NOTE BY THE RAPPORTEUR

The Asian-African Legal Consultative Committee at its plenary meeting held on 27 January 1971 recommended that the Rapporteur of its Sub-Committee on the Law of the Sea prepare a paper containing a list of various issues on the Law of the Sea, a summary of the views expressed in the Committee on those issues and a questionnaire inviting the views of Governments, and that paper be ready for distribution by the Secretariat on 15 February 1971.

The attached Working Paper has been prepared with a view to implementing that recommendation. In the very brief period available to the Rapporteur for completion of his task, no study in depth of the issues would have been feasible. The Working Paper contains a brief survey of what appears to the Rapporteur to be the main issues that might be expected to engage the attention of Governments as they prepare for negotiations on the Law of the Sea, several questions likely to arise in practice on which decisions of policy may need to be taken, and, in some instances, a summary of the main trends of opinion among Governments. The questions referred to have not been merely listed, as in the usual form of questionnaire, but are raised in the context of a brief review of each issue.

The Working Paper does not pretend to be comprehensive or exhaustive either as to the issues or the questions arising in connexion with them.

The General Assembly resolution 2750 of 17 December 1970 containing *inter alia* the Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Sub soil thereof, beyond the Limits of National Jurisdiction, and a brief summary of the United States proposal regarding a regime

for the international sea-bed area, have been included as annexure for convenient reference.

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I. THE INTERNATIONAL REGIME FOR THE SEA-BED BEYOND NATIONAL JURISDICTION

Under this heading, two categories of issues may be considered: (A) the manner in which the limit of a coastal State's national jurisdiction will be arrived at; and (B) the nature of the international regime to govern the exploration of the area beyond national jurisdiction and the exploitation of it resources. These would appear to be inter-related issues. For some, whether or not to accept a narrow limit of national jurisdiction, would depend on whether the international regime beyond national jurisdiction was such as to be capable of providing tangible benefits to developing countries according to their needs.

For others, delimitation of national jurisdiction is a matter already regulated by certain rules, i.e. the depth plus exploitability test laid down in the Geneva Convention on the Continental Shelf, and States which had exercised their rights under those rules might not be expected to accept without good reason, any variation or restriction of those rights. In general, the latter take the position that it would not be logical to consider the nature of the regime to govern the area beyond national jurisdiction so long as the extent of that area was not defined by an accepted method of delimiting national jurisdiction.

A. The manner in which the limit of a coastal State's national jurisdiction will be arrived at

Several methods of delimiting jurisdiction may be considered for adoption singly or in combination, e. g. (i) a fixed distance from the territorial sea baselines of the coastal

State (distance criterion); (ii) a fixed depth seawards from the coastal State (depth criterion), allowance being made for the occurrence of deep trenches in otherwise relatively shallow areas; (iii) a combination of the distance and depth criteria, as alternatives, the choice of either criterion being left to the coastal State concerned; (iv) a method which would apportion an area of the sea-bed to remain under national jurisdiction, arrived at by reference to uniformly applied geological, geographical and economic factors relevant with respect to the State concerned; (v) a system whereby the principles of delimitation would be worked out on a regional basis (possibly varying with the region concerned), taking into account regional differences of a geographic, economic and legal nature; (vi) national jurisdiction might be said to extend to some arbitarily determined point on a generalised representation of the physiographic areas of the continental margin, (irrespective of distance, depth or area) e. g. until immediately beyond the "continental rise".

Other possible methods for delimiting national jurisdiction might be worked out. In considering which method to adopt it would be necessary to bear in mind that if it is planned to set up international machinery with comprehensive powers with respect to the sea-bed beyond national jurisdiction as a kind of administrator of that area as a "common heritage of mankind", then the machinery should be allowed jurisdiction over an area, the depth and resources of which permit immediate commercially profitable exploitation either indirectly through the issue of licences to operators, or directly through contractors or by means of its own equipment, facilities and services. It has been suggested that if all coastal States were to extend their national jurisdiction up to immediately beyond the continental rise, which could contain readily exploitable hydro-carbon deposits, the area beyond, which would be left to the international machinery, would be at such depth as to make commercial exploitation in the near future difficult, if not impossible. In that event,

the establishment of international machinery with comprehensive powers might not be practicable for the present.

Developing countries would have to consider carefully whether their long term interest in maximising their share of the wealth of the sea-bed would best be served by claiming extensive areas as falling within their national jurisdiction and exploiting those areas through foreign firms on bilaterally negotiated terms, or accepting relatively narrow limits of national jurisdiction and placing the responsibility for carrying out and or regulating exploitation of the sea-bed on international machinery with comprehensive powers and in the control of which they had an adequate share.

