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Introduction

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For over ten years, in three Conferences and some nine Conference sessions, the United Nations has grappled with the codification and the creation of the Law of the Sea. Numerous writers have recounted the uniqueness and importance of these negotiations and the difficulties in the path of agreement. These difficulties can in some measure be ascribed to the consensus negotiating process itself, but they can also be ascribed to the pressing nature of the issues and interests involved and the need to anticipate the issues of tomorrow. These issues are not always clearly discernible or easily resolved.

When the negotiations recessed temporarily last September in New York, there was strong sentiment on the part particularly of the smaller countries that significant progress must be made on the outstanding issues during the Eighth Session opening this March to justify the continuation of UNCLOS III. I propose to use this introduction to the *San Diego Law Review*'s annual Symposium on the Law of the Sea to review these outstanding issues and to place them in perspective against the broad range of consensus agreement already recorded.

SEABED MINING

The contentious nature of the current debate over seabed mining issues has tended to obscure the broad consensus on seabed mining already achieved. The outlines of the seabed mining regime have already for the most part been worked out. There is

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general support for an international Authority that would supervise the conduct of deep seabed mining. There is general agreement that revenues stemming from the mining operations should be shared among the nations of the world. There is general agreement on a parallel system that would provide access to deep seabed nodule resources to an international Enterprise as well as to qualified State and private miners. There is also general recognition that a review Conference to reassess this regime should be convened twenty or so years after the treaty enters into force.

Despite this broad agreement on seabed mining, several sharp differences remain on some of its modalities. These issues include such difficult questions as the decisionmaking process in the Authority, the financial obligations to be imposed on seabed miners, the availability of technology to the Enterprise, and resource policy questions.

The Decisionmaking Process in the Authority

Decisionmaking within the Authority is perhaps the single most important seabed issue left to be negotiated. Its resolution will require a considerable amount of ingenuity and genuine desire to reach agreement. The structure and process decided upon will have a direct impact upon most of the other seabed mining provisions. Broad confidence in the decisionmaking process would significantly reduce the need to work out and incorporate detailed provisions on access, financial conditions, and resource policy—leaving broader discretion and flexibility on these matters to the Authority. Such confidence would not be engendered, however, by a decisionmaking process based essentially on a nose-count of nations. Rather, it requires a system of weighted or concurrent majority voting that would adequately recognize the valid interests at stake—those of consumers, producers, investors, regional groups, and developing countries.

The only alternative to a decisionmaking process in which the potential seabed mining countries could repose confidence would be to limit significantly the discretion of the Authority on these basic questions by spelling out the requirements in the treaty itself. It is not at all clear, however, that sufficient details could be included in such a treaty to overcome a failure to secure a mutually acceptable and workable decisionmaking structure.

Finance and Technology Transfer

The financial and technology-transfer obligation issues are in some ways more apparent than real. There is already a general recognition among negotiators that the financial obligations to be

imposed on seabed miners should be reasonable and should not impede or artificially limit an adequate return on investment. The remaining problem is one largely of settling on the appropriate figures and mechanisms for application and not one of the philosophy underlying financial assessments. Some genuine bargaining still must take place on this issue, but some movement in the right direction has already begun.

The technology issue, while ticklish in nature, is also fully susceptible of early resolution. It is obvious to all that the technology required for the Enterprise to commence operations must be available to it. The most important assurance that the requisite technology will be available, the industrialized countries maintain, is their pledge for an adequately financed Enterprise. With adequate financing the Enterprise would be able to purchase the technology on the open market or to develop it itself. The developing countries, however, are concerned that the Enterprise might be artificially cut off from such technology. They insist that some guarantee is necessary to insure that consortia entering seabed mining would be willing to make their technology available for sale to the Enterprise. Attempts by some members of the Group of 77 to push forward within the Law of the Sea their ideological positions on their New International Economic Order have complicated these discussions. Nevertheless, a treaty provision that would serve to assure the availability of such technology may be essential to the acceptability of the parallel system.

Resource Policy Questions

The resource policy issues to be resolved continue to raise basic substantive issues. The first of these issues involves the potential impact of seabed nodule-mining on land-based producers and the question of production controls. The second issue relates to the proper method of assuring equitable, yet non-discriminatory, access to seabed resources.

Land-based producers of manganese, nickel, cobalt, and copper—the major commodities found in seabed nodules—perceive a threat to their earnings from the introduction of major new production sources. This threat is more potential than current, however, given the heavy capital investment that would initially be required and the more costly methods of extraction now linked with seabed mining. The United States recognized in 1976 that

there was some legitimacy to demands for an orderly introduction of seabed-source minerals into the market. One such formula—that included in the Revised Single Negotiating Text (RSNT)—would have limited production of seabed nickel (the nodule metal of greatest commercial interest) to the actual growth segment in world demand for that metal.[1] Seabed mining would thereby compete with new or expanded land-based production rather than directly with current land-based production. The formula subsequently included in the Informal Composite Negotiating Text (ICNT),[2] however, would limit seabed mining to sixty percent of the total nickel market growth segment, raising another and distinctly different issue: the artificial appropriation of resources, regardless of efficiency, between land-based and ocean-based miners. The United States has pursued with certain land-based producers the possibility of reaching some reasonable compromise that provides legitimate protection to land-based producers but assures sufficient entry opportunity for seabed mining.

