Future Work of the Preparatory Commission

During the concluding Session, the Chairman of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Mr. Jose Luis Jesus (Cape Verde) made some proposals as to the future work of the PREPCOM. He made a reference in particular to the possibility that the final solution of the pending issues should be sought at the appropriate time and in his view negotiations should be focussed on negotiating a "Framework Agreement" before the entry into force of the UN Convention on the Law of the Sea. In his view, Part XI of the Convention on the Sea-bed mining regime, is a source of practical difficulties for several States and many of the pending "hard core" issues arise from those practical difficulties. The efforts of the Secretary-General in the open-ended informal consultations on the Law of the Sea are precisely aimed at dissolving these hard core issues to enable the Convention to obtain universal acceptance and ratification.

Nevertheless it is doubtful whether a so called "Framework Agreement" which would in effect mean a new treaty would be acceptable. The PREPCOM itself has not even managed to complete the work assigned to it by the Convention in the eleven years that it has been engaged in these negotiations. It is highly unlikely that a Framework agreement can be negotiated in the near future. Certainly it should not hold up the ratification process bringing into force the 1982 Convention which involves far more than Part XI.

On the recommendation of the General Committee, the Commission decided not to hold any more meetings in the course of this year. Since the Preparatory Commission was established with the mandate extending to the coming into force of the Convention, it could not adopt definitively its reports and therefore only took note of them. However, the existing pattern of meetings would not be continued as the Preparatory Commission has substantially completed the work it could realistically be expected to accomplish. On the recommendation of the General Committee the following future programme of work was approved:

a) not to hold any more meetings in the course of this year;

b) to make provision every year for the United Nations servicing of a two-week annual session of the Preparatory Commission, until the entry into force of the Convention;

c) the need for the effective holding of the annual session of the Preparatory Commission will be decided by the Chairman of the Preparatory Commission in consultation with the Chairman of the Special Commissions, the Chairmen of Regional Groups and interest groups. The Chairman of the Preparatory Commission will also decide, on the basis of such consultations, the precise date for such a meeting;

d) the General Committee, acting on behalf of the Preparatory Commission as its executive organ for the implementation of Resolution II, will meet for two or three days annually to consider matters related to the implementation of Resolution II and to continue the monitoring of the implementation of the obligations of the registered pioneer investors.

It is clear now that as the negotiations on the outstanding issues are concerned, the focus will be on the open-ended informal consultations organised by the Secretary-General. Already there have been several such consultations, the last of which were held from 8th to 12th November 1993 and produced significant results.

Report on the UN Secretary-General's Informal Consultations

The Secretary-General of the AALCC participated at the Tenth round of the informal consultations organised by the Secretary-General of the United Nations on 27th and 28th April 1993.[1] These consultations chaired by H.E. Dr. Carl August Fleischhauer, Under Secretary-General and Legal Counsel were based on an Information Note dated 5th April 1993 prepared by the United Nations Secretariat as an informal document largely based on the work done in the previous sessions particularly those held in 1992.

The document was divided into two parts. Part A deals with the consideration of procedural approaches of reflecting any agreement that might be reached in the informal consultations in a legally binding manner to come into effect preferably simultaneously with the entry into force of the Convention. It should be pointed out that the 1982 Convention has already obtained 55 ratifications and thus requires only four more ratifications and subsequently a period of one year[2] before it enters into force. Hence the

1. As these informal consultations are being accepted and they are open-ended, the Secretary-General of the AALCC, in his report on the consultations, expressed the hope that as many of the AALCC Member States as possible would be represented by *their experts* in the next round of negotations. It was far from satisfactory, as has been the case in past negotations, merely to assign some officials from the Permanent Mission to represent the States in what are highly complicated negotations with far-reaching results.

