In case voting in the Council is necessary, decisions on questions of procedure shall be taken by a majority of members present and voting and decisions on questions of substance shall be taken by a two-thirds majority of members present and voting provided that such decisions are not opposed by a majority in any one of the chambers. A special procedure for the approval of a plan of work has been envisaged to the effect that "...the Council shall approve a recommendation by the Legal and Technical Commission for approval of a plan of work unless by a two-thirds majority of its members present and voting, including a majority of members present and voting in each of the chambes of the Council, the Council decides to disapprove a plan of work".

Most of the developing countries had difficulties with the chamber system. They argued that in Article 161 of the Convention the balance of interests has been maintained. System of Chamber voting would impede the progress of the work of the Authority. This is an indication of distrust on the majority, and it might be preferable to follow the system of consensus. It was pointed out that while the Chamber system's aim is to counter the "tyranny" of the majority it applies dual standard. For instance, for the assistance to developing countries is treated as a matter of substance, while the approval of a plan of work needs special treatment guaranteeing almost automatic approval. It is however the incorporation of the veto system in the Convention which is most objectionable. The industrialized countries referring to the composition and voting of the Council as the heart of the matter, insist that decisions in Council should not be taken against the will of some concerned States and the Information Note has touched upon this concern. In their view, since decision-making in the organs of the Authority shall be based on consensus, there is no ground to regard the Chamber voting as veto system. In view of one delegation from developed country "...if we rely on the consensus, everyone can block the decision-making". Another delegation asserted that "...the principle of the common heritage of mankind is the guideline for the activities of the Authority and its organs, but in the meantime we should recognize the interests of the States, the investors, the consumers and the producers. By approving the system of chambers voting, we have incorporated a system based on the balance of the interests". In the view of the AALCC Secretariat if the chamber system is adopted it will lead to total paralysis in decision-making and only those decisions in favour of developed countries and their entities will be possible. What then will be the **content** of the common heritage of mankind.

On defining the categories of member States in the Chambers, the delegate of the USA raised the question concerning States who have not applied to be pioneer investors. It was pointed out that the 'August Paper' had

modified the provisions of Article 161, paragraph (A), in which the category (b) has provided "four members from States parties which have made investments in preparation for, and in the conduct of, activities in the Area, either directly or through their nationals." It should be noted that category (d), i.e. six members from among developing States parties, representing special interests has been deleted. The Convention provides that the special interest to be represented shall include States with large populations, States which are landlocked or geographically disadvantaged, States which are exporters of the categories of minerals to be derived from the Area, States which are potential producers of such minerals and least developed States. In the new paper the categories (d) and (e) of the Article 161, have been merged as category (d) with twenty-four members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole. Decision-making in the Council, eliminates the veto power given to the Chamber from these 24 members. In fact, contrary to the Convention, the new August paper has recognized only three major interest groups of States; the investors, the consumers and the producers.

The delegate of Cape Verde was of the view that the six members, from among developing States parties, representing special interests are not similar to other developing States. They have great interest in common heritage of mankind and therefore the provisions of the Convention regarding five categories of interests must be retained. The delegates of China and India favoured the retention of the composition as stipulated in the Convention. India stated that the decision-making by chamber system with blocking right does not facilitate the organization of the work. Indonesia rejected the chamber of four categories and insisted on the Chamber of five categories as being more democratic.

On decision-making, the August or the boat Paper, has stipulated a new formulae, in which, it is the Council which effectively makes rules and regulations and decides upon the conduct of the Enterprise. Para 3 and 10 on Decision-making read as follows:—

3. "Decisions of the Assembly on any matter for which the Council also has competence on any administrative, budgetary or financial matter shall be based on the recommendations of the Council. If the Assembly does not accept the recommendation of the Council on any matter, it shall return the matter to the Council for further consideration. The Council shall reconsider the matter in the light of the views expressed by the Assembly.

