"THE INTERNATIONAL SEABED AUTHORITY: BEYOND THE REACH OF DEVELOPING STATES".

BY

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DECLARATION

I, AKUNGA NEBAT MOMANYI, do hereby declare that this Thesis is my original work and has not been submitted either in part or whole and is not currently being submitted for a degree in any other University.

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DEDICATION

I dedicate this work to Betty Nyaboke.

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TABLE OF ABBREVIATIONS

ECOSOC	- The Economic and Social Council
ed.	- Edition / Editor
EEC	- European Economic Community.
EEZ	- Exclusive Economic Zone.
GATT	- General Agreement on Tariffs and Trade.
G-77	- Group of Seventy - Seven.
I.C.J.	- International Court of Justice.
I.S.N.T	- Informal Single Negotiating Text
I.L.C.	- International Law Commission
UK	- United Kingdom of Great Britain.
UNCED	- United Nations Conference on the Environment and Development.
UNCLOS I	- First United Nations Conference on the Law of the Sea
UNCLOS II	- Second United Nations Conference on the Law of the Sea.
UNCLOS III	- Third United Nations Conference on the Law of the Sea.
UNGA	- United Nations General Assembly.
U.N.T.S	- United Nations Treaty Series.
USA/US	- United States of America
U S SR.	- Union of Soviet Socialist States.
W T O	- World Trade Organisation.

ABSTRACT

This thesis argues that the deep seabed mining provisions and the International Seabed Authority created under Part XI of the 1982 UN convention on the Law of the Sea are beyond the reach of developing states because they lack capital and technology to meaningfully venture into the seabed by themselves. Consequently the developing states may not benefit from the exploration and exploitation of seabed resources.

Chapter One makes a general introduction and statement of the problem and traces the historical evolution of the present legal regime for the seas. This chapter also justifies the legal regime for the seas and finally makes an overview of the law of the sea convention)n.

In Chapter Two a study of the institutional framework of the Authority is undertaken. The establishment and membership of the Authority, which is a creature of the Convention constitutes the first part of the chapter. An important issue for discussion in this chapter is the decision-making processes and the composition of the organs of the Authority. This proved to be a major and controversial issue during negotiations in UNCLOS III. This principal organs of the Authority, namely, the Assembly, the Council, the Secretariat and the Enterprise are then discussed in turn. The other institutional aspects of the Authority are summarised. The Preparatory Commission, which is the harbinger of the Authority is discussed in the last part of this chapter.

Chapter Three defines and describes the Area and discusses the principles governing the Area. The common heritage of humankind principle, perhaps the most important principle governing the Area, is seen to be in jeopardy. The provisions of the Convention on transfer of technology make unacceptable demands on the developed states. The principle of equitable distribution of seabed resources is still an untried formula. An attempt is also made to discuss the issue of development of the resources of the Area which is closely related to the issue of principles governing the Area. In particular, the chapter discusses the problems and issues emerging from the Convention's prescribed production policies and controls, and singles out the controversial and prominent issue of "pioneer investments." There is also a discussion of the so- called "Alternative Regimes."

Chapter Four discusses the developing states and international organisations generally, and the Authority in particular. The controversies, conflicts and tensions that beleaguered the construction of the deep seabed mining provisions in the Law of the Sea Convention are demonstrative of the imbalances between the majority developing states and the minority developed states in the pursuit of interests in the deep seabed. The pioneer investors and the reciprocating states regimes considerably strengthen the position of developed states over the developing states. An examination of the various national legislation and Agreements on deep seabed mining (which collectively constitute the Reciprocating States Regime) leads to the conclusion that this development would considerably hurt and bleed the Conventional regime. Finally, a discussion of the United Nations General Assembly Agreement relating to the implementation of Part XI of the UN Convention of the Law of Sea is undertaken. The Agreement is perceived as an attempt at bridging the differences and healing the wounds between those states, mainly developing states, which back the Conventional regime and those ones, mainly developed states, which back the Reciprocating States' Regime.

Chapter Five summarizes the main points and makes recommendations and reflections on the improvement of the deep seabed mining regime and the Authority, given that the Convention has now entered into force as international law.

CHAPTER ONE

1.1 GENERAL INTRODUCTION AND STATEMENT OF THE PROBLEM

On 10th December 1982, the United Nations Convention on the Law of the Sea[1] was adopted and opened for signature at Montego Bay, Jamaica.[2] Eleven years later, the Convention received its sixtieth instrument of ratification or accession. A year passed and the Convention on the Law of the Sea entered into force.[3] This was in accordance with Article 308 of the Convention. This marked the culmination of more than fourteen years of negotiations and discussions within the framework of three United Nations Conferences on the Law of the Sea (UNCLOS I, II and III), involving participation by more than 158 countries. The representation at the Conferences involved "all regions of the world, all legal and political systems, all degrees of socio-economic development, countries with various dispositions regarding the kinds of minerals that can be found in the seabed, coastal states, states described as geographically disadvantaged with regard to ocean space, archipelagic states, Island states and landlocked states."[4] The intention was to establish a comprehensive regime "dealing with all matters relating to the Law of the Sea ..... bearing in mind that the problems of ocean space are closely inter-related and need to be considered as a whole."[5] The result of the efforts was the Convention

The Convention has been hailed as a monument to international co-operation in the treaty-making process.[6] It has also been described as a "..... precedent setting document[7] and "the most complex and comprehensive multi-faceted ..... package."[8] The Convention has 320 articles, divided into seventeen parts and, in addition, nine annexes. Together, they embrace every human concern with more than two-thirds of the Earth's surface.[9] The Convention governs all aspects of ocean space from delimitations to environmental control, scientific research, economic and commercial activities, technology and the settlement of disputes relating to ocean matters. However, in spite of the air of achievement surrounding the signing of the Convention, a few developed states led by the United States of America (USA), Britain and Germany have persistently held out against several features of Part XI[10] of the Convention which regulates the exploration and exploitation of the deep seabed beyond the limits of national jurisdiction.[11] Part XI of the Convention constitutes the major focus of this study.

The broad objective of the new legal regime of the seas and oceans is to facilitate international co-operation and promote the peaceful uses of the seas and oceans. It is also proposed to oversee the equitable and efficient utilisation of their resources as well as the conservation of their living resources. The legal regime is also committed to the study, protection and preservation of the marine environment, and the peaceful resolution of disputes.[12] The Convention provides for the establishment of three new international organisations, namely the commission on the Limits of the Continental Shelf,[13] to make recommendations to states on establishing the outer limits of the continental shelf when it extends beyond 200 nautical miles,' the International Seabed Authority,[14] to administer the resources of the seabed beyond the limits of national jurisdiction (the so-called "Area"); and the International Tribunal for the Law of the Sea,[15] for settlement of disputes .

The International Seabed Authority has three principal organs, namely, the Assembly, considered as the "supreme Organ of the Authority",[16] the Council described as 'the Executive Organ" of the Authority[17] and which itself has two organs - the Economic Planning Commission and the Legal and Technical - Commission, and the Secretariat.[18] The Convention creates a unique organ of the Authority, the Enterprise, as 'the organ of the Authority which shall carry out activities in the Area directlyAuthority which shall carry out activities in the Area directly[19]." The Enterprise has a separate annexedstatute creating it and governing its operationsstatute creating it and governing its operations annexed to the Convention. [20]

The Convention sets out the financial arrangements of the Authority,[21] the legal status of the Authority and its privileges and immunities [22] and circumstances for suspension of the exercise of rights and privileges of members[23] as well as provisions for settlement of disputes and advisory opinions.[24] Membership of the Authority is tied to signature, ratification or accession to the Convention itself. [25]

The creation of the Authority and the related deep seabed mining provisions in Part XI of the Convention have received wide attention especially due to the strong objections voiced by some developed states. Indeed the deep seabed mining provisions generated the greatest controversy,[26] partly explaining the long negotiation period of the Convention.

Although at the time of discussion at UNCLOS III the recovery from the ocean bed of manganese nodules (the most prominent resources of the deep seabed) was "still fairly

futuristic",[27] it was apparently spotted by the "Group of 77" as an ideal opportunity to introduce the principles of the New International Economic Order (NIEO) in modern maritime law.[28] In the process, issues of world economic and material inequalities pitting developed countries against the developing countries were being revisited, this time in the context of maritime resources. Part XI of the Convention makes several explicit references to the 'interests of developing countries." The issue arises whether indeed, the "interests" of the developing countries are adequately addressed and protected.

Several issues and controversies arise for discussion in the present study. The first one is the issue of the institutional framework of the Authority. It is by no means the most important issue of this study, but it is nevertheless a central theme. The Convention states that the Authority is the organisation through which states parties shall "organise and control activities in the Area, particularly with a view to administering the resources of the Area. [29] Under the provisions of the Convention, all exploring and exploiting activities in the International Seabed Area would be under the control of the Authority. The Authority is entitled to conduct its own mining operations through its operating arm, the Enterprise. The Authority may also contract with private and state ventures to give their mining rights in the Area so that they could operate in parallel with the Authority. One of the most critical issues with respect to the institutional framework of the Authority, is the decision-making or voting process. Throughout the negotiation of the seabed mining regime in UNCLOS III it was apparent that the acceptability of much of the regime embodied in Part XI of the Convention depended to some degree upon the composition and voting rules of the various organs of the Authority and upon the provisions set up for settlement of disputes."[30]

Most of the developing states chose one-vote majority system mainly because of their numerical advantage over the developed states. On the other hand most of the developed states favoured weighted voting. The USA, for instance, thought that the decision-making process established in the deep seabed regime did not give a proportionate voice to the countries "most affected" by the decisions and would thus not fairly reflect and effectively protect their interests.[31] The USA and a few other developed states consequently refused to sign or ratify the Convention. One of the issues for study herein is the viability of the decision making process of the Authority.

There is also the issue of the apparent mandatory requirement for technology transfer, which is also provided for under Part XI of the Convention.[32] The Authority is expected to acquire technology and to promote and encourage the transfer of the same to developing countries and to the Enterprise 'under fair and reasonable terms and conditions.[33] The Convention does not explicitly state where the technology or scientific knowledge would come from and does not directly mention developed countries as the source of technology. It is a fact that the largest share of marine technology is in the hands of the developed states. The latter would naturally be reluctant to give up their hard-earned technological or scientific information to an "omnipresent and omnipotent"[34] organisation ostensibly for the benefit of all humankind. These states generally regard technology as private property of individuals or corporations. Ambassador James Malone, Special Representative of the USA President at UNCLOS III submitted before the House Merchant Marine and Fisheries Committee on 23rd February 982, that the Convention should not contain provisions for mandatory transfer of private technology. He asserted that there was a deeply held view in the American Congress that one of America's greatest assets was its capacity for innovation and invention and its ability to produce advanced technology. It was understandable therefore, that a treaty would be unacceptable to many Americans if it required the USA, or more particularly, private companies to transfer that asset in a forced sale[35]

There is no doubt about the highly complex nature of marine technology and the huge capital outlays in developing the same. This fact makes it largely the preserve of developed states. Suppose those states which have the technology simply refuse to transfer their technology to the Authority even when they are states parties to the Convention, inspite of the principle of the pacta sunt servanda? How can the Authority ensure that it acquires such technology from such states? Suppose, like the USA, a state is not a state party to the Convention and therefore a member of the Authority, would the Authority expect transfer of technology from .such a non-state party to the Convention?

There is also the issue of the so-called "Pioneer Investor Regime"[36] Pioneer investors won concerted support from developed states primarily because such Pioneers were their own private citizens or state ventures equipped with marine technology which they wanted to protect in view of the coming into force of the Convention. In 1982, the USA strongly argued that the Convention must assure "national access" to those resources by current and future

qualified entities to enhance USA security of supply, avoid monopolisation of the resources by the operating arm of the Authority and promote the economic development of the resources. The USA argued that Pioneer investors had made huge capital outlays for extraction of deep seabed minerals and for development of appropriate technology.[37] How do developing states stand in relation to the "Pioneer Investor Regime"? Who are the ultimate beneficiaries of the so-called "Pioneer Investor Regime"?

Part XI of the Law of the Sea Convention also raises the contentious issue of production controls and apparent protection of land-based producers. The Convention[38] sets out tough and complex "production policies" and regulations to govern exploration and exploitation activities in the Area. The idea apparently is to encourage seabed production at prices remunerative to producers and fair to consumers with the least possible harm to land-based producers of the same minerals. This would be achieved by the issuance by the Authority of production authorisation to approved seabed operators specifying an annual production rate for each. The system introduced by the Convention is therefore one of controls, which is in apparent contradiction to market forces. Is such a system feasible and sustainable in an increasingly free-market world economy?

The USA, spearheading objections to the deep seabed mining provisions of the Convention, asserted that the Convention must not deter development of any deep seabed mineral resources to meet national and world demand.[39] Ambassador Malone asserted that the USA believed that its interests, those of its allies and indeed the interests of the vast majority of nations, would be best served by developing the resources of the deep seabed as market conditions warranted. He said America had a consumer-oriented philosophy. The draft treaty, in America's view, reflected a protectionism bias which would deter the development of deep seabed mineral resources including manganese nodules.[40]

How would the production system created by the Convention cope in a predominantly market-oriented economy? In any case, how would it face up to the apparent hostility of the few but rich developed states which appear to prefer nationalist programmes?

Apart from production controls, the Convention also seeks to govern the distribution of the resources recovered from the deep seabed.[41] Thus another issue for study, also in Part XI of

the Convention, is the distribution formula for resources of the deep seabed. The formula prescribed by the Convention is yet to be tested but it is nevertheless vague and generalistic. According to Article 140 paragraph 2 of the Convention the Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis , in accordance with Article 160 paragraph 2(f)(i)

On its part, Article 160 paragraph 2(f)(i) merely empowers the Assembly of the Authority to "consider and approve upon the recommendation of the Council of the Authority the rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area taking into particular consideration the interests and needs of developing states and peoples who have not attained full independence or other self-governing status."

It remains to be seen how the assumed wealth of the deep seabed would be apportioned and whether the "interests and needs" of developing states would be taken into "particular consideration" in that process. But all this presupposes, of course, that the Authority would have recovered resources from the deep seabed in the name of humankind!

Perhaps the most controversial issue surrounds the principle of the "common heritage of [humankind]."[42] This principle constitutes the bedrock of Part XI of the Convention and perhaps explains the need and desire for universal acceptance of Part XI and the Convention as a whole. It was the basis upon which the whole work of UNCLOS III was built.[43] The issues of controversy at UNCLOS III with regard to Part XI mainly hinged on this fundamental principle. According to this principle, the Area beyond the limits of national jurisdiction and the resources thereof are the "common heritage of humankind." It has been described as "a fashionable newcomer" whose claims to recognition as a fundamental principle extend well beyond the deep seabed although its legal foundations are still "less than entirely secure."[44] R. P. Anand suggests that the principle of "common heritage of humankind" is in conflict with the traditional freedom of the high seas.[45]

At the time it was introduced in the United Nations General Assembly (UNGA) by Maltese Ambassador Pardo in 1967, it won general acceptance.[46] However, in subsequent years, the

common heritage" principle has become increasingly unacceptable especially to developed states resulting in the erosion of the perceived acceptance and universality of the principle.[47]

The principle of common heritage has generated a great deal of emotion among international publicists with the resultant loss of objectivity.[48] According to Pontercovo, a relatively simple economic problem has been unnecessarily politicised.[49] Whereas the concept could easily be accepted as sound and just, transforming the same into practical benefit for humankind is certainly difficult. This is the task sought to be achieved by the Authority. Will the Authority be able to lay claim to the entire Area and its resources for and on behalf of humankind, the vast majority of whom are to be found in developing states? Will the common heritage principle survive the onslaughts on it by its protagonists, particularly the developed states?

Finally, there are two important developments since 1982, touching on part XI of the Convention. The first is that several developed states, most of which objected to the deep-seabed mining provisions of the Law of the Sea Convention, have resorted to national legislation on the deep seabed and co-ordinating agreements between themselves. The USA for instance enacted the US: Deep Seabed Hard Mineral Resources Act on 28th June, 1980, earlier than the signing of the Convention in 1982.[50] Italy enacted its legislation, Italy: Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, Law Number 41 of 20th February, 1985,[51] ostensibly to regulate the exploration and exploitation of the mineral resources of the deep seabed by Italian citizens or organisations. Article 1 of the Italian Law described this as a "temporary measure" pending the entry into force for Italy of the Law of the Sea Convention.

France, Germany, Britain and the USA signed a co-ordinating Agreement in Washington on 2nd September, 1982: Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Seabed.[52] On 2nd September, 1984, Belgium, France, Germany, Italy, Japan, the Netherlands, Britain and the USA signed a Provisional Understanding Regarding Deep Seabed Mining.[53] The development of national legislation and co-ordinating Agreements on the contentious deep seabed mining issue is interesting and intriguing . This development amounts to undermining and bleeding the Law of the Sea Convention.

The second development is that on 28th July, 1994, a few months prior to the entry into force of the Law of the Sea Convention, the United Nations General Assembly (UNGA) came up with an "Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of December 10th, 1982.[54] The Agreement was as a result of informal consultations by the UN Secretary-General seeking universal acceptance of Part XI of the Convention. The Agreement essentially removes the obstacles that had stood in the way of universal acceptance by substituting general provisions for detailed procedures contained in the Convention and by leaving it to the Authority to determine at a future date the exact nature of the rules it will adopt with respect to the authorisation of deep seabed mining operations[55] The Agreement also removes the obligation for mandatory transfer of technology and ensures the representation of certain states or groups of states in the Council of the Authority, while giving those states certain powers over decision-making.[56]

The Agreement amounts to an "informal" amendment of the provisions of the Convention in an effort to seek universal acceptance. The Agreement also amounts to an attempt at healing wounds inflicted by, among other things, the passing of national legislation and the co-ordinating Agreements on deep seabed mining by certain developed States. However, in the process, the Agreement considerably strengthens the position of the minority developed states over the majority developing states.

The broad objective of this study is to critically examine the deep seabed mining provisions in the Law of the Sea Convention and the institutional system created by the Convention for the Area and to assess the overall position of developing states in the system established by the Convention. More specifically, this study aims to:

i) Trace the historical development of the present legal regime for the seas and oceans.
ii) Critically examine the workings of the Preparatory Commission of the Authority and particularly the participation in it of developing states.
iii) Describe and critically analyse the institutional framework of the Authority and particularly the composition, powers and functions, voting systems within various organs, immunities and privileges, financial arrangements as well as dispute resolution.
iv) Critically examine the principle of the "common heritage of humankind" and its applicability to the International Seabed Area.

v) Assess the overall economic and legal position of developing states in the institutional framework of the Authority.

vi) Critically examine the Law of the Sea Convention provisions regarding the principles governing the Area particularly transfer of technology and the common heritage of humankind.

vii) Critically examine the Convention's provisions regarding the development of the resources of the Area and particularly the so-called "Production Policies."

viii) Compare the present institutional system reflected in the Authority with the so-called "Alternative Regimes" fronted by certain developed states which have held out against the Convention.

ix) Assess the relative strengths and weaknesses of the institutional framework of the Authority and suggest areas and provisions requiring strengthening with a view to improving the efficacy and workability of the Authority and enhanced participation by developing states.

1.2 HISTORICAL DEVELOPMENT AND EVOLUTION OF THE PRESENT LEGAL REGIME FOR THE SEAS: TOWARDS THE LAW OF THE SEA CONVENTION

From ancient times, the seas and oceans of the world have represented a source of food, a means of communication and trade and even a source of danger to those communities which feared attack by pirates or enemy fleets. Thus there is nothing essentially new in the present day interplay of economic, political and strategic interests that characterise the problems of the law of the sea.[57] However, the content of the many rules that have evolved over the years to make up the content of the law of the sea varied enormously with the passage of time, perhaps reflecting the shifts in the balance or reconciliation of interests.[58]

In classical times, the Greeks and the Romans treated the seas as res nullius,[59] belonging to no one, and therefore open to claim. However, some Roman thinkers like Gaius and Justinian were already developing the notion of res communis,[60] belonging to everyone, and therefore open to use but not appropriation. State practice after the fall of classical civilisation inclined towards the res nullius interpretation with states claiming either specific jurisdiction or complete sovereignty over parts of the sea.[61] As early as the 9th century, Byzantium claimed

jurisdiction over fishery and salt resources and by the 15th century quarantine regulations and limits were quite common. Venice claimed the Adriatic Sea and various states laid claims to the Baltic, largely on the basis of local naval power. This process culminated in 1493 - 1494 when Spain and Portugal divided up most of the world's oceans between themselves on the basis of a Bull pronounced by Pope Alexander VI. Reaction against the Portuguese and Spanish claims became visible and English and Dutch naval powers challenged this hegemony over the oceans.[62]

By the early years of the 17th century, jurists in Spain itself were questioning the closed sea, mare clausum doctrine and in 1609, Hugo Grotius published his famous treatise MARE LIBERIUM attacking the closed sea concept.[63] The increasing use of the sea by many states was in any case making the extravagant closed sea claims of Spain and Portugal untenable. The high seas reverted in theory and practice to an open sea, mare liberum, regime. The closed sea concept was confined to a belt of "territorial sea" bordering a state's coast. By the end of the 17th century the distinction between the high seas and the territorial seas was firmly established. Alongside the evolution of the territorial sea belts was the issue of the breadth seawards from the coastal states. However, the marine league of approximately three miles was becoming the generally accepted common limit of coastal state jurisdiction.

The compromise provided a stable legal regime for over 200 years. Except for the long-established 4-mile territorial sea claims of Norway, Sweden and Iceland and the 6-mile claim made by Portugal in 1885, the 3-mile territorial sea was almost universally recognised.[64] It was a sufficient boundary to protect the interests of most coastal states, and since the activities of man had not as yet noticeably strained the seemingly inexhaustible resources of the ocean, freedom of the seas seemed to be an ideal regime.

The seabed itself passed almost unnoticed through these changes of regime. Its only importance appeared to be in places where its living resources were accessible, such as the pearl beds off Ceylon and Venezuela and the Persian Gulf and the sponge fishing grounds off Tunisia.[65] Indeed it was not until the middle of the 19th century, under the impact of a rapidly developing science and technology that the seabed began to acquire an importance of its own.[66] At that time, the first deep surveys were beginning to plump the depths and the laying of telegraphic cables was making the seabed important. There was a Convention for the

Protection of Sub-marine Cables held in Paris in 1884.[67] Limitations of the contemporary technology and the availability of relatively plentiful land resources, however, caused commercial interests in seabed mineral resources to lag considerably behind scientific interest.

The period between 1945 and 1950 witnessed the first national claims to the sea, hitherto not considered to be appropriable. This trend was mainly triggered by the so-called Truman Proclamation in which USA President Truman, on 28th September 1945, claimed "the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the USA as appertaining to the USA and subject to its jurisdiction and control."[68] In seabed politics, the Truman Proclamation was therefore a landmark as it showed that advancing technology was bringing seabed mineral resources within the realm of economic accessibility and also it was the first claim by a major maritime power to jurisdiction over the continental shelf beyond the territorial sea. Soon, several other states followed suit.

The unilateral continental shelf claims and the protestations that followed the Truman Proclamation and the steady trickle of unilateral extensions of the territorial sea, that had been going on since the 1930's finally provoked responses at both regional and international levels. The International Law Commission (ILC), at its first session in 1949, chose the law of the sea as one of the three subjects to which it would give immediate priority. The ILC was attempting to create a sufficiently acceptable and uniform international law of the sea.

The work of ILC led directly to the first United Nations Conference on the Law of the Sea (UNCLOS I), although in the years between 1951 - 1958 about 28 more states unilaterally extended their maritime jurisdictions. There was also a substantial revival of claims to a territorial sea beyond three miles during this period. The ILC discussed on its agenda the high seas, continental shelf and territorial sea and in fact drafted articles. At its 1956 session, the ILC presented final versions of all its draft articles on the Law of the Sea, and recommended that the United Nations General Assembly (UNGA) should convene a conference to consider passing conventions on the matter. The ILC's draft articles on the Law of the Sea were important both as a coherent set of proposals on which UNCLOS I would base its deliberations and as a statement of the prevailing international consensus on the law of the Sea. Seabed issues were fairly easy to compromise on due to the low level of economic

interest in the seabed at the time.[69] Nevertheless, even for seabed politics and issues, the ILC proposals were a major landmark.

The stage then shifted to UNCLOS I (1958) and UNCLOS II (1960). UNCLOS I, attended by 86 states considered all aspects of the law of the sea and came up with four conventions on the subject. These were the Convention on the Territorial Sea and the Contiguous Zone,[70] the Convention on the Continental Shelf,[71] the Convention on the High Seas,[72] and the Convention on Fishing and Conservation of the Living Resources of the High Seas,[73] all done at Geneva on 29th April 1958. Broadly, the Geneva Conventions covered the principal aspects of the law of the sea which included issues of national and coastal state jurisdiction, freedom of the high seas and protection of the marine environment and living resources in the seas.[74] UNCLOS II (1960) was really a continuation of UNCLOS I and dealt mainly with the contentious questions of the breadth of the territorial sea and of coastal state jurisdiction over fisheries neither of which had been settled in 1958. UNCLOS II was unable to find a consensus on either question and did not produce any convention.

All the 1958 Conventions were passed by very large majorities, and taken together they represented a substantial codification of the pre-existing rules of international customary law on the subject. They did not however settle the problem of the limits of the coastal state jurisdiction over fisheries or in the territorial sea and left unresolved definitions of inner and outer limits of the continental shelf. Other issues like piracy and the determination of baselines were settled. The many unresolved issues justified the convening of UNCLOS III.

In the period 1961 - 1967 there were some developments that tended to undermine the Geneva Conventions (1958) as a stable basis for a law of the sea regime. Firstly, the Conventions were slow to come into force as they did not quickly attract ratification by a majority of states in the international system. Secondly, there was an influx of new states, mostly African, into the international system following decolonization of hitherto colonised territories. All of these new membets were developing states and few of them felt much commitment to a system of international law that had been erected without their participation and which reflected the dominance of former colonial maritime powers. Thirdly, the Soviet Union steadily emerged as a full maritime state and it consequently shifted its interests to a position more in line with that of the traditional maritime powers.[75] Fourthly, there was the

continued expansion in the use of the oceans combined with an intensification, particularly in the USA, of research and development in marine science and technology.[76] Moreover, this period was also marked by a natural lull in international activity on the law of the sea following the concentrated efforts of the 1958 and 1960 conferences. Initiative in ocean affairs was once again in the hands of individual states. Developing states, especially African coastal states, sought to make national claims off their coasts. Developed states increased their use and capabilities in sea ventures. For example, the USSR became a full maritime power and became more interested in fish protein. The USA was mainly interested in military ventures and mining. Other developed states also stepped up their marine science and technology.[77] On the one hand developing states sought to make national claims on the seas while on the other, developed countries increased their use and capabilities in sea ventures.

By the mid 1960s, the potential for conflict of these new developments was becoming apparent. The seabeds were no longer inaccessible. International law on the seabed beyond the continental shelf was ambiguous and therefore controversial and the emerging marine technology appeared to be on the brink of nullifying the concept of "inability to occupy" that underlay the res communis interpretation of the high seas including the seabeds.[78]

The prospects of the occupation of the international seabeds in turn raised the prospect of conflict amongst states. This in turn led to a re-opening of the seabed question and, indeed, of the whole law of the sea.[79]

Elsewhere, there was massive expansion of fishing and shipping activities beginning in the 1950s and continuing unabated in the 1960s. Indeed the passing in 1958 of the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas [80] reflected the international community's awareness that developments in fishing technology posed a threat of over exploitation of the living resources of the sea [81] The establishment of exclusive fishery zones in the 1960's and their gradual extension from twelve to two hundred miles in the 1960's and 1970's were in part a response to the threat to national fisheries presented by the new, highly efficient factory-fishing fleets developed for distant water fishing.[82] Similarly, the growing awareness of the economic and technical feasibility of the deep sea mining of polymetallic nodules would in any event have demanded the establishment of a new regime for the Area beyond the limits of national jurisdiction [83] Oceans were also being used as the

ultimate dumping ground for sewage, industrial, and nuclear wastes. Problems of saturation and hazardous use also began to arise in this area and the marine environment was under threat of pollution.

For example, in 1954, radiation from hydrogen bomb tests conducted by the USA on the high seas in the area of the Eniwetok Atoll in the Strategic Trust Territory administered by the USA caused the death of a Japanese fisherman and injury to others. It also caused injury to some inhabitants of the Rongelap Atoll within the Territory and to some USA nationals.[84] Between 1956 and 1958, the UK conducted nuclear tests near Christmas Island, a British Island in the Pacific. This adversely affected Japanese fishing interests.[85] The exploration and offshore drilling for oil and gas intensified even off the coasts of the other states which raised hopes of off-shore oil wealth in most coastal states.[86] Interest in off-shore hard mineral was also rising particularly for manganese nodules, especially in the USA.[87]

By 1967, the cumulative effect of legal, political, technological and economic actions by states had reached a level sufficient to propel seabed politics, and indeed the whole law of the sea, back on the agenda of the UN.[88]

From 1966 onward, UNGA developed an increasing interest in the oceans in general and the seabed in particular. This involvement related directly to both the expanding USA and Soviet ocean programmes, and the heightened awareness of coastal state interests especially among the developing states.[89] The Economic and Social Council (ECOSOC) of the UN passed Resolution 1112 of March 1966[90] touching on seabed resources, and UNGA passed Resokition 2172 of December 1966.[91] Both resolutions established the needs and interests of the developing states as an important factor in the new economic interest in the oceans. They also set the stage for a major UN role in the emerging international controversy on the law of the sea. Then came Ambassador Pardo's August 17th, 1967, proposal for declaring seabed resources the common heritage of humankind.[92] The proposal was a solo move designed to stimulate action on internationalisation of the deep seabed before advancing technology made exploitation possible and resulted in the proliferation of even larger national claims. The proposal prompted a major shift in the future direction of the debate on the seabeds and the law of the sea as a whole.

