Some preliminary remarks

-- summary of longer paper, to be discussed with some delegations before being distributed. Action-oriented, not abstract, Time constraint. Paper will be distributed before next session, to this I shall return at end of my remarks.

--original goals and purposes of JEFERAD remain unchanged. Not necessarily in order of importance these are:

expeditious implementation of para. 12 of Res.II;

to ensure early entry of Enterprise into effective operation;

- to make the Prep.Com. immediately and visibly useful to the international community;

- to be action oriented: oriented toward action NOW, becaue it is only if we focus on the present that we can begin to implement para.12: training, technology development and exploration. In this connection I want to stress a fact often overlooked: We may have different concepts of the immediate economic interest or profitability of deep seabed mining and the time at which it will come into being commercially. But there can be no doubt about the importance of deep-sea exploration and the research and development of the required technologies. That is going on. That will go on. These technologies belong to the group of technologies characterizing the new phase of the industrial revolution. Need of getting developing countries into these developments.

And this leads me to the final purpose of JEFERAD: You cannot open a technical journal nowadays without finding a piece on the high cost of R&D in high technology and the need for international cooperation in this field, whether that is micro electronics, laser, satellite, the bio industries, or deepsea technologies. There eists indeed already a growing number of cooperative projects in these fields. The trouble is only that almost all of this type of international cooperation is North-North. The South is left behind. Here we have an opportunity to establish such a venture North-South, and no sector could be more approprite for that than that of the technologies required to explore and exploit the common heritage of mankind.

So this was, and remains the inspiration behind JEFERAD.

Two more preliminary remarks:

Our paper is based on a scenario in which only those pioneers whose claims are noncontroversial, there being no overlapping claims, are registered, and registered without delay. This, as we heard during the first days of this session, is in line with the policy adopted by the Group of 77. We opted for this scenario for the following reason:

Cables : 'LEGCOM' NEW DELHI

ASIAN-AFRICAN LEGAL
CONSULTATIVE COMMITTEE
27, RING ROAD, LAJPAT NAGAR-IV,
NEW DELHI - 110024
(INDIA)

July 25, 1985

No. 6(9)/85

Dear Mme Borgese,

I would like to thank you most warmly for your letter of the 7th July and for sharing with me your thoughts and ideas about the future of the international Sea-bed Regime. I would also like to thank you for sending me a copy of your letter dated July 1st, 1984 which unfortunately I had not received earlier.

I must confess, I have been a bit out of touch with the work of the PREPCOM since August last year since the matter has been handled by some of my colleagues. The paper which we had presented last year on the JEFERAD proposal was simply to raise some points which we thought the governments needed to consider; it did not necessarily reflect our final position in the matter and I would be happy to discuss the matter further. Unfortunately it would not be possible for me to go to Geneva in August as I am rather tied-up with the preparation of some studies for the Fortieth Anniversary of the United Nations. I would therefore suggest that we discuss the matter a little later in the light of the reactions that may be forthcoming on your more detailed memorandum at the Geneva colloquium at the beginning of the resumed PREPCOM Session.

I expect to be in New York for the General Assembly Session from the 10th of September until the end of the month and then again at the end of November until the conclusion of the Session. Perhaps we could find a suitable opportunity to meet during that period.

With kind regards,

Yours sincerely

(B. Sen)
Secretary General

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ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE SECRETARIAT

M E M O R A N D U M

Subject: - Austrian proposal before the Preparatory Commission for the International Sea Bed Authority.

We have examined the proposal of Austria for establishment of a Joint Enterprise for Exploration, Research and Development in the Ocean Mining (LOS/PCM/SCN. II/L-II) presented before the Special Commission II at the Second Session of the Preparatory Commission in March 1984. The objective behind the proposal, it is stated, is to facilitate preparing for the Enterprise to go into mining activities soon after the Convention on the Law of the Sea comes into force, a task which is entrusted to the PREPCOM. The proposal proceeds on the basis that under Resolution I, the Special Commission, established pursuant to paragraph 8, is to take all measures necessary for the early entry into effective operation of the Enterprise and that the PREPCOM has the necessary legal capacity for the exercise of its functions in relation thereto.

The proposal conceives of an entity being formed as a joint venture in which the PREPCOM shall hold 51% of the share capital; the other partners being states signatories to the Convention or entities whose components are natural or juridical persons possessing the nationality of one or more such states. It is suggested that the joint venture partnership shall inter alia, carry on the task of exploration of the reserved areas including deposit evaluation, undertake research and development in mining technology, transport and processing, and organise training programmes and

establish a technology bank. It is also suggested that the joint venture shall present a plan of work for undertaking exploitation of a reserved area and be given priority for the purpose. It is further suggested that the share capital of the PREPCOM should come by way of voluntary countributions from various sources since the Commission has to borrowing powers. The proposal finally suggests the establishment of a group of experts to work out the details of the proposed scheme.

The purpose of this note is to examine the feasibility of the proposal purely from a legal standpoint without expressing any opinion on its merits. In doing so, it is necessary at the outset to discuss the powers and functions as also the scope of the activities which the PREPCOM is authorised to undertake.

In the first place, it may be mentioned that unlike a Conference of Plenipotentiaries, the PREPCOM does not have any plenary powers; it is a creature of a Resolution and its powers and functions are limited to those specified therein. The PREPCOM has accordingly to function within the framework of Resolutions I and II in conformity with the provisions of Part XI of the Convention. In this connection, it is to be stated that the PREPCOM by its very nature does not have the necessary characteristics of an organisation - it is a body composed of representatives of states signatory to the Convention which is to undertake certain functions over a limited period of time; its functions come to an end with the entry into force of the Convention for certain purposes and until the convening of the first meeting of the Assembly for some other purposes.

The work entrusted to the PREPCOM broadly fall in three categories, namely, (i) the normal preparatory work for the Authority including preparation of draft rules and regulations, making of recommendations for the Authority's Budget for the first financial year etc. (Para 5, Clauses (a) to (g)); (ii) powers and functions assigned under Resolution II relating to preparatory investments (para 5(h)) ; and (iii) undertaking of studies on problems of land-based producer states (para 5(i)). Closely connected with the above is the preparatory work for the Enterprise for which the PREPCOM is required to establish a Special Commission in terms of paragraph 8 of Resolution I. Under this provision, the Special Commission is to be entrusted with the functions referred to in paragraph 12 of Resolution II on preparatory investments; the Special Commission is also to take "all measures necessary for the entry into effective operation of the Enterprise."

