

## Notes on the Forthcoming Eighth Session of the Law of the Sea Conference

### The Situation

1. There is considerable pressure on the Conference to wind down its affairs during 1979. While two long sessions are foreseen for 1979, it is not likely that the G.A. will authorize such sessions for 1980. The assumption is that either the Conference can complete its substantial work this year, with a signing ceremony in 1980, or it cannot complete this work at all in its present incarnation.
2. Considering the profound disagreements on vital issues it is not likely that the Conference can agree on a text, based on the ICNT, this year. It is even doubtful whether the ICNT, such as it now stands, can be "formalized."
3. If no new elements are introduced, it is likely that a revised ICNT will remain as a document of great moral and political importance which will continue to act on the world community but without the power of a Treaty. The Conference might transform itself into a forum that meets periodically, and the development of a new order for the oceans might continue at a more leisurely and unpredictable pace. While this would not be a total loss, such a course of events is obviously fraught with many dangers.

### Policy Options

#### 1. "Trimming."

During a meeting of the Governing Bodies of the IOI last April, the present status of the L.o.S. Conference was discussed. Some of the leading figures of the L.o.S. Conference (Amerasinghe, Yankov, Castaneda, Warioba, etc.) are members of our governing bodies and were present at the discussion. Attention was drawn to the uneven character of the ICNT: parts of which are broad, comprehensive, and of a constitutional character, while other parts lose themselves in the complexities of detail, trying to predetermine and to freeze the uncertainties of a changeable future. This applies, in particular, to Part XI of the Text (the Constitution of the Seabed Authority) and is, to a large extent, the cause of the present stalemate on this crucial part of the Text. Participants in the IOI meeting suggested that the only way to solve this problem was to simplify and condense the Text, providing a constitutional and institutional framework without trying to freeze passing and unpredictable situations into detailed legal provisions which would soon prove to be unworkable and would bereave the Text of the necessary flexibility and adaptability to future developments.

Last year, the time was not ripe for the adoption of such a policy by the Conference. The USA delegation, in particular, had inherited from the previous Administration the paradoxical

position of stressing, on the one hand, the novelty and unpredictability of the economics and technology of seabed mining, and, on the other hand, of wanting to spell out every detail of managerial and financial arrangements, leaving nothing to the discretion of the competent organs of the future Authority.

This year the situation has changed. The Delegation of the USA is preparing new proposals, and the keyword in these proposals is "trimming." It is now acknowledged that the Text must be streamlined and simplified, and that certain problems can only be solved by leaving them to the future.

## 2. Abandonment of the Parallel System.

A policy of "trimming" would make it possible to abandon the horns of the dilemma of the so-called "parallel system."

The "parallel system," it will be recalled, was introduced by the USA during the Third Session of the Conference, to provide for a "compromise" between the two extremes in conceiving the mode of mineral exploitation of the international seabed: Developing countries called for a strong Authority, including an "Enterprise system", modelled after the nationalized Chilean copper industry, under which the Authority would have had a monopoly on the exploitation of the minerals. This was conceived as embodiment of the concept of the common heritage of mankind. The industrialized countries, on the other hand, took the common heritage principle cum granu salis. They opted for a weak Authority, restricted, essentially to the function of licensing States and companies who wanted to exploit the resources.

The USA "compromise" provided for both: an Enterprise system and a licensing system. This apparently solomonic justice entailed an unbreakable concatenation of insoluble problems which paralyzed the conference ever since.

The difficulties, surfacing mainly in the form of questions on financial arrangements and technology transfers between the industrialized countries and the Authority, stem from two basic flaws in the conception of the "parallel system." First, it puts the Authority's Enterprise (i.e., the Authority) into a position where it has to compete with established industry in seabed mining, instead of building established industry into the Authority on a basis of cooperation. In the present and predictable global economic situation, the Authority can in no way sustain this competition. Secondly, it distorts the original concept of the Enterprise as the embodiment of the common heritage of mankind, in which all States cooperate, and turns the Enterprise into a status symbol for poor nations. But if the industrial States are free to mine what they need under a licensing system -- who needs the Enterprise? Not the mineral exporting developing countries, who would be ill advised to invest in the establishment of the Enterprise which would have to compete both with the

industries of the developed countries and with their own land-based industries. Not, either, the importing developing countries, who are importing on a relatively small scale and can be shown to fare better, in financial terms -- at least in the short term -- if they import manufactured goods based on seabed minerals from industrialized countries than if they were to invest capital in seabed mining production, processing, and manufacturing.

Thus there is no real economic incentive to get the Enterprise off the ground, while, on the other hand, there is no political incentive to give it up and bury it.

While the Conference was hung in the horns of the dilemma arising from the misconception of the "parallel system," the Text grew more complex, more bizarre and more perplexing, from year to year.

The option of "trimming" could reduce the Text to a level of simplicity and rationality on which a practical, non-ideological solution can be based. Such a solution must embody cooperation rather than competition between established industry and the Authority and must benefit both industrialized and non-industrialized, producer and consumer States. Such a system can only be the kind of unitary joint-venture system proposed by Nigeria in 1976 and elaborated by Austria in 1977. Reduced to one paragraph, the proposal provides that States and companies have free access to exploit the Area, provided they form a joint venture or new entity with the Authority, for which the Authority provides half the investment capital, appoints half the members of the Governing Board, and takes half the produce and profits. The other half of decision-making power and profits is to be divided among States and companies in proportion to their investment. There could be one such joint-venture, there also could be a series -- one for each mining project, and probably between six and twelve between now and the end of the century.