2. The Convention has been ratified by Angola, Antigua and Barbuda, Bahamas, Bahrain, Belize, Belgium, Botswana, Brazil, Cameroon, Cape Verde, Cote d' Ivoire, Cuba, Cyprus, Djibouti, Dominica, Egypt, Federated States of Micronesia, Fiji, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Iceland, Indonesia, Iraq, Jamaica, Kenya, Kuwait, Mali, Malta Marshall Islands, Mexico, Namibia,

urgency of these consultations which hopefully will pursuade the industrialised countries to ratify the Convention which until now has been ratified almost exclusively by developing countries.

The second part of the Information Note, Part B, deals with the formalization of the result of the consultations and arrangements subsequent to the entry into force of the Convention and during the interim period before the commencement of commercial exploitation. This is predicated on the assumption that there will be an initial period which may last for twenty years or more between the entry into force of the Convention and the commencement of commercial production of minerals from deep sea-bed, an assumption which now seems to be generally accepted.

Consideration of Procedural Approaches

As many delegations pointed out, the Procedural approaches should be considered only after the agreement has been achieved on substantive issues already identified during the previous consultations. Nevertheless the Legal Counsel was of the view that if these procedural issues were discussed as early as possible they would facilitate discussions and finalization of the consultations. Significant achievements have already been reached on several substantive issues during the informal consultations. How these results are to be reflected becomes important since some States have already gone through the procedural ratification process. It is generally agreed that they should not be expected to go through the whole procedure again to reflect these changes assuming that they were acceptable to them.

As the UN Secretary-General has clearly pointed out the purpose of the consultations is to provide practical solutions to the difficulties that industrialized countries have expressed about Part XI on deep seabed mining in what they claim are changed circumstances since the Convention was negotiated. It is not the intention to re-negotiate Part XI which remains an integral part of the Convention. As was pointed out in the discussions, including Part XI, was meticulously negotiated as a package deal by consensus and should therefore remain an integral whole.

In the Information Note, the Secretary-General proposed four possible procedural approaches for reflecting the results in a legally binding manner, which however are not meant to be mutually exclusive, and contain elements which might possibly be merged to achieve acceptable formulations.

Nigeria, Oman, Paraguay, Philippines, Saint Lucia, Senegal, Seychelles, Sao Tome and Principle, Somalia, Sudan, Togo, Trinidad and Tobago, Tunisia, Uganda, United Republic of Tanzania, Yemen, Yugoslavia, Zaire and Zambia.

I. The first alternative proposed is that the result of the consultations could be included in a *contractual instrument such as a Protocol* which formally amends Part XI of the Convention, both with respect to the interim period and with respect to the future deep sea-bed mining regime. As the Information Note points out, this approach would be inconsistent with the procedure for amendment as provided for in Part XI of the Convention in Article 154 and Article 314 dealing respectively with periodic review after entry into force of the Convention and the Review Conference relating to activities in the Area. Nevertheless, such a procedure could in fact be legal under Articles 39 and 40 of 1969 Convention on the Law of Treaties, but only by agreement between the parties of the Convention. In this case, however, the agreement would be required not only from the parties to the Convention but non-parties to the Convention including those States which have signed but not ratified the Convention and those who have not even signed it.

During the discussions there was very little support for this procedure because it would clearly amount to partial re-negotiations of Part XI and there is no mandate for such negotiations. Many delegations particulalry those from developing countries rejected this approach out of hand and it is unlikely to form the basis for solution.

II. The second alternative is predicated on the assumption that the negotiations currently under way constitute few changes in the actual text of the Convention but primarily reflect understandings on the interpretation of application of particular provisions of the Convention. It is therefore proposed as an alternative in the Information Note that the result of the consultations could be made operational in a simple and yet legally binding form as an *agreement containing authoritative interpretations of the provisions concerned.* Those States which have already ratified the Convention would merely give implied consent to the agreement without the necessity of formally adopting them unless they decide to do so within a period of time.