Paragraph 12 of Resolution II sets out certain obligations placed upon every registered pioneer investor 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 the States and other entities. The obligation of a registered pioneer investor in this respect include carrying out exploration at the request of the Commission in the reserved area which it had offered in terms of paragraph 3 of Resolution II and also to provide training at all levels for personnel designated by the Commission coupled with an undertaking in the matter of transfer of technology. It is presumed that in relation to paragraph 12 of Resolution II, the Special Commission on Enterprise, established by PREPCOM, would need to decide upon the question whether or not to

request a pioneer investor to explore a reserved area and also to designate personnel for the purpose of training. It is however not clear what other matters the Special Commission would have to deal with under paragraph 8 of Resolution I as "taking all measures necessary for the entry into effective operation of the Enterprise". The matter can be put, as the language goes, on a very wide spectrum but in our view the expression "all measures necessary" must be read consistent with the character of the PREPCOM as a preparatory body and taking into account the broad framework of Part XI of the Convention and the texts of Resolutions I and II as a whole. It is also to be appreciated that the Special Commission being a body established by the PREPCOM its powers and functions cannot travel beyond what the PREPCOM itself could be authorised to do.

In so far as the Convention is concerned, all activities in the Area are to be organised, carried out and controlled by the Authority in accordance with Article 153 and other relevant provisions of Part XI, the Annexes as also the rules, regulations and procedures of the Authority. Such activities are to be carried out (a) by the Enterprise and (b) by States Parties or entities sponsored by them. The Enterprise is the commercial arm of the Authority to carry out activities in the Area and also to undertake such activities as transporting, processing and marketing of minerals recovered from the Area. According to the scheme incorporated in Annex III, it is envisaged that after the coming into force of the Convention, the Authority would award contracts to states parties or entities sponsored by them for activities in relation to specific areas and through that process certain reserved areas would come into existence for undertaking of

activities by the Enterprise. The Enterprise itself is to come into existence upon the entry into force of the Convention and it would then exercise its powers and functions in accordance with its statute set forth in Annex IV to the Convention. Article 11 of Annex IV deals with the finances of the Enterprise whilst Article 12 contains provisions on the operations to be undertaken by the Enterprise including awarding of contracts and entering into joint venture arrangements.

In the normal circumstances, the PREPCOM's powers would have been limited to such preparatory work as are indicated in clauses (a) to (g) of paragraph 5 of Resolution I so as to prepare for the Authority including its various organs to commence their functions upon the entry into force of the Convention. A departure from the normal practice on the functions of a Preparatory Commission has been made through adoption of Resolution II which vests in it certain additional functions such as registration of pioneer investors and allotment of certain areas to them for pioneer operations. Through this process some reserved areas are to come into existence to be available for the future operations of the Enterprise, and certain exploratory work to be undertaken in relation to such reserved areas and other assistance to be rendered for the future benefit of the Enterprise by pioneer investors also finds place in Resolution II. The PREPCOM is given certain supervisory functions (to be exercised by the Special Commission) in relation to such matters but apart from that there is no indication as to what would include within the expression "taking all measures necessary for early entry into effective operation of the Enterprise."

In one possible view of the matter, it could take in an entire range of activities beginning with the provisional selection of its staff and extending upto provisional arrangements for processing and marketing etc., taking in also such matters as selection of reserved areas, exploration of such areas, arranging for technology, finance and a host of other things. Another possible view may be that in the context of Resolutions I & II the functions of the Special Commission are far more limited and extends only to such matters as are indicated in Resolution II and matters analogous thereto. It is obvious that whatever interpretation one adopts, the PREPCOM cannot take any decision or make recommendations of a binding nature to the Enterprise on matters which the Enterprise is to decide for itself when it comes into existence. No such competence can be spelt out of the two resolutions.

We are inclined to favour the narrower interpretation as in our view Resolution II gives an indication of the type of preparatory work which the PREPCOM was expected to undertake. In fact, the stated purpose of Resolution II itself is to prepare for the Enterprise. The Preamble sets out as one of the objectives to be "the need to ensure that the Enterprise will be provided with funds, technology and expertise necessary to enable it to keep pace with the states and other entities". Therefore the type of preparatory work which can reasonably be said to be contemplated under paragraph 8 of Resolution I would, in our view, be related to exploration of the reserved areas, arranging for training through pioneer investors and obtaining of undertakings from pioneer investors in regard to transfer of technology. It may be possible to say that in such an interpretation full effect is not being given to the last sentence of paragraph 8 and that the interpreation we are

placing could have been achieved through the first sentence of the paragraph alone. This is true to a point but one of the considerations which has prompted us to choose the narrow interpretation is the fact that if the Conference had intended the PREPCOM to undertake work of a wider magnitude than what is contemplated in Resolution II, it would have clearly provided for appropriate financial arrangements. The question of finances for the PREPCOM had been in perspective and there are two provisions in Resolution I, namely, paragraphs 14 and 15 as also one provision in Resolution II, namely, paragraph 7 clauses (a) and (b) which deal with financial questions. We are also of the view that the scheme of Resolutions I & II taken together with the Convention is that the decisions concerning the activities in the area including those by the Enterprise are to be taken by the competent organs of the Authority after the Convention comes into force - the only exception being that the PREPCOM is authorised to take certain decisions in regard to matters specifically covered by Resolution II.

The proposal for establishment of JEFERAD, in its present form, would not, in our view, seem to fit in to the context of Resolutions I and II read with the Convention. Even on a wider interpretation of para 8 of Resolution I, several provisions of the proposal will be in conflict with the provisions of the Convention and Resolution II. The reasons for our conclusion are as follows:-

(a) It is doubtful whether the PREPCOM, a body composed of representatives of states parties established under a resolution for a temporary period would be competent to enter into joint venture arrangements with states and other entities unless such power is

specifically given. A joint venture, whether of a contractual nature or through equity participation, falls within the domain of private law governed by municipal systems. An organisation can enter into such transactions by virtue of the power given to it in its constitution and that is recognised practically in all municipal systems. The same is the case with governments and public undertakings but here again the power to enter into contracts is provided in the constitutions or the charter establishing the undertakings, as the case may be. The powers given to the PREPCOM under Resolution II are of a public law nature analogous to the executive functions exercisable by a government. There would appear tobe no provision in Resolution II to support any capacity to enter into contracts. Paragraph 6 of Resolution I cannot take the matter any further.

(b) It is doubtful whether an entity, except one whose composition is limited to pioneer investors, can be allowed access to reserved areas for the purposes of exploration, research and development by the PREPCOM having regard to the provisions of Resolution II. This is particularly so in the light of the provision of confidentiality in relation to information and data.

(c) The provision concerning the contribution of share capital by PREPCOM is unrealistic. The Commission has no powers to borrow and in our view it would not be competent to receive any funds beyond what is provided for in Resolutions I & II. We consider that it would not be permissible for the PREPCOM to raise

the share capital by way of donations nor to allow any party to provide the share capital on its behalf even if such funds were forthcoming.

