Annex 2

Statement

by

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Delegation of Austria

Working Paper for Consideration by the Group of 77
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Introduction and Summary

During the final week of the Spring, 1979, (Eighth) Session of the L.o.S. Conference, the Delegation of the Netherlands introduced a proposal for a modified unitary joint venture system which might offer a key to the solution of some of the remaining problems related to Part XI of the ICNT/Rev.1 and the pertinent Annexes. The statement by Professor Riphagen of the Netherlands is attached as annex 1 to this working paper.

In essence, the proposal provides that

> At the time of granting by the Authority of a contract with respect to activities for exploration and exploitation, the Enterprise should be offered the option to enter into a joint venture with the applicant.... If the Enterprise decides to exercise its optional participation right and enters into such arrangement with the contractor, the latter should subsequently have a similar and equivalent optional right for entering into a joint-venture arrangement with the Enterprise in the exploration and exploitation of the corresponding area. The participation by either party in such joint venture arrangements should not exceed 20%.

A number of Delegations (Sri Lanka, Sierra Leone, Austria) commented favorably; not one Delegation rejected the proposal. The Delegation of the Soviet Union declared that, although it might have certain caveats, it would be willing to discuss the proposal if the Group of 77 were in favor.

This working paper consists of four parts.

Part I sets forth the advantages of the Netherlands' proposal by expanding somewhat on the statement by the Delegation of Austria, which is attached as Annex 2. These advantages can be summarized under nine headings:

1. The proposed system ensures that the Enterprise can initiate its operations at the same time asthe contractors;

2. The problems of the financial terms of contracts are simplified;

3. The system maximizes financial benefits for the Enterprise and the Authority;

4. The system facilitates technology transfer;

5. It avoids the problem of the attributable net proceeds (ANP);

6. It avoids the problems caused by the banking system.

7. It avoids problems of discrimination between the Enterprise and contractors with regard to taxation;

8. It facilitates the task of the Review Conference;

9. It builds established industry into the system on the basis of cooperation rather than competition.

In Part II an attempt is made to identify the conditions that might make the proposal acceptable to socialist and to free-market industrialized countries. With regard to socialist countries (1) the relations between socialist States and private companies must be clarified; (2) it must be ensured that the joint-venture system is not in fact dominated by private companies; (3) the right of States to access to the Area must not be infringed; and (4) the system must provide effective anti-monopoly provisions. With regard to the industrialized countries with a free-market economy, (1) access must be guaranteed; (2) security of tenure and of investments must be guaranteed; (3) a reasonable rate of return must be assured; (4) intellectual property must be protected. It is shown that the Netherlands proposal can be elaborated in such a way as to satisfy all these conditions.

Part III examines the financial implications of the proposal. It is shown that these are optimal. Revenues would range between the optimum revenues that can be derived from the parallel system as presently conceived to at least twice that amount.

Part IV, finally, indicates necessary changes in the ICNT/Rev.1. These are very few, restricted to Article 153, where one sub-paragraph, already drafted by the Delegation of the Netherlands, has to be added, a couple of additions in Annex II, and the possible addition of an Annex III (bis). One aspect of the genius of the Netherlands' proposal is indeed that it reaches such positive substantive results with such minimal textual changes.

I.

The first question that arises is: Who stands to gain, and who has to give up anything, if the proposal were to be included in the Text.

As far as developing countries are concerned, the Enterprise remains intact. There is nothing in the proposal that would restrain the Enterprise from (a) starting an operation on its own; (b) entering into any kind of contractual arrangement with any company or other entity. The Enterprise acquires in fact a new right: that is, the right to enter into a joint venture with any contractor in the nonreserved area. If the Enterprise chooses to exercise this option, the contractor has no right to refuse.

In return the contractor acquires the right to enter into a joint venture with the Enterprise in the reserved area. Since he acquires this right only if and when the Enterprise freely chooses to exercise its own option, never on his own initiative, the advantage clearly is on the side of the Enterprise. Supposing that both options are exercised, the Enterprise now has 20 percent of the operation in the nonreserved area, and 80 percent of the operation in the reserved area. One could even look at the two operations as one financial undertaking, in which the Enterprise holds 50 percent. This of course happens only if both partners freely exercise their option which the other partner has no right to refuse.

