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Disagreement without End?

Third UN Conference on the Law of the Sea

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The Third UN Conference on the Law of the Sea meets in New York from August 21 to September 15, 1978, for the second half of its Seventh Session. At its earlier meetings the Conference had not succeeded in mapping out a new international maritime law. The present article analyses the state of the negotiations and the problems still awaiting solution.

The Third UN Conference on the Law of the Sea offers an opportunity of regulating by peaceful means such universally significant juridical, economic and political subjects as the re-definition of zones of influence over the sea, of replacing such power-policy conflicts as have occasionally flared up¹ with a negotiated settlement from the outset. The mere fact of a renewed meeting of the Conference, however, reveals the laboriousness of implementing such a strategy of common sense. So far the Conference has had seven sessions totalling altogether 47 weeks (sic). Three factors may be identified as the causes of the exceptionally slow progress of the negotiations:

- The intensification and extensification of the exploitation of the sea since the earlier Conferences on the Law of the Sea of 1958 and 1960 and the problems arising therefrom,
- The heterogeneity of the interests of a greatly extended circle of Conference participants, as well as
- The politicization of the Conference as a result of the North-South conflict.

Changing Function of the Seas

The greatly increased interest that is nowadays shown in problems of the Law of the Sea, compared with the past, derives chiefly from the changed function of the seas. Economic exploitation of the seas, which account for 70% of the surface of the globe, has been very considerably intensified and extensified since the last two Conferences on the Law of the Sea². Thus *marine*

shipping has undergone an exceedingly dynamic development in line with the general expansion of international trade. The number of ships employed has been doubled, their tonnage and cargo carrying capacity has been trebled. The consequence, however, has been a marked exacerbation of transport, safety and environmental problems which urgently call for regulation.

International fisheries have undergone a similar development. The sea and its live resources at present account for 3% of the world population's foodstuff consumption and cover 11% of its animal protein consumption. The *fish reserves* of the seas are nowadays exploited far more systematically than in the past, through the employment of highly efficient technologies. World catches have risen from 40 mn ts in 1960 to 70 mn ts in 1976. This has been accompanied by over-fishing of certain species, to the point of endangering stocks, and by conflicts among the fishing nations concerning fishing rights. International agreements on fish stock protection, on national fishing zones and on the fishing rights of third parties can no longer be put off. They are necessary, however, also on the as yet unexhausted potential of live resources which, without threat to stocks, probably amounts to nearly double the present catch totals.

Key Role of Marine Raw Materials

Alongside the live resources it is chiefly the *marine raw materials* which have left their stamp

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¹ Cod war about Iceland; Greek-Turkish frictions in the Aegean

² Cf. Axel Borrmann: Die Neue Weltwirtschaftsordnung und Internationales Seerecht (The New International Economic Order and International Law of the Sea), in: Dietrich Keeschull, Wolfgang Michalski, Hans-Eckart Scharrer (Ed.): Die Neue Weltwirtschaftsordnung (The New International Economic Order), Hamburg 1977, pp. 131 ff.

on the Third UN Conference on the Law of the Sea and its progress. So far the real importance of marine raw materials can only be perceived in outline since no more than 3% of the seabed has been systematically investigated. Of overwhelming importance at present are undoubtedly the *energy raw materials* of the seas, whose exploitation has risen rapidly since the last Conferences on the Law of the Sea. At present about 20% of the world's crude oil production and 10% of the world's natural gas production are extracted from deposits of the continental shelf; 20% each of presently known oil and gas reserves are situated in the off-shore zone. The growth-policy key role of energy raw materials and the worldwide run on these resources have increased the need for the definition of mandatory boundaries of coastal seas and continental shelves – a burden which the current Conference has inherited from its two predecessors.

