The International Seabed and the Single Negotiating Text

A.V. LOWE*

The work of Committee I at the United Nations Conference on the Law of the Sea, dealing with the seabed beyond the limits of national jurisdiction, is as interesting as it is important. Its task is the establishment of a legal regime to govern the last great store of undivided and accessible resources. The structure of this regime is of immediate concern to almost all States. Producers of raw materials likely to be recovered from the seabed fear the impact on their economies; potential exploiters of the area fear interference with the activities and profitability of their capital-intensive enterprises; land-locked and many developing States fear that the original concept of the "common heritage of mankind" will not satisfactorily be translated into reality. The body charged with the reconciliation of such conflicting interests contains an imbalance between the group of States with the greatest economic and political power and the group of States having the greatest voting power; both sides have an uneasy relationship with the multinational enterprises upon whose cooperation the success of the regime will, to some extent, depend. This Article attempts to outline the events leading up to the submission of Part I of the Informal Single Nego-

* Lecturer in Law, University of Wales Institute of Science and Technology, Cardiff, United Kingdom.

tiating Text[1] by the Chairman of Committee I at the end of the Geneva session of the Conference, to examine the contents of that document, and to suggest some of the wider implications of developments regarding the international seabed area.

The History of the Text

It may be useful to summarize the events which led to the production of the Text.[2] On August 17, 1967, Dr. Pardo, the Maltese Ambassador to the United Nations, proposed the inclusion of an item on the agenda of the 22nd session of the General Assembly, to be entitled "Declaration and Treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and ocean floor underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."[3] The United States Congress reacted swiftly with the introduction on September 13 of the first of several resolutions aimed at preventing any rapid action on the Maltese proposal and specifically of preventing the vesting of the area in the United Nations. This attitude, at best cautious and at worst obstructionist, was reflected by many States in the First Committee of the United Nations, where the Maltese proposal was discussed following Dr. Pardo's famous speech on November 1, 1967.[4] The advanced States, including the United Kingdom,[5] the United States[6] and the Soviet Union[7] urged a cautious approach limited initially to a careful study of the problems raised by the Maltese proposal and discussed by Dr. Pardo in his introductory speech to the First Committee. Many of the other participants in the debates preferred a cautious approach based upon further study of the issue. Only a handful of States, including Ghana,[8] Sweden,[9] and Cyprus,[10] turned their attention to the

1. U.N. Doc. A/CONF.62/WP.8/Pt. 1 (1975) [hereinafter referred to as the Text], *reproduced in* 14 Int'l Legal Materials 682 (1975).
2. *See also* E. Luard, The Control of the Sea-Bed: A New International Issue 81-193 (1974); Weissberg, *International Law Meets the Short-Term National Interest: The Maltese Proposal on the Sea-Bed and Ocean Floor—Its Fate in Two Cities*, 18 Int'l & Comp. L.Q. 41 (1969). A concise account of the major events appears in the *Yearbooks of the United Nations.*
3. U.N. Doc. A/6695 (1967).
4. 22 U.N. GAOR, 1st Comm., U.N. Doc. A/C.1/PV.1515, at 1 (1967).
5. *Id.*, U.N. Doc. A/C.1/PV.1524, at 2-4.
6. *Id.*, U.N. Doc. A/C1/PV.1524, at 4-5.
7. *Id.*, U.N. Doc. A/C.1/PV.1525, at 3-4. The U.S.S.R. was the most cautious, being unwilling to go beyond a study of the state of present activity among bodies dealing with various aspects of the problem.
8. *Id.*, U.N. Doc. A/C.1/PV.1526, at 7-8.
9. *Id.*, U.N. Doc. A/C.1/PV.1527, at 12-14.
10. *Id.*, U.N. Doc. A/C.1/PV.1530, at 5-7.

substantive suggestions of Dr. Pardo's speech and urged that the United Nations should take action by declaring the principles of a new regime in the immediate future.

There was already evident a split between the advanced States, who stood to lose some of their existing advantages in the race to the ocean resources, and the developing States, who in general[11] would benefit from the adoption of a regime to replace the freedom of access which was the law at that time. The main concern of participants in the debate was the procedure to be followed in examining the problem, rather than the substance of any future regime. It was therefore comparatively easy to secure agreement on the proposal[12] (submitted by Belgium on behalf of a group of 34 States[13]) for the establishment of an ad hoc committee of 35 States[14] to consider the question. The Ad Hoc Committee was established by the General Assembly on December 18, 1967, by resolution 2340 (XXII).

1968

Before the first session of the Ad Hoc Committee in March 1968, member States were invited to submit their views on the scope of the Committee's activity. The replies of the developed States manifested the same cautious approach based upon study of the problem and the survey of current activity, while some of the developing States and, again, Sweden, adopted a more positive stance and gave greater emphasis to the substance of the problem and to moves for the establishment of a new regime.[15]

The word of the Ad Hoc Committee was divided between the Legal Working Group and the Economic and Technical Working Group. In both, in the words of the Tanzanian delegate, "it was clear that there was a 'great divide' between the developed and the

11. Some developing states had national interests, such as growing offshore oil industries or wide claims to national jurisdiction which they felt might be prejudiced by the intended regime, and they therefore sided with the more cautious states.
12. U.N. Doc. A/C.1/L.410 (1967).
13. 22 U.N. GAOR, 1st Comm., U.N. Doc. A/C.1/PV.1542, at 1 (1967).
14. The draft resolution was adopted 93 to 0 with 1 abstention, *id.*, U.N. Doc. A/C.1/PV.1542, at 47-50.
15. 23 U.N. GAOR, Ad Hoc. Comm., U.N. Doc. A/C.135/1, at 19 (1968).

developing countries and that certain developed countries would prefer the Committee's work to proceed very slowly."[16] This he attributed to a desire "to frustrate the interests of the developing countries." Not only was this "great divide" evident in the approaches to the procedure of the Committee, but also it appeared in the attitudes to the substantive aspects of the problem. Thus, early in the meetings of the Economic and Technical Working Group it became clear that "western" developed States favored a "minimalist" regime, with little control over activities on the deep seabed, based upon registration of claims and payment of royalties.[17] Similarly, the Soviet bloc was not prepared to support any new machinery at that time.[18] The developing States, on the other hand, seemed intent on establishing more complex machinery.[19]

This difference in approach was epitomized in the Report of the Ad Hoc Committee on its 1968 session, which noted the failure to secure agreement on the principles to be submitted to the General Assembly. Included in the report were two alternative sets of proposals said to "contain an indication of the support that the various ideas received."[20] The first set of proposals provided for a fairly detailed declaration of general principles governing the area, including the establishment of an international machinery to secure the equitable distribution of benefits arising from the exploitation of the area. These proposals originated in a Working Paper submitted by 15 developing States.[21] The second set of proposals was submitted by the United Kingdom delegate, and was a much less detailed "statement of agreed principles." While accepting that the seabed beyond national jurisdiction should be reserved for peaceful purposes and its resources used for the benefit of all mankind, the proposals contained no indication of the nature of the regime to be established.

These alternatives were considered at the 26th meeting of the Ad Hoc Committee. The first proposal drew its support from the developing States, while the second proposal drew support from the developed States. The U.S.S.R. reserved its position.[22] Despite the cautious attitude resulting from the desire to protect their ex-

16. *Id.*, U.N. Doc. A/AC.135/WG.2/SR.10, at 41.
17. See the contribution of the United Kingdom delegate, *id.*, U.N. Doc. A/AC.135/WG.2/SR.8, at 14-15.
18. See the contribution of the U.S.S.R. delegate, *id.*, U.N. Doc. A/AC.135/WG.2/SR.9, at 23-26.
19. See the contribution of the Thai delegate, *id.*, U.N. Doc. A/AC.135/WG.2/SR.8 at 16-17.
20. *Id.*, U.N. A/7230.
21. *Id.*, U.N. Doc. A/AC.135/36.
22. *Id.*, U.N. Doc. A/AC.135/SR.26.

tended national claims to jurisdiction which to some extent set the Latin American bloc apart from other developing States, they voted for the first set of articles. When the principles were considered by the First Committee, the divisions reappeared, stated in stronger and more colorful terms. It was not possible to agree upon a set of principles for recommendation to the General Assembly; instead, the Maltese delegate proposed that the alternatives be referred to the Permanent Committee which was to be set up to replace the Ad Hoc Committee, and this was agreed.[23]

The work of the United Nations on the seabed in 1968 was completed with the adoption, as resolution 2467 (XXIII), on December 21 of four resolutions passed to the General Assembly by the First Committee. The first resolution established a 42-State Permanent Committee to replace the Ad Hoc Committee, and was passed by 112 votes to none, with seven abstentions including the U.S.S.R. The Soviet objection was that the Communist bloc was inadequately represented—an objection based not upon the arithmetical distribution of seats among States, but upon their desire to secure the socialist interest against that of "imperialist" States.[24] The importance of membership of the Committee was also stressed by other States.[25] The issue became a constant theme in debates on the distribution of power within the Committee and within the machinery of the projected regime.

The second resolution, passed unanimously, requested the Secretary General to undertake a study of the hazards of pollution and harmful effects arising from the exploitation of the deep seabed.

The third resolution requested the Secretary General to report on the establishment "in due time" of appropriate international machinery to promote the exploitation of the area. The interests and needs of the developing countries were to be given special consideration. It was passed by 85 votes to nine, with 25 abstentions. This resolution, of course, went directly against the cautious approach of the developed western States, and these States abstained on the vote. The Soviet bloc voted against it, consistent with their

23. *Id.*, U.N. Doc. A/C.1/PV.1538-1649, 1648th meeting.
24. *Id.*, U.N. Doc. A/PV.1752, at 27-30.
25. *See, e.g.*, the comments of the Ceylonese delegate, *id.*, U.N. Doc. A/C.1/PV.1649, at 4-5.

stronger opposition to such rapid progress towards a regime which they considered would be centered on a supranational machinery in which "the principal posts of command . . . would inevitably be in the hands of the capitalist monopolies of certain imperialist powers" and which would become "just one more mechanism for the enrichment of rapacious monopolies and the execution of neo-colonialist policies."[26] The overwhelming vote in favor of the motion was constituted by the developing States, including the Latin American bloc, and the Scandinavian bloc. The Scandinavian vote was explicable partly in terms of their internationalism and partly in terms of their interests as States possessing very limited continental margins.