The difficulties of ensuring under the ICNT/Rev.1 that the Enterprise is in a position to start operations at the same time as the contractors are well known. This is an enormous task, as the Chairman of Negotiating Group I, Frank Njenga, pointed out in his statement of 26 April 1979 (A/Conf.62/L.35): "...we had to imagine ways and means to equalize two different kind of entities: thepowerful consortia with all their capital and credit, technology, and organization, some of which are already engaged in seabed operations; and the Enterprise, an entity so far existing only in our imagination, a creature to be born without the necessary tools to filfull the purpose for which it was created."

Whether the financial provisions, as now proposed in Article 12 of Annex II, and the provisions of Article 5 of Annex II, dealing with technology transfer -- even if they were accepted by the industrialized countries --would suffice to close this gap between reality and imagination, is still an open question. Fears that there will be an undue imbalance in the exploitation of the reserved areas and the nonreserved areas, during the first 25 years, appear to be well justified. The

Netherlands' proposal may solve this problem. Exercising its option to enter into joint ventures in the nonreserved area, the Enterprise may begin its activities simultaneously and jointly with the very first applicant for a contract. 20 percent of the investment capital and of the operating costs can certainly be assumed to be guaranteed under the present provisions of the ICNT/Rev.1; technology need not be acquired in advance: it comes with the standard joint-venture agreement.

A great deal of time, effort, and ingenuity has been devoted by the Conference to solve the problem of Attributable Net Profits (ANP). Methods proposed to calculate this value, and the results of the calculations very widely. The compromise, it has been suggested, would have to be a political one, which, however, might turn out not to be bearable in economic terms.

To complicate matters further, the whole question may have to be reconsidered in the light of discussions, during the Spring, 1979, Session, on the definition of the term "activities in the Area." This is an issue which never had been clarified in the Text: For in one place (Article 133, Use of Terms) a narrow definition is given: "'Activities in the Area' means all activities of exploration for, and exploitation of, the resources of the Area," while a far more inclusive interpretation must be given to "activities" in the Title of Section 3, "Conduct of Activities in the Area," which includes Marine scientific research, Transfer of Technology, Protection of the Marine Environment, Protection of Human Life, Accomodation of Activities in the Area and in the Marine Environment; Participation of Developing Countries in Activities in the Area; and Archeological and Historical Objects. The wider interpretation obviously is to the better interest of developing countries. The narrower the definition of "activities," the narrower is the competence of the Authority --which corresponds more closely to the concepts of some of the industrialized States. It should also be noted that the definition of "activities," having a bearing on the functions of the Authority, also has a bearing on the structure of its organs. Many doubts about the composition of the Council could be resolved more easily if the meaning of "activities" were clarified.

Now "activities" has come to embrace processing, shipping, and marketing of nodules and the metals derived therefrom (Article 170 (1)). This is an activity of exploitation, not of the resource, but of the minerals. (The use of the terms "resources" and "minerals" also need further clarification, which has a bearing on the legal and economic content of the concept of the Common Heritage of Mankind.) Furthermore, these "activities) do not necessarily take place "in the Area,"

as pointed out during last Spring's discussions.

The establishment of a unitary joint-venture system would be most helpful in disentangling these difficulties since the joint venture could cover all phases of production: from exploration through lifting, shipping, processing, and marketing. It would increase the Authority's share in the whole economy of nodule mining and, therefore, also increase the Authority's revenues.

In cases where a joint-venture were to cover only one or two stages, the calculation proposed in NG2/11, or based on the net back method as proposed by the Netherlands in another proposal, would still be applicable to the joint venture; but considering the far greater profitability of an integrated operation, such cases would probably be marginal.

Another, major, advantage of the Netherlands' proposal is that it would do away with some of the difficulties inherent in the banking system. I have elsewhere (e.g., San Diego Law Review, Vol. 15, Number 3, 1978) dealt extensively with these difficulties and need not repeat my arguments here. Suffice it to say that the determination of two sites of "equal commercial value" may give rise to considerable problems. The Netherlands' proposal obliterates the problem and, more broadly, tends to soften the lines dividing the Common Heritage of Mankind which must be indivisible. In practice, the Netherlands' proposal would equally work without the establishment of a banking system. In simple terms: For every joint-venture, formed on the initiative of the Enterprise, and in which the Enterprise holds 20 percent, there may be a second joint venture, on the initiative of the "contractor," in which the Enterprise holds 80 percent. In both cases, exploration and exploitation would be the responsibility of the joint venture.

