

LAW OF THE SEA:

THE NEXT PHASE

[Corrections in pencil - L.W.P.]
2/7/1982

Introduction

In April 1981, the Third World Quarterly published a report on the Third United Nations Conference on the Law of the Sea and an analysis of the Draft Convention by Dr/ S/P/ Jagota.

The report traced the history and origin of the Conference, described the position of various interest groups on the major issues involved, and assessed the emerging compromise solutions.

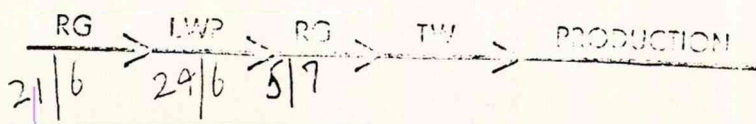
Since Dr. Jagota finished his report, two further Sessions of the Conference have taken place; the Tenth Session was held in New York from 9 March to 17 April 1981, and resumed in Geneva from 3_L to 28 August 1981. The Eleventh Session opened in New York on 8 March and culminated on 30 April 1982, with the adoption of the Convention by a vote of 130 States in favour, four against, and 17 abstentions.

August
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The changes made in the text of the Convention since Dr. Jagota's report are of secondary importance and his analysis remains as valid today as it was when it was written. What has changed - in some aspects, dramatically so - during the last year and a half, are the circumstances surrounding the text of the Convention, and_L without repeating what has already been stated in Dr. Jagota's excellent analysis, this article will simply begin where he ended.

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We shall briefly discuss the events of the Tenth and Eleventh Sessions and the background against which they arose, and then try to assess the importance of the Convention as a whole, in the context of the present world situation. Within this perspective, we shall attempt to examine the role of ocean mining and of the International Seabed Authority (ISA) in international and national development strategy.



Chronology of Events

1. The Tenth Session

The Ninth Session ended in a mood of euphoria. A major breakthrough had been achieved on one of the most intractable questions that had still remained unresolved; that is, the mode of decision-making in the ISA's powerful executive body, the Council, one of the great innovative features of the emerging Convention. The solution to this problem had been largely engineered by the leader of the US delegation, Ambassador Elliot Richardson/who, at the end of that session, expressed the confident hope that the Conference was now ready to adopt the Convention, an event which he described as the most important since the foundation of the United Nations itself.

Instead, the Tenth Session was overshadowed by the United States' decision to undertake a comprehensive review of the Draft Convention, questioning the very principles on which it was founded, and to withdraw from the negotiations at the Conference until this review was completed. The gaps between "Reaganomics" and the new philosophy of the Common Heritage of Mankind were all too evident. Major changes, affecting the basic principles of the Convention, could not be considered without risking the unravelling of the whole "package". It soon became clear that the choices were not between this Convention and another or better one, but between this Convention or none at all; not between a Convention with or without the US, but a Convention without the US or no Convention at all. What effect the US withdrawal would have on the other industrialised countries and, in particular, on NATO allies and the EEC, was not too difficult to predict. It was clear that Europe's interests differed substantially from US interests and that Europe's relations with Third World countries were considerably more important than those between Reagan's America and the developing countries. It was clear that countries such

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as Canada, Australia and Norway, had too much to gain from the Convention to be willing to give it up, while the socialist countries could not be displeased by a demonstration of political isolation of the United States as the Cold War temperatures kept sinking. If the Tenth Session began with deep concern about the practical utility of a Convention to which the major maritime powers would not be parties, it ended with the unquestionable determination to go ahead and conclude this monumental work, even at the cost of abandoning the principle of consensus and proceeding to a vote. In spite of the overwhelming political difficulties looming in the background, the work of the Tenth Session was productive.

Of the five major issues left unresolved - listed by Dr. Jagota on p 291 of his article - two were solved: the question of the location of the ISA and its organs and, simultaneously, the location of the International Tribunal for the Law of the Sea; and the question of the delimitation of economic zones and continental shelves between States with adjacent or opposite coasts.

The question of the seat of the Authority was a politically sensitive one, since it was divisive within the Group of 77 itself. Malta, which had played a leading role in laying the foundations for UNCLOS III, officially renounced this role during the Second Session in Caracas in the summer of 1974. "The path indicated by Malta in the past remained open", Mr. Bellizzi, the Maltese representative, said on 11 July 1974, "but his delegation would not be acting as guides."¹ In accordance with this policy, Malta did not put forward its candidacy for the seat of the Authority. Filling the vacuum, Jamaica stepped forward and promptly secured the support of the Group of 77. It was only thereafter that Malta changed its mind and placed its candidacy. The competition between the two developing island states was fierce, and often bitter, and not defused by the advent of a third

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¹ Official Records. Vol. 1 p 158.

UNCLOS III,

Is this a full and adequate citation?

competitor, Fiji, which joined the contest in 1976 without, however, having a serious chance of displacing the two senior rivals.

When it became clear that the Conference could not reach consensus on the question of the seat, it was decided to put the question to a vote during the Tenth Session - together with the equally *strongly*-contested seat for the International Tribunal for the Law of the Sea, coveted by Portugal, Yugoslavia, and the Federal Republic of Germany.

Jamaica won the vote, on the second ballot, with 76 votes, while Malta obtained 66 votes, and there were five abstentions. Fiji, having received only fourteen votes in the first ballot, was eliminated in the second. To have failed, actually only by five votes, after starting the race with such an unfortunate handicap, was really a moral victory for Malta and attested to the perseverance and diligence of the Maltese delegation, working, as they did, under very difficult circumstances. Malta conceded her defeat graciously, with sincere recognition of Jamaica's valour in the contest. Fiji's somewhat jesting conclusive observation, that "Jamaica has the seat of the Authority, but we have the nodules" may have more significance than may have been apparent when it was made. The seat of the International Tribunal for the Law of the Sea went to the Federal Republic of Germany. May the Hanseatic city of Hamburg, with its long maritime tradition and its independent spirit, provide a suitable home!

The question of delimitation had eluded satisfactory solution through nine sessions. The advocates of the two opposing schools of thought - one relying on "equidistance" (median line) as the decisive criterion for delimitation, the other, on the principle of "equitable principles" - were entrenched in two separate interest groups. Both held out, unwilling to make concessions which might have entailed losses in case UNCLOS should fail and there was no convention. On this issue, involving territorial rights and questions of sovereignty, there was no difference between

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developed and developing countries. Both the "equidistance" group and the "equitable principle" group - one led by Ireland, the other by Spain - contained both developed and developing countries.

The eventual compromise, very simply^e and embodied in Articles 74 and 83 of the Draft Convention, provides that delimitation between States with opposite or adjacent coasts "shall be effected by agreement on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." The articles also contain a formula on an interim solution which should not prejudice the final delimitation. That the Tenth Session saw hardened positions softening and a compromise solution emerging, was a clear indication of the political mood of the Conference.

^b Substantial progress was made on the discussion on "participation", that is, the question of who may sign the Convention and be a member of the ISA. Was it to be States only, as under traditional international law, or other entities as well, responding to the fact that the structure of international relations is changing?

The status of the Draft Convention was altered by dropping the subtitle "Informal Text"; and, finally, an iron-clad schedule was adopted for the completion and adoption of the Convention at the Eleventh Session.