The fourth resolution, passed without vote, initiated the International Decade for Ocean Exploration, following an American initiative in the Ad Hoc Committee.[27]

At the end of 1968, then, a number of trends were already evident. Firstly, it was significant that from the beginning the issue was assigned to the First Committee (Political and Security Committee) rather than the Sixth (Legal) Committee. This was, perhaps, due partly to the emphasis given to the reservation of the area for peaceful purposes, but was also a consequence of the light in which the proposals for the exploitation of the resources were seen. This was no matter of codifying or revising existing legal principles, but an attempt to reconcile conflicting international interests and potential interests in a new regime to be established *ab initio* in accordance with overtly political criteria. Perhaps it was recognized that international law is a living process and that the interests of the fifty or so States which had come into being since the 1958 Conference on the Law of the Sea could not be accommodated satisfactorily within a legal framework drawn up largely to meet the interests of the "traditional" maritime powers.

Secondly, the importance of the allocation of seats on the Committee underlines the perception of a split between the interests of the developing and the developed States in their views on the substance of a future regime as well as their views on the procedure by which the regime should be established. Particularly noteworthy were the positions of the Soviet delegation, which adopted the most conservative line, and the Latin American States, which began the careful maneuvers dictated by the necessity to protect

26. *Id.*, U.N. Doc. A/C.1/PV.1592, at 3-4 (Mr. Mendelevich).
27. *Id.*, U.N. Doc A/AC.135/33.

their extended claims to national jurisdiction[28] while retaining links with their "natural allies," the developing States.

The third trend was the rapid progress made by the Economic and Technical Working Group compared with the Legal Working Group. This was largely a reflection of the fact that most States knew very little about the resources of the seabed, and particularly the seabed beyond national jurisdiction. However, there is a more general tendency for the law to lag behind the advancement of technology in marine affairs.

1969

Activity in the Permanent Committee in the Spring of 1969 centered upon the attempt to arrive at an agreed set of principles—a task passed on to it by the Ad Hoc Committee. The attitudes of States remained roughly the same. Thus, the U.S.S.R. continued to assert that the present law was adequate and to oppose the establishment of a special legal status based on the concept of the "common heritage of mankind."[29] The United Kingdom continued to declare that the concept had no established meaning, and that its implications must be carefully worked out and in such a way as not to destroy the incentives for new industries, concluding that "agreement could be achieved only by a gradual process."[30] The developing States continued to urge for rapid movement towards a strong regime,[31] the Mexican delegate going so far as to propose that a declaration by the General Assembly of legal principles and conditions governing the area would have binding effect pending the conclusion of a convention on the matter.[32] Perhaps there was in his mind, as there clearly was in the minds of other delegates,

28. *See* F.V. GARCÍA-AMADOR, LATIN AMERICA AND THE LAW OF THE SEA (1972).

29. 24 U.N. GAOR, Comm. on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction [hereinafter cited as the Permanent Committee], U.N. Doc. A/AC.138/SC.1/SR.8, at 79-82 (1969).

30. *Id.*, U.N. Doc. A/AC.138/SC.1/SR.6, at 47.

31. *See, e.g., id.*, U.N. Doc. A/AC.138/SC.1/SR.5, at 42-44 (Brazil); *id.*, U.N. Doc. A/AC.138/SC.1/SR.10, at 119-20 (Brazil); *id.*, U.N. Doc. A/AC.138/SC.1/SR.11, at 129-30 (Thailand).

32. *Id.*, U.N. Doc. A/AC.138/SC.1/SR.5/, at 38-40.

the precedent of the Outer Space Treaty[33] concluded the year before.

Between the second and third sessions of the Legal Subcommittee, an informal drafting group, composed of Brazil, India, Libya, Norway, the U.S.S.R. and the United States, prepared a report on the alternative proposals for a set of principles.[34] This led to the preparation of a "synthesis"[35] eventually adopted as part of the Committee's report for that year.[36] While it was possible to point out certain areas of agreement (such as the existence of an area of seabed incapable of national appropriation, which was to be reserved for peaceful purposes, and the resources of which should be used for the benefit of mankind), it was evident that there was still fundamental disagreement on the details. Thus, there was no agreement on the limits of the area, or upon even the main features of the regime.

The differences of approach had been made clear when the Economic and Technical Committee considered the Study on the establishment of an appropriate international machinery[37] prepared by the Secretary General pursuant to General Assembly resolution 2467 C of 1968. As before, the developing States advocated a strong international machinery,[38] whereas the developed States favored a much weaker machinery operating as little more than a registry of claims or at best through a licensing system.[39] The U.S.S.R. delegate continued to display a singular reluctance to enter into any "hasty" discussions on the matter.[40] The Study itself, of course, made no recommendations on the most suitable type of machinery, but nonetheless, a cautious and conservative attitude can be inferred from the prominence given to discussion of the registration and licensing functions of the Authority.

The debates proceeded along well-established lines in the First Committee, and also in the General Assembly, which again completed the year's work with the passing of four resolutions. Two

33. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, 6 INT'L LEGAL MATERIALS 386 (1967). On the legal effects, see Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965).

34. 24 U.N. GAOR, Perm. Comm., U.N. Doc. A/AC.138/SC.1/4 (1969).

35. *Id.*, U.N. Doc. A/AC.138/SC.1/9.

36. *Id.*, U.N. Doc. A/AC.138/18/Add.1.

37. *Id.*, U.N. Doc. A/AC.138/12.

38. *See, e.g., id.*, U.N. Doc. A/AC.138/SC.2/SR.18, at 47-48 (India); *id.*, U.N. Doc. A/AC.138/SC.2/SR.21, at 92-93 (Trinidad & Tobago).

39. *See, e.g., id.*, U.N. Doc. A/AC.138/SC.2/SR.20, at 65-70 (France); *id.*, U.N. Doc. A/AC.138/SC.2/SR.20, at 70-73 (United Kingdom); *id.*, U.N. Doc. A/AC.138/SC.2/SR.21, at 80-83 (United States).

40. *Id.*, U.N. Doc. A/AC.138/SC.2/SR.20, at 73.

of these, resolutions 2574 B and 2574 C, were passed without opposition, but with one and 11 abstentions respectively. These resolutions simply requested the Committee to expedite its work of preparing a comprehensive and balanced statement of principles and to formulate recommended rules and economic and technical conditions for the exploitation of the area. The Secretary General was requested to continue his study on various types of international machinery, paying particular attention to the detailed question of its status, structure, functions and powers.

The other two resolutions met with more opposition. Resolution 2574 A requested the Secretary General to solicit the views of member States on the desirability of convening a law of the sea conference to consider all aspects of the law of the sea. This ran contrary to the wishes of those developed States who, satisfied with the 1958 Conventions, looked with dismay upon any attempt to supplant those laboriously prepared and negotiated texts. The resolution was also at odds with the wishes of those States who sought a rapid conclusion to the debate on the international seabed area, and thought that agreement on that issue was likely to be considerably delayed by throwing all the numerous and complex issues of the law of the sea into the melting pot. This resolution therefore gained less support, being passed by 65 votes to 12, with 30 abstentions.

The last resolution, 2574 D, declared that

> pending the establishment of the . . . international regime . . . States and persons, physical and juridical are bound to refrain from all activities of exploitation of the resources of the area of the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.[41]

This so-called "Moratorium Resolution"[42] met with strong opposition from most developed States, who sympathized with the American delegates' view that retardation of progress in the development of deep-sea technology helped no one. It was felt that the resolution might actually encourage States set upon seabed exploitation to extend their national claims unreasonably to "legitimize" activities beyond the present limits of national jurisdiction. The resolution was passed by 62 votes to 28, with 28 abstentions.

41. *Id.*, U.N. Doc. A/P.V.1833.
42. It has been argued by some developing states that this resolution has

The 1970 session culminated in a more tangible achievement than the earlier sessions; a Declaration of Principles governing the area was adopted by the General Assembly at the end of the year. In addition, the session saw considerable progress in the discussion of the details of the type of machinery to be established to have jurisdiction over the area. Pursuant to resolution 2574 C (XXIV), the Secretary General submitted a more detailed study[43] to follow up that submitted in 1969. This set out some of the criticisms of the licensing and registry models described in the earlier report, and made the significant move of including a detailed examination of international machinery having comprehensive powers, as suggested by a number of developing States.

The United States,[44] United Kingdom,[45] and France[46] also submitted working papers on a regime for the area. The American Draft Convention on the International Seabed Area sought to find a compromise on the much-disputed issue of boundaries by interposing an International Trusteeship Area between the continental shelf under national jurisdiction, which would extend as far as the 200 meter isobath, and the international seabed area proper, which would begin at a point beyond the base of the continental slope where the downward inclination of the surface of the seabed declines to a gradient which would have been determined by technical experts.[47] Even if this had been acceptable as a compromise on the issue of boundaries, there was little compromise on the nature of the machinery, this being based on a "weak" licensing Authority.[48]

The United Kingdom Working Paper also suggested a "licensing and royalties" regime, with a machinery bound by precisely stated rules and criteria which it would be obliged to follow in its operations. The French Working Paper adhered to this "Western" approach by also suggesting a regime based on registration and licensing, and a machinery with tightly-defined powers. It was quite

---

a binding effect. Even if unanimous declarations by the general assembly are regarded as having some quasi-legislative effect, there is little to be said for ascribing such effect to a resolution passed, as in this case, by a narrow majority.

43. 25 U.N. GAOR, Perm. Comm., U.N. Doc. A/AC.138/23 (1970).
44. *Id.*, U.N. Doc. A/AC.138/25.
45. *Id.*, U.N. Doc. A/AC.138/26.
46. *Id.*, U.N. Doc. A/AC.138/27.
47. *See* Auburn, *The International Seabed Area*, 20 INT'L & COMP. L.Q. 173 (1971).
48. *See, e.g.*, 25 U.N. GAOR, Perm. Comm., U.N. Doc. A/AC.138/25, art. 68, at 21-22 (1970).

clear that these developed States[49] preferred the more conservative of the models discussed in the Secretary General's Study, while the developing States retained their preference for a much stronger Authority with greater discretion and power in the administration of the area.[50]

Two other matters took on increasing importance during the session; first, the problem of transferring technology so as to ensure the participation of developing States in the exploitation of the area, and second, the vital question of how the benefits, both financial and nonfinancial, (for example, development of technology, servicing industries, etc.) would be distributed. This latter point, left open in the American draft convention, was the subject of a preliminary note of the Secretariat.[51] The Committee recognized that there was an urgent need for further consideration of this problem.

The attempts in the Committee and its Legal Subcommittee to arrive at an agreed text of a Declaration of Principles failed, but the Chairman continued informal negotiations with members after the end of its 1970 session. A text[52] was agreed upon in time for submission to the General Assembly's 25th session. This text did not represent a perfect consensus, but rather the highest degree of agreement then attainable. It did not represent a provisional regime applicable to the area pending the establishment of a permanent regime, but only a first step towards that regime.[53] Although there undoubtedly was considerable compromise on the part of many States, this was on the question of what should be expressed in the Declaration, rather than on the substance of the principles themselves. It is clear from the debates of the First Committee on the draft that the acquiescence of States in the final draft was attributable to the exceptional vagueness of the language, which allowed virtually any national position to be reconciled with the

49. *See also* the Working Papers submitted to the Economic and Technical Subcommittee by the United States and Canada, *id.*, U.N. Doc. A/AC.138/29, app. IV.

