AUSTRALIA AND THE LAW OF THE SEA

SEMINAR

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PAPER ON THE PREPARATORY COMMISSION FOR THE ESTABLISHMENT OF THE INTERNATIONAL SEABED AUTHORITY AND THE INTERNATIONAL TRIBUNAL FOR LAW OF THE SEA

The paper is intended only to provide a summary of the main aspects of the Preparatory Commission, its functions and work in progress. It does not canvass in any detail sensitive or contentious points of policy.

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The paper represents the personal assessment of the author. It does not necessarily represent the views of the Department of Foreign Affairs or the Australian Government.

LAW OF THE SEA: PREPARATORY COMMISSION

The United Nations Convention on the Law of the Sea closed for signature on 9 December 1984. It had attracted 159 signatures, including Australia which signed on 10 December 1982. The Convention will enter into force 12 months after it receives sixty ratifications or accessions. There have been 32 ratifications to date. (The list of ratifying countries is at Annex A). The United States, United Kingdom and the Federal Republic of Germany (FRG) are the major non-signatories.

Part XI of the Convention, its deep seabed mining regime, is the contentious part. Dissatisfaction with it is the reason for non-signature by the UK and FRG and the opposition of the United States.

The Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea (Prepcom) was established in 1982 at the end of the Third United Nations Conference on the Law of the Sea (UNCLOS III). Its purpose is to elaborate the deep seabed mining (DSBM) regime in Part XI of the Convention. The Prepcom's responsibilities include the registration of pioneer investors in seabed mining pending the entry into force of the Convention, as well as the preparatory work to set up the organs of the International Seabed Authority (the Assembly, Council and Secretariat) and the Authority's operational seabed mining arm, the Enterprise. It is also tasked with the drafting of a Deep Seabed Mining Code, the study of possible compensation arrangements for developing land-based producers affected by deep seabed mining and the work necessary to establish the International Tribunal for the Law of the Sea.

The mandate of the Prepcom is set out in detail in Resolution I (at Annex B) adopted by UNCLOS with the Convention in April 1982.

The Prepcom has held four annual sessions (of two meetings each) since its establishment. The fourth session met last year in Kingston, 17 March - 4 April and New York, 12 August - 5 September. The forthcoming fifth regular session will be in Kingston, 30 March - 16 April and its resumed meeting in New York, 13 July - 7 August. Despite initial organisational hiccups the Prepcom has now settled down to business, although there has been only limited progress on major points of dispute.

The United States is not participating in the Prepcom and is working to develop an alternative DSBM regime based on the reciprocal recognition of national DSBM licences. The UK and FRG attend the Prepcom as observers and have taken an increasingly active role in its proceedings.

Structure of the Prepcom

The Prepcom works through a plenary (both formal and informal) and four Special Commissions.

Formal plenary is the main body of the Prepcom; it adopts reports and recommendations from the Special Commissions and handles political issues. It will pass on decisions and recommendations from the Prepcom to the first Assembly of the International Seabed Authority (ISA).

Informal sessions of plenary function as a drafting group for the rules, regulations and procedures (RRP) of the Assembly of the Authority (ISA), the Council of the Authority and other organs (the Economic Planning Commission, the Legal and Technical Commission etc).

Special Commission 1 (under the chairmanship of Mr Hasjim Djalal, Indonesia) deals with the problems of developing land-based producer countries which claim to be affected adversely by deep seabed mining.

Special Commission 2 (under the chairmanship of Mr Lennox Ballah, Trinidad and Tobago) is concerned with the establishment of the Enterprise, the Authority's operational arm for deep seabed mining.

Special Commission 3 (first under Mr Hans Sondaal and now Mr Jaap Walkate, the Netherlands) is drafting the "Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area", i.e. the Deep Seabed Mining Code.

Special Commission 4 (under Dr Gunter Goerner, German Democratic Republic, GDR) is drafting the rules of procedure and related practical arrangements for the International Tribunal for the Law of the Sea.

The executive organ of the Prepcom is its thirty-six member General Committee. The Committee is, inter alia, entrusted with receiving the applications for registration by the pioneer investors in DSBM (see below) and registering them. Australia is a vice-chairman of the Prepcom and a member of the General Committee.

The chairman of the Prepcom is H.E. Mr Joseph Warioba, formerly Minister for Justice and now Prime Minister of Tanzania. He has indicated his intention to relinquish the chairmanship as soon as possible because of his prime ministerial duties. A successor has yet to be found. Under the agreed allocation of executive positions within the Prepcom the position is an African one.

State of the Prepcom

Registration of Pioneer Investors

There has been no registration of the deep seabed mine-site claims of the various categories of pioneer investors recognised by the Convention as having priority rights of registration. The basic problem has been the concentration of claims in the same area of the north-east Pacific (the Clarion-Clipperton Fracture Zone).

To safeguard the interests of those states and private international consortia which had already made substantial preparatory investments in deep seabed mining activities, UNCLOS III adopted a special regime applying to these entities. This was set out in Resolution II "Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules" (at Annex C). It is not part of the Convention as such, since it is intended to operate pending the Convention's entry into force. Parts of the draft of the Convention were, however, amended to take account of its substance. The way in which Resolution II is implemented will also clearly affect the practical elaboration of Part XI of the Convention through the Prepcom and the future of the parallel system of exploitation under it.

Resolution II creates the special category of "pioneer investors". These are

(i) France, India, Japan and the USSR. These have state-associated DSBM enterprises and claim to have spent before 1 January 1983 the mandatory minimum of US Dollars 30 million (at 1982 rates) on DSBM activity.

(ii) the four private consortia which also claim to have spent this amount. These are Kennecott (UK/US/Japan); Ocean Mining Associates, OMA (US/Belgium/Italy); Ocean Management, Inc., OMI (US/Canada/FRG/Japan); Ocean Minerals Company, OMCO (US; two Dutch companies withdrew from this consortium in late 1985).

(iii) any developing country which has signed the Convention and spent the required US Dollars 30 million by 1 January 1985.

The pioneer investors are entitled to explore, but not commercially exploit, their registered area of the seabed until the Convention comes into force. They are guaranteed priority over all other applicants except the Enterprise once commercial production from the seabed can begin. The consortia can operate under Resolution II only through a so-called certifying State which is a party to the Convention. Approval of actual exploration and exploitation by the consortia of a designated mine-site can only be given if all States whose natural or juridical persons comprise the consortia are parties to the Convention.

Overlapping Claims

The implementation of Resolution II is contingent upon the resolution of any conflicts between the pioneer applicants. That is, any overlaps between their claims are to be settled by the applicants themselves before the Prepcom can register the claims. There is provision in Resolution II (para 5 (c)) for the arbitral settlement of disputes. The pioneers have not, in fact, wanted to submit to arbitration and this provision has been effectively shelved.

Consultations outside the Prepcom to resolve overlaps between three of the state pioneers (France, Japan, the USSR) were completed in 1986. Consultations to resolve the overlaps between the USSR and the consortia have only recently begun. Their progress is uncertain.

The sites claimed by France, Japan, the USSR and the consortia are all in the nodule-rich area of the Clarion-Clipperton Fracture Zone in the north-east Pacific. The Indian site is in the central southern Indian Ocean. The Indian site has no overlaps. Substantial overlaps, however, have existed between the other sites.

The overlaps between the consortia sites, France and Japan were resolved progressively through a series of industrial and states' agreements culminating in the adoption by the eight western DSBM countries on 3 August 1984 of the "Provisional Understanding Regarding Deep Seabed Matters".* Although this Understanding potentially constitutes the basis for an alternative DSBM regime to the Convention, it is in present circumstances essentially a mechanism for conflict resolution.

Overlaps between France and the USSR and Japan and the USSR were resolved in February 1986 by the so-called "Arusha Understanding", which laid the basis for subsequent negotiation within the Prepcom of a general legal and political framework for the implementation of Resolution II.

Overlaps between the USSR and at least three of the consortia (OMI, OMA, OMCO) remain. To protect the interests of their national components in the consortia, Belgium, Italy, the Netherlands and Canada have argued that pioneer investor registration cannot proceed until all overlaps have been resolved. Western countries have to date effectively supported the principle of no registration without a comprehensive resolution of overlaps, despite pressures from the USSR and the developing countries (the so-called "Group of Seventy-Seven", G77)** to proceed to early registration. Western signatories have not wanted to further alienate the major non-signatories and the consortia from the Convention by registering a Soviet mine-site which overlapped with the consortia. This would promote the development of an alternative DSBM regime.

The negotiations (outside the formal Prepcom process) on resolving overlaps culminated in adoption by the Prepcom on 5 September 1986 of a "framework agreement" establishing the legal and political basis on which registration can go ahead, possibly in 1987. The text is at Annex D.

* US, UK, FRG, Japan, France, Italy, Belgium, Netherlands.

