THERE IS NO ESCAPE FROM HISTORY

Challenges of the Seventh Session of the U.N. Conference on the Law of the Sea

The Third U.N. Conference on the Law of the Sea is getting ready for its Seventh Session.

This is a good time to sit back and try to re-appraise its historic significance, to assess its progress to date, and to try to suggest some solutions to some of the remaining problems.

I.

The Conference is a unique event in the history of international relations. While, to many observers, it still appears a lawyers' exercise on a rather abstruse subject matter remote from the mainstream of vital political and economic development, in reality it is the most comprehensive and the most transformatory effort to create a new world order ever undertaken by the world community. For the Law of the Sea Conference does not deal with law of the sea as we learned it at school. That law has already been transformed and enlarged past recognition. No matter what the final results of the Conference, that law will never be the same.

The traditional law of the sea was made by and for a few great seafaring nations. It dealt with navigation and, to a limited extent, with fishing. The new law of the sea is made by and for over 150 nations many of whom are landlocked and whose claims have to be accommodated together with those of the traditional seafarers. The traditional uses of the sea -- navigation and fishing -- have been radically transformed by technological developments, and a number of new important uses have been added -- from offshore drilling to the extraction of energy from ocean thermal differentials; from deep-seabed mining to the construction of artificial islands -- and the new

law of the sea has to deal with all of these. There is in fact hardly a problem facing the world community today -- food, energy, minerals, technology transfer, science policy, multinational corporations, East-West cooperation, North/South gap, arms control, regional development -- with which the Law of the Sea Conference is not involved in one way or another, and where it could not come up with new and imaginative approaches and solutions. In this sense the oceans are our great laboratory for the building of a new world order.

The traditional law of the sea was based on the concept of State sovereignty over a narrow strip of "territorial sea" near the coast, and the "freedom of the high seas" over practically all of ocean space.

The new law of the sea is reversing the proportions between national ocean space and international ocean space by bringing vast areas formerly of the high seas under national jurisdiction. At the same time, however, the awareness is growing that the nationalization of ocean space cannot solve the grave ecological and economic problems arising from a competitive and anarchic misuse of the oceans, and that new forms of international cooperation and organization are required, based on the revolutionary principle that the oceans and their resources are the common heritage of mankind. This principle transcends the old concepts of sovereignty and freedom and potentially transforms relations between poor and rich nations by replacing the old and, on the whole, discredited notion of "foreign aid" with the new concept of sharing resources and their development and management, that are not owned by any one. The implications of this new principle of the common heritage of mankind for development strategy, transfer of technology, and industrial restructuring have not yet been fully explored.

This, then, is the unique historic significance of the Conference: the uniqueness of the challenge and the opportunity it represents.

The thesis, heard more loudly and more often these says, that it might be more advantageous for the U.S. if the Conference failed and there were to be no new Law of the Sea, is as near- as it is narrow-sighted. Pressures from single sectors, such as the mining industry or the fishing industry (or parts thereof) distort the issues: issues which must instead be seen in their totality and interaction and which require approaches that reflect the long-range interests of the United States as a whole, not the perceived short-range interests of any one sector. The idea, furthermore, that we have a choice between the status quo of the existing law of the sea and the making of a new law, is an illusion: for the old law is gone. The choice is between a new law and a new lawlessness. The great goals of the Conference, finally, are already transcending the limits of the Conference itself, in time and in scope. They are overflowing into other fora of world-order building: regional commissions and organizations; the whole range of U.N. organizations and agencies dealing with various uses of ocean environment and resources, or economic planning and development for the eighties and beyond. Technological and political imperatives will keep pushing, ineluctably, towards the goals set by the Conference: no matter what happens to the Conference itself. There is no escape from history.

II.

The Sixth Session ended with the publication of a Text, the so-called Informal Composite Negotiating Text, which is a unique document in the history of constitutional international law. Although highly controversial in methodology and content, and still defective in many ways, it bears the seed of a new order for the oceans and for the world.

The Composite Text covers ocean space under national jurisdiction and international ocean space. It moves from non-institutional to institutional aspects of the new order in the seas.

