



I.O.I. Occasional Papers

No. 6

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of the International Seabed Authority to manage
the common heritage of mankind.

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ELISABETH MANN BORGESE

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Introduction

1. The purpose of the present paper is to submit new suggestions with regard to the still unresolved question of who may exploit the international seabed area in the light of the principle of common heritage of mankind and of effective implementation of the United Nations General Assembly resolution 2749 (XXV) (Declaration of principles).

2. There is considerable controversy with regard to the role of the proposed International Seabed Authority (the Authority) in the exploitation of the resources of the international seabed area.

3. The Revised Single Negotiating Text (RSNT) in Part I, Article 22, established a dual or parallel system of resource exploitation: the proposed Authority may conduct resource exploitation activities directly; at the same time such activities may be undertaken "in association with the Authority and under its control...by States Parties, State Enterprises or persons natural or juridical which possess the nationality of State Parties...."

4. Annex I to Part I elaborates, inter alia, the qualifications and mode of selection of applicants wishing to undertake resource exploitation activities as well as provisions designed to safeguard the interests of the Authority. Paragraph 8 (d) (i) in particular provides that when applying for a contract an applicant must indicate the coordinates either of one area twice as large as the intended mine site, or two areas of equivalent commercial value. If a contract is awarded, the Authority retains one of the two mine sites for exploitation either conducted directly by the Enterprise or, at its discretion, in association with the Authority, by developing countries or other entities sponsored by them and under their effective control (the so-called banking system). During the informal negotiations in Geneva in March, 1977, it was proposed to modify the wording of these provisions without, however, changing the substance of the parallel system embodied in Article 22 of Part I of the RSNT.

5. Annex II to Part I contains the Statute of the Enterprise which is conceived as the organ of the Authority which directly conducts resource exploration and exploitation activities in the international seabed area pursuant to Article 22 of Part I. The Enterprise has a Governing Board of 36 Members elected by the Assembly of the Authority on the same basis as members of the Council (2/3 geographical representation, 1/3 representation of special interests); a Director-General elected by the Board and a staff of civil servants. The Enterprise may undertake projects with the approval of the Council on the basis of a written plan of work; to the extent that the Enterprise does not possess the goods and services required for its operations it may procure them through the award of contracts. The Enterprise has title to all minerals and processed substances produced by it which must be marketed in accordance with rules, regulations and procedures adopted by the Council of the Authority.

6. Two proposals designed to provide the Enterprise with the capital required to undertake operations have been introduced thus far in the discussions.

- a. The United States offered to contribute up to 20 percent of the capital investment required to launch a first project of the Enterprise, provided the remainder is contributed by other countries.
- b. Ambassador Castaneda of Mexico prepared a working paper proposing the payment of fees, taxes, royalties to the Authority; access to international financial institutions for the Enterprise, as well as useful measures for the transfer of technology.

7. Another proposal to strengthen the Authority has been to make cooperation with the Enterprise compulsory. This, it has been suggested, could be done in either of two ways.

- a. One might adopt a sort of rotating system, whereby a certain number of contracts, during a determined period of time, must be concluded between States and companies and the Authority; whereas an equal number of contracts, during another determined period, must be concluded between States and companies and the Enterprise; or

- b. It could be provided that for each contract with the Authority, involving a non-reserved area of the "banking system," a company or State must conclude a contract with the Enterprise for the development of an equivalent "reserved" area. Or, to put it in another way, a company or State must develop both parts it has prospected under the "banking system" -- one-half under conditions deemed favorable to the private sector, under contract with the Authority, the other half, under conditions deemed less favorable, in association with the Enterprise.

8. Analogies have been drawn between a "mixed economy" within a State, consisting of a public and a private sector, and the parallel or dual or mixed system proposed in the RSNT.

9. The dual system of international seabed-resource exploitation contained in the RSNT and summarized above, however, is still highly controversial; more importantly, the system, even if eventually adopted by the Law of the Sea Conference, would not be viable.

10. In order to establish a viable system of exploitation of the resources of the international seabed area, the relevant legal and economic facts must be fully taken into account. Among these fact are the following:

- a. At the present time, the only commercially profitable minerals in the international seabed are manganese nodules;
- b. Manganese nodules are an abundant resource: more than 300 commercially mineable deposits, probably containing several hundred million tons of nodules, have been discovered;
- c. Probably 15-20% of commercially mineable manganese nodule deposits are situated in seabed areas under national jurisdiction as a result of the archipelagic and economic zone provisions (Part II of the RSNT) and it is to be foreseen that additional commercially mineable deposits (perhaps as many as another 20-30 percent) will be brought under national jurisdiction as a result of the flexible baseline provisions contained in

Part II of the RSNT, and of the inadequate definition of the limits of the international seabed area (RSNT, Part I, article 2) which does not debar a State from redefining national jurisdictional limits previously notified to the International Seabed Authority;

- d. The entities, public or private, having an interest in mining manganese nodules and possessing the capital, technology, and managerial skill required for this purpose, are very few. The situation that will prevail for the foreseeable future is one of abundance of resources and scarcity of capital, technology, and managerial skill.

11. Accordingly the International Seabed Authority will not enjoy a virtual monopoly of manganese nodule deposits. The Enterprise will have to cope not only with volatile world markets, as other private and public entities engaged in manganese nodule mining, but also with specific competition outside the control of the Authority, that is, with manganese nodule mining conducted in seabed areas under national jurisdiction as well as with land-based mining of the minerals contained in the nodules.

