

1975

The Third United Nations Conference on the Law of the Sea: the 1974 Caracas Session

John R. Stevenson

Bernard Oxman

University of Miami School of Law, bhoxman@law.miami.edu

Follow this and additional works at: https://repository.law.miami.edu/fac_articles

Part of the [Law of the Sea Commons](#)

Recommended Citation

John R. Stevenson and Bernard Oxman, *The Third United Nations Conference on the Law of the Sea: the 1974 Caracas Session*, 69 *Am. Jl. Int'l. Law* 1 (1975).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: THE 1974 CARACAS SESSION *

*By John R. Stevenson ** and Bernard H. Oxman ****

INTRODUCTION

Will there be a timely and successful conclusion to the Law of the Sea Conference? This is the basic question governments and interested members of the public are considering as they review the results of the organizational session of the Conference at UN Headquarters in New York from December 3 to December 15, 1973, and the first substantive session in Caracas from June 20 to August 29, 1974. During this review they face ever more pressing problems arising from the strategic, economic, scientific, and environmental use and importance of the oceans and ocean resources, intensified by growing concern with international trade and with supplies and prices of food and basic raw materials.

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

Two underlying problems affect the evaluation of the Caracas session. First, events beyond the control of the Conference are tempting states to take matters into their own hands. Thus, progress must be measured against the real possibility that the Conference may be overtaken by events. Second, the Conference suffers from the carryover of a negotiating style more suitable for General Assembly recommendations or negotiation of abstract issues than for texts intended to become widely accepted as treaty obligations affecting immediate interests of states in a dynamic situation. Tactics, rather than negotiation, were the rule. Thus, the real potential for accommodation is not as evident in the public record as it might be.

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

(a) The vast array of traditional Law of the Sea issues and proposals which fall within the mandate of Committee II was organized by the

* This article is a sequel to Stevenson and Oxman, *The Preparations for the Law of the Sea Conference*, 68 AJIL 1 (1974). The views expressed herein are those of the authors and do not necessarily represent the views of the Department of State or the U.S. Government.

** Of the Board of Editors. Ambassador, Special Representative of the President for the Law of the Sea Conference.

*** Assistant Legal Adviser for Oceans, Environment and Scientific Affairs, U.S. Department of State.

Committee into a comprehensive set of informal working papers reflecting main trends on each precise issue. New proposals and trends may of course appear in the course of efforts to achieve an accommodation on various issues. The large number of formal proposals were mainly introduced as a basis for insertions in these informal working papers. All states can now focus on each issue, and the alternative solutions, with relative ease in a consolidated text.¹ A similar development occurred with respect to marine scientific research² and in part with respect to preservation of the marine environment³ in Committee III.

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

(c) The overwhelming majority clearly desires a treaty in the near future. Agreement on the Rules of Procedure⁴ by consensus is clear evidence of this desire to achieve a widely-acceptable treaty. The tone of the general debate and the informal meetings was moderate and serious. The Conference adopted a recommended 1975 work schedule deliberately devised to stimulate agreement.

(d) The inclusion in the treaty of a 12-mile territorial sea and a 200-mile economic zone was all but formally agreed, subject of course to acceptable resolution of other issues, including unimpeded transit of straits. Accordingly, expanded coastal state jurisdiction over living and nonliving resources appears assured as part of the comprehensive treaty.

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

(f) Traditional regional and political alignments of states are being replaced by informal groups whose membership is based on similarities of interest on a particular issue. This has greatly facilitated clarification of issues, and is necessary for finding effective accommodations.

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

With few exceptions, the Conference papers now make clear the structure and general content of the treaty, the alternatives to choose from, the blanks to be filled in, and even the relative importance attached to different issues. What was missing in Caracas was sufficient political will to make hard negotiating choices. The main reason was the conviction that this would not be the last session and that it was not necessary to take those difficult decisions yet. This, in turn, was related to the problem of resolving diverse issues, to which different states may attach differing importance, as a "package" and unwillingness to move in some areas without concurrent movement in others. Nevertheless, the words "we are not far apart" were more and more frequently heard.

¹ A/CONF.62/C.2/WP.1.

² A/CONF.62/C.3/L.15.

³ A/CONF.62/C.3/L.17.

⁴ A/CONF.62/30/Rev.1.

The Conference has recommended to the UN General Assembly that the next session be held in Geneva from March 17 to May 10, 1975. The Conference also agreed to recommend that the formal final session of the Conference should be held in Caracas for the purpose of signature of the final act and other instruments of the Conference.

ORGANIZATION

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

The First Committee is concerned with the international regime and machinery for the seabed beyond the limits of national jurisdiction, usually referred to as the "international area" or the deep seabeds. It established a working group, and later in the session a negotiating group with closed meetings. The Committee was chaired by Paul Bamele Engo of Cameroon, and the working group and negotiating group by Christopher Pinto of Sri Lanka. Both served in similar capacities in the Seabed Committee.

The Second Committee has the broadest and most complex mandate, embracing virtually all of the traditional Law of the Sea subjects. These include issues regarding the territorial sea, straits, archipelagos, the high seas, the economic zone, including living and nonliving resources, the continental shelf, and access to the sea. The Committee was chaired by Ambassador Andres Aguilar of Venezuela, who also chaired its informal sessions.

The Third Committee is concerned with pollution and with scientific research and transfer of technology. Ambassador A. Yankov of Bulgaria was elected Chairman. Informal sessions on pollution were held, with Mr. Jose Vallarta of Mexico serving as chairman. Mr. Vallarta served in this capacity in the Seabed Committee as well. Mr. Cornel Metternich of the Federal Republic of Germany was elected chairman of the informal sessions on scientific research and transfer of technology.

A Drafting Committee of 23 members was elected, under the chairmanship of Ambassador Alan Beesely of Canada. A Credentials Committee of 9 members was elected under the chairmanship of Mr. Heinrich Gleissner of Austria. The General Committee of the Conference consists of the 48 officers of the Conference and its main committees.

The most difficult issue regarding the organization of work concerned the problem of voting. The underlying problem is one of reconciling the interests in ensuring that a treaty widely acceptable among all groups of states is produced with the need to accomplish this within a reasonable time. The resolution of the General Assembly calling the Conference⁵ was accompanied by a "gentleman's agreement"⁶ to the effect that the Conference should proceed on the basis of consensus as far as possible.

⁵ UN G.A. Res. 3067(XXVIII), Nov. 16, 1973.

⁶ Appendix to Rules of Procedure, note 4 *supra*.

The rules of procedure adopted by the Conference by consensus include reaffirmation of the "gentleman's agreement,"⁷ and provisions requiring a delay in a vote on substance in plenary and in committee for a specified period, after which a determination must be made that all efforts at consensus have been exhausted.⁸ The traditional rule that texts require a majority vote in committee and a two-thirds vote in plenary of states "present and voting" contains an added qualification that the two-thirds majority in plenary must also constitute a majority of states participating in that session of the Conference.⁹

⁷ For further discussion of the consensus rule, see Daniel Vignes, *Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?* *infra* p. 119. The "gentlemen's agreement" is quoted at p. 124, note 16.

⁸ Rule 37 of the Rules of Procedure, Note 4 *supra*, provides as follows:

Rule 37

1. Before a matter of substance is put to the vote, a determination that all efforts at reaching general agreement have been exhausted shall be made by the majority specified in paragraph 1 of rule 39.

2. Prior to making such a determination the following procedures may be invoked:

(a) When a matter of substance comes up for voting for the first time, the President may, and shall if requested by at least 15 representatives, defer the question of taking a vote on such matter for a period not exceeding 10 calendar days. The provisions of this subparagraph may be applied only once on the matter.

(b) At any time the Conference, upon a proposal by the President or upon motion by any representative, may decide, by a majority of the representatives present and voting, to defer the question of taking a vote on any matter of substance for a specified period of time.

(c) During any period of deferment, the President shall make every effort, with the assistance as appropriate of the General Committee, to facilitate the achievement of general agreement, having regard to the over-all progress made on all matters of substance which are closely related, and a report shall be made to the Conference by the President prior to the end of the period.

