

Afterword*

Third United Nations Conference on the Law of the Sea: Report on the 1976 New York Sessions* *

SUBCOMMITTEE ON INTERNATIONAL RELATIONS
OF THE ADVISORY COMMITTEE
ON THE LAW OF THE SEA***

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INTRODUCTION

This is the fourth report of the Subcommittee on International Law and Relations ("Subcommittee") of the Advisory Committee

* The *San Diego Law Review* is pleased to provide a forum for the publication of the Subcommittee on International Law and Relations Report on 1976 New York sessions of the Third United Nations Conference on the Law of the Sea. The Report is denominated an *Afterword* only because the press of events precluded the publication of the Report with the papers in the articles section of the *Review*.

** This is the fourth report of the Subcommittee on International Law and Relations of the Advisory Committee on the Law of the Sea. The Committee, established in 1972, is composed of private citizens appointed by the Chairman of the National Security Council Interagency Task Force on the Law of the Sea to "provide adequate representation of the diverse interests involved in the law of the sea." Members of the Committee serve solely in an advisory capacity. This informational report has been prepared by the Rapporteur of the Subcommittee, John Temple Swing, Esq. The views stated herein do not necessarily represent those of the United States Government or of the subcommittee as a whole.

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on the Law of the Sea with respect to pending negotiations on Law of the Sea and particularly the Third United Nations Conference on Law of the Sea ("Conference"). The first report consisted of recommendations for research prior to the first substantive session of the Conference. The second report consisted of an account and analysis of the proceedings at the Caracas session of the Conference together with a recommendation for inter-sessional research. The third report contained a general discussion of organizational procedural aspects of the Geneva session and an analysis of the outcome with particular reference to the "informal Single Negotiating Text." It concluded with some recommendations for future inter-sessional research.

The present report briefly reviews the work of the principal Conference committees at the third and fourth substantive sessions of the Conference held in New York from March 14 through May 7, and from August 2 through September 17, 1976, respectively; continues with a discussion of dispute settlement and a brief report on the present status of the Revised Single Negotiating Texts at the end of the second New York session and concludes with a summary outlining some of the more difficult problems that will be before the Conference when it resumes in its fifth substantive session in New York in May, 1977.

REPORT ON COMMITTEE I

The single most difficult question before the entire Conference in general and Committee I in particular has been the question: Who shall exploit the mineral resources of the deep ocean (the "common heritage" area) and under what circumstances? From the outset the developed world, with the United States in the fore, has stressed the need for guaranteed access, security of tenure and sanctity of contract as essential ingredients of any treaty. On the other hand, the developing countries, led by the Group of 77 (now more than 100 developing countries), and with clear resonance to arguments made by that group in its pursuit of a "new economic order," have consistently sought a monopolistic seabed authority

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with jurisdiction both over production and marketing so constructed procedurally as to give the developing countries clear control over its key organs.

The difficulty of constructing a compromise between what in essence is a conflict between two sharply differing philosophies can be seen by making a comparison between the text developed in Committee I with those produced by Committees II and III. By the end of the second substantive session of the Conference held in Geneva in the spring of 1975, informal Single Negotiating Texts were prepared by the chairmen of each of the three principal committees. While all three texts were in theory based on the opinion of the respective chairmen, in Committees II and III, many of the draft articles reflected weeks of hard negotiation and proposed solutions around which a substantial consensus might be expected to coalesce. Thus, even in their initial form, both the Committee II and III texts provided the framework from which the final treaty itself might ultimately emerge.

Such, however, has not been the case in Committee I. In Geneva, even the tentative efforts to come forward with provisions that sought the beginnings of compromise between the two positions painfully negotiated in the working group chaired by Christopher Pinto were overturned at the last minute in important respects by Chairman Paul Engo whose informal Single Negotiating Text tilted sharply toward accommodation of the views of the Group of 77. As such, the Engo text was largely unacceptable to the major industrial countries.

During the Geneva session, if there was any single rallying point for the Group of 77, it was the need to protect developing land-based producers from the alleged threat of economic damage that might result from seabed production. Beginning in the month immediately before and during the New York spring session, the United States explored areas of possible compromise with some of the land-based producer countries and some of the more moderate members of the Group of 77. Drawing on these and other informal discussions during the session, the text prepared by Chairman Paul Engo at the end of the session did propose at least a partial solution to the land-based producer problem. Engo also made other important changes in the text which made it more acceptable to the United States. There were, however, some other features of the text which the United States has found objectionable.

