

# Foreword

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As this eighth annual law of the sea symposium of the *San Diego Law Review* appears, delegates from more than 140 nations are convening in New York for the third substantive session of the United Nations Conference on the Law of the Sea. These negotiations are most critical. Secretary of State Kissinger has said that "no current international negotiation is more vital for the long-term stability and prosperity of our globe."<sup>1</sup>

The year 1976 will be a decisive one for the law of the sea negotiations. An eight week session of the Conference from March 15 through May 7 is now underway in New York; an additional session may be held in the summer of this year if the Conference determines it is necessary. Unless substantial agreement is reached at these sessions, a unique opportunity to conclude a comprehensive treaty governing the use of some 70 percent of the

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1. Speech by Secretary of State Henry A. Kissinger before the American Bar Association Annual Convention, Montreal, Canada, Dep't of State Release No. 408, at 2 (Aug. 11, 1975).

earth's surface may be lost for the foreseeable future. Domestic pressures are mounting for nations around the world to achieve their oceans objectives through unilateral action rather than international agreement. Since the last session of the Conference ended in Geneva in May 1975, several coastal nations have unilaterally extended their fisheries or economic resource jurisdiction to 200 miles; others have extended their territorial seas significantly. In the United States, the House and the Senate have passed bills to extend United States fisheries jurisdiction to 200 miles, pending entry into force of an international law of the sea agreement, and there is increased Congressional interest in proposed legislation regarding deep seabed mining. A worldwide trend to unilateral action is unmistakable.

There still remains a reasonable chance for agreement on the essential elements of a law of the sea treaty in 1976. The informal single negotiating text presented at the end of the Geneva session provides a workable basis for further negotiations in Committee II, which deals with the territorial sea, straits, the economic zone, the continental shelf and the high seas, and in Committee III, which deals with marine scientific research and protection of the marine environment. In the area of dispute settlement, the informal text issued by the President of the Conference will be a useful starting point for negotiations. Unfortunately, the single negotiating text for Committee I, involving the deep seabeds, is essentially a restatement of the position of the developing countries and accordingly does not provide a real basis for further negotiations. If the single negotiating text were the sole basis of evaluating the possibility of success of the Conference in 1976, the prognosis would not be good. However, at intersessional negotiations since the Geneva session, new and more realistic texts have begun to emerge. Hopefully, the momentum gained in these negotiations can be carried over to the New York session.

In any protracted negotiation, a stage is reached where timing is critical. In the law of the sea negotiations, there have been six preparatory sessions, one organizational session and two substantive sessions since the General Assembly called the Conference in December 1970. The time has arrived to shift from tactical bargaining positions to basic negotiations designed to reach an accommodation. Whether an agreement can be concluded will depend largely on whether the great majority of nations are willing to make the political decisions necessary to accommodate the essential interests of others. Of course, no sovereign state can sacrifice its vital interests simply for the sake of securing an agreement.

However, on the difficult issues still separating the participants at the Conference, there is common ground which can be reached if the political will exists to do so.

Committee I is perhaps the principal stumbling block in the negotiations, where contentious issues include the nature and scope of the new international organization, the powers and voting structure of its Assembly and Council, whether states and their nationals or only the new international organization will be entitled to exploit the resources of the deep seabed, and the economic effects of projected seabed production on consumers and land-based producers.

As A.V. Lowe indicates in his historical survey of the Committee I negotiations from 1967 through the end of the Geneva session, eight years of discussions and negotiations have apparently not succeeded in bridging the gap between the developed States with the greatest economic and political power and the developing States with the greatest voting power. Developed States are unwilling to risk their national interests by subjecting deep seabed mining to the unchecked control of a new international organization; they insist upon a guaranteed right of access for all States and their nationals to deep seabed minerals under reasonable conditions. By contrast, the single negotiating text provides for exploitation of the deep seabed to be conducted only by, or pursuant to a discretionary decision of, the international organization.

Martin Glassner places the deep seabed argument in perspective. He believes that much of the literature is overly optimistic about the extent of the riches which will be harvested from the deep seabed in the foreseeable future. The bulk of the treasure on the ocean floor is in the form of hydrocarbons on the continental margin, almost all of which are within the 200-mile economic zone, and all of which would be subject to the jurisdiction of the coastal State under the provisions of the single negotiating text. Since revenues from mining the manganese nodules of the deep seabed will do little to close the gap between rich and poor, Professor Glassner suggests that a more meaningful solution would be for coastal States to share with the international community revenues from mineral and petroleum exploitation of the continental margin.

Many of the developed countries, including the United States, have indicated that they would prefer a stable international legal framework for deep seabed mining to be established before commercial mining operations begin. At the same time, as Professor Lowe points out, if the law of the sea negotiations drag on, the developed countries may eventually succumb to internal political pressures to adopt measures necessary to ensure that deep seabed mining can commence. Currently, the nations of the world have an opportunity to create a new legal order for the deep seabeds and simultaneously to fashion an economic scheme under which revenues from deep seabed mining would contribute to the development of the poorer nations. A failure of the negotiations would result in every nation acting for itself, with no common benefit for the international community.