(d) It is doubtful whether research and development in mining technology, transport and processing, establishment of technology bank and testing of mining systems are directly within the functions of the Commission. Having regard to the overall objectives, however, the Commission could perhaps encourage such activities as long as it does not involve any financial commitments on the part of the PREPCOM or access to a reserved area by parties other than the pioneer investor or to giving of any assurance regarding any finances or use of technology by the Enterprise.

(e) Training is intended to be provided through pioneer investors under para 12 of Resolution II. Nevertheless, the Commission can encourage training programmes as long as it does not involve any financial commitments on the part of the PREPCOM or access to a reserved area by parties other than pioneer investors or to giving of any assurance on behalf of the Enterprise.

(f) It appears to be the intention that JEFERAD may wish to present a plan of work for a reserved area and that it should be accorded priority in respect thereof. This would seem to militate against the provisions of the Convention since the plan of work in respect of a reserved area has to be submitted by the Enterprise. It is possible that

the Enterprise, when it comes into being, may decide to give a contract to JEFERAD and adopt its plan of work as its own, but the PREPCOM is not entitled to give any assurance to JEFERAD in this regard and much less about any priority to be accorded.

It would indeed appear from the explanatory statements that the proponents of the scheme for JEFERAD were aware that it may not come squarely within the purview of the functions of the Commission as expressly spelt out and resort therefore had been taken to what could be called as the unwritten functions of the PREPCOM in the light of later developments. Some of the premise on which the arguments in favour of the scheme have been built would however need to be examined.

For example, it is stated that the recent scientific developments have shifted the focus of attention from manganese nodules to other mineral deposits available in the ocean bed. Mention is made in this connection of the poly-metallic sulphides which has been discovered off the north-west coasts of United States and British Columbia, in the region of Juan de Fuca Ridge, in the areas between Hawaiian islands and Samoa, in the Seamount north-west of Palmyra, Atoll and Kingman Reef (U.S. territorial possessions) and in some other areas of the Pacific Ocean. These deposits are said to be rich in cobalt, nickel and manganese. It is also stated that a process to recover silver (97%), zinc (99%) and copper (78%) from these sulphides had already been developed by the U.S. Department of Mines. According to the explanatory note, these developments create a totally new context for seabed mining and that had such information been available to the Conference, Part XI of the Convention would have been different. It therefore calls for making

suitable adjustments of the provisions of the Convention taking into account these new developments.

In the first place, it is to be stated that any revision of the Convention is not within the competence of the PREPCOM. Furthermore, it may be mentioned that the discoveries of polymetallic sulphides was not altogether unexpected. Ocean exploration and scientific research have been going on for long and as the explanatory note says, new discoveries are announced practically every month. This can not mean that the Convention would need modification and amendment each time a new discovery is made. In fact, the Law of the Sea Conference has been conscious of the scientific developments and discoveries, and have not restricted the provisions of Part XI and the relevant annexes to polymetallic resources only in the shape of manganese oxide nodules.

The term polymetallic nodules has been defined in Resolution II as ".... 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". In other words, not only the oxides and sulphides but also all other resources which contain manganese, nickel, cobalt and copper are covered under this definition. It may be recalled that the policies governing the Area as stipulated in Article 150 of the Convention also covers all resources of the Area and not merely the plymetallic oxides. The production control limitations set out in Article 151 are also based on recovery of metals from any polymetallic nodules. Furthermore, according to paragraph 9 of Article 151, "the Authority shall have the power to limit the level of production of minerals from the Area, other than minerals

from polymetallic nodules....." These provisions clearly show that the discovery of polymetallic sulphides have not created a "totally new context".

It must also be mentioned here that the areas where the polymetallic sulphides have been discovered so far are mostly within the Exclusive Economic Zone of the United States or its territorial possessions. In the area between Hawaiian islands and Samoa which is the international area, only preliminary investigations have been carried out so far and these have revealed existence of deposits rich in nickel, cobalt, and manganese. There are many other areas of the ocean, such as the southern margin of equatorial Pacific, the Aitutaki Passage as well as the Samoan basin and northern sector of the South Western Pacific basin or the Eastern sector of South West Pacific lat 42^{0}S etc. which are rich in polymetallic oxide nodules but are not commercially viable in terms of density, concentration and weather conditions given the present technology. In fact, the only area in the Pacific other than the Clarion-Clipperton Fracture Zone which can be termed as a potential area for exploitation appears to be the Peru Basin. Mere discovery of polymetallic resources in newer areas of the ocean cannot be said to create situations which call for modifications of the Convention.

The explanatory note also states that the polymetallic nodules (whether oxides or sulphides) in many regions are not necessarily concentrated in the international area and are found in areas under national jurisdictions, and further that many deposits may straddle national boundaries or boundaries between areas under national jurisdiction and the international area. Available scientific information shows that the only areas where polymetallic concentrations

occur within the exclusive economic zones are in the case of France (around Clipperton island), Mexico (around Clarion island) and USA (around the Hawaiian archipelago, Florida and South Carolina Coast). Even assuming that the nodules straddle across boundaries with different legal regimes, it is possible to work within the framework of the Convention itself. In any event, the concept of EEZ has already crystallised and nearly 100 states have enacted legislations on EEZ.

Further it is stated that the projections on the economics of seabed mining made during the seventies are no longer accurate in view of the deep protracted recession over the last decade or so. This economic recession is said to be one of the main factors which has dampened the enthusiasm of most seabed miners exhibited in the early seventies. Whilst this may be true to a certain extent, another reason why some of the potential seabed miners (especially the MNCs) have cut down their expenditure on research and development relating to seabed mining is probably due to the uncertainty of the legal regime under which they may have to operate.

II Some suggestions

Even though the proposal for JEFERAD in its present form and structure might be difficult to accept for the reasons already stated, it is felt that some of the ideas which underlie the proposal could be given some further thought and concretised in a fashion that would be in consonance with the practical realities of the situation but at the same time not derogate from any of the provisions of the Convention or Resolutions I and II. The main objectives underlying the proposal namely, (i) exploration of the reserved

areas; (ii) research and development in relation to polymetallic nodules; (iii) arranging of training programmes; (iv) research and preparatory work concerning mining equipment as also work related to subsequent stages of processing, transport and marketing, may be considered in this context in order to find ways and means through which it might be possible to achieve these objectives.

In the practical realities of the situation, it is fairly obvious that when the Enterprise comes into being, upon the entry into force of the Convention, it is not likely to be in a position to undertake operations in the reserved areas by itself. All that it is likely to have at its disposal when it comes into being would be the availability of some reserved areas with the possibility of their having been explored, some personnel trained upto certain stages of mining activity, a promise concerning transfer of technology and the possibility of obtaining some funds towards the costs of an integrated project. It does not need much labouring to make the point that these are by no means sufficient for the Enterprise to commence operations. It would be logical to conclude that the Enterprise is most likely to fall back on its powers either to enter into joint arrangements with some contractor or other or to farm out specific sectors of its activity to independent contractors on what may appear to be the best negotiated bargain. It is possible that in relation to mining activities in the reserved areas, the choice for co-operative arrangements may have to fall as between the pioneer investors or a combination of them, having regard to the scheme of Part XI of the Convention, Annex III and Resolution II. But there would appear to be no reason for any

restriction in the matter of choice in regard to other matters such as processing, transport or marketing or any preparatory work in relation thereto.

