

The background of the cover is an aerial photograph of a deep blue ocean. The water is textured with numerous small, white-capped waves that create a rhythmic pattern across the surface. The lighting is bright, suggesting a clear day, and the overall color palette is dominated by various shades of blue, from deep navy to a lighter, almost white at the crests of the waves.

THE DEVELOPMENT OF THE REGIME FOR DEEP SEABED MINING

Satya N Nandan
Michael W Lodge
Shabtai Rosenne (General Editor)

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Foreword

The Center for Oceans Law and Policy, University of Virginia School of Law Commentary Project (“Virginia Commentary”) is a comprehensive, objective and authoritative analysis of the development of each of the 320 articles and 9 annexes in the 1982 United Nations Convention on the Law of the Sea (“1982 Convention”), of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, and of relevant provisions in the Final Act of the Conference.

Volume VI, of which the present monograph forms the Introduction, is the fifth substantive volume to be published in the Virginia Commentary series. Volume VI of the Commentary deals with Part XI of the 1982 United Nations Convention on the Law of the Sea (articles 133 to 191) and the related annexes, which, together with resolution II of UNCLOS III and the 1994 Agreement, set out the regime of “the Area” and provide the legal framework governing activities in the Area. Part XI is the largest single part of the Convention and was the most difficult to negotiate. In the 1960s, it was the need for a legal regime to govern the use of the resources of the seabed and ocean floor beyond the limits of national jurisdiction for the benefit of mankind as a whole that inspired the international community to review and revise the law of the sea as set out in the 1958 Geneva Conventions. Following initial study of the issues through an *Ad Hoc* Committee of the United Nations General Assembly (1967-1968), and more detailed consideration of the issues in the Sea-bed Committee (1969-1973), the question of the legal regime for deep seabed mining was to become the most complex issue before UNCLOS III. The failure to resolve fundamental philosophical and ideological issues relating to the nature of the regime set out in Part XI was the primary factor leading to the rejection of the Convention by the United States and other key industrialized States, including Germany and the United Kingdom. It was not until 1994, with the adoption by the General Assembly of the Agreement relating to the Implementation of Part XI, that it was possible to resolve the outstanding differences with respect to the deep seabed by the introduction of significant changes to the regime contained in Part XI.

The present monograph contains a comprehensive review of the development of the concept of the common heritage of mankind from the earliest times. It also provides an overview of the work of the *Ad Hoc* Committee, the Sea-bed Committee, and the First Committee of UNCLOS III and its relationship to the work of the Conference as a whole. In addition,

a summary is provided of developments subsequent to 1982, including the work of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea, and the Secretary-General's informal consultations on outstanding issues relating to the deep seabed mining provisions of the Convention (which led directly to the 1994 Agreement).

About the Commentary Project

A project to prepare a commentary on the 1982 Convention was conceived as early as 1976 at the Center for Oceans Law and Policy following a discussion with Ambassador Satya N. Nandan of Fiji. To the Center's good fortune, Satya N. Nandan agreed not only to serve as General Editor of the series but also to take the lead on editing Volume VI. From the inception of the Project, the Center, under the direction of its Director John Norton Moore and Series Editor-in-Chief, Myron H. Nordquist, sought to provide a non-speculative commentary on the development of each textual provision in the 1982 Convention. Contributions to the multi-volume series that would be required were obtained from over 100 diplomats and scholars from throughout the world. When feasible, the contributors were individuals who were directly involved in the negotiations that produced the text on which they were asked to comment. Throughout this process, each contributor acted in an individual capacity without reference to any official or governmental status.

Volume I of the series, published in 1985, consists of background material, the original texts of the Convention and Final Act of the Conference and commentaries on the Final Act and Preamble to the 1982 Convention. Volume I also contains an overview of the negotiating process at the Conference and a discussion of the work of the Drafting Committee. Volume II is devoted to the traditional law of the sea, including territorial sea and contiguous zone, straits used for international navigation, archipelagic States, exclusive economic zone, and continental shelf. The relevant texts are found in articles 1-85, Annexes I and II of the Convention, and Annex II of the Final Act. Volume III of the series focuses on the high seas, regime of islands, enclosed and semi-enclosed seas and landlocked States' access to and from the sea. The text for these provisions in articles 86-132, as well as a dozen documentary annexes, round out Volume III. Volume IV is largely devoted to protection and preservation of the marine environment and marine scientific research as found in articles 192-278. Volume V contains the commentaries on Parts XV, XVI and XVII (articles 279 to 320) pertaining to dispute settlement, together with the related subject matter of Annexes V, VI, VII, VIII and IX, as well as Resolutions I, III and IV contained in Annex I of the Final Act of UNCLOS III, which forms an integral whole with the 1982 Convention.

Volume VI covers articles 133-191, annexes III and IV, Final Act, Annex I, Resolution II and the 1994 Agreement relating to the Implementation

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of Part XI as well as several documentary annexes, including the Regulations for Prospecting and Exploration for Polymetallic Nodules in the Area and a specialized index relating to Part XI. A final volume in the series, Volume VII, is planned to include a comprehensive subject index to the series, consolidated lists of treaties, cases and appendices, and additional reference materials.

The Authors

SATYA N. NANDAN, C.F., C.B.E., was elected Secretary-General of the International Seabed Authority in March 1996 and re-elected in March 2000. He has served as Secretary for Foreign Affairs of Fiji. He was a representative of his country at the United Nations (1970-76 and 1993-95) and was Fiji's Ambassador to the European Union, Belgium, France, Italy, Luxembourg, and the Netherlands (1976-1980).

Ambassador Nandan served as Under-Secretary-General of the United Nations and Special Representative of the Secretary-General for the Law of the Sea from 1983 to 1992. He headed the United Nations Office for Ocean Affairs and the Law of the Sea and was responsible for the secretariat servicing the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea. Ambassador Nandan was Chairman of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (1993-95) and President of the meeting of the States Parties to the 1982 United Nations Convention on the Law of the Sea at its first, second, and third sessions. He also served as the Chairman of the Multilateral High Level Conference, which negotiated the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (1997-2000).

In 1990, as Under-Secretary-General and Special Representative for the Law of the Sea, Ambassador Nandan initiated the Secretary-General's informal consultations to address the problems of Part XI of the Convention and subsequently, as a delegate of Fiji, was Chairman of the informal group (the "Boat Paper Group") that negotiated the Implementation Agreement adopted by the General Assembly on 28 July 1994, which resolved those problems and opened the door to universal participation in the Convention.

Ambassador Nandan headed the Fiji delegation to the Seabed Committee (1970-1973) and to UNCLOS III (1973-1982). He was among the conference leaders and participated in the negotiations on a number of key issues. As Rapporteur of the Second Committee of the Conference (the traditional law of the sea), he composed the single negotiating text for the Chairman, which became the basic text of the Committee. In 1975, he served as Chairman of the Working Groups of the Committee, on the Exclusive Economic Zone, Delimitation of Maritime Boundaries, and the High Seas.

Ambassador Nandan also co-chaired a private informal (Fiji/UK) group, which negotiated the compromise on the critical issue of passage through straits used for international navigation and the regime for archipelagic sealanes passage. In 1977, he was appointed Chairman of Negotiating Group

4 of the Conference, which dealt with the participation by landlocked and geographically disadvantaged States in the exploitation of the living resources of the neighboring exclusive economic zones. He also chaired an informal group on production policy relating to deep seabed mining. He was Chairman of the Group of 77, the group of developing States (1978-1979).

He is a General Editor of the Law of the Sea Commentary Project, published by the University of Virginia Center for Oceans Law and Policy, and Volume Editor for Volumes II, III, and VI.

SHABTAI ROSENNE served as a member of the Israel delegation to the United Nations General Assembly from 1948 to 1983. He was Vice Chairman of the Israel delegation to UNCLOS I and II, Observer for Israel in the Sea-Bed Committee from 1971 to 1973, Chairman of the Israel delegation to the UNCLOS III (1973, 1978-1982) and a member of the English Language Group of the Drafting Committee. He was a member of the International Law Commission from 1962 to 1971. Since Ambassador Rosenne retired from diplomatic service in 1982 with the rank of Ambassador-at-Large, he has been a visiting professor in the Universities of Cambridge, Utrecht and Amsterdam, and a Visiting Scholar and adjunct faculty at the University of Virginia School of Law. He is a member of the Institute of International Law, and Honorary Member of the American Society of International Law and a recipient of its Certificate of Merit. Ambassador Rosenne has been counsel in numerous cases before the International Court of Justice and in international arbitrations. In 1999 he was awarded the Manley O. Hudson medal. He is a General Editor on the Law of the Sea Commentary Project and Volume Editor on Volumes II, III, IV and V.

MICHAEL W. LODGE served as the first legal adviser to the International Seabed Authority from its establishment in 1996 to 2003. He also served as the Secretary to the Council and to the Legal and Technical Commission. He was responsible for the drafting of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and for the negotiation and preparation of contracts between the Authority and the first group of investors to be granted contracts for exploration of the deep seabed. Prior to joining the International Seabed Authority, he served as Legal Counsel to the South Pacific Forum Fisheries Agency and was one of the key participants in the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks from 1993 to 1995. He was also the Executive Secretary of the Conference for Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, which concluded with the adoption of the Honolulu Convention in 2000, and is presently the Head of the Interim Secretariat for the Preparatory Conference for the Western and Central Pacific Fisheries Convention. He has worked as a consultant on fisheries, environmental and international law in Europe, Asia, Eastern Europe, the South Pacific and Africa and has written widely on fisheries and deep seabed mining. He is a barrister of Gray's Inn, London and also holds an M.Sc. in Marine Policy from the London School of Economics.



Development of the Regime for Deep Seabed Mining

INTRODUCTION

1. Part XI of the Convention (articles 133 to 191) sets out the regime of “the Area” and provides the legal framework governing activities in the Area. In accordance with article 1, paragraph 1(1), of the Convention, “the Area” is “the seabed and the ocean floor and subsoil thereof, beyond the limits of national jurisdiction.” Therefore, the regime of the Area is applicable to the seabed beyond the outer limits of the continental shelf established under article 76 and Annex II of the Convention (Commission on the Limits of the Continental Shelf).¹ Part XI, as adjusted by the 1994 Agreement, must be read together with Annex III of the Convention, containing the “Basic Conditions of Prospecting, Exploration and Exploitation” with respect to the resources of the Area, and with Annex IV, which contains the Statute of the Enterprise, the operational arm of the International Seabed Authority, which may carry out activities in the Area. Related provisions of the Convention include the preamble and articles 1, 82(4), 84(2), 209, 256, 273, 274, 286(3), 287(2), 305, 308(3), (4), and (5), 311(6), 314, 316(5), and 319(2)(a), (b), and (3). Relevant provisions also appear in the Final Act of the Conference; specifically in resolution I, on the “Establishment of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea,” and resolution II, “Governing Preparatory Investment in Pioneer Activities relating to Polymetallic Nodules.” Both of these resolutions, which contained, *inter alia*, interim arrangements pending entry into force of the Convention and the establishment of the International Seabed Authority, were important elements in the package negotiated in the First Committee at UNCLOS III. Also related to the seabed mining regime under Part XI are the provisions of Annex VI and, in particular, articles 14 and 35 to 40

¹ Under article 76, paragraph 1, the continental shelf of a coastal State extends “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.” Article 76, paragraph 8, provides that where a coastal State wishes to establish the outer edge of its continental shelf beyond 200 nautical miles, that limit is subject to review by the Commission on the Limits of the Continental Shelf, established under Annex II of the Convention. For further details, see Vol. II of this series.

concerning the establishment and composition of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea.²

2. Although Part XI is the largest single part of the Convention and was the most difficult to negotiate, dissatisfaction with the deep seabed mining regime was also the primary reason expressed for the rejection of the Convention by the United States and other key industrialized States, including Germany and the United Kingdom, in 1982. The original Part XI regime effectively prevented industrialized States from becoming party to the Convention for more than a decade. It was not until 1994, with the adoption by the General Assembly of the United Nations of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982,³ that it was possible to resolve the outstanding differences with respect to Part XI by the introduction of significant changes to the regime contained in Part XI. The adoption of the 1994 Agreement followed extensive consultations initiated in 1990 under the auspices of the Secretary-General of the United Nations, Javier Pérez de Cuéllar, and continued by his successor, Boutros Boutros-Ghali, after it had become apparent that in light of the significant ideological, political, and economic changes that had occurred around the world since the adoption of the Convention, it was timely to re-examine the controversial provisions on seabed mining (See paragraph 34 below).

The Agreement removed some of the most troublesome elements of the Part XI regime such as the requirements for the compulsory transfer of technology and the subsidization of the activities of the Enterprise. It takes a functional and cost-effective approach towards the establishment of the institutions under Part XI; it provides for a stable environment for investors in deep seabed minerals under a market-oriented regime; it guarantees access to the resources of the seabed to all qualified investors; it provides for the establishment of a system of taxation that is fair to the seabed miner and from which the international community as a whole may benefit; and

² The Commentary on Annex VI is contained in Volume V of this series, which deals, *inter alia*, with the settlement of disputes under the 1982 Convention.

³ Hereafter cited as the 1994 Agreement. The Agreement was adopted by the General Assembly on 28 July 1994 and is formally annexed to GA res. 48/263, 48 GAOR, agenda item 36. The resolution and the Agreement are reproduced as Documentary Annex I to this volume. The summary report of the Secretary-General on the Informal Consultations appears in UN Doc. A/48/950 (9 June 1994), at 2-7. Reproduced in *Secretary-General's Informal Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Collected Documents*, International Seabed Authority, 2002. For further details on the Agreement, see the statement by the representative of Fiji, A/48/PV.99 (27 July 1994), at 1-7; that statement is also reproduced in *1994 Rhodes Papers: Entry into Force of the Law of the Sea Convention*, M.H. Nordquist and J.N. Moore (eds.), at 119-29 (1995) and *The Law of the Sea: Compendium of Basic Documents*, International Seabed Authority in collaboration with Caribbean Law Publishing Company, Kingston, 2001, at lxxii-lxxix.

it makes provision for assistance from the proceeds of mining to developing land-based producers of minerals whose economies may be affected as a consequence of deep seabed mining. In addition, it provides for a balance between the powers and functions of the Assembly and Council and it establishes a mechanism for decision-making in the Council that enables all groups to protect their interests. In accordance with article 2 of the 1994 Agreement, the Agreement and Part XI "shall be interpreted and applied together as a single instrument," and in the event of any inconsistency between the two, the provisions of the Agreement shall prevail.

THE COMMON HERITAGE OF MANKIND 1493-1968

3. The foundation of Part XI of the Convention rests on the principle that the Area and its resources are the "common heritage of mankind." That term, although nowhere defined in the Convention, represents a relatively recent and evolutionary development in international law.⁴ Previously, for over 300 years, the basis for the legal framework for ocean governance had been the doctrine of the freedom of the seas. As long ago as 1580, the notion of freedom of the seas had been asserted most vigorously by Queen Elizabeth I in response to increasingly broad assertions of jurisdiction over newly discovered parts of the world by Spain and Portugal⁵ and was later to be expounded by Grotius in his treatise *Mare Liberum* of

⁴ See Christopher C. Joyner, *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection*, University of South Carolina (1998). For an alternative, but probably outdated, view, see Dennis W. Arrow, "The Customary Norm Process and the Deep Seabed," *Ocean Development and International Law*, Vol. 9, No. 1-2 (1981).

⁵ In 1580, when Mendoza, the Spanish ambassador to the English court, complained of the activities of Sir Francis Drake in the seas claimed by Spain, Queen Elizabeth famously declared that "the use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, forasmuch as neither nature nor regard of the public use permitteth any possession thereof." Camden, *Annales*, 225 (ed. 1635); quoted in T. W. Fulton, *The Sovereignty of the Sea*, 107 (1911). In 1493, Spain and Portugal had obtained from Pope Alexander VI a bull (*Bullarium Romanum Novissimum*, i. 346), according to which

Insulæ novi Orbis à Ferdinando Hispaniarum Rege, et Elisabeth Regina repertæ, et repertiendæ, conceduntur eisdem, propagandæ fidei Christianæ causa . . . omnes insulas et terras firmas inventas et inveniendas, detectas ad detegendas versus Occidentem et Meridiem fabricando, et construendo unam lineam à Polo Arctico scilicet Septentrione, ad Polum Antarcticum, scilicet Meridiem, sive terræ firmæ, et insulæ inventæ et inveniendæ sint versus Indiam aut versus aliam quamcumque partem, quæ linea distet à qualibet Insularum, quæ vulgariter nuncupantur de los Azores y cabo vierde, centum læucis versus Occidentem et Meridiem . . .