** The G77 now actually comprises 127 members.

Nature and Size of Sites

In addition to the need to resolve the overlaps between the USSR, France, Japan and the consortia, the key problem in these negotiations has been the nature and size of the site(s) which must be allocated under Resolution II to the International Seabed Authority for the operations of the Enterprise.

Technically, applicants for registration are to submit to the Prepcom a mine-site area sufficiently large and of sufficient estimated commercial value to allow two mining operations. Applications are to indicate the coordinates of the total area, dividing it into two parts of "equal estimated commercial value". The applications are to contain all the data available to the applicant for both parts of the area. The Prepcom is then to choose an area for itself (to be reserved for the Authority for eventual use by the Enterprise), and allocate the other part of the claim to the pioneer. This system is meant to guarantee that the Authority's sites are of equal value to the pioneers' sites.

Given the actual configuration of their claims (reflecting problems of nodule density and technological access), France, Japan and the USSR insisted that they could resolve their overlaps in a way which guaranteed the commercial viability of their claims only if they were allowed to choose their own sites as between themselves and allocate the site(s) to the Authority. This was the so-called principle of "self-allocation" of sites.

The agreement of 5 September provides a safeguard that registration can only proceed if the Authority's site(s) is guaranteed to be of equal commercial value to the other sites.

The G77 reluctantly conceded self-allocation only as a practical necessity to allow implementation of Resolution II. They have insisted that the 5 September agreement is not a precedent and that it does not affect the eventual operation of the Convention's parallel system of exploitation and the Enterprise's role within it. As a quid pro quo they secured in the agreement an extension of the deadline beyond 1 January 1985 by which developing countries can qualify for pioneer investor status (Resolution II, 1, (a), iii). In practice, they probably realise that it is very unlikely that any developing country would qualify as a pioneer and actually seek registration. The concession is more a matter of politics to maintain the G77's standing in the LOS negotiating process.

The Potential Applicants

The other key problems have been how to safeguard the interests of the potential applicants for registration (i.e. the consortia) if registration of the first generation of pioneers (France, Japan, India, USSR) is to proceed now, and to ensure that the area allocated to the Authority is free of overlaps. The solution has been the mechanism of "pre-relinquishment".

Resolution II (1, e) provides that registered pioneers shall relinquish certain percentages of the area allocated to them over an eight-year period. These relinquished parts are to revert to the international "Area" (i.e. the area beyond national jurisdiction).

The 5 September agreement, however, provides for pioneers (i.e. the USSR) with overlaps with potential applicants (i.e. the consortia) to relinquish voluntarily parts of their claims at the time of registration (and not over the eight-year period). These relinquished areas will not revert to the international Area but will form a reserve of "banked" sites for allocation to the potential applicants, should they apply for registration prior to the entry into force of the Convention. If this deadline is not met, the relinquished areas will revert to the international Area.

The practicality of this provision is open to question. The consortia are commercial entities which seem unlikely to seek registration unless DSBM is economically viable. Viable DSBM is a long way off (see below). The consortia will presumably also want to be assured that the DSBM regime developed by the Prepcom is an open and commercially practicable one. Pre-relinquishment has, nevertheless, provided a mechanism which would allow the process of registration of the state pioneers to proceed, while allowing for the interests of the future pioneer applicants to be recognised and potentially for major conflicts between their DSBM claims and those registered under the LOS regime to be resolved.

The agreement of 5 September does not have an express provision that registration can only proceed if the remaining overlaps between the USSR and the consortia are resolved. Moreover, the agreement lays down a precise timetable for registration at the next session of the Prepcom (March/April 1987). In practical terms, however, the USSR genuinely seems to want to resolve the overlaps to ensure guaranteed title over its claim. Negotiations between the USSR and the western countries with interests in the consortia, including significantly the United States, UK and FRG, have been underway since mid-1986. The 5 September agreement, in any case, makes provision for registration to be delayed if the Prepcom is satisfied that real progress towards resolving overlaps is being made but that time has been insufficient to finalise this. A resolution of overlaps is almost certainly unlikely before the March Prepcom. Whether they can be resolved before the July session is an open guess at this stage. The attitude of the consortia will be a critical element.

Other Issues

The Authority

There has been a growing sense of realism in the Prepcom as recognition that DSBM is not a viable commercial prospect until at least the end of this century, and probably well into the next, has grown (see below). The G77 have

tempered their earlier push for large and expensive bureaucratic establishments for both the Authority and the Enterprise. There is an increasing awareness of the financial implications for states which ratify the Convention and which must pay for the Authority and Enterprise.*

Financial questions such as the procedures for financial decision-making in the Authority will be a major item for discussion at future sessions. The major western countries and the East Europeans (whose budgetary contributions will be the largest if they ratify the Convention) are seeking safeguards in decision-making for their financial interests**. The East Europeans want all financial decisions to be by consensus. The G77 support simple majorities for decisions in those areas where qualified majorities of two-thirds or three-fourths are not prescribed by the Convention (Articles 161, 162). The latter include some budgetary questions.

* The budget of the Authority is to be paid in accordance with an agreed scale of assessment based on the scale used for the regular budget of the United Nations (Art. 160. 2, (e)), at least until the Authority has sufficient income derived from commercial production in the Area. This is a critical factor for the industrialised countries considering ratification since these countries are the largest UN contributors and would have to shoulder the burden of the Authority's budget. Annex IV, Art 3, (b) also requires States Parties to provide interest-free loans to the Enterprise for half of the funds necessary to explore and exploit one mine site and to transport, process and market the minerals recovered and to meet initial administrative expenses. These loans would be pro rated to countries' UN contributions (adjusted to take account of non-members of the UN).

** The eleven countries with DSBM interests pay around 77% of the UN regular budget.

The drafting of the rules, regulations and procedures (RRP) governing the Authority and its executive organ, the Council and subsidiary bodies is slow and complex. As at UNCLOS itself consideration of the key contentious issues (financial decision-making, electoral majorities, the role of observers, the nature of subsidiary organs) have been left pending. Financial issues, in particular, may need to be addressed as a package for negotiation at a stage when the nature and scope of the Mining Code and the prospective structure of the Authority and Enterprise have become clearer.

The Enterprise (Special Commission 2)

The Prepcom is responsible for the preparatory work necessary to establish the Authority's operational mining arm, the Enterprise, to allow it to keep pace with the other operators in the Area under the parallel system of exploitation.

Discussion to date has focussed principally on the possible profile of a deep seabed mining project by the Enterprise and the assumptions necessary to evaluate operational options for it: the magnitude of the project (at least 3 million dry tonnes of nodules annually); marketing opportunities; on-land infrastructure; transportation; finance.

The issue of the economic viability of deep seabed mining has become central. An important Australian study (by the Bureau of Mineral Resources, Geology and Geophysics) on "The Economic Viability of the Deep Seabed Mining of Polymetallic Nodules"* has been the major influence in bringing about a more realistic appreciation of the economics of DSBM and the conditions under which the Enterprise can be established as a successful commercial operation. The study concluded that, given the present outlook for metal prices, commercial DSBM is unlikely for the foreseeable future, probably until the next century.

* Circulated as Prepcom document LOS/PCN/SCN.2/WP.10 and Add.1 (14 January 1986)

This has now been widely accepted, with the result that discussion of operational assumptions has effectively run into the sands. A Chairman's Advisory Group on Assumptions has been established to monitor metal prices and technological and other factors affecting the viability of DSBM.** Australia has undertaken to revise its study once agreement has been reached on reasonable working assumptions for a project.

Discussion of actual operational options has been hampered by the lack of direction on assumptions. Given the present economic outlook, consideration will now focus on those options that will facilitate start-up operations, notably joint ventures and leasing options.

Some G77 countries continue to favour establishment of the Enterprise irrespective of the economics. Recognition that DSBM is unlikely to be economically viable for a long time, however, has brought a growing awareness that the Enterprise's establishment must be paced accordingly. Brazil has proposed the creation of a small core group of experts which would function as a nucleus of the future Enterprise, monitoring economic and technological developments and preparing the Enterprise to start up quickly once the economic viability of DSBM is established. Initially, it would not be a separate entity; funding could come from the budget of the Authority. This proposal will be discussed at future sessions.

A number of questions affecting the internal administration and management of the Enterprise - administrative regulations (including those governing entry into contracts), financial management, personnel policies) will soon be looked at. These can be studied more independently of the fundamental questions

** Members are India (Chairman), Australia, Brazil, China, the EC (Commission), Kenya, Uganda, USSR.

of the size and organisation of the Enterprise. Developed countries insist, and developing countries are more widely accepting, that the latter must be structured to the actual economic conditions affecting DSBM.

