The Draft Convention on the Law of the Sea

An Appeal for Action Now

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The Tenth Session of the U.N. Conference on the Law of the Sea, suspended on April 17, marked a most regrettable set-back. Although technically the work proceeded and valuable results were achieved, politically the Conference was paralysed by the U.S. announcement that the Reagan Administration was undertaking an extensive, comprehensive review of the Draft Convention and would not be in a position to negotiate this year.

Assessing, in this light, the prospects for the Conference and the chances of getting the Draft Convention adopted, President Koh, in his Press Conference of April 17, outlined four alternatives:

(1) The U.S. comes to the conclusion that the Treaty is in the national interest and can live with the Draft Convention as it is. In this case, the work can be completed this summer and the Convention opened for signature;

(2) The U.S. asks for minor changes in the Draft Convention. These could be negotiated this summer, the work completed, and the Conventioned opened for signature;

(3) The U.S. asks for major changes. In this case (a) the Conference might agree to a lengthy renegotiation introducing basic changes in the text; this might require one or more years, taking us to 1983 or 1984. Or (b) the Group of 77 rejects the demands of the U.S. It proposes to give up the consensus principle; the Conference resorts to voting, and the Convention is adopted without the U.S;

(4) The U.S. comes to the conclusion that it is not in favour of any Treaty: in which case the option outlined under 3 (b) above would be resorted to, and the Convention would be adopted without the U.S.

I am basing my appeal for action now on an analysis of these four options, and onthe conclusion that unless the Convention is adopted this year it will not be adopted at all.

I.

The chances for options (1) and (2) are very low. This can be deduced from the general influence of the mining industry, including the oil industry, on the Reagan Administration; from the letter addressed recently by a group of influential Congressmen to the President with regard to the Convention; from the general tenure of the press which, with few exceptions (Chicago Tribune, Christian Science Monitor), enthusiastically applauded the Administration and had only bilious contempt for the Convention, especially the Seabed Authority, decried as a sellout to the Third World which, thank God, the Reagan Administration has prevented at the last moment by scuttling the Treaty... . It can be deduced, last not least, from the type of experts the Administration has chosen to brief its Delegation (Mr. Leigh Ratiner) and to preside over the Revision Committee (Mr. Th. Kronmiller): hard-liners both.

Option (3) -- the US. requests basic changes, including, probably, the elimination of production controls, a de-emphasis of technology transfer and, possibly, the abolition of the Enterprise -- generates two sub-options: (a) The Conference accepts a lengthy process of re-negotiating the Convention; or (b) the Conference decides to go ahead without the United States; which, according to Koh, would also be the consequence if the U.S. chose option (4) and decided simply to withdraw from the negotiations.

Between options (3) and (4) it appears more likely that the U.S. chooses option (3). There is no need for the rejection of the Convention as a whole. The total rejection of law and order in the oceans is not in the spirit of the Administration, nor would it serve the U.S. image abroad. With a few minor changes in Parts II through X and XII through XIV, and the basic reconception of Parts XI, the pertinent Annexes,

and, to some extent, Part XV, the Convention could be made harmless in the eyes of the industry, and the U.S. posture would appear constructive rather than destructive.

The question, then, is: Will the Conference choose sub-option (a) or (b)?

I am convinced that a re-opening of basic questions would break up the Conference. Sub-option (a), in my view cannot be considered to be realistic. Bilateral pressures, on the part of the U.S. Government, are heavy, as shown already by the paralysing effect of the announcement of the new U.S. policy. As the economic crisis deepens, few developing countries will risk U.S. aid and trade for the sake of the Convention. Admittedly the process of "revision" in the U.S. Administration goes hand in hand with "bilateral consultations" apt to re-inforce this point.

If it were decided now to abandon the consensus principle early during the resumed session and to proceed to voting, it is very likely that the Convention would be adopted, even though the losses, already now, would be heavy. In the present situation, the countries of the EEC and Japan would have no choice but to follow the U.S. in voting against adoption. The group of 77 is already heavily divided and demoralized. Many of them have expressed, privately, serious doubts as to the "realism" of going ahead with the Convention without the industrialized countries. About 30-40 percent of the Group of 77 would oppose, already today, the abandoning of the consensus rule and the application of the rules of procedure.