The achievements of the Tenth Session were substantial, considering the difficulties engendered by the US withdrawal and the general deterioration of the world political climate which might even have led to the break-up of the Conference.

2. The Eleventh Session

The agenda for the Eleventh Session was heavy. Three of the five issues listed by Jagota were yet to be resolved: the establishment of a Preparatory Commission and its functions and powers in relation

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to the future ISA; the proposal, by the industrialised countries, for a "Preparatory Investment Protection" (PIP) pending entry into force of the Convention; and the issue of participation. The Drafting Committee had yet to complete its work, particularly on Part XI and annexes. Beyond these technical questions loomed the political problems arising from the fact that the US had completed its fundamental review, and was ready to discuss a set of amendments. These were first presented in the so-called "Green Book" - an almost complete rewrite of Part XI of the Convention, taking the Conference back to pre-Caracas days - and subsequently, in somewhat attenuated form in a set of formal amendments sponsored by seven industrialised states (Belgium, France, Federal Republic of Germany, Italy, Japan and U.K.)² Some of this material found its way into an alternative set of amendments, sponsored by a group of neutral "Friends of the Conference" consisting of medium-sized and small industrialised countries (Australia, Austria, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden, and Switzerland)³. This group tried to mediate between the US on the one hand and the Third World on the other; but only three minor points of their proposal survived in the final text of the Convention as adopted by the Conference.

In accordance with the timetable adopted at the end of the Tenth Session, the first three weeks (8-26 March) were devoted to informal consultations and negotiations. The results were presented on 29 March in a series of documents (Report by the President on participation in the Convention by entities other than States, Doc. A/Conf.62/L.95; Report by the Chairman of the First Committee, Paul Bamela Engo of Cameroon, indicating lack of agreement on proposed changes in the text, Doc. A/Conf.62/L.91; Report by the Co-chairmen of the Working Group of 21 on seabed issues, offering two draft resolutions, one on preparatory investment protection, the other

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² Doc. A/Conf.62/L.121

³ Doc. A/Conf.62/L.104

on the establishment of the Preparatory Commission, Doc. A/Conf.62/C.1/L.30; Report by the Chairman of the Second Committee, Andres Aguilar of Venezuela, stating that sufficient support had been indicated for only one minor amendment, proposed by the United Kingdom and regarding the duty of coastal States to remove abandoned or disused structures to ensure safety of navigation.

Is this a
reference to
Aguilar
Report?

The introduction of these reports was followed by nine plenary meetings during which 112 speakers were heard. On the basis of this discussion, the Collegium completed the final revision of the text. The recommendations of the Chairmen and of the President were all incorporated, with very minor changes.⁴

After receiving the final revised text, the Conference was ready for the introduction of formal amendments by States who were dissatisfied with the compromises reached.)

A spate of amendments came forth, affecting almost every part of the Convention. Six meetings were devoted to hearing 87 speakers on these proposed amendments. During this period, however, Tommy Koh, the President of the Conference, succeeded in convincing the sponsors of most of them not to press for a vote. The adoption of amendments, which could have upset the balance of the Conference package as a whole, might have endangered the adoption of the Convention.

On April 23 the Conference determined that all efforts of reaching general agreement had been exhausted, and that the Conference was ready for decision-making. The amendments were then disposed of on 26 April. All but 12 of the 31 sets of formal amendments had already been withdrawn, and more disappeared during that day. In the end, only three were put to the Vote. Two (by Spain) concerned minor points with regard to passage through straits used for international navigation; one was put forward by Turkey and would have cancelled Article 309, providing that "No reservation or exception may be made to this Convention unless expressly permitted by other articles of this Convention."

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⁴ Doc. A/Conf.62/L.93 and corr. 1

The defeat of these amendments demonstrated that the Conference wanted to conclude and adopt the Convention such as it was, and no chances were to be taken by opening a Pandora's box of amendments, wherever they came from. On the other hand, the rejection of these amendments was paid for with the loss of three votes. Spain abstained in the final vote, while Turkey and Venezuela voted against the adoption of the Convention which, to them, was unacceptable, unless they had the right to make reservations, especially with regard to the question of delimitation.

Only one amendment proved to be sufficiently uncontroversial to be adopted, and it concerned a Resolution rather than the Text itself. This amendment enabled Namibia, through the UN Council for Namibia, to sign the Convention and thereby qualify for participation in the Preparatory Commission.

The next two days were marked by hectic activity, to make ready the final package for adoption or rejection on the appointed day, 30 April. "Consensus" was still possible, inasmuch as it was clear that the overwhelming majority of the Conference was in favour of the Convention, but it was anybody's guess whether the United States, and perhaps some of its allies, would raise a "formal objection". Last-minute changes were conceded, to better the odds, but in vain. On 30 April, the United States demanded that a roll-call vote be taken. Had the Conference gauged the mood of the US correctly, it might have refrained from last-minute compromises which could not soften the US position, while frustrating the Group of 77 and alienating, and finally losing, the East European socialist states.

5/ II The Resolution

1. The Resolution on the Protection of Preparatory Investments

The major confrontation, at this time, was not over the Convention itself, but the Resolution on the Protection of Preparatory Investments (PIP) the one important innovation emerging from the work of the Eleventh Session.

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A first draft for a text on PIP had been introduced by the United States on 2 April/ 1980, at the end of the Ninth Session. It was not discussed during that session but formed the basis for discussions outside the Conference, on the so-called "Mini-Treaty" or reciprocal agreement among States ^{which had} ~~(having)~~ enacted unilateral mining legislation.

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o.k.

The US proposal was officially withdrawn from the Conference early in 1980.

Upon the urging of the Conference, a new text was introduced, co-sponsored by Belgium, the Federal Republic of Germany, Italy and the US.⁵ The proposal amounted to a Mini-Treaty. It carved up the international seabed into enormous blocs and totally emasculated the ISA, obliging it to rubberstamp the production plans presented by the "pioneer investors" who would proceed with their plans without that rubberstamp, in case the Convention was not ratified ("Nothing in this resolution shall be construed to prohibit commercial production after 1 January 1988 if the Convention has not entered into force by that date").

'rubber-stamp'
when a verb

'rubber stamp'
when a noun

o.k. ?

An alternative proposal was introduced by the Group of 77. In fourteen points it stressed strict conformity with the provisions of Part XI of the Convention and demanded that training and technology transfer would be undertaken on a scale that would make it possible for the Enterprise to initiate exploitation simultaneously with the "pioneer operators."

In the meantime, the co-chairmen of the Group of 21 had introduced a draft which, subsequently went through a number of revisions incorporating suggestions in the above-mentioned documents. The final draft was introduced on 20 April⁶ and was accepted by the Conference on 30 April 1980.

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⁵ Doc. A/Conf.62/L.122

⁶ Doc. A/Conf.62/L.141. Add.1.

In essence, Resolution II defines and recognises a number of "pioneer investors". It obliges them to register their claims to an exploration site not larger than 150,000 km, and to pay a registration fee of \$150,000, after they have ensured that there are no overlapping claims among themselves and, in case of conflicting claims, accepted a system of mandatory dispute settlement (this, really being the essence of the "mini-Treaty"). It carefully circumscribes their right to the exploration of polymetallic nodules in the international area, and to research and development of the pertinent technology. It further imposes on them the duty (a) of turning over to the Preparatory Commission a "reserved site" in accordance with the terms of the Convention; and (b) of assuming the responsibility for training and technology transfer for the future Enterprise. Finally, it guarantees priority to the pioneer investor with regard to a contract for exploitation and a production authorisation, once the Convention has entered into force and the "pioneer investor" has ratified it (assuming the "pioneer investor" is a State), or in the case of a consortium, its "certifying State" or States have ratified it.

