

## **C. THE GENERAL EFFECTS OF THE CONVENTION**

### **1. A Constitution for the Oceans**

The Convention is a comprehensive political and legal work which includes directives for international politics, international relations, and international law. It is a new international order for the oceans of the world, which make up five-sevenths of the planet's surface. The Convention's 320 articles, which are divided into seventeen main parts, take into account all legal aspects of the ocean space; nine annexes dealing with specific matters are attached to the Convention, but are integral parts (Art. 318). In many areas the Convention does not lay down a detailed scheme of regulations; instead, it provides a general legal framework within which states parties are required to act (e.g., Art. 194) or may act, (e.g., Art. 21) put other conventions or treaties into effect, (e.g., Art. 211, Para. 2) or conclude agreements (e.g., Art. 125, Para. 2). The Convention is designed and structured to be applied without prejudice for any laws or rules which may previously exist or which may be made in future, (e.g., Art. 237, Para. 1; Art. 304) while at the same time binding such laws, rules, and agreements of state to the general objectives and principles of the Convention, (e.g., Art. 237, Para. 2; Art. 311, Para. 3-6) Moreover, the Convention distinctly manifests political principles and programmes such as, "The high seas shall be reserved for peaceful purposes," (Art. 88) "The Area and its resources are the common heritage of mankind," (Art. 136; Art. 311, para. 6) or, States have the obligation to protect and preserve the marine environment. (Art. 192) Its quality of general application and its basic impact on all matters concerning the ocean give the Convention the status of a constitution for the oceans.

### **2. Impact of the Four UN Conventions on the Law of the Sea of 1958**

The subject matter of all four Geneva Conventions of 1958 was under discussion at the Conference. These conventions have all been incorporated into the 1982 Convention, with varying degrees of change and amendment for improvement and to make them more consistent with each other and the further provisions. For states parties to the 1982 Convention, the later Convention prevails over those of 1958 (Art 311, Para. 1)

### **3. Significant Achievements**

During the course of its work, the Conference was able to solve highly controversial matters and make important innovations. Far-reaching innovations such as the "Dispute Settlement System" (Part XV) and the Sea-Bed Regime (Part XI) may even have revolutionary impact on relations between states in many other fields besides maritime operations. Other major achievement were

- (1) Solving the question of the breadth of the territorial sea (Part II, Art. 3), which had remained open from the 1958/1960 conferences;
- (2) Regulation of the fishing rights of coastal states by implementing the exclusive economic zone (Part V, Art. 56-57);

- (3) Fundamental change in the continental shelf concept of the Convention of 1958 (Part. VI, Art. 76);
- (4) Concept of transit passage through straits (Part III, Art. 38) and archipelagic waters (Part IV, Art. 53) for international navigation;
- (5) The concept of archipelagic states (Part IV);
- (6) The obligation to engage in international co-operation in general (e.g., Art. 118, conservation and management of living resources; Art. 242, marine scientific research) and the development and transfer of marine science and technology to developing countries (e.g. Art. 150, Subpara. (d); Art. 274, Area; Art. 202, prevention of pollution; Art. 275-277 scientific and technological centres);
- (7) The concept of a comprehensive environmental law (Part XII).

Although this list is not complete, it does give some idea of the general magnitude of the achievements of the Conference. It is said that the Convention may, in addition to its technical and substantive regulations, affect other matters as well such as questions of disarmament and of a new international economic order. A provision which declares, "The sea-bed (Area) shall be open to use exclusively for peaceful purposes," (Art. 141) could influence military actions, and the concept by which an international authority such as the Sea-Bed Authority (Part XI, Section 4) is obliged to promote just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and other sources (Art. 150, Subpara. (f); Art. 160, Para. 1) can challenge the concept of the free market economy.

## 4. The Limits of Regulations

The achievements mentioned above are without exception the result of long, tedious struggles for compromise. Even so, these compromises could quite often be reached only by leaving some questions open or by using vague, ambiguous, and even almost contradictory language. Thus the right of land-locked states to the sea is in practice weakened by the transit state's right to request an advance agreement on terms and modalities (Art. 125, Para. 2) and the supremacy of the transit state's "legitimate interests," while at the same time the meaning of the term is left open. (Art. 125, Para. 3) Other such examples are the term "innocent passage" (Art. 19) or the term straits used in international navigation; (Art. 37) in both cases, the articles were drafted so as to avoid a clear definition.

