



Briefing Paper

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THE THIRD WORLD AND THE LAW OF THE SEA**

Introduction

In August 1980, after seven years of negotiation, the delegates to the Third UN Conference on the Law of the Sea (UNCLOS) ended their ninth session in Geneva, having succeeded in drafting an ambitious and comprehensive convention to regulate the future uses and exploitation of the oceans and their resources. One further session was scheduled for April 1981 to resolve the remaining issues, but on the eve of this final session the US announced its intention to set up an inter-agency review of the entire scope and purpose of the convention. This review is unlikely to be completed before 1982, thus postponing the signing of the convention, previously scheduled for September this year,¹ and possibly jeopardising the results of the negotiations. The Third World has had an important stake in the outcome of the conference and has played a major role in the proceedings. The purpose of this Briefing Paper is to identify the interests of the Third World and to assess the extent to which it has achieved its particular objectives.

Preparations for the conference began in 1967, when the UN set up a committee to study the uses of the seabed outside the limits of national jurisdiction. This committee was created in response to the initiative of Malta which, in November 1967, demanded that consideration be given to the reservation of the international seabed for peaceful purposes and that the area be designated the 'Common Heritage of Mankind'.

As a result of significant advances in marine technology and oceanography, interest in the resources of the seabed had grown considerably in the 1960s. This interest was coupled with a growing awareness of the inadequacies of traditional law in dealing with the many uses of the ocean. The developing countries (ldcs) in particular were increasingly critical of traditional law – which was based on the concepts of freedom of navigation and coastal state sovereignty over a narrow area adjacent to the coast – on the grounds that they had not participated in its codification at the two previous UN conferences in 1958 and 1960. A small number of Latin American countries had also greatly extended their coastal water claims. Thus it became readily apparent that a third conference was necessary to take into account these increasingly assertive actions as well as the impact of technological advances on the world ocean order. Hence, in December the UN agreed to convene a general conference in 1973 to formulate a 'package' treaty

encompassing a new international seabed regime as well as the traditional law of the sea issues.

Objectives

The ldcs were greatly encouraged by this and had high expectations of the economic benefits to be generated from the exploitation of mineral resources from the international seabed. Great importance was also attached to the concept of the common heritage of mankind. The Indian representative at the UN remarked that it

'... symbolises the hopes and needs of the developing countries, which can legitimately expect to share in the benefits to be obtained from the exploitation of the resources. Those benefits would help to dissipate the harsh inequalities between developed and developing countries.'²

At the outset, therefore, many ldcs urged that the international seabed area be as large as possible. Subsequently, however, the Latin American states persuaded the African and Asian groups that the extension of national jurisdiction to 200 miles would bring greater benefits. It was argued that access to the fishery and mineral resources within such a broad area would help to satisfy protein and energy requirements and greatly increase export revenues.

Developing countries, which have spoken together at UNCLOS through the Group of 77, have therefore stressed two broad objectives: first, the establishment of an International Seabed Authority to control and regulate exploitation of the resources of the deep seabed in order to ensure an equitable distribution of its wealth among ldcs; and second, the recognition of national control over a 200 mile exclusive economic zone (EEZ), within which coastal states would have jurisdiction over fisheries, mineral resources, the preservation of the marine environment, and the conduct of marine scientific research.

* The Institute is limited by guarantee.

** This paper is an edited and updated version of 'Canada, the Third World and the Law of the Sea', a paper produced by the North-South Institute, Canada, in March 1981.

1. Once signed, the Convention must be ratified by at least 66 states, a process that could take an extended period.
2. Statement by Indian Representative, United Nations General Assembly, First Committee, October 31, 1969, A/C. 1/PV. 1673, p. 17.