On the other hand, all Socialist States and China would be in favor. The Socialist States want the Convention adopted without amendments. New Zealand, Australia, Canada, and the Northern Countries (except Denmark) would be favorable.

In other words, if it were decided now to proceed to voting early during the resumed session; if there were strong leadership; and if the period between now and the resumption of the session in August were

utilized for speedy and effective preparatory diplomatic activity, the chances for the adoption of the Convention would be substantial. If, on the other hand, time is given for the fruits of the U.S. "bilateral consultations" to mature, the majority of the seventy-seven would be lost. This majority would not include a hard-core of land-based producers, which will never accept the elimination of production controls, but this group would be too small to get the Convention adopted. The Conference would break up in 1982.

II.

The adtoption of the Convention without the USA, the EEC, and Japan, is an option seriously considered also by Koh. The difference between Koh and the view expressed in these pages is one of timing: Koh would leave all options open until the U.S. reveals its position, which he assumes to be this year: an assumption not likely to come true. This paper urges an immediate decision. Decisive action now would seem, in fact, the only way to induce the U.S. Government to move quickly in the direction of options (1) or (2).

The EEC could not afford to stay out long. To proceed, outside the U.N. frame, with a "mini-treaty" with the U.S. and Japan would not appear to be an advisable course for the EEC. Seabed mining activities, under such a mini-treaty, might be challenged by the ICJ as pointed out by Koh in his Press Conference, and the EEC could ill afford to offend its Lomé Pact partners in this gratuitous manner. EEC countries are presently divided in their attitudes towards the Convention: a division which will last as long as the fate of the Convention is uncertain. Once it is clear that the Convention will be ratified, the EEC must accede, and it will exercise considerable pressure on the USA in this direction. It is in fact possible that the USA posture itself will change once it recognizes that it cannot prevent the adoption of the Convention. The strong posture adopted now pays only so long as it appears to reach results.

The adoption of the Convention, with or without the USA, is the only way to assure continuity. It is only upon the adoption of the Convention -- whether by consensus or by vote -- that the Preparatory

Commission can be established, which, in a way, is a continuing Commission. In my view, the Commission should not be too large, and should be composed only of States having signed the Convention and, in a second phase, of the first forty having ratified the Convention. I imagine the Commission will be active for a rather prolonged time, and that this time should be used for a re-conceptualization of the Authority within the terms of the Convention. To be functional, the Authority has to adjust its activities to the reality that is emerging in the 80s, which is very different from the perceptions of the 70s. This can be done without changing the Convention. The Preparatory Commission is the body most suited to this task.

If, on the other hand, there is no Convention and no Commission, there is no forum for the establishment of a Seabed Authority. A Seabed Authority is needed, for a number of reasons which I discuss in a separate paper.

It seems advisable to accept the position of the Soviet Union and its Socialist allies, that is, to adopt the Convention without amendments. The introduction of any changes, no matter how small, would open the sluice gates to a flood of amendments, jeopardizing the speedy adoption of the Convention.

Since, undoubtedly, there are many articles in which changes are desirable, and will become more desirable over time, the Conference should agree, by resolution or as part of the Final Act of the Conference, to hold a Review Conference on the whole Convention ten years -- or even five years -- after its adoption.

III.

In conclusion, the course of action here advocated consists of the following steps:

1. Decision now to adopt the Convention, with or without the US.

2. speedy diplomatic action to assure the adoption of the Convention this summer.

Such action could, most suitably, take the form of an informal intersessional meeting in June, getting together a group of 20-30 like-minded countries to discuss strategy for the resumed session.

3. Proposal that not more than the first three weeks of the resumed session be devoted to the resolution of the "outstanding issues."

4. Proposal that, at the beginning of week 4, the consensus principle be abandoned, if necessary, and the Convention, without amendments, be put to a vote.

5. Proposal that the final week of the resumed session be devoted to the elaboration and adoption of two resolutions: one establishing the Preparatory Commission; the other, providing for a Review Conference ten years after the adoption of the Convention.

This course of action, obviously, is not without risk. The risk, however, is calculated, not reckless: There is nothing to lose. Any other course, postponing a decision to 1982, is tantamount to certain failure. In other words: If we force action now, we may, or we may not, succeed. If we accept US pressure for stalling, the cause is lost. We may get a Convention now. We certainly will not get one in 1982 or later.

