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**THE THIRD UNITED NATIONS LAW
OF THE SEA CONFERENCE:
THE CURRENT STATUS AND THE
“INFORMAL SINGLE
NEGOTIATING TEXT”***

ROSTER OF MEMBERS,
SUBCOMMITTEE ON INTERNATIONAL LAW AND
RELATIONS, as of January, 1976

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INTRODUCTION. This is the third report of the Subcommittee on International Law and Relations (“Subcommittee”) made pursuant to a Ford Foundation grant to the American Society of International Law. The grant supports activities of the Subcommittee with respect to the international law of the sea negotiations and the Third United Nations Conference on the Law of the Sea (“Conference”). The first report consisted of recommendations for research prior to the first substantive session of the Conference. The second report, printed in this issue, consists of an account and analysis of the proceedings at the Caracas session of the Conference together with recommendations for intersessional research.

The present report contains a brief introduction setting forth

* This is the third report of the Subcommittee on International Law and Relations of the Advisory Committee on the Law of the Sea. The Committee, established in 1972, is composed of private citizens appointed by the Chairman of the National Security Council Interagency Task Force on the Law of the Sea to “provide adequate representation of the diverse interests involved in the law of the sea.” Members of the Committee serve solely in an advisory capacity and the views stated herein do not necessarily represent those of the United States Government.

salient data concerning the Geneva session of the Conference, a general discussion of the organizational and procedural aspects of the session, and an analysis of the outcome with particular reference to the "Informal Single Negotiating Text." It concludes with some recommendations for further intersessional research.

I. GENERAL INFORMATION

The third (second substantive) session of the Conference was held in Geneva, Switzerland, from March 17 to May 10, 1975. The session continued the substantive work begun at the Caracas meeting held from June 20-August 29, 1974. Approximately 140 states participated in the Geneva session. No treaty or treaties dealing with the law of the sea were adopted, however, and in concluding its work the Conference decided to recommend to the General Assembly that a third substantive session be held in New York City from March 29-May 21, 1976, and that the Conference be empowered to decide then whether an additional session will be needed during the summer of 1976.

II. PROCEDURE

Most observers of the Geneva session perceived a greater willingness on the part of most delegates to negotiate seriously and to seek compromise solutions. This compared favorably with the rhetorical "position taking" atmosphere which prevailed during the Caracas session. Nonetheless, it was apparent from an early date that it would not be possible to secure the desired treaty during the Geneva session and, indeed, that a target date of late 1976 was as optimistic an outlook as could be found.

There was very limited use at the Geneva session of formal meetings of the Conference or its main committees, and greatly more use was made of working sessions of the main committees and private group meetings such as those of the "Evensen Group," chaired by Mr. Jens Evensen of Norway. The pattern during the early weeks of the session was one of committee or informal group meetings in the morning with afternoons devoted to meetings of informal specialized interest or negotiating groups. There was, in fact, a plethora of such informal groups which, though producing a more practical negotiating atmosphere, created in the case of the Evensen Group some resentment on the part of a few delegations not invited to participate. A table of formal and informal groups active at Geneva, prepared by Ann L. Hollick, is appended to this paper as Annex A.

The negotiations proceeded quite slowly during the first half

of the session and, in an attempt to accelerate the process of reaching agreement, Conference President Amerasinghe proposed at one point that negotiations take place in consultative groups based on regional representation. That proposal was rejected, however, and thereafter the existing procedures and organizations were continued. A second proposal by Amerasinghe met with Conference approval. He asked that the chairman and officers of each of the three main committees prepare a single unified negotiating text to serve as the basis for future negotiating or voting efforts, such texts to take account of the work of the formal and informal groups of the Conference.¹ It was expressly understood that such texts were not to be binding on the delegations, but would provide a single text from which negotiations could further progress.

III. OUTCOME OF THE GENEVA SESSION

A. *Substance of the Informal Text*

As a result of the acceptance of Amerasinghe's second proposal, the Geneva session of the Conference produced the "Informal Single Negotiating Text."² The Informal Text consists of three main parts, each being a draft prepared by the chairman of one of the three main committees and dealing with the subject allocated to that committee. In addition, there is a draft of articles dealing with compulsory dispute settlement, prepared by the Conference President based upon the product of an informal working group.