National ocean space, as already indicated, is greatly enlarged and consists of different components: the traditional division between internal waters (landwards of the "baselines" from which the territorial sea is measured), the territorial sea which has been expanded to 12 miles; the contiguous zone, extending over an additional 12 miles, has been maintained. Added has been the exclusive economic zone of 200 miles within which the coastal State is to exercise sovereign rights over all resources and economic activities, and jurisdiction, exclusive or concurrent, over all other activities. The Continental shelf, on which the coastal State exercises the same rights as in the economic zone, extends, beyond the 200 m isobath, beyond the 200 mile limit of the economic zone, way down to the abyssal ocean floor, in some cases many hundred miles from shore. A new category of national ocean space, finally are the archipelagic waters, vast extensions of water surrounding and connecting the islands of an archipelagic State.

International ocean space consists of the High Seas, beyond the limits of the economic zone, and the much smaller international seabed area, beyond the limits of the outer continental margin.

The more or less adequate description of boundaries and jurisdictions, and the rights and duties of States within these various components of ocean space constitute the non-institutional parts of the Text. The institutional parts, which are the most innovative and creative parts of the Text, establish an International Seabed Authority to manage the resources of the International Seabed Authority which are the common heritage

of mankind, and a Dispute Settlement System, including a Law of the Sea Tribunal with a special Chamber for issues arising from seabed mining, and offering a wide range of options of alternative ways and means to arrive at a binding judgment, even though there are a number of rather crippling exceptions to the juris diction of the international institutions.

No institutional framework is provided for the other uses of the oceans -- fishing, navigation, scientific research, environmental protection, transfer of technologies -- although the principles on which such a framework must be based are laid down, and the action of "appropriate international institutions" is frequently invoked. Such institutions must now be restructured and strengthened where they already exist, or newly created where they don't, to meet the recuirements of the new order and assume the functions assigned to them by the Composite Text.

Looking back over the evolution of the Composite Text, from the groping attempts of the "Main Trends" emerging from the Second Session, the "Single Informal Negotiating Text" of the Third, and the "Revised Single Informal Negotiating Text" of the Fourth Session, one should marvel that this huge Conference, beset with so many intrinsic and extrinsic political difficulties as it is, has been able to move as far as it has: one should not gripe that it is not already farther ahead than it is. The changes in the law of the sea are profound. The problems are enormous. The solutions are untried and without precedent. The completion of the work will take time. If we cannot escape from history, neither can we force its pace.

III.

Two sets of problems stand out, which still have to be solved if the Conference is to draw to a successful conclusion and the new Law of the Sea is to be equitable enough to be viable -- indeed, a viable part of a new international order.

The first set of problems concers the vast areas that, under the new law, will fall under national jurisdiction, that is, about one-third of ocean space. This will, undoubtedly, raise issues with regard to transnational activities such as navigation and scientific research, but, more serious even than that, it will increase inequalities among nations and therefore the potential of conflict. Rational management of resources, or of the environment, in fragmented zones where resources and pollution freely move across political boundaries, is virtually impossible. The rumblings of dissatisfaction are becoming more audible as the facts unravel. It is clear that by far the greatest advantage from the "grab" of the 200-mil Eclusive Economic Zone accrues to a few, already rich, coastal States, while the majority of poor developing States, incl ding the poorest among them, get nothing. Apart from Micronesia, whose huge area can be calculated in different ways, the U.S.A., acquiring an economic zone of 2,222,000 square nautical miles, is the principal beneficiary, the next three being Australia, New Zealand, and Canada. Some 25 States will acquire 76 percent of the total area of all economic zones. Of these, 13 are developed States which, together, will gain 48 percent of the total area; the 12 developing countries will, together, gain 28 percent of the total area. About 80 countries will gain nothing.

The question, however is, what do we really mean by "gain"? The rich and powerful coastal States "gain" what they already have: for the former freedom of the high seas bestowed on their might the right to exploit

marine areas as far as their technologies, and their national interests, would reach: 200 miles out or further. Developing coastal States, on the other hand, formerly at the mercy of the fishing fleets and factory ships of wealthy distant-water fishing States free to deplete and pollute their coastal waters, are now, at least theoretically, protected against these inroads. But the bit question is: what next? For the problems of surveillance, enforcement and management of vast maritime zones are rather staggering. In many respects they are bound to lead to periods of convulsion and transition.