(d) If by the end of a specified period of deferment the Conference has not reached agreement and if the question of taking a vote is not further deferred in accordance with subparagraph (b) of this paragraph, the determination that all efforts at reaching general agreement have been exhausted shall be made in accordance with paragraph 1 of this rule.

(e) If the Conference has not determined that all efforts at reaching agreement had been exhausted, the President may propose or any representative may move, notwithstanding rule 36, after the end of a period of no less than five calendar days from the last prior vote on such a determination, that such a determination be made in accordance with paragraph 1 of this rule; the requirement of five days' delay shall not apply during the last two weeks of a session.

3. No vote shall be taken on any matter of substance less than two working days after an announcement that the Conference is to proceed to vote on the matter has been made, during which period the announcement shall be published in the Journal at the first opportunity.

Rule 55 applies rule 37 "to the proceedings of committees and subsidiary bodies, except that: . . .

(d) Rule 37 shall be applied to the Main Committees, provided that a determination pursuant to paragraph 1 shall require a majority of the representatives present and voting, the deferment of the question of taking a vote by the Chairman of the Committee in conformity with subparagraph 2(a) shall not exceed five calendar days and the assistance specified in subparagraph 2(c) shall be rendered the Chairman by the officers of the Committee.

⁹ Rule 39, paragraph 1, which also applies under rule 37, provides:

Decisions of the Conference on all matters of substance, including the adoption of the text of the Convention on the Law of the Sea as a whole, shall be taken by a two-thirds majority of the representatives present and voting, provided that such majority shall include at least a majority of the States participating in that session of the Conference.

Many delegations regarded the psychological significance of the negotiations on the rules of procedure as of at least as much importance as the practical significance of the rules themselves. The question was whether those normally well placed to wield voting majorities in UN forums, and those that have traditionally favored consensus procedures, would in effect indicate a mutual intention to negotiate in good faith within a reasonable time period by accepting certain procedures encouraging such negotiation. In more immediate terms, this was translated into the question whether a consensus could be reached on the rules of procedure within the one-week deadline fixed for this purpose for the Caracas session. This was accomplished.

After agreement on the rules of procedure, the plenary heard general debate statements under guidelines which emphasized interventions from states which did not participate in the Seabed Committee. This took about two weeks. The general debate of the Conference is now concluded.

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

While not part of its formal organization, regional and other groups play an important role in the Conference. It is difficult to determine when a pattern of consultations among states becomes a group, but some at least might be mentioned.

The Conference inherited from the United Nations its regional groups: African, Asian, Eastern European, Latin American, Western European and Others. It also inherited the so-called "Group of 77," principally the developing countries of Africa, Asia, and Latin America, now numbering more than 100. Some subregional meetings also occurred, for example among Arab states and among members of the European Economic Community.

Landlocked and other "geographically disadvantaged" states consult with each other frequently. Meetings among maritime states occur. A "coastal state group" tends to consult frequently, and some of its participants co-sponsored a wide-ranging comprehensive proposal mainly on Committee

Rule 40 contains the following definitions:

1. For the purpose of these rules, the phrase "representatives present and voting" means representatives present and casting an affirmative or negative vote; representatives who abstain from voting shall be considered as not voting.

2. Subject to the provisions of rules 1 to 5 and without prejudice to the powers and functions of the Credentials Committee, the term "States participating" in relation to any particular session of the Conference means any State whose representatives have registered with the Secretariat of the Conference as participating in that session and which has not subsequently notified the Secretariat of its withdrawal from that session or a part of it. The Secretariat shall keep a Register for this purpose.

II issues.¹⁰ States interested in dispute settlement have consulted together, and some participants cosponsored a working paper on this issue.¹¹ An interesting characteristic of these groups is that they are organized on a substantive, rather than regional, basis.

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

THE FIRST COMMITTEE

The very nature of the First Committee's mandate invites excitement: to construct a new international regime to give content to a new concept, "the common heritage of mankind."¹² On an ideological or political level, it invites attempts to implement visions of a more perfect international community. On an economic level, it invites approaches based on producer or consumer interests, or relative technological capability, that become entangled with the political and ideological issues. The result is a broad policy dispute that frequently seems to bear little relation to the immediate economic object of the effort: manganese nodules on the deep ocean floor that have yet to be commercially exploited.

One delegation described the proposals of another as "archaic." Another delegation felt it necessary to point out that the past evils of colonialism could not be compensated from the deep seabed. One view is that the policy debate in fact derives from very real differences in economic interest, but has been conceptualized as a tactic. Another is that the majority of states, having realized that manganese nodules are not an international "pot of gold," feel freer to concentrate more on political and ideological issues in Committee I, including what might be termed economic ideology. The two observations are not mutually inconsistent.

It is interesting that fundamental questions regarding the legal regime applicable to virtually all seabed petroleum seem closer to resolution in Committee II than fundamental questions regarding deep seabed manganese nodules in Committee I. Or so it appears on the surface. A third interpretation of events in Committee I is that a number of delegations did not see any point in Committee I's moving too far ahead of the other Committees, particularly in light of widespread talk of an overall package settlement. Thus, in this view, the Caracas session could best be devoted to in-depth probing of precise issues in Committee I. Whatever the rea-

¹⁰ A/CONF.62/L.4.

¹¹ A/CONF.62/L.7.

¹² For further discussion on this issue, see A. O. Adede, *The System for Exploitation of the "Common Heritage of Mankind" at the Caracas Conference*, *infra* p. 31.

son, such probing in fact occurred, and it is in this connection that signs of possible accommodation began to emerge.

Unlike other Committees, virtually the entire range of issues under Committee I's mandate had been reflected in alternative treaty articles prepared by the Seabed Committee. The one exception was the preparation of treaty articles on rules and regulations for deep seabed mining. In previous sessions of the Seabed Committee, which worked on the basis of consensus, there had been considerable opposition to discussion of rules and regulations.

The Committee held one week of general debate. A number of African and Asian delegations expressed their willingness to support an exploitation system that permitted different types of contractual arrangements in the early years of operation, coupled with a gradual phasing out of these systems in favor of direct exploitation by the Seabed Authority. In this connection, the need to provide security of tenure and conditions that would attract entities with the necessary capital and technology was a prevalent theme in their statements. There was increased support among European delegations for a parallel licensing/direct exploitation system; Australia and Canada maintained their support for this approach. The United States and others emphasized the need for nondiscriminatory access and a stable investment climate that does not inhibit exploration and development of seabed minerals. A large number of developing country and other delegations referred to the need to include dispute settlement machinery in the Authority.

The general debate was followed by a rapid reading of the regime articles prepared in the Seabed Committee in an informal committee of the whole. There were some reductions in alternatives and bracketed language on several articles. The majority received no alteration.¹⁸ The informal committee decided to discuss in detail major issues of disagreement rather than proceed to the texts on the international machinery. The three major issues selected were the exploitation system (Article 9 of the regime), conditions of exploitation (rules and regulations) and economic implications.

The exploitation system (Article 9) was identified by many countries as the crux of the Committee I negotiations.

During the Caracas session, the Group of 77 agreed on a single text for Article 9 (reflected in Alternative B below) which would permit the Authority to enter into a variety of legal arrangements, provided it maintained "direct and effective control at all times."

The alternatives under consideration were as follows:

Article 9

WHO MAY EXPLOIT THE AREA

(A)

All exploration and exploitation activities in the Area shall be conducted by a Contracting Party or group of Contracting Parties or

¹⁸ Draft Articles Considered by the Committee at its Informal Meetings (Articles 1-21), A/CONF.62/C.1/L.3.

natural or juridical persons under its or their authority or sponsorship, subject to regulation by the Authority and in accordance with the rules regarding exploration and exploitation set out in these articles.

OR (B)

All activities of exploration of the Area and of the exploitation of its resources and all other related activities including those of scientific research shall be conducted directly by the Authority.

The Authority may, if it considers it appropriate, and within the limits it may determine, confer certain tasks to juridical or natural persons, through service contracts, or association or through any other such means it may determine which ensure its direct and effective control at all times over such activities.

OR (C)

All activities of exploration and exploitation in the Area shall be conducted in accordance with legal arrangements with the Authority pursuant to this convention, regulations included in this convention and those promulgated by the Authority pursuant to this convention.