10. The Council may decide to postpone the taking of a decision in

order to facilitate further negotiations whenever it appears that all efforts at achieving consensus on the question have not been exhausted."

The Issue was raised as to whether the formulae was to give disproportionate voting power to the Council and in other words to a few States. This would be contrary to the principle of the common heritage of mankind which should not be vested within the jurisdiction of any group of States however powerful.

Relationship between the Council and the Assembly on Decision-making and the question of *renvoi* is of great importance and one of the "hard-core" issues. If the Assembly is the supreme body in the decision-making process or for the sake of consistency in that process between the Assembly and the Council, a *renvoi* should be applied in sense that if the Assembly wants to disagree with a decision of the Council, it shall send its recommendations back to the Council and the Council shall reconsider the matter in the light of the recommendations made by the Assembly. The industrialized countries have justified the *renvoi* system by the argument. Since the developing countries have two-thirds majority in the Assembly, it is necessary to establish a check and balance system. In their view if the Assembly is the supreme power, the process of negotiations amongst interests groups will be meaningless. The object of the *renvoi* is to encourage negotiations. While in principle there was no objection to *renvoi* procedure by the developing countries, they insisted that there should be the possibility to a conclusion of the process of decision taking. One should not forget that all members of the Authority are expected to fulfil in good faith the obligations assumed by them, and that the Assembly should not be a rubber stamp of the Council's decisions.

On the Economic Planning Commission and Legal and Technical Commission, the application of the principle of cost effectiveness was reiterated and one delegation even proposed that the Council may decide to decrease the size of either Commission.

The August Paper has stipulated that the functions of the Economic Planning Commission provided for in the Convention shall be performed by the Legal and Technical Commission until such time as the Council decides otherwise. Some delegations rejected the idea of combining the functions of these two commissions and argued that the Economic Planning Commission's function is to assist developing countries, while Legal and Technical Commission has a different task. The representative of the United States of America favoured the combination of the Commissions functions in one Commission or giving the mandate to the Council to decide.

The composition and functions of the Finance Committee received divergent views. On the one hand, some participants supported the idea of having a Financial Committee to consider and check all the expenditures of the Authority and make recommendations on the assessment of contributions of members to the administrative budget of the Authority. It should also draft financial rules, regulations and procedures of the various organs of the Authority and on financial management and internal administration of the Authority. On the other hand, some developing countries argued that the Finance Committee should not be empowered to take control of all the activities of the Authority. The August paper, proposes that decisions by the Council and the Assembly on many issues shall be made based on recommendations of the proposed Finance Committee. It was however pointed out by several delegations that if the operation of the Authority and its organs shall be based on the principle of cost effectiveness and evolutionary approach, it is difficult to see the need for a Finance Committee.

The August paper provides that "...the Finance Committee shall be composed of 15 members. Until the Authority is self-financing, the Committee shall include the five largest financial contributors". Some representatives preferred the provision in the Secretariat's Informal Note which gives due account to the representation of States Parties with the highest contribution to the administrative budget of the Authority.

The Information Note envisaged a very limited structure for the Enterprise whose functions in effect would be to wait and see when commercial production of deep seabed minerals becomes feasible. Thereafter, the Enterprise shall begin its operation through joint ventures, while the States parties would not be any longer under an obligation to fund a mining operation of the Enterprise. It is also stated "... the obligation of mandatory transfer of technology to the Enterprise shall not arise since the Enterprise shall begin its operations through joint ventures and is free to engage in this type of operation at any time thereafter. The availability of technology shall be a part of the joint venture arrangements." Most of the developing countries, were not satisfied with the provisions on functions assigned in the Information Note for the operations of the Enterprise or the provisions on the transfer of technology. They view this as the evolutionary emasculation of the Enterprise which commenced in the process of negotiations in the PREPCOM and continued in the informal consultations of the UN Secretary-General. The concept of Common Heritage of Mankind which was adopted by the General Assembly and the UN Convention on the Law of the Sea without dissent, in order to preserve the Area and its resources for the generations to come and to ensure that the benefits of the exploitation accrue to all mankind and in

particular to the developing countries, has dramatically changed in the new political and economic order. The Enterprise as the organ of the Authority designed to carry out activities in the Area for the benefit of mankind has been reduced to a casual body, incapable of carrying out any operation.