The "trimmed" text need not contain more than one such paragraph. The detailed provisions on basic conditions, financial arrangements, transfer of technology, could all be eliminated. The elaboration of a model statute for the joint-venture system could be entrusted to a group of experts and completed within six months. Joint ventures provide a framework tested and familiar to established industry. On the other hand, a unitary system is the only one that holds any promise for developing countries, economically, technologically, and institutionally. This will be shown by a computer model, presently in preparation at Dalhousie University.

3. Continental Shelf.

"Trimming" need not be restricted to Part XI of the Text. It could equally be applied to the complexities of the definition of the outer continental margin. This raises issues on which the Conference is bitterly divided. A large majority of nations has nothing to gain from jurisdiction over an excessively wide continental margin. The definition proposed in the so-called Irish formula is so complex that it might in fact be difficult to apply. At this stage -- as the Conference was apprised during the last session -- it is impossible even to draw a map on the basis of the criteria proposed. Adoption of the Irish formula would not restrain any nation to take whatever it wanted to take anyway. Rather than freezing such a formula into a Convention, it might therefore be wiser to abstain from any definition at this time and leave the question unprejudiced for a later decision. The international community, after all, has lived for decades without an agreement on the limits of the territorial sea. Insoluble in 1958 and 1960, this problem solved itself in the 1970s, as the perception of national interests kept changing. It is quite conceivable that the definition of the outer limit of the continental shelf will go through analogous phases. A decision of restraint, at this moment, might save the Conference.

4. The Portuguese Resolution

The chances of agreement on a Text so "trimmed" would be considerably better than the chances of agreement on the present Text. On the other hand, a "trimmed" text would leave more work to be done at a later stage. Whether there is no agreement at all, or agreement on a "trimmed" text, there will be a pressing need for a "continuing mechanism" to further develop, broaden and deepen the work of transforming the international order, initiated by this, the greatest of all international conferences ever held in history. The Portuguese resolution, which already commands wide support at the Conference, admirably serves this purpose. Elements of the far less comprehensive Peruvian proposal for an International Commission on the Law of the Sea, introduced in the Seventh Session of the Conference, could be included. One useful addition to the Portuguese Resolution might be a special recommendation to UNEP to undertake a pilot project, perhaps in joint venture with one of the Consortia, to explore the environmental consequences of nodule-mining. Such a study is urgently needed, if the international community is to make rational regulations on the environmental aspects of seabed mining as provided for by the Text. A project of this kind would also, during this stage of transition, maintain an international presence in seabed mining, which would have a positive moral and political impact.

It is to be hoped that the Portuguese Resolution will be adopted by consensus by the Conference. It would be an instrument suitable

- . to continue the work of the conference and
- . to guide and coordinate the multiple activities arising in the

wake of the Conference:

- restructuring the marine-oriented institutions and agencies of the U.N. system;
- advancing the establishment of new international or regional marine resource management systems
- assisting developing nations in the use of marine resources and integrating ocean management into their own development strategies; and
- absorbing new ideas, trends and developments already on the horizon of intergovernmental and nongovernmental programmes and projects, such as those of IFIAS, the IOI, the UNESCO symposium on Man and the Ocean and Ethics and many others, as the work of UNCLOS -- never completed -- begins to trickle down and penetrate the awareness of the international community at large and the world community begins to adjust to the post-UNCLOS period. No matter what, the international community, after UNCLOS, will never be what it was before.

# MARINE RESOURCES, OCEAN MANAGEMENT, AND INTERNATIONAL DEVELOPMENT STRATEGY FOR THE 80s AND BEYOND

## A. Conceptual Framework

1. Introduction and background. Essential points of the Sixth and Seventh Special Session of the UNGA. Declaration of Rights and Duties of States. Essential points of subsequent negotiations (UNCTAD, Non-Aligned, North-South: main stumbling blocks). Search for a new development strategy.
2. Relevance of ocean space to development strategy and NIEO
  - a. Basic needs
    - i. Peace
    - ii. Food
    - iii. Energy
    - iv. Minerals
    - v. Transport
  - b. The Concept of the Common Heritage of Mankind and its implications for development strategy and NIEO.
  - c. Environment (UNEP, Mediterranean, Gulf)
  - d. Transfer of technology and science (IMCO, UNIDO, FAO)
  - e. Cooperation (solidarity. Cooperative management. Sea Environment encourages cooperation.
3. Law of the Sea Conference: Essential points. Seabed institutions. Real relevance of seabed mining to developing countries. Economic Zone: Alternatives of exploitation. Environment. Research. Surveillance.
4. Strategies for development
  - a. National.
  - b. Regional
  - c. Global.

## 5. Conclusions

## B. Technical Annexes

1. The Seabed Mining Training Project: analysis and recommendations.
2. Marine Resources and African Development: Analysis of Pacem in Maribus IX and recommendations.
3. The Development of Pacific Islands. Analysis and recommendations.