The Authority shall enter into legal arrangements for exploration and exploitation with Contracting Parties, groups of Contracting Parties and natural or juridical persons sponsored by such Parties, without discrimination. Such Parties or persons shall comply with this convention, regulations included in this convention and those promulgated by the Authority pursuant to this convention.

OR (D)

All exploration and exploitation activities in the Area shall be conducted by a Contracting Party or group of Contracting Parties or natural or juridical persons under its or their authority or sponsorship, subject to regulation¹⁴ by the Authority and in accordance with the rules regarding exploration and exploitation set out in these articles. The Authority may decide, within the limits of its financial and technological resources, to conduct such activities.

Note (1) The Committee will have to consider whether to set out here, as is done in some proposals, the general rules regarding resource activities in the Area. These could include, *inter alia*, according to the type of administration adopted as regards exploration and exploitation, rules on: notice to mariners and other safety procedures, areas to be allotted, work requirements, work plans, inspection, service contracts, licensing, joint ventures, fees payable, revocation of service contracts, revocation of licenses and integrity of investments. On the other hand, the Committee may decide to omit them from part I of the articles.

Several delegations indicated a willingness to discuss formulas which might include the concept that the Authority's control over resource ex-

¹⁴ Footnote 7 of the text, *id.* at 9, appears here and reads as follows: "The view was expressed that the word 'regulation' in this context should be replaced by the word 'supervision.'"

ploitation would be exercised in accordance with certain broad general principles to be laid down in the Convention.

Jamaica introduced a proposal for Article 9 that includes such general principles, together with the requirement that the Authority promulgate rules and regulations within this framework.¹⁵ While the Jamaican proposal was not extensively debated in form, the discussions in fact concentrated on the precise issues raised by that proposal. In general it would be fair to conclude that the debate over Article 9 has proceeded beyond the generalized concepts of the Article 9 texts, and that the real issues are in fact accurately enumerated in the Jamaican proposal. Some at least might interpret the unusually strong negative reaction of land-based producers to the Jamaican proposal as an indication that paragraph 2(e)¹⁶ is for them the crux of the matter.

The essential problem is that all of the proposals say little if anything about how the mining system would in fact work. Thus, states would have to ratify the treaty without having a clear idea of what they were accepting. There would be no guarantee that the interests of any state or group would be adequately protected in the relevant decisions of the Authority. In particular, the essential interest of consumers in assuring that exploitation does take place and that the minerals are freely available on the market without artificial restraint or price-fixing is not protected if there is no assurance that the conditions of exploitation are workable. It has been argued that since the vast majority of states are direct or ultimate consumers of the metals involved, leaving these matters to the Authority is not prejudicial. However, the political power of the land-based producers within the Group of 77 in this negotiation, and the absence of more vigorous and widespread assertion of consumer interests at the Special Session of the UN General Assembly in the spring of 1974, would indicate the opposite.

The draft text on basic conditions of exploitation that emerged from the Group of 77 was for the most part an elaboration of their proposal on Article 9, granting almost complete discretion to the Authority in very general terms to make decisions concerning exploitation, so as to give the Authority "direct and effective control" over all operators.¹⁷ In certain areas it described in greater detail how the Authority should maintain control and sprinkled throughout were the seeds of ideas that might be converted into treaty articles to protect investment.

In addition to the Group of 77 proposal on basic conditions, draft rules and regulations were submitted to Committee I by the United States,¹⁸

¹⁵ *Id.* at 19. Quoted in full *infra* p. 38.

¹⁶ Paragraph 2(e) reads:

2. Regulations promulgated pursuant to paragraph 1 of this article shall include adequate provisions for: . . .

(e) the assurance to consuming countries, on a non-discriminatory basis, of adequate supplies at reasonable prices of the products arising from the exploration and exploitation of the Area and its resources, due regard being paid to the availability on fair and equitable terms of similar or competitive land-based products.

¹⁷ A/CONF.62/C.1/L.7.

¹⁸ A/CONF.62/C.1/L.6.

by Japan,¹⁹ and by eight members of the European Community.²⁰ The U.S. draft rules are a detailed compilation of the conditions of exploitation. They deal with the size of mine sites, the acquisition and duration of exploration and exploitation rights, work requirements, certification of financial and technical responsibility, and other basic conditions of mining. The detailed rules proposed by the eight EEC members introduce the idea of national area quotas absent from the U.S. and Group of 77 approaches. There has been criticism that the U.S. and others' rules are too detailed, and unnecessarily restrict the ability to adapt to new technological and other conditions. The variations in proposed technical criteria in the different sets of rules are cited as evidence of the need to avoid such detail in the treaty itself.

In the closing days of the session, after earlier resistance to detailed discussion of the content of general conditions of exploitation, Committee I established a negotiating group with the mandate to consider Articles 1-21,²¹ placing special emphasis in its work on both Article 9 and conditions of exploitation. The negotiating group met several times and engaged in very constructive discussions on the Group of 77 text for Article 9. There emerged in these exploratory talks a definite willingness on the part of a number of delegations supporting that text to explore changes in the text without commitment.

Committee I devoted several days of direct on the record debate to the issue of economic implications. Land-based producers of the metals contained in manganese nodules had in previous sessions of the Seabed Committee succeeded in winning substantial support for price and production controls.

The Caracas session resulted in two new developments on this issue. First, detailed presentations and question-and-answer periods with representatives of UNCTAD and the Secretary-General of the United Nations served to highlight the great uncertainty regarding any threat that the ocean mining industry may pose for the economies of developing country producers of the metals contained in nodules. Second, several developing country representatives made public statements on the need to protect consumers from artificially high prices. This had never occurred in the Seabed Committee.

The U.S. delegation submitted a working paper²² and made statements that pointed out the interests of all consumers in encouraging seabed output, the unlikelihood that the income of existing producers would decrease, even with seabed production, and the inherent difficulties and adverse effects of schemes to protect land-based producers. Several developing countries expressed a willingness not to require protective measures in the Convention itself, and an insistence that a balance between consumer and producer interests be structured into whatever machinery was created for dealing with the potential problem.

¹⁹ A/CONF.62/C.1/L.9.

²¹ Note 13, *supra*.

²⁰ A/CONF.62/C.1/L.8.

²² A/CONF.62/C.1/L.5.

Committee I did not review the draft articles on the structure, powers, and functions of the Seabed Authority, although the question of discretion underlying the debate on Article 9 and conditions of exploitation is clearly linked to this issue. Several implicit understandings seem to be involved in this decision. The general outlines of the structure of the Authority are essentially agreed. There would be an Assembly of all parties, a Council of limited size, and necessary subsidiary organs. A trend is emerging in favor of a special dispute settlement organ for deep seabed problems in the Authority that embraces functions analogous to those of the French Conseil d'Etat. A discussion of conditions of exploitation fixed in the treaty is in fact a direct approach to the fundamental issue of defining the substantive scope of the Authority's decisionmaking powers with respect to exploration and exploitation, since such decisions would have to be consistent with the treaty. Thus, the basic issue put aside is that of the decisionmaking process itself.

It is generally assumed that regulatory decisions would require approval of a substantial majority of treaty parties, probably two-thirds. There is considerable support for the view that a body of experts should initially draft regulations and submit them first to the Council, which would also have executive functions. The precise question therefore is the composition and voting procedures of the Council. The issue is simple: Are states going to agree to be bound by decisions with which they may disagree? Theorizing about sovereign equality with respect to voting leads one nowhere; while some argue that sovereign equality requires decisions on a "one state one-vote" basis, sovereign equality can just as easily mean the right of each state to veto a decision, or the right of each state to declare that it is not bound by the decisions of other states. All of these options could seriously impair the system. The best alternative is to agree on a Council that, in composition and voting structure, sufficiently balances the substantive interests involved to inspire confidence when coupled with precise and enforceable treaty limitations on the substantive scope of decisions. Confidence will be further enhanced if there is provision for member states to give their tacit approval to any rules approved by the Council—*i.e.* not more than a stipulated number object within a specified time period.

In sum, there was a new, more serious mood in the Committee that indicated an understanding that genuine negotiation is needed if an agreement is to be concluded.

