"SOLIDARIDAD PARA LA PAZ Y EL DESARROLLO"

Reunión Especial del Club de Roma

Guanajuato, México, 23-27 de julio de 1975

RAPING OR MANAGING THE OCEANS

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Versión original: Inglés.

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Report on the Third Session of the Third U.N. Conference on the Law of the Sea

by

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I.

Following upon a first, procedural, session of three weeks in New York in December, 1973, and a second, working, session of ten weeks in Caracas during the summer of 1974, the Third Session of the United Nations Conference on the Law of the Sea took place in Geneva from March 17 to May 9, 1975.

From Caracas, the Geneva session inherited a voluminous material: an infinity of draft articles, alternatives, working papers, reports; a deepened understanding of some basic issues, but no agreement, not even a negotiating text on which to base further discussions. It also inherited a trend towards considering all problems from a purely national and fragmented point of view -- quickened by the "energy crisis," the greed for raw materials presumed to be scarce, and by the mounting world confrontation between so-called producers and so-called consumers. From Caracas the Conference also inherited a structure dividing it into three main working committees, the first one dealing with the Seabed Authority, the second, with the Law of the Sea, and the third one with environmental protection, scientific research, and the transfer of technology.

It was a tough session. Nobody honestly expected any results to come out of Geneva. Pessimism, even cynicism prevailed. The final result, however, was far, far better than anybody would have dared to hope. The documents released by President Amerasinghe, after a brilliant procedural maneuver, constitute a break-through.

Thus the Geneva session was a surprise: an illustration of the strange workings of group dynamics.

The shift from global, international considerations to merely national concerns was paralleled by a shift of attention from the First Committee (International Seabed Authority) to the Second Committee (national jurisdiction in ocean space) as the focus of the conference. And as the discussion disintegrated into a confusion of disconnected details, the Second Committee dissolved into small, disgragated, overlapping interest groups, working groups, contact groups, negotiating groups, whose multiple efforts became harder and harder to follow, let alone to coordinate or harmonize. The clear-cut division between developed and developing nations that had polarized the Caracas session gave way to intricate alignments of developing mineral exporting, developing mineral importing and developed consumer nations; coastal and land-locked, oceanin and geographically disadvantaged nations. By mid-April, everything seemed in jeopardy. The press reported the Conference had bogged down. A stalemate was feared.

When paralysis set in, a myth was invoked.

One of the most important unofficial groups that had been established in Caracas, is the so-called Evensen Group, named after its founder and Chairman, Jens Evensen of Norway. The Evensen Group originally was a self-selected group composed of the most prestigious jurists from various parts of the world, who participated in the Group in an individual capacity. The purpose of the Group was to conduct high-level discussions on the inchoate matter of the Second Committee and to come up with a text that might be acceptable to a large number of important nations.

The Evensen Group worked extremely hard: during the Caracas session, between sessions, and during the Geneva session.

Gradually its composition changed, and more and more it began to include heads of delegations representing the interests of a variety of nations, but especially of the big

coastal States. Eventually it became open to any nation that wanted to join; and as it became more numerous, it became more heterogeneous, thus eluding consensus.

In the meantime, the paralysed Conference held its breath, so to speak, waiting for the tables of the law to be handed down from the Evensen Group. For what the Evensen Group came up with would determine what the Second Committee would do; and what the Second Committee did would determine the outcome of the Conference as a whole.

But the tables did not come. Internal dissent, external criticism, from delegations who felt left out and condemned the whole effort as an undemocratic, elitist maneuver, and formal difficulties as to how to transform most efficiently the work of an unofficial group into an official document of the Conference, slowed down ~~the~~ ~~process~~, deflated the myth: undervaluating, as it had overvaluated what in reality was and remained -- no matter what view one took on a number of details -- one of the most constructive and dynamic efforts the Conference had produced.

With less than three weeks left, thus the Conference still was without tangible result.

The voices of protest grew louder. A new approach was called for. A break-through was needed. Leadership was invoked: and leadership came to the rescue.