50. *See, e.g.*, the Working Paper submitted by Cameroon and 11 other States, *id.*, U.N. Doc. A/AC.138/29, app. III.

51. *Id.*, U.N. Doc. A/AC.138/24.

52. *Id.*, U.N. Doc. A/C1./L.544.

53. *See id.*, U.N. Doc. A/C.1PV.1773, at 13 (Mr. Amerasinghe); *id.*, U.N. Doc. A/C.1/PV.1781, at 2 (Mr. Pohl).

Principles. However, the "fragile balance" was preserved, and the Declaration was adopted on December 17, 1970, by the General Assembly, with 108 votes in favor, none against, and 14 abstentions, as resolution 2749 (XXV).

Three other resolutions were adopted by the General Assembly on the same day. The first resolution, derived from a draft resolution[54] submitted to the First Committee by a group of developing States, requested the Secretary General to cooperate with UNCTAD in the preparation of a report on the impact of seabed minerals on the prices of mineral exports on the world market and on the economic well-being of developing countries, and to propose effective solutions to the problems arising. It was adopted as resolution 2750 A (XXV) by 104 votes to 0, with 16 abstentions.

The second resolution requested the Secretary General, in collaboration with UNCTAD, to prepare a report on the problems of land-locked States, especially in relation to the exploitation of the international seabed. The draft, introduced into the First Committee[55] by twelve land-locked States, met with some criticism for singling out land-locked States from other geographical disadvantaged States. The criticism was similar to that directed towards the draft on the economic impact of seabed minerals which had singled out developing states. Nevertheless, it was approved in the First Committee and adopted by the Assembly as resolution 2750 B (XXV) by 111 votes to 0, with 11 abstentions.

The third and most important resolution passed on that day decided to convene a conference on the law of the sea in 1973, and to charge the Seabed Committee, to which 44 States would be added, with the task of preparing for that conference. Three draft resolutions on this question were set before the First Committee:[56] the American draft, which sought to confine the projected conference to a consideration of the problems left unresolved at the 1958 and 1960 Law of the Sea Conferences; and the developing States' drafts, which would have reopened consideration of all the problems of the law of the sea, which were seen as being inextricably linked with each other; and a final "compromise" text,[57] which tended towards the approach of the developing States. It was accepted by

54. *Id.*, U.N. Doc. A/C.1/L.543/Rev.1/Corr.1.
55. *Id.*, U.N. Doc. A/C.1/L.551.
56. *Id.*, U.N. Doc. A/C.1/L.536/Rev.1. (United States); *id.*, U.N. Doc. A/C.1/L.539 (Brazil, Trinidad & Tobago); *id.*, U.N. Doc. A/C.1/L.545 (five-power developing States).
57. *Id.*, U.N. Doc. A/C.1/L.562 (23-power "compromise" draft).

the First Committee, and adopted by the Assembly by 108 votes to 7,[58] with 6 abstentions, as resolution 2750 C (XXV).

1971

By the 1971 session, several States had been able to prepare substantial drafts on the international seabed. The Committee had decided to form three subcommittees.[59] These drafts went to Subcommittee 1 which, under the chairmanship of Dr. Seaton of Tanzania, was to deal with the question of the international seabed. In addition to these drafts, the subcommittee received the three reports which the General Assembly had requested the Secretary General to prepare. The first of these dealt with the possible impact of seabed mineral production on world markets.[60] Its tone was generally optimistic, regarding the market in manganese as the only market likely to be seriously affected within the foreseeable future. Both the Secretary General and UNCTAD[61] recognized that this was a question of great importance which would require much further study—a feeling shared by members of the subcommittee, some of whom thought that the report had underestimated the problem. The subcommittee decided not to formulate specific proposals on the basis of the second report[62] which dealt with problems of land-locked countries, but to keep the matter under constant consideration. In connection with the third report[63] on the sharing of proceeds and other benefits, the importance of non-financial benefits such as direct participation and the need for training nationals of developing countries was stressed.

The draft articles submitted by Tanzania[64] were a striking contrast with those submitted by the western States at the previous session.[65] While permitting exploitation by member States and

58. The Communist bloc voted against the resolution.
59. 26 U.N. GAOR, Perm. Comm., U.N. Doc. A/AC.138/SR.45, at 7 (1971). The subcommittees dealt with the international seabed area (SC.I), the comprehensive list of subjects for the Law of the Sea Conference (SC.II), and pollution and scientific research (SC.III).
60. *Id.*, U.N. Doc. A/AC.138/36.
61. *Id.*, U.N. Doc. A/AC.138/SC.I/L.5 (UNCTAD statement to SC.I, Aug. 13, 1971).
62. *Id.*, U.N. Doc. A/AC.138/37/Corr.1 & Corr.2.
63. *Id.*, U.N. Doc. A/AC.138/38/Corr.1.
64. *Id.*, U.N. Doc. A/AC.138/33.
65. *Id.*, U.N. Doc. A/AC.138/49 (Chile, Colombia, Ecuador, El Salvador,

companies under their sponsorship through a licensing system, it also gave the Authority the power to undertake exploitation itself; in either event, all activities related to the exploration and exploitation of the resources of the area were to be subject to regulation by the Authority. In addition, the Authority was to provide for the sharing of financial and other benefits, and establish measures to eliminate fluctuations in the prices of land-based minerals resulting from the exploitation of the seabed. Even this did not go so far as the 13-power draft which was based on the opinion of its sponsors that "the concept of a licensing or concession system is . . . inconsistent with the principle of the common heritage." While preserving the "rights and legitimate interests of coastal States," provision is made for the establishment of a strong Authority with exclusive jurisdiction over the area. The Authority would undertake exploration and exploitation activities in the area, although it might do so through a system of contracts or through the establishment of joint ventures. In addition to the duty of distributing benefits, the Authority is to take all necessary measures, including suspension of production and price-fixing, in order to protect developing countries and exporters of raw materials from any adverse economic effects of seabed production. Under the Tanzanian draft, this function would be performed by a less powerful three to five man board elected by the Assembly of the Authority.

An interesting difference between this text and that submitted by Tanzania is that the latter gives the greater power to an 18-State council. The Assembly is limited to a supervisory and broad policy-making role. The 13-power draft, on the other hand, gives the Assembly the power to discuss and decide on any questions within the scope of the Authority, and to direct the 35-State Council (elected, like the Tanzanian Council, with due regard to the principle of equitable geographical representation) on such matters, and gives the Council less power than its Tanzanian counterpart.

None of the other drafts adopted such a radical stance as the two mentioned above. A seven-power draft submitted by geographically-disadvantaged States[66] had interesting features. It proposed a composite criterion for fixing the outer edge of the national seabed, this being either the 200-meter isobath or 40 miles from the baseline of the territorial sea, and required equal numbers of primarily coastal States and primarily noncoastal States in any organ

Guatemala, Guyana, Jamaica, Mexico, Panama, Peru, Trinidad, Tobago, Uruguay, and Venezuela).

66. *Id.*, U.N. Doc. A/AC.138/55 (Afghanistan, Austria, Belgium, Hungary, Nepal, Netherlands, and Singapore).

of the Authority in which not all member States were represented. However, its plans for the Authority, although allowing joint ventures, direct exploitation and marketing by the Authority, were vague and relatively conservative. Even the magnificently idealistic Maltese Draft Ocean Space Treaty[67] based its system of seabed exploitation on exclusive licenses issued on a nondiscriminatory basis. Permanent seats on the Council would be granted to coastal States with either a population exceeding 90 million inhabitants or certain other attributes which would, in general, favor the developed western States. Similarly, the Canadian working paper[68] emphasized that progress towards even the limited objective of giving the Authority the power to exploit the area should be very slow. Although it gave the "resource management commission" of the Authority the power to exercise control over the method and volume of production, this was only for the purpose of preventing waste of resources.

The position of the United Kingdom remained conservative. It proposed a licensing system within the area beyond the trusteeship zone, a suggestion made the previous year in the American draft treaty. The Authority would possess limited powers in relation to the licenses. Regarding the Authority, the United Kingdom proposals observed that

> just as it would be appropriate to give developing States a special position on any institutions of the Authority which might be set up for the purpose of distributing sea bed benefits, so it would be necessary to make special provision on the Council for those States with an established sea bed technology, who have a special contribution to make in organising sea bed activity and without whose support no international regime in this field would be viable.[69]

Finally, the papers submitted by the U.S.S.R.[70] and Poland[71] demonstrated a reluctance to see a "strong" regime with a comprehensive Authority, which was consistent with the conservatism previously noted.

By contrast with this activity in the Committee, the General Assembly took little action. The Chairman of the Committee outlined

67. *Id.*, U.N. Doc. A/AC.138/53.
68. *Id.*, U.N. Doc. A/AC.138/59.
69. *Id.*, U.N. Doc. A/AC.138/46.
70. *Id.*, U.N. Doc. A/AC.138/43.
71. *Id.*, U.N. Doc. A/AC.138/44.

to the First Committee[72] some of the trends and interest groups which were emerging, but the Assembly confined itself to adopting, on the recommendation of the First Committee, resolution 2881 (XXVI) which added China and four other States[73] to the Committee, and noted with satisfaction the progress of the Committee.

1972

In 1972, activity in the Seabed Committee moved away from the work of Subcommittee I towards the questions relating to living resources and preservation of the marine environment under consideration by the other two subcommittees. These preoccupations were also evident outside the Committee; for instance, in the Declaration of Santo Domingo and the Yaoundé conclusions on the one hand, and the Stockholm Conference on the Human Environment and the London Conference on the Prevention of Marine Pollution by Dumping of Wastes, on the other.[74] It seems likely that developing States were coming to regard extended claims to national jurisdiction as serving their immediate interests better than the possibility of a strong international seabed regime. This changing conception of the importance of the international area was reflected in the increasing emphasis given to the nonfinancial benefits arising from the exploitation of the area, and the fears of some geographically-disadvantaged States that such wide limits would severely diminish the potential benefits of the common heritage. These fears prompted the introduction of a proposal[75] that the Secretary General should be requested to prepare a study of the economic implications of various proposed limits of the international seabed area. This proposal, although opposed in the Committee on the grounds that it both prejudged the question of limits and was simply a device for opposing the claims to broad coastal jurisdiction, was accepted in a modified form by the General Assembly.

