Oceans
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United Nations Conference on the Law of the Sea:
Eighth Session

The Eighth Session of the United Nations Conference on the Law of the Sea (UNCLOS) resumed in New York City on July 16, 1979. Much had been accomplished during the first six weeks of negotiations in Geneva, but it was clear that much difficult work remained when the Eighth Session resumed. Many felt that time was running out for UNCLOS. Governments had grown weary of financing protracted negotiations that appeared to be going nowhere. During the opening plenary, President Amerasinghe noted that the Conference must proceed with a deep sense of urgency. From all indications, governments were losing patience, and at the outset, it was hoped that all unresolved Committee I hard-core issues would be resolved within the first three weeks of the resumed session.

Though the goal of concluding all substantive negotiations during this session was not met, the final reports of the Committee Chairmen reflect substantial progress toward agreement on most remaining hard-core issues. At the conclusion of the Eighth Session, U.S. Ambassador Elliot Richardson noted that “the successful completion of the Third United Nations Conference on the Law of the Sea is now in sight.” Richardson commented further that member nations “have marshalled...
the political will to overcome whatever obstacles block the road to a treaty.”

The ambitious schedule for the Conference’s next negotiating session is indicative of the desire to conclude substantive negotiations in 1980 and to begin the treaty ratification process in Caracas in 1981. Work on final clauses will be concluded in an informal plenary during the first two weeks of the Ninth Session. This Session will be conducted in two five-week meetings, the first in New York beginning on March 3, 1980, and the second beginning on July 28, 1980, in Geneva. During this same period, all substantive negotiations of the three Committees should be completed, along with the final revision of the Informal Composite Negotiating Text (ICNT). Debate on the revised ICNT is expected to conclude within two weeks, the goal being the conversion of the revised ICNT into a final Conference document to serve as a draft convention by the end of the sixth week of the Session. The remainder of the Ninth Session will be used to discuss the questions of amendments, reservations, relation to other conventions, entry into force, transitional provisions, and participation in the Convention.

It is believed that with the informal intersessional meetings and serious and conscientious negotiations during the Ninth Session, substantive negotiations can be completed in 1980. However, there are critical areas of disagreement which could result in delay. Additionally, although much time was spent during the Eighth Session on the questions of final clauses, reservations, entry into force, and participation in the Convention, problems in these areas could prove to be insurmountable. These procedural questions, now expected to be addressed fully at the conclusion of substantive negotiations, pose the most serious problems for UNCLOS.

The difficult issues faced during the resumed Eighth Session were primarily those dealing with deep seabed mining (Committee I). It is noteworthy that the greatest achievement in New York was the resolution of the outstanding Committee I mining issues. Though no new official text has been issued, the report of the Working Group

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4. Id.

5. See U.N. Doc. A/CONF. 62/BUR/12 (1979). The term “Final Clauses” is used to describe the procedural provisions of the treaty covering such aspects as signature, ratification, status of Annexes, deposits, and testimonium clauses. Also, the use of the term is appropriate when dealing with other procedural matters such as amendments, reservations, relation to other conventions, entry into force, transitional provisions, denunciation, and participation in the Convention.
of 21 offers a greatly improved prospect of consensus on most issues and should serve as the basis of final revisions in 1980.

The Authority and the Council

As in Geneva, the most intractable problems involve the organs of the Authority and the voting procedure of the Council. Article 158 provides that the Authority's principal organs consist of an Assembly, a Council, and a Secretariat. Article 158 is amended to make it clear that the Assembly and Council must avoid actions "which may derogate from or impede the exercise of specific powers and functions conferred upon (each other)." This provision makes it clear that the Assembly cannot interfere with the operations of the Council in exercising its important functions. This amendment and the changes made with respect to Article 160 eliminate many of the criticisms expressed by the U.S. Delegation and industry interests. However, no satisfactory solution to the problem of decision-making in the Council of the Authority has been determined.