&c. Art. 8, "prohibet aliis accessum ad illas insulas pro mercibus habendis absque Regis licentia." [The essence of the Papal Bull was the division of the known world between Spain and

1618.⁶ Under this doctrine, the seas and their resources were open to use and exploitation by all nations without distinction and could not be appropriated. This did not prevent, however, continued attempts to prohibit foreigners from fishing in certain areas, or from the exercise of jurisdiction or sovereignty for other purposes, such as national security,⁷ leading to broad acceptance of the general principle that coastal States have jurisdiction over a narrow strip of the sea along the coast. This basic division of the seas into areas of territorial seas and high seas, and the availability of the high seas as a shared resource, continued to be the dominant theory until well into the twentieth century.

While critical impetus to the concept of the resources of the oceans as the common heritage of mankind was generated by the statement of Malta's ambassador to the United Nations, Arvid Pardo, in 1967 (see paragraphs 9 and 10 below), it is important to bear in mind that Pardo's ideas were not completely novel. There had already been considerable discussion and articulation of the common heritage concept before 1967. In the nineteenth century, Latin-American jurist Andrés Bello had argued that things that could not be held by one nation without detriment to the others ought to be considered by the international community as "common patrimony."⁸ Similarly, the French jurist A. G. de Lapradelle advanced the idea that the oceans should be "le patrimoine de l'humanité" and said that such resources

Portugal according to a straight line drawn from the North Pole to the South Pole, passing 100 leagues to the west of the Azores and Cape Verde Islands. All islands or lands discovered to the west of this line, which had not been in the possession of any Christian power, were to belong to the Spanish Crown; and all territory discovered to the east of it was to belong to Portugal. The Pope, moreover, granted a monopoly of commerce within those regions to the respective crowns, so that no other nation could trade without licenses from the Spanish or Portuguese sovereigns.] In 1494 the line of demarcation was moved 270 leagues farther west by the Treaty of Tordesillas.

⁶ Hugo Grotius, *Mare Liberum* (1618). For a translation of Grotius' treatise, with an introductory note on the origins of the text, see R. van D. Magoffin, *The Freedom of the Seas* (1916), published under the auspices of the Carnegie Endowment for International Peace. See also L. E. van Holk and C. G. Roelofsen (eds.), *Grotius Reader* (1983) 5-15; G. Fahl, *Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493 bis 1648* (1969), at 49-130; P. T. Fenn, *The Origin of the Right of Fishery in Territorial Waters* (1926, reprinted 1974), at 150-231; T. W. Fulton, *The Sovereignty of the Sea* (1911), at 338-77; and G. Gidel, *Le droit international public de la mer* (1932), at 123-200.

⁷ One of the earliest of which was the Proclamation of James I of 1609 prohibiting fishing in the British and Irish seas without a license. *Proclamation of James I for the Restraint of Foreigners Fishing on the British Coasts* (1609) *State Papers, Dom.*, xlv. 24.

⁸ Andrés Bello, *Principios de Derecho Internacional, Libreria Hermanos Gernier* (1882); Bernardo Zuleta, "The Law of the Sea after Montego Bay," *San Diego Law Review*, Vol. 20, No. 3; M. C. W. Pinto, "Common Heritage of Mankind: From Metaphor to Myth," in Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in Honour of Krzysztof Skubiszewski*, Kluwer 1996, at 224; Markus G. Schmidt, *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*, OUP (1989).

should be administered by the society of nations.⁹ Prompted by growing concerns relating to maritime safety, the discovery of offshore mineral resources, and conservation of living resources of the seas, the League of Nations showed an interest in the law of the sea as early as 1924 when it commenced attempts to codify the law on various topics, including territorial waters and the exploitation of marine resources. In a report to the Committee of Experts for the Progressive Codification of International Law on the question of the exploitation of the products of the sea, Argentinean jurist José León Suarez described “the riches of the sea” as the “patrimony of the whole human race” and suggested:

To save this wealth, which, being today the uncontrolled property of all, belongs to nobody, the only thing to be done is to discard the obsolete rules of the existing treaties, which were drawn up with other objects, to take a wider view, and to base a new jurisprudence . . . on the scientific and economic considerations which . . . may be put forward, compared and discussed at a technical conference by the countries concerned.¹⁰

The Codification Conference convened at The Hague in 1930 did not succeed in adopting a convention on the extent of the territorial sea.¹¹ Nevertheless, the Conference did succeed in demonstrating that major national and international interests were at stake that required the attention of the international community.¹²

4. The outbreak of World War II temporarily suspended consideration of law of the sea issues. After the war, however, the Truman Proclamation of 1945¹³ gave a new impetus to the development of this

⁹ *Le droit de l'état sur la mer territoriale*, 5 *Revue générale de droit international public* (1898), at 309-347.

¹⁰ Report on the Exploitation of the Products of the Sea, Rapporteur: M. José Leon Suarez (Argentina), League of Nations Document C.49.M.26.1926.V., annexed to the Report by the Committee of Experts for the Progressive Codification of International Law to the Council of the League of Nations on the questions that appear ripe for international regulation, adopted by the Committee at its third session, held in March-April 1926. Reproduced in Shabtai Rosenne (ed.), *The League of Nations Committee of Experts for the Progressive Codification of International Law [1925-1928]*, 2 Vols. (1972), Vol. II, at 146.

¹¹ The proceedings and other relevant documents of the Conference are reproduced in Shabtai Rosenne (ed.), *League of Nations Conference for the Codification of International Law [1930]*, 4 Vols. (1975). See also Rosenne, *The League of Nations Committee of Experts for the Progressive Codification of International Law [1925-1928]*, *op. cit.*

¹² Shabtai Rosenne, “Reflections on the Third United Nations Conference on the Law of the Sea: Where it Stands in April, 1981,” in F. T. Chen (ed.), *Proceedings of Conference on Deep Seabed Mining and Freedom of the Seas*, Grotius Society of International Law, Bridgeport, Connecticut, 1981.

¹³ Proclamation No. 2667 Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, Sept. 28, 1945, 10 Fed. Reg. 12, 303 (1945), 3 C.F.R. 67 (1943-48); 40 Am. J. Int'l. L. (1946), Suppl., 45.

branch of the law. The establishment of the United Nations provided the machinery for issues relating to the law of the sea to be taken up again, first by the International Law Commission and, subsequently, in 1958 and 1960 by the First and Second United Nations Conferences on the Law of the Sea (UNCLOS I and II).¹⁴ The Commission to Study the Organization of Peace¹⁵ was one of the first to propose that an “international regime for the Antarctic continent should be established, with direct administration by the United Nations.” It suggested that such a step should not be too difficult “if undertaken promptly, since none of the powers has yet acquired important interests on that continent . . .”¹⁶ More boldly, in 1957, the Commission expressed the belief that “the United Nations is capable not only of administering territory, but of acquiring title under international law through cession by the state with the title or through prior claim to territory or space to which no state has a title.” In particular,

[t]he United Nations should undertake the responsibility of administering certain contested areas of international importance for water or air transport, and certain uninhabited areas like Antarctica, at the request or with the consent of states having claim to such territories. With respect to the bed of the high seas beyond the continental shelf . . . outside the jurisdiction of any state, [the General Assembly should] declare the title of the international community and [should] establish appropriate administrative arrangements.¹⁷

¹⁴ Resulting in the Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, 516 UNTS 205; Convention on the High Seas, Geneva, 29 April 1958, 450 UNTS 11; Convention on the Continental Shelf, Geneva, 29 April 1958, 499 UNTS 311; and Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, 29 April 1958, 599 UNTS 285.

¹⁵ The Commission to Study the Organization of Peace was established in New York in 1939 to study problems associated with world governance. As well as a number of highly-placed individuals in the U.S. government, the members of the Commission included eminent internationalists, such as James T. Shotwell, Quincy Wright, John Foster Dulles, and Clark Eichelberger. The work of the Commission, which was targeted in four main subject areas, “the problem before us,” principles and institutions for organizing peace, transition problems following the war, and the role of the United States, was to have a major influence on the text of the Charter of the United Nations. See Robert Hillman, *Quincy Wright and the Commission to Study the Organization of Peace*, in *Global Governance: A Review of Multilateralism and International Organizations*, Vol. 4, No. 4, Oct.-Dec. 1998.

¹⁶ Commission to Study the Organization of Peace, *5th Report: Security and Disarmament Under the United Nations* (June 1947), at 22. Reprinted in *Building Peace: Reports of the Commission to Study the Organization of Peace 1939-1972*, Vol. I, at 185, 202 (1973).

¹⁷ Commission to Study the Organization of Peace, *10th Report: Strengthening the United Nations* (1957), at 6-7 (recommendation 13). Reprinted in *Building Peace . . .*, supra note 16, at 331, 334, 335. In its report, the Commission pointed out that “the development of international administration under the United Nations, particularly in

5. During UNCLOS I, several delegations proposed that the continental shelf should be exploited for the benefit of and in the interests of mankind as a whole.¹⁸ The President of the Conference, Prince Waithayakon of Thailand, explored this theme. He noted that “the sea was the common heritage of mankind” and that in the common interest the law of the sea “should ensure the preservation of that heritage for the benefit of all.”¹⁹ Although he did not call for regulatory control by the United Nations of the bed of the high seas, he did express in general terms that in the exploitation of its natural resources “the freedom of the high seas must also be respected in the interests of the international community.”²⁰ The idea of the exploitation of seabed resources, including those of the continental shelf, through an international organization for the benefit of all mankind had in fact been considered by the International Law Commission following the Second World War during its work on the Regime of the High Seas and the Regime of the Territorial Sea.²¹ The Commission’s work initially focused on the conservation of the living resources of the high seas. The draft articles adopted by the Commission at its fifth session under the chairmanship of Special Rapporteur François, in 1953, included a provision whereby, in the event of failure to agree on

Antarctica and the ocean bed, offers the prospect of facilitating the exploitation for universal human benefit of major new food supplies and other economic resources, and of providing significant revenues to strengthen the programs of the United Nations.” In discussing the need to control “open territory,” a subcommittee of the Commission considered that, in relation to the high seas and the seabed, there were “three general problems—conservation of fisheries, prevention of pollution and exploitation of the seabed—which warrant fresh consideration of the ‘regime’ of the high seas in terms of the interest of the international community as a whole.” It suggested, therefore, “the advisability of establishing a new worldwide international organization within the framework of the United Nations to deal with problems of the high seas and the seabed,” which would be established by treaty on the pattern of the specialized agencies. In summary, the subcommittee recommended that “the floor of the high seas be recognized as ‘*res communis*’ and its ownership and control be conceded to the United Nations.”

¹⁸ *The Law of the Sea, Concept of the Common Heritage of Mankind, Legislative History of Articles 133 to 150 and 311(6) of the United Nations Convention on the Law of the Sea*, United Nations, New York (1996), p. 1.

¹⁹ A/CONF.13/SR.1, para. 37 (1958), First plenary meeting (1958); UNCLOS I, II Off. Rec. 3.

²⁰ *Ibid.*, 21st plenary meeting (1958), para. 71.

²¹ The Commission had included the Regime of the High Seas on its provisional list of fourteen topics suitable for codification in 1949 as a matter of priority. The Regime of the Territorial Sea was also on the list but was not accorded priority by the Commission. At its Fourth session, in 1949, the General Assembly, considering that the topics of the regime of the high seas and the regime of territorial waters were closely related, recommended to the Commission that it include the topic of the regime of territorial waters in its list of priorities (GA res. 374 (IV), 6 December 1949). See Yearbook of the International Law Commission (YB ILC) (1st session, 1949).

the regulation of fishing on the high seas in a given area, States would be under a duty to accept as binding any system of regulation of fishing in any area of the high seas that an international authority, to be created within the framework of the United Nations, prescribed.²² This provision, in fact, which was put forward in the context of compulsory settlement of disputes, replaced an earlier proposal, included in the draft articles provisionally adopted in 1951, for the establishment of an international body with legislative powers.

At its Eighth session, in 1953, having regard to “the fact that the problems relating to the high seas, territorial waters, contiguous zones, the continental shelf and the superjacent waters are closely linked together juridically as well as physically,” the General Assembly decided not to deal with any aspect of the regime of the high seas or the regime of territorial waters until all the problems involved had been studied by the Commission and reported upon by it to the General Assembly.²³ In its final report on all the subjects relating to the high seas,²⁴ which also took into account the results of an International Technical Conference on the Conservation of the Living Resources of the Sea held in Rome in 1955, the International Law Commission noted that the 1953 proposal to establish a central authority with legislative powers had not been adopted:

On the other hand, consideration was given to the possibility of setting up a permanent international body within the framework of the United Nations, with the status of a specialized agency, to be responsible not only for making technical and scientific studies of problems concerning the protection and use of living resources of the sea, but also for settling disputes between States on this subject. The Commission is of the view that the establishment of an international study commission is worthy of close attention.²⁵

The Commission had also considered this issue in the context of the draft articles on the Continental Shelf, but there again, “for practical reasons,” had been unable to endorse the idea of internationalization of the submarine areas comprised in the continental shelf. At the same time, however, noting the anxiety created in scientific circles by the prospect that the freedom to conduct scientific research on the seabed and in the waters above the continental shelf might be endangered, the Commission “did not discard

²² GAOR, Eighth Session, Supplement No. 9 (A/2456).

²³ GA res. 798 (VIII), 7 December 1953.

²⁴ Report of the International Law Commission covering the work of its eighth session (A/3159), Final Report on the Law of the Sea, II YB ILC 1956. United Nations publication, Sales No. 1956, V.3, Vol. II).

²⁵ *Ibid.* See also ILC Final draft articles and Commentary, “Conservation of the Living Resources of the High Seas,” para. (19), reproduced in Sir Arthur Watts, *The International Law Commission, 1949-1998* (3 vols.), Vol. I (Treaties), at 81.

the possibility of setting up an international body for scientific research and assistance with a view to promoting their most efficient use in the general interest." The Commission noted that "some such body may one day be set up within the framework of an existing international organization."²⁶

6. In 1965, John L. Mero authored a book that brought together most of the known information on a new seabed resource, so-called "manganese nodules," which are scattered over vast areas of the Pacific Ocean and, to a lesser extent, over the seabed of other oceans.²⁷ In fact, manganese nodules had been first discovered on the bed of the deep oceans during the *Challenger* Oceanographic Expedition, 1872–1876. It was not until the 1960s, however, that advances in ocean science made exploitation of those nodules technologically feasible. In his work, Mero provided estimates of the volume of manganese nodules present on the floor of the Pacific Ocean and of the minerals contained in those nodules, including copper, cobalt, manganese, and nickel. Those estimates led many to envision manganese nodules as a vast reserve of strategic minerals and to conclude that commercial exploitation of manganese nodules might be economically viable in the near future. In December 1965, the question of what should be done with these newly discovered resources was raised at a White House Conference on International Co-operation, called by President Lyndon B. Johnson of the United States, where a report was presented by the Committee on Conservation and Development of Natural Resources, which noted the possibility of exploiting the manganese nodules lying on the ocean bottom and pointed out that

Because these resources are clearly outside national jurisdictions, the possibility of their exploitation raises two problems: the efficient and orderly exploitation of the nodules, and the distribution or sharing of the mining rights. Producers must have exclusive mining rights to areas that are sufficiently large to permit them to operate economically and without fear of congestion or interference. And if the rights are to be granted for

²⁶ *Ibid.*, at 296, section III, "The Continental Shelf," paras. (3)-(4); See also ILC Final draft articles and commentary, Article 68, para. (9). Reproduced in Sir Arthur Watts, *op. cit.*, Vol. I (Treaties), at 102. A/CONF.13/C.4/L.1, paras.1-3, UNCLOS I, VI Off. Rec. 125; and *ibid.*, summary records of 6th, 7th, 8th, 9th, 10th, 11th, 12th, 22nd, 23rd, and 24th meetings.