Certain other delegations have expressed a concern that one or more of the developed States might obtain a dominant position in seabed mining, acquiring most of the viable mining sites to the exclusion of other developed States.[3] They have suggested that provision be made for limiting the number of sites available to the miners sponsored by any one State. Such a clause, however, might result in discriminatory awarding of contracts on the basis of nationality. It might also encourage mining under flags of convenience. The United States agrees that an acceptable and equitable seabed mining regime would not be one which would result in the domination of the seabed by a single nation but believes that this result could be avoided without imposing any artificial restrictions on who can apply. Nevertheless, the United States remains open to a solution that would be both equitable and non-discriminatory.

COMMITTEE II

The progress made in reaching agreement on the various subjects and issues included under the rubric of Committee II has truly been notable. General consensus support has been reached on almost all of the major issues pertaining to jurisdictional defi-

1. U.N. Doc. A/Conf. 62/WP. 8/Rev. 1/pt. 1, art. 9(4)(ii), *reprinted in* 5 UNCLOS III OR 125 (1976). This formula would also have provided a six percent floor for the introduction of the seabed metal.

2. U.N. Doc. A/Conf. 62/WP. 10, art. 150(1)(g)(B)(i), *reprinted in* 8 UNCLOS III OR 1, *and in* 16 INT'L LEGAL MATERIALS 1108 (1977) [hereinafter cited as ICNT].

3. The problem would not arise for developing States that would have access to reserved or banked sites through the Authority.

nitions and limitations, navigation and overflight, and coastal living and non-living resources. The creation of the exclusive economic zone, the codification of high seas navigational rules, the incorporation of customary, treaty, and new law regarding fishing, and the clarification of other traditional Law of the Sea questions have demonstrated a willingness to resolve essential issues through negotiations, ingenuity, and realistic compromise.

The ICNT and the amendments to it formulated in Geneva in 1978 were tested in both Geneva and New York when Committee II reviewed the relevant ICNT articles provision by provision. The exchange of views recorded during these sessions showed that although certain delegations had reservations or even objections to some provisions, a recognition existed that the package of provisions was fairly balanced. There was also broad recognition that reopening issues that have been largely resolved could threaten to unravel much of the progress and compromise made.

Unresolved Issues

The principal Committee II issues still to be resolved relate to the definition of the limit of the continental shelf and to the applicable principles for delimiting the economic zone and continental shelf between opposite and adjacent States. The continental shelf question involves choosing a precise outer boundary that is legally sound, scientifically based, and politically acceptable. As yet there is no consensus on such a definition, although one—the so-called Irish formula[4]—has attained broad support from both developed and developing States in all regions. As a balanced compromise proposal it has the support of the United States. It provides that the edge of the continental shelf, where it extends beyond 200 nautical miles, should be determined by either of two criteria. The first criterion is a line linking the outermost points at which the sedimentary thickness is at least one percent of the shortest distance from such point to the foot of the continental slope—a prominent natural feature. The second criterion (also known as the modified Hedberg approach[5]) would draw the boundary no more than sixty miles from the foot of that slope.

Certain States would prefer to make the continental shelf coterminous with the exclusive economic zone, *i.e.*, 200 miles. The So-

4. U.N. Doc. A/Conf. 62/C.2/L.98 (1978).
5. *See id.*

viet Union and the Eastern European bloc support a proposal that would limit the continental shelf, where it extends beyond the 200-mile economic zone, to a maximum of 300 miles. These approaches, however, do not contain the elements of compromise necessary to command a consensus at the Conference.

There is general agreement, meanwhile, that whatever outer limit for the continental shelf is decided upon, there must be revenue-sharing for the benefit of the lesser developed countries from the returns associated with the exploitation of mineral resources located beyond 200 miles.

The Delimitation Question

The delimitation question raises one of the thorniest boundary issues in international law—whether precedence in resolving such disputes should be given to the application of equidistant or median lines or to equitable principles as the standard for settlement. Boundary delimitation touches on questions of jurisdiction and sovereignty. It is usually a bilateral issue and is already in many cases the subject of dispute or negotiation. The text before the Conference places primary emphasis on the need to settle these questions by agreement between the parties but also provides for compulsory or binding third-party settlement.[6] It favors the application of equitable principles taking into account all relevant circumstances.[7] For every State benefited by the application of equitable principles, there is an opposing State that prefers to emphasize the equidistance method. The supporters of the current ICNT text, however, point out that equitable principles embrace equidistance where it is equitable.

The delimitation issue has attained a certain paramountcy in Committee II because of the treaty's contemplated provisions for compulsory dispute settlements. Several countries question whether and to what extent delimitation disputes should be the subject of compulsory and binding third-party settlement at all. This question in itself has become one of the basic dispute-settlement issues yet to be resolved.