The Conference President, Ambassador Shirley Amerasinghe of Sri Lanka, has a genius for cutting parliamentary Gordian knots. He had saved the Conference at Caracas with a procedural miracle, and he did it again. Aided by the twelve or twenty, out of the two thousand, participants who still have a grasp of the <u>problematique</u> of the Conference, he moved from disgregation to integration, from the profusion and confusion of the "informal working groups" back established Committees: more than that: to the hearts of the Committees: to the elected Committee Chairmen: Paul Engo of Cameroon, for the First Committee, Reynaldo Galindo Pohl of El Salvador, for the Second, and Alexander Yankov of Bulgaria, for the Third.

He charged these three men with the responsibility of producing over the next two weeks "unified texts," that is, Treaty Articles on all items covered by their mandate. It was an awsome responsibility. It was an unprecedented procedure.

The texts were not to represent the view of any one interest group. They were not to represent the consensus or even the majority view of the Conference. They were to be based on all discussions, formal and informal, that had been held to date. Parts of the Evensen-Group paper that had been completed were turned over to the Presidency without fanfar; so was a set of articles prepared by the Group of 77. The "unified texts" were to represent the considered judgment of the Committee Chairmen and the Conference President and, possibly, some of their fervor, hopes, and inspiration.

The genius of the move was that the texts were presented at the closing session of the Conference. As a matter of fact, they were distributed just after adjournment (A/Conf.62/WP.8, Parts I, II, and III). Thus there was no discussion, no opportunity to tear the texts to pieces. The session ended with a touch of self-irony: There was laughter when the President, wishing a safe journey home to all delegates, added: "You are carrying in your baggage a precious document..." But it ended also on a note of hope, on the basis of work done.

There now was, not a negotiated paper, but a negotiating paper, a basis for negotiations in the intersessional period and for the next session, a basis which, thus far, had been sorely lacking.

II.

The documents project a systematic and coherent picture of the new law of the sea. From a juridical, technical, drafting point of view, they are throughout of the highest quality. They are impeccably fair in attempting to accomodate the points of view of all major groups. Considering the trends prevailing at the Geneva session, the documents

go as far as they possibly could in the direction of building a new internat ional order. They attempt a synthesis between national and international interests -- even if they could not be successful on all points without leaving prevailing conference trends dangerously far behind. These trends, however, have changed since 1967 when the Delegation of Malta first brought the Marine Revolution to the attention ofthe international community. They will keep changing. A thorough analysis of the present documents, and a certain number of technical studies, to which such an analysis might give rise, should contribute to the further evolution of Conference trends -- and to the further development of the documents.

Part I contains the Constitution of the Seabed Authority. It is the most innovating, the most imaginative, the most creative of the threeddocuments. Potentially at least, it is the one that makes the greatest contribution to the building oa a new international economic order.

The Constitution faithfully incorporates the Declaration of Princeples on the peaceful uses of the seabed byyond national jurisdiction adopted by the XXV General Assembly. The "machinery" consists of an Assembly, a Council with two subsidiary organs, a Planning Commission and a Technical Commission (which might become a Commission on Science and Technology), an Enterprise, a Secretariat, and a Tribunal. There will be three Annexes, containing the Statute for the Tribunal and the Enterprise (these two are yet to be drafted), and on the basic conditions of exploration and exploitation (already there).

The Assembly consists of all Members, each having one vote. The Council consists of 36 Members, elected on the basis of rather complex criteria attempting to combine regional, functional, and natonal principles of representation. 24 Members are elected on a regional basis. The remaining 12 are divided between developed and developing nations: 6 representing "Members with substantial investment in,

or possessing advanced technology which is being used for the exploration of the area and the exploitation of its resources, plus some other ad hoc specifications: in other words, the great industrialized nations, West and East. 6 represent developing nations, drawn from 6 categories: exporters and importers of landbased raw materials which may also be produced from the resources of the area; States with large populations; land-locked States; geographically disadvantaged States; and least developed countries.

To safeguard national interests, finally, there is a provision that any Member may send a representative to the Council and participate in its discussions without a vote, if a matter particularly affecting it is under discussion.