Most delegations wanted to get to work immediately, and opposed an initial plan for two weeks of general debate. Attempts to prohibit reference to the conditions of exploitation in the debate on Article 9, to obstruct progress in the negotiating group, to prevent informal economic seminars on economic implications, and to rally support for a vote on Article 9 did not succeed. In various general statements and in all drafts of the basic conditions, the need to ensure an attractive and secure investment climate for deep seabed exploiters was acknowledged.

The differences of view cannot be disregarded. But there appears to be

a genuine desire to reconcile them, and to avoid as much as possible obstacles to such a reconciliation.

THE SECOND COMMITTEE

Those who took a pessimistic view of the prospects for an early and successful conclusion to the Law of the Sea Conference frequently noted the fact that, in addition to the task of narrowing and resolving the basic political differences, the necessary technical task of organizing in usable form the large number of issues within the mandate of the Second Committee had not been performed by the Seabed Committee. Some also added that even a first round of debate on these precise issues could take years.

On August 28, the Chairman of Committee II of the Conference presented an extraordinary political and technical summary of its work. The Committee decided to circulate that summary as an official Conference document.²³ Excerpts from that summary follow:

In 13 informal Working Papers the officers of the Committee summarized the main trends with respect to the various subjects and issues, as they had been manifested in proposals submitted to the United Nations Seabed Committee or at the Conference itself. . . . In view of the nature and purpose of those papers, each of them had been submitted to the Committee in formal working meetings. Thus all the members of the Committee have had the opportunity to make observations on these papers in their original versions and in their first revised versions. After considering those observations in detail, the officers prepared a first and, in almost all cases, a second revision of the papers which, by agreement of the Committee, is the final version.

Thus what we have is the collective work of the Committee which, with the limitations and reservations to be indicated in the general introduction, and, in some cases, in the explanatory notes accompanying certain of the papers, is a faithful reflection of the main positions on questions of substance that have taken the form of draft Articles of a Convention.

Assembling these papers in a single text, with consecutive numbering makes it possible to present in an orderly fashion the variants which at this state of the work of the Conference are offered for consideration by states with respect to the subjects and issues falling within the Committee's competence.

This document, in my opinion, should serve not only as a reference text relating to the most important work done by the Committee at this session but also as a basis and point of departure for the future work of this organ of the Conference. It would be senseless to begin all over again the long and laborious process which has led us to the point where we now stand.

No decision on substantive issues has been taken at this session, nor has a single Article of the future Convention been adopted, but the states present here know perfectly well which are at this time the

²³ A/CONF.62/L.86.

positions that enjoy support and which are the ones that have not managed to make any headway.

The paper that sums up the main trends does not pronounce on the degree of support which each of them had enlisted at the preparatory meetings and the Conference itself, but it is now easy for anyone who has followed our work closely to discern the outline of the future Convention.

So far each state has put forward in general terms the positions which would ideally satisfy its own range of interests in the seas and oceans. Once these positions are established, we have before us the opportunity of negotiation based on an objective and realistic evaluation of the relative strength of the different opinions.

It is not my intention in this statement to present a complete picture of the situation as I see it personally, but I can offer some general evaluations and comments.

The idea of a territorial sea of 12 miles and an exclusive economic zone beyond the territorial sea up to a total maximum distance of 200 miles is, at least at this time, the keystone of the compromise solution favored by the majority of the states participating in the Conference, as is apparent from the general debate in the Plenary meetings, and the discussion held in our Committee.

Acceptance of this idea is, of course, dependent on the satisfactory solution of other issues, especially the issue of passage through straits used for international navigation, the outermost limit of the continental shelf and the actual retention of this concept and, last but not least, the aspirations of the land-locked countries and of other countries, which, for one reason or another, consider themselves geographically disadvantaged.

There are, in addition, other problems to be studied and solved in connection with this idea, for example, those relating to archipelagos and the regime of islands in general.

It is also necessary to go further into the matter of the nature and characteristics of the concept of the exclusive economic zone, a subject on which important differences of opinion still persist.

On all these subjects substantial progress has been made which lays the foundations for negotiation during the intersessional period and at the next session of the Conference.

The thirteen informal working papers have been reorganized into a single working paper containing 243 provisions divided into 13 parts that correspond to the thirteen original papers.²⁴ This paper is an appropriate point of departure for discussing the work of the Second Committee.

Part I:

TERRITORIAL SEA

Agreement on a 12-mile territorial sea is so widespread that there were virtually no references to any other limit in the public debate, although

²⁴ Note 1, *supra*.

other alternatives are presented in the working paper. Major conditions for acceptance of 12 miles as a maximum limit were agreement on unimpeded transit of straits and acceptance of a 200-mile exclusive economic zone. A variety of articles have been introduced, and incorporated in the working paper, on baselines for measuring the territorial sea and on the innocent passage regime which, with some differences, parallel the provisions of the 1958 Territorial Sea Convention.²⁵ One interesting aspect of the paper is the elaboration of the meaning of innocent passage and the regulatory powers of the coastal state with respect to such passage (Provisions XXVI to XXVIII), largely based on proposals initially presented by Fiji²⁶ and by the United Kingdom.²⁷

Part II:

CONTIGUOUS ZONE

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

In examining this question, it might be considered whether the modern radar facilities may be a cheaper and more effective deterrent than the wide-ranging patrol craft needed to enforce the theoretical liability to arrest—which the smuggler is prepared to risk as he approaches shore anyway.

The question of contiguous zone jurisdiction extending beyond 12 miles is important not only on its merits, but because agreement will become more difficult as more types of jurisdiction are added to the economic zone. Resolution of some issues, such as pollution and scientific research within the economic zone, is already complicated by concerns about encouraging a territorial attitude toward the economic zone which would ultimately prejudice navigation.

Part III:

STRAITS USED FOR NAVIGATIONAL PURPOSES

The introduction of the U.K. articles²⁸ was the major event of the session on the straits issue. The United Kingdom—as both a maritime power and a state bordering the most heavily used strait in the world—necessarily sought an accommodation of the interests involved. These articles were

²⁵ Convention on the Territorial Sea and the Contiguous Zone. 15 UST 1606; TIAS 5639; 516 UNTS 205; 52 AJIL 851 (1958).

²⁶ A/CONF.62/C.2/L.19.

²⁷ A/CONF.62/C.2/L.3.

²⁸ Note 27, *supra*.

well received. The USSR²⁹ and Oman³⁰ introduced articles on straits as well. In general, the trend was in the direction of unimpeded passage. While there was little public movement toward conciliation on the part of the straits states, debate was less heated.

The United States and others made statements reiterating the fundamental importance of unimpeded passage on, over, and under straits used for international navigation and addressed means of accommodating the concerns of straits states with respect to security, safety, and pollution. The United States also made clear its view that distinctions regarding the right of passage could not be made between commercial vessels and warships.

The "security" problem with submarine and military aircraft transit of straits is in fact one of limiting the right to transit to its normal incidents. It is a legitimate problem and the working paper contains numerous texts designed to deal with it. But the problem cannot be resolved until it is clearly recognized that sophisticated warships, submarines, and high-speed aircraft need not, and would in fact not be foolish enough to, enter narrow straits passages if their intent were hostile. Many of the great naval defeats of history occurred when warships exposed themselves to attack in confined areas. It should also be recognized that the legitimate interest of a straits state in avoiding involvement in differences among others is prejudiced, not enhanced, if that state requires or receives notice of, or grants authorization for, transit.

By identifying the precise issues involved, including relevant definitions of straits, proposed "exceptions" for straits where a new regime of unimpeded passage might not be necessary, and elaboration of the protections for straits states, the working paper may make a significant contribution to a narrowing and successful resolution of the issues. However, the underlying political issue remains vital to the success of the Conference: whether essential lines of communication through straits should be subject to discretionary interference by the riparian states. There is simply no possibility of a widely accepted treaty that does not answer this question in the negative.