While the new text provided for a strong central seabed authority, it also adopted the so-called "banking system" proposed by the

United States at Geneva and rejected there by the Group of 77, which provided for the equal allocation of prime mining sites, one-half to the industrialized countries and the other half to the Authority to be developed by it or "banked" for future exploitation by developing countries. In return, representing a compromise on the part of the United States, the text also contained a twenty-year production limit tied to the annual growth of the nickel market to afford protection to developing land-based producers. Although important issues such as composition and voting of the Council were not dealt with at the New York spring session, it did appear as though the issues had been sufficiently narrowed to provide a basis for real negotiation at the summer session that began in August.

Unfortunately, this proved not to be the case: the new texts simply were not acceptable to the Group of 77. Its more radical spokesmen flatly refused to accept a text that they considered to be a serious dilution of the "common heritage" concept and one in creation of which they had not been adequately consulted. As a result, much of the summer session in New York was taken up with procedural jockeying with virtually no serious negotiations on any key points. The Group of 77, through a working group co-chaired by Sondaal of the Netherlands and Jagota of India, put forward alternate provisions that, had they been adopted would, in effect, have returned the texts to their post-Geneva, pre-New York state. These proposals were unacceptable to most of the industrialized countries which maintained a largely solid front throughout the entire session. It must be noted, however, that the main issue on which the United States and other developed countries have parted company—the question of a quota system limiting the maximum share of any country in seabed production—was not discussed at the New York session.

Three weeks prior to the end of the session, Secretary of State Kissinger attempted to break the log-jam by proposing that if the developing world would accept the dual access system incorporated in the Revised Single Negotiating Text, the United States would see to the initial financing of the Enterprise, the proposed operating arm of the new Authority so that, in theory, it could compete on an equal basis with the developed world. He also proposed an international review of the entire system at the end of

twenty-five years. While he received a respectful hearing, his proposal, which was not spelled out in detail in any case, simply did not go far enough to bridge the gap between the developed and developing worlds. With much of the session focusing on the question of access, on which no progress was made, it is clear that those worlds still remained too far apart. Given the situation, it almost goes without saying that questions involving the relative power of the Assembly and Council, or the composition and voting in the Council itself, were never addressed at all.

In summary, at the end of the second New York session, the situation was much as it was at the beginning of the Caracas session two years before. It had become increasingly plain as Paul Engo himself noted in his report delivered at the end of the New York summer session that "a number of basic and highly political questions . . . have to be answered before any actual drafting of a compromise text can be undertaken in good faith, and these questions should be answered at the highest political level."¹

REPORT ON COMMITTEE II

Unlike the informal Single Negotiating Text for Committee I, the Committee II text that emerged from Geneva did reflect the serious negotiations that had taken place on many important issues. As already noted, it already projected the broad shape of what might, with some further serious work, be expected to form the basis of the final treaty.

One of the problems that has plagued the negotiations throughout, as much in Committee II as in Committee I, is the following paradox: while it is much easier to make real progress when negotiating in a relatively small group, the provisions so negotiated tend to be distrusted, if not totally rejected, by those countries left out of the negotiations. Without question this factor contributed to the rejection by the Group of 77 of the "dual access" system proposed by a small negotiating group during the first New York session in Committee I. In Committee II during Geneva many of the provisions adopted in the Single Negotiating Text had in fact emerged from the so-called "Evensen Group" chaired by Jens Evensen of Norway and limited to selected heads of delegations from approximately forty countries. Countries that had not been included in those negotiations were critical of many of the Evensen provisions and largely to still this criticism Andres Aguilar, when he resumed the chairmanship of Committee II from Galindo Pohl in New York

1. Conf. 62/L16, at 12.

in the spring, chose to give the entire informal Single Negotiating Text an article-by-article reading, precisely to give all states a right to be heard.

In an effort to reduce the number of overall speakers that might wish to be heard on any issue, the chairman of Committee II enforced the "rule of silence" that had been proposed by the President of the Conference and adopted by all three committees but only really followed in Committee II, whereby delegates who failed to speak up were presumed to be in favor of the Single Negotiating Text provision then under discussion, or, in the alternative, to be opposed to suggested amendments to the text unless explicitly speaking in favor of such amendments.