There are, at least five sets of measures that can be taken, at the Conference, around the Conference, and beyond the Conference, to make the Excl sive Economic Zone a viable part of a new international economic order.

The first is the tidying up of the boundaries of the economic zone in order to prevent the further escalation of national claims. In particular, the article on baselines, the article on islands, and the article on the limits of the continental shelf need improvement.

The second concerns the completion of the institutional framework. Strong, comprehensive, and operational international institutions are needed to assist developing coastal States with the management of their zones and resources if they are really to benefit from these resources and not to fall back on dependence on the industrialized States and their companies. Such institutions are also needed for the rational management of the resources of international ocean space (not only the seabed); for without that, and without the proper interweaving of national and international management systems, the rational management of national ocean space will be impossible.

The third set of remedial measures concerns regional organization and the merger, where appropriate of economic

zones into regional economic zones. This is the only solution for enclosed or semi-enclosed seas, like the Mediterranean or the Caribbean, where national economic zones would be exceedingly complicated to delineate and would make rational resource management totally impossible. Cooperation, through an appropriate regional institutional framework, should extend to all marine activities.

The establishment of regional regimes need not be limited to enclosed or semi-enclosed seas; they can be conceived as part of land-based regional economic development, such as the EEC or African or Latin American common markets. The extension of such common markets to regional economic zones holds by far the greatest promise for the solution of the problems of landlocked and geographically disadvantaged States which would participate in the marine common markets on an equal footing.

A fourth measure would be the establishment of an ocean development tax, that is a small levy -- say one percent -- on all major uses of the oceans, be it the production of offshore oil and gas, commercial fish production, navigation, or the use of cables and pipelines. Such a tax should be collected by States and paid to the international ocean institutions, or, in other words, States' contributions to the international community would be assessed on the basis of their uses of the oceans. The tax would be based on a functional criterion (the use of the oceans, anywhere), not on territorial criteria (there would be no distinction between areas under national jurisdiction and international areas).

The delegate of Saudi Arabia recently proposed such a tax on offshore oil production for development purposes. UNEP is presently working on a scheme for international taxation in the context of its anti-desertification programme. The idea of international taxation as a means to achieve automaticity of transfers and redistribution of international income is gaining ground in

many places. An ocean development tax of the kind referred to would put billions of dollars annually into the treasury of the international community to spend on international development and assistance to developing countries. It could be a tool of substantial importance in development strategy. It could also, to a large extent, compensate landlocked and geographically disadvantaged States for the vagaries of geography that have been invoked in fashioning the inicuities of the exclusive economic zone. An ocean development tax may be an idea whose time has come.

The fifth set of measures concerns surveillance and enforcement. Most coastal States will be unable to police the areas under their jurisdiction or, at any rate, it would put a heavy military burden on them and detract from their development efforts. They would do themselves a great service if they pressed for the internationalization of surveillance and enforcement instruments. Regional surveillance by planes, helicopters and satellites would be cheaper and more effective than national surveillance. Even coastguard continengs could be internationalized for regional enforcement purposes. This may be a long-range development and cannot take place everywhere at once. But it would contribute toward making of the Exclusive Economic Zone a viable part of a New International Economic Order. It would contribute both to development and disarmament.

The other set of problems concerns the regime for the mining of minerals from the deep seabed. The provisions in the Composite Text are conceptually defective and practically inapplicable. As they are, they are neither acceptable to the industrialized States, who alone possess the technology and the capital required for deep seabed mining, nor to the developing countries, who seek their fair share of the Common Heritage of Mankind and to participate in the management of these resources. The Text is based on a curious sort of com-

promise between the positions of these two major groups of States: not by reconciling or synthesizing them, but merely by adding them up. Thus the industrialized States wanted a licensing system under which their companies could essentially have a free hand after payment of certain fees to the International Authority and obeying certain general guidelines with regard to the Authorities rather perfunctory resource policy. This position was unacceptable to the developing States who considered it contrary to the principle of the Common Heritage.

To embody this principle, the developing countries proposed a public international Enterprise as the operational arm of the International Seabed Authority: an Enterprise modelled essentially after the nationalized mining enterprises in Latin America. But the Authority is not a State; it was to have neither technology nor capital, and if the industrialized States and their private consortia refused to cooperate, the system simply was unworkable.

