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Disaccord on Seabed Mining

by Klaus Dieter Wolf, Tübingen

Continuing the discussions under way since 1973, the Third United Nations Conference on the Law of the Sea (UNCLOS III) held the first half of its ninth session from March 3 to April 4 in New York. What has been achieved at this meeting?

For its New York session earlier this year UNCLOS III had set itself the task of bringing the informal phase of negotiations to an end, going once more over the already once before revised "Informal Composite Negotiating Text" (ICNT/Rev. 1)¹, and raising it to the status of a final conference document which would serve as a formal draft convention. It was intended to place a *negotiated* text, instead of a *negotiating* text, before the Conference when its ninth session is carried on in Geneva from July 28 to August 29, 1980, so that formal requests for amendments – for which then a two-thirds majority would be required – could be put to the vote. The final signing of a comprehensive Law of the Sea Convention is to take place in Caracas, Venezuela, in 1981.

Before the session in New York opened, 90 % of the issues covered in the over 300 Articles of ICNT/Rev. 1 had already been regarded as resolved in principle on the basis of an overall package deal. This applied to the extension of the territorial seas to 12 sea-miles (Art. 3), the right of foreign ships to innocent passage through these waters (Art. 17), as well as the right to transit passage through "straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone" (Art. 37, 38).

Agreement had also been reached on the establishment of national "exclusive economic zones"

of 200 sea-miles width (Art. 56) in which the use of all natural resources – which in conjunction with the new regime on continental shelves (see below) means almost all fish stocks and oil and gas deposits – are reserved for the coastal state and in which the coastal state will also have a great measure of control over the protection and conservation of the marine environment (Art. 211).

In what remains the most problematic complex of subjects, the arrangements on deep seabed mining (Section XI and Annexes II and III of ICNT/Rev. 1), an understanding had at least been reached by the more than 150 states taking part in the Conference to set up an *International Seabed Authority* (ISA), to allow seabed mining operations to be started provisionally in the framework of a parallel system to be "organized, carried out and controlled by the Authority on behalf of mankind as a whole" (Art. 151) and to correct this system of exploitation if required at a later Review Conference. This compromise is to enable both the Authority's own "Enterprise" which the developing countries want to have set up and private and public seabed mining enterprises from industrialized states to have access to the manganese nodules at the bottom of the sea to which the industrialized states are attaching great importance for future supplies,

¹ UN Doc. A/Conf. 62/WP. 10/Rev. 1 of April 28, 1979; all Articles referred to in the following relate to this text.

particularly because of their copper, nickel and cobalt content.

Still open were a number of important questions of detail relating to the future regime for seabed mining (on which the "Working Group of 21" has been negotiating since 1979), especially the fixing of production ceilings for seabed mining in line with the annual growth rate of the world's nickel consumption, the obligation of the interested states and enterprises to transfer to the mining enterprise of the Authority as part of a contract the technologies which it needs to be able to operate, and the financing of this "Enterprise".

No accord has been reached either as yet about the voting modalities in the ISA's Council as the industrialized states in East and West demanded a veto right so as to prevent their being outvoted by the states of the Third World. The question of a general moratorium on deep seabed mining in the event of the failure of the projected Review Conference also remained a contentious issue.

The difficulties encountered in dealing with these questions reflect the fact that the industrialized states with an interest in seabed mining, above all the USA, had regarded the ICNT provisions on this point from the outset as "fundamentally unacceptable"², and ICNT/Rev. 1 made basically no change in this respect.

Small Progress

Apart from this complex of subjects, the ninth round of UNCLOS III negotiations was intended chiefly to bring clarity about the definition of the outer limit of the continental shelf and to solve the marine scientific research problems. There were a number of other issues such as the final clauses and the provisions for peaceful settlement of conflicts, especially in regard to the delimitation of adjoining and opposite continental shelves. None of these made in New York the progress which had been hoped for.

It is chiefly due to the continuing difficulties regarding the design of the *international deep seabed mining system* that the New York session, contrary to its programme of work, could do no more than prepare a second revision of ICNT/Rev. 1 which will have to be discussed again in Geneva in the summer.

The three groups of interested states in this dispute are:

The industrialized states on the threshold of deep seabed mining (especially the USA, and also the Federal Republic of Germany, Japan, France, Great Britain and the USSR) which want a system hampering production as little as possible;

The group of land-based raw material-exporting producers affected by seabed mining, including both industrialized and developing countries (e. g., Zambia, Zaire, Chile, Peru, but also Canada, South Africa and Australia), which would prefer to prevent deep seabed mining altogether in order to safeguard their export earnings;

The numerous, mostly underdeveloped states which have nothing else to expect from UNCLOS III and hope that a flourishing deep seabed mining industry will open up as large a "common heritage" as possible.