Land-locked and shelf-locked States and States with short coast-lines might be expected to favour narrow national limits and exploitation of the area beyond by international machinery with comprehensive powers. However, some States with narrow continental shelves have claimed wide jurisdictional limits, sometimes up to 200 miles, as a kind of compensation for the lack of an extensive exploitable shelf. Such States may wish to consider carefully whether that course would be in their long-term interest, since such claims do not add a greater area of exploitable shelf but merely rely on greater access to the living resources of the sea which could be achieved by merely claiming exclusive jurisdiction for fishing purposes. They may similarly wish to consider whether it might not be in their interest to (a) claim such exclusive fishery rights in those waters while (b) restricting their claim to the bed of the sea to a relatively narrow area thus adding their support for narrow national jurisdiction over the sea-bed and contributing to the viability of any international machinery that might be set up to exploit the area of the sea-bed beyond national jurisdiction.

If, as it now appears, most developing countries have narrow continental shelves, they may wish to consider support for narrow limits of national jurisdiction in the hope

that countries with wide shelves could be induced to accept such narrow limits and leave their adjacent readily exploitable sea-bed areas under the jurisdiction of the new international machinery. In return for what might appear to be a concession on the part of those countries, it may be necessary to consider a scheme whereby a greater portion of the profits/revenues/raw materials from such adjacent areas were to be allocated to the coastal States concerned.

Extracts from 1971 Report of the AALCC Sub-Committee on the Law of the Sea

> *"The limits of national jurisdiction over the sea-bed, including a concept of "trusteeship" over the continental margin as proposed by the United States."*

The Sub-Committee discussed the question whether to consider first the proposed international regime for the sea-bed beyond national jurisdiction, or the limits of national jurisdiction over the sea-bed.

Some Delegations suggested that the Sub-Committee should commence its work by considering the extent of a coastal State's jurisdiction over the sea-bed adjacent to its coast, or continental shelf, since in their view the nature of the international regime to be established would depend to a great extent on the limits of national jurisdiction.

Some Delegations urged that the question of the limits of national jurisdiction over the continental shelf be taken up only after there had been a discussion of the international regime for the sea-bed beyond national jurisdiction such as was envisaged in the General Assembly's Declaration of 17 December 1970. In their view there was a vital connexion between the character of that regime (including the international machinery) and the question of limits. If agreement could be reached on a strong organization which offered a reasonable prospect of providing real benefits to

the developing countries in accordance with a scheme which would fairly take into account the needs of those countries, there might be support for relatively narrow limits of national jurisdiction. On the other hand, if the machinery contemplated were to lack comprehensive powers or were for some other reason unable to discharge such functions acceptably, then it might become necessary to consider recognising much wider limits of national jurisdiction so as to allow coastal States themselves maximum opportunity for exploitation.

Following a discussion of the relative merits of depth, distance, and a combination of both factors as criteria for measuring the limit of the continental shelf, several members while expressing a preference for a distance criterion on the ground that a simple depth criterion might be unfair to States with narrow continental shelves, indicated that they would prefer to leave the matter open for the time being until they had been able to gather more scientific data and had studied the full implications of using each particular criterion. Whatever criterion or figure was arrived at, it must be related to the equities of the situation and take account of a variety of factors, including the nature of the proposed international machinery.

A few Delegations indicated their clear preference for a depth criterion of say, 200 metres, which had been accepted and acted upon by many States over the years. Some Delegations objected to limiting national jurisdiction to the 200-metre isobath because the Geneva Convention on the Continental Shelf had already admitted a deeper limit beyond that depth and because there are parts of the sea-bed area deeper the 200-metre isobath but surrounded by areas of lesser depth of one or two States which in their view should be under national jurisdiction, primarily on the ground of propinquity. It was pointed out that some States had in fact authorised exploitation of their adjacent sea-bed areas on the assumption

that the depth plus exploitability criterion prescribed in Article 1 of the Geneva Convention on the Continental Shelf was settled law, and that it would be unfair and unrealistic to expect States to abandon that criterion altogether even though its revision in some respects might be necessary.

Some Delegations proposed that States should abandon the depth plus exploitability criterion for the limits of national jurisdiction and consider recognizing a limit of 200 miles to be measured from the coastal State's baselines as this, in their view, was the most equitable criterion and hence most likely to command the support of the majority of the international community. A number of members were inclined to view the proposal favourably and considered it desirable to study the concept further.