²⁷ J. L. Mero, *The Mineral Resources of the Seas*, Oceanography Series 1, Elsevier, Amsterdam (1965). Prior to this, Mero had written a report, which had been widely distributed to the mining industry, titled: *A Preliminary Report on the Economics of Mining and Processing Deep-Sea Manganese Nodules*, Institute of Marine Resources, University of Southern California, 1 January 1959. The study upon which the report was based had grown out of interest in a sample of nodules of relatively high cobalt content recovered near Tahiti during 1957 as part of the International Geophysical Year. The report indicated that nodules appeared to be economical to mine and process and led to considerable interest on the part of the U.S. mining industry.

resources that are the common property of the world community, then decisions on the allocations of these rights or on the methods of acquisition must be made within the framework of international law. A Specialized Agency of the United Nations would be the most appropriate body for administering the distribution of exclusive mining rights.²⁸

Taking into account its discussion on fisheries, the Committee recommended, more broadly, that

A Specialized Agency of the United Nations be established for international marine resources, including fishery and mineral resources, for the purposes of preventing conflict, reducing the waste of capital and labor, ensuring orderly and efficient exploitation of mineral resources and preventing the depletion of fisheries.²⁹

In 1966, the Commission to Study the Organization of Peace prepared a report, specifically taking into account Mero's book, recommending that the "General Assembly immediately declare the high seas not subject to appropriation by any State."³⁰ Further, it recommended that in order to "avoid controversy among nations arising from conflicting claims to, and appropriative uses of, the uncommitted areas of the earth and its surrounding space," the title to these areas must be vested in the international community through the United Nations.³¹ The Commission recommended the establishment of a special

²⁸ The report may be found in the Report on the Conference edited by Richard N. Gardner, *Blueprint for Peace* (1966), at 144.

²⁹ *Ibid.*, at 157, 158.

³⁰ This was compared in the Commission's Report to the principles adopted by the General Assembly in 1961 that "outer space and celestial bodies are not subject to national appropriation." Commission to Study the Organization of Peace, *17th Report: New Dimensions for the United Nations: The Problems of the Next Decade* (1966), at 37. Reprinted in *Building Peace . . .*, supra note 16, Vol. II, at 574, 608. It should be recalled that during the 1960s the concept of the common heritage was also being developed in the sphere of outer space. The principle was first expressed in a general manner in the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (GA res. 1962 (XVIII)) and was subsequently reflected in the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (610 UNTS 205) and in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1363 UNTS 22).

³¹ Otherwise, according to the Commission, simultaneous exploitation of a common resource by many nations would lead to its "rapid depletion, by economic waste, or by conflict." There was danger of contamination of the sea "by radioactive materials, pesticides and other poisons," coming from land to the sea. All nations, not just a privileged few, should be able to share directly or indirectly in the resources of the sea. The income of the United Nations might be augmented by granting licenses for the exploitation of the resources of the sea, and the United Nations might be able to expand its program of technical assistance to the developing nations. To that end, the Commission recommended that "under the principle that no nation is allowed to

agency of the United Nations, to be called the "United Nations Marine Resources Agency." This agency was to

. . . control and administer international marine resources; hold ownership rights; and grant, lease or use these rights in accordance with the principle of economic efficiency. It should function with the independence and efficiency of the International Bank. However, it should distribute the returns from such exploitation in accordance with directives issued by the United Nations General Assembly.³²

7. Through the early 1960s, the Government of the United States showed renewed interest in marine resources. In June 1966, Congress enacted the Marine Resources and Engineering Development Act.³³ That Act declared that it was the policy of the United States "to develop, encourage and maintain a co-ordinated, comprehensive, and long range national program in marine science *for the benefit of mankind*" (emphasis added). Its objectives included: (i) the accelerated development of the resources of the marine environment; (ii) the expansion of human knowledge of the marine environment; and (iii) encouragement of private investment enterprise in exploration, technological development, marine commerce, and economic utilization of the marine environment. Another objective was to encourage "co-operation by the United States with other nations and groups of nations and international organizations in marine science activities when such co-operation is in the national interest."³⁴ To assist in this project, Congress established a Commission on Marine Science, Engineering and Resources, with a broad mandate to investigate all aspects of marine science and to prepare a national oceanographic program adequate to meet the present and future national needs.³⁵ President Johnson appointed Julius A. Stratton, Chairman of the Ford Foundation, to chair the Commission, which subsequently became known as the Stratton Commission. In

appropriate the sea or seabed beyond the twelve mile limit for fish or beyond the continental shelf for minerals the United Nations [should] take title to these areas." Commission to Study the Organization of Peace, *17th Report: New Dimensions for the United Nations: The Problems of the Next Decade* (1966), at 3739. Reprinted in *Building Peace . . .*, supra note 16, Vol. II.

³² Ibid. For official comment on this report, see *Marine Resources and Legal-Political Arrangements for Their Development*, Panel Reports of the International Panel of the [U.S.] Commission on Marine Science, Engineering and Resources, Vol. 3, Part VIII, at VIII94 (1969).

³³ Marine Resources and Engineering Development Act of 17 June 1966, P.L. 89454, 80 Stat. 203; 33 U.S.C. §1101 (1967).

³⁴ Ibid., P.L. 89454, §2; 33 U.S.C. § 1101.

³⁵ Ibid., P.L. 89-454, §5; 33 U.S.C. § 1104. In addition, the Act established a National Council on Marine Resources and Engineering Development, chaired by Vice President Hubert H. Humphrey and composed of representatives of various governmental agencies, "to co-ordinate a program of international cooperation in work done pursuant to" the Act.

transmitting to Congress the first report of the Council on the implementation of the Act, President Johnson declared that “[t]he wealth of the ocean floor must be freed for the benefit of all people” and that the United States would bring to the challenge of the ocean depths “a determination to work with all nations to develop the seas for the benefit of mankind.”³⁶ The Council emphasized in its report the importance of “international collaboration in the exploration and use of the seas and their resources and the opportunity to utilize the seas to advance world peace, understanding, and economic development at home and abroad.”³⁷

In July 1966, in a major policy statement regarding the deep seabed, President Johnson said:

[U]nder no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the oceans bottoms are, and remain, the legacy of all human beings.³⁸

8. Discussions in the United Nations at this time also focused on the question of marine resources. In February 1966, the United States, together with Ecuador and Pakistan, submitted a resolution to the UN Economic and Social Council (ECOSOC) asking it to consider that “the resources of the sea constitute reserves of raw materials which are as yet not fully being utilized, and that the rational use of these resources to ensure optimum yield and minimum waste is of vital importance to all countries” and requesting the Secretary-General “to make a survey of the present stage of knowledge of the resources of the sea, and of the techniques for exploiting these resources,” and “to attempt to identify those off-shore resources now considered capable of economic exploitation, especially for the benefit of developing countries.”³⁹ During a discussion in the Economic Committee

³⁶ *Marine Science Affairs—A Year of Transition*, message from the President transmitting the first Report of the National Council on Marine Resources and Engineering Development (February 1967), at iii and v. See also *Weekly Compilation of Presidential Documents*, Vol. 3, No. 10, at 412-13 (1967).

³⁷ *Marine Science Affairs . . .*, supra note 36, at 35.

³⁸ Address by President Lyndon B. Johnson at the commissioning of the new research ship *Oceanographer*, 2 *Weekly Comp. Pres. Doc.* 930, 931, July 13, 1966. In Professor Louis Henkin’s words, “Not only President Truman but the other American President . . . also deserves a memorial in the law of the sea: President Johnson was apparently the first to insist that the deep seas and the ocean bottoms are ‘the legacy of all human beings.’” Louis Henkin, “Old Politics and New Directions,” in R. R. Churchill *et al* (eds.), *New Directions in the Law of the Sea: Collected Papers*, Vol. III, Chap. 1 (1973).

³⁹ UN Doc. E/AC.6/L.330, incorporated in E/4164 (Report of the Economic Committee, March 1966), para. 5(a), 40 ESCOR, Annexes, agenda item 7, at 2526.

of ECOSOC, the sponsors of the resolution proposed replacing the phrase “the resources of the sea” by a more specific phrase “the mineral and food resources of the sea beyond the continental shelf, excluding fish.” A parallel change was made in the first request to the Secretary-General by replacing “knowledge of the resources of the sea” by “knowledge of these resources of the sea, beyond the continental shelf” (the words “these resources” thus included indirectly the preambular reference to “excluding fish”). In the next request, the sponsors proposed the omission of the words “off-shore.” The Council adopted this revised text by acclamation,⁴⁰ and the revised text became ECOSOC resolution 1112 (XL).⁴¹

In a parallel development, the General Assembly, in its resolution 2172 (XXI), expressed recognition of “the need for a greater knowledge of the oceans and of the opportunities available for the utilization of their resources, living and mineral” and the realization that “the effective exploitation and development of these resources can raise the economic level of peoples throughout the world, and in particular of the developing countries.” It also took into account the activities in the field of the resources of the sea already being undertaken by various United Nations agencies and by “other intergovernmental organizations concerned, various governments, universities, scientific and technological institutions and other interested organizations” and considered “the need to maximize international co-operative efforts for the further development of marine science and technology and to avoid duplication or overlapping of efforts in this field.” It endorsed the request of the Economic and Social Council for a survey by the Secretary-General of “the present state of knowledge of the resources of the sea other than fish” and requested that the Secretary-General undertake, in cooperation with the other organizations and institutions working in this area, a comprehensive study of the activities undertaken by them that relate to marine science and technology, including “mineral resources development.” It also requested that the Secretary-General, in cooperation with UNESCO, in particular with its Intergovernmental Oceanographic Commission (IOC), and the Food and Agriculture Organization of the UN (FAO), formulate proposals based on that study that would ensure “the most effective arrangements for an expanded programme of international co-operation . . . in the exploitation and development of marine resources, with due regard to the conservation of fish stocks.”⁴² That resolution was sponsored by sixteen countries, including

⁴⁰ *Ibid.*, at 27.

⁴¹ ECOSOC resolution 1112 (XL) of 7 March 1966, on NonAgricultural Resources, 40 ESCOR, Supp. No. 1 (E/4176), at 3.

⁴² GA res. 2172 (XXI), 6 December 1966, on Resources of the Sea, 21 GAOR, Supp. No. 16 (A/6316), at 32.

the United States.⁴³ During discussion of the draft resolution in the Second Committee,⁴⁴ Malta proposed shifting the study from the Secretary-General to the Economic and Social Council and limiting it to the evaluation of the potential benefits of such a study. The Soviet Union proposed shifting the study to UNESCO, as the IOC had already achieved important progress “in joint international action to explore the ocean and its resources.” As a result of the discussions, the sponsors of the main resolution added a special reference to the IOC in the enumeration of institutions already working in the field and those to be consulted, and changed references to “in consultation with” to “in co-operation with.” They also changed the scope of the survey to “the present stage of knowledge of the resources of the sea beyond the continental shelf, excluding fish, and of the techniques for exploiting these resources.” Both Malta and the Soviet Union then withdrew their proposed amendments. In the final vote on the draft resolution, the Soviet Union requested a separate vote on a paragraph authorizing the Secretary-General to set up a small group of experts to assist him in the comprehensive survey; the vote on this paragraph in the Committee was 74 to 10, with 13 abstentions. The vote on the resolution as a whole was 87 in favor to none against, with 12 abstentions.⁴⁵ In the General Assembly, the representative of the United States (James Roosevelt) emphasized the provision authorizing the Secretary-General to utilize, *inter alia*, “such voluntary services as may be offered” by the private sector (“universities, scientific and technological institutions and other interested organizations”), stating that

We may indeed find this project is so worthwhile that it may command to itself contributions and resources from the private sector so that it can most effectively be carried out.

63. No man can define the vistas toward progress which may be unlocked by these efforts in marine research. Human ingenuity may establish man’s mastery over the sea and his utilization of the sea for mankind. There will of course be difficulties; perhaps the legal problems will be most difficult to solve. But if man can hope to master the

⁴³ Adopted from draft resolution A/C.2/L.882/Rev.1, sponsored by Chile, Colombia, Costa Rica, Denmark, Ecuador, Iceland, Jamaica, Nigeria, Norway, Panama, the Philippines, Peru, Trinidad and Tobago, the United Arab Republic [Egypt], and the United States of America. The 1967 report of the National Council on Marine Resources and Engineering Development expressed the Council’s support of “[a] U.S. initiative at the 1966 United Nations General Assembly calling for an examination of international marine science activities” as a means of giving high priority to supporting increased international cooperation in this field. See *Marine Science Affairs . . .*, supra note 36, at 35.

⁴⁴ A/6533 (6 November 1966), Report of the Second Committee, part I, “Resources of the Sea,” 21 GAOR, Annexes, Vol. III, agenda item 94, at 46.

⁴⁵ *Ibid.*, para. 13.

seas, he can similarly aspire to international co-operation in the resolution of his difficulties.⁴⁶

The General Assembly adopted the resolution by 100 votes to none, with 11 abstentions.⁴⁷

9. The following year, in July 1967, the World Peace through Law Conference, following the recommendation of the Commission to Study the Organization of Peace, adopted its Resolution No. 15 on the Resources of the High Seas. In that resolution, the Conference noted that "*the high seas are the common heritage of mankind*" and recommended that the General Assembly of the United Nations issue a proclamation declaring that "the non-fishery resources of the high seas, outside the territorial waters of any State, and the bed of the high seas beyond the continental shelf, appertain to the United Nations and are subject to its jurisdiction and control."⁴⁸ At the same time, however, the Conference rejected the idea that exploitation of the resources of the deep sea should be undertaken to provide a source of independent income for the United Nations. Stimulated by these and other developments, Malta requested, on 18 August 1967, the inclusion on the agenda of the Twenty-second session of the General Assembly of a supplementary item titled "Declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind." In an explanatory memorandum attached to that request, Malta explained that, in view of technological advances, these areas "will become progressively and competitively subject to national appropriation and use" resulting in, *inter alia*, "the exploitation and depletion of resources of immense potential benefit to the world, for the national advantage of technologically developed countries." Malta therefore considered that the time had come to declare "the seabed and the ocean floor a common heritage of mankind" and suggested that immediate steps be taken to draft a treaty embodying that principle and creating an international agency to assume jurisdiction, as a trustee for all countries, over the sea-bed and the ocean floor, to regulate, supervise and control all activities thereon and to ensure that the activities undertaken conform to the principles and provisions of the proposed treaty.⁴⁹ Since the political and security implications would probably be

⁴⁶ 21 GAOR, plenary meetings, Vol. III, paras. 62-63.

⁴⁷ *Ibid.*, para. 70.

⁴⁸ Quoted in the U.S. Commission's Panel Report, *supra* note 32, at VIII-95. Quoted also by Ambassador Pardo in his presentation of the Maltese proposal to the First Committee of the 22nd session of the General Assembly (A/C.1/PV 1515, 1 November 1967, para. 104), 22 GAOR, First Committee, Vol. I, 1515th meeting (1967), para. 104, citing 113 U.S. Congressional Record §24190 (1967).

⁴⁹ A/6695 (18 August 1967), 22 GAOR, Annexes, Vol. III, agenda item 92, paras. 3-4.

the decisive factor, Ambassador Arvid Pardo of Malta proposed to the General Committee of the General Assembly that the topic be allocated to the First Committee (the political committee of the General Assembly). The United States supported the Maltese proposal since, with the new developments in science and technology, "the sea promised great benefits to mankind, and for the fulfilment of that promise it was essential that the peoples of the world should work in co-operation and not in conflict." In that light, the United States thought that "the United Nations could take the lead in enlisting the peaceful co-operation of all nations in developing the world's oceans and ocean floor."⁵⁰ Although some aspects of the item might have been considered within the context of the Sixth Committee (legal issues) or Second Committee (which had been considering the subject of natural resources), as Malta had raised a serious question related to the regulation of armaments, the United States supported reference of the Maltese item to the First Committee. Several Latin American delegations pointed out that the topic was essentially a legal question and that it raised the issue of internationalization of the seabed and the ocean floor, which had a direct effect on the national jurisdiction or sovereignty of States. They felt it should be referred to the Sixth Committee. The General Committee decided that for the moment it would recommend that the General Assembly include the item in the agenda.⁵¹ Malta subsequently informed the General Assembly that the previous title of the item "unduly emphasized legal objectives." It presented instead a new title, which omitted the references to a declaration and a treaty, restricted the topic to an "[e]xamination of the question" and added references to "the subsoil" and the "high seas." As revised, item 92 of the agenda was to read as follows: "Examination of the question of the reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind." The General Assembly approved this change without objection and referred the item to the First Committee.⁵²

10. Consequently, it was before the First Committee that Ambassador Pardo made his well-known speech, which inaugurated the official discussion of the various issues relating to the exploration and exploitation of the resources of the seabed and subsoil beyond the limits of national jurisdiction.⁵³ After describing the geological, economic, and technical

⁵⁰ 22 GAOR, General Committee, 166th meeting (1967), para. 4 (A/BUR/SR.166).