Ambassador Pardo's proposal immediately led to UNGA Resolution 2340 of 18th December, 1967[93] by a vote of 99:0:0 establishing a 35-state Ad Hoc Seabed Committee[94] to study the peaceful uses of the seabed and the ocean floor beyond the limits of national jurisdiction. The Ad Hoc Seabed Committee work had the long-term effect of increasing the momentum toward the re-opening of other law of the sea questions supposedly closed by the Geneva Conventions. In the process, law of the sea issues were being considered as an inter-connected whole. From the Ad Hoc Seabed Committee, the debate moved to UNGA which in turn established a Permanent Seabed Committee of 42 members through Resolution 2467A of 21st December, 1968.[95] By the end of 1968, it was clear that a new seabed regime was not going to be quickly created. Indeed there was a great debate on seabed issues particularly in the USA during the period between 1966 - 1970.[96]

From 1969 - 1970, there was a perceptible trend indicating a swing towards a broader discussion of all the law of the sea issues and a corresponding lapse in the priority of the international seabed regime and machinery which the Permanent Seabed Committee was mandated to pursue.[97]

Subsequently, a group of developing states led by Brazil, Jamaica, and Trinidad and Tobago requested for a new conference covering all aspects of the law of the sea, and not just the continental shelf boundary agenda favoured by Malta and most of the Western states. The developing states argued that the essential unity of ocean issues made it impossible to deal with the seabed in isolation from other aspects of the law of the sea. Seventeen developing states co-sponsored a draft agenda which was broad-based for discussion in the Seabed Committee. They were determined to undertake a thorough re-examination of the entire law of the sea. The developing states had numerical voting power to counter the increasing economic and technological power of the developed states.[98] As a result, UNGA Resolution 2574A,[99] established the idea of a comprehensive conference on the law of the sea and by the end of 1970 the focus was more on broader ocean issues. It was the numerical strength of the developing states that ensured the passing of the so-called "Moratorium Resolution" (UNGA Resolution 2574 A).[100]

UNCLOS III was convened in 1973. Its first session took place in New York (1973 - 1974), the second session in Caracas and then in Geneva (1974 - 1975) and thereafter in New York

and Geneva.[101] In all, UNCLOS III took eleven sessions spanning 93 weeks of negotiations, spread over more than eight years,[102] culminating in the signing of the Final Act in Montego Bay, Jamaica in December 1982. Many states participating in UNCLOS III indicated their willingness to support the conference as the best road to a new international law of the sea. Eventually, UNCLOS III bore the United Nations Convention on the Law of the Sea (1982),[103] in spite of spirited opposition from a few developed states led by the USA.

Throughout the long history and evolution of the present law of the sea, a large body of case law accumulated especially from the 17th century onwards. It is appropriate to discuss a few examples to conclude this part on the historical evolution of the law of the sea. It will shortly be apparent that most of the cases and disputes concerned national jurisdiction, maritime zones and boundaries and the freedom of the high seas.

The period between the 17th Century and the late 19th century has been characterised as the 'era of the great arbitration which settled the freedom of the seas[104] For example, the Costa Rica Packet Arbitration (1897)[105] distinguished jurisdictions on the high seas from those within the so-called range of cannon.' Earlier, in the Behring Sea Fur Seals Arbitration 1895)[106] the Arbitrators held that the USA did not have any right of protection or property in the fur seals frequenting the islands of the USA in Behring Sea when such seals were found outside the ordinary three mile limit. In this case, the facts briefly were that British subjects were engaged in taking fur seals in the Behring Sea beyond American territorial waters. This had the effect of diminishing the stock which was accustomed to breed in American territory. USA officers seized British sealers on the high seas and the resultant dispute was referred to arbitration. Among the arguments canvassed by the USA were the necessity for fishery conservation and the exclusion of fur seals from the category of fish' for the purposes of formulating the freedom to fish. An effort was being made to assimilate seals to domesticated animals.

This arbitration was therefore significant for re-asserting the territorial claims of coastal states to be within the three-mile limit. That in effect meant that beyond the three-mile limit was the high seas, and the resources of the high seas did not belong to any nation or state. The resources of the high seas and of the international seabed therefore remained free of appropriation and national claims.

The Behring Sea Arbitration[107] was followed in an arbitration between the USA and Russia in the Cape Horn Pigeon Arbitration (1902),[108] Kate and Anna Arbitration (1902),[109] and James Hamilton Lewis and C. H. White (1902).[110] In all the three cases, the seizure by Russia of American fishing vessels outside territorial waters was held to be illegal. This fortified the principle of the freedom of the high seas, while at the same time demonstrating the rising interest in marine living resources, especially fisheries

In 1910, the Permanent Court of Arbitration in the North Atlantic Coast Fisheries Arbitration (1910)[111] dealt with a dispute between the USA and Great Britain over some North Atlantic fisheries which arose out of failure to agree on the accepted limits of territorial jurisdiction. Apparently, at this time, the conventionally accepted territorial sea limit was the three-mile limit. However, with growing technology and accessibility of the seas and oceans, national claims were challenging the limit and penetrating territories that were considered to be within the realm of the high seas.

The International Court of Justice (ICJ) dealt with the delimitation of the territorial sea in the Anglo-Norwegian Fisheries Case.[112] The bone of contention was a Norwegian Decree of 1935, which delimited Norway's 'fishery zone' (or its territorial sea) along almost 1000 miles of coastline. This distance was measured from the straight baseline and not from the low water-mark at every point along the coast as was the normal practice. By using the straight baseline method, Norway enclosed waters within its territorial sea that would have been high seas and hence open to foreign fishing if she had used the low-water mark line. Norway justified her method on the grounds that she had well-established titles of right, on the (unique) geographical conditions prevailing on the Norwegian coast, and on the safeguard of what she deemed vital interests of the inhabitants of the northernmost parts of the country.

The UK challenged the legality of Norway's straight baseline system and the choice of certain baselines used in applying it. British fishing interests in the region were at stake as her vessels had been subjected to Norwegian enforcement machinery.

The ICJ found in favour of Norway. It held that for purposes of measuring the breadth of the territorial sea, it was the low water mark as opposed to the high water mark or the mean between the two tides which had generally been adopted in the practice of states. It found the

criterion to be the most favourable and agreeable to both parties although they differed as to its application. The court also found that the ten-mile rule advanced by the UK had not acquired the authority of a general rule of international law as other states had applied different limits. In particular, the rule was inapplicable to Norway as she had consistently rejected it.

The ICJ further established general criteria to provide adequate basis for decisions on the territorial seas. These criteria included the close dependence of the territorial sea upon the land domain and the close relationship existing between certain sea areas and the land formations dividing or surrounding them. Lastly, certain economic interests peculiar to a region, the reality and importance of which were clearly evidenced by long usage, was held to be one of the criteria for deciding on delimitations of territorial seas. In effect, the Court justified Norway's position and held that she had not contravened international law.

This case significantly demonstrated the tension between coastal state territorial sea claims and the freedom of the high seas motivated primarily by the pursuit of economic gains from the seas and oceans. Fishery claims were particularly important for the maritime states of the time In spite of the attempt by the Court to establish criteria for delimiting territorial sea claims, it was obvious that this tension would continue until an acceptable international legal regime was established. The Law of the Sea Convention puts the territorial sea at twelve nautical miles [113]

Prior to adjudicating in the Anglo-Norwegian Fisheries Case, [111] the ICJ gave an opinion in a dispute involving the UK and Albania in the Corfu Channel Case (Merits)(1949) [115] The facts of this case briefly were that on 15 May and 22 October 1946, two British cruisers while passing southward through the North Corfu Channel were fired at by an Albanian battery. The UK Government at once protested to the Albanian Government stating that innocent passage through straits was a right recognised by international law. There ensued diplomatic correspondence in which the British Government asserted that foreign warships and merchant vessels had the right to pass through Albanian territorial waters without prior notification to, and the permission of the Albanian authorities. The UK sent two warships through the North Corfu Strait on 22 November 1946 raising tension and uncertainty. The matter was subsequently referred to the ICJ for an opinion.

The ICJ was of the opinion that it was generally recognised and in accordance with international custom that states in time of peace had a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal state, provided that the passage was innocent. Unless otherwise prescribed in an international convention there was no right for a coastal state to prohibit such passage through straits in time of peace. The rights of passage and innocent passage through international straits were incorporated into the Law of the Sea Convention (1982).[116] The Corfu Channel Case[117] was useful in developing the rights or freedom of transit passage along or across international straits. In the Abu Dhabi Arbitration (1951)[118] Lord Asquith, dealing with the existing law in relation to the continental shelf, found that the law had not as yet assumed the "hard ligaments or the definitive status of an established rule of international law." The law needed to develop in this area. This was perhaps an explicit admission that the existing law of the sea was incomprehensive and inadequate. UNCLOS I attempted to codify this law in the Convention on the Continental Shelf (1958).[119] The Law of the Sea Convention sets out the current law governing the continental shelves.[120]

The ICJ in the North Sea Continental Shelf Cases (1969)[121] found itself adjudicating on the principles and rules that were applicable to the delimitation as between parties of the areas of the continental shelf in the North Sea. These were the (Federal Republic of) Germany, Denmark and The Netherlands. A number of bilateral agreements had been made drawing lateral or median lines delimiting the North Sea continental shelves of adjacent and opposite states including two lateral line agreements between the Netherlands and Germany (1964) and Denmark and Germany (1965). The agreements were not comprehensive enough and further agreement proved impossible. The parties referred the matter by consent to the ICJ and the Court combined the two cases. Denmark and the Netherlands argued that the 'equidistance-special circumstances' principle in Article 6(2) of the Geneva Convention on the Continental Shelf (1958)[122] applied. Germany denied this and proposed 'the doctrine of the just and equitable share'.

The Court rejected the German proposition although it also found that Germany was not a state party to the Geneva Convention on the Continental Shelf[123] and therefore was not bound by it. Denmark and The Netherlands were parties. The question therefore became whether

the equidistance principle advanced by Denmark and the Netherlands, had come to be regarded as a rule of customary international law so that it would be obligatory for Germany, as other states which had accepted it. The Court found that the Geneva Convention was not, in its origins or inception, declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent states. Neither did its subsequent effect constitute such a rule. Moreover, state practice up-to-date had equally been insufficient for the purpose.

The import of this decision was that the law in this area was still unsettled and controversial. In spite of the Geneva Convention there were still gaps that needed to be bridged to constitute a comprehensive and universally acceptable regime.

Between the judgement in the North Sea Continental Shelf Cases (1969)[124] and the adoption of the Law of the Sea Convention in 1982, three further maritime disputes were settled The first of these was the Anglo-French Continental Shelf Case (1977).[125] This decision was perhaps the second judicial landmark in the development of the rules on delimitation between neighbouring states. It was the first case between parties to the Geneva Convention on the Continental Shelf (1958).[126] It provided a useful opportunity for a re-examination of the ICJ's judgement in the North Sea Continental Shelf Cases[127] of eight years earlier. In this case, the Court of Arbitration was asked to determine the course of the continental shelf boundary between France and the UK in part of the English Channel. The arbitration was resorted to after years of unsuccessful negotiations. The parties made long submissions on the law applicable and the delimitation of the continental shelf between themselves. France argued that since she had made certain reservations to the 1958 Geneva Convention on the Continental Shelf on 14 June 1965, she had not retracted them On the strengths of those reservations and objections made by the UK the 1958 Convention was not in force between France and the UK. The legal obstacles to the entry into force of the 1958 Convention between the two states still persisted in their entirety. France submitted further that the international law applicable in this 'matter between the parties was customary law as particularly set out in the North Sea Continental shelf cases. Those customary rules prescribed that the boundary between France and UK must be drawn according to the principles of natural prolongation and other equitable principles. Alternatively, if the 1958 Convention was in force between the two states, Article 6 thereof was not applicable between them. Even if

Article 6 was applicable between the two, there were special circumstances in the Channel Islands and the Atlantic that prohibited recourse to the equidistance method. France also submitted on the actual delimitation in the channel and the Atlantic.

The UK submitted that neither at the time of formulation of France's reservations on accession to the 1958 Convention nor at the time of the formulation of the UK's observations on those reservations did there exist any rule of international law establishing a presumption that in relation to a treaty containing no provisions regarding reservations, this precluded the entry into force of the treaty as between the "reserving" and the "objecting" states. The objections or observations of the UK to the French reservations did not preclude the existence of treaty obligations between themselves and the 1958 Convention in its entirety was a treaty in force between UK and France. The UK in the alternative pleaded the invalidity of France's reservations and also submitted on the actual delimitations.

The court unanimously held, inter alia, that the 1958 Convention was a treaty in force and whose provisions were applicable between France and the UK. The court, nevertheless, acknowledged the evolving customary law on the subject Article 6 on the 1958 Convention was applicable between the parties although this did not preclude. relevant or emergent customary law. The appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation was a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of method had to be based on equitable principals. The court also ruled that France's reservations were true and admissible, and proceeded to draw the Continental Shelf boundaries between the parties.

The second case was the Iceland-Jan Mayen Case (1981)[128] which involved an agreement on the continental shelf delimitation between Iceland and Jan Mayen, signed on 22 October, 1981. On 20 May 1980, the Governments of Iceland and Norway concluded an Agreement concerning fishery and continental shelf questions. The preamble to the agreement recognised that Iceland should have an economic zone in accordance with its law of 1 June 1979. During negotiations of the Agreement Iceland advanced the view that she was entitled to a continental shelf area extending beyond the 200 - mile economic zone Since no agreement was reached on this question during the negotiations, the parties agreed to refer it to a Conciliation Commission to be established in accordance with Article 9 of the Agreement. The

Commission was mandated to submit non-binding recommendations with regard to the dividing line for the shelf area between Iceland and Jan Mayen. The Commission submitted that Jan Mayen was an island within the meaning of Article 121 of the Draft Convention on the law of the Sea of August 1980. Jan Mayen was entitled to a territorial sea, an economic zone and a properly delimited shelf. Both parties were entitled to delimitation of their territorial zones. The Commission also proposed certain delimitations and ajoint co-operation arrangement for the area so defined.

The third case was the Tunisia-Libya Continental Shelf Case (1982)[129] which was a dispute between Libya and Tunisia on the delimitations of their continental shelf boundaries In the latter case the parties requested the court to declare what principles and rules of the international law might be applied for the delimitation of each party's continental shelf and to clarify the practical method of their application. The court found that there was just one continental shelf common to both states, and thus the extent of the continental shelf area appertaining to each could not be ascertained from the criteria of natural prolongation. However, the court held that the delimitation was to be effected in accordance with equitable principles and taking account of all relevant circumstances. In the particular geographical circumstances of the present case, the physical structure of the continental shelf areas was not such as to determine an equitable line of delimitation. The court also outlined the equitable principles and circumstances of the present case and the practical method for application of the principles

Throughout the historical evolution of the present law of the sea, case law played a significant role in the development of the rules and principles that constitute the regime. The preceding brief survey of cases concerning various aspects of the law of the sea illustrates this assertion.

1.3 WHY A LEGAL REGIME FOR THE SEAS?

The need for an international legal regime for the oceans and seas was recognised as early as the Code of Hammurabi almost 4000 years ago.[130] However, the most dramatic developments with regard to an international regime for the seas and oceans are recent responses to new scientific and technological capabilities, growing demands for marine resources, and the realisation of the potential for new conflicts among states.[131] The growing

incidence of marine degradation from human activities has also contributed to the rapid development of international law of the sea over the past few decades. The Stockholm Conference on the Human Environment (1972)[132] is evidence that the world was concerned about the degradation of the environment. The Conference adopted two principal instruments, an Action Plan and a Declaration on the Human Environment.[133] Principle 22 of the Declaration refers to liability and compensation for marine pollution damage. The rising incidence of marine pollution was also expressed in the UN Conference on the Environment and Development (UNCED) (1992).[134] The human activities that contributed to the incidence of marine pollution and degradation were fishing and shipping.[135] For example, the tonnage of world fish catch rose from 21.1 million metric tons in 1950 to 36.7 million metric tons in 1959. In 1969 the figure rose to 63.1 million metric tons, to 71.08 million metric tons in 1979, and to 99.5 million metric tons in 1989.[136]

The growing scientific and technological capabilities, particularly amongst the developed states have tremendously accelerated the search for an agreeable regime for the seas especially the deep seabed beyond the limits of national jurisdiction.[137] The developments in technology and science mean that hitherto "inaccessible" and "unreachable" extents and depths of the seas and oceans, are now becoming increasingly accessible especially to those states which have the technological and scientific capability to undertake sea ventures. Although scientific knowledge invariably runs ahead of the law, it is imperative that a legal regime be constructed to support and guide an orderly evolution and development of marine science and technology. The rapid evolution of the law of the sea, especially in recent decades is a direct response to developing technology and the need to reconcile conflicts of economic interests created thereby.[138]

Over the years, there has been growing demand for ocean or marine resources. The seas and oceans, viewed as the last frontiers of the world, are increasingly coming across as full of plentiful economic promises.[139] However, the marine resources are not uniformly distributed or developed. With a picture of apparently endless economic promises for humankind goes also the challenges and grave threats to the peace of humankind. There has been a serious lacuna in the law of the sea,[140] particularly the deep seabed beyond national jurisdiction hindering the exploitation of the resources of the seabed. The legal lacuna has to be filled otherwise the uncertainties about the extent of national jurisdiction and the legal regime of the

deep seabed, and the temptation on the part of the advanced states to find vast resources with the help of their ever developing technology pointed to the possibility of a serious international conflict. This would invariably repeat the old history of scramble for colonies among European powers, and all its disastrous consequences.[141] While urging the world to declare seabed resources beyond the limits of national jurisdiction to be the "common heritage of humankind" in 1967, Ambassador Pardo expressed such fear. [142]

Moreover, at the time ocean issues and especially marine resources began capturing world attention in earnest, there was already a strong peace movement borne out of the experiences of World War I and II. The world was not sparing efforts to build world peace both on land and on the waters.[143] The efforts were being directed at establishing and undertaking peaceful purposes in the seas and oceans particularly in the seabed and the high seas. The peace movement by itself necessitated the formulation of a legal regime for the vast seas and oceans of the world.

On the other hand, international environmental awareness was also rising rapidly. International concern was mainly expressed in efforts to control pollution, to conserve the environment including protection of natural resources, and to preserve the aesthetic values in the environment. 144 The legal lacuna in the seas and oceans, coupled with increased human activity, made the possibility of marine environmental degradation and pollution very real. A legal regime had to be constructed, among other things, to combat marine environmental degradation and protect the environment in the seas and oceans. Thus, the international environmental movement arguably also justified to some degree the formulation and passing of an international legal regime for the seas.

Lastly, there were also various community interests to be balanced against national interests in the high seas, the seabeds, territorial seas and waters. Rules had to be formulated regarding access to the seas by landlocked states, piracy and pirate broadcasting from high seas. There were also rights of island states and archipelagic states, the limits of national jurisdiction and sovereignty, the rights and freedoms of coastal states, all of which had to be addressed. All these were issues of concern to the international community and had in varying degrees been addressed albeit in a piecemeal fashion..Eventually, it became necessary to formulate a

comprehensive international legal regime for the seas and oceans to accommodate the varied needs, interests and challenges of the international community.

1.4 THE LAW OF THE SEA CONVENTION: AN OVERVIEW

The Law of the Sea Convention establishes a comprehensive framework for the regulation of all ocean space. It is divided into seventeen parts and nine annexes and contains provisions governing, inter alia,, the limits of national jurisdiction over ocean space, access to the seas, navigation, protection and preservation of the marine environment. Other provisions contain the exploitation of living resources and conservation, scientific research, seabed mining and other exploitation of non-living resources, and the settlement of disputes. In addition, the Convention establishes new international bodies, including the Authority, to carry out functions for the realisation of specific objectives.

The Convention begins in its first six parts[145] with issues of national jurisdiction. Part I is basically introductory and provides for the definition of terms and the scope of application of the Convention. The Convention will apply to those states and other entities which sign and ratify or which accede to it.[146]

The territorial sea is established as part of the coastal state adjoining thereto and extends not more than twelve nautical miles measured from the baselines determined in accordance with the Convention.[147] The coastal state will have full sovereignty over the territorial sea together with its own land territory and internal waters. This sovereignty extends to the airspace above the territorial sea and to its seabed and subsoil.[148] The sovereignty of the coastal state over its territorial seas is stated to be subject to the "right of innocent passage" which is defined as navigation through the territorial sea of a coastal state which is not prejudicial to the peace, good order or security of the coastal state and is expected to be "continuos and expeditious".[149] The coastal state is otherwise entitled to enforce its sovereign control in respect of all ships and vessels in its' territorial sea. The Convention also makes specific provision for rules applicable to merchant ships and Government ships operated for commercial purposes and establishes criminal and civil jurisdiction over such ships.[150] There are also rules applicable to warships and other government ships operated for non-commercial purposes.[151] Thus, the territorial sea is an area of full and exclusive sovereign control by the

respective coastal state. This area is effectively part of the national territory of the coastal state.

The Convention creates a contiguous zone defined as a zone "contiguous" to the territorial sea of a coastal state which extends to a maximum of twenty-four nautical miles from the baselines from which the territorial sea is measured [152] Thus in reality, it is a strip of twelve nautical miles contiguous to the territorial sea. The coastal state is given preventive, regulatory and policing competencies or jurisdiction to ensure protection of its territory and territorial sea.[153] Comparative to the territorial sea jurisdiction, the coastal state has only a limited jurisdiction over the area or zone contiguous to its territorial sea.

Part III of the Convention governs straits used for international navigation and establishes both the right to transit passage and innocent passage through such straits, while reserving some jurisdictional competencies for the coastal state.[154] Part IV deals with Archipelagic states. An archipelago means a group of islands, including parts thereof interconnecting waters and other natural features which are so closely interrelated that such islands, waters and natural features form an intrinsic geographical, economic and political entity or which are historically regarded as such. [155] An archipelagic state means a state constituted wholly by one or more archipelagos and may include other islands. [156]

A sui generis regime called the Exclusive Economic Zone (EEZ) is created under Part V of the Convention. The EEZ is also sometimes called the "200-mile limit" because it is stated to be an area not exceeding 200 nautical miles from the baseline from which the territorial sea is measured.[157] It is immediately adjacent to the territorial sea. Over this zone, the coastal state is given rights, duties and jurisdictions including sovereign rights for exploration, exploitation, conservation and management of the natural resources both living and non-living of the waters superjacent to the seabed and of the seabed and sub-soil, the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment.[158]

There are also certain regulated rights and duties of other states both coastal and land-locked over the EEZ and these include navigation, overflight and the laying of sub-marine cables and pipelines.[159] The Convention provides for the conservation of the living resources of the EEZ

and provides that the coastal state should determine the allowable catch of the living resources in its EEZ. The coastal state is also obliged to ensure proper conservation and management measures to guard against over-exploitation of the natural resources and in this connection to keep sustainable populations of the living resources and their respective species.[160] Exchange of scientific data at sub-regional, regional or global level is provided for towards this end.[161] The coastal state shall promote the objective of optimum utilisation of the living resources in its EEZ, and to this end may allow other interested states to utilise the surplus if any.[162] In addition, there are elaborate rules as to highly migratory species, marine mammals, anadromous stocks, catadromous species, sedentary species and the like.[163] Within the EEZ, there is provision for the right of land-locked states and other geographically disadvantaged states to benefit from the resources of the EEZ which are surplus relative to the needs of the coastal state.[164]

Part VI deals with the continental shelf which is described to comprise the coastal state's seabed and sub-soil of the sub-marine areas that extend beyond its territorial waters or sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[165]

The coastal state's rights to the continental shelf include the laying of sub-marine cables and pipelines, a right also enjoyed by other states, and the operations of installations, structures and artificial islands on the continental shelf.[166] The coastal state retains regulatory jurisdiction over the continental shelf.[167]

There is a subtle but important distinction between the EEZ and the continental shelf. Both of them are stated to be two hundred nautical miles from the baseline of the coastal state seawards.[168] In this sense, they appear to be concurrent. However, the EEZ is comprised of the water mass and surface in the area beyond and adjacent to the territorial sea.[169] The continental shelf comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its territory to the outer edge of the continental margin. Where the outer edge of the continental margin does not extend up to that distance, nevertheless the continental shelf will be measured to a distance of two hundred

nautical miles from the baselines from which the territorial sea is measured.[170] For both the EEZ and the continental shelf, the coastal state is given certain sovereign and regulatory rights and competences which are primarily designed to facilitate peaceful and orderly exploitation of the resources of the EEZ and the continental shelf.[171]

Part VII codifies the international customary law principle of freedom of the high seas and reserves the high seas for peaceful purposes only.[172] High seas are regarded as all those parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a state, on or in the archipelagic waters of an archipelagic state.[173] On the high seas, sovereign claims by any state are invalid,[174] and the rights of navigation (passage) and hot pursuit are provided for.[175] An important provision is made for the conservation and management of the living resources of the high seas and the duty is incumbent upon all states who use or are entitled to the high seas to conserve and manage the living resources in the high seas.[176] This is perhaps the most expansive zone of the seas and which epitomises the international character of the seas. It is important that this zone remains peaceful and free of any national claims as this could easily lead to conflict.

Part VIII (Article 121) deals with the regime of the islands, Part IX (Articles 122 - 123) with the enclosed or semi-enclosed seas and Part X deals with the right of access of land-locked states to and from the sea, and the freedom of transit [177] All these provisions, in one way or another, protect special or community interests which were negotiated into the package-deal Convention. Thus, such special interest groups as island states and land-locked states are catered for in these provisions.

Part XI of the Convention, which is the primary focus of this study, deals with The Area, defined as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.[178] The Part enunciates the principles governing The Area including the principle that The Area and its resources are the common heritage of humankind and that activities in The Area are for the benefit of humankind.[179] Provision is made for the development of the resources of The Area, and the International Seabed Authority is incorporated with an elaboration of its organs, functions, financial arrangements, status, privileges and immunities as well as dispute settlement.[180] This part is borne of the desire to create a just and equitable international society by allocating global resources in the seas and oceans of the world.

Part XII deals with the protection and preservation of the marine environment and obligates all states to protect and preserve the environment.[181] Measures to prevent, reduce and control, pollution of the marine environment are put in place and states are duty-bound to conserve marine environment.[182] The Convention makes provision for regional and global co-operation in the protection and conservation of the marine environment.[183] There are provisions for technical assistance, monitoring and environmental assessment, international and national rules to prevent, reduce and control pollution of the environment and for enforcement, safeguard of ice-covered areas, responsibility and liabilities of states, sovereign immunity of states and obligations under other conventions on the protection and preservation of the marine environment.[184] Underlying this Part is the global movement towards the preservation of the environment both on land and in the waters. Marine environment constitutes an important segment of the world's environment.

In the area of marine scientific research, Part XIII entitles states to undertake research and makes provision as to international co-operation in marine scientific research, conduct of marine scientific research, installations or equipment for the purpose, responsibility and liabilities of states as well as settlement of disputes and interim measures.[185] Marine technology is important especially for exploration and exploitation of resources of the seas and also for the preservation of the marine environment. Scientific discoveries and research in this area seem crucial in this respect.

Part XIV of the Convention deals with the development and transfer of marine technology and provides for international co-operation on the same, and for the establishment and conduct of national and regional marine scientific and technological centres.[186] This part significantly complements Part XIII and together they underscore the importance of scientific discovery and technology in the evolving legal regime for the seas.

Part XV covers the difficult but important area of dispute settlement which includes compulsory procedures entailing binding provisions and limitation and exceptions to the applicability of certain of the settlement procedures.[187] The Convention creates the International Tribunal For the Law of the Sea for dispute settlement.[188] Obviously it is imperative for any regime, whether domestic, regional or global to have a dispute settlement

machinery. In the seas and oceans where disputes are bound to arise on matters of jurisdiction, access to resources, environmental preservation and the like, a dispute settlement machinery is indispensable.

Part XVI comprises the general provisions by which the principle of good faith is said to apply and which prohibits the abuse of rights. Other principles include the principle of peaceful uses of the seas, the disclosure of information, handling of archaeological and historical objects found at sea, and the responsibility and liability of states for damage caused by themselves.[189]

Finally, Part XVII deals with the final provisions as to signatures, ratifications, accessions, entry into force, reservations and exceptions, declarations and statements, amendments, relations to other conventions and international agreements, denunciation, depository, status of annexes and authentic texts [190]

In addition to the Convention itself, there are nine annexes dealing with various law of the sea issues. These are : Highly Migratory Species;[191] Commission on the Limits of the Continental Shelf ;[192] Basic Conditions of Prospecting, Exploration and Exploitation; [193] Statute of the Enterprise;[194] Conciliation;[195] Statute of the International Tribunal For the Law of the Sea;[196] Arbitration;[197] Special Arbitration;[198] and Participation By International Organisations.[199]

The Final Act of UNCLOS III has several annexes, six in number, with Annex I comprising of four Resolutions. Resolution I of Annex I to the Final Act establishes the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea, while Resolution II governs preparatory investment in pioneer activities relating to polymetallic nodules.

Upon the signing of the broad-based "package deal" of the Convention and the Final Act, in 1983 the Preparatory Commission met in Kingston, Jamaica to begin work on the creation of the International Seabed Authority and International Tribunal For the Law of the Sea[200]

END NOTES TO CHAPTER ONE

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3. See The Daily Nation, (Nairobi), November 17, 1994. p. 4. As at the first half of 1995, Seventy three States had ratified or acceded to the Convention. Of these, only nine were developed states (See, Bulletin number 27, Law of the Sea, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 1995.)

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CHAPTER TWO

THE INTERNATIONAL SEABED AUTHORITY : INSTITUTIONAL FRAMEWORK

2.1 INTRODUCTION

This chapter discusses the institutional framework of the Authority. The establishment and membership of the Authority, which is a creature of the Convention, constitutes the first part of the chapter. An important issue for discussion in this chapter is the decision-making processes and the composition of the organs of the Authority. This proved to be a major controversy during negotiations in UNCLOS III. The principal organs of the Authority, namely, the Assembly, the Council, the Secretariat and the Enterprise, are then discussed in turn. The other institutional aspects of the Authority are summarised. The Preparatory Commission which is the harbinger of the Authority is discussed in the last part of this chapter.

