 68, 1 (January, 1974), pp. 2-3.

as a "test" of the efficacy of global multilateral diplomacy, the political implications of failure to produce a timely treaty would not be limited to the oceans. On the other hand, a timely and successful conference could instill new confidence in the UN. and would surely contribute to the strengthening of international law and institutions generally.

The Third Conference so far had one plenary session and four substantive sessions (See Table 8)

- The plenary session, which was essentially a procedural one, was held in New York in 1973.

- The first session of the substantive session in Caracas in 1974,

- The second session in Geneva in 1975,

- The third session in New York in 1976 from March to May.

- The fourth session in New York from August to September, 1976.

- The fifth session is going to convene in the summer of 1977 in New York.

Table 8 : The Third United Nations Conference on the Law of the Sea

(Plenary Session) - dealing with organizational matters only

(2 weeks)

December 3 - December 15, 1973 - New York, USA.

(according to General Assembly Resolution 2570 C (XXV), adopted on Dec. 17, 1970)

(Substantive Sessions)

(10 weeks)

- 1 st. Session June 20 - August 29, 1974 - Caracas, Venezuela (149 Countries)
(according to General Assembly Resolution 3067 (XXVIII), adopted on Nov. 16, 1973)

(8 weeks)

- 2 nd. Session March 17 - May 10, 1975 - Geneva, Switzerland (141 Countries)
(according to General Assembly Resolution 26713 A, adopted on Dec. 17, 1974)

(8 weeks)

- 3 rd. Session March 15 - May 7, 1976 - New York, USA. (156 Countries)

(Not Available)

(7 weeks)

- 4 th. Session August 2 - September 17, 1976 - New York, USA. (150 Countries)

(Not Available)

The Third United Nations Conference on the Law of the Sea opened in New York at the United Nations Headquarters on Monday December 3, 1973 with a two-week organizational session. The

General Assembly had already approved procedural rules and working methods quite new to the long history of international conferences. The mandate of the Conference to produce a single comprehensive convention came with the recognition by the Assembly of the need for a "package deal" which would allow for the balancing of diverse interests over a broad range of interrelated issues. To avoid needless and premature declarations of position by states, the Assembly also decided that the Conference should adopt a "gentleman's agreement" to the effect that the Conference should proceed on the basis of consensus as far as possible. There would be no voting on substantive matters until all efforts at consensus had been exhusted. The Conference agreed that a cooling-off period would intervene between the request for a vote on substantive matters and the actual voting to allow delegations to exhaust all possibilities of achieving general agreement.

The traditional rule that texts require a majority vote in committee and a two-thirds vote in plenary of states "present and voting" contains an added qualification that the two-thirds majority in plenary must also constitute a majority of states participating in that session of the Conference. In this context, Rule 39, paragraph 1, provides:

> Decisions of the Conference on all matters of substance, including the adoption of the text of the Convention on the Law of the Sea as a whole, shall be taken by a two-thirds majority of the representatives present and voting, provided that such majority shall

include at least a majority of the states participating in that session of the Conference.[24]

The first substantive session took place in Caracas, Venezuela, from June 20 through August 29, 1974. The tentative list of issues that had emerged from three years of preparatory work in the United Nations Seabeds Committee included 25 major headings, and 92 subheadings. And some 149 nations, 119 of which are coastal states, focus on the problem of bringing greater legal order to 70 per cent of the world's surface, that is the seas. The Conference, in a very real sense, engaged in drafting a basic charter for over two-thirds of the earth's surface. In meeting this challenge the best guide is a careful functional division of ocean uses.

Dr. Kurt Walheim (UN. Secretary - General), addressing the conference on June 20, said that "it must succeed lest old quarrels as land be replaced by new quarrels at sea."[25] Dealing with the many factors which had made the Conference necessary,

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[24]John R. Stevenson and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea : The 1974 Caracas Session." American Journal of International Law, 69, 1 (January, 1975), p. 4.

[25]"Third UN. Conference on Law of the Sea" Keesing's Contemporary Archives 1974. 20, 1555 (January 1, 1974 - December 31, 1974), p. 26713.

Dr. Walheim said that, in addition to the problems which remained unsolved after the 1958 and 1960 conferences, there was dissatisfaction with the existing law caused in part by the fact that many states which had become independent since the law was framed had had no part in shaping it and did not feel that it conformed to the realities of the new international community. A crucial factor had been the very rapid progress of technology and the rising demand for resources. Growing world demand had also caused an increase in fishing, with modern industrialized fleets, and had intensified maritime transport, particularly in the form of super-tankers. A concomitant of these developments had been greater pollution of the seas. The most important factor, however, had been the mounting pressure on world resources and the awareness that the seabed and oceans contained some of the largest unexploited reserves available to man.

The Conference organized itself along the model of the UN. Seabed Committee. Ambassador Hamilton Shirley Amerasinghe of Sri Lanka, formerly Chairman of the Seabed Committee, was elected President of the Conference. There are three main committees of the whole.

- The First Committee is concerned with the international regime and machinery for the seabed beyond the limits of national jurisdiction, usually referred to as the "international area" or the deep seabeds. It established a working group, and later in the session a negotiating group with closed meetings. Both

served in similar capacities in the Seabed Committee.

- The Second Committee has the broadest and most complex mandate, embracing virtually all of the traditional Law of the Sea subjects. These include issues regarding the territorial sea, straits,archipelages, the high seas, the economic zone, including living and nonliving resources, the continental shelf, and access to the sea.

- The Third Committee concerns with pollution and with scientific research and transfer of technology. Informal sessions on these three subjects were also held.

While not part of its formal organization, regional and other groups play an important role in the Conference. It is difficult to determine when a pattern of consultations among states becomes a group, but some at least might be mentioned. The Conference generally breaks down into two wary camps. On the one side there are the 120 developing countries, ranging in size from China (population 800 million) to the South Pacific island state of Nauru (population 6,500). This group called the "Group of 77."* They argue that the law Grotius wrote in a maritime era gives an unfair advantage to developed nations in a technological era. If the developed nations were allowed to

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*The so-called "Group of 77" is principally the developing countries of Africa, Asia, and Latin America, now numbering 106 countries.

exploit the seas at will, Makhold Lerotholi of Lesotho protested, "they would go on to lay claim to the moon, the stars and the planets."[26]

Lined up on the other side of this emotionally charged debate are a group of 29 modern industrial nations; led (loosely) by the US. and the USSR and including the European Countries plus Canada, Australia and Japan. This group is generally known as "the Authority." French Diplomat Michel Lennuyeux - Comnène makes no secret of the fact that his country "is hostile to a vote of the majority of developing nations dictating maritime law to the minority of countries technologically capable of exploiting the seas."[27] No one denies that the large maritime nations, which still rule the seas, hold effective veto power on any decisions involving the sea. Without the full agreement of the US, USSR, Britain and Japan, one American delegate concedes, a new law of the sea "won't be worth the paper it is written on."[28]

Besides, some subregional meetings also occurred among Arab States, among members of the European Economic Community

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[26] "The Oceans : Wild West Scramble for Control", TIME, op. cit., p. 40.

[27] Loc. cit.

[28] Loc. cit.

and among landlocked and other "geographically disadvantaged" states.

An interesting characteristic of these groups is that they are organized on a substantive, rather than regional, basis. Groups can and do have both affirmative and negative potential. To the extent that they reflect true similarities of interests, they can be used to iron out minor differences and to reduce and simplify the alternatives. To the extent that they reflect a desire for political or geographic harmony, they can perhaps more easily encourage accommodations that will work generally. But groups can also be divisive or invite rigidity, particularly when they have worked out delicate internal compromises that leave little flexibility for negotiation with others, or when the majority in effect gives its proxy to a vocal and purposeful minority.

For example, the developing countries, which constitute the "Group of 77", have been so far successful in achieving the following consensus at the Third Conference:

(i) A coastal state may establish a territorial sea of up to 12 nautical miles measured from the appropriate baselines over which it enjoys sovereignty subject to the right of innocent passage to foreign ships.

(ii) A coastal state may also establish a contiguous zone, adjacent to its territorial sea up to 24 nautical miles, measured from the appropriate baselines, wherein it has control over

customs, fiscal, immigration, and sanitary matters.

(iii) A coastal state may establish an economic zone of up to 200 nautical miles from the baselines, from which its territorial sea is measured. Within this zone it has sovereign rights over the living and non-living resources and exclusive jurisdiction in respect of some other matters, including the conduct of scientific research and control of pollution.