The composition of the Council, and the relations between Council and Assembly, raise crucial problems on which industrial and non-industrial nations have different views. The industrial nations want a Council that is technically "efficient," the non-industrial nations want a Council that is politically representative and in whose decision-making processes they have their fair share. The industrial nations want the Council to be the dominant organ of the Authority, the non-industrial nations want this to be the Assembly.

The compromise attempted by the document is not successful.

As far as the composition of the Council is concerned, the regional principle is sadly underdeveloped. Africa, Asia, Eastern Europe (socialist), Latin America, and "Western Europe and others" are no constituencies in any sense. Clearly, these groupings have been taken over from the regional working groups which play an increasingly important role at the Conference itself. But they have arisen in a somewhat casual and informal way. To structuralize and "freeze them in a Constitution would be a mistake. The "regions" which could form a basis for representation in the Council

must be (1) more equal in population (2) more coherent culturally or geographically or economically or politically. To design them in these terms is not an easy job and will require a great deal of negotiation.

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 represent ation in a political organ on magnitudes of investment. The six richest States must not have any special position in the Council. This violates, not only the principle of sovereign equality among nations. It also violates any principle of equity. It viciates the idea of democracy in internati onal relations. Magnitudes of investment may play a role in the Enterprise, which is a business. In our own model draft treaty (The Ocean Regime, second revision, 1970) we provided, in fact, that the Assembly should appoint 50% plus one of the members of the Governing Board of the Enterprise, The rest would be appointed by States or Corporations, in proportion to their investment.

But the Council must be kept "clean."

The alotment among the developing countries is less dangerous, but equally dysfunctional. It is ad hoc, arbitrary, necessarily incomplete, and unstable. 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?

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

In his accompanying note, Chairman 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.

As far as the relation between Council and Assembly is concerned, the document asserts, on the one hand, that "the Assembly shall be the supreme policy-making organ of the Authority," but, on the other hand, severly limits the effectiveness of Assembly control. The Assembly meets only once every two years, which simply is not enough. There is, furthermore, a delying mechanism which can be set in motion by a minority of one blocking third of the Members on "any matter before the Assembly" -- which may have a rather crippling effect.

Perhaps the Council should have the possibility to create other Commissions -- besides the Planning Commissionaand the Technical Commission. For instance, there might be a Commission on the Law of the Sea, to review and revise the Laa of the Sea, and harmonize national and international maritime law.

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.

The Appendix on Basic Conditions is extremely well done. With some variants, it follows very closely CP cab 12, of 9 April, 1975. It is not as specific as the industrial nations would have desired, but far more specific than the original proposal of the "77." It concentrates on jointsventures. 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 clauses, stipulating, e.g., that amendments to this Annex come into force if ratified by a majority, rather than by two-thirds, of Member States.

The basic difficulty with Part I is the 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 rest of this century, creating an international income of about 5o - 150 million dollars annually. This could be administered in a much simpler way. The importance of the Seabed Authority as here designed, however, is not financial, or even economic. Its real contribution is that it sets a new pattern, In this sense it is a break-through.

The drafting of Part II presented an almost superhuman task for the Chairman of the Second Committee. To compose a coherent whole out of the contradictions and conflicts ravaging his Committee should have seemed impossible. He has done a superb job. He has accepted, and undoubtedly had to, maximal claims of national expansion, and he had to accomodate other interests within these perimeters.

Part II deals with the Territorial sea and Contiguous Zone; with straits used for internati onal navigation; the Exclusive Economic Zone, the Continental Shelf, the High Seas, Land-locked States, Archipelagoes, Islands, Enclosed and Semi-enclosed Seas, Territories under foreign occupation or colonial domination, and Settlement of Disputes.

As was to be expected, the territorial sea extends to twelve nautical miles, measured from baselines which are imprecisely defined: which will cause some trouble in the future.

The articles on navigation in the territorial sea and through straits are excellent. Many of the provisions 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, which really made "freedom of navigation" inthe zone obsolete. These problems will have to be faced in the imminenta future.

The Economic Zone extends to 200 miles from the same

baselines from which the territorial sea is measured.

