'FLUCTIBUS HAUD AEQUIS': A BRIEF ANALYSIS OF THE CURRENT TALKS ON THE NEW LAW OF THE SEA

DAVID J. ATTARD

The nations of the world are now facing decisions of momentus importance to mankind's use of the oceans for decades ahead. At issue is whether the oceans will be used rationally and equitably and for the benefit of all mankind, or whether they will become an arena of unrestrained exploitation and conflicting jurisdictional claims in which even the most advantaged states will be the losers.

The technological and political developments[1] that mankind has been witnessing throughout the past few decades, have tended to sharpen the historical collision between two doctrines which can be considered as the very basis of the traditional maritime order. One doctrine gives the right of ownership over the sea and its resources, the other insists that the sea should be free from any dominion and open to use by all. The former was implicit in the Spanish and Portugese claims to the Gulf of Mexico and the entire Atlantic Ocean; the latter was important to the great trading companies such as the Dutch East India Company.

However, even in their seventeenth century formulation both doctrines seem remarkably pertinent to the contemporary clashes between coastal and maritime interests of states. The Dutch lawyer Hugo Grotius was in favour of free access to the seas, whilst John Selden, the British jurist argued in favour of the right of dominion.

Grotius held that nations must not exercise any acts of ownership over the seas because it would violate right reason, equity and nature:

'The sea, since it is as incapable of being seized as the air,

[1] Vide D.J. Attard: 'Ocean Space and the New International Economic Order': Lecture given during a course 'Introduction to the Mediterranean' organised by the Extension Studies Board of the University of Malta (Summer 1976).

cannot be attached to the possessions of any particular nation.'[2]

What he called the 'boundless ocean' was indivisible open, intangible, and had infinite rescources. Moreover, maritime freedom should serve the national interest, international public order and 'the society of all mankind'.

Selden[3] on the other hand, was more concerned with the strength of historical experience, and the realities of state power and practice rather than ideals and philosophy. For him the important issues were national safety and national self-interest. The right of dominion gave nations the right to exclude others from claimed portions of the sea, to prevent fishing, navigation, landing and 'the taking of gems'. He challenged Grotius description of the sea: its resources *were* exhaustible, its space *could* be divided, and its uses *could* be effectively controlled.

We all know future was on Grotius' side; freedom of the seas provided generations of maritime powers with doctrinal support in diplomacy and legitimacy in international law. However, during the last decades technological and political developments have begun to undermine the freedom of the seas doctrine. The ever-increasing claims of states over the oceans may seem as if Selden was winning over Grotius.

The truth, however, is that neither doctrine comes to grips with the fundamental revolution in man's spatial relationship to the sea. The oceans can no longer be conceived primarily as two dimensional space defined by surface longitude and latitude.[4] We have come today, it being possible to exploit the seabed and fly within the airspace above the sea, to see them as pluridimensional in character. In this regard the trend in specialized circles is to supplant the words 'sea and ocean' with the universal expression 'Ocean Space'.[5]

[2] Vide: 'Mare Liberium' (1605) trans. R. Van Deman Magoffin, London: Oxford University Press (1916).

[3] Vide: Wolfgang Friedman: 'Selden Redivivus – Towards a partition of the Seas?' (65AJIL 757 (1971).

[4] Resolution 2750 (XXV) of December 17, 1970 includes in its preamble 'The General Assembly ... conscious that the problems of the marine environment are closely linked to each other and should be examined in their totality'.

[5] The father of this new concept is Arvid Pardo, who has described it as comprising the surface of the sea, the water column, the seabed and its subsoil; vide also Lawrence Juda: 'Ocean Space Rights' (Praeger Special Studies in International Politics and Government New York); W.L. Griffin: 'Emerging Law of Ocean Space', The International Lawyer 546 (July 1967); F. Shick: 'Problems of Space in the U.N.' B.I.C.Q.L. 969 (July 1964).

'Ocean Space' has been described as a new continent, which is opening to full utilization and intensive exploitation by man. All states, whether large or small, developed or developing, coastal or land locked are intimately interested in the legal regime which will regulate mankind's activity in 'Ocean Space'. The increasing problems which this development has brought about are insoouble on the basis of the present law of the sea. It was under these circumstances that on August 17, 1967, the Permanent Mission of Malta to the U.N. proposed the inclusion in the Agenda of the twenty-second session of the General Assembly, of an item entitled 'Declaration and Treaty concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and of the Ocean Floor, underlying the Seas beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interests of Mankind'.[6]

After six years of pre-Conference deliberations[7] during which dozens of governments proposed draft treaties, the General Assembly on November 16, 1973 took the final steps necessary for the implementation of the Conference. By adopting Resolution 3067 (XXVIII),[8] it confirmed the preliminary agenda for the meeting at the U.N. Headquarters in New York for the purpose of: 'dealing with matters relating to the organisation of the Conference, including the election of officers, the adoption of the agenda and the rules of procedure of the Conference, the establishment of subsidary organs and the allocations of work to these organs ... to adopt a convention dealing with all matters relating to the law of the sea ...' Before turning our attention to how matters stand, as the sixth session of the third U.N. Conference on the Law of the Sea[9] reconvenes, it is useful to trace the events which got us where we are today.