Depending on progress in the registration of pioneer investors, there will also be pressure in the future to discuss in detail the obligations of pioneer investors to the Enterprise. Resolution II (12) stipulates five obligations for pioneers to ensure that the Enterprise can keep pace with them: exploration of the Authority's site(s) (at basic cost plus 10 per cent per annum); training of personnel designated by the Prepcom; appropriate technology transfer before the Convention's entry into force; funding; periodic reporting to the Prepcom on pioneer activities.

The G77 are particularly anxious to establish a training program and have foreshadowed a major training proposal at the next Prepcom. The pioneers have reiterated their commitment in principle to training but France, Japan and the USSR have intimated that any useful training program must await progress in actual DSBM operations.

The Rules of Exploitation - the Deep Seabed Mining Code (Special Commission 3)

The drafting of the Rules for Prospecting, Exploration and Exploitation (i.e. the Deep Seabed Mining Code) has been slow. The issues are complex. Many of them are novel; land-based mining experience is not always readily transferable to exploitation of the seabed.

The basic conditions of prospecting, exploration and exploitation of the deep seabed are defined in Annex III of the Convention. On the basis of preliminary discussions by the Prepcom and advice through private consultants the UN

Secretariat drafted the first elements of the Mining Code: the rules governing prospecting, applications for approval of plans of work and the processing of those applications.* A first review of these has taken place.

The most contentious major issue has been whether submission of applications for designation of an area and approval of a plan of work should be a one or two-stage process. Developed countries have supported a two-stage process (selection of a site followed by submission of a plan of work), with a one-stage procedure available as an option if the applicant so wishes. This is a more flexible and commercially-oriented procedure. Australia has coupled this with a proposal for a random method of site selection by the Authority without involvement by the Legal and Technical Commission (LTC) in assessment of the prospecting data. This seems the surest way to guarantee the commercial equality of the Enterprises' sites and those of the other operators.

Even in the early stages of considering this first set of articles it was evident that there were numerous issues which still required elaboration in the rules themselves or in subsidiary regulations: the scope of the prospector's obligations, verification by the Authority of the prospector's compliance with the Code, the size and shape of application areas, criteria for estimating the commercial value of application areas, the determination of the Authority's costs for the processing of applications and the adjustment of the application fees, and the confidentiality of data submitted by the applicant.

Preliminary discussion of the first set of draft articles has finished. Attention has now focussed on those regulations which will deal with stages following the approval of a plan of work.

* LOS/PCN/SCN.3/WP.6

Discussion at the last session of the financial terms of contracts* (Annex III, Art. 13) highlighted the opposing wishes of the potential mining states, which are seeking to minimise contractors' financial obligations to the Authority, and the developing countries, which inevitably want to maximise those obligations. The mining states (the so-called "Group of Six", G6**, and the USSR) have argued that the contractors' financial liabilities generally to the Authority (and the rates for financial contracts specifically) should be lessened because of the commercial unattractiveness of DSBM; when the Convention was drafted DSBM had seemed a much better economic prospect. The G77 have declared themselves firmly against amendments to the Convention, including by what they see as the back-door route through the content of the Mining Code. On the rates for contracts, they have acknowledged that changes might be necessary to improve the economic attractiveness of DSBM, but have insisted that such changes could only be made by the Authority when it is established.

Financial incentives for contractors (Annex III, 13, (14)) are currently being drafted by the UN Secretariat and are scheduled to be discussed at the next session.

Draft regulations for the application for and approval and issuance of production authorisations have been drafted but not yet discussed.***

* Doc. LOS/PCN/SCN.3/WP.6/Add.2 and Corr.1

** G6: Italy, Belgium, UK, FRG, Japan, the Netherlands (France was a member of the original "Group of Seven" western DSBM states but withdrew, essentially for reasons of political presentation, in August 1984).

*** Document LOS/PCN/SCN.3/WP.6/Add.1

A critical area which has not yet been addressed concerns the terms and conditions for technology transfer. Another significant area is the protection of the marine environment.

Within the general regulatory framework of the Code pivotal roles are played by two sub-organs of the Council (itself the executive organ of the Authority): the Legal and Technical Commission (LTC) and the Economic Planning Commission (EPC).

The EPC will review metal prices and supply and demand to ensure that land-based producers do not suffer adverse effects from seabed production and to propose remedial action if they do.

The LTC has several important roles. It will recommend environmental measures to protect the deep seabed. It will calculate the production ceiling (at its simplest, 60 per cent of the projected annual increase in world nickel demand, Article 151). It will recommend to the Council approval or rejection of plans of work. Its role in this is crucial. When it has recommended approval the plan of work comes into effect automatically unless another party objects. In that case a conciliation procedure is applied. If the objection is maintained the plan can be disallowed only by consensus

These two Commissions are central and the rules of procedure governing them are under discussion at present (in the Informal Plenary). The main contentious issues for developed countries relate to their composition and elections to them, their decision-making procedures (majorities or consensus), and the confidentiality of data submitted to them.

Overall, discussion of the Mining Code has highlighted the dichotomy between the G77, which wish to regulate DSBM activity as much as possible, and the developed countries (both the industrial market economies and the East European socialist states), which are seeking to minimise regulation and attenuate those parts of Part XI to which they object (see below) by drafting actual rules of exploitation which are less onerous for contractors than the Convention itself. The

G77 have said they are willing to look at ways of making the Mining Code practical and workable, but they have also steadfastly said they are against any process of effective amendment to the Convention through the Code. Clearly, if mining is to take place under the Convention, the G77 in particular will have to make some accommodation. Without the funds and technology of the main DSBM countries, there seems little, if any, future for the Convention's deep seabed mining regime.

Problems of developing land-based producers (Special Commission 1)

Despite the uncertainties pending the actual commencement of deep seabed mining, Special Commission 1 is moving towards the drafting of recommendations to the Authority on how to meet the problems of developing land-based producers (DLBPs) which claim to be adversely affected by DSBM.

The G77 have forced the pace. Methodologies for identifying developing land-based producers likely to be affected by DSBM, and for measuring the possible effects, have been developed. Both the market industrial countries and the East Europeans have argued that general methodologies cannot be established; that it cannot, in any case, be assumed that DSBM will adversely affect land-based producers; and that those claiming to be affected must be studied on a case-by-case basis once DSBM has actually begun. Any loss in minerals export revenue and/or volume, or associated economic effects, must clearly be shown to be the result of seabed production.

The issue of compensation is now squarely to the fore. At the recent New York Prepcom (August/September 1986) the G77 proposed establishment of a compensation fund to be financed from the profits of the Enterprise and other operators in the Area, and voluntary contributions. There has been no discussion of this specific proposal yet. Developed countries

seem likely to oppose a fund. They have already argued that compensation is not mandatory under the Convention; that structural adjustment is the answer; and that existing remedial economic measures (such as the IMF's compensatory financing for balance of payments problems and the World Bank's structural adjustment loans) should be adequate. The East Europeans have proposed special bilateral agreements between traditional importers and exporters of affected minerals. The G77 have rejected the effectiveness or adequacy of bilateral arrangements.

Australia, in particular, has sought to persuade developing land-based producers that the essential safeguard for land-based producers is to ensure that DSBM is undertaken on a strictly commercial, unsubsidised basis.* For DSBM to be profitable the prices of nickel, cobalt, copper and ferro-manganese must at the very least double. The sustained upturn in world economic conditions necessary to beneficiate new investment in DSBM is such that existing land-based producers would already be profiting before commercial DSBM became profitable. Compensation would thus be unnecessary.

The International Tribunal for the Law of the Sea (Special Commission 4)

The work of drafting the rules of procedure of the International Tribunal for the Law of the Sea is proceeding slowly but without major problems. The rules of the International Court of Justice (ICJ) have provided the basic model. A number of practical issues concerning the establishment of the Tribunal, including the headquarters agreement between the Tribunal and the host government, are to be addressed at the next Prepcom.

* The Enterprise, of course, already enjoys significant concessional advantages under the Convention.

The Convention (Annex VI, Art. 1, 2) provides for the seat of the Tribunal to be Hamburg (FRG). The FRG's failure to sign the Convention may, however, result in relocation of the seat. Both the East Europeans and the G77 have already queried Hamburg. The Chairman of Special Commission 4 (Goerner, GDR) floated a proposal at the last Prepcom that provides for relocation of the Tribunal's headquarters from Hamburg if the FRG has not acceded to the Convention by the sixtieth ratification (the Convention enters into force one year later). The proposal is to be discussed at the next session. The FRG has stated its opposition to it (but has given no commitment on accession to the Convention).

