(BACKGROUND PAPER - 1)

THE LAW OF THE SEA AND THE NEW INTERNATIONAL ECONOMIC ORDER

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Part I

THE UNIFIED TEXTS

A/CONF.62/WP.8/Parts I, II, III

[Most recipients of this material will have obtained the Unified Texts. For reasons of weight and economy, therefore, we omit them in this collection. If you require a copy, however, we shall be happy to supply you with one.]

Part II

ANALYSIS

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Introduction

At the conclusion of the third session of the Third United Nations Conference on the Law of the Sea (Geneva, March 17 - May 9, 1975), the President distributed an Informal Single Negotiating Text (A/Conf.62/WP.8/Part I, II, and III). The drafting of these documents was the responsibility of the three Committee Chairmen. In their work, the Chairmen took into account all the formal and informal discussions held so far. The documents do not represent the consensus of the Conference -- they have not been "negotiated." They are intended to be "negotiating documents," i.e., they constitute a unified, concrete and systematic basis for further discussion and negotiation. They do not affect the status of proposals already made by delegations or the right of delegations to submit amendments or new proposals.

In spite of these qualifications, the documents constitute, in the opinion of this writer, a real break-through. They project a systematic and coherent picture of the new law of the sea. From a juridical, technical, and drafting point of view, the documents are throughout of the highest quality. They are impeccably fair in attempting to accommodate the points of view of all major groups. Considering the trends that actually were prevailing at the Geneva session, which did not distinguish itself as particularly constructive or progressive or intent on building a new international order, the documents went as far in this direction as they possibly could. They certainly attempt a synthesis between national and international interest, even if they could not be successful in all cases without leaving prevailing conference trends dangerously far behind. These trends, however, have changed since 1967 when the delegation of Malta first brought the Marine Revolution to the attention of the international community. They will keep changing. A thorough analysis of the present documents, and a number of studies to which such analyses may give rise, should contribute to the further evolution of conference trends and to the further development of the documents.

The present analysis thus is not meant as a criticism but as a contribution, no matter how tentative and preliminary, to this development.

PART I

TEXT PRESENTED BY THE CHAIRMAN OF THE FIRST COMMITTEE
(A/CONF.62/WP.8/Part I)

PART I

General comments.

This is a fascinating document, containing many of the ideas we worked on from 1968 to 1970.

The basic defects are:

1. a discrepancy or disproportion between structure and function. The structure is most complex, comprehensive -- and costly; the function will turn out to be very limited. The mining of manganese nodules from the deep ocean floor of international ocean space will be of minor importance for the rest of this century, creating an income of about 50 to 150 million dollars annually. This could be administered in a much simpler way.

2. an inadequacy in the Council's composition. The "criteria" of selection of members composing it are ad hoc, and unstable.

On the positive side one should note that this is a structure designed for the future which might well become a model for the restructuring of other international organizations operating in ocean space, in a more practical and more real economic context.

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Detailed comments.

Article 1 is a good opening, revealing the spirit of synthesis and accommodation pervading the whole document.

Subparagraph (ii) is rather comprehensive, much more so than both superpowers would concede. Both of them, in fact, made strong statements in Geneva to the effect that scientific research should be explicitly excluded from the competences of the Authority. It is here explicitly included.

Subparagraph (iv), instead, is taken over literally from A/Conf. 62.C1/L.12, i.e., the Soviet paper on Basic Conditions.

Subparagraph (iv) (a) provides an interesting opening towards including the water column. If you deal with "water, steam, hot water and also sulphur and salts extracted in liquid form in solution," how can you separate the seabed from the water column?

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Article 2 leaves the determination of the boundary between national and international jurisdiction clearly to the member States themselves. There is no mention of any third party arbitration or dispute settlement in case national claims are unreasonable. In this context, let me quote a recent statement by the Canadian Minister for the Environment and Fisheries:

> We are pushing our limits seaward, pushing them to the edge of the continental shelf, to the continental margin, to the margin including the slope.... Our continental shelf is immense.... We are taking over these great resources, making them ours from the management point of view and, indeed, an ownership point of view, with very little effort and very little attention. (WORI Report, April, 1975)

It is this kind of attitude that is bound to reduce the significance, in economic and political terms, of the Seabed Authority and therefore its effective contribution to the building of the New International Economic Order.

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Articles 3 to 10. Not much needs to be said about these articles. As Chairman Engo pointed out in his accompanying letter, they spell out the Declaration of Principles, without substantial additions. Article 8, for instance, might have been a bit more precise. When shall we make any progress towards a definition of "peaceful uses"?

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Articles 10 to 12. This section must be better coordinated, or should probably be merged, with the text of Part II, in particular, Articles 8, 9, 17, 25, and 28.

Article 10 of Part I states that "The Authority shall be the centre for harmonizing and co-ordinating scientific research." The document does not, however, provide for an organ to exercise this function. There is a Commission for Planning (excellent); there is a technical Commission (less important than the scientific organ would be); but there is no scientific Commission. Perhaps the omission is voluntary, in order to avoid duplication of efforts with IOC.

IOC, in fact, submitted a paper to the Conference announcing its intention of becoming the scientific arm of the new international Authority. In a resolution of its executive body IOC declared that it would do the necessary "restructuring" to assume this function. IOC, of course, would deal with oceanographic sciences as a whole, not merely with the seabed. So do, it would seem, the "appropriate international organizations" referred to in Part III. It would indeed be difficult to separate the seabed and the water with regard to scientific research. It seems that more work is needed to harmonize this section of Part I with Part III and a redefinition of the role of IOC.

