

reasonable terms and conditions, if the technology in question was not available in the open market, should be deleted. They argued that since it is not the State which is the possessor of the technology such obligation is unreasonable. But what happens if the operator refuses to heed the invitation to co-operate in the transfer of technology? The argument that since the Enterprise would operate on the basis of joint ventures and thus obtain technology is unconvincing because the new proposals both in the Information Note and the "Boat Paper" don't give any advantage to the Enterprise which would attract potential viable joint venture partners.

Review Conference

With respect to Review Conference there is a provision in the Convention for review after a period of 15 years after commercial production begins. Amendments accepted therein would be by consensus or three-fourths majority intended to become binding on all States whether they ratify or not. In the Information Note two-thirds majority is required provided they are approved by the majority in each Chamber and ratified by at least sixty States. According to the "Boat Paper", Article 155 of the Convention would not be applicable and the Review Conference is ruled out. Only the provisions in Article 314 on Amendment, Article 315 on Ratification and Article 316 on Entry into Force for those who have ratified would apply. There is a basic flaw here since the jurisdiction for the present negotiations is that the economic and political climate has changed since the adoption of the Convention. Who can say what the situation will be in 30 years or so when economic exploitation becomes feasible?

In the course of discussions, it became clear that the industrialized countries preferred the amendments based on the provisions of the "Boat Paper" to that of the Information Note. While Germany supported the provisions in the Information Note, the United States saw no need for a Review Conference since there was no foreseeable commercial mining and insisted that it could not accept any provision which would provide for advance express commitment and hence preferred the provisions of the "Boat Paper" which would freeze the situation. Austria suggested that the amendments should become effective only if adopted by consensus. However this might be impossible if ratification by all States Parties was necessary. Consequently the system in the Information Note would be preferable. This however should not also rule out the possibility of Review Conference as was the case in the "Boat Paper". Canada recognised that the Authority should be given powers to hold a Review Conference if it deemed it necessary.

The developing countries who actively participated in the discussions

expressed the view that it was necessary to hold the Review Conference. China stated that the provision on the Review Conference in the Convention should be retained. The Information Note has provided different aspects including the adoption by majorities of the Council in chambers to be established which however have not been agreed upon. Such issues should thus be deferred. Trinidad and Tobago argued that the nature of such composition of Chamber voting is undemocratic and to a large extent excludes developing countries. Jamaica strongly favoured the retention of the provisions or the Review Conference procedure and rejected the Boat Paper provision which would eliminate the need for review. Any future amendments could be blocked by three States in one of the Chambers. India also evaluated the Chamber voting procedure as a provision for veto by as few as three States.

The Legal Counsel concluded that there was no common ground to reach consensus on the proposal on the Review Conference. He stated that in due course it might be necessary to assess whether such problems as suggested by the industrialized countries really existed. Indeed many Conventions including the UN Charter, FAO, WHO among others contained similar provisions on possible review. The safeguard was to take into consideration the possibility of a State withdrawing if an amendment unacceptable to it was adopted. This provided adequate safeguard against unacceptable amendments.

Production Limitations

On production Limitation Policy, the principles of non-subsidization of minerals from deep seabed and non-discrimination between minerals from land and from deep seabed and production schedule for the plan of work approved by the Authority were generally acceptable. Some suggestions were made for clarification. For instance, Argentina proposed that distinction should be made with respect to State responsibility and responsibility of the contractors for accepting subsidization. Indonesia viewed the sweeping replacement of several paragraphs of the Convention in the "Boat Paper" as unacceptable.

Compensation Fund

On the question of Compensation Fund or Economic Assistance, no agreement was reached. The Legal Counsel recognised the necessity for further negotiations on the substance. The developing countries opposed the provision of leaving the determination of the compensation or Economic Assistance to the Council and insisted that the Authority should decide the modalities. On the other hand the developed countries rejected the idea of

compensation for economic loss because of new minerals as unrealistic. They saw the compensation principle as offensive provisions to free market philosophy which should be removed. Some of these States favoured the provisions in the "Boat Paper" which give the Council the power to determine from time to time on a case by case basis, upon the recommendation of the Finance Committee on economic assistance to developing countries affected.

Financial Terms of Contract

The issue of Financial Terms of Contract was very controversial as both sides had stuck fast to their positions. The industrialized countries and the pioneer investors were determined that US \$1 million annual fee should be waived and only be required when economic exploitation becomes feasible as otherwise it would be a disincentive and an obstacle to ratification. Provision in the "Boat Paper" for breaking down the applications fee for exploration and exploitation to US \$250,000 for each stage would in their view be logical instead of the present US \$4500,000 and this would be a matter of deferment. The developing countries however were not satisfied with the logic and reasons of other side. Indonesia for instance referred to landbased mines for which the annual fixed fees were payable right from the exploration. Hence waiving the US \$1 million fees would be prejudicial. Expenses before registration should not be confused with diligence fees since they have already been rewarded by registration.