While this "article-by-article" approach meant that little progress would be made toward the resolution of major outstanding issues, it did have the result of clarifying the strength or weakness of opposing views, throwing into stark relief those issues on which there was a sharp and important divergence and where further negotiations clearly would be required. These "priority" issues identified by Chairman Aguilar at the end of the first New York session included the juridical status of the waters of the proposed "exclusive economic zone," access by land-locked states to the sea and to resources of the economic zone of the region, and definition of the continental margin including the question of revenue sharing beyond 200 miles. Of these, at least the first two, juridical status and land-locked rights, are worthy of particular note: the first because it was the single issue on which the Committee most evenly split and the second because it generated the most heat.

The question of the juridical status of the waters (and airspace) of the economic zone has always been one of major importance to the United States. During the debate on this issue at the first New York session, some fifty nations spoke in favor of the maritime states' view that, in spite of resource rights given to the coastal state, the waters of the economic zone for all other purposes remain "high seas." Almost an equal number spoke in opposition. Part of the support for the high seas status of the economic zone, interestingly enough, came from land-locked and geographically disadvantaged states which saw it as in their best interest to side with the maritime states in limiting coastal state rights in the economic zone in order to strengthen their own case for a share of the resources found in the economic zone of their immediate coastal state neighbors.

Indeed, it was over the allocation of resource rights in the economic zone that the land-locked and geographically disadvantaged states, now numbering fifty-one in all, coalesced into one of the more effective interest groups operating throughout both the first and second New York sessions. The hardening position of this group, which led to its assertion of a claim to nonliving as well as living resources in the economic zone of their coastal state neighbors, had the effect of hardening the position of the coastal state group, pushing some of the more extreme members back toward their original conception that, except for rights of navigation and overflight and the laying of submarine pipeline and cables, the exclusive economic zone should, in reality, be a territorial sea. While minor changes in favor of the land-locked states were made in Articles 57 and 58 of the Single Negotiating Text as a whole, they were clearly not satisfied with the status of the text at the end of the first New York session. Thus, both this issue and the juridical status of the zone remained high on the agenda for the second New York session.

As the second session began, the key issues, including "straits" that had been added at the suggestion of the President, were referred initially to open-ended negotiating groups and subsequently to small groups of states that met at the invitation of the Chairman. Regardless of the forum, no real progress was made toward the solution of any of the major outstanding issues dealt with during the session. The most that can be said is that toward the end of the session, on the issue of the juridical status of the economic zone, a proposal by the United Arab Emirates to amend Article 46 dealing with "rights and duties of other states in the exclusive economic zone" so as to include "other generally recognized high sea uses compatible with the principles embodied in the charter of the United Nations and other rules of international law" to be enjoyed by "all states whether coastal or land-locked" provided at least a possible signpost toward eventual resolution of this difficult issue.

It is also true that the "contact group" consisting of a group of coastal states led by Mexico and land-locked and geographically disadvantaged states led by Austria did make some progress toward a compromise that would give the latter preferential rights to living resources in their neighbor's economic zone, not solely to any surplus that might exist after the coastal state had exhausted its harvesting capacity, as provided in the Revised Single Negotiating Text. Other questions, however, including differentiation between land-locked versus geographically disadvantaged states and distinc-

tions between the treatment of developing as opposed to developed land-locked remain to be settled.

It should be noted that the second New York session saw little progress made on Andres Aguilar's other priority issues: definition of the outer edge of the continental margin and revenue sharing beyond 200 miles. Both of these await resolution no less than the other major issues described above.

