SAN MARINO

MEMORANDUM

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On December 13-14 President Amerasinghe called a meeting of all Delegations[1] to the Third United Nations Conference on the Law of the Sea, to consult with them on the date, venue, and agenda of an intersessional working session to be held prior to the Seventh Session.[2]

President Amerasinghe proposed the following agenda, which was accepted.

I. Regime of the deep seabed.

1. Resource policy and production limitation
2. System of exploration and exploitation
   a. Joint Ventures and technology transfer[3]
3. Scope of the regime with regard to minerals covered by it
4. Composition and voting procedures in the major organs (Assembly and Council)
5. Financing
6. Revision clause.

II. Access of States, especially landlocked and Geographically disadvantaged States, to the living resources of the economic zone.

III. Regime of the continental shelf and related issue of profit sharing beyond the 200-mile limit of the economic zone.

IV. Delimitation of the outer continental margin

V. Delimitation of boundaries between States lying adjacent or opposite each other.

VI. Dispute settlement with regard to

1. the sovereign rights of coastal States over their resources;

2. boundary issues.

VII. Preamble, final clauses, including the question of amendments.

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[1] The date of the informal consultation was notified in the U.N. Journal. It was also notified directly to the Missions of all member States of the Conference. Due to a slip-up of the Secretariat, it was not notified to the Consul-General of San Marino. I brought this to the attention of Secretary David Hall who promised to apologize with the Consul General. Not having been notified in time, the Consul-General was unable to attend the consultation meeting. However, I remained in touch with him throughout.

[2]Subsequently set for February 6-17, in New York.

[3]This sub-item was proposed by Ambassador Elliot Richardson of the United States.

This memorandum contains some brief comments on each of these points.

I.

The crucial point under this heading is point 2., "System of exploration and exploitation." Once an agreement has been found on this point, the remaining five points under I. will be far easier to agree upon.

The Conference is completely stalled on the question of the system of exploration and exploitation.

As the Government of San Marino is aware of, there have been two diametrically opposed tendencies at the Conference: The industrialized States advocated a kind of licensing system under which they would have free access to the resources of the area and would be basically free to operate as they wished, upon payment of certain fees or royalties, and with the obligation of following certain loosely defined guidelines. The developing countries, on the other hand took the position the exploitation of the resources by half a dozen industrialized States and their companies was contrary to the principle of the common heritage of mankind. They advocated the establishment of a public international Enterprise, under the control of the Authority. The Enterprise was to be roughly modeled after the nationalized copper industry in Chile. Since the Authority, however is no State, and since the Enterprise would not have the financial means nor the technology nor the managerial skills required for successful operation, the proposal was obviously unrealistic.

Two years ago, the United States proposed a "compromise" according to which the Authority would establish an Enterprise and, at the same time, States and companies would operate under a licensing (renamed "contract" system) system. The Conference has labored since that time to work this system out in detail. As was easily predictable, however, it has failed to do so. The parallel system turned out to be totally unworkable, for the basic reason that the Authority's "Enterprise," which, under this system, becomes a status symbol of the poor nations which really nobody needs, cannot possibly compete with the established industry. Either the industrialized States would have to be burdened with such fees and taxes as to make the "Enterprise" competitive, and this would not be acceptable to the industrialized States; or the financial burdens are light enough for the industrialized States to bear, and then the Enterprise will not be able to start operations. There is no way out of

this dilemma. The text, emerging from the attempts to build a compromise on this basis, led by Minister Evensen of Norway, has turned out to be unacceptable both to developed and developing States. A break-through is needed on this fundamentally important question. The Delegation of Austria has introduced a different proposal. This would eliminate both the licensing system and the Enterprise, and introduce, instead, a unitary joint-venture system. States and companies would be guaranteed free access, but only under the condition that they operate in joint venture with the Authority: i.e., The Authority must provide at least 50 percent of the capital (including the value of the nodules in situ) and must appoint at least half of the members of the Board of Directors of the joint-venture. In other words, a new "Enterprise" is established, jointly by the consortia and the Authority, for each mining project. Profits are distributed in proportion with investments. A number of technical questions will have to be negotiated within this over-all framework, but they are practical, rational and can be negotiated within this framework. The first reactions both from developing countries and from the industry (we just had extensive discussions with the people of A.M.R. in Frankfurt and with representatives of the West German Government) are quite favorable.

The Government of San Marino might support this initiative of the Delegation of Austria.

If an agreement were reached on this question and a Statute for the Enterprise system were agreed upon, the whole regime of the deep seabed could be greatly simplified, and laborious sub-paragraphs and Annexes that will be obsolete before they are even adopted, could be omitted.