The major contributions of Subcommittee I to the preparation for the Conference were its consideration of the further report of the Secretary General on the economic implications of seabed min-

72. 26 U.N. GAOR, 1st Comm., U.N. Doc. A/C.1/PV.1843, at 6 (1971).

73. The First Committee had proposed three other States, to be appointed by the Chairman of the First Committee in consultation with regional groups, with due regard to the interest of underrepresented groups.

74. *See, e.g.*, Fleischler, *Pollution for Seaborne Sources*, 3 NEW DIRECTIONS IN THE LAW OF THE SEA 78 (1973); Nelson, *The Patrimonial Sea*, 22 INT'L & COMP. L.Q. 668 (1973).

75. 27 U.N. GAOR, Perm. Comm., U.N. Doc. A/AC.138/81 (1972). *See also* the Netherlands' proposal concerning the intermediate zone, *id.*, U.N. Doc. A/AC.138/SC.I/L.9.

eral production,[76] and the preparation by a 33-State working group of texts illustrating areas of agreement and disagreement,[77] although neither activity led to any significant changes in national positions.

The General Assembly confined itself to procedural matters when considering the question of the seabed, and resolved to convene the first session of the Conference in 1973. In addition, the Secretary General was requested to prepare studies on the implications of the various proposed limits of jurisdiction both for the International Area and for riparian States. These resolutions constituted resolution 3029 (XXVII), adopted on December 18, 1972.

1973

The 1973 session of the Committee was devoted to preparing for the Conference. In Subcommittee I, the Working Group on the international regime and machinery continued its preparaton of a text indicating areas of agreement and disagreement. The text[78] was annexed to the final report of the Seabed Committee[79] and was to form the basis for the work of the Conference. There were texts submitted to the Committee which reiterated established positions. An example is the draft articles on the rights of land-locked States submitted by Bolivia[80] and by a group of seven land-locked States.[81] Also, there was a paper from the Netherlands[82] on the concept of an intermediate zone where coastal State jurisdiction would be subject to international rules, and where there would be review and supervision by international bodies and a sharing of benefits with the international community. The Committee also received a strong affirmation of belief by the Organization of African Unity in a regime for the seabed which, through an Authority with comprehensive powers, would "give full meaning to the concept of the common heritage of mankind."[83] In addition, the Secre-

76. *Id.*, U.N. Doc. A/AC.138/73.
77. *Id.*, U.N. Doc. A/AC.138/L.18/Add.3.
78. 28 U.N. GAOR, Perm. Comm., U.N. Doc. A/AC.138/94/Add.1 (1973).
79. 28 U.N. GAOR, Supp. 21, U.N. Doc. A/9021 (1973).
80. 28 U.N. GAOR, Perm. Comm., U.N. Doc. A/AC.138/92 (1973).
81. *Id.*, U.N. Doc. A/AC.138/93 (Afghanistan, Bolivia, Czechoslovakia, Hungary, Mali, Nepal, and Zambia).
82. *Id.*, U.N. Doc. A/AC.138/86.
83. Declaration on the issues of the Law of the Sea, *id.*, U.N. Doc.. A/AC.138/89 OAU (Addis Ababa).

tary General provided a report on the economic significance of the various limits proposed for national jurisdiction.[84]

Perhaps the most significant development in 1973 was the realization of the difficulty which would be experienced on agreeing upon a system for taking decisions in the Conference. Discussion of the question began in March in the Seabed Committee, and was continued at length in the First Committee later that year. However, as is well known, there was a fundamental disagreement between those States who counseled caution and objected to decisions being taken by numerical majorities regardless of the political weight of the opposition, and those who thought that progressive legislation for the seas required that there should be no minority veto.[85]

The Conference

The debate on decision-making occupied all of the first session of the Conference, which took place in New York in December 1973, and the first week of the second session in Caracas.[86] Finally, there was agreement on a procedure which allows a vote to be taken when attempts at reaching consensus have failed.[87] So far as the substantive work of the Caracas session was concerned, there was renewed activity among the developed States. The United States put forward a paper[88] which criticized some of the Secretary General's predictions of the economic impact of seabed minerals[89] and argued that complex international bodies to regulate production "may result in greater economic costs to all mankind than the benefits they are designed to achieve." This was followed by a draft[90] containing detailed provisions governing the award and conditions of mining licenses. Prospecting would be unregulated, and mining subject to nondiscriminatory licenses awarded on a first-come, first-served basis, until the Convention enter force, when a bidding procedure is instituted. The Authority would have little or no power to impose further requirements on an operator once the license is issued. The license is made freely transferable provided only that the transferee agrees to comply with the provisions of the Conven-

84. *Id.*, U.N. Doc. A/AC.138/87; *cf.* U.N. Doc. A/AC.138/90 (1973).

85. *See* Vignes, *Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?*, 69 Am. J. Int'l L. 119 (1975).

86. The second session was to have been held in Santiago, Chile (Res. 3029 (XXVII)), but was moved to Caracas following the overthrow of the Chilean government in September 1973.

87. U.N. Doc. A/CONF.62/30/Rev.1 (1974).

88. U.N. Doc. A/CONF.62/C.1/L.5 (1974).

89. The most recent report is U.N. Doc. A/CONF.62/25 (1974).

90. U.N. Doc. A/CONF.62/C.1/L.6 (1974). On this and the other draft conditions, see U.N. Doc. A/CONF.62/C.1/SR.14 (1974).

tion and, if the transferee is not a State, is sponsored by a Contracting Party.

Similar draft conditions were proposed by eight EEC States[91] and Japan.[92] There are several matters of detail on which these drafts differed from the American proposal, the most interesting being that competing applications for licenses are not settled by competitive bidding. In the Japanese draft, selection by the Authority takes into account the equitable distribution of contracts among prospective contractors and the import needs of parties and in particular of developing parties. In the EEC draft, selection is made by "objective criteria" which remain to be determined, but appear likely to follow the "equitable distribution of contracts" approach.

The draft conditions of exploration and exploitation submitted by the Group of 77[93] were quite different. The conditions were less detailed, therefore leaving greater discretion with the Authority. In some matters of substance, wider powers were expressly given to the Authority. For example, the Authority would determine from time to time the areas in which exploration and exploitation would take place, rather than leaving the initiative to operators; the Authority would be entitled to revise, suspend or cancel contracts where there is a radical change in circumstances, rather than only where there is a gross violation of the operator's obligation; rights and obligations under the contract would not be transferrable without the consent of the Authority, and there is a provision for the continuous transfer to the Authority not only of "raw data," as in the "western" texts, but also of "technology and know-how" which would presumably include the means of interpreting that data. Most significantly, the draft, following the compromise advanced by the Group of 77 during the informal sessions,[94] pro-

91. U.N. Doc. A/CONF.62/C.1/L.8 (1974) (Belgium, Denmark, France, Germany, Italy, Luxemburg, Netherlands, and the United Kingdom).
92. U.N. Doc. A/CONF.62/C.1/L.9 (1974).
93. U.N. Doc. A/CONF.62/C.1/L.7 (1974).
94. Working Paper C.1/CPR.4, *included in* U.N. Doc. A/CONF.62/C.1/L.3 (1974). *See* Adede, *The System for Exploitation of the "Common Heritage of Mankind" at the Caracas Conference*, 69 AM. J. INT'L L. 31 (1975); Amerasinghe, *Basic Principles Relating to the International Regime of the Oceans at the Caracas Session of the United Nations Law of the Sea Conference*, 6 J. MAR. L. & COMM. 213, 235 (1975).

vided that although all exploitation of the international area would be conducted directly by the Authority, this might be done through service contracts or any other means which preserved direct and effective control by the Authority at all times.

The debates of Committee I at Caracas did little more than clarify the established differences between the national positions. The general debate which occupied the first week consisted in a rehearsal of positions ranging from the assertion that

> only a regime providing the necessary safeguards to subordinate the interests of individual States, groups of States or private enterprises to the interest of the whole community would be consistent with the concept of the common heritage[95]

to the assertion that a system based upon anything other than licensing "would not only deprive a State of its lawful rights to the resources but would also enable a considerable number of capitalist monopolies to obtain large profits from their exploitation."[96]

After the first week, the debate moved on to consider the Basic Principles, with particular emphasis on article nine which dealt with the question of who should exploit the area. It was in connection with article nine that the Chairman of the informal meeting reported to the Committee that the Group of 77 proposal represented "an event of major significance and one that had perhaps marked a turning point"[97] in the Committee's work. Certainly it appeared from the general debate which preceded the informal meetings that the developing States were becoming aware that, regardless of the legal powers of the Authority, only a handful of entities in the world possessed the technology necessary to begin exploitation and that the regime would therefore have to secure their cooperation. At the same time, the developed States were coming to recognize that the complete freedom of exploitation formerly enjoyed beyond national jurisdiction could not form the basis of a generally acceptable regime, and that the overwhelming majority of States demanded an Authority with powers extending beyond the issue of licenses. As the Sri Lankan delegate had remarked at the beginning of the session, "the main difference between the systems related to the degree to which the new organization would control the activities of the entity carrying out exploration and exploitation."[98]

---

95. U.N. Doc. A/CONF.62/C.1/SR.3 (1974) (Trinidad and Tobago).
96. U.N. Doc. A/CONF.62/C.1/SR.8 (1974) (U.S.S.R.).
97. U.N. Doc. A/CONF.62/C.1/SR.9 (1974) (Mr. Pinto).
98. U.N. Doc. A/CONF.62/C.1/SR.2 (1974).

Apart from the reduction of this question from a matter of principle to a matter of degree, and a rereading of the alternative texts on the basic principles which clarified the remaining differences, there was little progress in the Committee or in the formal meetings and working group. Towards the end of the session, the Committee considered the economic implications of seabed exploitation, again without reaching any conclusion. However, the working papers from the United States[99] and from Chile,[100] both of which discussed the reports from the Secretary General and UNCTAD,[101] and the debates themselves, went some way towards clarifying the basic approaches to controlling the impact of seabed minerals.[102]

There was considerable diplomatic activity between the second and third sessions of the Conference, and there was a guarded optimism that the Geneva session would be able to produce the core of an agreement. The First Committee had before it a comparative table[103] of the proposals from the United States, Group of 77, the eight European Powers, and Japan. At the second meeting, the U.S.S.R. introduced a further working document[104] on conditions of exploitation. This document adhered to the previously stated Soviet view that exploitation should be conducted by States, who may transfer their rights to national or juridical persons under their jurisdiction, on the basis of "contracts" (which differ little, if at all, from licenses) with the Authority. The proposal certainly goes some way towards a compromise with the proposals of the Group of 77. For instance, the Authority would be entitled to participate in exploitation, and may reserve areas, though not whole regions, of the seabed to itself. Where more than one State applies for a contract relating to an area, the Authority is to have regard,

99. *See* note 88 *supra.*
100. U.N. Doc. A/CONF.62/C.1/L.11 (1974).
101. U.N. Doc. A/CONF.62/25 (1974); U.N. Doc A/CONF.62/32 (1974). For a brief review of these reports, see U.N. Doc. A/CONF.62/C.1/L.2 (1974).
102. See the summary given by the Chairman, U.N. Doc. A/CONF.62/C.1/SR.14 (1974).
103. Proposals Regarding Conditions of Exploration and Exploitation, CP/Working Paper No. 2, First Committee Working Group, summarizing U.N. Doc. A/CONF.62/C.1/L.6 (1974); U.N. Doc. A/CONF.62/C.1/L.7 (1974); U.N. Doc. A/CONF.62/C.1/L.8 (1974); U.N. Doc. A/CONF.62/C.1/L.9 (1974).
104. U.N. Doc. A/CONF.62/C.1/L.12 (1975); U.N. Doc. A/CONF.62/C.1/SR.19 (1975).

inter alia, to the number of contracts already obtained by the competing States and to the importance of the contract for their economies. Preference would be given to developing countries which are to a "certain extent" dependent on obtaining the contract.