With regard to the first objective, the ldc's have been intent on minimising adverse economic effects on any of their number that are land-based producers of minerals to be extracted from the deep seabed. Great importance has also been attached to the transfer of mining technology to the Authority, and the generation of maximum revenues for it. Concerning the second objective, there has been a general consensus among ldc's on the necessity of an extension of national jurisdiction, but there have also been significant differences between them about the extent and nature of such jurisdiction and the rights of coastal nations versus the rights of those that are land-locked and geographically disadvantaged – the so-called llgds.³ Indeed, as the conference progressed, the Group of 77 had increasing difficulty in maintaining a homogeneous position, as its various members became more and more aware of the implications of their individual interests. Nevertheless, a common perspective prevailed, that a new law of the sea convention represents an important step in the building of a new international economic order and is integral to the overall development strategy of the Third World.

The issues

One of the most contentious issues, which was not resolved until the ninth session of the conference, concerned the system of **exploration on the international seabed**. Of considerable economic interest are the potato-like nodules found there which are known to contain nickel, copper, cobalt and manganese. Five consortia comprising companies from Canada, France, Japan, West Germany, the Netherlands, the United Kingdom, and the United States are at present engaged in the development of technology which will enable the commercial exploitation of this potentially enormous ocean resource.

At the outset, the Group of 77 demanded the creation of an Authority with exclusive mining rights. The industrialised states, on the other hand, envisaged a licensing system which would allow private and state entities unrestricted access to the area. Agreement was finally reached on the 'parallel system' whereby the Authority, through its operating arm, the Enterprise, would exploit half the area while the other half would be opened to states or private companies. Negotiations then focused on the details of its implementation. As regards financial arrangements, the Group of 77 was anxious to ensure that payments to the Authority by commercial contractors would be sufficient to allow the Enterprise to undertake mining operations with the minimum of delay. The industrialised states, as the principal metal consumers, wanted guaranteed access to prevent the Authority from using its discretion in such a way as to discourage mining by individual states or their nationals. They argued that if the charges were too onerous it would not be financially feasible for private companies to undertake mining operations. The ldc's subsequently agreed that large fees should not be charged, at least initially, and that provision should be made in the draft convention for external financing of the Enterprise.

With respect to limitations on **production**, the Group of 77 demanded that clauses be included to minimise the adverse economic effects on developing land-based producers – such as Chile, Indonesia, Zaire and Zambia – which rely heavily on mineral export earnings. The consuming states argued that production controls would be detrimental to the continued investment potential of the industry. The question of subsidising seabed mining operations by national governments was raised. This was seen, particularly by Canada – the world's largest producer of nickel (the principal metal to be extracted from manganese nodules) – as likely to distort the free market and thereby jeopardise domestic competitiveness. Canada worked closely with the Group of 77 on this issue, and together they pressed for a seabed production limitation mechanism to phase seabed output gradually into the world nickel market. In 1978 the Canadian and US delegations to the conference reached agreement on a production ceiling formula that related levels of seabed production to new growth in the market for a 20 year period. The US delegation was, however, unable to convince the US administration, which, with Japan and the EEC, feared that their access to the seabed would be restricted if the world growth of the nickel market was low. In 1979 an alternative compromise – the so-called Nandan formula – was agreed. This allocated to seabed production the entire growth in world nickel demand prior to commercial production, with a subsequent 60% of world market growth plus a 'safety net' provision guaranteeing that the growth rate would never be deemed to be below 3%. Several land-based producers have been highly critical of what they see as inadequate protection during a phase-in period, but they have failed to prevent the incorporation of this formula in the draft convention. Significantly, the production ceiling formula is one of the items on which the US review will focus its attention in the coming months.

The draft convention includes provision for an Assembly, a Council, an Enterprise, a Secretariat, and a Tribunal within the **institutional framework**. Negotiations on the respective powers and functions of the Assembly and the Council as well as on the composition and voting and veto procedures of the Council were particularly difficult, but have been basically resolved. The transfer of mining technology was also a problem. Ldc's considered it essential for the effective operation of the Enterprise, while the industrialised states were reluctant to accept strict mandatory transfer requirements.

It is important to note that these various provisions are based on the premise that nodule exploitation will occur, for the most part, within the international seabed area. There have been recent reports, however, of the discovery of a substantial deposit of nodules off Chile and similar deposits may exist elsewhere within national jurisdiction. In some quarters it is thought that this may make mining within the international seabed area unattractive or may postpone it.