2.2 ESTABLISHMENT AND MEMBERSHIP OF THE AUTHORITY

The idea of establishing an international machinery for the administration of The Area and its resources was born concurrently with the designation of the deep seabed and its resources as the common heritage of humankind. In other words, the international machinery was perceived to be the vehicle through which the common heritage principle would be realised. In introducing the common heritage principle to the UN General Assembly in 1967, Maltese Ambassador Pardo said that the long-term objective was the creation of a special agency with adequate powers to administer, in the interests of humankind, the oceans and the ocean floor beyond national jurisdiction. He envisaged such an agency as assuring jurisdiction not as a sovereign but as a trustee for all countries over the oceans and ocean floor. The agency would be endowed with wide powers to regulate , supervise and control all activities on or under the oceans and the ocean floor.[1]

The special agency that Ambassador Pardo referred to was to be the Authority upon the passing of the Law of the Sea Convention in 1982. The fact that the international community recognised an international area beyond the limits of national jurisdiction and in principle

designated it as the common heritage of humankind necessitated the establishment of an appropriate regime whose primary objective would be to advance the status of the Area as the common heritage of humankind and to regulate the conduct of activities in the Area. The Authority was designated and intended to meet these objectives.[2] It was supposed that all states would benefit from a system of rational management and control of the resources of the seabed in accordance with the common heritage of humankind.[3]

On the other hand, the establishment of the Authority could be regarded as the conditio sine qua non of community management of the common heritage of humankind. A strong machinery, embodied in the establishment of the Authority and with power and jurisdiction over the whole Area, would presumably avoid unnecessary conflicts and overlapping of competences that may result from laissez faire activities of many entities. The purpose of the international machinery was to achieve a unitary rather than a fragmentary approach to deep seabed issues.[4] The exploration, exploitation and distribution of the resources of the deep seabed and other activities within the Area needed a co-ordinated and uniform approach if grim conflicts and competition reminiscent of the colonial scrambles in Africa, Asia and elsewhere during the last century were to be avoided

However, on the issue of the need to establish an international machinery for the International Seabed Area, as in other law of the sea issues, there were differences between developing states and developed states. Developed states felt that a 'regime' for the deep seabed did not have to include 'machinery.'[5] On the other hand, the developing states felt that only an international machinery would be the one to enforce the principle of the common heritage of humankind. From the point of view of developing states, the establishment of an international machinery seemed inevitable. With time, and in spite of initial categorical rejections of any form of international machinery by the developed states, it was soon realised that such a machinery was indispensable for a workable and meaningful regime in which all the states would have real participation. The idea was eventually incorporated in paragraph 9 of the UNGA Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction.[6]

The unanimous acceptance did not reflect the acceptance of any particular type of international machinery with agreed upon competence and composition. Indeed, the disparity of opinions

about the international machinery was as large as the interpretations of the common heritage principle.[7] It was widely held that there was an intimate connection between the principles applicable to the deep seabed and its resources and the kind of international machinery required to ensure the effective implementation of the regime to be based on those principles. Thus the developing states demanded the establishment of a strong machinery with a comprehensive mandate and competence. Developed states feared the emergence of a strong 'supra-national' organisation which would necessarily affect their own vested state and corporate interests. Developed states particularly did not like to see the establishment of an agency with powers of direct exploration and exploitation. Their arguments were generally based on the reality of business transactions and complexity which might arise as a result of permitting an international organisation to act as a commercial entity. Such complexities included large initial capitalisation, production policies and distribution of profits.

The issue of machinery remained contentious and difficult to tackle. The Ad Hoc Committee which was constituted by UNGA in the wake of Pardo's common heritage speech made merely incidental references to the issue of machinery. Nevertheless, at the instance of the developing states, UNGA requested the Secretary General of the UN through Resolution 2467A (XXIII)[8] to undertake a study on the question of establishing in due time an appropriate international machinery for the promotion of the exploration and exploitation of the resources of the seabed. The Secretary General presented to the Seabed Committee in 1969, a report which contained three different types of machinery for registration, licensing or operation. After extensive consideration of the report and its three types of machinery, UNGA once again requested the Secretary General to prepare a further study on the same issue.[9] UNGA this time requested specifically a detailed study of an international machinery with powers exceeding registration and licensing; a machinery with power to regulate, co-ordinate, supervise and control all activities relating to the exploration and exploitation of deep seabed resources for the benefit of humankind as a whole, with particular attention to the needs and interests of the developing states.

The Secretary General issued, on 26th May, 1970, a comprehensive report which led to further discussions in the Seabed Committee.[10] This in turn resulted in the submission of several alternative draft articles by the Seabed Committee to UNCLOS III. The developments and

discussions in UNCLOS III finally resulted in the adoption of the Law of the Sea Convention whose Part XI contains provisions as to the Authority.

It is noteworthy, however, that the question of the international machinery for The Area, although as important as the utilisation system, did not occupy much of the time at UNCLOS III. Problems relating to it, such as composition of organs, competence and functions, seemed surmountable.[11]

At the first substantive session of UNCLOS III at Caracas in 1974, it was generally acknowledged that the international agency to be established would have an Assembly and a Council as the two main organs. Besides these, it was generally acknowledged that one or more of the following organs, namely, a Secretariat, an operational organ called the Enterprise and some form of disputes settlement tribunal were to be established as parts of the Authority.[12] For some states, all these five organs were to be considered as principal organs of the Authority while others supported three or four main organs leaving the rest as subsidiary ones.[13] The creation of the five organs did not prove to be a controversial problem. Many states however expressed doubts as to the desirability of setting up a disputes settlement tribunal as part of the Authority. Eventually, the Tribunal was established independent of the organisation of the Authority to settle disputes relating to deep seabed mining.[14] It is therefore clear that states were generally agreed about the need to establish an international agency to administer the common heritage resources.

What remained critical was the distribution of power between the Assembly and the Council. Developing states favoured a supreme and powerful Assembly comprising all member states with a one-state one vote decision-making system.[15] Developed states principally held the view that no organ of the Authority should be held to be hierarchically superior to the other, especially as between the Assembly and the Council. They favoured a strong and powerful Council.

During the negotiations on membership of the Authority at UNCLOS III, it was agreed that all states parties to the Law of the Sea Convention would be, ipso facto, members of the Authority. Article 156 of the Law of the Sea Convention provides thus:

1. There is hereby established the International Seabed Authority, which shall function in accordance with this part.
2. All states parties are ipso facto members of the Authority.
3. Observers at the Third United Nations Conference on the Law of the Sea who have signed the Final Act and who are not referred to in Article 305 paragraph 1(c), (d), (e) or (f), shall have the right to participate in the Authority as observers in accordance with its rules, regulations and procedures.
4. The Seat of the Authority shall be in Jamaica.
5. The Authority may establish such regional centres or offices as it deems necessary for the exercise of its functions.

Thus membership to the Convention necessarily means Membership in the Authority as well. Such membership criterion is both inclusive and exclusive at the same time: inclusive because membership to the Authority is automatic for any state party to the Convention, and exclusive because those states which choose not to sign or accede to or ratify the Convention are automatically locked out of membership in the Authority. Assuming that the Convention were to achieve universal acceptance, all states would, ipso facto, be members of the Authority. This representation would truly reflect the Authority as a custodian of international resources in which the whole of humankind has a stake.

The provision that observers to UNCLOS III who signed the Final Act to UNCLOS III would be observers entitled to participate in the Authority without vote was perhaps an attempt at accommodating as many states as possible including the protesting developed states led by the USA, with a view to having them sign up as full members.[16] This 'quasi-membership' designation was perhaps aimed at universalising the acceptance of the new regime and machinery created by the Law of the Sea Convention. Universal acceptance of the Convention was imperative as it meant the realisation of the principle of common heritage.

The broad purpose for the establishment of the Authority is stated in the Convention to be to enable states parties to 'organise and control activities in the [seabed] area particularly with a view to administering the resources of the Area.'[17]

2.3 DECISION-MAKING PROCESSES AND THE COMPOSITION OF THE ORGANS OF THE AUTHORITY

Throughout the negotiation of the seabed mining regime in UNCLOS III, it was apparent that the acceptability of much of the regime embodied in Part XI of the Convention depended partly upon the composition and voting rules of the various organs of the Authority and partly upon the provisions on the settlement of disputes.[18] Even when, towards the conclusion of UNCLOS III, provision was made for the establishment of the Preparatory Commission, care had again to be taken to ensure that the institutional balance achieved in the Convention should not be upset by the terms of Resolutions I and II.[19] Resolution I established the Preparatory Commission for the Authority and for the International Tribunal for the Law of the Sea. Resolution II governed preparatory investment in pioneer activities relating to polymetallic nodules.

The international community was, during negotiations at UNCLOS III, faced with two diametrically opposed positions concerning the nature of the deep seabed mining regime. One position was that of the developing states represented by the G77. The other position was that of the developed states represented mainly by the USA, the European Economic Community (EEC), Japan and the Soviet Union.[20] Although there was general agreement that the seabed beyond the limits of national jurisdiction was the common heritage of humankind', there was much controversy and little agreement during UNCLOS III as to how this Area should be exploited for the common benefit of all.[21]

Developing states were concerned that the international seabed resources should not be appropriated by the developed states able to develop the sophisticated and expensive technology and to secure large capital outlays necessary for exploitation of resources of the deep ocean floor[22] Land-based producers of mineral resources recoverable from the deep seabed were particularly concerned about the market implications of unrestrained exploitation of deep seabed minerals by the technologically superior developed states. The developing states therefore favoured a system whereby the international community, with themselves maintaining a large voice in decisions by virtue of their numerical strength, controlled and determined the levels of deep seabed mining.On the other hand, developed states were

confident of their own technological and capital capabilities. They were interested in a weak regulatory system which would not unnecessarily encumber their ventures into the deep seabed. They preferred a system which protected their special and vested interests.[23]

Against this background, it would be natural that the decision-making processes of the Authority and the related issue of the composition of the organs of the Authority, the international agency designed to organise and control activities in the Area, would raise a lot of controversy. In the end, however, the discussions in UNCLOS III finally resulted in the adoption of a form of composition of the organs of the Authority and particularly the Council that reflects the special interests of the different groups of states rather than humankind as a whole, and a decision-making procedure in the Council, which is virtually tantamount to weighted voting.[24]

Much discussion on the controversial issue of the institutional arrangement of the Authority centred on the distribution of powers among the various organs of the Authority, their composition, and the processes of decision-making within those organs.

During negotiations in the Seabed Committee, it was widely recognised that the Authority's basic machinery should consist of an Assembly where all parties to the Convention would be represented, and a small representative Council with executive powers. The predominant developing states' view was that the Assembly should be the supreme organ of the Authority with effective power over decision-making. The developed states, and particularly the USA, favoured a system where the Council, in which they hoped to carry more weight, would be the locus of power and therefore exercise control of the Authority's operations. Up to the first substantive session in Caracas (1974), nothing much had been agreed on the structure of the Authority and during the session references to the issue were very polarised.[26]

The position of the developed states was principally based on the premise that no organs of the Authority should be endowed with a status superior to the others. It was their objective to obtain or restrain the discretionary powers of the Assembly as well as to elevate the position and influence of the Council in proportion to that of the Assembly. The USA, for instance, realised that detailed mining provisions alone would not adequately protect her interests in guaranteed access to seabed resources, and she emphasised that her position required the

achievement of an appropriate balance in decision- making organs that realistically reflected the "existing interests." [27] The delegates to UNCLOS III were thus reminded that they had to reconcile the antagonism between the idea of sovereign equality of states and the concept of proportional representation of economic interests.[28] The USA pushed for a strong Council with effective policy-making functions that in composition and voting structure balanced all the substantive interests involved. The Assembly was to be given merely recommendatory powers and the USA rejected the one-state, one-vote system.[29] There was need for a division of functions between the Assembly and the Council and the latter's composition had to be balanced on the basis of various interest groups and their respective 'special interests'[30]. It was the view of the developed states that the Council should have wide executive powers with a large extent of autonomous power.

On their part, developing states assumed a power for the Assembly to set the general policies, regulations and directions for the day-to -day activities of the other organs of the Authority In that way, they attributed a controlling character to the Assembly and held it to be supreme According to the initial position of the developing states, the Council as the executive organ of the Authority was to be elected by and be responsible to the Assembly. The Council was also to determine specific policies in conformity with the general policies laid down by the Assembly. Membership in the Council had to be limited and composition was to be based solely on equitable geographical representation. Even here, like in the case of the Assembly, the main principle was the sovereign equality of states, and any form of weighted voting of permanent seats was excluded. The developing states believed in democratic procedures both in the Assembly and in the Council, and expressed fears that a scenario such as existed in the UN Security Council where permanent membership and veto power were crippling decisionmaking,[31] should not be imported to the Authority's Council.

The 1975 UNCLOS III discussions in Geneva confirmed that the current question was not whether the Council should have a decisive say in some questions and should also contain representatives of 'special interests'as well as members elected by the Assembly, but how this should be done. The developing states had made a compromising gesture by conceding to the 'special interests' as criterion for the membership of certain states in the Council. In this way they accommodated a significant demand of the developed states. However, some members

of the G77 still insisted that irrespective of the composition, the Council had to be controlled by the Assembly.[32]

The USA representative to the UNCLOS III 1975 session, Leigh Ratiner, listed twelve critical elements of the structure of the Authority.[33] He insisted that the Council should have the exclusive mandate to exercise the Authority's powers relating to exploration and exploitation while conceding some 'carefully defined' and specific policy-making powers to the Assembly.

Based on these signs of accommodation and compromise, the Chairman of Committee One Working Group, Christopher Pinto, drafted a reasonably balanced text on the Authority's structure.[34] The Assembly would be the 'supreme policy-making organ' but would not be able to impinge on the Council's prescribed functions. The Council would be composed of thirty-six members, 50% representing special interests and the other 50% coming from the five geographical/regional groups. Decisions would require a three-fourths majority. Pinto's proposal in effect offered the developed states what they wanted: the power to block Council decisions adverse to their interests.

Pinto's unofficial text however differed significantly from Engo's[35] Single Negotiating Text (ISNT) with regard to the international machinery. The latter's Article 26 gave the Assembly overall authority over activities in the Area. Twelve Council members only were to represent 'special interests' the other twenty four had to be elected. This was certainly giving the G77 an overall majority. Council voting was arranged on a two-thirds plus one majority basis which was hardly enough to protect the developed states' minority. Engo's text raised more tension and delayed the agreement on the structure of the Authority. In December 1975, the USA submitted radical changes to the ISNT regarding the composition of and voting in the Council.[36] What followed were a series of proposals and counter proposals which went into the fourth, fifth, sixth and seventh sessions without apparent success in resolving all the points of controversy. It was apparent that agreement on the decision-making processes of the Authority was proving very elusive.

In the 1976 session of UNCLOS III, the composition of the Council did not change, and further discussions on this subject as well as the distribution of the power between the Council and the Assembly were deferred to later sessions. Eventually, the criteria for membership in the Council was equally divided between special interests and special qualifications on the one

hand and on equitable geographical distribution on the other hand.[37] The differences as to special interests were contested between the G77, socialist states and the developed states. During the 1978 - 1980 sessions (7th - 9th) the main forum for deliberations concerning the composition of the Council and other related issues was Negotiating Group 3 chaired by Paul Engo who was also the Chairman of Committee One at UNCLOS III.[38] In 1978 debates focused on the Council organs, namely, the Legal and Technical Commission and the Economic Planning Commission. While there was general agreement that the Commissions should be seen to be subsidiary to and answerable to the Council, there was some dispute over their composition. Developing states emphasised the political character of the Commissions and contended that members should be representatives of states. The USA favoured Commissions staffed by experts in relevant fields. Engo's revised text required Commission members elected by the Council to have appropriate expertise and qualifications. In the end, the criteria for election to the Commissions blended appropriate expertise and qualifications as well as special interests and equitable geographical distribution.[39]

Little time was spent on the Council issue during the 8th session, but in the resumed session (1979) it was discussed at length both with regard to the relationship of the Council to the Assembly, Council composition and voting procedures. By then, almost everyone seemed to realise that the Council question presented the most difficult problem remaining before the conference.[40] A solution had to be found on this issue otherwise, as UNCLOS III President Amerasinghe put it, 'then the whole thing collapses like a house of cards!'[41] Subsequent debates centered on whether the same majority should be required for all substantive Council decisions and on the size of the blocking vote if there was to be one. Developing states were firm that they could not agree to a right of minorities to block all substantive issues. Concerning the size of the blocking vote, the USA and its allies stressed that they should be able to thwart a decision without the need to secure support from any other group in the Council.[42]

Towards the end of the 8th session, the Jamaican delegation submitted a voting formula which included three different forms of majorities and foreshadowed the compromise found a year later: a simple majority for all procedural matters, a two-thirds majority on substantive issues, and a special majority on most sensitive issues which were catalogued.[43]

At the 9th session, the developed states pursued their efforts to secure provisions regarding Council decision-making which would enable them to block Council decisions adverse to themselves. The G77 remained unwilling to meet this position. By mid 1980, the contending sides increasingly felt that time was ripe for compromises and that there could be no progress on other issues until the Council voting issue had been resolved. Priority was thus given to Council decision-making at the resumed 9th Session. There were several proposals before the Conference on decision-making representing the principle interest groups.[44] The developed states and their Socialist counterparts had it as their objective to secure a voting formula which could protect their vital interests. The point of departure for all three groups of states was that each member state had one vote. The G77 relied on their numerical strength already secured in the Assembly, to push for a two thirds majority for substantive decisions and simple majority for others. The Socialist states initially did not have a uniform position and their favoured system ranged from consensus to simple majority. Developed states generally favoured weighted voting to protect their interests; they argued that without their technology and investments, no international regime for the deep seabed mining would be viable. Moreover, the developed states and Socialist states had one common goal: to forestall the developing states from imposing their will in the Council. This required setting up a voting system in which the overall majority in the Council was balanced by a majority in each of the different groups with special interests.

Soon, it was obvious to all that any solution acceptable to all states with respect to the decision-making process of the Council had to take account of several factors, including the need to seek consensus in the first place, or in default the affirmative vote of an overall majority of members to a decision, a protective blocking minority for interest groups, and a protective blocking vote for geographical regions.[45] This realisation led to positive consultations and compromises. The three-tiered system was becoming acceptable to all. Discussions then centred on which category of decisions to be subject to which majority vote, and which to consensus. The USA insisted on a majority (three-fourths) for most issues while the G77 pressed for a lower (two-thirds) majorities. Finally, the compromise on Council voting, regarded as the decisive breakthrough of the Session, was incorporated into the Draft Convention on the Law of the Sea.

The voting process of the Council as is set out in the Convention[46] tends to encompass the foregoing considerations. Besides requirements for simple majority for procedural questions, the questions of substance have been categorised into three for which two-thirds or three-fourths majorities or consensus is required.

The problem of decision-making in the Assembly and the Council related closely to the question of composition, powers and functions of these two organs. The difficulty in reaching an agreement concerning the composition and voting process in the Council and the final compromise in the form of the so-called three-tiered system perhaps reflect the understanding that the Council possesses extensive powers concerning the main task of the Authority, namely the rational management of the mineral resources of the deep seabed. The Council now has far more powers than what the developing states could originally have anticipated.[47] Nevertheless, the USA was not satisfied with the deal and she rejected the whole Convention, as apparently she 'did not want anything except everything.'[48]

2.4 ORGANS OF THE AUTHORITY

The Authority has three 'principal organs' - an Assembly, a Council and a Secretariat. In addition, it has a unique organ, the Enterprise and also two subsidiary organs, although the Convention provides for establishment of other subsidiary organs as may be necessary.[49] Each of the principal organs and the Enterprise are expected to have and exercise powers and functions conferred upon it by the Convention and avoid in the process any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ. The balance of power between the Assembly and Council was so painstakingly negotiated that care should be taken not to upset it in practice. It was the formal reflection of the balance of power established between the G77 and the developed states by the close of the negotiations at UNCLOS III.[50]

It would be important to briefly discuss each of the organs of the Authority.

2.4.1 THE ASSEMBLY

Articles 159 and 160 of the Convention outline the composition, procedure and voting, and the powers and functions of the Assembly. The Assembly consists of all the members of the Authority, with each member having one representative in the Assembly. The Assembly shall meet in regular annual sessions and in such special sessions as it may be decided by the Assembly, or convened by the Secretary General at the request of the Council or of a majority of the members of the Authority,[52] and primarily at the seat of the Authority.[53] Therefore, each State Party to the Convention, both developed and developing, has a seat in the Assembly. This representation underlines the theoretical sovereign equality currently prescribed in international relations. The one state - one representative system is closely modelled on the UN system.[54] It is widely accepted for a plenary organ such as the Assembly of the Authority because it appears democratic and representative of all members. The developing states would readily favour this system because of their numerical strength. The collective strength of the votes of the developing states could easily sway decisions in their favour and make lip for their individual weak positions vis-A-vis developed states. Within the Assembly, the developing states would present a powerful challenge to the developed states if they mobilise themselves collectively. However, individually, and in spite of their theoretical sovereign equality of states, they would remain weak.

A majority of the members of the Assembly constitute a quorum, with each member retaining one vote[55] Procedural matters are decided on a simple majority whilst decisions on questions of substance shall be taken by a two-thirds majority of the members present and voting provided that such majority includes a majority of the members participating in the session.[56]. Thus, it is quite possible for the developing states to constitute a quorum and reach decisions that are technically valid and binding. This would appear to be oppressive to the minority developed states. Indeed, all decisions which require simple majorities and which do not need special interest voting could easily always favour the numerically superior developing states. The Assembly decision-making formula appears to favour developing states as they have numerical strength. There is, however, one specific case when decisions of the Assembly require consensus: when the financial contributions of states parties for funding the Enterprise's activities in its first mine site are insufficient. The Assembly, in such event, is required to seek consensus in dealing with the shortfall,[57] For the developing states, even the

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requirement for consensus is ultimately favourable because it renders practically beneficial the theoretical sovereign equality principle. However, it is incumbent upon all developed and developing states, to seek consensus where it is required.

On the whole, however, the decision-making procedure of the Assembly of the Authority resembles the procedure in the plenary organs of the majority of international organisations many of which are modelled on the UN itself. [58]

On the face of it, it might appear that the powers and functions of the Assembly are those befitting 'the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided for in the Convention.[59] As the supreme organ of the Authority, the Assembly is empowered to, inter alia, establish general policies,[60] elect the members of the Council, the Secretary General, and the Governing Body and Director General of the Enterprise,[61] establish subsidiary organs,[62] assess budgetary contributions and approve the annual budget,[63] consider and approve rules, regulations and procedures,[64] decide upon the equitable sharing of financial and other economic benefits derived from activities in the Area,[65] and establish a system of compensation for developing states whose export earnings have been adversely affected by activities in the Area.[66] Perhaps such wide ranging powers and functions, coupled with the numerical strength of the developing states, made the relationship between the Assembly and the Council a critical issue of vital importance particularly for the developed states during UNCLOS III negotiations.

The Assembly is therefore the policy-making organ of the Authority. Developing states are thereby entitled to participate in policy-making for the Authority both individually and collectively. In the same way, developing states are entitled to elect or constitute the principal officers or bodies of the Assembly. Budget decision for any organisation are very important. The developing states have the right as members of the Assembly to participate in making budget decisions. They are also entitled to decide, as members of the Assembly, upon the equitable sharing of financial and other economic benefits derived from the Area as well as the establishment of a system of compensation. Most of these decisions are to be made by majority vote in the Assembly which would seem to disadvantage the minority developed states

Assuming the powers and functions of the Assembly were to be constructed merely on the basis of the sovereign equality of states, and on a voting system with a built-in bias in favour of the developing states, it would have been more difficult to reach agreement. It was therefore essential that adequate safeguards be provided for the interests of the developed states which would frequently find themselves in minority. These safeguards effectively resulted in the weakening of the Assembly and by extension the position of the developing states which relied on their collective weight in the Assembly.

After long and protracted debates and compromises, a balance was arrived at and incorporated in the Convention. On closer scrutiny, it emerges that the Assembly's powers can only be exercised on the basis of recommendations from the Council or within the confines of formulae established by the Convention. According to Brown,[67] in reality, the more important powers lie with the Council. An examination of its membership, its voting rules and its powers and functions, and indeed the fundamental nature of the Authority, reveals as much. To truly appreciate the weak position of the Assembly, one needs to appreciate the powers the Council wields within the whole framework of the Authority and particularly in relation to the Assembly.

2.4.2 THE COUNCIL

The Council is designated 'the executive organ of the Authority.'[68] It has a membership of thirty six state members of the Authority elected by the Authority, with the criteria for election reflecting various interests and the principle of equitable geographical representation.[69] The Convention does not meaningfully differentiate between the Assembly as 'a supreme' organ and the Council as an 'executive' organ. The main difference between them appears to be in composition. The former is composed of all member states to the Convention (general membership) while the latter is composed of a small number of states specifically chosen on a special-interests formula (limited membership). The other main difference is in their respective powers, functions and decision-making processes.

The interest groups are as follows: four members from amongst the world's largest consumers of minerals derived from the Area including one state from the Eastern European (Socialist) regions and the largest consumer, four members from amongst the eight (8) largest

investors in activities in the Area including at least one state from the Eastern European (Socialist) region, four members from among states which are major net exporters of the categories of minerals derived from the Area, including at least two developing states whose exports of such minerals have a substantial bearing upon their economies, six members from among developing states parties representing special interests such as large populations, states which are landlocked or geographically disadvantaged, major importers of the minerals derivable from the area, potential producers of such minerals and the least developed states. The other eighteen members are elected on the basis of equitable geographical distribution of seats in the Council as a whole provided that each principal geographical region shall have at least one member elected on this criterion. The principal geographical regions are identified as Africa, Asia, Eastern European (Socialist), Latin America, and Western European and Others.

Of the special interest groups in the Council, the developing states have the lowest representation. They would not fall under the category of the world's largest consumers of minerals derived from the sea. Indeed, of the four members from this category, one must be the largest consumer and another must originate from the Eastern European (Socialist) region. Developing states are also not likely to be found in the category of the eight largest investors in the Area. In any case, one of the four states from this category must be from the Eastern European (Socialist) region. In the category of major net exporters of minerals derivable from the Area, there is at least mention of two developing states. In the latter category, as in the category of six members from amongst the developing states, these states have a chance to sit in the Council.

Perhaps, it is only in respect of the other eighteen seats to be shared according to equitable geographical distribution that the formula for constituting the Council appears to favor developing states. This is because, Africa, Asia and Latin America are listed among the five principal geographical regions of the world.

Moreover, the Convention makes further special mention of land-locked and geographically disadvantaged states and coastal states, which incidentally have large numbers of developing states. There is also a democratic element where it is provided that states elected to represent particular groups must be those states, if any, nominated by those groups. To this extent, it seems that, at least numerically, the developing states are represented in the Council.

Evidently, there was considerable emphasis on the representation of special economic interest groups as opposed to a straight forward representation based on equitable geographical distribution. This appears to have favoured the minority industrialised-developed states. Taken together with the Council's voting rules, the composition of the Council placed the developed states in a significantly advantaged position.

Elections of the Council shall take place at regular sessions of the Assembly and each member of the Council shall serve for four years, subject to re-election but with due regard to the desirability of rotation of membership.[70] The Council shall function at the Seat of the Authority, and shall meet as need arises, but not less than three times a year.[71] A majority of the Council Members constitute a quorum.[72]

Thus, the Council members are elected by the Assembly. This, prima facie, suggests the 'supremacy' of the Assembly over the Council. It also suggests that there is a democratic system of electing Council members at regular intervals. However, it must be remembered that the Assembly does not have a free hand in electing Council members as it must be guided by the special interest-equitable geographical representation formula.

The Convention provides that each member shall have one vote.[73] Decisions on procedural questions are to be taken by simple majority while substantive issues are subject to a carefully negotiated and complex three tiered voting system.[74] In short, there is two thirds majority votes for certain substantive matters, three-fourths majority for another category and consensus ('the absence of any formal objection') for yet another category. As a general rule, it would seem, the more important the decision, the bigger the voting majority (or consensus) required for its adoption. The one-state one-vote rule in the Council is similar to that in the Assembly. However, the various majorities (or consensus) required make it likely that the various interest groups would vote as blocs. The more influential developed states are more likely to mobilise support around their interest groups or blocs much more than the developing states whose bargaining power is traditionally weaker.

On the other hand, it appears that each member of the Council has a veto power over the most important decisions of the Council, which require consensus. In effect, it would mean that

leading developed states such as the Soviet Union (as it then was) and the USA (if it were a state party to the Convention) would virtually be guaranteed a seat in the Council and the attendant veto power.

Article 162 of the Convention outlines the numerous powers and functions of the Council which, cumulatively, appear to place the Council in a de facto superior status vis-a-vis the Assembly with regard to the real power of the Authority.[75] As the executive organ of the Authority', the Council has the power to establish the specific policies to be pursued by the Authority on any question or matter' within the competence of the Authority.[76] It also has powers to supervise and co-ordinate the implementation of the provision of Part XI on all questions and matters within the competence of the Authority',[77] recommend to the Assembly candidates for election of the Secretary General of the Authority,[78] and the Members of the Governing Board and Director General of the Enterprise.[79] The Council will also recommend to the Assembly on the establishment of subsidiary organs to itself. 80 In addition it has powers to adopt its own rules of procedure,[81] enter into agreements with the UN or other international organisations on behalf of the Authority subject to approval by the Assembly.[82] consider reports of the Enterprise and present its own annual reports to the Assembly as well as recommendations to the Assembly on the reports of the Enterprise.[83] The Council will issue directives to the Enterprise in accordance with Article 170.[84] In addition, the Council is invested with the important function of approving plans of work[85] and exercise of control over activities in the Area in accordance with Article 153(4) of the Convention and the rules, regulations and procedures of the Authority. [86]

The Council also has powers to take measures of protection from adverse economic effects specified under Article[150] on recommendation of its subsidiary organ, the Economic Planning(commission,[87] make recommendations to the Assembly on measures of economic adjustment assistance and compensation under Article 151(10),[88] and enact rules, regulations and procedures on equitable sharing of financial and other economic benefits derived from activities in the Area.[89] The Council will adopt and apply provisionally, pending approval by the Assembly, the rules, regulations and procedures of the Authority relating to prospecting, exploration and exploitation in the Area and the financial management and internal administration of the Authority.[90] The Council will also review the collection of all payments to be made by or to the Authority in connection with operations pursuant to Part XI of the

Convention,[91] make the selection from among applicants for production authorisations pursuant to Annex III, Article 7,[92] and submit the proposed annual budget of the Authority to the Assembly for its approval.[93] The Council will make recommendations to the Assembly concerning policies on any question or matter within the competence of the Authority[94] and concerning suspension of the exercise of the rights and privileges of membership pursuant to Article 185.[95] The Council will also institute proceedings on behalf of the Authority before the Seabed Disputes Chamber[96] in cases of non-compliance and notify", the Assembly of the decision of the Disputes Chamber with or without recommendations [97] and issue emergency orders including orders for suspension or adjustment of operations, to prevent serious harm to the marine environment.[98] it is for the Council to establish appropriate mechanisms for directing and supervising a staff of inspectors who shall inspect activities in the Area to determine whether Part XI and the rules, procedures and regulations of the Authority as well as the terms and conditions of any contract with the Authority were being complied with[99]

The Council is invested with very many important powers and functions. These powers are either exercisable directly and exclusively or are recommendatory in relation to the Assembly. Clearly the Council has a lot of control over the decisions made by the Assembly It is apparent that where the Convention provides for recommendations to the Assembly by the Council, the Assembly has no power or permission to act. When it is borne in mind that most of the powers and functions of the Assembly are exercisable subject to the recommendation of the Council, it emerges that the Council in fact has a superior status to the Assembly' As for the powers exercisable directly and exclusively, the Council has many more than the Assembly. The Council emerges as the stronger organ when compared to the Assembly.