⁵¹ *Ibid.*, paras. 6-10 and 12-13. The Assembly approved this recommendation, without discussion, but deferred the allocation of agenda item 92 to a Committee. 22 GAOR, 1564th plenary meeting, paras. 74 and 111.

⁵² For the recommendation of the General Committee, see 22 GAOR, General Committee, 171st meeting (1967). For the General Assembly's referral of the item, see 1563rd plenary meeting, paras. 186-90.

⁵³ That speech extended for two meetings of the Committee. See 22 GAOR, First Committee, 1515th and 1516th meetings (1967). A/C.1/PV 1515 and A/C.1/PV 1516.

issues, Ambassador Pardo accentuated the danger of militarization of the seabed and of some countries using “their technical competence to achieve near-unbreakable world dominance through predominant control over the seabed and the ocean floor.”⁵⁴ Near the end of his statement, he referred to the need for

. . . an effective international regime over the sea-bed and the ocean floor beyond a clearly defined national jurisdiction [as] the only alternative by which we can hope to avoid the escalating tensions that will be inevitable if the present situation is allowed to continue.⁵⁵

He also noted that this was “the only alternative that gives assurance that the immense resources on and under the sea will be exploited with harm to none and benefit to all.”⁵⁶ For practical reasons, Pardo rejected making the United Nations responsible for administering an international regime, since it was

. . . hardly likely that those countries that have already developed a technical capacity to exploit the ocean floor would agree to an international regime if it were to be administered by a body where small countries . . . had the same voting power as the United States or the Soviet Union.⁵⁷

Instead, Malta envisaged “the creation of a special agency with adequate powers to administer in the interests of mankind the oceans and the ocean floor beyond national jurisdiction.” That agency would assume jurisdiction “not as a sovereign, but as a trustee for all countries over the oceans and the ocean floor.” Furthermore, it would be “endowed with broad powers to regulate, supervise and control all activities on or under the oceans and the ocean floor.”⁵⁸ In conclusion, Ambassador Pardo emphasized that the General Assembly should promptly adopt a resolution based on the concept that “the sea-bed and the ocean floor are a common heritage of mankind and should be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole.” The resolution would go on to provide for the establishment of “a widely representative but not too numerous body,” to draft “a comprehensive treaty to safeguard the international character of the seabed and the ocean floor beyond present national jurisdiction,” and provide “for the establishment of an international agency which will ensure that national activities undertaken in the deep sea and on the ocean floor will conform to the principles and provisions incorporated in the proposed treaty.”⁵⁹

⁵⁴ Supra note 53, 1515th meeting, para. 91 (see also paras. 45-55).

⁵⁵ Supra note 53, 1516th meeting, para. 3.

⁵⁶ Ibid.

⁵⁷ Ibid., para. 7.

⁵⁸ Ibid., para. 8.

⁵⁹ Ibid., paras. 13 and 15.

11. Following a lengthy debate on the item in the First Committee,⁶⁰ the General Assembly⁶¹ unanimously adopted resolution 2340 (XXII) of 18 December 1967. In that resolution, the General Assembly recognized “the common interest of mankind in the sea-bed and the ocean floor, which constitute the major portion of the area of this planet” and recognized further that the “exploration and use of the sea-bed and the ocean floor, and the subsoil thereof . . . should be conducted in accordance with the purposes and principles of the Charter of the United Nations, in the interest of maintaining international peace and security and for the benefit of all mankind.”⁶² The resolution went on to establish an *Ad Hoc* Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction and requested the *Ad Hoc* Committee to prepare, for future consideration by the General Assembly, a report that would include: (i) a study of the past and present activities of the United Nations, the specialized agencies, and other international organizations with regard to the seabed and ocean floor; (ii) an account of the scientific, technical, legal, economic, and other aspects of the item; and (iii) “[a]n indication regarding practical means of promoting international cooperation in the exploration, conservation and use of the sea-bed and the ocean floor, and the subsoil thereof . . . and of their resources.”⁶³ While a number of proposals for implementation of the Maltese initiative quickly followed, both in the United Nations and in other conferences and symposia, many also expressed caution about the possibility of immediate economic benefits from deep seabed resources.⁶⁴ These early warnings, presaging subsequent developments, occurred even at the level of the Secretary-General of the United Nations, U Thant, who reported to the Economic and Social Council that

There is no doubt that the potential gross amounts of manganese and associated minerals contained in ocean floor nodules are enormous.

⁶⁰ 22 GAOR, First Committee, 1524th to 1530th meetings and, after consultations on the proposed resolution, 1542nd to 1544th meetings. See also the report of the First Committee (A/6964), reprinted in 22 GAOR, Annexes, Vol. III, agenda item 92, at 2-3.

⁶¹ 22 GAOR, 1639th plenary meeting, paras. 1-39, agenda item 92.

⁶² 22 GAOR, Supp. No. 16, at 14 (preambular paragraphs). See also Vol. I of this series, at 161.

⁶³ 22 GAOR, Supp. No. 16, at 14, para. 2. See also Vol. I of this series, at 162.

⁶⁴ The texts of some of the proposals made at the time may be found in S. Oda, *The International Law of the Ocean Development: Basic Documents*, Vol. I (1972), at 231-338. For a critical analysis of the main proposals, see the report of the International Panel of the U.S. Commission on Marine Science, Engineering and Resources, supra note 32, Appendix A—Alternative Legal-Political Frameworks for Exploring and Exploiting the Mineral Resources of the Deep Seas—at VIII-91-104 (1969). See also L. M. Alexander, *Future Regimes: A Survey of Proposals*, in S. H. Lay, R. Churchill *et al* (eds.), *New Directions in the Law of the Sea; Documents*, Vol. III, at 119-33 (1973).

The possibility of commercial harvesting and processing has however caused controversy, with some experts of the opinion that the copper, nickel and cobalt contents of the nodules, together with manganese, may warrant their commercial exploitation, while most people in the business believe that their economic potential is highly uncertain and is likely to remain so for years, if not for one or two decades.⁶⁵

This reflected a practical assessment of the technological and economic uncertainties and obstacles that existed with respect to the commercial exploitation of manganese nodules.

12. In 1968, the *Ad Hoc* Committee established by the General Assembly held three sessions: 18 to 27 March, 17 June to 7 July in New York, and 19 to 30 August 1968 in Rio de Janeiro.⁶⁶ “At its first session, the *Ad Hoc* Committee set up two working groups of the whole, one to deal with the economic and technical aspects of the item and the other with the legal aspects. The Committee retained for itself discussion of the remaining matters . . .”⁶⁷ The issues of direct relevance to the concept of the common heritage of mankind were dealt with by the legal working group, which discussed, in particular, the problems connected with the legal status of the seabed and the ocean floor and subsoil thereof, the reservation of the seabed and ocean floor and the subsoil thereof exclusively for peaceful purposes, use of the resources of the seabed and ocean floor and the subsoil thereof in the interests of mankind, freedom of scientific research and exploration of the seabed and the ocean floor and the subsoil thereof, the question of reasonable regard to the interests of other States in their exercise of the freedoms of the high seas, and the question of pollution and other hazards. Other questions discussed in the working group included the question of a definition of the seabed and the ocean floor underlying the high seas beyond current national jurisdiction, the question of a moratorium or freezing of national claims over the seabed and the ocean floor beyond the limits of current national jurisdiction, and the question of a statement of principles, in the form of a declaration, to be adopted by the General Assembly.⁶⁸ The legal working group had before it two studies prepared by the Secretariat titled “Legal aspects of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor and the subsoil thereof, underlying the high seas beyond the limits of present

⁶⁵ *Mineral Resources of the Sea beyond the Continental Shelf*, Report of the Secretary-General, ECOSOC Doc. E/4449/Add.1 (19 February 1968), at 36. Although that report covers the full spectrum of marine minerals, a detailed overview on manganese nodules is included at 30-37.

⁶⁶ The composition of the *Ad Hoc* Committee is set out in operative paragraph 1 of the resolution. See Vol. I of this series, at 162.

⁶⁷ A/7230, para. 4.

⁶⁸ A/7230, Annex II, paras.12-45.

national jurisdiction, and the use of their resources in the interests of mankind”⁶⁹ and a “Survey of national legislation concerning the seabed and ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction.”⁷⁰ The legal working group and the Committee also had before them the views submitted by Member States,⁷¹ as well as ten documents submitted by delegations in the form of draft resolutions or amendments.⁷² Following consideration of the various reports and proposals, the Committee finally adopted and proposed for submission to the General Assembly two documents: a draft declaration of general principles and a draft statement of agreed principles, both indicating the support that the various ideas, and particularly the concept of the common heritage of mankind, had received. However, it was also pointed out by the *Ad Hoc* Committee that the terms of reference of General Assembly resolution 2340 (XXII) did not provide for the elaboration of a scheme for the legal regulation of the status of the seabed and ocean floor.

The twenty-third session of the General Assembly considered the report of the *Ad Hoc* Committee⁷³ in the First Committee at its 1588th to 1605th meetings, from 28 October to 11 November 1968, and its 1646th to 1649th meetings, from 18 to 20 December 1968. The First Committee had before it a number of draft resolutions and amendments relating to the establishment of a standing committee and its terms of reference and a draft declaration of principles.⁷⁴ Fifty-six Member States expressed their views on the concept of the common heritage of mankind. These views were summarized by the Secretariat in a working paper.⁷⁵ As a first step in establishing new legal principles for the seabed, there was a broad level of support for any acceptable declaration to the effect that the seabed and ocean floor were the common heritage of mankind. It was also suggested that it might be appropriate to entrust to the proposed standing committee a study of principles to serve as a basis for the elaboration of arrangements and agreements to preserve the resources of the area for the good of mankind. The aim should be to develop legal principles that would foster the development of international cooperation, on an equal footing, in the exploration and exploitation of the seabed in the interest of all peoples, while ensuring the legitimate rights and interests of all States and taking due account of the needs of the developing countries. A number of delegations suggested or endorsed particular principles for inclusion in a statement of principles, either as commending general acceptance or as

⁶⁹ A/AC.135/19 and Add.1 and 2.

⁷⁰ A/AC.135/11 and Corr. 1 and Add.1.

⁷¹ A/AC.135/1 and Corr. 1 and Add. 1-10.

⁷² A/7230, Annex III.

⁷³ A/7230.

⁷⁴ 23 GAOR, Annexes, agenda item 26, (A/7477), paras. 6-12.

⁷⁵ A/AC.138/7.

being of special importance, including the concepts that (i) the resources of the seabed were a common heritage of mankind, (ii) the exploration, use, and exploitation of the resources must be carried out for the benefit of and in the interests of all mankind, and (iii) regulations should be established as soon as possible for the exploration and exploitation of the seabed in the interests of mankind. Five draft resolutions were submitted relating to the principles governing the uses of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of present national jurisdiction.⁷⁶ At the 1648th meeting of the First Committee, on 19 December 1968, the representative of Malta suggested that the various draft resolutions referred to above should be referred to the proposed standing committee for consideration and stated that he would not press his draft resolution to a vote if the sponsors of other draft resolutions agreed to this procedure. The representatives of Cyprus, Mexico, and Brazil, respectively, for three of the four other draft resolutions so agreed. The First Committee decided to transmit those draft resolutions to the proposed standing committee for consideration⁷⁷ and proceeded to a vote on the main draft resolutions (a) to establish the committee on the peaceful uses of the seabed and request it to study the elaboration of the legal principles and norms that would promote international cooperation in the exploration and use of the seabed beyond the limits of national jurisdiction (A/C.1/L.425/Rev.2), and (b) requesting the Secretary-General to undertake a study on the question of establishing appropriate international machinery for the promotion of the exploration and exploitation of the resources of "this area" and the use of those resources in the interests of mankind (A/C.1/L.441 and Adds. 1-5).

While the draft resolution contained in A/C.1/L.425/Rev.2 was adopted by 96 votes to none, with 6 abstentions, draft resolution A/C.1/L.441 and Adds. 1-5 was more controversial and was adopted by 77 votes to 9, with 18 abstentions. The Soviet bloc voted against the draft resolution on the grounds that (in the words of the representative of the USSR, Mr. Mendelevich)

... if such a system of joint ownership, a supranational utilization of international machinery, were to be established, this would be solely in the interests of the international imperialist monopolies with which my country has absolutely no relationship and does not even wish to have any relationship. We cannot co-operate with the monopolies which are the basic instruments of neo-colonialist policies.

⁷⁶ Mexico: draft resolution A/C.1/L.430; Cyprus, Liberia, and Uruguay: revised draft resolution A/C.1/L.432/Rev.1 and Add.1; Malta, Mauritius, and United Republic of Tanzania: draft resolution A/C.1/L.433 and Corr.1; Liberia: draft resolution A/C.1/L.434/Rev.1; and Argentina, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Libya, Nicaragua, Peru, Spain, and Trinidad and Tobago: draft resolution A/C.1/L.437 and Adds. 1 and 2.

⁷⁷ 23 GAOR, Annexes, agenda item 26, (A/7477), para. 16.

The Soviet bloc was also concerned that the proposed committee would deal with matters relating to disarmament, which were also being considered in the Committee on Disarmament. The main concern of these States related to the uncertain extent of national jurisdiction over the continental shelf and whether that area would be reserved for peaceful uses.

Many of the States from the Western European and Others Group, including the United Kingdom, France, Canada, Australia, New Zealand, Portugal, and the United States, abstained from voting. The reasons were reflected in the statement of the representative of the United Kingdom as follows:

My own delegation supports the view that there should be an international regime governing exploitation of the resources of the seabed and ocean floor beyond the limits of national jurisdiction. But we, and I believe most other Member States, are far from having formed a final view on what the precise nature of such a regime should be. We consider that this is a matter that should be clarified in the Committee set up by the draft resolution contained in document A/C.1/L.425/Rev.2, and that a request of this kind should not be made to the Secretary-General when the issue is clearly contentious.

Following the debate in the First Committee, the General Assembly, by its resolution 2467 A (XXIII) adopted on 21 December 1968 by 112 votes to none, with 7 abstentions, established a Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction.⁷⁸ The so-called "Sea-Bed Committee" was instructed under paragraph 2 of that resolution, *inter alia*:

(a) To study the elaboration of the legal principles and norms which would promote international co-operation in the exploration and use of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction and ensure the exploitation of their resources for the benefit of mankind, and the economic and other requirements which such a regime should satisfy in order to meet the interests of humanity as a whole; [and]

(b) To study the ways and means of promoting the exploitation and use of the resources of this area, and of international co-operation to that end, taking into account the foreseeable development of technology and the economic implications of such exploitation and bearing in mind the fact that such exploitation should benefit mankind as a whole[.]

⁷⁸ In accordance with the decision taken by the First Committee at its 1648th meeting, on 19 December 1968, the Committee was expanded to forty-two States; for its composition, see Vol. I of this series, at 169.

In its resolution 2467 C (XXIII), also adopted on 21 December 1968, the General Assembly requested the Secretary-General

. . . to undertake a study on the question of establishing in due time appropriate international machinery for the promotion of the exploration and exploitation of the resources of this area, and the use of these resources in the interests of mankind, irrespective of the geographical location of States, and taking into special consideration the interests and needs of the developing countries, and to submit a report thereon to the [Sea-Bed Committee] for consideration during one of its sessions in 1969.

THE SEA-BED COMMITTEE 1969-1973

13. The Sea-Bed Committee met from 1969 to 1973 under the Chairmanship of H. Shirley Amerasinghe (Sri Lanka). Initially, it was composed of a Legal Sub-Committee, which took up paragraph 2(a) of the resolution, and an Economic and Technical Sub-Committee, which addressed the issues raised in paragraph 2(b). The Sea-Bed Committee held three sessions at the United Nations Headquarters in 1969.⁷⁹ Issues of direct relevance to the concept of common heritage of mankind were discussed in the Legal Sub-Committee under the following headings: (i) legal status; (ii) applicability of international law, including the Charter of the United Nations; (iii) reservation exclusively for peaceful purposes; (iv) use of the resources for the benefit of mankind as a whole, irrespective of the geographical location of States, taking into account the special interests and needs of the developing countries; (v) freedom of scientific research and exploration; (vi) reasonable regard to the interests of other States in their exercise of the freedoms of the high seas; (vii) question of pollution and other hazards, and obligations and liability of States in the exploration, use, and exploitation; and (viii) other questions.⁸⁰ In the debates of the Committee, references were made to the draft resolutions and amendments submitted to the *Ad Hoc* Committee and to the First Committee at the twenty-third session of the General Assembly.⁸¹ Many delegations expressed the belief that the concepts of *res nullius* and *res communis* “were of little practical value” in determining the legal status of the international seabed area.⁸² At the same time, some delegations felt that the concept of the common heritage of mankind “was contrary to existing norms and principles of international law” and was “devoid of legal content.”⁸³ The

⁷⁹ 6-7 February; 10-28 March; and 11-29 August.