THE DRAFT CONVENTION

by

Elisabeth Mann Borgese

Volume I of the Ocean Yearbook presented a detailed analysis[1] of the Informal Composite Negotiating Text (ICNT, 1977) which remains basically valid today. Yet: how much has happened to and around the emerging new Law of the Sea!

The first revision of the ICNT was effected on April 30, 1978, at the end of the first part of the Seventh Session of the Conference. The relevant changes were reported in Volume II of the Ocean Yearbook.[2]

A second revision was published on April 11, 1980, after the conclusion of the first part of the Ninth Session, but consensus was still lacking on a number of key issues, notably those relating to the Seabed Authority.[3]

The second part of the Ninth Session (Geneva, July 28 - August 23, 1980) was generally considered a breakthrough session. Agreement was reached on some of the most difficult problems on questions relating to the Seabed Authority, in what Chairman Engo described as a meeting of his First Committee "in perhaps the happiest atmosphere ever." Since its first meeting in Caracas, he continued, "when illusion and great hope still dominated every thought and action, the Committee has come a long way, traversing difficult, sometimes strange and unexplored terrain; bullied by unrelated international incidents; teased by paradoxical realities; tamed by the realization that none could impose its will on another; saved by the knowledge that, in the nature of things, there is an uncomfortable limit in the scope of that which could be changed and, finally, united in adopting a model of reaching-out to the opposing sides in a joint quest for understanding, accommodation and, yes compromise, (italics, his), in a clear and unequivocal response to the pressing needs of this generation."[4]

A new revision was released after the end of the Session, and although this text, like its predecessors, still is a "negotiating," not a "negotiated" text -- i.e.,

it has not been "formalized" by adoption as the official text -- it bears the promising title "Draft Convention", with the designation "informal text" relegated to the subtitle. As stated in the Explanatory Memorandum by the President of the Conference,[5/] "the President expresses the hope that this revision will be regarded as bringing the Conference to the final stage of its delibrations and negotiations."

The relevant revised sections of the Draft Convention together with a summary of the proceedings, are reproduced on pp 000-000 of this volume. Besides the articles on the Seabed Authority, they include the Preamble, the Final Clauses, and a new Part XVI on "General Provisions," a new Article 76, on the delimitation of the continental margin, and a new Annex (Annex II), on the establishment of a Commission on the limits of the Continental Shelf.

Basically, the changes effected in the succeeding revisions, from the ICNT to the Draft Convention, are not substantial. There are drafting improvemnts (although the major part of the massive work of the Drafting Committee is not yet included); there are technical improvements (e.g., in the Statute of the Enterprise), and there are some conceptual refinements (e.g, on the production limitation provisions), but the thrust of the whole remains basically unchanged: A document that reflects, and enhances, the revolutionary changes of our era: the advent, on the scene of international relations, of so many new actors: developing countries and non-States, like the European Communities or the Liberation Movements; the new role of science and technology; the growing impact of industrial civilization on the environment; the transformation of the concepts of ownership and sovereignty; the transition from a laissez-faire system to one of management; the emergence of a new, structured relationship between multinational companies and the international community and, more broadly, between economics and politics in general.

That this transition is groping, and that the document is marred by imperfections and contradictions, goes without saying.

The basic defects as pointed out in Volume I of the Ocean yearbook -- lack of precision in the definition of boundaries; iniquity in the distribution of ocean space and resources; imbalance between national and international interests, between national rights and national responsibilities; basic misconceptions with regard to the management

seabed resources embodied in a "Parallel System" that cannot possibly function the way it was intended; lack of institutional infrastructure in other areas of ocean management -- all these defects remain in the Draft Convention just as they were in the ICNT.

What has changed, or matured, is the will of the international community as embodied in this greatest of all internatinal conferences ever held: the will to conclude this mammoth effort and, with a little give-and-take, complete the Convention, the Constitution for the Oceans, this year.

It was this political will that was responsible for the breakthrough on the last of the outstanding thorny issues, that is, the voting system in the powerful Council of th Seabed Authority.

The Council, it will be remembered, is the executive organ of the Authority, having the power to establish, in conformity with the provisions of the Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.6/

The Council consists of 36 members elected on the basis of (a) geographic representation;(b) interest representation, the two being interwoven and politically balanced in a most intricate way.