This approach attracted considerable support during the discussions. It nevertheless has the disadvantage that some of the issues which are subject of ongoing informal negotiations, particularly with respect to decision-making and Review Conference procedures and voting in the Council and the Commission involve substantive changes of the provisions contained in Part XI and could not in any way be considered as mere interpretations but substantive amendments.

III. The third approach proposed in the Information Note would consist of *an interpretative agreement on the establishment of an Initial Authority and an Initial Enterprise for the duration of the interim period,* i.e. before commercial production becomes feasible, *to be followed by a procedural arrangements for the convening of a Conference to establish a definitive regime for commercial production of deep sea-bed minerals before commencement of commercial production.*

This approach found favour particulalry from the industrialized countries and indeed from a few representatives of the developing countries. However, it was strongly opposed by a significant number of the developing countries who were concerned that the acceptance of such a proposed conference would in effect amount to acceptance of re-negotiation of Part XI in a manner not consistent with the provisions of the Convention. Part XI is considered as an integral part of the Convention which envisages only the possibility of Review Conference subsequent to commencement of commercial production.

Moreover, the only safeguard anticipated with respect to Part XI is that

"....The Conference shall ensure the maintenance of the principle of common heritage of mankind as well as the implementation of the results of consultations".

Thus the door to whole-scale revision of the fundamental principles concerning the exploration and exploitation of the Area now contained in Part XI would be wide open. Nevertheless from what is proposed in the latter part of Informal Note of the Secretariat this seems to be the approach favoured for reflecting the results of the informal consultations. Essentially what this approach does is to postpone the immediate changes of the substantive provisions of the Convention until after commercial exploitation becomes feasible. If this proposal is accepted the result of the consultations would be adopted in a document emanating for instance from a resolution of the General Assembly, with the consent of all States, to be annexed to the Convention as an integral part of it.

IV. The fourth approach, which emanated from a proposal made earlier by a delegation, would constitute the *conclusion of an agreement additional to the Convention which would become an integral part of and enter into force together with the latter.* That agreement would incorporate the results of the consultations and constitute the guiding framework for the action of the Authority, the structure, functions and composition which would also be provided for in the

agreement. While such an approach may be attractive to industrialised countries it would be generally unacceptable to the developing countries, and in the view of AALCC Secretariat, would be impracticable to achieve. It would in any case involve a whole new process of ratification to come into force and this would be unacceptable particularly to those States which have already ratified the Convention.

It is therefore clear that no generally accepted procedure for reflecting the agreement has yet emerged from the informal consultations. Based on the discussions, however, it is expected that an attempt will be made (by the UN Secretariat) before the next round of informal consultations to combine various elements of the respective approaches to achieve a compromise though this will not be an easy task.

Formulation of the results of the Consultations

As mentioned earlier, the previous consultations had concentrated on some specific aspects of institutional arrangements which may be adequate in the interim period subsequent to the entry into force of the Convention and before commercial exploitation becomes practical. In the Information Note prepared by the Secretariat, an attempt was made to put on paper specific ideas giving possible scenarios for the establishment of the International Sea-bed Authority with the limited structure.

The Note proposes the establishment of an Initial Authority whose functions would be restricted primarily to continue the functions being carried out by the Preparatory Commission with respect to pioneer investors including the training programmes and receiving and processing of new applications. The Initial Authority would also have the function of implementing the decisions of the Preparatory Commission, monitoring and reviewing the trends of development relating to the deep sea-bed mining activities including the protection of the marine environment and setting up of regulations covering activities related to deep sea bed and monitoring the implementation. It would also have the function of contracting with investors or other entities, establishment of necessary subsidiary bodies and continuing consultations on resolutions of such issues which would be pending after the United Nations Secretary-General's informal consultations or at the time of entry into force of the Convention.

While this possible structure received widespread support from most of the delegations, a trend emerged with the preference of industrialised countries for restricting even further the functions of the 'initial authority' to the

minimum function, largely restricted to monitoring activities. The excuse or explanation for this was that since there would be no commercial production and because of the need to reduce the costs to the State parties, only the bare minimum functions should be performed by the Authority during the interim period.

