

BACKGROUND PAPER

concerning the difficulties
raised at the last Informal Consultation of the Secretary-General
with respect to the deep sea-bed mining provisions of the
UN Convention on the Law of the Sea

An attempt is made below to summarize the nature of the difficulties which certain States have concerning the issues mentioned during the consultation of 30 October. This summary is not exhaustive nor does it reflect the views of all sides on the issues.

1. The Enterprise and
2. Transfer of technology (these issues are inter-related)

Convention provisions: The Convention seeks to ensure that the Enterprise is enabled to operate effectively. For this purpose, 50% of the funds for its initial operation are to be provided by States parties by way of long-term interest-free loans. Debts incurred by the Enterprise in raising the other half are to be guaranteed by States parties. The transfer of technology provisions were designed to ensure that the Enterprise would have access to the required technology if such technology was not available on the open market. In such circumstances, the Convention requires a contractor to make available to the Enterprise the technology that he is using. The obligation to transfer the technology would apply during the first ten years of a contract with the Authority and the Authority must pay a fair and reasonable price for it. A contractor would have the same obligation in respect of a developing country operator.

Concerns expressed: The financial and other privileges accorded to the Enterprise enable it to undertake activities on more favourable terms and conditions than commercial operators. Moreover, there are high costs and risks involved for States parties in the Enterprise undertaking mining on its own behalf. The mandatory requirement for transfer of technology to the Enterprise raises issues of principle. There are also practical difficulties for the commercial operators, especially if they are not owners of the technology in question.

Note: It has been suggested that if the Enterprise which already has some reserved mining areas were to operate through joint ventures with partners who possess the necessary financial resources as well as the required technology most of the difficulties could be overcome.

3. Cost to States Parties

Convention provisions: The Convention provides for a Secretariat of the International Sea-Bed Authority and staff for its operational arm, the Enterprise. It also calls for an annual meeting of the Assembly of all States members of the Authority and for at least three meetings a year of its 36-member Council. In addition, it requires a number of meetings of the Legal and Technical Commission and of the Economic Planning Commission, each of which will have 15 members. Costs are involved in the maintenance of staff and headquarters, and the servicing of the meetings of the various organs of the Authority. In addition, the Convention establishes a 21-member International Tribunal for the Law of the Sea. The members of the Tribunal have to be remunerated and it is necessary to maintain its headquarters and to remunerate the Registrar and his staff. The meetings of the Tribunal will also incur servicing costs.

Concerns expressed: There is a common concern among all States with respect to the financial implications arising from the present structure of the institutions established by the Convention. The structure of the Authority is considered too elaborate at a time when the prospect for commercial deep sea-bed mining seems remote. The running costs for both the Authority and the Tribunal would be considerable. The operational costs to States for the start-up of the Enterprise could be burdensome.

Note: It is generally agreed that the Authority's structure should be scaled down to respond to the current state of sea-bed mining and that the Tribunal should be phased in. The Secretariat has already submitted to the Preparatory Commission studies on reduced structures for the Authority and of the Tribunal, and on possible budgetary options for States parties during the transitional period. Since commercial deep sea-bed mining activities are not likely to take place for the next few decades, the need to fund the first operation of the Enterprise is therefore not going to be a factor, especially since other operational options for the Enterprise are also being considered.

4. Production limitation

Convention Provisions: The Convention attempts to integrate deep sea-bed mineral production into the international metal market without undue disruption of the market in an effort to minimize adverse effects on the economies of land-based producer countries. A formula was devised to limit the minerals that can be produced from the deep sea-bed to 60% of the growth in nickel consumption based on 15 years of historical data. The Convention also refers to the problem of unfair economic practices such as dumping of metal from subsidized sea-bed mining. In addition, it requires the Authority to study the impact of deep sea-bed mining on developing land-based producer States and to consider measures such as an assistance fund or a compensation fund for developing land-based producer States whose economies may be affected. No source for such funds is identified but reference is made to existing international institutions.