Although the Authority is empowered to establish subsidiary organs as may be found necessary, [100] the Convention itself provides for two subsidiary organs, namely, the Economic Planning Commission and the Legal and Technical Commission, both described as 'organs of the Council.'[101] As many of the Council's powers have to be exercised on the basis of advice or recommendations from its Commissions, it was important for the framers of the Convention to detail issues such as composition, powers and competencies of the Commissions. The Assembly on the other hand, does not have subsidiary organs. This is perhaps an implied admission that the Council is invested with a lot more powers and functions than the Assembly.

Under Article 163, each of the two Commissions is to be composed of fifteen (15) members elected by the Council. Members of the Commissions are expected to have appropriate qualifications and states parties must nominate candidates of the 'highest standards of competence and integrity' and qualifications in the relevant fields.[102] Due regard is to be had to 'equitable geographical distribution' and representation of 'special interests'.[103] Members of the Commissions are to serve on only one Commission at a time,[104] for a period of five years subject to re-election for a further term[105] and they shall have no financial interest in any activity relating to exploration and exploitation in the Area.[106] The Commissions, generally, take directives from the Council and are subject to the control and direction of the latter, mainly undertaking studies and making recommendations to the Council in their respective area of competence.[107] The size and structure of the Commissions themselves is therefore of an executive nature. They are designed to undertake expert functions under the directions of the Council.

The powers and functions of the two Commissions subsidiary to the Council add to the already packed portfolio of the Council and serve to illustrate the extensive nature of the competencies of the Council vis-à-vis the Assembly. Indeed, on closer reflection, it does emerge that the power distribution between the Assembly and the Council is such that although the Assembly 'shall be considered' by virtue of its membership as the supreme organ of the Authority, its characterisation as such is merely formal and explicitly due to its composition. The supremacy of the Assembly seems to be merely symbolic.[108] The Assembly actually possesses a restricted power and the real power concerning decisions on access to resources and activities in the Area abides in the Council. In other words, while the Assembly is formally the supreme organ of the Authority, the Council holds a de facto superior status with regard to the real power. This is exactly what was originally demanded by the developed states

2.4.3 THE SECRETARIAT

The Secretariat of the Authority is a principal organ of the Authority as is the Assembly and the Council. The Secretariat of the Authority shall comprise a Secretary General and such staff as the Authority may require.[109] The Secretary General shall be elected for four years by

the Assembly from among the candidates proposed by the Council and may be re-elected.[110] The Secretary General is the chief administrative officer of the Authority and shall act in that capacity in all meetings of Assembly, the Council and of any subsidiary organs and shall make an annual report to the Assembly on the work of the Authority.[111] The Secretariat is thus the principal administrative organ of the Authority. It bears close resemblance to the UN Secretariat.[112] The language of the Convention is strikingly similar to the one adopted in the Charter of the UN.[113]

The staff of the Authority is to consist of persons qualified in relevant technical and scientific fields and the paramount consideration for their recruitment and employment should be the necessity of securing the highest standards of efficiency, competence and integrity although geographical considerations are also important.[114] The staff of the Authority are to be appointed by the Secretary General[115] The Convention also provides for the international character of the Secretariat[116] and for consultation and co-operation by the Secretary General with other international and non-governmental organisations recognised by the Economic and Social Council of the UN (ECOSOC).117 Apparently the contending negotiators during JNCLOS III did not find it difficult to reach early agreement on the Secretariat. The most important feature of the Secretariat perhaps is its international status. Developing states as well as the developed states are obliged to observe and respect the international character of the Secretariat.

2.4.4 THE ENTERPRISE

To the extent that the Enterprise is neither a principal organ' nor a subsidiary organ of the Authority,[118] it may be described as a unique organ of the Authority. It is a sui generis and an unprecedented creature of the Convention. The Convention defines it as the organ of the Authority which shall carry out activities in the Area directly .[119] As the operating arm of the Authority, the Enterprise is a real innovation as far as the institutional organisation of the Authority is concerned. It was always considered as the political symbol of the G77 in the negotiations concerning the legal regime of the deep seabed.[120] This led to the G77 insisting on making it as self-reliant, viable and strong as possible. The acceptance of the parallel system of utilisation by the G77 was indeed based on the assumption of efficiency of the Enterprise.

On the other hand, the developed states sought to weaken its capabilities and position vis-a-vis its potential competitors, namely the deep sea mining consortia. The Convention's provisions are an attempt at balancing these conflicting forces.

Article 170 of the Convention and Annex IV to the Convention set out detailed provisions with regard to the establishment, composition, powers and functions of the Enterprise. The Enterprise shall, within the framework of international legal personality of the Authority, have such legal capacity as is provided for in the statute set forth in Annex IV, but is stated to be subject to the directives and control of the Council. [121] It enjoys a measure of autonomy.[122] It shall have its principal place of business at the seat of the Authority[123] and shall be funded and supplied with technology in accordance with the provisions of the Convention and Annex IV.[124]

The structure of the Enterprise is relatively simple. It shall have a Governing Board, a Director General and Staff necessary for the exercise of its functions.[125] The Governing Board is to be composed of fifteen members elected by the Assembly in accordance with Article 160 (2)(c) the Convention[126] with regard to securing the highest standard of competence and qualifications in relevant fields as well as the principle of equitable geographical distribution. They shall serve for a period of four years, subject to re-election.[127] Each member of the Board shall have one vote and all matters before the Board shall be decided by a majority of its members.[128] This relatively simple structure of the Governing Board of the Enterprise in the form of limited membership and a simple decision-making procedure was designed to ensure the efficiency of the Enterprise.

Annex IV further details the powers and functions of the Governing Board,[129] the Director General and staff of the Enterprise[130], reporting[131], allocation of net income,[132] finances of the Enterprise,[133] operations of the Enterprise,[134] and the legal status, privileges and immunities of the Enterprise[135]. Clearly, the Enterprise emerges as an autonomous body which has a personality distinguishable from the Authority itself although it is subject to the latter.

Evidently, the Enterprise needs capital, technology and management. Lack of these essentials would necessarily weaken its viability as a commercial enterprise. Indeed, as already stated,

there is a formula for capitalisation and financing of the Enterprise both in the Convention and in Annex IV. It must be appreciated also that the Enterprise is a commercial rather than a political organ.[136]

Because of its immunities and exemptions, its affiliation with the Authority and its symbolic importance as the operating arm of the Authority, the Enterprise as a mining entity may appear to stand in a position apparently superior to that of its competitors in deep seabed mining. However, its innate weaknesses such as lack of necessary capital, technology and management as well as its subordination to the control of the political organs of the Authority can hardly render it an efficient competitor to other miners. [137] In the initial period of the activities of the Enterprise when it is heavily dependent on the technology of other miners and capital to be financed by the States parties or through loans guaranteed by them, the Enterprise could find it particularly difficult to cope with competition. Such a scenario is bound to disadvantage especially the developing states which look up to the Enterprise as their best vehicle to the benefits of deep seabed mining.

2.5 FINANCIAL ARRANGEMENTS AND OTHER INSTITUTIONAL ASPECTS

2.5.1 FINANCIAL ARRANGEMENTS

The issue of funding the Authority arose during negotiations on the institutional aspects of the deep seabed mining regime. Given the nature of its activities and operations, funding became a critical issue. According to the formula set out in the Convention [138] for raising funds of the Authority, the first source is assessed contributions made by members of the Authority in accordance with Article 60 (2) (e),[139] based on the scale used for the regular budget of the UN. It is envisaged that these assessed contributions will be payable only up to the time the Authority has sufficient income from other sources to meet its administrative expenses. This part of the Authority's funds is paid into a special account marked for the Authority's administrative expenses[140]. These administrative expenses are also, however, a first call upon the funds of the Authority.[141]

Other sources of financing the Authority are funds received by the Authority pursuant to Annex III Article 13 in connection with activities in the Area,[142] funds transferred from the Enterprise in accordance with Annex IV Article 10,[143] funds borrowed pursuant to Article 174,[144] voluntary contributions made by members or other entities,[145] and payments to a compensations fund pursuant to Article 151 (1) of the Convention.[146] To an extent therefore, the Authority is self-supporting, financially.

With regard to the annual budget of the Authority, the Convention[147] stipulates that the Secretary General, being the Chief Administrative Officer of the Authority, shall draft the proposed annual budget of the Authority and submit it to the Council. Upon consideration, the Council shall submit it to the Assembly together with any recommendations thereon. The Assembly shall consider and approve the proposed annual budget in accordance with Article 160 Paragraph (2)(h). Similarly, the Secretary General of the UN will make budget estimates to the General Assembly in his annual report.[148]

After meeting administrative expenses, the funds of the Authority which remain may be shared in accordance with Articles 140 and 160(2)(g) or be used to provide the Enterprise with funds in accordance with Article 170(4) or be used to compensate developing states in accordance with Article 151(10) and Article 160(2)(I).[149]

The Convention also provides for the borrowing powers of the Authority whose limits will be prescribed by the Assembly and which borrowing power shall be exercised by the Council.[150]

The Assembly shall appoint an independent auditor to audit the records, books and accounts of the Authority annually.[151]

2.5.2 LEGAL STATUS, PRIVILEGES AND IMMUNITIES OF THE AUTHORITY

As an international organisation, the Authority has an international legal personality and legal capacity.[152] However, its operating arm, the Enterprise, enjoys a level of autonomy and a legal personality distinct from that of the Authority itself.[153] The Authority enjoys a wide range of privileges and immunities in the territory of each state party including immunity from legal process, search and any form of seizure, exemption from restrictions, regulations, controls and

moratoria, inviolability of its archives and official communications, privileges and immunities of certain officers of the Authority, and exemption from taxes and customs duties.[154] All these privileges, immunities and exemptions are typical of most international organisations particularly those modelled on the UN.[155]

2.5.3 SUSPENSION OF RIGHTS OF MEMBERS OF THE AUTHORITY

Under Article 184 of the Convention, a state party which is in arrears in the payment of its financial contributions to the Authority shall have no vote if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years, although the Assembly may waive such suspension. A state party which has 'grossly violated' the provisions of Part XI may be suspended from the exercise of the rights and privileges of membership by the Assembly upon the recommendation of the Council. This can only be done upon a finding by the Seabed Disputes Chamber.[156] Interestingly, the Convention does not provide for expulsion, such as is provided for in the UN Charter.[157] Apparently, no member of the Authority may be expelled. A member can only have its exercise of voting rights or other rights and privileges suspended. This is perhaps due to the overriding desire to realise the universal acceptance of the Convention. Since membership in the Authority is dependent on party status in the Convention, this sounds logical. After all, the resources of the Area are declared to be the common heritage of humankind. To provide for expulsion from membership of the Authority may appear to contradict the principle .This is a significant strength of the Conventional system.

2.5.4 GENERAL APPRAISAL OF THE AUTHORITY

The Authority is in many ways a unique international organisation. This is apparent from its purposes and functions, and its power to make rules, regulations and procedures for the proper conduct of activities in the Area. Its main function is the utilisation of the Area for the common benefit of humankind. Therefore, ideally, its main power base should be the plenary organ - the Assembly - which is a broader forum for humankind, an idea supported by the G77

However, the institutional framework presently vests the real power in the executive organ, the Council. This is very nearly the position which the developed states adopted after they had

succeeded in getting the parallel system of utilisation accepted by the G77. The present institutional framework was a compromise between the G77 who supported a strong decisive and democratic Authority and the developed states who viewed the Authority as 'a necessary evil' whose only legitimate function was to allocate sites and administer a minimum of regulation.[158]

These differing positions gave rise to the controversy between the principle of sovereign equality and the one-state one-vote scheme on the one hand, and the argument of special interests of certain states, on the other. The same arguments which resulted in the creation of a parallel system of utilisation rationalised a compromise in regard to the composition, competence and functions of the Authority. The key words in both cases were 'the balance of interests.' This was apparently achieved by providing for a majority one-state-one-vote system in the Assembly and a 'special interest' formula in the Council. The powers accorded to the Council are far more than was originally intended.

The Enterprise has guaranteed access to the Area, and to finances and technology. However, its proper functioning is dependent upon many uncertain factors such as adequacy of funds and availability of efficient technology. This is because some developed states may choose (as the US has done) to remain out of the Convention, and also provide efficient and commercially sound competition through their state enterprises and even private investors. In such event, the Enterprise may be hard-pressed to compete favourably.

The distribution of powers, competences and composition of the Authority appears rather limited. It is however too early to judge the viability or otherwise of the institutional system.[159] In its present form, it does appear that the organisational features of the Authority suggest that its members, particularly the developed states, will exercise effective control on it, and the execution of its functions and powers may well be restrained either in the form of prescribed rules already in the Convention or by decisions to be adopted by its political organs.[160] Based on the theoretical principle of sovereign equality, it may appear that the developing states have rights, privileges and powers similar to the developed states. However, the distribution of power particularly between the Council and the Assembly makes it difficult to sustain such a view.

2.6 THE PREPARATORY COMMISSION: HARBINGER OF THE AUTHORITY

2.6.1 ESTABLISHMENT, MEMBERSHIP AND PURPOSES

The need to establish the Preparatory Commission was felt as early as 1980 when the prospect of the conclusion of UNCLOS III was in sight.[161] Resolution I to the Final Act of UNCLOS III deals with the establishment and purposes of the Preparatory Commission, the forerunner of the Authority.[162] UNCLOS III, upon adopting the Convention which also provided for the establishment of the Authority and the International Tribunal for the Law of the Sea, decided to 'take all possible measures' to ensure the entry into effective operation without undue delay, of the Authority and the Tribunal and to make the necessary arrangements for the commencement of their operations.[163] UNCLOS III therefore proclaimed the establishment of the Preparatory Commission[164] to achieve the foregoing purposes. It was to be convened by the Secretary General of the UN no sooner than sixty days and no later than ninety days upon the signature of or accession to the Convention by fifty states. The Preparatory Commission held its first Session on 15th March, 1983.[165] Resolution I provided that the Preparatory Commission was to remain in existence until the conclusion of the first Session of the Assembly of the Authority.[166] The Assembly of the Authority convened for the first time in February 1995 at Kingston, Jamaica.[167]

The Preparatory Commission was stated to consist of the representatives of states and of Namibia, represented by the UN Council for Namibia, which had signed the Convention or acceded to it.[168] In addition, there was observer status for representatives of signatories of the Final Act but without decision-making rights.[169]

The specific functions and purposes for which the Preparatory Commission was established included the preparation of the provisional agenda for the first session of the Assembly and the Council, preparation of the draft rules of procedure of the Assembly and the Council, making recommendations governing the budget for the first financial period of the Authority, making recommendations concerning the relationship between the Authority and the UN and other international organisations, making recommendations concerning the Secretariat of the Authority, and undertaking studies as necessary concerning the establishment of the Authority.

Other functions include the preparation of draft rules, regulations and procedures to enable the Authority to commence its operations, the exercise of the powers and functions assigned to it under Resolution I of UNCLOS III relating to Preparatory Investment in Pioneer Activities relating to polymetallic nodules, and to undertake studies on problems which would be encountered by developing land-based producers likely to be most seriously affected by the production of minerals from the Area.[170]

It was particularly significant and unprecedented that the Preparatory Commission was mandated with the extra function of administering the interim regime for the protection of preparatory investment in pioneer activities. This was so because the considerable investments of the ocean mining consortia in the years prior to the adoption of the Convention had given rise to the demand by some of the developed states of the integration of the nationally recognised claims of these consortia with the regime envisaged in the Convention. The question of preparatory investment protection was not discussed in the Conference until the very last session in March 1982, when the G77 made an important concession by accepting the adoption of an interim regime for such proposition in order to pacify the American mining industry and to lure the USA and the other developed states to join the Convention.[171]

2.6.2 ORGANISATION AND WORK OF THE PREPARATORY COMMISSION

During the first session of the Preparatory Commission, Joseph S. Warioba of Tanzania was elected Chairman. The Commission also adopted its Rules of Procedure and completed its organisational structure.[172] It established the Plenary as the principal organ, a General Committee Bureau and four special Commissions of equal status. The Special Commissions were Special Commission I dealing with the problems that could be encountered by developing land based producer states likely to be most seriously affected by the production of minerals derived from the international Seabed area, Special Commission II dealing with the adoption of all members necessary for the early entry into effective operation of the Enterprise, Special Commission III for the preparation of rules, regulations and procedures, for the exploration and exploitation of the international seabed Area, and Special Commission IV to prepare recommendations regarding practical arrangements for the establishment of the International Tribunal For the Law of the Sea.[173]

Other subsidiary bodies established by the Preparatory Commission for the effective exercise of its functions include bureaus for the four special Commissions and the Working Groups of the Plenary and of the Special Commissions as established.[174]

The Plenary was to be assisted by a bureau composed of the Chairman, fourteen vice-chairmen and the Rapporteur General. The officers of the bureau together with the Chairman of the Special Commissions and Vice-Chairman constituted a General Committee of thirty six members whose main function was to act as the executive organ for the administration of Resolution II on Pioneer Investments.

Since 1983, when the Preparatory Commission first convened, it has ordinarily met twice a year and based its work on background papers, working papers, draft rules and other legal texts prepared either by its Secretariat or by the Preparatory Commission itself. The Secretariat services of the Preparatory Commission were provided by the UN from whose budget it was funded.[175] The UN Secretary General appointed a special representative who acted in that capacity in the Preparatory Commission.

Resolution II to the Final Act of UNCLOS III[176] provided for the regime regulating the rights and obligations of pioneer investors which had made Preparatory investments in pioneer activities relating to the exploration and exploitation of polymetallic nodules from the international seabed Area. The implementation of this regime constituted an important mandate of the Preparatory Commission. The Preparatory Commission received applications for registration of pioneer investors. Perhaps the most significant achievement in this regard was that in 1987, there was the resolution of all overlapping claims and the registration of seabed mining entities of France, India, Japan and the former Soviet Union as the first pioneer investors. The historic result was achieved by consensus.[177]

The Preparatory Commission also made substantial progress in other areas of its activities including the provisional adoption of a substantial part of the rules of procedure of the organs of the Authority, the identification of provisional recommendations to be made concerning developing land-based producer states, the drafting of the rules, regulations and procedures for applications and approvals for seabed mining (the so-called 'Mining Code'), and the

consideration of the practical arrangements for the establishment of the International Tribunal for the Law of the Sea.[178]

2.6.3 DECISION-MAKING IN THE PREPARATORY COMMISSION

Resolution I remained silent about the decision-making system of the Preparatory Commission. Paragraph 4 of Resolution I merely states that the application of the Rules of Procedure of UNCLOS III shall apply mutatis mutandis to the adoption of the rules of procedure of the Preparatory Commission. The main explanation for the apparent omission was the controversy at UNCLOS III between the G77 which favoured a majority voting system, or at least some voting procedure as applied in the conference itself, and the developed and Socialist states which demanded consensus. However, the G77 made some compromises, and according to Rule 35 of the Rules of Procedure, the most important decisions of the Preparatory Commission were to be taken by consensus.

Evidently, the decision-making procedure of the Preparatory Commission was more demanding than that of UNCLOS III. Consensus was the only procedure for taking decisions on most of the substantive matters, and no recourse could be had to voting in those cases enumerated in Rule 35 of the Rules of Procedure even if the Preparatory Commission faced a deadlock. In perspective, the decision-making system may have hampered the rapid progress of the work of the Preparatory Commission. Consensus system is hardly a useful method for working out rules, regulations and procedures meant to lure a number of hesitating states to sign or ratify the Convention or accede to it. Yet also it was a positive way of reaching compromises and accommodation of various interest groups with a view to smoothening the operation of the Authority and indeed the whole Convention when it eventually came into operation.

In sum, the Preparatory Commission was an interim arrangement designed to make those preparations normally required for the establishment of a new international organisation and to undertake additional tasks that would permit the Authority to undertake, without delay, the organisation and control of activities in the international seabed Area and allow its Enterprise

to start mining operations in the same time frame as other mining entities.[179] The Preparatory Commission was effectively the harbinger of the Authority.

END NOTES TO CHAPTER TWO

1. Maltese Note Verbale of 17 August 1967 to the UN Secretary General, UN. Doc. A/6695, (1967). See also Dr. Pardo's speech in the General (UN. Doc.A/C.1/PV.1515, (1967).
2. Rembe N. S Africa and the International Law of the Sea (Sijthoff & Noordhoff. 1980), p. 59.
3. Ibid., p. 58
4. Ibid., p. 64
5. Said. M The Law of Deep Seabed Mining (Almquist & Wilksell International, Stockholm, 1987), p. 256.
6. UNGA Resolution 2749 of 1970, Reprinted in 10 International Legal Materials. 220(1970).
7. Supra, note 5, p. 257
8. UNGA Resolution 2467 A(XXIII) of 21 December, 1968. 22 Yearbook of the United Nations. (Office of Public Information, United Nations New York, 1968) pp. 80 - 81
9. UNGA Resolution 2574 XXIV of 15 December 1969, 23 Yearbook of the United Nations. (Office of Public Information, United Nations, New York, 1969), p. 69.
10. See 24 Yearbook of the United Nations. (Office of Public Information, United Nations, New York, 1970), pp. 79 - 83.
11. Supra, note 5, p. 256. See also Ogley, R Internationalising the Seabed, (Gower, Publishing Co. 1984), p. 194: Schmidt, M Common Heritage or Common Burden? The United States Position on the Development of a Regime for Deep Seabed Mining in the Law of the Sea Convention (Clarendon Press, Oxford 1989), p 176.
12. Third United Nations Conference on the Law of the Sea Official Records, Volume II. Second Session, Summary Records of Meetings, U N. Sales Number E75.V 4. See also 28 Yearbook of the United Nations. (Office of Public Information, United Nations, New York, 1974), pp. 71 - 85.
13. Ibid.
14. Annex VI to the Law of the Sea Convention 1982, (United Nations Publication, New York, 1983), pp. 140 - 149, UN. Doc. A.CONF.62/122 (1982).
15. Supra, note 12.

16. Article 156 (3) of the Convention.

17. Ibid., Article 157.

18 Brown E. D Seabed Energy and Mineral Resources and the Law of the Sea (Volume 2, Graham & Trotman, 1986), p. II. 5.1.

19. Ibid.

20. Leipziger, D.M & Mudge, J.L Seabed Mineral Resources and the Economic Resources of Developing Countries (Ballinger Publishing Company, Cambridge, Massachusetts., 1976), p.21

21. Anand, R. P. Exploitation of Deep Seabed Resources: Interests of the Developing Countries in the Deep Seabed and its Mineral Resources: Proceedings of the 3rd International Ocean Symposium, 1978, (Tokyo, Japan Shipping Chib Tokyo 1979), p. 28.

22. Supra note 20, p. 21.

23. Supra, note 12.

24 Supra, note 5 p. 256. See also Article 161 of the Convention.

25. See Sinjela, M Landlocked States and the UNCLOS Regime (Oceania Publications, London, 1983), p. 358. See also Said , op. cit., p. 261; Adede A. O "The Group of 77 and the Establishment of the International Seabed Authority," 17 Ocean Development and International Law, 31(1986): Ogley, op. cit., p. 197.

26. Supra, note 12.

27. Schmidt, op. cit., p. 177. See also note 32, infra.

28. Ibid.

29. Ibid.

30. Supra, note 5, p. 262.

31. Articles 23 and 27 (3) of the UN Charter.

32. 29 Yearbook of the United Nations, (Office of Public Information, United Nations, New York, 1975), pp. 116 - 134. See also, Third United Nations Conference on the Law of the Sea, Official Records, Volume IV, Documents U.N. Sales Number E75.V1 0.

33. Schmidt,op. cit., p. 177.

34 Supra note 32.

35. Ibid.

36. Ibid.

37. Article 161 of the Convention.

38. 32 Yearbook of the United Nations (Office of Public Information, United Nations, New York 1978), pp. 147 - 148; 33 Yearbook of the United Nations, (Office of Public Information, United Nations, New York, 1979.)pp. 122 - 123; 34 Yearbook of the United Nations (Office of Public Information, United Nations, New York 1980), pp. 137-139.

39. Article 163 of the Convention.

40. Schmidt, op. cit., p 180.

41 The Financial Times, 16 April 1980, p. 3, Column 6.

42 Ibid.

43. 33Yearbook of the United Nations (Office of Public Information, United Nations, New York 1980), Supra note 38, volume (1979), pp. 126 - 130.

44. 34 Yearbook of the United Nations. (Department of Public Information, United Nations, New York, 1980), pp. 136 - 159.

45. Ibid.

46. Article 161 (8) of the Convention.

47. Supra, note 5, p. 266.

48. Schmidt, op. cit. 11, p. 186. See also, 36 Yearbook of the United Nations (Department of Public Information, United Nations, New York, 1982), pp. 180-181.

49. Article 158 of the Convention.

50. Supra, note 18, p. 11.5.2.

51. Article 1 59(1) of the Convention.

52. Ibid., Article 159(2).

53. Ibid., Article 159 (3).

54. Article of the Convention UN Charter provides for representation in the General Assembly of all Members of the UN and for five representatives in the Assembly. However, each Member of the Assembly is entitled to only one vote (Article 1 8 (1)). On the other hand, each member of the Authority is entitled to one representative in the Assembly, but who may be accompanied by alternates and advisers (Article 159 (1)). Each member of the Assembly of the Authority is entitled to only one vote (Article 159 (6)).

55. Ibid., Articles 159 (5) and (6).
56. Ibid., Article 159(7).
57 Annex IV to the Law of the Sea Convention (Statute of the Enterprise) supra, Article 1 l(3)(c)c.
58. For a general discussion of international organisations, see Bowett, D. W. The Law' of International Institutions (Stevens and Sons., London, 1982)
59. Article 160(1) of the Convention.
60. Ibid., Article 160 paragraph (1).
61. Ibid., Article 1 60(2)(a)- (c)
62. Ibid., Article 160(2)(d)
63. Ibid., Article 160(2)(e) and (h).
64. Ibid., Article 160(2)(f)
65. Ibid., Article 160(2)(g)
66. Ibid., Article 160(2)(i)
67 Ibid., note 18, p. 11.5.4.
68. Ibid., Article 162(1).
69. Ibid., Article 161(1).
70. Ibid., Article161(3) and (4).
71. Ibid., Article 161(5)
72. Ibid., Article 161(6)
73. Ibid., Article 161(7)
74. Ibid., Article 161(8)
75. Said, op.cit. p.266
76. Ibid., Article 162(1).
77. Ibid., Article 162(2)(a).
78. Ibid., Article 162(2)(b).
79. Ibid., Article 162(2)(c).
80. Ibid., Article 162(2)(d) and (y).
81. Ibid., Article 162(2)(e).
82. Ibid., Article 162(2)(f)
83. Ibid., Article 162(2)(g) and (h).
84. Ibid., Article 162(2)(i).

85. Ibid., Article 162(2)(j) and (k).
86. Ibid., Article 162(2)(i).
87. Ibid., Article 162(2)(m).
88. Ibid., Article 162(2)(n).
89. Ibid., Article 162(2)(o)(i).
90. Ibid., Article 162(2)(o)(ii).
91. Ibid., Article 162(2)(p)
92. Ibid., Article 162(2)(q).
93. Ibid., Article 162(2)(r).
94. Ibid., Article 162(2)(s).
95. Ibid., Article 162(2)(t).
96. Ibid., Article 186 and Annex VI to the Convention.
97. Ibid., Article 162(2)(u) and (v).
98. Ibid., Article 162(2)(w) and (x).
99. Ibid., Article 162(2)(z).
100. Ibid., Article 162(2)(d) and (y).
101. Ibid., Article 163(1).
102. Ibid., Article 163(3). See also Articles 164 and 165.
103. Ibid., Article 163(4).
104. Ibid., Article 163(5).
105. Ibid., Article 163(6).
106. Ibid., Article 163(8).
107. Ibid., Articles 163, 164 and 165.
108 Supra. note 5, p. 282.
109. Ibid., Article 166(1).
110. Ibid., Article 166(2).
111. Ibid., Article 166(3).
112. Articles 97, 98 and 100 of the Convention.
113. Ibid.
114. Ibid., Article 167(1) and (2).
115. Ibid., Article 167(3).
116 Ibid., Article 168.

117. Ibid., Article 169.

118. Article 158 of the Convention provides :-

1. There are established, as the principle organs of the Authority, an Assembly, a Council and a Secretariat.
2. There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in Article 170 (1).
3. Such subsidiary organs as may be found necessary may be established in accordance with this Part.
4. Each principal organ of the Authority and the Enterprise shall be responsible for exercising those power and functions which are conferred upon it.

119. Ibid., Article 153 (2)(a).

120. Supra, note 5, p. 283.

121. Ibid., Article 170 (2).

122. Ibid., Annex IV, Article 2.

123. Ibid., Article 170(3).

124. Ibid., Article 170(3).

125. Ibid., Annex IV, Article 4.

126. Ibid., Annex IV Article 5 (1).

127. Ibid., Annex IV Article 5 (2)

128. Ibid., Annex IV Article 5 (8).

129. Ibid., Annex IV Article 6.

130. Ibid., Annex IV Article 7.

131. Ibid., Annex IV Article 9.

132. Ibid., Annex IV Article 10.

133. Ibid., Annex IV, Article 11.

134 Ibid , Annex IV Article 12.

135. Ibid., Annex IV Article 13.

136. Ibid., Annex IV, Article 12 (7).

137. Supra, note 5, p. 285.

138 Ibid., Article 171.

139 Ibid., Article 171 (a).

140 Ibid., Articles 160 (2)(e) and Article 173 (i).

141. Ibid., Article 172 (2).
142. Ibid., Article 171 (b).
143. Ibid., Article 171 (c).
144. Ibid., Article 171(d).
145. Ibid., Article 171(e).
146. Ibid., Article 171(f).
147. Ibid., Article 172.
148. Article 98 of the UN Charter.
149. Article 173 of the Convention.
150. Ibid., Article 174.
151. Ibid., Article 174.
152. Ibid., Article 176.
153. Ibid., Article 170.
154. Ibid., Articles 177-183.
155. Supra, note 58, p. 33.
156. Article 185 of the Convention.
157. Article 6. of the UN Charter.
158. Brewers, W. C. Jr "Deep Seabed Mining: Can an Acceptable Regime Ever be Found?" II Ocean Development and International Law (1982) p. 25.
159. Said, op.cit. p. 304.
160. Ibid.
161. Said, op.cit. p. 234.
162. Resolution I to the Final Act of the Third United Nations Conference on the Law of the Sea, 1982, (United Nations Publication, New York, 1983).
163. Ibid., preamble.
164. Ibid., Paragraph 1 of Resolution I.
165. See, The Law of the Sea: Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea: Documents. Volume I; First Session 1983 Office for Ocean Affairs and the Law of the Sea, UN, New York, 1991.
166. Supra, note 162, paragraph (13).
167. The Daily Nation (Nairobi), Monday, February 27th, 1995, p. 3.