Thus the elaborate and quite obscure provisions for production limitation should be omitted. As they are now, they are based on the faulty assumption that the Authority will in fact have a monopoly on nodule production. This, however, is not the case. Due to Articles on boundary determination in other parts of the Text, a considerable part of the nodules will fall into areas under national jurisdiction. To limit production in the international area thus would have no effect on production: it would simply force production, out of the international area, into areas under national jurisdiction. The Authority would control itself out of business.

The Authority should instead have broad competences to formulate a resource policy and to participate in world-wide commodity agreements.

With regard to point 3 ("Scope of the regime with regard to minerals covered by it"), this scope should be comprehensive: Since the area and its resources are defined as the common heritage of mankind, the scope of the Authority extends to the area and all its resources. In economic or commercial terms, this means, for the foreseeable future, only the manganese nodules of the international area; in the future, however, it may include other minerals, particularly oil.

On this question, the position of the developing countries is more in line with accepted principles.

With regard to point 4. ("Composition and voting procedures").This depends on the scope of the Authority. The discussions on this point, thus far, have been quite ambiguous. The industrialized countries have tended, more and more, to consider the scope of the Authority very narrow. in their conception, as it evolved, the whole Authority really is a nodule-mining business. This, of course, justifies a Council which, in fact, is a Board of Directors, representing special interests, including, heavily, financial interests and a system of weighted voting. The developing countries, on the contrary have tended toward a much wider concept of the Authority as the organ through which the international community administers a large sector of ocean space and its resources which are the common heritage of mankind. This includes far broader responsibilities: conservation of the environment, scientific research, coordination of uses of the seabed with the uses of other parts of the ocean environment, etc. If the responsibilities of the Authority are construed in this wider sense, the Council should not represent special interests or financial interests, but it should represent the international community as a whole, in a fair and balanced way. This could best be achieved on a regional basis, perhaps on the very simple lines the Text proposes for the composition of the Law of the Sea Tribunal. At present, the Text vacillates between these two concepts of the Authority. The term "Activities in the Area" is defined in different ways in different places, the responsibilities of the Council are unclear, and the composition is unduly, and unrealistically, complicated.

Point 5 (financing) would be greatly simplified under a unitary joint-venture system, where the industrialized countries and established industry bring 50 percent of the required capital and all the technologies to each "Enterprise." However, the Authority still will have to contribute some capital and this will have to be raised. One way to obtain it would be through the World Bank or regional Banks or, e.g., OPEC countries. Another way would be through an ocean development tax or, more specifically, a tax on offshore oil. The idea of greater automaticity of transfers through international taxes is gaining in many sectors of the United Nations (UNEP, UNCTAD). The idea of "revenue sharing in the Economic Zone" has been much discussed, especially by nongovernmental organizations around the Law of the Sea Conference. Obviously it would mitigate the injustices and decrease the inequalities arising from the present aggrandizement of coastal-State jurisdiction. The Delegation of Nepal is presently studying this possibility. It is an idea whose time will come. It may still be premature, however. If the Delegation of Nepal should decide to go ahead, it obviously deserves the support of landlocked and geographically disadvantaged States.

Also point 6, which presently contains a declaration

of unfulfilled principles, could be greatly simplfied if there were an agreement on a unitary joint-venture system. The Convention as a whole, as any convention in this era of rapid change, should have a revision clause. In this case, no special revision clause would be required for Part XI. Perhaps the general revision clause should contain a provision that the basic elements of the unitary joint-venture system can be changed only by consensus. This would give the necessary guarantee of continuity to all parties concerned.

II.

The question of access of landlocked and geographically disadvantaged States to the living resources of the economic zone can best be solved within the context of regional organization and regional development. Such developments, therefore, should be supported by the landlocked and geographically disadvantaged States. The section on enclosed and semi-enclosed seas might be strengthened accordingly. Special consideration might also be given to mariculture in areas under national jurisdiction. cultured resources are not natural resources in the traditional sense, and require special legal treatment. The Text pays no attention whatsoever to these new scientific/technological developments, their legal requirements, and their implications for landlocked and geographically disadvantaged States. The Delegation of Austria has introduced a proposal in the Group of LL and GDS. A copy will be transmitted to the Government of San Marino.

Points III and IV must be considered together.

Article 76, on the delimitation of the outer continental margin, in its present form, is defective and leaves the question open-ended. The limit of the continental shelf should coincide with the limit of the economic zone. This is in the interest of the majority of States. The group of LL and GDS has the power to block adoption of Article 76 in its present form. This might mean that there will be no agreement at all on this article. No agreement, however, might be better than a bad agreement. It would not affect, furthermore, the establishment of the boundaries of the International Seabed Area which, according to the Text, is determined at any rate by unilateral declarations of coastal States. To leave the question of a general definition open at this time might make it easier to reach a fair agreement in the future.