Declarations on Illegality of National Mining Licences

The United States issued DSBM licences to the four consortia in late 1984 under US national legislation (the Deep Seabed Hard Mineral Resources Act, 1980). Ten year exploration licences were issued in August to Ocean Minerals Company (OMCO), Ocean Mining Associates (OMA) and Ocean Management Inc. (OMI), and in October to the Kennecott consortium. The co-ordinates of the sites (in the Clarion-Clipperton Fracture Zone) were published in November/December 1984 following the resolution between the consortia and France and Japan of overlaps between their sites. The UK issued a licence to Kennecott in January 1985 and the FRG issued licences to the two West German companies in the AMR component of the OMI consortium in December 1985. The US has since been preparing draft regulations for the commercial exploitation of the deep seabed.

The Prepcom has adopted two Declarations rejecting the issuing of these national DSBM licences as "wholly illegal". The initiative for the Declarations came from the G77, with strong support from the East Europeans. The texts are at Annex E.

The first of the Declarations, rejecting the United States licences, was adopted at Geneva on 30 August 1985. The Declaration does not mention the US specifically in its operative part but the preamble contains a reference to the US licences. The UK licence (January 1985) was apparently not known to the G77 or the East Europeans when the Geneva Declaration was adopted, although its issue had been published at the time. The FRG licences were not issued until after the Geneva Declaration.

Western countries were unhappy with the Declaration and at first sought to prevent its adoption. The G77 and East Europeans were adamant that the Declaration was necessary to assert the sole legitimacy of the Convention in the face of United States' attempts to promote an alternative regime based on the reciprocal recognition of national licences. A number of changes were made to the initial text to meet western concerns but the final text still contained a number of problematic legal judgements. It was considered unsatisfactory by most western countries but they wanted to avoid politicizing the Prepcom by forcing a vote on it.

The result was that western countries acquiesced in an odd procedure allowing adoption of the Declaration without formal dissent (a vote or even statements of reservation) but with a statement on adoption by the Prepcom chairman indicating that some countries (i.e. western countries) had reservations about the Declaration's legal substance and effect.

The second Declaration, rejecting the UK and FRG licences and reaffirming the Geneva Declaration, was adopted at Kingston on 11 April 1986. The text was stronger than the earlier Declaration and singled out the UK and FRG licences for specific condemnation in its operative paragraphs. Western countries were more strongly opposed to this text, especially since, unlike the United States, the UK and FRG are actual participants in the Prepcom (albeit, as non-signatories, with only observer status). This, coupled with their membership of the EC, made the politics of the second Declaration different.

The G77 were prepared to modify their text (including by amending the references to the UK and FRG), if western countries were prepared to go along with adoption of the Declaration by the same procedure as at Geneva in August 1985. Notwithstanding their reservations, western countries would again probably have done so. The East Europeans, however, refused to accept a milder version of the G77's text and forced a vote on the original Declaration. This was adopted by a vote of 59 in favour (G77, East Europeans), 7 opposed (Netherlands, Italy, Belgium, France, Japan, Luxembourg, Canada), and 10 abstaining (Australia, Sweden, Denmark, Norway, Finland, Ireland, Austria, Switzerland, Portugal, Greece). Most western countries made statements after the vote which reaffirmed their commitment to the Convention and willingness to work through the Prepcom to develop a generally acceptable DSBM regime. At the same time they expressed their reservations over specific legal elements of the Declaration and queried the competence of the Prepcom to make the kind of legal judgements it contained.

It was the precise legal import of the Declarations that caused particular difficulties for western countries. There is recognition of the rights of the international community generally over the seabed beyond the limits of national jurisdiction (the "common heritage of mankind"). It is not clear, however, that Part XI of the Convention is an acceptable expression of the international community's rights, especially since the US, UK and FRG have not signed the Convention which is not yet in force.

The vote on the Kingston text effectively nullified whatever political and legal gains the G77 and East Europeans felt they had won through the "consensus" adoption of the Geneva Declaration.

The Prepcom's Future

The future of the Prepcom and Part XI of the Convention will depend on the attitudes of the major western industrialised

countries with an interest in DSBM. While the United States remains firmly opposed to the Prepcom, the UK and the FRG (moreso the latter) are more ambivalent. Both attend the Prepcom as observers. Together with the other major West European DSBM countries which have signed the Convention, both say that they will not ratify it unless substantial changes are effected in Part XI.

National emphases vary but essentially all these countries want guarantees that:

- their interests will be protected in the Authority's mechanisms for financial decision-making;
- technology will not be alienated on non-commercial terms;
- the Enterprise will operate on a wholly commercial basis;
- mine sites will be allocated on strictly technical grounds;
- the Enterprise will not squeeze out the private mining companies;
- the production limitation on seabed mining (which is designed to cushion the impact on land-based producers but which could actually distort the market) will be amended or dropped.

The United States says that, unless Part XI is, at the very least, substantially altered to take account of these elements, there is no hope of its accession to the Convention or participation in the Prepcom. There appears to be little possibility of a change in this attitude in the foreseeable future and the United States is proceeding with its own

domestic arrangements for DSBM. The other western DSBM states hold out some hope of their participation in the Convention's DSBM regime if movement on their various concerns can be achieved.

The need to secure the support of these countries to ensure a universal and viable Convention is gaining some recognition among the G77. There is hope that at least some of the miners' concerns might be accommodated through the drafting of the rules, regulations and procedures (RRP) of the Authority and the Mining Code. The process is slow. The G77 still react against talk of amending Part XI, but a more realistic atmosphere is beginning to emerge, particularly with the wider recognition that commercial DSBM is unlikely for a long time. Certainly, the United States' expectation that the Prepcom would never get off the ground has not been realised but whether sufficient concessions can be made to the miners' concerns is a wide open question.

The attitude of the consortia is a key factor. They appear to have no active interest in DSBM operations at present. The minerals market is completely against commercial DSBM in the foreseeable future. The two Dutch companies withdrew from the Ocean Minerals Company (OMCO) consortium in late 1985, apparently because they assessed DSBM as no longer commercially viable. The consortia have demobilised their DSBM teams. OMCO has recently advertised for sale equipment for deep sea prospecting. The report on "Deep Seabed Mining" to the United States Congress in December 1985 by the US National Oceanic and Atmospheric Administration, (NOAA) notes:

> "most of the consortia activities during the last five years can be characterised as heavily oriented to shoreside engineering development, which was well-funded early in the period, with severe retrenchment occurring in recent years due to continuing poor world metal markets and restricted cash flows as a result of the recent recession."*

* US Department of Commerce, National Oceanic and Atmospheric Administration, Report to Congress "Deep Seabed Mining", December 1985.

NOAA's activities in drafting rules for commercial exploitation reflects the requirement pursuant to the US Deep Seabed Hard Mineral Resources Act (1980) to create a legal framework within which US companies can make the necessary investment decisions over the longer-term for DSBM activities. It does not in itself reflect commercial pressures from those companies or establish the economic viability of such activities.

To date the consortia have remained aloof from the Prepcom. They have been issued DSBM licences under national legislation, while at the same time Belgium, Italy, the Netherlands and Canada have been defending the consortias' interests as potential applicants for registration under the pioneer investor regime in Resolution II. The consortia have given no commitment to the LOS process, although the Convention signatories which have been protecting their interests seem to believe that the consortia can eventually be brought into the Convention's regime, as long as the economics is right and the regime is a practical and commercially-oriented one. Progress outside the Convention in developing alternative legal structures for DSBM will also clearly be important. The consortias' attitudes in the present negotiations with the USSR on the resolution of their overlaps will be instructive.

As for the state pioneer investors (France, Japan, USSR and India), what will happen after they have been registered is unclear. Some G77 have argued that their wish for early registration is a harbinger of actual DSBM. This is not necessarily the case. Without gross operational subsidisation there will not be commercial DSBM in the near future. The need for registration as a prior condition for DSBM by the pioneer investors is simply a requirement of the Convention. There is no nexus with the economic and technological aspects of DSBM.

The pace at which ratifications of the Convention proceeds is a critical factor. The Convention comes into force one year after the sixtieth ratification or accession. There are at present thirty-two ratifications. At the current pace it is possible that the Convention may come into force in 1989/90.

The first session of the Assembly of the Authority (of which all ratifying states are automatically members) is to meet on the date of entry into force of the Convention (Art. 308, 3). The Prepcom's mandate expires at the conclusion of the Assembly's first session and its work in elaborating the Convention's DSBM regime transfers to the Assembly. The Assembly must, in any case, adopt the actual details of implementing Part XI (on the recommendation of its executive organ, the Council).

If the Prepcom has been unable to develop a DSBM regime that induces at least some of the major western countries (especially those with DSBM interests) to ratify the Convention, and thus become members of the Assembly, it is difficult to see how the Assembly could adopt a generally acceptable, satisfactory DSBM regime.

There is a school of thought that argues that, as the pace of ratifications picks up (presumably by developing countries which will pay little to the Authority's budget), and the date of the Convention's entry into force draws close, the G77 will decide to make the kind of concessions necessary to induce at least some of the major western countries with DSBM interests to ratify. The G77 hope would be that this would establish the viability of Part XI and deter significant DSBM activities outside the Convention over the longer-term.