It is said that the Convention also employs the "technique of silence." This might be the case with respect to the polar areas and military actions, but whether this is actually "silence" or not will depend on the individual viewpoint. However, all matters not regulated by the Convention continue to be governed by the rules and principles of general international law. (Preamble, last paragraph)

## 5. "Equality" - Equal Rights for All?

The regime of the oceans established by the Convention brings about 40% of the ocean space partly or wholly under the national jurisdiction of coastal states. This space encompasses the most valuable and most easily accessible resources of the oceans; 100% of the presently exploitable hydrocarbon deposits in the sea (85% of all known deposits) and about 90% of the commercial living resources are to be found in this area. Of this 40% subject to the jurisdiction of individual states, about half will fall to only a dozen or so coastal or archipelagic states, while the remainder

(about 20% of the ocean space) will be partitioned out to the remaining 120 coastal states, including the so-called geographically disadvantaged coastal states (there are about thirty of the latter). Of the dozen coastal states thus highly favoured, more than half, such as the USA, the USSR, Canada, Great Britain, France (including the Dominions), Japan, New Zealand, and Australia are highly developed countries. The approximately thirty land-locked states, fourteen of which are in Africa, receive no benefit from the ocean space under their jurisdiction. But all states share the same rights and obligations in the remaining 60% of the ocean space: the high seas, the deep sea area, and its resources.

In light of these figures, can the Convention be justified in claiming to be an equitable result of the Conference?

The Conference was instructed to deal with the establishment of an equitable international regime for the deep sea-bed area and its resources and, *inter alia*, with questions of the continental shelf and fishing on the high seas, including the question of the preferential rights of the coastal states. In coming to the conclusion that the rights of coastal states should take priority over about 40% of the ocean space and that all states should have equal rights in the remaining 60%, the Conference has done nothing but fulfil its task. The question could also be considered in the context of the Charter of the United Nations of 1945, which in Chapter I, Purpose and Principles of the United Nations, requires that friendly relations among nations be developed, based on respect for the principle of equal rights, and that international co-operation be achieved in solving international problems of an economic, social, cultural, or humanitarian character. By convening the Conference on the basis of equal rights for all states, the General Assembly adhered to the principles of the Charter.

Another question is whether the economic effects resulting from the Convention are in the interest of mankind as a whole and, in particular, of the developing countries, a major objective of Ambassador Arvid Pardo's proposals in 1967.

## 6. Major Objections to the Convention

During the last two years of the Conference, the United States took a new approach to the negotiations after Ronald Reagan became President. On July 9, 1982, he announced in a statement that the USA would not sign the Convention. Attempts before and after this statement to alter the Convention so as to gain the support of the United States remained unsuccessful. The key concern of the United States at that time was to ensure the access of its nationals to deep sea mining, to avoid any deterrence to mining, and to prevent the monopolization of the resources (Reference: Art. 150) by the operating arm of the Sea-Bed Authority. Otherwise, the regime of the deep sea would become an unrealistic dream, and its centralized and anti-free market provisions, a set of precedents for the use of enormous power by an international institution, would be uneconomical. Later, certain problem fields such as tuna fishing (Reference: Art. 64; Annex I) and the compulsory transfer of deep sea mining technology (Reference: Annex III, Art. 5, Subpara. 3(b)) were also criticized. Great Britain and West Germany also objected to the regime of deep sea mining and concluded an agreement with France and the United States concerning interim arrangements relating to polymetallic nodules of the deep sea in September 1982.