Since, however, changes in the text should be, in any case, kept to a minimum, Article 8 of Annex II and Article 16, 2 (a) of Annex II could remain unchanged, to cover the cases, if any, in which the Enterprise might not exercise its option. Such cases, however, are likely to remain theoretical. In practice, the Enterprise should exercise its option in every case; and thus, practically, the banking system is bound to atrophy.

The basic weakness of the "parallel system" as it developed over the past few years, is that it fails to structure established industry into the Authority's production system, but instead places the Authority's production system (the Enterprise) into a position where it has to compete with established industry: a competition it is likely not to sustain and which gives rise

to all the problems of technology transfer, financing, production limitation, with which the Conference has had to grapple. The "contractual" sector of the parallel system -- likely to remain the stronger, for many years to come -- corresponds, in many ways, to the system of concessions in the petroleum industry. The joint-venture system corresponds to a system of participation in the oil industry. In the oil industry, as one outstanding expert, Ahmed Sadek El-Kosheri put it, the transition from a system of concessions to one of participation (joint ventures), means the transition from confrontation and instability to cooperation and stability. (Le Régime Juridique créé per les accords de participation dans le domaine pétrolier, Académie de Droit International, Recueil des Cours, 1975,IV).

II.

Some of the socialist countries of Eastern Europe have, in the past, raised strong objections against the concept of a unitary joint-venture system. These can be summarized as follows: (1) A unitary joint-venture system might infringe on the sovereign right of States to access to the Area. States must have guaranteed access to the exploitation of the Area. (2) A unitary joint-venture system would, in practice, mean a system dominated by the multinational companies and their economic philosophies which are incompatible with those of socialist States. (3) The relations between private companies and States may give rise to difficulties. (4) A unitary system might fail to provide adequate anti-monopoly guarantees; it might, instead, itself become a monopolistic entity.

These objections must be carefully studied, and their basis must be removed.

With regard to the first point, the Netherlands' proposal, with its great flexibility, leaving all options open, would appear to meet the objection. The Articles in the ICNT/Rev.1, guaranteeing accessto States to the exploitation of the Area, in particular, Article 152 (b) of Part XI and para.3 of Article 4 of Annex II, remain unchanged.

Points (2) and (3) overlap. Over the past years, joint ventures between private companies and State Enterprises in socialist countries have become more and more common. The control by the socialist State is usually assured by a provision that the foreign company is limited to a minority position in investment and decision making (usually 49 percent) , and there are detailed

provisions insuring the full participation of the host country in management and employment.

The Netherlands' proposal places the Authority into a minority position (the Authority's participation is limited to 20 %) in the nonreserved area; and if the private-sector partner chooses not to exercise his option for a 20 % participation in a second joint venture in the reserved area, the Authority remains in a minority in seabed production management.

A previous proposal, introduced by the Delegation of Austria during the intersessional meeting in Geneva in the Spring of 1977 (See Paper submitted by Ambassador Karl Wolf, in Report of Informal Consultations, Annex 6, reprinted, e.g., in 1 Forschungsinstitut für Internationale Politik und Sicherheit, Stiftung Wissenschaft und Politik, Dokumente der Dritten Seerechtskonferenz der Vereinten Nationen -- New Yorker Session 1977, at 310,351 (1977)) provided for a 52 %control by the Authority in all joint ventures. This was to insure the control of the Authority at all times.

The Netherlands proposal, however, has several advantages. First of all, it reduces the investment share of the Authority to a contribution of 20 % to the joint venture, which, during an initial phase, might be advantageous. As a matter of fact, the initial financing of the Enterprise (capital for one full-scale comprehensive operation) would enable the Enterprise to become a partner in 5 joint ventures, on this basis. There hardly will be more, during the initial phase. An immediate start, technology transfer, training, and participation in profits and in decision making are assured in any case, whether the participation is 20% or 50%.

Secondly, the Netherlands's proposal would make the unitary joint-venture system more acceptable to industrialized countries and therefore increase the chances of consensus.

Thirdly there are ways in which the Netherlands' proposal could be amended to incorporate a process successfully applied in other joint venture arrangements, including the OPEC General Agreement signed in New York in October 1972. This agreement assures producer countries an increasing participation in the control of hydrocarbon production: 25 percent in 1973, an additional 5 percent each year from 1979 to 1982, and 6 percent in 1983, bringing participation up to a total of 51 percent by that date. In the case of nodule mining, the period could be stretched over the entire twenty years, up to the Review Conference. States or companies would have the corresponding option to increase their own participation in the corresponding joint

ventures in the reserved area. Obviously this process would facilitate the task of the Review Conference enormously. It would remove the danger of discontinuities and moratoria.