It was commonly understood that the Committee I text was largely the work of the chairman of the working group, Christopher Pinto of Sri Lanka, who had been endeavoring to establish a common ground between developing and developed nations by the use of a compromise approach in the "Pinto Paper." The Committee Chairman, Paul Engo of Cameroon, however, extensively rewrote the Pinto draft with the result that it leans far more toward the Group of 77 position than had earlier Pinto drafts. It consists of 75 articles dealing with general principles, the seabed authority and its machinery, and questions of finance. The Annex on basic conditions of exploration and exploitation was, however, prepared by Pinto and transmitted by his working group to the main committee. Committee I seems to be the only Conference committee in which agreement is still not within reach. By the end of the session it was clear that there was a mutual distrust between

¹ See U.N. Doc. A/CONF.62/SR.54 (18 April 1975) at 3.

² U.N. Docs. A/CONF.62/WP.8/Parts I, II, and III (6 and 7 May 1975); And SD.Gp/2d Session/No. 1/Rev. 5 (1 May 1975).

the developed and the developing nations regarding one another's proposals for the operating of the seabed authority and that there was little likelihood of a common meeting ground. The developing countries wish to see the seabed authority as an "Enterprise" controlled by them with the power to discriminate in their favor and to develop independently as an "Enterprise" seabed resources, which would be "banked" during the initial years in which mining operations would be conducted by the developed nations.³ The developed powers, in turn, were distrustful of the fairness with which such an "Enterprise" would be operated and feared, quite logically, that it could result in an OPEC-like cartel. The issues here are ideological and are connected closely with the drive of the developing countries for a "new economic order" in which the wealth of the developed countries would be redistributed. The powers and structure of the international seabed authority and the methods to be used for the exploitation of the manganese nodules have thus become enmeshed in a larger dispute about a "just" division of the world's economic resources.

The text presented by Galindo Pohl of El Salvador, Chairman of Committee II, consists of 137 articles and covers the territorial sea and contiguous zone, straits used for international navigation, the exclusive economic zone, the continental shelf, high seas, land-locked states, archipelagos, regime of islands, enclosed and semi-enclosed seas, territories under foreign occupation or colonial domination, and settlement of disputes. The basis for this text included a lengthy working paper with alternative articles as well as documents produced by the Evensen Group, the Group of 77, and functional negotiating groups. The text represents a compromise acceptable to some nations insofar as the major principles are concerned, but there are a number of inconsistencies and purely drafting matters which will need to be dealt with in subsequent negotiating sessions. There are also some points about the draft which should raise serious concern among United States Government negotiators (some of these questions are identified in Annex B, prepared by Lewis M. Alexander).

The text for Committee III was the product of the Committee Chairman Alexander Yankov of Bulgaria, his bureau, and the heads of the working groups on scientific research (Cornel Metternich of West Germany) and pollution (Jose Luis Vallarta of Mexico). It consists of 44 articles on the marine environment, 37 articles on

³ See Murphy, *Deep Ocean Mining: Beginning of a New Era*, p. 46 *infra*, (ed. footnote).

marine scientific research, and 11 articles on development and transfer of technology. Included in the text are several articles that were actually negotiated in the respective working groups. The working group on pollution produced negotiated articles on monitoring, environmental assessment, standards for land-based sources (with alternative formulations concerning double standards), and pollution from dumping of wastes at sea. The working group on science and transfer of technology issued possible consolidated texts, including some alternative provisions, on the conduct and promotion of marine scientific research, the legal status of installations for marine scientific research, and responsibility and liability. As a result of some confusion concerning the respective jurisdiction of Committees II and III over pollution from ships in the economic zone, further negotiations will be needed on that subject, and the Evensen Group is likely to consider the matter at its planned intersessional meeting.