Article 161 addresses the composition, procedure, and voting on the Council. As amended, it provides that decisions on procedural questions be made by a majority vote of those members present and voting. Decisions on substantive questions (a narrow refinement of what is substance under this section is provided) shall be made by

6. See U.N. Doc. WG 21/2 (1979). The Working Group of 21 (WG 21) is a special negotiating group established in Geneva during the Eighth Session of UNCLOS. Its function is to seek compromise solutions to remaining "hardcore" Committee I, deep seabed mining, issues.
8. Id.
9. Id.
10. Article 160 deals with the functions and powers of the Assembly. The United States objects to the reference to the Assembly as the "Supreme Organ" of the Authority. The first sentence of Article 160 is amended to read that: "The Assembly, as the sole organ consisting of all members, shall be considered the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided..." This is an improvement over the language in the ICNT/Rev. 1 providing that "the Assembly is the supreme organ... and as such shall have the power to establish the general policies... to be pursued by the Authority... ."
11. Article 161 (7) (b), as amended, provides:
(b) Decisions on questions of substance arising under article 162 of paragraph 2 (b), (c), (d), (e), (f), (g), (h), (i), (o), (r), (t) in cases of non-compliance by a contractor or a sponsor, (u), (v) provided that orders issued under this subparagraph may be binding for no more than 10 days unless confirmed by a decision taken in accordance with subparagraph (c) below, (x) and (y) shall be taken by a two-thirds majority of the members present and voting, provided that
a two-thirds majority of those members present and voting, "provided that such majority includes a majority of the members of the Council." 11 Section 7(c) is illustrative of attempts by certain special interest groups—such as those industrialized nations whose nationals are engaging in deep seabed mining development and are likely to be the first to begin actual mining activities—to ensure that the Council cannot take arbitrary and capricious actions against those special interests. Section 7(c) provides in part: "In order to promote the resolution of particularly sensitive issues by means of consensus, decisions on all other questions of substance shall be taken by a two-thirds majority of members present and voting, provided that members have not cast negative votes." 12

This provision ensures that a small group of Council members, voting against the majority, can effectively halt actions against their interests. Current proposals regarding the number of negative votes needed to block a decision range from as low as five to as many as ten; not surprisingly, the Group of 77 nations prefer a higher number than do the industrialized nations. A refinement of the substantive-procedural distinction, the resolution of the blocking number, and the determination of membership on the Council 13 still await final approval during the Ninth Session. The entire issue of decision-making on the Council, and representation of all interests on the Council, must be resolved fairly and equitably if any draft convention is to be ratified by the vast majority of nations. If such a resolution cannot be attained in 1980, the Conference could fail.

Deep Seabed Mining

A proposed amendment to Article 140, Benefit of Mankind, provides that activities in the international seabed area be conducted for the benefit of mankind as a whole, including all countries "and peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance
with General Assembly resolution 1514(XV) and other relevant General Assembly resolutions . . . .” The United States seeks to ensure that financial benefits from the area will be shared only among those States who are parties to the Convention. The difficulty raised by this issue is amplified by its highly political nature. The Group of 77, in particular, seeks to include political organizations, such as the Palestinian Liberation Organization, under Article 140. This, of course, is not politically acceptable to the United States. Compromise solutions are possible as both sides weigh the overall importance of the treaty and the problems created by the inclusion of liberation movements.

Several changes in the ICNT are designed to accommodate mining interests by eliminating uncertainties concerning their future operations. Article 1, Annex II now provides that: “Title to the minerals shall pass upon recovery in accordance with this convention,” as opposed to its original requirement that title passes in accordance with a contract between the mining consortia and the Authority. The amendment stipulates that title passes upon mineral recovery, with no special actions being required to pass title. This assures the mining consortia of a property right in mined minerals without the necessity of, or uncertainty resulting from, further action by the Authority or the Enterprise.

Article 6, Annex II gives the Authority broad discretion in approving proposed plans of work within the Area. Because of the potential uncertainty inherent in such a grant of discretionary power, Article 6 is amended:

All proposed plans of work shall be dealt with in the order in which they were received, and the Authority shall conduct, as necessary and as expeditiously as possible, an inquiry into their compliance with the terms of the present Convention and the rules, regulations, and procedures of the Authority, including the operational requirements, the financial contributions and the undertakings concerning the transfer of technology. As soon as the issues under investigation have been settled, the Authority shall approve such plans of work, provided that they conform to the uniform and non-discriminatory requirements established by the

15. Id. (emphasis added).
16. The “Area” is defined in Article I as “the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.”
rules, regulations, and procedures of the Authority. . .17 (emphasis added).