Other Delegations pointed out that while they might favour the distance criterion in preference to a depth criterion, if very wide limits of national jurisdiction were to be recognised, the remaining area of the sea-bed that may be placed under the control of the international authority would be at such depth as to be impossible to exploit in the near future. This would endanger the financing and viability of any proposed machinery, or permit the creation of only machinery with restricted powers and functions.

The United States' proposal for a "trusteeship" area that might extend from the 200-metre isobath to the end of the continental margin was examined at length. It was pointed out that the wide powers and extensive benefits which would be conferred on a "trustee" coastal State under that system would be incompatible with the status of the area and its resources as the common heritage of mankind. Moreover, it appeared to be inconsistent with the basic principles of trusteeship, as that concept was known in private law systems, in that the trustee and not the beneficiaries appeared to receive the bulk of the benefits of exploitation of the "trusteeship area."

B. The nature of the international regime to govern the exploration of the area of the sea-bed beyond national jurisdiction and the exploitation of its resources.

Governments would wish to consider the nature of the international regime that will be established with respect to the area of the sea-bed beyond national jurisdiction in all its aspects, and including, in particular, the structure, powers and functions of the international machinery (International Authority) that would give effect to the regime.

Important issues relating to the nature of the international machinery

In the Secretary-General's study of June 18, 1969 (A/AC. 138/12), the regime alternatives were described in terms of three models, one involving the registration of the sea-bed resources activities, another involving their licensing, and a third involving a regime implemented by machinery with exclusive rights to direct and conduct sea-bed exploration and exploitation. In his study of May 26, 1970 (A/AC. 138/23), the Secretary-General extended the range of alternatives to cover : (i) a regime that would merely call upon States to co-operate in the exchange of information related to sea-bed activities ; (ii) a regime that would provide procedures and rules governing sea-bed activities, and would adopt and enforce them voluntarily ; (iii) international registration or licensing of activities involved in sea-bed exploration and exploitation ; and (iv) a regime that could fully govern exploration and development of sea-bed resources, including the regulation, supervision and control of all activities involved.

One basic decision would be whether to support the establishment of machinery with comprehensive powers, such as that contemplated in the fourth alternative of the Secretary-General, or an organisation of more restricted

scope. The more restricted the scope of the machinery, the wider the opportunities for free enterprise which, according to some, would offer the greatest prospect for early development of sea-bed exploitation techniques, and the maximum and timely utilisation of the resources of the area. Others, apprehensive that this might lead to selfish exploitation of these resources, now recognised as the common heritage of mankind, by private entrepreneurs guided solely by the profit motive, would prefer machinery with comprehensive powers capable not only of direct exploitation of the sea-bed by its own staff and facilities, but also of supervising and controlling the activities of all States in the area, and responsible for the equitable distribution of benefits to all according to their needs.

Powers and functions of the Authority

General

The powers and functions of the International Authority, are foreseen in paragraph 9 of the Declaration of 17 December 1970. Those powers and functions were elaborated in the course of discussions at the Twelfth Session of AALCC in Colombo, in January 1971, and a list is contained in the summary of the discussions that followed. Of these, five are of prime importance, i.e. (a) the power to carry out exploitation activities by means of its own facilities, equipment and services, or such as are procured by it ; (b) the power to license exploration and exploitation and related activities ; (c) to provide for the equitable sharing of benefits ; (d) to establish and adopt measures designed to minimise and eliminate fluctuation of prices of land minerals and raw materials that may result from the exploration and exploitation of the international sea-bed area and its resources ; and (e) scientific and technical training.

Exploitation by the International Authority

It may be that some disagreement could develop between those countries that favour exploitation through

private enterprise alone, and others who would want the International Authority itself to carry on exploration and exploitation activities, perhaps in competition with private enterprise. Those who oppose the idea that the International Authority should itself carry out exploitation activities by means of its own resources, refer to the problems involved, viz. lack of trained expert personnel, lack of capital to invest in what may be high risk activities, possible adverse effects on and resistance by, a private sector currently ready and willing to proceed with exploitation etc. Others support the idea that the Authority should enter the exploitation and marketing business on its own or through contractors at some stage in its development, and thus should be given the power in its constituent instrument to do so. In their view, it is only an Authority with such wide powers that could act as a genuine trustee of the wealth of the sea-bed—the common heritage of mankind—for the benefit of all countries and particularly the developing countries. Countries favouring a virtually unrestricted private enterprise system (and these will in the main be the developed countries with practically a monopoly of the expertise and finance needed to carry out exploration and exploitation at the present time) are likely to oppose any system under which the Authority can carry out exploitation on its own, even in competition with exploiting entities licensed by it, and Governments may wish to consider how best to accommodate each other's views.