[6]U.N. Doc A/6695 (Aug. 18, 1967); The Memorandum attached to the 'Note verbale' expressed fear that rapid progressive Marine technology by the developed countries would lead to national appropriation and use of the seabed and ocean floor.

[7]A major part of this work was done by the U.N. Seabed Committee. The topics it dealt with were subdivided amongst its three sub-committees. Sub-committee I was concerned with an international regime and international organisation; sub-committee II with most of the traditional law of the sea issues, including territorial seas, straits, the high seas, fisheries and the seabed within national jurisdiction; sub-committee III was concerned with pollution and scientific research.

[8]U.N. G.A. Res. 3067 (XXVIII), 2169th meeting Nov. 16, 1973, 1 Official Records VII (1975).

[9]Hereinafter referred to as U.N.C.L.O.S. III.

U.N.C.L.O.S. III is reputed to be the longest, largest and most expensive conference in the history of mankind. At its second session in Caracas,[10] there were about 2,000 delegates representing over 143 states many of whom relatively new countries with no prior experience in dealing with ocean issues. Facing the Conference was an agenda with over 100 items which had to be agreed upon, before a comprehensive law of the sea treaty could be achieved. Unlike the previous 1958 Law of the Sea Conferences, there was no draft treaty prepared in advance by the International Law Commission. It was, therefore, necessary to divide the Conference into three formal negotiating groups: Committee I dealing with the concept of common heritage and the new international authority to be created; Committee II focusing on the territorial sea, the 200 mile zone and the high seas; and Committee III concentrating on scientific research and environmental issues.

Notwithstanding, a warning by Dr. Waldheim U.N. Secretary General, that new conflicts concerning the sea were 'very considerable and, given the inevitable development of marine technology, ... bound to increase unless we resolve to reach agreement while there still is time to do so, ...' attitudes at the Geneva Session[11] were still somewhat militant.

It was only at the end of this session that the three principal Conference-committee chairmen[12] were able to reduce a wide variety of differing claims and proposals into one three-part Informal Single Negotiating Text[13] to which the President of the Conference later added a separate text on Settlement of Disputes.[14]

This Text has served as a basis for discussion during the fourth session which took place in New York.[15] Several changes were introduced varying from technical and editorial improvements

[10] This session was held in August 1974, the previous session took place in New York in 1973.

[11] This session was held between March 17 to May 19 and was attended by some 1,700 delegates from 141 countries.

[12] Committee I: M. Barnela Eugo (Cameroon); Committee II: St. Reynaldo Galindo – Polil (El Salvador); Committee III: Mr. Alexander Yankor (Bulgaria).

[13] Hereinafter referred to as S.N.T.; vide also U.N. Doc. A/CONF. 62/WP. 8 Parts I, II, III, May 7, 1975.

[14] Mr. Hamilton Shirely Amerasinghe (Sri Lanka); vide U.N. Doc. A/CONF. 62/WP9 Part IV, July 21, 1975.

[15] Held on March 15 to May 7 1976 and was attended by 137 out of 147 members states of the U.N. and 12 other states which are members of the U.N. Specialised agencies; In Committee II A. Qguilar (Venezuela) succeeded Galendo – Polel.

to significant transformation of basic concepts. In spite of the fact, that significant progress was made in the negotiations towards a consensus in some areas, the resulting new Text known as the Revised Single Negotiating Text[16] still has the status of an 'informal' document drafted under the sole responsibility of the Chairmen of the Committees and the President of the Conference. The latest session in New York ended inconclusively for although the session had clarified the ideas of various parties and had indicated the outlines of possible compromise, several important countries were not able to accept them.[17]

The politics of the Conference are very complex. In relation to the oceans, no two nations are alike – but all have a considerable interest. Two basic factors tend to dominate the workings and negotiations within the Conference. The first factor is an idealogical one, which tends to separate the developed countries from the the developing ones (Since U.N.C.T.A.D. 1964 the latter have formed the so-called 'Group of 77', which attempts to put forward a unified front at international meetings.)[18] This factor is most clearly illustrated in the various and conflicting views put forward by both sides in the debate over how the 'International Seabed Authority'[19] should be structured and how the resources of the deep seabed are to be exploited. The second factor is a geographical one. Some countries, for example, have miles of coastline, whilst others have little or none.[20] This factor cuts across all ideological differences effecting various developed and developing states.[21]

Moreover, the major visible product of substance that emerged at the first session of U.N.C.L.O.S. III was an agreement to agree. A new comprehensive treaty was to be formed by consensus, in-

[16] Hereinafter referred to as R.S.N.T.; vide also U.N. Doc. A/60NF 62/WP 8/Rev. 1/Pt. May 6, 1976.

[17] Held from Aug. 2 to Sept. 17, 1976 and was attended by over 2,000 delegates from 147 states.

[18] Vide D. J. Attard: 'The New International Economic Order: Myth or Reality?' 8 Cobweb (Winter 1976) Dept. of Economics, University of Malta.