(iv) A coastal state, in addition, has sovereign rights over the seabed and ocean floor, beyond its territorial sea, up to the outer edge of the continental margin, or up to 200 nautical miles where such order edge does not extend up to that distance. These rights pertain to exploration and exploitation of petroleum, gas and other mineral resources, sedentary fishery resources and establishment of artificial islands and installations.[29]

There are some criticisms that, given such fundamental imbalances in national power and purpose among different groups, the wonder is that the sea conference is being held at all. The reason is that the major powers know that the days when they could partition territory among themselves are gone; they are too entangled in a web of economic and political agreements

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[29]H.R. Gokhale, "Changing Structure of Law of the Sea -- An Indian Perspective", Indian & Foreign Review. 13, 23 (September 15, 1976), p. 14.

for that, and too dependent on developing nations for raw materials. Indeed, says Richard N. Gardner, a Columbia Law School professor and advisor to the US. State Department, "1974 represents a turning point in international relations. The global agenda is now more important than traditional foreign policies. If the law-of-the-sea conference fails, it will harm prospects for other international negotiations on food, population, energy, security, and trade. Caracas is a test case for mankind's capacity to deal with global problems in a rational way."[30] Says John R. Stevenson, chief of the US. delegation : "We all feel a sense of urgency."[31]

The work of the Caracas Conference was concentrated thereafter in its main committees, and in particular, in their working groups and informal sessions, where the most time was spent. There were normally three simultaneous meetings in the morning and afternoon, usually accompanied by early morning or night meetings of regional or other groups and some official night sessions, and extensive informal contact during all available hours. Of the speculations proffered on the failure to achieve a treaty at Caracas, the suggestion that many delegations did not work hard reveals the last familiarity with what

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[30]"The Oceans : Wild West Scramble for Control." TIME, loc. cit.

[31]Loc. cit.

in fact took place during those ten weeks.

The object of the Law of the Sea Conference is a comprehensive Law of the Sea Treaty. While this was not achieved, the Caracas session accomplished a great deal : the foundations and building blocks of a settlement are now all present in usable form. A treaty can be achieved if negotiation among delegates authorized to reach an accommodation on critical issues takes place without delay.

Accomplishments of the session were considerable. Among the most important are the following:

(a) The vast array of traditional Law of the Sea issues and proposals which fall within the mandate of Committee II was organized by the Committee into a comprehensive set of informal working papers reflecting "main trends" on each precise issue. New proposals and trends may of course appear in the course of efforts to achieve an accommodation on various issues. A similar development occurred with respect to marine scientific research and in part with respect to preservation of the marine environment in Committee III.

(b) The transition from the UN. Seabed Committee of about 90 to a Conference of almost 150 was achieved without major new stumbling blocks and a minimum of delay.

(c) The overwhelming majority clearly desires a treaty in the near future. Agreement on the Rules of Procedure by consensus is clear evidence of this desire to achieve a widely -

acceptable treaty. The tone of the general debate and the informal meetings was moderate and serious.

(d) The inclusion in the treaty of a 12-mile territorial sea and a 200-mile economic zone was all but formally agreed, subject of course to acceptable resolution of other issues, including unimpeded transit of straits.

(e) With respect to the deep seabeds, the first steps have been taken toward real negotiation of the basic questions of the system and conditions of exploitation.

(f) Traditional regional and political alignments of states are being replaced by informal groups whose membership is based on similarities of interest on a particular issue.

(g) The number and tempo of private meetings has increased considerably, and moved beyond formal positions. This is essential to a successful negotiation.

With few exceptions, the Conference papers now make clear the structure and general content of the treaty, the alternatives to choose from, the blanks to be filled in, and even the relative importance attached to different issues.

Two underlying problems affect the evaluation of the Caracas session. First, events beyond the control of the Conference are tempting states to take matters into their own hands. Thus, progress must be measured against the real possibility that the Conference may be overtaken by events. Second, the Conference suffers from the carryover of a negotiating style more

suitable for General Assembly recommendations or negotiation of abstract issues than for texts intended to become widely accepted as treaty obligations affecting immediate interests of states in a dynamic situation.

Essentially, what was missing in Caracas was sufficient political will to make hard negotiating choices. The main reason was the conviction that this would not be the last session and that it was not necessary to take those difficult decisions yet. Nevertheless, the words "we are not far apart" were more and more frequently heard.

Although no specific agreements were reached on any of the issues before the Conference, Mr. Hamilton Shirley Amerasinghe (Sri Lanka), President of the Conference, declared on August 29, 1974 : "We can, however, derive some legitimate satisfaction from the thought that most of the key issues have been identified and exhaustively discussed."[32]

The Caracas Conference has recommended to the UN. General Assembly that the next session be held in Geneva from March 17 to May 10, 1975.* The second substantive session was decided

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[32]"Third UN. Conference on Law of the Sea." Keesing's Contemporary Archives 1974, loc. cit.

*For full details see John R. Stevenson and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea : The 1975 Geneva Session." American Journal of International Law. 69, 4 (October, 1975), pp. 763-797.

at the outset that this would be a negotiating session. There was no general debate. Few formal meetings were held. Even informal working groups of the whole tended to rely on smaller groups the work of which was necessarily removed from public view. Progress, in many respect substantial progress, was made toward producting generally acceptable texts in this way. However, the Conference did not complete the negotiation of a new Law of the Sea Convention or approved texts.

From the very beginning this Geneva Conference has been dominated by two basic and contradictory cleavages. One, with strong ideological overtones, tends to pit the developed countries against the poor nations of the world. Since the first UNCTAD conference in 1964, the latter have generally banded together in a loose yet formidable political alliance which although its membership is now more than 100 nations, is still called the "Group of 77." At the Law of the Sea Conference, both the philosophy and goals of the Group of 77 have been most clearly expressed in the debate over exploitation of mineral resources of the deep seabed or the common heritage area.

The second basic cleavage has its roots in the hard realities of ocean geography and existing political boundaries. Some countries, both developed and developing, have long coastlines and broad margins while others are totally landlocked. If, as expected, the conference adopts a 200-mile economic zone, of the 35 per cent of total oecan space within the zone, almost

one-third will belong to the ten states already named, seven of which are developed : Australia, Canada, Japan, New Zealand, Norway, the USSR and the US.

It was this second cleavage that led the geographically disadvantaged countries at Geneva in 1975 to take an increasingly independent stand without regard to whether they were developing or developed. Geographically disadvantaged countries within the Group of 77, in particular, have questioned whether their interests in the 200-mile economic zone have been adequately protected in proposals put forward at the insistence of strongly nationalistic coastal states, whose ideological leadership has previously tended to dominate the Group.

The Conference reaffirmed its Caracas decision not to engage in formal debates or statements of national positions and decided to devote most of its available time to informal consultations. These talks were not reflected in the documents produced by the Conference as the delegations kept confidential their positions taken within informal working groups pending the achievement of the package deal.

Towards the end of the session the Conference decided the time had come to produce what had never been possible before: the formulation of the "Single Negotiating Texts" (SNT) covering all the subjects entrusted to the three Committees. This document was circulated on the last day of the session and since then Governments have given it intensive study in preparation for the forthcoming New York session of the Conference.

Since the single negotiating texts of the Main Committee Chairman were distributed on the last day of the session, they were not the subject of debate or negotiation as such. However, in some important respects they do reflect a basis for agreement that emerged in informal negotiations. The SNT takes account of all the formal and informal discussions held so far. It is informal and does not prejudice the position of any delegation, nor does it represent a negotiated text or accepted compromise. As mentioned earlier, the text is a procedural device providing a basis for negotiations. It does not affect the status of proposals already made by delegations or the right of delegations to submit amendments to them or to make new proposals. At the end of the third substantive session in New York in May 1976, the SNT has been revised on the basis of which the fourth and fifth sessions are now continuing their negotiations.

The "Revised Single Negotiating Texts" comprised 397 articles and 11 annexes and divided into four parts, three of which were prepared by the chairmen of the three main committees, and the fourth, covered dispute settlement procedures, by the session's president. These texts did not indicate the degree of agreement or disagreement among delegations on particular provisions but were intended for consideration by the participating governments.

A detailed analysis of the single negotiating texts is beyond the scope of this study. However, an examination of

these texts can provide a useful basis for indicating the new trends emerging from this third Conference. These new trends will in the future be useful in helping to meet the present sea law problems, if they are to be adopted in the treaty forms. In the following parts, we will review some of the new trends appearing in the "Revised SNT" classified along the three Main Committees.

The First Committee

The first part of the Committee I single negotiating text refers to the seabed and ocean floor beyond the limits of national jurisdiction. This part contains 19 articles dealing with the legal regime for the deep seabed embodies treaty articles on which both the UN. Seabed Committee and the Caracas session of the Conference concentrated.