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Article 17 might contain a reference to dispute settlement.

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The International Sea-Bed Authority

Articles 25 and 26. We now come to the structure of the Authority. There seems to be a contradiction between Article 26, which states that "the Assembly shall be the supreme policymaking organ of the Authority," and Article 25, which severely limits the effectiveness of Assembly control. Subparagraph 2 provides that the Assembly meet only once every two years in regular session. This is simply not enough. Subparagraph 8 provides a delaying mechanism which can be set in motion by a minority of one-third of the Members of the Assembly on "any matter before the Assembly," which may have a rather crippling effect.

Article 26 is inspired by the "77." Article 25 is a concession to the United States (the delaying mechanism was proposed by the U.S. in a statement in the First Committee on April 28). A better harmonization of these articles is needed.

Subparagraph 2 of Article 26 empowers the Assembly to appoint the members of the Governing Board of the Enterprise. This is excellent. We had such a provision in our model draft constitution, The Ocean Regime (second revision, 1970). This draft, incidentally, contains what is still the most complete description of what an "Enterprise" (or "Maritime Corporation") might look like and how it could be integrated into the political structure.

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Article 27. This Article on The Council is perhaps the most difficult. It is also the weakest. Such as it is composed here, the Council cannot function. The underlying principle, that the Council should be based on a balanced combination of regional, national, and functional representation, is sound and points toward the future. The application, however, is faulty.

The regional principle is sadly underdeveloped. Africa, Asia, Eastern Europe (socialist), Latin America, and "Western Europe and others" are no constituencies in any sense. Clearly, these groupings have been taken over from the regional working groups which play an increasingly important role at the Conference itself. But they have arisen in a somewhat casual and informal way. To structuralize and "freeze" them in a constitution would be a mistake. The "regions" which could form a basis for representation in the Council must be (1) more equal in population, and (2) more coherent culturally or geographically or economically or politically. To design them in these terms is not an easy job and will require a great deal of negotiation. The division into nine regions proposed by Neptune, No. 6, May 7, 1975 (see Appendix I) might provide a starting point.

Once an acceptable regional division has been agreed upon, each region should have the same number of Delegates. Membership should be rotated among the states within each region.

Functional interests have been transformed into special, ad hoc interests of States and thereby rendered dysfunctional. The Council is a political organ. It is extremely dangerous to base representation in a political organ on magnitudes of investment. The six richest States must not have any special position in the Council. This violates not only the principle of sovereign equality among nations. It also violates any principle of equity. It vitiates the idea of democracy in international relations. Magnitudes of investment may play a role in the Enterprise, which is a business. In The Ocean Regime, we provided, in fact, that the Assembly should appoint 50% plus one of the Governing Board of the Enterprise. The rest would be appointed by States or Corporations in proportion to their investment.

But the Council must be kept "clean."

The allotment among the developing countries is less dangerous but equally dysfunctional. It is ad hoc, arbitrary, necessarily incomplete, and unstable, e.g., there is a provision for landlocked States. Why not "developing island States" to which reference is made in a number of places in the documents adopted by the Sixth Special Session of the General Assembly? Why not "developing oceanic States"? Where do you put a country like Mexico?

The division corresponds to that proposed by the "77." It is defective nevertheless.

If the regional principle were well-developed, one might renounce this category of representation altogether.

In his accompanying note, Engo is fully aware of the transitory nature of the divisions which are here frozen into a system of representation. It is dangerous. It cannot work.

Subparagraph 7, finally, provides for the ad hoc representation of any State when a matter particularly affecting it is under discussion. This is a good provision, safeguarding national interests in a body which is not directly based on States. There is a danger, however, that too many States will apply for the privilege of being represented and heard, and thus the Council might become "open-ended" and ineffective. A provision that the number of States thus represented shall at no time be greater than, say, four, might solve this problem. On the other hand, to protect national interests even more effectively, one might entitle the Delegate of the State not only to participate in the deliberations but also to vote. He could not do much harm. We have a provision of just this kind in The Ocean Regime.

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Articles 29 to 31 are very good. The Technical Commission might be conceived as a Commission on Science and Technology, and this would solve, at least partly, the problems raised above in connection with Articles 10 to 12.

Subparagraph 2 of Article 29 provides that "The Council shall invite States Parties to this Convention to submit nominations for Appointment to each Commission." This might be a place to give greater scope to nongovernmental organizations, such as trade unions, organizations of producers and consumers, as far as the Planning Council is concerned, and universities and scientific institutions with regard to the Council on Science and Technology. Since the members of the Commissions serve in an individual capacity and on the basis of their technical skills, it would be appropriate if they were nominated by competent institutions rather than by States. On the other hand, to tie in institutions other than States would be in accordance with the trend of the times and the aspirations of many people.

There might be an additional article, following Article 31, giving the Council the possibility to create other Commissions if the occasion arises, e.g., there might be a Commission on the Law of the Sea to review and revise and harmonize national and international maritime law.

There might also be a provision for temporary Committees, hearings, etc.

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I prefer to hold my comments on the Tribunal (Articles 32 to 34) until we have the Annex which Ambassador Engo is currently drafting.

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The same applies to the Enterprise (Article 35). I prefer to comment when we have the Annex.

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Articles 26 to 41 on the Secretariat are standard and non-controversial.

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Finances

Articles 42 to 47 might contain some general provisions on profit-sharing, although it is all too clear that there will not be any profits to share for many years and, on the other hand, profit-sharing should not be forced into any rigid scheme but should be flexible and according to needs. Nevertheless, something ought to be said.