On the other hand, it was pointed out by the developing countries representatives that whatever new developments that have taken place, and which have been given as the reason for restricting the scope of Part XI, they had no bearing on many of the functions now spelt out in Part XI, since it would not be feasible to exploit the resources of the Area in the foreseable future. It was therefore pointed out by them that the interim regime should be empowered to exercise all the functions given to the Authority in the Convention except those that it cannot exercise because of the changed economic and political situation. These functions would include such activities as are related to marine scientific research, protection of marine environment and of human lives, disposal of archaeological finds and coordination between sea-bed mining related activities in the area and other oceans uses and between activities in the area and coastal States.

It was further pointed out by several participants that the reference to interim "Initial" Authority or "Initial" Enterprise was unacceptable because it would give the impression that such institutions are to be created afresh and are not the same as those already provided for in the Convention. Consequently it was suggested that it would be better to refer to the initial functions of those institutions to dispel this impression. It would appear that this suggestion will be taken up when the Informal Note is revised.

Concerning the structure and composition of the organs of the Initial Authority, the Note suggested that there shall be an Assembly composed of all States parties with non-parties participating fully in the deliberation as observers but not entitled to participate in the taking of decisions. There is also a provision for a General Committee as the executive organ of the Initial Authority until the Council is established. The General Committee is a body not foreseen in Part XI and while supported by several industrialised countries it was criticised by many developing countries' representatives who could not see the advantage of establishing such a General Committee instead of establishing the Council as provided for in Part XI. Also provided for in the Note is the establishment of a Group of Technical Experts which would perform relevant functions of the Economic Planning Commission and Legal and Technical Commission until the need to establish such organs has been determined. A Finance Committee has also been proposed.

This structure was on the whole not very controversial though some representatives who were in favour of limiting the functions of the Assembly saw no need for establishing the Initial Enterprise or Group of Technical Experts whose work they claimed could effectively be carried out or performed by the Secretariat. There was however general understanding that the functioning of these bodies will be based on an evolutionary approach and on cost effectiveness and their meetings would be streamlined to the maximum extent possible to reduce costs.

A Provision has been made for the establishment of a Secretariat of the Initial Authority which would consist of a Secretary-General and a limited number of professional and general service staff. It might however be argued that the functions of such a Secretariat could easily be performed by the existing Secretariat in the UN which services the PREPCOM. This would be particularly appropriate towards reducing the costs.

On expenses of the Initial Authority, alternative proposals were made in the Note i.e. either for such costs to be covered by the regular budget of the United Nations or through assessed contributions by members of the Authority. Most developing countries, with the exception of Cape Verde, were in favour of the cost being covered by the regular budget of the United Nations, particularly since all States parties and non parties would be entitled to participate fully in the work of these organs. Many industrialised countries however expressed the view that the administrative expenses should be borne on the basis of assessed contributions of only the members i.e. the States parties which have ratified the Convention. This may consider to be a mean reflection of the attitude of industrialised countries. Their concerns have necessitated these informal consultations and they have since obtained, or hope to obtain, far reaching concessions from developing countries without giving much, if anything in return.

It should also be pointed out that the Information Note contains an Annex on Preliminary estimated of expenses of the Initial Authority which indicates that a Self-Administrered Secretariat of the Initial Authority would cost US $ 3.3-4.5 million while a United Nations linked Secretariat of the Initial Authority would only cost US $ 2.3-3.0 million. While these amounts are modest, there is no reason why they should be borne by developing countries alone which have the least capacity to bear them.

There is also a proposal to establish an Initial Enterprise with a limited structure whose functions would be restricted to analysis of world market condition and metal prices, trends and protections, collection of information

on the available technology, assessment of the State of knowledge of deep-sea environment and assessment of criteria and data relating to prospecting and exploration. While most of the delegations were prepared to accept these proposals, some industrialised countries considered that such an Enterprise would be premature. According to them, the Enterprise should only be established when it became necessary. This in the view of the AALCC Secretariat is further unnecessary tampering with the institutions provided for in the Convention.