Even though the decision in regard to the choice of partners or contractors with whom arrangements for the operation of the Enterprise may be made must rest with the Enterprise when it comes into being and no advance commitment can be made in respect thereof by the Preparatory Commission or any other body, it is obvious that the existence of an organisation capable of assisting the Enterprise in one or more sectors of operation is bound to be availed of from a practical stand point. Furthermore, it may be possible for the PREPCOM to mention in its Report of the existence of such an organisation and the preparatory work undertaken by it for consideration of the Authority. It is also to be mentioned that having regard to the extremely high costs of any activity connected with seabed mining and the research and development in relation thereof, many entrepreneurs, whether states or corporations, may welcome the idea of a joint effort in a co-operative fashion to undertake such tasks particularly in the developmental stage. It is in this context that the formulation of a scheme may be conceived of but it has to proceed from an angle that would project backwards from the stage of the Enterprise coming into being rather than the method employed in the present proposal involving the PREPCOM with an organisation and projecting its activities to the future.

Let us now examine a possible framework from this view point which will be an integrated scheme undertaken on commercial lines that would receive some form of recognition from the PREPCOM but with no direct participation financial or

otherwise. Such a scheme might conceive of the following:

1. A registered partnership may be formed or a company incorporated under the appropriate laws of Jamaica or any country where the conditions are considered favourable for incorporation of an entity having international components, such as Bermuda or the Bahamas. The partnership shall be composed of by two or more pioneer investors whether states or entities. In the event of a joint stock company being formed, it should be in the nature of a private company with the share capital subscribed by two or more pioneer investors as in the case of partnership. The possibility of admission of other pioneer investors in the partnership or the private company may be kept in perspective.

2. The partnership or the company may at an appropriate stage enlarge itself by admission of states or entities other than pioneer investors.

3. The partnership or the company so formed shall be the parent organ which may carry out certain functions on its own and promote subsidiaries for undertaking certain other functions.

4. Each subsidiary shall be a company incorporated under the laws of a country that may be deemed appropriate. Its share capital may be subscribed to the extent of 51 per cent by the parent company or partnership, the balance being made available for public subscription.

5. The parent organ (partnership or company) shall be authorised to undertake under the partnership deed or the memorandum and articles of association, as the case may be, activities concerning exploration of reserved areas and to organise directly or through subsidiaries of such matters as training programmes, research and development as also

work in relation to processing, transport and marketing. The partnership deed or the memorandum of association would naturally be as wide in terms as possible. Similarly in the case of subsidiaries the memorandum and the articles of association shall spell out the activities to be undertaken by the entity. However, both in relation to the parent organ and the subsidiaries, care has to be taken to ensure that the memorandum or articles do not authorise any access to the reserved areas or data or information in relation thereof other than in conformity with the provisions of the Convention and Resolution II.

6. The finances required for the activities of the parent organ as also the subsidiaries would need to come through normal commercial sources or from states or the undertakings in the shape of borrowings as may be worked out in the usual course of business.

7. When the partnership or company to serve as the parent organ has been formed with the participation of pioneer investors it may bring that fact to the notice of the Preparatory Commission as being an effort on the part of the pioneer investors concerned to pool their resources and expertise for discharge of the functions under paragraph 12, clauses (a) and (b) of Resolution II. The PREPCOM may at its option agree to the obligations of the pioneer investors, parties to the arrangement, to be performed by the partnership or the company on their behalf, the same acting basically as the agent on behalf of the pioneer investors who had formed the partnership or the company. In that event the costs for the exploration would be reimbursed to the partnership or the company, as the case may be. In regard to the training programme contemplated under para 12(b) of Resolution II,

it is conceivable that the partnership or the company will arrange for the training programmes on behalf of the pioneer investors concerned and may for that purpose avail of facilities of existing institutions such as I.O.I. or any other institution which might offer suitable training facilities approved by the PREPCOM.

8. The parent organ or its subsidiaries, in undertaking any activity in research, development or designing of equipment as also in preparing themselves for activities connected with processing or transport, would have to do so at their own risk and costs. Nevertheless, in the practical realities of the situation it is conceivable that such efforts might fructify in award of contracts from the Enterprise in relation to its activities in the reserved areas. Even though the PREPCOM could neither make any commitment nor give any assurances in this regard, it may be possible for the PREPCOM to mention in its final Report under para 11 of Resolution I the state of preparatory work undertaken and accomplished by the parent organ and its subsidiaries.

9. Having regard to the functions entrusted to the PREPCOM in the preparations for the Enterprise, it may be possible to suggest that the PREPCOM consider establishment of a Committee to oversee the fulfilment of the objectives under para 12 of Resolution II. Some thought may be given to the possibility of the Committee being composed of representatives of pioneer investors together with an equal number of members chosen by the Special Commission representing other signatory states, the Chairman of the Committee being the Chairman of the Special Commission on the Enterprise or in his absence a vice-Chairman. This is in the light of the close involvement of pioneer investors in the

preparations for the Enterprise as envisaged in Resolution II. Such a Committee could oversee the programmes of exploration of reserved areas, approve of and supervise training programmes under para 12 of Resolution II. It could also examine the work of the entities contemplated in this scheme with a view to their activities being included in the PREPCOM's final Report under para 11 of Resolution I.

By way of explanation, it may be stated that the above scheme takes into account the objectives and purposes behind the Austrian proposal in promoting collective effort towards research and development of sea-bed technology as also in preparing for the Enterprise. But the approach in the scheme is somewhat different in retaining the primary role with pioneer investors in conformity with the provisions, objectives and purposes of Resolution II. It postulates two or more pioneer investors pooling their resources and expertise for meeting their obligations in conformity with Resolution II concerning exploration of reserved areas and the training programme. It also envisages that pioneer investors could collaborate in research, development of mining technology and designing of equipment as also in preparing themselves in processing and transport. Participation of other states or entities in activities other than exploration of reserved areas is also contemplated by providing that 49 per cent of the share capital of the subsidiary companies, through which such activities would be carried on, would be open for public subscription.

What is stated above is in the nature of preliminary thinking and these could be elaborated further in the light of reactions from the proponents of the Austrian proposal before the PREPCOM.