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No comment is needed on the remaining Articles 48 to 75 which are standard.

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Annexes

The Annex I on Basic Conditions of General Survey Exploration and Exploitation is extremely well done. With some variants, it follows very closely CP cab of 9 April 1975. It is not as specific as the industrialized nations would have desired but far more specific than the original proposal of the "77." It concentrates on joint ventures. Other forms of operation and management should also be included.

Considering the rate of technological change it would perhaps be advantageous if a special provision were included in the Amendment clause (Articles 64 and 65), stipulating, e.g., that amendments to this Annex come into force if ratified by a majority rather than by two-thirds of member States.

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PART II

TEXT PRESENTED BY THE CHAIRMAN OF THE SECOND COMMITTEE (A/CONF.62/WP.8/Part II)

PART II

General comments.

The drafting of this section presented an almost superhuman task for the Chairman of the Second Committee. To compose a coherent whole out of the contradictions and conflicts ravaging his Committee should have seemed impossible. He has accepted, and undoubtedly had to, maximal claims of national expansion and accommodated other interests within these perimeters. In commenting on the Articles, I shall accept the same framework: a territorial sea of twelve miles, an economic zone of 200 miles, and the obsolescent division of ocean space into territorial sea, contiguous zone, economic zone, high seas, economic shelf, and seabed beyond the limits of national jurisdiction. I shall comment on some of the consequences for the new International Economic Order in the concluding section of this analysis.

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Detailed comments.

Article 4. It would be appropriate that the Charts mentioned in this Article were not only officially recognized by the coastal State but at least deposited with the international institution.

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Article 5 could perhaps be spelled out in some more detail. What if the reef is submerged at high tide? What if the distance between the low-water mark of the natural entrance points of the reef exceeds 24 nautical miles? Might there be a definition of what an atoll is?

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Article 6. Since the length of the base line is not limited, this Article is bound to give rise to uncontrollable expansionisms. This may be modified to some extent by Subparagraph 3, but this Subparagraph is imprecise. It reminds of the "adjacency clause" in the Continental Shelf Convention, and it is well-known what happened to that....

Subparagraph 4 might include also man-made islands and offshore fixed or floating installations.

Subparagraph 5 may give rise to many interpretations.

Subparagraph 7 provides for the Charts of these baselines to be turned over to the Secretary General who shall give due publicity thereto. So why not the same for Article 4? Is the Secretary General of the United Nations the suitable authority? Would the Secretary General of the Seabed Authority be more suitable?

The coastal State is the only authority to determine its own baselines, and there is no provision for any disagreement between the international authority and the coastal State.

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Article 8. With regard to the Secretary General, see comments on Article 6, Subparagraph 5 above.

Subparagraph 6. Why not add a provision making it incumbent on contracting parties to register their claims to historic bays and waters within a determined time span after which no further claims would be recognized? This might avoid complications later.

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Article 13, Subparagraph 1. This will give rise to many disputes. There is no provision for dispute settlement.

Subparagraph 2. These Charts, again, should be deposited with the appropriate international authority.

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Articles 14 to 23. These Articles are excellent, concise and comprehensive. Many of the provisions, however, should be equally applicable to the economic zone where intensified economic uses are going to pose problems of safety, security, good order and environmental conservation to international navigation. These will have to be faced in the imminent future.

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Perhaps greater emphasis could be placed on the obligations of coastal States as against their rights. For example, Article 18 provides that the coastal State "may" make laws and regulations with regard to the safety of navigation, etc. Should one not say they "must" make and apply such laws -- or be liable for any damage caused to foreign ships by the lack of appropriate safety measures in the territorial sea as well as in the economic zone?

Article 23 does, in fact, establish mutual liability. But the liability of coastal States is limited to cases where, in the application of its laws and regulations -- which it may but need not make -- a coastal State acts in a manner contrary to these Articles.... Compare, e.g., Article 26 of A/AC. 138/SC.II, L.28.

Article 19, Subparagraph 2. The provision for tankers and ships carrying nuclear or other inherently dangerous or noxious substances or materials is perhaps too limited. These vessels may cause catastrophic damages. On this point, perhaps, Main Trends, Provision 36, might be taken over more extensively.

Subparagraph 4 (a) points to the interaction between national and international organization. So does, further down, Article 40, Subparagraph (4). It is very interesting that in this paragraph it is the strait State that is the controlling authority, for the international organization "may adopt only such sea lanes and separation schemes as may be agreed with the strait State, after which the strait State may designate or prescribe them." In the U.K. paper on Straits (A/Conf. 62/C.2/L.3) the controlling authority is the international organization: "Before designating sea lanes or prescribing traffic separation schemes, a straits state shall refer proposals to the competent international organization and shall designate such sea lanes or prescribe such separation schemes only as approved by that organization (incorporated as Formula A of Provision 59 of Main Trends). The present text, however, differs from Formula B of this Provision in Main Trends; according to which the coastal State "may, on the recommendations by the Inter-Governmental Maritime Consultative Organization, designate a two-way traffic separation governing passage...." In no case is there a provision for dispute settlement, in case of disagreement between the national and the international authority. In A/AC. 138/Sc.II.L.28 the controlling authority is the Coastal State whose decision, however, can be challenged by the international authority, and if no agreement is reached, there is a provision for dispute settlement (Article 37).

