CATHARSIS

It was a long hot summer for the nearly 1,500 delegates who attended the Fifth Session of the Third Law of the Sea Conference in New York from August 2 to September 17 of this year. And the results -- to outsiders and insiders alike -- were disappointing.

And yet, this session was crucial, in many ways. In the long-range perspective it may even have been the most productive of all.

The Law of the Sea Conference -- embodying what is probably the most important development in international relations during the second half of this century -- goes back to the initiative of Malta in 1967: when Ambassador Pardo proposed that the oceans and their resources, beyond the limits of national jurisdiction be declared the common heritage of mankind, that the General Assembly adopt a Declaration of Principles governing the peaceful uses of the deep seabed, and that this Conference be called, to embody the Principles in a comprehensive treaty and the necessary institutional framework.

After six years of preparatory work, the Conference embarked, in December 1973, on the momentous task to give a new order to the oceans: as a part of, and conceivably model for, a new order for the world.

The very fact that the Conference was called was, and remains, a triumph for the proponents of a new international order.

Developments, since then, however, have not been of linear progression. Contradictory and overlapping trends have been at work.

Like Rashamon's story one could tell the story of the Conference, from the second session (Caracas, Summer, 1974) through the third (Geneva, Spring, 1975), fourth, and fifth (New York, Spring and Summer, 1976) in many quite different ways.

One could talk about the conflict between internationalism and nationalism which kept rearing its many heads in many ways.

At Caracas, one might say, the two trends of nationalism and internationalism were in balance: as exemplified, or even symbolized, by the key address of that session, delivered by President Luis Echeverria of Mexico. The entire first part of his address was a glorifiaction of national aggrandizement. The acquisition of an Exclusive Economic Zone, in which the coastal State would acquire sovereign rights was hailed as a victory of justice, a triumph for the developing nations. The second part of the speech, however, was unconditionally internationalistic in its approach.

President Echeverria's words bear repeating here, for they are exemplary:

> Man's entire attitude with regard to the sea must change. The dramatic growth of the world's population, and the consequent increase in demand for food from the sea; the expanding industrialization on all continents; the congestion of populations in coastal areas; the intensification of navigation and the ever more frequent deployment of supertankers, containers of liquid gas, and nuclear-powered vessels; the increasing use of chemical substances which eventually end up in the seas: all these are factors which impose the necessity to regulate globally, to administer internationally, the uses of the oceans. Every day there will arise new and greater conflicts between different competitive uses of the oceans, conflicts which no nation will be able to resolve alone.
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> There is furthermore a constant interaction between the multiple uses of the oceans. The exploitation of seabed resources may affect the utilization of the superjacent waters and vice versa; activities in international areas and in national coastal zones affect one another mutually; and the sea in its totality, and the atmosphere above it, form one ecological system. All these interactions demand a global and integrated vision and treatment of the marine environment.

From Caracas on, nationalism was on the ascent. The consequences for the Conference were profound: first of all, there was a shift in the equilibrium of the conference: The first Committee, charged with the responsibility of building the new international regime for the seabed, lost importance, so much so that rumors became audible according to which there might be a treaty without a seabed authority, the establishment of which might be postponed ad calendas graecas. The Second Committee, which was the forum for the advancing of national claims, became the real focus of the Conference.

Secondly , while the emphasis on the building of international instituions is potentially unifying, national claims are divisive: their effect on the Conference was disintegrative, cracking the structure into an infinity of interest groups, regional groups, negotiating groups. Ths substance and scope of the Conference seemed about to sink in the miasma of their wranglings, between Caracas and Geneva and New York.

Here is another way of telling the story: One group of nations wanted to replace the obsolescent freedom of the seas with strong management systems, both national and international, while another group -- mostly of maritime powers -- wanted to preserve the freedom of the seas which had profitted them in the past and still could profit them. They wanted both weak and fragmented international institutions, and weak and fragmented economic zones. As the conference itself tended to weaken and fragment, they found themselves on the ascent.

Yet another version traces the conflict between industrialized States on the one hand and developing countries on the other. Caracas, from this angle of observation, marks the high point of the initiative, cohesion, and revolutionary fervor among the developing nations, and although by the time of Geneva, symptoms of break-up were rampant, yet the spirit of Caracas was still strong enough to inspire the Third-World orientation of the emerging Single Negotiating Text. By the time and Fourth and Fifth Session got under way in New York, however, it was over. The acrimonious split between coastal and landlocked States went right through the lines of developing States. It was "institutionalized" with the establishment of an official Group of Coastal States at the beginning of the Fifth Session in New York. This split among the developing nations, no doubt, is largely responsible for the "turn to the right" manifest in the Revised Single Negotiating Text which articulates views much closer to those of the developed nations than the preceding Geneva Text.