⁸⁰ 24 GAOR, Supp. No. 22, (A/7622), Part Two, paras. 5, 11, 19-97. *Ibid.*, annex, paras. 4-29.

⁸¹ The texts of those draft resolutions and amendments were reproduced in an annex to a working paper prepared by the Secretariat entitled *Proposals and views relating to the adoption of principles*, A/AC.138/7.

⁸² See SBC Report 1969, Part Two: Report of the Legal Sub-Committee, para. 19, at 14.

⁸³ *Ibid.*, para. 23.

report of the Sea-Bed Committee was submitted to the twenty-fourth session of the General Assembly and was taken up in the First Committee at its 1673rd to 1683rd meetings, from 31 October to 10 November 1969, and its 1708th to 1710th and 1713th to 1715th meetings, held between 2 and 9 December 1969.⁸⁴ Five draft resolutions, with amendments to four of them, were introduced under the item.⁸⁵ The draft resolution submitted by Malta,⁸⁶ as orally revised and amended, was adopted by the General Assembly at its 1833rd plenary meeting on 15 December 1969 as resolution 2574 A (XXIV) by 65 votes to 12, with 30 abstentions.⁸⁷ At the same meeting, a draft resolution, originally submitted by Cameroon, Ceylon, India, Jamaica, Kenya, Kuwait, Libya, Mauritania, Mexico, Nigeria, Pakistan, the Philippines, Sudan, Thailand, Trinidad and Tobago, the United Republic of Tanzania, and Yugoslavia, and subsequently joined by other States, was adopted as resolution 2574 C (XXIV) by 100 votes to none, with 11 abstentions.⁸⁸ The latter resolution requested the Secretary-General to

... prepare a further study on various types of machinery, particularly a study covering in depth the status, structure, functions and powers of an international machinery, having jurisdiction over the peaceful uses of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, including the power to regulate, coordinate, supervise, and control all activities relating to the exploration and exploitation of their resources, for the benefit of mankind as a whole, irrespective of the geographical location of States, taking into account the special interests and needs of the developing countries, whether landlocked or coastal[.]

A further draft resolution originally submitted by Ceylon, Ecuador, Guatemala, Kuwait, Mauritania, and Mexico, later joined by other States, was adopted by the General Assembly as resolution 2574 D (XXIV) by 62 votes to 28, with 28 abstentions.⁸⁹ This resolution, the so-called "Moratorium Resolution," declared that pending the establishment of an international regime, including appropriate machinery governing the seabed beyond national jurisdiction,

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploration of the resources of the area of the sea-

⁸⁴ 24 GAOR, Supp. No. 22 (A/7622).

⁸⁵ 24 GAOR, Annexes, agenda item 32, (A/7834), paras. 4-9.

⁸⁶ A/C.1/L.473/Rev.2.

⁸⁷ 24 GAOR, Plenary meetings, Vol. III, 1833rd meeting, para. 2. See Vol. I of this series, at 169.

⁸⁸ 24 GAOR, Annexes, agenda item 32, (A/7834), para. 13, resolution C; *ibid.*, Plenary meetings, Vol. III, 1833rd meeting, para. 4.

⁸⁹ 24 GAOR, Annexes, agenda item 32, (A/7834), para. 13, resolution D. See also Vol. I of this series, at 172.

bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction; [and]

(b) No claim to any part of that area or its resources shall be recognized.⁹⁰

14. In 1970, the Sea-Bed Committee held an organizational meeting on 26 February and two sessions: a spring session at the United Nations Headquarters from 2 to 26 March and a summer session in Geneva from 3 to 28 August. Pursuant to paragraph 4 of General Assembly resolution

⁹⁰ The resolution was strongly opposed by most of the industrialized States, including the United States. The U.S. representative is on record in the First Committee, where the draft resolution was adopted by 52 votes to 27, with 35 abstentions, as stating, "It is not enough to say that the prohibition which the draft resolution contains is without binding legal effect; that is the case with almost any General Assembly resolution; and it is certainly the case for any General Assembly resolution purporting to prescribe standards of conduct for States in the oceans." A/PV. 1833, 1 (1969). The issue continued to cause difficulties, even after the adoption of the Declaration of Principles in 1970, when the United States reiterated its position as follows:

The Executive Branch continues to hold the view that deep seabed mineral exploitation constitutes a reasonable use of the high seas and is presently permitted under international law. We have made this position clear to other nations on many occasions. In this connection, the United States has repeatedly expressed its position that the so-called moratorium resolution is without binding legal effect. Some States have suggested that it is possible to interpret the Declaration of Principles . . . as legally prohibiting the exploitation of the seabed until the new international regime and machinery for that exploitation comes into effect. These States derive this interpretation from their understanding of the common heritage of mankind concept. The United States, however, has consistently maintained that its interpretation of the Declaration of Principles does not permit the derivation of a "moratorium effect" from this resolution.

Hearings before the Senate Committee on Interior and Insular Affairs, Sub. Comm. on Minerals, Materials and Fuels 994 (1974). Equally strong opposing views were held by the Group of 77, USSR, and China. The position of the Group of 77 was that the effect of the Declaration of Principles was to expressly exclude the possibility of extending freedom of the high seas to the seabed and to subject exploration and exploitation of the resources of the seabed to the international regime to be established. Unilateral legislative action by any State or group of States before such an international regime was established would, therefore, be contrary to the Declaration of Principles and international law. The Group of 77 therefore called upon all States to exercise restraint and refrain from unilateral legislative or other action. See statement by Mr. Nandan (Fiji) as Chairman of the Group of 77, 15 September 1978, IX Off. Rec. 103, and response by Ambassador Elliot L. Richardson (United States) emphasizing that, in the view of the United States, the "moratorium" resolution had no binding legal effect, IX Off. Rec. 104. Following the unilateral introduction in 1980 by the United States of legislation to regulate deep seabed mining outside the provisions of the draft Convention, see the statement of Ambassador Elliot L. Richardson at the resumed ninth session (1980), A/CONF.62/103 and generally paragraph 31 below.

2574 B (XXIV), the Committee had been requested to expedite its work of preparing a comprehensive and balanced statement of principles and to submit a draft declaration to the Assembly at its twenty-fifth session. As agreed at the 17th meeting of the Committee, on 26 February 1970, the Legal Sub-Committee continued throughout 1970 its intensive study of various formulations of different principles to be contained in a declaration of legal principles and in identifying the differences among various formulations. The Sub-Committee based its considerations particularly on the synthesis contained at the end of its report on its work in 1969, reflecting the extent of the work done in the formulation of principles.⁹¹ The Sub-Committee set up an informal group to conduct consultations and to review the formulation of principles, considering individually each of the topics dealt with in the synthesis but deciding to consider also other matters, which had not been touched upon in the synthesis but which it was believed should be included in the statement of principles. It also took into account other formal and informal proposals submitted for consideration, as well as two draft resolutions that had been submitted to it during the March session.⁹² A number of other proposals were presented to the Sub-Committee, including a working paper prepared by the United States containing a "Draft United Nations Convention on the International Seabed Area."⁹³ While no agreement was reached on a draft declaration of principles during the summer session, it was nevertheless felt during the

⁹¹ GAOR 24, Supp. No. 22 (A/7622), Part Two, paras. 83-97.

⁹² A/AC.138/SC.1/L.2 and L.4. A revised version of the draft resolution contained in document A/AC.138/SC.1/L.4 was submitted at the August session as A/AC.138/SC.1/L.4/Rev.1.

⁹³ A/AC.138/25, 3 August 1970. 25 GAOR, Supp. No. 21 (A/8021), Annex V, at 130. The working paper was, in fact, a highly detailed document containing, in addition to general principles, detailed licensing and fiscal provisions for seabed exploration and exploitation through an International Seabed Resource Authority. It reaffirmed that the international seabed area shall be the common heritage of mankind, and no State may claim or exercise sovereign rights over any part of the International Seabed Area. While the paper was presented with the disclaimer that "further detailed study is clearly necessary" and its contents "do not necessarily represent the definitive views of the United States Government," it was submitted in implementation of the new oceans policy announced by President Nixon. The Statement on United States Policy for the Seabed, announced on 23 May 1970 by President Nixon, proposed that

all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters (218.8 yards) and would agree to regard these resources as the common heritage of mankind. The treaty should establish an international regime for the exploitation of seabed resources beyond this limit. The regime should provide for the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries.

informal consultations that it would be useful to prepare a single paper, which would attempt to narrow as far as possible the differences between such formulations in the light of the discussions and the various views expressed.

The report of the Sea-Bed Committee was considered by the First Committee of the twenty-fifth session of the General Assembly.⁹⁴ Since the Sea-Bed Committee had been unable at its 1970 sessions to reach agreement on a declaration of principles, the Chairman of the Committee undertook informal consultations with its members in an effort to prepare a draft declaration that would command general support. In his letter dated 24 November 1970 addressed to the Chairman of the First Committee, the Chairman of the Sea-Bed Committee reported that as a result of these consultations, a draft declaration had emerged that "reflects the highest degree of agreement attainable," although "it does not . . . represent a consensus of all the members of the Committee." That letter, together with the text of the draft declaration, was circulated as a document of the First Committee.⁹⁵ On 2 December 1970, the text of the draft resolution prepared by the Chairman of the Sea-Bed Committee was submitted as a draft resolution sponsored by forty-seven States.⁹⁶ At its 1789th meeting on 15 December 1970, the First Committee decided without objection to give priority in the voting to that draft resolution, which was adopted by 90 votes to none, with 11 abstentions. Subsequently, at its 1933rd plenary meeting on 17 December 1970, the General Assembly adopted resolution 2749 (XXV), Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction,

This "agreed international machinery" would regulate exploration and use of seabed resources in the area "beyond continental margins." In announcing the new oceans policy, Nixon emphasized that "The nations of the world are now facing decisions of momentous importance to man's use of the oceans for decades ahead. At issue is whether the oceans will be used rationally and equitably and for the benefit of mankind or whether they will become an area of unrestrained exploitation and conflicting jurisdictional claims in which even the most advantaged states will be losers." He also warned that if the law of the sea "is not modernized multilaterally, unilateral action and international conflict are inevitable." On the other hand, if an international agreement could be reached, it would "save over two-thirds of the earth's surface from national conflict and rivalry, protect it from pollution and put it to use for the benefit of all." President Nixon's statement appears at 62 U.S. Dept. of State Bull. 737 (1970). Also reproduced in S. H. Lay *et al* (eds.), *New Directions in the Law of the Sea*, Vol. II (1973), at 751-752. See also "Summary of Provisions of Draft 'United Nations Convention on the International Seabed Area,'" prepared by John R. Stevenson, Legal Adviser, Dept. of State, *ibid.*, at 753-768.

⁹⁴ The report was considered at the 1773rd to 1789th meetings, from 25 November to 8 December 1970; the 1794th to 1796th meetings, from 11 to 14 December; and the 1789th to 1801st meetings, on 15 and 16 December 1970.

⁹⁵ A/C.1/L.542.

⁹⁶ A/C.1/L.544.

by a vote of 108 to 0, with 14 abstentions.⁹⁷ The Declaration of Principles affirmed the basic concept of the common heritage of mankind and stated that

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the Area), as well as the resources of the Area, are the common heritage of mankind.

2. The Area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the Area or its resources incompatible with the international regime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the Area and other related activities shall be governed by the international regime to be established.

5. The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or landlocked, without discrimination, in accordance with the international regime to be established.

6. States shall act in the Area in accordance with the applicable principles and rules of international law, including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

7. The exploration of the Area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether landlocked or coastal, and taking into particular consideration the interests and needs of the developing countries.

8. The Area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader Area. One or more international agreements shall be concluded as soon as

⁹⁷ GAOR 25, Vol. I, Annexes, agenda item 25 (A/8097), at 19-20, and "Action taken by the General Assembly," at 23; GAOR 25, Supp. No. 28, at 24, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA res. 2749 (XXV), 17 December 1970 (hereafter the "Declaration of Principles"). Reproduced in Vol. I of this series, at 173.

possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor and the subsoil thereof from the arms race.

9. On the basis of the principles of this Declaration, an international regime applying to the Area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The regime shall, *inter alia*, provide for the orderly and safe development and rational management of the Area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether landlocked or coastal.

And further that

14. Every State shall have the responsibility to ensure that activities in the Area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international regime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organizations or on their behalf. Damage caused by such activities shall entail liability.

The elements defined in the Declaration of Principles were to provide the foundation for the development of the legal regime for the deep seabed. Indeed, most of the principles contained in the Declaration are reflected in Part XI (especially articles 136 to 149).⁹⁸

⁹⁸ The content of the Declaration of Principles does not differ greatly from the principles outlined by Pardo as the "legal pillars" upon which a "new order for using ocean space" should be built, namely: (1) the commons area is not subject to national appropriation in any manner whatsoever; (2) the commons area is reserved exclusively for peaceful purposes; (3) scientific research conducted in the commons area is freely permissible, and its results are to be made available to all; (4) resources of the commons, if exploited, must be done in the interest of mankind, with particular regard to the interests of developing countries; and (5) exploration and exploitation of the commons should be conducted in a manner consistent with the principles and purposes of the UN Charter and in such a manner that no serious damage is caused to the environment. In a recent analysis of the common heritage principle, in which it is asserted that the philosophical concept of the common heritage of mankind has evolved from a merely theoretical aspiration to becoming progressively accepted as a principle of international treaty law, the following key attributes of the concept have been identified: (1) nonappropriation (which is an explicit rejection of the concept of *res nullius*); (2) shared management (to the exclusion of national governments except as representatives of all mankind and thus inviting the establishing of an international regulatory agency); (3) shared benefits (on an equitable basis); (4) reser-

15. At the same time as the Declaration of Principles was adopted, the General Assembly also decided, in resolution 2750 C (XXV) of 17 December 1970, to convene in 1973 a Third Conference on the Law of the Sea, which would:

... deal with the establishment of an equitable international regime—including an international machinery—for the area and the resources of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment (including, *inter alia*, the prevention of pollution) and scientific research.

In the meantime, the mandate of the Sea-Bed Committee was reaffirmed and expanded and the size of the Committee was increased by a further 44 members to 85.⁹⁹ The enlarged Committee was instructed to hold two sessions in 1971 in order to prepare for the Conference on the Law of the Sea:

... draft treaty articles embodying the international regime—including an international machinery—for the area and the resources of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, taking into account the equitable sharing by all States in the benefits to be derived therefrom, bearing in mind the special interests and needs of developing countries, whether coastal or landlocked, on the basis of the Declaration of Principles Governing the Seabed and the Ocean Floor and the Subsoil Thereof beyond the Limits of National Jurisdiction, and a comprehensive list of subjects and issues relating to the law of the sea . . . which should be dealt with by the Conference, and draft articles on such subjects and issues[.]

vation for peaceful purposes; and (5) conservation of resources and preservation of environmental quality in the commons area for future generations. A basis for all these elements may be seen in the 1970 Declaration of Principles. See Christopher C. Joyner, *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection*, University of South Carolina (1998). See also A.C. Kiss, "La notion de patrimoine commun de l'humanité," *Recueil des cours de l'Académie de droit internationale*, Vol. II at 175 and Jean-Pierre Lévy, *Le Destin de l'Autorité Internationale des Fonds Marins*, Pédone, 2002, at 13.

⁹⁹ GA res. 2750 C (XXV), 17 December 1970. Reproduced in Vol. I of this series, at 178. For its composition, see Vol. I, at 181-182. Under resolution 2881 (XXVI) of 21 December 1971, the Sea-Bed Committee was further expanded to 90 States; see Vol. I, at 182, 183.