REPORT ON COMMITTEE III

Unlike Committee II, Committee III at the New York spring session made important progress at least in one important area: the control of vessel-source pollution. Building on the solid work of the Evensen Group that met during the post-Geneva inter-session period and guided by the Chairman of the working group on pollution, Vallarta of Mexico, the text as a whole struck what appears to be an acceptable balance between competing claims: the need for effective pollution control, and the need to prevent undue interference with navigation. While the new text generally relies on international standard setting in the territorial sea and economic zone, coastal states would be permitted to adopt standards more stringent than those set internationally to govern vessel discharges in the territorial sea. Special regulations can also be adopted by coastal states "for the prevention, reduction and control of marine pollution from vessels" in ice-covered areas within the limits of the economic zone where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation. . . ."²

On the question of enforcement while primary reliance remains on the flag state, coastal states are given jurisdiction to take administrative measures, initiate proceedings and, in the economic zone, the right to board and inspect vessels which have not provided specified information, and where substantial discharges or other important violations of international standards appear to have taken place. The new text also provides safeguards such as requiring that vessels be released promptly upon deposit of adequate bond, limiting penalties to those of a monetary nature and establishing a three-year statute of limitation in criminal proceedings under the articles.

2. Art. 43 A/Conf. 62/WP. 8/Rev. I/pt. 3, at 22.

As the summer session began in New York, there was only one important outstanding pollution question that had not been settled, at least to United States satisfaction. Would a coastal state be permitted to adopt design, construction, manning and equipment standards more stringent than those imposed internationally for the vessels entering its twelve-mile territorial sea? The Committee II text for the Territorial Sea, expressly prohibited the adoption of such rules and regulations³ while the Committee III text did permit the adoption of national laws and regulations provided that they did "not interrupt or hamper the innocent passage of foreign vessels."⁴ It is perhaps indicative of the lack of progress achieved by the second New York session as a whole that even on this one issue, important to the United States because of its rigorous ports and waterways legislation already in place, no progress was made.

Turning to the question of marine science, from the perspective of those favoring freedom of scientific research, a situation that was already serious enough at the outset of the first New York session had become even worse by the time the second session had concluded, last September. As was true in the case of the setting of design, construction, manning and equipment standards to control vessel-source pollution in the territorial sea, there was an important discontinuity between the Committee II and Committee III texts on scientific research coming out of Geneva. The Committee II text provided for coastal state consent for all scientific research within the economic zone while the Committee III text only required such consent for research "related to resources of the economic zone or continental shelf." Under the Committee III text, research of a "fundamental nature" could be undertaken without consent.

During the first New York session, some of the more nationalistic coastal states, possibly reflecting a hardening position across the board in reaction to the new-found coherence among the landlocked and geographically disadvantaged states, attempted to make defense considerations an issue by urging that scientific research be permitted only where it clearly was for peaceful purposes. Perhaps the most surprising development during the session was the shift in position on the part of the Soviet Union. Toward the end of the session, in what appeared to be a complete about-face on

3. Art. 20, 2.

4. Art. 2, 3.

its part, the Soviet Union adopted the Group of 77 position that would require coastal state consent in the economic zone for all scientific research with consent, however, not to be withheld if such research were "for peaceful purposes" and not related to resources. The text that ultimately emerged, while it dropped the "peaceful purposes" concept, largely adopted this approach.

At the second New York session, while Committee III for all practical purposes remained deadlocked on this issue, the drift remained clear. Following the conversion of the Soviet Union to the cause of a comprehensive consent regime in the economic zone, and in spite of the forceful reiteration by the United States both in public and private of the importance it attached to free scientific research, the United States throughout the second session found itself increasingly isolated. Only a handful of those countries that might otherwise have been expected to support free science were willing to speak out unequivocally on the issue. Significantly, while Chairman Yankov of Committee III made oblique reference to the continuing deadlock on the consent issue, in his final report on the session he proposed a "compromise" that would have the effect of giving coastal states even greater discretion in granting or withholding consent than had been provided in the Revised Single Negotiating Text promulgated at the end of the spring session.

From the United States' point of view it is ironic that, having initially agreed to a substantial list of obligations to be assumed by a researching state (advanced notification, the sharing of results, etc.) precisely in order to avoid the need to seek coastal state consent, the United States now finds itself confronted with a text that provides both the obligations *and* coastal state consent.