[19] Hereinafter referred to as the 'Authority'.

[20] Thirty landlocked countries, ranging from Austria in the developed world to Zambia in the 'Group of 77' have no coastline.

[21] In fact, if the generally agreed to 200 mile zone is introduced, of the 35% of total ocean space within the new zone, almost one-third (including the area where it is most probable to expect oil) will belong to ten states, seven of which are developed: Mexico, India, Brazil, New Zealand, Australia, Norway, USSR, USA, Canada and Japan.

stead of by a majority or two-thirds of those voting, which had been a popular method in the past.[22]

In the document containing the rules of procedure for the Conference[23] we read: 'bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole and the desirability of adopting a convention ... which will recure the widest possible acceptance, the Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.' This agreement which came to be known as the 'Gentleman's Agreement' has now matured into a major accomplishment and a significant development in process of international treaty law. The reason behind 'consensus politics' emerges from the bitter experiences the international community faced with the 1958 Law of the Sea treaties, when fewer than two-thirds of the participants ultimately ratified the treaties.

Against this background we can now turn to a detailed discussion of three issues, negotiations over which have come to a deadlock. These are (a) the legal status of the exclusive economic zone;[24] (b) the intersts of landlocked and geographic disadvantaged countries; (c) the nature of the proposed 'Authority'. These issues are generally considered as 'critical' for unless they are resolved, the international community will be faced with a renewed wave of unilateral claims and action over 'ocean space' which would lead to serious friction if not outright conflict.[25] It would be pertinent to point out that between 1967, when Ambassador Pardo spoke out, and 1973, the year of the formal opening of U.N.C.L.O.S., no less than 81 states asserted over 230 new juris-

[22] Although the practise of decision by consensus has been introduced 'de facto' into the operation of several U.N. bodies, it has never managed to force its way into rules of procedure. Apart from the Law of the Sea Conference, there has only been one major debate where the matter was raised; this was in a meeting of the U.N. Population Commission and the Economic and Social Council held in preparation for the World Population Conference. Moreover, it has been held that the consensus procedure does exist 'de facto' in the Security Council where no decision may be taken without the consensus of the permanent members.

[23] U.N. Doc. A/CONF 62/WP 2 (Rules of Procedure 1974).

[24] Hereafter referred to as E.E.Z.

[25] Ireland's move to a 50 mile exclusive fishing zone, participated the famous 'Cod War'; Greece and Turkey were up in arms over the right to search for resources in disputed Aegean waters.

dictional claims of varying degrees of importance.[26] Within this short period the 'common heritage of mankind' was reduced to 65 per cent of ocean space. The remaining 35 per cent claimed by coastal state appears to have virtually all gas and oil resources and 95 per cent of all harvestable living resources.

(A) THE LEGAL STATUS OF THE EXCLUSIVE ECONOMIC ZONE

Traditional international law, in principle, does not recognise the jurisdiction of a coastal state beyond the Contigous Zone[27] apart from sovereign rights over the natural resources the of continental shelf. The 1958 Convention set a maximum limit of 12 miles for the Contigous Zone and allowed the Coastal state authority to exercise control within the Zone under certain circumstances.[28] Over the last couple of decades, however, there has been a movement to claim jurisdiction and sovereign rights over marine areas often up to 200 nautical miles from the coast. This movement was sparked off by the Truman Proclamation in 1945 on the continental shelf and fisheries; this Proclamation inspired by America's fear of a shortage of hydrocarbons, was followed by the Latin American States, who have large continental shelves off their Atlantic coasts.[29] Various other countries have followed suit. Both the 1975 and 1976 Texts offer international recognition to this trend by proposing the establishment of an exclusive economic zone extending to a maximum distance of 200 nautical miles, not from the coast but from the baselines from which the breadth of the territorial sea is measured.

Many countries including the U.S.A.[30] have announced their

[26] Vide: D.J. Attard 'Malta's 1967 initiative in U.N. on Seabed Problems'. S.T.O.M. May 2, 1972 (Malta).

[27] Vide S. Oda: 'The Concept of the Contiguous Zone', I.CLQ vol.11 Jan. 1962; G. Fitzmaurice 'Some Results of the Geneva Conference on the law of the Sea' ICLQ Vol. 8 1959; A. Dean 'The Geneva Conference on the Law of the Sea: What was Accomplished'. 1958, 52AJIL 607.

[28] Vide R.S.N.T. Article 14 et: U.N. Documents A/CONF/62/WP8/Rev. 1/ Part II for a proposed increase to 24 miles of the Contiguous Zone.

[29] For an excellent analysis of the Latin American claims vide: F.V. Garua Amador, 'The Latin American Contribution to the Development of the Law of the Sea' (1974) 68 AJIL 33.