It should be noted that the International Seabed Authority is an international intergovernmental institution established under public international law. An arrangement of this kind would therefore be of enormous general importance: For the first time, multinational corporations or Transnational Enterprises (TNEs) would be brought, not merely under a code of conduct, but under structured public international control. This would be a significant contribution to the building of a New International Economic Order. It certainly should satisfy socialist as well as developing countries with regard to the concerns indicated under (2) and (3).

There remains (4), i.e., the need for antimonopoly provisions. These are contained in Articles 150(f) of Part XI and Articles 6.4.d, 6.5 and 7.3 of Annex II. These Articles would remain unchanged.

With regard to industrialized countries with a free-market economy, the proposed system would initially guarantee to them the financial control that corresponds to the economic reality of today and the integrity of management they require for the launching of a new industry. It would guarantee access, security of investment and continuity. It is indeed interesting to recall that the major consortia, meeting in Geneva on April 5, 1978, examined most thoroughly the question of joint ventures and of a unitary joint venture system. They even drafted a very detailed Article. This, they point out "is founded on the premise of a true parallel system, one in which the Enterprise side and the state and private party side are treated equally by the Convention. If, in the course of negotiation a unitary system of joint ventures should come under consideration" -- emphasis added. It should be noted that this possibility is not at all rejected out of hand by the companies -- "the industry would wish to reconsider this draft article, because certain very significant changes would have to be made under a unitary system to assure access to the resources of the Area. It must be emphasized that the enclosed draft article would not be satisfactory to the mining industry in the context of a unitary system of joint ventures. This draft article is submitted by way of an example and not every company necessarily supports all provisions of the article."

The Article is attached as Annex 3. While it may not be acceptable in all aspects to developing countries it might nevertheless provide a basis for discussion with the industrialized countries.

III.

In a paper: The Impact of Seabed Mining on Developing Countries. Four Models, I have shown that the Authority's revenues from a unitary joint venture system would be roughly twice as large as under a parallel system, basing my calculations on the MIT base model. Taking into account the criticism by the Technische Universität Aachen, one would come to the conclusion that the revenues accruing from the parallel system would be considerably lower. Since the same reduction would have to be made for the revenues from a joint-venture system, we may leave the German figures out of consideration for the moment.

The present calculations are based on NG2/12 and on my models.

Taking the average of all values calculated in NG2/12 ("Evaluating my new compromise proposal") the revenues to the Authority from a contractor (one operation, 3 million tons of nodules annually; life-span of mine site: 20 years) would be $675 million.

A joint venture -- just like a contractual operation -- would yield annual operating profits of $148 million (MIT figure) or 2,960 million over a period of 20 years. If the Enterprise share were 50%, the revenue would be 1,480 million over the 20 year period -- considerably higher than the highest assumption in NG 2/12 and over twice the average of those assumptions.

These proportions would apply if all options were exercised, i.e. the Enterprise would have 20 percent of all contractual operations in the reserved area and 80 percent of all operations in the reserved area, i.e., an average of 50 percent of total seabed production.

It is not likely, however, that this will be the case. While it is obviously in the Authority's interest that the Enterprise should exercise all its options, contractors may not in all cases exercise theirs. The minimum revenue thus would be 20 percent per operation which, assuming again annual operating profits of 148 millions, would come to 592 million over the 20 year period. This is still within the range of the meanfigures of NG2/12. If the Netherlands' proposal were amended to include a formula for increasing participation, maximum profitability would be reached at the end of the 20 year period. During this time, the Authority, and developing countries, would progressively acquire capital, technology, and managerial skills.

IV.

The changes required in the Text to incorporate the Netherlands proposal are minimal. In fact, the Netherlands' proposal does not change the present situation. It merely adds a new option. It opens new possibilities towards a desirable future development. What is required, accordingly, is not so much changes in the text as a few additions.

Activities in the Area are carried out, as heretofore, by the Enterprise and, in association with the Authority, by States Parties or State Entities or persons natural or juridical, etc. The Netherlands' Delegation proposes the addition of a subpara 2 (b) (bis) which would read as follows:

"(b) (bis) The Enterprise has the option to enter into a joint-venture arrangement with the Contractor to a maximum of 20 percent participation under terms and conditions to be agreed upon between the Enterprise and the Contractor.