A fourth version, thus, sees the main division running through the Conference's history as between coastal States and landlocked States. As all other single factors in the analysis, this factor too is to some extent illusory. The coastal States are the large majority of nations. Their interests, however are quite divergent. The landlocked and geographically disadvantaged States are even more divergent in their interests. Before every decision that is to be taken, their loyalties divide: some follow the lead of the Group of 77, in so far as it still exists; others -- the landlocked States of Eastern Europe, follow the lead of the Soviet Union, while the geographically disadvantaged States of Western Europe follow the line of the industrialized Western States. The points on which the all landlocked and geographically disadvantaged States can agree, are few.

Finally, the story could be told in simple terms of the results achieved: The Caracas session produced a preliminary, much labored working paper called "Main Trends," which set forth the position of various groups in the form of alternative articles. Geneva produced the Informal Single Negotiating Text -- a Draft Treaty in four parts which, though not produced by negotiation, nevertheless reflected the views of the major groups, attempted fair compromises, and still maintained some of the spirit of the origins. The prototype for the Informal Single Negotiating Text, though unavowed, was the Maltese Ocean Space Treaty of 1971: which had tried to reformulate the traditional law of the sea in terms of contemporary requirements; proposed, under the name of "national ocean space" what today is called the Economic Zone; established a Seabed Authority with comprehensive powers; dealt with pollution and scientific research, and provided for a dispute settlement system.

The New York Session (Spring 1976) produced the Revised Single Negotiating Text, which brought many technical improvements to the Geneva Text but wounded its heart in Part I.

The New York Session (Summer, 1976) produced...nothing.

This does not mean that no work was done, or that the delegates were dining and wining in what is now fashionably assumed to be United Nations style. Some out of the 1,500 may well have done so. But those -- several hundred -- who carry the real burden of the Conference, worked hard. Often they worked day and night.

The Conference was divided into four groups working simultaneously: To the three established working Committees was added, this time, the Plenary, charged with the responsibility of examining Part IV of the Single Negotiating Text which deals with the dispute settlement system. This part, drafted on the individual initiative of President Amerasinghe in the period between the Geneva and New York sessions, had not yet been subject to a full debate and thus was one stage behind the other parts of the Single Negotiating Text, even though conceptually, it was, in some ways, ahead of them. For the dispute settlement system provides the only unifying element in the Treaty thus far. It deals with issues arising from all uses of the oceans. It provides, in a way, a first piece of "integrative machinery" which otherwise is still well beyond the scope of the Conference.

The first weeks of the Plenary's debate on the dispute settlement system were indeed the highlight of the Conference. There was a group of international jurists of highest competence, representing different philosophies of law. Lauterpacht of Australia, Galindo Pohl of El Salvador, Romanoff of the Soviet Union, Sohn of the United States; Jusuf of Indonesia, Yakub Ali of Pakistan; Rosenne of Israel. Chaired by the Conference President (and author of the text) Ambassador Amerasinghe of Sri Lanka and, in his absence, by Minister Jens Evensen of Norway, it was an exceptional dialogue. It was a pleasure to listen to.

Two apparently conflicting trends came to the fore. On the one hand, participants insisted on flexibility and a wide range of choices among procedures -- from informal negotiation and conciliation, through arbitration, special procedures, to formally institutionalized procedures such as the International Court of Justice and the newly established Law of the Sea Tribunal. Every "culture" of jurisprudence showed its own strong preference for one or the other of these procedures. Yet each was tolerant toward the preferences of the others. The resulting comprehensive system, obviously, was rather complex.

On the other hand, participants urged *simplification*, the avoidance of cumbersome bureaucracies, duplication of efforts, multiplicity of jurisdictions. There seemed to be a strong trend in favor of abandoning the present proposal of the Single Negotiating Text for a Seabed Tribunal, provided for in Part I, and, quite separate therefrom, a Law of the Sea Tribunal dealing with issues arising from all other uses of the Sea.
The participants seemed more favorable to the establishment

of one single Law of the Sea Tribunal with several chambers, one of which would deal with Seabed questions.

Some time was spent on discussing the role of scientists and experts in dispute settlement. The conclusion that this role should be subsidiary and advisory only, was practically unanimous.

In reference to special procedures, the Single Negotiating Text attempts, in some instances, a distinction between issues arising from the application of the Convention and issues arising from its interprtation. Participants in the dialogue were almost unanimous in the opinion that such a distinction cannot be made.

Some delegates -- more conservative in their approach to international law -- had difficulties in conceiving that standing before the courts might be granted not only to States but to juridical and physical persons while others -- e.g., the members of the European Communities -- found this development of international law quite acceptable.