Under the proposed system of exploration and exploitation in the Area, applicants for work plans will submit data on an area large enough to accommodate two mining operations. One of these areas is reserved for the Enterprise, with the Enterprise selecting the area it wishes to reserve. Under Article 8, applicants are required to provide the Authority with the "data necessary to make the assessment of the value of the sites," so that the Authority can "designate the part which is to be reserved solely for the conduct of Activities by the Authority. . .". 18 It is unclear from this language whether the Authority, after receiving the available data from an applicant, could require the applicant, at great cost, to obtain additional data. To clarify this and to ensure that the applicant provides all available data at the time that the application is submitted, Article 8 is amended to provide that the applicant submit "all the data obtained by him with respect to both parts of the area." 19 The reservation of a site by the Authority may be delayed if the Authority "requests an independent expert to assess whether all data required by this article has been submitted to the Authority." 20 This provision eliminates a potential added cost to mining interests in their preparation of mining sites. If the Authority is able to require extensive additional data not available to an applicant, the increased costs as well as the potential for discriminatory and unwarranted demands for data, could clearly frustrate mining activities.

Closely associated with the protections of Article 8 are those of Article 13, Annex II, Transfer of Data. The operator of a mining activity must provide the Authority with all data "necessary and relevant to the effective implementation of the powers and functions of the principle organs of the Authority in respect to the area covered by the plan of work." 21 However, in order to protect operators from disclosing this so-called proprietary data, Article 13 (3) provides that such transferred data "deemed to be proprietary, shall not be disclosed by the Authority." 22 These protections are necessary since proprietary data is often acquired at great cost, but would be

18. Id.
19. Id. (emphasis added).
20. Id.
22. Id.
valueless if unnecessarily disclosed. The United States Delegation seeks the additional clarification that data should be considered proprietary if the would-be transferor so deems it. However, this provision is not included in the ICNT because the negotiators feel that such is the case without having to specifically so provide. 23

Another accommodation to mining interests is the revision of Article 2, Annex II, Prospecting. The ICNT/Rev.1 provides that prospecting is to be conducted only after the Authority receives adequate written assurance that the prospector shall comply with the Convention and the rules of the Authority in regard to environmental protection and training personnel nominated by the Authority. This training requirement is not acceptable to the mining industry because it is not subject to guidelines or standards, thereby posing an unknown financial burden on industry. This oversight is corrected in the newest proposals which require prospectors to comply with the rules and regulations of the Authority concerning "co-operation in training programs according to Articles 143 and 144 . . . ." 24

Another serious problem found in Article (2)(1)(D), Annex II concerns the Authority's powers to close mining sites for prospecting if "available data indicates the risk of irreparable harm to a unique environment or unjustifiable interference with other uses of the Area." 25 From an environmental point of view, this provision seems most reasonable. However, this grant of discretion to a political organization, such as the Authority, is not acceptable to the mining interests. It is estimated that the cost of site preparation may be as high as $100 million. If industry is to commit this amount to an already highly speculative venture, they must be assured that a political organ—wherein its interests are not adequately represented—cannot arbitrarily and indiscriminately curtail its prospecting operations. Such a decision should not rest with the Authority, but should

24. Articles 143 and 144 deal with Marine Scientific Research and Transfer of Technology, respectively, within the Area. Under Article 144, States Parties assume the obligation to "cooperate in promoting the transfer of technology and scientific knowledge relating to activities in the Area. . . ." The Transfer of Technology provisions make it clear that technology, if available on the open market, is to be purchased at fair market prices. However, States Parties agree to assist the Authority in obtaining technology in the event it is not available for purchase, or if the fair market purchase price is excessive.
be left to the Council (or an agency of the Council), where political pressures can be minimized, thus ensuring that site closings are truly based on "available data." Due to this objection, Section 1(D) is eliminated from the current proposals on prospecting.