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(1) $lc_{pr} \approx\Rightarrow$ activity$_{pr}$

(2) if activity$_{pr} > lc_{pr}$

then

activity$_{pr} \Rightarrow lc_{pr_{0-1}}$ (+ & $E_{1\to 0}$)

& $lc_{pr_0} \approx$ activity$_{pr_0}$

$= \frac{cr+c}{r} = \frac{c(r+1)}{r}$

$\left(c+\frac{c}{r}\right) + \left(\frac{c+\frac{c}{r}}{r}\right) =$

$\frac{cr+c}{r^2} = \frac{c(r+1)}{r^2}$

$\frac{cr+c}{r} = \frac{c(r+1)}{r} + \frac{c(r+1)}{r^2} =$

$\frac{c(r+1)}{r^n} +$

$\frac{c(r+1)}{r} + \frac{c(r+1)}{r^2}$

$= \frac{cr(r+1)+c(r+1)}{r^2}$

$= c[(r+1)+r+1$

$= \left(\frac{2c(r+1)}{r^2}\right) + \frac{2c(r+1)}{r^3}$

$= \frac{2cr(r+1+2c(r+1}{r^3}$

Mr. Chairman, there is only one point we want to stress today.

The Delegation of Austria views tese recent developments with profound regret and deep concern. The regime prescribed by Resolution II is, in a wy, a trial run for the future regime of the Authority. If the Resolution-II regime is not workable, the Authority regime is unworkable as well. If the Authority regime is unworkable, let us not establish the Authority. If we do not want to establish the Authority, let us not bring the Convention into force. This reasoning does not make a wrinkle. It should be aded that if the Resolution-II regime is not enacted and if the Convention does not come into force, the "Provisionl Understanding" constitutes the only valid international agreement in force with regard to sea-bed mining.

It is therefore absolutely essential that registration should proceed with minimum delay.

This means, first of all, that the rules and regulations for registration should be completed. We can see no reason why this work cannot be done immediately and without delay.

Secondly we do not think that negotiations to achieve the early registration of all Pioneer Investors would in any way be ~~affected~~ impaired if, to begin with, and to establish a fact, the Prep.Com. could register, in accordance with Resolution II, any claim that was noncontroversial. On the contrary, the establishment of such a fact might create a basis on which it would be easier to negotiate the issues presently blocking registration of all pioneers.

Confidential

Draft

DELEGATION OF AUSTRIA

WORKING PAPER 3

JOINT ENTERPRISE FOR EXPLORATION, RESEARCH AND DEVELOPMENT

(JEFERAD)

PREP.COM., RESUMED THIRD SESSION

Geneva, August 12, 1985

INTRODUCTION

1. During the Spring, 1985, session of the Prep.Com. numerous references were made to the Austrian proposal for the establishment of a Joint Enterprise for Exploration, Research and Development (JEFERAD), particularly in the context of the discussion on training. A number of Delegations expressed strong support for the Austrian proposal; others voiced criticism and concern.

2. Since the Spring Session, perspectives, once more, have been changing. It is the purpose of this paper to look at the proposal in the light of changing circumstances.

3. The JEFERAD proposal assumed a scenario in which all four Pioneer Investors should have registered their claims; the regime prescribed by Resolution II would have been in force; and Paragraph 12 of that Resolution had to be implemented. JEFERAD should have been the operational arm of the Prep.Com.: the most efficient instrument for the implementation of that paragraph. JEFERAD should have given reality, from the outset, to a parallel system in which the

Pioneer Investors should have been a pre-incarnation of the "Contractors" under the Convention, JEFERAD, a pre-incarnation of the Enterprise; and the Prep.Com, a pre-incarnation of the Authority. The proposal was based on the conviction that such an arrangement would indeed be necessary to ensure the early entry into effective operation of the Enterprise; that it would be equally beneficial to the Enterprise, to developing countries and to industrialized countries and their companies. It was founded on a wide interpretation of Resolution II, in the sense that the Prep.Com., having the legal capacity necessary for the exercise of its functions and the fulfilment of its purposes, was empowered to take all measures necessary for the early entry into effective operation of the Enterprise, and if the establishment of JEFERAD was one of such necessary measures, the Prepcom was competent to establish it.

4. In the light of developments since the last session, ~~it appears unlikely that the claims of~~ there is little hope that the four Pioneer Investors ~~can be registered this year or even next year or during the expected life time of the Prep.Com.~~

5. The Delegation of Austria views these developments with deep concern. The regime prescribed by Resolution II is, in a way, a trial run for the future regime of the Authority. If the the Resolution II regime is not workable, the Authority regime is unworkable as well. If the Authority regime is unworkable, let us not establish the Authority. If we do not want to establish the Authority, let us not bring the Convention into force. This reasoning does not make a wrinkle. It should be added that if the Resolution II regime is not enacted and if the Convention does not come into force, the "Provisional Understanding" between the seven industrialized States constitutes the only valid international agreement in force with regard to sea-bed mining.

6. Clearly this is a situation that must be avoided. If ~~it is impossible to register the claims~~ of the four Pioneer

Investors, ~~an alternative strategy will have to be devised to bring the~~ regime prescribed by Resolution II into force as the only legitimate regime, solemnly adopted by 159 members of the international community, for the exploration of the Common Heritage of Mankind and the research and development required for its exploitation, once the Convention comes into force.

7. ~~This Commission of sovereign States has decided by consensus that the registration of the claims of all four Pioneer Investors should take place simultaneously. This was a decision of a tactical nature, intended to make things fair and easy. Now the situation has changed. There is nothing that could prevent this Commission of sovereign States from taking a further decision, adjusting its tactics to the changed situation. Today the priority would appear to be the registration of at least one Pioneer, to get the system going.~~

8. The scenario for this study is based on the assumption that one Pioneer Investor has registered his claim, which is noncontroversial, there being no overlapping claims from any other party. This would have certain clear-cut advantages both for the Prep.Com. and for the Pioneer Investors. It would be a great practical learning experience, in a relatively simplified situation. Questions such as the assessment of the equal commercial value of the two mine sites prospected by the Pioneer Investor, confidentiality, transfer of technology, etc., would be experienced in practice and could be perfected in the process.

9. In accordance with Resolution II, one site will have accrued to the Commission, in this scenario, for exploration for the benefit of the Enterprise.

10. It ~~is~~ would be now our task to

(1) ensure the early entry into effective operation of the Enterprise;

(2) benefit participating parties, whether developing or industrialized;

(3) implement paragraph 12 of Resolution II;

(4) strictly keep within the terms of reference of the Convention and of Resolutions I and II.

THE AALCC MEMORANDUM

11. Last year, the Asian-African Consultative Committee Secretariat (AALCC) proposed an alternative mode of establishment for JEFERAD in a Memorandum on the Austrian proposal before the Preparatory Commission for the International Sea-Bed Authority. While approving the aims and purposes of the JEFERAD proposal, the Memorandum questioned the legal competence of the Commission to initiate an undertaking of this sort.