Opinions were deeply divided with regard to the degree to which international jurisdiction could be compulsory. The more conservative delegates saw in this an infringement of national sovereignty. Others saw in it the protection of weak States and the guarantee for their sovereignty. On the whole, as one of the leading participants put it, "There was reluctance to accept judicial settlement to the extent foreseen in Part IV of the Single Negotiating Text. *At the same time, it would also appear that States participating in this Conference are nevertheless ready to assume obligations in respect of judicial settlement of disputes arising in connection with the law of the sea which go further than at any earlier stage in history.*"

After the first few weeks' discussion, difficulties seemed to increase: mainly because of problems that had to be resolved by the other working groups. Thus no final position could be taken with regard to the structure of the dispute settlement system until the First Committee decides what it wants to do about its own dispute settlement system. And nothing, really, could be done with regard to procedure in general while the state of the law of the sea itself was as uncertain as it was: for the substance of the law and the settlement procedures are intimately interrelated.

Within the limits set by these uncertainties, however, many technical improvements to the Amerasinghe Text were suggested. The outcome will be a Revised Text which will be a better basis for negotiation, in line with the development of the law and its institutional framework.

The Third Committee had 13 informal meetings between August 10 and September 9 and examined primarily the provisions

of those articles relating to protection and preservation of the marine environment dealing with vessel source pollution. In total, 146 amendments were submitted to Part III of the Single Negotiating Text and four, to related articles in Part II. Most of the proposals aimed at removing ambiguities from the Text. Alexander Yankov, the Chairman of the Third Committee, while drawing the attention of the Conference to the many and important issues that had yet to be resolved, concluded his work, nevertheless, in a spirit of optimism, "since, in my personal opinion," he said, "we have successfully narrowed the issues before the Committee, and I believe that our common objective is almost within our grasp...That is why at the end of this session I feel a spirit of optimism, and I would like to express my readiness to fully cooperate and make all the necessary contributions to assist the President to reach a successful conclusion."

Committee I established five negotiating Groups which examined a number of controversial and unresolved questions such as the legal status of the exlusive economic zone and the rights and duties of the coastal State and of other States therein; the rights of access of landlocked States to and from the sea, and freedom of transit; payments and contributions in respect of exploitation of the continental shelf beyond 200 miles; the definition of the outer edge of the continental margin; straits used for international navigation, and the delimitation of areas under national jurisdiction between adjacent or opposite States.

Progress was made on a number of articles, on which final agreement is now well within sight. This applies roughly to about one third of the Articles of Part II of the Text. The final assessment of the Committee's Chairman, Ambassador Aguilar of Venezuela, was therefore not too pessimistic either: "It is clear from what has been said above, the Committee worked very hard at the present session. A sound selection was made of questions which called for priority consideration, and a serious negotiating process was begun in connection with them... No concrete results were achieved at this session regarding any of the questions considered by the various negotiating groups. Hosever, the process of negotiating on these complex and controversial issues is underway, and the work that has been done serves to afford Governments a very clear idea, at least in some cases, of the road to follow in seeking a final agreed formula."

The First Committee, alas, was bogged down in procedural questions for three full working weeks. Then it established a "workshop." The Workshop then established a negotiating group, but negotiations did not go beyond one article of the Text and a few related subparagraphs in the Annex. One was caught in the painful circle that the delegates took refuge in procedural difficulties and technical details in order to avoid the real issues, and that the real issues could not be discussed because of procedural difficulties. In spite of the dedicated work of the Chairman and the two co-chairmen -- Jagota of India and Sondaal of

the Netherlands who had been appointed to direct the work of the "workshop" and of the "negotiating Group," and of a number of Delegations and the Conference Bureau, negotiations came virtually to a standstill. "It would clearly be less than candid," the Chairman reported to the closing plenary meeting, "to describe this as one of our more productive sessions." He also said: "If it was regrettable that the First Committee failed at this session to make spectacular gains, it was, nevertheless, entirely understandable and, if I may say so, both foreseeable and foreseen." The Committee, he said, had progressed as far as it possibly could down its present road. "The time has come for the Committee to make a radical departure from its existing processes. At the heart of our problems lie a number of basic and highly political questions that have to be answered before any actual drafting of a compromise text can be undertaken in good faith, and these questions should be answered at the highest political level."

Three things became unmistakably clear during this session of the Conference: and this is why it may be considered as the most fruitful session of all:

1. In spite of the apparent shift to the "nationalistic" approach and the ensuing degradation of the work of the First Committee, it became clear that *there can be no treaty on the law of the sea unless in includes, in some form, Part I of the Single Negotiating Text, with provisions for the regime for the management of the resources of the seabed beyond national jurisdiction:* be it because the original inspiration of the Conference, hallowed in the Declaration of Principles adopted unanimously by the General Assembly, is hard to die; be it because the Treaty cannot leave a hole, a juridical vacuum, in the middle of the oceans. No matter how one looks at it: it became clear that the success or failure of the First Committee detemines the success or failure of the Conference as a whole. The recognition of this fact is of the greatest, positive importance.