[30] The American Law is called 'The Fishery Conservation and Management Act of 1976'. It takes effect on March 1, 1977 and provides for control of foreign fishing within 200 miles of the U.S. coasts; most provisions are in accordance with the R.S.N.T. Also Mexico has claimed an E.E.Z. by a decree of January 22, 1976 amending article 27 of the Constitution. The decree is elaborated further in implementing legislation which is also largely based on the R.S.N.T. Although neither India nor

intention to claim E.E.Z.'s regardless of the outcome of the Conference. Both the 1975 and 1976 Texts offer international recognition to this trend by proposing the establishment of an E.E.Z. extending to a maximum distance of 200 nautical miles, not from the coast but from the baselines from which the breadth of the territorial sea is measured.[31]

The critical unsolved issue, however, concerns the nature and scope of the 'national jurisdiction' within the E.E.Z. One group of nations, mostly South American, assert that such jurisdiction should be total; this would in effect transfer the E.E.Z. into a territorial sea, in which other nations would enjoy only subordinate rights of navigation, over flight and communication. On the other hand, coastal states which have great maritime traditions would like to see the E.E.Z. remaining part of the high seas whilst jurisdiction is limited to certain economic rights of the coastal state, thereby enabling freedom of navigation and over flight.[32]

A popular moderate view, which is now embodied in the R.S.N.T.,[33] considers this Zone as 'sui generis', neither high seas nor territorial seas, subject to 'national jurisdiction'; however, the freedom of navigation and overflight, and the right to lay cables and pipelines is protected.[34] Indeed, the coastal state will have the right to explore and exploit the area and to conserve and manage its natural resources. It will also be possible for such states to erect artificial islands, installations and structures.[35] When the proposed convention does not attribute rights of jurisdiction within the E.E.Z., conflicts between the interests of the coastal states and of other states are to be resolved 'on the basis of equity and in the light of all relevant circumstances taking into account the respective importance of the interests involved to the

Sri Lanka had at the time of writing claimed an E.E.Z., both had signed an agreement to draw a boundary line where their zones overlap; either state will be allowed to fish in each other's zone.

[31] U.N. Document A/CONF 62/WP 8/Rev. 1/Part II, Article 45.

[32] For example: T. Vicent Leaison, the leader of the US delegation stated that it was 'critical to the U.S. that the economic zone (between 12 and 200 miles offshore) should remain high seas' (Address to the fifth session of U.N.C.L.O.S., New York Aug. 2 to Sept. 17 1976).

[33] Vide U.N. Document A/CONF 62/WP8/Rev. 1/Part II, Article 46(1).

[34] See the Introductory Note of the Chairman of the Second Committee to Part II, the Revised Single Text, P. 4.

[35] Vide Article 44(1) of the R.S.N.T. The text of this article is based on the sixth revision of a text prepared by the 'Evensen Group'. (This is an informal group of some 40 representatives chaired by Jens Eversen of Norway).

international community as a whole'.[36]

It is possible to identify four interests which various developed countries including the Soviet Union[37] have sought to protect. First, some maritime nations frequently conduct naval and aircraft activities within 200 miles of other nations shores (for example, the Superpower activities in the Mediterranean).[38] They, therefore, reject the 'sui generis' position as it might be construed to vest important 'residual' or unspecified uses of the Zone by the coastal state. In fact, the Soviet Union announced on February 12, 1976, that it would, at the fourth session of U.N.C.L.O.S. III, support a 12 mile territorial sea limit and a 200 mile economic zone for all coastal states; it condemned countries, such as China, supporting a 200 mile territorial limit, as it would mean that 40 per cent of the world's ocean area would fall under the control of coastal states. Thus the North Sea, the Mediterranean and the Caribbean, it feared, would be divided among a few coastal states.

The problem is that although specific treaty language could conceivably be drafted to protect this essentially military interest most developing nations strongly oppose any open recognition of a right to conduct military activities in the Zone. In fact, this interest is only discussed privately and it has been hard to bring the issue out into the open.[39]

The second interest of the maritime states is that of protecting their merchantile navies from undue interference of coastal states. Although, this interest seems adequately protected in the current Text, it is very possible that the issue will be reopened in the forthcoming session due mainly to the recent spate of oil spills and other accidents to shipping operating in the coastal waters of various states. The result could produce more extensive asser-

[36] Vide Article 47 of the R.S.N.T.

[37] For the position taken by the U.S. see Dr. H. Kissinger's speech made on April 8, in New York before members of the Foreign Policy Association, the U.S. Council of the International Chamber of Commerce and the U.N. Association of the U.S.A.

[38] Professor Lawrence Martin of King's College London in his paper 'The Role of Force in the Ocean' has studied the implications of a change in legal regimes of oceans on the role of navies. Vide 'Perspectives on Ocean Policy' National Science Foundation (Grant No. GL 39643, John Hopkins University, Washington D.C.).

[39] J.A. Knauss: 'The Military Role in the Ocean and its Relation to the Law of the Sea' 6th Annual Conference of the Law of the Sea Institute, Kingston 1972 P. 77-86.

tions of coastal states rights to lay down safety and other standards.

The third of the 'maritime-coastal' issues concerns freedom to engage in scientific research within the 200 mile zone. All parties agree that at present, and for the forseeable future, the most important areas of marine scientific research will take place within this 200 mile zone. It is also recognised that a significant number of such studies will require transit through more than one zone, since fish schools, geologic structures and currents cross various zones. Hence, a regime that imposes the requirement of single state and especially multiple-state consent, to conduct research activities presents the risks of substantially impairing marine scientific research.