Licensing system

The system of licensing will have to be carefully considered in its scientific and technical, as well as legal, administrative and regulatory aspects. A detailed study of systems of licensing of off-shore exploitation activities prevailing in developed countries, like Canada, France, the United States, the United Kingdom, and others would be useful before a system to be applied by the Inter-

national Authority can be devised. Attention will have to be paid to such matters as (a) the activities to be licensed, e.g. exploration activities, exploitation activities ; (b) the type of entities to be licensed, e.g. a Contracting State, groups of Contracting States, nationals of Contracting States, whether natural or juridical, international organisations ; (c) the area to which a licence will apply, e.g. how such areas are to be allocated, delimited, etc ; (d) the duration of a licence ; (e) the minerals to be covered by the licence ; and (f) the scale of fees and payments to be made by the licensee.

On the latter aspect, the United States' proposal provides for such payments as : exploration licence fees ; exploitation licence fees ; annual block rentals according to the mineral being exploited, and increasing at a specified annual rate ; a cash bonus payble on commencement of commercial production, plus regular payments proportionally to the value of actual production varying with the mineral concerned, and determined on the basis of gross value of production at the site. Governments may wish to ensure that a fair proportion of the profits from minerals obtained is paid to International Authority. Where there is competition for a particular block, consideration may be given to awarding the licence to the competitor who offers the best return to the Authority. However, the level of fees and payments should not be such as to discourage the private investor, having regard to the high risk character of the sea-bed exploration and exploitation. Basic differences between the approaches of Socialist and non-Socialist countries to this question will have to be taken into account.

Governments may wish to consider whether the licensing system should be so devised as to engage directly or indirectly the responsibility of the State of the nationality of the operator. This might be accomplished by issuing licences for exploration and exploitation only to States or groups of States, or to natural or juridical persons under conditions

whereby a person's State stands behind him, guarantees compliance with the terms of the licence and accepts ultimate responsibility for any damage caused as a result of such activities. Detailed rules for determining nationality and fixing liability would need to be considered. Should licences be issued to international organizations ? (On this point see the penultimate sentence of paragraph 14 of the Declaration of 17 December 1970).

Equitable sharing of benefits

Of particular importance will be the system of equitable sharing of benefits between States, foreseen in paragraph 9 of the Declaration. A first question might be what is comprised in the term "benefits" ? Among such benefits would be the raw materials themselves, funds from the sale of such raw materials, other receipts, such as licencee fees, royalties or other payments to the Authority by operators, and scientific information. On what system will such benefits be allocated ? The system should be devised and adopted by the plenary organ of the Authority, taking into account a variety of factors, but in principle related to the *needs* of each developing country. It might be possible to envisage a method of allocation based on an inversion of the UN contribution scale, or on per capita income or other factors. It has been suggested that funds should, as far as possible, be channelled directly to developing countries, unless they individually or collectively specify that an international or regional institution is to receive the funds in the first instance. In any event, criteria like "economic performance" or some other indicator based on the success of a country's economic efforts, used from time to time in foreign aid operations, might not be desirable. What a country would receive from the Authority is its own, its proper share in the proceeds of the common heritage of mankind. It is not "foreign aid".

Should funds received by the International Authority

be used for community purposes other than through direct transfer to Government ? If so what are those purposes ? Governments may wish to consider whether it would be justifiable to channel part of these funds into a fund for relief in the event of disasters caused by or associated with sea-bed activities, or whether operators should be required to pool their resources in order to provide for such relief.

Other questions that will arise are : on what basis will actual raw materials be shared ? By that means will the Authority assure the effective publication of research programmes and the effective dissemination of the results of such research as contemplated in paragraph 10 of the Declaration ?

Price fluctuation control

How should the Authority discharge its obligations in respect of minimising and eliminating fluctuation of prices of land minerals and raw materials that may result from exploitation of the resources of the area beyond national jurisdiction, and any adverse economic effects caused thereby ? It seems desirable that in its efforts in that direction it should co-operate closely with other agencies active in the field, such as UNCTAD. Would current techniques, such as commodity agreements and compensatory financing be appropriate, or should other techniques be devised under the auspices of the Authority. (Ref. General Assembly resolution 2750, part II. A).

Scientific and technical training

Governments would wish to consider the nature of the Authority's functions in regard to the scientific and technical training of personnel from developing countries. Improvements of the technological expertise of the developing countries with respect to sea-bed would seem to provide the best guarantee of their full participation in such activities and of their ultimately receiving maximum benefits from the resources of the area. Paragraph 10 of the Declaration of