When it met in 1971, the Sea-Bed Committee was reorganized into three subcommittees of the whole. Sub-Committee I—later to evolve into the First Committee of UNCLOS III—was assigned the task of preparing draft treaty articles embodying the international regime, including an international machinery for the area and the resources of the seabed and the ocean floor beyond the limits of national jurisdiction.¹⁰⁰ It is important to recall, however, that discussions on the international regime were very much subject to the outcome of discussions in Sub-Committee II on the overriding issue of the limits of national jurisdiction. Accordingly, the Sea-Bed Committee agreed on 27 August 1971 that

. . . [W]hile each Sub-committee will have the right to discuss and record its conclusions on the question of limits so far as it is relevant to the subjects allocated to it, the main Committee will not reach a decision on the final recommendation with regard to limits until the recommendations of Sub-Committee II on the precise definition of the [A]rea have been received, which should constitute basic proposals for the consideration of the main Committee.¹⁰¹

The basis for the work of Sub-Committee I between 1971 and 1973—and subsequently for the First Committee at UNCLOS III—was the Declaration of Principles. In the early stages, discussions in Sub-Committee I focused on several issues. These included, *inter alia*: (i) the scope of the international regime to be established and the nature of that regime; (ii) the question of the precise definition of the area beyond the limits of national jurisdiction; (iii) the relationship between the international regime and the rights of coastal States; and (iv) potential conflicts between the international regime and the question of the freedom of the high seas and the traditional uses of the oceans.¹⁰² The Sub-Committee also discussed the scope and functions of the international machinery to be established to regulate activities in the area and exploitation of the resources of the seabed beyond the limits of national jurisdiction.

It became evident as the subsequent dialogue developed that an ideological division existed between States based on differing interpretations of how those principles were to be applied. Industrialized States saw in manganese nodules an assured future supply of copper, nickel, cobalt, and manganese. In particular, the United States perceived a strong national interest in reducing its reliance on the importation of strategic minerals from foreign nations.¹⁰³ Among these States, however, Australia

¹⁰⁰ For an overview of the work of Sub-Committee II, and of the Second Committee at UNCLOS III, see Vols. II and III of this series; on the work of Sub-Committee III and the Third Committee, see Vol. IV.

¹⁰¹ 26 GAOR, Supp. No. 21; SBC Report 1971, at 8.

¹⁰² See SBC Report 1971, at 24-25.

¹⁰³ See "Deep Seabed Minerals: Resources, Diplomacy and Strategic Interest," Report to the Sub-committee on International Organizations of the Committee on International Relations, U.S. House of Representatives, 1 March 1978, at 2.

and Canada¹⁰⁴ sought to protect their own national interests, since they were the only industrialized land-based producers who were net exporters of those minerals. On the other hand, the developing States, represented by the Group of 77,¹⁰⁵ saw in seabed minerals an opportunity for distribution of wealth that would help close the gap between poor and wealthy nations.¹⁰⁶ Similarly, despite the wide agreement on the concept of an

¹⁰⁴ See A/AC.138/59 (Canada), reproduced in SBC Report 1971, at 51.

¹⁰⁵ The Group of 77 had been established at the end of the first session of the UNCTAD in Geneva on 15 June 1964 when seventy-seven developing countries signed a joint declaration under which they recognized the first session of the UNCTAD as “a significant step towards creating a new and just world economic order.”

¹⁰⁶ It is important to bear in mind that much of the work of the Sea-Bed Committee and UNCLOS III took place in parallel with discussions on the establishment of a New International Economic Order (NIEO) and that one of the major concerns of the United States and other industrialized States during the UNCLOS III negotiations was that its position on issues such as resource access, distribution, and technology transfer should be consistent with its positions in other fora where international economic issues of NIEO and the North-South dialogue were under discussion. In 1972, at the behest of the Group of 77, UNCTAD, in its resolution 45 (III), recognized that it is not feasible to establish a just order and a stable world as long as a charter to protect the rights of all countries, and in particular the developing States, is not formulated and stressed the urgency to establish generally accepted norms to govern international economic relationships systematically. In the same resolution, it was decided to establish a working group of governmental representatives to draw up a draft Charter of Economic Rights and Duties of States. In 1974, the 6th special session of the United Nations General Assembly adopted by a vote the “Declaration on the Establishment of a New International Economic Order and Programme of Action on the Establishment of a New International Economic Order,” resolution 3201 (S-VI) (1 May 1974). In December of the same year, the twenty-ninth session of the General Assembly adopted the Charter of Economic Rights and Duties of States, article 29 of which stated that

The sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the Area, are the common heritage of mankind. On the basis of the principles adopted by the General Assembly in resolution 2749 (XXV) of 17 December 1970, all States shall ensure that the exploration of the area and exploitation of its resources are carried out exclusively for peaceful purposes and that the benefits derived therefrom are shared equitably by all States, taking into account the particular interests and needs of developing countries; an international regime applying to the Area and its resources and including appropriate international machinery to give effects to its provisions shall be established by an international treaty of a universal character, generally agreed upon.

See also M. C. W. Pinto, “Emerging concepts of the Law of the Sea: some social and cultural impacts,” in “Managing the Ocean: Resources, Research, Law,” edited by Jacques Richardson, Lomond Publications 1985, Chapter 28, at 304; M. C. W. Pinto, “The United Nations Convention on the Law of the Sea and the New International Economic Order: Interdependence and International Legislation,” in Proceedings of the Seventeenth Annual Conference of the Law of the Sea Institute, Oslo, Norway, 13-16 July 1983; *The 1982 United Nations Convention on the Law of the Sea*, edited by

international regime, there was considerable disagreement with regard to the nature and function of that regime. Several draft proposals were put forward. On the one hand, some industrialized States favored an arrangement in which national companies (whether private or State-owned) would be the sole operators; the conditions and requirements for mining would be fairly liberal to attract the necessary investment; there would be security of investment; there would be no production limitations; the proposed international bureaucracy would act essentially as a service organ for the purpose of issuing licenses and would have few discretionary powers; and decision-making would be structured to ensure that industrialized States had an effective veto.¹⁰⁷ On the other hand, the Group of 77 favored a system in which the International Seabed Authority, through its own operating arm (the Enterprise), would conduct all seabed mining activities; there would be a possibility of joint ventures; the conditions of exploitation would be decided by the International Seabed Authority; decision-making would be on a one-nation, one-vote basis; and the Area would be the common heritage of mankind in the fullest sense. In short, they envisaged a collective approach to seabed mining with a strong International Seabed Authority.¹⁰⁸ A far more comprehensive proposal, covering the whole of ocean space, was submitted by Malta, but also took the latter approach to the regulation of deep seabed mining.¹⁰⁹ Those basic positions were to remain largely unchanged throughout UNCLOS III.¹¹⁰

Albert W. Koers and Bernard H. Oxman, Honolulu, Hawaii: Law of the Sea Institute, University of Hawaii, 1983, 224-235; Robert L. Friedheim and William J. Durch, "The International Seabed Resources Agency and the New International Economic Order," *International Organization* 31 (2) Spring 1977, 343-384; Ronald S. Katz, "Financial Arrangements for Seabed Mining Companies: An NIEO Case Study," *Journal of World Trade Law*, Vol. 13 (1979), 209-222.

¹⁰⁷ These positions were reflected in the proposals put forward by, *inter alia*, Japan, A/AC.138/63, and in the "Draft United Nations Convention on the International Seabed Area" prepared by the United States of America, A/AC.138/25, reproduced in SBC Report 1970, at 130-76. See also "Report on a Regime for the Exploration and Exploitation of the Mineral Resources of the Ocean Bed" prepared by the British Branch Committee on Deep Sea Mining of the International Law Association for the Hague Conference (1970).

¹⁰⁸ This approach was adopted in a "Draft statute for an international sea-bed authority" submitted by the United Republic of Tanzania, A/AC.138/33, reproduced in SBC Report 1971, at 51-64; and the proposal by Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Mexico, Panama, Peru, Trinidad and Tobago, Uruguay, and Venezuela, A/AC.138/49, reproduced in SBC Report 1971, at 93.

¹⁰⁹ Malta, "Draft ocean space treaty," A/AC.138/53, articles 66-85, reproduced in SBC Report 1971, at 105.

¹¹⁰ For an overview of the basic objectives and underlying concerns of the major interest groups, see Report of the Chairman of the First Committee at the fifth session, A/CONF.62/L.16, VI Off. Rec. 130, at 133.

16. At the 1972 session of the Sea-Bed Committee, the program of work for Sub-Committee I focused on two items:

Item 1: Status, scope, and basic provisions of the regime based on the Declaration of Principles (resolution 2749 (XXV)).

Item 2: Status, scope, functions and powers of the international machinery in relation to:

- (a) organs of the international machinery, including composition, procedures and dispute settlement;
- (b) rules and practices relating to activities for the exploration, exploitation and management of the resources of the area, as well as those relating to the preservation of the marine environment and scientific research, including technical assistance to developing countries;
- (c) the equitable sharing in the benefits to be derived from the area, bearing in mind the special interests and needs of developing countries, whether coastal or landlocked;
- (d) the economic considerations and implications relating to the exploitation of the resources of the area, including their processing and marketing;
- (e) the particular needs and problems of landlocked countries; and
- (f) relationship of the international machinery to the United Nations system.¹¹¹

To deal with Item 1, a Working Group on the International Regime was established.¹¹² On the basis of the various proposals that had been submitted, that Working Group prepared a working paper containing “texts illustrating areas of agreement and disagreement” on matters relating to the status, scope and basic provisions of the regime (that is, relating to Item 1 of the program of work).¹¹³ In light of the relationship between Item 1 (the international regime) and Item 2 (the international machinery), the Working Group was subsequently given the task of dealing with the matters in Item 2 of the program of work.¹¹⁴

17. At the 1973 session of the Sea-Bed Committee, the Secretary-General made available a number of reports that had been requested by the twenty-seventh session of the General Assembly following consideration of the report of the Sea-Bed Committee.¹¹⁵ These included a comparative study of “the extent and the economic significance, in terms

¹¹¹ SBC Report 1972, para. 51, at 17-18.

¹¹² Established at the 44th meeting of the Sub-Committee based on a proposal by the Chairman of Sub-Committee I. *Supra* note 111, para. 71.

¹¹³ A/AC.138/L.18/Add.3, reproduced in SBC Report 1972, at 81-108. For particulars on the Working Group, see *supra* note 111, paras. 71-77. The Chairman of the Group was Christopher W. Pinto (Sri Lanka).

¹¹⁴ SBC Report 1972, para. 143, at 34.

¹¹⁵ Resolution 3029 B (XXVII), 18 December 1972.

of resources, of the international area that would result from each of the various proposals on limits of national jurisdiction submitted so far to the [Sea-Bed Committee] and a report on 'Seabed mineral resources: recent developments'."¹¹⁶ During 1973 the Working Group continued its discussion of the matters before it, and produced an expanded working paper containing "texts, illustrating areas of agreement and disagreement on items 1 and 2."¹¹⁷ Although many of those texts were discussed in some detail, there was insufficient time to give full consideration to all viewpoints and (as indicated in the title of the working paper) much disagreement remained. As such, no consensus was reached on draft articles, and the working paper prepared by Sub-Committee I only presented a series of alternative texts that were included in the six-volume final report of the Sea-Bed Committee, along with all of the proposals, principal texts, and variants thereof on each of the twenty-five main topics discussed by the Committee, for later consideration at UNCLOS III.¹¹⁸

UNCLOS III AND THE WORK OF THE FIRST COMMITTEE 1974-1982

18. The First Committee at UNCLOS III was one of the three Main Committees of the Conference. It dealt with all questions concerning the international regime for the seabed and the ocean floor beyond the limits of national jurisdiction. Its work encompassed what became Part XI of the Convention (articles 133 to 191), Annex III (Basic Conditions of Prospecting, Exploration and Exploitation), and Annex IV (Statute of the Enterprise), as well as resolution I, on the "Establishment of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea," and resolution II, "Governing Preparatory Investment in Pioneer Activities relating to Polymetallic Nodules," both annexed to the Final Act of the Conference.¹¹⁹ The Chairman of the First Committee throughout the negotiations was Paul Bamela Engo (United Republic of Cameroon). The Rapporteur of the Committee was the

¹¹⁶ See, respectively, A/AC.138/87 and A/AC.138/90 (both 1973).

¹¹⁷ A/AC.138/94/Add.1, reproduced in SBC Report 1973, Vol. II, Annex I, Appendix III, at 39-166.

¹¹⁸ Reports of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, 28 GAOR, Supp. No. 21 (A/9021), 1973. One of the problems arising from the work of the Sea-Bed Committee was that, unlike the International Law Commission in the 1950s, it made no attempt to provide any guidance to the Conference on the relative merits of the proposals tendered to it. Following the decision in 1970 to expand the mandate of the Committee, the number and scope of the proposals submitted to it far outweighed its capacity to deal with them. See Louis B. Sohn, "Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea," *Columbia Journal of Transnational Law*, Vol. 36, Nos. 1 & 2 (1997), p. 285.

¹¹⁹ A Commentary on resolution I appears in Vol. V of this series, at 467-77.

representative of Australia.¹²⁰ The First Committee held fifty-six formal meetings between 1974 and 1982, and an indeterminate number of informal meetings, including those in the formal and informal negotiating groups and in different working groups. Reports on those meetings were submitted at each session by the Chairmen of the various groups and by the Chairman of the First Committee. The list of subjects and issues prepared by Sub-Committee II of the Sea-Bed Committee formed the principal agenda for UNCLOS III.¹²¹ From that list, the following items were allocated to the First Committee:

- Item 1. *International regime for the seabed and ocean floor beyond national jurisdiction*
 - 1.1 Nature and Characteristics
 - 1.2 International machinery: structure, functions and powers
 - 1.3 Economic implications
 - 1.4 Equitable sharing of benefits bearing in mind the special interests and needs of the developing countries whether coastal or landlocked
 - 1.5 Definition and limits of the area
 - 6.6 Use exclusively for peaceful purposes

- Item 23. *Archaeological and historical treasures on the seabed and ocean floor beyond the limits of national jurisdiction.*

Each Main Committee of the Conference was also allocated the following items insofar as they were relevant to its mandate:

- Item 15. *Regional arrangements*
- Item 20. *Responsibility and liability for damage resulting from the use of the marine environment*
- Item 21. *Settlement of disputes*
- Item 22. *Peaceful uses of the ocean space; zones of peace and security*

In addition, the Conference recommended that, with regard to the organization of work, the agreement reached in the Sea-Bed Committee on 27 August 1971 should be carried forward in respect of each of the main Committees of the Conference.¹²²

19. When the substantive work of UNCLOS III commenced at the second session (1974), the First Committee had before it several documents that formed the basis for its work. Foremost among these were the

¹²⁰ At the first and second sessions, the Australian representative was H. C. Mott; at the third to tenth sessions, it was John Bailey; and at the eleventh session, Keith Brennan served as Rapporteur.

¹²¹ The full list is reproduced in I SBC Report 1972, at 5-8. For the allocation of the items to different committees at UNCLOS III, see A/CONF.62/28 (1974), III Off. Rec. 57. See also Vol. I of this series, at 32 and 87.

¹²² Supra note 101. Cited in A/CONF.62/29 (1974), Note, III Off. Rec., at 59, 61.

Declaration of Principles and the draft alternative texts prepared by Sub-Committee I of the Sea-Bed Committee. In addition, the Secretary-General prepared an extensive report on the "Economic implications of sea-bed mineral development in the international area."¹²³ During the second session, the First Committee held seventeen formal and twenty-three informal meetings. The international regime and machinery was considered at the 2nd to 8th meetings; the economic implications of seabed mineral development were considered at the 9th and 10th meetings and 12th to 14th meetings, while the conditions of exploration of the Area were discussed at the 14th and 15th meetings. In addition, the 11th meeting and part of the 14th meeting were devoted to reports on the informal meetings. Part of the 15th to 17th meetings was devoted to reports from an open-ended Working Group established to pursue negotiations on the principles of the international regime and on conditions of exploration and exploitation.¹²⁴ Negotiations in the Working Group centered on two issues: (i) the system of exploration and exploitation— who may exploit the Area; and (ii) the conditions of exploration and exploitation.¹²⁵ Those two issues were seen as being virtually inseparable.¹²⁶ As a result of the negotiations undertaken in the Working Group, both technical and substantive adjustments were made to the working paper produced by Sub-Committee I of the Sea-Bed Committee.¹²⁷

20. At the third session (1975), the First Committee conducted its work in formal meetings and through the Working Group. In its formal meetings, the Committee discussed the structure, powers, and functions of the international machinery to be established, especially those provisions relating to the structure and functions of the Authority and their relevance to the negotiations on the basic conditions of exploration and exploitation.¹²⁸

¹²³ A/CONF.62/25 (1974), III Off. Rec., at 4-40 (Secretary-General).