The articles on the Economic Zone are taken, with very minor variations, from the Evensen paper. So are the articles dealing with the management of living resources. Land-locked States have the right of transit through neighboring coastal States and the right to fish in the economic zones of these States. They have no right, however, with regard to the mineral resources of the continental shelf of their more fortunate neighbors -- which might be, economically, far more important for their development.

Jurisdiction over the continental shelf extends, beyond the 200 mile limit of the economic zone, to include the entire margin down to the abyssal ocean floor. The boundary is to be determined unilaterally by the coastal State. There is, however, a provision for profit sharing in the area between the 2oo mile limit of the economic zone and the boundary of the international area.

In the High Seas, the traditional freedoms of the sea are preserved. It is difficult to assume, however, that. e.g., freedom to fish can be maintained in the international area without adversely affecting the efficiency of management systems in the national zones. There are, in fact, articles regulating the "management and conservation of the living resources" in the high seas, but the document fails to describe the required internatonal, regional and subregional organizations to embody this international management system and its interactions with the national systems.

The articles on Archipelagoes are quite precise ,better than the discussions in Caracas and Geneva would have indicated. Their real significance, in economic terms, however, willlbecome clear only after precise technical studies of the effects of these articles on the extension and on the economics of achipelagic States will have been made.

The articles on the regime of islands are very broad and will allow very great expanses of ocean space to fall under national jurisdiction.

Part II, on the whole, is "systems-conserving," i.e., the changes it introduces are changes within the status quo. They do not contribute towards the building of the new international economic order. As has often been pointed out, the developing nations which gain, in economic terms, from the establishment of the economic zone, are few. The majority of the developing States, including the least developed States, gain nothing, whereas a number of already rich countries, such as the U.S.A., Canada, Australia, South Africa, etc., acquire huge expanses of ocean space. Some of the provisions of Part II -- e.g., the seaward delimitation of the continental shelf or the provisions with regard to the regime of islands, placing large seabed areas under national jurisdiction, will diminish the role the Seabed Authority will be able to play in the building of the new international economic order.

Part III deals with the protection and preservation of the marine environment, with scientific research, and the transfer of technologies.

The section on the marine environment treats this environment as a whole and deals with pollution in a comprehensive way, including all sources. It establishes responsibility and liability of States for damages to the marine environment under the jurisdiction of other States or beyond the limits of national jurisdiction. It provides, in broad terms, cor compulsory dispute settlement. Provision is made for national, regional, and global measures of pollution control. All this is excellent and reflects an evolution of thinking that has taken several years.

The articles maKE NO PROVISION? HOWever, for changes in the marine environment caused by technologies which are not polluting, such as the effects of large-scale extraction of energy from ocean currents (it has been predicted that such activities, off the coast of Florida, might change the impact of the Gulf Stream on the climate of European States) or other such "macro-technological" developments. Perhaps the Soviet resolution, introduced in the General Assembly last

year, which prohibits certain technological activities which might alter the marine environment (including the atmosphere) might be taken into consideration.

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

The articlesoon marine scientific research propose an excellent compromise, based on the Mexican working paper, between the alternatives of freedom of research and coastal-state control.

In the present situation, however, one may question whether these alternatives really still exist. The inextricable connection between scientific research and industrial research on the one hand, military researbh on the other, has made "freedom of scientific research" intolerable. Any compromise between the alternatives "freedom of research" and "coastal-state control," no matter how perfect in theory, is bound to work out, in practice, in favor of coastal-State control. The distinction between fundamental and resource-oriented research necessarily will give rise to innumerable disputes and crippling delays. This is quite inevitable, especially as between scientifically/industrially advanced nations and others. The real alternatives in the present situation are coastal-State control and international control, but the international organ or organs which might be created or used for this purpose are only vaguely adumbrated. No reference at all is made to IOC which, with the necessary structural modifications, could indeed become the scientific arm of the ocean institutions and has declared its willingness to do so.

The articles on Development and Transfer of Technology provide broad guidelines for the conduct of States, and competent international. and regional organizations. They still are at the hortatory stage, however, addressing the status quo. It is difficult to envision any real progress without a precise restructuring of the international machinery dealing with scientific research, the transfer of technology, and the conservation of the environment.