The text describes this international region as "the Area." The resources in question in "the Area" at this time are the manganese nodules lying at or near the surface of the deep seabed, mostly at depths of 12,000 feet or more. This part includes the following principles : the Area is the common heritage of mankind; there shall be no claim or exercise of sovereignty or other rights of states in the Area; activities in the Area shall be used exclusively for peaceful purposes. Other articles relate to the principles governing activities in the Area, liability for damage and the participation of the developing countries including land-locked and other geographically

disadvantaged states.

The fundamental problem addressed in Committee I was that of reconciling the views of those favoring a system of direct exploitation by the new international Authority (usually referred to as international "machinery" issues) to be established with the views of those interested in assuring guaranteed access to, and production of deep seabed minerals by states and their nationals under reasonable conditions with security of tenure. The progress made in exploring ways to bridge this gap revolved around attempts to elaborate "basic conditions" of a system of exploitation. It was, of course, also recognized that there are other critical elements of any accommodation, in particular the decisionmaking process of "the Authority."

The Committee devoted the first half of the session to consideration in its Working Group of basic conditions of exploitation. The effort to find a set of basic conditions that would at the same time accommodate the desires for direct and effective control and for guaranteed access was arduous. The approach to the resource exploration and exploitation system is finally set out in Article 9 (4), under the title "General Principles Regarding Economic Aspects of Activities in the Area". It is as follows:

Activities in the Area shall be undertaken in such a manner as to:

Appendix ?

... 4. Protect against the adverse economic effects of a substantial decline in the mineral export earnings of developing countries for whom export revenues from minerals or raw materials also under exploitation in the Area represent a significant share of their gross domestic product or foreign exchange earnings, when such decline is caused by activities in the Area, by:

(i) facilitating, through existing forums or such new arrangements or agreements as may be appropriate and in which all affected parties participate, the growth, efficiency and stability of markets for those classes of commodities produced from the Area, at prices remunerative to producers and fair to consumers, the Authority shall have the right to participate in any commodity conference dealing with the categories of minerals produced in the Area. The Authority shall have the right to become a party to any such arrangement or agreement resulting from such conferences as are referred to above. The participation by the Authority in any organs established under the arrangements or agreements referred to above shall be in respect of the production in the Area and in accordance with the rules of procedure established for such organs. In carrying out the decisions taken by such organs, the Authority shall assure the uniform and non-discriminatory implementation of such decisions in respect of all production in the Area of the minerals concerned. In doing so, the Authority shall act in a manner consistent with the terms of existing contracts;

(ii) the Authority limiting, in an interim period specified below, total production in the Area so as not to exceed the projected cumulative growth segment of the nickel market during that period. The cumulative growth segment for the purpose of this Part of the

Convention shall be computed in accordance with Annex I, paragraph 21.* The interim period referred to above shall be of a duration of 20 years and shall begin on 1 January 1980, or immediately upon the commencement of commercial production under a contract, whichever comes earlier. During the last 12 months of the 20 year period, the Council may take a decision to prolong the period for another 5 years. Production levels under existing contracts, shall not be affected by the interim limit, but shall, however, be included in the calculation of the stated production limits under this sub-paragraph.

(iii) a compensatory system of economic adjustment assistance in respect of the adverse effects referred to in this paragraph.[33]

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*Annex I paragraph 21 states that "the rate of increase in world nickel demand projected for the interim period referred to in Article 9 shall be the average annual rate of increase in world demand during the 20-year period prior to the entry into force of this Part of the Convention, provided that the computed rate of increase shall be at least 6 per cent per annum. The cumulative growth segment of the world nickel market referred to in Article 9 shall be computed on the basis of this annual rate of increase from a base amount, which shall be the highest annual world demand during the three-year period immediately preceding the year in which the interim period commences."

[33]"Revised Single Negotiating text, Part I : Note by the President of the Conference." United Nations Third Conference on the Law of the Sea. (New York: United Nations, May 6, 1976), pp. 13-14.

The establishment of an International Seabed Authority and the nature and fundamental principles of its functioning and its organs are provided for. The Authority would be the organization through which states parties to the Convention would administer the Area. Such an institution would be an entirely new development in man's history, for the first time major resources would be developed not for any one country or group of countries but for the benefit of all people.

According to the "Revised SNT", Articles 19-24 which deal with the establishment of the International Seabed Authority, nature and fundamental principles of the functioning of the Authority, and functions and organs of the Authority, the Authority may conduct activities in the Area including the actual recovery or mining of deep-sea minerals through its own Enterprise and may enter into agreements with states or their nationals as long as the Authority maintained control over exploration and exploitation activities in the Area.

The principal organs of the Authority envisioned are an Assembly of representatives of all members of the Authority; a Council of 36 Members elected by the Assembly (in accordance with the principle of equitable geographical representation, representation of special interests such as states with substantial investment or the technology needed for exploitation of the Area, exporters and major importers of the same minerals found in deep-sea nodules which come from land-based sources,

and land-locked or otherwise geographically disadvantaged states); a Law of the Sea Tribunal composed of nine independent judges with jurisdiction with respect to disputes relating to the Convention; an Enterprise responsible for the execution of activities of the Authority in the Area subject to general policy directions and supervision of the Council; and a Secretariat headed by a Secretary-General to carry out the functions required by the Authority or any of its subsidiary organs. A trend is emerging in favor of a special dispute settlement organ for deep seabed problems in the Authority that embraces functions analogous to those of the French Conseil d' Etat.

It is generally assumed that regulatory decisions would require approval of a substantial majority of treaty parties, probably two-thirds. This reflects a willingness to depart in principle from selection solely on the basis of equitable geographic representation.

The first part of the negotiating text also includes provisions for finance, for the settlement of disputes, for the status, immunities and privileges that would be accorded to the Authority, for amending the Convention, for its review after being in effect for six years, and for the suspension of privileges of a state party in arrears in the payment of its financial contribution to the Authority.

The Second Committee

By far the largest and most diverse number of issues

and the disposition of the most vital and valuable resources of the oceans at this time were entrusted to the Second Committee. It entered the Geneva session with a paper developed at Caracas to reflect the "main trends" of the discussion and which set out a clear and limited number of alternatives on virtually every issue.

The atmosphere in the Second Committee and related negotiations was extremely workmanlike. Many ad hoc informal groups met to consider specific issues under the guidance of the Committee officers. While open to all, the groups were generally of manageable size. An impressive number of informal draft articles emerged from these groups. These articles are reflected in the single negotiating text and are likely to command wide support. They deal with virtually all of the traditional aspects of the territorial sea regime, including baselines and innocent passage and the high seas regime, with some techincal changes in and elaborations of the existing regimes.

(i) Territorial Sea

The single negotiating text reflects the general view expresed by delegations in favor of a maximum limit of 12 nautical miles for the territorial sea and retention of existing regimes regarding baselines and innocent passage with some elaboration and technical changes.

The provisions in the "Revised Single Negotiating Text" on baselines from which the breadth of the territorial sea

is measured contain some interesting new elements[34] not found in the 1958 Convention on the Territorial Sea and the Contiguous Zone.

Considerable time was devoted to an elaboration of the rule in the 1958 Territorial Sea Convention that passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state. While doubts were expressed as to whether an exhaustive list of non-innocent activities could be prepared, others noted that the goal of "objectivizing" innocent passage indicated the desirability of attempting such an approach. Article 18 elaborates a dozen activities which would render passage prejudicial to the peace,

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[34]Article 5 provides that in the case of islands situated on atolls of islands having fringing reefs, the baseline shall be the sea-ward low-water line of the reef. Article 6 provides that straight baselines may connect appropriate points along the furthest seaward extent of the low-water line notwithstanding subsequent regression of the low-water line. Article 9 is made to define historic bays with greater precision. Article 10, one of a number that takes account of new technological developments, provides that offshore installations and artificial islands shall not be considered as permanent harbor works for purposes of measuring the territorial sea.

good order, or security of the coastal state.[35]

The right of the coastal state to regulate innocent passage was not deal with in detail in the Territorial Sea Convention. Article 20 (2) of the revised single negotiating text elaborates the scope of this regulatory power and deals with both navigational safety and prevention of pollution; it also contains a proviso that coastal state laws and regulations "shall not apply to or affect the design, construction, manning or equipment of foreign ships or matters regulated by generally accepted international rules unless specifically authorized by such rules."[36]

Article 23 of the territorial sea chapter, in addition to specifying that the coastal state shall not discriminate in form of in fact against the ships of any state or against ships carrying cargoes to, from, or on behalf of any state, provides that the coastal state shall not "hamper" innocent passage or "impose requirements on foreign ships which have the practical effect of denying or prejudicing the right of innocent passage."[37]

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[35]"Revised Single Negotiating Text, Part Two : Text Presented by the Chairman of the Second Committee." United Nations Third Conference on the Law of the Sea. (New York: United Nations, May 6, 1976), pp. 15-16.