In addition to the Soviet draft, Czechoslavakia, on behalf of the Group of Land-Locked and Geographically Disadvantaged States, submitted two papers. The first[105] one required the net annual revenue arising from exploitation to be distributed as follows: ten percent to a price stabilization fund, 35 percent to all developing countries, 23⅓ percent among land-locked States, 12⅔ percent among disadvantaged States and 20 percent among all States. Of these, all except the first and last categories are to be distributed according to a formula based upon population and per capita income. The second paper[106] provides that at least two-fifths of the members of the Council, and of any other organ of the Authority in which not all Member States are represented, shall be representatives of land-locked and geographically-disadvantaged States. These represent a new phase in the demands of geographically-disadvantaged States, which had hitherto been concerned mainly with establishing the principle of their access to and participation in the resources of the international area.

The most important document to emerge from the session was the Working Group paper on Basic Conditions of Exploration and Exploitation[107] which sought to present a unified text on the contractual joint venture system for the Authority which the Committee had been studying,[108] and taking account of the major concerns of delegations.[109] Although this paper had been the subject of wide consultation, it was not a negotiated compromise, but rather a device to facilitate further negotiation.

This paper need not be considered here in detail because it forms the Annex to the Single Negotiating Text. However, it is important to note firstly, that the Chairman of the Working Group thought that the paper was acceptable to the Working Group, with the exception of two matters relating to the reservation of portions of the area for the Authority's use, and secondly, that the paper was expressly based upon the conditions proposed by the Group of 77.

---

105. U.N. Doc. A/CONF.62/C.1/L.13 (1975).
106. U.N. Doc. A/CONF.62/C.1/L.14 (1975).
107. Basic Conditions of Exploration and Exploitation, First Committee Working Group, CP/cab.12 (Apr. 9, 1975).
108. Information Note on Joint Ventures, First Committee Working Group, C.1/Working Paper No. 5 (Apr. 8, 1975).
109. U.N. Doc. A/CONF.62/C.1/SR.20 (1975).

THE TEXT

The text submitted by Mr. Engo as Chairman of Committee I is rather different in its tone from the other two parts of the Informal Single Negotiating Text. It makes little attempt to produce a set of articles balanced either by the inclusion of articles representative of those submitted by all interest groups, or by adopting the draft articles facing the least opposition. Instead, the text adheres fairly consistently to the line advanced by the Group of 77. Although the text is merely a device to facilitate negotiation, it is important to realize that the developing States have made significant progress already by having so influenced the debate on the international area as to have future negotiations conducted on the basis of their views.

The text provides for an International Seabed Authority which would govern activities in the area with the aim of fostering a healthy world economy while protecting the economies of developing States which already export minerals to be produced from the seabed, and promote the orderly development and rational management of the area. The Authority would be responsible for the equitable distribution of benefits, both financial and nonfinancial, arising from the exploitation of the area, paying particular attention to the position of developing States. Exploration, exploitation, and the marketing of resources would be undertaken both directly by the Authority (acting through the Enterprise which is one of its subsidiary organs) and by States Parties, or entities under their jurisdiction, with which the Authority has concluded agreements under which they remain at all times subject to the direct and effective control of the Authority. The functions of the Authority would be discharged by the 36-State Council, subject to the policy guidelines laid down by the Assembly to which all member States belong. Members of the Council would be chosen, paying regard to the equitable distribution of seats among the major geographical regions.

In addition to the Enterprise, the Authority has two other subsidiary organs—the Technical Commission and the Economic Planning Commission, both of which advise the Council, which is served by a small secretariat. A tribunal would be established to which either party to a dispute arising in relation to the area might have

recourse if other methods of peaceful settlement are not agreed upon.

The regime can be conveniently discussed under the following headings: General Principles of the Regime; Research and Exploration; Distribution of Benefits; Transfer of Technology; Safety and Pollution; Composition of the International Authority; and Dispute Settlement. Before doing so, the question of the limits of the international area must be considered.

Limits

The Committee II Single Negotiating Text provides, in article 62, that national jurisdiction over the seabed extends throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 miles from the baseline of the territorial sea where the margin does not extend up to that distance. This would have the effect of including over 40 percent of the seabed within national jurisdiction, compared with about 36 percent under a single limit of 200 miles. The wider limit is thought to bring almost 100 percent of offshore oil within national jurisdiction, whereas the 200-mile limit might leave between five percent and 15 percent within the international area.

By way of accommodating the interests of geographically-disadvantaged States, the Committee II text goes on to provide, in article 69, that a proportion of the value or volume of production at sites beyond the 200-mile limit shall be paid to the International Authority, which then distributes this on an equitable basis, taking the needs and interests of developing countries into account. This might seem a rather cumbersome procedure, especially when only a handful of States are expected to gain from the extended limit, and there is a strong case for adopting a simple limit of 200 miles for seabed jurisdiction. Firstly, the outer edge of the margin is difficult to determine.[110] A limit of 200 miles is not only easier for the coastal State to administer, but is also a more convenient limit for seamen seeking to discover whether or not they are within the jurisdiction of the coastal State. Secondly, since the waters above the margin but beyond the 200-mile limit would be "high seas," the coastal State would enjoy jurisdiction over foreign vessels only for the purpose of protecting their sovereign rights over the exploration and exploitation of the seabed. Such limited jurisdic-

110. *See* H. HEDBERG, NATIONAL INTERNATIONAL JURISDICTIONAL BOUNDARY ON THE OCEAN FLOOR (1972); Orlin, *Offshore Boundaries: Engineering and Economic Aspects*, 3 OCEAN DEVEL. & INT'L L.J. 87 (1975).

tion is likely to give rise not only to disputes over the legality of interference with foreign ships, but also to "creeping jurisdiction" resulting in the subsuming of the area within the EEZ.

If an acceptable regime for the international area is agreed upon, could not the coastal States' interests be accommodated by giving them preferential rights in the margin beyond 200 miles? It is arguable that any advantage gained by exploiting that outer margin under national jurisdiction, with a proportion of profits going to the Authority (rather than under the international regime, with a proportion of profits going to the contractor-State) is outweighed by the greater stability inherent in a single limit of 200 miles for maritime jurisdiction.

General Principles of the Regime

The first 19 articles of the text set out the general principles of the regime. These are of more than preambulatory effect, since the text as a whole is in the nature of a "framework treaty." Questions on the legality of actions taken by the Authority, and disputes arising out of the regime, will almost certainly be settled on the basis of these principles.[111] The developing States have been urging that there should be a regime based upon an international Authority implementing such general principles. If the premise of "democratic" government of international areas and resources is accepted, there is much to be said in favor of such a move away from "quasi-contractual" international agreements, and the flexibility which that move entails. Although such articles oftentimes secure agreement more easily because of the range of interpretation which they allow (which in turn makes them virtually impossible to enforce), it may be that the provision of a Tribunal which would be likely to base its decisions upon these principles will result in them being as closely negotiated as the more detailed provisions of the text.

The area is declared by article three to be the "common heritage of mankind," following the terms of resolution 2749 (XXV). The consequence of this, according to paragraph one of the Annex, is that "all rights in the resources are vested in the Authority on be-

111. *Cf.* para. 18 of the Basic Conditions, Annex 1 of the Text, U.N. Doc. A/CONF.62/WP.8/Pt.1 (1975).

half of mankind as a whole." This seems, however, to depend upon an interpretation of the concept of "common heritage" which in the past has not been universally accepted.[112] Such a far-reaching result is not obtained even with the combined effect of article four which provides that there shall be no claim to sovereignty over the area and that rights can only be acquired in accordance with the Convention, article six which provides that no activities in the Area shall be carried out except in accordance with the provisions of the Convention, and article seven which requires all activities to be carried out for the benefit of mankind as a whole. If it is intended to vest title to the resources in the Authority, this should be done in the body of the convention.

The definition of "activities in the Area" in article one is something of a compromise: the term is defined as "all activities of exploration of the Area and of the exploitation of its resources, as well as other associated activities in the area including scientific research." This definition is not wide enough to encompass activities such as the laying of cables and pipelines unconnected with the exploitation or exploration of the Area. To this extent, the definition will disappoint those developing States which sought a comprehensive regime for the seabed. On the other hand, the inclusion of research in the regime will cause concern to States such as the United Kingdom and U.S.S.R., which have often declared their support for the freedom of scientific research.[113] However, it may be that the substantive rules on research are acceptable to both groupings.[114] With the exception of these activities, and since the superjacent waters remain high seas (article 15), the traditional "freedom of the seas" remains.

The "common heritage of mankind" has the special meaning which it had (at least in the eyes of the majority of States) throughout the United Nations discussion of the concept. Thus article seven provides that

> [a]ctivities shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of the developing countries.

Article nine requires the development of the area to be carried out not only in such a manner as to foster the healthy development of the world economy but also so as to

112. *See* Amerasinghe, *supra* note 94, at 218-19; *cf.* notes 30 & 31 *supra.*

113. *See* 1 UNCLOS III OFFICIAL RECORDS 69 (1975) (U.S.S.R.); *id.* at 111 (United Kingdom).

114. *See* U.N. Doc. A/CONF.62/WP.8/Pt.III, arts. 16, 18, 49 (1975); Marine Scientific Research, *id.*, art. 25.

> avoid or minimize any adverse effects on the revenues and economies of the developing countries, resulting from a substantial decline in their export earnings from minerals and other raw materials originating from their territory which are also derived from the Area.