Alternatively, if no major western countries ratify the Convention, it may well be that Part XI will remain essentially inert once the Convention has entered into force. The economic inhibition to commercial deep seabed mining until almost certainly the next century could increase this possibility. Fresh attempts to devise a satisfactory DSBM regime may thus await the Convention's normal review process.

The Convention has two review procedures. Article 154 provides for a review every five years from the Convention's entry into force of how the international regime in the Area has operated in practice with a view to improving its operation. More fundamentally, Article 155 provides for a Review Conference to review Part XI fifteen years after the earliest commercial production under an approved plan of work.

These provisions would presumably provide the necessary legal mechanism within the existing Convention framework to develop a new and acceptable DSBM regime.

ANNEX A

The list of ratifications is as follows:

Country	Date of Ratification
Bahamas	29 July 83
Bahrain	30 May 85
Belize	13 August 83
Cameroon	19 November 85
Cuba	15 August 84
Egypt	26 August 83
Fiji	10 December 82
Gambia	22 May 84
Ghana	7 June 83
Guinea	6 September 85
Guinea - Bissau	25 August 86
Iceland	21 June 85
Indonesia	3 February 86
Iraq	30 July 85
Ivory Coast	26 March 84
Jamaica	21 March 83
Kuwait	2 May 86
Mali	16 July 85
Mexico	18 March 83
Nigeria	14 August 86
Paraguay	26 September 86
Philippines	8 May 84
Saint Lucia	27 March 85
Senegal	25 October 84
Sudan	23 January 85
Tanzania	30 September 85
Togo	16 April 85
Trinidad and Tobago	25 April 86
Tunisia	24 April 85
Yugoslavia	5 May 86
Zambia	7 March 83
Council on Namibia	15 April 83
TOTAL	32

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ANNEX B

RESOLUTION I

ESTABLISHMENT OF THE PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The Third United Nations Conference on the Law of the Sea,

Having adopted the Convention on the Law of the Sea which provides for the establishment of the International Sea-Bed Authority and the International Tribunal for the Law of the Sea,

Having decided to take all possible measures to ensure the entry into effective operation without undue delay of the Authority and the Tribunal and to make the necessary arrangements for the comencement of their functions,

Having decided that a Preparatory Commission should be established for the fulfilment of these purposes,

Decides as follows:

1. There is hereby established the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. Upon signature of or accession to the Convention by 50 States, the Secretary-General of the United Nations shall convene the Commission, and it shall meet no sooner than 60 days and no later than 90 days thereafter.

2. The Commission shall consist of the representatives of States and of Namibia, represented by the United Nations Council for Namibia, which have signed the Convention or acceded to it. The representatives of signatories of the Final Act may participate fully in the deliberations of the Commission as observers but shall not be entitled to participate in the taking of decisions.

3. The Commission shall elect its Chairman and other officers.

4. The Rules of Procedure of the Third United Nations Conference on the Law of the Sea shall apply *mutatis mutandis* to the adoption of the rules of procedure of the Commission.

5. The Commission shall:

(a) prepare the provisional agenda for the first session of the Assembly and of the Council and, as appropriate, make recommendations relating to items thereon;

(b) prepare draft rules of procedure of the Assembly and of the Council;

(c) make recommendations concerning the budget for the first financial period of the Authority;

(d) make recommendations concerning the relationship between the Authority and the United Nations and other international organizations;

(e) make recommendations concerning the Secretariat of the Authority in accordance with the relevant provisions of the Convention;

(f) undertake studies, as necessary, concerning the establishment of the headquarters of the Authority, and make recommendations relating thereto;

(g) prepare draft rules, regulations and procedures, as necessary, to enable the Authority to commence its functions, including draft regulations concerning the financial management and the internal administration of the Authority;

(h) exercise the powers and functions assigned to it by resolution II of the Third United Nations Conference on the Law of the Sea relating to preparatory investment;

(i) undertake studies on the problems which would be encountered by developing land-based producer States likely to be most seriously affected by the production of minerals derived from the Area with a view to minimizing their difficulties and helping them to make the necessary economic adjustment, including studies on the establishment of a compensation fund, and submit recommendations to the Authority thereon.

6. The Commission shall have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes as set forth in this resolution.

7. The Commission may establish such subsidiary bodies as are necessary for the exercise of its functions and shall determine their functions and rules of procedure. It may also make use, as appropriate, of outside sources of expertise in accordance with United Nations practice to facilitate the work of bodies so established.

8. The Commission shall establish a special commission for the Enterprise and entrust to it the functions referred to in paragraph 12 of resolution II of the Third United Nations Conference on the Law of the Sea relating to preparatory investment. The special commission shall take all measures necessary for the early entry into effective operation of the Enterprise.

9. The Commission shall establish a special commission on the problems which would be encountered by developing land-based producer States likely to be most seriously affected by the producion of minerals derived from the Area and entrust to it the functions referred to in paragraph 5 (i).

10. The Commission shall prepare a report containing recommendations for submission to the meeting of the States Parties to be convened in accordance with Annex VI, article 4, of the Convention regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea.

11. The Commission shall prepare a final report on all matters within its mandate, except as provided in paragraph 10, for the presentation to the Assembly at its first session. Any action which may be taken on the basis of the report must be in conformity with the provisions of the Convention concerning the powers and functions entrusted to the respective organs of the Authority.

12. The Commission shall meet at the seat of the Authority if facilities are available; it shall meet as often as necessary for the expeditious exercise of its functions.

13. The Commission shall remain in existence until the conclusion of the first session of the Assembly, at which time its property and records shall be transferred to the Authority.

14. The expenses of the Commission shall be met from the regular budget of the United Nations, subject to the approval of the General Assembly of the United Nations.

15. The Secretary-General of the United Nations shall make available to the Commission such secretariat services as may be required.

16. The Secretary-General of the United Nations shall bring this resolution, in particular paragraphs 14 and 15, to the attention of the General Assembly for necessary action.

ANNEX C

RESOLUTION II

GOVERNING PREPARATORY INVESTMENT IN PIONEER ACTIVITIES RELATING TO POLYMETALLIC NODULES

The Third United Nations Conference on the Law of the Sea,

Having adopted the Convention on the Law of the Sea (the "Convention"),

Having established by resolution I the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea (the "Commission") and directed it to prepare draft rules, regulations and procedures, as necessary to enable the Authority to commence its functions, as well as to make recommendations for the early entry into effective operation of the Enterprise,

Desirous of making provision for investments by States and other entities made in a manner compatible with the international régime set forth in Part XI of the Convention and the Annexes relating thereto, before the entry into force of the Convention,

Recognizing the need to ensure that the Enterprise will be provided with the funds, technology and expertise necessary to enable it to keep pace with the States and other entities referred to in the preceding paragraph with respect to activities in the Area,

Decides as follows:

1. For the purposes of this resolution:

(a) "pioneer investor" refers to:

(i) France, India, Japan and the Union of Soviet Socialist Republics, or a state enterprise of each of those States or one natural or juridical person which possesses the nationality of or is effectively controlled by each of those States, or their nationals, provided that the State concerned signs the Convention and the State or state enterprise or natural or juridical person has expended, before 1 January 1983, an amount equivalent to at least $US 30 million (United States dollars calculated in constant dollars relative to 1982) in pioneer activities and has expended no less than 10 per cent of that amount in the location, survey and evaluation of the area referred to in paragraph 3 (a);

(ii) four entities, whose components being natural or juridical persons[1] possess the nationality of one or more of the following States, or are effectively controlled by one or more of them or their nationals: Belgium, Canada, the Federal Republic of Germany, Italy, Japan, the Netherlands, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, provided that the certifying State or States sign the Convention and the entity concerned has expended, before 1 January 1983, the levels of expenditure for the purpose stated in subparagraph (i);

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[1] For their identity and composition see "Sea-bed mineral resource development: recent activities of the international Consortia" and addendum, published by the Department of International Economic and Social Affairs of the United Nations (ST/ESA/107 and Add.1).

(iii) any developing State which signs the Convention or any state enterprise or natural or juridical person which possesses the nationality of such State or is effectively controlled by it or its nationals, or any group of the foregoing, which, before 1 January 1985, has expended the levels of expenditure for the purpose stated in subparagraph (i);

The rights of the pioneer investor may devolve upon its successor in interest.