[36]Ibid., p. 17.

[37]Ibid., p. 18.

The complex nature of the problem of pollution regulation was widely recognized when a few states proposed the superficially enticing idea of stating that pollution is not innocent.

For the rights of protection of the coastal state, Article 24 of the revised SNT provides that "the coastal state may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published."[38]

(ii) Contiguous Zone

The contiguous zone is an area where the coastal state may take measures to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws in its territory or territorial sea. Its maximum limit is 12 miles under the 1958 Territorial Sea Convention. Some states seem to feel that with the establishment of a 12-mile territorial sea, the contiguous zone has become superfluous. Others would like it extended to an area beyond 12 miles.

In examining this question, it might be considered whether the modern radar facilities may be a cheaper and more effective deterrent than the wide-ranging patrol craft needed to

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[38] Loc. cit.

enforce the theoretical liability to arrest -- which the smuggler is prepared to risk as he approaches shore anyway.

The question of contiguous zone jurisdiction extending beyond 12 miles is important not only on its merits, but because agreement will become more difficult as more types of jurisdiction are added to the economic zone. In this matter, Article 32 of the revised SNT permits such a zone to extend up to 24 nautical miles from the baseline from which the breadth of the territorial sea is measured.[39]

(iii) Straits Used for International Navigation

The importance of the staits issue to the overall negotiations has long been recognized. At the Third Conference, there was increased sensitivity to the need to assure passage of such straits and to avoid establishing a basis for arbitrary interference with such passage. For some time, there had been searching for a rational solution which was "neither free transit nor innocent passage." In other words, a solution which would accommodate both the interests in passage and the concerns of straits states regarding such problems as navigational safety and pollution. The SNT and the revised SNT reflect this trend.

A right of "transit passage" would be established for "straits which are used for international navigation between

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[39] Ibid., p. 21.

one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone," (Article 36)[40] except where the strait is formed by an island of the coastal state and a high seas or economic zone route of similar convenience exists seaward of the island. "Transit passage is the exercise in accordance with the provisions of this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditions transit of the strait... (Article 36).[41] Article 43 prohibits suspension of transit passage.[42]

Virtually all of the remaining provisions deal with the concerns of strait states. Article 33 specifies that the regime of passage through straits "shall not in other respects affect the status of the waters forming such straits nor the exercise by the strait state of its sovereignty or jurisdiction over such waters..."[43] Article 38 requires vessels and aircraft inter alia to proceed without delay through the strait; to refrain from the threat or use of force against a strait state in violation of the UN Charter; to refrain from any

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[40] Ibid., p. 22.

[41] Ibid., p. 23.

[42] Ibid., p. 26.

[43] Ibid., p. 21.

activities other than those incident to their normal modes of continuous and expeditions transit unless rendered necessary by force majeure or by distress, and to comply with applicable international safety and pollution regulations.[44] Article 39 permits the straits state to designate and substitute sealanes and to prescribe traffic separation schemes after adoption of its proposals by the competent international organization, which "may adopt only such sealanes and separation schemes as may be agreed with the strait state."[45]

Article 40 deals with perhaps the most sensitive problem : the regulatory rights of the strait state. It permits the strait state to make laws and regulations regarding transit passage relating to:

(a) The safety of navigation and the regulation of marine traffic, as provided in article 39;

(b) The prevention of pollution by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

(c) With respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;

(d) The taking on board or putting overboard of any

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[44] Ibid., p. 23.

[45] Ibid., p. 24.

commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary regulations of states bordering straits.[46]

It provides that such laws and regulations shall be nondiscriminatory, and shall not have "the practical effect of denying, hampering or impairing the right of transit passage." Foreign ships "shall comply with such laws and regulations."[47]

And finally, Article 43 applies the regime of nonsuspendable innocent passage, as in the Territorial Sea Convention, in straits used for international navigation other than those to which transit passage applies; such other straits include straits used for international navigation between one area of the high seas or economic zone and the territorial sea of a foreign state.[48]

(iv) The Exclusive Economic Zone

While foreshadowed by other developments in the past few decades, the economic zone is a new concept of critical importance. The articles that would establish a 200-mile economic zone affect more interests of more states than any other aspect

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[46] Ibid., pp. 24-25.

[47] Ibid., p. 25.

[48] Ibid., pp. 25-26.

of the single negotiating text. They attempt to deal comprehensively with activities in an area that embraces perhaps 40% of the sea and in which most of the known hydrocarbons and commercial fisheries of the sea are found.

In 1972 an alternative approach to the regime for ocean space began to emerge, its key recommendation called for the creation of an offshore economic zone which would be controlled exclusively by the coastal state. The interest of the UN. Seabed Committee was aroused by developments that occurred at the Santo Domingo Conference of Caribbean Countries on the Problems of the Sea and at the African States Regional Seminar on the Law of the Sea. Both these meetings took place in June 1972 and both produced proposals embodying an offshore economic zone.

The Declaration of Santo Domingo introduced the concept of the "patrimonial sea". In the area so designated the coastal state was to have sovereign rights over the renewable and nonrewable natural resources found in the water, seabed, or subsoil. It is also to possess the right to regulate scientific research and the power to take measures to prevent marine pollution in this area. While the extent of this zone was to be determined by international agreement, it was felt that it should not exceed a breadth of 200 miles from the coast. Very significantly, in the patrimonial sea, ships and aircraft of all states were entitled to freedom of navigation and overflight with no

restrictions "other than those resulting from the exercise by the coastal state of its rights within the area."[49] In its statement on the continental shelf, the declaration accepted the Continental Shelf Convention's definition of the extent of the shelf but noted that the portion of the shelf that was located within the patrimonial sea was to be subject to the regime provided for that area; that part of international law. The seabed beyond the patrimonial sea and the continental shelf was to be treated as the "common heritage of mankind."

The African States Regional Seminar on the Law of the Sea reached similar conclusions recommending the creation on an economic zone. In this zone the coastal state would have exclusive jurisdiction for the purposes of owning, controlling, and regulating the national exploitation of the living and non-living resources of the sea and seabed. Within it the coastal state was also to have the power to prevent and control pollution but the zone was to be created without prejudicing freedom navigation, overflight, or the laying of submarine cables or pipelines. No mention was made of freedom of scientific research and no definite extent for the economic zone was suggested, although it was recommended that such an area encompass at least the continental shelf. The natural resources beyond this zone

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[49]Juda, op. cit., p. 122.

were to be managed by an international authority which would have special concern for the promotion of "the progress of mankind in the developing countries so as to correct the grave imbalance between the nations."[50]

Unlike the American draft treaty, these proposals did have great and immediate impact upon and appeal to a number of states, which believed that the economic zone concept provided a proper basis for a drafting of a new regime for ocean space. It was felt that these proposals would allow for the utilization of marine resources, provide a share of the ocean's wealth for the less developed states while protecting the interests of the coastal states in nearby offshore areas.

Accordingly, in 1972 Kenya introduced for consideration by the UN Seabed Committee and proposal for the creation of an economic zone.[51] The Kenyan draft articles would recognize the right of all states to establish an economic zone beyond the territorial sea. Within this zone the coastal state would have sovereign rights over natural resources and would have exclusive jurisdiction for the purposes of control, regulation, and exploitation of both living and non-living resources and

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[50] Loc. cit.

[51] "United Nations Committee on the Peaceful Uses of the Seabed and Ocean Floor: Kenyan Draft Articles on the Concept of an Exclusive Economic Zone Beyond the Territorial Sea." International Legal Materials. 12, 1(January, 1973), pp. 33-35.

for the purpose of prevention and control of pollution. The establishment of economic zone was not to affect freedom of navigation, overflight, and the laying of the submarine cables and pipelines "as recognized by international law." The coastal state would be authorized, however, to regulate scientific research. The envisaged extent of the zone was not to be in excess of 200 nautical miles from the baseline of the territorial sea.

In an important statement on August 10, 1972, American spokesman John Stevenson told the UN. Seabed Committee that the US. would be willing to accept coastal state jurisdiction over an economic zone beyond the territorial sea as a part of an overall law of the sea settlement. The American acceptance of economic zone was subject to five significant conditions.

- First, standards would have to be created and accepted so as to prevent unreasonable interference with uses of ocean space not involving resource exploitation.

- Second, international treaty standards to protect the ocean from pollution would have to be accepted.

- Third, the new treaty on the law of the sea would have to insure integrity of investment.