An entirely new dimension for the Conference has arisen from the numerous *mineral raw materials*, above all the metalliferous manganese nodules of the seabed which have since become the most controversial issue at the Conference. These complex-composition nodules contain numerous minerals: in addition to iron and manganese there is mainly copper, nickel and cobalt which are likely to play a major part in future world raw material supplies. According to American estimates the reserves of marine nodules amount for copper to 15 times, for nickel to 1,500 times and for manganese to as much as 4,000 times the known deposits on land. In spite of entirely novel and exceedingly capital-intensive technologies the problems of exploration, extraction and metallurgy would seem to be closer to a solution than the juridical and economic problems. In principle all states are advancing claims to the wealth of the seabed – although only a few industrialized countries with advanced marine technologies are in fact in a position to exploit the deposits. The Conference on the Law of the Sea is faced with the historic task of resolving the conflict between the "right of the stronger" and the still valid high-sea status of the seabed on the one hand and the principle of the "common heritage of mankind" on the other.

Heterogeneous Interests

The intensification and extensification of the exploitation of the sea has resulted in a considerable enlargement of the circle of participants compared with earlier Conferences on the Law of the Sea, whereby the interests of these participants are exceedingly divergent. This heterogeneity has led to numerous coalitions which have become serious obstacles to the progress of the Conference. The principal groupings include the

"territorialist", the littoral states, the shipping nations, the land-locked and geographically disadvantaged states, the "Oceanic Group", the group of archipelago states, as well as the important "Group of 77" which includes most of the developing countries. A "political algorithm" for the harmonization of the multiple interests of these and other groups has not so far been found. "Package dealing", usually a tested technique at international conferences, has become an extremely difficult task.

Progress of negotiations at the Third UN Conference on the Law of the Sea finally also suffers from an economically determined politicization. As a result of a growing worldwide awareness of resources the Conference, from its very beginning, has no longer had the character of a specialized juridical conference. It has become increasingly clear that behind all the wrangling over the legal status of the different marine regions there is a fierce dispute about participation in those attractive marine resources. Inevitably the Conference on the Law of the Sea has become part of the general North-South conflict. Even though there has not been a polarization right across the board on all the issues before the Conference, the debate of the problem of deep sea mining, in particular, clearly reveals the close connection between this debate and the general dispute about the New International Economic Order. The Third UN Conference on the Law of the Sea is quite obviously being viewed by the developing countries as a test case for the reorganization they are striving for. Seen thus the Conference is a chapter in the global struggle for the distribution of prosperity, resources and political power.

State of Negotiations

As expected, the Sixth Session of the Conference on the Law of the Sea again failed to provide the long hoped-for breakthrough. Even before a single point of the controversial convention was discussed the 1,400 delegates from 142 countries were first of all embroiled in a procedural conflict. For nine days (sic) argument continued about the mandate of the (until then) Chairman of the Conference, H. S. Amerasinghe, who, because of a change of government in the state of Sri Lanka, had lost his delegate status. Eventually, in a divided vote, he was confirmed in his post in the face of opposition from the Latin American countries. Only then did the Conference proceed to its agenda proper.

In spite of their rejection as an official subject under negotiation, especially by the delegations of the industrialized countries, the controversial details of the Third Draft Convention, submitted

to the Sixth Session by the Conference management as a basis for discussion, were again debated in Geneva. This Draft reflects the political implications of the whole set of problems of the Law of the Sea. It contains, in a manner not to be overlooked, the position of the developing countries and of the states supporting them and in no way reflects the actual state of negotiations.

The view has repeatedly been expressed that the so-called "Informal Composite Negotiating Text – ICNT"³, just as its two predecessors, contains certain irreversible prejudgements. Whether this is so will depend on what further procedure the plenary session of the Conference will agree on during the next round of negotiations, or rather on what persons with what authorities will be charged with a revision of the ICNT, and which delegations will demand changes with what insistence⁴. The procedure, moreover, could well be of importance generally also to the continuation of the Conference.

In spite of controversial details one thing is emerging clearly with regard to the future International Law of the Sea: a "creeping jurisdiction" will result in a far-reaching nationalization and zoning of the world's oceans such as has long begun to take shape through numerous unilateral national decisions. Only for the reduced area of the high seas, in particular for the deep seabed, will there be an international regime.