The 1958 Convention on the Continental Shelf had provided that: 'the consent of the coastal state shall be obtained in respect of any research concerning the Continental Shelf and undertaken there. Nevertheless the coastal state shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the Continental Shelf, subject to the proviso that the coastal state shall have the right, if it so desires, to participate or to be represented in the research and that in any event the results be published'.[40]

In the current negotiations the U.S.A. together with Western Countries have taken the lead in holding that freedom of scientific research will produce results of benefit to all nations. The U.S. proposals permit the provisions requiring the researcher to give prior notification to the coastal state, to disclose the results, and to permit representatives of the coastal state to take part in the research. However, the American view would permit the coastal state rejections of a research activity only when the coastal state determines that the activity has direct application to the profitable exploitation of resources within the Zone.[41]

The developing states oppose this view and assume that the direct benefits of research accrue primarily to the researcher; it is

[40] Vide Article 5 (8) of the 1958 Convention on the Continental Shelf.

[41] The scientific community within the U.S. is generally quite concerned to maintain the maximum possible freedom. In this respect see C.H. Check: 'Law of the Sea: Effects of varying coastal State Controls on Marine Research, A Survey of the U.S. Ocean Science Community', Ocean Development and International Law. Summer 1973 pp. 209-19; 'Ocean Researchers See a threat in Law of the Sea Conference' The New York Times August 30, 1975, P. 7.

therefore feared that the latter may take undue economic advantage of the discoveries. What they would like to see is the maximization of their benefits through technology transfer and fees; they also would like to have a control in the access to information.

The R.S.N.T. provides that 'the consent of the coastal state shall be obtained in respect of any research concerning the E.E.Z. to coastal state consent, which, however, shall not be withheld';[42] unless the research project '(a) bears substantially upon the exploration and exploitation of living and non living resources; the exploration and exploitation of living and non living resources; (b) involves drilling or the use of explosives; (c) unduly interferes with economic activities performed by the coastal state; (d) involves the construction, operation or use of ... artificial islands, installations and structures ...' (Article 60, Part III). The conduct of marine scientific research in the marine environment is restricted to states and competent international organisations. Moreover, the results of a research project bearing substantially upon the exploration and exploitation of the living and non-living resources of the economic zone shall not be published against the express wish of the coastal state. Another important aspect of this problem is provided for by the R.S.N.T. in providing procedures for the settlement of disputes relating to marine scientific research.

The fourth agreement is based on the experiences which resulted from the incompetence of the 1958 Conventions to deal with the development of marine technology.[43] It is held that new and important uses of the 200 mile zone may develop in the future just as the recent post has seen the development of new uses of the seabed. It is felt that if the 200 mile zone is regarded as high seas, the developed countries would have a better opportunity to

[42] Vide U.N. Document A/CONF/62/WP8/Rev. 1/Part III Article 49.

[43] One notorious article which has not managed to overcome the effects brought by new technologies is Article 1 of the 1958 Continental Shelf Convention. This article, described by Wolfgang Friedman as 'surely one of the disastrous clauses ever inserted in a treaty of vital importance to mankind', by allowing the legal Continental Shelf to be defined as '(a) the Seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploration of the natural resources of the said areas; ...' Over the past fifteen years states have interpreted the definition in a manner so as to give the coastal state with the progress of technology the right to expand their sovereign rights over seabed resources at unlimited distances.

take advantage of these uses when and if they arise. They claim that the 'status quo' is more flexible. If the coastal states are given residual rights such control may never be divested. Whilst, if in the future it becomes desirable to grant a particular set of rights to the coastal states this can be readily accomplished.

(B) LAND LOCKED AND GEOGRAPHICALLY DISADVANTAGED STATES

Another major issue facing U.N.C.L.O.S. relates to the problem of over 50 landlocked and geographically disadvantaged states.[44] The caucus of this group met regularly during the Conference sessions as early as the 1975 Geneva meeting. Initially the group was viewed as a potential source of pressure to maintain high seas freedoms as it had little or nothing to gain by increased zones of coastal state jurisdiction; however, due to procastination it developed into a political force too late to prevent the establishment of a 200 mile economic zone. It is therefore now concentrating its efforts to obtaining access to the economic zones of certain neighbouring states (Part II Articles 58 and 59).

Moreover, some landlocked states are seeking to gain improved access to the sea. Here again the efforts have not proved to be as effective as has been hoped. Their main weakness was that out of the group of 30 landlocked states, nine are European (in fact 4 are mini states[45] whilst the other 5 are developed states[46]) who have different interests from their developing counterparts.

Also whilst two South American States, Paraguay and Bolivia, have the potential for access through transit states to highly productive fishing grounds, practically none of the nineteen landlocked states of Africa and Asia have this opportunity. Most of the waters that face their coastal neighbours are poor in resource potential. The major exception to this is South Africa whose landlocked neighbours of Swaziland, Lesotho, and Botswana may perhaps in time find it possible to share in the fisheries resources off the Cape of Good Hope Area.