168. Supra note 162. paragraph (2)
169. Ibid
170. Ibid.,paragraph (5).
171. Supra. note 48
172. Ibid.
173. Article 168, (4)(g), (8),(9) and (10) of the Convention.
174. Ibid., Article 168(7;) The Preparatory Commission was empowered to establish subsidiary bodies as necessary for the exercise of its functions. Paragraphs (8) and (9) make specific provision for the establishment of two Special Commissions.
175. Ibid., Article 168, (14)and(15).
176. Resolution II to the Final Act of the Third United Nations Conference on the Law of the Sea, 1982, (United Nations Publication, New York, 1983).
177. Hayashi, M "Registration of the First Group of Pioneer Investors by the Preparatory Commission for the International Seabed Authority and for the International Tribunalfor the Law of the Sea," 20 Ocean Development and International Law. p. 1(1989).
178. Ibid.
179. Schmidt, op.cit.. p. XI.

CHAPTER THREE

PRINCIPLES GOVERNING THE AREA AND RESOURCE DEVELOPMENT

3.1 INTRODUCTION

This chapter defines and describes the Area and discusses the principles governing the Area. The common heritage of humankind principle, perhaps the most important of all principles governing the Area, is seen to be in jeopardy. The provisions of the Convention on technology transfer make unacceptable demands on the developed states. The principle of equitable distribution of seabed resources is yet an untried formula. An attempt is also made to discuss the issue of development of the resources of the Area which is closely related to the issue of principles governing the Area. In particular, we discuss the problems and issues emerging from the Convention's prescribed production policies and controls, and single out the controversial and prominent issue of 'Pioneer Investment.' There is also a discussion of the so-called 'Alternative Regimes.'

3.2 WHAT IS THE AREA?

The term 'Area' is new. It originates in the Convention on the Law of the Sea. Indeed Part XI's geographical jurisdiction is the Area. Moreover, Part XI of the Convention emerged as the most controversial issue during the negotiations of the Convention. Thus, it may be useful to examine the controversy surrounding the determination of the geographical extent of the 'common heritage of humankind.' In any case, the issue of boundaries generally featured prominently during the negotiations. The common heritage principle itself is in jeopardy and so it is useful to ask what the Area is and whether it is also in jeopardy. The International Seabed Authority is charged with the responsibility of administering the resources of the Area. The Authority's jurisdiction is exercised only within the Area. One cannot therefore meaningfully study one without the other.

It seems that in answering the question as to what the Area is, one has to appreciate the wider controversy of ocean boundaries. Two scholars have suggested that we have entered the

'golden age' of ocean boundary making, and that boundary-making itself is a primordial activity extending perhaps to the beginning of human existence.[1] Boundaries determine rights, liabilities, freedoms and jurisdictions and thereby create order and peace in the conduct of human affairs. Ocean boundaries by nature and function are primarily administrative. Three principal types of ocean boundaries may be identified: baselines (or closing lines) from which the territorial sea and other ocean regimes and zones are measured seaward, seaward limits of ocean regimes and zones, and delimitation lines drawn between opposite or adjacent states.

Boundary-making in the oceans and seas has always pitted national and sovereign claims of (especially) coastal states on the one hand, and the wider interests of the international community on the other. For centuries, there was a dilemma between the mare clausum and mare liberum doctrines. This dilemma was manifested after World War II when a growing number of states put forward claims to extend their authority for a number of reasons - mainly resource control - over vast marine areas off their coasts.[2] It was perhaps this dilemma that led to the UNCLOS I discussions and eventual adoption of four Conventions primarily dealing with various ocean boundaries. These were the Geneva Conventions on the Territorial Sea and Contiguous Zone,[3] High Seas,[4] the Continental Shelf,[5] Fishing and Conservation of the Living Resources of the High Seas.[6] UNCLOS 11(1960) was in effect a continuation of UNCLOS I but it did not come up with any Conventions and also left unsettled several issues including the boundary issue of the precise breadth of the territorial Sea.[7]

It is those unsettled issues at UNCLOS I and UNCLOS II that led to the feeling of inadequacy of the conventional regimes created in 1958 and to UNCLOS III. UNCLOS III had very wide terms of reference that effectively also encompassed the contentious issue of ocean boundaries.[8] It had the mandate to create complete and comprehensive international regimes for the high seas, the coastal waters and the seabed, the deep ocean floor, covering both environmental and economic aspects. On the contrary, the 1958 Conventions had dealt with the issue of ocean boundaries in a piecemeal and fractious manner.

During discussions on the seabed issue at UNCLOS III, and particularly the establishment of the Authority, one of the critical questions was the determination of the territory in which the Authority was to exercise control and jurisdiction or collect its revenues.[10] Evidently, there would be little point in setting up the Authority without agreeing upon or setting clear rules or

criteria for determining the boundary of the 'International Seabed Area' and determining the limits of coastal state or national jurisdiction.

The 'limits' or boundary question was quite separate from that of 'the regime and machinery.' Committee Two of the Seabed Committee and UNCLOS III was charged with the discussions of the 'limits', issue, whilst Committee One dealt with 'regimes and machinery.' In discussing 'limits' issues of a quasi-territorial nature were being raised. The coastal states were bargaining for wider territorial or national claims. The rest of the states hoped that a wider unshared or international area would lead to more financial benefit for them. Apart from the wealth issue, the 'limits' discussion also revealed issues of a purely territorial nature.[11]

Before UNCLOS III, coastal states were primarily interested in expanding and enhancing the breadths and depths of their jurisdictions. The prospect, particularly from 1967 onwards, of managing the area beyond national jurisdiction for the benefit of humankind as a whole, far from inhibiting coastal state expansion, seemed in fact to accelerate it.[12] Between 1958 - 1974 and especially in the years before 1967, coastal states increasingly made national claims to the seas and oceans. Technological advancements were improving access and exploration of the frontiers beyond the 1958 projections. These developments made the situation potentially volatile as they portended possibilities of national competition and rivalry in the seas and oceans. Ambassador Pardo's proposals to United Nations General Assembly in 1967 were indicative of increasing wariness about the expanding national claims over the seas and oceans. He thus sought to establish some form of international jurisdiction and control over the seabeds and ocean floor underlying the seas beyond the limits of national jurisdiction before events took an irreversible course. The issue of the geographical extent of the common heritage principle was important in so far as it also necessarily affected other geographical regimes of interest to coastal states especially. The issue was thus broadened to that of coastal state jurisdiction generally.

On the other hand, in 1970, the United Nations General Assembly came up with Resolution 2749 of 1970[13] in which it referred to the issue of limits. Its preamble declared that there was an area of the seabed beyond the limits of national jurisdiction whose 'precise limits ..... are yet to be determined'.[14] The United Nations General Assembly was careful not to rely on the

limits of national jurisdiction as then there was still a dispute as to extents of national jurisdiction.

Some states maintained that the issue of 'limits' would be determined by the kind of regime for the 'common heritage' that emerged from UNCLOS III. If what emerged was a viable international authority with comprehensive powers and acceptable decision-making processes, it would then be easy to support larger claims for international jurisdiction and vice versa Various states and interest groups, therefore, made proposals and counter-proposals right up to UNCLOS III. It emerged that the main dispute as to the limits of the international area basically had to do with amounts of resources of the international area. The opposing sides or interests were basically the landlocked and shelf-locked states versus coastal states' interests [15]

After a series of negotiations in UNCLOS III tentative agreements were reached with the generally accepted distance being 200 nautical miles.[16]

The 1979 Session established the Continental Shelf Boundary Commission to determine the extent of continental shelf beyond the 200-mile limit [17] However, the boundary between national and international areas of the seabed was difficult to fully determine. Nevertheless, the Convention defined the international Area which would be the geographical extent of the common heritage principle and over which the Authority would exercise jurisdiction on behalf of humankind [18] The Convention has over two dozen articles related to boundary-making. Part XI of the Convention is entitled 'The Area.' The Area and its resources are declared to be the common heritage of humankind.[19] The Convention defines 'the Area' as 'the seabed and ocean floor and subsoil thereof, beyond the limits of the national jurisdiction.'[20]

3.3 PRINCIPLES GOVERNING THE AREA

Among the greatest points of controversy at UNCLOS III was the determination of principles that would govern entry into and operations and activities in the Area. This was more so because of the superimposing importance of the common heritage principle. Indeed, the issues of controversy with regard to Part XI of the Convention during negotiations at UNCLOS III appeared to hinge on this one principle. Section 2 of Part XI of the Convention[21] covers the principles governing the Area. Among these are the common heritage principle, the provisions

on transfer of technology and the principle of equitable distribution of seabed resources. Some of these principles are discussed in so far as they would bind and guide the Authority in its responsibilities over the Area.

It should be pointed out that the principles governing the Area appearing in the Convention were previously the subject of heated debate and haggling leading, on 18 December, 1970 to the 15 United Nations General Assembly Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil thereof beyond the Limits of National Jurisdiction.[22]

3.3.1 THE COMMON HERITAGE OF HUMANKIND

The United Nations General Assembly Declaration of Principles (1970)[23] clearly portrayed the common heritage principle as its most basic and important in developing a regime and machinery for the seabed beyond the limits of national jurisdiction. The Assembly itself repeated the principle in numerous other resolutions.[24] Indeed, since Ambassador Pardo introduced it to the Assembly in 1967, the principle won general acceptance.[25] It quickly gained notoriety in legal circles and could not easily be dismissed as meaningless rhetoric or an empty phrase. Earlier, on 13 July 1966, the USA President Lyndon B. Johnson addressed the general issue of establishing a legal regime for the seas and provided the initial indication that the deep seabed resources would be the common heritage of humankind.' He said that under no circumstances must the prospects of rich harvest and mineral wealth be allowed to create a new form of colonial competition among the maritime nations. States had to be careful to avoid a race to grab and hold the lands under the high seas, and ensure that the deep seas and the ocean bottoms were, and remained, the legacy of all human beings. [26]

In elaborating the concept of the common heritage, Ambassador Pardo pointed out that recent discoveries and recoveries of manganese nodules from the floor of the ocean at great depths portended a race on the part of the technologically equipped states to exploit the newly revealed resource. This would thus accrue to the benefit of the rich and developed states when really it was a resource that could be said to belong to humankind, and should perhaps be used for the benefit of developing states to be able to transform world economy[27].

In spite of its wide acceptance and recognition there was disagreement about its real meaning, content and binding nature. The world found itself at a cross-roads: to share, for the first time in history, a common resource equitably, or to perpetuate a world of national rivalry.[28] On the one hand, most developing states supported the common heritage principle. They saw it as a symbol of their hopes and needs and which could be used to ameliorate the sharp inequalities between themselves and the developed states. Lending powerful support for the common heritage principle and evidently in sympathy with the developing states view, the Norwegian Ambassador to the UN, Hambro, said that the term 'common heritage of humankind' pointed to something valuable. It referred to the past as well as to the present and future, emphasising that those areas and the riches contained therein \with their possibilities and problems, had been passed on to the present international community as a heritage of humankind and for common benefit as a whole, not to any individual nation or group of nations.' [29]

Developing states viewed the common heritage principle as the cornerstone of a legal regime for the Area and in particular, for exploration, use and exploitation of the resources in the Area. Although they admitted that the concept was alien to existing international law and doctrine, they nevertheless were keen to develop the same into a legal norm.

On the other hand, developed states viewed the common heritage principle not as a legal principle but merely as an agreed moral and political guideline which the community of states had undertaken as a moral commitment to follow in good faith in the elaboration of a legal regime for the Area beyond the limits of national jurisdiction. Several delegates of developed states both in the Seabed Committee and UNCLOS III viewed the common heritage principle with doubts and reservations. They maintained that it was unknown to international law and had such an imprecise nature and meaning that it would be undesirable to incorporate it in a set of binding international rules and principles governing the seabed Area. The principle ran counter to existing norms and principles.[30] Some of these states feared that the principle was evolved with a view to preventing the appropriation of the ocean floor by certain states. Apparently, the developed states always favoured a free access system whereby individual developed states could venture into the ocean and seabeds backed by their own capital and technology. The principle of the common heritage threatened such national interests.

It would appear that the common heritage meant both a denial of rights and an assertion of rights. In the first place, it would mean that the Area could not be subject either to sovereign claims in public law or to appropriation in private law. In the second place, it would imply that all states should participate in the administration and regulation of the activities in the Area, as well as in the benefits obtained from the exploration, use and exploitation of its resources. Ambassador Pardo explained that the principle went beyond the realm of res communis and implied something to be administered in common and thus contained the notion of trust and of trustees, although not necessarily that of property. It also implied indivisibility, peaceful use, freedom of access and equitable distribution of resources.[31] It is these principles that also later came to be elaborated upon and pronounced by United Nations General Assembly in its Resolution 2749 (XXV) of 18th December, 1970.[32]

On reflection, it appears that Ambassador Pardo's 'common heritage' phrase has always had a ring to it. From the beginning, it has always meant more than a global commons, open to all to graze on. It has always implied the establishment of rules by which the exploitation of a part of the resources of the earth are to be governed, and of the institutions capable of acting on behalf of humankind as a whole.[33] Besides bestowing on humankind rich vast resources incapable of precise estimation presently, the common heritage principle also appears to place on humankind the huge responsibility of administering the Area in the interests of humankind as a whole. Article 136 of the Convention declares the Area and its resources to be the common heritage of humankind and thereby supports this view.

The common heritage principle survived controversy and objections in the Seabed Committee and UNCLOS III and found its way into the Convention, constituting the bedrock of Part XI of the Convention. It is elaborated in Articles 136, 137, 140(1) and 149 of the Convention. All resources[34] of the Area and the area itself are not appropriable by any state or natural or juridical person except in accordance with Part XI of the Convention.[35] Activities in the Area shall be carried out as specifically provided under Part XI of the Convention, for the benefit of humankind as a whole, irrespective of the geographical location of states, whether coastal or landlocked, and taking into particular consideration the interests and needs of developing states and of peoples who have not attained full independence or other self governing status.[36] Moreover, the Convention states that all objects of an archaeological and historical nature

found in the Area shall be preserved or disposed of for the benefit of humankind as a whole, particular regard being had to the preferential rights of the state or country of origin, or the state of cultural origin or the state of historical and archaeological origin.[37]

Within the Convention, the common heritage principle plays an important role in fashioning out a regime and machinery for the Seabed Area. All activities, operations and ventures in the Area must necessarily be cognisant of the 'common heritage' nature of the Area and its resources, and of the role of the Authority in administering the Area. However, even before the Authority achieves any mileage in terms of its mandate, it must be judged against the performance of other international organisations such as the defunct League of Nations and the UN itself.[38] In reality, it will be the generally powerful states, those that can convincingly promise and threaten that will decide the outcome of events, and they will invariably decide it according to their rivalries and interests.[39] In the event, the question as to what is in the interests of humankind simply cannot be taken seriously. Above all, such states will never contemplate establishing a rival actor, capable of speaking and acting for humankind as a whole and which is not under their control. Since such actor or body might impose limits on one's own freedom of action, it would be equivalent to voluntarily adding to one's potential rivals and competitors. Accordingly, if the Authority were to be created, it would either be the instrument of one or more powerful states or else totally insignificant.[40]

Some of the developed states, notably the USA and United Kingdom, are not states parties to the Convention, although they actively participated in its negotiations up to its conclusion. As non state parties to the Convention, they are not therefore members of the Authority and they did not participate in the Preparatory Commission. They therefore do not appear to be bound by the principle of common heritage. They stayed out of the Convention because of what they viewed to be fundamental deficiencies of Part XI of the Convention. The common heritage principle is the foundation of Part XI of the Convention. Its apparent failure to obtain universal support particularly from key developed states appears to weaken it. Some of the developed states have taken alternative courses that would inevitably puncture and maim the common heritage principle and indeed the entire conventional framework. This may render the principle, and the Authority itself, insignificant. Without the effective support and acceptance by as wide a bracket of humankind as practicable (if not outright universal acceptance), a principle that purports to embrace the interests of humankind will be a bad

starter. It would be tragic if such a principle fails to secure the support of the most important players in international affairs and politics.This is more so now that the Convention is in force as international law. The principle of common heritage can no longer be regarded even by its sceptics as a moral force or requirement. It is a principle of international conventional law. Its status as a legal principle in international law is stated in the Convention. Its content is also well-stated in the Convention.[41] The Area, which constitutes the geographical extent of the common heritage principle is not subject to state rights. Neither are its resources subject to such claims. In other words, the Area and its resources belong to humankind as a whole.[42] All rights in the resources of the Area are vested in humankind as a whole,and these resources are not subject to appropriation. Therefore, the ownership or title of the Area and its resources vests in humankind as a whole, collectively.

Activities in the Area and especially the exploration and exploitation of its resources, must be carried out for the benefit of humankind as a whole. The principle therefore entails conducting activities in the name of, and for the benefit of humankind collectively. The duty is incumbent upon individuals, enterprises and states venturing into the Area to do so on behalf of humankind.

Another important component of the common heritage principle is that the distribution of the resources or benefits of a financial or other economic nature must be spread equitably amongst humankind.[43] In other words, humankind should share the fruits of the Area fairly and equitably.

However, it must be conceded that the common heritage principle is a fashionable newcomer whose claims to recognition nevertheless extend well beyond the deep seabed although its legal foundations are still 'less than entirely secure.' It may be indicative of an emergent

principle of international law with the potential to emerge and crystallize into a mandatory legal norm.[44]. Some protagonists of the principle also suggest that the principle of common heritage is in conflict with the traditional freedom of the high seas.[45] Indeed, the USA and other developed states view the exploration and exploitation of mineral resources of the deep seabed as a freedom of the high seas which does not have anything to do with the common heritage principle.[46] On the other hand, developing states primarily view the mineral resources of the deep seabed as the common heritage of humankind (res communis) which may only be

exploited under the auspices of the Authority. This issue is still controversial in spite of the entry into force of the Convention.

The common heritage principle, now enunciated as a legal principle in the Convention, involves the principle of non-appropriation. This entails the common participation in the exploration and exploitation of the seabed resources and the equal sharing of the advantages between all countries, with particular consideration for the needs and interests of the goal of growth and stability especially for the societies that have been the most unfortunate. In other words, the principle promotes development of all for all.[47]

However, the principle does not appear to endear itself to developed states interests. This has led it to be a political issue of the most bitterly contested kind effectively reducing its chances of universal acceptance.[48] Without full and universal acceptance, the principle of common heritage may be difficult to implement and would perhaps be rendered completely meaningless. In spite of its presence in the Convention there is still substantial confusion over its nature and appropriate place in international law.

3.3.2 PROVISIONS ON THE TRANSFER OF TECHNOLOGY

The Convention makes it mandatory for state parties to transfer technology to the operating arm of the Authority, the Enterprise, and also to developing states.[49] According to the Convention,[50] the Authority shall take measures in accordance with the Convention to acquire technology and scientific knowledge relating to activities in the Area. Presumably, the Authority will 'acquire' technology from those who have developed it, invariably the developed states. Developing states are placed in the position of recipients which would either receive 'ready-made' technology or would benefit from the promotion of scientific or technological innovation by the Authority. But the question remains whether these Conventional demands on developed states, together with the expectations of the developing states and the Enterprise could be realised. How did the protagonists view the issue of technology and its transfer?

It must be borne in mind that technology is not an end in itself, it is a means to an end In the case of marine technology, it must be perceived as a means of entry, access, exploration and/or

exploitation of marine resources. Without appropriate marine technology, seabed or marine resources become virtually unreachable and unexploitable. They become remote, abstract and unimportant. Before the discovery of marine technology capable of making accessible the seabeds and high seas, the politics of the resources of the seabed did not attract significant attention. That partly explains the apparent legal lacunna that existed in respect of the seabed right up to the passing of the Convention in 1982. It was as marine technological and scientific knowledge increased particularly after World War II that the seabed became of increasing importance. It was not lost particularly on the traditional maritime powers that the 'nation that controls the sea will control the world'[51]. The effective bridge to that control would be marine technology. During the past few decades, more and more states and international organisations have spent considerable resources on oceanographic research.[52] Leading the pack are the USA, the Soviet Union and Japan.[53]

The marine technological breakthroughs of the 1960s and 1970s spurred international statesmen and publicists to the realisation that the seas and oceans, and particularly the deep seabed were no longer remote, abstract and unreachable. Ambassador Pardo's statement to United Nations General Assembly in 1967[54] was motivated by that realisation. A 'colonial grab' for seabed resources was not possible without marine technology. The realisation of the strategic importance of marine technology in seabed politics catapulted the issue of technology and its transfer (ostensibly for the benefit of humankind) into the centre-stage during negotiations on the legal regime and machinery for the Seabed.

The developing states view was that the Enterprise had to be empowered with appropriate technology from those who had it as a matter of obligation. They argued that the Enterprise could never by itself develop the technology and skills which would be needed to operate on its own. To them the right of the Enterprise to acquire seabed mining technology was an essential ingredient in spelling out the full meaning of the common heritage. It would be meaningless to have a share in the ownership of the resources of the seabed without the means to exploit them. In this sense, technology could be viewed as being close to being a part of the common heritage itself.

Yet, the developing states feared for the viability of the Enterprise. Whatever their obligations under the Convention, the developed states could fail to provide the Enterprise with enough

capital to commence its operations.[55] Those private enterprises, mainly multi-national concerns from the developed states, which had the technology would never sell it, and indeed could conspire to keep it from the Enterprise at any cost. And even if the Enterprise was able to acquire the technology, no one would know how to operate it, or to manage as complicated an organisation as the Enterprise. What would happen if the developed states and their private enterprises conspired to withhold technology? Perhaps this would expose the helplessness and vulnerability of the developing states which had counted so heavily on the hope of benefiting from the activities and resources of the Area.

It was a recurring theme of the developing states that the conditions under which patents and other proprietary knowledge moved from the developed states in which it originated to the developing states were unacceptable and unfair in a variety of ways including excessive cost, limitations on use, obsolescence and a choice of technology which was inappropriate to the recipient.[56] The result was an apparent manipulation of technology transfer for the benefit of developed states.[57] Was it going to be any different in the deep seabed mining regime unless the Convention provided for mandatory transfer of technology as a condition precedent to seabed mining?

On their part, the developed states primarily viewed technology as the private property of private enterprises which could not be subject to mandatory appropriation or transfer to the Enterprise or Authority, which some viewed as an 'omnipresent and omnipotent organisation[58] They would naturally be reluctant to give up their hard-earned technological and scientific information virtually at no cost to the Enterprise. Ambassador James Malone, Special Representative of the USA President at UNCLOS III perhaps summed this view accurately. He submitted before the House Merchant Marine and Fisheries Committee on 23 February, 1982 that the Convention should not contain provisions for mandatory transfer of private technology. He asserted that there was a deeply held view in the USA Congress that one of America's greatest assets was its capacity for innovation and invention and its ability to produce advanced technology. It was understandable, therefore, that a treaty would be unacceptable to many Americans if it required the USA, or more particularly, private companies to transfer that asset in a forced sale.[59]

The argument of the developed states was that if the Enterprise, and the developing states, needed appropriate marine technology, they ought to develop their own or else acquire the same in the open market and on a negotiated basis with those who possessed the technology.[60]

Governments or states themselves did not own the technology as this was privately owned by private enterprises and individuals. Those who owned the technology no doubt had invested plenty of time and money in research and development of the same. It would be unacceptable and unconscionable to force them to give up their knowledge to the Authority.

The Convention appears to favour the developing states' view and this explains why it is largely unacceptable among some developed states. Yet, as the Convention finally gets into operation as treaty law and as the demand for the seabed resources grows, the acquisition of technological capacity by the Enterprise and the developing states to enable them to participate fully and effectively in seabed operations becomes ever critical. Whereas economists and policy-makers may ask questions about the marine technology transfer process and its probable consequences, there is evidently a need to develop indigenous technology both in the developing states and in the Enterprise. That way, pressure may be eased on the developed states enabling them to be more responsive to the Conventional regime. Hopefully, then, even the non-states parties to the Convention such as the USA and the United Kingdom would be persuaded to sign and/or accede to the Convention and participate in realising the onerous provisions and demands of Part XI of the Convention.

3.3.3 EQUITABLE DISTRIBUTION OF SEABED RESOURCES

Another prominent principle governing the Area according to the Convention[61] is the principle of equitable distribution of seabed resources. It is evidently a new and untried formula as the recovery of the seabed resources on a large scale within the framework of the Authority is still a future expectation. Article 140(2) of the Convention provides that the Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through some appropriate mechanism, on a non-discriminatory basis, in accordance with Article 160(2)(f)(i).

Article 160(2)(f)(i) merely empowers the Assembly of the Authority to 'consider and approve' upon the recommendation of the Council of the Authority, the rules, regulations and procedures on the equitable sharing of financial and other economic benefits '.... taking into particular consideration' the needs and interests of developing states and peoples who have not attained full independence or other self-governing status.

Article 173 of the Convention also refers obliquely to the equitable distribution principle by providing that the remainder of the funds for administrative expenses of the Authority shall be shared according to Article 140 and Article 160(2)(g) and to 'compensate developing states' in accordance with Article 151(10) and Article 160(2)(l).

The Convention does not define the phrase 'equitable sharing' and merely prescribes 'any appropriate mechanism' for the purpose. This phrasing was perhaps a compromise so that bargains and concessions might be achieved leading to the passing of the Convention. The negotiators apparently preferred to allocate the duty to come up with the appropriate rules, procedures and regulations for equitable distribution to the Authority acting on the Council's recommendation. This could as well have been expedient. It may appear to have favoured the developing states although there was a serious caution. The Assembly could only proceed on the basis of recommendations from the Council.

What are the 'needs and interests' of developing states? It may well be assumed that these are primarily economic in nature. Apart from the basic assumption that developing states are characterised by poverty, there could be many variations between them which could compound their 'needs' and 'interests.' It remains to be seen whether the Authority's organs will succeed in fashioning out appropriate rules, regulations and procedures for resource allocation which would appear equitable to all interested parties. It must be conceded that this would perhaps be the first time in international history that common resources would be sought to be allocated and distributed for the benefit of humankind as a whole. It may be a momentous and challenging opportunity to re-allocate the resources of the world, improve the living conditions of peoples in developing states and reduce the gap between the rich and poor states and peoples. This should promote international peace and order. It should also reduce existing tensions between the rich and poor in the present interdependent world community.[63]

It is expected that the Authority and its Enterprise will exploit and recover resources on behalf of humankind as a whole from the International Seabed Area. The expected distribution of resources is premised on the expectation of production or recovery of the resources of the Area. Otherwise, the distribution process would be meaningless without assured or supposed production. To be able to operationalise the yet-to-be-tried distribution formula, there must be successful production and resources at hand. Although the Convention has recently entered into force, large scale or commercial production and distribution of the resources is still fairly futuristic.

3.3.4 OTHER PRINCIPLES GOVERNING THE AREA

Among other, less controversial, principles in the Convention is the principle of state responsibility,[63] by which states parties have the responsibility to ensure that activities in the Area are carried out in conformity with Part XI of the Convention. Breach of this responsibility gives rise to liability of the state or states concerned. At a general level, the principle of state responsibility is well established in international law. It arises from the general proposition that there must be liability for failure to observe obligations established by law. Responsibility arises for the breach of any obligation owed under international law. Presumably now that the Law of the Sea Convention is part of international law, breach of obligation by any state or states parties would attract liability or responsibility for the states or group of states.

There is also the principle of peaceful uses and purposes[64] by which states whether coastal or landlocked are obliged to use the Area only for peaceful purposes even if they are undertaking marine scientific research. Underlying this principle is the peace movement motivated by the devastation of the two world wars and the threat of increasing militarization of the seas and oceans of the world. The principle of peaceful purposes was declared by the United Nations General Assembly Resolution 2749 of 1970.[65]

Activities in the Area are to be carried out with due regard to the rights and legitimate interests of coastal states.[66] Coastal states are entitled to certain powers and competences of a regulatory and controlling nature. Yet the Authority shall promote and encourage the

conduct of marine scientific research in the Area and co-ordinate and disseminate the results of such research and analysis when available.[67] On their part, individual state parties are entitled to undertake marine scientific research in the Area and they are obliged to promote international co-operation in marine scientific research in a variety of ways.[68]

In sum, it would appear that the negotiators of the Convention sought to give the package - deal complexion to the principles governing the Area in an effort to accommodate the various interest groups represented, such as, coastal states, landlocked or geographically disadvantaged states, environmentalists, and peace movements. However, it was admittedly difficult to satisfy all interest groups with regard to the principle of common heritage and the provisions governing the transfer of technology.

3.4 DEVELOPMENT OF THE RESOURCES OF THE AREA

There were several objections by the developed states to Part XI of the Law of the Sea Convention. These objections were mainly on the detailed procedures and production policies, authorisations and controls and the cumbersome financial rules of contracts concerning the deep seabed. The Convention outlines policies relating to activities in the Area,[69] production policies for the economic exploitation and sharing of the resources of the Area[70] and the system of exploration and exploitation of the resources of the Area,[71] among others. Of utmost importance to us are the problems and issues arising from the conventional production polices and controls. Besides this, we discuss the so-called 'Pioneer Investment Regime' as it forms an important aspect of the development of the resources of the Area

3.4.1 PRODUCTION POLICIES AND CONTROLS: PROBLEMS AND ISSUES

According to the Convention, exploration and exploitation activities in the Area are subject to tough and complex 'Production Policies,' controls and regulations. To begin with, there are 'policies relating to activities in the Area,' the widest of which is to foster healthy development of the world economy and balanced growth of international trade, and also to promote international co-operation for the overall development of all states particularly developing states.[72] Other specific policies include the rational development of the resources of the Area

and the orderly, safe and rational management of the resources,[73] expansion of opportunities for participation particularly of developing states,[74] participation in revenues by the Authority and the transfer of technology to the Enterprise and developing states,[75] increased production of minerals to meet consumers' needs,[76] and the promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived from the Area and other sources, and the promotion of long-term equilibrium between supply and demand.[77] Others are the enhancement of opportunities for all states as equitably as possible and the prevention of monopolisation of activities in the Area,[78] protection of developing states from adverse effects on their economies or on their export earnings, that is economic adjustment assistance,[79] the development of the common heritage of humankind[80] and conditions of access to markets for the imports of minerals produced from the resources of the Area.[81]

It would appear that all states appreciated that the greatest importance of the Area was its potential as a source of economic benefit. Thus, they appeared to agree on the need of fostering the healthy development of the world economy and the balanced growth of international trade. The greatest motivation for entry into the seabed was obviously the expectation of deriving economic benefit therefrom. All the specific policies outlined above were basically geared towards maximising this expectation and enabling an orderly exploitation of seabed resources.

The negotiators of the Convention also identified developing states as needing the most in terms of benefit from the seabed. This could have occurred also because of the numerical superiority of the developing states during the negotiations in UNCLOS III. The production policies therefore appear to favour developing states. However, they come across as carefully detected and economically sound principles which are designed to realise the common heritage principle.