Concerns expressed: The present provisions contain regulatory principles which reflect central planning. They also give the Authority a certain discretion in selecting applicants to whom it will grant authorization to proceed to commercial exploitation when there are competing applicants for the allowable level of production. Furthermore, it is considered by some that a formula based on nickel consumption alone is not realistic. The formula is also not acceptable as a commodity arrangement since it protects land-based but not sea-bed producers and therefore may have the effect of deterring investment in sea-bed mining. The prolonged recession in the international metal market over the past decade or more has rendered the formula more restrictive than was intended with the result that the application of the formula would severely reduce the number of possible deep sea-bed mining operations. There is concern, therefore, that not all those seeking production authorizations would be able to obtain them.

Note: Land-based producers consider that the provisions on unfair economic practices require strengthening, at least at the commercial stage of a sea-bed mining operation, in order to ensure that the basic principle of free competition is maintained and that their products are not displaced from the market by subsidized metals produced from the sea-bed. They would also wish to see that there is an orderly integration of metals from this new source into the market. Developing land-based producers also consider that some adverse impact on their economies from deep sea-bed mining is inevitable and that therefore some form of financial assistance scheme for them is essential.

5. Compensation fund

Convention provisions: The Convention provides that the Authority shall establish a system of compensation or take other measures of economic adjustment assistance including co-operation with specialized agencies and other international organizations to assist developing land-based producer States 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 of that mineral, to the extent that such reduction is caused by activities in the international sea-bed area.

Concerns expressed: Any scheme for compensation can be very costly for all States parties. For instance, compensating the closure of a land-based mining operation could run into hundreds of millions of dollars.

Note: The Convention requires that studies be undertaken on a continuing basis on the possible impact of sea-bed mining on the economies of developing land-based producer States and those who are seriously affected should be provided special assistance. The Conventions suggests that this may be done, inter alia, through the cooperation of existing international financial institutions. In addition to this, the Authority could also create a special assistance fund from the proceeds of deep sea-bed mining to assist developing land-based producer States.

6. Financial terms for commercial operations:

Convention provisions: The taxation scheme in the Convention requires that deep sea-bed miners should pay to the Authority a US\$ 1 million dollar annual fixed fee following the approval of a contract to explore and/or exploit the mineral resources. The scheme provides for taxation on the profits at a graduated level once the tax on profits is higher than US\$ 1 million. The fixed fee was seen as a minimum up-front payment to ensure that the Authority had some income to sustain itself. It was also intended to be a diligence fee to ensure that frivolous claims for sea-bed mining areas were not staked by speculators who might prevent more serious miners from having access to the resources.

Concerns expressed : In the present economic circumstances and the expected delay in commercial sea-bed mining, it is considered that the fixed fee has become a disincentive to prospective miners, especially since there is likely to be a long lead-time between the exploration stage and commercial exploitation due to inadequate technology development and current market conditions. There is also some concern over the rate of taxation on profits though this, in fact, compares favourably with the rates paid by land-based operators.

Note: The Preparatory Commission has already agreed to forego the fixed fee of US\$ 1 million for registered pioneer investors during a prescribed period provided they complete free of cost a certain stage of exploration for the Enterprise in an area reserved for the Authority and also to implement a training programme to develop a pool of qualified personnel for the future staffing of the Enterprise. The period for which the fixed fee is waived may be extended if following a review immediately prior to the entry into force of the Convention, it is assessed that there is a prolonged delay in commercial sea-bed mining.

7. Decision-making

Convention provisions: The Convention provides a hierarchical structure for decision-making based on the importance of the issues. Certain important decisions many of which protect the interests of contractors are to be taken by consensus in the Council, the executive body of the Authority. Decisions of somewhat lesser importance are to be taken by a three-fourths majority in the Council. For the next category of decisions the required majority in the Council is a two-thirds majority and, lastly, decisions on other matters are to be taken by a simple majority. Decisions on the budget of the Authority are taken by a two-thirds majority of the Assembly following a recommendation of the Council.