Section 2 of Part B also contains an article dealing with the determination of the time when commercial production of deep sea-bed minerals becomes feasible. There is a proposal to provide that such determination shall be based upon recommendation by a group of technical experts. It was however pointed out by several speakers that such a determination ought to be based on the decision of prospective investors and their assessment of viability of commercial production and thus their application for licence to go for commercial production. This latter view has considerable merits.

Section 3 of the Information Note deals with the proposed conference to establish a definitive regime for commercial production on deep sea-bed minerals. As pointed out earlier, this proposed conference is based on the acceptance of the third alternative proposed by the Secretary-General. But that procedure of implementing the conclusion attracted wide scale criticism as in effect it would amount to advance acceptance of the Fourth Law of the Sea Conference and whole scale revision of Part XI. One particular paragraph in this section, para 21, attracted widespread criticism from many representatives from developing countries as it would in effect allow for a dual or parallel regime. This para provides:—

> "21. States which have not yet ratified or acceded to the United Nations Convention on the Law of the Sea, may, when becoming parties to the Convention, replace their consent to be bound by Part XI and the related annexes by the agreement to participate in the Initial Authority and the Initial Enterprise and in the Conference".

The Legal Counsel Dr. C.A. Fleischhauer in summing up explained that it was not the intention of the Secretariat to create a dual regime and this paragraph is likely to be revised in the final version.

At the eleventh round of consultations from 2nd to 6th August 1993, Part B-II of the Information Note, "Draft Texts Governing the Regime for Deep

Seabed Mining" were discussed.[3] Dr. Fleischhauer expressed the hope that the meeting would take a step further towards achieving the goal of universality of the Convention and warned that the failure of the efforts would be a major setback to the maintence of the law and order in the Sea. So, he suggested that the Informal Consultations should be concrete, productive and face to face discussions. The Representative of Argentine, as the Chairman of the Group of 77, welcomed the initiative for the face to face negotiations and expressed the Group's belief that "the dialogue should lead us to accommodation of specific issues of disagreement based on Part XI not on the assumption of the Initial Authority to change the Convention."

On the question of cost effectiveness and evolutionary approach, as a general rule applicable to all institutions, it was recognised that when commercial production of deep sea-bed minerals became feasible, the establishment and operations of the institutions provided for in the UN Convention on the Law of the Sea should continue to be based on cost-effectiveness and on evolutionary approach. The regime and the institution shall evolve on the basis of actual requirements and possibilities of deep sea-bed mining. There was however disagreement on the need to establish the institutions and bodies of the Convention.

The Information Note suggests that "No institution shall be established if its need has not been formally recognized." Views were expressed that instead of deciding about the establishment of the institution it could be decided as to when an institution or body of the Convention has to be activated. Any formulation for cost effectiveness should not be discriminatory. The principle of consistency and non-discriminatory approach in the establishment and operations of the bodies of the Convention should guide the Meeting. Cost effectiveness is related to the functions and should be measured in the context of the UN operations. For instance, the functions of the Authority in the interim period were referred to. Questions were raised as to whether it may carry out marine scientific research as has been stipulated in the Convention. The time should come when the Authority should acquire the necessary technology and scientific knowledge. Prospecting also is one of the early envisaged functions of the Authority. This however and some

3. During the April round of negotiations there was no time to deal with the Draft Texts concerning the Definitive Deep Sea-Bed Mining Regime as proposed in Section II of Part B of the Information Note. These proposals are based on the previous negotiations particularly those negotiations which took place in 1992. Nevertheless, it should not be assumed that they are generally agreed provision as the negotiations then were on the whole been of a limited character and most of the developing countries did not take part in the negotiations. The draft proposals should therefore form part of the future negotiations of these consultations.