The provisions on compulsory settlement of disputes contain four introductory articles followed by two main annexes. Although an attempt was made to arrive at one single negotiating text, various difficulties were encountered resulting in a compromise which proved acceptable to a vast majority of the participating delegations, namely that any contracting party, when ratifying the Convention may choose one of three methods of settlement — arbitration, law of the sea tribunal, or the International Court of Justice. Consequently, when a case is brought against a contracting party it has to be brought before the forum chosen by that party. This solution has the advantage of allowing greater flexibility in the choice of the forum by a particular State; it avoids the imposition on all States of one single method; and it thus provides more respect for the sovereign right of a State to choose the weapon with which it wants to fight its legal battles. Nevertheless, this solution was objected to by delegations which thought that the method they preferred — for instance the International Court of Justice — was so much better than the others that it should be universal. Objections were raised also by those who did not really like the idea of having to accept any procedure leading to a binding decision. Others — the so-called “functionalists” — were willing to accept the idea of binding decision-making for only a few selected areas (e.g., seabed beyond the limits of national jurisdiction, or fisheries, or scientific research, or pollution), but were opposed to it for the remainder of the Convention. A third group, while accepting binding decision-making in principle, argued that in areas under national jurisdiction (internal waters, territorial

sea, continental shelf, and economic zone) only national courts should have jurisdiction, except where some important international rights (such as freedom of navigation) were concerned.

B. *Status of the Informal Text*

The political and legal implications of the Informal Text are important. In his report on the Geneva session made to the Commission to Study the Organization of Peace, Professor Louis B. Sohn observed that:

While the four parts of the text are supposed to represent only the opinions of the chairmen of the various committees who prepared them, they are in fact based largely on drafts prepared by various working groups and reflect a large measure of consensus. Nevertheless, these texts are not considered "negotiated" or compromise texts, and are merely intended to serve as a basis for the next session of the Conference Delegations are free to propose further amendments but have been requested to work jointly on them and to prepare composite proposals rather than a mass of unrelated amendments.

Further indication of the political and legal status of the informal texts was given when representatives of the United States Government appeared before Congressional Committees to report on the progress of the negotiations at Geneva. In testimony before the Subcommittee on Fisheries and Wildlife of the House Committee on Merchant Marine and Fisheries on May 19, 1975, Professor John Norton Moore, Chairman of the National Security Council's Inter-Agency Law of the Sea Task Force, stated:

Although the single text is not a fully negotiated or consensus document, it is in important respects, at least in regard to Committees II and III, an indication of an overall package necessary for a satisfactory treaty Even though it is not a negotiated or consensus text, the preparation of the single text is a significant and necessary step toward a treaty. For the first time, the Conference will be able to focus on a specific text rather than a multitude of alternatives and national proposals I believe that for the most part, at least for the work of Committees II and III, it also reflects a widely shared view about the nature of the overall package in a manner conducive to the achievement of a realistic and widely acceptable Treaty.

At that same hearing, Deputy Assistant Secretary of State Thomas Clingan, of the Office of Oceans and Fisheries Affairs, Department of State, observed that:

The single negotiating text must be viewed as a procedural device providing the basis for further negotiations, and is not a

negotiated text or an agreed compromise. It does not affect any nation's national position Its roots are in the negotiations, and it is not to be seen as arbitrary or without substance. In some areas it reflects shared views.

According to these observations it is fair to conclude that the Informal Text is not binding and has no legal effect. As far as the United States is concerned, Part II does nonetheless reflect essentially what an acceptable ultimate agreement would look like on the subjects with which it deals. Part III also appears to be a negotiated product and, with some modification, may be acceptable to the United States on the subjects with which it deals. Part I is essentially the negotiating position of the Group of 77, the text not reflecting any consensus or compromise at this stage.

Acceptability of provisions by various nations or groups of nations aside, the Informal Text does represent a watershed development in the negotiations since for the first time delegates will have a single provision on each issue to use as the basis for further negotiations. Such "first drafts" or "reports," with regard to any negotiation or subject, often tend to take on a life of their own — that is, they strongly affect and direct negotiations from that point forward, carrying almost a presumption of agreement unless strong objections are voiced, as they have in the case of the Committee I text. Major effort tends to be turned in such situations to fine points of drafting, reconciling conflicting provisions, and to consideration of interpretation of language. It becomes progressively more difficult, as such single texts remain the basis for negotiation, to make major alterations in the substance of significant provisions.

Negotiations on the Informal Text will probably first revolve about attempts by some nations to make major changes in articles or texts with which they are fundamentally dissatisfied. This approach can be expected, for example, on the part of developed nations with respect to the Committee I text, although it does not seem likely that major alterations will be attempted with respect to the Committee II and III texts.