This discrimination in favor of developing States runs throughout the text. If it is thought that the parceling out of benefits from the exploitation of an area of *res communis* should be an occasion for the redress of existing inequalities, this is quite properly so. Although developed exporting States will also feel the effect of seabed mineral production, many of them, unlike developing States, will have the opportunity to participate in the wealth of the seabed through the profits on service contracts and joint ventures with the Authority. In any event, only blind acceptance of the "sovereign equality of States" could ignore the distinction between the interests of developed, and the needs of developing States. Allied to this notion are the universally accepted principles that the area should be reserved for peaceful purposes (article eight) and that activities shall generally be in accordance with the provisions of the United Nations charter (article five). This does not, of course, imply any new limitation on activity in the superjacent waters.

The principle governing responsibility for operations in the Area is an interesting insight into the limitations of the regime. Under article 17

> [e]very State shall have the responsibility to ensure that activities in the Area, whether undertaken by government agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the provisions of this Convention. . . . Damage caused by such activities shall entail liability on the part of the State . . . .

This article recognizes that the Authority, despite the provision for a staff of inspectors (article 40) is not likely to be able to police the area itself, but will depend upon States to do so. It implies that this will be on the basis of flag-state jurisdiction. This has certain weaknesses. First, it is readily foreseeable that the "flag of convenience" and "tax haven" problems will arise, especially where multinational enterprises have the added incentive of establishing themselves in countries which will be given preferential treatment under the proposed regime. This will result in an even more serious lack of control over convenience vessels than at present, since the activities will, by definition, be taking place at least 200 miles

from the nearest coast which probably will not be the coast of the flag State. On the other hand, this does not imply that any State will find it easy to supervise effectively the operators for whom they are responsible.

Second, the high entry price into the deep-sea mining market makes it likely that many operators will be consortia of persons of different nationalities, and it may be difficult to decide which State is to be responsible. Article 17(2) provides that "[a] group of States . . . acting together shall be jointly and severally responsible. . . ." This, however, does not unambiguously cover the situations described above. Also, this provision seems to be at variance with paragraph 5 of the Annex, which requires nonstate entities to be "sponsored" by a party before the Authority may conclude contracts with them—the obvious inference being that the sponsoring State should be responsible.

Third, vessels of several flags may be involved in an operation in the area. For example, a ship of State A unloads provisions onto an installation of State B. It would seem desirable to fix one State with responsibility for an entire operation in the area. The simplest method seems to be to require one State to sponsor an entire operation and sort out liability with any other States involved. This would also simplify the problem of the equitable distribution of contracts among States. In addition, enforcement could be made more effective if port State jurisdiction were adopted, giving the Authority the right to proceed against miscreant vessels wherever they put into port.[115]

There are a number of miscellaneous principles which impose upon the Authority the obligation to take "appropriate" or "necessary" measures. Examples include: the duty to protect the marine environment (article 12) and human life (article 13); to "promote" scientific research (article ten); the participation of developing States in activities in the area (article 18); and the transfer of technology (article 11). Article 14 contains two provisions relating to coastal States. The first requires due regard to be given to the rights and legitimate interests, whatever these might be, of coastal States where resources lie across the limits of national jurisdiction. The second appears to recognize the right of States to take necessary measures to prevent, mitigate or eliminate grave and imminent danger to their coastlines from pollution from activities in the Area. This latter provision is very similar to the provision in article one

115. *Cf.* Lowe, *The Enforcement of Marine Pollution Regulations*, 12 SAN DIEGO L. REV. 624 (1975).

of the 1969 Brussels Intervention Convention.[116] It supports the view that States may act in such circumstances against foreign ships or installations in pursuance of a right of self-preservation.

Research and Exploration

The Authority may conduct research itself, under contract to other entities if it so wishes, and is to act as a center for harmonizing and coordinating scientific research (article ten). The Committee III text provides, in article 25 of the section on "Marine Scientific Research," that States enjoy freedom of research in the area, subject to notification to the Authority and conformity with the provisions of the convention. The Basic Conditions permit "any entity" to carry out a "general survey" of areas determined by the Authority, provided that the Authority's environmental protection regulations are met (Annex, para. 3).

It is unclear whether paragraph five of the conditions, which requires sponsorship of entities by States parties before entry into research and exploration contracts within the Authority, is reconcilable with this freedom. It is likely that the Committee I text intends research concerning the seabed to be subject to the Authority's control, since this is a matter brought under the regime and therefore removed from the "freedom of the seas." However, this would not include research relating only to the superjacent waters. Nor would the requirements that the Authority should open areas for general survey or "prospecting" (as the Soviet,[117] Eight-power[118] and American[119] draft conditions term it), necessarily apply to "scientific" research.

Despite these possible concessions, this portion is unlikely to be satisfactory to the developed States, who sought freedom of research and general survey subject only to registration with the Authority. There are, of course, clear risks of unauthorized activities being carried on under the guise of research in coastal waters. Perhaps even greater is the danger that information gained from such

116. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 9 INT'L LEGAL MATERIALS 25 (1970).
117. U.N. Doc. A/CONF.62/C.1/L.12 (1975).
118. U.N. Doc. A/CONF.62/C.1/L.8 (1974).
119. U.N. Doc. A/CONF.62/C.1/L.6 (1974).

research will be used to the detriment of the coastal State in, for example, bargaining over offshore oil concessions. Yet, these considerations are less appropriate to the international area. Thus, it might be hoped that a compromise based upon notification for "pure research," and general survey under the Authority's control, with the Authority having the right to determine into which category a proposed voyage falls, would be acceptable.[120]

Evaluation and Exploration

The stage at which an identified deposit should be evaluated and exploited was more controversial. It is now clear though, that a regime which fails to bring these activities under its "direct and effective control" will not gain the necessary support in the Conference. The text allows the Authority to carry out these, as all other activities, directly, or through States parties and entities which they sponsor.[121] The exclusion of nonparty States offers an incentive to ratify the convention, although this distinction was not drawn in the Group of 77 or the Eight-power draft conditions. The Authority is to decide which areas are to be opened for evaluation and exploitation, although States parties may suggest suitable areas. This may give rise to fears among developed States that the Authority could refuse for "political" reasons to permit companies which have already invested heavily in the evaluation of certain sites to begin operations in those sites under a joint venture agreement. This possibility could be avoided by requiring the Authority to show the existence of specific circumstances such as unreasonable danger to shipping or the marine environment before refusing to enter into an agreement relating to a site proposed by a State party.

The original text on basic conditions[122] required applicants for joint venture contracts to apply for two alternative areas, one of which would be chosen and reserved for exploitation by the Authority. Agreement was not possible on that scheme, and it was omitted from the text, as was a Soviet proposal which would have reserved part of the seabed for States to exploit with a considerable

120. *See* U.N. Doc. A/CONF.62/C.1/SR.5 (1974) (Swedish delegate); U.N. Doc. A/CONF.62/C.1/SR.2 (1974) (Sri Lankan delegate); U.N. Doc. A/CONF.62/C.1/SR.21 (1975) (United States delegate).

121. The text, U.N. Doc. A/CONF.62/WP.8/Pt.1, art. 22 (1975); *cf. id.*, Annex, para. 5. Note that entitles "effectively controlled by their nationals" are included. These would not necessarily be under the State's "enforcement" or "legislative" jurisdiction.

122. Note 107 *supra*. *See also* article 5 in U.N. Doc. A/CONF.62/C.1/L.12 (1975).

degree of autonomy.[123] The omission was the result of a failure to agree upon a provision on this matter, rather than an agreement to omit the matter, which remains to be decided.

The authority has freedom to decide upon the form of agreement which it will enter into with other entities (article 22). Although the text only contains provisions relating to contractual ventures, this freedom was regarded as important by the Group of 77.[124]

When entering into contracts, the Authority's main obligation is "to promote and encourage activities in the Area and to secure the maximum financial and other benefits from them" (article 23). Nonfinancial benefits will include the training of personnel and transfer of technology. It is foreseeable that, particularly in the early stages of operation, the maximum benefit to the Authority may be secured at the expense of the maximum revenues to be distributed among the parties; however, this is a matter which can, perhaps, only be resolved by agreement within the functioning Authority.

Providing that the applicant is qualified according to the criteria laid down by the Authority (Annex, para. 7) and the financial arrangements[125] and other requirements are met, the Authority may not, in the absence of competing applications, refuse to enter into a contract (Annex, para. 8). Competing applications are to be resolved on a "competitive" basis. The Japanese and Soviet draft conditions sought resolution by consultation and agreement between competitors. In the absence of agreement, the Soviet draft provided for selection by the Council on the basis of criteria such as the importance of obtaining the contract to the applicant State's economy, the number of contracts held by the applicant, and the efficacy of planned antipollution measures. The Japanese draft would give the contract, in the absence of agreement, to the highest bidder in auction; that is the only method of selection proposed in the American draft. The Annex to the text leaves the Authority with wide discretion in this, as in all other matters, with the principles of the Convention as a guide (Annex, para. 8(c)).

---

123. Speech by Mr. Pinto, U.N. Doc. A/CONF.62/C.1/SR.20 (1975).
124. *See* the statement by Mr. DeSoto, Chairman of the Group of 77, U.N. Doc. A/CONF.62/C.1/SR.20 (1975).
125. Annex, para. 9(d) has not yet been drawn up.

There is one objective criterion proposed, which would limit any State to a certain number of contracts each year (Annex, para. 8(f), (g)). The aim is to prevent any one State from dominating the exploitation of the seabed, and from using the profits on contract to increase its share of the benefits arising from the area. Although the first point may be satisfied by the limits on contracts (which was also proposed in the Eight-power and Soviet drafts) this will not ensure equality of benefits; for example, one contract, in comparison with another may include more activities in relation to an area, or may result in higher profits to the contractor. This might also have the effect of encouraging the "incorporation of convenience," where a company seeking access to the area feels that its "natural" State of incorporation is less likely to successfully sponsor the company than, say, a developing State, because it has already sponsored a number of contractors. This, of course, is not necessarily a bad thing; if the developing States can attract such enterprises and can control them in the interests of the host State, such States may actually benefit. It is therefore arguably better to accept this consequence of limiting the number of contracts and concentrate on developing means to ensure that such companies do not act contrary to their host's interests.[126] The possibility of profits from contracts unbalancing the equitable distribution of benefits is evident and provision will need to be made to avoid this while allowing a reasonable profit to the companies concerned. In particular, some such provision would be necessary if the Authority fails to achieve early independence from the technology of the few corporations capable of exploiting the area.