Developing countries, obviously, wanted to make sure that the substantial majority they enjoy in the Assembly -- based on the one-State-one-vote principle -- which is the supreme body of the Authority but has little decision-making power, should be reflected also in the more powerful Council. They resolutely rejected any form of "weighting" the votes or of veto. Industrialized countries, on the other hand, wanted to make sure that they would not be outvoted on questions of investments, distribution of profits, or rules and regulations related to seabed mining. The Conference remained deadlocked on this issues through years.

Now a compromise has been reached, in the form of a so-called three-tiers system, that is, the issues on which the Council may have to vote, and which are enumerated in Article 162 under "Powers and functions of the Council," and passim in other articles, have been divided into three categories: The first category, of least controversial issues, requires a two-thirds majority for adoption; the second category, more controversial, and more comprehensive (there

are only eight items listed in the first category as against nineteen in the second) requires a three-fourth majority; whereas the third category, apparently containing only three items, requires consensus. In reality, these three items are multiple, like warheads on a missile. The first one refers to the power of the Council to adopt, on the recommendations of the Economic Planning Commission, necessary and appropriate measures to protect developing producer countries against adverse effects of seabed mining on the quantity, or the prices, of their exports of land-based minerals: a provision of basic importance to developing countries. If now any one of the 36 members of the Council potentially has a veto on a measure suggested by the Economic Planning Commission, it may be difficult for developing producer countries to get any compensatory satisfaction at all. The second item requiring unanimity concerns the power of the Council to recommend to the Assembly rules, regulations, and procedures on equitable sharing of financial and other economic benefits derived from activities in the Area and, on the other hand, the payments and contributions to be made to the Authority by States out of their revenues from the exploitation of the continental margine beyond the 200-mile limit of the economic zone. In other words, the potential veto applies to all rules and regulations on economic benefit sharing: another, rather bitter pill to swallow for developing countries.

The third item in this category, finally, concerns amendments to part XI of the Convention. These, likewise, require consensus.

It should be pointed out, however, that to equate the consensus requirement with a veto power does not do justice to the letter and spirit of the Convention. "Consensus" is defined [7] as "the absence of any formal objection." It is stipulated, furthermore, that within 14 days of a proposal requiring consensus, the President of the Council should informally ascertain whether there would be any objection in the Council if the proposal were put to a vote. If he does encounter difficulties, he shall constitute a conciliation committee, of which he himself shall be the chairman; and the conciliation committee shall try to work out a formulas that is acceptable. If it fails to work out a compromise within 14 days, it must report to the Council nevertheless, and explain the reasons for its failure.

Consensus thus understood -- as one delegate pointed out during the negotiations -- does not recall so much the veto system of (Western) international organizations

as the decision-making processes of the communal meetings or tribal councils in many developing countries.

One delegate from a developing country praised this innovative voting scheme as an attempt by the international community "to liberate itself from a domination exercised only by the powerful."[8]

On the other hand, the process is likely to be cumbersome. The fear has been expressed that, to the degree to which the Council is unable to take action, the real decision-making power would shift to the Commissions -- the Economic Planning Commission and the Legal and Technical Commission.[9] And since these are composed of technical experts, this shift could signify a shift from international democracy to international technocracy -- certainly an undesirable development. There are, however, other aspects. The members of the Commissions act not only as technocrats, they also act as individuals, i.e., not as representatives of their States. They form a supranational collective, like the Commission in the EEC. In their relation to the Council -- corresponding, mutatis mutandis, to the Council of Ministers in the EEC -- a dialogue between global interests and national interests might develop, reflecting and, at the same time, structuring the evolving political world situation.

We have dealt with this break-through at some length as it represents a real innovation. How it will work, only the future can tell. But certainly it is a contribution to the theory of decision-making in international bodies in general.

The other changes in Part XI are relatively less important. They do not basically change the comments made in Volume I of Ocean Yearbook.

The Preamble to the Convention, largely the work of President Amerasinghe, sets the new Law of the Sea into its full historic context. It notes that the developments that have occurred since the First and Second Conference on the Law of the Sea, in 1958 and 1960, have accentuated the need for a new and generally acceptable Convention. It recognizes the unity of ocean space; it highlights the importance of U.N. Resolution 2749 (XXV) which declares

the seabed and its resources to be a Common Heritage of Mankind; and it inserts the making of the new Law of the Sea into the broader U.N. effort to create a more equitable international economic order.