Even if no written agreement is derived from future negotiations, the Informal Text could still play a profound role in the development of customary international law. The portions that have been highly negotiated probably reflect the expectations of most nations and they will tend to conform, in state practice, to the principles set forth in the document. Where there is philosophical divergence, as is the case with the Committee I text, likely national actions can also be expected to follow on from the text —

developing nations seeking total control of seabed mining activities, developed nations opposing that approach and authorizing their nationals to engage in such mining activities. Thus, whether the Conference produces a desired treaty or not, the Informal Text may in one sense or another provide a reliable indicator of the future direction of the law of the sea.

IV. SUBJECTS FOR FURTHER RESEARCH

As has been done in both earlier reports of the Subcommittee, recommendations for possible further research are set forth in this section. Although such recommendations have in the past dealt with quite specific substantive matters, most of those set forth below deal with procedural matters or assessment of values involved in the negotiations.

1. Has the Conference already served its most useful purposes: clarification of issues, communication of positions on the issues, and an understanding of the linkages among the various issues? In the present context, is unilateral or coordinated multilateral action desirable?

In addressing these questions the alternatives should not be viewed too starkly — to continue with the Conference or walk out of it — but should rather be seen in terms of the various national interests involved on a topic by topic basis. To what extent, for example, has the Conference already become part of an on-going customary law-making process? Does it succeed only if it produces a widely accepted and comprehensive law of the sea treaty or are there other values which can be derived from its continuation? How would unilateral or coordinated multilateral action (particularly 200-mile fishing zones and deep seabed mining authorizations) affect the ability of the Conference to achieve its express objective or alternative thereto?

2. Which nations' interests would be better served by the adoption of a compromise treaty and which by the development of the law of the sea through customary international law?

Though involving some difficult matters of judgment, such a study would prove extremely enlightening both in assessing the attitudes of particular nations toward the Conference and in judging what future courses of action they might take in the event of a Conference failure. Obviously, such an inquiry would have to be made on a subject by subject basis, though the overall impact of one format over the other should be considered. Such a study would require an identification of interests to be analyzed; dif-

ferentiation between short, medium, and long term interests; differentiation between narrow, parochial interests and broader interests in world order; likely possible outcomes of the Conference in terms of substantive agreement; and likely scenarios in the event of non-agreement. It would probably be most practical if a quite limited number of key states or groups of states were selected for analysis.

3. What is likely to be the ultimate impact of the philosophical debate on the seabed mining question (Committee I) and how might this apparent impasse be resolved?

Several sub-issues should be addressed in such a study: (1) how pervasive are external influences on the Conference negotiations; (2) specifically, is the question of a seabed mining regime more linked to the question of cartelization of raw materials or to other law of the sea issues; (3) would it be practicable to sever the seabed question from the negotiations; and (4) what would be the relative advantages and disadvantages of approving a treaty based on Parts II and III of the Informal Text, sending Part I back to a revived Seabed Committee of more limited composition?

4. What is the value of the Informal Text?

As noted in this report, such documents tend to take a "life of their own," but the implications of that "life" are uncertain. This issue should be examined both from the standpoint of the Text as leading to accepted written agreement and as affecting customary law development in the event of a Conference failure.

5. From a United States point of view, are the detailed provisions of the Informal Text acceptable as they presently stand? What modifications, if any, would be required to reach that stage of acceptability?

In considering this issue, attention should not only be focused on an article-by-article assessment, but also on general negotiating tactics; that is, what articles might be improved from the United States point of view in terms of sacrifices on other articles? More broadly, which packages of articles might be improved at the expense of other interests? Although it might extend the scope of such an inquiry too far, it would nonetheless be useful to discuss external bargaining elements in such an analysis.