(b) "pioneer activities" means undertakings, commitments of financial and other assets, investigations, findings, research, engineering development and other activities relevant to the identification, discovery, and systematic analysis and evaluation of polymetallic nodules and to the determination of the technical and economic feasibility of exploitation. Pioneer activites include:

(i) any at-sea observation and evaluation activity which has as its objective the establishment and documentation of the nature, shape, concentration, location and grade of polymetallic nodules and of the environmental, technical and other appropriate factors which must be taken into account before exploitation;

(ii) the recovery from the Area of polymetallic nodules with a view to the designing, fabricating and testing of equipment which is intended to be used in the exploitation of polymetallic nodules;

(c) "certifying State" means a State which signs the Convention, standing in the same relation to a pioneer investor as would a sponsoring State pursuant to Annex III, article 4, of the Convention and which certifies the levels of expenditure specified in subparagraph (a);

(d) "polymetallic nodules" means one of the resources of the Area consisting of any deposit or accretion of nodules, on or just below the surface of the deep sea-bed, which contain manganese, nickel, cobalt and copper;

(e) "pioneer area" means an area allocated by the Commission to a pioneer investor for pioneer activities pursuant to this resolution. A pioneer area shall not exceed 150,000 square kilometres. The pioneer investor shall relinquish portions of the pioneer area to revert to the Area, in accordance with the following schedule:

(i) 20 per cent of the area allocated by the end of the third year from the date of the allocation;

(ii) an additional 10 per cent of the area allocated by the end of the fifth year from the date of the allocation;

(iii) an additional 20 per cent of the area allocated or such larger amount as would exceed the exploitation area decided upon by the Authority in its rules, regulations and procedures, after eight years from the date of the allocation of the area or the date of the award of a production authorization, whichever is earlier;

(f) "Area", "Authority", "activities in the Area" and "resources" have the meanings assigned to those terms in the Convention.

2. As soon as the Commission begins to function, any State which has signed the Convention may apply to the Commission on its behalf or on behalf of any state enterprise or entity or natural or juridical person specified in paragraph 1(a) for registration as a pioneer investor. The Commission shall register the applicant as a pioneer investor if the application:

(a) is accompanied, in the case of a State which has signed the Convention, by a statement certifying the level of expenditure made in accordance with paragraph 1(a), and, in all other cases, a certificate concerning such level of expenditure issued by a certifying State or States; and

(b) is in conformity with the other provisions of this resolution, including paragraph 5.

3. (a) Every application shall cover a total area which need not be a single continuous area, sufficiently large and of sufficient estimated commercial value to allow two mining operations. The application shall indicate the co-ordinates of the area defining the total area and dividing it into two parts of equal estimated commercial value and shall contain all the data available to the applicant with respect to both parts of the area. Such data shall include, *inter alia*, information relating to mapping, testing, the density of polymetallic nodules and their metal content. In dealing with such data, the Commission and its staff shall act in accordance with the relevant provisions of the Convention and its Annexes concerning the confidentiality of data.

(b) Within 45 days of receiving the data required by subparagraph (a), the Commission shall designate the part of the area which is to be reserved in accordance with the Convention for the conduct of activities in the Area by the Authority through the Enterprise or in association with developing States. The other part of the area shall be allocated to the pioneer investor as a pioneer area.

4. No pioneer investor may be registered in respect of more than one pioneer area. In the case of a pioneer investor which is made up of two or more components, none of such components may apply to be registered as a pioneer investor in its own right or under paragraph 1 (a) (iii).

5. (a) Any State which has signed the Convention and which is a prospective certifying State shall ensure, before making applications to the Commission under paragraph 2, that areas in respect of which applications are made do not overlap one another or areas previously allocated as pioneer areas. The States concerned shall keep the Commission currently and fully informed of any efforts to resolve conflicts with respect to overlapping claims and of the results thereof.

(b) Certifying States shall ensure, before the entry into force of the Convention, that pioneer activities are conducted in a manner compatible with it.

(c) The prospective certifying States, including all potential claimants, shall resolve their conflicts as required under subparagraph (a) by negotiations within a reasonable period. If such conflicts have not been resolved by 1 March 1983, the prospective certifying States shall arrange for the submission of all such claims to binding arbitration in accordance with UNCITRAL Arbitration Rules to commence not later than 1 May 1983 and to be completed by 1 December 1984. If one of the States concerned does not wish to participate in the arbitration, it shall arrange for a juridical person of its nationality to represent it in the arbitration. The arbitral tribunal may, for good cause, extend the deadline for the making of the award for one or more 30-day periods.

(d) In determining the issue as to which applicant involved in a conflict shall be awarded all or part of each area in conflict, the arbitral tribunal shall find a solution which is fair and equitable, having regard, with respect to each applicant involved in the conflict, to the following factors:

(i) the deposit of the list of relevant co-ordinates with the prospective certifying State or States not later than the date of adoption of the Final Act or 1 January 1983, whichever is earlier;

(ii) the continuity and extent of past activities relevant to each area in conflict and to the application area of which it is a part;

(iii) the date on which each pioneer investor concerned or predecessor in interest or component organization thereof commenced activities at sea in the application area;

(iv) the financial cost of activities measured in constant United States dollars relevant to each area in conflict and to the application area of which it is a part; and

(v) the time when those activities were carried out and the quality of activities.

6. A pioneer investor registered pursuant to this resolution shall, from the date of registration, have the exclusive right to carry out pioneer activities in the pioneer area allocated to it.

7. (a) Every applicant for registration as a pioneer investor shall pay to the Commission a fee of $US 250,000. When the pioneer investor applies to the Authority for a plan of work for exploration and exploitation the fee referred to in Annex III, article 13, paragraph 2, of the Convention shall be $US 250,000.

(b) Every registered pioneer investor shall pay an annual fixed fee of $US 1 million commencing from the date of the allocation of the pioneer area. The payments shall be made by the pioneer investor to the Authority upon the approval of its plan of work for exploration and exploitation. The financial arrangements undertaken pursuant to such plan of work shall be adjusted to take account of the payments made pursuant to this paragraph.

(c) Every registered pioneer investor shall agree to incur periodic expenditures, with respect to the pioneer area allocated to it, until approval of its plan of work pursuant to paragraph 8, of an amount to be determined by the Commission. The amount should be reasonably related to the size of the pioneer area and the expenditures which would be expected of a *bona fide* operator who intends to bring that area into commercial production within a reasonable time.

8. (a) Within six months of the entry into force of the Convention and certification by the Commission in accordance with paragraph 11, of compliance with this resolution, the pioneer investor so registered shall apply to the Authority for approval of a plan of work for exploration and exploitation, in accordance with the Convention. The plan of work in respect of such application shall comply with and be governed by the relevant provisions of the Convention and the rules, regulations and procedures of the Authority, including those on the operational requirements, the financial requirements and the undertakings concerning the transfer of technology. Accordingly, the Authority shall approve such application.

(b) When an application for approval of a plan of work is submitted by an entity other than a State, pursuant to subparagraph (a), the certifying State or States shall be deemed to be the sponsoring State for the purposes of Annex III, article 4, of the Convention, and shall thereupon assume such obligations.

(c) No plan of work for exploration and exploitation shall be approved unless the certifying State is a Party to the Convention. In the case of the entities referred to in paragraph 1 (a) (ii), the plan of work for exploration and exploitation shall not be approved unless all the States whose natural or juridical persons comprise those entities are Parties to the Convention. If any such State fails to ratify the Convention within six months after it has received a notification from the Authority that an

application by it, or sponsored by it, is pending, its status as a pioneer investor or certifying State, as the case may be, shall terminate, unless the Council, by a majority of three fourths of its members present and voting, decides to postpone the terminal date for a period not exceeding six months.

9. (a) In the allocation of production authorizations, in accordance with article 151 and Annex III, article 7, of the Convention, the pioneer investors who have obtained approval of plans of work for exploration and exploitation shall have priority over all applicants other than the Enterprise which shall be entitled to production authorizations for two mine sites including that referred to in article 151, paragraph 5, of the Convention. After each of the pioneer investors has obtained production authorization for its first mine site, the priority for the Enterprise contained in Annex III, article 7, paragraph 6, of the Convention shall apply.

(b) Production authorizations shall be issued to each pioneer investor within 30 days of the date on which that pioneer investor notifies the Authority that it will commence commercial production within five years. If a pioneer investor is unable to begin production within the period of five years for reasons beyond its control, it shall apply to the Legal and Technical Commission for an extension of time. That Commission shall grant the extension of time, for a period not exceeding five years and not subject to further extension, if it is satisfied that the pioneer investor cannot begin on an economically viable basis at the time originally planned. Nothing in this subparagraph shall prevent the Enterprise or any other pioneer applicant, who has notified the Authority that it will commence commercial production within five years, from being given a priority over any applicant who has obtained an extension of time under this subparagraph.

(c) If the Authority, upon being given notice, pursuant to subparagraph (b), determines that the commencement of commercial production within five years would exceed the production ceiling in article 151, paragraphs 2 to 7, of the Convention, the applicant shall hold a priority over any other applicant for the award of the next production authorization allowed by the production ceiling.