The new section on General Provisions is a small collection of articles that would not fit anywhere else. Article 300, on Good Faith and Abuse of Rights, was first proposed by Mexico and then taken up by the United States.[10] Article 301, on peaceful uses of the sea, based on a proposal by Costa Rica and co-sponsored by a number of other States[11] fills one of the major lacunae of the previous drafts, i.e., the lack of a definition of "peaceful uses" of ocean space. Article 302 on Disclosure of information was proposed by the United States[12]; Article 303, on archeological objects or objects of historical origin found at sea, is mostly the work of Greece and the United States,[13] and Article 304, on the responsibility and liability of damages is also of U.S. origin.[14]

The most interesting discussion, in the context of General Provisions, centered on a proposal by Chile.[15] The proposal, titled jus cogens, read

> The States parties to the present Convention accept and recognize on behalf of the international community as a whole that the provision relating to the Common Heritage of Mankind set out in Article 136 is a peremptory norm of general international law from which no derogation is permitted and which, consequently, can be modified only by a subsequent norm of general international law having the same character.

It was warmly endorsed by all developing nations: an indication of the fundamental importance given to this new concept by the vast majority of the international community.

The industrialized countries showed reluctance. Even a country like the Netherlands, which has given the most steadfast support to the concept -- even extending it to other areas such as Outer Space -- did not find it possible to suport the Chilean proposal: not for lack of sympathy, but because, legally, the signatories to a Convention (how many? Sixty? Seventy?) are not competent, under international law, to declare a norm to be ius cogens, a competence reserved to the International Court of Justice.

Thus a compromise had to be found to express the same idea in legally acceptable terms.

The new Part XVII, on Final Clauses, contains an article (Art. 311) which defines the relation between the new Law of the Sea and other conventions and international agreements. paragraph 6 of this article reads:

> The States parties to this Convention agree that there can be no ammendments to the basic principle relating to the Common Heritage of Mankind as set forth in Article 136, and that they shall not be party to any agreement in derogation thereof.

Were the Convention to be adopted by consensus, this might well provide the basis for the International Court of Justice, to declare the basic principle ius cogens at a later time. In any case, the concept of the Common Heritage of Mankind is here to stay.

A great deal of work went into the new part on Final Clauses: both by the group of legal experts under the chairmanship of Jens Evensen of Norway, and by the informal Plenary, under president Amerasinghe. This work touched on some of the most sensitive political problems: partly still unresolved.

Thus Articles 305 and 307 touch on the question of participation: What entities are qualified to become signatories to the Convention and Members of the Treaty organizations? Are they, as heretofore, sovereign States, or has the time come for acknowledging the changing structure of international law and the advent of new actors in international relations, by admitting non-State entities such as, on the one hand, the European Communities and, on the other, the national liberation movements?

The logic for admitting bodies like the EEc is rather compelling, as set forth, during the Ninth Session, in a letter from the Representative of Italy to the President of the Conference. [16] The member States of the EEC have in fact transferred certain competences to the EEC, especially with regard to the management of living resources, the protection and preservation of the marine environment, and commercial policy. Thus it follows that "on the one hand, in view of the transfer of competences which has occured the member States of the Community cannot undertake engagements with respect to third States in relation to matters over which the Community has competence. It is

accordingly necessary that these engagements be undertaken by the Community, and this requires that it should become a part of the future Convention together with its member States...On the Other hand, the participation of the EEC responds to the need to give third States which ratify the Law of the Sea Convention the legal guarantee that they have before them partners capable of honouring in their regard the totality of the obligations envisaged by the Convention."

In his intervention in the general debate, the Delegate of the Netherlands further clarified the position of the EEC by stating, "The Convention must contain a clause permitting the EEC to become a contracting party. The Community is ready to include in such a clause a guarantee that its participation in the convention will not result in a growth of representation in relation to that of its member States, and that in dispute settlement procedures the division of responsibilities between the EEC and its members will not deprive other States of any guarantees contained in the Convention. The EEC plans to pursue discussions on this matter." 17/

Peru, on behalf of the Latin Americans, introduced an informal proposal setting out the same principle. 18/

There is a difference between an intergovernmental organization to which States have delegated certain competences and responsibilities, and a national liberation movement. Nevertheless, once the principle is accepted that non-State entities are admitted on an equal footing with sovereign States, the political logic of admitting liberation movements as well becomes irresistible.