12. As a working alternative the Memorandum suggested

(a) that a "registered partnership" (JEFERAD) be formed or a company incorporated under the appropriate laws of Jamaica or any country. The partnership shall be composed of two or more Pioneer Investors whether States or entities. In the event of a joint stock company being formed, it should be in the nature of a private company with the share capital subscribed by two or more Pioneer Investors as in the case of partnership. The possibility of admission of other Pioneer Investors in the partnership of the private company may be kept in perspective.

(b) The partnership or the company may at an appropriate stage enlarge itself by admission of States or entities other than Pioneer Investors. There follow, in the AALCC Memorandum, some points about the establishment of subsidiaries, which, for the moment, we shall leave aside.

(c) The next salient point is that this partnership or

company shall be authorised to undertake activities concerning exploration of reserved areas and to organise directly or through subsidiaries such matters as training programmes, research and development and also work in relation to processing, transport and marketing. The partnership deed or the memorandum of association would naturally be as wide in terms as possible. However, care has to be taken that the memorandum or articles do not authorise any access to the reserved areas or data or information in relation thereof other than in conformity with the provisions of the Convention and Resolution II.

(d) As to the mode of financing, the AALCC Memorandum suggests that the finances required for the activities of this undertaking would need to come through normal commercial sources or from States or the undertakings in the shape of borrowings as may be worked out in the usual course of business.

(e) Once this partnership has been established with the participation of Pioneer Investors, it may bring that fact to the notice of the Preparatory Commission as being an effort on the part of the Pioneer Investors concerned to pool their resources and expertise for discharge of the functions under paragraph 12, clauses (a) and (b) of Resolution II. The Prep.Com. may at its option agree to the obligations of the Pioneer Investors, parties to the arrangement, to be performed by the partnership or the company on their behalf, the same acting basically as the agent on behalf of the Pioneer Investors who had formed the partnership or the company. In that event the costs for the exploration would be reimbursed to the partnership or the company. In regard to the training programme contemplated under para 12 (b) of Resolution II, it is conceivable that the partnership or the company will arrange for the training programmes on behalf of the Pioneer Investors concerned and may for that purpose avail itself of facilities of existing institutions such as the International Ocean Institute or any other institutions which might offer suitable training facilities approved by the Prep.Com.

(f) In undertaking any activity in research, development or designing of equipment as also in preparing themselves for activities connected with processing or transport, the partnership or company would have to act at their own risk and costs. Nevertheless, it is conceivable, the AALCC Memorandum suggests, that such efforts might fructify in award of contracts from the Enterprise in relation to its activities in the reserved areas. Even though the Prep.Com. could neither make any commitment nor give any assurances in this regard, it may be possible for the Prep.Com. to mention in its final Report under para 11 of Resolution I, the state of preparatory work undertaken and accomplished by the partnership.

(g) the AALCC Memorandum also suggests that it may be possible that the Prep.Com consider establishment of a Committee to oversee the fulfilment of the objectives under para 12 of Resolution I. Some thought may be given to the possibility of the Committee being composed of representatives of Pioneer Investors together with an equal number of members chosen by the Special Commission representing other signatory States, the Chairman of the Committee being the Chairman of the Special Commission on the Enterprise or in his absence a Vice-Chairman. This is in the light of the close involvement of Pioneer Investors in the preparations for the Enterprise as envisaged in Resolution II. Such a Committee could oversee the programmes of exploration of reserved areas, approve of and supervise training programmes under para 12 of Resolution II, and examine the work of the entities contemplated in this scheme with a view to their activities being included in the Prep.Com.'s Final Report under para 11 of Resolution I.

(h) The AALCC Memorandum concludes that the above scheme takes into account the objectives and purposes behind the Austrian proposal in promoting collective effort towards research and development of sea-bed technology as also in preparing for the Enterprise. But the approach in the scheme is somewhat different in retaining the primary role with Pioneer Investors in conformity with the provisions,

objectives, and purposes of Resolution II. It postulates two or more Pioneer Investors pooling their resources and expertise for meeting their obligations in conformity with Resolution II concerning exploration of reserved areas and the training programme. It also envisages that Pioneer Investors could collaborate in research and development of mining technology and designing of equipment as also in preparing themselves in processing and transport. Participation of other States or entities in activities other than exploration of reserved areas is also contemplated by providing that 49 percent of the share capital would be open for public subscription.

ASSESSMENT OF THE AALCC ALTERNATIVE

Advantages

13. The advantages of the AALCC proposal are obvious.

(a) In the first place, It provides an elegant solution to the difficult problem of the legal competence of the Prep.Com. This alternative is indeed compatible with the most narrow interpretation of the legal competence of the Prep.Com.

(b) Secondly, in theory, at least, it facilitates a solution to the financial aspect of the problem. In the AALCC proposal, the financing of JEFERAD, on a purely commercial basis, is entirely the responsibility of the participants.

(c) In the light of the present situation, there is a third, important, advantage. It gives far greater flexibility in defining the terms of reference of JEFERAD as broadly as desirable. Under the Austrian proposal, these terms would have had to be restricted to nodule mining and processing. The AALCC alternative does indeed provide for a pooling of resources and expertise for discharge of the functions under paragraph 12, clauses (a) and (b), of Resolution II. With regard to research and development of

technologies, however, obviously the Pioneer Investors are free to determine the range of their R&D in accordance with changing circumstances and requirements so as to remain competitive with the most advanced industries. This may include exploration for cobalt crusts and polymetallic sulphides and the development of the requisite technologies which recently have become the focus of attention of industry in the industrialized countries.

Problem Areas

14. There would appear to be some problem areas in the AALCC alternative.

(a) Through the injection of public international funding, the Prep.Com. would have had unambiguous control over JEFERAD in the Austrian proposal. The AALCC alternative weakens this control, making it, in a way, voluntary and informal.

(b) Again, through the injection of public international funding, the Prep.Com. would have ensured the direct participation of developing countries in the management of JEFERAD. The AALCC proposal limits participation in the "partnership" (JEFERAD) to Pioneer Investors and other parties able to contribute financially to the investment capital.

(c) The Austrian proposal would have offered financial incentives to the Pioneer Investors, reducing their investments in exploration, research and development by 50 percent. Under the AALCC alternative, Pioneer Investors as well as other parties would have to bear the full financial burden of contributions to the investment capital.

(d) The relation between the partnership and the Authority would have to be clarified. Under the Austrian proposal, JEFERAD would be dissolved five years after its establishment or six months after the coming into force of

the Convention, or it would have the option to transform itself into a Joint Venture of the Enterprise and submit a Plan of Work to the Authority. A partnership of Pioneers could, in theory, continue independently, not necessarily in joint venture with the Enterprise.