If the Enterprise decides to exercise this optional right and enters into such an arrangement with the Contractor, the latter has an equal optional right for entering into a joint-venture arrangement with the Enterprise for the exploration and exploitation of the corresponding reserved area.

The contractual arrangement either way shall be on commercial terms and conditions as customarily applied to joint ventures freely entered into between independent parties."

No other changes or additions are required in Part XI of the ICNT/Rev.1.

A few additions would have to be made in Annex II.

Para 1 of Article 10, Joint Arrangements should read:

"1. Contracts for the exploration and exploitation of the resources of the Area may provide for joint arrangements between the Contractor and the Authority through the Enterprise, in the form of joint ventures as provided for in Article 153 (2) (b) (bis), production sharing or service contracts, as well as any other form of joint arrangement for the exploration or exploitation of the resources of the Area. (New words are underlined.)

The Netherlands' Draft Article leaves financial arrangements and terms of technology transfer to be agreed upon between the parties from case to case. This has the great advantages of flexibility and simplicity: of minimizing changes and additions to the text. In their new Working Paper, the Netherlands' Delegation also

suggests methods of dispute settlement, should difficulties arise in negotiating a joint-venture agreement. These are analogous to those already included in the Text for the transfer of technology.

Alternatively, and to insure from the outset that the terms of the joint-venture agreements are not biased in favor of the multinational companies, the Group of 77 might consider the inclusion of an Article 12 bis, "Financial Terms of Joint Ventures. Following the example of the "illustrative agreement: Joint Venture Relationship," contained in David N. Smith and Louis T. Wells, Jr., Negotiating Third-World Mineral Agreements, Article 12 (bis) could take, among others, the following form:

Article 12 bis
Financial Terms of Joint-Venture Agreements

1. Equity Ownership in the Joint Venture.

(a) The initial equity capital in the joint venture shall be owned in the following proportions: Enterprise: 20 percent. Contractors: 80 percent.

(b) The cost of the Enterprise's initial shares in the Joint Venture shall be paid for as follows:

(i) 40 percent of the Enterprises's initial 20 percent shareholding shall be granted to the Enterprise in consideration of its granting the mining and exploitation rights referred to in this agreement.

[Note: this is a contribution in kind: the value of the nodules in situ, which are the common heritage of mankind.]

(ii) 20 percent of the Enterprise's initial 20 percent shareholding shall be paid for by the Enterprise within ___ months ofthe signing of the agreement.

(iii) 40 percent of the Enterprise's initial 20 percent shareholding shall be paid out of future dividends received by the Enterprise from the operations under this agreement. Provided, however, that at least 75 percent of the Enterprise's dividends each year shall be used for the purpose of paying for said shares until the cost of the shares is fully paid.

(c) The cost of the initial shares to be held by the Contractor(s) shall be paid for as follows:

(i) Cash in the amount of $___

(ii) equipment valued at $_____

2. Changes in Ownership Structure.

The Enterprise and the Contractor(s) agree that it shall be the policy of the Joint Venture that at the end of 20 years 50 percent of the ownership of the Joint Venture shall be held by the Enterprise, and 50 percent by the Contractor(s).

To this end, the Enterprise and the Contractor(s) agree that the Contractor(s) shall transfer its equity shares to the Enterprise so that total authorized equity shall be held in accordance with the following schedule.

	Enterprise	Contractor(s)
Initial share ownership	20%	80%
5 years from the date of establishment	27%	73%
10 years from the date of establishment	35%	65%
15 years from the date of establishment	42%	58%
20 years from the date of establishment	50%	50%

3. Payment for Shares

(a) The Enterprise shall pay for shares purchased from the Contractor(s) in cash or out of future dividends received from the Joint Venture.

(b) If the Enterprise elects to pay for the shares from future dividends [75 percent] of the dividends to which the Enterprise is entitled each year shall be used as a credit against its outstanding obligation to the Contractor(s) until such shares are fully paid for.

The price of shares sold by the Contractor(s) to the Enterprise shall be [the actual market value] as determined by an [independent accountant][arbitrator] selected by mutual agreement by the Enterprise and the Contractor(s). In determining the actual market value of such shares the [arbitrator] shall take into account, as one element, a price formula based on 10 times the pro-rata annual profit based on the previous [3] year's earnings. The prices of shares shall be paid in the currency of ___.