The subject of production limits has been discussed throughout the Committee I negotiations, and the Eighth Session was no exception. The basic concept upon which all agree is that to satisfy the land-based suppliers of nickel and copper (and other metals commercially mined from the Area), and to protect their mining industries and economies from the competition for world markets in these metals, certain limitations must be placed on the amounts of minerals mined from the Area. The difficulty ensues when one attempts to place a tonnage limit on a particular metal, such as nickel, when one cannot accurately estimate the cost of mining and future world market prices. However, all agree that the mining consortia must make a profit, and in order to be profitable, they must be able to sell sufficient quantities of mined metals.

Article 151, Production Policies, is unacceptable to the United States and the mining interests, and no acceptable proposals are included in the Committee reports. It is clear that much negotiating during the Ninth Session is necessary to settle this important and highly complex issue.

A related and as yet unresolved issue is the question of royalty payments by mining industries to the Enterprise. Basically, the Authority must have adequate capital to finance its operations, and it is presumed that the bulk of this capital will come from royalties. However, mining consortia must have flexibility in the amounts they pay so that the profitability of their operations is assured. A flat percentage rate, based on the market value of the mined minerals, is not acceptable because it does not take into consideration unexpected operation costs. A fixed charge based on mining consortia profits from minerals mined in the Area is also unworkable because the mining consortia must be encouraged to reinvest profits into the development of other mining sites, as well as technology and

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27. In the event mining activities are conducted pursuant to a joint venture agreement with the Enterprise, the question of royalty payment is to be settled under the provisions of the agreement. Therefore, problems of royalty payments arise only in relation to activities by private mining consortia in the Area. It has not been finally decided whether the Enterprise must make royalty payments to the Authority.
equipment research. In addition, due to the high initial cost of mining, larger profits are needed at the early stages of mining operations in order to repay loans. Finally, the consortia are likely to mine, process, and market these minerals. Questions arise as to when the consortia are to be taxed: at the time of mining, after processing, or after marketing.

However, the proposed revisions to Article 12, *Financial Terms of Contracts*, are an improvement:

The structure of the new article represents a carefully balanced package which attempts to meet the concerns of the potential seabed mining countries and the developing countries. . . . When the contractor's profitability is low, payments to the Authority will result in a smaller reduction in profitability. When the contractor's profits are high, the Authority will share in a proportionately higher part of those profits.28

Negotiators are optimistic that these technical problems can be resolved early in the Ninth Session. All agree that flexibility is needed; therefore, it seems reasonable to assume that this heretofore extremely difficult issue is now close to resolution.

**Financing the Authority**

Another difficult issue requiring attention in 1980 is the question of financing the Authority. The goal of the Conference is to establish a viable Enterprise which can begin mining operations at the same time that the first commercial mining operations take place. To do this, the Authority must possess large sums of money with which to purchase technology, equipment, and obtain the best trained personnel.

The United States makes it clear that it will not directly subsidize U.S. nationals in their mining activities. As a result, Convention provisions requiring direct payments to the Enterprise by the United States would meet with disapproval if such a provision were included when the draft convention is presented to the U.S. Senate. Current proposals require member nations to provide interest-free loans and loan guarantees. The United States and other industrialized nations accept these provisions. Since only technical questions concerning the amount of money and the manner in which it will be

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provided remain, negotiations on this question should be concluded during the first part of the Ninth Session.

**Outlook for the Ninth Session**

As noted, the most encouraging news from the resumed Eighth Session is the progress made on the outstanding Committee I issues. These problems continue to be the most difficult to solve, but it now appears that their resolution is at hand.29

Several difficult issues addressed in Committee II remain essentially unsettled. The definition of the outer limits of the Continental Shelf (Negotiating Group 6), the delimitation of maritime boundaries between opposite and adjacent States (Negotiating Group 7), and revenue sharing for shelf resources recovered beyond 200 nautical miles from the baselines have been discussed, but final resolution remains to be accomplished during the Ninth Session.

Article 76(5)30 is an attempt to accommodate both the broad margin States who seek to extend their continental shelf to as great a distance from the baseline as possible, and the landlocked and geographically disadvantaged States, with no shelf or very narrow shelves, who seek a share of the wealth from the continental shelves beyond 200 nautical miles from the baselines. To complicate matters, unresolved technical questions concerning the handling of oceanic ridges are raised.