- Fourth, the United States would insist that there be some sharing of revenues from an economic zone for international community purposes, particularly for the benefit of developing states.

> - Fifth and finally, there would have to be a system of compulsory dispute settlement to protect noncoastal and international interests.[52]

It was apparent that the concept of the economic zone was favored by a large number of states.

In 1973 proposals for an economic zone were incorporated into draft treaties and submitted to the UN. Seabed Committee for its consideration. Colombia, Mexico, and Venezuela introduced a draft treaty[53] that would create a patrimonial sea in accordance with the recommendations of the Declaration of Santo Domingo. In May of 1973, the Council of Ministers of the Organization of African Unity (OAU) met to harmonize the position of African States on law of the sea matters and, at their conference in Addis Ababa, recognized the right of each coastal state to establish an exclusive economic zone beyond its territorial waters to an outer limit of 200 miles as measured from the baselines for its territorial seas. In such zones the coastal state would exercise "permanent sovereignty" over living and mineral resources and would administer the zone without "undue interference" with freedom of navigation, overflight, and the laying

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[52]Juda, op. cit., p. 123.

[53]Further details see "United Nations Committee on the Peaceful Uses of the Sea-bed and Ocean Floor: Colombia-Mexico-Venezuela: Draft Articles for a Treaty on the Territorial Sea." International Legal Materials, op. cit., pp. 570-572.

of cables and pipelines. Scientific research within the economic zone, however, was to be carried out only with the consent of the coastal state. Ocean areas beyond national jurisdiction, according to the OAU, were to be dealt with as a common heritage of mankind and managed by international machinery. The African states favored a strong international governing body, which could itself explore and exploit the area and could minimize any adverse economic effects of price fluctuations of raw materials caused by activities carried out in the sea. Presumably then, this body would possess power to control levels of deep sea exploitation. Additionally, the governing body was to be authorized to regulate and to undertake scientific research and to protect deep ocean areas against marine pollution. The international machinery that would govern this area was envisaged to include an assembly of all member states and a council of limited membership, reflecting the principle of equitable distribution and exercising in "a democratic manner" most of the functions of the machinery. There was also to be a secretariat and a tribunal for the settlement of disputes. The conclusions of the OAU were there embodied in a 1973 draft convention co-sponsored by 14 African states and submitted to the Seabed Committee.

On July 16, 1973 the US. introduced its draft articles on a coastal seabed economic area. Unlike the aforementioned proposals for a coastal economic zone, the American draft would grant exploration and exploitation rights solely

to seabed resources; fisheries were not dealt with in this plan. The extent of the coastal seabed area was left open for future negotiations but it was noted by the American delegation that the preponderant view held by representatives of other states was that the outer boundary of an economic zone should be at a distance of 200 miles from the coast or should be marked by the outer boundary of the continental margin if it extended beyond 200 miles. The American proposal also incorporated stipulations that would give effect to the five conditions insisted upon by Ambassador John Stevenson in his August 10, 1972 address to the Seabed Committee.

While the US. was moving toward a position on the law of the sea that was more in line with the views of a majority of states, significant differences still existed between American preferences and those of the states favoring an offshore economic zone. Disagreement was evident in at least four areas: fisheries, pollution control, the regime for deep ocean space, and scientific research.

In terms of the actual negotiations in the Third Conference, there can be no doubt that the fundamental characteristic of the zone is an accommodation between coastal state and other interests, with a different balance struck with respect to different types of activities in the zone. It is most coastal or "territorial" in its treatment of the sovereign rights of the coastal state over seabed resources of the zone; it is most free

or "international" in its treatment of navigation, overflight, and similar uses. But even with respect to these activities, on the one hand, the coastal state sovereign rights are subject to duties designed to protect other uses and the marine environment, and, on the other hand, the freedoms of all states are subject to traditional high seas duties and environmental duties, as well as the duty to have "due regard to the rights and duties of the coastal state."

One significant article in the revised SNT is Article 44, which elaborates the rights of the coastal state in the zone. Article 44 reads in pertinent part as follows:

> 1. In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal state has:
>
> (a) sovereign rights for the purpose of exploring and exploiting conserving and managing the natural resources, whether living or non-living, of the seabed aand subsoil and the superjacent waters;
>
> (b) exclusive rights and jurisdiction with regard to the establishment and use of artificial islands, installations and structures;
>
> (c) exclusive jurisdiction with regard to:
>
> (i) other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and
>
> (ii) scientific research;
>
> (d) jurisdiction with regard to the preservation of the marine environment, including pollution control and abatement;

> (e) other rights and duties provided for in the present Convention.[54]

With respect to artificial islands and installations, Article 48 paragraph 1 of the revised single negotiating text provides:

> In the exclusive economic zone, the coastal state shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
>
> (a) artificial islands;
>
> (b) installations and structures for the purposes provided for in article 44 and other economic purposes;
>
> (c) installations and structures which may interfere with the exercise of the rights of the coastal state in the zone.[55]

The question of the juridical status and the rights enjoyed by all states in the economic zone was one of the most difficult aspects of the negotiations. The revised single negotiating text reflects the clear consensus in favor of "the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication"

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[54]"Revised Single Negotiating Text, Part II: Text Presented by the Chairman of the Second Committee." United Nations Third Conference on the Law of the Sea, op. cit., p. 26.

[55]Ibid., p. 27.

(Article 46),[56] on the one hand, and coastal state "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living" (Article 44 (1)(a)),[57] on the other hand. The problem centered on the "residual rights" which the Convention does not attribute either to the coastal state or to all states. This is linked to the question whether the status of the economic zone is that of the high seas (without prejudice, of course, to the specified rights of the coastal state in the zone).

The solution proposed in the revised single negotiating text has a number of elements. On the one hand, Article 75 defines the "high seas" as excluding the economic zone, reflecting the often expressed view that the zone is neither territorial sea nor high seas, but sui generis.[58] On the other hand, it attempts to reflect the view that the economic zone does not alter in concept the exercise of high seas freedoms being preserved. Anyway, the exclusion of the economic zone from the definition of the high seas was strongly opposed by some states.

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[56] Loc. cit.

[57] Ibid., p. 26.

[58] Ibid., p. 39.

The basic thrust of the economic zone is, of course, resource jurisdiction. Its most "revolutionary" aspect is the elimination of freedom of fishing and the substitution of coastal state sovereign rights over the exploration, exploitation, conservation, and management of living resources. Such a drastic alteration, coupled with the problems associated with the migratory and other biological characteristics of fish stocks, necessarily raises a number of practical problems that require resolution if a sound and widely acceptable agreement is to be reached. Therefore, it is not surprising that most of the articles in the economic zone section deal with fishing.

There are six basic elements in the treatment of fisheries in the revised single negotiating text:

(1) The "sovereign rights" of the coastal state. Fishing is subject to the jurisdiction and broad regulatory, and management powers of the coastal state.

(2) The coastal state duty to conserve. It has the duty to determine the allowable catch and adopt other conservation measures "designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant enrironmental and economic factors"; to ensure "that the maintenance of the living resources...is not endangered by over-exploitation"; and "to take into consideration the effects on species associated with or

dependent upon harvested species" (Article 50).[59]

(3) The coastal state priority allocation and duty to ensure optimum utilization. It has the duty to "determine its capacity to harvest the living resources" of the zone and, where it "does not have the capacity to harvest the entire allowable catch," to "give other states access to the surplus of the allowable catch" pursuant to coastal state regulations" consistent with the provisions of the present Convention." Among the factors the coastal state "shall take into account" in granting such access is "the need to minimize economic dislocation in states whose nationals have habitually fished in the zone or which have substantial efforts in research and identification of stocks." (Article 51).[60]

(4) Special provisions for highly migratory species (Article 53),[61] marine mammals (Article 54),[62] anadromous species (Article 55),[63] catadromous species (Article 56),[64] and sedentary species (Article 57).[65]

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[59] Ibid., pp. 28-29.

[60] Ibid., pp. 29-30.

[61] Ibid., p. 31.

[62] Loc. cit.

[63] Ibid., pp. 31-32.

[64] Ibid., pp. 32-33.

[65] Ibid., p. 33.

(5) Special provisions regarding access of land-locked and "geographically disadvantaged" states to fisheries in the economic zone of their neighbors (Articles 58, 59).[66]

(6) Comprehensive fisheries enforcement rights for coastal states in the zone. These include "boarding, inspection, arrest, and judicial proceedings," provided that arrested vessels and their crews "shall be promptly released upon the posting of reasonable bond or other security" and that "penalties for violations of fisheries regulations many not include imprisonment" in the absence of agreement to the contrary (Article 61)[67]

The question of the delimitation of the economic zone and the continental shelf between neighboring coastal states is highly divisive one. Article 62 places primary emphasis on procedure in this matter. It provides in pertinent part:

(1) The delimitation of the exclusive economic zone between adjacent or opposite states shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistant line, and taking account of all the relevant circumstances.