12. The parallel system proposed by the RSNT results from a simple addition of the main features of a licensing system, which is incompatible with the principle of the common heritage of mankind and therefore unacceptable to the majority of States, and the main features of an Enterprise system conceived as a political organ geared to production control rather than efficient management, therefore likely to be inefficient as an operational arm of the Authority and unacceptable to a minority of industrially developed States in possession of capital, technology and managerial skill. The simple addition of an unacceptable option and an unworkable option is not likely to result in a compromise that is both workable and acceptable.

13. The "banking system," which would be meaningful and beneficial to the authority in a situation of resource scarcity and abundance in capital, technology, and managerial skill, is instead meaningless in a situation of resource abundance and scarcity of capital, technology and managerial skill.

14. Considering past and present difficulties in raising capital for development aid, it is difficult to imagine that the U.S. proposal for financing a first project of the Enterprise be matched by other countries.

15. The Mexican proposal, whose chief merit resides in the fact that it puts the problem of financing the Enterprise in concrete and practical terms, may indeed have a catalytic effect in demonstrating the difficulties of capitalizing a new, high capital- and technology-intensive Enterprise from the revenues of half a dozen enterprises, having themselves invested enormous capitals.

16. As for the access to international financial institutions, it has been pointed out that amendments to the charters or statutes of these institutions, including the IBRD and the IMF are required to enable them to make loans and grants to the Authority for the purpose of financing the high-risk projects of the Enterprise. This, obviously will take time.

17. The compulsory "rotating system" described under paragraph 8a is not likely to be practical. If association with the Enterprise were to be somehow more favorable to the Authority and to developing countries than a contract with the Authority, the provision would hardly be acceptable to industrial States and their companies, because it would introduce an element of discrimination: Company X gets a "contract" of the kind it wanted, whereas Company Y has to work in association with the much disliked Enterprise under conditions that are not competitive with those under which Company X works. Or the conditions offered by the Enterprise are equivalent to those offered by the Authority, in which case the system would have no meaning for the Authority or, as a matter of fact, for anybody.

18. The compulsory system described under paragraph 8b would have other drawbacks: Either the area prospected by an applicant should be sufficiently large to be divided, as the RSNT suggests, and the contractor would be prepared to exploit half of it -- in this case it would not be reasonable to ask the contractor to exploit more than his investment capital and production plan would permit -- or, on the other hand, the area should be small enough for the contractor to exploit, half under contract from the Authority, half in association with the Enterprise, in which case he would be burdened with a system obviously not apt to enhance management efficiency.

19. By first admitting, and then proceeding to undo, a parallel system, one does not, and cannot, obtain a unitary system. A unitary system has to be set up as such from the beginning.

20. The analogy between the parallel system and the "mixed economy" within a State is misleading. There can be a public sector in the framework of a State able to raise taxes and administer a budget that can at least compete with, if not dominate, the private sector. Such a framework does not exist at the international level. Therefore the "public sector" remains unreal, and only the "private sector" is a reality.

21. In these circumstances it is suggested that the proposed parallel system be discarded and replaced by a single unitary system, designed to achieve the following objectives:

- a. establish a single viable and flexible resource exploitation system based on cooperation between the Authority, States, and private industry;
- b. establish effective Authority control over all mineral resource exploitation within the international seabed area, while guaranteeing maximum feasible access to the area to all States;
- c. maximize active Authority and developing country participation in mineral resource exploitation in the area together with transfer of technology;
- d. provide effective control of multinational corporations active in the area;
- e. cope with the eventuality, or certainty, that nodules will be exploited, not only in the international area but also in areas under national jurisdiction.

22. It is suggested that when a resource exploitation project is submitted by a qualified applicant (State Party or public or private entity designated by a State Party or any combination thereof) is approved by the Authority, the applicant(s) be required to form an Enterprise controlled by the Authority. Each Enterprise shall be governed by a Governing Board. A part of the representatives on the Governing Board

shall be appointed by the participating entities, in proportion to their investment, while another part shall be elected by the Assembly of the Authority to assure (a) the control by the Authority, and (b) the participation of developing countries unable to invest capital. The Authority must provide 52% of the investment capital, including the value of the nodules in situ, which are the common heritage of mankind. The remaining capital, technology, and managerial skill are to be provided by the participating entities.

23. The above proposal is based on the INMARSAT Convention, from which it has taken over and adapted the following two principles:

- a. relations between States Parties and public or private operators. The INMARSAT Convention distinguishes between "States Parties" and "Signatories." A "signatory" is an entity or enterprise, public or private, existing or established for the purpose, designated by a State Party to operate within the framework of the Convention. The relations between the State Party and its designated Signatory are regulated by applicable domestic law. The State Party provides guidance and instructions to its Signatory, but is not liable for financial obligations assumed by the Signatory except in certain cases. The INMARSAT Convention provides for an organization consisting of an Assembly, a Council, and a Directorate. The Assembly, which is the policy-making or "legislative" organ, is composed of representatives of States Parties, each having one vote, on the basis of the sovereign equality of States. The Council, which is the executive and operational arm of the organization, is composed of Signatories.
- b. composition of the controlling organ (called Council in the INMARSAT Convention, Governing Board in the RSNT and in the present proposal). The Council of INMARSAT is composed as follows:
 1. eighteen representatives of those Signatories, or groups of Signatories not otherwise represented, which have agreed to be represented as a group, which have the largest investment shares in the Organization;

19. By first admitting, and then proceeding to undo, a parallel system, one does not, and cannot, obtain a unitary system. A unitary system has to be set up as such from the beginning.

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11. Four representatives of Signatories not otherwise represented on the Council, elected by the Assembly, irrespective of their investment shares, in order to ensure that the principle of just geographical representation is taken into account, with due regard to the interests of the developing countries....