Another problem arises from the Sri Lanka situation. The Sri Lanka Delegation seeks a specific exception from certain provisions because its continental shelf extends as far as 500 nautical miles from its baselines. It is undesirable for the Convention to be burdened with single State exceptions because this opens the door for other States to seek exceptions to Convention provisions. However, the negotiators do not want to put Sri Lanka and other States in the position of having to make reservations to certain treaty provisions. Due

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29. According to Bernardo Zuleta, Special Representative of the United Nations Secretary-General to UNCLOS, the potential benefits from manganese nodules has been "grossly exaggerated." Perhaps the realization that the amount of money to be received by individual nations (160 nations are expected to receive some royalties from mining activities) is likely to be small has resulted in a willingness to solve the outstanding Committee I deep seabed mining issues. See U.N. Mining Treaty Near, The Plain Dealer, Aug. 16, 1979.

to the highly political nature of this problem, its resolution will not be easy and is likely to result in extended debate in 1980. 

A closely associated problem is the question of revenue sharing for shelf resources beyond 200 nautical miles from the baselines. Two aspects of this are addressed: (1) the system and rate of revenue sharing; and (2) the identification of which States must pay, and which States are to receive the revenues. Though the general consensus is that Article 8(D) is adequate, questions arise concerning the grace periods and the rate to be paid. Whatever numbers are finally chosen, they must be such as will not discourage exploration and exploitation.

The problem of the delimitation of maritime boundaries between opposite and adjacent states has essentially three components: (1) the criteria to be applied in delimiting the boundaries; (2) the measures to be applied in the interim period pending agreement; and (3) dispute settlement.

Perhaps the most difficult issues faced by any State are those relating to their boundaries. No State is going to give up land or water territory unless absolutely necessary. Thus, it is extremely difficult to provide the required mechanism for boundary delimitation in a comprehensive treaty. It now appears that any boundary disputes raised prior to the effective date of the Treaty are not to be governed by the Treaty. Thus, all coastal States have an opportunity to make their positions known in advance so that traditional boundary settlement mechanisms can be applied. Technical problems remain in these three critical areas. However, there is widespread agreement as to the general principles, and finalization of the applicable provisions should proceed with little difficulty.

The negotiations in Committee III are substantially completed. According to its Chairman, Ambassador Alexander Yankov of Yugoslavia, Committee III efforts:

were directed to the consideration of the pending substantive issues relating to the regime for the conduct of marine scientific

31. Id. at 51, 57. Article 74 discusses the delimitation of the Exclusive Economic Zone between adjacent and opposite States, and Article 83 deals with the delimitation of the continental shelf between adjacent and opposite States. Both Articles provide that delimitation "shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances." Failure to so agree shall result in resort to the procedures in Part XV of the Convention.
research on the continental shelf beyond 200 miles from the baselines from which the breadth of the territorial sea is measured as well as the problem of settlement of disputes relating to the interpretation or implementation of the provisions of this convention with regard to marine scientific research.32

Through the combination of formal and informal consultations, compromise formulas on technical issues are established, which, in the opinion of the Chairman, "have a substantial degree of support as to provide a reasonable prospect for a consensus. . . ." 33 It appears that the once intractable issue of marine scientific research on the continental shelf beyond 200 miles from the baselines can now be resolved. Once this is completed, the remaining Committee III problems should be easily resolved.

Treaty Implementation

As noted, the conclusion of substantive negotiations is anticipated early in the Ninth Session. However, the end of substantive negotiations does not guarantee successful treaty implementation. Upon the conclusion of substantive negotiations, the Conference must consider the questions of amendments, reservations, the relation of the Treaty to other conventions, entry into force, transitional provisions, denunciation, and participation in the Conference. The most serious of these are the questions of amendments and reservations.

Central to the amendments issue is the belief that the "package deal" concept of the Conference must not be disturbed. This view, in essence, means that the Convention must be taken as a whole, and if part fails, the whole Convention fails. Though most States favor some formal amendment procedure, many realize the potential for reopening substantive negotiations in areas once thought to be fully settled.