A final point is that several coastal states, particularly in Africa, border on two or more landlocked states. Tanzania and Zaire, for example, each have five neighbours, any or all of whom claim rights to fisheries of the transit states' economic zones. This would render such coastal countries themselves, in a sense, 'geographically disadvantaged'. In such cases unless regional

[44] Vide D.J. Attard 'Who will own the Sea around us?', S.T.O.M. Jan. 30, 1977.

[45] Andorra, Liechtenstein, San Marino and the Vatican City.

[46] Austria, Belgium, Czechoslovakia, Hungary and Luxemburg.

arrangements are worked out it is possible that they be reluctant to allow any transit from their landlock neighbours.

Towards the end of the fifth session of U.N.C.L.O.S. in New York[47] private negotiations between the landlocked and geographically disadvantaged states and a group of developed and less-developed coastal states seemed to be making progress on these issues rendering a break through possible early in the next session of the Conference.

(C) The Establishment of an International Seabed Authority and its Activities

Under a resolution by the General Assembly in 1970[48] it was decided that efforts would be made to establish an equitable international regime – including an international machinery – for the 'Area'[49] and resources of the seabed beyond the limits of national jurisdiction. Accordingly, the U.N. Seabed Committee took cognisance of the matter and attempted to formulate the objectives, nature, scope, powers and functions of this international mechanism. However, whilst all states represented in the Committee took into consideration the 'Declaration of Principles governing the Seabed beyond National Jurisdiction' their approach to the problems varied widely.[50]

In the so-called 'Area' large amounts of manganese, copper, cobalt and nickel contained in the tennis-ball sized manganese nodules are found located in the Abyssal Plain of the ocean. The developed countries led by the U.S.A., hold that the exploitation[51]

[47] In fact at this Session the Conference was faced with a newly formed group of some 90 coastal states (other than the big maritime powers) under the chairmanship of Sr. Jorge Castaneda (Mexico). He claimed his group had decided to take a common stand in view of the 'somewhat militant attitude' of the landlocked and geographically disadvantaged states; that they were willing to discuss access to living resources in the E.E.Z. but that access of landlocked states to non-renewable mineral resources in the Zone was 'absolutely unacceptable'.

[48] Vide Resolution 2750 (XXV) December 17, 1970: U.N. General Assembly.

[49] Hereinafter referred to as the 'Area'; a precise definition of this concept is still badly needed.

[50] Vide Resolution 2749 (XXV) U.N. General Assembly.

[51] For more information regarding the state of deep seabed technology vide 'Economic Implications of Seabed Mineral Development in the International Area: Report of the Secretary General' U.N. Doc. A/CONF 62/25 LOS III O.R. Vol. III p. 4. 1974. Although it must be added that from the date this report was written further progress in this field has been done,

of these nodules is to be considered to be derived from the principal of the freedom of the High Seas. On the other hand, the developing countries have been keen to see that this wealth is declared to be the 'common heritage of mankind' and that a new international regime is set up before it is exploited.[52] This is due to two main factors:

Firstly, the land-based producers of these metals were largely developing countries, and are therefore anxious to avoid costly competition. Secondly, the 'Group of 77' want to obtain a substantial share of the benefits of deep-sea mining as well as greater control over international economic decision-making. It was clear that unless a legal regime was created to cater for an equitable distribution of the proceeds of mineral exploitation, only the developed states, who had the technology would benefit.

The First Committee at Caracas held 17 formal and 23 informal meetings to discuss the legal regime to control the 'Area'.[53] The basic document which formed the ground work for the discussions was drafted by members of the Seabed Committee.[54] However, the more substantial analysis was reserved for the Geneva Session, where Committee I had six formal meetings and numerous informal ones. Emphasis in the discussions of the draft centred around article 9,[55] dealing with the exploitation of the sea bed and the en-

see for instance: Bastanelli 'Minere in Fondo al Mare'; ECOS rivista a cura dell'ENIN. 45/46 (1977) Roma.

[52] Vide: D.J. Attard 'The New Law of the Sea' paper delivered at the Sonnerburg Conference, April 1977, Malta.

[53] Annex 1. para. 6; 3 official records 102 (1975).

[54] 2 seabed Rept. 51-69 (1973).

[55] Since a synthesis of the various proposals is likely to emerge as the new law of the Sea it may prove instructive to summarise some proposals. The Soviet Union proposed that the Sea Bed Authority authorise states to search for minerals and mine them within the 'Area'. Each state would be entitled to a limited equal number of contracts, preference being given to the developing states. The 'Authority' would be able to carry out exploration in sectors reserved for itself, and states presently unable to carry out exploration would have sections reserved for them. The 'Group of 77' favoured a strong 'Authority' which would have a 'direct and effective' control over all resource exploration and exploitation. The 'Authority' would take care of the needs of the developing countries, landlocked states though contracts would be awarded on a competitive basis. The E.E.C. proposal favoured a weak 'Authority'. Any applicant would be permitted to engage in 'prospecting' including drilling to depths not greater than 80 meters, merely upon notification to the 'Authority'. Contracts would be awarded upon receipt of applications to

forcement mechanism to be operated by the proposed 'Authority'. Over 400 proposals were submitted; however, after extensive consultation, the chairman presented an informal negotiating text. Part III of this Text dealt with the creation of the proposed 'Authority' which would administer all activities in the 'Area', and through its own organisation, known as the 'Enterprise' would be able to enter into agreements with states or their nationals to mine or recover the resources of the 'Area'.[56] In fact under this text[57] the 'Authority' would be founded on three basic principles: (a) sovereign equality of all members; (b) all members must fulfil in good faith the obligations assumed by them; and (c) 'the Authority is the organization through which states parties ahall administer the Area, manage its resources and control the activities of the Area in accordance with the provisions of the Convention.'[58]