The importance of this resolution is considerable. It establishes immediately an interim regime for an indeterminate time, which may be quite long. Although it is almost certain that fifty States will be found to sign the Convention and establish the Preparatory Commission, ratification and entry into force may require several years, depending on circumstances other than the interests of seabed miners.

On the one hand, this regime does incorporate the principle of "the Common Heritage", or at least, pays lip service to it. It should be noted, however, that the term "Common Heritage of Mankind" does not occur in the Resolution. The Resolution, nevertheless, recognises that the principle can be deduced from the assertion (para. 1(e) (iii) that "area ... shall have the meanings assigned to [that term] under the Convention", since, in the Convention, the Area and its resources are defined as "the Common Heritage of Mankind")

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On the other hand, the regime practically creates a "grid system" as proposed, e.g., by the UK in pre-Caracas days. It effectively divides the Common Heritage and turns it over to a limited set of operators functioning on the basis of reciprocal agreement, licensed by a Commission with little operational capacity of its own.

The "pioneer investors" as defined by the Resolution, are eight, consisting of (i) France, India, Japan and the Soviet Union with their state companies, and (ii) of six private consortia (Kennecott, Ocean Mining Associates, Ocean Management Inc., Ocean Minerals Co., Association Francaise pour l'etude et la recherche des nodules, and Deep Ocean Minerals Association) associated with one or more of the following eight States: Belgium, Canada, Federal Republic of Germany, Italy, Japan, Netherlands, UK and US.

(iii) The door is also left open to newcomers from developing countries, provided that they meet the financial criteria by 1 January 1985. Depending on wider political and economic circumstances, one could envisage three more "pioneers" emerging within this period/ Brazil, Mexico, and perhaps a regional African Consortium, as proposed by the Tunis Symposium in May 1982. Also possible is the emergence of three regional, private/public enterprises: an African, a Latin American, and an Asian, which might influence the development of the ISA in unexpected ways once the Convention is in force.

This division of the actual or potential "pioneer investors" into three groups - two of which, (i) and (iii) are States which are obliged to sign the Convention to qualify, while one group (ii) consists of nonstate entities (consortia, most of which are multinational) - caused great difficulties and the eventual withdrawal of the East European socialist states.

The East Europeans had two basic objections. First, they maintained that private corporations had no place in an international Convention which is concerned with the conduct of States not of nonstate entities; secondly, and more important, the provision was discriminatory inasmuch as the States enumerated under (i) and indicated under (iii) were bound to sign the Convention in order to qualify as pioneers,

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non-State?

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57 whereas (the phrasing of (ii) provides a loophole for States to benefit from the activities of their associated companies without signing. Thus, ~~e.g.~~ the United States could benefit (without signing) from the work of a consortium, some of whose components were domiciled in the US but which was "certified" by other (signatory) States.

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On the first point the socialist states were over/ruled by the Legal Advisor of the UN whose advisory opinion had been sought at the request of the Soviet Union. The advisory opinion was that international law was not being violated by the provision in question. On the second question, the discriminatory character of the provision was conceded. It was pointed out, however, that a subsequent paragraph (para. 8 (c)) ensures that "no plan of work for exploration and exploitation shall be approved unless the certifying State is a party to the Convention. In the case of entities referred to in para/(a) (ii), the plan of work for exploration and exploitation shall not be approved unless all the States whose natural or juridical persons comprise these entities are parties to the Convention."

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The Soviet Union and its allies demurred, for the situation remained that during a first phase, of indeterminate length, discrimination remained. Thus the eight members of the socialist bloc abstained in the final vote.

How the question will eventually be resolved, depends on Soviet policy in a broader context. It may be that the Soviet Union will prefer not to sign, if the US insists on non/cooperation - especially in consideration of the fact that, for the Soviet Union, its signature will be almost tantamount to ratification; and entry into force, without the United States, has substantial financial implications.

non-cooperation

If the Soviet Union wants to sign and to participate in the work of the Preparatory Commission, there are two possible scenarios. First, a loosening of the Conference package; perhaps, in Caracas (in December, 1982) it may be possible to sign the Convention while maintaining one's disapproval with regard to one or more of the Resolutions. Should the Conference insist on maintaining the integrity of the "package," there still might be a second way open to the

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es/ Soviet Union and its allies. That is, they could sign the Final Act of the Conference, implying an observer status in the Commission, with a statement that they will accede to the Convention as the 53rd to 60th State; for, upon the deposit of the sixtieth instrument of ratification or accession, the Convention enters into force, and the discriminatory provision lapses.

The second important aspect of the Resolution is that it recognises that "activities in the area" in the foreseeable future shall not consist of commercial exploitation and that contracts for "integrated mining operations" (such as envisaged, with such lavish detail, by the text of the Convention) shall not be applicable for the foreseeable future. It will be the task of the Commission to concentrate its attention, for the time being, on exploration, research and development and ensure the fullest possible participation of developing countries in these activities. This could be achieved in ~~either~~ one of several ways. There is nothing in the text of the Resolution that prevents the Commission from establishing a joint venture, or joint ventures, for exploration, research and development, financed jointly by the private sector, States, and international funding institutions in the field of development cooperation. Such arrangements would be highly beneficial to the industrialised countries, by cutting investment costs and sharing risks. They would be equally advantageous to developing countries, enabling them to participate on an equal footing in an enterprise of high-technology management. Whether there would be one such joint venture, composed of those industrialised States and companies who wish to participate, together with a certain number of Board Members from developing countries who might be appointed by the Commission, or whether there would be several such ventures, taking into account eventual regional developments as suggested by the Africans, / depends on the actual course of events over the next two or three years. In any case, concentration on such a venture or ventures would scale down the cost of the ISA and the Enterprise to a non-utopian level, in line with economic and technological realities.

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The proposal was first introduced by the Austrian delegation in a statement on 31 March⁷ and is very much in line with the proposal launched by President Mitterrand at the opening of the Versailles Summit in June 1982. "Ocean exploration", together with space technology, biotechnology, electronics, nonconventional energy technologies, make up the "Third Industrial Revolution". It is in the area of new technologies that the French President proposed the launching of a "concerted programme" by establishing "international commissions for research and development and for technological cooperation between private and public firms and states." In this proposal he stressed the importance of the participation of developing countries in "joint ventures"

U (initiatives conjointes) to assure acquisition by them of these new technologies.⁸ Nothing could be more in line with the French proposal than this suggestion that the Commission concentrate its early efforts on establishing a joint venture for exploration, research and development in ocean mining.

2. The Preparatory Commission

A third important aspect of Resolution II is its impact on developments which will have to follow implementation of Resolution I / ^{which calls} calling for the establishment of the Preparatory Commission. Discussions during the Eleventh Session clearly demonstrated that this Commission had to be different from other preparatory commissions established within the UN system in the past. The Commission had to have executive and operational powers if it was to discharge the tasks imposed on it by Resolution II, that is, to recognise pioneer investors, register claims, choose reserved sites, and arrange for training and technology transfer for the ISA! So important, indeed, are the functions assigned to the Commission that it may become essential to devise a system of balanced representation and decision-making. One delegation went so far as to propose that the Commission

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⁷ Provisional Summary Record of the 160th Plenary Meeting, A/Conf. 62/SR163, 6 April 1982.