Comments on the remaining points will follow in two days.

MEMORANDUM

(continued)

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V.

The provision, in the Composite Text, for the determination of boundaries between States lying adjacent or opposite each other are vague, relying on criteria of "equity." It may not be possible to find a generally applicable and satisfactory rule. However, the median line should be given greater importance. If no agreement between parties can be reached, boundary issues should be subject to third-party settlement (see VI,2).

VI.

1. The notion that sovereign rights with regard to activities within the limits of national jurisdiction are not amenable to international jurisdiction is based on a narrow and antiquated concept of sovereignty. The institutions of the EEC, to use just one example, have long surpassed this notion. The Composite Text is extreme, both in substance and in rethorics, in stressing the incompatibility between sovereign rights and international jurisdiction. Much of this will undoubtedly remain. Some attenuation, however, may be possible.

2. Boundary issues must clearly be subject to some sort of international jurisdiction if conflicts are to be avoided. The framework of dispute settlement proposed by the Composite text is very flexible and accommodates preferences for various systems.

VII.

There are, at the Conference, two schools of thought with regard to the Preamble. One group of States would like to keep it as short and noncommittal as possible; the other would like to stress the importance of the Convention in the building of a new international order, including a new international economic order. Considering the character of the Convention and the context from which it is arising, this second point of view seems justified.

Obviously there must be an Article on amendments, including some guarantees that basic articles defining the system of exploration and exploitation of the deep seabed can be changed only by consensus.

There also should be an Article on a general review conference, to be called, probably, after ten years. And there should be a provision for some sort of continuing mechanism. For a Convention, based on the Composite Text, is not just a codification of international law but requires continuous international activity and institutional change. Such a continuing

mechanism should assess the performance of States with regard to the Convention and coordinate and guide the further development of the Law of the Sea and especially the institutional changes required by the Composite Text in the U.N. organs dealing with the uses of the oceans (IMCO, IOC, COFI, UNEP). The Delegation of Portugal has prepared resolutions and held a number of informal meetings at the Conference. There is a good chance that these resolutions will be adopted by consensus at the final Session. The initiative of Portugal should be warmly supported if it continues, or, if there is a change in the Delegation of Portugal, this initiative should be taken over. The adoption of resolutions of this kind would be equally important should the Conference as a whole fail at the next session, due to procedural difficulties.

Procedural points

As the Government of San Marino is aware, the Conference finds itself at a very serious procedural impasse. The new Government of Sri Lanka seems to have decided to withdraw President Amerasinghe. He is no longer the Permanent Representative to the U.N. and no longer a member of the Delegation to the LoS Conference. If, as a consequence of this, he has to step down from the Presidency, this will open a major political crisis which is likely to paralyse the intersessional working session (which will still be led by Amerasinghe) as well as the Seventh Session. The Group of 77 which, on the one hand, could have determining power at the Conference and, on the other hand, should have the greatest interest in maintaining the Presidency of Amerasinghe, is divided on this point as, unfortunately, on so many others. The Latin American delegations are in open opposition to Amerasinghe and are canvassing for Minister Jens Evensen of Norway.

Evensen has played a key role at the Conference, but would not be acceptable to all Delegations as President. The Asians and Africans are insisting that the President must be an Asian.

There seems to be no easy way out. It will be difficult to find a successor, with the experience and the parliamentary genius of Amerasinghe. It will be difficult to find a man able to hold this obstreperous Conference together.

There might be two ways to keep Amerasinghe in office: being forced, but difficult out
Either by a unanimous resolution of the Conference (there are precedents where the President of a U.N. Conference was not a member of a Delegation); ~~or by President Amerasinghe's joining another Delegation -- which would have to be an Asian Delegation, e.g., Tonga -- and representing himself as candidate. He should be supported in any case.~~ This, also, has been the policy of the group of Landlocked and Geographically Disadvantaged States.

Final point: In his discussions with me Dr. Pardo strongly re-emphasized what he had already stressed in his talk with the Secretary of State of San Marino: that is, he could undertake his task only if the program were agreed upon by both major parties, so that its continuity would be assured even in case of a change in Government. In view of the continuing crisis such an assurance appears to be particularly important. Without a guarantee of continuity, the undertaking would be a waste of time for San Marino as well as for Dr. Pardo.

It should not be difficult, however, to reach such an agreement considering the national, above-parties, character of the whole law of the sea issue, and considering, furthermore, that the proposed program is balanced, equitable, and offering benefits to every group of States. As far as the Communist Party of San Marino is concerned, it should be noted that the Soviet Union has been warmly supporting the positions of the Group of Landlocked and Geographically Disadvantaged States, due to the fact that it comprises in its membership almost all the socialist States of Eastern Europe.

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