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Next Steps Toward a Law of the Sea in the Common Interest

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This symposium in the *San Diego Law Review* will appear at an historic point in the development of oceans law. In May 1977, the Third United Nations Conference on the Law of the Sea (UNCLOS) will reconvene for its sixth session. Despite a continuing impasse on deep-seabed mining which developed during the fourth and fifth sessions of the UNCLOS, the sixth session should begin in a climate more favorable to productive negotiations. It is widely understood that agreement will require give and take on both sides and that an extremist few should not be able to dictate an unrealistic Group-of-77 position. Moreover, the appointment of Elliot Richardson, the only American to have held four cabinet positions, as Ambassador-at-Large to head the United States delegation is an unmistakable signal of the seriousness with which President Carter and Secretary of State Vance view the negotiations. A new level of professionalism is likely to guide the work of the sixth session, and as a result a new measure of optimism now seems justified.

Although reasonable optimism is realistic, storm clouds are gath-

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ering in the form of new unilateral oceans claims that could make agreement more difficult if not impossible. Following the passage of the United States 200-mile fishing zone in April 1976,[1] Liberia declared a 200-mile territorial sea, Bangladesh, the Comoros, Guatemala, India, the Maldives, Mexico, Mozambique, Pakistan, Senegal, and Sri Lanka declared a 200-mile economic zone; Angola, Benin, Canada, Denmark, the Federal Republic of Germany, France, Nicaragua, Norway, the United Kingdom, and the USSR declared a 200-mile fishery zone, and at this writing (in February 1977) at least eleven other nations have a 200-mile zone of one kind or another in the planning stage. Several bills on deep-seabed mining have been introduced in the United States Congress. For the first time it seems probable that a bill will be enacted.

Even with the considerable difficulties which lie ahead, a law of the sea treaty of unique benefit to all humanity is attainable. The leadership of the UNCLOS, including President Amerasinghe, the Special Representative of the Secretary-General Bernardo Zuleta, Committee Chairmen Paul Engo, Andres Aguilar, Alexander Yankov, Alan Beesley, and many others, are dedicated to agreement. Perhaps as much as eighty-five percent of the treaty, including many essential political issues such as transit passage through straits, has already been generally agreed upon. The task ahead is to resolve expeditiously the remaining ten to fifteen significant issues and to maintain confidence in the UNCLOS during the two-year period that will be required for negotiations. Because of the need for concordance on a new approach to deep-seabed mining and of the importance of building consensus through continued negotiation, a workable agreement could be concluded in late 1978 or early 1979 at a special signing session in Caracas.

A number of actions can increase the chances for agreement and can together point the way as the next steps in the negotiation.

UNCLOS Procedure and Final Articles

The production of a Single Negotiating Text (SNT)[2] at the Geneva session of the UNCLOS was a major procedural breakthrough and an important innovation in United Nations lawmaking. The strength of this approach is the ability of negotiators to utilize informal procedures for negotiation which are later incorporated into a broad package agreement. So long as no premature voting is undertaken, these informal procedures provide continuing opportun-

1. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801-82 (Supp. 2, 1976), effective Mar. 1, 1977).
2. Single Negotiating Text, U.N. Doc. A/Conf. 62/WP. 8 (1975).

ity to broaden accord. The sixth session seems likely to continue to build on the successful procedure of the SNT. Thus, remaining areas will be singled out where compromise is required as opposed to those areas such as the breadth of the territorial sea or transit passage through straits where UNCLOS leadership recognizes that major changes are not now amenable to realistic agreement. Additionally, the session will probably keep early agreement through informal negotiations whose results will be fed into yet another revised single text. This process can and should be repeated until maximum consensus is achieved (again when realistically attainable). Only after such consensus is reached will it be feasible to adopt the text formally through single majority votes in each Committee and ultimately by a two-thirds vote on the entire treaty in plenary session. Given the package nature of the agreement, article-by-article or even chapter-by-chapter voting at any stage seriously risks a breakdown of the UNCLOS.