MERGING THE AUSTRIAN AND THE AALCC ALTERNATIVES

15. In the situation as it has developed during the last twelve months, the AALCC alternative has taken on new aspects. The one Pioneer Investor who could initiate action along the lines suggested by the AALCC is in fact a developing country. The focus of action would shift to the Indian Ocean and could take advantage of, and enhance ongoing activities to strengthen scientific/industrial cooperation in that region. The recent Conference on Economic, Scientific and Technical Co-operation in the Indian Ocean in the Context of the New Ocean Regime (Colombo, Sri Lanka, 15-20 July 1985) moves in the same direction.

16. In this new context, one could envisage the following scenario: JEFERAD would be established as a public/private joint enterprise for high tech R&D in the Indian Ocean area. While it would be of unquestionable interest to at least some of the Pioneer Investors and some others to participate in this venture, the terms of reference of the venture should be considerably broader than those of Resolution II. They might, for instance, include exploration of the Indian Ocean Ridge for polymetallic sulphide deposits, which, according to Dr. Alexander Malahoff, one of the chief explorers of the sulphide deposits on the Galapagos Ridge, are most likely to exist in the Indian Ocean. It might also include testing of the Rand Corporation's study on nodule processing with OTEC energy, as well as the development of new mining concepts. Since JEFERAD would be an independent corporation, the Pioneers parties to it would be quite free to determine the functions and purposes of JEFERAD in such a way to put it at the spearhead of advanced R&D in sea-bed

mining technology. One could imagine that, besides some of the Pioneer Investors, other entities, like the Saudi-Sudanese Red Sea Authority, might have a direct interest in participating in such a venture.

17. The relations with the Prep.Com. should be established as suggested by the AALCC paper, and a Committee might be established to oversee the fulfilment of the objectives under para 12 of Resolution II. The Prep.Com. would of course be free to determine at what point in time exploration of the reserved site should actually be undertaken. This will depend on broader developments within the Prep.Com. itself and outside of it. A discretionary delay in the actual exploration of the reserved mine site would in no way imply a violation or abrogation of Resolution II. There can be no doubt, on the other hand, that the Prepcom. and, through it, the Authority would benefit greatly from R&D and training activities.

18. It should be pointed out that Pioneer Investors whose claim could not yet be registered in accordance with the terms of Resolution II, obviously have no obligations towards the Prep.Com. in regard to para.12 of Resolution II. It is conceivable, however, that they might voluntarily cooperate in assuming such responsibilities, in return for the advantages they would obtain from joint R&D.

19. It is essential to demonstrate that such advantages in fact exist. A proposal to commence research and development in deep sea-bed mining must pass certain tests of viability. Such tests will not necessarily search for satisfaction of all the usual private industrial/commercial criteria, but it is clear that, given the concerns of financial institutions and governments alike, any proposal in this area must guarantee a "return" of one kind or another.

20. The present proposal guarantees a return in the form of knowledge of the potential of particular areas, and the development of technology. Both are indispensable components of a strategy for recovery of minerals from the deep

sea-bed. This vital component of future policy making, and the technological research which will accompany it, not only constitute a viable return on risk and investment, but do so without pre-empting future actions by the Authority.

21. At this point, however, it might be advisable to examine the possibilities of injecting, on behalf of the Prep.Com. some public international funding into JEFERAD, along the lines suggested by the original Austrian proposal. In the new context, this would not be any longer a legal problem, since a corporate entity, the JEFERAD partnerships, would already be in existence. It would be purely a financial problem. Whether it is feasible to attract e.g., World Bank or regional bank funding for this purpose, is not a matter that can be discussed in the abstract. It would have to be discussed on the basis of economic and scientific facts as they would have arisen once JEFERAD, in the AALCC form, had been established and initiated its activities. A degree of public international funding, however, would ensure the three advantages mentioned above: (a) greater control by the Prep.Com.; (b) direct participation by more developing countries (even though, in the present context, quite a few would participate from the outset); (c) greater financial incentives to the Pioneer Investors. In addition, as pointed out in the previous Austrian working papers, it would be far less costly, and less binding and burdensome on the Authority, to pay for the exploration of the reserved mine site(s) whenever that takes place, rather than having to refund the Pioneer Investor at a much later date adding substantial interest payments which may easily double the cost.

22. There remains, however, yet another possibility of merging the advantages of the Austrian and the AALCC alternatives. One could envisage three stages of the JEFERAD partnership. The first stage would be the establishment of the partnership as proposed by the AALCC Memorandum. The second would be its association with the Prepcom through a series or sequence of agreements concerning the implementation of para.12 of Resolution II, and the

establishment of a joint committee to oversee these activities. The third stage would be the establishment of a full-fledged joint venture, not between the Prep.Com. and the JEFERAD partnership, but between the Enterprise and the JEFERAD partnership -- i.e., this third stage could be postponed until the coming into force of the Convention. If the proposal were conceived in this way, it would be useful to include this option already in the original agreement for the JEFERAD partnership.

CONCLUSIONS

23. This analysis leads to three major conclusions.

(a) In the present situation, a modified version of the JEFERAD proposal provides the only possibility for the implementation of Resolution II and the discharge of the operational part of the Prep.Com.'s responsibilities. Any other realistic strategy to break the present deadlock necessitates drastic amendments to Resolution II and, in practice, the relinquishing of the operational responsibilities of the Prep.Com. This could have very serious consequences for the coming into force of the Convention.

(b) The establishment of JEFERAD in the Indian Ocean region would benefit developing and developed countries and enhance ongoing efforts to strengthen industrial/scientific cooperation in that region. With the establishment of the International Centre for Bio-industries and Genetic Engineering in New Delhi, India has already become a leader in international cooperation in high tech R&D. The establishment of JEFERAD would be a step in the same direction. This kind of scientific/industrial cooperation between North and South is essential for the bridging of the development gap and the

establishment of a new international economic order. It is of fundamental importance for the exploration of the Common Heritage of Mankind and the development of the requisite technologies.

(c) India has already requested registration of its claim. If the Prep.Com. decided to proceed with the implementation of Resolution II and the discharge of its operational responsibilities, it would have to consider two steps:

(i) to take a new decision with regard to the tactics of registering the claims of all four Pioneer Investors simultaneously;

(ii) to complete, as expeditiously as possible, the rules and regulations for Registration.

24. The technical preparation for the establishment of the JEFERAD partnership would be the task of the partners themselves although it obviously would be advisable that this work should proceed in consultation with the Prep.Com. The possibility of adopting a Resolution welcoming and encouraging such a development might also be considered.

25. Quite apart from its practical usefulness, the legal importance of such a course of action, in giving reality and validity to the ocean mining regime under the Convention, cannot be overrated.

DEEP SEABED MINING - LEGAL AND COMMERCIAL CONSIDERATIONS

Introduction

Exploiting the mineral resources of the deep seabed has been discussed from almost every standpoint during the past decades. The lawfullness, economic viability, desirability, technical possibilities - these and other aspects have been analysed from many points of view. These notes will deal with some operational aspects of such operations. They will not address the general conceptual legal issues of international and domestic law. The economic, political and technological questions will be similarly ignored.