The Legal Counsel while summing up the discussions on this topic recognised the following:-

—In general on rules and regulations and procedures of contract, there was no basic disagreement.

—On the question of splitting the fees for exploration and exploitation there was also no major disagreement.

—The problem exists however in relation to annual fixed fee of US \$ 1 million and whether it refers to exploration and exploitation or whether it should be paid at all and also concerning the diligence fees and measures.

Finance Committee

On the Finance Committee as a subsidiary body anticipated by the PREPCOM, disagreements were on the composition of the Committee and its decision-making procedures. It was difficult to accept that the decision of the supreme organ such as the Council or the Assembly should only be based on recommendations of the Finance Committee. This was particularly pertinent

bearing into consideration that "...until the Authority is self-financing, the Committee shall include the five largest financial contributions."

The Legal Counsel concluded that there was basic agreement on the need for a Finance Committee but discussions had brought out various difficulties. The issue should therefore be revisited and he encouraged any group to reformulate the provision in the light of the debate.

THE 'BOAT PAPER'

A reference was made above to a paper purported to have been prepared by representatives of several developed and developing States and circulated among the delegations as a contribution to the process of consultations. A revised version of that 'Boat Paper' was circulated during the November round of the informal consultations. This section sets out the salient features of the revised text of that paper.

The "Boat Paper" comprises of a draft resolution expected to be adopted by the General Assembly, an Agreement relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea and the Annex thereto. The draft of the resolution expected to be adopted by the General Assembly comprises nine preambulatory paragraphs and five operative paragraphs. The operative part of the proposed resolution in adopting the Agreement relating to the Implementation of Part XI and related provisions of the Convention would require that future ratification or formal confirmations or accessions to the Convention on the Law of the Sea should imply acceptance of the Convention together with the Agreement. The Resolution also calls on States to act in accordance with the objectives and purposes of the Agreement.

The text of the Agreement included in the "Boat Paper" comprises of four preambulatory paragraphs and eight articles. The opening paragraph of the preamble to the Agreement recognises the contribution of the Convention on the Law of the Sea to the maintenance of peace, justice and progress for all peoples of the world. A reference is thereafter made to both the report of the Secretary-General of the United Nations on the Informal Consultations held since 1990 on outstanding issues relating to Part XI and related provisions of the Convention and note is taken of the political and economic developments affecting the implementation of the provisions of Part XI of the Convention so as to facilitate universal participation in the Convention.

The corpus of the Agreement comprising Eight Articles then goes on to deal with the following issues:

I. Implementation of Part XI (Article 1);

- II. Relationship between this Agreement and Part XI (Article 2);
- III. Accession (Article 3);
- IV. Simplified procedures (Article 4);
- V. Entry into force (Article 5);
- VI. States parties (Article 6);
- VII. Depositary (Article 7); and
- VIII. Authentic Texts and Depositary (Article 8).

The revised text of the Agreement in the Boat Paper circulated in November 1993 does not deviate from the August 1993 text of the paper except in respect of proposed Article 2 dealing with the relationship between the Agreement and the Part XI. Paragraphs 1 and 2 of the latter i.e. August 1993 text have been amalgamated and reformulated as paragraph 1 of draft article 2. It is not necessary for now to go into details of the other provisions since they involve no alteration or change from the original ideas in August 1993.

Paragraph 2 of the article 1 of the proposed Agreement entitled "Implementation of Part XI" stipulates that "The Annex forms an integral part of this Agreement". The Annex addresses itself to several key questions and issues considered during the Informal Consultations convened by the Secretary-General of the United Nations and is divided into nine sections.

A comparative reading of the provisions of the new sections of the Annex of the two texts shows that the November 1993 text has undergone several changes mostly of a drafting and syntactical nature. In section I dealing with the Costs to the States Parties and institutional arrangements, for instance, a provision has been included to provide for the competence of the Authority on acquisition of scientific knowledge and the monitoring of the development of marine technology relevant to the activities in the Area. A reading of the two text indicates that the phrase "acquisition of the scientific knowledge" has been added to the earlier text. Similarly in paragraph 6(j) of Section I the competence of the Authority to elaborate rules, regulations and procedures for exploitation has been qualified by the term "timely". Paragraph 7(a) (iii) and paragraphs 8, 10 and 11 of Section I incorporate new provisions. Amendments have also been effected to paragraph 12(b), paragraph 14(a) and paragraph 16. Paragraphs 14(b)(ii), (c), and (d) are the other fresh new provisions in this Section. Old paragraphs 14 and 4 have been deleted.