Then there are 'production policies' proper,[82] a set of detailed and complex rules and regulations governing production of the resources of the Area. The Authority is expected to take measures necessary to promote the growth, efficiency and stability of markets for those commodities produced from minerals derived from the Area, at prices remunerative to producers and fair to consumers,[83] and to participate in any commodity arrangements or agreements in a manner which assures a uniform and non-discriminatory implementation in

respect of all production in the Area of the minerals concerned.[84] During the 'interim period'[85] commercial production shall not be undertaken pursuant to an approved plan of work until the operator has applied for and has been issued, with a production authorisation by the Authority.[86] There are also requirements for specification of the annual quantity of nickel expected to be recovered under the approved plan of work.[87] Appropriate performance requirements are to be established by the Authority in accordance with Annex III Article 17.[88] The Authority shall issue a production authorisation for the level of production applied for unless that level and the levels already authorised exceeds the nickel production ceiling.[89]

Once issued, the production authorisation and approved application shall become a part of the approved plan of work,[90] and an operator whose application is denied for exceeding the production ceiling may apply again to the Authority at any time.[91] These provisions point towards controlled production and exploitation, which is basically inconsistent with free-market rules. The Authority stands in a superimposing position with supervisory and administrative competences. However, since the Authority has only began, it is not possible to comment in this regard.

The 'interim period' is scheduled to begin five years prior to 1st January of the year in which the earliest commercial production is planned to commence under an approved plan of work. It shall last 25 years or until the end of the Review Conference[92] referred to in Article 155 or until the day when such new arrangements or agreements as referred to in Article 151(1) enter into force, whichever is earliest.[93] There are highly scientific methods for determining production ceilings during the years of the interim period.[94] The Authority shall reserve to the Enterprise for its initial production 38,000 metric tonnes of nickel from the available production ceiling calculated pursuant to Article 151(4).[95] Article 151(4) provides the formula for calculating production ceilings. There is also provision for supplementary production authorisations subject to the Authority, being guided by the principle of not exceeding the total production allowed under the production ceiling in any year of the interim period which under any plan of work is 46,500 metric tonnes of nickel per year.[96] This production is also subject to quantitative production levels for other metals such as copper, cobalt and manganese.[97] The Authority is empowered to limit the level of production of minerals from the Area, other than minerals from polymetallic nodules.[98] The Assembly, on recommendations of the Council upon advice of the Economic Planning Commission shall

establish a system of compensation or take other measures of economic adjustment assistance for developing states which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of their land based minerals if such reduction is associated with activities in the Area.[99]

Besides the 'production policies' proper, the Convention also provides for a system of 'special consideration' for developing states,[100] for a system of exploration and exploitation under the control of the Authority which shall also give the Authority competence to take any measures at any time to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract, which shall always provide for security of tenure. Accordingly, the contract shall not be revised, suspended or terminated except in accordance with Annex III Articles 18 and 19. [101] Annex III Article 18 provides that a contractor's rights under the contract may be suspended, or terminated only in two cases. The first one is if, in spite of warnings by the Authority, the contractor has conducted his activities in such a way as to result in serious, persistent and wilful violations of the fundamental terms of the contract, Part XI and the rules, regulations and procedures of the Authority. The second case is where the contractor has failed to comply with a final binding decision of the dispute settlement body applicable to him. Article 19 of Annex III provides that parties to a contract may enter into negotiations to revise the terms of their contract. This is when circumstances have arisen or are likely to arise which, in the opinion of either party, would render the contract inequitable or make it impractical or impossible to achieve the objectives set out in the contract or in Part XI. There is also provision for periodic review every 5 years from 1st January of the year in which the earliest commercial production commences under an approved plan of work. [102]

Annex III to the Convention entitled 'Basic Conditions of Prospecting, Exploration and Exploitation' reinforces the provisions of the Convention. It covers, inter alia, prospecting[103] exploration and exploitation,[104] qualifications of applicants,[105] transfer of technology,[106] approval of plans of work,[107] selection among applicants for production authorisations,[108] financial terms of contract,[109] penalties,[110] and revision of contracts.[111]

The Conventional system regarding the development of the resources of the Area is clearly one of strict 'policies' and controls. The Authority is endowed with extensive production,

economic and administrative controls making it, at least prima facie, the effective overlord over the Area. This would predictably pose a problem of acceptability especially by those states, mainly the developed ones, which could venture on their own to the deep seabed. Some developed states apparently did not see the need for an international Authority to superintend and superimpose itself on the Area.[112] They consistently viewed the Authority as a creature and baby of the numerically superior developing states which wished to create a collective vehicle into the deep seabed.[113]

Although the Authority's present institutional framework was ultimately a long and delicately negotiated compromise, those developed states which refused to sign or accede to the Convention still viewed it with disdain and suspicion. They would not accept an omnipresent and omnipotent[114] organisation which had virtual lordship over international resources in which those states were each vitally interested. They accused this bureaucratic body' of being 'inefficient.'[115] They did this before it became functional. It should not be forgotten that some of these protesting developed states, particularly the USA, expected preferential membership status particularly in the Council of the Authority.[116] When the Convention did not explicitly provide for a permanent seat status in the Council for the USA, a major objective of the USA negotiators was unmet.[117] On the other hand, the Authority was given administrative and police control over the Area, licensing and authorisation competencies as well as preferential contractual status vis-a-vis its potential competitors, contractors and partners in deep seabed mining. This scenario would present a critical problem of acceptability of the regime among developed states. On the basis of this problem, among others, the USA and others rejected the whole Convention.

Another problem of the Conventional system is the quantitative controls and the other apparent anti-free enterprise prescriptions, such as the requirements for licensing, production authorisations and approval of plans of work. The quantitative prescriptions in the Convention were clearly based on the prevailing production, demand and supply levels, and might, with time, be inadequate unless they are reviewed and revised. The problem with quantitative controls is that they also tend to make the system static. The international mineral market, especially so far as copper and nickel are concerned,has been subject to wide ranging fluctuations since 1982. This situation, coupled with technological factors, production costs and others, has since had an influence on the forecast and assumptions that were taken into

account at that time.[118] Moreover, there was the consideration of protecting the 'needs' and 'interests' of developing states and especially land-based producers of copper, cobalt and nickel. The latter was a purely political consideration which was entrenched, thanks to the majority influence of the developing states.[119]

The USA led objections to the deep seabed mining provisions contained in Part XI of the Convention. She asserted that the Convention must not deter development of any deep seabed mining resources to meet national and world demand.[120] Ambassador Malone stated that the USA believed that its interests, those of its allies and indeed the interests of the vast majority of nations, would best be served by developing the resources of the deep seabed as market conditions warranted. The USA had a consumer-oriented philosophy. The draft treaty, in the USA's view reflected a protectionist bias which would deter the development of deep seabed mineral resources including manganese nodules.[121]

The provisions of the Convention come across as invariably complex, highly scientific and thus cumbersome and expensive to operate. The provisions of the Convention concerning development of the resources of the Area are some of the most detailed and complex provisions in the Convention. Although the Convention has only recently entered into force, it can safely be stated that the system of controls, authorisations and licensing administered by a large international organisation is going to be cumbersome and expensive. This system appears to have borrowed heavily from the bureaucratic and highly centralised communist economies in the days before perestroika and glasnost.[122] It is highly doubtful whether such a system may be feasible and sustainable in a world economy that is increasingly and predominantly free market oriented.

3.4.2 THE PIONEER INVESTORS REGIME

It was apparent prior to the eleventh session of UNCLOS III and confirmed at the session that the establishment of a Preparatory Investment Protection Scheme (PIP) which would offer adequate protection to pioneer seabed miners was a conditio sine qua non of a Conventional regime for seabed mining acceptable to the developed states. The eleventh session of UNCLOS III was essentially concerned with devising a scheme which would, on the one hand provide acceptable safeguards for the enormous investments already made by a number of

pioneer investors mainly from the developed states, and on the other hand, satisfy the G77 by preserving the main principles of the Convention as already drafted. [123]

The G77 appreciated that five of the developed states had already adopted unilateral legislation taking the cue from the USA[124] and that there was also talk of a Reciprocating States Regime to be established by those developed states on the basis of a co-ordinating Agreement. They also acknowledged that the failure to meet the minimum demands of the USA and its consequent refusal to become a party to the Convention would at the very least considerably weaken the Convention and possibly render it impracticable. On the other hand, developed states felt constrained to ratify the Convention so as not to put in peril the many valuable features of the package deal Convention, and to reduce the commercial risks for the consortia operating under national legislation rather than an internationally accepted security of tenure. Developed states were also aware of the political costs likely to be incurred in the event that they rejected the proposed Convention designed to give effect to the common heritage concept. [125]

After some trade-offs, which unfortunately did not persuade the USA, UNCLOS III arrived at some compromises which on the one hand, allowed the negotiations on some elements of the regime to continue in the Preparatory Commission, and on the other, held out some hope that the other developed states participating in the pioneer multinational consortia would find the ultimate Convention - PIP package sufficiently attractive to induce them to be states parties to the Convention. UNCLOS III established the Preparatory Commission,[126] and also came up with Resolution II to the Final Act, 'Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules.'

A question may arise as to the status of the pioneer investment regime vis-a'-vis the common heritage principle. Were the pioneer investors to operate within or without the common heritage principle? It was not explicitly stated. The negotiators at the eleventh session of UNCLOS III appeared to have been motivated more by the need to trade-off between the interests of the G77 and the developed states. It was appreciated that the acceptability of the common heritage principle was still bitterly contested by some developed states. Those same states had also made huge investments in the deep seabed prior to the adoption of the Convention. It was apparently assumed that the pioneer investors regime would somehow fit

in with the common heritage principle. Since the pioneer investors regime was stated to be temporary until the coming into force of the Convention, no conflict was envisaged with the common heritage principle. The administration of the regime was entrusted to the Preparatory Commission. The latter would naturally be expected to act on behalf of human kind and consistently with the common heritage principle. By extension, pioneer investors would be expected to explore and exploit the resources of the Area consistently with the common heritage principle. However, in practice, it would be difficult to reconcile the interests of the pioneer investors who had rejected the Conventional System, with the common heritage principle. The two systems seem to be incompatible.

Among the numerous tasks of the Preparatory Commission was to exercise the powers and functions assigned by Resolution II governing preparatory investment in pioneer activities relating to polymetallic nodules. [127] The Preparatory Commission was empowered to, inter alia register qualified applicants as Pioneer Investors.' These investors would be given exclusive rights to carry Out 'Pioneer activities' as defined in Resolution II in the areas allocated to them within the Area.

Resolution II[128] defines 'Pioneer investors' in three categories. The first category refers to France, India, Japan and the forner Soviet Union, or a state enterprise of each of those states or one natural or juridical person which possesses the nationality of or is effectively controlled by each of those states, or their nationals. It is required that such state concerned must have signed the Convention and also expended, before 1 January, 1983, an amount equivalent to at least $ US 30 million in pioneer activities and expended no less than 10% of that amount in the location, survey and evaluation of the area referred to in Resolution II[129] The area need not be a single area, must be sufficiently large and of sufficient estimated commercial value to allow for mining operations.[130]

The second category comprises four entities whose components being natural or juridical persons, possess the nationality of one or more of the following states, or are effectively controlled by one or more of them or their nationals, namely, Belgium, Canada, Germany, Italy, Japan, the Netherlands, the UK and the USA, provided that the certifying state or states sign the Convention and the entity concerned has expended before 1 January 1983, the levels of expenditure as in the first category of pioneer investors.

The third category of pioneer investors comprises any developing states which sign the Convention or any state enterprise or natural or juridical person which possesses the nationality of such state or is effectively controlled by it or its nationals, or any group of the foregoing which before 1 January, 1985 has expended the levels of expenditure as for the first category of pioneer investors.

The 'pioneer investors' are therefore fairly easily ascertainable. Quite clearly, the first category of pioneer investors appears to have a superior status vis-à-vis the other categories. In category one, the four entities must be states parties to the Convention and so are entities in Category three. The same, however, does not appear to be explicitly set out in respect of category two. Given that some states mentioned in category two are not states parties to the Convention, it would seem that this category was incorporated as a compromise to induce some of these states to join the Convention.

It is also noteworthy that whereas in the cases of category one and category two the expenditure date specified is 1 January 1983, in the case of category three the date is 1 January 1985. This clearly distinguishes the first and second categories of pioneer investors as developed states from the third category as the developing states. The expenditure date requirement was made more flexible in terms of time in the case of developing states perhaps to encourage them to participate in the pioneer investor regime. It was also an implied admission that the pioneer investor regime was heavily tilted in favour of the developed states which had the capital and technology to venture into 'pioneer activities.'

Resolution II[131] defines 'Pioneer activities' as undertakings, commitments of financial and other assets, investigations, findings, research, engineering development and other activities relevant to the identification, discovery and systematic analysis and evaluation of polymetallic nodules and to the determination of the technical and economic feasibility of exploitation. 'Pioneer activities' also include any at sea observation and evaluation activity which has as its objective the establishment and documentation of the nature, shape, concentration, location and grade of polymetallic nodules and of the environmental, technical and other appropriate factors which must be taken into account before exploitation, as well as the recovery from the Area of polymetallic nodules[132] with a view to the designing, fabricating and testing of

equipment which is intended to be used in the exploitation of polymetallic nodules.[133] Pioneer area is defined under Resolution II[134] as an area allocated by the Preparatory Commission to a pioneer investor for pioneer activities pursuant to the Resolution. Such area shall not exceed 150,000 square kilometers. No pioneer investor may be registered in respect of more than one pioneer area.[135] Any state which has signed the Convention is entitled to apply to the Commission on its own behalf or on behalf of any state enterprise or entity or natural or juridical person specified in Paragraph 1(a) for registration as a pioneer investor and the same shall be registered subject to certain conditions.[136] Every application shall cover a total area, which need not be a single continuous area, sufficiently large and of sufficient estimated commercial value to allow two mining operations, one of which would be taken by the Authority through its Enterprise[137] There is a rule against overlapping claims and resolution of disputes arising therefrom. [138] A pioneer investor registered pursuant to Resolution II shall from the date of registration have the exclusive right to carry out pioneer activities in the pioneer area allocated to it. [139]

Every applicant for registration as a pioneer investor shall pay to the Preparatory Commission a fee of $ US 250,000 and a similar amount for application to the Authority for a plan of work.[140] In addition, every registered pioneer investor shall pay an annual fixed fee of $ US 1 million commencing from the date of the allocation of the pioneer area.[141] In addition, every registered pioneer shall agree to incur periodic expenditures with respect to the pioneer area allocated to it, of an amount to be determined by the Commission.[142] No plan of work for exploration and exploitation shall be approved unless the certifying state is a party to the Convention.[143] There are also detailed provisions for production authorisations for pioneer investors.[144] The Resolution was to have effect until the entry into force of the Convention. [145] Consequently, with the coming into force of the Convention, the Pioneer investors regime has lapsed.

Thus, among the competences of the Preparatory Commission was the registration of qualified applicants as pioneer investors. Since 1983, the Preparatory Commission kept the question of registration of pioneer investors as one of its more important agenda items. After more than four years of intensive negotiations among various parties and interest groups, within and without the Preparatory Commission, it finally registered India as the first pioneer investor in August 1987.[146] Five months later , Japan, France and the former Soviet Union were registered as the first group of pioneer investors.[147] The four entities in category two were subsequently

identified as the Kennecott Group (USA, British, Canadian and Japanese concerns), Ocean Management Inc. (OMI) owned by Canadian, German, USA and Japanese concerns, Ocean Mining Associates (OMA) owned by Belgian, Italian and USA companies, and Ocean Mining Company (OMCO) owned by USA consortia.[148]

By 1st January 1985, no entity had fulfilled the requirements for registration as a pioneer investor under category three. Accordingly, the opportunity was lost for any developing state or its enterprise to become a pioneer investor under Resolution II. However, in 1986, the Preparatory Commission introduced a de facto modification which extended the time limit until the entry into force of the Convention.[149]

Indeed, the Preparatory Commission, operating on the basis of consensus on the outstanding issues in pioneer investment, adopted a flexible and realistic approach to its work. The Commission acknowledged that the interests of the potential applicants were inextricably tied to those of the three principal non-signatory developed states - the USA, Germany and Britain.[150] The Preparatory Commission appreciated that in order to ensure that the Convention would be workable and durable, those interests of the non-signatories must be accommodated and that a truly universal deep seabed system must eventually be established.

The Preparatory Commission gave the three non-signatories an opportunity to accede to the Convention before its entry into force with full entitlement to apply on behalf of one or more of the consortia for their registration as pioneer investors with respect to the areas they claimed. Put another way, the Preparatory Commission gave the USA, Germany and Britain an open chance to join the club of pioneer investors. This would allow these states to reserve seabed areas they claimed intact until the Convention entered into force.[151] Their acceptance of the system would have helped establish a universal system of pioneer investment and regime for deep seabed activities in accordance with the basic principles set out in the Convention.[152] As it turned out, the three non-signatory states rejected the deal.

In sum, it may be stated that pioneer investors won concerted support from developed states primarily because such 'pioneers' were their own private citizens or state ventures and enterprises equipped with marine technology and capital. The developed states wished to protect these interests \in view of the coming into force of the Convention. In 1982, the USA

strongly argued that the Convention must assure 'national access' to seabed resources by current and future qualified entities to enhance USA security of supply, avoid monopolisation of the resources by the operating arm of the Authority, Enterprise, and promote the economic development of the resources.[153] The USA argued that pioneer investors had made huge capital outlays for extraction of deep seabed minerals and for development of appropriate technology.[154] These vital interests had to be protected. The result was that the pioneer investor regime virtually marginalised the developing states and made the developed states the ultimate beneficiaries of the pioneer investors' regime. This system would largely be out of reach for most developing states. The developing states did not have technology of their own to venture into the seabeds. Neither did they have the capital. This was clearly demonstrated by the failure by any developing state to apply for registration as a pioneer investor under category three. Even assuming that they were given beyond 1st January, 1985 or an indefinite chance, still they were not likely to participate in the system.

3.5 THE SO-CALLED ALTERNATIVE RECIPROCATING STATES' REGIMES

The development of the so-called 'Alternative Regimes' indicated the lack of agreement existing especially among the developed states with regard to Part XI of the Convention. When they felt dissatisfied with the emerging Convention, they sought to construct an alternative regime based on national legislations ordered on a reciprocal basis and co-ordinated by an agreement between themselves. The search for alternative regimes was also justified on the conclusion that the Convention offered 'an inefficient legal institutional framework for seabed mining.'[155] Apparently also, some of the developed states did not feel well-served by collective action at UNCLOS III. Their demands concerning an international regime for the deep seabed, in which they were vitally interested, were ostensibly not well catered for. Considering themselves as a losing minority at UNCLOS III, these states considered the possibility of creating alternative institutions in which their preferences could be adequately represented to their satisfaction. This would result in a system virtually at variance with the Convention, enabling those states to engage in a seabed mining system very much like under a regime of open and free access. This system would be 'alternative' to the one established under the Convention, and would also be 'Reciprocal' in the sense that national legislations unilaterally passed, would be coordinated internationally on a reciprocal basis.[156] The economic advantages of the Alternative System would ostensibly include the fact that the

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states concerned or their entities or private investors would have free access to the seabeds. They would not feel encumbered by the system proposed under the Convention. Licensing or approval requirements would be done nationally and therefore the states participating in the Alternative System would only feel bound by their own national requirements and their reciprocal obligations to other states participating in the regime. This would effectively enable them to benefit from the resources of the seabeds without conforming to the onerous requirements of the Convention. Obviously, the Alternative regimes would be smaller and much easier to administer than the regime of the Convention.

The national legislation constituting the 'Alternative Reciprocating Regime,' professed to be of an interim nature, until the coming into force of the Convention. This raised expectations that its provisions should in general comply with the provision of the Convention and facilitate an orderly transition to the regime established by the Convention. However, there was always the suspicion, particularly by the G77, that this national legislation would merely pay lip service to the principle of common heritage as embodied in the Convention, and eventually develop into a network of parallel municipal legislation which would gradually consolidate into a permanent alternative regime departing to a significant degree from the provisions of the Convention.[157] As if to confirm these suspicions, in 1982 and 1984, two agreements were concluded designed to co-ordinate this network of national legislation by providing for the identification and resolution of conflicts over overlapping seabed claims and an undertaking by the states to refrain from issuing authorisations to engage in seabed operations for any area which overlapped specified areas covered by authorisations already granted or applied for.[158]

Among the states which adopted national legislation on seabed mining were the USA (1980),[159] Germany (1980, amended 1982),[160] the United Kingdom (1981),[161] France (1981),[162] the Soviet Union (1982),[163] Japan (1982),[164] and Italy (1985)[165]. The USA, Germany and the United Kingdom did not sign the Convention. Moreover, Belgium, France and Italy, when signing the Convention made some declarations referring to perceived deficiencies and flaws in Part XI of the Convention which required rectification by the Preparatory Commission.[166] Clearly, these states were motivated by national interest issues such as the desire to ensure non-discriminatory access to supplies of minerals in the national interest. They were also motivated by the desire to encourage continued research and development of deep-sea mining before the entry into force of the Convention, and to

encourage potential investors to support such research and development. They also wanted to ensure that their nationals should not be placed at a competitive disadvantage in relation to nationals of other countries which had adopted 'interim legislation.'[167]

All the states which came up with national legislation insisted that their legislation was interim in nature. They also said that no claims of sovereignty or sovereign rights were contemplated and that they remained committed to the conclusion and entry into force of the Convention which would give legal precision to the principle that the mineral resources of the deep seabed were the common heritage of humankind.[168] They also insisted that prior to the entry into force of the Convention they were not legally bound by United Nations General Assembly Resolutions on the common heritage of humankind. They stated that the doctrine of the freedom of the high seas applied to their activities. Indeed, these states even claimed that their national legislations were consistent and not in conflict with the Convention.[170]

A comparison of the essential features of the Alternative Reciprocating States Regime and the system established under the Convention leads to at least two conclusions. One, that the two systems are incompatible, as one is committed to unilaterism and the other to the common heritage principle. Two, the Alternative Reciprocating States Regime is yet another clear attempt by the developed states to entrench and perpetuate their national interests in the face of the common heritage principle. Considering that these developed states actively participated in UNCLOS negotiations on the Law of the Sea, their search for alternative regimes amounted to undermining the Convention.

D NOTES TO CHAPTER THREE

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34. 'Resources' are defined under Article 133 (a) of the Convention to mean all solid, liquid or gaseous mineral resources in situ in the Area, at or beneath the seabed, including polymetallic nodules.

15. Buzan, B Seabed Politics. (Praeger Publishers, New York/ Washington, 1976), p. 180.
16. See, 28 Yearbook of the United Nations. 80 (1974); 30 Yearbook of the United Nations. 124, (Department of Public Information, United Nations, New York).
17. 33 Yearbook of the United Nations. 124(1979).
18. Article 1 of the Convention.
19. Ibid.
20. Articles 136 - 149 of the Convention.
21. Supra. note 13.
22. Ibid.
23. Ibid.
24. Anand, R. P Legal Regime of the Seabed and the Developing Countries. (A. W. Sijthoff-Leyden 1976), p. 205.
25. Pontercovo, G Musing About Seabed Mining or Why What we Don't Know Can Hurt Us." 21 Ocean Development and International Law. 117, (1990).
26. See US House of Representatives, 88th Congress, Subcommittee on International organisation and Movements of the Committee on Foreign Affairs, Interim Report on the United Nations and the Issue of Deep Ocean Resources together with Hearings on International Organisations and Movements (Washington D. C, 1967).
27. Knight, G. & Chiu, H. The International Law of the Sea: Cases Documents and Readings. (Elsevier Applied Science, London and New York, 1991), p. 507.
28 Schmidt, G. M Common Heritaae or Common Burden? The United States Position on the Development of a Regime for Deep Seabed Minina in the Law of the Sea. (Clarendon Press, Oxford, 1989), p. 28.
29. Supra. note 24, p. 209.
30. Ibid., p. 206.
31. Ibid.,p. 212. See also. Joyner, C Legal Implications of the Concept of the Common Heritage of Mankind, 35 International and Comparative Law quarterly. 190(1986).
32. Supra. note 13.
33. Supra note 10, p.31. See also Joyner C,. op.cit. , p. 190.
34. 'Resources' are defined under Article 133 (a) of the Convention to mean all solid, liquid or gaseous mineral resources in situ in the Area, at or beneath the seabed, including polymetallic nodules.

35. Ibid., Article 136.
36. Ibid., Article 140 paragraph (1).
37. Ibid., Article 149.
38. Infra, chapter 4.
39. Supra, note 10, pp 31 - 32.
40. Ibid.
41. Ibid., Articles 137 and 140.
42. Ibid., Article 137 (1).
43. Ibid., Article 137 (2).
44. Brown, E. D. Seabed Energy and Mineral Resources and the Law of the Sea Volume 2 (Graham & Trotman, London, 1986), p. 11.222. See also Joyner C. op.cit., p. 199.
45. Supra, note 24, p. 205.
46. Sohn, L. B The Law of the Sea, (Kristen, West Publishing Company, St. Paul, Minn, 1984), p. 173.
47. Ibid.
48. Supra, note 15,p. 68.
49. ibid., Article 144,. See also Kaczynski, V. M. "Problems of Marine Technology Transfer to the Developing Countries: The Case of West Africa," 20 Ocean Development and International Law, 623. (1989).
50. Ibid., Article 144.
51. Supra, note 24, p.3
52 For some statistical data, see Anand, op. cit., p. 8.
53. Ibid.
54. Maltese Note Verbale of 17 August, 1967 to the UN Secretary General, UN Doc. A/6695, (1967). See also Dr. Pardo's speech in the General Assembly (UN Doc. A/C. 1/PV.1515, (1967) 21 Yearbook of The United Nations, 41(1967) (Department of Public Information, United Nations, New York).
55. See 30 Yearbook of the United Nations 85 (1976); 31 Yearbook of the United Nations 122 (1979). See also supra, note 15, p. 229.
56. Ibid. See also Brewers C W infra note 58, p. 47.
57. Supra, note 15, p. 229,
58. Brewer, C. W."Deep Seabed Mining; Can An Acceptable Regime Ever Be Found?" 11 Ocean Development and International Law, 47 (1982); supra, note 25; Foders, F

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Supra. note 27, p. 539.
Supra. note 28, pp. 162 - 163.
Ibid., Articles 140, 160 and 173. See also Brown E. D..op. cit., p. 11.3.30.
Supra note 24, p. 2.
Ibid., Article 139.
Ibid., Articles 141 and 143 (1).
Supra. note 13.
Ibid., Article 142.
Ibid., Artide 143 (1).
Ibid., Article 143 (2).
Ibid., Artide 150.
Ibid., Artide 151.
Ibid., Article 153.
Ibid., Article 150.
Ibid., Article 150 (a) and (b).
Ibid., Article 150 (c).
Ibid., Artide 150(d).
Ibid., Article 150(e).
Ibid., Article 150(f).
Ibid., Article 150(g).
Ibid., Article 150 (h).
Ibid., Article 150 (i).
Ibid., Article (j).
Ibid., Article 151.
Ibid., Article 151 (1) (a).
Ibid., Article 151(I) (a) and (b)..
Ibid., Articles 156 and 150.
Ibid., Article 15 1(2) (a).
Ibid., Article 151 (2)(b).
Ibid., Article 151 (2)(c).

89. Ibid., Article 151 (2) (d).

90. Ibid., Article 151 (2) (e).

91. Ibid., Article 151 (2) (f).

92. The Review Conference by definition (Article 155) is a Conference, held 15 years from 1st January of the year in which the earliest commercial production commences under an approved plan of work. It is convened by the Assembly for the review of those provisions of Part XI and the relevant Annexes which govern the system of exploration and exploitation of the resources of the Area.

93. Ibid., Article 151 (3).

94. Ibid., Article 151 (4).

95. Ibid., Article 151 (5).

96. Ibid., Article 151 (6).

97. Ibid., Article 151 (7).

98. Ibid., Article 151 (8).

99. Ibid., Article 151 (10).

100. Ibid., Article 152.

101. Ibid., Article 153.

102. Ibid., Article 155.

103. Article 2 of Annex III to the Convention.

104. Ibid., Article 3

105. Ibid., Article 4.

106. Ibid., Article 5.

107. Ibid., Article 6.

108. Ibid., Article 7.

109. Ibid., Article 13

110. Ibid., Article 18.

111. Ibid., Article 19.

112. Said, M. The Law of Deep Seabed Mining A Study of the Progressive Development of International Law Concerning the Management of the Polymetallic Nodules of the Deep Seabed (Almqvist & Wiksell International, Stockholm Sweden, 1987), pp 258 - 259.

113. Ibid.

114. Supra, note 25 and 58.

115. Foders, op.cit. p. 528.

116. Supra, note 112, pp. 261 - 266.

117. Article 161 of the Convention does not specify any particular state to sit in the Council

118. Pontercovo, op.cit. p. 117.

119 Ibid.

120. Orrego, "The Deep Seabed Mining Regime: Terms and Conditions for its Renegotiation", 20 Ocean Development and International Law. 58 (1989).

121. Supra, note 27.

122. Foders, op.cit. p.528

123. Supra, note 120, p. 58.

124. Supra, note 27, p. 536.

125. Supra, note 44, p II.7.1.

126. Ibid, p.II.7.2.

127. For a discussion of these, see chapter 4.4, infra.

128. Resolution I to the Final Act to UNCLOS III, United Nations Publication Sales NO. E.83 V.5. pp. 175 - 176, ('Establishment of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea.')

129. Resolution II to the Final Ac to UNCLOS III, United Nations Publication, Sales Number E.83 V.5 pp. 177 - 182 (New York, 1983). See in particular paragraph 1(b).

130. Ibid.

131 Ibid., paragraph(3)(b).

132. Ibid.

133. Paragraph 1(d) of Resolution II defines 'polymetallic nodules' as one of the resources of the Area consisting of any deposit or accretion of nodules, on or just below the surface of the deep seabed, which contains manganese, nickel, cobalt and copper.

134. Ibid., paragraph 1(e).

135. Ibid., paragraph (4).

136. Ibid., paragraph (2).

137. Ibid., paragraph (3).

138 Ibid., paragraph (5).

139. Ibid., paragraph (6).

140. Ibid., paragraph (7) (a).

141. Ibid., paragraph (7) (b).

142. Ibid., paragraph (7) (c).

143. Ibid., paragraph (8) (c).

144. Ibid., paragraph (9).

145. Ibid., paragraph (14).

146 Hayashi, M "Registration of the First Group of Pioneer investors by the Preparatory Commission for the international Tribunal for the Law of the Sea" 20 Ocean Development and International Law. 1(1989).

147. Ibid.,p. 2

148. Ibid.,p. 2

149. Ibid., p. 4.

150. Germany has since become a state party to the Convention. (See Law of the Sea, Bulletin Number 27, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 1995 p. 16).