ANNEX A

GROUPS AT LOS-3

Compiled by Ann L. Hollick

I. *Official Conference Groups*

Conference (Bureau) General Committee (48 members)

Committee I (Bureau) Working Group (of 50) — Chairman's private consultative groups

Committee II (Bureau) Informal consultative groups (all members — with working groups of smaller sizes for some issues):

1. Baselines Working Group
2. Historic Bays and Historic Waters Working Group
3. Contiguous Zone Working Group
4. Innocent Passage Working Group
5. High Seas Working Group
6. Land-locked and Geographically Disadvantaged Working Group on Access to the sea (8 transit and 5 land-locked)
7. Continental Shelf
8. Exclusive Economic Zone
9. Straits
10. Enclosed and Semi-enclosed Seas
11. Islands
12. Delimitation

Committee III (Bureau) two working groups — Chairman's private drafting and negotiating groups

Credentials Committee

Drafting Committee

II. *Semi-official Negotiation Groups*

Dispute Settlement Group

Juridical Experts (Evensen Group consisting of heads of delegations)

III. *Ad Hoc or Miscellaneous Issue-oriented Groups*

Group of 17 — pollution

Group of 5 — security and transit

Group of 13 — science

Amorphous Group — science

Honduras Group on Continental Shelf

UK/Fiji Group on Straits

IV. *Regional Groups*

African Group — Ivory Coast chairman

Latin American Group — Contacts to Committee I (Rattray)
and II (Ajala)

1. Caribbean States

2. Central American States

Asian — Asian group of Group of 77

Arab — separate meetings on each committee

WEO

European Economic Community

East European

V. *Interest Groups*

Group of 77 (Bureau) Kedadi chairman

Committee I — Working Group (Bureau) Contact Group

Committee II — Contact Group (Njenga chairman)

Committee III — Working Group — Contact Group Iraq chair-
man

Archipelagic States

Oceanic States

Land-locked and Geographically Disadvantaged — 48 members
(Turkey chairman)

Committee I Working Group (Czechoslovakia chairman)

Committee II — Contact Group questions of Transit

Working Group on Marine Scientific Research (Nether-
lands chairman)

Land-locked states of Group of 77

Straits States

Territorialist Group

Coastal States (transformed into Evensen Group)

VI. *Luncheon Clubs*

Dredge and Drill

Fishhook

Defense Lunch

Science Club Lunch

ANNEX B

SOME CRITICISMS OF PART II OF THE
INFORMAL SINGLE NEGOTIATING TEXT IN TERMS
OF UNITED STATES OCEAN INTERESTS

Compiled by Lewis M. Alexander

1. There is a provision for a contiguous zone beyond territorial limits, up to 24 miles from shore. The U.S. has opposed such a zone on the grounds that it might be taken as a security zone. There is no mention of the zone as a security zone in the text.

2. Within straits used for international navigation there is provision for straits States regulating certain aspects of transit passage.

3. Mention is made in the straits articles of their connecting "high seas or an exclusive economic zone." The U.S. is pressing hard for the status of the extra-territorial waters of the economic zone to be that of high seas.

4. Within the exclusive economic zone, coastal State jurisdiction would extend over scientific research and pollution control and abatement. This is partially negated by provisions in Part III, but it is in Part II.

5. The provisions for internationalization of highly migratory species within the economic zone are extremely weak. Also, whales and porpoises are included in the list of highly-migratory species to be regulated by regional organizations.

6. There are no specifics for fixing the outer edge of the continental margin.

7. There is no mention of a boundary review commission to pass on the suitability of a coastal State's designation of its outer seabed limits, nor is there mention of the permanence of boundaries once fixed or of the integrity of foreign investment in seabed resources beyond the economic zone.

8. The International Authority is given the right to determine rates of contribution by developing countries from seabed resource exploitation beyond the economic zone.

9. On archipelagos there was no decision on the percentage of baselines which could be greater than 80 nautical miles in length, nor on the breadth of the sealanes; and the definition of an atoll is a poor one. By this definition the Bahamas are not an archipelago, since their land/water ratio is greater than 1:1.

10. Under "Islands" there is a provision that rocks which cannot sustain human habitation or economic life of their own shall

have no exclusive economic zone or territorial sea. The U.K. would probably refuse to ratify such a treaty.

11. Part II retains the reference both to "enclosed" and "semi-enclosed" seas, without distinguishing between them. It also retains the requirement that they be connected with the ocean by a narrow outlet, thereby ruling out a number of otherwise bona fide semi-enclosed seas (e.g., the North Sea and the Gulf of Thailand).

12. The provisions for boundary delimitation between opposite or adjacent continental shelves or economic zones are a step backward from the 1958 Convention in that they make no specific reference to special circumstance situations.