

August 19, 1976.

To: Ambassador Wolf

From: EMB

Subject: Comment on the proposal of the Group of 77 regarding Article 22, 23, and related provisions in Annex I.

General Comment: The document attempts a conservative and conciliatory approach to the redrafting of the articles and related provisions in Annex I. The changes do not affect the basic structure or functions of the Authority as conceived in the Revised SNT. There is more rhetorical emphasis on "complete" control "at all times," etc., but this is not substantiated operationally; there is more emphasis on benefits for developing countries, but, again, these are not substantiated operationally. Since the Enterprise is dysfunctional both in the Geneva text and in the Revised text, a compromise between these two cannot achieve anything. A new approach, a breakthrough is needed in this area.

The Committee, however, will have to live with this proposal until the report of the Secretary-General on how to finance the Enterprise will have been received and discussed. It is a foregone conclusion that the proposal of the 77 will die with that report.

Detailed Comments:

Article 22:

The Article is clear and well organized. It does not differ substantially from the Revised Text. A great deal hinges on the reference (paragraph 2) to the Statute of the Enterprise, which, under the present terms of reference, is not under discussion. It should be noted that without the Statute, and without reference to Article 41, the "package" is not viable -- i.e., does not constitute a "system" in the sense postulated yesterday by the delegate of the United States.

in Paragraph 3, reference to Article 28(2)(xii) has been deleted. This deletion is useful: The reference to Art. 28 (2)(xii) cannot be discussed until the functions and powers of the Council have been discussed. Art. 28(2)(xii), in my opinion, constitutes an unjustifiable attempt to circumvent the prerogatives of the Assembly.

Article 23:

This follows more closely the Revised Text than the Geneva Text. The only changes proposed: in paragraph 1, the deletion

of the words "except as specifically provided for in this Part of the Convention;" in paragraph 2, the addition of the words "including the conduct of activities by the Authority in certain parts of the Area solely in association with them." This provision accepts the "parallel system" of exploitation on which the Revised Text is based. The practical significance of the provision hinges solely on the availability of funds to the Authority --and this problem remains unsolved.

### Annex I

Paragraph 2: Here the 77 proposal returns to the Geneva Text, merely simplifying the final reference to contracts: The Geneva text provided "...and the terms and conditions of the relevant contracts, joint ventures or other form of association entered into by it"; the 77 proposal provides "...and the terms and conditions of the contracts."

Paragraph 7 contains two minor changes. in subparagraph c, the words "and on equal footing" have been inserted, referring to States applicants and other applicants. This insertion is likely to be opposed by the Soviet Union. There should be no difficulty in canceling it, since it has a merely rhetorical value.

Under subparagraph (c), a (iv) has been added, enjoining the Authority to "undertake to promote the interests of developing countries by association or other means." It is difficult to see how one should seriously oppose this provision, which is nonoperational.

(new) paragraph 8: Activities conducted through the Enterprise. If one is to assume that the Enterprise will have any practical function at all, this Article is unobjectionable and necessary. It cannot be discussed without discussing the Statute of the Enterprise, and without having an idea of the ways of financing it, however.

paragraph 8 (SELECTION OF APPLICANTS). The proposal of the Group of 77 (a) gives more emphasis to the initiative of the Authority: The Revised Text enables the Authority to act only "upon receiving an application with respect to activities..." whereas, under the proposal of the 77, it is the Authority which "determines to conduct activities in the Area..." It may determine so on its own initiative or upon receiving an application. (b) The 77 proposal provides for a time limit for the submission of competing applications; (c) the conditions under which applications are to be accepted are stated in positive rather than in negative terms; (d) the possibility, that a contract may not be concluded, is taken into consideration: in this

case "the Authority may reinitiate the procedure for selection of applicants..."

Again, the parallel system of exploitation is maintained, the changes with regard to the activities of the Authority in areas under direct exploitation by the Authority in association with developing countries are more editorial than substantial.

Paragraph (f) has been added. It incorporates part of what was provided by paragraph 9(a) of the Revised Text. It is difficult to see how one could seriously object to it.

In conclusion, it is clear that the proposal is not self-sufficient, and that the discussion must be enlarged.



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August 30, 1976.

To: Anton Vratusa

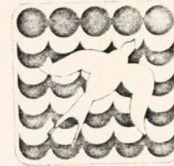
From: Elisabeth Borgese

Subject: INSTITUTIONAL HEADQUARTERS.

When, during the second session of the Law of the Sea Conference, Jamaica applied for the seat of the institutional headquarters emerging from the law of the sea Conference, only one institution was to be created and in quest of a seat. That was the International Seabed Authority.

During the third session in Geneva, the need for an additional new institution emerged: the Law of the Sea Tribunal. Originally it was suggested that the seat of the Law of the Sea Tribunal should be at the seat of the International Seabed Authority. Later this idea was abandoned, and quite rightly so. The Law of the Sea Tribunal deals with matters arising from all kinds of activities in the oceans. It must draw on expert advice from ILO, IMO, IOC, and UNEP. Jamaica would not be the most suitable place. In a way, the place for the Law of the Sea Tribunal should be "neutral" between the seats of these institutions.