The scope of the 'Authority' in principle, was held to have jurisdiction over 'all activities of exploration of the "Area" and of the exploitation of its resources as well as other associated activities in the "Arena", including scientific research.'[59] Such 'activities' would be conducted directly by the 'Authority', which could if it considered appropriate carry out such activities through state parties, state enterprises or individuals.[60]

the 'Authority', except that no applicant could hold more than six contracts at a time. The duration of contracts would be 30 years, with two renewable ten-year options. The U.S.A. also favoured a weak 'Authority' to the extent that states would be the dominant element in its proposed system. The 'Authority' could enter into contracts with states as well as individuals and corporations. Any person or group would be permitted to engage in 'Commercial prospecting', though the 'Authority' would have to be notified. The working paper submitted by Japan provided for registration of contracts with the 'Authority' by states or their corporate or individual agents, termed subcontractors, who could transfer their rights merely by notifying the 'Authority'. The latter would be given the power to negotiate over fixed blocs of ocean, defined by reference to longitude and latitude. Exploitation contracts would be for 20 years, with a renewable option to ten years.

[56] This part and the Base S.N.T. generally were subject to general criticism see 'Hearing on Geneva Session of the Third U.N.C.L.O. Before the National Ocean Policy Study of the Senate Comm. on Commerce.' 94th Congress; 1st session, series No. 94-80 (June 3-4 1975).

[57] This Text, which predominantly reflects the views of the developing countries, was issued as U.N. Doc. A/CONF 62/WP 8/Part I, on the last day of the Geneva session of the Conference.

[58] Vide U.N. Doc. A/CONF 62/WP 8/Part I, Article 2/(i).

[59] Vide U.N. Doc. A/CONF 62/WP 8/Part I Article 1 (ii).

[60] Vide U.N. Doc. A/CONF 62/WP 8/Part I, Article 22 (1) (2).

The Geneva session also witnessed strong efforts by some states in the 'Group of 77' to produce a moratorium resolution on seabed exploitation; eventually it was realised that any insistence on the matter could have adverse consequences for the negotiations especially in view of the fact that the U.N. General Assembly had already passed such a resolution[61] over the negative votes of the U.S.A. and other developed countries.

When U.N.C.L.O.S. reconvened in New York in March 1976, it became immediately apparent that major provisions in the 1975 Informal Single Negotiating Text were not acceptable to a majority of the developed countries which had the technological capability of exploiting the deep seabed in the foreseeable future.

The first two basic principles on which the 'Authority' was to be based were not altered in the R.S.N.T. But the last was revised to read: 'The Authority is the organisation through which states Parties shall organise and control activities in the Area, particularly with a view towards the administration of the resources of the Area, in accordance with this part of the Convention.'[62] This reformulation is important and vital for whilst in the S.N.T. the 'Authority' was conceived as directly responsible for the administration of the 'Area' on behalf of the community of states; in the R.S.N.T. on the other hand, the 'Authority' has no direct competence with respect to the 'Area', and its functions are limited to controlling activities (in principal undertaken by other entities) focussed essentially on resource exploration and exploitation.[63] The latter text defines the term 'activities in the Area' as 'all activities of exploration for, and exploitation of, the resources of the Area'.[64] These 'activities', according to the 1976 Text, could be conducted either by the 'Authority' itself or 'in association with the authority and under its control ... by State Parties or State enterprises or persons natural or juridical which possess

[61] Vide Res. 2574 D (XXIV); GAOR, 24th Session; Supp. 30, at 11, U.N. Doc. A/7630. In regard to this problem President Amerasinghe on the last day of the Geneva session appealed to delegates: 'to use their nationals from taking any action or adopting any j easures, which would place in jeopardy the conclusion of a universally acceptable treaty of a just and equitable nature.'

[62] U.N. Doc. A/CONF 62/WP 8/Rev. 1/Part I Article 21 (i).

[63] In the R.S.N.T. all references to any direct competence of the 'Authority' over the 'Area' have disappeared and have been replaced by references to 'Authority' control over activities in the 'Area'. This control is exercised only for 'the purpose of receiving effective compliance with the relevant, provisions of the Convention ...'