Clarification of ICNT Conservation Provisions

The conservation provisions of the ICNT[8] provide a sound framework for the regulation and preservation of the ocean's living resources. The Conference has already settled on a regime for

6. ICNT, *supra* note 2, arts. 279, 283, 287.
7. *Id.* art. 83. *See also id.* art. 74 with respect to the exclusive economic zone.
8. *Id.* pt. 7(2).

cooperation on matters concerning the conservation of coastal, as well as highly migratory and anadromous, species. The Conference delegations have shown a keen and growing awareness of the special nature of marine mammals and of the need to protect them.

Although the current ICNT affords some general protection for marine mammals, the United States still believes that Articles 65 and 120 should be clarified in the Eighth Session to indicate a State's obligation to impose regulations at least as stringent as those contemplated by the ICNT.

COMMITTEE III

Broad agreement has also been reached on the various Committee III issues relating to the environment. As Committee III Chairman Ambassador A. Yankov of Bulgaria reported to the Conference at the close of the Geneva Seventh Session, his Committee has been largely successful in keeping

> a viable balance between the ecological considerations and the legitimate demands of expanding international navigation, between national legislation and enforcement measures on the one hand and the international rules, standards and regulations on the other, between coastal state and flag state jurisdiction, between the interests of developed maritime powers and developing countries.[9]

United States pollution control and prevention proposals won general acceptance during the Seventh Session in New York. These proposals strengthen the coastal State's right to impose penalties for pollution violations occurring within its territorial sea. They also clarify the right of coastal States to take action to mitigate pollution following a maritime casualty and expand the power of the coastal State to board, inspect, and detain ships that have made illegal discharges in its economic zone.

During the New York Session the United States also introduced a package of amendments dealing with marine scientific research.[10] These important amendments would restore the definition of marine science research contained in the RSNT.[11] They

9. U.N. Doc. A/Conf. 62/RCNG/1, at 79-80, *reprinted in* 10 UNCLOS III OR 13, 96-97 (1978).

10. U.N. Doc. A/Conf. 62/C.3/Rep. 1, at 12, *reprinted in* 10 UNCLOS III OR 173, 190 (1978).

11. U.N. Doc. A/Conf. 62/WP. 8/Rev. 1/pt. 3, art. 48, *reprinted in* 5 UNCLOS III OR 125 (1976). This text was circulated during the Sixth Session but was replaced at its end by the ICNT.

would also permit States to undertake such research on the continental shelf beyond the 200-mile exclusive economic zone. This right would be subject to the fulfillment of certain specified conditions, however, when such research would be of direct significance to resource exploration or exploitation.

The United States amendments also spell out the rationale for permitting marine scientific research generally and as a matter of right when such research is necessary for the prevention and control of damage to the health, safety, and environment of other States. Likewise, these proposals underscore the value of broad dissemination of scientific information for the general benefit of the world community. The United States delegation will push hard for the adoption of these necessary amendments during the Eighth Session.

Dispute Settlement

The Conference has already made considerable headway on developing a structure for dispute settlement suitable to the multifarious obligations to be included in a comprehensive Law of the Sea treaty. The system devised provides for compulsory dispute settlement for many issues, encourages recourse to non-binding dispute-settlement procedures for certain other issues, and exempts certain specified issues from such obligations.

The ICNT provides for a special Law of the Sea Tribunal,[12] a Sea-Bed Disputes Chamber,[13] a system of arbitration,[14] and one for conciliation.[15] The choice of dispute settlement is left largely to the parties, although the Law of the Sea Tribunal and the Sea-Bed Disputes Chamber are given exclusive jurisdiction for certain disputes involving respectively the interpretation of the treaty or the actions of the Seabed Authority. In the absence of agreement on a forum, arbitration is specified.[16]

Discussion within the Conference is now focused principally on whether or not, or to what extent, compulsory dispute-settlement procedures should be applicable to maritime boundary questions. A number of intermediate dispute-settlement possibilities are now being explored to see whether an appropriate compromise solution can be achieved. These possibilities include the exception of certain pre-existing disputes or the application to them of conciliatory rather than binding settlement procedures. Under

12. ICNT, *supra* note 2, Annex V.
13. *Id.* Annex V, art. 15.
14. *Id.* Annexes VI-VII.
15. *Id.* Annex IV.
16. *Id.* art. 287.

this approach alternative non-binding procedures might be made applicable to disputes that came into existence prior to the entry into force of the Convention.

CONCLUSION

The delegations attending the Eighth Session opening this spring in Geneva will be faced with difficult negotiations on the issues outlined above. The necessary choices will be hard. The past ten years have educated all parties both as to their own real interests in a comprehensive treaty and as to the real interests of others. The previous sessions have struck balanced compromises on most of the contents for a treaty and have brought the outstanding issues into clear focus.

A look back over the past ten years and at the progress made will lead one to conclude, I believe, that a treaty is within our common grasp. The areas of agreement are now substantial; the compromises achieved have been solidified. Many difficult issues still have to be resolved, but the broad areas of accord should provide a sufficient incentive for us to strive for the completion of a Law of the Sea Convention.