24. The INMARSAT Convention combines in one structure aspects of a (political) intergovernmental organization and an (economic) enterprise or business. The Seabed Authority is more complex. The Authority is a (political) intergovernmental organization with broad functions and responsibilities such as the framing of resource policy, the planning and coordination of the whole Enterprise system, scientific research, environmental policy, the protection of human life, the regulation of installations, the disposal of archeological finds, the coordination between seabed activities and other uses of ocean space. The Enterprises, on the other hand, are businesses, responsible for prospecting, exploring and exploiting the area, raising the nodules, processing and marketing metals. The Authority is composed of States Parties; the Enterprises are composed of Signatories.¹

25. In addition it is interesting to note that a United States Congressman, Mr. McCloskey, has submitted a very similar suggestion with regard to "Federal Coordination, Planning and Regulation of Deep Seabed Resource Development."²

¹It is likely that, between now and 1985, there may be between half a dozen and a dozen Enterprises. Each one of the well-known consortia (Ocean Mining Associates; Kennecott Consortium; Summa Corporation; INCO Consortium) will want to form an Enterprise, and it is to be assumed that the Socialist countries will designate Signatories to form Enterprises, singly or jointly. Other, smaller or developing countries are not likely to apply directly. They will stand for election by the Assembly to the various Governing Boards. Any developing country will participate, this way, in at least one Enterprise.

²Section 201 of the Draft Bill provides that "only Enterprises organized in accordance with this Act may engage in deep seabed resource development"; therefore (Section 301) "any person who

26. The present proposal offers a dynamic, functional, and operational concept of the Enterprise. Enterprises, under the proposed system, exist only in relation to the work they perform. There are no idle or unemployed Enterprises; there is no need for the establishment of huge, centralized international bureaucracies.

proposes to engage directly or indirectly in deep seabed resource development shall apply to the Secretary [of Commerce] for permission to form an Enterprise."

Within 60 days after the approval of an application for the formation of an Enterprise, the President of the United States shall appoint, by and with the advice and consent of the Senate, three individuals to the Board of Directors of the Enterprise (Section 304a). At the same time, the applicant shall appoint six individuals to the Board of Directors.

It is further provided that the President shall appoint two further individuals to the Board of Directors: one within 60 days after the Federal Share exceeds 30 percent, one within 60 days after the Federal Share exceeds 40 percent.

"Federal share" is defined in Section 401a as "the value of the reimbursable services provided by the Federal Government to an Enterprise expressed as a percentage of the equity value of the Enterprise." "Equity value of an Enterprise" means the adjusted basis of any assets held by that Enterprise plus the value of all reimbursable services provided by the Federal Government to that Enterprise, minus the liabilities of that Enterprise.

What should be noted here is the striking similarity between the McCloskey proposal at the national level and the present proposal at the international level. Both proposals provide for an Enterprise system, consisting of an indeterminate number of Enterprises, formed by joint venture between the Authority or, respectively, the Government, and other entities (companies) governed by a Board composed of members partly designated by the companies, partly appointed by the Government (or elected by the Authority).

Whatever the other intentions of the McCloskey Bill might be, it is these Enterprises that might be designated as Signatories to cooperate with the International Seabed Authority.

27. It should be noted that the proposal provides that the Authority must provide "at least" 52 percent of the investment capital and have "at least" 13 out of 25 seats on the Governing Board of any Enterprise. There is nothing in the proposal to preclude the possibility that the Authority might provide 90 percent of the investment capital and form a joint venture with only one developing country or a group of them. This is a long-term possibility which the industrial nations would have to take into account although it is indeed not likely that it will materialize during the next 25 years. But, at any rate, it is not the substance of the Enterprise concept put forward by the developing nations that would have to be changed; it is the form that they should accept to change.

28. The developed countries, on the other hand, would have to accept the notion, responding to a need keenly felt by the international community, that the international operations of multinational companies must be brought under effective public international control.

29. Both developed and developing nations should agree to separate the question of resource policy, which should be solved at the level of the Authority, from the question of management which relates to the structure and function of the Enterprise system.

30. Once this were agreed upon, the completion of Part I of the Convention would be relatively easy. And even though seabed mining is one of the minor uses of ocean space, the successful completion of Part I is the foundation for the successful conclusion of the whole Conference on the Law of the Sea -- or, at least, of its present phase.

DRAFT STATUTE
FOR ENTERPRISES

Article 1

Establishment of the Enterprises

1. Enterprises shall be established in conformity with the provisions of this Convention and its Annexes.

2. Each Party to the Convention shall sign the Statute for the Enterprises or shall designate a competent entity, public or private, subject to the jurisdiction of the Party, to sign the Statute.

Comment: Adapted from the INMARSAT Convention. It is assumed that Part I of the Convention, just like the SNT, will have several Annexes, the first dealing with Basic Conditions, the second containing the Statute for Enterprises. The INMARSAT wording has been modified to make it possible that new Enterprises are formed whenever desirable, once the Convention and the Statute, applicable to all Enterprises, whenever established, has been signed.

Article 2

Relations between a Party and its
designated entity or entities

Where a Signatory is an entity designated by a Party,

- (a) relations between the Party and the Signatory shall be governed by applicable domestic law;
- (b) the Party shall provide such guidance and instruction as are appropriate and consistent with its domestic laws to ensure that the Signatory fulfils its responsibilities;

- (c) the Party shall not be liable for obligations arising under Annex I of this Convention. The Party shall, however, ensure that the Signatory, in carrying out its obligations within the Enterprise, will not act in a manner which violates obligations which the Party has accepted under this Convention or under related international agreements;
- (d) if the Signatory withdraws or its participation in an Enterprise is terminated, the Party shall act in accordance with Article 20.

Comment: Taken over from the INMARSAT Convention.