(d) If two or more pioneer investors apply for production authorizations to begin commerical production at the same time and article 151, paragraphs 2 to 7, of the Convention, would not permit all such production to commence simultaneously, the Authority shall notify the pioneer investors concerned. Within three months of such notification, they shall decide whether and, if so, to what extent they wish to apportion the allowable tonnage among themselves.

(e) If, pursuant to subparagraph (d), the pioneer investors concerned decide not to apportion the available production among themselves they shall agree on an order of priority for production authorizations and all subsequent applications for production authorizations will be granted after those referred to in this subparagraph have been approved.

(f) If, pursuant to subparagraph (d), the pioneer investors concerned decide to apportion the available production among themselves, the Authority shall award each of them a production authorization for such lesser quantity as they have agreed. In each case the stated production requirements of the applicant will be approved and their full production will be allowed as soon as the production ceiling admits of additional capacity sufficient for the applicants involved in the competition. All subsequent

applications for production authorizations will only be granted after the requirements of this subparagraph have been met and the applicant is no longer subject to the reduction of production provided for in this subparagraph.

(g) If the parties fail to reach agreement within the stated time period, the matter shall be decided immediately by the means provided for in paragraph 5(c) in accordance with the criteria set forth in Annex III, article 7, paragraphs 3 and 5, of the Convention.

10. (a) Any rights acquired by entities or natural or juridical persons which possess the nationality of or are effectively controlled by a State or States whose status as certifying State has been terminated, shall lapse unless the pioneer investor changes its nationality and sponsorship within six months of the date of such termination, as provided for in subparagraph (c).

(b) A pioneer investor may change its nationality and sponsorship from that existing at the time of its registration as a pioneer investor to that of any State Party to the Convention which has effective control over the pioneer investor in terms of paragraph 1 (a).

(c) Changes of nationality and sponsorship pursuant to this paragraph shall not affect any right or priority conferred on a pioneer investor pursuant to paragraphs 6 and 8.

11. The Commission shall:

(a) provide each pioneer investor with the certificate of compliance with the provisions of this resolution referred to in paragraph 8; and

(b) include in its final report required by paragraph 11 of resolution I of the Conference details of all registrations of pioneer investors and allocations of pioneer areas pursuant to this resolution.

12. In order to ensure that the Enterprise is able to carry out activities in the Area in such a manner as to keep pace with States and other entities:

(a) every registered pioneer investor shall:

(i) carry out exploration, at the request of the Commission, in the area reserved, pursuant to paragraph 3 in connection with its application, for activities in the Area by the Authority through the Enterprise or in association with developing States, on the basis that the costs so incurred plus interest thereon at the rate of 10 per cent per annum shall be reimbursed;

(ii) provide training at all levels for personnel designated by the Commission;

(iii) undertake before the entry into force of the Convention, to perform the obligations prescribed in the Convention relating to transfer of technology;

(b) every certifying State shall:

(i) ensure that the necessary funds are made available to the Enterprise in a timely manner in accordance with the Convention, upon its entry into force; and

(ii) report periodically to the Commission on the activities carried out by it, by its entities or natural or juridical persons.

13. The Authority and its organs shall recognize and honour the rights and obligations arising from this resolution and the decisions of the Commission taken pursuant to it.

14. Without prejudice to paragraph 13, this resolution shall have effect until the entry into force of the Convention.

15. Nothing in this resolution shall derogate from Annex III, article 6, paragraph 3 (c), of the Convention.

ANNEX D

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Annex

STATEMENT ON THE IMPLEMENTATION OF RESOLUTION II

The Commission shall proceed in this matter on the basis of the following understanding:

1 Th Preparatory Commission takes note of the information from the first group of applicants that, on the basis of this understanding, France and the Union of Soviet Socialist Republics and Japan and the Soviet Union can resolve the overlaps of th areas in respect of which they have applied for registration as pion r inv stors. They have also informed the Commission that the results of their aqr ements would be reflected in the revised application to be submitted by each of th m

2. France, India, Japan and the USSR will submit to the Secretary-General by 25 March 1987 revised applications in accordance with resolution II and subject to the guid lines set forth in this understanding.

3. Th General Committee will meet at the beginning of the second week of the n xt session of the Preparatory Commission to consider the applications and decid n th ir registration. Before the General Committee meets, the Chairman will rec iv reports from all concerned on the progress made on any outstanding issues that may be the subject of inter-sessional discussions and report to the Preparatory Commission on any developments. If the Preparatory Commission is satisfied that substantial progress has been made during the inter-sessional discussions, but that due to lack of time it was not possible to complete th discussions, the Preparatory Commission may decide, at its next session, to prolong th period for discussions, as necessary.

4. Th General Committee shall consider the applications taking into account th r ports of the group of technical experts. The group of technical experts shall d t rmin whether the applications are in conformity with resolution II, in particular with the principle of equal estimated commercial value, subject to th quid lin s and procedures set forth in this understanding and submit a report on each application to the General Committee. In case of there being different opinions, such opinions should be included in the report.

5. Th General Committee shall postpone the registration of an application wh r th total area including the areas referred to in paragraph 13 (1) (c) and (d) b low, to be reserved for the conduct of activities by the Authority through th Ent rprise or in association with developing countries, is not of equal estimated comm rcial value until the necessary adjustments are made to achieve this equivalence.

6. Th group of technical experts shall be appointed by the Chairman of th Pr paratory Commission in consultation with the regional groups and the composition of th group as a whole shall reflect the principle of equitable geographical distribution. The members of the group will be selected from a list compiled by the Secr tary-General of qualified candidates propos d by th members of th

Pr paratory Commission. Each member of the Preparatory Commission may propos no more than three candidates not later than 31 October 1986. The membership of the group of technical experts shall include four members representing the first 4 applicants and shall not be more than 15. The expenses of the technical experts shall be borne by the States nominating such experts.

7. Th group of technical experts shall meet during the first week of the next session and shall submit its report at the beginning of the second week of the session to the General Committee. Each applicant has the right to appear before th group of experts when its application is being considered. Other applicants of th first group who have an interest in the application being considered may give notice to appear before the group of experts when that application is being consid red.

8. The Secretary-General would be authorized to make available the applications with the accompanying data and information for examination by the group of technical experts. The members of the group of technical experts will maintain the confid ntiality of the data and information submitted to them, even after the conclusion of their functions.

9 In order to meet certain practical problems and, in particular, to take into account the interests of potential applicants under resolution II, paragraph 1 (a) (ii), an applicant who has practical problems may voluntarily r linquish in advance portions of the application areas simultaneously with its registration as a pioneer investor. The areas relinquished in these circumstances may xceed 75,000 sq kms and shall be without prejudice to paragraph 13 below. The applicants so relinquishing shall be deemed to have complied with the provisions of r solution II, paragraph 1 (e).

10. Applicants who do not have practical problems and do not make voluntary advanc r linquishments of areas shall be deemed to have complied with the requir ments for relinquishment under resolution II, paragraph 1 (e) upon registration, provided that the total pioneer area allocated to them does not exc ed 75,000 sq km.

11 The Preparatory Commission shall allocate according to the procedures specified in resolution II, paragraph 3, to applicants who are not deemed to hav complied with the requirements of resolution II, paragraph 1 (e), under paragraphs 9 and 10 above, an area necessary to ensure that each such applicant shall hav a pioneer area not exceeding 75,000 sq km after the relinquishment of ar as in accordance with resolution II, paragraph 1 (e).

12 Th r linquished areas, referred to in paragraph 9, shall remain deposited with the Preparatory Commission and will be reserved to form part of the application areas of potential applicants qualified to apply as pioneer investors under r solution II, paragraph 1 (a) (ii), until the Convention enters into forc

13. Th General Committee shall make its decisions relating to the designation of the areas to be reserved for the Authority and the allocation of pioneer areas covered by revised applications of the first group of applicants in accordanc with the following:

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1.(a) The area to be designated in respect of each application as an area to be reserved for the conduct of activities by the Authority through the Enterpris or in association with developing countries shall be not less than one half of th total area applied for by each applicant. In the case where an applicant has r linquished over 75,000 sq km under paragraph 9 above, the area to be res rved for the Authority may be reduced, but in any case it shall not be less than 75,000 sq km.

(b) The areas to be reserved for the Authority in respect of each application shall be of equal estimated commercial value to the respective areas allocated to each applicant.

(c) Applicants with overlapping claims, namely France, Japan and the USSR, shall contribute portions of areas in the north-east Pacific Ocean covered by th ir r spective revised applications that will constitute part of the area to be reserved for the Authority. The areas so contributed may be incorporated in any ar a for which the Enterprise may wish to submit a plan of work and together they shall be of equal estimated commercial value to at least the average estimated commercial value of the three areas of up to 52,300 sq km to be allocated to th pion r investors pursuant to paragraph 13 (2).

