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Background Note*

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SHARING THE RESOURCES OF THE SEA

One Voice for the Community ?

The next session of the UN Conference on the Law of the Sea, due to start on August 2, could prove crucial as to whether or not the resources of the sea-bed will be developed in an orderly fashion to the benefit of all, or will start a race where the pickings will go to the strongest in technological development.

Since 1970 the United Nations has been struggling with the hardest practical task it has ever set itself - namely, the creation of an International Sea-Bed Authority and Enterprise which will control or directly exploit the sea-bed resources, mainly for the benefit of the developing countries.

The practical, ethical and legal problems are immense; inevitably conflicts of interest arise, not only between the developed and developing countries, but within regions and bilaterally between states. This became clear at the last session which ended in May, where discussion centred on a Single Negotiating Text (SNT) drawn up by the Chairman in consultation with the Conference's specialist Committees.

In August the Conference will have before it a Revised Single Negotiating Text (RSNT) which takes account of criticism at the earlier session. There is almost certain to be agreement on introduction of a 200 mile Exclusive Economic Zone (EEZ) for coastal states; but failure to endorse, at least in principle, the basic tenets of the proposed Convention will mean that certain countries - the United States and Iceland are already two examples - will take unilateral measures to impose 200 miles exclusive economic zones; multinational consortia may start prospecting the sea-bed beyond these zones without reference to international codes or control, and attempts to establish a world-wide system will be that much harder in future.

In these circumstances the Commission is urging more forcefully than ever that not only should the Community broadly speak with one voice in August, but that a Clause should be inserted in the Convention recognising the Community as a negotiating entity. Failing this, the Commission suggests, neither the Community nor its Member States could ever become contracting parties to the Convention.

To clarify the position the Commission has produced a Communication* to the Council, "Third United Nations Conference on the Law of the Sea", which sets out the main positions reached on the RSNT and recommends policy guidelines for adoption by Member States. On past experience adoption of such common policies is likely to be difficult.

Major matters for consideration

Apart from the internal matter of the Community role as a contracting party to the Convention, the major questions to be discussed at the August session of the Law of the Sea Conference are as follows:

1. The exclusive economic zone;
2. The continental shelf;
3. The international sea-bed;
4. Protection of the marine environment;
5. Marine Scientific research;
6. The transfer of technology;
7. The settlement of disputes;
8. Provisions relating to overseas countries and territories.

THE ROLE OF THE COMMUNITY

The Commission draws attention to the fact that, when an international agreement deals in whole or in part with matters for which the Community has competence, the Community alone is competent by virtue of these matters to enter into commitments relating to the third states concerned. This non-negotiable requirement makes it impossible for individual member states to sign on behalf of the Community; it also ensures that third countries which are signatories to an agreement receive a legal guarantee that they have contracted with parties capable of honouring all the obligations laid down in the agreement.

At previous Law of the Sea Conferences the Community has had observer status; the Commission now points out that in order to sign an agreement dealing with matters within its competence, the agreement must include a clause entitling the Community to sign. It suggests the clause should be worded as follows:

'Customs unions, communities and other regional economic groupings exercising powers in the areas covered by this Convention may be parties to this Convention'.

THE EXCLUSIVE ECONOMIC ZONE (EEZ)

The Single Negotiating Text (SNT) sets out the principle, now generally accepted by the majority of states as inevitable, of the introduction of economic zones for coastal states measuring 200 miles from the base line used to determine the width of territorial waters.

It lays down that in this zone the coastal states shall have 'sovereign rights' in respect of exploration and exploitation of natural resources, 'exclusive jurisdiction' as regards scientific research, and 'jurisdiction' as regards the preservation of the marine environment. All states, however, shall have freedom of navigation and overflight in the economic zone, and be able to use the sea for internationally lawful purposes relating to navigation and communications.

The Revised Single Negotiating Text has not been changed, despite reservations from most maritime states, regarding the actual powers allocated to a coastal state in relation to other states operating lawfully under conventions affecting the High Seas. Most Community members, supported by the USA, the USSR and Japan pressed amendments that would, at least, have made it clear that insofar as the economic zone is not covered by special rules, it will remain an integral part of the high seas and will thus be subject to the corresponding provisions.