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[66] Ibid., pp. 33-34.

[67] Ibid., p. 34.

(2) If no agreement can be reached within a reasonable period of time, the states concerned shall resort to the procedures provided for in part...(settlement of disputes).

(3) Pending agreement or settlement, the states concerned shall make provisional arrangements, taking into account the provisions of paragraph 1.

(4) For the purposes of the present Convention, "median or equidistant line" means the line every point of which is equidistant from the nearest points of the baselines from which the broadth of the territorial sea of each state is measured.

(5) Where there is an agreement in force between the states concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.[68]

However, Article 128 of the revised single negotiating text provides, "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[69]

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[68] Ibid., pp. 34-35.

[69] Ibid., p. 57.

(v) Continental Shelf

The basic and still unresolved issue regarding the continental shelf is whether it would be defined to include continental margin areas beyond 200 miles, thereby placing seabed resource exploration and exploitation of the entire margin under coastal state jurisdiction. With respect to the definition of the continental shelf, the revised SNT provides a new definition in order to eliminate the ambiguity of the Article 1 of the 1958 Continental Shelf Convention, particularly the "exploitability clause." In Article 64, the definition of the continental shelf was designated to comprise "the seabed and subsoil of the submarine areas that extend beyond its territorial sea (i) throughout the natural prolongation of its land territory to the outer edge of the continental margin, (ii) or to a distance of 200 nautical miles from the baselines from which the breath of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."[70] It is noticeable that the "creeping jurisdiction" of the Article 1 of the 1958 Convention which stated" or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas" is all deleted.

Article 65 states the rights of the coastal state over the continental shelf as follows:

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[70] Ibid., p. 35.

1. The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal state.

3. The rights of the coastal state over the continental shelf do not depend on occupation, effective or national, or on any express proclamation.

4. The natural resources referred to in this Chapter consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.[71]

Article 70[72] reflects the view that an accommodation which combines coastal state jurisdiction and a revenue-sharing obligation with respect to mineral exploitation of the margin beyond 200 miles is the only practical way to protect the general

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[71] Ibid., p. 36.

[72] Ibid., p. 37.

interest in widespread agreement. This article does not specify the amount of revenue sharing, but does reflect the view of the US. and others that the obligation should be stated as a percentage of the value of mineral production at the site in order to ensure greater simplicity and certainty of expectations. It also reflects the view of some countries that the coastal state might, if it wishes, make its contribution in kind as a percentage of the "volume of production" at the site. However, supporters of a formula based on a percentage of the value of production noted the difficulties in determining profits on a uniform and equitable basis under different economic, accounting, and tax systems.

Besides, Article 70 also provides for the International Authority to determine the extent of developing country revenue-sharing obligations. The underlying accommodation that revenue-sharing represents is that, in exchange for agreeing to coastal state jurisdiction to the outer edge of the margin, the international community would receive a share of the benefits of mineral exploitation. Very few developing coastal states are likely to be affected to a significant degree. The acceptability of this basis of accommodation on the margin issue would be jeopardized by injecting the broad philosophical and political difficulties inherent in discriminatory rates of contribution. Perhaps one way around the problem might be to allow some coastal state flexibility as to the development organizations receiving contributions, which might include region developments organizations

associated with the United Nations.

The questions of drilling, scientific research on the continental shelf, sedentary species, and delimitation between opposite and adjacent states were discussed in connection with the economic zone. While Article 67[73] would treat installations on the continental shelf beyond the economic zone in the same manner as those within the zone, there was sentiment for taking, with respect to the area beyond 200 miles, the approach of Article 5 of the 1958 Continental Shelf Convention, which refers to coastal state jurisdiction only in respect of installations for the exploration and exploitation of the natural resources of the continental shelf.

(vi) The High Seas

The most important question raised by the high seas chapter is the definition of the high seas. The implications of defining the high seas to exclude the economic zone have been discussed in connection with the economic zone.

Articles 104 and 105 taken together, make it clear that freedom of fishing on the high seas beyond the economic zone is "subject to... the duty to adopt, or to cooperate with other states in adopting, such measures for their respective nationals as may be necessary for the conservation of the living

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[73] Ibid., pp. 36-37.

resources of the high seas."[74] In addition, where the same stock or stocks of associated species occur both within the economic zone and "in an area beyond and adjacent to the zone." Article 52 (2) provides for the coastal state and states fishing such stocks in the adjacent area to seek to agree on conservation measures in the adjacent area.[75] While this provision does not speak of a "special interest" of the coastal state in conservation, its practical effect, particularly if there is compulsory dispute settlement, would be to provide some protection of the conservation interests of the coastal state.

(vii) Landlocked States

In the Draft Articles (A/Conf. 62/ C.2/ L. 39)[76]-- sponsored by the land-locked and other geographically disadvantaged states including Singapore-- it has been proposed that land-locked and other geographically disadvantaged states be given the right to participate in the exploration and exploitation of the living resources of the zone of neighboring coastal states on an equal and nondiscriminatory basis. The draft articles also make reference to a system of revenue-sharing of the living resources of the zone of developed countries and a system of revenue-sharing

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[74] Ibid , p. 49.

[75] Ibid., p. 31.

[76] Singh, op. cit., p. 119.

of non-renewable resources of the zone. More specifically, it has been proposed that a developed coastal state contributes a certain percentage of its revenue derived from the exploitation of the living resources in that zone to the international authority, and that all coastal states contribute a percentage of the revenue derived from the exploitation of the non-renewable resources of the zone, which contributions shall then be distributed by the international authority on the basis of an equitable-sharing criterion. This appears to be a fair solution to problems of the land-locked, shelf-locked and other geographically disadvantaged countries. Practical problems may, however, arise. For example, it would be argued that reference to "revenue" must mean "net revenue" and not "gross revenue." If this is accepted, the problem then arises whether states might not want to reduce their "net revenue" so as to be able to keep a larger portion of the revenue for themselves.

At the Third UN. Conference, Article 110 of the revised SNT provides that land-locked states "shall have the right of access to and from the sea for the purpose of exercising the rights provided for in the present Convention."[77] Terms and

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[77]"Revised Single Negotiating Text, Part II. Text Presented by the Chairman of the Second Committee." United Nations Third Conference on the Law of the Sea, op. cit., p. 51.

conditions would be specified in bilateral, subregional, or regional agreements. Transit states "have the right to take all measures to ensure that the rights provided for in this Chapter for land-locked states shall in no way infringe their legitimate interests."[78] Traffic in transit would be exempted from customs duties, taxes, and charges other than those for specific services rendered (Article 112).[79]

The importance of the issue of access to and from the sea is related not only to the increased number of land-locked states in the international community, particularly in Africa, but to the fact that the means and commercial incentives in developing coastal states for transporting the trade of developing land-locked states may not be entirely equal to their need.

(viii) Archipelagos

The revised SNT seeks to accommodate the desire of certain island nations to enclose the waters of their archipelagos with the interests of other nations in protecting the seas from unreasonably broad claims and in protecting navigation and overflight.

Article 118 provides that "archipelagic state" means a state constituted wholly by one or more archipelagos

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[78] Loc. cit.

[79] Loc. cit.

and may include other islands."[80] But the concept does not apply to islands of continental states.

The articles establish criteria in terms of length of line and land-to-water ratio for drawing lines around an island group. Article 119(2) states that "the length of such baselines shall not exceed 80 nautical miles, except that up to one per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles."[81] Waters within such lines are" archipelagic waters" where the archipelagic state exercises sovereignty "subject to this Chapter" (Article 121).[82] The territorial sea, contiguous zone, economic zone, and continental shelf would be measured seaward of these lines (Article 120).[83]

Article 125 establishes a right of "archipelagic sealanes passage" in sealanes and air routes designated by the archipelagic state "suitable for the safe, continuous and expeditious passage of foreign ships and aircraft" through archipelagic waters.[84] Criteria for the width and location of lanes are elaborated. Article 125 (3) defines archipelagic sealanes passage as follows:

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[80] Ibid., p. 53.

[81] Loc. cit.

[82] Ibid., p. 54.

[83] Loc. cit.

[84] Ibid., p. 55.

> Archipelagic sealanes passage is the exercise in accordance with the present Convention of the rights of navigation and overflight in the normal mode for the purpose of continuous and expeditious transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.[85]

The provisions regarding the duties of states exercising the right of archipelagic sealanes passage (Article 126),[86] the designation and international review of sealanes and traffic separation schemes (Article 125), and the regulatory rights of the archipelagic states with respect to such passage are similar to the provisions regarding transit passage of straits (Article 126).