2. It became clear that the difficulties of the First Committee were not difficulties of detail that could be negotiated by leaving a little and taking a little, but that they are of a profoundly political nature, dependent on one's basic approach to world order, including the New International Economic Order.

3. It became clear that the alternatives now before the Committee presented a dilemma with no way out: with absolutely no possibility of reaching a workable compromise. An entirely new approach is needed.

This last point requires some explanation.

Although there are many shades of opinion in the First Committee, and quite significant differences between socialist and free-enterprise nations, among the industrialized countries; deep divisions among the Communist States; a great variety of interests among the non-industrialized countries, and interesting

ideological contrasts between some of the socialist States and the developing countries, and, finally, there is a group of nations (the nordic group of Iceland, Finland, Norway and Sweden, plus Canada) which are more or less "neutral" in industrial policy and have begun to assume a highly constructive role as mediators in the conflict: one can, nevertheless, and without gross oversimplification, distinguish between *two basic positions* in the Committee: One group, of relatively few but strong States, adovates *freedom of access for States and State-sponsored companies* to the minerals of the deep seabed beyond national jurisdiction, under a weak and strictly limited, pro forma, institutional framework; and a large number of relatively weak States advocates a strong international institutional framework, including an international public Enterprise to exploit the common heritage of mankind. Attempts to reconcile these two positions by admitting both possibilitities in a so-called "parallel system" under which the Authority's Enterprise *and* States and their companies would freely mine, is an illusion: illusory, therefore, Secretary of State Kissinger's offer to "finance" the Authority's Enterprise in return for the right of free access to States and their Enterprises.

The Authority's Enterprise, such as it is now conceived in the Negotiating Text, is very poorly structured and conceptually defective, as we have shown elsewhere (Center Magazine August/ September, 1976). It is a political bureaucracy, merely duplicating other organs ofthe Authority: not a functional industrial enterprise. Poorly conceived and structured, it lacks everything else as well: capital, technology, experts. Although not viable, it might be propped up by monopoly, i.e., by excluding other entities from the Area, but it is clear that production , under such circumstances might not be very efficient, and if it is unacceptable to all of those who have the technology and the capital, there is bound to be trouble. If, on the other hand, the Authority is admitted on equal terms with industrial States and their companies, as is now being proposed, the Authority's Enterprise simply cannot compete.

Add to this that th "parallel system" completely changes the significance of the Enterprise and preempts its raison d' être.

The Authority's Enterprise was to embody a new form of active participatory cooperation between industrialized and developing countries. Sharing in the common heritage of mankind was to replace the humiliating concept of foreign aid. This was to be a breakthrough. This was to be the historic significance of the Enterprise.

Now, by a slide of hand, we are faced with a completely different concept. The industrialized States and their companies "do their own thing." They take what they need or want on the basis of "free access," provided merely with a "contract" which the Authority cannot refuse. The Enterprise, to which full lip service is rendered, becomes the status symbol of the poor. It

depends, once more, on aid from rich nations and grant-giving instittutions. Do the poor nations really need this kind of aid? There might even be more useful ways to spend this aid money than deep seabed mining, which, in development terms,, is certainly not the thing developing nations need most.

The "parallel system"--in any form or fashion -- is unacceptable and unworkable. To offer to "finance the Enterprise" in return for the acceptance of free access to States and companies merely means to try to buy free access for States and companies -- which, of course may be worth quite a lot. It also means to offer to spend public money to assure private profits. The "parallel system" draws a parallel between a reality and a myth. The concept of the common heritage of mankind recedes into the realm of myth.

The issue certainly was not spelled out in these terms at the conference. But it did become clear that *either alternative of the dilemma was unacceptable and that no compromise was possible*. This is tremendously important.

There must be a fresh start: a new conception of a unitary, not parallel system of exploitation: embodying the principle of the common heritage of mankind, assuring effective control by the Authority, and acceptable to at least some sectors of industry and capital.

The encouraging fact is that, at the very last minute of the very last working day, a proposal was introduced which might indeed point the way in this new direction. "Nigeria's distinguished Attorney-General and Commissioner for Justice, Mr. Justice Dan Ibekwe...proposed what he considered to be 'the area of least resistance'," Chairman Engo reported to the closing Plenary meeting. "He suggested in effect a joint venture system applying to all activities of exploration and exploitation in the Area; this, he argued, would avoid the problems of the types of relationships proposed between the Authority on the one hand and States and private parties on the other."