Concerns expressed: Industrialized States want more weight to be given in the decision-making process to States which are either major financial contributors or major investors in sea-bed mining. Some view with concern the present composition of the Council of the Authority which they consider has a bearing on the decision-making procedure. In other areas of decision-making, they

would like to remove the requirement to evaluate the financial and technical viability of a mining operation before approving its plan of work since they consider this to be a constraint on access to deep sea-bed mining. They view such restraints as self-defeating if the resources of the deep sea-bed are to be developed for the benefit of mankind. Consequently they would prefer a more automatic procedure for the approval of mining applications.

Note: Most States are sensitive to the issue of the decision-making procedure. There is some discussion that the Council of the Authority which is the main recommendatory body on most substantive and financial matters of the Authority should follow the decision-making procedure adopted in the CPC and that the Assembly of the Authority should follow the practice of the General Assembly on budgetary and financial matters. The Preparatory Commission is currently considering the establishment of a Finance Committee as an advisory body to the Council and the Assembly of the Authority (along the lines of the ACABQ) on matters having financial implications. Issues that have to be agreed upon are the composition of the Committee, its functions, its role vis-à-vis the Council and the Assembly of the Authority and its decision-making procedure.

8. Environmental considerations

Convention provisions: Under the Convention States have the obligation to protect and preserve the marine environment from activities in the international sea-bed area and are required to cooperate directly or through competent international organizations for this purpose.

Concerns expressed: While it is accepted that it is inevitable that there will always be some impact on the marine environment as a consequence of any activity on the sea-bed, the concern is in respect of any effect from such activities on the living or non-living components of the marine environment and associated ecosystems beyond that which is negligible or which has been assessed and judged to be acceptable in accordance with relevant rules and regulations for this purpose.

Note: The Preparatory Commission has been considering a comprehensive set of rules which inter alia require that activities in the deep sea-bed area can only take place if they do not cause harm to the marine environment beyond a prescribed acceptable level, established on the basis of data and information gathered at each stage of the activities. Under this monitoring scheme, such activities can only take place if the technology and procedures used are safe, if there is the capacity to monitor the environmental parameters and ecosystem components so as to identify any adverse effect and if there is the capacity to respond effectively to accidents, particularly those which might cause serious harm to the marine environment. No plan of work for exploration would be approved under these rules unless an environmental report is submitted by the applicant based on data collected during the prospecting stage, together with a programme for oceanographic and baseline environmental studies of a general as well as site-specific nature. In the case of exploitation, no approval will be given unless an environmental impact-statement of a site-specific nature is submitted and evaluated and found to be consistent with the requirements of the rules.

A special preservation reference zone within a mine site is to be set aside in which no mining is to occur to ensure representative and stable biota of the sea-bed in order to assess any changes in the flora and fauna of the marine environment. The rules would also provide for the responsibility of the sponsoring State and the liability of the operator for any serious harm to the marine environment.

9. The Review Conference

Convention provisions: The Convention provides that 15 years after the commencement of commercial production a conference should be convened to review the system of exploration and exploitation of the resources of the deep sea-bed area. In particular the Conference would review whether the parallel system has worked satisfactorily. Any amendments following the review would not affect rights acquired under existing mining licences. The Convention provides that, if no consensus on amendments to the system of exploration and exploitation of the resources of the deep sea-bed can be reached after five years of negotiations, the conference may decide by a three-fourths majority to adopt the amendments and submit them to the States parties for ratification or accession. Such amendments shall enter into force for all States parties twelve months after the deposit of instruments of ratification or accession by three-fourths of the States parties.

Concerns expressed: The problem lies with the decision-making procedure for the Review Conference where there is no consensus. Some States find it unacceptable that any amendment should become binding on them automatically without their approval. Moreover, certain States feel that any amendments relating to the system should become effective only if ratified or acceded to by all States parties.

Note: Under the Vienna Convention on the Law of Treaties an amendment does not bind any State party which does not become a party to the amending agreement.