The outlook at the moment is so discouraging that the only promising avenue of compromise would appear to be acceptance, in principle, of coastal state consent while limiting insofar as possible the criteria on which a coastal state can base its denial. The so-called "tacit consent" provisions of the present text, providing that failure to respond within a given period can be deemed the equivalent of consent, would have to be retained if not strengthened. Perhaps even more important, dispute settlement procedures should be made available to a researching state wishing to challenge what it believed to be an improper denial of consent for research within the economic zone. The beginning framework for such a

compromise was in fact formulated by Australia shortly prior to the end of the second New York session. The extent of researching states' rights in other states' coastal economic zones, however, may ultimately depend on the outcome of the Committee II debate on the "high seas" status of waters in the economic zone, an issue over which the Conference as a whole, both for practical and philosophical reasons, remains sharply divided.

REPORT ON DISPUTE SETTLEMENT

Given the nature of the problems that still confront the three major Conference Committees and over which the Conference is still seriously split, one might have been tempted to predict that dispute settlement would have been an early entrant on the Conference casualty list of issues beyond the capacity of the Conference to resolve. Surprisingly, such has not been the case. While Conference organizers failed initially to accord formal recognition to dispute settlement as an area of work deserving equal status with that of the three principal Conference Committees, the task of developing a viable dispute settlement text has nonetheless proceeded quietly and on its own as a sort of out-rider to the work of the Conference as a whole, sometimes breaking new ground and enjoying an increasing degree of respectability, status and formal recognition as the Conference has proceeded. This is all the more remarkable since there has always been an underlying uncertainty as to the strength of commitment on the part of a majority of states to any form of binding dispute settlement that gave an ethereal quality to the entire debate.

It may be remembered that by the end of the Geneva session, an informal working group on settlement of disputes in which representatives from more than sixty countries had participated from time to time, produced four agreed articles followed by several annexes embodying fundamentally different approaches to how disputes might be settled. The first annex (Articles 5-17) proposed a comprehensive approach and had attached to it sub-annexes dealing with conciliation, arbitration and a Law of the Sea Tribunal. The second annex, based on a functional approach, referred special categories of disputes to specialized procedures. A third annex dealt with information and consultation. The failure of the working group to agree on anything more than four introductory articles, reflected both a continuing split over the "choice of forum" question (should a plaintiff be required to accept the forum chosen by the defendant at the time of ratification of the Convention—arbitration,

a Law of the Sea Tribunal or the International Court of Justice?) and the continued strength of those preferring a functional approach: binding dispute settlement in only a few specific areas such as fisheries or scientific research.

After the Geneva session, the President of the Conference on his own initiative, prepared an informal Single Negotiating Text on dispute settlement, which tried to bridge the gap between the two positions. The status of this text was in dispute, and some countries asked that the question of dispute settlement be put on the agenda of the next session of the Conference.

Following the end of the first New York session, during which the Conference had conducted a six-day plenary session on dispute settlement that heard statements from some seventy countries, the President of the Conference was officially authorized to prepare a new text. This text, accorded the status of an "informal Single Negotiating Text," contained eighteen principal articles with annexes dealing with conciliation, arbitration and a draft statute of the Law of the Sea Tribunal, with a second annex setting forth a system of special procedures for fisheries, pollution, scientific research, and navigation. Since signatory powers could choose their preferred forum at the time of ratification of the convention, the President, in essence, succeeded in giving something to everybody.

On the encouraging side, during the first New York session, it was possible to detect a growing acceptance of the over-all concept of binding settlement of disputes perhaps best exemplified by the apparent acceptance of the concept on the part of the Soviet Union at least where fisheries, scientific research, the environment, and navigation were concerned. Still unsettled, however, was the major issue of the relationship between the general Law of the Sea Tribunal provided for in the new text and the special Tribunal under contemplation in Committee I as an arm of the International Seabed Authority. "Should there be rights of appeal from one to the other?" And, "Is there even a need for two separate tribunals?" were but two of the fundamental outstanding questions that remain to be answered.

At the second New York session, the President's informal Single Negotiating Text was subjected to an article-by-article review in

which all major geographical groups, including the Africans in particular, appeared to be fully engaged for the first time. In the Revised Single Negotiating Text promulgated by the President of the Conference following the end of the session, as to the "choice of forum" question the text reflects the growing interest, apparent during the session, in giving a plaintiff some choice in the matter: the right to proceed to arbitration rather than acquiesce in the forum pre-selected by the defendant. There are signs that even the Soviet Union might find this an acceptable solution.