This issue makes strange bedfellows: it aligns, on one side, the EEC with the most radical elements in the developing world, and, on the other side, the Soviet Union in its untiring defence of traditional international law, and Israel, which does not want the PLO.

In any case, this is a discussion that far transcends the boundaries of the Law of the Sea. its outcome will have a significant impact on the further development of international law and of the concept of sovereignty.

Another difficult problem -- which, however, can now be solved, since the composition and voting procedure of the Authority's Council has been finally agreed on -- is the composition of the first Council in the hypothetical case -- very likely to materialize -- that the distribution of required ratifications is such as not to permit the composition of the Council according to the highly complex prescriptions of Article 161. The formula provisionally adopted, and still under discussion, is that "the first Council shall be constituted in a manner consistent with the purpose of Article 161 if the provisions of that article cannot be strictly applied." This leaves some flexibility, for an interim period. History will take care of the rest.

Other articles in this Part -- prohibiting reservations and exceptions and defining the kind of declarations and statements that may be made by States signing, ratifying or acceding to the Convention -- are footnoted with caveats, recalling that they are based on certain assumptions which may or may not materialize.

A compromise has been reached on Article 76, the delimitation of the continental margin. It is compounded of "Irish "(the geomorphic criterion), "Russian (the distance criterion) and political (the ambiguities) ingredients. The definition of the continental margin offers serveral alternatives: boundaries could be drawn in a number of ways, using the same criteria, a fact demonstrated by Soviet cartographers last year and confirmed by IOC. 19/

This made it necessary to establish a Boundary Commission, as proposed by the Delegation of Canada, to supervise and advise on the drawing of boundaries on the seabed:20/ an immensely costly and surrealistic endeavor. How, and at what cost, the Commission will fulfil its task remains to be seen. What is of immediate interest, however, is the manner of establishment of the Commission, as it represents one of the few institutional provisions contained in the the Convention --apart, obviously, from the Seabed Authority and the Tribunal.

The Commission, described in Annex II of the Convention, will consist of 21 members, elected by a meeting of States Parties, convened by the Secretary-General at the U.N. headquarters, from a list of candidates prepared by the Secretary-General on the basis of nominations by States, acting through regional caucuses. The 21 members of

the other ocean space institution (besides the Seabed Authority) i.e., the International Tribunal for the Law of the Sea, are elected in a similar way.

It is remarkable, incidentally, how many of the ocean space institutions proposed in this draft are composed of members who act as individuals, not as representatives of States: More than in any other U.N. institution.

The meeting of States parties thus has already several functions: the election of the Tribunal and the election of the Commission. Additional responsibilities accrue to it in connection with Amendments to the Convention and the Review of Part XI.

The Meeting of States Parties could, in time, evolve as the basis of that "integrative machinery" that is needed in any case if the awareness that "the problems of ocean space are closely interrelated and need to be considered as a whole" [21] is to be translated into institutional arrangements. Again, the EEC comes to mind. The role of its Assembly is not too different.

The final item in our list of documents from the Ninth Session is not part of the Convention itself. It is the draft for a separate resolution, the final act of the great Conference: the establishment of a Preparatory Commission -- an interim piece of "integrative machinery -- to make the necessary arrangements for the implementation of the institutional aspects of the Convention so that the institutions it creates -- the Assembly and the Council of the Seabed Authority, the Enterprise the International Tribunal for the Law of the Sea and, now, the Boundary Commission -- should be established and can function as soon as the Convention comes into force, upon the deposition of the sixtieth instrument of ratification.

The Draft was prepared by the President. After an initial, favorable, reception by the Plenary, it is yet to undergo a detailed examination at the Tenth Session.

The first question that arises is the membership of this Commission. The Draft suggests that they should be the signatories of the Convention. Preliminary discussions considered an alternative. Some countries may not be able

to sign the Convention immediately, due to internal constitutional requirements. But since membership in the Commission should be, initially, as wide as possible, it might be preferable to admit all signatories, not of the Convention but of the Final Act of the Conference. To encourage ratification, it might be stipulated that, at a second moment, membership could be restricted to the first fifty States having ratified the Convention.