The "compromise" added these two alternatives: There was to be an "Enterprise" as the operational arm of the Seabed Authority, and there was to be free access for States and consortia under a licensing or "contract" system. The addition of an unacceptable and an unworkable system was to result in a workable and acceptable one!

The difficulties that arose in fact turned out to be unsurmountable. How was the Authority's Enterprise going to be financed? How was it going to obtain its technology? If the industrialized States and their companies were free to mine what they needed, who needed the Enterprise? Rather than an embodiment of the principle of the Common Heritage of Mankind, was it not to become a status symbol of poor nations? Like a restless sleeper, the huge Conference tossed from one side to the other: on the one side, imposing financial burdens and obligations of technology transfer on the industrialized

States which should have enabled the Authority's Enterprise to get off the ground but which were unbearable to the industrialized States; on the other side, trying to make their demands bearable to the industrialized States, but then the Enterprise could not get off the ground. There was no way out of the dilemma, as the compromise text grew longer, more complicated, more involved, more contradictory, more abstruse. Disillusioned, frustrated, the Conference was dragging itself towards the end of a dead-end road.

But there are other roads. First Nigeria and then, in far greater detail, Austria have put proposals before the Conference which might meet the objectives and objections of all major groups of States. There is a certain reluctance to start all over at this late stage of the Conference; but better late than never, considering that the failure of the "compromise" has become a glaring fact that may endanger the success of the Conference as a whole.

What Austria has proposed -- thus far only informally, in order not to distract in any way from the ongoing efforts -- is a unitary joint-venture system based on the principle, not of an unsustainable competition between the Authority and established industry, but of cooperation: established industry is structured into the system by solid and well tried, familiar rules of the game.

Thus States and their companies, whether public or private, have guaranteed access to the international seabed area, but only in joint venture with the Authority. In other words: each one of the four or five international consortia, duly authorized by their States of origin, must form an Enterprise with the Authority whereby the Authority must furnish at least one half of the capital investment (including the value of the mineral nodules in situ, which are the Common Heritage of Mankind), appoint at least one half of the Board of Directors and obtain at least one half of all profits. Companies are

obviously quite used to working under such a system which offers them the advantage of reducing their capital investment and sharing their risks. Tenure, within an international system established by Treaty which cannot be changed except by international consensus, would be more securely guaranteed than it is in joint ventures with weak or unstable individual countries. On the other hand, this system offers to developing countries the possibility of broad participation in all Enterprises, through appointment, by the Authority, to the Governing Boards; and it offers the Authority the possibility of control and of broad financial participation.

The system vastly facilitates the problem of "financing" the Enterprises (reducing the required Authority investment by a factor of at least four) and of technology transfer (which follows standard form under a joint-venture arrangement and raises no particular problem.

The proposal has a number of other technical and political advantages over the "parallel system" belabored by the Composite Text. Among other things, it would greatly facilitate agreement on a resource policy which has turned out to be totally intractable under a "parallel system," and it would considerably shorten and simplify the present text, freeing it of involved sub-paragraphs and lengthy annexes. This, in turn would reduce the time still needed to complete the work. A Treaty within 1979 would become a practical possibility.

The United States, as one of the countries most advanced in deep-sea mining and as the leader of the industrialized world, bears a great responsibility at this Conference. It was the United States that led the Conference into the dead-end road of the "parallel system." What the U.S. will do next, now that we are at the dead-end, will clearly be of crucial importance.

To give up and fall back on national legislation

is not a workable alternative. Undoubtedly, national legislation is needed. It is needed, however, not as an alternative but as a complement and implementation of an international agreement. For only the integration of national effort and international cooperation can give the security of tenure and of investment that is needed by the industry. Nor can there be an "interim" solution: For the very concept of interim is contrary to long-term stability.

The stakes are high, higher even than those of the mining industry as such. For, in the Seabed Authority, within the context of an equitable and viable new law of the sea, a new type of international organization is arising: partly political, partly economic, partly scientific, and integrating these three realms of human endeavor in a new way; an international organization that is economically productive, scientifically operational, and politically apt to release new, dynamic forces for development and peace.

The Seabed Authority may well turn out to be the prototype for international organization and cooperation during the next century.