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Straits Used for International Navigation

Article 42 provides, in a rather general way, that "user States and straits States should by agreement cooperate in the establishment and maintenance in a strait of necessary navigation and safety aids, etc. What happens if they fail to do so and accidents ensue? There is no provision for liability. Should not the strait State have the duty and responsibility to provide all necessary safety measures? It might be aided by the right to collect transit fees and/or by the competent international organization.

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The Exclusive Economic Zone

Articles 45 to 61, with very minor variations, are taken from the Evensen Paper. Ocean Science News (May 2, 1975) comments: "For all practical purposes, this text is close to the final position of the U.S...."

In comparing the introductory Article 45 with the corresponding Article in the Evensen Paper and in the "77" Paper, it is interesting to note that the present provisions are stronger on the side of the coastal State than in the Evensen Paper. Evensen provides for jurisdiction with regard to other activities.... The present text provides for exclusive rights and jurisdiction over artificial islands, installations and structures, and exclusive jurisdiction over non-depleting economic uses and scientific research.

The "77," on the other hand, provide for "sovereign rights" over such uses; jurisdiction in environmental matters, and exclusive jurisdiction with regard to artificial islands, etc. and matters pertaining to what used to be the contiguous zone. "Jurisdiction" without "exclusive," obviously includes the possibility of concurrent jurisdiction by the competent international authority

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Article 47. Freedom of navigation will be difficult to maintain in an intensively developed economic zone. As mentioned above, many of the coastal State's regulatory powers will necessarily have to be extended to the economic zone. The provision of safety zones (Article 48) may not be sufficient.

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As the Delegate of Malta has pointed out on several occasions in the Seabed Committee, submarine cables and pipelines should be given different treatment as their functions and the problems they might cause are quite different.

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Article 49 should be harmonized with Part III.

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Articles 50 to 60, dealing with the management of living resources (all taken over from the Evensen paper) are excellent.

One should note, however, the numerous references to international management measures, without which national management measures cannot be effective. In this respect, see Article 50, Subparagraphs 2 and 5; Article 52, Subparagraphs 1 and 2; Article 53, Subparagraphs 2 and 3. No attempt has yet been made, however, to define the machinery needed for these complementary international management measures. I am attaching part of a study we prepared for the Tinbergen Project on the New International Order (Appendix II). See also Articles 81 to 90 of A/AC.138/SC.II/L.28, which -- without contradicting any of the provisions of this excellent section of the present document -- interweave national and international mangement measures in an exemplary way.

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Article 57 makes provision for the land-locked States. It faithfully reflects the view of the majority of States. One may, nevertheless, question its rationale in two ways. First, the desire of land-locked States, especially of developing land-locked States, to fish in the economic zones of neighboring coastal States, or to fish at all, or even to eat fish, is very hypothetical. It would really be useful to make a study of the social and economic implications of this paragraph. How many developing land-locked States have fished under the regime of freedom of the seas? How does the establishment of the economic zone affect them?

The final sentence of Subparagraph 1 is equally hypothetical. Where in the world is there a developed land-locked State with neighboring developing coastal States?

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A weakness of the section, evidently unavoidable at the present stage of negotiations but perhaps remediable in another year or two, is the lack of any provision for dispute settlement.

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Continental Shelf

Articles 62 to 72 on the Contental Shelf likewise represent a position that, at this stage of negotiations, cannot be reversed but may well be modified during the next couple of years. It is quite certain that (1) delimitation of the continental margin beyond the 200-mile limit to be determined by the coastal State unilaterally and (2) the overlapping of one State's economic zone and another's continental margin will give rise to an infinite number of disputes and conflicts. It might also be preferable -- to avoid the term (Article 62) "natural prolongation of the land territory of a coastal State," since this concept is scientifically dubious and philosophically unacceptable. A State, not being a "natural" formation, can hardly have a "natural" prolongation.

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Article 65. Here again it might be preferable to distinguish between cables and pipelines.

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Should not this section contain an Article on disarmament or, at least, de-nuclearization of the continental shelf, at least in accordance with the Sea-Bed Disarmament Treaty, if one cannot go beyond that?

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The High Seas

Article 74. The concept that the use of the High Seas shall be reserved for peaceful purposes, carried over from Main Trends, is obviously an excellent one. It is one of

the implications of the notion that ocean space beyond national jurisdiction is the common heritage of mankind which, curiously enough, has survived, e.g., in Doc. A/Conf.62/ C.3/L.12/Rev.1, presenting the position of the Group of 77. The naval powers do not share this view. This is why they refuse the extension of the concept of common heritage from the deep seabed (militarily not interesting) to the superjacent waters and the establishment of appropriate institutions for the management of this extended common heritage.

The Conference as a whole has not dared to move in this direction. In the present, limited context what can be the meaning of the statement that the uses of the high seas shall be reserved for peaceful purposes? Would it be more correct to say that this Convention deals only with the peaceful uses of the High Seas?

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<u>Articles 77 to 80</u>. Could there be an Article expressly providing penalties for a ship using a flag of convenience beyond the general, traditional statement that it shall be assimilated to a ship without nationality, which has not worked in the past?

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<u>Article 84, Subparagraph (a)</u>. I suppose that "any person found at sea in danger of being lost" includes persons in submarines, on vessels other than ships, or on fixed installations on the sea or on the seabed.

<u>Subparagraph (c)</u>. Collisions may happen with manned objects other than ships. Therefore the term "the other ship" is perhaps too limiting in the face of contemporary developments.

<u>Subparagraph 2</u>. States should cooperate also with the appropriate international institutions in this matter.