Part IV:

CONTINENTAL SHELF

Part V:

EXCLUSIVE ECONOMIC ZONE BEYOND THE TERRITORIAL SEA

Part VI:

COASTAL STATE PREFERENTIAL RIGHTS OR OTHER NONEXCLUSIVE JURISDICTION OVER RESOURCES BEYOND THE TERRITORIAL SEA

These three parts of the paper basically address the same issue: the nature and extent of coastal state jurisdiction over resources beyond the

²⁹ A/CONF.62/C.2/L.11.

³⁰ A/CONF.62/C.2/L.16.

territorial sea. Part IV deals primarily with nonliving resources, while Part VI deals primarily with living resources; Part V deals with both. Although this division creates certain methodological problems, it reflects strongly held substantive views. Some believe the doctrine of the continental shelf should be wholly or partially subsumed within the economic zone, while others disagree. Some would give a strong role to international organizations in management of coastal fisheries coupled with coastal state preferential rights, while others would place management responsibility in the coastal state in a 200-mile zone. The nature and content of the economic zone are in fact the central issue.

Over 100 countries spoke in support of an economic zone extending to a limit of 200 nautical miles as part of an overall treaty settlement. With respect to the content of the zone, there is widespread support for the following:

- (a) Coastal state sovereign or exclusive rights for the purpose of exploration and exploitation of living and nonliving resources;
- (b) Exclusive coastal state rights over artificial islands and most installations;
- (c) Exclusive coastal state rights over drilling for all purposes;
- (d) Coastal state rights and duties with respect to pollution and scientific research to be specified, presumably in the Chapters of the Convention being prepared in Committee III.

There is general agreement that there would be freedom of navigation and overflight in the economic zone, as well as rights to lay and maintain submarine cables and pipelines. Provisions for the accommodation of uses in the zone would be included. The question of "residual rights" not specifically granted to the coastal states or all states remains to be resolved, and is discussed below.

With a few exceptions, economic zone proposals have now been proffered by all conference groups, including the United States.³¹ It is widely recognized that the precise issues presented by a variety of detailed provisions in these proposals will determine whether this overall framework can be translated into a generally acceptable treaty. Virtually all these details, in alternative form, are now present in the working paper, thus laying a clear foundation for negotiation and decision of these issues.

The major problems encountered in the economic zone negotiation center on the following points:

- (1) Do the rights of coastal states over the resources of the seabed and subsoil of the continental shelf extend beyond 200 miles where the continental margin extends beyond that limit? While a trend toward agreement on such jurisdiction is discernible, with some states declaring that such jurisdiction is a condition of agreement for them, landlocked and geographically disadvantaged states, and some African coastal states, favor limiting coastal state jurisdiction to a 200-mile zone. The U.S. proposal of an accommodation that includes coastal state jurisdiction over the mar-

³¹ A/CONF.62/C.2/L.47.

gin coupled with revenue-sharing as a solution to the problem is picking up additional support, but is still strongly opposed by some coastal states with large margins. The idea proposed by some landlocked states that they have rights of access to mineral resources under the jurisdiction of adjacent coastal states has met strong and widespread opposition.

(2) What are the duties of the coastal states with respect to conservation and full utilization of fish stocks? What are the rights of access of landlocked states to fisheries? What is the role of regional and international organizations in fisheries management? What special provisions should be included for highly migratory species and for anadromous species?

Three main approaches seem to have emerged with respect to fisheries in the economic zone. One is complete exclusivity with no coastal state duties. Another is the U.S. type approach, which couples exclusive coastal state regulation with conservation and full utilization duties, and special treatment for anadromous species and highly migratory species. A third, exemplified by the articles presented by eight EEC states,³² emphasizes the role of regional organizations. While advocates of the first approach dwelt largely on conceptual arguments in the public meetings, private discussions tended to reveal more flexibility.

The provisions in the U.S. articles³³ on highly migratory species such as tuna represent a new attempt to find a reasonable accommodation. They provide for coastal state regulation in the economic zone in accordance with international and regional conservation and allocation regulations, and include fees, special allocations, enforcement rights, and other protections for the coastal state. A number of developing country delegates have commented favorably on the U.S. move.

In response to conceptual problems with jurisdiction following anadromous species such as salmon beyond the economic zone, the United States has now proposed a ban on fishing for such species beyond the territorial sea, except as authorized by the state of origin, for purposes of ensuring full utilization.

(4) What principles apply to the delimitation of the economic zone or continental shelf between adjacent and opposite states? Any precise formula will tend to divide the Conference, since for each coastal state that supports a particular rule—*e.g.*, equidistance—another naturally reacts in fear that it will lose some area. This problem has in turn given rise to arguments over the weight to be given to islands in such delimitation and, even further, to arguments that small or uninhabited islands are not entitled to an economic zone at all. The general question of islands is dealt with in Part XIII of the working paper. The realization is growing that the Conference could become hopelessly bogged down if it tries to deal definitely with essentially bilateral delimitation problems.

(5) What is the legal status of the economic zone? It is clear that the economic zone is not a territorial sea. However, some classic high seas

³² A/CONF.62/C.2/L.40.

³³ Note 31, *supra*.

freedoms will be eliminated (*e.g.*, fishing) or modified. Subject to the provisions of the Convention (for example, provisions on pollution), other freedoms will be retained (*e.g.*, navigation and overflight). It appears that the provisions of the Convention regarding coastal states' rights will need further elaboration before some states are prepared to grapple with the issue of the legal status of the economic zone in precise terms.

In an effort to mollify such concerns, and taking into account the need to avoid confusion with respect to the application of a variety of different treaties and principles of international and domestic law, the United States, after consultation with a number of coastally-oriented states, introduced the following text:³⁴

The regime of the high seas, as codified in the 1958 United Nations Convention on the High Seas, shall apply as modified by the provisions of this Chapter [High Seas] and the other provisions of this Convention, including, *inter alia*, those with respect to the economic zone, the continental shelf, the protection of the marine environment, scientific research and the international sea-bed area.

(7) Dispute Settlement. Since the heart of the economic zone negotiation turns on a balance of rights and duties, the question of dispute settlement is a critical, substantive element. On the one hand, guarantees are sought against unreasonable interpretations, particularly as they affect navigation and overflight. On the other hand, a measure of discretion for coastal state resource management is clearly inherent in the exercise of resource jurisdiction.

There appears to be a genuine desire to negotiate on these questions and they are likely to dominate regional and international consultations before the next session.

Part VII:

HIGH SEAS AND TRANSMISSION FROM THE HIGH SEAS

The provisions in this part of the working paper are largely derived from the Convention on the High Seas.³⁵ The most difficult problem concerns the legal status of the waters of the economic zone, as already noted.

Certain new proposals were made regarding suppression of drug traffic,³⁶ transmission from the high seas,³⁷ hot pursuit,³⁸ and flag state duties,³⁹ as well as conservation of living resources beyond the economic zone.⁴⁰

Proposals for a different concept of "international seas" are also included. One important characteristic of these proposals is a purported exhaustive enumeration of freedoms, rather than the partial enumeration coupled with

³⁴ A/CONF.62/C.2/L.79.

³⁵ Convention on the High Seas. 13 UST 2312; TIAS 5200; 450 UNTS 82; 52 AJIL 842 (1958).

³⁶ Main Trends paper, note 1 *supra*, provision 174.

³⁷ *Id.*, provision 177.

³⁸ *Id.*, provisions 175-76.

³⁹ *Id.*, provision 142.

⁴⁰ *Id.*, provisions 155-63.

reference to freedoms "recognized by the general principles of international law" contained in the High Seas Convention.

The high seas comprise all parts of the sea not included in the internal waters or territorial sea of a state.⁴¹ Indeed, this is the major significance of the territorial sea limit. The underlying assumption of many states in the negotiation has long been that aside from resource issues, and subject to a reasonable accommodation on scientific research and pollution, freedom of the high seas beyond the territorial sea would be preserved, perhaps with some modifications or clarifications (*e.g.*, coastal state exclusive jurisdiction with respect to artificial islands in the economic zone). The serious implications for reaching agreement of a fundamental change in the negotiating assumptions regarding a matter as complex and fundamental as this should be clear to all.