4. Transfer of Shares

Neither the Enterprise nor the Contractor(s) shall sell, pledge, or otherwise dispose of its shares in the Joint Venture to other parties without the prior written consent of the other parties to this Agreement.

This paragraph then should be followed by one providing for the same arrangement in reverse (the Enterprise starting with 80%, the Contractor(s) with 20%) for joint ventures undertaken on the initiative of the Contractor(s) in reserved areas.

No other changes or additions are required in Annex II.

Optionally, there might be an Annex III (bis) containing a model joint-venture agreement, establishing each joint venture as a new legal entity operating under the authority of the International Seabed Authority, with its Governing Board or Joint Venture Committee, voting rights, etc. The drafting of such a model should not give rise to any particular difficulties, once the ground rules were established, and could be entrusted to a Group of Experts during the remainder of the Eighth Session.

Annex 3

Draft Article Prepared by
Companies meeting in Geneva on April 5, 1978

(This Draft Article is reproduced here to illustrate the possible starting position of the companies of the industrialized countries.)

Mr. Chairman:

The Austrian Delegation has listened with keen interest to the distinguished Delegate of the Netherlands, on April 20 in the Working Group of 21 and now again, on his timely, conceptually bold and flexible proposal, and I should like to congratulate him on his initiative. At this moment, when the Conference is faced with serious difficulties in finding a modus operandi acceptable to both the industrialized and the developing countries and, at the same time, ensuring that the Enterprise can function on an equal footing with the Contractors -- the Netherlands' proposal may indeed open the way towards a solution, a way out of our deadlock.

As was pointed out by various delegations, the idea of a unitary joint-venture system is not new to this Conference. The Delegations of Nigeria, Sri Landa and others have introduced it into our debates on various occasions. I may remind you that a proposal in this direction was also made by my own Delegation, albeit it during an informal working session in the Spring of 1977. The text of this proposal is available in the Report of Informal Consultations in Geneva Annex 6, which was distributed by the Secretariat.

I should like to summarize here very succinctly the advantages of a unitary joint venture system, with particular reference to the version proposed by the Netherlands.

It should be stressed at the outset that the Netherlands proposal introduces a unitary system only to the extent that the Enterprise exercises its option for joint venture with the Contractor in the non-reserved area and the Contractor exercises his option to enter into a joint venture with the Enterprise in the reserved area. To the extent that these options are not exercised, the parallel system is retained. This means that the changes required in the ICNT are relatively minimal. They could, conceivably, be contained in an additional single Article 151 bis and some changes in Annexes II and III. If the Conference could agree on financial terms, terms and conditions of technology transfer, etc., all these paragraphs and articles could be included in the Text and remain the basis for the parallel system. Should, however, the Conference fail to agree on these detailed provisions, we need not despair: for we could then assume that Enterprise and Contractors would fall back on exercising the option for joint ventures. The availability of the option cools the burning importance of the provisions for financial arrangements and technology transfer.

It should also be stressed at the outset that the Netherlands proposal does not detract one iota from the rights and aspirations of the Enterprise as conceived by the Developing countries. It merely adds to these rights. The Enterprise retains its full rights to operate by itself, but in addition it has the right to share in all seabed production operations. Theoretically, it has this option also under the ICNT; practically, however, it was not assured that there would be State or private partners for the Enterprise for joint ventures. The Netherlands proposal assures that the option can be exercised.

Let us assume now that the options are exercised: What are the advantages of the system? I should like to develop the following 9 points:

1. The system ensures that the Enterprise can initiate its operations at the same time as the private sector. It is the only system that gives this assurance.

2. The problem of the financial terms of contracts becomes far simpler. They can be solved in accordance with standard commercial practice: The share of the produce, the share of profits, and the share of decision-making power are proportionate to the Enterprise's investment share, which, according to the Netherland's proposal, would be up to 20 percent in the non-reserved, and at least 80 percent in the reserved, areas, that is, an average of 50 percent, if all options were exercised.

3. The system thus maximizes financial benefits for the Enterprise and the Authority (in the optimal case, 50 percent of the total seabed production); at the same time, it is financially advantageous to States and companies since it reduces their investment up to 50 percent average while providing for the kind of flexible profit and risk sharing system which the industrialized countries have been advocating during our discussions here.