151. Supra. note 146, p.4.

152. Ibid., p. 24.

153. Supra note 27.

154. Ibid.

155. Foders, . op.cit.. p. 526.

156 Supra. note 44 p. 11.8.4.

157. Ibid.

158. Agreement concerning Interim Arrangements Relating to polymetallic Nodules of the Deep Seabed between France, the Federal Republic of Germany, United Kingdom and United States of America, 2nd September, 1982, reprinted in 21 International Legal Materials 950 (1982).The Provisional Understanding Regarding Deep Seabed Matters between Belgium, Federal Republic of Germany, France, Italy, Japan, the Netherlands, the United Kingdom and the United States, 3rd August 1984, reprinted in 23 international Legal Materials 1354 (1984).

159. United States: Deep Seabed Hard Minerals Resources Act, reprinted in 19 International Legal Materials 393 (1 980).

160. Germany: Act of Interim Regulation of Deep Seabed Mining, reprinted in 20 International Legal Materials 1003 (1981).

161. The United Kingdom: Deep Sea Mining (Temporary Provisions) Act, reprinted in 21 International Legal Materials 1217 (1981).

162. France: Law on the Exploration and Exploitation of Mineral Resources on the Deep seabed Law Number 81 -1135 of 23rd December, 1981, reprinted in 21 International Legal Materials 808(1981).

163 USSR: Edict on Provisional Measures to Regulate the Activities of Soviet Enterprises Relating to the Exploration and Exploitation of Mineral Resources of Seabed Areas Beyond the Limits of the Continental Shell, reprinted in 22 International Legal Materials 551(1982).

164. Japan: Law on Interim Measures on Deep Seabed Mining, reprinted in 22 International Legal Materials 102(1982).

165. Italy: Regulations on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, Law Number 41 of 20 February, 1985, reprinted in 24 International Legal Materials 983 (1985).

166. For texts of the Declaration made by Belgium, France and Italy, see the Law of the Sea Bulletin Number 5, July 1985, at pp. 3, 11 and 15.

167. Supra. note 44, pp. II.8.6.

168 Ibid.

169. Ibid.

CHAPTER FOUR

THE DEEP SEABED MINING PROVISIONS, THE AUTHORITY AND DEVELOPING STATES: A REGIME BEYOND REACH?

> ..... in the present condition of world politics, ...ideas of cosmopolitan or world justice play very little part at all. The world society or community whose common good they purport to define does not exist. For guidance as to what the interests of the world as a whole might be ..... we are forced to look to the views of sovereign states and of the international organisations they dominate.. [1]

4.1 INTRODUCTION

This chapter discusses the developing states and international organisations generally, and the Authority in particular. The controversies, conflicts and tensions that beleaguered the construction of the deep seabed mining provisions in the Law of the Sea Convention[2] are demonstrative of the imbalances between the majority developing states and the minority developed states in the pursuit of interests in the deep seabed. Evidence of tilts in favour of the developed states include the so called pioneer investor regime[3] and the Reciprocating States Regime.[4] An examination of the various national legislations and Agreements on deep seabed mining (which collectively constitute the Reciprocating States Regime) leads to the conclusion that this development would considerably hurt and bleed the Conventional regime. Finally, a discussion of the United Nations General Assembly 'Agreement relating to the implementation of Part XI of the UN Convention on the Law of the Sea[5] is undertaken. The Agreement is perceived as an attempt at bridging the differences and healing the wounds between those states, mainly developing states, which back the Conventional regime and those ones, mainly developed states, which back the Reciprocating States Regime.

4.2 DEVELOPING STATES AND INTERNATIONAL ORGANISATIONS GENERALLY: APPARENT MARGINALIZATION

An exposition of international organisations[6] will establish that it is the Big Powers' that are in the centre stage. Besides the fact that such states traditionally wield political, military and economic power, it must also be conceded that most developing states were colonial or non-self-governing entities at the time most present day international organisations were established. They were therefore largely left out in the evolution of' most present day international organisations. For purposes of brevity, we will briefly consider the League of Nations and the United Nations (UN).

The establishment of the League of Nations in the wake of the First World War was marked by the decisive influence of the major powers. The Covenant of the League emerged as a blend of USA President Woodrow Wilson's third draft and the British proposals emanating from the Phillimore Committee.[7] Most of the crises and problems the League dealt with were European. They included the Graeco-Bulgarian crisis of 1925, the Italo-Abyssinian War of 1935, and the Nazi German invasion of the Rhineland in 1936, Austria in 1938 Czechoslovakia in 1939 and Poland in 1939.

The composition of the organs of the League also demonstrated the marginalisation of developing states and peoples.[8] Decision-making in the League was by unanimous vote subject only to the exclusion of the vote of a party to a dispute (Article 15). Inevitably, the Council of the League quickly became ineffective due to great power rivalry. Evidently, the Great Powers of the time had sought to entrench their individual national interests and preferences in the emerging international organisational system.

The League never truly acquired a universal character. It was handicapped from the beginning by the non-participation of the USA, making it a predominantly European affair.

The European maritime imperial and colonial powers thus played the key roles in the life of the League. The system failed as the delinquent states such as Germany, Italy and Japan simply withdrew from the League to pursue their nationalist aggression unpertuted by League membership. Those same major powers ignited the flames of World War II which consumed

the remains of the League of Nations. The League formally died on 18 April 1946.[10] Clearly, therefore, the League experiment demonstrated that developing states were largely left out of emerging international organisation. It must be admitted, though, that during the League period there were only a few scattered self-governing developing states. Most of present day developing states were non-self governing colonial territories.

It is the 'Big Powers' which caused and fought the Second World War. The rest of the world was utilised as the battle fields. After the devastating experiences of the War, and the sad realisation that the framework of the League had failed to stop another costly world war, statesmen and generals from the very same Big Powers thought afresh on the issue of establishing an international organisation The stated objective of the next initiative was to prevent the recurrence of the scourge of war, which had twice in the first half of this century taken its toll on humankind. The new initiative was the United Nations Organisation (UN)

It is apparent that the establishment of the UN, in as much as it was proclaimed to be a global organisation for all humankind, was really the brainchild of a few powerful European states and the USA. As the prime movers of military, political and economic power, they took centre-stage right from inception of the idea of the UN to the actual establishment of the Organisation. To this extent, it may be asserted that the developing states made little, if any, contribution to the establishment of the UN. The so-called Allied Powers were in effect presuming themselves to be the quintessence of the international community as a whole.

That the developing states are generally marginalised in the UN system is discernible if one were to look at such features as the power distribution between the organs of the UN, the decision-making processes and even membership of its various specialised agencies.

The General Assembly and the Security Council, respectively regarded as the 'Plenary organ' and the 'Executive organ' of the UN, have between themselves the largest powers and competences vis-à-vis the other organs.[11] As the 'Political' organs of the Organisation they are the ultimate decision-makers. However, the Council clearly emerges as the ultimate centre of power in the UN. One scholar has correctly observed that Article 24 of the UN Charter gives the Security Council '..... greater powers than have ever before been exercised by an international body.'[12]

The decision-making processes in the UN demonstrate the disadvantaged position of the developing states vis-à-vis the more powerful and prosperous states. The most conspicuous demonstration of this advantage is in the decision-making mechanism of the Security Council.[13] On the most important issues and decisions of the Security Council the permanent members must be unanimous otherwise decisions would not be taken. A negative vote by a permanent member would effectively block an affirmative vote. In reality therefore, the five permanent members of the Security Council have a superior vote, comparative to the other (non-permanent) members of the Security Council and indeed the whole Organisation. They wield the veto power.

The decision-making process of the Security Council leaves the developing states in a vulnerable and weak position in spite of their numerical advantage. In 1989, when the USA attacked the Republic of Panama, a small third world country, the majority of developing states reacted angrily and with a deep sense of desperation and disillusionment. The Representative of Libya in the Security Council summed up this reaction thus -

> Small countries without the means to defend themselves that have believed the Charter protects them are daily losing their faith in the system of international security and in the Security Council, where law is interpreted so as to support the strong and allow the small and weak to be violated .....[14]

It is apparent that the existing international organisations are heavily tilted in favour of the developed states. The political, economic and strategic interests of developed states reign supreme. This invariably leaves developing states in a disadvantaged position. In view of this, it is highly doubtful whether the International Seabed Authority would reflect the interests of humankind and not these of the developed states. Like the UN Security Council, the Council of the Authority virtually assures developed states of a perpetual presence in the Council. The special interests formula of member states of the Council of the Authority guarantees seats for those states which also occupy permanent seats in the UN Security Council. Even in decision-making in both Councils, developed states wield the veto power and thus have a decisive say in all important decisions. The power distribution in both Councils places developed states on

a comparative advantage over developing states in spite of the latter's superiority in numbers. As in the case of the UN, developed states would be expected, at least initially - to finance the Authority and also provide ready technology to enable the Authority to venture into deep seabed mining. Clearly, the odds are against the developing states as the present international institutional order is inimical to their development.

4.3 DEVELOPING STATES AND THE AUTHORITY: OVERALL POSITION

The institutional system constituted by the Authority places developing states in relative disadvantage to the developed states. The situation is made worse by the United Nations General Assembly Agreement of 28th July, 1994[15] which seeks to address those areas of difficulty which stand in the way of universal participation in the Convention. These critical areas include transfer of technology, production controls and policies, financial arrangements, the operational arm of the Authority, the Enterprise, and the decision-making procedures in the Assembly and the Council.

It cannot be gainsaid that developing states command a strong and solid majority in the membership of the Authority.[16] After all, membership of the Authority derives automatically from accession to or ratification of the Law of the Sea Convention.[17] Yet, in spite of their numerical advantage, developing states cannot be said to control the decision-making process of the Authority. Why?

The numerical advantage is only useful - and even then only to an extent - in the Assembly.[18] According to the Convention,[19] matters of procedure in the Assembly are carried by simple majority. In such matters, developing states could be said to be well positioned. In the case of substantive questions, where there is a requirement for a two-thirds majority, it is more difficult as this is a high majority. The United Nations General Assembly Agreement[20] complicates the matter further by providing that as a general rule, decision making in the organs of the Authority, 'should be by consensus.' Consensus means the absence of objection or the presence of general agreement on an issue.[21] Only after all efforts to reach consensus have been exhausted should the Assembly resort to voting by the majorities stated above. Moreover, the powers of the Assembly itself are clipped further by the Agreement. Decisions of the Assembly on any matter in respect of which the Council also has competence, that is,

where both organs have concurrent jurisdiction, has to be based on the recommendation of the Council.[22] Besides, 'any administration, budgetary or financial matter' before the Assembly shall be based on the 'recommendation' of the Council.[23]

The Agreement provides that if the Assembly does not accept the recommendation of the Council on 'any matter,' it shall return the same to the Council for re-consideration.[24] The Council shall then reconsider the matter in light of the views expressed by the Assembly.[25] Thus, in reality the Council has the last word in all matters of substance before the Assembly. In essence, the Agreement prohibits the Assembly from taking any decision on a substantive question which contradicts a decision or position of the Council. The Assembly can only make decisions having a financial or budgetary implication on the recommendation of the Finance Committee.[26]

What, then, remains of the powers of the Assembly, designated as the 'supreme organ' of the Authority to which the other organs are said to be 'accountable'?[27] Nothing much, except perhaps for the procedural powers which in any case have to be subjected to the general rule of consensus. Consequently, most of the functions and powers of the Assembly set out in the Convention would be borne by the powerful Council. This would make majority of the developing states virtually helpless on-lookers where important decisions are involved. It is not useful to refer to the actual practice of the Assembly as at the time of writing this thesis, the Assembly has only concluded its first Session.[28]

The Convention and the Agreement together fashion the Council as the most powerful and formidable organ of the Authority. The Council would effectively be the power behind every important decision of the Authority. Under the Agreement, the most important and primary function of the Assembly, namely the 'establishment of general policies' of the Authority,[29] is shared by the Council. Thus, the Assembly and the Council must 'collaborate' in the formulation of the general policies of the Authority.[30] Besides, the Council has numerous other important competences making it truly the 'executive organ' of the Authority.[31] The composition, procedure and voting in the Council as set out in the Convention and in the Agreement[32] squarely place decision making on important matters in the Authority within the control of the developed states. This is in spite of the general rule of consensus enjoined on all organs of the Authority by the Agreement.[33] The Agreement itself specifies that in event of

failure to reach consensus, decisions in the Council on matters of procedure shall be carried by simple majority.[34] Decisions on substantive questions, except where the Convention itself provides for consensus in the Council, shall be taken by two thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the interest groups represented in the Council.[35]

It is thus apparent that the interests of the developed states are served and well-represented in the Council. The composition formula is such that the developed states would be well represented in the Council. This would enable them to protect and enhance their national interests to the greatest disadvantage of the developing states. It would be difficult to fathom a situation where decisions and measures adverse to a leading industrial state or group of such states is carried through the Council or the Assembly of the Authority.

In view of the foregoing, the representation of developing states' interests in the Council and its subsidiary organs could as well be viewed as a sham and a smokescreen to hoodwink the vast community of developing states eager to share in the common heritage resources. The overall position of the developing states in the Assembly and the Council, the two most important organs of the Authority, is so weak that it can be sustainably argued that the whole regime is beyond their reach. At the time of writing this thesis, the Authority had completed its first Session without agreeing on the issue of membership of the Council.[36]

Part XI of the Law of the Sea Convention, which constitutes the deep seabed mining regime together with its institutional system, suffered the most acrimonious controversies during negotiations at UNCLOS III. The provisions in the Convention are thus a carefully and painstakingly negotiated compromise which create a middle course between hitherto very hard-line positions. The trade-offs and compromises mainly between the developing states and the developed states considerably weaken the position of the former in favour of the latter. Thus, as it is, the Convention is already a poor deal for the developing states. The most conspicuous manifestation of this is the creation of the so-called parallel system of exploitation whereby the Authority through its operating arm, the Enterprise, would operate mining programmes side by side with licensed private entrepreneurs or state ventures. The latter would mainly be concerns or interests from developed states which have prior to the passing of the Law of the Sea Convention invested a lot in exploratory work in the oceans and seas.

Although the private entrepreneurs and state venture would be expected to share the profits of their deep seabed mining, it would nevertheless be difficult to enforce such an expectation.

Under the parallel system of exploitation, the developed states have a clear head-start. They have the technology and capital to venture into deep seabed mining. Without its own capital and technology, it would be difficult for the Enterprise to favourably compete with the private concerns or state ventures of the developed states. The fact that the Authority would be the licensing authority and also that capital and technology would be passed to the Enterprise virtually for free could not in reality amount to much consolation. In fact, these latter provisions alienate further the perceived partners of the Enterprise making the latter a bad starter. The best hopes of the developing states lie in a strong and effective Enterpnse and its parent, the Authority.

The Agreement [37] accentuates the already weakened position of the developing states. Decision making has been conms of contrasolidated lurther to favour the Council, dominated by the developed states. The Enterprise, symbolising the best hopes of the developing states, has been overhauled. The contentious provisions governing transfer of technology, production policies economic assistance and financial terms of contracts have been thoroughly reviewed and evidently tilted in favour of the developed states[38]. In addition, the Agreement creates a Finance Committee which takes up very important powers hitherto entrusted to the Assembly, which constitutes the backyard of most developing states.

Put together, Part XI of the Convention and its complimenting Agreement tilt the balance heavily against the developing states and appear to appease and entrench the interests of the developed states. The developing states are marginalised by the system which is enacted by the Convention and the Agreement.

4.4 THE PIONEER INVESTORS REGIME, NATIONAL LEGISLATION AND AGREEMENTS ON DEEP SEABED MINING: TILTING THE BALANCE AND BLEEDING THE CONVENTION

The Pioneer Investors Regime and the Reciprocating States regime constitute hallmarks of a system that is manitestly tilted in favour of the developed states. Both regimes tend to

undermine and bleed the painstakingly negotiated Conventional regime. Several reasons explain this.

On pioneer investment, the first group of pioneers were in fact - save only for India- developed states with high stakes in the oceans and seas: Japan., France and the former Soviet Union. The second category of investors were USA, British, Canadian, Japanese, German, Belgian and Italian companies and consortia. This demonstrates that developing states had virtually no involvement in pioneer investments. The specified date of 1st January, 1985[39] passed for the category three, comprising developing states, without a single state or entity being registered. This showed the unpreparedness and/or inability of the developing states to undertake pioneer investment on their own. Simply put, even though their limitation time was subsequently modified to run until the entry into force of the Convention,[40] that would not improve their preparedness or ability to participate in the regime in any significant way. The developed states thus had a clear advantage over the developing states in pioneer investment.

Moreover, the question as to what it would cost in terms of capital and technology to venture into pioneer investment was ever present. It was doubtful whether the developing states or their entities could manage the awesome financial and technological requirements of deep seabed mining.[41] The truth is that they could not afford it. In fact, it was because of the huge capital and technological investments already made by the so-called pioneers prior to the passing of the Law of the Sea Convention that it became necessary and expedient to protect them within the framework of the Convention. The establishment of the pioneer regime was a tacit recognition that some states were already deeply involved in exploratory work in the deep seabed. [42]

The Pioneer investors regime was clearly stated to be an interim measure to last until the Convention came into force.[43] Upon the entry into force of the Convention, the pioneer investor's regime would lapse. This was a recognition that the system was purely expedient and designed to reward and satiate those who had already entered the Area, as far as possible before the Conventional regime took effect. It would also hopefully induce the developed states and their entities to embrace and accept the Authority and its Enterprise as partners in deep seabed mining.

It would seem that the regime has emboldened and entrenched the interests and positions of the developed states. The regime has made it even harder to appreciate, even with the entry into force of the Convention, that deep seabed mining is supposed to be in realisation of the common heritage principle. The failure to realise the common heritage principle would be a fundamental betrayal of the one principle on which Part XI of the Convention is founded. Developing states would be the worst losers were the common heritage principle system to collapse. The pioneer investors regime runs the danger of undermining the Conventional regime in the long-term as it ultimately benefits only a fraction of humankind. Pioneer investors would first and foremost be serving their own narrow commercial interests and serving humankind, if at all, on a secondary level. It would be difficult to see how the general interests of humankind would be served by enterprises or entities whose primary concern is profit-making.

Moreover, some of the pioneer investors, particularly in category two, are not state parties to the Convention in the first place. The USA and Britain are prime examples. Such states would not feel legally obligated to work towards the realisation of the Conventional regime if they had stayed out of the whole regime in the first place. Nothing would bind them, even during the interim period when pioneer investment would be valid, to remain true to the realisation of the common heritage of humankind. If anything, these dissenting states would be striving to disprove and dismantle the Conventional regime for deep seabed mining as it is framed. They would seek to justify their dissenting positions at the expense of the Conventional regime.

The invitation in Resolution II, which creates the pioneer investors' regime, to all and any state which has signed the Convention to be registered as Pioneer investors[44] on reflection seems hollow and meaningless. Given the capital and technological requirements involved, it would be a mockery of the developing states. In the end, only those which could afford the huge commitments would participate and benefit. It is on this basis that developed states oppose the Conventional requirements for transfer of technology to the Authority and the financing of the Authority.

The pioneer investor regime also underlines the ultimate triumph of those who champion a free access regime over a collective approach system. Western free-market protagonists have thus scored over those whose position would be for a controlled community system which is typified by the Authority. Even if stated to be for a Limited period only, this would give free-market protagonists a clear head-start, enabling them to entrench their positions and interests. The Conventional regime would then be left limping and bleeding.

It is those same developed states participating in the pioneer investor regime which have also enacted unilateral national legislation and co-ordinated the same with "Agreements"[43] to enable them enter the deep seabed. Like the pioneer investor regime, they stated their so-called Reciprocating States Regime to be 'interim' or 'temporary.' Their respective legislation and the Agreements would last until the Convention entered into force for them. To an extent, it could be argued that these states have enacted their legislation and Agreements to back up and protect their Pioneer investments. Since the Law of the Sea Convention had not entered into force by then, it would be rational and expedient to enact national laws to legitimise the operations of pioneer investors. It would also be useful to co-ordinate these legislation on a multi-lateral basis to avoid conflicting and/or concurrent claims between themselves.

Some of these states, particularly the USA, Britain and Germany, which refused to sign the Convention when it was adopted, were enacting legislation to express indignation and disapproval of the Conventional system.[44] They perceived themselves to be a losing minority whose interests were not well-catered for at UNCLOS III. These states could also argue that as far as they were concerned, no rule of international law, whether conventional or customary, barred them from unilaterally legislating. After all, the Law of the Sea Convention had merely been adopted and had not in fact come into force as international law.

Whatever the arguments or justifications for the creation of the alternative Reciprocating States Regime, nevertheless, it creates a system completely at variance with the Conventional regime. The regime represents the creation of an exclusive club of developed states committed to enrich themselves at the expense of the wider international community. This contradicts the Conventional regime's commitment to place seabed resources in the hands of humankind as a whole and especially those living in developing states. The Conventional regime is committed to universalism, the Reciprocating States Regime to unilateralism . It

would be foolish to assume that such systems could be compatible. The national Legislation leave out important Conventional demands such as mandatory transfer of technology, production controls and financing the Authority. The developing states primarily rely on the institutional system of the Convention to be able to benefit from the seabed. In short, the national legislation and their co-ordinating Agreements tend to undermine the Convention.

The unilateralists essentially proclaim loudly that their legislation and Agreements are consistent with or compatible with the Conventional regime. They would point for example, to the interim nature of the Reciprocating States Regime, the establishment of a revenue-sharing fund, and controls for the protection of the environment and of scientific research. In reality, though, they have selected a few important features of the Conventional regime and substantially changed and modified them to suit their best interests. As Brown has aptly commented, there [was] a nod rather than a bow to the common heritage regime.[47]

The legislation are described as 'interim' with the intention that they would be repealed upon the entry into force of the Convention for each of the states participating.[48] However, there is no specification in the legislation as to how long the 'interim regime would last . Apparently, these states could still pursue their nationalist interests under respective legislation even after the Convention becomes international law. Some states, such as USA and Britain, have remained non-member states to the Convention. Their respective national legislation, if still in force, would be flying in the face of international law. The foregoing issues are very critical even more so now that the Convention has come into force. This aspect of the unilateral legislation also undermines and bleeds the Convention.

The provisions governing licensing, reservation of sites, anti-monopoly and diligence provisions, protection of land based mineral producers and matters of finances and the hind, and transfer of technology among others, lead to at least one conclusion. The Reciprocating States Regime establishes a privileged club of economically and technologically advanced states whose citizens would enjoy preferential and relatively secure opportunities to engage in deep sea mining while other sectors of international society,particularly the developing states, stand helplessly on the sidelines with no hope of participating in the exploitation of seabed resources.[49] The legislation of practically all the Reciprocating States provides for the issue of license to their own nationals, or to nationals of fellow Reciprocating States.[50] The legislation

is primarily designed to provide a favourable legal regime for the nationals of the states concerned.

'Site-banking', or reservation of sites, which is provided for both in the Convention and in Resolution II does not appear to have been incorporated in the national legislation. It may have been viewed as one of the hallmarks of quantitative production controls, stifling exploitation of deep seabed resources. The Reciprocating Regime favours a free access system. The Convention contains elaborate provisions for the protection of land-based producers of minerals derivable from the deep seabeds especially developing states.[51] Under the Reciprocating States legislation, no provision is made for production control.

Some of the Reciprocating States legislation also provide for the establishment of funds into which levies or other resources derived from the deep seabed would be paid by investors for the benefit of humankind.[52] This is said to be a sign of good faith and commitment to the common heritage principle. Humankind, or the international community, have no control or access to these national funds as of right. The legislations themselves do not even compel the appropriate state organs to surrender these funds for distribution to humankind!

One of the most glaring omissions of the Reciprocating States Regime is with regard to transfer of technology. The legislation omits provisions obligating the participants to transfer technology. It would be difficult to contemplate such inclusion in the legislation. The failure to include provisions for obligatory transfer of technology would be manifestly incompatible with the Conventional regime. Without technology, the Authority and its Enterprise would be immobilised. The developed states possessing technology would hold on to it and apply the same for their own benefit. Developing states without technology of their own would be completely alienated without hope of ever participating in or benefiting from the common resources of humankind.

The alternative Reciprocating States Regime is incompatible with the conventional regime. The cumulative effect of the operation of the Reciprocating States Regime and the pioneer investors' regime weighs heavily in favour of the developed states at the expense of the developing states. The two regimes together also constitute an assault on the Conventional

regime which would further weaken the position of developing states in the Convention and in the Authority.

4.5 UNITED NATIONS GENERAL ASSEMBLY AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UN CONVENTION ON THE LAW OF THE SEA: HEALING THE WOUNDS?

As the Law of the Sea Convention waited to come into force, efforts were made both within and without the framework of the Preparatory Commission to realise the goal of universal acceptance of the Convention. The developing states consistently supported the Conventional system. Some developed states vehemently objected to the deep seabed mining provisions and opted for alternative Reciprocating Regimes which ultimately benefited them. Mid-way in the life of the Preparatory Commission, it became obvious that little progress was being made towards the achievement of universal acceptance of the Convention. Negotiations at the formal level were deadlocked.

It was then that negotiators and states began informal consultations under the auspices of the UN Secretary General with a view to removing the obstacles to the universal acceptance of the Convention. The most formidable obstacles were provisions in Part XI of the Convention governing deep seabed mining. At the time Guyana deposited the sixtieth instrument of ratification on 16th November, 1993,[55] the consultations were still going on. The deposit of the sixtieth instrument of ratification made it even more urgent and critical that agreement should be reached out of the informal consultations sooner than later. All parties concerned must have appreciated the urgency of the matter and stepped up efforts to achieve some agreements on the key issues of controversy. Developing states particularly hoped that the Conventional regime would finally come into force.

Developed states were equally anxious. Although they objected to the deep seabed mining provisions of the Convention, and some of them refused to be states parties, they were nevertheless confronted with the prospect of the Convention becoming international law. How would they relate with the new international law in spite of their alternative Reciprocating States Regimes? They could lead themselves and their nationals participating in deep seabed mining into a state of legal and jurisdictional difficulties and confusion. This

would be self-defeating. Besides, developed states could not have wished to throw overboard the entire package of the Convention as it had many important provisions governing the vast seas and oceans. A way had to be found to rationalise Part XI of the Convention so as to vindicate the many years' efforts that had led to the passing of the Convention in the first place.

It is instructive that some developed states including Germany, Italy and Australia acceded or ratified the Convention after the passing of the United Nations General Assembly Agreement concerning Part XI of the Convention.[54] This is perhaps a symptom of gradual and eventual acceptance of the Convention even by some of its harshest opponents.

On 28th July, 1994, just over three months prior to the entry into force of the Law of the Sea Convention, the informal consultations registered a breakthrough. United Nations General Assembly passed Resolution 48/263 entitled 'Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10th December, 1982.'[55] At the onset, the Agreement states that it is prompted by the 'desire to achieve universal participation' in the Law of the Sea Convention and to 'promote appropriate representation in the institutions established by it.'[56] Clearly, this is the overriding purpose and import of the Agreement. Without universal acceptance of the Convention, it would be difficult to realise the common heritage principle. It would also be difficult to genuinely reflect the interests of all states and sections of humankind in the Authority and its organs.

Indeed, the United Nations General Assembly found it necessary to 're-affirm' the common heritage principle in the preamble to the Agreement. This was perhaps an implicit admission that this fundamental principle was in jeopardy and that the goal of universal acceptance of the Convention could not be achieved without accepting the principle of common heritage. The United Nations General Assembly had earlier, on 9th December, 1993, passed resolution 48/28 in which it invited all states to participate in the consultations and to increase efforts to achieve universal participation in the Convention as early as possible.[57] The United Nations General Assembly 'considered' that the objective of universal participation in the Convention may best be achieved by the adaptation of an agreement relating to the implementation of Part XI. Thus, it could be stated that the United Nations General Assembly was seeking to bridge

gaps and wounds resulting from the divergent interests and positions of states with regard to Part XI of the Convention.

The United Nations General Assembly also 'recognised' that political and economic changes had occurred which 'necessitated' the re-evaluation of some aspects of the regime of the Area and its resources. It cited, in particular a "growing reliance on market principles."[58] Although the General Assembly did not enumerate them, it may be supposed that among the political changes of great significance since the passing of the Convention was the collapse of communism and the former Soviet Union. The fall of communism and the disintegration of the Soviet Union brought to an end the era of the Cold War. The Convention itself had been negotiated in the context of the sharp East-West ideological differences. The balance of power and interests in the Convention and particularly the organs created under Part XI reflected these realities.[59] Without those political realities, it became difficult to sustain the balance reflected in the Convention.

In recognising the 'growing' reliance on market principles, the position of the West in the Cold War days was being vindicated. The pendulum had shifted in favour of the capitalist West. These geo-political changes place the West and its free-market ideas at the forefront of the emerging regime for the seabed . Indeed, the West appears to dictate the nature and pace of political and economic changes virtually unchallenged.

It may also be pointed out that in view of the collapse of communism, and the disintegration of the Soviet Union, developed states in the West hoped to have more controlling influence in the Authority and its organs. They hoped to have decisive control of the decision making processes of the organs of the Authority. This way, and also by direct inclusion in the Agreement, developed states hoped to dispense with some of the more objectionable principles and demands already existing in the Convention such as transfer of technology, production controls and financing of the Authority.

The United Nations General Assembly in fact stated that it was re-evaluating the Convention.[60] Put another way, the United Nations General Assembly was in fact reviewing or informally amending the Convention. The Agreement itself was informally negotiated under the auspices of the UN Secretary General. This review exercise was carried out and the

Agreement arrived at purely out of expediency and in the overall interest of achieving universal acceptance of the Convention. The United Nations General Assembly Resolution explains it.

First of all, it provides for the provisional application of the Agreement from the entry into force of the Convention on 16th November, 1994.[61] Secondly, it 'reaffirms' the unified character of the Convention.[62] Thirdly, it 'affirms' that the Agreement 'shall' be interpreted and applied together with Part XI.[63] Fourthly, future ratifications or formal confirmations of or accessions to the Convention would be accompanied by the necessary consent of the respective states parties to be bound by the Agreement unless such states had previously established or establishes at the same time their consent to be bound by the Convention."[64]

The Agreement seeks to legitimise itself further by providing that states parties to the Agreement undertake to implement Part XI of the Convention 'in accordance with the Agreement.'[65] The Agreement provides that the provisions of the Agreement and Part XI shall be interpreted and applied together 'as a single instrument' and that in the event of any inconsistency between them, 'the provisions of [the] Agreement shall prevail.'[66] It would appear that the Agreement effectively supersedes the provisions of Part XI of the Convention.[67] Signature,[68] consent to be bound,[69] entry into force,[70] provisional application,[71] and other Conventional features[72] also appear to suggest that the Agreement is in fact a Protocol to the Law of the Sea Convention. It has an independent existence from the Convention as reflected by the fact that several tens of states have signed the Agreement without being states parties to the Convention and vice-versa.[73] The majority of states have also signalled their consent to provisional application of the Agreement.[74]

An interesting feature of the Agreement is the specific mention of the representation of interests of the developed states. Article 6 dealing with entry into force of the Agreement provides that it shall come into force 30 days after the date on which 40 states have established their consent to be bound. The 40 state consents must include seven of the States referred to in Paragraph 1(a) of Resolution II to UNCLOS III (pioneer investors), and five "of those states are developed states." Mention is also made of developed states under Article 7 on termination of provisional application of the Agreement.