Domestic law is applicable only to the relations between a Party and its Signatory, not to relations between Parties or between Signatories or Parties and Signatories of other Parties. The law applicable to these relations is

- (a) the Convention, including its Annexes;
- (b) the Rules, Regulations and Procedures of the Authority;
- (c) the terms of any material contracts;
- (d) subject to the above, any relevant rules of generally recognized international law.

For the foregoing, see RSNT, Annex III, paragraph 18.

If a Signatory withdraws from an Enterprise, the Party having jurisdiction over the Signatory should be entitled to replace the withdrawing Signatory. See INMARSAT Convention, Article 29.

Article 3

Purposes

1. The Enterprises shall conduct the activities of the Authority in the Area, in the performance of their functions in implementation of Article 41.
2. In the performance of their functions and in carrying out their purposes, the Enterprises shall act in accordance with the provisions of this Part of the Convention, in particular with Articles 9 and 22, and the Annexes thereto.

3. The purposes of an Enterprise shall be the common exploration of manganese nodule deposits and the development of extraction, recovery, transportation and treatment systems for large-scale tests, as well as the subsequent economic operation of the mine. Enterprises shall also conduct feasibility studies in the field of marketing, transportation, logistics, and site selection.

Comment: The first two paragraphs are taken over from the RSNT; the third, indicating more specific activities, from the "Consortial agreement" proposed by the Deutsche Metallgesellschaft (Review of Activities, Edition 18 - 1975 - Manganese Nodules from the Sea).

Article 4

No impediment

The Enterprises shall be confined to the duties and objectives of manganese nodule mining, without restricting the mining production, and sale of minerals other than manganese nodules, by the Signatories.

Comment: Taken over from the "consortial agreement" proposed by the German Metallgesellschaft. This is not to preclude that problems arising from the interaction between land- and seabed-production must be taken care of in the wider framework of commodity agreements.

Article 5

Operational and financial principles

1. The Enterprises shall be financed partly by the International Seabed Authority, in accordance with the provisions of this Convention, and partly by the contributions of Signatories. Each Signatory shall have a financial interest in the Enterprise to which it belongs, in proportion to its investment share.

2. Each Signatory shall contribute to the capital requirement of the Enterprise to which it belongs and shall receive capital repayment and compensation for use of capital in accordance with Annex I.

3. The investment of Signatories shall be limited to 48 percent of the required investment capital. At least 52 percent of the investment capital must be provided by the International Seabed Authority in accordance with the provisions of this Convention.

4. Enterprises shall operate on a sound economic and financial basis having regard to accepted commercial principles.

[Article 5 (bis)]

For Enterprises operating in areas under national jurisdiction, the coastal State shall provide 52 percent while the International Seabed Authority shall provide at least 24 percent and the remaining 24 percent or less may be provided by other Signatories.]

Comment: These financial and operational principles have been adapted from the INMARSAT Convention. They have been adapted in such a way, however, that the Authority must have financial control over the Enterprises. At the same time, this provision maximizes financial benefits for the Authority. On the basis of the equity joint-venture system here proposed -- with the established industry providing the technology and managerial skill and almost half of the capital investment and the Authority contributing, to start with, the value of the nodules in situ, it should not be impossible for the Authority to find the remaining needed capital in the form of grants and loans from the World Bank, regional banks and other institutions. On the proposed 52-48 basis, the revenue of the Authority will be such that it can repay loans within a very short time.

The bracketed Article 5 (bis) has been added for the case, very likely to arise, that a substantial portion of manganese nodules will, in fact, be mined in areas under national jurisdiction. If this contingency is not considered, it might, in time, leave the Authority without any business. Cooperation between the coastal State having jurisdiction over nodule sites and the Authority's Enterprises must of course be voluntary. For developing countries it certainly would be more beneficial to cooperate with the Authority's Enterprises than to deal with individual industrial States or private consortia. Developing States might, through their appropriate fora,

resolve to adopt such a policy. It would of course be preferable if enough public pressure could be built to make of this policy international good practice. In other words, the manganese nodules of the deep ocean floor should be considered common heritage of mankind, no matter on which side of the limit of national jurisdiction they happen to lie. This could be achieved through a non-binding recommendation by the Council or the Assembly.

Article 6

Structure

The Enterprises shall be governed by

-- a Governing Board

-- a Directorate headed by a Director General.

Comment: This Article needs no comment. It is in line with the RSNT as well as the INMARSAT Convention. The Consortial Agreement proposed by the Metallgesellschaft is somewhat looser.

Article 7

The Board of Governors

1. The Board of Governors of an Enterprise shall consist of 25 representatives of Signatories.

Comment: The number is purely illustrative. It seems, however, within the bounds of reason. The members of the INMARSAT Council are 22. The RSNT provides for 36 members of the Governing Board, duplicating the Authority's Council. The Statute for European Companies merely states that "the number of the members of the Board will be limited by the Statute," but does not yet contain the limit. Twenty-five seems to be a rather reasonable number.

Article 8

Board - composition

1. The Board shall be composed of

- (a) 12 representatives of those Signatories or groups of Signatories not otherwise represented, which have agreed to be represented as a group, which have the largest investment shares in the Enterprise. If a group of Signatories and a single Signatory have equal investment shares, the latter shall have the prior right. If by reason of two or more Signatories having equal investment shares the number of representatives on the Board would exceed 25, all shall, nevertheless, exceptionally, be represented.
- (b) 13 representatives not otherwise represented on the Board, elected by the Assembly of the International Seabed Authority on nomination by the Council, in order to ensure that the principle of just geographical representation is taken into account, with due regard to the interest of developing countries, of labor, and of consumers. Any Signatory elected to represent a geographical or functional group shall represent each Signatory in this group which has agreed to be so represented and which is not otherwise represented on the Board.