The detailed conditions of the contracts are left for the Authority to determine (Annex, para. 12), but a number of conditions have received special consideration. Chief of these is the provision of some control on production in order to minimize any deleterious economic effects of seabed production. This is now regarded as an essential component of the regime by the Group of 77, and the debate is over the best method of achieving this objective.[127] The problem is, of course, that an effect which is detrimental to some States, or interest groups within States, such as a fall in the price of minerals, is beneficial to other States or interest groups. The main fear of developed States is that interference with production

126. *See* Multinational Corporations in World Development, U.N. Doc. ST/ECA/190 (1973); Report on the First Session of the Commission on Transnational Corporations, 59 U.N. ECOSOC, Supp. 12 (1975).

127. U.N. Doc. A/CONF.62/26 (1974); U.N. Doc. A/CONF.62/C.1/L.5 (1974); U.N. Doc. A/CONF.62/C.1/L.11 (1974); U.N. Doc. A/CONF.62/C.1/SR.20 (1975) (Statement of the Chilean delegate).

levels will discourage investment in the area, and restriction of the entry of the minerals into the world market will deprive the users of the minerals of the benefits which they might reasonably expect to gain from the exploitation of the area.

"Stabilization" of mineral markets could be undertaken within the Authority both by including provisions in the original contract and by regulating operators after the contract has been concluded. Many States would argue that the power to do this is inherent in the "direct and effective control" which the Authority exercises over activities in the area. Agreement might be reached on a compromise which would give the Authority the right to regulate the flow of minerals onto the market, either physically or by price-fixing, pursuant to an agreement concluded outside the Convention—for example a separate commodity agreement covering the most economically significant metal recovered from the area. Such agreements are likely to become increasingly common if the move towards the new international economic order continues. This compromise could allow full production at the site of exploitation, and regulate the commodity in the context of wider agreements on raw materials production.

There appears to be considerable agreement on the principle that contractors should have reasonable security of tenure. The period would be decided in accordance with the necessity for giving the contractor sufficient security to plan the orderly execution of the contract while keeping contract periods fairly short so that their terms can be renegotiated on expiry in the light of experience gained from earlier operations (Annex, para. 19). Similarly, there should be little difficulty in reconciling present differences on the size of areas in respect of which contracts should be awarded (Annex, para. 18), or on requirements for a minimum level of activity under the contract (Annex, para. 20). Contracts can be suspended or cancelled for gross violations of the Convention (Annex, para. 14).

The Authority may explore and exploit the Area itself, acting through its Enterprise (article 35). These activities are subject to the above conditions, and any projected activity must be shown to result in optimum benefits to the Authority (Annex, para. 4). The resources produced are to be made available to States generally at not less than the market price (Annex, para. 4(e)). Marketing is

to be regulated in accordance with what was article ten of the draft articles considered at the Committee's informal meetings,[128] and is now article nine of the Text. Developing States would be given "preferential access or favorable terms to such minerals or products" (article 20(xi)). However, it will be necessary to ensure that those States and enterprises actually producing the resources have access to a reasonable share of the products derived from the seabed. Again, this might appropriately be dealt with by a commodity agreement outside the Convention. The Authority's ability to enter into such activities will, of course, depend upon the acquisition of the necessary skills, and those possessing these skills may, as is noted below, be unwilling to transfer them to the Authority. Until the Authority gains the independence which possession of these skills confers, it will have to employ personnel, equipment and services in order to permit the Enterprise to begin operations.

Article 22 requires that the Authority identify as soon as possible ten economically viable mining sites and exploit these through joint ventures. This goes some way to meet the fears of western States that the Authority would unduly delay activities in the area, although by the time that the Convention comes into force there may be more than ten consortia prepared to embark upon these activities. Like all joint ventures, these ten schemes would be financed by the contractors concerned and not by the Authority. The contractor would be repaid and take his share of the proceeds (Annex, para. 9) once production began. The Secretary General's report stated that

> the medium estimate of the take from a single mining operation of 3 million tons per year would be $96 million. This would still allow the miners a 36% return on total investment after payment of the Authority's share. . . . [T]he average return on investment in mining in the United States of America . . . was 10.4% in 1972.[129]

Of course, this leaves open the question of the conditions under which these first operations would take place. Without agreement upon these conditions, this proposal is not likely to satisfy the developed States whose companies are potential contractors. Since the Convention is unlikely to enter force until the 1980's, these States' interests require an "interim regime" to govern the area before that time. If such a regime is not negotiated in the near future, there are likely to be increasing pressures on States to take unilateral action in order to permit operators such as Deep Sea Ven-

128. U.N. Doc. A/CONF.62/C.1/L.3 (1974).
129. U.N. Doc. A/CONF.62/25 (1974); 3 UNCLOS OFFICIAL RECORDS 171 (1975).

tures to begin exploiting the area and start to gain some return on their massive investment in deep-sea technology. This problem is under close study, but there are no signs of an emerging agreement at present.

Distribution of Benefits

Central to the idea of the common heritage of mankind is the distribution of benefits derived from the international area. Although it has frequently been stated that "benefit" should not be understood to mean simply money, the text only makes clear provision for the distribution of revenue and for the transfer of technology. So far as revenues are concerned, any amounts left after meeting the expenses and costs of the Authority, which may include not only administrative costs but also "the expenditure of the Enterprise, to the extent that it cannot be met out of the Enterprise's own revenues and other receipts" (article 44), are to be paid into a "Special Fund." The extent to which these costs and expenses are to be met from the proceeds, rather than out of contributions from members, is determined by the Assembly on a recommendation from the Council, but the very idea of an expensive machinery subsidized by member States is anathema to the western States.

Amounts in the special fund are to be "made available" in accordance with the Assembly's criteria for the equitable sharing of benefits. As was noted above, the Czechoslovakian delegation introduced at Geneva a proposal for dividing States into various groups, each to receive a proportion of the special fund. Within each group, the monies would be distributed in proportion to the following formula:

$$\frac{\text{population of State}}{\text{global population}} \times \frac{\text{global per capita income}}{\text{per capital income of State}}$$

It may also be questioned whether the "thin spread" of revenues which would result from the formula is more beneficial than the distribution of revenues on a more selective basis, perhaps giving a substantial proportion of a year's "profits" for the funding of some regional project. In any event, this is a question which the Group of 77 is likely to want to remain in the hands of the Assembly, and not fixed by a rigid formula in the treaty.

Great importance has been attached to the provisions on the transfer of technology, it being recognized that the know-how necessary for exploiting the resources of the international seabed is possessed by a handful of enterprises in the developed States. The subject has received much attention in recent years not only from the General Assembly,[130] but also from UNCTAD and other international bodies. The Secretariat produced a report[131] on the specific problems of acquiring and transferring marine technology for the Caracas session of the Conference. The text, in article 15, imposes a general obligation on States and the Authority to promote the transfer of technology relating to the area. Two particular methods are the training of personnel from developing countries, and the facilitation of access to patented and nonpatented technology.

The training of personnel is unlikely to create many problems. There exist already many schemes under the auspices of bodies such as the I.O.C., as well as the general educational programs established by most developed States.[132] There are some difficulties; for example, the skills which participants in deep-sea mining ventures acquire will not necessarily be applicable to ventures in shallower coastal waters. These, however, are matters of detail rather than principle. Contractors engaged in joint ventures with the Authority will find that their contracts include obligations to train nationals of developing States.[133] This is in line with the approach of all the draft basic conditions except those proposed by the United States delegation.

The transfer of technology, especially patented technology, will be more difficult. The complex national laws on confidential information and intellectual property arose precisely because entrepreneurs wanted to be able to prevent competitors from using the technology which they had developed, often at considerable cost, and on which their ascendancy over their rivals depended. So long as competition has some place in the International Seabed regime, whether between competitors for an Authority contract, or between private enterprises seeking the continuation of the joint venture system and the Enterprise seeking to move towards complete inde-

130. *See* 6 U.N. GAOR, Supp. 1, U.N. Doc. A/9559 (1974), and especially resolution 3202 (S-VI), pt. IV therein.

131. U.N. Doc. A/CONF.62/C.3/L.3 (1974). The document outlines the work of other bodies on the subject.

132. *See* Bello, *The Present State of Marine Science and Oceanography in the Less Developed Countries*, 8 INT'L LAW. 231 (1974).

133. The Text, U.N. Doc. A/CONF.62/WP.8/Pt. 1 (1975); Annex, *id.*, para. 10(b). The reference to article 12 in paragraph 8(b) is to the article in U.N. Doc A/CONF.62/C.1/L.3 (1974), now article 11 of the Text.

pendence of these enterprises, this expensive technology is not likely to be willingly given up.

The text makes some concessions to the interests of the owners of the technology. Article 39 requires the Authority's inspectors not to divulge industrial secrets or data declared by the Authority to be proprietary, or other confidential information coming to them in their official capacity. Paragraph ten of the Basic Conditions goes further, allowing the contractor to determine which information is proprietary, with the result that it may not be disclosed to third parties without the consent of the contractor. It also allows the contractor to refuse to disclose proprietary equipment design data. The acceptance of any such compromise, and its implementation, will depend to a considerable degree upon the goodwill of the business community lobbying national delegations at the Conference, and of the contractors who eventually operate under the regime. It is a commonplace of contemporary life that many transnational corporations negotiate with governments on equal terms. It should not be supposed that these corporations will share the willingness to compromise which governments might demonstrate.[134] Opposition by transnational corporations could be more obstructive to the aspirations of the developing States than conservative stances taken by the developed States.

Safety and Pollution

The regime imposes general obligations on the Authority to make regulations for the protection of the marine environment (article 12) and human life (article 13, article 28). Environmental implications are to be taken into account when framing any regulation (article 31). However, the question of pollution was not fully considered. This was partly because it was thought less important than other questions dealt with by Committee I, and partly because pollution in general was dealt with by Committee III. The Committee III text makes no substantial provision on pollution

134. The literature on this topic is voluminous. *See, e.g.*, C. TUGENDHAT, THE MULTINATIONALS (1971); R. VERNON, SOVEREIGNTY AT BAY (1971). Note the role of the oil companies in the South China Sea in C. PARK, CONTINENTAL SHELF ISSUES IN THE YELLOW SEA AND THE EAST CHINA SEA ISLAND (1972).

arising from the international seabed (text, pt. III, article 17), except to suggest that the enforcement of standards should be by the Authority in cooperation with Flag States (pt. III, article 24). The deficiencies of Flag State jurisdiction as a basis for the enforcement of marine pollution regulations are well known. It may be more effective to base the enforcement of pollution regulations, and all other regulations promulgated by the Authority, on Port State jurisdiction.[135]

Composition of the Authority

The composition of the Authority attracted much discussion. There is general agreement on the division of powers between an Assembly of all parties, and a small executive council. Disagreement arises over the question of protecting critical interests of States within this framework. For example, an American delegate stated at Geneva that his delegation

> attached special importance to a council structure which recognised the special interests of certain States, both developed and developing. . . . [V]oting arrangements should protect the critical interests to that effect while avoiding procedures which might paralyze decision making.[136]

The position of the Group of 77 was made equally clear at the same meeting.