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The Articles on navigation, on the whole, are quite excellent, considering the present situation. The moment may come, even during the next two years, when one might move more decidedly towards international registration of ships, advocated already by many shipping companies and international organizations (see Appendix III, containing an excerpt from the Proceedings of Pacem in Maribus V), and towards international jurisdiction over activities of ships in international ocean space, e.g., see A/AC.138/53.

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Management and Conservation of the Living Resources

Articles 103 to 107. The very title of this section is encouraging since it clearly implies that the living resources in the international area must be managed and that "freedom to fish" can exist only within the regulations and limitations of a management system. This is all the more important since the pressure on the living resources of international ocean space is bound to increase since on the one hand, distant-water fishing boats and trawlers will be barred from exclusive economic zones and on the other, advancing technologies will open up increasingly possibilities of harvesting "unconventional" living resources which abound in international ocean space.

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The "appropriate subregional and regional organizations" mentioned in Article 105 will have to be described more precisely in some place, maybe by the next session of UNCLoS.

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It might also be desirable to insert a reference to "appropriate international organizations" in Article 106 since it is impossible for States to determine and adopt the measures in question unilaterally.

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Land-locked States

Articles 108 to 116. These Articles seem to me quite adequate. However, the geographically disadvantaged States are far from satisfied (e.g., the two Germanys). Perhaps one should add some provision for geographically disadvantaged States such as those contained in Main Trends, even though this is not easy. The definition of "geographically disadvantaged State has turned out to be very illusive. "Geographically disadvantaged" may, in fact, be as comprehensive as "geography" which, in recent times, has begun to include just about everything, from the geophysical sciences to economics, cultural anthropology, demography, etc.

The gist of these Articles is that transit accommodations must be made between land-locked and transit States but that the modalities of these accommodations may be negotiated bilaterally or regionally. If this is the essence of the section, it might perhaps be strengthened by a reference to dispute settlement in case the bilateral negotiations were too long-drawn-out, or otherwise unsatisfactory.

Article 116. This is too broad. Land-locked States do not need more privileges than coastal States. It would suffice if they could fish (if they want to at all!) in the economic zone of one neighbor. They need not fish all over the place, if they happen to have neighbors fronting different world oceans!

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Archipelagos

Articles 117 to 131. These Articles are very precise. Undoubtedly maps will be available by the time of the next session of UNCLoS showing the exact boundaries of all archipelagic States in accordance with these Articles. One should also make studies of the effects of these boundaries on the economies of these States. It is difficult to comment on the real significance of these Articles without these data.

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With regard to the passage of ships through archipelagic water, it seems to me that the Articles pose no special problems. For Article 124, Subparagraph 9, see comments to Article 19, Subparagraph 4 (a) above.

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Without the maps and studies referred to above I am unable to comment on Article 131.

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Regime of Islands

Article 132. This Article is very inclusive, especia-ly since Subparagraph 3 may give rise to disputes. What is "economic life of their own"?

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Enclosed and Semi-enclosed Seas

Articles 133 to 135. There are very useful Articles. One could perhaps add under Article 134 a Subparagraph (e) "cooperate to regulate the interaction of various uses of marine space and its resources."

This would, at least by indirection, touch on the extraction of nonliving resources, especially oil, which is taboo! (I shall return to this in the closing section of this analysis.) The interaction of various uses, especially the extraction of oil and the harvesting of living resources, must be regulated in enclosed and semi-enclosed seas, and priorities must be set.

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Territories under Foreign Occupation or Colonial Domination

Article 136 takes care of the proposals by the Group of 77. It is excellent. It will not be easy to enforce.

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PART III

TEXT PRESENTED BY THE CHAIRMAN OF THE THIRD COMMITTEE (A/CONF.62/WP.8/Part III)

Part III

General comments

With regard to environmental policy, this Section treats the ocean environment as a whole and deals with pollution in a comprehensive way, including all sources. It establishes responsibility and liability of States for damage to the marine environment under the jurisdiction of other States or beyond the limits of national jurisdiction. It provides, in broad terms, for compulsory dispute settlement. All this is excellent and reflects an evolution of thinking that has taken several years.

With regard to scientific research, instead, the Section attempts to separate -- at least as far as international ocean space is concerned -- between the water column and the seabed. It may turn out to be difficult to apply this distinction in practice.

The transfer of technology requires an institutional framework. Without such a framework, recommendations to States remain largely hortatory.

Detailed comments.

Protection and Preservation of the Marine Environment

Articles 12, 13, and 14 make it quite clear that the activities required to assess, monitor, minimize, and control pollution necessitate "appropriate international organizations." At the next session of UNCLoS these ought to be defined.

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Article 15 could make reference not only to Article 13 but also to Article 11, providing international assistance to developing countries concerning the preparation of environmental assessment.

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Articles 16 and 17 make it clear that the setting of standards requires international institutions.

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Article 21 might contain a reference to appropriate international organizations, especially WMO.

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Articles 22 to 40 establish an elaborate enforcement procedure. Once the three parts of the unified texts are unified in one Convention or Treaty, one wonders whether this is necessarily the right place for such detailed Articles. Pollution control and abatement is one of the many rights and duties of the coastal State referred to in Part II with regard to the territorial sea, the economic zone and straits used for international navigation. Enforcement procedures should be unified with regard to all rights and obligations of the coastal state and the international community. There seems to be no reason to single out the protection of the marine environment for special treatment.