The delegate of Trinidad and Tobago pointed out that the form should follow the function. If the Enterprise has no function to perform there is no justification to establish it. The delegate of Indonesia criticized the provision in which, the Council shall decide upon the commencement of the functioning of the Enterprise. This in effect would mean that the Enterprise will never come into existence. Thus the achievements of the past twenty years of hard work, are going to be obliterated. He stated "...Although, we in the PREPCOM have recognized the changed situations, and incorporated them in the provisions of the rules, regulations on procedures, but at last there is no assurance that the Enterprise can survive."

The industrialized countries in response argued that the Enterprise should not be a debt burden organisation and as it is a costly one, it could be one of the main obstacles in the process of ratification for some countries. The only viable solution is the operation through joint ventures, and the Enterprise should be looked at on the basis of economic realities and market forces, not from ideological approaches. They will not subsidize the Enterprise which would result in discrimination against the other operators.

At the end of the meeting the Legal Counsel Dr. Carl August Fleischhauer, expressed the view that the talks had advanced further and hoped that in the next meeting the consultations would enter into a more precise and focussed discussion to solve specific issues. He went on to say that the deliberations took place in a very professional manner and were fruitful. The passionate exchange of views proved that the main question of divergency has to be clarified and this shows the magnitude of the work involved. He stated that there is no need for new Information Note from the Secretariat. A short and factual report of what had happened would be prepared for the delegations.

Examination of the papers (the Information Note and the August Paper) will be completed thus clearing the way for the conclusion of negotiations.

The General Assembly in its resolution 47/65 called upon States to take appropriate steps to promote universal participation in the Convention, including through dialogue aimed at addressing the issues of concern to some States.

The Secretariat of the AALCC is of the view that the Convention is one of the most significant achievements in the field of progressive development

of international law and its codification. The universality of the Convention is of great importance for the mainteance of peace, justice and progress of all peoples of the world. So it is necessary that the integral character of the Convention and related resolutions adopted therewith should be safeguarded, and applied in a manner consistent with that character, object and purpose. The Convention, including Part XI, was meticulously negotiated as a package deal by consensus and should therefore remain an integral whole. The United Nations Secretary-General's informal consultations on outstanding issues relating to the deep seabed mining provisions of the Convention have entered into a productive stage and it is expected that a face to face dialogue between the concerned States brings an accepted formula by which the Area and its resources as the common heritage of mankind would be reaffirmed.

The Secretariat of the AALCC recognises that there will be a prolonged period after the entry into force of the Convention in which there will be no deep seabed mining. This interim period will be followed by a period during which the Convention will be in force and commercial production of deep seabed minerals will commence as envisaged in Part XI of the Convention. However, Part XI is of relevance not only to the second phase, but also to the first one, that is, the interm period. The institutional arrangements in the interim period, should be based on cost-effectiveness and on an evolutionary approach. But if the Interim Regime is not effective, any cost, even the very modest one, would be a total waste. The Interim Regime must be expowered to exercise all the functions given to the Authority under the Convention, except those that it cannot exercise because of the changed situations. The transition from Interim Regime to the Definite Regime must take place smoothly in order to enable the Authority and the Enterprise to utilize and build on the experience of the Interim Regime. An "Initial Enterprise" with its hands tied and its functions limited to "monitoring developments" can never be transformed into an Enterprise that "keeps pace" with the commercial investors. In other words, if the Enterprise shall ever be able to carry out its functions in the Area, from the beginning it must work in joint venture with the pioneer investors, in exploration, in technology development and in development of human resources.