## 7. A New Economic Order?

The Convention is often mentioned in conjunction with the expression "new international economic order." This expression emerged in the mid-1970s as a result of the oil shortage and resultant price increases in those years and was the subject of UN resolutions. The central theme was "interdependence" and focused on the relationship between industrialized and non-industrialized countries. One important aspect was transfer of technology. This has found its way into the Convention with respect to mining technology in the Area, (Art. 144) the development of marine technology and, more generally, the transfer thereof, (Part XIV) such as the specific case of the transfer of technology for the prevention of pollution. (Art. 202) Some regulatory impact on the ore commodity market can also be expected from the power delegated to the Sea-Bed Authority. (Art. 150-153) Detractors of the Convention are suspicious that these measures contain elements creating precedents for a new economic doctrine undermining democratic capitalism and the principles upon which that system is based. These elements would be the pacing of the development of the resources of the seabed according to market demand, the monopolization of the resources, and a system of compulsory transfer of technology.

It is almost impossible to conduct a fruitful discussion of criticism which is based more on ideological grounds than on factual evidence. Except for the concept of the common heritage of mankind, the systems of 'deep-sea mining and transfer of technology are more in the nature of political programmes than they are concrete plans readily subject to analysis or even predictions of how the system will work in the future. Democratic capitalism is itself static in practice, and neither the basic requirement of the Convention to co-operate nor any specific regulations undermine any principle. A negative attitude towards co-operation could have a greater impact on principles than any regulation of the Convention. In actual fact, an increased awareness on the part of the world's population of the importance of the oceans would in many cases be of advantage for industrialized countries. And have these countries not already benefited from the concept of the exclusive economic zone and the "package" deal in general? Although countless prognoses can be made with respect to mining in the Area and the impact of such operations, any such predictions concerning the use of the oceans in future can be only speculative and cannot be presented as unavoidable. The oceans themselves remain mysterious, relentless, and the source of constant surprise for the imagination of humanity.

## **8. Provisions, for Entry into Force**

The Convention was open for signature (Art. 305, Para. 1) from December 10, 1982 to December 9, 1984. (Art. 305, Para. 2) 119 states signed the Convention on the opening day for signature at Montego Bay/Jamaica. As of the closing day, a total of 155 states and the Cook Islands, the European Economic Community, Namibia, and Niue had signed. (Art. 305, Subpara. 1(b-f)) As of 1987, the Convention had been ratified by more than thirty states and Namibia, represented by the United Nations Council for Namibia. (Art. 305, Subpara. 1(b)) The ratifying states come from the following regions: eight from Asia, sixteen from Africa, eight from Latin America, and two from Europe (Iceland and Yugoslavia).

The Convention does not enter into force until twelve months after the date of deposit of the sixtieth instrument of ratification or accession. (Art. 308, Para. 1) Depository is the Secretary-General of the United Nations, (Art. 319, Para. 1) who is also responsible for preparing and circulating reports on issues related to the Convention. (Art. 319, Para. 2)

## **9. The Importance of Having Signed the Convention**

The signing of the Convention between 1982 and 1984 has two effects for the signatory states. First, the states are obligated not to act in a manner which would defeat the object and purpose of the Convention unless the state makes clear that it does not intend to become a party to the treaty. Second, the signatory states obtain the right to participate as full members in the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, and under certain circumstances may commence preparatory work for deep sea mining before the Convention enters into force. States which have signed only the Final Act may act as observers, but they are not entitled to participate in the taking of decisions. The Preparatory Commission was to begin work when fifty states had signed the Convention, which was already the case on December 10, 1982. The Commission has indeed taken up its work.

## 10. Practice of the States in Recent Years

The states' practice of claiming sovereign rights in zones of varying sizes continued throughout the sessions of the Conference and into the 1980s. Today almost all coastal states have established a territorial sea (Art. 3) of twelve nautical miles or more. The number of contiguous zones (Art. 33) established is significantly lower, but exact figures are difficult to obtain, as many of the claims do not adhere to the applicable provision of the Convention, (Ibid) either in terms of the extent of such a zone or of the rights granted therein. The trend of the 1960s to claim exclusive fishing rights beyond the territorial sea was forgotten in the rush to establish an exclusive economic zone (Art. 56, 57) of up to two hundred nautical miles. By the end of the Conference, about seventy claims of exclusive economic zones had been made, and this number grew to about eighty-five by 1985 (including about twenty claims by territories, etc.). Continental shelf claims rose sharply during the 1970s, but only a few have been made in the 1980s. The coastal states' right to a continental shelf off its coast exists *ipso facto* today (as undisputed international law), and is not dependent on proclamation or occupation. (Art. 77, Para. 3)

In summary, it can be said that the most beneficial aspects of the Convention, namely the establishment of rights for the coastal states, have already "entered" into force.