¹²⁴ That Working Group was established at the 14th meeting of the First Committee, based on a proposal by Brazil. First Committee, 14th meeting (1974), paras. 36-37 and 39, II Off. Rec. 73. The Working Group was directly related to the Working Group established by Sub-Committee I of the Sea-Bed Committee. As with the former Working Group, the Chairman of the Working Group established in the First Committee was Christopher W. Pinto (Sri Lanka).

¹²⁵ See A/CONF.62/L.8/Rev.1 (1974), Annex I, paras. 18-22, at 93, 103. The report by the Chairman of the Working Group is contained in the report of the 17th meeting of the First Committee, paras. 2-21, II Off. Rec. 84-86. In that report, the Chairman notes that the negotiations centered around article 9, alternative B, addressing the question of who may exploit the Area, and on a proposal submitted by the Group of 77 concerning the conditions of exploration and exploitation. *Id.*, para. 20. For the Group of 77 proposal, see A/CONF.62/C.1/L.7 (1974), III Off. Rec. 172.

¹²⁶ First Committee, 20th Meeting (1975), para. 1, IV Off. Rec. 54.

¹²⁷ That text is reproduced as A/CONF.62/C.1/L.3 (1974), articles 1 to 21, III Off. Rec. 157-64.

¹²⁸ See A/CONF.62/C.1/L.15 (1975), para. 9, IV Off. Rec. 189, 190 (Rapporteur, First Committee); and First Committee, 20th meeting, para. 11, IV Off. Rec. 56.

The Chairman noted that the international machinery must be established parallel to the international regime, since they were integral parts of the new order being established under the Convention.¹²⁹ The formal work and the number of informal meetings were curtailed, however, and emphasis was placed on working in small informal negotiating groups.¹³⁰ The Chairman of the Working Group, Christopher Pinto (Sri Lanka), indicated that the group “had then singled out and classified in groups items of fundamental importance for [the] negotiations,” namely:

first, the issues relating to the scope of the Authority’s power (stages of operations, legal arrangements relating to activities, Authority’s power to open areas, production control), secondly the issues concerning the method of entering into arrangements with the Authority and basic principles of those arrangements (selection of entities, participation in subsequent stages of operation, financial arrangements), and thirdly, the issues relating to the settlement of disputes (security of tenure, enforcement, *force majeure*, suspension or termination of arrangements entered into, settlement of disputes).¹³¹

Furthermore, the Chairman of the Working Group reported the decision of the group that

for the time being, its aim was to lay down certain basic conditions, certain fundamental norms to be set out in the Convention, that would offer guidance to the future Authority and its organs in the performance of their functions. The basic conditions would thus enable the Authority’s powers to be clarified and circumscribed.¹³²

The Chairman felt that the Working Group should complete its work on the basic conditions before returning to consideration of articles 1 to 21 of its text prepared at the previous session.¹³³ The working group subsequently prepared (and later revised) an informal paper on “Basic conditions of exploration and exploitation.”¹³⁴ That document sought to reconcile different points of view and indicated the important elements that had been brought out in the discussions.

Following a recommendation by the General Committee and subsequent decision by the Conference at the 55th plenary meeting, the Chairman of each Main Committee was requested to prepare a single

¹²⁹ First Committee, 20th meeting, paras. 16 and 18, IV Off. Rec. 56.

¹³⁰ First Committee, 19th meeting, para. 3, IV Off. Rec. 51. See also A/CONF.62/C.1/L.15, supra note 128, para. 7.

¹³¹ First Committee, 19th meeting, paras. 15 and 16, IV Off. Rec. 53.

¹³² *Ibid.*, para. 17.

¹³³ First Committee, 23rd meeting (1975), para. 6, IV Off. Rec. 70, 71.

¹³⁴ See CP/Cab.12 and Rev.1 (both 1975). Reproduced in VI Platzöder 81 and 90.

negotiating text covering the subjects allocated to his Committee.¹³⁵ The Chairman of the Working Group thought that the First Committee “might perhaps like to consider adopting the corresponding articles in that text as a basis for discussing the substantive questions previously covered by articles 1 to 21 in [the Group’s earlier paper].”¹³⁶ At the end of the third session, Part I of the Informal Single Negotiating Text (ISNT/Part I) was issued by the Chairman of the First Committee.¹³⁷ In the Introduction to that text, the Chairman noted that it would

serve as a procedural device and only provide a basis for negotiation. It must not in any way be regarded as affecting either the status of proposals already made by delegations or the right of delegations to submit amendments or new proposals.¹³⁸

As the Chairman subsequently explained, that text contained ideas drawn from his personal impressions of what could provide a consensus, and was designed to identify problems, not resolve them. Further, he had

worked in the light of the provisions contained in the [Declaration of Principles] . . . Also of considerable importance for me was another international document commanding wide universal support: the Declaration on the Establishment of a New International Economic Order adopted by the General Assembly on 1 May 1974 at its sixth special session.¹³⁹

Annex I of the ISNT/Part I addressed the “Basic conditions of general survey, exploration and exploitation.” That annex was taken from the informal paper circulated by the Working Group.¹⁴⁰ Reflecting the trend towards discussion of the international machinery and its subsidiary organs, a footnote to the annex indicated that annexes issued in the future would cover the Statute of the Enterprise and of the Tribunal, both of which were

¹³⁵ See 54th and 55th plenary meetings (1975), IV Off. Rec. 11-26 (especially paras. 92 and 93 of the latter). For discussion in the General Committee, see 10th and 11 meetings (1975) (esp. paras. 5 and 49 of the latter). See further T. T. B. Koh and S. Jayakumar, “The Negotiating Process of the Third United Nations Conference on the Law of the Sea,” in Vol. I of this series, at 29, 115 (para. 11).

¹³⁶ First Committee, 23rd meeting (1975), para. 6, IV Off. Rec. 70, 71.

¹³⁷ A/CONF.62/WP.8/Part I (ISNT, 1975), articles 1 to 63, and Annex I, IV Off. Rec. 137-52 (Chairman, First Committee). Articles 64 to 75 of that text contained Final Provisions for incorporation in a draft Convention.

¹³⁸ For further details on the problems associated with the preparation of this text, which help to account for the unnecessary complexity and obscurity of many of the provisions of Part XI and Annex III, see Koh and Jayakumar, *supra* note 135, at 116 (para. 14).

¹³⁹ See A/CONF.62/L.16 (1976), second para., VI Off. Rec. 130 (Chairman, First Committee). See also First Committee, 24th meeting (1976), para. 1, V Off. Rec. 97.

¹⁴⁰ *Supra* note 134.

to be principal organs of the Authority to be established. The ISNT/Part I produced by the Chairman of the First Committee did not satisfy either the developing countries or the industrialized countries and served to further polarize the positions in each camp.

21. In response to its dissatisfaction with the ISNT, the U.S. administration gave more attention to the status of the negotiations. In April 1976, immediately prior to the fourth session, U.S. Secretary of State Henry Kissinger made a major policy statement on the Law of the Sea negotiations.¹⁴¹ In his statement, Kissinger, who viewed the Law of the Sea negotiations primarily in the context of broader North-South relations, announced that while the U.S. “cannot accept” that the “right of access to seabed minerals be given exclusively to an international authority or be so severely restricted as effectively to deny access to the firms of any individual nation,” it was prepared to accept “that an ‘Enterprise’ should be established as part of the International Seabed Resource Authority and given the right to exploit the deep seabeds under the same conditions as apply to all mining.” The U.S. recognized that the world community should share in the benefits of deep seabed exploitation and that “the riches of the sea” should “not be the exclusive preserve of only the most powerful and technologically advanced nations.” Kissinger stated that the U.S. would be able to accept, as part of an overall settlement,

a system in which prime mining sites are reserved for exclusive exploration by the Enterprise or by the developing countries directly — if this approach meets with broad support. Under this system, each individual contractor would propose two mine sites for exploitation. The Authority would then select one of these sites, which would be mined by the Authority directly, or made available to developing countries at its discretion. The other site would be mined by the contractor on his own.¹⁴²

The other elements of this overall settlement¹⁴³ included a proposal for an equitable decision-making system through an International Seabed Resource Authority, comprising an Assembly, Council (the composition and structure of which would “reflect the producer and consumer interests of those States most concerned with seabed mining”), Secretariat, and Tribunal; non-discriminatory access to seabed mining sites for States and

¹⁴¹ *The Law of the Sea: A Test of International Cooperation*, 74 U.S. Department of State Bulletin, No. 1922, pp. 533-542, April 26, 1976. The statement was made in New York on April 8, 1976, before the Foreign Policy Association, the U.S. Council of the International Chamber of Commerce, and the UN Association of the U.S.A.

¹⁴² *Ibid.*, 540.

¹⁴³ *Ibid.*, 541-42. Kissinger’s proposals also dealt with the other issues vital to the U.S. of the right to conduct marine scientific research in the economic zone and dispute settlement. These were an integral part of the overall package.

their nationals under specified and reasonable conditions; and temporary production limitations together with adjustment assistance programs to respond to the legitimate concerns of land-based producers of minerals, provided that, after the limited period to be fixed in the treaty, seabed production should be governed by overall market conditions.

At the fourth session (1976), discussions in the First Committee were conducted in informal meetings and in small groups of experts on a given subject. The results of those discussions were communicated to the Chairman, who issued a series of drafts on various provisions of the ISNT/Part I,¹⁴⁴ which were circulated to all delegations. Based on the response to those drafts, the Chairman prepared Part I of the Revised Single Negotiating Text (RSNT/Part I).¹⁴⁵ That text included three annexes dealing with: (i) basic conditions of prospecting, exploration, and exploitation; (ii) Statute of the Enterprise; and (iii) Statute of the seabed dispute settlement system. In addition, there was a "Special Appendix" dealing with financial arrangements of the Authority (the provision on that subject had been left blank in Annex I of the ISNT/Part I). For the first time, the RSNT included an extensive introductory note by the President of the Conference as well as introductory notes by the Chairmen of the First and Second Committees, which explained the changes that had been made in the text.¹⁴⁶ The President's note stressed that the text

will have no other status other than that of serving as a basis for continued negotiation without prejudice to the right of any delegation to move any amendments or to introduce any new proposals. The texts must not be regarded as committing any delegation or delegations to any of their provisions.

The RSNT incorporated a modified version of Kissinger's proposal for a parallel system. Nevertheless, while the RSNT was viewed as a major improvement by the United States, the reception from other western European States and Japan was less enthusiastic. The text was also unacceptable to the Group of 77, many of whom were unhappy at the extent of the concessions made to the industrialized countries and particularly wanted to see far more emphasis placed on the transfer of technology, without which the newly industrialized countries would have little prospect of participating in seabed mining.

¹⁴⁴ Those papers became known as the "PBE Series," circulated as C.1/PBE.1 to 17. Reproduced in VI Platzöder 100-65. Those papers also reflected discussions held in intersessional meetings prior to the fourth session.

¹⁴⁵ A/CONF.62/WP.8/Rev.1/Part I (RSNT, 1976), articles 1 to 63, and Annexes I, II, and III, V Off. Rec. 125-50 (Chairman, First Committee). For further details, see Koh and Jayakumar, *supra* note 135, at 119 (para. 26). The articles concerning final provisions were deleted in this text, since they were general in nature and affected the Convention as a whole.

¹⁴⁶ A/CONF.62/WP.8/Rev.1 (RSNT, 1976), V Off. Rec. 125.

22. At the fifth session (1976), the First Committee held a series of formal meetings; however, most of the Committee's work took place in informal meetings, "either in the workshop set up by the committee, or in the *ad hoc* group created by the workshop to conduct negotiations on the system of exploitation of the international sea-bed area."¹⁴⁷ Both groups were co-chaired by Satya P. Jagota (India) and Hans H. M. Sondaal (Netherlands). The focus of the discussion in the workshop was article 22 of the RSNT/Part I, dealing with the functions of the Authority, and related paragraphs in Annex I (particularly paragraphs 7 and 8), on the basic conditions of prospecting, exploration, and exploitation. Various proposals for article 22 were submitted to the workshop as a basis for its discussions in the form of working papers, although these continued to reflect a basic divergence of approach between a parallel, or dual-access, system in which States Parties, other entities, and the Enterprise would be able to carry out activities in the Area under contracts with the Authority (which would continue to exercise fiscal and administrative supervision over the Area) and a system where activities in the Area were to be conducted exclusively by the Authority. The Group of 77 put forward a proposal whereby activities carried out by the Enterprise would be conducted under a formal written plan of work, while activities carried out by States Parties in association with the Authority would be conducted under a contract with the Authority. Both the plan of work and the contract would be drawn up in accordance with the guidelines set out in Annex I and would be subject to approval by the Council. The Authority, however, would exercise full and effective control over all activities in the Area. Despite the various proposals, the workshop failed to reach any conclusive outcome. In their final report, the Co-Chairmen pointed out that some important issues concerning the system of exploitation—for example, the reservation of areas and the financial arrangements—were left for future discussion.¹⁴⁸ The Chairman of the Committee noted that despite the apparent lack of progress, it had at least isolated and narrowed areas of disagreement and, in doing so, had completed the first phase of its task. He continued:

Having completed this initial phase, dealing vigorously and courageously with a wide variety of legal, technical and economic problems, we have now come to confront the central and most difficult problem of all and it is this: should the new system of exploitation provide for a guaranteed

¹⁴⁷ See A/CONF.62/L.16, VI Off. Rec., at 131. The workshop was established at the 26th meeting of the Committee on the recommendation of the Vice-Chairmen of the Committee. See further A/CONF.62/C.1/L.18 (1976), VI Off. Rec. 161 (Rapporteur, First Committee).

¹⁴⁸ The final report on the workshop is contained in A/CONF.62/C.1/WR.5 and Add.1 (1976), VI Off. Rec. 165-69 (Co-Chairmen, workshop). See also the weekly reports, A/CONF.62/C.1/WR.1 to 5, VI Off. Rec., at 162-65.

permanent role in sea-bed mineral exploitation for State Parties and private firms? Or should such a role for States Parties and private firms be considered only at the option of and subject to conditions negotiated by the Authority? Or again, should their role be conceived of as essentially temporary, to be phased out over a defined period agreed to beforehand?¹⁴⁹

This he considered to be the most important question faced by the First Committee. The Committee also recognized the need to consider the question of the settlement of disputes, but discussion of that issue was deferred to the next session owing to lack of sufficient time to give it proper consideration.¹⁵⁰ Additional material for consideration by the Committee was presented in a study prepared by the Secretary-General on "Alternative means of financing the Enterprise."¹⁵¹ That study addressed, *inter alia*, how the Enterprise could obtain the necessary technology to become operational; however, it was submitted too late for detailed discussion at the fifth session.

Towards the end of the fifth session, on 1 September 1976, U.S. Secretary of State Henry Kissinger again visited New York and held private meetings with the President of the Conference and with key delegation leaders.¹⁵² At a reception for heads of delegations to the Conference the same evening, Kissinger made public a number of additional proposals in an attempt to break the deadlock in the First Committee. In response to the concerns of the Group of 77 that the Enterprise would not be a viable entity without adequate financing and technology, Kissinger stated that the U.S. would be prepared to "agree to a means of financing the Enterprise in such a manner that the Enterprise could begin its mining operation either concurrently with the mining of states or private enterprises or within an agreed timespan that was practically concurrent."¹⁵³ Kissinger also proposed that the financing mechanism would include "agreed provisions for the transfer of technology so that the existing advantage of certain industrialized states would be neutralized over a period of time." At this time also, the idea of a periodic conference to review the seabed mining provisions of the Convention was also raised for the first time.¹⁵⁴ Although

¹⁴⁹ A/CONF.62/L.16, VI Off. Rec., at 130, 132.

¹⁵⁰ See A/CONF.62/C.1/L.18, VI Off. Rec., at 160, 162 (para. 14).

¹⁵¹ See A/CONF.62/C.1/L.17 (1976), VI Off. Rec. 156-61 (Secretary-General). That study had been requested by the First Committee at its 28th meeting, paras. 9-14, VI Off. Rec. 60.