What emerges therefore is an interesting and ironical twist. The Convention repeatedly refers to the 'interests' and 'needs' of 'developing states.'[75] The Agreement on the other hand, specifies 'developed states' interests in decision making processes. Apparently, the developed states had considered themselves to be the losing minority in UNCLOS III. They argued that UNCLOS III and the Convention it bore gave the majority developing states an undue advantage over themselves which was totally unacceptable.[76] Thus, we have an Agreement, stated to prevail over the provisions of Part XI of the Convention, which favours developed states. This supports the view that the regime is beyond the reach of developing states. Far from bridging the gaps and healing the wounds, it appears that the Agreement actually alienates the majority of developing states as it inclines towards the interests of the developed states. Its Annex, which is stated to form an integral part of the Agreement[77] has provisions which seem to fortify this view. Those provisions broadly deal with costs to states parties and institutional arrangements,[78] the Enterprise,[79] decision making,[80] Review Conference,[81] Production policies,[82] Economic assistance ,[83] and the Finance Committee.[84] We shall deal briefly with those provisions.

In prominently addressing the issue of costs to states parties and institutional arrangements,[85] the negotiators of the Agreement must have appreciated two things. First, that the Authority and its organs constituted a very large and unwieldy bureaucracy which would affect the efficiency and workability of the institution. Secondly, the costs of running the Authority and its organs would ultimately be borne by the developed states. The latter were naturally anxious at the prospects of having to finance an institution they viewed as an inefficient bureaucracy.

The Agreement thus provides that in order to minimise costs to states parties, all organs and subsidiary organs to be established under the Convention should be cost-effective.[86] The principle of cost-effectiveness is also stated to apply to the frequency, duration and scheduling of meetings.[87] It is also provided that the setting up and functioning of the organs and subsidiary bodies of the Authority shall take an 'evolutionary approach' minding the needs of cost-saving and efficiency.[88] Towards this end, the Agreement prioritises the areas of concentration by the Authority.[89] It should be recalled that the issue of costs is one of the critical problems hampering the full acceptance of the Convention's Part XI especially by the

developed states. It would ultimately be in the best interests of humankind if the Authority and its organs were organised in such a way as to cut costs and increase efficiency. Cost-saving and efficiency should characterise a global organisation committed to serve the interests of humankind

Under the Agreement,[90] the Council is given powers to 'consider' applications for approval of work for exploration. The Council is also empowered to elaborate and adopt rules, regulations and procedures necessary to facilitate the approval of plans of work for exploration or exploitation. There is virtually no mention of the Assembly in this regard. It would appear that the foregoing powers are exclusive to the Council. Considering that under the Convention the Council already wields a disproportionate amount of power, it would seem that these provisions favour the developed states. Developed states thus have a fresh opportunity to exert their influence and control over the deep seabed mining regime. Developing states in turn have a diminished role in this regime.

The Agreement[91] states that the Enterprise shall conduct its initial deep seabed mining operation through joint ventures with other 'entities.' This appears to favour developed states whose entities or state ventures are listed as pioneer investors. Moreover, there is no obligation of state parties to fund one mine site of the Enterprise.[92] Thus the automatic financing that the Enterprise would otherwise enjoy under the Convention is repealed. Without guaranteed financing, the Enterprise would certainly be a weak starter and would even be a weak partner in joint venture arrangements. The best hopes for developing states' participation in deep seabed mining would thus be shattered. The weakening of the Enterprise would result in the weakening of the position of developing states in deep seabed mining.

The Agreement also deals with the controversial issue of decision making.[93] The Council and the Assembly shall collaborate to establish the general policies of the Authority.[94] As a general rule, decision making in the organs of the Authority, and particularly the Assembly and the Council shall be by consensus.[95] The Agreement appears to dwell at length on the composition and decision making formula in the Council, and provides for consensual decision making.[96] The requirement of consensus is perhaps intended to deal with the numerical advantage enjoyed by developing states in the Authority. Whereas consensus may be the best approach towards the realisation of the common heritage principle, it is difficult to achieve. In

order to achieve it, the Council is expected to play the leading role. Yet, the Council is virtually controlled by the developed states.

The Agreement effectively repeals the provisions relating to the Review Conference in Article 155(1), (3) and (4) of the Convention.[97] Notwithstanding the provisions of Article 314(2) of the Convention, the Assembly, upon the recommendation of the Council may undertake 'at any time' a review of the matters referred to in Article 155(1).[98] This provision appears to justify ad hoc or impromptu reviews or re-evaluations of the Convention such as the one leading to the Agreement itself. Such flexibility is commendable but at the same time is subject to abuse especially by the developed state parties.

The Agreement removes the obligation for mandatory transfer of technology.[99] The Enterprise and developing states wishing to obtain deep seabed mining technology shall seek to obtain such technology on fair and reasonable commercial terms and conditions on the open market or through joint-venture arrangements.[100] Otherwise, the Authority may request all or any of the contractors and their respective sponsoring state or states to co-operate with it in facilitating the acquisition of deep seabed mining technology by the Enterprise or its joint venture or by a developing state or states.[101] This must be on commercial terms and conditions and must be consistent with the effective protection of intellectual property rights. Thus, the Conventional provision regarding mandatory transfer of technology is removed. The Enterprise and developing states cannot expect guaranteed transfer of marine technology to themselves. They have to purchase the same at market rates. The position taken by the Agreement places the developed states on a clear advantage. It vindicates their opposition to the conventional demand for mandatory transfer of technology. It also places them in the position of merchants of seabed technology.

The Enterprise and developing states would certainly find it difficult to obtain technology by purchasing the same. Lack of initial capital and technology would mean that the Enterprise and developing states cannot undertake deep seabed mining. This would be advantageous to developed states which have the technology and capital to venture into deep seabed mining on their own.

The Agreement provides that the production policy would take place in accordance with sound commercial principles.[102] The provisions of the General Agreement on Tariffs and Trade, its relevant codes and successor or superseding agreements shall apply with respect to activities in the Area. It should be recalled that developing states within the framework of the so-called G77 has viewed the General Agreement on Tariffs and Trade (GATT) as an exclusive club of the developed states.[103] Those same developed states dominating the GATT have sought to introduce the principles therein in the deep seabed mining regime. Incidentally, GATT is currently being transformed into the World Trade Organisation (WTO). This is a manifestation of the dominant role played by the developed states in the fashioning out of the Agreement.

There are also provisions in the Agreement on economic assistance to developing states which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of minerals derived from activities in the Area.[104] The Council of the Authority is the administering authority and it is expected to deal with developing states on a case-by-case basis. Developing states cannot therefore expect automatic or guaranteed economic assistance from the Authority.

Finally, the Agreement deals with financial terms of contracts[105] and the establishment of the Finance Committee respectively.[106] The Finance Committee is entrusted with important financial and budgetary powers, which under the Convention are shared by the Assembly and the Council. This arrangement effectively diminishes the role of the developing states in decision-making on financial matters. Since such matters are removed from the Assembly, developing states would find it difficult to participate in effective decision-making in this regard.

The Agreement and its Annex place the interests of developed states above those of the developing states. Under the Agreement and its Annex, the scales tilt enormously in favour of the developed states. It thus becomes difficult to appreciate that the deep seabed mining regime is meant to realise the common heritage of humankind. The Agreement itself is stated to be an effort to universalise the acceptance of the Conventional regime. Rather than achieve this objective and heal wounds created in the course of negotiations of the Convention and the practice of some states after the Convention was adopted in 1982, the Agreement appears to

alienate the largest sections of the international community. It makes it difficult for the Authority through the Enterprise, and developing states to meaningfully participate in deep seabed mining. To this extent, the deep seabed mining regime is beyond the reach of developing states.

END NOTES TO CHAPTER FOUR

1 Hedley Bull, quoted in Ogley, R Internationalising the Seabed, (Gower Publishing Company Limited, 1984), p 34

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4. Supra, chapter 3.4.

5 UNGA Resolution 48/263 of 28 July 1994, 48th Session, Volume II 24 December 1993 - 19th September 1994, Official Records Supplement Number 49A(A.48/49/Add.1).

6 See, Bowett D W The Law of International Institutions, 4th ed.,(Stevens & Sons, London, 1982), pp 1 - 13

7 Ibid .,p. 15.

8. Article 4(1) of the Covenant of the League of Nations.

9. Ibid., Article 15

10 Henig, R The League of Nations, (Oliver and Boyd, Edinburgh, 1973), p.15.

11 Articles 10 - 17 and 24 of the United Nations Charter. See also chapters VI and VIII of the Charter

12 Brierly, Y J , The Law of Nations: An Introduction to the International Law of Peace, 6th ed. (Oxford University Press, New York, 1963), p. 111.

13. Article 27 of the UN Charter.

14 Mr Reiki of Libya cited in 'Provisional Reports, Security Council Official Reports (S/PV 2900) on 'The Situation in Panama, UN, New York (1989), p. 43..

15. Supra, note 5.

16. See Bulletin Number 27, Law of the Sea, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 1995, p. 10.

17. Article 156 of the Law of the Sea Convention, (United Nations Publication, Sales Number E.83.V.5. New York, 1983).

18. Ibid., Article 159.

19. Ibid., Article 159 (7).

20. Supra, note 5.

21. Article 161, paragraph (e) of the Convention.

22. Section 3 of the Annex to the Agreement, paragraph 4 (Supra, note 5).

23. Ibid., paragraph (7)

24. Ibid., Section (3) (4).

25 Ibid.

26. The Finance Committee is established under Section 9 of the Annex to the Agreement.

27 Article 160, (1) of the Convention

28 See, Press Release Round-up of Session SEA/1502, 21 August 1995

29 Article 160 (1).

30 Section (3) of the Annex to the Agreement. See also Article 162 (1) of the Convention.

31 Ibid

32. Article 171 of the Convention and Section (3) of the Annex to the Agreement.

33 Section (3) (2) of the Annex to the Agreement.

34. Ibid., paragraph (3).

35 Ibid , paragraph (5).

36 Supra, note 28

37 Supra, note 5.

38 Ibid.

39 Paragraph 1(a)(iii) of Resolution II to the Convention

40. See the Statement on the Implementation of Resolution II UN.Doc. LOS/PCN/L.41/Rev.1 (1986) Annex paragraph 20. See also, Hayashi, M: "Registration of the First Group of Pioneer Investors by the Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea," 20 Ocean Development and International Law, 2.(1989).

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42. Said, M. The Law of Deep Seabed Mining: A study of the Progressive Development of International Law Concerning the Management of the Polymetallic Nodules of the Deep Seabed.', (Almqvist & Wiksell International, Stockholm, Sweden, 1987), p. 321.

43. Supra, note 41.

44. Supra, note 39, paragraph (2).

45. Supra, Chapter 3, notes 158 - 165 inclusive.

46. Schmidt, G. M. Common Heritage or Common Burden? The United States Position on the Development of a Regime for Deep Seabed Mining in the Law of the Sea. (Clarendon Press, Oxford, 1989), pp. 214 - 215.

47. Brown, E. D., Seabed Energy and Mineral Resources and the Law of the Sea, Volume 2 (Graham & Trotman, London1986), p II.222.

48. Supra, Chapter 3, notes 158 to 165 inclusive; Sections 2(a)(16), 2(b) (2) - (3); 201 and 202 of the American Law; Sections 1 and 2 of the German Law; Section 18 (3) - (4) of the British Law; Article 1 of the French Law, Article 1(1) of the Japanese Law and Article 1 and 20 of the Italian Law

49. Supra, note 45, p II.8.11.

50. Supra, chapter 3, note 158 to 165; section 4(14) of the American Act; Articles (1_) and (3) of the French Law, Articles (1) and (3) of the Italian Law, Section (3) of the German Act; Articles 11(1) and 40 of the Japanese Law; and Paragraph (1) of the Soviet Edict.

51. Articles 150 paragraph (h) and 151 paragraph (1)(a) and (10).

52. Supra, chapter 3 notes 158 to 165; Section 2(b)(2) and 403 of the American Act; Section 10 of the British Act; Section 13 of the German Act; Article 15 of the Italian Law; Paragraph 18 of the Soviet Edict.

53. Supra, note 16, p 16.

54. Ibid

55. Supra, note 5.

56 Ibid., preamble.

57 UNGA Resolution Number 48/28 of 9th December, 1993

58 Supra, note 5, Preamble.

59. Articles 159, 161 and 166.

60. Supra, note 5, Preamble.

61. Ibid.

62. Ibid.

63. Ibid.

64. Ibid., paragraphs (2) (4) and (5). The Agreement itself, Articles 1 - 7 deals with the issues of the legal validity of the Agreement and its relationship to the Convention

65. Supra, note 5, Article 1 of the Agreement.

66. Ibid., Article 2.

67 The 1969 Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27, provides guidelines on the amendment or review of multi-lateral treaties. Notification of amendment is expected to be made to all states parties, and it would bind only those states which ratify the amendment (See Articles 39 and 40 of the Vienna Convention).

68 Supra,, note 5. Article 3

69 Ibid., Article, 4.

70. Ibid., Article 6.

71. Ibid., Article 7.

72. Ibid., Article 8 (States parties), Article 9 (Depository and Article 10 (Authentic texts).

73 Supra,, note 16.

74. Ibid.

75. For example, Articles 140, 144(i)(b), 148 and 150

76. Supra, note 52, p. 216.

77 Supra, note 5, Article 1

78 Ibid., Section (I) of the Annex to the Agreement.

79. Ibid., Section (2).

80. Ibid., Section (3).

81. Ibid , Section (5).

82. Ibid., Section (6).

83 Ibid , Section (7).

84. Ibid., Section (9).

85. Supra, note 77

86. Ibid., paragraph (2).

87. Ibid.

88 Ibid., paragraphs (3) and (4).

89. Ibid., paragraph (5).

90. Ibid.

91. Ibid., Section 2 of the Annex to the Agreement, paragraphs (2) and (3).

92. Article 11(3) of Annex IV to the Convention.

93. Supra., note 5, Section 3.

94 Ibid., paragraph (1)

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96. Ibid., paragraphs (3) - (11).

97 Ibid., Section 4 of the Annex to the Agreement.

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99 Ibid. Section 5 of the Annex to the Agreement.

100 Ibid , paragraph 1(a).

101 Ibid., paragraph 1(b).

102. Ibid., Section 6 of Annex to the Agreement.

103 Lazar, L Transnational Economic and Monetary Law: Transactions and Contracts, Volume 1, (Oceana Publications Inc. Dobbs Ferry New York, 1977), pp 1.1 006 - 1.1.007.

104. Ibid., Section 7 of Annex to the Agreement.

105 Ibid , Section 8 of Annex to the Agreement

106 Ibid., Section 9 of Annex to the Agreement.

CHAPTER FIVE

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS.

5.1 INTRODUCTION

On the basis of the whole study, this chapter summarises the main points and makes recommendations and reflections on the improvement of the deep seabed mining regime and the Authority, given that the Convention has now entered into force as international law.

5.3 SUMMARY AND CONCLUSIONS

Before 1950, most of the current concerns about global resources had not appeared in the agenda of either international organisations or national authorities. The era of industrial revolution had fostered attitudes of human domination over most aspects of nature. Current problems of food supply, population growth, poverty, and jurisdiction over the oceans and seas of the world did not receive wide attention. Today, however, the management of global resources is a primary area of study and debate in academic, governmental and inter-governmental circles.[1] The adoption of the Law of the Sea Convention[2] must be appreciated within this context. The international community sought to create a stable and ascertainable legal regime for the seas and oceans of the world. The study focused on Part XI of the Law of the Sea Convention[3] which deals with the contentious issue of exploitation and distribution of resources from the Area. It is under Part XI of the Convention that the Authority is created and mandated.

Notwithstanding the acrimony and controversy surrounding the adoption of the deep seabed mining provisions under the Convention, the world is agreed on the basic need to define a legal regime for the deep seabed and, indeed, the whole extent of the seas and oceans. It is generally recognised that the oceans and seas offer the greatest promises and also pose the greatest dangers and threats to the world of tomorrow. This study has analysed the institutional formula proposed to ensure order and stability in the seas and oceans whilst at the same time administering the resources of the deep seabed on behalf of all humankind.

In summary, this study has focused on the historical evolution of the present Law of the Sea, the institutional aspects of the deep seabed mining regime of the Convention, and the principles governing the exploitation and development of the resources of the Area. Throughout the study, the position of the developing states vis-a-vis the legal regime governing the Area, has been noted.

This study has discussed the justifications for the construction of a legal regime for the seas. The institutional features of the Authority, which is charged with the administration and exploitation of the resources of the Area, have been discussed. The most contentious issue in this regard is the decision-making and power-distribution formula within and between the Council and the Assembly of the Authority. The position of developing states in the Authority has been discussed.

The principles governing the Area and its resource development include the common heritage of humankind, viewed in the study as increasingly jeopardised. Other principles include the equitable distribution of seabed resources and state responsibility. These principles have been discussed. Another contentious issue which has been discussed is the provisions of the Convention concerning transfer of technology to the Authority and developing states.

The other principal issues discussed in this study are the production policies and controls prescribed by the Convention, the Pioneer Investors Regime, the so-called Alternative Reciprocating States Regime and the recent United Nations General Assembly Agreement relating to the implementation of Part XI of the Law of the Sea Convention.

Several conclusions emerge from the study.

The increased interest by humankind in the seas and oceans of the world is mainly motivated by potential economic gains.[4] This appears to be the greatest motivation of the states and explains the rivalry between the developed states and the developing states. The developing states, bearing the burden of human suffering and poverty, expect that these assumed riches of the seas and oceans would be available to better the lot of their peoples. They rely on the organised institutional system of the Authority and its Enterprise to exploit and distribute these

resources. The developed states, equipped with capital and technology, do not appear to need international organisational or institutional means to reach the deep seabed. They had rather go it alone or within smaller frameworks such as the reciprocating states regime and the pioneers investors regime.

Without strong legal and institutional frameworks for the deep seabed beyond the limits of national jurisdiction, there would be anarchy, chaos and confusion in the seas, which may spill to the continents. In spite of its institutional flaws, the Authority is an important player in the emerging law of the sea. There is no other way of administering global or international resources than by an organised institutional framework. Unilateral approaches to the exploitation and distribution of seabed resources would only perpetuate the existing inequalities in economic and technological endowments between the developing states and the developed states.

The common heritage principle is the basis and underlying assumption of the deep seabed mining provisions of the Law of the Sea Convention.[5] This principle guided the construction of the deep seabed mining provisions. When Maltese Ambassador Pardo introduced it in 1967, the common heritage principle was generally accepted in principle. However, how to translate it into practice subsequently became contentious. Developing states favoured the multilateral approach whilst developed states seemed to prefer the unilateral approach. As a result this principle has become increasingly jeopardised, and is far from gaining universal acceptance. However, the common heritage principle still remains the basic underlying assumption on which the deep seabed mining provisions are constructed. Without this proposition, there would be a chaotic and destructive nationalist colonial-type entry into the deep seabed. Apart from the conflict potential of such a situation, only a few developed states would afford the capital and technology requirements and thereby dominate the seabed to the exclusion of the vast majority of humankind especially in the developing states.

The conventional requirement for mandatory transfer of technology places unacceptable demands on developed states. The United Nations General Assembly Agreement is meant to mitigate, among other things, these unacceptable demands. The Agreement virtually removes the requirement for mandatory transfer of technology. This perhaps makes it more acceptable and favourable to the developed states. Yet, it tends to marginalise the developing states

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further as there is no mandatory requirement for the transfer of technology to themselves or to the Enterprise of the Authority. There is every likelihood that technology will continue to present the law of the sea with a continuing challenge. The law must therefore acquire a pattern of techniques for the solution and settlement of the conflicts of interests which will continue to arise especially between the developed states and the developing states." It is admitted, nonetheless, that technology is a resource like any other, which is owned by states or their subjects and which is therefore subject to the jurisdiction, policies and regulations of the respective states. To demand a mandatory transfer of such a resource may amount to a breach of the principle of state sovereignty. Moreover, there is no direct prohibition in the Convention or in the Agreement against any state or group of states contracting between themselves to develop technology or scientific knowledge on deep seabed mining by unilateral or joint ventures.

The production policies and controls contained in the Convention also present problems of acceptability especially to the market-oriented developed states. The latter generally view such policies and controls as being inhibitive of the free and profitable development and exploitation of the deep seabed resources. Developing states generally favour the policies and controls as they ultimately rely on the Authority and its Enterprise to benefit from any production or development of the deep seabed resources. The United Nations General Assembly Agreement virtually removes the conventional controls and expects market forces to influence the exploitation and development of the deep seabed resources. The Agreement appears in this regard to favour the position of developed states vis-à-vis the developing states

The commercial production of the resources of the Area is still fairly futuristic. The distribution formula proposed in the Convention is yet to be tried. Only time will prove its efficacy. However, it must be admitted that the difficulties inherent in producing a 'just' allocation of resources are enormous. The solution of some of these difficulties depends on such factors as the availability of adequate scientific information about the nature of these resources and adequate information about the economic needs of various states.[7] Admittedly, the necessary scientific information is simply not readily available in many parts of the world. Assuming the Authority recovers resources from the Area on behalf of humankind, it would be difficult to equitably distribute them taking 'particular consideration' of developing states.

The Pioneer Investors Regime' and the 'Reciprocating States Regime' are two hallmarks of the pre-eminent and dominant position of the developed states, at the expense of the developing states. Save for India, all other so-called pioneer investors are developed states. Developing states have not been able to qualify for registration. Virtually the same states participating in deep seabed mining as pioneer investors also participate in the reciprocating states regime. The unilateral legislation enacted by those states is primarily meant to serve their national or reciprocal interests to the exclusion of the wider international community. The reciprocating states regime and the pioneer investor regime are incompatible with the common heritage principle. The two regimes are unilateralist while the conventional regime is multilateralist.

The United Nations General Assembly Agreement of 1994 concerning the implementation of Part XI of the Law of the Sea Convention is partly motivated by the noble desire to bring the Convention to universal acceptance. Indeed, its text states as much. However, the Agreement amends or reviews important provisions of the Law of the Sea Convention. The result is that the position of the developed states is considerably strengthened and entrenched at the expense of the developing states. Consequently, it is doubtful whether the Convention will ever achieve universal acceptance and truly balance the interests of the entire humankind.

There is still a growing desire and effort towards the establishment of a just and equitable international economic and social order.[8] There have been phenomenal developments in the areas of science and technology enabling humankind to reach hitherto unreached parts and resources of the world. This has in turn necessitated the development of international law as a vehicle for ordering the affairs of the vast international community. International law and the international community, must rise to the occasion, in the regime of the seas as elsewhere, to create an equitable and just world order. Such an order should ensure peace and prosperity for all humankind. It should particularly address the needs of the vast millions of poverty-stricken peoples the world over especially in the developing states. Such an order should indeed narrow the vast gap between the rich and the poor of the world.

The International Seabed Area and its assumed wealth of resources presents an opportunity and a challenge for the realisation of a just and equitable world order. The deep seabed mining provisions in the Law of the Sea Convention[9] should be designed to achieve such a

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world order. The way to achieve such order must be marked with co-operation, patience, trust, understanding between all states, big or small, rich or poor. Neither state nor group of states can ignore the interests of others and hope to succeed.[10]

5.3 RECOMMENDATIONS FOR IMPROVEMENT OF THE DEEP SEABED MINING REGIME AND THE AUTHORITY: TOWARDS ENHANCED PARTICIPATION BY DEVELOPING STATES.

The Convention has only recently entered into force. Reliance on the practice of states with regard to the Convention and the Authority is not possible for now. Admittedly, it is difficult to propose recommendations or changes to the conventional system without giving it a chance to operate as passed. This could amount to a further debate or discussion on the Convention as if it is not yet passed.

Nevertheless, it is in order to make some recommendations for the better functioning of the regime.

The institutional system of the Authority and its organs should be given a chance to operate and prove or disprove itself. The Authority has been attacked as an expensive, cumbersome and inefficient bureaucracy. Critics[11] view with trepidation the issue of funding such a large organisation. They also believe that the provisions requiring the Authority to license deep seabed operators and enforce and monitor production controls is a cumbersome and inefficient approach to the exploration and exploitation of deep seabed resources. The Authority is viewed as the anti-thesis of free market forces. The Authority is one of the largest international organisations by virtue of its mandate over the vast international seabed Area. In the long-term, assuming the Authority were to be engaged in large-scale commercial production, its present perception as a large and wasteful bureaucracy may change Moreover, the Authority is a typical international organisation. Nothing makes it more unwieldy than, say, the UN or any of its specialised agencies.

Nevertheless, the decision-making processes and membership of the organs of the Authority must continue to reflect the delicate balance between interests of the majority developing states and the minority developed states, Special interest groups should also continue to be adequately catered for. In this sphere, as in other international spheres, the players must

recognise the just and reasonable needs and interests of other players. Developing states must not be tempted to wield their majority influence to the detriment of the minority developed states. Neither should the latter be allowed to perpetuate their national interests over the former merely because they hold the capital and technology that is required for deep seabed mining.

As much as possible, and in line with Article 155(3) of the Convention and the Agreement, all efforts should be exhausted towards consensus decisions. Voting, whether by individual states or group interests, should only be resorted to when all efforts towards consensus have been exhausted. Even then, most of the major interest groups should be accommodated to enhance acceptability of the decision. In proposing the foregoing, notice is taken of the setbacks of decision-making by consensus or by accommodation of the principal interest groups.

The Enterprise should remain as the principal vehicle through which deep seabed mining is undertaken. It should get the support and preferential treatment that is apparent in the Convention, and which is removed in the Agreement. This should enable it, initially and thereafter, to participate fully in deep seabed mining. Although it is undesirable to designate it as the licensing authority over its fellow competitors, yet it should be accorded both capital and technological assistance to enable it participate fully in the deep seabed mining regime and in fact take charge of it. Without the central and effective participation of the Enterprise, it may be very difficult to realise the principle of the common heritage of humankind. In spite of its deficiencies and weaknesses, the Enterprise is the best vehicle for the realisation of the common heritage principle. It needs the support of both the developing states and developed states to be able to work.

The Reciprocating States Regime should be abolished. It is neither viable nor consistent with the common heritage principle. In fact, the system may be insecure.[12] Unilateral legislation or even the reciprocating states Agreements may not provide sufficient legal security for miners, because other non-Reciprocating States may not respect it and would certainly not feel legally bound by it. Moreover, at the time it was established it failed to accommodate the former Soviet Union and the developing states. This naturally raised the risk of legal and political disputes about ocean mining rights. As it is, any mining under the Reciprocating States Regime is fraught with uncertainties of a legal, political and economic nature[13]. This is not to

deny that there would also be uncertainties under the conventional system. The States Parties should deal collectively with any uncertainties that arise in the conventional system instead of going it alone or in interest groups. This way, there would be wider acceptance of the conventional system.

The common heritage principle should be shielded from increasing jeopardy. All states should appreciate that the common heritage principle is the bedrock of the entire regime of the international seabed Area. All states must view the resources of the international seabed Area as a global heritage to be administered or exploited by and on behalf of humankind as a whole. One way of achieving universal respect for the common heritage principle is for all states to harness their efforts towards full and universal acceptance of the Law of the Sea Convention. Some of the harshest critics of the common heritage principle are in fact non-states parties to the Convention. Another way of promoting the common heritage principle is to leave it intact in the Convention and to avoid changes or amendments that are bound to diminish its importance. This way, the principle will continue to enjoy constitutional validity and legitimacy.

The issue of transfer of technology is one of the most outstanding problems affecting the universal acceptability of the deep seabed mining regime. Ideally, the Authority and its Enterprise should obtain marine technology from the states parties. However, in practice, it would be difficult for the Authority to demand the transfer of technology to its Enterprise. It does not have a police machinery to enforce the demand for technology. Even if it had, still it has to be appreciated that states are sovereign entities which cannot be compelled contrary to their interests. On the other hand, some of the states endowed with marine technology such as the USA and the UK are not states parties to the Convention in the first place. Yet, it is also true that the Authority and its Enterprise do not have capital or technology of their own. Without capital and technology, it would be virtually impossible to enter the deep seabed or to participate in deep seabed mining in any meaningful way.

The way forward should be joint ventures and partnerships between the Authority and its Enterprise on the one hand, and those who have already developed appropriate technology in this field, on the other. The Enterprise should be enabled financially, to obtain technology from the market on fair and reasonable terms and conditions. Joint ventures as proposed in

the Agreement are perhaps the most realistic approach to deep seabed mining at least for a start. Another approach, also favoured by the Agreement, is for developing states to seek help in developing their own technological capabilities.As a general rule, states parties should promote international technical and scientific co-operation, whether between themselves or by developing training, technical assistance and scientific co-operation programmes in marine science and technology.[14] In the long term, the issue of technology will be resolved if all or most states obtain their own technology. In such event, technology will be more readily available to the Authority and its Enterprise. The Authority and its Enterprise could also in fact develop their own technological base side by side with the states Parties.

Finally, the attitudes of states ought to be changed rapidly. This is admittedly difficult given that states are the main subjects of international law and they claim sovereignty. States tend to act in terms of their narrow national or group interests. Each state would naturally think of self-preservation. Developed states would go beyond mere self-preservation and seek to dominate and create spheres of influence among the developing states. The latter would primarily be fighting for self-preservation and self-determination, in the economic and political realms. Group interests would generally follow this dichotomy. In the end, it becomes difficult to think collectively as humankind or as equal partners in the pursuit of the common good of humankind. It is encouraging that more states, including developed states have ratified or acceded to the Law of the Sea Convention, thereby creating the expectation that the Convention may finally achieve universal acceptance.[15] Instead, states should pursue genuine co-operation and collectivism in administering the resources of the Area. This co-operation and collectivism should also be pursued in the march to global peace and security, in environmental preservation, in trade and commerce, and in other fields. Humankind should approach the next millenium as one integrated whole.

END NOTES TO CHAPTER FIVE

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15. As at June 1996, at least 99 states had ratified or acceded to the Convention. Among the latest to ratify or accede were China, Finland, Ireland, Japan, Norway and Sweden.

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