2. Each representative belonging to category (a) shall have a voting participation equivalent to the investment shares he represents. Each representative belonging to category (b) shall have an equal voting participation equivalent to 3 percent of the total investment.

3. Members of the Board shall serve for terms of three years or until their successors have been appointed, except that the first 25 shall be appointed for staggered terms of one, two, and three years.

4. Members of the Board shall have no direct financial interest in deep seabed resource development or related industries.

5. Members of the Board shall receive just compensation for their services.

[Article 3 (bis)]

1. For Enterprises operating in areas under national jurisdiction, the Board shall be composed of

- (a) 13 representatives of Signatories designated by the coastal State having jurisdiction in the area;
- (b) up to and not more than 6 representatives representing the largest investment shares in the Enterprise, which shall amount to up to and not more than 24 percent of the total investment capital of the Enterprise;
- (c) at least 6 Signatories elected by the Assembly of the International Seabed Authority, on nomination by the Council, in order to ensure that the principle of just geographical representation is taken into account, with due regard to the interests of developing countries, of labor, and of consumers.

2. Each representative belonging to categories (a) and (b) shall have a voting participation equivalent to the investment shares he represents. Each representative belonging to category (c) shall have an equal voting participation equivalent to 4 percent of the total investment capital of the Enterprise.]

Comment: Adapted from the INMARSAT Convention. In INMARSAT, 18 representatives are appointed on the basis of their financial investment, only 4 are "elected by the Assembly, irrespective of their investment share, in order to ensure that the principle of just geographical representation is taken into account, with due regard to the interests of developing countries"

The Seabed Authority's Enterprises are to exploit the Common Heritage of Mankind. They are to be under the effective control at all times by the Authority. Hence the number of elected representatives has been increased as has been the Authority's investment share. It is interesting, however, that the principle of combining the appointment of representatives on the basis of investment shares with the election of representatives to take care of the interests of developing countries is already established in the INMARSAT Convention.

The arrangement proposed here maximizes the active participation of developing countries in all Enterprises established by the Authority.

Paragraphs 3, 4, and 5 of Article 8 (which should be repeated in Paragraph 8 (bis) are taken from the McCloskey Draft Bill, which established "Enterprises" for deep seabed mining under Federal control. It is indeed interesting that these "Enterprises" are established very much on the same lines as those proposed here, i.e., a part of the Board of Directors is appointed by private industry, a part by the Federal Government; a part of the financing comes from private industry, a part is "Federal shares." According to Title II, Sec. 201 of that Draft Bill "only Enterprises organized in accordance with this Act may engage in deep seabed resource development." These "Enterprises" would be the obvious "Signatories" to enter into joint venture with the Seabed Authority.

We have added a somewhat vague reference to the representation of labor and of consumers on the Board. This is in line with present trends. It is not easy to specify a number, with only 13 seats at the disposal of developing countries and labor and consumers. An alternative possibility would be to establish a separate "work council" or "Labor council" the consensus of which would be needed for certain categories of decisions. This is the method adopted by the Statute for European Companies. A third alternative would be to provide for cooperation with ILO in certain areas.

Article 8 bis has been added in accordance with Article 5 bis.

Article 9

Board - procedure

1. The Board shall meet as often as may be necessary for the efficient discharge of its functions but not less than three times a year.

2. The Board shall endeavor to take decisions unanimously. If unanimous agreement cannot be reached, decisions shall be taken as follows: Decisions on substantive matters shall be taken by a majority of the representatives on the Board representing at least two-thirds of the total voting participation of all Signatories and groups of Signatories represented on the Board. Decisions on procedural matters shall be taken by a simple majority of the representatives present and voting, each

having one vote. Disputes whether a specific matter is procedural or substantive shall be decided by the Chairman of the Board. The decision of the Chairman may be overruled by a two-thirds majority of the representatives present and voting, each having one vote. The Board may adopt a different voting procedure for the election of its officers.

3. (a) Each representative shall have a voting participation equivalent to the investment share or shares he represents. However, no representative may cast on behalf of any Signatory more than 25 percent of the total voting participation of the Enterprise.
- (b) (i) If a Signatory represented on the Board is entitled, based on its investment share, to a voting participation in the Enterprise, it may offer to other Signatories any or all of its investment share in excess of 25 percent.
 - (ii) Other Signatories may notify the Enterprise that they are prepared to accept any or all of such excess investment share. If the total of the amounts notified to the Enterprise does not exceed the amount available for distribution, the latter amount shall be distributed by the Board to the notifying Signatories in accordance with the amounts notified. If the total of the amounts notified does exceed the amount available for distribution, the latter amount shall be distributed by the Board as may be agreed among the notifying Signatories, or, failing agreement, in proportion to the amounts notified.
 - (iii) Any such distribution shall be made by the Board at the time of determination of investment shares pursuant to paragraph of Annex I. Any distribution shall not increase the investment share of any Signatory above 25 percent.
- (c) To the extent that a Signatory decided not to offer its excess investment share to other Signatories, the corresponding voting participation of that Signatory in excess of 25 percent shall be distributed equally to all other representatives on the Board.

4. A Quorum for any meeting of the Board shall consist of a majority of the representatives on the Board, representing at least two-thirds of the total voting participation of all Signatories and groups of Signatories represented on the Board.

Comment: Adapted from the INMARSAT Convention.