The Commission urges Community members to take a common stand on this issue, but it is only one of several on which agreement will be hard to reach, even among Community members themselves. The two most difficult areas relate to fishing and conservation rights, and an acceptable definition of what constitutes the continental shelf.

Fishing and Conservation rights

Despite the misgivings expressed by many states with opposing interests to the earlier draft the RSNT has scarcely been changed.

Briefly, it proposes the following:

- (i) The coastal state shall determine the authorized catch of fish ('living resources') in its economic zone while ensuring that these resources are not jeopardized by over-fishing.
- (ii); If the zone yields more fish than the coastal state requires for its own purposes or can catch, it shall reach agreement with other states, granting them access to the surplus subject to the local regulations of the coastal state.

- (iii) The arrangements must take into account the problems of land-locked or disadvantaged countries and the needs of developing countries in the same region or sub-region. Where nationals of these states have been regularly engaged in fishing in these waters, their rights must be safeguarded.

With Britain and Belgium, for different reasons, not participating, other Member States have tabled amendments seeking to eliminate, as far as possible, any arbitrariness in decisions taken by coastal states regarding harvesting capacities and the allocation of fishing rights to other parties. The UK has, so far, refused to accept that the subjects covered by the amendments are subject to Community jurisdiction until internal problems concerning the Community's common fishing policy are resolved.*

The Continental Shelf

The 1958 Geneva Convention stipulated that coastal states shall exercise "sovereign rights" on the continental shelf for the purpose of exploration and of exploiting their natural resources. The problem arising from the introduction of the 200 mile economic zone is to decide what system is to be applied when the continental shelf of a coastal state, (i.e. the land area under the sea before the sharp declivity into the 'continental slope') extends beyond the 200 mile limit. Forty-four coastal states have an extended continental shelf, of which 16, including Britain, France, Ireland and Denmark within the Community, are already exploiting or intending to exploit the shelf, mainly for oil, beyond the limit. (The Rockall Basin is a case in point).

The solution proposed in the SNT, and still standing, is that coastal states should be granted "sovereign rights" on the continental shelf up to a distance of 200 nautical miles or, when the natural extension exceeds this limit, to the outer edge of the continental shelf. However, the coastal state would be obliged to make a payment or contribute in kind in order to operate beyond the 200 miles; the rate of payments or contributions would correspond to a percentage of the value or volume of production resulting from this exploitation. The International Authority (see below) would be responsible for collecting payments or contributions and would allocate the sums received on the basis of impartial criteria bearing in mind the interests and needs of these countries.

As the Conference is likely to accept the geophysical realities of the extended continental shelf, the main issue for discussion will be the methods of contribution to the common pool beyond the 200 mile limit. The USA, Ireland and other countries have put forward different ideas on this matter; the Commission proposes that they should be carefully studied as to their relevance to Community problems.

* See Background note: "Fishing Limits and the Common Fisheries Policy", ISEC/B3/76

THE INTERNATIONAL SEA-BED

The key concern of the Conference is to establish an International Sea-Bed Authority to regulate exploitation of the mineral deposits to be found on the oceanic sea-bed beyond the limits of national jurisdiction. These deposits, containing nickel, copper, cobalt and manganese, are expected to provide a considerable proportion of the future import demand of industrialised countries.

A US Senate report estimates, for instance, that by 1990 the US will be able to replace entirely its present imports of nickel, copper and cobalt and to reduce manganese imports from 82% to 23%. Developing countries whose economies depend heavily on the export of these minerals, are naturally concerned to protect their future and regard the International Sea-Bed Authority - initially proposed by the developing countries - as the instrument for doing so. As outlined in the text, its operations are undoubtedly biased in favour of developing countries; thus the discussions have divided on North/South lines between the industrialised states, led by the USA, and the Group of 77.

The major proposals for the powers and constitutions of the ISA & Enterprise are as follows:

Operators in the International Sea Bed

All operations beyond the 200 mile EEZ (excluding the extended continental shelf) would be conducted by the International Sea-Bed Authority, either directly or by operators acting in association with the Authority.