Coastal Waters and Contiguous Zone

Thus the extension of *territorial waters* from the present three to twelve nautical miles may be regarded as generally accepted (Article 3, ICNT), just as the right of peaceful passage (Article 17, ICNT) which, incidentally, will apply also to the more than 100 *straits* (Article 38, ICNT) which will result from the extension of coastal waters. Controversial in essence is now only the scope of Article 19, ICNT, and the question of whether national or international standards for traffic and the protection of the environment are to apply in the straits. Meanwhile 86 states have already extended their coastal waters to 12 nautical miles⁵.

³ United Nations, Third Conference on the Law of the Sea, Sixth Session: Informal Composite Negotiating Text, n.p. 1977, A/CONF.62/WP.10 (hereinafter quoted as: ICNT).

⁴ Cf. Renate Platzöder: Schriftliche Stellungnahme zur öffentlichen Anhörung von Sachverständigen und Verbänden zum Thema "Probleme der Dritten UN-Seerechtskonferenz unter besonderer Berücksichtigung des Meeresbergbaus" (Written Comment on the Public Hearing of Experts and Associations on the Subject "Problems of the Third UN Conference on the Law of the Sea with Particular Reference to Marine Mining"), in: Deutscher Bundestag, 8. Wahlperiode, Stenographisches Protokoll der 19. Sitzung des Auswärtigen Ausschusses und der 22. Sitzung des Ausschusses für Wirtschaft v. 7. Dezember 1977 (Shorthand record of the 19th session of the Foreign Affairs Committee of the Bundestag and of the 22nd session of the Economic Committee of December 7, 1977), n.p. n.d., p. 570.

⁵ Cf. Vanya Walker-Leigh: Time May Be Running Out for World Maritime Committee, in: International Herald Tribune of January 30, 1978.

Under the impact of the latest tanker disaster off the Breton coast agreement was reached relatively quickly in Geneva on stricter environmental provisions and measures which are to be the prerogative of the littoral state. Such a state, for example, can prescribe mandatory routes for ships with dangerous cargoes, such as oil, and issue entry regulations for its ports. Within its territorial waters a littoral state is even to be able in future to place masters of ships under arrest and bring ships forcibly into its own ports.

It is likely that the *contiguous zone* of 12 nautical miles' width will also be included in the new Law of the Sea; in that zone the littoral state will enjoy sovereign rights in respect of, among other things, customs, immigration and health (Article 33, ICNT). This means the de facto creation of coastal waters 24 nautical miles wide⁶. A nationalization of further sea areas will probably also take place in the *archipelago waters* of, for instance, Indonesia, the Philippines, Mauritius and Fiji (Articles 46 ff., ICNT).

Economic Order

There is uncertainty about the future legal status of the so-called economic zone which, including coastal waters, is to extend to a maximum of 200 nautical miles (Article 57, ICNT). The introduction of the zone as such is no longer likely to be controversial now that the maritime great powers have agreed to it and that it has already been introduced by over 40 states⁷; what rights, however, the littoral states are to enjoy in detail continues to be an open question. This zone, which accounts for about 21% of the sea area, contains about 80% of marine fish stocks. Here also lie all the known economically exploitable off-shore reserves and 87% of all presumed hydrocarbon deposits below the seabed. Apart from the manganese nodules of the deep sea nearly all the mineral marine resources at present thought exploitable are located in that zone⁸. The littoral states, according to ICNT, are to enjoy exclusive rights for all forms of economic exploitation of marine resources as well as for exploration and environmental protection within that zone (Articles 56 and 59, ICNT). Fishing rights are to be granted by the littoral states to other states in respect of the surplus not required for their own

⁶ Cf. Renate Platzöder: Der Beitrag der Dritten Welt zur Dritten Seerechtskonferenz der Vereinten Nationen und die Interessenlage der Bundesrepublik Deutschland (The Third World's Contribution to the Third UN Conference on the Law of the Sea and the Position of Interests of the Federal Republic of Germany), in: Alfons Lempfer (Ed.): Die 3. UN-Seerechtskonferenz, Weltwirtschaft und Internationale Beziehungen, Diskussionsbeiträge (The Third UN Conference on the Law of the Sea, International Economics and International Relations, Contributions to the Debate), No. 10, Munich 1977, p. 51.

⁷ Cf. Vanya Walker-Leigh, op. cit.