While there are no changes in paragraphs 2 and 3 in the original proposal additions and alterations have been effected in paragraphs 1,4,5 and 6. In paragraph 1 it is now stipulated that the Enterprise shall commence its functioning upon the issuance of a directive by the Council pursuant to

Article 170, paragraph 2 of the Convention. The August 1993 text had merely stated that the Council shall decide upon the Commencement of the functioning of the Enterprise. The new formulations reflect an improvement of the earlier text. Para 6 of the same section also reflects similar improvement in providing that Article 170, paragraph 4, Annex IV and other provisions of the Convention relating to the Enterprise shall be interpreted and applied in accordance with this Part. The earlier provision read "sub-section E of sub-section 4 Part XI, Annex 4 and other provisions relating to the enterprise shall be modified by this Part".

Section 3 of the Annex to the proposed Agreement dealing with decision-making appears to have been recast. By and large, barring paragraphs 7, 14 and 16 the phraseology and language of the earlier text have been retained. In paragraph 7 it has been expressly stipulated that the principle of rotation shall not apply to the two States specifically referred to in paragraph 14(a). Paragraph 14 of Section 3, deals with the composition of the Council. It is envisaged that the Council shall consist of 36 members of the Authority elected by the Assembly. Allied to the question of the composition of the Council is the issue whether the system of chamber voting in Council should extend to the category of developing States representing special interests viz. land-locked or geographically disadvantaged States, island States, States with large populations and States which are major importers of the minerals to be derived from the Area. Finally a new paragraph 15 stipulate that the "provisions of Article 161, paragraph 1 of the Convention shall not apply."

Section 4 of the Annex addressed one of the most keenly debated issues namely, Review Conference has been modified. The provision of this section has been toned down in as much as only the non applicability of the provisions of paragraphs 1, 3 and 4 of Article 155 of the Convention is expressly stipulated therein and the revised text goes on to prescribe the applicability of the principles, regime and other terms of paragraphs 2 of Article 155 and to leave unaffected the rights referred to in paragraph 5 of that Article. It is however clear that the provisions of paragraphs 2 and 5 of Article 155 would remain unaffected and applicable only where the proposed amendment of Part XI is in accordance with the provisions of Articles 314 315 and 316 of the Convention. Sub-paragraph (b) of the Section which reads "amendments shall enter into force on a date determined by the Council by a three-fourths majority of the members present and voting, including a majority of members of each chamber of the Council at that time" remain applicable. Consequently the objections made to the provision earlier remain unchanged.

The Section on Transfer of Technology dealt with in Section 5 of the

Annex provides that the transfer of technology, for the purposes of Part XI, shall be governed by the provisions of Article 144 of the Convention. The Enterprise shall take measures to obtain the technology required for its operations on the open market or through its joint venture arrangements. It also provides that if the technology is not available on the open market, the Authority may invite all or any of the contractors or their respective sponsoring State or States to cooperate with it in facilitating acquisition of technology or its joint venture on fair and reasonable commercial terms and conditions including effective *protection of intellectual property rights*. The reference to the effective protection of intellectual property rights did not appear in the August edition of the Boat Paper and is thus a new provision in so far as its proposals are concerned. The matter has of course been raised in the past and the reservations of the developing countries in respect of transfer of technology in the "Boat Paper" have already been expressed. The revised version of the Boat Paper also envisages the inclusion of an explicit provision that the stipulations of article 5 of Annex III of the Convention shall thereafter be inapplicable.

The section on Production Policy has also been revised. In substance the provisions are similar to those contained in the earlier issue of the Boat Paper. A notable exception, however, is paragraph 1(d) which now requires that the plan of work for exploitation approved by the Authority in respect of each mining area shall indicate an anticipated production schedule which shall include the estimated maximum amounts of minerals that would be produced per year under that plan of work. This section in our view is an improvement if it is intended to regulate production in the area to prevent wrecking of land based production from developing countries.

Section 7 of the Annex endeavours to find solutions to the vexing question of economic assistance to developing countries which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral, or in the volume of exports to the extent that such reduction is caused by activities in the Area. Here too the November edition of the "Boat Paper" does not substantially change from its August version.

The section on the Financial Terms of Contract proposes that the fee for processing applications for the approval of a plan of work limited to one phase, either the exploration or exploitation phase shall be US \$50,000. This reduces the said fee for processing applications by half the amount that was listed in the original version.

Finally the last Section dealing with the Finance Committee has four

provisions which may be said to differ from those incorporated in the initial issue of the Boat Paper. Paragraphs 4, 5 and 6 of this section dealing with matters relating to the membership of the proposed finance committee are new provisions. Paragraph 8 may require consideration as it envisages that the recommendations of the finance committee shall where necessary, be accompanied by a summary of the range of opinions in the Committee.