These procedural issues are linked with the issue of reservations. A realistic package approach suggests a policy of no reservations. Yet in such a broad agreement a policy of no reservations risks treaty rejection by many nations even if such a treaty were to be adopted by a two-thirds vote. The solution seems to be to continue active negotiations until such time as objections likely to cause reservations have been met. However in each case the UNCLOS leadership would understand that a change in the text would not be defeating the treaty. For example, the breadth of the territorial sea cannot be increased beyond twelve miles with any hope of UNCLOS approval because some territorialists initially might not accept the treaty on this basis. Transit passage through straits is another example of such an issue. The importance of continuing negotiation until maximum consensus is achieved suggests that no effort should be made to pressure a final deadline. A better procedure would be to seek affirmative support for a vigorous UNCLOS work schedule until maximum consensus has been attained.

Because of the critical nature of the procedural issues and because of the interrelation between procedure and final treaty articles, preparing a single text of final articles as soon as possible is of critical importance.

Deep-Seabed Mining

The deep-seabed mining issue is the principal cause of the con-

tinuing UNCLOS impasse. In my judgment the present Revised Single Negotiating Text[3] (RSNT) is in no State's interest, and it will not be approved by the United States Senate. Although the causes of this impasse are many, I believe the principal difficulty has been the failure to conceptualize any compromise capable of meeting the needs of both the Group of 77 and of the major developed States, rather than an inherent incompatibility of minimum needs. If this analysis is correct, there is cause for hope. We now have a unique opportunity to fashion a new and easily understood approach which can be both realistic and fair to all.

In fashioning such an approach both sides must exhibit realism and flexibility. The Group of 77 must understand that unless a treaty provides assured access to mineral resources of the deep seabed, no United States negotiating team could promise passage by the Senate. In turn the United States and other potential deep-seabed mining nations must be sensitive to aspirations for a meaningful international Enterprise and a sharing of benefits.

Whatever the resolution, the impasse can be broken only by a concerted effort of the heads of delegations with discussions centered on an overall Committee I package clearly understood by all. This is one issue concerning which secret diplomacy and behind-the-scenes dealing have no place.

The Character of the Economic Zone

The debate at the last two sessions about the character of the economic zone seems largely a debate without dialogue. The legal realists long ago taught us to discard conceptual labels in favor of more specific concerns. It is hoped that both sides will shift their attention to the specific changes required in the single text chapters on the economic zone and the high seas rather than continue their conceptual debate. In this connection those who are urging that the economic zone is not high seas should be prepared to meet the reasonable concerns of those urging this label. They should also bear in mind, as Professor Clingan indicates in his article for this symposium,[4] how far the maritime States have already gone in their acceptance of the 200 mile zone. Similarly, it appears inconsistent to point out that the zone is not high seas as that term has been traditionally used while simultaneously de-

3. Revised Single Negotiating Text, U.N. Doc. A/Conf. 62/WP. 8/Rev. 1 (1976) [hereinafter cited as RSNT].

4. Clingan, *Emerging Law of the Sea: The Economic Zone Dilemma*, 14 San Diego L. Rev. 531, 538-39 (1977).

claring the zone to be "exclusive" in clear contravention of the specific provisions of the RSNT. If the economic zone is to be only an "economic zone," it should not be conceptually loaded in contradiction of the real political compromise underlying the zone—that is, an agreement recognizing expanded coastal State resource jurisdiction in return for an unequivocal understanding of navigational, overflight, and similar freedoms in the zone.

Tuna and Marine Mammals

Articles 53 and 54 of the RSNT[5] deal with highly migratory species and marine mammals. They do not yet embody a realistic or desirable result. No State will profit by treaty which is inadequate to resolve political disputes and conservation needs. It is hoped that the informal negotiating groups dealing with the article 53 tuna problem will once again make an effort to reach a fair and useful conclusion.