Part VIII:

LANDLOCKED COUNTRIES

Most of this part of the paper deals with the problem of access to the sea for landlocked countries. Happily, the question does not appear to be one of principle. Most coastal states readily acknowledge the need to deal with the problem in a positive way. The difficulty is one of emphasis, detail, and implementation, matters which many landlocked countries are reluctant to leave entirely to subsequent bilateral arrangements. Two alternative texts in the paper serve to illustrate some of the areas of agreement and difficulty.

Provision 181

Formula A

The right of landlocked States to free access to and from the sea is one of the basic principles of the law of the sea and forms an integral part of the principles of international law.

In order to enjoy the freedom of the seas and to participate in the exploration and exploitation of the seabed and its resources on equal terms with coastal States, landlocked States, irrespective of the origin and characteristics of their landlocked conditions, shall have the right of free access to and from the sea in accordance with the provisions of this Convention.

The right of free access to and from the sea of landlocked States shall be the concern of the international community as a whole and the exercise of such right shall not depend exclusively on the transit States.

Since free transit of landlocked States forms part of their right of free access to and from the sea which belongs to them in view of their special geographical position, reciprocity shall not be a condition of free transit of landlocked States required by transit States but may be agreed between the parties concerned.

⁴¹ High Seas Convention, note 35 *supra*, Art. 1.

Formula B

Each landlocked State shall enjoy free access to and from the sea.

Neighboring transit States shall accord, on a basis of reciprocity, free transit through their territories of persons and goods of landlocked States by all possible means of transportation and communication. The modalities of the exercise of free transit shall be settled between the landlocked States and the neighboring transit States by means of bilateral or regional agreements.

Landlocked States shall have the freedom to use one or more of the alternative routes or means of transport, as agreed with the transit States concerned, for purposes of access to and from the sea.

The remainder of this part of the working paper deals with participation of landlocked countries in the international regime and machinery for the deep seabeds and in the exploitation of the living resources of the economic zones of neighboring coastal states. With respect to the latter question, one issue is whether nationals of landlocked states would enjoy equal treatment with coastal state nationals in all or part of the economic zone of an adjacent coastal state, or whether they would enjoy preference over the treatment given nationals of any third states. The U.S. economic zone proposal takes the former approach. Another issue relates to balancing the desire of coastal states to prevent any transfer of landlocked state rights to third parties with the desire of landlocked states to be able to obtain technical and financial assistance for the purpose of developing their fishing industries.

Part IX:**RIGHTS AND INTERESTS OF SHELF-LOCKED STATES AND STATES WITH
NARROW SHELVES OR SHORT COASTLINES**

The substance of this paper addresses the right of "geographically disadvantaged States" to access to living resources in the economic zone of neighboring coastal states. The substantive issues presented regarding access to living resources are essentially the same as in the case of landlocked states. However, some states are not as prepared to agree to special rights in this case as they are in the case of neighboring landlocked states.

A further question relates to the definition of "geographically disadvantaged States," in essence the substantive criteria justifying a special right of access. Although several criteria for defining "geographically disadvantaged states" are proposed, the heart of the matter relates to a coastal state which cannot derive substantial economic advantage from the establishment of an economic zone off its own coast and suffers actual or potential disadvantage from the establishment of a zone by others. A frequent example is a state with a small coastline facing the coasts of others. Were the regime of freedom of fishing to continue beyond 12

miles, such a state would presumably continue, or have the opportunity to commence, fishing in such areas.

The U.S. proposal⁴² attempts to find a middle ground on the fishing issue by making it clear that the coastal state has priority in its economic zone to the extent of its fishing capacity and the right, but not the obligation, to treat nationals of economically dependent neighbors as its nationals in determining its capacity and their rights of access.

Of course, some international revenue-sharing from the hydrocarbon resources of the economic zone and continental margin beyond the 200-meter isobath as proposed by the United States would introduce a major element of accommodation with respect to the underlying problem of the unequal geographic situation of states.

Part X:

ARCHIPELAGOS

The proposals for a special regime for archipelagos generally relate to "a group of islands, including parts of islands, interconnecting waters, and other natural features which are so closely interrelated that such islands, waters, and other natural features form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such." Under all variants proposed, the coastal state would exercise sovereignty over marine areas within the archipelago, subject to passage rights, and would measure its maritime jurisdiction from straight lines enclosing the archipelago connecting the outermost islands. While analogies are drawn by proponents of the archipelago concept to the system of straight baselines approved in the *Anglo-Norwegian Fisheries* case⁴³ and Article 4 of the Convention on the Territorial Sea and the Contiguous Zone,⁴⁴ the situations are different.

In practical terms, the major island nations advocating the archipelago theory lay astride some of the most important communications routes in the world and seek to enclose very substantial marine areas. The issue has been complicated by the addition of arguments for archipelagic treatment of island groups belonging to continental states, with substantial differences of view indicated in Conference statements on this issue. Since virtually all archipelago areas being discussed would be embraced by a 200-mile economic zone, it is doubtful whether the underlying rationale proffered by island nations for the archipelago concept, particularly that of political unity, is applicable to states that are not island nations and whether the practical effects of extending the concept are justifiable.

Two key issues require resolution for a satisfactory accommodation on the issue whether a regime of archipelagic waters should be included in the treaty.

⁴² Note 31, *supra*.

⁴³ [1951] ICJ REP. 116.

⁴⁴ Note 25, *supra*.

The first is a precise definition and limitation of the areas that may be enclosed, in order to permit states to understand the precise consequences of what they are accepting, and to prevent attempts to apply the concept to enclose far-flung small islands and other situations where its application would be unreasonable. Among the criteria proposed are land-to-water ratios and precise maximum lengths for archipelagic lines. A reasonable combination of the two would ensure compactness and the type of relationship between islands and water that constitutes the underlying reason for the proposals.

The second issue is that of rights of navigation and overflight. In approaching this issue, it must be recognized that substantial areas that would otherwise be high seas would become archipelagic waters. Traditional doctrines such as innocent passage are objectionable for many of the same reasons as exist in connection with straits. On the other hand, it is complete freedom of navigation and overflight, rather than unimpeded transit, that is the source of the concerns that some island nations have expressed. Some see a solution to this critical issue in the establishment of an unambiguous right of transit through the archipelago for all vessels and aircraft coupled with the designation of adequate lanes for the exercise of the right. It remains to be seen whether such an accommodation can be found. It would of course be related to an overall satisfactory settlement of navigation issues, including those regarding straits.

Part XI:

ENCLOSED AND SEMI-ENCLOSED SEAS

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

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

Some of the provisions in this part of the working paper provide for special cooperation among the riparian states within the general framework of the treaty. On its face, this would appear to be desirable. However, to the extent that questions regarding access to resources, transit rights, and delimitation between neighboring states are involved, these are likely to be the same as the questions arising in the context of the universally applicable provisions of the treaty.

In brief, given the importance of the areas in question, this agenda item contains the inherent risk of requiring many of the same issues to be negotiated twice. Hopefully, this can be avoided.

Part XII:**ARTIFICIAL ISLANDS AND INSTALLATIONS**

This part of the working paper concentrates on the important issue of accommodation of uses. By their very nature, artificial islands and large installations preclude alternative use of the areas they occupy. Moreover, safety zones may be necessary to protect the installations and navigation. The Convention on the Continental Shelf addresses these issues, but only in terms of resource exploration and exploitation equipment.⁴⁵ This part of the working paper deals with the issue in principle, and thereby also covers a host of new uses: deepwater ports, offshore airports, power plants, etc.

The paper reflects the general view that artificial islands, deepwater ports, airports, power plants, and similar new fixed economic uses of the economic zone should be subject to coastal state authorization and regulation. This view no doubt emanates in some measure from the fact that any such uses would probably entail substantial potential permanent interference with the exercise of the resource jurisdiction of the coastal state in the area. The paper also reflects the general view that the coastal state would be under a duty to prevent such artificial islands and installations from unjustifiably interfering with navigation and other uses of the sea. While reasonable safety zones could be established around them where necessary, territorial seas and economic zones would not be measured from artificial islands and installations, except perhaps as currently specified in the distinguishable technical provisions of the Territorial Sea Convention dealing with lighthouses on low-tide elevations and with roadsteads.⁴⁶

The High Seas Convention, of course, provides that the laying and maintenance of submarine cables and pipelines is a freedom enjoyed by all states.⁴⁷ The Continental Shelf Convention contains provisions regarding accommodation of this right with the resource interests of the coastal state.⁴⁸ These texts have been reintroduced, and it would appear that this general approach, perhaps with some clarifications, will continue.