Closely related to the amendments issue is the question of reservations.34 Some delegations indicate that their governments may seek to reserve on certain Convention provisions. The goal of the

33. Id. at 3.
34. "Reservations," as defined by the Vienna Convention on the Law of Treaties, "means a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state." See W. Bishop, INTERNATIONAL LAW, CASES AND MATERIALS 124-41 (3d ed. 1971).
Conference is to produce a comprehensive Law of the Sea Treaty that is accepted by the vast majority of States. If many States make reservations to numerous provisions, the concept of the "package deal" is destroyed, and the Convention's aims of uniformity and comprehensiveness are undermined. Most delegates support the position that no reservations to the Convention should be allowed. However, the political realities of the situation dictate that some reservations are necessary. According to the United States Delegation:

Many of the delegations noted that liberal reservation provisions would destroy the consensus procedure of the Conference. One solution preferred would categorize the provisions of the treaty according to their status vis-à-vis reservations. Those provisions embodying "jus cogens," or reflecting customary international law, or fundamental to the package deal would not be subject to reservations . . . \textsuperscript{35}

However, lengthy negotiations could ensue as to what is reflective of customary international law, or what is "fundamental to the package deal." The Conference will address this critical issue during the Ninth Session, no satisfactory solution being found during the Eighth Session. The Conference leadership, from both the industrialized world and the Group of 77, recognize that a prolonged reservation process could destroy the Convention. It is because of the widespread recognition of the potential impact of reservations that many are optimistic that the Convention will remain essentially intact after that process.

It is generally believed that entry into force, transitional provisions, and denunciation raise few problems. However, entry into force does raise three issues: (1) the extent that the 1958 Conventions are superseded; (2) the effect of the new treaty on other United Nations sponsored treaties; and (3) the effect of this treaty on other bilateral and multilateral treaties and agreements. The general consensus is that where there is no inconsistency, other treaties and agreements are not affected. However, the Law of the Sea Treaty must prevail where there is conflict, although an attempt will be made to construe all agreements to minimize this problem.

The participation question is the subject of some intense disagreement. Universal participation with early entry into force is the main goal. There is some dispute, however, as to what entities can become

\textsuperscript{35} See U.S. Delegation Report, supra note 23, at 47.
parties to the Convention. Five categories of entities are discussed: States, regional economic communities, such as the European Economic Community (EEC), Trust Territories, non-self-governing territories, and liberation movements, such as the Palestinian Liberation Organization (PLO). The negotiations in the Informal Plenary on Final Clauses have become politically-motivated on this point. The United States seeks to limit parties to "all States," with a resolution to the effect that other entities such as the EEC can participate.36

The United States opposes the participation of dependent Trust Territories or liberation movements, such as the PLO, in the Treaty. The United States feels that the inclusion of these parties could preclude the widespread ratification essential to the viability of the Treaty, as well as raising serious international law problems.

Conclusion

It is the goal of the Conference to conclude substantive negotiations early in the Ninth Session, with the signing of a draft convention in Caracas in 1981. Although several difficult issues remain unresolved, it is generally believed that this goal can be achieved.37 All agree that the time to conclude the Conference has come, and the sense of urgency expressed by President Amerasinghe is shared by the majority of the delegates. The progress of the Eighth Session of UNCLOS is illustrative of the willingness of the Delegations to seek workable compromise solutions to difficult issues and to conclude the negotiating process as quickly as possible. It is hoped that the potential problems raised by unlimited amendments and reservations can be avoided, thus removing the only real obstacle to a successful conclusion of the Conference.

36. Id. at 49-50.
37. According to the U.S. Delegation Report: The forward momentum generated now seems sufficient to enable the Conference to resolve the difficult remaining issues next year in a generally satisfactory manner. At this point, the major potential obstacle to achievement of a generally acceptable treaty are the danger of reopening compromises already reached, the loss of sufficient will to resolve the remaining issues, or the unraveling of the intricate and delicate package during formal proceedings on a final text. There is a substantial risk that one of these obstacles will emerge. But if a "critical mass" of leaders determined to achieve and protect the consensus can be maintained, there is no longer any reason to believe the obstacles will prove to be insuperable. Id. at 8.