> The composition of the Council should respect the principle of equitable geographical distribution, but should also take account of the interests concerned and possibly affected by activities in the area. Nevertheless, the Group of 77 could not accept any system of veto or weighted voting.

An examination of the system of protecting the rights of minority shareholders in municipal company law might be fruitful in this context, although it must be remembered that much of the efficacy of the municipal system is derived from the ease with which disputes may be transferred to the courts, which is unlikely to be the case under an international regime.

So far as the Assembly is concerned, the "one-State, one-vote" formula is generally accepted. It should be remembered that the Group of 77 can hope, at least when it operates as a united group, to command the two-thirds majority necessary for decisions on questions of substance. This, of course, is a major factor in the Group's preference for an Authority with considerable freedom to establish rules for the regime. So long as the Assembly operates

135. *See* note 115 *supra*.
136. U.N. Doc. A/CONF.62/C.1/SR.21 (1975).

as a primarily supervisory body, as is proposed under article 26 of the text, this is likely to be unopposed by the developed States.

The 36-State Council is more controversial. This is a larger body than most drafts suggested, and therefore has greater flexibility in the arrangements for representing interest groups. The text proposes, in article 27, that 24 states should be elected in accordance with the principle of equitable representation of the major geographical regions—Africa, Asia, Eastern Europe (Socialist), Latin America, and "Western Europe and others." Although article 27 does not stipulate the proportion of representatives from each region, article 35, in providing for representation on the Governing Board of the Enterprise, requires equal representation for each region. It may be intended that approximate equality should apply to the composition of the Council. The other twelve seats are shared equally between States with substantial investment in the area or possessing advanced technology which is being used in the area, and developing States, again on the basis of equitable geographical representation. The six developing States' seats are to be allocated to one State from each of the following categories: land-based exporters of minerals exploitable in the area, States importing these minerals, States with large populations, land-locked States, geographically-disadvantaged States, and the least developed countries. This will certainly not satisfy the demand of the geographically-disadvantaged States for two-fifths of the seats,[137] and it is unlikely to gain the support of many developed States so long as the Council retains the wide discretion proposed in the exercise of its considerable powers (article 28). Agreement on the composition of the Council may be made easier if clear limits to its discretion in matters affecting the "vital interests" of States can be negotiated and included in the body of the Convention.

Although the Enterprise has a "representative" Governing Board elected by the Assembly, the other organs of the Authority—the Technical Commission, the Economic Planning Commission and the Tribunal—are "expert" bodies to which individuals are elected on the basis of their expertise, and do not represent their countries' or any other sectional interests.

137. U.N. Doc. A/CONF.62/C.1/L.14 (1975). There are about 51 land or shelf-locked States.

Dispute Settlement

The question of dispute settlement was the subject of a separate Working Paper[138] submitted together with the three parts of the Single Negotiating Text to the Geneva session of the Conference. Article 57 of the Text contains a preliminary obligation to seek peaceful settlement of disputes, and follows this with the provision that any party to the dispute may apply to the Tribunal if the dispute is unresolved within a month. This may be difficult to operate, since disputes often grow slowly out of mere differences of opinion, and one or other party may deny that a dispute exists.

Although either party to a dispute, whether or not it is a State, can apply to the Tribunal under article 57, applications to question the legality of the measures taken by organs of the Authority can, according to article 58, only be made by States. Since disputes between, for example, the Authority and a national company may well involve determinations on the legality of measures, it might be preferable either to allow companies as well as States to bring actions under Article 58, or to require all actions to be brought to the Tribunal by States. Under the latter procedure, where a company's interests were affected, the State responsible under Article 17, or perhaps the "sponsoring" State under paragraph five of the Conditions, would bring the action in the Tribunal. It may be easier to secure agreement along these traditional lines. The provision for an Arbitration Commission in article 63 adds little to the regime, since parties would be entitled to refer the matter to arbitration under article 57.

It is interesting to note that, under paragraph 18 of the Basic Conditions,

> [t]he law applicable to the contract shall be solely the provisions of this Convention, the rules and regulations presented by the Authority, and the terms and conditions of the contract . . . . No contracting State may impose conditions on a Contractor that are inconsistent with the principles of this Convention.

This greatly enhances the legal effect of the general principles at the beginning of the Convention and to this extent detracts from the relative certainty of the legal regime under the more detailed provisions. For this reason, the provision may be unacceptable. Even if it does secure agreement, parties to a dispute may be discouraged from bringing action before the Tribunal.

---

138. U.N. Doc. SD.Gp/2d Sess.No.1/Rev.5 (1975), *reproduced in* 14 INT'L LEGAL MATERIALS 762 (1975).

CONCLUDING OBSERVATIONS

The most salient feature of the Conference, and the cause of most of the disagreement, is the imbalance which exists between the group of States with the greatest economic and political power and the group of States with the greatest voting power. There is also a clear unwillingness on the part of each group to trust the other. There is, of course, no reason why the situation should be otherwise, since the "national interests" articulated by the representatives of many developed States are quite opposed to those articulated by the representations of many developing States.

To speak of national interests is to oversimplify. Within a single State the defense lobby might be seeking narrow limits of coastal jurisdiction in order to preserve freedom of passage. The seabed mining lobby might seek a combination of wide national seabed jurisdiction and a laissez-faire regime beyond. The environmental lobby might seek a shift away from laissez-faire policies towards stricter control over all activities in the seas. The same lobby in different States may advance different solutions. For example, the "defense" needs of maritime powers might be said to require maximum freedom of navigation for warships, while the same needs of developing States might be said to require the right of the coastal State to deny that very freedom. However, the synthesis of these domestic pressures into the various national positions leaves a fairly clear division between States which corresponds closely with the developed/developing States split.

One reason for this is that since the Conference is renegotiating the whole international law of the sea, and since at the moment each major topic is being negotiated more or less separately, each of the conflicting national interests can be advanced in relation to specific draft articles. Thus for example, a State can propose the widest limits for national jurisdiction over the seabed in Committee I, while seeking the minimum competence for States over coastal waters in Committee II. The time for trade-offs between topics has not yet arrived. When it does arrive—if the slow progress of the Conference does not precipitate a fall into unilateralism—it may be that, for example, the United States would be prepared to compromise on the international seabed in return for the advancement of its interests in regard to navigation.

At the moment, the international seabed issue is being argued for the most part not on the basis of such a compromise, but on the basis of national interests in that area alone. This inevitably results in the division along economic lines between States. The debates have indicated that the developed States (most of whom advocate, if they do not practice, domestic government through a one-man, one-vote democracy) are unwilling to risk their national interests through subjecting activities in the international seabed area to democratic control. At best, this attitude amounts to the assertion that, since free enterprise economies cannot compel investment and industrial activity in the area, the international regime must constitute a legal climate which will attract such investment and activity from those companies possessing the necessary technology by protecting their interests. At worst, it amounts to the assertion that because the developed States possess this economic power, the perpetuation and protection of this power in the regime is the price the developing States must pay in order to avoid unilateral action by developed States from which no other States would benefit. By opposing United States proposals, for example, the Group of 77 is risking the very real possibility that internal political pressure in America will force the Administration to meet the requests of Deep Sea Ventures[139] for "permission" to begin immediate activities in the international seabed area.

Apart from the immediate loss of cooperation over the deep seabed, unilateralism would work to the disadvantage of developing States in general. It is only in international organizations where they enjoy the benefits of the one-State, one-vote principle, that they enjoy any considerable power at the moment. It is clear that developing States cannot match the power of the developed States outside the Conference chamber, and it is questionable how far the tactical alliances existing in international organizations would survive the transfer of issues such as the law of the sea into the "real world." Thus, the Group of 77 has a clear interest in adopting a moderate line in the Conference—an interest which must have been brought home recently by American threats of withdrawal from the I.L.O. and of economic sanctions against States pursuing the strongly anti-Zionist line in the United Nations.

On the other hand, if the developed States retreat into unilateralism, they risk creating a vacuum in international bodies into which States capable of marshalling the economic power of the developing world might be drawn. The extent to which, for example, China

139. *See* 14 INT'L LEGAL MATERIALS 51, 795, 796 (1975).

(which has not yet played a significant part in the Conference), would be prepared to act in this role is unclear, but this must remain a consideration in national policies. Equally, there is no doubt that the developed States wish to be seen to be acting in a fair manner towards the rest of the world. This will provide a powerful incentive to continue the conduct of negotiations on the law of the sea in an international conference. Insistence on weighted votes or vetos, which freeze the power relationships in international organizations, do not advance this aim. The Group of 77 has made its opposition to such devices clear, and it might reasonably be expected that this opposition will extend in the future to other bodies, such as the United Nations Security Council. The political necessity for agreement with the developed States demands some compromise, but this is more likely to be secured through the express recognition and protection of present needs through substantive provisions in the Convention than by a permanent grant of "procedural protection."

At the same time that the Group of 77 has been advancing proposals for a strong regime for the deep seabed, they have been proposing an extended zone of coastal State jurisdiction elsewhere in the conference. Both proposals are aimed at the protection of the sea and its resources from the possibilities of abuse inherent in a regime largely based upon the freedom of the high seas. To this extent the attitude of the group can be said to be negative, although the results of this stance will undoubtedly make for the more rational management of the oceans. Again, what the attitude does throw into doubt is the long-term cohesiveness of a group of States of widely differing national interests.

One of the most interesting aspects of the future of the deep seabed will be the role of the transnational enterprises contracting with the Authority. There is evident at the moment a growing concern to ensure that the activities of these corporations are consistent with the national interests of the countries within which they operate. How far an international Authority, with a membership of widely divergent interests, will succeed in imposing its will on such companies remains to be seen. Certainly a refusal to yield up the technological skill which the Authority needs in order to secure its independence could effectively thwart the planned regime, but it is far from clear how the transfer of this technology

could be compelled. The Convention envisages that there will be some contractual obligation to this effect, but the efficacy of such an obligation depends largely upon the cooperation of the contractors concerned, even if the regime as a whole commands sufficient acceptance to enter force.

There has been a great shift in the degree of influence which the developed and developing States exercise over the creation of new international law. This has been clear since 1958, but even since the beginning of the present debates the developing world has not only been able to determine the pace of debate but also to determine, as in the text, the ground on which debates take place. Debates do not necessarily result in progress, but the changes in national policies on the law of the sea in the last eight years must be seen as most rapid progress, and in a direction determined largely by the developing States. The debates of the First Committee of the Conference, dealing as they do with a single problem in comparative isolation from the other issues in the Conference, provide a rich store of indications of shifting policies which deserve close examination, and raise many important problems—not only for the law of the sea, but for international relations in general.