⁸ Cf. Axel Borrmann, op. cit., p. 145

needs, on the basis of appropriate treaties. Littoral states which live predominantly by fishing are totally exempted from this provision; the other littoral states may themselves determine the conditions of such shared user rights. Shipping is granted the right of free passage.

It was mainly the geographically disadvantaged states, the leading shipping and the long-haul fishing nations that, at the Seventh Session in Geneva, again opposed an economic zone as a zone *sui generis*. They pleaded in favour of allowing the high seas with their universal maritime freedoms to begin immediately outside the coastal waters and of designating the economic rights of littoral states as exceptional rights in order thus to call a halt from the very outset to the extension of national jurisdiction, e.g. in the area of shipping⁹ and of environmental protection¹⁰. In addition, they are calling for objective criteria for access to the live resources as well as freedom of basic research within the economic zones. A compromise of conflicting interests has begun to take shape in Geneva on a give-and-take basis. If the group of littoral states were to receive concessions in the matter of the continental shelf then it might consider the demand of the group of geographically disadvantaged countries concerning their fishery rights in the economic zone, and vice versa.

What was presumably the last attempt to save the concept of the "common heritage of mankind" for the economic zone and to avert the threat of nationalization of its resources was made in Geneva by the Vatican. The rejection of a relevant proposal symptomatically reflects the fact that the Third UN Conference on the Law of the Sea is not in a position to evolve international solutions to the majority of unresolved law-of-the-sea problems and is instead yielding to the expansionist aspirations of the littoral states.

High Seas and Deep Sea

Beyond the 200 nautical mile zone ICNT envisages the beginning of the high seas which are reserved to peaceful exploitation and subject to a ban of sovereignty (Articles 86 ff., ICNT). This principle is infringed only by the continental shelf regulation (Articles 76 ff., ICNT), according to which littoral states are to receive an exclusive right to the exploitation of the marine mineral wealth of the continental shelf even outside the economic zone.

⁹ Comprehensive national cabotage reservation, supply shipping subject to licence. Cf. Verband Deutscher Reeder: Schriftliche Stellungnahme zur öffentlichen Anhörung (Association of German Shipowners: Written Comment on the Public Hearing), op. cit., p. 430.

¹⁰ Cf. Uwe J e n i s c h : Ergebnisse der 6. Session der 3. UN-Seerechtskonferenz (Outcome of the Sixth Session of the Third UN Conference on the Law of the Sea), HWWA Report No. 46, Hamburg 1977, p. 23.

As a result of this regulation a further estimated 5% of the world's sea area would be nationalized¹¹. The poorest developing countries, and among them more particularly the land-locked countries, are, in accordance with the "Irish formula", to participate in the exploitation profit up to a maximum of 5% (Article 82, ICNT). Even though only about 30 states have such wide continental margins, this boundary is no longer regarded as controversial in principle¹². Its accurate line, however, continues to be undefined.

During the second half of the Seventh Session of the Third UN Conference on the Law of the Sea the seabed and the marine subsoil with the raw material reserves discovered there, or presumed to be present there, were without any doubt again at the centre of the negotiations. No substantial progress on this matter was, however, achieved at Geneva. The "Intermediate Session" of the Conference, to be held in New York from 21st August, 1978, will be concerned principally with attempted compromises on the mining of mineral raw materials on the seabed. The task, once again, will be the material implementation of UN Resolution No. 2749 of 1970, in which the deep sea was declared to be the "common heritage of mankind", as well as the replacement of the "Moratorium" Resolution No. 2574 of 1969, which postulates a "stand-still" for all exploitation activity pending the enactment of a new seabed regime. Both resolutions, just as the ICNT's proposal for a seabed authority (Articles 133 ff., ICNT), pursue the aim of not handing over the sole exploitation of the promising seabed wealth to the industrialized countries with their superiority in technology and capital, of protecting dry-land producers among the developing countries against marketing losses, and letting the rest participate in the exploitation profits. The establishment of a Seabed Authority, which would have an exclusive exploitation monopoly, is intended at the same time as a powerful (raw materials) political instrument.