Conclusion

The UN Convention on the Law of the Sea after the sixtieth ratification on November 16, 1993 needs a period of one year before it enters into force. Hence the urgency of these consultations should persuade the industrialized countries to accommodate their interests with that of the developing countries so as to smoothen the path for the universal acceptance of the Convention. So long as their demands remain unrealistic and excessive this will not happen. A spirit of mutual understanding and cooperation and realism on all sides is necessary particularly since commercial exploitation of the area in question is not imminent. In the circumstances, as these consultations progress, it is necessary that more attention to the "Non-Paper" which offers practical solution for the interim period should be given. The time for grand standing dire threats to the viability of the Convention if only small developing countries become parties is now well over.

(NON-PAPER)

**Agreement on the implementation of Part XI
and Annexes III and IV of the United Nations
Convention on the Law of the Sea.**

The General Assembly

Recognizing the historic significance of the United Nations Convention on the Law of the Sea, 1982, (hereinafter referred to as "the Convention") as a *unique contribution to the maintenance of peace, justice and progress for all peoples of the world.*

Reaffirming the principle of the common heritage of mankind codified in that Convention;

Convinced, therefore, that the implementation and progressive development of the Law of the Sea as embodied in the Convention is essential for the attainment of sustainable development envisaged by the United Nations Conference on Environment and Development and its follow-up activities;

Aware that the problems of ocean space are closely interrelated and must be considered as a whole, and that this requires the full participation of all States whatever their stage of economic development;

Bearing in mind that the prospects of commercial exploitation or deep seabed mineral resources have receded into the future, generating an interim period between the coming into force of the Convention and the beginning of commercial seabed mining,

To this end desiring to embody the results of the consultations and negotiations organized by the Secretary-General of the United Nations in order to promote the universal acceptance of the Convention in accordance with the mandate given by the General Assembly of the United Nations.

Expresses its consent by the present resolution to adopt the Agreement contained in the Annex attached to the present resolution.

Agreement on the Establishment of an Interim Regime from the Coming into Force of the Convention to the time When Seabed Mining becomes Feasible

The General Assembly has agreed as follows:

to extend the mandate of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea (hereinafter referred to as the Commission) for the interim period from the coming into force of the Convention to the time when commercial seabed mining becomes feasible.

to authorise the Commission to exercise all the initial functions of the Authority and the Enterprise in accordance with the Convention, in an evolutionary manner, during this interim period.

to convene a review Conference at the time when commercial seabed mining is about to begin.

Ratifying States may make a declaration, in accordance with Article 310 of the Convention, that they reserve their right to denounce the Convention in accordance with Article 317, should their rights not be properly protected when seabed exploitation will commence.

A. OBJECTIVES

Article 1

1. The present Agreement shall be based for the functioning of the operations by the Commission on cost-effectiveness, taking into account the needs to discharge effectively its responsibilities.
2. The present agreement shall apply to the Area as defined in the Convention and shall translate into operational terms the principle of common heritage of mankind.
3. The present agreement shall form an integral part of the Convention and is concluded in order to facilitate the implementation of Part XI and Annexes III and IV of the Convention. Subject to this agreement the provisions of Part XI and Annexes III and IV shall apply as appropriate.
4. The present Agreement and the provisions of the Convention shall be read and interpreted together as one single instrument.

B. INSTITUTIONAL ARRANGEMENTS

**Article 2
Participation**

1. In order to give time to States and entities entitled to become parties to the Convention, such States and entities may, upon notification to the depositary of the Convention, become parties to the Convention on a provisional basis for a period not exceeding three years. After three years, such States and entities shall ratify or accede to the Convention.
2. During this period, States and entities which have become parties on a provisional basis shall fulfil all duties and obligations, and enjoy all rights of Parties to the Convention, subject to the limitations inherent to the interim nature of the regime.

**Article 3
Powers and Functions**

In accordance with Paragraph 6 of Resolution I, the Commission shall continue to have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes as adjusted to this interim regime.

**Article 4
Organs**

1. For the duration of the interim period, the plenary of the Commission shall perform the functions of the Assembly of the Authority. Each Party shall have one vote. The Rules of Procedure of the Commission shall continue to apply.
2. For the duration of the interim period, the General Committee of the Commission shall perform the functions of the Council of the Authority. Each party shall have one vote. The Rules of Procedure of the Commission shall continue to apply. Upon the coming into force of the Convention, the General Committee shall be renewed through election by the Assembly.
3. For the duration of the interim period, the Secretariat may be drawn initially from staff members of the Secretariat of the United Nations.
4. For the duration of the interim period, the Group of Technical Experts and the Training Panel established by the Commission, shall perform the functions of the Economic Planning Commission and the Legal and