One of the major developments at UNCLOS was the agreement in 1975 on a 200 mile exclusive economic zone. The idea was initially introduced by Kenya in 1972, at which time the reaction of most of the industrialised states was extremely hostile. However, a small number of developed coastal states recognised

3. The llgds group is made up of approximately 52 states which cannot claim an EEZ, either because they have no coastline or because narrow coastlines, narrow shelves or proximity to other states substantially limit their offshore resources.

the economic importance of enhanced **coastal state jurisdiction** and became instrumental in forging a consensus on the issue. After a lengthy negotiating process which focused on coastal state rights with respect to fisheries, mineral resources, marine pollution and marine scientific research within the EEZ, the concept was eventually accepted.

With respect to **fisheries**, the ldc's had insisted upon absolute coastal state jurisdiction, but the distant-water fishing states – eg the USSR, Japan, Spain and Portugal – were particularly reluctant to accept any change in the status quo. In any case, they would not accept a 200 mile zone without provision for full utilisation, conservation and access by foreign fleets to surplus fish stocks. Such provisions were therefore included in the **draft convention along with the right of access by the land-locked states to surplus fish stocks within the zones of neighbouring coastal states.** This latter issue caused considerable dissension within the Group of 77. Also included was a special provision regarding salmon, but no provision was made for coastal state preferential rights to fish stocks beyond 200 miles.

The principal point of contention concerning **mineral resources**, once the concept of the EEZ was accepted, was coastal state jurisdiction over the continental shelf beyond 200 miles. Some 40 countries, both developed and developing, have shelves that extend beyond the EEZ. Initially, there was considerable opposition from the Arab and African states to the extension of coastal state jurisdiction beyond 200 miles. The lld's were the most vociferous, but their acquiescence was secured with the promise of revenue-sharing from the exploitation of minerals beyond 200 miles and on the understanding that the edge of the shelf would be precisely defined. The draft convention provides two methods for delimiting the shelf and specifies that the outer limit cannot exceed either 350 miles beyond the territorial sea or 100 miles from the 2,500 metre isobath.

In the case of **marine pollution**, general obligations are included in the treaty to encourage states to minimise pollution from the atmosphere as well as from all installations and devices operating in the marine environment. Agreement was more difficult to attain with respect to pollution from vessels, as the countries with shipping interests were unwilling to accept coastal state powers that might restrict freedom of navigation. In the early stages of the conference ldc coastal states were enthusiastic about possible new powers to prevent pollution off their coasts. Their enthusiasm slowly waned, however, with the realisation that strict marine pollution measures might be detrimental to their shipping interests and economic development. A compromise was eventually reached, and the draft convention recognises limited coastal state environmental powers in the EEZ, although new restrictions are placed on existing coastal state powers in the territorial sea.

A compromise was also reached on **marine scientific research**. The ldc's considered this a matter over which they should exercise control in order to protect their security and economic interests, while most industrialised states were opposed initially to restrictions on their research activities. The draft convention is based on a consent regime, with provisions to ensure that consent is withheld only under certain specified circumstances.

Agreement was also reached on a 12 mile territorial sea, on navigation and overflight through international straits and archipelagoes, on the legal status of the EEZ, and on a system for the compulsory settlement of disputes. **Unresolved issues** – and on this it is expected that the formula included in the draft convention will be confirmed – are the definition of the edge of the continental shelf and the delimitation of certain problem maritime boundaries. Negotiations must also be finalised with respect to the Preparatory Commission which will be responsible for the establishment of the International Seabed Authority after the convention is signed.