REPORT ON UN SECRETARY-GENERAL'S INFORMAL CONSULTATIONS ON SEABED MINING PROVISIONS OF THE UN CONVENTION (PART XI) ON THE LAW OF THE SEA

8—12 November 1993

As agreed at the conclusion of the Informal Consultations held from 2-6 August 1992, the continuation of these Consultations on the issues relating

to the provisions on seabed mining provisions of Part XI of the 1982 Law of the Sea Convention took place during the 48th Session of the General Assembly from the 8-12 November 1993. This was a deliberate effort to assure the widest participation, since all States were represented at the regular meetings of the General Assembly. The meetings of the Sixth Committee were suspended for that week to enable all the legal representatives to participate at the Informal Consultations.

The Consultations were inaugurated on 8th November 1993 by the Secretary-General H.E. Dr. Boutros-Boutros Ghali. In his opening remarks the Secretary -General observed that the Informal Consultations had assumed very important role due to the imminence of the entry into force of the Convention on the Law of the Sea, after its ratification by 59 Member States. During these consultations which followed previous consultations instituted by his predecessor, he pointed out that some 96 Member States have so far participated, indicating the interest of Member States to overcome difficulties experienced by some industrialised countries with Part XI of the Convention on the deep sea bed mining provisions which have so far made it difficult for them to ratify the Convention.

In his view, significant achievements have so far been made during the Informal Consultations but so far no definite results have been achieved. It was however necessary that concrete results should be achieved before the entry into force of the Convention which was expected within a period of a year.

It will be recalled that during the Informal Negotiations held in New York from 2-6 August 1993, discussions were held based on an Information Note prepared by the Secretary-General on outstanding issues. During those consultations views had been exchanged on the issues concerning the Assembly, the Council, the Economic Planning Commission, the Legal and Technical Commission and the Finance Committee in face to face negotiations. The Enterprise was also specifically addressed.

The intention therefore for the consultations held from 8-12 November 1993 was to address in the same manner the remaining issues in the Information Note which included the following—

—Transfer of Technology

—Review Conference

—Production Limitation

—Compensation Fund

—Financial Terms of Contracts

Other Negotiating Papers : The "Boat Paper"

It will be recalled that during the August discussions, an anonymous paper purported to have been prepared by representatives of several developed and developing States was circulated among the delegations as a contribution to the process of consultations. In the process of the discussions it became difficult to establish the authors of this paper which is now referred to as the "August 1993 paper" or with reference to a boat depicted on its cover page as the "Boat Paper". From its contents, however, it is clear that majority of the developing countries could not have been parties to it and were neither consulted nor support its content. The 'Boat Paper' is annexed to this report for ease of reference (Annexure B).

THE "NON-PAPER"

During the formal inauguration of the Informal Consultations, the Representative of Sierra Leone Ambassador, Abdul G. Koroma, introduced a new paper referred to as the "Non-Paper" which was said to have been prepared by the representatives of the delegations primarily from the Group of 77. The Paper underscored the difficulties of achieving the major amendments incorporated in the 'Boat Paper' representing the position of industrialised countries which would make radical changes to Part XI of the Convention. Such changes would take a long time to be negotiated with the Group of 77. In the meantime, since the Convention was about to enter into force, it was necessary to make provisional measures for the interim period before commercial exploitation of the minerals became feasible so as to avoid the existence of a vacuum during which dual regime would exist—the Convention regime and the traditional high sea freedoms regime. In his introductory statement Ambassador Koroma stated the following:—

> "The importance of the fact that 59 instruments of ratification have so far been deposited, that the Convention will enter into force in about 12 months from now, cannot be over emphasized. As stated in the preamble of the paper, the drafters are convinced that the progressive implementation of the Convention is essential for the attainment of sustainable development as envisaged by Agenda 21 of the United Nations Conference on the Environment and Development and its follow-up activities; for the unity of ocean space and for the close inter-relationship of the problems of ocean space which must be considered as a whole, necessarily requires the full participation of all States. As we all know, when the sixtieth instrument of ratification is deposited, there will be a time limit of

one year for the Convention to come into force. The broadest possible participation must, therefore, be achieved before the Convention enters into force".