These articles make no provision for changes in the marine environment caused by technologies which are not polluting, such as the effects of large-scale extraction of energy from ocean currents (it has been predicted that such activities, off the coast of Florida, might change the impact of the Gulf Stream on the climate of European States) or other such "macro-technological" developments. Perhaps the Soviet resolution, introduced in the General Assembly last year, which prohibits certain technological activities which might alter the marine environment (including the atmosphere) might be taken into consideration. See also the Maltese Draft Articles on the Preservation of the Marine Environment, Article 2, subparagraph 1 (a).

There exists now a well-developed international movement for the establishment of marine parks for the preservation of exceptional or threatened marine fauna and flora. A number of developing nations are interested in this development which, besides its environmental value, may have an economic value in attracting tourism. Perhaps there could be an Article covering this new development.

There are no Articles to control dangerous activities, such as the use of nuclear energy for peaceful purposes or the storage and disposal of radioactive waste in ocean space beyond the limits of national jurisdiction.

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Marine Scientific Research

Articles 13 to 26. With regard to areas under national jurisdiction, these articles propose an excellent compromise, based on the Mexican working paper, between the alternatives of freedom of research and coastal-state control.

In the present situation, however, one may question whether these alternatives really still exist. The inextricable connection between scientific research and industrial research on the one hand, military research on the other, has made "freedom of scientific research" intolerable. Any compromise between the alternatives "freedom of research" and "coastal-State control," no matter how perfect in theory, is bound to work out in practice in favor of coastal-State control. The distinction between fundamental and resource-oriented research necessarily will give rise to innumerable

disputes and crippling delays. This is quite inevitable, especially as between scientifically/industrially advanced nations and others. The real alternatives in the present situation are coastal-State control and international control, but the international organ or organs which might be created or used for this purpose are only vaguely adumbrated. No reference at all is made to IOC which, with the necessary structural modifications, could indeed become the scientific arm of the ocean institutions and has declared its willingness to do so. IOC, of course, would deal with science in the seabed as well as in the superjacent waters. This would solve the problem raised by Article 26 of the present text, according to which scientific research in the waters of the High Seas beyond the limits of the economic zone is "free" while on the underlying seabed it is subject to the control of the Seabed Authority. This may turn out to be very difficult in practice.

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Development and Transfer of Technology

These Articles -- as the whole document, for that matter -- are well-organized and provide broad guidelines for the conduct of States and competent international and regional organizations. They still are at the hortatory stage, however, addressing the *status quo*. It is difficult to envision any real progress without a precise restructuring of the international machinery dealing with scientific research, the transfer of technology, and the conservation of the environment.

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FURTHER COMMENTS

THE LAW OF THE SEA AND THE NEW INTERNATIONAL ECONOMIC ORDER

In conclusion I shall deal briefly, and in a very preliminary way, with the potential contribution of the new Law of the Sea to the building of the New International Economic Order and the question as to how far the Unified Texts fulfill the requirements of the Resolutions and the Programme of Action adopted by the Sixth Special Session of the General Assembly as well as the Charter of Economic Rights and Duties of States.

In his accompanying letter, the Chairman of the First Committee explained that, in drafting his Articles, he kept in mind particularly two basic documents: The Declaration of Principles adopted by the XXV General Assembly and the Documents adopted by the Sixth Special Session. It is, in fact, the First Committee that has made, potentially, the greatest contribution to the building of the new economic order. The Articles of the First Committee (Part I), are, in Jan Tinbergen's terminology, systems-transforming, while the Articles of the other two Committees are "systems-conserving."

Tentatively, one might make a check-list of ten points (further expanded below) on which the documents of the Sixth Special Session and the Charter on Economic Rights and Duties of States require action from the Conference on the Law of the Sea:

(1) the development of land-locked States and developing island States;

(2) the study of raw materials and development;

(3) permanent sovereignty over natural resources and international cooperation. In particular, efforts to ensure that competent agencies of the U.N. system meet requests for assistance from developing countries in connection with the operation of nationalized means of production;

(4) unexploited or underexploited resources which, put to practical use, would contribute considerably to the solution of the world food crisis;

(5) strengthening of economic integration at the regional and subregional level;

(6) formulation and implementation of an international code of conduct for multinational corporations;

(7) transfer of technology;

(8) equitable participation of developing countries in the world shipping tonnage;

(9) definition of policy framework and coordination of the activities of all organizations, institutions, and subsidiary bodies within the U.N. system, for the implementation of the Programme of Action and the New International Economic Order;

(10) enhancement of participation in decision-making bodies in development-financing and international monetary problems.

(1) Land-locked States are referred to throughout, in all three parts of the text. Developing island States are not given any special treatment. In Parts I and III their interests are subsumed under those of other developing nations. In Part II, however, they probably should be given special attention, particularly with regard to the delimitation of their national ocean space. An island like Malta, for instance, is likely to end up badly squeezed between Libya / Tunisia and claims arising in connection with Italian islands. Similar problems will arise for some developing island States in the Caribbean.

A provision might be added under Article 132 of Part II.

The participation of land-locked States in the exploration and exploitation of the deep seabed is provided for in Part I. Their right to transit is assured in Part II. This, of course, is of prime importance economically and, as pointed out above, some improvement could be made here. Their right to fish in the economic zone of neighboring coastal States is equally assured in Part II. This, as was pointed out, is a right that is at once too broad and probably economically quite insignificant, at least for many years to come.

On the other hand, land-locked, shelf-locked, and zone-locked developing States and island States are categorically excluded from the continental shelves of neighboring coastal States on the basis of the theory of the "natural prolongation of the land territory of a State." Given the overwhelming importance for development of oil and gas -- taboo in these documents -- this is of course the crux of the whole matter. In terms of power politics, nothing can be done about it at this time. In terms of hard and logical thinking, at least some beginning could be made. Issues could be raised. Bargaining positions could be strengthened.

The continental shelf is indeed called the continental shelf because it is the natural prolongation of the continental land mass, which is a thing given in geo-physical terms -- it is not the natural prolongation of the human artifact that is the State. The whole import of the Truman Doctrine, on which the Continental Shelf Convention purports to be based, was to take away jurisdiction from coastal States, beyond their territorial sea of three miles, and to turn it over to federal (continental) Government since, being the natural prolongation of the continental mass, it belonged to all of the United States. Rarely has a theory been twisted around

in such strange ways. Its intention had been to settle an internal matter -- between the States and the Federal Government. It became an international one. It was to serve to unify the management of resources. It became an instrument to fragment them.

On the basis of the Truman Doctrine, land-locked developing States and shelf-locked developing island States should ask for rights in the exploitation of the continental shelf in the economic zone of neighboring States on the same terms they are granted, by the Unified Texts, these rights with regard to fishing. This would be in accord with the resolutions of the Sixth Assembly. It would be of great and real importance for their development.

In other words, the continental shelf and its resources beyond the territorial sea of twelve miles should be the common heritage of all States on the continental landmass. It should not be appropriated by States, should be managed cooperatively, and the benefits derived therefrom should be shared. It should be used for peaceful purposes only.

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(2) and (3) might be taken together. They require a voluminous treatment which can be merely adumbrated here.

The mere ownership of industrially important natural resources is not necessarily conducive to development if the industries for which they are valuable do not exist in the country that owns the resources and if their extraction has to be entrusted to foreign companies, giving rise to a post-colonial extraction economy. Whether the OPEC pattern, arising from a temporary coincidence of the interests of the producer States and the multinational companies, will be beneficially applicable in the long run to other resources is at least open to question. It is of vital importance that there be international institutions and public international enterprises such as the one foreshadowed for deep-sea mining to cooperate with the developing nations in the exploration and exploitation of their nationally-owned resources. The real importance of the Sea-bed Authority's "Enterprise" probably is not at all the mining of manganese nodules which are of interest above all to a few industrially

developed nations and may yield an international annual income of 50 to 150 million dollars, an amount which most certainly will do preciously little towards building a new international economic order. The real importance of the Enterprise may be that it provides a new form of active, participatory cooperation between industrialized and non-industrialized nations. If this were so, the establishment of other public international Enterprises ought to be considered, first of all for oil and gas which constitute the real wealth of the oceans for years to come. If the new law of the sea is to make a real contribution to the building of the New International Economic Order, it must mobilize the real wealth of the oceans for this purpose, not the fictitional. The real wealth of the oceans is oil, gas, and food.

It would be infinitely more beneficial for developing nations to cooperate with a public international enterprise in the extraction of their offshore oil than to do it with the multinationals whose nefarious influence is being revealed every day more shockingly. Such an Enterprise could make a vital contribution towards solving international monetary problems such as those that have arisen from the "energy crisis."

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(4) This touches on the delicate question of the under-use of living resources in the economic zones of some of the less-developed nations. This is dealt with in Article 51 of Part II. A really satisfactory solution to the problem of fully exploiting the living resources of the economic zone of a less developed country, again, can be found only in the establishment of an international fisheries management system, capable of interacting effectively with the national systems. Such a system is postulated in Part II, but in no way created.

Another question that should be raised in this context is the development of unconventional living resources in international ocean space, such as squid, or antarctic krill. Obviously this should not be left to the industrialized nations. It should be developed through international cooperation. This vast potential is not touched upon by the Unified Texts. It requires, again, the creation of an effective

international management system for fishing, through the appropriate structural changes in COFI (FAO).

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(5) Regional cooperation plays an important role in all three parts of the Unified Texts.

Part I, Article 20, provides for "regional centers or offices" of the Sea-bed Authority. Regional representation is the basis for the composition of the Council and is taken into consideration in the composition of all other organs.

Regional organization will play a major role in fisheries management as adumbrated in Articles 50, 53, and 105 of Part II. Enclosed and semi-enclosed seas are the basis for regional cooperation with regard to environmental policy, fisheries management and scientific research (Part II, Articles 133 to 135).

Part III, finally, provides for regional cooperation with regard to the Protection and Preservation of the Marine Environment (Articles 6 and 11), monitoring (Article 14), standards (Article 7), the transfer of technology (Article 5). Chapter 3 (Articles 10 and 11) provides for Regional Marine Scientific and Technological Centers. All this may play a role in strengthening economic integration at the regional and sub-regional level.

It should be noted that three different kinds of regionalization are involved in building an ocean regime. They are overlapping and, one might say, in a dialectic relationship to one another. They are:

(a) political regionalism,

(b) continent-centered regionalism, and

(c) sea-centered regionalism.

Political regionalism originates from the regional groupings in the U.N. and, in particular, at the Conference on the Law of the Sea. It forms the basis of systems of representation in various organs of the ocean regime, particularly in the Council of the Sea-bed Authority. I have commented on this above, in connection with Part I, Article 27. It is likely, furthermore, that existing regional intergovernmental organizations such as EEC, OAS, etc. will have a special relationship with the organs of the ocean institutions, just as they have it at the Conference -- or even more so.