Determined Refusal

After these three groups of countries had reached an understanding in principle on a parallel system in 1976, this compromise solution is now seen to be of increasingly doubtful value. In some industrialized states which by assenting to the parallel system implicitly promised to guarantee the viability of the ISA's Enterprise there has been growing opposition to the requisite detail measures which reflects a deeper-seated resistance to the planned regulation of private economic activities: the Federal Republic, for instance, again playing as the "right wing forward" of the industrialized states, expressed itself again "philosophically opposed" to such concepts as production restrictions and mandatory technology transfers.

The amendments made in the course of the discussions in the "Working Group of 21"³ which were almost without exception to the advantage of the seabed mining states were rejected – partly with a view to being well equipped for an impending debate in the *Bundestag* – for two reasons which cast a light on the strained relations which also exist between several industrialized states: on the one hand the German Government felt that it had been kept out of the final phase of the negotiations which had, largely on US and Brazilian instigation, been conducted in a very small circle; on the other hand it felt increasingly doubtful about the sense of joining a convention which does not offer an acceptable framework for investments by the interested firms and involves outlays for the financing of the ISA's Enterprise but provides no corresponding compensation in any other area for geographically

² Mr. Richardson, leader of the US delegation, in a statement on July 20, 1977, quoted by Bernhard H. Oxman: *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, in: *American Journal of International Law*, Vol. 72, No. 1, January 1978, p. 57-83 (59f.).

³ The results are given in UN Doc. A/Conf. 62/C. 1/L.27 (Parts I-V) of March 27, 1980.

disadvantaged industrialized states like the Federal Republic. Unlike its bed fellows – the USA, France, Great Britain and also Japan – which, being coastal states with large marine resources of their own or thanks to the world-wide navigation interests of their shipping and ship-owning industries, have one foot in either camp, the Federal Republic has by now come to judge success at UNCLOS III from a more limited viewpoint of its own interests by equating it with a deep seabed mining arrangement to the advantage of industrialized states.

The amendments proposed during the ninth session are not thought to meet this criterion. The ICNT/Rev. 1 provisions on a *production policy* for deep seabed mining (Art. 151) which the advocates of national unilateral legislation turned down as being an instrument of the land-based producers for the preservation of their production monopoly and the obstruction of seabed mining have been subjected to significant changes: provisions for a *floor mechanism* have been inserted in the production limitation formula in the shape of a guaranteed minimum output⁴. The original linkage of seabed mining production to 60 % of the annual growth rate of the world's nickel consumption has been modified by addition of a provision that if this growth rate falls below 3 % of total consumption deep seabed mining may contribute up to 100 % of the incremental production.

The fierce resistance of the land-based producers, especially Canada, but also of several underdeveloped exporters of the four metals found at the bottom of the sea who are in full agreement with the former in this matter, shows that a compromise formula giving more satisfaction to the industrialized states which take an interest in seabed mining is unlikely to gain acceptance. A guarantee of the mentioned kind would in the view of these states go too far.

The amendments in regard to *technology transfer*⁵ under Art. 5 of Annex II by which the nature and duration of the mandatory technology transfers were defined more precisely or restrictively did not go far enough either: the provisions are still considered too comprehensive and, especially because of the possibility of technologies being passed on by ISA to third parties, unwarrantable.

The withdrawal of the provisions of Art. 155 par. 6 on a *moratorium on deep seabed mining* was considered similarly unsatisfactory. If the Review Conference to be convened at a date 15 years after the commencement of commercial production cannot reach agreement on an eventual mining system after five years of

negotiations, the requisite measures are under the revised arrangements to be decided by a two-thirds majority without, as feared by the industrialized states, leading to a production stoppage or to an automatic transition from the parallel system to a unitary system in which the ISA alone would still have the right to engage in seabed mining.

The reform of the voting modalities in the ISA Council also goes some way to meet the wishes of the industrialized states: Votes on substantive questions require a three-quarters majority⁶ which gives them the demanded right of veto.

Whether the potential seabed mining states can obtain further concessions by threatening to put their national interim laws in force is questionable: the legislative bodies of the USA and the FR Germany, for instance, had been waiting to see what happened at UNCLOS III but are now ready to pass their in the meantime readied bills before this year has ended. The "Deep Seabed Minerals Act" passed the US Senate on December 14, 1979, and a corresponding version is now before the last committee of the House of Representatives⁷. In the German *Bundestag* a "Bill on the provisional regulation of deep seabed mining" (*Bundestagsdrucksache* 8/2363 of December 7, 1978) has gone through all committees and is now ready to be passed.

On the other side, a few developing countries are already threatening to turn their economic zones into coastal seas if the USA actually allows deep seabed mining to start under national legislation⁸.