## 11. What is the Law of the Sea Today?

As the 1982 Convention has not yet entered into force, the reluctance of the United States and other countries to act constructively and the self-serving "enactments" by the coastal states have created a legal environment which can only be described as gloomy and falling far short of the goal of law to provide stability, predictability, and justice. This preliminary note must be kept in mind in order not to be misled by the following generalization

In principle, the law that is in force today on any particular issue related to the oceans is still basically derived from the four 1958 Conventions and customary international law. To a large extent, this law is now represented in the provisions of the 1982 Convention. In other words, the 1982 Convention has absorbed (for the most part) the four 1958 Conventions on the Law of the Sea and unwritten customary law. The provisions which are not identical with the pre-1982 Conventions on the Law of the Sea, but which are practiced by the states, may become customary law, while other provisions of the 1982 Convention not practiced would only become applicable when the Convention enters into force. Day-to-day practice will not highlight any differences, and the 1982 Convention will be seen as representing the law of the sea. Thus the 1982 Convention serves as an excellent guideline to the regime of the law of the sea, but in any particular case it will

continue to be necessary to weigh circumstances carefully in order to decide which source of law applies. In addition, the Convention contains new law fields, such as the deep-sea Area (Part XI), marine scientific research (Part XIII), development and transfer of technology (Part XIV), and settlement of disputes (Part XV). Some of these new regulations may have some impact on what is or what becomes international law, even prior to entry into force of the Convention.

The uncertainty for the field of the law of the sea will last until the Convention enters into force and is widely accepted.

## **12. The Future of the Convention**

A reliable prediction of the significance of the Convention in the future cannot be expected at this point - but consideration of certain basic factors may indicate the probable direction events will take.

International conventions never enter into force until a certain period of time has passed, and experience in the last four decades has shown that the period needed today will be three or four times that required in the 1950s, if not even longer. The nations of the world can be expected to take a particularly long time with the 1982 Convention as it does not contain simple, straightforward technical regulations nor concern only one subject; instead, it is a unique and comprehensive law, with potentially far-reaching consequences for a broad range of subjects. Most of the coastal states which do not belong to the ten or so traditional shipping or fishing nations have only recently begun to think about making use of their "maritime rights", having previously had neither a reliable infrastructure nor the necessary means and knowledge of marine science to enable them to project the implications of the Convention or judge what effect its obligations would have on them, much less put it into practice. As there is presently no economic pressure to commence deep sea-bed mining, there will be quite a wait until the Convention enters into force.

The ratification process - as of this date (early 1988), slightly more than half of the required sixty instruments of ratification or accession have been deposited - will undoubtedly continue, and one day the Convention will formally enter into force. The more important question, however, is whether the Convention will be universally accepted.

The answer to this question depends on the attitude of the superpowers, particularly the United States, and the further development of political circumstances. The attitudes of the superpowers will have an immediate effect on their allies, with the result that larger groups of states may refuse to accept the Convention. If, however, only one of the superpowers withholds its acceptance, this state will more likely find itself increasingly isolated.

Other political circumstances or practices, such as ratification by groups (e.g., Group 77), incidents which occur during passage through straits, enforcement of coastal state laws in excess of the regulations of the Convention, economic recession, and military tensions, will favourably or adversely affect the implementation process or the position of the Convention. Indifference might also slow down the decision-making progress for a certain period of time,

but a complete and final stop will not be possible, as the growing uncertainty and instability in legal, economical, and political matters concerning the oceans, already predictable, will continue to push the issue onto the order of business. It is already obvious that the 1982 Convention, whatever direction developments of the future take, has become an established guide for political, technical, and legal matters involving the oceans, and it will become obsolete only when it is replaced by its successor.