As envisaged by the developing countries, the Authority will, in this monopoly system, regulate at its own discretion the access of private or state enterprises which have no title to such access. Access to the deep sea raw materials will be possible only through the Authority's own mining enterprise in the form of joint ventures; a further condition will be the provision of marine technology and capital. The decision structure of the Seabed Authority will be characterized by the principle of "one country, one vote". This means that the developing countries would have a ma-

¹¹ Cf. Jürgen W e s t p h a l : Neues Seerecht — nicht ohne Schlagseite (New Law of the Sea — Not without List), in: Frankfurter Allgemeine Zeitung of October 31, 1977.

¹² Cf. Renate P l a t z ö d e r : Der Beitrag der Dritten Welt ... op. cit., p. 57.

jority – as in the UN bodies – though with totally different chances of enforcement. After 20 years a revision conference is to be free to decide, by a two-thirds majority, an adjustment or – as is to be expected – the abolition of the rights of access of third parties, such a decision not requiring the otherwise customary ratification by individual states. In the event of the Conference being deadlocked transition to this 100% monopoly system will be automatic.

Hardening Fronts

This monopoly system proposed by the developing countries and included in the ICNT again ran into vigorous opposition in Geneva in the spring from those industrialized countries leading in marine technology. Quite apart from order-political objections, they criticized, among other things, the lack of right of access for their enterprises, the unreasonable investment risks, the rigid system of duty, the automatic compulsory transfer of marine technology and the one-sided financial burdens on the industrialized countries. They moreover point to the production-impeding role of the authority and to the absence of safeguards for the supply of those raw materials whose dry-land production will no longer meet requirements in the foreseeable future. Finally they reject the proposed allocation of votes which provides no minority safeguards whatever for them. Instead, their initially favoured licencing system having been rejected as equally extreme, they are now proposing a so-called parallel system. Under this parallel system the Seabed Authority is envisaged as an economically orientated enterprise possessing its own exploitation right but being also obliged, through compulsory contracting, to grant mining rights to private firms. In return the Authority will be furnished with technology and capital as well as with fully exploited mining areas which the private firms must offer them free of charge. As an alternative to "dual access" a joint-venture solution is being proposed.

The front lines between the industrialized and the developing countries have hardened to an extreme extent and it seems exceedingly doubtful

whether New York will produce an agreement on the seabed issue and hence generally a positive result of the Conference. The negotiations are moreover bedevilled by attempts on the part of some industrialized countries to enact interim legislation that would enable private firms to engage temporarily in exploitative activity. Such a "go it alone" line is seen most clearly in the USA; however, the possibility is also being discussed in Japan, Great Britain, France and the Federal Republic of Germany. The industrialized countries consider such a procedure to be legal since, in their view, they are *not* bound in international law by the two UN resolutions of 1969 and 1970¹³.

It is not impossible that the Conference will fail in the face of unbridgeable conflicts or that the contentious problems will be uncoupled. Such a separation of these problems would be entirely feasible since in any case there is now only a "thin umbilical cord" left between the deep sea issue and the remaining problems of the Law of the Sea¹⁴. In that event one might envisage a special seabed conference or else the inclusion of the subject in the North-South dialogue¹⁵. The latter alternative may seem an obvious choice considering that the Seabed Authority clearly reveals raw material policy implications very similar to the Common Fund as part of the Integrated Programme for Raw Materials, and as neither contracting party has so far wished to prejudge future decisions through yielding. The developing countries in Geneva have threatened re-negotiation of the straits issue in the event of the above-mentioned separation being seriously attempted. Certainly a solution within the framework of the current Conference on the Law of the Sea would be preferable. The readiness to compromise on the part of certain developing countries in the matter of rights of access by private enterprises might be a thin silver lining in an otherwise grey sky over the Conference.

¹³ Cf. Norbert Kleinheyer: Konzeption und Kompetenz einer Weltmeeresbehörde (Concept and Competence of an International Sea Authority), in: Diskussionspapiere zur Entwicklungspolitik, Issue 2, Bonn 1978, pp. 46 ff.

¹⁴ Cf. Wolfgang Graf Vitzthum: Schriftliche Stellungnahme zur öffentlichen Anhörung, op. cit., p. 556.

¹⁵ Cf. *ibid.*

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