Article 10

Board -functions

The Board shall have the responsibility to make provisions for carrying out the purposes of the Enterprise in the most economic, effective and efficient manner consistent with this Convention and its Annexes. To discharge this responsibility, the Board shall have the power to perform all appropriate functions, including:

- (a) Adoption of one-year, two-year, and five-year programmes, which should be in concert with the research or the commercialization programme. The budget for each programme as stipulated must not be exceeded except with the approval of the Board;
- (b) Adoption and implementation of management arrangements which shall require the Director General to contract for technical and operational functions whenever this is more advantageous to the Enterprise;
- (c) Adoption of procurement procedures, regulations and contract terms and approval of procurement contracts consistent with this Convention and its Annexes;
- (d) Adoption of financial policies, approval of the financial regulations, annual budget and annual financial statements and decisions with respect to all other financial matters, including investment shares and capital ceilings consistent with the Convention and its Annexes;
- (e) Submission of the one-year, two-year, and five-year programmes to the Council of the Seabed Authority;
- (f) Submission of an annual report and recommendations to the Assembly of the Seabed Authority, in accordance with Article of the Convention;

- (g) Designation of an arbitrator where the Enterprise is a party to arbitration;
- (h) Oversight over the activities of the Enterprise to ensure full public disclosure of all information not protected under
- (i) Exercise of any other functions conferred upon it in any other Article of this Convention or its Annexes or any other function appropriate for the achievement of the purposes of the Enterprise.

Comment: The introductory paragraph and subparagraphs (b), (c), (d), (g), and (i) are adapted from the INMARSAT Convention. Subparagraph (g) will have to be brought into accord with the Articles in Part I of the Convention dealing with dispute settlement. Paragraphs (a) and (e) are new, in accordance with the requirements of the "basic conditions for exploration and exploitation" contained in Annex I of the Convention. So is paragraph (f). Paragraph (h) is taken over from the McCloskey Draft Bill (3-9-77).

Article 11

Directorate

1. The Director General shall be appointed, from among candidates proposed by the Council of the Seabed Authority, by the Board, subject to confirmation by the Assembly. The appointment is confirmed unless within sixty days more than one-third of the Members of the Assembly have informed the Depositary in writing of their objection to the appointment. The Director General may assume his functions after the appointment and pending confirmation.
2. The term of office of the Director General shall be six years. However, the Board may remove the Director General earlier on its own authority. The Board shall report the reasons for the removal to the Assembly of the Authority.
3. The Director General shall be the chief executive and legal representative of the Enterprise and shall be responsible to and under the direction of the Board.
4. The structure, staff levels and standard terms of employment of officials and employees and of consultants and other advisers to the Directorate shall be approved by the Board.

5. The Director General shall appoint the members of the Directorate. The appointment of senior officials reporting directly to the Director General shall be approved by the Board.

6. The paramount consideration in the appointment of the Director General and other personnel of the Directorate shall be the necessity of ensuring the highest standards of integrity, competency, and efficiency.

Comment: This article is standard and poses no particular problem. It is mostly adapted from the INMARSAT Convention. The appointment of the Director General is linked to the Seabed Authority which exercises some degree of control over it.

Article 12

Procurement

1. To the extent that an Enterprise does not at any time possess any goods and services required for its operations, it may procure and employ them under its direction and management. Procurement of goods and services required by an Enterprise shall be effected by the award of contracts, based on response to invitations in member countries to tender, to bidders offering the best combination of quality, price, and the most favourable delivery time.

2. If there is more than one bid offering such a combination, the contract shall be awarded in accordance with the following principles:

- (a) Non-discrimination on the basis of political or similar considerations not relevant to the carrying out of operations with due diligence and efficiency;
- (b) Guidelines approved by the Board with regard to the preferences to be accorded to goods and services originating in developing countries, particularly the land-locked or otherwise geographically disadvantaged among them;

3. The Governing Board may adopt rules determining the circumstances in which the requirement of invitations in member countries to bid may be dispensed with.

Comment: Adapted from Annex 2 of Part I of the Convention. In paragraph 2 (b) the Board has been substituted for the Council which,

in the RSNT, has to approve these guidelines. This is in accordance with the principle of giving the greatest possible self-determination to the Enterprises.

Paragraph (e) of the RSNT has been omitted as it deals with other matters.

The article is standard and seems to pose no particular problem. The corresponding article in the INMARSAT Convention is somewhat more detailed, and the details would be equally applicable to this Convention, but it was felt that the more summary provisions of the RSNT are adequate and more concise.

Article 13

Distribution of products

Each Signatory shall be assigned a part of the products for marketing in accordance with his share in the Enterprise.

Comments: This would take the place of the above-mentioned paragraph 7 (e) of Annex II of the RSNT. The wording is taken over from the Consortial Agreement proposed by the Metallgesellschaft AG (Review of Activities, Edition 18 - 1975 - Manganese Nodules Metals from the Sea).

Article 14

Inventions and technical information

1. An Enterprise, in connection with any work performed by it or on its behalf at its expsnes, shall acquire in inventions and technical information those rights, but no more than those rights, which are necessary and in the common interests of the Enterprise and of the Signatories in their capacity as such. In the case of work done under contract, any such rights shall be on a non-exclusive basis.

2. For the purpose of paragraph 1, an Enterprise, taking into account its principles and objectives and generally accepted industrial practices, shall, in connection with such work involving

a significant element of study, research or development, ensure for itself:

- (a) the right to have disclosed to it without payment all inventions and technical information generated by such work;
- (b) the right to disclose and to have disclosed to Parties and Signatories and others within the jurisdiction of any Party such inventions and technical information and to use and to authorize and to have authorized Parties and Signatories and such others to use such inventions and technical information without payment in connection with the exploration and exploitation of the nodules on the deep seabed;

3. In case of work done under contract, ownership of the rights in inventions and technical information generated under the contract shall be retained by the contractor.