U ⁸ Reported in Le Monde (Paris), 6/7 June 1982.

itself should be composed along the lines of the future Council of the Authority, and that it should appoint various subcommissions and committees.

The final text, as adopted, provides that the Commission shall be composed of all signatories to the Convention, and all signatories to the Final Act may participate as observers. The Commission shall establish a special subcommission "on the problems of land-based producers likely to be most seriously affected by the production of the Area." A second sub/commission is to be established to "take all necessary measures for the early entry into effective operation" of the Enterprise.

There is nothing in the Text to prevent the Commission from appointing or electing a smaller executive council, which might be organised on a regional basis. The Resolution, in fact, provides (para.7) that "The Commission may establish such subsidiary bodies as are necessary for the exercise of its functions and shall determine their functions and rules of procedure." The establishment of an executive council might increase the efficiency of the Commission and guarantee a fair balance in decision-making which could be lacking in the larger body.

3. Other Resolutions

Not much need be said about the remaining Resolutions in the "package."

P 4 Resolution III reaffirms, but separates from the body of the Convention, what was previously a Transitional Provision. It guarantees to those peoples who have not yet obtained full independence the enjoyment of the rights and benefits of the Convention.

Resolution V, introduced by the Group of 77, calls on member States, ≡ the competent international organisation, the World Bank, and the UN Secretary-General to assist developing countries in training, education and assistance in the field of marine science and technology and ocean services. These two resolutions were uncontr^oversial, but considerable controversy_L was caused by Resolution IV, which provides

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that the national liberation movements, which have been participating in UNCLOS III shall be entitled to sign the Final Act of the Conference, in their capacity as observers, and that, in that capacity, they may participate in the Preparatory Commission. The adoption of this Resolution as an inextricable part of the "package" induced Israel to vote against adoption of the Convention.

III The Convention on the Law of the Sea

1. Introduction

As already mentioned, the changes made in the text of the Convention itself are minor, and the reader is referred to Dr. Jagota's analysis which remains valid. It is on the basis of that analysis that we will attempt to assess the importance of the Convention for the international community in general and for developing countries in particular.

There can be no doubt that the adoption of the Convention is a landmark. It signifies a breakthrough in the structure of international relations introducing, as it does, a number of concepts into international law which, taken together, offer a new platform from which to launch a new international order. These innovations were stressed, in the final statements of the President of the Conference, Tommy Koh, and the Chairman of the Drafting Committee, Ambassador Beesley of Canada:

- ① - The concept of the Common Heritage, transcending the traditional notions of sovereignty and ownership.
- ② - The concept of a public international institution (the Seabed Authority) that is operational, capable of generating revenue, imposing international taxation, bringing multinational companies into a structured relationship; responsible for resource planning on a global scale as well as for the protection and conservation of the marine environment and scientific research. An institution linking politics, economics and science in new ways - a model, potentially, for international organisation in the 21st century.
- The concept of the Economic Zone, adding a new dimension to development strategy.
- The concept of international environmental law.
- New concepts such as the archipelagic State or transit passage, adjusting the traditional law of the sea to the requirements of the situation as it emerges from UNCLOS III.

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T.W. 'Twenty-first' or '21st'?

- A regime for marine scientific research and technology transfer.
- The most comprehensive, and most binding system of international dispute settlement ever devised.

No ident here → / There never has been a document like this.

Needless to say, progress is never linear. History manages to move forward and backward at the same time. The Convention is the result of political compromises, reflected in ambiguities, loopholes, and even contradictions. Solutions of some problems give rise to new problems. Perceptions of interests keep changing. Circumstances surrounding problems supposedly solved keep changing. Agreed solutions may turn out to have unforeseen implications and consequences.

Thus/while the Conference was crossing the last "t" and dotting the last "i" of this law for the future, symbolically, and as though to remind the world community of the persistence of the old order, navies were girding for battle in the South Atlantic, to decide a question of "sovereignty", imperial style. At stake was not just the domination of a far-flung tiny colonial holding, but the hub of an ocean area larger than the continent of Europe, probably rich in untapped resources, and a bridgehead to the last continent, Antarctica, where the next conflict is looming between the principle of national sovereignty and the principle of common heritage, between the past and the future.

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2. The Common Heritage, ISA and ocean mining

The concept of the Common Heritage of Mankind, proposed by the Delegation of Malta in 1967 is one of the (few) great contributions of the 20th Century to political theory and international law.

Resource depletion, technological and economic developments transcending the boundaries of nation states, and the degradation of the marine environment on which all life depends, were beginning to play havoc with the application of the traditional principles of sovereignty and ownership to the new medium of the ocean. While not negating the old principles, the new concept of the Common Heritage

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transcends them by asserting that certain resources, and, inseparably linked with them, certain technologies, and certain financial resources cannot be owned in the traditional sense; ~~but~~ must be managed in common, for the benefit of all mankind, with particular consideration for the needs of the poor and of future generations and ~~can~~ be used for peaceful purposes only.

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The principle of the Common Heritage, first applied to the resources of the seabed beyond the limits of national jurisdiction, has implications far wider than the oceans. Ideally, it could become the foundation of a new economic order. It should become the basis of a new economic theory, which the world so badly needs to replace the worn-out and evidently bankrupt economic theories applied today.

True, the Convention does not fully define the new principle: but the gist is there.

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True, while proclaiming the new principle, States, both developed and developing, hastened to contravene and abridge it as far and as fast as possible by stretching the limits of their national jurisdictions. These jurisdictions are, however, permeated by the new principle of functional sovereignty ~~that is~~, (sovereign rights over uses) ~~is~~ taking the place of territorial sovereignty and absolute ownership.

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True, the mechanism embodying and articulating the principle of the Common Heritage, ~~that is~~ (the ISA) is far from perfect, and reflects conflicts and contradictions ~~the~~ Conference ~~was~~ not really able to overcome.

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Thus, industrialised countries, having spent many millions on developing technologies that should have increased their independence from supposedly unstable foreign producer countries, found themselves slipping, through the ISA, under the control of the very same countries

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An individual agreement with one side is bilateral; to use both is tautologous. Omit both? Or go back to original and omit 'and' and substitute a comma.

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that they had sought to avoid individually and bilaterally. Developing countries, on the other hand, who had hoped to gain collectively from sharing in the management of the Common Heritage, found their economies threatened by the competition between marine resources and land-based resources.

The very nature and scope of the ISA remains somewhat uncertain; between the aspirations of the developing countries, who wanted to build a first piece of the New International Economic Order in the shape of an operational Authority with broad and comprehensive powers and functions ranging from scientific research and environmental policy to resource management, technology transfer and a redistribution of wealth, and the conservatism of the industrialised world wanting the Authority (if any) as narrow in scope (restricted to nodule mining) and as powerless as possible. To reduce its discretionary powers to the minimum they insisted that every administrative and financial detail be spelled out in advance: and, this, for an industry still at the experimental stage and on the basis of economic projections that had to be purely conjectural.