The working paper also contains proposed provisions on military installations and devices on the continental shelf. During the discussion, other states noted that arms control questions were more properly addressed in other forums and could complicate the negotiations. They pointed out that the emplacement of nuclear weapons and other weapons of mass destruction on the seabed was already prohibited beyond twelve miles from the coast by the Seabed Arms Control Treaty,⁴⁹ and that this

⁴⁵ Convention on the Continental Shelf. 15 UST 471; TIAS 5578; 499 UNTS 311; 52 AJIL 858 (1958). Art. 5.

⁴⁶ Note 25, *supra*. Arts. 4 and 9.

⁴⁷ Note 35, *supra*. Art. 21.

⁴⁸ Note 45, *supra*. Art. 4.

⁴⁹ Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof. 23 UST 701; TIAS 7337. Art. 1.

treaty would by its terms be subject to review within a short time after a Law of the Sea treaty could be expected to enter into force.

Part XIII:

REGIME OF ISLANDS

Should a coastal state be entitled to exercise the same jurisdiction in the marine area adjacent to an island as it would if the area were adjacent to a continent?

The Territorial Sea Convention and the Continental Shelf Convention make no distinction. Indeed, the former treats island fringes along the coast in the same way as deeply indented coastlines for purposes of establishing a system of straight baselines,⁵⁰ and the latter expressly provides that an island has, in juridical terms, a "continental" shelf.⁵¹ A distinction is only made between islands and low-tide elevations; the latter, with some precise technical exceptions, do not provide a basis for exercising maritime jurisdiction.⁵²

Some argue that a distinction is implied by the reference to "special circumstances" in the articles on delimitation of area of jurisdiction between neighboring coastal states,⁵³ and by the references to relative length of coastline in the *North Sea Continental Shelf*⁵⁴ cases on delimitation. It should be noted, however, that this concerns the issue of delimitation, not entitlement to jurisdiction in principle.

Proponents of maintaining the existing approach and according the same rights to islands in principle argue that they have vested rights under international law of which they cannot be deprived. Some point out that the inhabitants of small islands may be more dependent on marine resources than the inhabitants of large continents.

A number of newly independent developing nations are composed of small islands. The proponents of limitations on the jurisdiction that can be exercised by virtue of sovereignty over small islands tend to emphasize several different considerations. The debate between Greek and Turkish representatives on the issue derives from a situation in which the extension of the territorial sea to 12 miles around Aegean islands would eliminate most of the high seas in the area and the direct access to the high seas from significant parts of the Turkish coast, as well as affect the lateral delimitation situation. A number of states emphasize equitable considerations with respect to delimitation of areas of jurisdiction between small islands and large continental coasts. Thus, some proposals distinguish between "adjacent" and "non-adjacent" islands. Some are concerned about reduction in the size of the international seabed area.

⁵⁰ Note 25, *supra*. Art. 4.

⁵¹ Note 45, *supra*. Art. 1.

⁵² Territorial Sea Convention, note 25, *supra*. Arts. 10 and 11.

⁵³ *Id.*, Art. 12; Continental Shelf Convention, note 45, *supra*. Art. 6.

⁵⁴ [1969] ICJ REP. 3.

In an unfortunate move that clearly injects political issues, some have sought to make a distinction for "islands under foreign domination and control." The very legal formula, of course, begs the question and invites dispute: it is questionable whether a state will regard itself as foreign to an area over which it claims sovereignty. There are many states that have islands, and there are many states with islands that do not form part of an historical cultural unit with the mainland or may not be regarded as such by another state with an incentive for taking such a position.

Some states would make distinctions between islands, islets, and rocks. Some distinguish islands on the continental shelf of another state, although juridically this, of course, begs the question. Some consider population a relevant factor.

From a political perspective, it might be noted that sovereignty over many islands is in doubt or in dispute. Moreover, no geographer is likely to assert that all high-tide elevations have made their appearance. The promise of jurisdiction over seabed minerals or fisheries could well serve to stimulate or exacerbate disputes over islands. Indeed, it is arguable that this has already begun to happen.

The development of seabed mining and fixed installations creates a new need for precise and permanent jurisdictional boundaries. An important aspect of the issue is the "boundary" between resources under coastal state jurisdiction and resources of the international seabed area. Provision for coastal state submission within a reasonable time of a precise and permanent delineation of the seaward limit of its seabed jurisdiction (the "boundary" with the international area), subject to impartial international review, might not only allay concerns regarding the location of the precise limit of the continental margin, but also in effect freeze the island situation and avoid the difficulties that might otherwise be attendant upon the discovery or formation of a new high-tide elevation at sea.

This part of the working paper in essence tries to come to grips with a fundamental problem in all of the law of the sea, exacerbated by the extension of the breadth of jurisdictional zones: the length of a coastline and its exposure to the open sea bear no necessary relationship to abstract equitable criteria for apportioning ocean areas and resources. To this one might add that two areas identical in size may differ vastly in their importance to navigation or resource content. Seen in this light, the solution to many aspects of the islands problem is part of the solution to the broader problems of navigation and straits, limitations on coastal state jurisdiction in the economic zone, and delimitation among neighboring states.

THE THIRD COMMITTEE

Most of the work of the Third Committee was done in informal sessions of the Committee which were the equivalent of working groups. Partial consolidated texts were forwarded on preservation of the marine environ-

ment⁵⁵ and on marine scientific research and development and transfer of technology.⁵⁶ Those to which no reservations are noted, and which do not appear in alternative form, can be regarded as approved at the level of the informal sessions.

MARINE POLLUTION

Committee III met 22 times in informal session as a small negotiating group to deal with marine pollution issues. Draft articles were completed on general obligations to prevent pollution, particular obligations, global and regional cooperation, technical assistance, rights of states to exploit their resources, and the relevance of economic factors to the obligations of developing countries. These texts were not fully agreed and the United States, among others, opposed the last two in their entirety. Discussion continued, particularly on an informal basis, on the right to set standards and to enforce them and on monitoring. The Committee did not begin consideration of state responsibility and liability, sovereign immunity, or settlement of disputes.

A basic difficulty faced in the discussions related to the problem of qualifying the treaty obligation of states "to protect and preserve the marine environment," to "take all necessary measures to prevent, reduce and control pollution of the marine environment from any source using for this purpose the best practical means at their disposal and in accordance with their capabilities, individually or jointly, as appropriate," and to "take all necessary measures" to ensure that activities under their jurisdiction and control "do not cause damage to areas beyond their national jurisdiction including damage to other States and their environment by pollution of the marine environment."

Three types of qualifications are present in the consolidated texts, alone or in combination. One, in essence, is introduced by the language "pursuant to its environmental policies" qualifying a state's legal obligation. While this text is probably designed to introduce a measure of flexibility as to the type of environmental programs used, the context of its introduction is related to the remaining qualifications.

A second qualification preserves "the sovereign right of a state to exploit its own natural resources pursuant to its environmental policies and programmes for economic development and in accordance with its duty to protect and preserve the marine environment." The text is amenable to extreme interpretations that would render it either meaningless or totally contradictory to other articles. The intent would appear to be to preserve the right to develop resources and resource management flexibility subject to respect for environmental duties, and this interpretation would of course be compatible with the other articles. Needless to say, this text is an attempt to express in legal terms the underlying need to harmonize economic and environmental interests.

The third qualification would make the legal obligation to prevent and

⁵⁵ Note 3, *supra*.

⁵⁶ Note 2, *supra*.

control pollution dependent on the ability to discharge that obligation and the stage of economic development of a state. It, of course, entails the obvious risk of rendering the obligation essentially hypothetical for most, if not all, states. One alternative text would qualify all environmental obligations in this way, while another would limit the qualification to land-based sources of marine pollution.

Needless to say, there is opposition to all the qualifications on environmental grounds. In addition to environmental problems, the third qualification—which is, of course, not a matter of economic or technical assistance—raises the difficult problem of imposing different legal obligations on developed and developing countries. Strong resistance on these grounds can be expected and it poses a more general problem in international law as well. One of the most curious effects would be that developing countries would not enjoy many of the benefits of the treaty obligations, since all have mostly developing country neighbors.