4. The system solves the problems of technology transfer which is automatically assured in a joint venture.

5. Joint ventures may cover one or more or all stages of an integrated operation, from Research & Development through Prospectint, Exploration, Exploitation, Processing and Marketing. The untractable problem of calculating the ANP (attributable net proceeds) is thus avoided under a joint venture system.

6. The banking system, which caused a great many difficulties, some of which have not even been fully discussed at this Conference, is greatly simplified under the Netherlands' proposal. Under the ICNT it was indeed difficult to decide at what point the two mine sites under consideration could be deemed to be of equal commercial value, and what this value was to be. The question of who was to be responsible for the costs of exploration up to the point of this decision had indeed not been solved satisfactorily to all parties. Under the Netherlands' proposal this difficulty is avoided. In practice, the banking system, under the Netherlands' proposal would work as follows: For each Contract A, in which the Enterprise has the option for a 20 percent participation, there is a Contract B, in which States and companies have an option for an equal participation up to 20 percent. Exploration, in each case, is to be carried out by the joint venture.

7. The problem of discrimination between the Enterprise and States and companies with regard to taxation is avoided. All joint ventures will be treated in the same way, without discrimination.

8. The most important and basic advantage of the system is that the established industry is built into it on the basis of cooperation rather than competition. The Netherlands' proposal introduces this principle in a most flexible way, without shaking the basis of the parallel system. It opens options. Commercial practice and experience themselves will decide to what extent these options will be exercised.

9. The problems of the Review Conference, therefore, lose much of their pungency and become far more tractable. For if the system of exploration and exploitation is built in such a way that the most efficient form of cooperation is allowed to emerge during the first 20 years, the task of the Review Conference will be greatly facilitated. Rather than a consolation prize for those who did not really want to accept the parallel system in the present Convention, the Review Conference will be a normal occurence, faced with the normal tasks of consolidating the system and making minor improvements, not of basically changing the system, under the two-edged sword of Damocles of a moratorium.

The Conference owes a debt of gratitude to the Delegation of the Netherlands for this proposal and we are looking forward to deliberations on it in the resumed session.

Delegation of Austria

1. On the invitation of the Delegation of Austria, informal consultations took place at an inter-sessional meeting at the Palais in Geneva from August 2 to 6. Three meetings were held: On August 2, P.M.; August 3, A.M.; and August 6, A.M.

2. The following 29 Delegations participated:

Africa
Algeria
Egypt
Ivory Coast
Kenya
Liberia
Madagascar
Council of Namibia
Sudan
Zambia

Asia
India
Indonesia
Iran
Dem.Rep.of Korea
Malaysia
Vietnam
Japan

Group B
Australia
Austria
Denmark
France
Italy

Group D
CSSR
DDR
Mongolia
Romania
USSR (Observer)
Yugoslavia

Latin America
Columbia
Honduras

3. The basis of discussion was the Austrian proposal JEFERAD, together with Austrian Working Paper 2, which had been drafted in response to various comments and queries during the Spring Session in Kingston and in the intersessional period.

4. The main points raised during the discussion were the following:

(a) Legal competence of the Prep.Com.

The Delegation of Austria suggested that there could be a wider or a narrower interpretetion ofthe provisions in Resolutions I and II touching on the questions of the legal powers of the Prep.Com. Ultimately it was a question of political will rather than of legal competence.

(b) The Funding of JEFERAD

The Delegation of Austria suggested that the issue should be divided into two parts: (i) establishment of a mechanism through which funding formally and legally could take place; (ii)identification of eventual voluntary contributors willing to make funds available through the established mechanism. A possible way of dealing with (i) was to use the UNDP Revolving Fund for this purpose, and first, informal contacts with the Fund had been encouraging; an alternative might be the establishment of a Special Fund under the Secretary-General, which might be established through Resolu-

tion by the Prep.Com. and Resolution by the General Assembly. Point (ii) should be the responsibility of the Group of Experts which, itwas hoped, might be established next year.

(c) Relations, or "nexus", between the Fund and JEFERAD; between the Fund and the Prep.Com.

The Delegation of Austria suggested that the precise definition of these relationships should be part of the mandate, or terms of reference, of the Group of Experts. In any case, the rules of operation of the Revolving Fund are flexible, and the activities of JEFERAD should be organised in such a way as to remain under the control of the Prep.Com.