These notes have been drafted for a specific purpose. They assume that it has been decided to commernce exploration of the deep seabed in a matter not incompatible with the provisions of the United Nations Convention on the Law of the Sea. They assume that there will be some involvement by states, state entities and private concerns in some aspect or other of these operations. The question is, what specific legal and commercial considerations arise? Or, to put the question in a different way, how will decisions made on the former affect the latter?

General lego/commercial considerations

Let us assume for present purposes that some (limited) analogies may be drawn between continental shelf operations and deep seabed mining. What is meant by the phrase "continental shelf operations"? Let us take the widest possible view in the conyext of a country not averse to (some) foreign capital, private and

public involvement in the petroleum industry seeking to effect the rational exploitation of its non-renewable resources. The phrase connotes the coexistence of

- petroleum deposits
- expertise to explore, exploit, conserve, transport, refine, and market the mineral
- capital to make all of the above possible
- a market or consumer (prepared to pay the necessary price)
- a system or regime governing operations, i.e. licensing and regulation
- adequate return/reward for those undertaking the work
- the political will to hold everything together and bring projects to their proper conclusion.

An analysis of the development of offshore mineral regimes has shown that once it has been decided to rely on a mixed public and private endeavour some considerations of the lego/commercial sort are virtually non-negotiable. The list given above is merely a list - much depends on the strengths of each element.

Let us assume, for instance, that there is no market, or a very weak market. How can the operation be justified? If the justification is political, then the tests to be satisfied will be all the stronger. The further one moves away from the "ideal" menu as set out above, the greater the compensating factors have to be.

The issue I am addressing here can be illustrated by looking at the problems presently encountered by the government of the Phillippines on the continental shelf. There are no problems with foreign capital etc - the government is trying to attract the multinationals. There are deposits of petroleum, the expertise is available - so why are operations at a virtual standstill? It is because the oil industry has looked at the regime, and decided that the rate of return is inadequate to justify investment. The response of the government has been to spend many millions of World Bank dollars on extensive exploration. They plan to present the industry with their findings, and hope that this will prove sufficiently attrractive. These expectations are almost certain to be dissappointed. Countries with a proverm record can attract the industry under terms which would appear to be hartsh elsewhere. Countries still hyoping for industry attention cannot dictate terms.

The problem here is political. It is not enough to legislate on the basis of soveriegn rights, ands permenant sovereignty over natural resources, not if one is trying to attract foreign industry. Thus, one miscalaculation can endanger the entire endeavour.

For the rest, the menu set out can really be reduced to a number of propositions, as follows (again assuming that the operation is justifided on grounds of proper utilization of the resource):

1. Political and legal stability - the state (or other entity) concerned and its licence or permit must be perceived as being

stable and trustworthy.

2. The return/reward (for the state and/or industry) must be demonstrable.

3. The parties undertaking the work must be trustworthy (or else they will not be funded by the international banking system).

Deep Seabed Mining

The above section sets out the principal points which the proponents of JEFERAD will be required to address. Basically, they may be summarized thus.

1. Have the proposed activities of JEFERAD a political purpose, or an economic/resource purpose, or a combination of the two?

2. Is JEFERAD structured in such a way as to inspire the trust of the financial institutions/governments who may be approached for funding?

3. Will JEFERAD and its activities meet the test of politico-legal stability?

1. Purpose

In order to obtain political and financial backing the proponents face the task of specifying the purpose of JEFERAD. The present climate of resource financing suggests that some potential backers will wish to be satisfied to no uncommon degree that the purposes of JEFERAD are economically justifiable. It seems to me that a political justification alone will run into trouble unless the arguments are very compelling. This point of view is not confined to deep seabed mining, but all resource based activity.

The decreasing interest in the potnetial of the Canadian continental shelf is only one example of this.

Accordingly, I would suggest that the "something must be done because something must be done" approach will be worse than useless in some circles.

2. Structure of JEFERAD

JEFERAD must be structured in a way that governments, public entities, financial and industrial entites "recognize" it; i.e., they can identify with it, and assimilate it into their various experiences. Thus, the entity must have a strong structure, with clear decision-making and responsibility taking features. There should be strong imput from government and industry personnel on these points. But it also seems to me that if JEFERAD is perceived as a body which will be hidebound by governments in such a way that its decision-mkaing processes are stiffled, then the concept will run into difficulties.

3. Stability

(more to come here)

APPLICATION OF THE ABOVE TO THE ANNCO DRAFT

Resource economists agree that the last two decades have witnessed a rapid evolution in the way in which proposed mineral activities are regarded by government, industry, international institution and the financial world. In the sixties, resource

activities were welcomed from any number of perspectives - economic, political, industrial, the furtherance of sovreignty, and so on. A somewhat harsher, pragmatic view is taken today. A proposal to commence research and development into deep seabed mining must pass certain tests of viability. Such tests will not necessarily search for satisfaction of the usual private industrial/commercial criteria, but it is clear that given the concerns of financial institutions and governments alike, any proposal in this area must guarantee a "return" of one kind or another.

The present proposal guarantees a return in the form of knowledge of the potential of particular areas, and the development of technology. Both are indispensible components of a strategy for recovery of minerals from the deep seabed.

Indeed, the JEFERAD proposal is designed to lay the foundation for future work by satisfying, in certain areas, the "need to know" element in mineral strategic planning. This vital component of future policy making, and the technological research which will accompany it, not only constitute a viable return on risk and investment, but do so without pre-empting future actions by the Authority. Indeed, such activities will ultimately serve the Authority well.

The need to demonstrate a valuable return is a primary requirement for any proposal; the proponents must also demonstrate the inherent stability of the controlling and operating mechanisms. The ANCC response to the original JEFERAD proposal concerntrates on one aspect of this - the need to work

within a secure and stable legal environment.

This environment comprises a complex set of legal relationships. A partnership or company of two or more pioneer public and/or private investors, formed or incorporated under the law of Jamaica, Bermuda or the Bahamas will oversee the activities of subsidiaries incorporated in appropriate countries. Share capital to be at least 51% subscribed by the parent entity, thought rather more than this may be required at first. Thus, the activity takes on transnational element from the first. The nature of an appropriate relationship with PREPCOM, bearing in mind that entity's powers and mandate, could be worked out in a way which would enable the Authority to play a supervisory role once the latter is established.

Thus, the operating entities would function within the stable corporate framework. At the same time, the uncertainties over the timing of the entry into force of the Convention are side stepped in a way which is compatible with the terms and spirit of the treaty. There would be no possibility of cancellation of the arrangements made in pursuance of this proposal by the Authority.

Thus, the revised proposal is specifically designed to satisfy the hard tests of utility and stability. Important pioneering research and development can take place within the framework of the Law of the Sea Convention before the treaty enters into force and its various organs established.