It should be noted that since these consultations were held the Convention has received the sixtieth instrument of ratification on 16th of November 1993. It will therefore come into force on that date in 1994. This proposal therefore should be read in that context though it was hardly discussed during the Informal Consultations in New York. Essentially it involves the transformation of the Preparatory Commission into the implementing machinery of the Convention and allows for provisional membership of those States which have not yet ratified the Convention. As has been the case so far the cost of the Preparatory Commission would be met from the regular budget of the General Assembly. Consequently no extra expenses would be necessary for either the ratifying States or for the others. The "Non-paper" is appended to this Report as Annexure A.

Meeting of the Group of 77 prior to the commencement of the Negotiations with informal consultations

After the formal inauguration, the Group of 77 under the Chairmanship of the representative of Argentina, held a meeting to agree on its strategy, particularly with respect to the 'Boat Paper'. During these discussions, it was pointed out that the 'Boat Paper' involved very extensive amendments to the Convention and it was therefore important to have a clear understanding of all its implications if it was going to be adopted as a negotiating document. It was necessary to have a clear picture as to where the developing countries were being requested to proceed in these consultations. The 'Boat Paper' made very significant and far-reaching amendments to the Review Conference, technology transfer, production policy, with respect of which the industrialized countries had indicated their dissatisfaction. The implications of these proposed changes require very careful examination.

With respect to the Review Conference, the 1982 Convention provided for a Review Conference after 15 years subsequent to the entry into force which would consider the operation of the regime of Part XI. Significant safeguards however were introduced with respect to some fundamental principles and the Convention made provisions as to the adoption of amendments which would be accepted either by consensus or by three-fourth majority. The Secretariat paper—The Information Note—had suggested a two-third majority to be required for adoption of amendments as the Review Conference, subject to their ratification by at least 60 States and a majority in each of the Chambers envisaged in the Council. The 'Boat Paper' on the

other hand provides for total elimination of the Review Conference as unnecessary and any subsequent amendments would only be in accordance with the provisions provided in Article 314 on Amendment, Article 315 on Ratification and Article 316 on Entry into Force of such amendments.

It was also emphasised in the Group of 77 that it has always taken the position that there should be no amendments to the Convention before it comes into force and such amendments should be consistent with the provisions provided for in the Convention. Some delegations observed that the so called 'Boat Paper' would involve fundamental amendments to the Convention and if the Group of 77 was willing to accept such amendments they should carefully examine the manner and methodology of their adoption in view of the need to avoid substantive changes before the Convention enters into force. In this regard particular attention was drawn to the proposed composition of the membership of the Council and the introduction of the Chamber voting system which constitutes fundamental changes and involves the introduction of what amounts to veto power which would allow as few as three Member States in some of the proposed chambers to block any future amendments not to their liking.

Negotiations in the Informal Consultations

These negotiations were very ably chaired by the distinguished Legal Counsel Dr. C.A. Fleischhauer, the Under Secretary General. At his suggestions, the discussions systematically followed the outstanding items as outlined earlier. It should however be underscored that even though many delegations from developing countries participated in these consultations they were largely a dialogue between industrialised countries with very few delegations from developing countries taking an active part. This is an indication of the reluctance if not a rejection of the proposals currently being made particularly in the so called 'Boat Paper' and also to some extent the paper prepared by the UN Secretariat, which equally involved some very significant changes in the Convention with respect of Part XI.

Transfer of Technology

On Transfer of Technology, the developing countries were opposed to the provision of the Information Note regarding the restricted Enterprise as is the case in para 36 on joint ventures. However industrialised countries are against the mandatory transfer and would like to see only voluntary transfer and don't accept Annex III of the Convention. They also insist that the obligation of sponsoring States to co-operate with the Authority in the acquisition of technology by the Enterprise or the joint venture on fair and