During the fourth session in New York, further institutional requirements emerged. On the initiative of Portugal, two studies were undertaken: one, by the Delegation of Portugal, on institutional requirements implicit in the Negotiating Text; a second, by the Secretariat, on the institutional availabilities in the U.N. system. The need for restructuring and strengthening the existing agencies dealing with ocean affairs clearly emerged. What further emerged -- stressed in statements before the Plenary by Portugal, Sri Lanka, Surinam, and the International Ocean Institute -- was the need for some kind of continuing and coordinating mechanism to carry on where the Law of the Sea Conference will leave off. It was envisaged that such a continuing mechanism might consist in a bi-ennial meeting of contracting parties, assisted by a small Secretariat and a Group of Eminent Persons who should advise on any matter that contracting parties might bring to their attention and on the restructuring of the Agencies as



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- 2 -

on the integration of their policies.

It is here suggested that the seat of the Law of the Sea Tribunal, together with the seat of the continuing mechanism, be established in MALTA.

There are six reasons for this:

1. Malta has the unquestioned historic merit of having raised the whole law of the sea issue in the United Nations in 1967 and of being primarily responsible for the adoption of the Declaration of Principles, the establishment of the Seabed Committee and the calling of this Conference. Prime Minister Mintoff has emphasized this historic priority on many occasions.

2. With the establishment of the International Ocean Institute and the Mediterranean Marine Pollution Center, Malta has developed a notable international maritime capacity -- a point also stressed by the Prime Minister on many occasions.

3. Malta is politically, socially, and economically, as well as culturally and geographically, ideally located: Non-Aligned; between developed and developing States; between Europe, Africa, and Asia; at the center of the Mediterranean; at the crossroads of history and of many cultures and races; a nodal point of maritime traffic in war and peace; equipped with unique natural harbor facilities.

4. Malta is easily reachable from Rome (FAO), Paris (IOC), London (IMCO) and the Hague (ICJ); it is neutrally located between these and Nairobi (UNEP) and Jamaica (ISA).

5. Malta has excellent conference and housing facilities. Buildings evacuated by the departing NATO and U.K. authorities are ready to be taken over by the new ocean space institutions.

6. Malta's future as an independent and non-aligned nation depends heavily on international cooperation. As a world capital in ocean affairs it could survive in dignity and make its unique kind of contribution to world peace and development.

TO: AMBASSADOR WOLF

FROM: EMB

SUBJECT: COOPERATION WITH THE 77 IN COMMITTEE I

1. Cooperation between the Group of Landlocked and Geographically Disadvantaged Nations and the Group of 77 in Committee I would, at this crucial point, have a number of advantages:
  - (a) It might introduce an element of stability and productivity in this Committee which is, otherwise, rapidly disintegrating;
  - (b) Some concessions to the "77" in Committee I -- where our interests, by and large, coincide anyway -- might generate some concessions in Committee II.
  - (c) Progress in Committee I would tend to redress the balance of the Conference from the great over-emphasis on national interests -- from which our Group necessarily loses -- to more emphasis on the building of a new international order and international institutions, from which our group -- as well as the "77" -- have everything to gain.
2. The first item on which we could cooperate is the mode of Exploitation of the Area (Article 22) and, intimately connected therewith, Art. 41, "The Enterprise."
3. This aspect of Part I has developed into an absurdity. I do not think it can be brought back to reality by tampering with details. This is one of the few basic aspects of the SNT where a new approach is needed -- even if we start from the premise that as much as possible of the Revised Text must be saved, if we ever want to get a Treaty.
4. The interest of the "77" is to get an Enterprise system through which production is effectively controlled by the Authority.
5. Our Group consists largely of (a) socialist States; (b) small and progressive industrialized nations. Considering developments, even within the EEC with regard to European Companies, the "concessions" to the "77" are not shockingly radical. They are in fact in line with the Report of Eminent Persons on TNEs, and with general trends of our time.
6. Based on the reasoning of my recent paper III UNCLDS 4, I would propose the following changes in the SNT:

(a). Article 22 should read:

"1. Activities in the Area shall be conducted directly by the Authority and in association with the Authority and under its control in accordance with paragraph 3 of this article by States Parties, or State enterprises, or persons natural or juridical which possess the nationality of States Parties or are effectively controlled by them or their nationals, or any group of the foregoing in accordance with the provisions of Article 41, the rules regulations and procedures of the Authority, and the Statute of the Enterprise.

2. Activities in the Area shall be carried out in accordance with a formal written plan of work drawn in accordance with Annex I and approved by the Economic Planning Commission.

3. The Authority shall exercise control over activities in the Area for the purpose of securing effective compliance with the relevant provisions of this Convention."

In paragraph 1 I have omitted the last words of line 5, "when sponsored by such States," which, it seems to me, unduly restricts the freedom of the Authority. The Authority might want to cooperate with a small, independent company rather than with one of the multinationals that might be "sponsored" by a State. The provision that any legal entity cooperating with the Authority must possess the nationality of States Parties or be effectively controlled by them or their nationals, should be a sufficient guarantee as far as the Authority is concerned.

I have omitted reference to Article 28 (2)(xii). Quite apart from the fact that this paragraph constitutes an attempt to bypass the Assembly in a way that will not be acceptable to the "77", discussion of this provision must be postponed until we discuss the powers and functions of the Council.

In Paragraph 2, I think it is far more important that plans be approved by the Economic Planning Commission than by the Technical Commission. Discussion on this point too, however, can only be preliminary and will have to be resumed after we have discussed the Council.

Paragraph 3 has been simplified, and reference to Art. 28 (2)(xii) has been omitted for the reason explained above.

These changes are apparently minor. However, they must be read in connection with the proposed changes in Article 41. This Article now would read: