Draft

THE LAW OF THE SEA

AND

THE NEW INTERNATIONAL ECONOMIC ORDER

A Projection from the Present Work of the United Nations Conference on the Law of the Sea

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PREFACE

The Informal Single Negotiating Texts released at the end of the Geneva session of the Law of the Sea Conference are potentially a break-through.

The purpose of the projection made here is to show how these documents could be further developed and integrated in an ocean management system able (1) to cope with the multiple uses of ocean space and resources; (2) to advance the principles and objectives of the New International Economic Order and create an institutional framework to embody this order with regard to the development and conservation of the ocean environment.

The comprehensive convention needed for this purpose will consist of several parts as already indicated by the Informal Single Negotiating Texts. One might project three main parts. Part I would deal with the Law of the Sea. This will be, basically, the result of the work of the Second Committee. We are reproducing this part of the Single Negotiating Text, appending our comments.

Part II would deal with the principal uses of ocean space and resources and their institutional requirements. It would have four sections. Section 1 would deal with the mining of minerals from the deep seabed beyond the limits of national jurisdiction. This would be, basically, the Single Negotiating Text of the First Committee. We are reprodu ing this text, appending our comments. Section 2 would deal with the international management of fisheries. We are inserting, at this stage, some background material and suggestions. The Constitution for the Institution required for the international management of fisheries ought to be prepared and proposed by the Committee on Fisheries of FAO. This Constitution should eventually be inserted in this place. Section 3 would deal with

the international requirements of navigation. This is the responsibility of IMCO. IMCO is presently engaged in a process of enlarging its membership and the scope of its operations. This process should be accelerated and expanded, and the new Charter should, eventually, be inserted in this Section. Section 4 would deal with the conservation of the marine environment, scientific research, and the transfer of technology, and the institutional requirements for these activities. We shall insert here the Single Negotiating Text of the Third Committee with our comments. However, this section must take into account also the work presently undertaken by IOC to make such changes in its own structure as to enable it to become the scientific arm of the new international ocean institutions. The relevant part of the IOC resolution is inserted as Section 3.

We have added an Annex to Parts I and II, with some comments on the relations between the Informal Single Negotiating Texts and the New International Economic Order. This part is analytical and descriptive; it obviously would have no place in the structure of the final Convention.

The final Convention would conclude with a Part III, dealing with the interaction of uses and the "integrative machinery" required to harmonize such uses, maximizing the benefits therefrom and minimizing the harmful side effects on the socio-economic and natural environment. This part consists of 4 Sections: Section 1 contains the Declaration of Oaxtepec which outlines a "new strategy" to advance the goal of comprehensive ocean space institutions at the Conference on the Law of the Sea. Section 2 describes the present U.N. structures dealing with international ocean affairs. Section 3 proposes a new model for the coordination and integration of the activities of these organizations, and Section 4 offers some comments on the model.

PART I.
THE LAW OF THE SEA

Section 1

THE INFORMAL SINGLE NEGOTIATING TEXT PRESENTED BY THE CHAIRMAN OF THE SECOND COMMITTEE

[not included]

Section 2

Comments

General Comment

The drafting of this Part presented an almost super-human 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 accomodated other interests within these parameters. In commenting on the Articles we shall accept the same framework: a territorial sea of 12 miles, an Economic Zone of 200 miles, and the obsolescent division of ocean space into territorial sea, contiguous zone, economic zone, high seas, ~~economic~~ continental shelf, and seabed beyond the limits of national jurisdiction. There is little doubt that this cumbersome and blurred spacial organization will have to be replaced by a more modern one, dividing ocean space, quite simply into national and international ocean space, with one single boundary which, as long as present trends prevail, would have to be drawn at 200 nautical miles from precisely defined baselines.

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 also deposited with the appropriate authority of the international institutions.

Article 5. This 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?

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 sub-paragraph 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 -- or of the new Integrative Machinery -- 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.

Article 8. With regard to the Secretary General, see comment 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.

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.

Articles 13-23. 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.

Perhaps greater emphasis could be placed on the obligations of coastal States as against their rights. E.g., 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, by contrast, 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 straits 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 straits State, after which the straits 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/1.28 the controlling authority is the Coastal State or Straits 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).

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 transfit fees and/or by the competent international organization.

Articles 45-50. The Articles on the Exclusive Economic Zone are taken, with very minor variations, from the Evensen Paper. Ocean Science News (May 2) 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 Evensen and in the '77' paper, it is interesting to note that the present provisions are stronger on the side of the coastal State than Evensen. 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.

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.

As the Delegation 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.

Article 49 should be harmonized with the Section on the Conservation of the Marine Environment, Scientific Research, and the Transfer of Technologies.

Articles 50-60, 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. See, in this respect, 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. This is indicated in Part II, Section 2 of this Projection. See also Articles 81-90 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 management measures in an exemplary way.

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?

Second, 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?

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

Articles 62-72. The Articles on the Continental Shelf, likewise, represent a position which, 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) the 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 -- in spite of the current consensus among a number of States -- to avoid the term (Article 62) "The 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.

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

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?

Articles 73-107. 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 so 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 really 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?

Articles 77-80. Could there be an article providing expressly for 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 been very effective in the past?

Article 84. Subparagraph (a). "Any person found at sea in danger of being lost" evidently includes persons in submarines, on vessels other than ships, or on fixed installations on the sea or on the seabed.

Subparagraph (c). 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.

Subparagraph 2. States should cooperate, in this matter, also with the appropriate international institutions.

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 Part II, Section 3), and towards international jurisdiction over activities of ships in international ocean space. See, e.g., A/AC.138/53.

Articles 103-107. The very title of this section, "Management and Conservation of the Living Resources," 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 as, 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.

The "appropriate subregional and regional organizations" mentioned in Article 105 will have to be described more precisely. See Part II, Section 2 of this Projection.

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.

Articles 108-116. Land-locked States. These articles seem quite adequate. However, the geographically disadvantaged States are far from satisfied (e.g., the two Germanies). Perhaps one should add some provision for geographically disadvantaged States, as those contained in Main Trends -- even though it is not easy. The definition of "geographically disadvantaged" has turned out to be very illusive. It 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 accomodations must be made between land-locked and transit States, but that the modalities of these accomodations 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!

Articles 117-131. Archipelagos. 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.

With regard to the passage of ships through archipelagic waters, the articles seem to pose no special problems. For Article 124, subparagraph 9, see comments to Article 19, subparagraph 4 (a), above.

Without the maps and studies referred to above, comments on Article 131 are premature.

Article 132. This is very, very inclusive, especially since subparagraph e may give rise to disputes. What is "economic life of their own"?

Very great expanses of ocean space will fall under national jurisdiction, in accordance with this article.

Articles 133-135. Very useful articles. One could, perhaps, add, under Article 134, a subparagraph (e), "Co-operate 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. 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.

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

PART II.

THE USES OF OCEAN SPACE AND RESOURCES AND THEIR INSTITUTIONAL REQUIREMENTS

Section 1

THE MINING OF MINERALS FROM THE SEABED BEYOND THE LIMITS OF NATIONAL JURISDICTION

Subsection (a): THE INFORMAL SINGLE NEGOTIATING TEXT PRESENTED BY THE CHAIRMAN OF THE FIRST COMMITTEE

[not included]

Subsection (b): Comments

General Comment

Of the three documents released by the Geneva session of UNCLoS III, this is the most constructive and forward-looking one. It contains many of the ideas elaborated during the early, preparatory phase of work for UNCLoS III, i.e., 1967-1974.

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, very limited. The mining of manganese nodules from the deep ocean floor of international ocean space will be of minor importance, for the foreseeable future, creating an income of perhaps 50-150 million dollars annually. This could be administered in a much simpler way. (2) the composition of the Council is inadequate. The criteria of selection of members composing it, is 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.

Detailed comments

Article 1 is a good opening -- revealing the spirit of synthesis and accomodation 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 (a) -- from the same source -- provides an interesting opening towards including the water column: for, 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?

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.

Articles 3-10. 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"?

Articles 10-12. This section could be better coordinated, or should probably be merged, with the text of what is in this Projection Part II, Section 4, in particular, Articles 8,9, 17,and 28.

Article 10 states that "The Authority shall be the Center for harmonizing and coordinating scientific research." But the document does not 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 comprehensively, not merely with the seabed. So, it would seem, do the "appropriate international organizations" referred to in the Single Negotiating Text of the Third Committee. 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 with the text of the Third Committee and with a redefinition of the role of IOC.

Article 17 might contain a reference to dispute settlement.

Article 25-26. There seems to be a contradiction between Article 26, which states that "the Assembly shall be the supreme policy-making organ of the Authority," and Article 25, which severely limits the effectiveness of Assembly control. Subparagraph 2 provides that the Assembly meets only once every two years in regular session. This is simply not enough. Subparagraph 8 provides for 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 US 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, and integrates the Enterprise into the political structure.

Article 27. This is perhaps the most difficult article. It is also the weakest. Such as it is composed here, the Council is not likely to be effective.

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 has not yet been adequately developed. Africa, Asia, Eastern Europe (socialist), Latin America, and "Western Europe and others" are not, in all cases, meaningful constituencies. 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

should be more equal in population; (2) more coherent geographically or economically or politically or culturally. To design them in these terms is not an easy job and will require a great deal of negotiation. The suggestions in Part III of this Projection are as tentative as any and have a merely illustrative value.

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. Ths 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 viciates the idea of democracy in international relations. Magnitudes of investment may play a role in the Enterprise, which is a business. One might in fact stipulate that the Assembly should appoint 50% plus one of the members of the Governing Board of the Enterprise. The rest could be appointed by States or Corporations, in proportion to their investment.

But the Council must be kept "clean."

The alotment of seats 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 land-locked 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 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, e.g., 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.

Articles 29-31 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 10-12.

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 expertise, 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 international law and harmonize national and international maritime law; and there might be a Commission on Multinational Corporations (on this latter point, see Part II, Annex).

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

As Chairman Engo points out in his accompanying note, the statutes for the Tribunal and for the Enterprise will be annexed later. Comments on these sections should be withheld until then. The articles on the Secretariat are standard and noncontroversial.

The Articles on Finance might contain some general provisions on profit sharing, although it is all too clear that there won't be any profits to share for many years to come, 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.

No comment is needed on the remaining articles, which are standard.

The Appendix on Basic Conditions is extremely well done. With some variants, it follows CP cab 12, 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 64-65), stipulating, e.g., that amendments to this Annex come into force if ratified by a majority, rather than by two-thirds, of Member States.

SECTION 2

International Fisheries Management

Present situation and future requirements

1. Arrangements for management of fisheries

Although the 1958 Geneva Convention of Fishing and Conservation of the Living Resources of the High Seas contains a definition of "conservation" and admonition to adhering states to take appropriate conservation measures, such management as there now is of fisheries in international waters and of resources which inhabit waters under more than one jurisdiction is done under the auspices of regional and specialized fishery bodies. These have increased in number and scope since 1946 until they now appear to cover practically the entire ocean. This full coverage is, however, illusory if one is concerned with function. The range of scope and competence of the fishery bodies is extremely wide. In the North Atlantic two regional Commissions (ICNAF and NEAFC) have comprehensive responsibility for practically all resources in their respective areas, and count as members practically all the coastal nations and others fishing there; the members are all "developed" countries, they are supported by strong research efforts and are engaged in both overall regulation of fishing and the allocation of shares of the fish yields among participants. In the North and Central Pacific, on the other hand, research and management are fractured, bodies have limited competence as to species responsibility and limited membership; there is no regional scientific advisory body with the prestige and effectiveness of ICES for example. Elsewhere, off the West Coast of Africa, for example, the characteristics of the existing bodies are that their members are a mix of coastal, developing countries and powerful N. Hemisphere countries whose ships have, in recent years, come down to fish in the area. The wide variety of situations and arrangements has been well documented elsewhere and needs no repetition here. Our main concerns are the scope of competence, the orientation of the policies of these bodies, and their links with the global international system, that is with the UN family.

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As to scope, the fact that some bodies are species oriented and others are regionally comprehensive creates a problem of overlapping competence - for example tunas in the North Atlantic are within the purview of the International Commission for the Conservation of Atlantic Tunas (ICCAT) and of ICNAF, and NEAFC as well as ICES. In practice arrangements can be made relatively easily for a "leading role" to be taken by one organization, and the work reasonably coordinated. This is, however, only feasible so long as the various stocks of fish are considered to be more or less independent of each other. But as the exploitation of living marine resources becomes more intense and also diversified, independence becomes a less viable assumption; increasingly man continues to exploit a "traditional" stock while beginning to catch the organisms which form its diet or are competitors with it or otherwise ecologically related. The mix of "species and area" bodies (especially those latter having limited authority) will not be able to cope with the new ecological problems arising from intensive use.

A "species" coverage can cover large gaps in overall responsibility. The outstanding example is the Antarctic ocean. We have become accustomed to think of Whales as the only important living resource exploitable in that area, and they are the responsibility, for better or for worse, of the International Whaling Commission (IWC). Now, however, the interest of N. Hemisphere nations is turning seriously also to the shrimp-like "krill" (main food of some whales) and the Antarctic fish which are far from negligible in abundance. Management of these cannot be achieved solely through the creation of an "Antarctic ocean fisheries commission" if that has no interest also in whales, since the definition of a rational and equitable exploitation policy necessarily must take into account all the resource stocks and the biological interactions between them.

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The policies of the fishery commissions were based originally on the assumption that management is the responsibility of those nations which exploit the resources - or rather of the nations whose flags are flown by the fishing vessels. In regional bodies recently established under the auspices of FAO - since 1958 - the interest of the coastal states is, of course, recognized, irrespective of the level of their fishing activities. Nowhere, however, is the interest of the world community explicitly recognized, even for resources far offshore. The over-exploitation of whales by a few nations gives, again, a dramatic example. It can be, and indeed has been, maintained with economic arguments to back it, that if those nations deplete such a resource they will suffer the consequences in loss of profits, food products and employment. By their actions, however, they have denied to the rest of the world the possibility of securing some part of a very large protein source for the half-century it will take for the S. Hemisphere whale stocks to recover. Further, if the "krill" is exploited intensively - by some nations - in the next ten years, as now seems very likely, the whale stocks will recover even more slowly, if at all. Thus, agreements through treaty organizations to limit catches, and to share them among present participants, while being immensely better than a cut throat free-for-all, do not ensure either that the resources are maintained in such a state that they can be harvested on a continuing basis, or that the yields are shared equitably, as between either present peoples or between the present generation and its descendants.

As to the relations of the fisheries bodies with the United Nations System, there has been no progress, even regression, in the past three decades. Some new bodies were established soon after the end of the 2nd World War with provision in their convention that they might seek association with, even integration in, the

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emerging UN System; in no case did they elect to do so. The majority of regional and specialised fishery bodies were created outside the system and stayed there. Notwithstanding constitutional impediments noted above, a number of bodies were, however, established under the aegis of FAO, under a number of different constitutional provisions. These FAO bodies covering the Mediterranean, Central Eastern Atlantic, S.W. Atlantic, IndoPacific, Indian Ocean, and most recently the Caribbean all contain a majority of developing countries as members. Most derived their funds entirely from the completely inadequate FAO regular budget and are correspondingly crippled, although, some -- notably the Indian Ocean Fisheries Commission (IOFC) - have been able in recent years to secure support through UNDP projects. Although all fishery bodies work through the voluntary action of each member state following collective decisions, the force of these decisions varies greatly among the bodies, and those established under FAO are generally weaker than the others; none have yet taken firm management decisions, although in some cases tentative steps are now being taken in that direction, for example by the General Fisheries Council for the Mediterranean (GFCM) a quarter century after its establishment.

2. Future arrangements for management of living resources.

It seems evident that any decisions taken by the UNCLOS regarding the resources living within Exclusive Economic Zones will greatly affect the existing fishery bodies most of which are concerned, at present, overwhelmingly with the exploitation of resources within 200 miles of one coast or another. The need for regional arrangements will remain because few of the resources live wholly within one national EEZ. Without agreement among the fishing

nations, whether they are groups of adjacent countries, or including others, national management is inconceivable in most cases.

In some cases adjustment to the new situation might be relatively painless - in the N. Atlantic, for example. Elsewhere, either because of the direct interaction between developing coastal and other maritime states, or because of treaty inadequacies as in the N. Pacific, adjustment may be more difficult. At the same time, with fishing intensity still increasing, and the natural limits of the resource base becoming more evident, it is becoming difficult to regulate fishing in one region without having significant repercussions elsewhere. Regulation of tuna fisheries in the Pacific can cause vessels to move into the Atlantic; closure of some EEZ's to foreign vessels will certainly lead to the deployment of those vessels elsewhere. It seems therefore that this period of adjustment is one during which a new global view of the future of the sea fisheries can be taken.

There have been suggestions that a new world fishery organization should be established, and even that such a body need not absorb the Department of Fisheries of FAO and its COFI, but could act in a complementary manner*. It seems desirable at the present time, however, on the one hand not to encourage the multiplication of partially competent organization, nor on the other hand to substitute a new body for the FAO-based structures, provided that the latter can be adapted to present and future needs. The body which was established to take a global view, but which has hardly yet been able to do so, is COFI. To fulfil its role in the new situation considerable change is required. Such change might be modelled on the IOC which, while remaining administratively in Unesco, has far more operational independence, enhanced by the growth of seperate financial resources in its Trust Fund. Thus COFI should be able to

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* See e.g. A.W. Koers (1973) "International Regulation of Marine Fisheries", Fishing News (Books) Ltd. London.

accept membership by states not members of FAO; membership should not be subject to approval by executive organs of FAO; COFI should have a clearly identified and adequate secretariat; it should serve the other Agencies of the UN System, as IOC serves others than Unesco; it in turn, should be served, as is IOC, by an advisory System, including but not confined to the ACMRR. COFI should be enabled to accept and expend funds in addition to those provided by the FAO regular budget. An additional feature of the style of operation of the IOC is the growing role of the elected officers - the Chairman and the six vice-chairmen. These officers working closely with the joint secretariat contribute very much to both the formulation and implementation of the IOC programme. They are unpaid (although some remuneration has been suggested) but they devote considerable time to their duties, and also each take on specific areas of responsibility. A corresponding evolution of COFI could contribute to its status and effectiveness.

Changes on the above lines would put COFI into a position of more authority with respect on the one hand to the regulatory fishery bodies and on the other hand to the other special organs of the World System concerned with the ocean - IMCO, IOC and the Sea-bed Authority. At the time of establishment of COFI it was stressed by FAO that its purpose was "to supplement but not to supplant" the existing international fisheries bodies. The intent was that it should not be suspected of having been given a co-ordinating role. Such a role must however now be taken, and COFI can be the appropriate body for this purpose. A failing of the 1958 Geneva Conventions was that no organ was assigned continuing responsibility for keeping under-review the implementation of the

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provisions in them with respect to fisheries. COFI should be required to fulfil that function, as may follow from the UNCLOS, and as IMCO already does, through convening review conferences relating to the various conventions for which it is responsible. Specific mechanisms need to be created to ensure that the business of regional fisheries bodies is conducted in accordance with general guidelines and principles established by global authority, including particularly the New Economic Order. One such mechanism might be a Council of designated governmental representatives of the fishery bodies, or their elected officers, under the auspices of COFI and reporting to it. An important function of COFI would then be to examine the actions taken by the fishery bodies and evaluate the likely consequences of them with respect to the principles of the N.E.O. COFI should be given a special responsibility for overseeing the development and conservation of fisheries in the areas beyond national jurisdictions, and the actions within national jurisdictions which may affect the open ocean resources. In addition COFI should be given the authority directly, or through the establishment of a new body permanently associated with it, to regulate the development of industries based on living marine resources south of the Antarctic convengence, including the marine mammals (whales and seals) in that region. It might be empowered to delegate in certain cases such authority to other existing bodies - such as the IWC, and the group of Antarctic Treaty nations but ultimate responsibility should stay with the world community, as represented through a strengthened expanded COFI. If, in addition, as suggested above, COFI were the recipient of trust funds from national and international sources its fulfilment of these new functions would be facilited directly through selective financial support of the regional and specialized fishery bodies, especially those which have developing countries as members.

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3. The principles of international fisheries management.

It is generally agreed that the annual catch of fish of traditional kinds is within sight of the limit of what these natural resources can sustain. Several stocks are already seriously overfished, some can sustain higher catches with increasing intensity of exploitation, but the total, even under proper management, will not exceed double the present level. Features of the present situation are (1) that the total level of investment in fishing vessels and equipment already exceeds what would be needed to take the maximum catch and (2) an increasing proportion of the catch, even by developing countries, is used in livestock feeds which are moved, almost entirely, to increase food supplies in the already well-fed countries. Two desirable changes are therefore avoidance of waste of other natural resources of fuels and materials which consumed in incessive fishing on some stocks, and measures to encourage increased consumption of their own catches by developing countries, preferably directly. In addition, however, there is known to be very large potential for non-conventional marine organisms as food, in the Antarctic and elsewhere. It is essential to ensure that these resources are developed in such a way as to tend to equalize protein consumption patterns rather than further to enhance existing difference and, further they are used with restrain so that future generations are ensured the full benefits from them, if they so wish.

Equity in the distribution of benefits in time is at least as important as equity in distribution of current benefits in the context of the N.E.O. The principle of conservation, as defined in the 1958 Geneva Conventions, and largely reiterated in draft articles submitted to the UNCLOS, are inadequate as a basis for present and future requirements. The definitions and principles drawn up by a group of leading marine scientists in February - April, 1975 are commended (see Annex) for inclusion in the new

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conventions, with the intent that COFI should be charged to monitor their general application. However, although COFI, as modified, should be a suitable instrument to promote equity in current distribution, special arrangements may be needed to fultil the longer-term requirements. An independent office, linked with the scientific advisory system, should be charged, and given the means, to assess the consequences of all planned activities which will affect the living marine resources and their environment, with respect to future options and potential benefits, and generally to represent the interests of future generations of mankind. Reference of management plans to this "ombudsman" should be mandatory.