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Thus, with every session that passed, the compromise text became more complex, more ambiguous, more unwieldy, and more remote from the real world, for the assumptions of the 1970s, on which the whole edifice (including systems of production, production limitations, etc.) is based were never questioned. While they remained immobile, however, the real world kept moving, so that a gap opened, and began to widen, between the construct and the economic and political reality.

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The assumptions of the 1970s, basically, were three: first, that seabed mining would be fully operational on a commercial scale by the 1980s, and that the revenues accruing to the Authority, both from licenses and from the operations of the Enterprise, would be substantial. Secondly, that seabed mining would in practice be restricted to the mining of polymetallic nodules, and that other deep-sea minerals would be without economic interest for the foreseeable future; and, thirdly, that nodules were to be found

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(S=US) usage

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only in the "international area", far beyond the limits of national jurisdiction, so that the Authority would have a monopoly position enabling it effectively to control production.

All three assumptions have turned out to be wrong; Economic depression, a glut of land-based minerals, and volatile prices on the commodity market, are not conducive to the launching of a new mining industry. Before the beginning of the next century, there is ~~not~~ unlikely to be a commercial, integrated mining project of the kind considered by the MIT Model,⁹ on which the convention has lavished such an abundance of legal minutiae.

Thus, no revenues are in sight for the ISA. *instead of being* From an instrument for the redistribution of wealth, it *needs* ~~(is becoming a drain for)~~ large-scale international funding ~~(needed)~~ to defray administrative costs and ~~(to) assist the Enterprise to get started.~~ *become operational.*

This reappraisal of the financial potential of the ISA raises the fundamental question of the relevance of ocean mining for developing countries, and, on this, opinions are divided. The more traditional view of the development economist is that ocean mining is of no interest, since the technologies involved are highly complex and highly capital-intensive rather than labour-intensive.

I have always held the opposite view. Ocean-mining technologies belong to those listed by President Mitterrand as part of the *≡* ~~(~~Third Industrial Revolution. If developing countries fail to join this revolution "on the ground floor" - at the present stage of research, development, and exploration - the development gap will widen to the point *?* *at which /* ~~where~~ 20 years from now it may become unbridgeable. Furthermore, ocean-mining technologies can be disaggregated into systems and subsystems which range from the highly complex to fairly simple. At the less complex end of the spectrum, even the least industrialised countries could make some contribution. Participation in an international venture in ocean mining will accelerate technology

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W ⁹ J.D. Nyhart et al, A Cost Model of Deep Ocean Mining and Associated Regulatory Issues. Cambridge/Massachusetts; MIT. 1978 *2/*

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transfer and enhance industrial diversification. If, in the long term, over the next 50 years, there is going to be a large-scale displacement of land-based mining by ocean mining - a development that appears to be very probable - then land-based producers should be the first ones to join the new industry. Just as the oil companies are eager to buy into alternative energy industries, in view of the anticipated shift from a petroleum-based energy economy to one based on other energy resources and technologies.

The second assumption, on which Part XI of the Convention is based, is that the only commercially interesting form of deep/sea mining would be nodule mining; recent scientific discoveries have altered this picture. The discoveries of sulphide deposits ~~in the~~ offshore of the Galapagos Islands and off the West Coast of the United States, with metal contents in concentrations far superior to those of the manganese nodules, have defused interest in the manganese nodules; ~~these~~ ^{which} are the only type of resource covered by the text of the Convention, ^{and thus the Convention} ~~which is thus~~ already obsolete in this respect. Rules, regulations, and procedures will have to be drafted, not only for manganese nodule mining but for other forms of deep-sea mining as well.

The most serious consequences, however, will derive from the collapse of the third assumption - that the ISA has a virtual monopoly over the resource it is to manage. Apart from the metalliferous muds of the Red Sea (under the jurisdiction of Saudi Arabia and the Sudan), and ~~apart from~~ the sulphides (under the jurisdiction of Ecuador and the United States), nodule deposits of considerable commercial interest have been identified in the Economic Zones of Chile and Mexico. It is probable that additional deposits have already been discovered and will be explored in French Polynesia and ~~in the~~ offshore of Hawaii (US jurisdiction).

It need not be emphasised, because it is self-evident, that the ISA's position is of one kind if States and companies have no choice but have their activities organised, carried out and controlled

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I don't think you can say 'in the offshore' here, it's used in the sense of 'nearby'...

Hawaii is part of the US (the 49th State) - since 1959

kind/

by the ISA on behalf of mankind as a whole ; and ~~that it is~~ quite another ~~thing~~ if States and companies have a choice between working under the ISA or under bilateral agreement with some coastal State, in areas under national jurisdiction. It is well known, and documented, where the preferences of the companies lie.

Production limitation under the Convention ^{has} always posed problems which have not really been resolved. It was only during the Tenth Session that the land-based producers among the developing countries became aware of the fact that a limitation formula based on the projected nickel demand would not really protect the producers of cobalt and manganese. But even supposing it had been possible to devise a formula safeguarding these countries; it is one thing to base such a formula on the assumption of monopoly by the ISA, and it is quite another thing to apply such a formula, if production is out of the ISA's control and takes place in areas under national jurisdiction. For what cannot be produced by or through the ISA - because of the application of production limitation - may be produced, unchecked, in areas under national jurisdiction. ,/

Thus there arises the spectre of an Authority incapable of performing the functions for which it was created, and useless, because ocean mining, if and when it comes, will take place in areas under national jurisdiction. Thus arises the spectacle of a whole bureaucracy "Waiting for Godot."

But it need not go that way. Curiously enough, those very actors ^{(persons) ?} who, through the kind of PIP resolution that they proposed at the Conference, clearly manifested the intention of postponing the Common Heritage regime ad Kalendas Graecas and, for all practical purposes, of replacing it with a registry system based on mutual agreement among the seabed mining States, have opened the possibility

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of initiating activities in the right direction. Part XI being inapplicable in the present situation, the Convention might have been by-passed if ratified, or not ratified at all. The PIP resolution confers powers and functions on the Preparatory Commission that it might not have had otherwise. Yet the Preparatory Commission, unlike the rigid structure erected in Part XI, is flexible enough to adjust the concepts of the 1970s to the realities of the 1980s. Furthermore, the establishment of the Commission when a mere fifty States will have merely signed (not ratified) the Convention, is a goal that is undoubtedly far easier to reach than the sixty ratifications needed for the establishment of the ISA. Whether the Commission will succeed in adjusting and preparing the activities of the ISA in such a way that, rather than waiting for Godot, it may render tangible and immediate services to the world community and especially to developing countries, depends on the trends of history, the political will and the leadership capacities of those who will be called to serve. The foundation has been laid. Never before has the international community had at its disposal an instrument with a development potential such as that of the Commission.

3. The Exclusive Economic Zone

One need not be a Hegelian (assuming that whatever happened had to happen) to realise that the extension of national jurisdiction into the oceans ^{was} ~~were~~ inevitable. The territorial sea of three, or of six, or even of twelve miles was an anachronism, unable to respond to the needs of military as well as economic security as shaped by technological developments. Industrialised countries had to regulate and manage the penetration of the industrial revolution into deeper and wider offshore zones. Developing nations had to defend their coastal waters against the depredations of modern distant-water fishing fleets and factory-ships. No country could tolerate the emplacement of spying devices or the conduct of polluting activities near their coast

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The time of laissez-faire in the oceans was over. Systems of management were required, and jurisdiction was needed to build them. Even Arvid Pardo, the father of the Common Heritage concept, proposed (as early as 1971) in his Draft Convention submitted to the Seabed Committee, the recognition of "national ocean space" up to a limit of 200 miles from clearly defined baselines. Nor was he over-concerned that the establishment of such a zone would detract from or conflict with the concept of the Common Heritage.