(d) The contribution to be made by the three applicants for this purpos shall be as follows:

(i) France - an area totalling 20,000 sq km adjacent to its presently overlapping area with the Soviet Union;

(ii) Japan - an area totalling 17,300 sq km adjacent to its presently overlapping area with the Soviet Union;

(iii) Soviet Union - an area totalling 15,000 sq km, 14,549 sq km of which will be from within its presently overlapping areas with France and with Japan and 451 sq km which it obtains from France following adjustment of claims between the two applicants.

2. The total area to be allocated to each applicant shall not exc ed 75,000 sq km after any relinquishment of areas referred to in paragraphs 9, 10 and 11 has been made. For the purpose of allocation, each applicant may indicat in its application portions of its application area up to a limit of 52,300 sq km that shall form part of the total area to be allocated to it by the Commission In addition to the areas indicated by the applicants, the Commission shall allocate, in accordance with resolution II, paragraph 3, an area from their respectiv application areas necessary to complete the total area to be allocated to each applicant.

3 Notwithstanding the foregoing the registration of India as a pion er investor shall be made in conformity with resolution II. However, India, like oth r applicants, if it so wishes, will identify in its application area an ar a totalling 52,300 sq km for incorporation in the area of up to 150,000 sq km to b allocated to it as a pioneer area The provisions on relinquishment in resolution II, paragraph 1 (e), shall apply to the allocated ar a.

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14. Notwithstanding the provisions of paragraph 12 (a) (i) of resolution II, th first group of applicants will assist the Preparatory Commission and the Authority in the exploration of a mine site for the first operation of the Enterprise and in preparing a plan of work in respect of such a mine site. The conditions and ext nt of this assistance will be discussed and agreed to following registration, applying mutatis mutandis the provisions of paragraph 7 (c) of resolution II.

15 The treatment to be accorded to potential applicants in respect of their applications shall be similar to the treatment given to the first group of applicants provided that potential applicants assume similar obligations to those of the first group of applicants and submit their applications before the entry into force of the United Nations Convention on the Law of the Sea.

16. The procedures and mechanisms outlined in this understanding have been devised in order to overcome practical difficulties in the implementation of resolution II and to facilitate the registration of the first group of applicants as soon as possible.

17 The procedures, mechanisms and provisions of this understanding are ssentially designed for the registration of the first group of applicants as pione r investors under resolution II and constitute an integrated package to be impl mented as a whole. They shall be respected by all concerned.

18. These procedures and mechanisms shall not be construed as setting a preced nt for the implementation of the régime for sea-bed mining under the Convention, nor do th y purport to alter or amend that régime in any way.

19. The procedures and mechanisms that have been outlined above:

(a) Provide the Preparatory Commission with sufficient time to prepare it lf to consid r and register the pending applications of the first group of applicants as pion r investors which have submitted applications under resolution II of th Conf r nc on the Law of the Sea;

(b) Provide a time-table which ensures that all meetings of the group of xperts and the General Committee will substantially take place during the next s ssion in order not to incur expenditure which has not been budgeted for by the G neral Assembly;

(c) Provide a time-table which gives ample opportunity for the four applicants to review the data and information relating to their original applications in the light of the procedures and mechanisms outlined above and to submit their revised applications;

(d) Provide a mechanism for voluntary relinquishment at the time of registration which represents an equitable approach to resolving any practical problems that might be anticipated between any of the first group of applicants and any potential applicants. The time intervening between now and the submission of revised applications will provide an opportunity for those concerned to possibly qiv mor precision to the approach. The Preparatory Commission would encourag such fforts and urge all concerned that this be don in an atmospher of fre and

frank discussions, making available to each other at these discussions the nec ssary data and information. Any results of such endeavours should be tak n into account in the revised applications and respected by all concerned;

( ) Provide for similar treatment to be given to potential applicants as that given to the first group of applicants, provided that potential applicants assum similar obligations to those of the first group of applicants, if the former submit th ir applications before the entry into force of the United Nations Convention on th Law of the Sea.

20. Any developing State that has signed the Convention or any State enterpris or natural or juridical person that possesses the nationality of such Stat or i ffectively controlled by it or its nationals, or any group of the foregoing, shall hav the right to apply as pioneer investor under resolution II, until th Convention enters into force.

21. A group of all or several socialist States of Eastern Europe, a/ or a group of Stat nterprises of such States, shall have the right to apply as pion er investors in accordance with resolution II for one pioneer area until th United Nations Convention on the Law of the Sea enters into force.

22. The provisions of paragraphs 20 and 21 are without prejudice to the rights acquir d upon registration by the first group of applicants as pioneer inv stors and to the interests of the potential applicants in conformity with this und rstanding.

Notes

a/ Bulgaria, Byelorussian SSR, Czechoslovakia, German Democratic Republic, Hungary, Poland, Ukrainian SSR and the USSR.

ANNEX E

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Distr.
GENERAL

LOS/PCN/ 72
2 September 1985

Original: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Geneva, 12 August-4 September 1985

DECLARATION ADOPTED BY THE PREPARATORY COMMISSION ON 30 AUGUST 1985

Th Preparatory Commission for the International Sea-Bed Authority and for th International Tribunal for the Law of the Sea;

Determined to carry out the powers and functions entrusted to it by r solutions I and II of the Third United Nations Conference on the Law of the Sea;

Taking note of the increasing and overwhelming support for the United Nations Convention on the Law of the Sea as evidenced, int r alia, by 159 signatories and 21 ratifications;

Considering that the United Nations General Assembly has adopted without dissent the declaration of principles in resolution 2749(XXV) proclaiming that the sea-bed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction as well as the resources of th Area, are the common heritage of mankind;

Recognizing that the United Nations Convention on the Law of the Sea establishes the only régime to be applied to the Area and its resources;

Taking note of the letter dated 10 June 1985, addressed to the Chairman of the Preparatory Commission by the Acting Permanent Representativ of th Union of Soviet Socialist Republics to the United Nations regarding the licence granted by the United States of America for the exploration of parts of the Area, 1/

1/ Document LOS/PCN/64

- 3 -

Recalling Article 137 of the Convention which proclaims that no state or natural or juridical person shall claim, acquire or exercise rights with regard to the minerals recovered from the Area except in accordance with Part XI of the Convention;

Deeply concerned that some states have undertaken certain actions which undermine the Convention and which are contrary to the mandate of the Preparatory Commission;

Recalling also the United Nations General Assembly resolution 39/73, of 13 December 1984, which calls upon all states to desist from taking actions which undermine the Convention and defeat its object and purpose;

1. Declares that:

a) The only régime for exploration and exploitation of the Area and its resources is that established by the United Nations Convention on the Law of the Sea and related resolutions adopted by the Third United Nations Conference on the Law of the Sea.

b) Any claim, agreement or action regarding the Area and its resources undertaken outside the Preparatory Commission which is incompatible with the United Nations Convention on the Law of the Sea and its related resolutions shall not be recognized.

2. Rejects such claim, agreement or action as a basis for creating legal rights and regards it as wholly illegal.

UNITED NATIONS

LOS

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Distr.
LIMITED

LOS/PCN/L.29
4 April 1986

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Kingston, 17 March-11 April 1986

DRAFT DECLARATION SUBMITTED BY CAPE VERDE ON BEHALF OF THE GROUP OF 77

The Preparatory Commission for the International Sea-Bed Authority and for th International Tribunal for the Law of the Sea,

Considering that the United Nations General Assembly adopted without dissent the declaration of principles contained in resolution 2749 (XXV) proclaiming that the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the Area, are the common heritage of mankind,

Recognizing that the United Nations Convention on the Law of the Sea and related resolutions establish the only régime to be applied to the Area and its resources,

Recalling the unprecedented overwhelming support for and the historical significance of the United Nations Convention on the Law of the Sea, which is an integral and indivisible whole,

Recalling also the declaration adopted by it on 30 August 1985, which declares that the United Nations Convention on the Law of the Sea and related resolutions establish the only régime for exploration and exploitation of the Area and its resources and that any claim, agreement or action regarding the Area and its resources undertaken outside the Preparatory Commission which is incompatible with the Convention and its related resolutions shall not be recognized, and which rejects such claim, agreement or action as a basis for creating legal rights and regards it as wholly illegal, 1/

Recalling further resolution 40/63 on the law of the sea, adopted by the United Nations General Assembly on 10 December 1985,

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1/ Document LOS/PCN/72.

Deploring the fact that the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany have issued licences for the exploration of parts of the Area,

1 Reaffirms its declaration adopted on 30 August 1985;

2. Reiterates its rejection of any claim, agreement or action, including the aforementioned purported issuing of licences, undertaken outside the Preparatory Commission which is incompatible with the United Nations Convention on the Law of the Sea and its related resolutions, and regards them as wholly illegal and devoid of any basis for creating legal rights.

ANNEX F

Select Bibliography of Recent Literature on the Law of the Sea Convention

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