Although the proposal needs to be developed and spelled out, it appears to be very much in line with the proposal published in the Center Magazine last August/September. If the First Committee, during the next session, in May 1977, succeeds in working out the details to assure effective control of investment and decision-making to the Authority in these joint ventures, Part I of the Single Negotiating Text could be concluded successfully that very same year.

A breakthrough in Committee I would have a tremendous effect on the work of the other Committees, which have not yet had their own catharsis, and whose catharsis will be far less traumatic than that of the First Committee. Yet, also the Second

and Third Committee need their brekathrough: a shift in perspective on some crucial issues may reveal the alternatives of of perceived dilemmas as optical illusions.

It is quite possible, for instance, that the hopeless confrontation between land-locked and geographically disadvantaged nations on the one hand and coastal States on the other, which characterizes -- and threatens -- the present stage of negotiations at the Conference, will completely change its nature over the next ten to twenty years. To achieve this, again, a slightly different perspective is needed. Obviously it is very difficult, if possible at all, to resolve this conflict within the narrowly circumscribed framework of the Law of the Sea Conference, within which one group makes only demands (the landlocked States) and the other group is supposed to make only concessions. This, obviously, is not a good framework for negotiation. If the conflict is taken out of this narrow framework and inserted into the wider context of the new international economic order, the problem not only becomes soluble: it goes away. One of the points on the plan of action for the New International Economic Order is *regional economic integration*. Within such a framework, wherein *all* States of a region benefit from and make concessions to the realization of a common economic policy, landlocked States have the same rights in all economic activities as all other members of the Economic Community. In the EEC, which, in some ways, is the most advanced example, the citizens of any State, including landlocked States (there is only Luxembourg) have the right to fish in the waters under the jurisdiction of any other member State; they have the same rights on the continental shelf of any other member State, and they have free transit to and from the sea. This, obviously, is the way to go, but it can only be done in the wider framework of building a new international economic order , by means of regional economic integration, among other things. This is the way to heal the rift between landlocked and coastal developing States, which is essential for the success of the Conference and for the building of the New International Economic Order.

As far as the Third Committee is concerned, the place where a breakthrough is most needed is probably the issue of freedom of scientific research versus coastal State control. This, as the Committee's Chairman put it in his final report, again, is "a question of crucial importance not only for the Third Committee but for the outcome of the Conference as a whole." The Chairman himself proposed, during this session, a compromise formula which, essentially, provides for a consent regime under which, however, the coastal States "shall normally grant their consent for marine scientific research activities by other States or competent international organizations in the economic zone or on the continental shelf of the coastal State. To this end, coastal States shall establish rules and procedures insuring that such consent will not be delayed or denied unreasonably." It is provided also that coastal States "may withhold their consent" if a project "bears upon the exploration and exploitation of the living and nonliving resources," involves drilling or the use of

explosives, or the construction and operation of artificial islands or other structures.

While it may be relatively easy to make a decision based on these latter two, fairly tangible and objective criteria, the first one is far more difficult to deal with. Who is to decide what kind of scientific research may have a bearing, direct or indirect, upon the exploration and, eventually, exploitation of living and nonliving resources? Is there any project that does not? And what about the military implications of the research? No matter in what form it is couched, any attempt to distinguish between "fundamental" research and "resource-oriented" research, or between "peaceful" or "military-oriented" research is bound to lead to insuperable complications.

If we were to look for a breakthrough, analogous to those in the other two Committees, we would have to *abandon both alternatives of the dilemma:* We should advocate *neither* freedom of research in areas under the national jurisdiction of another State, which is unacceptable, *nor* coastal State control: which might be stifling for scientific research, and scientific research is essential for the building of a rational new order in the oceans and in the world. Instead of either of these alternatives, one might look toward the *internationalization* of research: the more the better. To begin with, the Intergovernmental Oceanographic Commission (IOC) should be entrusted with the responsibility of examining, registering, and guaranteeing projects of scientific institutions. Obviously, costal States, and in particular, developing coastal States would *participate* in this examination and in undertaking this guarantee. *Only institutions or projects thus registered and guaranteed would be "free,"* subject, of course, to some provisions for participation by the coastal State and for the sharing of benefits: provisions already agreed upon by the Conference without any dissent. Only research carried out under *national* or *private* auspices, and not registered by IOC, would be subject to a consent regime, i.e., to bilateral negotiations between the researching State and the coastal State in or under whose waters the research is to be carried out.

Proposals in this direction have already been advanced in the Third Committee. It is likely that their day will come.

Things will move again at the next session. The catharsis was necessary. It may well turn out to have been quite productive.

E.M.

E.M. Borgese

The Fifth Session.