An assessment of the outcome

When UNCLOS began the Third World was very optimistic that a new law of the sea regime to regulate the vast resources of the ocean would make a major contribution to its development. Therefore, the Group of 77 as a whole attached high priority to the establishment of a powerful International Seabed Authority and the creation of a 200 mile EEZ. However, the recent discovery of mineral nodules off the coast of Chile brings the future importance of an international seabed regime into question. Also, even if exploitation were to occur in the international seabed area, it is doubtful whether the parallel system would bring significant benefits to ldc's. Under the parallel system, the Enterprise is placed in direct competition with transnational firms, and it is by no means certain that it will be equipped with adequate financial and technological resources to compete effectively. Furthermore, at least for the foreseeable future, the sophisticated and capital-intensive technology required for seabed mining will remain in the hands of a few industrialised states.

With respect to the Group of 77's second priority, the hope that a broad EEZ would bring considerable economic benefits has faded for many ldc's. As regards fisheries, the EEZ poses formidable investment, management, and enforcement problems. Considerable financial and technological resources will be required before the ldc's can significantly increase their catch so that, in the short term at least, the benefits from the EEZ will be minimal. However, there is some hope that, in the long term, programmes such as those being established by the UN Food and Agriculture Organisation will change the situation. In 1979, FAO announced a 3 year, \$35 million programme to assist ldc's in building up fishing industries to meet their food needs, to improve their balance of payments and to create employment.

At present, hydrocarbons are the most valuable resource recovered from the ocean, and it is believed that approximately 50% of the ultimately recoverable hydrocarbon resources are located offshore.⁴ However, these resources are, of course, unevenly distributed, and while a few developing countries such as Mexico will benefit significantly, many will not. Ironically, those states with the largest continental shelves are mainly developed states, and the revenues which they would be expected to share from exploitation beyond the EEZ might have been much greater, had a more generous arrangement been agreed upon.

4. Arvid Pardo and Elizabeth M. Borgese, 'Marine Resources, Ocean Management and the New International Development Strategy', International Foundation for Development Alternatives, IFDA Dossier 13, November 1979, p. 32.

With the establishment of a 200 mile EEZ ldc's will acquire increased powers of control over marine pollution. However, effective marine pollution control, which is essential to protect the marine environment and ensure the viability of intensive ocean development, would impose a heavy financial burden on them.

Similarly, they lack the financial resources to acquire the marine science capabilities needed to preserve the marine environment or to make intensive use of the resources of the EEZ. The mere control of marine scientific research will not bring direct benefits, and great efforts will be required to implement the transfer of marine technology.

In general, the draft convention worked out at UNCLOS represents a major change in the legal framework within which the varied uses of the ocean would be undertaken, including the creation of a new international institution. However, it is clear that the proposed new regime falls far short of some of the benefits anticipated for the Third World. Both developed and ldc groups of states, each of which contributed to the acquisitive atmosphere of the conference, must take responsibility for this. Nevertheless, after seven years of negotiations, agreement over the draft convention represents a remarkable achievement. The Group of 77 must now await the report of the US inter-agency review, due early 1982. The worst outcome would be for the US review to present a new list of negotiating demands which could unbalance the delicately negotiated convention arrived at to date, especially if other developed countries align themselves with the US. Alternatively, the ldc's will hope that any remaining issues can be dealt with quickly and effectively, so permitting the convention to be formalised and opened for signature.

Bibliography

- 1977 R.L. Friedheim and W.J. Durch, 'The International Sea-bed Resources Agency Negotiations and the New International Economic Order', *International Organisation*, 31, pp. 343-84.
- 1978 R.R. Darman, 'The Law of the Sea: Re-thinking US Interests', *Foreign Affairs*, Vol. 50, No. 2, pp. 373-95.
- 1980 Klaus Dieter Wolf, 'Conflicts and Cooperation in the Opening up of New Economic Resources', *Intereconomics*, Jan/Feb, pp. 21-28.
- 1980 Julio Fuandez, 'The Sea-bed Negotiations: Third World Choices', *Third World Quarterly*, Vol. 2, No. 3, July, pp. 487-99.
- 1981 S.P. Jagota, 'Developments in the UN Conference on the Law of the Sea: A Third World Review', *Third World Quarterly*, Vol. 3, No. 2, April, pp. 287-319.

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