The Committee II single negotiating text, as Robert Krueger indicates, is a comprehensive and generally balanced document which encompasses every subject dealt with by the four 1958 Geneva Conventions adopted at the first United Nations Law of the Sea Conference plus a number of other complex subjects. Although it contains a number of points on which there must be further negotiation, it reflects in many respects the results of intensive informal negotiations at Geneva. The remaining problem areas include the difficult dispute between coastal States, on the one hand, and land-locked states and so-called "geographically disadvantaged States" on the other, regarding access of the latter to resources of the economic zones of neighboring coastal States. Lewis Alexander and Robert Hodgson illuminate the difficult problem of the geographically disadvantaged States. Their Article illustrates the extreme complexity of determining which States should be regarded as geographically disadvantaged and the difficulty of determining the scope of access to resources. They demonstrate that the first task is to define what we mean by "geographically disadvantaged," since different types of disadvantage may require different solutions.

The Committee II single negotiating text also does not provide adequately for rational management of highly migratory fish species such as tuna. Proper utilization and conservation of highly migratory species can only be accomplished effectively through regional organizations that include all coastal States and others fishing in the region, with powers of resource allocation coupled with an effective enforcement system. A third problem in the Committee II negotiations involves the extent of coastal State jurisdiction over the continental margin. One group of States believes such jurisdiction should be limited to 200 miles, while another in-

sists that it extends to the edge of the margin even beyond 200 miles. An accommodation in this area could be based upon a relatively simple formula for defining the extent of the margin, combined with an obligation upon broad margin States to share with the international community a portion of the revenues derived from exploitation of the mineral resources of the margin beyond 200 miles.

A further problem in Committee II relates to the precise description of the rights of the coastal State in the economic zone and the juridical status of the zone. These issues are of great importance if one of the principal objectives of the negotiations is to be realized, namely, arriving at an accommodation of coastal State resource interests on the one hand, and international interests in navigational and other freedoms, on the other. Maritime States would have little incentive to accept a treaty in which the economic zone did not reflect an accommodation of all interests, but was a mere stepping stone to more comprehensive coastal claims. In addition, it must be recognized that the resulting treaty will be subject to misinterpretation. To avoid the conflicts which may result, a general, compulsory, and binding dispute settlement procedure is necessary.

The single negotiating text for Committee III dealing with marine scientific research and protection of the marine environment is also a fairly balanced text, but there are significant unresolved problems. Many coastal States seek a regime which would require coastal State consent for all scientific research in the economic zone, while others believe that such restrictions would serve neither the interest of the coastal States themselves nor those of the international community. Unencumbered scientific investigation is critical to our understanding and rational use of the oceans, and the results of scientific research should be broadly disseminated. Legitimate coastal State concerns regarding marine scientific research conducted off its coasts can be protected by imposing upon the researching nation clear obligations regarding the conduct and results of this research. Finally, although significant progress has been made on the subject of marine pollution in Committee III, important problems remain regarding the extent of coastal State competence to set and enforce vessel source pollution standards. These problems go to the heart of the underlying accommodations

between the powers of the coastal State and the protection of navigation.

Mark Janis deals with the vital issue of free transit through and over straits used for international navigation and the preservation of freedom of navigation and overflight in the economic zone from the perspective of the world's four most powerful navies, those of the United States, the Soviet Union, Great Britain and France. He demonstrates how geographical constraints affect the positions of these four countries with respect to navigational freedoms.

Don Walsh's Article stresses the urgency of developing a future oceans policy of the United States, regardless of whether the Law of the Sea Conference reaches a successful conclusion. To anyone who believes the Law of the Sea Conference affects only narrow specialized interests, Mr. Walsh underlines the importance of the oceans to the overall interests of the United States. Careful attention should be paid to his plea that more serious policy study and planning be given to the oceans.

In addition, this *San Diego Law Review* symposium contains some very thoughtful Comments with respect to the validity under international law of the mining claim made by Deepsea Ventures, Inc. and the factors affecting United States policy toward deep seabed mining; the outstanding problem in the law of the sea negotiations of the regime for highly migratory species, and the effect that a 200-mile economic resource zone could have on the American tuna industry; the complex questions involved in attempting to create a regime for archipelagos consistent with the interests of the world community in protecting freedom of navigation and the development of the doctrine of innocent passage and its effect on the legality of reprisal by the United States in the Mayaguez incident.

In summary, the editors of the *San Diego Law Review* have produced a stimulating symposium at a critical time in the law of the sea negotiations.

As Secretary Kissinger stated in his address to the American Bar Association in Montreal:

We are at one of those rare moments when mankind has come together to devise means of preventing future conflict and shaping its destiny rather than to solve a crisis that has occurred or to deal with the aftermath of war. It is a test of vision and will, and of statesmanship. It must succeed.<sup>2</sup>

Time may be running out. If the Conference is to succeed, nations must decide now that the time has arrived to compromise and to conclude the negotiations.

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2. *Id.* at 6.