In principle, the EEZ concept is the most benign, the most flexible, and the most innovative way in which the inevitable trend towards the extension of national jurisdiction could have been met. In the Convention, however, it is flawed by ambiguities which, as in the case of seabed mining, open the possibilities of increasing inequality, conflict and chaos as well as those of rational management and international cooperation.

If the hope had been that the new limits would be such as to forestall further expansion of claims which might entail conflicts and further increase inequalities among States, this hope has been deluded. There are three major loopholes through which expansion could proceed unchecked.

The first is the inadequate definition of straight baselines in Article 7, which does not specify the maximum length of these baselines from which the territorial sea, ^{the} EEZ and, in some cases, the breadth of the continental shelf are measured. Nor does it define the "appropriate points" to be connected by the baselines, which need not be on land but may be defined by coordinates on the map. Thus, States have the possibility of including considerable ocean spaces as "internal waters" and extending their EEZs, the breadth of which is measured from the baselines, well beyond 200 miles from the shore.

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The second loophole is the lack of a proper definition of islands in Article 121. It may turn out to be difficult to draw the line between an "island" defined as a "naturally formed area of land, surrounded by water, which is above water at high tide", (which is entitled to an EEZ and a continental shelf) from a "Rock which cannot sustain human habitation or economic life of its own" (which is not entitled to an EEZ or a continental shelf of its own). The acquisition of tiny islands, or rocks claimed to be islands, may bestow vast ocean spaces and their resources. The Falkland Islands conflict, may/ alas, be one in a long series of similar conflicts.

The third loophole is the definition of the limits of the Continental Shelf in Article 76. The "Irish formula", of Byzantine complexity, on which it is based, is practically open-ended, and competent geologists, from the Soviet Union as well as from the Intergovernmental Oceanographic Commission of UNESCO, and others, have not failed to point out that it is inadequate as a basis for actually drawing boundaries. I do not hesitate to define it as pseudo-scientific. Beyond that, I would seriously challenge the validity of invoking geophysical criteria for the drawing of political boundaries. Such criteria have long since been abandoned on land, and there is no reason for this relapse into romantic geopolitics at sea.

The Soviet amendment, incorporated in the final text of Article 76, limiting any claims under the Irish formula to no further than 350 miles from the above-mentioned baselines, is undoubtedly an improvement. But even this limit is as elastic as the baselines from which it is measured.

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The continental shelf doctrine might have been deemed superseded by the economic zone doctrine, as was proposed by Arvid Pardo and advocated by a number of countries, especially African and Arabic, at the Conference. To have a single boundary, from the surface through the water column to the ocean floor and its subsoil, at 200 miles from clearly defined baselines would have been simple and tidy. Only a few countries would have lost rights they might have claimed, beyond 200 miles, under the Continental Shelf Convention of 1958 and they might have been compensated.

As long as present political winds prevail, it is to be feared that expansion will continue, and the discovery of any significant resource anywhere in the oceans will immediately be followed by claims by the nearest coastal, island or archipelagic State. Further expansion of claims will further increase inequalities among States and increase tension and conflict. But, again, the glass is half-empty as well as half-full. The Convention, while yielding to, and further encouraging, expansionist and nationalistic ^{tendencies} trends, also responds to other needs and has triggered off different trends. The extension of national jurisdiction itself, and the transition from a laissez-faire system to a system of management requires more, not less international cooperation and organisation. Three developments, all initiated by the Convention even before its adoption, are clearly discernible.

IV. New Trends, triggered by the Convention

1. National Legislation

The first is the adjustment and updating of national legislation and the building of national infrastructure as a response to the opportunities offered and responsibilities imposed by the new Law of the Sea. This is a complex process. Old laws have to be pulled out of a great number of Government Departments. Activities that did not

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exist, areas over which the State had no jurisdiction, have to be covered by new laws. Boundaries have to be determined, out at sea, or negotiated with neighbours. Hydrographers, geologists, ^{and} experts in marine biology, fish population dynamics and fisheries management, in the protection of the marine environment in all its ramifications, in ocean mining, ^{and} in energy, are needed; also, lawyers ^{trained} in the most recent developments in public and private international law, collecting, collating, updating, and harmonising the old laws, ^{internally} among themselves and with ~~the~~ international law.

≠ Ocean Development ^{and} Departments / Ministries for Ocean Affairs, have to be built and their interaction with other ≠ Government departments, at the national, at the local, as well as with international agencies, have to be articulated. In no other area are internal and international affairs so inextricably linked as in ocean affairs.

2. Regional Integration

Pollution, as is well known, does not stop at national boundaries. Fish cross political frontiers without submitting to passport control. If, in a laissez-faire or freedom-of-the-seas system, it was possible for each nation to fend for itself, and the strongest nations fended best, a system of management, instead, requires attention to interlinkages. If Nation A wants effectively to manage a certain fish stock, it depends on Nations B and C for cooperation, for this stock may migrate between two or more EEZs, or between EEZs and the high seas. And it is not only with regard to this one stock that cooperation is necessary - it is for the stock that this fish feeds on, as well as the predators that may feed on the fish in question; it is the environment in which it breeds; it is the whole ecosystem, which in most cases cannot be contained within national boundaries.

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Scientific research, on which stock assessment and management must be based, must extend over the whole ecosystem, and, if management is to be effective, the political system will have to be adjusted to it.

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Oceanographic research is too costly to be carried out by individual nations and necessitates international cooperation, not only because the ecosystem to be researched is transnational but ^{also} as a cost-sharing mechanism.

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Thus we see an emerging trend towards regional integration of marine activities. The Convention foresees such developments, in Article 123, on Cooperation of States Bordering Enclosed or Semi-enclosed Seas, and in the sections dealing with the management of living resources, in the EEZ as well as on the high seas; with the protection and preservation of the marine environment; with marine scientific research; and ^{with} the transfer of technology.

T.W. = ?
The real push, however, came from the Regional Seas Programme, initiated and coordinated by the United Nations Environment Programme (UNEP) and involving the cooperation of over a hundred governments, intergovernmental organisations and nongovernmental organisations. Ten regional sea programmes are presently in action, covering one area after another with networks of regional cooperation, with laws and regulations, plans of action, monitoring and enforcement systems, and financial arrangements to carry the cost. The Regional Seas Programme would be unthinkable without UNCLOS III and the principles it has been evolving. On the other hand, the Convention on the Law of the Sea might have remained a dead letter, had it not been for the Regional Seas Programme, which is beginning to articulate, at a practical, regional level; to implement and complement; to give "teeth" to the new Law of the Sea.