4. An Enterprise shall also ensure for itself the right, on fair and reasonable terms and conditions, to use and to have used inventions and technical information directly utilized in the execution of work performed on its behalf but not included in paragraph 2, to the extent that such use is necessary for the reconstruction or modification of any product actually delivered under a contract financed by the Enterprise, and to the extent that the person who has performed such work is entitled to grant such right.

5. The Board may in individual cases approve a deviation from the policies described in paragraphs 2 (b) and 4, where in the course of negotiation it is demonstrated to the Board that failure to deviate would be detrimental to the interests of the Enterprise.

6. The Board may also, in individual cases where exceptional circumstances warrant, approve a deviation from the policy prescribed in paragraph 3 where all the following conditions are met:

- (a) it is demonstrated to the Board that failure to deviate would be detrimental to the interests of the Enterprise;
- (b) the Board determines that the Enterprise should be able to ensure patent protection in any country;

- (c) where, and to the extent that, the contractor is unable or unwilling to ensure such patent protection within the time required.

7. With respect to inventions and technical information in which rights are acquired by an Enterprise otherwise than pursuant to paragraph 2, the Enterprise, to the extent that it has the right to do so, shall upon request:

- (a) disclose or have disclosed such inventions and technical information to any Party or Signatory subject to reimbursement of any payment made by or required of the Enterprise in respect of the exercise of the right of disclosure;
- (b) make available to any Party or Signatory the right to disclose or have disclosed to others within the jurisdiction of any Party and to use and to authorize and to have authorized such others to use such inventions and technical information:
 - (i) without payment in connection with the exploration and exploitation of the nodules of the deep seabed;
 - (ii) for any other purpose, on fair and reasonable terms and conditions to be settled between Signatories or others within the jurisdiction of any Party and the Enterprise or the owner of the inventions and technical information or any other authorized entity or person having a property interest therein, and subject to reimbursement of any payment made or required of the Enterprise in respect of the exercise of these rights.

8. The disclosure and use, and the terms and conditions of disclosure and use, of all inventions and technical information in which an Enterprise has acquired any rights shall be on a non-discriminatory basis with respect to all Signatories and others within the jurisdiction of Parties.

9. Nothing in this Article shall preclude an Enterprise, if desirable, from entering into contracts with persons subject to domestic laws and regulations relating to the disclosure of technical information.

Comment: Adapted from the INMARSAT Convention. The RSNT contains very little with regard to inventions and technical information. The Consortial Agreement proposed by Metallgesellschaft AG is very much more secretive about them. The provisions of INMARSAT have been taken over in the hope that they will maximize the transfer of technology to the Authority.

Article 15

Audit

The accounts of the Enterprises shall be audited annually by an independent Auditor appointed by the Council of the International Seabed Authority. Any Party or Signatory shall have the right to inspect the accounts of the Enterprises.

Comment: Annex II of the RSNT does not contain any article on audit. The article here proposed is standard.

Article 16

Legal personality

The Enterprises shall have legal personality and shall be responsible for their acts and obligations. For the purpose of their proper functioning, they shall, in particular, have the capacity to contract, to acquire, lease, hold and dispose of movable and immovable property, to be a party to legal proceedings and to conclude agreements with States or international organizations.

Comment: Taken over from INMARSAT Convention. Standard article. Corresponds to paragraph 9 of Annex II of the RSNT, "Status of the Enterprise." The capacity to conclude agreements with States or international organizations" is not provided for in the RSNT. It could be retained by the Authority itself. It is proposed here to grant it to the Enterprises, again, to maximize their autonomy and self-determination. This capacity might be useful especially for Enterprises operating in areas within national jurisdiction.

Article 17

Seat of the Enterprises

The seat of the Enterprises shall be at the seat of the International Seabed Authority or at the seat of any of the regional centers or offices established by the Seabed Authority in accordance with Article 20 of this Convention.

Comment: Adapted from the RSNT. The "regional centers or offices" mentioned in Article 20 of the Convention are not mentioned in the Statute of the Enterprise (Annex II). The Statute provides, in a paragraph on "Location of offices," (d) "The principal office of the Enterprise shall be at the seat of the Authority. The Enterprise may establish other offices in the territories of any member." Article 17 as here proposed seems to make better use of Article 20 of the Convention. The use of the regional offices or centers would otherwise remain too non-descript.

Article 18

Privileges and immunities

1. Actions may be brought against an Enterprise only in a court of competent jurisdiction in the territories of a Party in which the Enterprise has an office, has appointed an agent for the purpose of accepting service or notice of process, has entered into a contract for goods or services, or has issued securities. The property and assets of the Enterprise shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Enterprise.
2. Property and assets of the Enterprises, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.
3. The archives of the Enterprises shall be inviolable.

4. To the extent necessary to carry out the operations provided for in this Convention and its Annexes and subject to the provisions of this Annex, all property and assets of the Enterprises shall be free from restrictions, regulations, controls, and moratoria of any nature.

5. The official communications of the Enterprises shall be accorded by each Party and Signatory the same treatment that it accords to the official communications of other Parties.

6. The members of the Governing Board, alternates, officers and employees of the Enterprises:

- (a) shall be immune from legal process with respect to acts performed by them in their official capacity;
- (b) not being local nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by Parties to the representatives, officials, and employees of comparable rank of other Parties;
- (c) shall be granted the same treatment in respect of traveling facilities as is accorded by members to representatives, officials and employees of comparable rank of other Parties.

7. (a) The Enterprises, their assets, property, income and their operations and transactions authorized by this Annex shall be immune from all taxation and from all customs duties. The Enterprises shall also be immune from liability for the collection or payment of any tax or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Enterprises to members of the Board, alternates, officials, or employees of the Enterprises who are not local citizens, subjects, or other local nationals.