In archipelagic waters outside sealanes and air routes, there would be a right of innocent passage subject to temporary and nondiscriminatory suspension by the archipelagic state where essential for the protection of its security (Article 124).[87] There are also special provisions regarding traditional fishing rights (Article 123),[88] and communication between two parts of the territory of an immediately adjacent neighboring state (Article 119).[89]

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[85] Ibid., p. 56.

[86] Ibid., p. 57.

[87] Ibid., p. 55.

[88] Loc. cit.

[89] Ibid., p. 53.

The question of archipelagos is a good example of the delicate problem of promoting a widely acceptable treaty. Inclusion of the concept is of overriding concern to a limited number of states. However, unless the definition is carefully circumscribed and adequate navigation and overflight rights are guaranteed the inclusion of the concept would seriously reduce the chances of a widely acceptable treaty.

(ix) Regime of Islands

As noted before, Article 128 of the revised single negotiating text provides that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[90] Aside from this, all the substantive rules of the Convention applicable to other land territory also apply to an island, defined as a "naturally formed area of land, surrounded by water, which is above water at high tide."[91]

The effect of this text, and the reactions of states to it, are unclear. For example, what if it is the presence of marine resources and the desalination of sea water that render habitation and economic life possible?

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[90] Ibid., p. 57.

[91] Loc. cit.

(x) Enclosed and Semienclosed Sea

This subject is a microcosm of the overall negotiation. It touches on virtually all the problems regarding the nature, extent, and delimitation of coastal state jurisdiction, and international and regional cooperation in the exercise of that jurisdiction.

Some of the world's most important high seas can be regarded as enclosed or semi-enclosed seas. Much of the world's trade passes through these areas. The strategic importance of some is obvious. It would therefore appear that, insofar as the navigation and other rights of the international community as a whole and the rights of coastal states vis-a-vis the community are concerned, it is necessary to treat such areas in terms of the universally applicable provisions of the treaty.

Article 129 of the revised SNT defines"enclosed or semienclosed seas" as "a gulf, basin, or sea surrounded by two or more states and connected to the open seas by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states."[92]

Article 130 provides for cooperation among states bordering enclosed or semienclosed seas in the exercise of their rights and duties under the Convention.[93] Specific reference is

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[92] Loc. cit.

[93] Ibid., p. 58.

made in this regard to coordination with respect to living resources, preservation of the marine environment, and scientific research.

Article 130 is perhaps a somewhat narrower example of the general need for cooperation among neighboring coastal states. It does, however, tend to reflect some efforts already underway or under consideration in such areas as the North Sea, the Mediterranean Sea, the Caribbean Sea, and the Persian Gulf.

The Third Committee

The mandate of Committee III was functional rather than territorial. If was to deal with the problems of pollution and scientific research everywhere in the oceans. Thus, most of the work of the Third Committee was done in informal sessions of the Committee which were the equivalent of working groups. Partial consolidated texts were forwarded on preservation of the marine environment and on marine scientific research and development and transfer of technology. These critical problems lie in the area of coastal state jurisdiction beyond the territorial sea, and this largely overlaps, as far as jurisdictional issues are concerned, with the work of the Committee II.

(i) Protection and Preservation of the Marine Environment

The revised single negotiating text on protection and preservation of the marine environment largely reflects the results achieved in Caracas on the general articles on the subject and the specific results in the Working Group on marine pollution in Geneva.

The first section of the revised SNT, General Provisions, sets out the basic legal obligations to protect and preserve the marine environment and addresses the difficult and controversial problem of balancing those obligations against economic considerations and legitimate uses of the sea. These articles provide in part:

> States have the obligation to protect and preserve all the marine environment (Article 2)[94]
>
> States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment (Article 3).[95]
>
> States shall take all necessary measures consistent with this Convention to prevent, reduce and control pollution of the marine environment from any source using for this purpose the best practicable means at their disposal and in accordance with their capabilities, individually or jointly, as appropriate, and they shall endeavour to harmonize their policies in this connexion (Arcitcle 4 (1)).[96]
>
> States shall take all necessary measures to ensure that activities under their jurisdiction or control are so conducted that they do not cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond

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[94] "Revised Single Negotiating Text, Part III. Text Presented by the Chairman of the Third Committee." United Nations Third Conference on the Law of the Sea. (New York: United Nations, May 6, 1976, p. 5.

[95] Loc. cit.

[96] Loc. cit.

> the areas where they exercise sovereign rights in accordance with this Convention (Article 4 (2)).[97]
>
> The measures taken pursuant to this Chapter of the Convention shall deal with all sources whatsoever of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent (Article 4 (3)).[98]

The second section sets out obligations to formulate and elaborate international rules, standards, and recommended practices and procedures for the prevention of pollution (Article 7);[99] to cooperate in eliminating the effects of pollution and preventing or minimizing damage (Article 9),[100] and to cooperate in scientific research and data exchange programs regarding pollution and its remedies (Article 10)[101] and in working out appropriate scientific criteria for the formulation of international environmental measures (Article 11).[102]

Section Three contains broad provision on the promotion of scientific, educational, technical, and other assistance to

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[97] Loc. cit.

[98] Loc. cit.

[99] Ibid., p. 7.

[100] Loc, cit.

[101] Loc., cit.

[102] Loc. cit.

developing countries for the preservation of the marine environment and the prevention of pollution (Article 12).[103] Such provisions can and should be regarded as an integral part of a global effort to control marine pollution.

Section Four obliges states to "endeavour, as far as is practicable" to monitor pollution of the marine environment (Article 14 (1)),[104] and to report the results to the UN. Environment Programme or any other competent organization," which should make them available to all states" (Article 10).[105] States are also required to keep under surveillance "the effect of any activities which they permit or in which they engage to determine whether these activities are likely to pollute the marine environment" (Article 14 (2).[106]

Section Five provides that states "shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in Article 15 of this Part of the Convention" (Article 16).[107]

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[103] Ibid., p. 8.

[104] Ibid., p. 9.

[105] Ibid., p. 7.

[106] Ibid., p. 9.

[107] Loc. cit.

Section Six, regarding standards to prevent, reduce, and control marine pollution raises perhaps the most difficult issue in this section. It provides that states "shall establish... international rules and standards" regarding vessel-source pollution (Article 21);[108] "shall establish global and regional rules, standards and recommended practices and procedures" regarding pollution from exploration and exploitation of the seabed (continental shelf) and "from artificial islands, installations, and structures under their jurisdiction" (Article 18);[109] "shall endeavour to establish" as soon as possible such global and regional measures regarding ocean dumping (Article 20);[110] and "shall endeavour to establish" such global and regional measures regarding pollution from atmospheric sources (Article 22)[111] and "from land-based sources, taking into account characteristic regional features, the economic capacity of developing countries and their need for economic development" (Article 17 (4)).[112]

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[108] Ibid., p. 12.

[109] Ibid., p. 10.

[110] Ibid., p. 11.

[111] Ibid., p. 13.

[112] Ibid., p. 10.

In the case of pollution from landbased and atmospheric sources, states are required to establish national laws and regulations, taking into account internationally agreed rules, standards and recommended practices and procedures. For all sources of marine pollution except landbased atmospheric sources, there is a requirement that national laws and regulations "shall be no less effective" than international or generally accepted rules and standards; with respect to these sources of marine pollution, the text also applies the "no less effective" rule to internationally "recommended practices and procedures."

The general approach of these articles is to vest the relevant environmental rights and duties in that state which has jurisdiction over the activity in question. The close relationship between the application of environmental measures and the overall regulation of activities justifies, such an approach. There would be the possibility of interference should another state be granted such rights and duties. Thus, a coastal state, with respect to seabed exploitation in its economic zone, and a flag state, with respect to vessels flying its flag, would be obliged to carry out the relevant environmental duties and would have the right to impose more stringent environmental measures than these required by the duty to respect international standards. On the other hand, the duty to develop and respect international standards derives from recognition of the fact that the state whose activities are the source of pollution is not necessarily

the only state affected by such pollution; in some cases, it may not even be in the least affected. This is an additional reason for the strong and wide-spread support for international standards with respect to vessel-source pollution.

While the general approach of relying on the state conducting the activity to enforce international standards is reflected in Section Seven, both juridical and practical questions arise with respect to vessels.

The juridical problems involved in limiting enforcement of vessel-source pollution laws and regulations to the flag state relate to the rights of the coastal state in ports and in the territorial sea. A state has the right to establish conditions of entry to its ports (Article 27).[113] In addition, the coastal state is sovereign, subject to its duty to respect innocent passage, in its territorial sea. It has certain regulatory rights with respect to innocent passage.