Continent-centered regionalism is foreshadowed in Part I, Article 20, establishing "regional centers or offices of the Sea-bed Authority." If and when developing nations, land-locked and geographically disadvantaged nations, i.e., the overwhelming majority of nations, will realize that it is more to their advantage, that it will strengthen new forms of economic integration and hasten development, if they interpret the Truman Doctrine in the sense I have proposed above, these regional centers and offices of the Sea-bed Authority may develop regional Enterprises for the exploitation of the continental shelf beyond twelve miles. Obviously these would be structurally coordinated with the Sea-bed Authority itself and their work would be complementary, not competing. The "boundary" between the area under the administration of the continental center and the area managed by the Sea-bed Authority directly would therefore be far less important and controversial.

All this, of course, is far in the future. The "regional centers of offices of the Sea-bed Authority" provided for in Part I, Article 20, may nevertheless be seminal in this direction.

Ocean-centered regionalism is developing around fishing, environmental policy, and scientific research. Enclosed and semi-enclosed seas are the most obvious basis. Ocean-centered regionalism may have a strong cultural component, for instance, in the Caribbean or in the Mediterranean. Here ancient cultural systems of communication and modern scientific and technological interdependence reinforce each other. This kind of regionalism will play an increasingly important role.

On the whole, one may predict a shift from the continent-centered, "geopolitical" regionalism of the nineteenth century, based on sovereignty, ownership, and power, which was part of a war system, to the sea-oriented regionalism of the twenty-first, which may be part of a peace system based on the concept of the common heritage of mankind, cooperation, and the transformation of the concept of sovereignty along with that of ownership.

A number of nations will participate in all three forms of regionalism. Far from being unbearably confusing, this may increase stability, after this revolutionary period of building the New International Economic Order. For, as modern anthropology knows, overlapping membership in a number of different social systems increases social stability and reduces conflict.

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(6) The only provisions making any contribution under the heading "Formulation and implementation of an international code of conduct for multinational corporations" are contained in Annex I to Part I of the Unified Texts on Basic Conditions of General Survey, Exploration and Exploitation, which is based on CP/cab.12. It is indicative, however, that, as the Chairman of the Working Group reported on April 25 (Provisional Summary Record of the Twentieth Meeting), the fears of some delegations that the entire seabed might become a prey to exploitation by giant corporations to the detriment of developing countries was not entirely dispelled. The control of the Authority extends to States members of the Authority or State Enterprises, or persons natural or juridical which possess the nationality of a State Party or are effectively controlled by it or its nationals and are sponsored by a State Party or any group of the foregoing. "Any group of the foregoing" would include the multinationals. There is no other reference to multinationals, however, and it is likely that they would continue to escape through the same legal loopholes through which they escaped in the past.

The Sea-bed Authority would be the appropriate body to formulate and implement an international code of conduct for multinational corporations active on the Sea-bed, and that means the oil companies. More than that. There have been many proposals, from many quarters, to the effect that multinationals, escaping the control of the nation State, should be chartered internationally. The Sea-bed Authority would be the appropriate authority to grant charters to multinationals. It might derive an additional income for development purposes from this activity. Effective control of the multinationals is absolutely essential for the establishment of the New International Economic Order.

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(7) Transfer of technology is dealt with in Part I, where it is entrusted to the Technical Commission (Article 31). It is also insured by the rules, regulations, and procedures of the Enterprise (Annex I, paragraph 12, (11). Since the financial means of the Sea-bed Authority in the present perspective are very limited, it is to be feared that its effectiveness in the transfer of technology will also be very limited.

Part III amply provides for the transfer of technology both with regard to the protection of the environment and scientific research. Since no institutional framework is prescribed to enact these measures, however, they remain hortatory. Only a scientific organ, such as a restructured IOC, integrated into the system and properly financed, could make the measures effective.

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(8) No provision whatsoever is made for the equitable participation of developing countries in the world shipping tonnage. This could only be made in Part II, dealing with navigation, and it could only be made if a restructured and strengthened IMCO were integrated into the system.

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(9) The Conference has done nothing towards the definition of a policy framework and coordination of the activities of all organizations, institutions, and subsidiary bodies within the U.N. system, in spite of the proddings of IOC. A development in this direction was proposed by the Oaxtepec Declaration, issued last January on the initiative of the International Ocean Institute, Malta, which is attached as Appendix IV.

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(10) One place on which the law of the sea could make a contribution towards the enhancement of participation in decision-making bodies in development-financing and international monetary problems is in Articles 42 to 46 of Part I of the Unified Texts, establishing a General and a Special Fund of the Sea-bed Authority. There is no special provision, however, as to how these funds are to be administered. It is merely stated that they are under the control of the Assembly which shall act on the advice of the Council. It is assumed that the participation of developing nations in these organs is adequately assured.

Considering the expected amount of revenues of the Authority and the limited importance of these funds, as compared with, for example, the World Bank and the International Monetary Fund, it is unlikely that these provisions will do much to change the present international economic order.

The effective participation of the less-developed nations in the management and decision-making of a public international enterprise for offshore oil extraction would be a far more important step in this direction.

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In conclusion one must admit, in spite of some promising starting points, that a very large part of the Unified Texts has no relevance to the building of the New International Economic Order. Part I is by far the most relevant contribution in this regard. Its effects, however, are bound to be extremely reduced by the limitations imposed on the operations of the Sea-bed Authority by the provisions of Part II. Part II is "system-conserving." It is mostly irrelevant to the building of a New International Economic Order and partly, possibly, counterproductive. Part III has a great potential, but lacks an institutional infrastructure.

Much detailed, technical study is needed to confirm or refute these conclusions. On the basis of such studies it should be possible -- at least partially -- to suggest amendments apt to increase the positive impact of the Articles on the building of the New International Economic Order.

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