[64] U.N. Doc. A/CONF 62/WP 8/Rev. 1/Part I, Article I.

the nationality of States Parties ... when sponsored by such States ...'[65] It is clear to see that there is a substantive difference between the two texts; in the 1975 Text the 'Authority' is primary responsible for undertaking all activities in the 'Area', although it may also enter in some form of association with other entities. In the later Text, State parties and private enterprises are placed virtually on the same footing as the 'Authority' itself.[66]

Another major change which came about through the 1970 Text, and which many states particularly the developing states consider vital, is that all references, to the equitable sharing by states in the benefits derived from activities in the 'Area' has been removed. Reference to equitable sharing has, however, been retained regarding the financial and economic benefits.

At the fifth session the different approaches to the system of exploitation were produced by the USSR, the U.S.A. and the 'Group of 77'. The Soviet Union wanted to utilise the 'Authority' to direct the activities of states and to regulate fiscal and administrative matters. It could undertake its own activities, but could not acrry them out on a scale such that the area involved exceeded that allocated to States for exploitation purposes. Individual parties would be excluded if they lacked state sponsership.[67]

The American proposal allows a dual access, the 'Authority' would be forbidden to impair the rights granted under the seabed part of the convention. Title to resources would vest in a contractor at the time of a successful recovery, pursuant to contract. The right to let contracts would be automatic, provided financial guarantees to the Authority were met.[68]

The developing world called again for a strong 'Authority' which would have full and effective control over the exploitation of resources within the 'Area'.[69] It would also have the exclusive

[65] U.N. Doc. A/CONF 62/WP 8/Rev. 1/Part I Article 22 (1). Vide also W. Sullivan 'Sea Mining: Difficult but not Impossible' New York Times Nov. 21, 1976 Para. 4 Page 9.

[66] Vide: D. J. Attard: 'Will Malta replace Jamaica as home for ISA?' S.T.O.M. May 22 1977 (Malta).

[67] It is interesting to note that the reason behind the Soviet exclusion of private independent entities was based on their interpretation of the concept of the 'common heritage of mankind.' It was claimed that only states who were the juridical representatives of mankind under International Law, could exploit and explore that area belonging to the 'common heritage of mankind'.

[68] Vide U.N. Doc. Press Release SEA/235; Sept. 9, 1976.

[69] The most extreme among the developing countries, such as Algeria, Kuwait, Libya and India would like to give ultimate and unrestricted

right to conduct the said 'activities', either through its proposed executive organ 'The Enterprise' or through the help of private parties pursuant to contract. In either case the 'Authority' would retain 'full and effective control over the activities in the Area'. There was also a natural desire to ensure that developing countries would be entitled to certain priorities and all private parties, including states, would have to apply to the 'Authority' or the 'Enterprise' in order to engage in exploitation within the 'Area'. Furthermore, they denounced the proposals of the two superpowers, as failing to consider the concept of mankind's common heritage of the oceans.

As between these contrasting positions, the 1976 Text reflects a compromise, so far unsatisfactory to and side. In fact throughout the fifth session no side gave ground. As a result, the discussions in Committee I were primarily limited to procedural debates, and to the kind of non-substantive rhetoric heard three years previously at the second session in Caracas. Disagreement remained so widespread, that the President of the Conference, obtained the agreement of the Conference that it would devote the first three weeks of the next session mainly to the regime of the deep seabed, with heads of delegations expected to conduct the negotiations.

Conclusion

If the treaty produced by U.N.C.L.O.S. III is to be truly meaningful, it must not only deal reasonably with all specific issues but, more importantly, it must justify acquiescence in its terms on the basis of the broader purposes of establishing an equitable system of order for the oceans. In this regard two elements are important: first, the treaty must be widely accepted by all segments of the international community; secondly, it should provide a peaceful and compulsory settlement of disputes arising under the treaty must be ensured.[70]

Failure to reach agreement on the three main critical issues discussed above could mean the failure of the whole Conference; with its failure all issues that have so far been resolved will go down the drain. For example, there is considerable agreement on a

power over to the Assembly rather than the Council of the 'Authority' where voting is on a one-national one-vote basis. In addition they would like to see the Enterprise as the sole exploiter of the deep seabed.

[70] Vide: A. Pardo's settlement on Dispute Settlement at U.N.C.L.O.S. III (April 8); S.T.O.M. April 25th, 1976.

12 mile territorial sea, a 200-mile exclusive economic zone that will add resource control to the coastal state, the need for new dispute settlement procedures, and the transit to the sea for land-locked states. In fact, negotiations have gone a long way since Caracas in 1975 where delegations were advocating hardline nationalistic views and spurned accomodation.

In the final analysis, U.N.C.L.O.S. III must be seen from a wider perspective. Inescapably, these negotiations pose the broader issue of world order. As U.N. General-Secretary Waldheim made clear in his inaugural address to the New York session of the Conference: 'We will have lost a unique opportunity, and one that may never occur again, if the uses made of the sea are not subjected to orderly development for the benefit of all, and if the law of the sea does not succeed in contributing to a more equitable global economic system.' For, he concluded 'it is not only the law of the sea that is at stake. The whole structure of international co-operation will be affected, for good or for ill, by the success or failure of this Conference.'[71]

[71] Vide U.N.C.L.O.S. III Official Records Volume 5 Page 3.