The second question concerns the structure of the Commission: This might be simple, with the choice of a Chairman, the establishment of subcommittees, the adoption of rules and regulations, left to the body itself, once it is constituted; or it might be more elaborate, including a description, in the establishing resolution, of an executive committee, its composition, manner of election, voting procedure, etc.

The third question concerns the competence of the Commission -- and this will depend partly on the length of time for which it is expected to function. Some flexibility in its functions and powers, as indicated in paragraph 8 of the Draft -- "The Commission may deal with any other matter falling within its sphere of action..." is therefore highly desirable.

Which takes us to the conclusive, necessarily speculative, part of these comments.

In general, the world-wide optimism at the end of the Ninth Session appeared justified. All major issues that had defied the skills and wills of the diplomats for years, had been solved. Only four issues remained to be settled: the question of participation in the Convention; the question of the delimitation between States with adjacent or opposite coasts and the settlement of disputes thereon; an American proposal for a provision regarding preparatory investment protection; and details concerning the preparatory Commission. True, the first of these issues is politically explosive; the second might elude consensus, and require the introduction of formal amendments and voting; the third represents a very limited problem, and the fourth presents no unsurmountable obstacles. Given a continuation of the political will manifested during the Ninth Session, the monumental work could ~~be~~ terminated successfully in one brief session. With the Drafting Committee pursuing its work at its present accelerated pace, the Convention could have been opened

for Signature in Caracas late in 1981 or early in 1981.

Three factors, however, intervened and cast a pall of uncertainty on the forthcoming developments.

The first is the sudden and unexpected death of president Amerasinghe. The Conference will undoubtedly miss his diplomatic genius, his ability to cut Gordian knots: what is even worse, however, is that his disappearance is bound to open the door to procedural wranglings for his succession, and valuable time may be lost. It is indeed unlikely, at this writing, that the work can be completed, as planned, in the Spring, 1981, Session.

The second factor is the change in the Administration, and in the political mood of the USA. Immediately after the Inauguration, a scathing article appeared in the Wall Street Journal, under the unflattering title, "Third World's Sea Pact Takes U.S. for a Ride."[22] It condemns the Law of the Sea negotiations as sheer folly and sell-out and culminates in the question: How is it possible that such a radical document as the Draft Convention may soon be signed by the U.S.? "Some have argued rather persuasively," the article suggests, "that the U.S. would be better off scuttling the treaty as it stands and exploiting the seabed in agreement with other mining nations (Congress recently passed legislation permitting this.) 'Mini-treaties' could then be negotiated with other nations to ensure that important straits remain open."

It is an ominous piece.

The third factor, apt to re-inforce the Wall Street Journal reasoning, is the official recognition of the fact, unmentionable until now (but mentioned in Ocean Yearbook, Vol. I)[23] that there are nodule deposits in areas under national jurisdiction which may be exploited under bilateral arrangements by-passing the Seabed Authority. As the Government of Chile recently announced,[24] one of the largest commercially exploitable nodule deposits has been discovered in the offshore of the Juan Fernandez Archipelago, under Chilean sovereignty. The Government of Chile is preparing for commercial exploitation of this wealth under its jurisdiction, in cooperation with one of the multinationals who have the technology and the capital.[25]

A number of scenarios could be conceived for the Tenth Session. One is, that the US will ask for fundamental changes in the Text. It could not hope, however, that these would be accepted, or even considered, at this late stage. After twelve years of labor (since the establishment of the "Seabed Committee) the Draft Convention is what it is. To "unravel" the "package" would clearly signify the failure of the Conference. U.S. demands for basic changes would merely be a pre-announcement of refusal to sign.

U.S. unwillingness to sign might have series repercussions in Western Europe and Japan.