(d) Relations between Prep.Com. and JEFERAD

The Delegation of Austria suggested that these relations would be analogous to the relations between the Enterprise and the Authority, upon the coming into force of the Convention.

(e) Timing of JEFERAD proposal

The Delegation of Austria emphasized that JEFERAD could not possibly be established before the question of overlapping claims had been settled, some pioneers had registered their claims, and sites were made available to the Prep.Com. for exploration for the Enterprise. It was to be hoped, however, that this situation would have developed by the time of the Third Session of the Prep.Com next March/April. If activities in favor of the Enterprise were to move on a line parallel to those of the Pioneer Investors, some decisions as to the framework of such activities would have

to be taken during this session.

(f) Phasing of JEFERAD proposal

One Delegation suggested the activities of JEFERAD might be phased, in step with the availability of funding. During a first phase, JEFERAD might concentrate on Training, which required relatively modest financial means: while the more costly activities, such as exploration and research and development, might be postponed to a second phase.

The Delegation of Austria suggested that, in accordance with the mandate of the Prep.Com., a framework should be designed for the most efficient way of organising training as well as exploration and the transfer or development of technology, but once this framework was established, reality would have to dictate the course of events: If funds were available only for training, to start with, this would be a starting point. If 20 to 30 million dollars a year could be made available as provided in the JEFERAD proposal, the full range of activities could be planned from the outset.

(g) Training

One Delegation suggested that management training for the Enterprise should be, above all, profit oriented, and that there was no margin for experimentation and idealism.

TheDelegation of Austria stressed that the needs of the Enterprise were basically different from those of traditional commercial enterprises; that the Enterprise, and, before it, JEFERAD, was, after all, a first concrete piece of a New International Economic Order, and that its training needs deserved the most careful consideration.

(h) Transition from exploration stage to exploitation stage

Some Delegations expressed concern about difficulties that might arise when the Convention comes into force and JEFERAD would have either to be dissolved or transformed.

The Austrian Delegation suggested that the case for dissolution should be provided for in great detail in the terms of the JEFERAD Agreement; if, on the other hand, the Enterprise chose to enter into a new Joint Venture with the partners of JEFERAD, this agreement would be based on the Convention itself.

(i) Funding of the Group of Experts

One Delegation expressed concern about the funding of the group of experts to be established. It would be difficult for some developing countries to provide extra funds for the work of an expert and his participation in the Prep.Com.

The Delegation of Austria suggested, that the three experts to be appointed by the Pioneer investors certainly could be paid for by their

Governments. The four experts to be appointed by the Prep.Com. on the other hand could, conceivably be financed by a voluntary contribution from an organisation such as IDRC in Canada (International Development Research Centre) which had already expressed interest in this possibility.

5. One Delegation drew attention to Article 235 of the EEC Treaty provides that, if an activity of the Community becomes necessary for the attainment of a goal within the context of the Common Market and the required competence is not provided by the Treaty, the Council may, on the proposal by the Commission and after hearing the Assembly, take the required measures by consensus.

6. In summing up, the Delegation of Austria stressed that JEFERAD would provide a systemic framework for the implementation of Resolutions I and II with regard to the Enterprise, which was essential if the Prep.Com. was to fulfill its mandate effectively. JEFERAD had three basic advantages over any other approach discussed thus far:

(a) it ensured the full participation of developing countries right from the beginning, through the interim phase until the coming into force of the Convention;

(b) it offered incentives to the industrialised countries and their companies, in accordance with the Convention;

(c) it opened the most efficient way of ensuring the early entry into effective operation of the Enterprise, without burdening the Enterprise in

advance with liabilities and binding decisions.

Let me, however, make it once more quite clear to all:

JEFERAD is not an independent creature, usurping the powers of the PREPCOM or, in any way competing with it.

JEFERAD is the operational arm of a Prep. Com., controlled by the Prep Com as the Enterprise is the operational arm of the Authority.

Without an operational arm, Mr. Chairman, the Prep Com cannot be operational on behalf of the Enterprise, as it must, if it is to fulfil its Mandate.

JEFERAD, when it will terminate its activities upon coming into force of the Convention does not preclude any option of the Enterprise. Quite on the contrary: of all scenarios options before us, it is the only one that imposes no financial liability on the Enterprise, thus removing entirely the reason to accept or reject a request of JEFERAD, who per force has to be pre-financed and post-financed by the Enterprise.