Thorny problems, however, remain and whether the President has dealt with them in an acceptable manner is still to be seen. One of these is the question of access, a two-fold problem involving both the question of political entities that are not themselves states (the P.L.O. "problem") and the status of corporations and individuals. The United States is virtually alone in favoring access for non-governmental entities which the new text does not permit even where access is sought by individual or corporate owners of vessels seized by a state party to the treaty in order to seek release of that vessel.

The solution to most other difficult issues, however, ultimately depends on the resolution of outstanding issues elsewhere before the Conference. Thus, while the new text in Article 15 of Annex II makes general provision for a Seabed Disputes Chamber of the Tribunal "for dealing with disputes relating to the interpretation or application of the provisions" of the deep seabed text to be developed by Committee I, questions of "jurisdiction, powers and functions of, and access to," the Chamber are left for resolution in the Committee I text. Equally basic to dispute settlement is resolution of the Committee II debate over the "high seas" status of the economic zone. Only then are conference participants likely to agree finally to what extent dispute settlement procedures will have jurisdiction, as provided to a limited degree by the new text, over disputes arising from the economic zone on questions involving living resources or the conduct of scientific research. If the "high seas" and Committee I questions can be resolved, the major obstacles impeding the development of a widely acceptable dispute settlement text will have been removed.

REPORT ON STATUS OF THE TEXTS

After the President of the Conference issued his dispute settlement text, there were for the first time Revised Single Negotiating Texts, in theory of equal status, covering the entire work of the Conference. How this came about is worth a moment's reflection.

At the end of the second New York session, Conference leaders faced a serious problem. The Revised Single Negotiating Text for Committee I simply was not acceptable to a majority of Conference participants, nor was it a text that could be fixed by further textual refinements whether made by the Committee Chairman or, as had been proposed during the session, by the President of the Conference himself, and as might have been the case for the Committees II and III texts.

Since further changes in any of the texts would have meant formal elevation of the status of that text, making it clear that it would be henceforth even harder to change other articles not touched in such a revision, the Conference leaders chose, probably quite wisely, to do nothing. At the end of the second New York session, each of the Conference Chairmen simply reported on what negotiations had taken place and gave his personal assessment of what work remained to be done. Not a word was changed in any of the Single Negotiating Texts. Since the session had run out of time, there was little more that the Conference could do for the moment than, in essence, hold its breath.

On September 17, 1976, the last day of the session, the Conference at the urging of its President did agree to reassemble in May, 1977. Its task, as proposed by the President, will be a highly ambitious one: first to develop an "Informal Single Composite Negotiating Text" and ultimately a draft convention. Given the lack of progress at the second New York session, whether the Conference can achieve this objective must, at best be viewed as highly problematic.

CONCLUSION

During much of the first New York session, the seriousness of the division over deep-seated issues in Committee I was temporarily eclipsed by the flurry of attention given to the question of what new rights, if any, would be given the land-locked and geographically disadvantaged states which spoke out with more firmness and coherence in New York than at any previous session of the Conference. Some observers even went so far as to say that this was now the paramount issue to be resolved if the Conference as a whole were to succeed.

With the second New York session now behind us, it now seems clear, on reflection, that the preeminence of the "land-locked" issue was at best temporary. It remains true that the Conference must make some accommodation with the LL/GDS group just as it must find a way to resolve the "high seas" status question in the economic zone. In the last analysis, however, the critical problem facing the Conference remains, as it has always been in reality, who shall have access to the deep seabed and under what circumstances?

Where does the solution to the "deep-seabed" problem lie? The answer, for better or for worse, can probably only be found in the inner-workings of the chanceries of the world rather than in the ability of Conference negotiators, no matter how able, to arrive at new text provisions. Do the countries of the world see a successful outcome of the Conference as in their best interest, and how high a price in new accommodations are they willing to pay to obtain it? To what extent will developing countries insist on linking progress on the deep seabed to forward movement on other North-South issues springing from the New Economic Order and the Charter of Economic Rights and Duties? These are largely political questions and decisions on them *must* be taken by participating states at very high levels.

If there is any work to be done between now and the time the Conference resumes in May, it must involve quiet reflection and study of all the varying proposals that have been and will be put forward to facilitate creation of a practical seabed regime, one with which all important participants can live, even if their theoretical desires are not fully satisfied. If the political will is there, the practical solution ultimately will be found.

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