In spite of this, and considering the enormous investment in UNCLoS; considering that more than the Convention, the credibility of the United Nations and of multilateral diplomacy in general are at stake; and considering, last not least, that there is general agreement on most parts of the Convention, and there is the wide-spread conviction that order in the oceans is better than chaos in the ocean -- it is likely indeed that fifty States will be found, among the over 150, who will sign the Convention. It may not be as joyous, as triumphal an act as was assumed in the euphory at the end of the Ninth Session, but it will happen: and the Marine Revolution will move into a new phase. A first piece of machinery -- the Preparatory Commission -- will be in place. The Draft Convention, colossal testimony to the collective will of our era in transition, will be the new Law -- whether ratified according to traditional rules or not. Action will tend to be more decentralized than it has been during the past decades, when it was focused rather dramatically on the Law of the Sea Conference. Regional development, coordinated, initially, by UNEP's Regional Seas Programme 26/ is likely to play an important role; the development of national legislation, and its harmonization with the new Law of the Sea, ratified or not, will go on apace, engendering a feed-back relationship between national and international development. The U.N. agencies engaged in marine activities in one way or another (FAO, COFI/FAO; IOC/UNESCO, IMCO, UNEP, WMO, ILO, UNCTAD, IAEA) will try to rally, to restructure, to strengthen their operational capabilities, to respond to the needs created by the new Law of the Sea, whether de facto or de jure; and science and technology will proceed, and change the perceptions of interests. History, and interpretation of the Convention in the light of practical needs, will take care of the rest.

NOTES

1. Arvid Pardo, "The Evolving Law of the Sea: A Critique of the Informal Composite Negotiating Text (1977)." Ocean Yearbook, Vol. I, 1978, pp.9-37.

2. "A Selection of Documents from the Eighth (Geneva) Session of UNCLOS III," Ocean Yearbook, Vol.II, 1980, pp.458-515.

3. A/CONF.62/WP.10/ REV.2, April 11, 1980.

4. A/CONF.62/L.62, 26 August 1980, Report of the Chairman of the First Committee, Paul Bamela Engo (United Republic of Cameroon).

5. Document A/CONF.62/WP.10/REV.3/ADD 1, 28 August 1980. Explanatory Memorandum by the President of the Conference.

6. Draft Convention, Article 162.

7. Draft Convention, Article 161, paragraph 7 (e).

8. United Nations Press Release SEA/132, 27 August 1980.

9. It should be noted, e.g., that, if the Legal & Technical Commission recommends the approval of a plan of work, it shall be deemed to have been approved by the Council if no Council member submits to the President within 14 days a specific written objection....In this case, a long procedure is initiated, at the end of which the Council must act by consensus, if it is to override the Commission's recommendation. De facto, it is the Commission that makes the decision. See Draft Convention, Article 162, paragraph 2 (j)(i).

10. A/CONF.62/L. 25, May 5, 1978, and FC/15, 21 August 1979.

11. GP/1, 21 March 1980.

12. GP/3, 25 March 1980.

13. GP/11, 19 August 1980.

14. GP/8, 5 August 1980.

15. GP/9, 5 August 1980.

16. A/CONF.62/98, 31 March 1980.

17. United Nations Press Release SEA/131, 27 August 1980.

18. (Verspreid tijedens overleg met Latijns-Amerikaanse groop op 13 augustus 1980). Peru. No Ref. Number. Reproduced in Renate Platzöder, Dokumente der dritten Seerechtskonferenz der Vereinten Nationen - Genfer Session 1980. Stiftung Wissenschaft und Politik, 1980, p.418.

19. Ocean Yearbook, Vol. II, pp 498 -506.

20. A "Boundary Commission" was also proposed by the USA in the Seabed Committee in 1970. See United States of America: Draft United Nations Convention on the International Sea-Bed Area. A|AC.138|25 of 3 August 1970; A|8021, pp.130-176.

21. Draft Convention, Preamble.

22. Mark T. Lilla, "Third World's Sea Pact Takes U.S. for a Ride. Wall Street Journal, January 26, 1981.

23. Pardo, loc.cit.

24. Pacific Islands Monthly, August, 1980, p.158."Chile plans to extract minerals from the seabed in an area within 200 nautical miles of the Juan Fernandez archipelago in its South Pacific territories. The Chilean Government also plans to make international legal submissions for extending the area of extraction. The plans were announced recently by the Chilean Minister for Mines, Mr. Quinones...Mr. Quinones said investigations so far suggested that the proposed field was one of the largest undersea mineral reserves in the world....Chile would probably call world-wide tenders for involvement in the project. The government would be looking for partners with a high level of technical expertise in mineral extraction and undersea operations."

25. For some suggestions as to how to adjust the International Seabed Authority to these developments, see Elisabeth Mann Borgese, "The Role of the Seabed Authority in the 1980s," San Diego Law Review, May, 1981.