other functions have not been listed as its functions in the interim period. The significant question is as to who will decide whether to exercise these functions. It is clear that the developing countries do not want the Authority to become hostage to the decisions of the Council. The issue is whether the function of the Authority in early stage will be limited to the ones that have been enumerated in the Information Note or they should build up over time. How the Authority shall acquire the technology is another issue. Resources must be available to it, if it is to start its functions. Training Programme and the pioneers obligations for providing finances are all intended for smooth progressive build-up of the capacity of the Authority. The industrialized countries however took the position that the cost effectiveness and evolutionary approach to implementation of the Convention are the basic guidelines, and therefore it was appropriate to combine some functions or technical bodies.

The functions of the Authority in the Interim period for new applicants such as "receiving and processing any new applications, monitoring the implementations of their obligations as agreed upon by the Authority..." were discussed in detail. The need was expressed for clarity concerning the obligations of the pioneer investors and the new applicants. Some industrialized countries proposed that, taking into account the various levels of new applicants and that of the pioneer investors with regard to different stages of the activities in the Area and the investments on the study, and exploration, the Authority should recognize the principle of non-discrimination, so that no additional financial burden will be imposed on the newcomers so as to safeguard their interest in the system. A distinction can be made between two categories—registered pioneer Investors and New Applicants in the exploration of mine site. It was suggested that the Authority in the interim period should continue the functions already being carried out by the Preparatory Commission concerning the implementation of their obligations. Some delegations were of the view that the one million dollar exemption granted to pioneer investors should also be granted to new applicants until the commercial production of deep sea-bed minerals commences.

On the third day of the Informal Meeting, an anonymous draft dated 3 August 1993 was circulated consisting of a draft resolution for adoption by the General Assembly of an Agreement relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea and two annexes. The paper referred to as the "August paper" or the "boat paper" (from the sketch on the front page) was prepared by the representatives of several developed and developing States as a contribution to the process of consultations relating to outstanding issues of Part XI of the Convention.

Annex I of the paper entitled "Agreed Conclusions of the Secretary-General's consultations" has the following sub-titles: Cost to States parties and institutional arrangements; The Enterprise; Decision-making; Review Conference; Transfer of Technology; Production Policy; Economic Assistance; and Financial Terms of Contract. Annex II under the title of Consequential Adjustment, identifies those provisions of the Convention which have been modified, amended or deleted.

It was suggested that the August paper could be utilized along with the Secretariat Information Note for further constructive discussions but the Information Note will be the basic text for deliberations. The new paper's merit and substance were not discussed, but in the course of examination of the Information Note references were made by several delegations to the similar provisions of the new text. It was however noted by some developing countries that the August Paper had the privilege of being tabled by the developed countries, so at least, it indicated what they really wanted of these consultations and it required careful study and consideration by the developing countries.

A new proposal was introduced by the Delegations of France to provide for the possibility for States to have provisional membership in the Convention and the Authority for a period of five years. States which have not ratified the Convention, would thus participate and assume all duties and rights of membership, pending the process of ratification of the Convention (and the new agreement would be initiated by them). Provisional members would be required to fulfill all their obligations including financial contributions. Although this proposal was advanced orally, it received support particularly from among the developed countries. The Delegate of France stated that there is a similar provision in the GATT. Some other delegates expressed their willingness to study the new concept as a provisional arrangement prior to ratification. Consequently, the concept will be elaborated further on financial contribution aspects, decision-making and its conformity with the Law of Treaties. Such provisional membership however should not be long and it should only be acceptable if it was a process of ratification. The Chairman at the end of discussion recognised the importance of the idea of provisional membership, its technicality and inherent dangers.

The composition of the Council and Voting was the most contentious subject. The Information Note prepared by the Secretariat explains that the composition of the council

> "...shall reflect the major categories of interests and these categories shall be treated as Chambers for the purposes of decision-making".