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3. The Evolving Basic Ocean Organisations

The third development, closely related to the first two, is the restructuring^{or} and strengthening of the UN agencies and institutions, engaged in marine activities. "Basic Organisations" in this respect are: the Intergovernmental Maritime Organisation (IMO - formerly, IMCO), the Intergovernmental Oceanographic Commission of UNESCO (IOC), the United Nations Environment Programme (UNEP), and the Committee on Fisheries of the Food and Agriculture Organisation of the United Nations (COFI). £ 57

The text of the Convention imposes new responsibilities and enlarges the scope of activities of each of these. There are no less than sixty-two references to the "competent international organisations" whose cooperation is prescribed in determining shipping lanes, in managing living resources, in monitoring pollution, in advancing scientific research and facilitating technology transfer, in establishing regional centres, ^{and} in harmonising national laws, standards and regulations. "Competent international organisations" identified here as FAO, UNEP, IMO, and IOC have to play an entirely new role in dispute settlement. They have to establish and maintain a register of experts from which special arbitration commissions may be drawn, and which may also be entrusted with functions of fact-finding ⁱⁿ ~~its~~ disputes.

Resolution V, adopted by the Conference ~~as part of the Conference~~ as part of the Convention package, recognises "the special role of the competent international organisations envisaged by the

Convention on the Law of the Sea," and recommends "that all competent international organisations within the UN system expand programmes within their respective fields of competence" for assistance to developing countries in the field of marine science, while Article 278 of the Convention itself prescribes that "the competent international organisations referred to in this Part (XIV) and in Part XIII shall take all appropriate measures to ensure, either directly or in close cooperation among themselves, the effective discharge of their functions and responsibilities under this Part."

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(emphasis added) /
A study, released by the Secretary-General of ^(ten)UN during the Tenth Session in ~~1982~~¹⁹⁸¹, on "The Future Functions of the Secretary-General Under the Draft Convention and on the Needs of Countries Especially Developing Countries for Information Advice and Assistance Under the New Legal Regime," points out that "The emphasis in the present study has necessarily been placed on the interrelationship among 'problems of ocean space' and on the need to establish effective linkages among marine activities particularly for the establishment of sufficiently comprehensive policies." While this is beyond the scope of the Conference itself, it may be expected, the Study concludes, "that the 'cross-organisational programme analysis' on marine affairs to be conducted for the Committee on Programming and Coordination in 1983 will be helpful in this respect as will the various studies that have been made or are planned by individual organisations with respect to the effects of a new legal regime on their technical cooperation activities and the effects of the relevant provisions of the Draft Convention on their functions."

Looking at the Convention in a wider historical perspective, ~~one~~

one notices ~~indeed~~ a curious discrepancy. "Conscious that the problems of ocean space are clearly interrelated and need to be considered as a whole", the Convention covers all uses of the oceans. In this sense, the Convention is truly 'a Constitution for the Oceans'. At the same time, however, it provides an institutional framework only for one specific use of ocean space - and not the most important one that is, deep-seabed mining. With respect ^{to} ~~of~~ the other uses of the ~~O~~ceans, the Convention is satisfied with more or less nebulous references to "the competent international institutions."

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see page 17, first sentence of 2. (last para).

The Maltese Draft of 1971 - the ~~prototype~~ of this Convention - provided an institutional framework for all major uses of ocean space. It was way ahead of its time.

Rather than doing the whole, overwhelmingly complex, job in one revolutionary swoop, the international community has chosen a more gradual approach, ^{both} building on the past and ~~on the present~~, utilising existing structures, ~~the basic organisation~~ within the UN system. They are now busy analysing the effects of the Convention on their own structures and functions and studying how they can adjust to the new requirements. It is more than likely that the ISA, the institutional model provided by the Convention, will exercise some influence in the various areas in which restructuring is required.

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The first requirement is a transition from a coordinating to an operational stage. As long as membership of these organisations was restricted to a small number of countries with highly developed marine capabilities of their own, co/ordination of their activities was a proper function. Now the task is not only to co/ordinate

and harmonise, but to create marine capabilities where they do not exist, especially in the developing countries. This clearly requires operational capacity.

There is indeed no reason why mutatis mutandis, the basic "competent international organisations" should not, over time, develop "Enterprises" or "joint ventures" of their own, just like the ISA, on a regional or on a global basis. Just as in seabed mining, such ventures would offer the most direct, effective, and economical way to bring developing countries into the mainstream of ocean management. The regional marine scientific centres, prescribed by the Convention could be conceived as joint ventures in research and development. A first such venture, with the IOC or the ^{ISA}~~Seabed Authority~~ or both, for research and development in ocean energy (OTEC, tides, waves, salinity gradients) would be of direct and immediate benefit to developing countries. A joint venture with FAO for the exploration and exploitation of Antarctic krill, which should be declared part of the ^CCommon ^Heritage of ^Mankind, could provide a very large source of ^Protein to developing countries. An International Sea Service, in joint venture with IMO, could perform not only useful international functions with regard to emergency situations, disaster relief, or training, but it could provide an ^Economically effective way to strengthen Third World shipping capabilities.

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Secondly, what is needed is an expansion of financial resources. Here, again, the innovative principles already adopted with regard to the ISA could serve as an example. The ISA has the power to impose taxation. There is no reason why the other basic organisations should not equally have a right to tax.

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If they are operational, they ought to be able to generate revenue, just as provided for the ISA. If they render tangible services to the international community, these services ought to be paid for. Nothing could be more equitable than a progressive tax on the major commercial ocean uses or users, the beneficiaries of ^(f)activities of these "competent international organisations." An Ocean Development Tax was proposed by the International Ocean Institute as early as 1970. The Maltese Draft provides for it in Article 6I. In the evolving ocean economy, such a tax would go a long way towards securing the kind of "automaticity of transfers" that has been sought by development economists in the World Bank and elsewhere.

Thirdly, there is the requirement of close cooperation and integration of policies between all the basic organisations, including the ISA.

The existing inter-Agency co^fordinating ^emechanisms are evidently inadequate for the new job as indicated by the Secretary-General's recommendation that new ones be established. What is needed is an effective integrative machinery, comprising the ISA ^{IMO, IOC, UNEP} a joint Assembly where problems of ocean policy and management can be debated in a comprehensive, tran^ssectoral manner.

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FAO and COFI - perhaps through a /

All these developments will undoubtedly take time - perhaps the next 25 years. Let us assume a time table could be agreed on to complete them by the time of the ^rReview ^Conference of the ISA. caps? (see text)

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Taken together ^rthe signing of the Convention and the establishment of the Commission as an effective interim regime; the adjustment of the functions of the ISA in accordance with the terms of the Convention

but in accordance, also with the economic and technological realities of the 1980's; the development of national legislation and infrastructures in accordance with the provisions of the Convention and interacting with international law and organisation; regional integration and cooperation; the evolution of the "competent international institutions" and integration of their policies with those of the ISA through an appropriate integrative machinery; and, the introduction of a functionally-based "ocean development tax" could contribute much towards transcending the unwanted and unforeseen implications of the Convention. Such a development, based on cooperation rather than conflict, on redistribution of income rather than on unilateral aggrandisement, on the concept of the Common Heritage of mankind rather than on obsolete concepts of absolute sovereignty and ownership, would also greatly diminish the importance of where the "boundaries" are and would facilitate the participation of land-locked and geographically disadvantaged countries in regional and global joint activities, as well as the participation of developing countries in the new ocean industries.