III.

To assess the full impact of the new law of the sea on the building of the new international economic order, extensive studies are needed. The International Ocean Institute has initiated such a study, in the context of the Tinbergen Project on the New International Order. As will be shown in this stucy, a large part of the documents issued by the third session of the Third United Conference on the Law of the Sea has no relevance to the building of a new international order. On the other hand, the real wealth of the oceans, which is oil, gas, and food, has not been mobilized for the building of such an order.

The Resolutions and the Programme of Action adopted by the Sixth Special Session of the General Assembly and the Charter of Economic Rights and Duties of States contain many points that require action by the Conference on the Law ofthe Sea. Onlyssome of them have been acted upon. More could be done -- even within the present, largely systems-conserving institutional framework. Here are some of the points raised by the documents on the New International Economic Order on which the Conference on the Law of the Seak has not yet acted, but could act.

(1) Developing island States ought to be given some special attention. Some of them -- in the Caribbean as well as in the Mediterranean -- might be badlyssqueezed if present conference trends prevail unchecked.

(2) The International Seabed Authority would betthe proper authority for the formulation and implementation of an international code of conduct for multinational corporations operating on the seabed. This includes, above all, the oil companies.

(3) These multinationals, as is well known, escape the control by national governments. The proposal that they be chartered internationally has been made on many occasions Eyom many quarters. Could they be so chartered by the International Seabed Authority? The Authority might derive additional

income, for development purposes, from this aativity.

(4) The Seabed Authority, acting through its Assembly and Council, might be empowered to create other public international Enterprises, besides the one for deep-sea nodule mining, whose real importance, probably, is not at all in its very limited mining activity but in that it provides a new form of active, participatory cooperation between industrialized and nonindustrialized nations. If this is so, the establishment of other public international Enterprises ought to be considered as soon as feasible: first of all, for oil and gas. It would be infinitely more beneficial for many developing nations to cooperate with such a public international enterprise in the extraction of their offshore oil than with the multinationals. Obviously, not everything can be done at once, but it would suffice, at this time to include an article in the Constitution empowering the Authority to create "other" public international Enterprises if and when they become feasible and useful.

(5)The Law of the Sea Conference could do more towards the definition of a policy framework and the coordination of the activities of all organizations, institutions, and subsidiary bodies within the U.N. system for the implementation of the Programme of Action and the New International Economic Order, as far as the oceans are concerned.

The moment has come for a more effective coordination and integration of the activities of the U.N. and other integgovernmental organs and organization whose activities are wholly ocean-oriented. IOC has declared its readiness to undertake the necessary restructuring enabling it to become the scientific arm of the new Authority, but the documents of the third Session of the Law of the Sea Conference do not yet take note of this development. A comprehensive development in this direction was proposed by the Declaration of Oaxtepec, issued last January on the

initiative of the International Ocean Institute, Malta, which is attached as Appendix.

(6) Attention ought to be given to assure a more equitable participation of developing countries in the world's shipping tonnate. This could be done in Part II, dealing with navigation, but it could be done only if a restructured and strengthened IMCO were integrated into the system.

(7) Unexploited and underexploited resources which could contribute to the solution of the world food crisis ought to be mogilized. As far as such resources are in the economic zoneoof developing countries, they are dealt with in Part II of the documents. A really satisfactory solution however can be found only in the establishment of an international fisheries management system, capable of interacting effectively with the national systems. Such a system is postulated in Part II, but in no way created. Another question that should be raised in this context is the development of unconventional living resources in international ocean space, such as squid, or Antarctic krill. Obviously this should not be left to the industrialized nations. It should be developed through international cooperation, for the benefit of the developing nations. This vastppotential is not touched upon by the Geneva documents. It requires, again, the creation of an effective international management system for fisheries, through the appropriate structural changes in COFI (FAO).

Considering the enormous importance of marine resources and the growing proportion of ocean produce in the world GNP, no new international economic order can be viable unless it includes ocean management. Ocean management, on the other hand, in which so much time, financial resources, and ingenuity has already been invested, may well become the prototype for international economic/ecological cooperation embodying a new order.