Article 54 on marine mammals presents a somewhat different problem. Unfortunately we have failed to recognize that whales are highly migratory on a global basis. Just as regionally migratory fish and porpoise stocks require a series of *regional* organizations for effective conservation and management throughout their range, whale stocks require a single international organization for their *global* conservation and management. Because it does not address this issue, article 54 requires major revision. It does not seem too much to ask that there be at least one article promoting effective protection for whales in a treaty of from 400 to 600 articles. Senator Weicker of Connecticut has made some interesting suggestions for strengthening article 54 which would be a good starting point for needed revision.

The Outer Edge of the Continental Margin

Broad margin States such as Canada, Argentina, the United Kingdom, or the USSR probably will not sign a treaty cutting off seabed jurisdiction at 200 miles. However, landlocked and geographically disadvantaged states that do not stand to gain by extension beyond 200 miles should have fair incentive for agreement. Thus, a solution

5. RSNT, *supra* note 3, pt. 2.

could be arrived at by permitting coastal nations exclusive seabed resource jurisdiction to 200 miles or to the outer edge of the continental margin, whichever is farther seaward. In turn the rest of the UNCLOS should be entitled to a provision for revenue sharing at reasonable rates beginning at 200 miles. Also included should be a reasonable and clear definition of the term *outer edge of the margin* that would neither usurp the common heritage nor contain the needs of future conflict. Definitions which could arguably include the entire continental rise are in my judgment little more than special interest pleadings and should be rejected.

Fishing Rights of Landlocked and Geographically Disadvantaged States

With the exception of an informal agreement on catadromous species, one of the few accomplishments of the fifth session of the UNCLOS was a near agreement on the principal remaining issue of landlocked, geographically disadvantaged States' access rights to coastal fish stocks in neighboring economic zones. This negotiation should be finalized and incorporated in the RSNT at the earliest opportunity.

Standard Setting for Vessel-Source Pollution for Vessels in Innocent Passage in the Territorial Sea Outside Straits

One of the few remaining issues in the territorial sea and environmental chapters is the extent of coastal State standard-setting authority for vessels in innocent passage outside straits. At the present time there is an important inconsistency on this issue between the Committee II and Committee III texts. This issue should be resolved at the earliest possible time through negotiations between the concerned parties. In this connection it should be borne in mind that the Ports and Waterways Safety Act[6] imposes special constraints for the United States negotiators dealing with this problem.

Marine Scientific Research

The present RSNT is highly burdensome for marine scientific research. Despite the real concerns of coastal States, it is unlikely that the present approach will achieve anything other than reducing the flow of fundamental information about the world's oceans.

6. 33 U.S.C. §§ 1221-27 (Supp. 1976).

The current approach is uniformly opposed by the world's marine scientific community, and I have little doubt that were it adopted, all humanity would be the loser. It would be helpful even at this late date for both sides to seek a new conceptual approach that would offer greater opportunity to meet the reasonable needs of all. One element of new approach could be establishing a system of regional oceanographic centers which would provide developing countries an opportunity to make their own value choices concerning research. Such an approach would eliminate the second-hand participation through coerced jurisdictional presence in research projects which has previously occurred. Although this concept was once hinted at as an element in a satisfactory science compromise, strangely the possibility of regional centers was never pursued.

There are other important issues to be resolved, including the breadth of archipelagic sea routes, seabed boundary delimitation, islands and dependencies, and a generally acceptable dispute settlement chapter. The UNCLOS leadership will encourage early agreement on each of these issues. It is also desirable that nations forego new oceans claims for the duration of the UNCLOS and that a more favorable negotiating climate encourage this needed restraint.

All nations must face the choice. Can we afford to miss the opportunity for an oceans agreement in the interest of all humanity and permit oceans issues to degenerate into a race to stake out national claims? I believe that we cannot, and that answer is widely shared within the UNCLOS. With patience and perseverance the UNCLOS can yet confound its critics. If it does, the present agony could lead to a renaissance of the oceans for the benefit of all humanity.