The establishment of a New International Economic Order is not a one-time happening at a given place on a given date. It is an ongoing process and will never quite be completed. Within this process, however, the adoption of the Convention on the Law of the Sea is undoubtedly a milestone. The Convention is imperfect as are all things human. It is ambiguous, it is ambivalent. It does not by itself solve the problems it set out to solve. Neither security of boundaries nor economic justice nor the integrity of the environment are necessarily enhanced. Given certain political trends, the further escalation of national claims, increased inequality among states, the degradation of the environment, the exhaustion of fish stocks, will go unchecked.

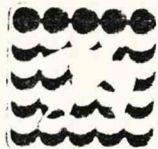
The Convention cannot prevent it. Mankind may destroy itself at sea as on land and in outer space.

But it need not be so. The Convention on the Law of the Sea, more than any other international instrument, offers to all countries and all persons of goodwill the possibility of an alternative development, the realisation of new principles, the emergence of new economic theories and solutions. It offers a forum, a platform on which to stand a framework within which to act creatively, innovatively.

Without the Convention we would not have had these possibilities.

With the Convention, we have at least ambivalence: the path to destruction is not closed, but a path to construction has been opened.

It is therefore of the utmost importance that at least fifty States will sign the Convention this year, so that the Commission can be established and the next phase can begin. Clearly this decision is in the hands of the Third World.



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- 32 -

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- 33 -

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- 34 -

nal institutions."

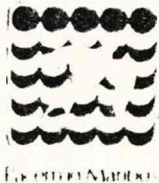
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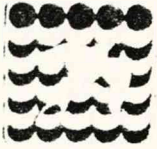
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- 35 -

scientific centres, prescribed by the Convention could be conceived as joint ventures in research and development. A first such venture, with the IOC or the Seabed Authority or both, for research and development in ocean energy (OTEC, tides, waves, salinity gradients) would be of direct and immediate benefit to developing countries. A joint venture with FAO for the exploration and exploitation of Antarctic krill -- which really should be declared a Common Heritage of Mankind -- could provide a very large source of protein to developing countries. An International Sea Service, in joint venture with IMO, could perform not only useful international functions with regard to emergency situation, disaster relief, or training, but it could provide an economically effective way to strengthen Third-World shipping capabilities.

Secondly, what is needed, is an expansion of financial resources. Here, again, the innovative principles already adopted with regard to the Seabed Authority could serve as an example. The Seabed Authority has the power to impose taxation. There is no reason why the other basic organizations should not equally have a right to tax. If they are operational, they ought to be able to generate revenue, just as provided for the Seabed Authority. If they render tangible services to the international community, these services ought to be paid for. Nothing could be more equitable than a progressive tax on the major commercial ocean uses or users, the beneficiaries of the activities of these "competent international organizations." An Ocean Development Tax was proposed by the International Ocean Institute as early as 1970. The Maltese Draft provides for it in Article 61. In the evolving ocean economy, such a tax would go a long way towards security the kind of "automaticity of transfers" that has been sought by development economists in the World Bank and elsewhere.

Thirdly, there is the requirement of close cooperation and integration of policies between all the basic organizations, including the Seabed Authority.



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- 36 -

Presently existing inter-Agency co-ordinating mechanisms are evidently inadequate for the new job, as indicated by the Secretary-General's recommendation that new ones be established. What is needed is an effective integrative machinery, comprising the Seabed Authority, IMO, IOC, UNEP, and FAO/COFI, perhaps through a joint Assembly where problems of ocean policy and management can be debated in a comprehensive, trans-sectoral manner.

All these developments will undoubtedly take time -- perhaps the next 25 years. Let us assume a timetable could be agreed on, to complete them by the time of the Review Conference of the Seabed Authority.

Taken together

. the signing of the Convention and the establishment of the Commission as an effective interim regime;

. the adjustment of the functions of the Seabed Authority, in accordance with the terms of the Convention, but in accordance, also, with the economic and technological realities of the 'eighties;

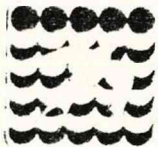
. the development of national legislations and infrastructures in accordance with the provisions of the Convention and interacting with international law and organization;

. regional integration and cooperation;

. the evolution of the "competent international institutions" and integration of their policies with those of the Seabed Authority through an appropriate integrative machinery; and

. the introduction of a functionally-based "ocean development tax"

could contribute much towards transcending the unwanted



FACULTY OF MARINE

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P.O. Box 524 Valletta - Malta

- 37 -

and unforeseen possible implications of the Convention. Such a development, based on cooperation rather than conflict, on redistribution of income rather than on unilateral aggrandizement, on the concept of the common heritage of mankind rather than on obsolete concepts of absolute sovereignty and ownership, would also greatly diminish the importance of where the "boundaries are," and would facilitate the participation of landlocked and geographically disadvantaged countries in regional and global joint activities, as well as the participation of developing countries in the new ocean industries.

The establishment of a New International Economic Order is not a one-time happening at a given place on a given date. It is an ongoing process and will never be quite completed. Within this process, however, the adoption of the Convention on the Law of the Sea is undoubtedly a milestone. The Convention is imperfect, as are all things human. It is ambiguous: it is ambivalent. It does not, by itself, solve the problems it set out to solve. Neither security of boundaries nor economic justice nor the integrity of the environment are necessarily enhanced. Given certain political trends, the further escalation of national claims, increased inequality among States, the degradation of the environment, the exhaustion of fish stocks, will go unchecked: The Convention cannot prevent it. Mankind may destroy itself at sea as on land and in outer space.

But it need not be so. The Convention on the Law of the Sea, more than any other international instrument, offers to all countries and all persons of good will the possibility of an alternative development, the realization of new principles, the emergence of new economic theories and solutions. It offers a forum, a platform on which to stand, a framework within which to act creatively, innovatingly. Without the Convention we would not have had these possibilities. With the Convention, we have at least ambivalence: the path to destruction is not closed, but a path to construction has been opened.

It is therefore of the utmost importance that at least fifty States will sign the Convention this year, so that the Commission can be established and the next phase can begin. Clearly, this decision is in the hands of the Third World.



Ex Officio Maribus

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LAW OF THE SEA:

THE NEXT PHASE

Introduction

In April, 1981, the Third World Quarterly published a report on the Third United Nations Conference on the Law of the Sea and an analysis of the Draft Convention by Dr. S.P. Jagota of India. The report traced the history and origin of the Conference, described the position of various interest groups on the major issues involved and assessed the emerging compromise solutions.

Since Dr. Jagota finished his report, two further Sessions of the Conference took place: The Tenth Session was held in New York from March 9 to April 17, and resumed in Geneva from August 3 to 28. The Eleventh Session opened in New York on March 8 and culminated, on April 30, 1982, in the adoption of the Convention by a vote of 130 States in favor, four against, and 17 abstentions.

The changes made in the text of the Convention since Dr. Jagota's report are of a very secondary importance, and his analysis remains as valid today as it was when it was written.

What has changed -- in some aspects, dramatically -- during the last year and a half, are the circumstances surrounding the text of the Convention.

Without repeating what was already stated in Dr. Jagota's excellent analysis, today's report will simply begin where Dr. Jagota ended.

We shall briefly discuss the events of the Tenth and Eleventh Sessions and the background against which they arose. We will then try to assess the importance of the Convention as a whole, in the context of the world situation as it appears today. Within this perspective, we shall attempt to examine the role of ocean mining and of the International Seabed Authority in international and national development strategy.