Mr. Richardson, the leader of the US delegation, finding himself in danger of missing all boats with his intermediary attempts, presented on the last day of the session a working paper⁹ which may point to a way out of the difficulties. He starts from the premise that major pre-production investments would in any case have to be made long before a Law of the Sea Convention comes into force which, if it is signed in 1981, cannot be expected to happen before 1988. The proposed "Preparatory Commission", a body which will have the task of enabling the ISA to exercise its

⁴ UN Doc. A/Conf. 62/C. 1/L.27 (Part II), p. 26ff., espec. p. 32-34.

⁵ *Ibid.*, p. 13-15.

⁶ UN Doc. A/Conf. 62/C. 1/L.27 (Part IV), p.6.

⁷ Cf. H. V. Hartley: U. S. Senate Passes Mining Bill, in: *Neptune*, Vol. 16, March 1980.

⁸ Cf. T. T. B. Koh, Chairman of the Law of the Sea Conference's NG 2, in: U. N. Observer & International Report, March 21, 1980.

⁹ "Informal Working Paper", Doc. IA/1, April 2, 1980: "An Approach to Interim Protection of Investment".

functions from that time onwards, should therefore “create a priority for the pre-Convention investor” to protect such investments, and this priority was to be commuted by the text of the Convention “into legal rights secured by the Convention when it enters into force”. If this were done it would still be possible to pass unilateral legislation in the course of the current year but it would not be effective before 1988 and the then possible start of commercial exploitation of the seabed resources, and even after that date only if the Convention failed to provide the demanded protection for investments.

The problem with this proposal is that its implementation requires the consent of the developing countries to an investment protection clause (“grandfather clause”) in the Convention which they have hitherto resisted, and willingness of the seabed mining lobby which is very influential, especially in the USA, to postpone the practical application of the national laws until 1988. This is now receiving sympathetic consideration.

Lasting Discontent

The negotiations on the definition of the outer limit of the continental shelf and the consultations on marine scientific research and some less important issues brought some advances although they were overshadowed by the dispute about deep seabed mining¹⁰.

In regard to the question of the *outer limit of the continental shelf* which is crucially important for the distribution of the oil and gas deposits in this area the two superpowers struck a bargain with the broad margin states, to the exclusion of the other states, on a formula which assigns the lion’s share of these resources finally to a few coastal states. The new proposal for Art. 76 provides as before that the continental shelf of a coastal state extends “throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles”¹¹.

The definition of the outer edge is based on a combination of the original Irish proposal (Doc. NG 6/1) which applied the criterion of “thickness of sedimentary rocks” and thereby provided for the

widest margin with the proposal of the USSR (Doc. NG 6/8) according to which the outer limit must not be either more than 350 sea-miles from the land territory or 100 sea-miles beyond the 2,500 metre depth-line. According to the amendment introduced as a Chairman’s proposal on March 27, 1980 oceanic ridges may not be taken into account in applying the depth criterion but “submarine elevations that are natural components of the continental margin” may be included which makes extensions beyond 350 sea-miles possible¹².

The various outer limits are to be computed with the help of recommendations by an independent Commission on the Limits of the Continental Shelf.

This arrangement does nothing to meet the wishes of the Arab states which had withdrawn their earlier proposal, made on behalf of the group of landlocked and geographically disadvantaged states, to limit the national continental shelves to the 200 sea-mile extent of the economic zones, in the hope that they would thereby reach a less expansive compromise and an improved revenue-sharing settlement. The new coalition of expansionists carries however so much political weight that the expected protests from the landlocked and geographically disadvantaged states – the number of which the Ugandan spokesman put at 64, sympathizers included – will at most result in more generous participation of the international community in revenue sharing with respect to the exploitation of the continental shelf beyond 200 miles. Art. 82 provides for such levies on oil and gas exploitation in these areas by the coastal states but there were no negotiations about them in New York.

The third main committee was able to conclude its consultations about marine scientific research in the main although it was not possible to clear up the differences between coastal states on the one hand and landlocked and geographically disadvantaged states and states with research interests on the other concerning the extent of the rights of control to be given to the coastal states in the regime for the conduct of marine scientific research on the continental shelf beyond 200 miles (Art. 246).

The half session in New York has confirmed the impression that several influential states want to bring the Conference as soon as possible to a conclusion. Many other states are however still dissatisfied after more than seven years of negotiations, and there remains the possibility that they will not ratify the end product of the Conference. A Convention come by in this way would be of questionable value.

¹⁰ Cf., on marine scientific research, the Report of the Chairman of the Third Committee, UN Doc. A/Conf. 62/L. 50, March 28, 1980; on the continental shelf, the Report of the Chairman of the Second Committee, UN Doc. A/Conf. 62/L. 51, March 29, 1980.

¹¹ UN Doc. A/Conf. 62/L. 51, p. 6.

¹² *Ibid.*, p. 7, para 6.