Associated activities would be conducted - probably by multinational consortia (three are already capable of starting) - under contracts with the Authority. Direct operations would be conducted by a special organ, the Enterprise, which would be distinct from the rest of the Authority and be a legal entity in its own right. All states parties to the Authority would automatically be members of the Enterprise which would be directed by a Governing Board. Contracts would be awarded on a competitive basis and the Enterprise would have title to all minerals and processed substances it produced. These would be sold at international market prices, although sales to developing countries might be at below market prices. In addition contracting entities would have to share their areas with the Authority; the areas retained by the Authority would be available solely to the Enterprise, to the developing countries or to entities sponsored by them.

As a safeguard for developing countries, during a period of 20 - 25 years, nickel production is to be restricted and commodity agreements are to be fixed on other metals to which the Authority may be a contracting party.

While accepting the principle of the ISA and Enterprise and the need to assist developing countries, the industrialised states have been anxious to write into the text definitive powers for both bodies so as to avoid vague or arbitrary execution.

Composition of the ISA

It is proposed that the ISA should be composed of an Assembly, a Council, Specialised Commission, the Enterprise, a Secretariat and a Tribunal. Interest centres most on the Council which will be able to establish general policies and, more important, award contracts. It is suggested that it should consist of 36 members, 24 elected on a geographical basis and 12 representing interest groups drawn from the developed and developing countries. As there has been little discussion on composition as yet, the position remains open.

Community members have been somewhat divided between those who would be affected by the ISA and Enterprise and those who would not, the latter tending to be on the side of the developing countries.

The main concern of the Commission is to ensure that the present vague conception of the Enterprise activities 'in the area' should be clearly defined as referring to physical activities conducted in the area and should not, except in so far as financial arrangements might involve later stages of operation, include processing and marketing.

The Commission also has reservations about proposals that the Enterprise should be immune from taxation and customs duties as this may conflict not only with Community principles but its relations with GATT. It urges the Member States to seek Community rather than individual representation on the Council which would give it parity in economic punch with the USA and the USSR.

Regarding financial arrangements, the Commission favours a self-supporting Authority and Enterprise but suggests that the proposed procedures for settling disputes should be viewed with caution.

OTHER MATTERS

Apart from the major issues above, the Conference will also be faced with a series of contentious matters that flow directly from them. Developed countries are particularly concerned about the rules and standards to be adopted for protection of the marine environment, such as the dumping of harmful substances into the sea. Developing countries, less worried about this matter, wish to establish less stringent rules than those laid down, for instance, in the

London Convention of 1972 or Barcelona Convention for the Mediterranean in 1976. Maritime states also question how far a coastal state can regulate shipping within its EEZ without interfering with the freedom of the high seas.

Developing countries, anxious to share in or undertake developments in marine technology have proposed that the Sea-Bed Authority itself should be given an active role in the transfer of know-how; States already well advanced in conducting research are worried that the powers of control of coastal states over their economic zones will result in arbitrary decisions affecting such research.

There are also basic different approaches to the settlement of disputes. The USA and most Western developed countries want to see an effective system of compulsory settlement of disputes; the Soviet Union remains consistently reluctant to submit disputes to third party arbitration, while developing countries are sensitive about their "sovereign rights".

Finally, the developing countries have written into the text that the natural resources of non-independent territories administered by a metropolitan power should benefit the local inhabitants only. The Chairman of the Second Commission (of the Law of the Sea Conference) has acknowledged that this raises questions outside the scope of the law of the sea, but it remains in the RSNT. France has said that she will not sign the Convention if the Article (136) remains in, and other countries including the Netherlands have strong reservations about it. In this case the Community could not accede to the Convention.

CONCLUSIONS

Despite the wide differences that still exist between states the very existence of a broadly acceptable negotiating text is a remarkable achievement.

Providing progress is made at the forthcoming session it is anticipated that an International Convention on the Law of the Sea will be signed in Caracas during a final session some time next year.

In the shorter term the Council of Ministers has the task of deciding to what extent the Community will be able to speak with one voice within a few weeks from now.

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