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UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

Report on the Resumed Ninth Session, Geneva, August 1980

This Report has been prepared by Dr. Charles Fincham, Cape Regional Director of the Institute, who was in Geneva during the above Session as an unofficial observer of the proceedings. Dr. Fincham is a former South African Ambassador, and he represented South Africa at previous Sessions of the United Nations Conference on the Law of the Sea and the earlier Sea-bed Committee.

The "classical" Law of the Sea, as it is sometimes called, is laid down in the four Geneva Conventions of 1958 which provide a régime for the Territorial Sea and Contiguous Zone; for the High Seas; for the Continental Shelf; and for Fisheries and the Conservation of the Living Resources of the Sea.

While none of these Conventions was ratified by more than 50 States (the Fisheries Convention attracted only 32 ratifications), the Geneva Conventions had an influence which extended far beyond the limited circle of States parties. There is an elusive point at which conventional international law ceases to be binding only on the contracting parties to the law-making treaty. Rules established after long study and negotiation, if they are widely observed by the international community, become part of customary international law. Be that as it may, the 1958 Conventions established and codified the international law of the sea, thus imposing a uniform code of behaviour governing man's use of the seas and oceans of the world.

Together, they constitute a remarkable achievement on the part of the comity of nations, of the International Law Commission, and of those scholars and jurists around the world who had contributed their expertise. Essentially, however, the Geneva Conventions were the result of a straightforward exercise. The Conference had before it a draft prepared by the International Law Commission and revised a number of times in the light of comments by Member States - a draft which already embodied the greatest measure of agreement which could be achieved between States at that stage in the development of international relations. From that point onward, the process of codification consisted in

approving, and here and there refining, a body of accepted law and negotiating a necessary minimum of provisions "de lege ferendum" - new law - to enable the whole to hang together.

The task which confronted the international community in the late Sixties was of a very different order, and it required a different approach.

The United Nations was no longer a "club" of developed countries having a common - or at least vaguely similar - interest in States' rights in the sea. The membership had grown beyond recognition, and the Third World - which was now in the majority - suspected that the Conventions merely entrenched the interests of the developed countries. They had played no part in framing the Conventions, and were not particularly concerned about the enjoyment by the maritime nations of the freedom of navigation, the freedom to fish close to their shores, and the freedom to mine for oil and hard minerals. The sea was beginning to take on a new significance - as a potential source of proteins for their own peoples and of minerals badly needed for their own economies.

The catalyst came during a debate in the General Assembly in 1967, when Ambassador Pardo of Malta articulated what must have been an inchoate trend whose time had come. He came forward with the somewhat startling thesis that the resources of the seabed and ocean floor beyond the limits of national jurisdiction should be regarded as the Common Heritage of Mankind, to be exploited for the benefit of all and especially of the developing countries.

Thirteen years of debate and negotiation followed in the original Committee, in the "Enlarged Committee on the Peaceful Uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction" and, since 1974, in the Plenipotentiary of UNCLOS III - the Third United Nations Conference on the Law of the Sea. The plenipotentiary phase alone occupied some 10 sessions or renewed sessions, spread over more than 70 weeks of negotiation and debate.

Early in the marathon debate, it became clear that the developing countries would not be satisfied with an up-dating of the Geneva Conventions to bring them into line with the new economic realities. They wanted nothing less than a re-negotiation of States' rights and obligations in, over and under the sea.

The task was one of staggering proportions. Not only must the new Law of the Sea cover a much wider field than did the 1958 Conventions; but, in terms of a"gentlemen's agreement" between participating States, the new Convention would have to be adopted by consensus.

At the session which has just concluded in Geneva, the point was reached which some aver had to be passed before such a difficult negotiation could succeed - the parties had to face each other in a make-or-break confrontation and the fate of the Conference had to be placed in the balance. Such a break-point was reached early in the session, when the Superpowers made it clear that they must insist on a régime for the exploitation of the sea-beds, which would protect their considerable investments from the vagaries of a possibly arbitrary majority in the Council. In effect, they were insisting on having a veto on decisions of the Council (the executive arm of the international seabed authority). The Third World countries had difficulty in backing off, but finally did so when a face-saving compromise was worked out.

The draft Convention, which should be finalised after a Tenth Session in New York in March 1981, will first be subject to an inter-sessional examination by the Drafting Committee - a very necessary exercise. The first task of the Drafting Committee will have to be to determine which of the ambiguities in the text are the result of bad drafting and which are deliberate attempts to cover a delicate balance between otherwise irreconcilable views. The latter will have to be preserved. The various language groups - English, French, Spanish, Arabic, Russian and Chinese - will then have to harmonise their versions of the text.

In the end, we shall be left with a Convention of over 300 articles,with no less than eight annexes. The ground which is covered is very much wider than that covered by the four Geneva Conventions of 1958, most of the articles of which have been absorbed in the new text. The new dispensation covers the Territorial Sea (fixed at 12 miles) and the Contiguous Zone; the status of the waters in straits used for international navigation; the special régime of archipelagic waters; the new concept of a 200 mile economic zone, in which the coastal State will have exclusive rights to the resources of the sea, the seabed and whatever lies beneath it; the continential shelf, the high seas and the régime of islands (taken over almost verbatim from the 1958 Conventions); the right of access of landlocked States to and from the sea and the freedom of transit; a new and important section on "The Area" which falls under the Common Heritage concept, laying down the general principles governing the Area, the conduct of activities in the Area and the development of its resources, the setting-up of the International Authority which will control it, and the settlement of disputes which may arise under the Convention; two new sections covering in extensu the rules for the protection and preservation of the marine

environment and for the conduct of marine scientific research; a new section on the development and transfer of marine technology; further provisions for the settlement of disputes; and final clauses.

The voluminous and comprehensive convention is further supplemented by eight annexes, containing inter alia provisions for conciliation and arbitration, a Statute for the Law of the Sea Tribunal and a Statute for the Enterprise - the body which will exploit the resources of the seabed on behalf of the international community. No doubt the most important is Annex III, which lays down conditions for the exploitation of seabed resources, striking a balance between the demands of the Superpowers (which alone have the financial and technical resources for seabed mining) for a stable régime and adequate protection of their investments, and the Third World which would have preferred a strong Authority on which, being in the majority, they could have a decisive voice. Certainly Annexure III, which is incorporated by reference in the Convention, represents a hard-won compromise without which there would have been no Convention.

If the Convention is impressive for its complexity and for the wide field which it covers, it is doubly impressive when one considers that it is to be adopted by consensus, without a vote being taken. Few observers, seeing the painfully slow progress over the years and the diverse and sometimes violently conflicting interests to be reconciled, would have given the Conference a chance to succeed. The fact that consensus has at last been achieved against such overwhelming odds, suggests that the Third United Nations Conference on the Law of the Sea may well go down in history as the conference which marked the coming-of-age of the international community.

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