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After six years of preparatory work, the Conference embarked, in December 1973, on the momentous task of giving a new order to the oceans: as a part of, and conceivably model for, a new order for the world.

The very fact that the Conference was called was, and remains, a triumph for the proponents of a new international order.

Developments since then, however, have not been of linear progression. Contradictory and overlapping trends have been at work.

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Law of the Sea Tribunal with several chambers, one of which would deal with Seabed questions.

Opinions were deeply divided with regard to the degree to which international jurisdiction could be compulsory. The more conservative delegates saw in compulsory international jurisdiction an infringement of national sovereignty. Others saw in it the protection of weak States and the guarantee for their sovereignty. On the whole, as one of the leading participants put it, "There was reluctance to accept judicial settlement to the extent foreseen in Part IV of the Single Negotiation Text. At the same time, it would also appear the States participating in this Conference are nevertheless ready to assume obligations in respect of judicial settlement of disputes arising in connection with the law of the sea which go further than at any earlier stage in history."

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Within the limits set by these uncertainties, however, many technical improvements to the Amerasinghe Text were suggested. The outcome will be a Revised Text which will be a better basis for negotiation, in line with the development of the law and its institutional framework.

The Third Committee had 13 informal meetings between August 10 and September 9 and examined primarily the provisions of those articles relating to protection and preservation of the marine environment dealing with vessel

source pollution. In total, 146 amendments were submitted to Part II[1] of the Single Negotiating Text and four to related articles in Part II. Most of the proposals aimed at removing ambiguities from the Text. Alexander Yankov, the Chairman of the Third Committee, while drawing the attention of the Conference to the many and important issues that had yet to be resolved, concluded his work, nevertheless, in a spirit of optimism, "since, in my personal opinion," he said, "we have successfully narrowed the issues before the Committee, and I believe that our common objective is almost within our grasp.....That is why at the end of this session I feel a spirit of optimism, and I would like to express my readiness to fully cooperate and make all the necessary contributions to assist the President to reach a successful conclusion."

Committee II established five negotiating Groups which examined a number of controversial and unresolved questions such as the legal status of the exclusive economic zone and the rights and duties of the coastal State and of other States therein; the rights of access of landlocked States to and from the sea, and freedom of transit; payments and contributions in respect of exploitation of the continental shelf beyond 200 miles; the definition of the outer edge of the continental margin; straits used for international navigation, and the delimitation of areas under national jurisdiction between adjacent or opposite States.

Progress was made on a number of articles, on which final agreement is now well within sight. This applies roughly to about one third of the Articles of Part II of the Text. The final assessment of the Committee's Chairman, Ambassador Aguilar of Venezuela, was therefore not too pessimistic either: "It is clear from what has been said above, the Committee worked very hard at the present session. A sound selection was made of questions

which called for priority consideration, and a serious negotiation process was begun in connection with them... No concrete results were achieved at this session regarding any of the questions considered by the various negotiating groups. However, the process of negotiating on these complex and controversial issues is underway, and the work that has been done serves to afford Governments a very clear idea, at least in some cases, of the road to follow in seeking a final agreed formula."

The First Committee, alas, was bogged down in procedural questions for three full working weeks. Then it established a "workshop." the Workshop then established a "Negotiating Group," but negotiatinns did not go beyond one article of the Text and a few related subparagraphs in the Annex. One was caught in a painful circle where the delegates took refuge in procedural difficulties and technical details in order to avoid the real issues, and the real issues could not be discussed because of procedural difficulties. In spite of the dedicated work of the Chairman and the two co-chairmen -- Jagota of India and Sondaal of the Netherlands who had been appointed to direct the work of the "Workshop" and of the "Negotiating Group," and of a number of Delegations and the Conference Bureau, negotiations came virtually to a standstill. "It would clearly be less than candid," the Chairman reported to the closing plenary meeting, "to describe this as one of our more productive sessions." He also said: "If it was regrettable that the First Committee failed at this session to make spectacular gains, it was, nevertheless, entirely understandable and, if I may say so, both foreseeable and foreseen." The Committee, he said, had progressed as far as it possibly could down its present road. "The time has come for the Committee to make a radical departure from its existing processes. At the heart of our problems lie a number of basic and highly political

questions that have to be answered before any actual drafting of a compromise text can be undertaken in good faith, and these questions should be answered at the highest political level."

Three things became unmistakeably clear during this session of the Conference: and this is why it may be considered as the most fruitful session of all:

1. In spite of the apparent shift to the "nationalistic" approach and the ensuing degradation of the work of the First Committee, it became clear that there can be no treaty on the law of the sea unless it includes, in some form, Part I of the Single Negotiating Text, with provisions for the regime for the management of the resources of the seabed beyond national jurisdiction: be it because the original inspiration of the Conference, hallowed in the Declaration of Principles adopted unanimously by the General Assembly, is hard to die; be it because the Treaty cannot leave a hole, a juridical vacuum, in the middle of the oceans. No matter how one looks at it: it became clear that the success or failure of the First Committee determines the success or failure of the Conference as a whole. The recognition of this fact is of the greatest, positive importance.