(c) No taxation of any kind shall be levied on any obligation or security issued by the Enterprises (including any dividend or interest thereon) by whomsoever held:

- (i) which discriminates against such obligation or security solely because it

is issued by an Enterprise; or

- (ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Enterprise.

8. Each Party shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Annex and shall inform the Enterprises of the detailed action which it has taken.

9. The Enterprises in their discretion may waive any of the privileges and immunities conferred under this article to such extent and upon such conditions as they may determine.

Comment: This article has been taken over from the RSNT. Privileges and immunities are strong in the RSNT. They are intended to contribute to making the Enterprise competitive with States and private companies operating in the area. Since this motive falls in the context of the present proposal, and economic operations, not only of the Authority but of States and private companies are directly involved, these provisions -- especially those concerning tax exemptions -- might be reconsidered. It should be noted that the INMARSAT Convention equally provides (Article 26) that "Within the scope of activities authorized by this Convention, the Organization and its property shall be exempt in all States Parties to this Convention from all national property taxation and from customs duties...." Under that Convention, too, private companies and States are directly involved.

Article 19

Liabilities

1. A Signatory shall be liable to pay damages for any action of his or his subcontractor injurious to any Enterprise arising from gross negligence or injury by malice aforethought.

2. Parties are not, in their capacity as such, liable for the acts and obligations of the Enterprises, except in relation to non-Parties or natural or juridical persons they might represent insofar as such liability may follow from Treaties in force between the Party and the non-Party concerned. However, the foregoing does not preclude a Party which has been required to pay compensation under such a Treaty to a non-Party or to a natural or juridical person it might represent from invoking any rights it may have under that Treaty against any other Party.

Comment: Paragraph 1 is adapted from the Consortial Agreement proposed by Metallgesellschaft AG. Paragraph 2 is taken over from the INMARSAT Convention. The RSNT has a paragraph, "Limitation of Liability" providing merely that "No member shall be liable, by reason of its membership, for obligations of the Enterprise." This is taken care of by Paragraph 2 as here proposed, which, however, is far more specific.

Article 20

Withdrawal

1. Any Party or Signatory may by written notification to the Depositary withdraw from any Enterprise at any time.

2. The withdrawing Signatory shall offer assignment of his share to the other Signatories, subject to the provisions of Article 8, and the Signatories in possession of such offer shall make up their minds within a certain period of time whether they want to buy the share or not. The remaining signatories shall also have the right to buy such share in common, distributing it among themselves in accord with their own shares in the Enterprise.

3. If after expiry of the fixed period none of the Signatories has accepted the offer, the Signatory intending to assign his share shall be entitled to assign it to other interested parties. The buyer, who will need approval and designation by a Party, shall enter into all rights and obligations of the withdrawing Signatory.

Comment: Adapted from the Consortial Agreement proposed by the Metallgesellschaft AG.

Article 21

Suspension and termination

1. Persistent violations by a Signatory of any of its obligations to an Enterprise shall render such Signatory liable to suspension pursuant to Article of the Convention.

2. While under suspension a Signatory shall not be entitled to exercise any rights under this Annex except the right of withdrawal, but shall remain subject to all obligations.

. Comment: Adapted from the RSNT. The corresponding provision in the INMARSAT Convention is far more elaborate. Perhaps this should be spelled out further.

Article 22

Dissolution

An Enterprise shall be terminated if all of the Signatories agree to do so. All rights and obligations of the Signatories (except for open accounts) shall then become null and void with immediate effect. In the event that after termination of the research phase only one Signatory should be left in an Enterprise, the same shall be dissolved.

Comment: Adapted from the Consortial Agreement proposed by Metallgesellschaft AG.

Article 23

Dispute settlement

[This Article will have to be harmonized with the emerging provisions of Part I and Part IV of the Convention. It affects disputes arising between Parties, or between Parties and Signatories of another Party, or between Parties or Signatories and the Enterprise, or between the Enterprises and the Seabed Authority or any organ thereof, relating to rights and obligations under this Convention and its Annexes. If not settled by negotiation or conciliation within a fixed period, such disputes will be subject either to arbitration, or to a special committee of five members appointed by agreement between the parties and selected from a list of experts on scientific, technical, economic and legal aspects of seabed mining, established by the

International Seabed Authority in accordance with Annex IIA of Part IV of the Convention. Or they will go to the appropriate Chamber of the Law of the sea Tribunal.]

Article 24

Amendments

1. Amendments to this Statute may be proposed by any Party. Proposed amendments shall be submitted to the Directorate, which shall inform the other Parties and Signatories. Three months' notice is required before consideration of an amendment by the Council of the International Seabed Authority, which shall submit its views to the Assembly within a period of six months from the date of circulation of the amendment. The Assembly shall consider the amendment not earlier than six months thereafter, taking into account any views expressed by the Council. This period may, in any particular case, be reduced by the Assembly by a substantive decision.

2. If adopted by the Assembly, the amendment shall enter into force one hundred and twenty days after the Depositary has received notices of acceptance from two-thirds of those States which at the time of adoption by the Assembly were Parties and represented at least two thirds of the total investment shares. Upon entry into force, the amendment shall become binding upon all Parties and Signatories, including those which have not accepted it.

Comment: Adapted from INMARSAT Convention.

Article 25

Depositary

1. The Depositary of this Statute shall be the Secretary-General of the International Seabed Authority.

2. The Depositary shall promptly inform all Signatory and acceding States and all Signatories of:

- (a) The establishment of any new Enterprise;
- (b) The adoption of any amendment to the Statute and its entry into force;
- (c) Any accession of new Signatories;
- (d) Any notification of withdrawal;

- (e) Any suspension or termination;
- (f) Other notifications and communications relating to the Statute.

3. Upon entry into force of the Statute the Depositary shall transmit a certified copy to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

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