Sections Six and Seven "do not affect the legal regime of straits used for international navigations" as the relevant pollution provisions regarding transit passage are in the straits articles. The same result should presumably apply to "archipelagic sealanes passage" for the same reason.

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[113] Ibid., p. 15.

While there is general agreement on the need for safeguards, the actual enforcement powers of port states and coastal states are likely to continue to be controversial. For example, the United States and others have argued that there are sound environmental reasons not to limit port state enforcement of discharge violations to discharges in specific zones off the coast. Some will regard the coastal state enforcement rights at sea as too broad, and others as too restricted. The question of recourse to compulsory dispute settlement to ensure that environmental duties are met and that exercise of environmental powers is in conformity with the Convention is critically related to the substance of the articles (Article 47).[114]

The remaining sections contain provisions on responsibility and liability (Article 44),[115] vessels entitled to sovereign immunity (Article 45),[116] other environmental conventions (Article 46),[117] and a general cross-reference to the section on compulsory dispute settlement (Article 47).[118]

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[114] Ibid., p. 23.

[115] Ibid., p. 22.

[116] Loc.cit.

[117] Ibid., p. 23.

[118] Loc.cit.

(ii) Marine Scientific Research

Negotiations on the question of research in the economic zone and on the continental shelf dominated the work of an informal negotiating group on marine scientific research. They are proved to be very difficult.

The basic difference centered on whether, as proposed in a document reintroduced with only minor changes on behalf of the Group of 77, such research should be subject to coastal state consent or, as proposed by other countries, including developed and developing landlocked and geographically disadvantaged countries, such research should be subject to certain oblibations to the coastal state, including notification, participation, and data sharing, with preliminary dispute-settlement procedures to ensure fulfillment of the obligations prior to undertaking the research project. The view of the US. was that the conditions for scientific research should be agreed in the treaty and subject to compulsory dispute settlement in order to protect the interests of the coastal state and the international community and that this obviates the need for and dangers of consent. Moreover, the fact that drilling for all purposes on the continental shelf would be controlled exclusively by the coastal state meets the major arguments for a consent regime.

Early in the session, the USSR and other Socialist countries introduced a formal proposal that would require coastal consent for research "related to the exploration and exploitation

of living and non-living resources,"[119] while other scientific research would be subject to a series of treaty obligations. The idea of distinguishing between types of research thereafter dominated the discussions. Needless to say, supporters and opponents of a consent regime noted the difficulties of making such distinations but were aware of the potential for accommodation in such an idea. In the closing days of the session, and after prior consultation with others, Colombia, El Salvador, Mexico, and Nigeria introduced a proposal which makes an analoguous distinction between "resource related research" and "fundamental scientific research."[120] In the case of the former, coastal state consent is required.

The SNT and the revised SNT texts pick up this general approach. In the revised SNT, scientific research in the economic zone or on the continental shelf would be subject to such requirements as notice to the coastal state, participation by the coastal state, provision of data and samples to the coastal state, assistance to the coastal state in assessing data, samples, and results, and international dissemination of results, and

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[119] Stevenson and Oxman, "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session," American Journal of International Law, op. cit., p. 793.

[120] Ibid., p. 794.

ensure that the research results are made internationally available through appropriate national or international channels "as soon as feasible" (Article 59)[121]

The notice to the coastal state must state whether the research project is "bearing substantially upon the exploration and exploitation of the living or non-living resources of the economic zone and on the continental shelf" (Article 61).[122] If the project is related to such resources, it is subject to coastal state consent and additional conditions, including a duty to ensure that the research results "shall not be published or made internationally available against the express wish of that state" (Article 61).[123]

Disagreements regarding the question whether research is fundamental are subject to relevant compulsory dispute-settlement procedures specified elsewhere in the Convention. There is also a general cross-reference to the dispute settlement section (Article 76).[124]

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[121]"Revised Single Negotiating Text, Part III" Text Presented by the Chairman of the Third Committee." United Nations Third Conference on the Law of the Sea, op. cit., p. 26.

[122]Ibid., p. 27.

[123]Loc. cit.

[124]Ibid., p. 30.

The remaining provisions on marine scientific research deal with the right to conduct scientific research beyond the economic zone and continental shelf (Article 69),[125] scientific research installations and equipment (Articles 70-74),[126] and responsibility and liability of the researching party (Article 75).[127]

Aspirations for successful completion of the Geneva Conference have not been met in 1976 beginning with the third session held in early 1976 (May 15- May 7) at New York. The failure depends in part on whether there is sufficient political will to make the additional accommodations necessary for success, and whether adequate time is provided for both informal work and Conference sessions.

The Conference convened a further session which was the fourth one at New York during August 2 - September 17, 1976. However, this session also failed to resolve a number of important differences, mainly between developing and developed coastal countries. In this Conference, the work of both Committees I and II were done in informal sessions, including "workshop" and

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[125] Ibid., p. 29.

[126] Loc. cit.

[127] Ibid., p. 30.

"ad hoc" groups in Committee I, and "negotiating" and "consultative" groups in Committee II.[128]

In Committee I, the most important debate concerns Article 22 of the Part I of the revised SNT which deals with the functions of the Authority towards the administration of the resources of the "Area." In this matter, although both of the "Group of 77" and the group of developed countries led by the US. would have the coinciding opinions that the activities in the "Area shall be conducted by the Authority in association with the Authority and under its control... by state parties, or state enterprises, or persons natural or juridical which possess the nationality of states parties or are effectively controlled by them or their nationals, when sponsored by such states, or any group of foregoing in accordance with the provisions of Annex I, ... under Article 28 (2) (XII) and the statute of the Enterprise;[129] they had also some conflicting ideas. The Group of 77 preferred to grant more power to the

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[128]Further details see Proceedings on the Third Conference on the Law of the Sea, Fifth Session at New York. (Bangkok: Ministry of Foreign Affairs, September 29, 1976), 5.p. (in Thai).

[129]"Revised Single Negotiating Text, Part I: Note by the President of the Conference." United Nations Third Conference on the Law of the Sea, op. cit., p. 19.

"Enterprise" rather than to the state parties and state enterprises in exploring and exploiting the living resources, while the developed countries particularly the US. wished to see both parties (The Enterprise and the state parties or state enterprises) to have power and opportunities in the "parallel system."

Aside from this, the Committee II also had some problems. The essential subject concerns with the rights and duties of the coastal and other states in the exclusive economic zone. The land-locked and the geographically disadvantaged states announced the economic zone as part of the high seas in order to confine the rights of the coastal states. Most of the coastal states, on the contrary, attempted to conserve the extreme rights above this zone, declaring it a "sui generis zone" and not part of the high seas or territorial sea.

Besides, the land-locked states also confirmed the right of access to and from the sea and the freedom of transit through the territories of transit states by all means of transport. They opined that the transit should not be based on the concept of the "equity of reciprocity."

Although the proceedings of this Conference was held in the form of informal sessions and small groups in order to compromise and reach the consensus on the significant subjects, it is apparent that not any single agreement was to be reached. The first question that should receive top priority focus is in the Committee I.

As a result, the Conference has recommended a final session of the Third Conference at New York, commencing from May 23, 1977 and lasting about 7 to 8 weeks. During the first two or three weeks, attempts will be placed on the agreement in the Committee I, and in the last section of the Conference, the "Informal Single Composite Negotiating Text" will be produced. It will be adopted under the consensus rule to be the Convention in the last week of the Conference.

The Conference on the Law of the Sea scheduled for 1977 if it achieves agreement, is not likely to harness powerful and divergent forces. At least, the negotiation will provide ground rules under which competition can be carried on without disastrous conflict from which no one will emerge the winner. To be sure, a successful negotiation must be a two-way street. As it is quite properly pointed out, the developing countries are by their sheer weight of numbers in a position to dominate the conference. But the object of the negotiation is not the adoption by the conference of a treaty text by the developing countries over the opposition of the maritime and developed countries, but rather a generally acceptable treaty that can be ratified by most states, including the principal maritime and developed countries.

There or elsewhere, we are likely to get some rules and even some institutions governing the resources of the seabed. That will be the beginning. Like the law of particular nations

and like the law of nations generally, the future law of the sea will have the characteristics less particular monopoly, less national autonomy, less conflict and ad-hoc accommodation, and more regulation, more cooperation, as well as more concern for the general welfare. We believe that upon its success depends the evolution of a new structure of law of the sea, which would be a corner-stone for an era of unprecedented international cooperation and of accelerated process of reduction of world tensions and economic inequalities.