2. It became clear that the difficulties of the First Committee were not difficulties of detail that could be negotiated by leaving a little and taking a little, but that they are of a profoundly political nature, dependent on one's basic approach to world order, including the New International Economic Order.

3. It became clear that the alternatives now before the Committee presented a dilemma with no way out: with absolutely no possibility of reaching a workable compromise. An entirely new approach is needed.

This last point requires some explanation.

Although there are many shades of opinion in the First Committee, and quite significant differences between socialist and free-enterprise nations, among the industrialized countries; and deep divisions among the Communist States; a great variety of interests among the non-industrialized countries, and interesting ideological contrasts between some of the socialist States and the developing countries, and finally, there is a group of nations (the nordic group of Iceland, Finland, Norway and Sweden, plus Canada) which are more or less "neutral" in industrial policy and have begun to assume a highly constructive role as mediators in the conflict: one can, nevertheless, and without gross oversimplification, distinguish between <u>two basic positions</u> in the Committee: One group, of relatively few but strong States, advocates <u>freedom of access</u> for States and State-sponsored companies to the minerals of the deep seabed beyond national jurisdiction, under a weak and strictly limited, pro forma, institutional framework; and a large number of relatively weak States advocates a <u>strong international institutional framework,</u> including an international public Enterprise to exploit the common heritage of mankind. Attempts to reconcile these two positions by admitting both possibilities in a so-called "parallel system" under whith the Authority's Enterprise <u>and</u> States and their companies would freely mine, is an illusion: illusory, thererfore, Secretary of State Kissinger's offer to "finance" the Authority's Enterprise in return for the right of free access to States and their companies.

The Authority's Enterprise, such as it is now conceived in the Negotiating Text, is unfortunately very poorly structured and conceptually defective. It is a political bureaucracy, merely duplicating other organs of the Authority: not a functional, operational industrial

enterprise. Poorly conceived and strudtured, it lacks everything else as well: capital, technology, experts. Although not viable, it might be propped up by monopoly, i.e., by excluding other entities from the Area, but it is clear that production, under such circumstances might not be very efficient, and if the system is unacceptable to all of those who have the technology and the capital, there is bound to be trouble. If, on the other hand, the Authority's Enterprise is admitted on equal terms with industrial States and their companies, as is now being proposed, the Authority's Enterprise simply cannot compete.

What is even worse is that the "parallel system" completely changes the significance of the Authority's Enterprise and preempts its raison d'être.

The Authority's Enterprise was to embody a new form of active, participatory cooperation between industrialized and developing countries. Sharing in the common heritage of mankind was to replace the humiliating concept of foreign aid. This was to be a breakthrough. This was to be the historic significance of the Enterprise.

Now, by a slight of hand, we are faced with a completely different concept. The industrialized States and their companies "do their own thing." They take what they need or want on the basis of "free access," provided merely with a "contract" which the Authority cannot refuse. The Enterprise, to which full lip service is rendered, becomes the status symbol of the poor. It depends, once more, on aid from rich nations and grant-giving institutions. Do the poor nations really need this kind of aid? There might even be more useful ways to spend this aid money than deep seabed mining which, in development terms, is certainly not the thing developing nations need most.

The "parallel system" -- in any form or fashion -- is unacceptable and unworkable. To offer to "finance the Enterprise" in return for the acceptance of free access to

merely means to buy free access for States and the companies:

States and companies -- which, of course, may be worth quite a lot. It also means to offer to spend public money to assure private profits. The "parallel system" draws a parallel between a reality and a myth. The concept of the common heritage of mankind recedes into the realm of myth.

The issue certainly was not spelled out in these terms at the conference. But it did become clear that either alternative of the dilemma was unacceptable and that no compromise was possible. This is tremendously important.

There must be a fresh start: a new conception of a unitary, not parallel system of exploitation: embodying the principle of the common heritage of mankind, assuring effective management and control by the Authority and acceptable to at least some sectors of industry and capital.

The encouraging fact is that, at the very last minute of the very last working day, a proposal was introduced which might indeed point the way in this new direction. "Nigeria's distinguished Attorney-General and Commissioner for Justice, Mr. Justice Dan Ibekwe...proposed what he considered to be 'the area of least resistance'," Chairman Engo reported to the closing Plenary meeting. "He suggested in effect a joint venture system applying to all activities of exploration and exploitation in the Area; this, he argued, would avoid the problems of the types of relationships proposed between the Authority on the one hand and States and private parties on the other."