At the next session, the Committee will begin with the article on monitoring and then take up standard setting and enforcement rights. The basic problem of vessel-source pollution remains to be addressed, although a trend against coastal state standard setting is already evident, particularly with respect to construction and design standards.

Negotiations have moved to the point of beginning on the major controversial issues of standards and enforcement, particularly regarding vessel-source pollution. Private negotiations and consultations indicated considerable detailed consideration of specific problems and a willingness to discuss realistic solutions.

MARINE SCIENTIFIC RESEARCH AND DEVELOPMENT AND TRANSFER OF TECHNOLOGY

The Informal Working Group on Marine Scientific Research and Development and Transfer of Technology held 21 meetings, either in informal session or as a negotiating group.

Initially, there was an attempt to elaborate a definition of scientific research drawing from the definition elaborated by the Seabed Committee which excluded industrial exploration and specified that such research should be conducted for peaceful purposes. Several proposals were made by developing countries to delete these two qualifications. After inconclusive discussion, the informal committee decided to put the definitional question aside.

Agreement, however, was reached on general principles for the conduct of research as well as obligations for international and regional cooperation. The general principles include a requirement that scientific research be conducted exclusively for peaceful purposes; a clause dealing with noninterference with other uses; a requirement that research comply with applicable environmental regulations; and agreement that research activities shall not form the legal basis for any claim to any part of the marine environment or its resources.

The most important issues, and those on which there was the greatest divergence of views, centered upon research in the economic zone. As deliberations neared conclusion four major trends emerged. Those trends were set forth in the Report of the Working Group which is expected to form the basis for negotiations at the next session.

One of those trends was tabled by Colombia and is stated to represent "The consensus of the Group of 77 of the Third Committee, without committing the final position of the members of the Group."⁵⁷ This proposal provides that all research in the economic zone—including that conducted by satellites—requires the explicit consent of the coastal state. Publication of results also requires coastal state consent. Research in the international area would be conducted directly by the International Authority or under its regulation or control. The introduction of the satellites issue, of course, raises questions of outer space law beyond the purview of the law of the sea as such, dealt with in the Outer Space Treaty and under consideration in the Outer Space Committee of the UN General Assembly.

The second trend, although not based on a formal proposal, follows the language of the Continental Shelf Convention and provides that, while consent is required to conduct research in the economic zone, this consent shall not normally be withheld when certain conditions are met. It contains no reference to research in the international area.

The third trend provides for an agreed set of international requirements for the conduct of research in the economic zone in lieu of a requirement to obtain coastal state consent. The proposal also contains provisions regarding notice, participation, interpretation, and assistance for landlocked and geographically disadvantaged states in the region as well. Research in the international area may be carried out by all states. This trend is based on a proposal introduced by 17 states, a majority of which are developing countries.⁵⁸

In general, the precise requirements for scientific research in the latter two trends are designed to insure respect for coastal state interests in the area of resource jurisdiction and reflect similar points: notice, participation, sharing and assistance in interpreting data, samples, and results, and respect for applicable environmental regulations.

The fourth and final trend provides for total freedom to carry out research in the economic zone "except that marine scientific research aimed directly at the exploration or exploitation of the living and non-living resources shall be subject to the consent of the coastal state. In the international area, all states have the freedom to carry out marine scientific research related to the seabed, subsoil and superjacent waters."

In addition to the above, proposals were made with respect to the legal status of marine research installations and the responsibility and liability of those conducting research. These proposals, however, were not formally discussed at this session.

⁵⁷ A/CONF.62/C.3/L.13.

⁵⁸ A/CONF.62/C.3/L.19.

With respect to research installations and equipment other than vessels, three of the issues raised are: whether the consent of the coastal state is necessary in the economic zone in all cases or only insofar as it would be necessary in other cases; irrespective of the consent issue, whether the installation or equipment is subject to coastal state or flag state jurisdiction, or both; and whether, with respect to both of the issues posed above, a distinction should be made between "fixed" (presumably stationary) and "floating" (presumably free floating) equipment.

Nigeria and Sri Lanka introduced separate formal proposals on technology transfer. Sri Lanka formally withdrew its proposal and joined with Nigeria and about 20 others in cosponsoring a subsequent proposal on technology transfer.⁵⁹ This proposal calls for transfer of technology, including the facilitation of transferring patented and nonpatented technology through agreements under equitable and reasonable conditions. It requires, *inter alia*, that the Authority ensure that legal arrangements with respect to seabed activities provide for the training of developing state nationals, and that all patents on machinery and processes for exploiting the international area be made available to developing states upon request.

DISPUTE SETTLEMENT

Aside from Committee I, there has not been much public debate in the Conference on dispute settlement, although there are many states that regard it as a critical aspect of the negotiations. In the latter part of the session about 30 states from all regions interested in dispute settlement met informally on a regular basis to discuss ideas and provisions for the dispute settlement chapter of the Convention. The Group was chaired by Ambassadors Galindo Pohl of El Salvador and Harry of Australia. Professor Louis Sohn of Harvard Law School served as rapporteur. The result is a working paper containing alternative texts on basic provisions introduced during the last week of the Conference by Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore, and the United States⁶⁰ and viewed with favor by most members of the Group. The new paper is likely to stimulate further study and discussion during the period before the next session of the Conference.

The paper resulted from some of the most serious and constructive meetings of the entire session. It contains draft alternative texts, and notes indicating relevant precedents, on the following eleven points:

(1) Obligation to settle disputes under the Convention by peaceful means.

(2) Settlement of disputes by means chosen by the parties.

(3) Clause relating to other obligations. The issue dealt with is whether, in the absence of express agreement to the contrary, precedence is given to the procedures in the Convention or other procedures accepted by the parties entailing a binding decision.

⁵⁹ A/CONF.62/C.3/L.12.

⁶⁰ Note 10, *supra*.

(4) Clause relating to settlement procedures not entailing a binding decision. In a situation in which a dispute is referred to nonbinding procedures, these articles deal with the question of when a party is entitled to invoke applicable binding procedures under the Convention.

(5) Obligation to resort to a means of settlement resulting in a binding decision. Three alternative forums are described in connection with the obligation: arbitration, a special Law of the Sea Tribunal, and the International Court of Justice.

(6) The relationship between general and functional approaches. During the discussion, there was considerable support for special functional forums in connection with some issues. The most widely discussed was a special Dispute Settlement Forum within the Seabed Authority. The issue addressed here is whether, and to what extent, there is recourse from a special functional forum to the general procedures established by the Convention.

(7) Parties to a dispute. These texts establish that the dispute settlement machinery would be open to state parties to the Convention, and then addresses the issue of whether, and the extent to which, international organizations and natural juridical persons could be involved.

(8) Local remedies. The texts deal with the question of exhaustion of local remedies.

(9) Advisory jurisdiction. The question addressed is whether a national court, duly authorized by domestic law, may request an advisory opinion from the Law of the Sea Tribunal on a question relating to the interpretation or application of the Convention.

(10) Law applicable. The question addressed is whether and under what circumstances rules, in addition to the Law of the Sea Convention, may apply, including bilateral agreements, regulations of international organizations pursuant to the Convention, and the right of parties to agree to seek a settlement *ex aequo et bono*.

(11) Exceptions and reservations to the dispute settlement provisions. The issue addressed is whether, and with respect to what issues, there would be exceptions to the dispute settlement obligations of the Convention.

CONCLUSION

There can be a widely acceptable Law of the Sea Treaty in 1975. Most states desire this. In almost all important cases, the framework, issues, alternatives, interests requiring accommodation, and potential accommodations are known. If the treaty is not concluded in 1975, the chances for agreement will decline sharply. The passage of this psychological deadline is likely to weaken resistance to unilateral action, and such action—and the reactions to it—would seriously complicate further negotiations. Thus, states must now negotiate on the hard issues. To do this, they must avoid individual or regional decisions that do not have the necessary flexibility to achieve a comprehensive and widely acceptable treaty. The time for bargaining positions has passed.