The proposal needs to be developed and spelled out. If the First Committee, during the next session, in May 1977, succeeds in working out the details to assure effective control of investment and decision-making to the Authority in these joint ventures, Part I of the Single Negotiating Text could be concluded successfully that very same year.

A breakthrough in Committee I would have a tremendous effect on the work of the other Committees, which have not yet had their own catharsis, and whose catharsis will be far less traumatic than that of the First Committee. Yet, also the Second and Third Committee need their breakthrough: a shift in perspective on some crucial issues may reveal the alternatives of perceived dilemmas as optical illusions.

It is quite possible, for instance, that the hopeless confrontation between landlocked and geographically disadvantaged nations on the one hand and coastal States on the other, which characterizes -- and threatens -- the present stage of negotiations at the Conference, will completely change its nature over the next ten to twenty years. To achieve this, again, a slightly different perspective is needed. Obviously it is very difficult, if possible at all, to resolve this conflict within the narrowly circumscribed framework of the Law of the Sea Conference, within which one group makes only demands (the landlocked States) and the other group is supposed to make only concessions. This, obfiously, is not a good framework for negotiation. If the conflict is taken out of this narrow framework and inserted into the wider context of the new international economic order, the problem not only becomes soluble: it goes away. One of the points on the plan of action for the New International Economic Order is <u>regional economic integration</u>. Within such a framework, wherein <u>all</u> States of a region benefit from, and make concessions to, the realization of a common economic policy, landlocked States have the same rights in all economic activities as all other members of the Economic Community. In the EEC, which, in spite of all its difficulties, is the most advanced example of economic regional integration, the citizens of any State, including landlocked States (there is only Luxemburg) have the right to fish in the waters under the jurisdiction of any other member State (barring

changes in policy); they have the same rights on the continental shelf of any other member State, and they have free transit to and from the sea. This, obviously, is the way to go, but it can only be done in the wider framework of building a new international order, by means of regional economic integration, among other things. This is the way to heal the rift between landlocked and coastal developing States, which is essential for the success of the Conference and for the building of the New International Economic Order alike.

As far as the Third Committee is concerned, the place where a breakthrough is most needed is probably the issue of freedom of scientific research versus coastal State control. This, as the Committee's Chairman put it in his final report, again, is "a question of crucial importance not only for the Third Committee but for the outcome of the Conference as a whole." The Chairman himself proposed, during this session, a compromise formula which, essentially, provides for a consent regime under which, however, the coastal States "shall normally grant their consent for marine scientific research activities by other States or competent international organizations in the economic zone or on the continental shelf of the coastal State. To this end, coastal States shall establish rules and procedures insuring that such consent will not be delayed or denied unreasonably." It is provided also that coastal States "may withhold their consent" if a project "bears upon the exploration and exploitation of the living and nonliving resources," involves drilling or the use of explosives, or the construction and operation of artificial islands or other structures.

While it may be relatively easy to make a decision based on these latter, fairly tangible and objective criteria, the first one, is far more difficult to deal with. Who is to decide what kind of scientific research may have

a bearing, direct or indirect, upon the exploration and, eventually, exploitation of living and nonliving resources? Is there any project that does not? And what about the military implications of the research? No matter in what form it is couched, any attempt to distinguish between "fundamental" research and "resource-oriented" research, or between "peaceful" or"military-oriented" research is bound to lead to insuperable complications.

If we were to look for a breakthrough, analogous to those in the other two Committees, we would have to abandon both alternatives of the dilemma: We should advocate neither freedom of research in areas under national jurisdiction of another State, which is unacceptable, nor coastal State control: which might be stifling for scientific research, and scientific research is essential for the building of a rational new order in the oceans and in the world. Instead of either of these alternatives, one might look towards the internationalization of research: the more the better. To begin with, the Intergovernmental Oceanographic Commission (IOC) should be entrusted with the responsibility of examining, registering, and guaranteeing projects of scientific institutions. Obviously, coastal States, and, in particular, developing coastal States, would participate in this examination and in undertaking this guarantee. Only institutions or projects thus registered and guaranteed would be "free," subject, of course, to some provisions for participation by the coastal State and for the sharing of benefits: provisions already agreed upon by the Conference without any dissent. Only research carried out under national or private auspices, and not registered by IOC, would be subject to a consent regime, i.e., to bilateral negotiations between the researching State and the coastal State in or under whose waters the research is to be carried out.

Proposals in this direction have already been advanced

in the Third Committee. It is likely that their day will come.

Things will move again at the next session. The catharsis was necessary. Now the drama can move towards its end.

E.M. Borgese