¹⁵² See *Remarks following meeting* (Press Release 409, September 1, 1976), in *Secretary Kissinger Discusses U.S. Position on Law of the Sea Conference*, 75 U.S. Dept. of State Bull., No. 1944 (September 27, 1976).

¹⁵³ *Ibid.* Nordquist and Park, *Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea*, 1983, pp. 141, 145.

¹⁵⁴ Schmidt suggests that in proposing the review conference Kissinger was motivated in part by his experience of arms control negotiations. Markus G. Schmidt, *Common Heritage or Common Burden . . .*, *supra* note 8.

the U.S. proposals were not discussed in any detail during the fifth session and, indeed, some delegations preferred to wait for the outcome of the U.S. presidential elections later that year, they were to have a major influence on the future direction of the Conference and became the focus of discussions in subsequent sessions.

23. At intersessional consultations between the fifth and sixth sessions, the proposed mini-package on the system of exploration and exploitation, the so-called “parallel system,” was developed in greater detail to include provisions on the setting up and financing of the Enterprise, as well as the question of refining or revising the temporary system envisaged for the period prior to entry into force. Those consultations also highlighted the importance of basic issues related to the tenure of contract during an “interim period” after the entry into force of the Convention, at the end of which the “parallel system” would be reviewed to see if it had worked, and the mandate and decision-making processes of the Review Conference.¹⁵⁵ At the sixth session (1977), the Chairman proposed that, to facilitate the Committee’s work, the “mini-package” would comprise the resource policy of the Authority, the system of exploitation, and the setting up and financing of the Enterprise, particularly in the start-up phase.¹⁵⁶ In his report at the start of the session, the Chairman indicated that the Committee should concentrate on “a number of basic elements which could complete the over-all package deal, namely, the problems of exploitation, the institutional questions and the dispute settlement system.”¹⁵⁷ Further, he noted that

efforts should now be focused on determining the conditions of exploitation and the financial means most appropriate for the initial system . . . With respect to conditions of exploitation, it was necessary to determine the qualifications and the methods of selection of applicants and the rights and obligations of the contractors.¹⁵⁸

With regard to the question of financial arrangements, the Chairman referred to the report prepared by the Secretary-General, in response to the Committee’s request, on “Costs of the Authority and contractual means of financing its activities.”¹⁵⁹ He also noted, *inter alia*, that (i) means had to be developed to make technology available through the Authority and its subsidiary organs for the benefit of mankind; (ii) the search should continue for a feasible means of financing the Enterprise and ensuring an expeditious

¹⁵⁵ See A/CONF.62/WP.10/Add.1 (1977), VIII Off. Rec. 65, 66 (President); see also First Committee, 38th meeting (1977), para. 3, VII Off. Rec. 31. See also Commentary on article 155.

¹⁵⁶ See A/CONF.62/WP.10/Add.1, VIII Off. Rec., at 66.

¹⁵⁷ First Committee, 38th meeting (1977), para. 1, VII Off. Rec. 31.

¹⁵⁸ *Ibid.*, para. 3.

¹⁵⁹ A/CONF.62/C.1/L.19 (1977), VII Off. Rec. 54-73 (Secretary-General).

decision-making process, to make it more commercially viable; (iii) consideration should be given to joint-venture arrangements; (iv) the decision-making process of the Assembly, and its powers and functions, should be examined; (v) attention should be given to the structures, powers, and functions of the subsidiary organs; (vi) the question of a review clause for the system of exploitation should be examined; and (vii) elaboration of the dispute settlement system under the competence and jurisdiction of the Tribunal was necessary.¹⁶⁰ With regard to the latter issue, it was noted that there were two major categories of disputes: those that were primarily contractual and administrative, and those involving the interpretation of provisions of the Convention.¹⁶¹

To deal with questions on the system of exploitation, an informal working group of the whole was established, with Jens Evensen (Norway) as its Special Coordinator.¹⁶² Despite intensive negotiating efforts, the working group was not able to obtain consensus on the main elements regarding the system of exploitation. In addition, small groups of experts worked on the resource policy, financial terms of contracts, and the "Special Appendix" (in the RSNT/Part I) dealing with financial arrangements. Consultations were also undertaken regarding the question of a quota system or anti-monopoly clause and regarding institutional arrangements. With regard to the latter, the most important question was the composition of the Council. The subsequent report by the Chairman of the First Committee outlined in detail the issues for further consideration by the Committee, including: (i) the resource policy; (ii) the organization of activities in the Area; (iii) financing of the Enterprise; (iv) institutional questions; and (v) the settlement of disputes.¹⁶³ Although many outstanding questions remained, the results of the discussions on these diverse topics were reflected in the Informal Composite Negotiating Text (ICNT) issued in 1977.¹⁶⁴

24. At the seventh session (1978), the Conference recognized that the First Committee was not making sufficient progress as compared to the other Main Committees and that several hard-core issues remained unresolved in both the First and Second Committees. It was felt necessary to involve more people who had a deeper understanding of the substantive issues and who could be entrusted with the responsibility to find acceptable solutions to those issues. In order to give a renewed impetus to negotiations on First Committee issues, it was decided to bring the outstanding hard-core issues from the Main

¹⁶⁰ See the Chairman's report generally, VII Off. Rec. 31-32.

¹⁶¹ *Ibid.*, at 32.

¹⁶² *Ibid.* See also A/CONF.62/C.1/L.21 (1977), VII Off. Rec. 78 (Chairman, First Committee).

¹⁶³ For the Chairman's report, see A/CONF.62/C.1/L.21 (1977), VII Off. Rec., at 78-83.

¹⁶⁴ A/CONF.62/WP.10 (ICNT, 1977), articles 133 to 192, and Annexes II and III, VIII Off. Rec. 1, at 22-34 and 49-57. A Memorandum accompanying that text, issued by the President of the Conference, elaborated on the elements considered by the Committee. See A/CONF.62/WP.10/ Add.1 (1977), VIII Off. Rec., at 66-68.

Committees to the Plenary and allocate them to seven negotiating groups, which would be responsible directly to the Plenary.¹⁶⁵ Each negotiating group comprised a nucleus of countries principally concerned with the outstanding core issue, but was open-ended (that is, open to all interested delegations). Three groups dealt with matters originating in the First Committee, namely:

Negotiating Group 1

[Chairman: Francis X. Njenga (Kenya)]:

- System of exploration and exploitation, and resource policy;

Negotiating Group 2

[Chairman: Tommy T. B. Koh (Singapore)]:

- Financial arrangements (of the Authority and the Enterprise, as well as the financial terms of contracts for exploration and exploitation);

Negotiating Group 3

[Chairman: Paul Bamela Engo (Cameroon)]:

- Organs of the International Seabed Authority, their composition, powers and functions.

Following discussions in each negotiating group, the Chairman of the group submitted suggested compromise proposals on the issue(s) dealt with in his group.¹⁶⁶ Those proposals were intended to help foster consensus by providing new bases for negotiations and were discussed in the First Committee before being taken to the Plenary. Negotiating Groups 1, 2, and 3 concluded their work midway through the eighth session (1979).¹⁶⁷

¹⁶⁵ See A/CONF.62/62 (1978), para. 5, X Off. Rec. 7; See Koh and Jayakumar, *supra* note 135, at 92 and 97 (para. 13). For the report to the Plenary by the Chairman of the First Committee on issues relating to the First Committee, see A/CONF.62/RCNG/1 (1978), X Off. Rec. 13, at 14-18.

¹⁶⁶ For the text of those proposals, see NG1/10/Rev.1 (Chairman, NG1); NG2/4, NG2/5 and NG2/7 (Chairman, NG2); and NG3/2 (Chairman, NG3), all reproduced in A/CONF.62/RCNG/1 (1978), X Off. Rec. 21, 54, 56, 58, and 74, respectively. Also reproduced in IX Platzöder. Similar compromise proposals were submitted at the resumed seventh session (1978), where the First Committee held only one informal meeting to receive the reports from the negotiating groups. For the text of those proposals, see NG1/13 and Corr.1, NG2/10/Rev.1, and NG3/4, reproduced in A/CONF.62/RCNG/2 (1978), X Off. Rec. 137, 144, and 158, respectively.

¹⁶⁷ See A/CONF.62/L.36 (1979), XI Off. Rec. 96 (Chairman, First Committee). Summary reports by the Chairmen of the hard-core negotiating groups, and of the informal negotiating groups, are contained in First Committee, 45th meeting, paras. 3-34, *ibid.*, 49-52. The results of the discussions in the negotiating groups on hard-core issues are contained in NG1/16/Rev.1, reproduced in A/CONF.62/L.35 (1979), Annex III, XI Off. Rec. 86, 90-96 (Chairman, NG1); NG2/4 and NG2/5, reproduced in A/CONF.62/C.1/L.22 (1979), Annexes I and II (dealing with the financial arrangements of the Authority and the Enterprise, respectively), *ibid.*, 103, 105 (Chairman, NG2); NG2/12 *id.*, Annex III, at 106; and NG3/6 (1979), reproduced in IX Platzöder 295 (Chairman, NG3).

25. During the eighth session, several new informal negotiating groups were established within the First Committee. An informal group on the question of production policies was established under the auspices of NG1, chaired by Satya N. Nandan (Fiji).¹⁶⁸ In addition, a Group of Legal Experts was formed to deal with the question of the settlement of disputes relating to Part XI, under the chairmanship of Harry Wuensche (German Democratic Republic).¹⁶⁹ In response to a proposal by the Group of 77, the Conference also established a negotiating group of limited size to resolve all the outstanding issues relating to the agenda of the First Committee. This negotiating group was called the "Working Group of 21" (WG.21) and operated under the co-chairmanship of the Chairmen of Negotiating Groups 1, 2, and 3.¹⁷⁰ Although the membership of WG.21 was restricted, its membership was based on regional representation and therefore brought together spokesmen and representatives of all interest groups. WG.21 was established by the General Committee and should by right have reported directly to the Plenary. However, at the insistence of the Chairman of the First Committee, the Group reported in the first instance to the First Committee and the Chairman of the First Committee then reported to the Plenary on behalf of WG.21.¹⁷¹

The results of the negotiations in these various groups were incorporated in the ICNT/Rev.1¹⁷² issued at the end of the session. The President's explanatory memorandum to that text stressed that the revision remained a *negotiating* text, not a *negotiated* text. At the resumed eighth session (1979), WG.21 continued its work under the overall chairmanship of the Chairman of the First Committee. The Chairman of NG1 coordinated

¹⁶⁸ The report by the Chairman of those negotiations is reproduced in A/CONF.62/L.35 (1979), Annex I, XI Off. Rec. 86, 87 (Chairman, NG1).

¹⁶⁹ That issue had been raised in the Plenary; see, in particular, the statement by the representative of Israel at the 110th plenary meeting, paras. 34-36, XI Off. Rec. 5. The Group of Legal Experts was set up by the Chairman of the First Committee in consultation with the President of the Conference. The results of that group's work are contained in A/CONF.62/C.1/L.25 and Add.1 (1979), XI Off. Rec. 109-20 (Chairman, Group of Legal Experts on settlement of disputes relating to Part XI).

¹⁷⁰ Ambassador Tommy Koh (Singapore) at this time was also the President of the Conference following the death of Hamilton Shirley Amerasinghe (Sri Lanka).

¹⁷¹ WG.21 comprised ten members nominated by the Group of 77, seven members from the western European countries, three members from the Eastern European Group and China. For further details on the composition and work of WG.21, see Koh and Jayakumar, *supra* note 135, at 93 (para. 15). The Chairman's report on the work of WG.21, and on the work of NG3, is contained in A/CONF.62/C.1/L.23 (1979), XI Off. Rec. 107 (Chairman, First Committee). The compromise proposals prepared by the Chairmen of WG.21 are contained in WG.21/1 (1979, mimeo.) [Chairman, First Committee]. Reproduced in VI Platzöder 317-63.

¹⁷² A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979), articles 133 to 191, and Annexes II and III. Reproduced in I Platzöder 375, at 436-61 and 500-20.

the negotiations on the system of exploration and exploitation; the Chairman of NG2 coordinated the negotiations on financial arrangements; and the Chairman of the group of legal experts held separate meetings of his group and reported to WG.21.¹⁷³ WG.21 considered the hard-core issues in the following order: first, the Assembly and the Council—the composition of the Council, the decision-making system, and the relationship between the Council and the Assembly; second, financial arrangements; and third, the system of exploration and exploitation.¹⁷⁴

26. At the ninth session (1980), negotiations and consultations on the outstanding issues before the First Committee were again conducted mainly in WG.21, continuing the format followed at the previous session. The Chairman of the Committee received reports from the various coordinators and included them in his report on the negotiations. The main issues discussed related to: (i) the system of exploration and exploitation, and the resource policy; (ii) production policies; (iii) financial arrangements, particularly with regard to the financing of the Enterprise, the financial terms of contracts and the Statute of the Enterprise; (iv) the Assembly and the Council, and their relationship; and (v) the settlement of disputes relating to Part XI.¹⁷⁵ In addition, the issue of the seat of the International Seabed Authority was raised but was referred to the Plenary for later discussion.¹⁷⁶ Following the general debate, the results of the negotiations were reflected in the ICNT/Rev.2, issued on 11 April 1980.¹⁷⁷ The President of the Conference stressed that the text remained a *negotiating* text but provided a better basis of negotiation and offered a substantially improved prospect of consensus.

At the resumed ninth session in Geneva (1980), WG.21 continued its work, following the same method of working as at the previous session.

¹⁷³ Suggestions resulting from consultations held by the Chairman and the Coordinators of WG.21 are contained in WG.21/2 (1979), reproduced in A/CONF.62/C.1/L.26 (1979), Appendix A, XII Off. Rec. 77, 84-90 (that report itself is annexed to A/CONF.62/L.43 [1979], XII Off. Rec. 74 [Chairman, First Committee]). The report by the Chairman of the group of legal experts on the settlement of disputes relating to Part XI is contained in GLE/2 (1979), reproduced in *ibid.*, Appendix B, at 90-92.

¹⁷⁴ For details on those discussions, see A/CONF.62/C.1/L.26 (1979), XII Off. Rec., at 77-84.

¹⁷⁵ For details on those negotiations, as well as texts suggested by the Chairmen of the groups dealing with the outstanding issues, see A/CONF.62/C.1/L.27 and Add.1 (1980), XIII Off. Rec. 113-137 (Coordinators, WG.21) [submitted by the Chairman of the First Committee]. See also A/CONF.62/L.54 (1980), *ibid.*, 88-90 (Chairman, First Committee).

¹⁷⁶ See A/CONF.62/C.1/L.54 (1980), XIV Off. Rec. 90, paras. 25-26. See also para. 13 of the President's explanatory memorandum in A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2), at 21. For further details on this matter, see the Commentary on article 156 below.

¹⁷⁷ A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980), articles 133 to 191, and Annexes III and IV. Reproduced in II Platzöder 3, at 64-91 and 129-55.

The report on those negotiations by the Chairman of the First Committee highlighted some of the significant aspects of the package that had been worked out in the Committee, namely: (i) the sharing of benefits derived from the Area; (ii) production policies for seabed resources, (iii) the Review Conference; (iv) a three-tier mechanism for decision-making; (v) transfer of technology; (vi) the anti-monopoly clause; (vii) the financial terms of contracts; (viii) the Statute of the Enterprise; and (ix) interim arrangements pending entry into force of the Convention and the Preparatory Commission.¹⁷⁸ The report of the Coordinators of WG.21 provides further details on the issues considered.¹⁷⁹ With respect to the negotiations in the First Committee, the Chairman of the First Committee reported that the package negotiated in the Committee was considered a breakthrough in the negotiations and that

the package reflected in the new texts, in spite of its shortcomings and the work that still has to be done, form[s] the best available basis for an acceptable compromise at this stage.¹⁸⁰

Following the session on 22 September 1980, the ICNT/Rev.3 was issued under the title "Draft Convention on the Law of the Sea, Informal Text."¹⁸¹ In his explanatory memorandum, the President explained that although the title of the text had been changed, it did not "prejudge the status of the text" as a negotiating text.

27. Shortly before the tenth session (1981), the United States of America, under the new administration of President Ronald Reagan, decided to conduct a detailed review of the entire Convention and to not participate in the negotiations pending the outcome of that review. A principal focus of the review was Part XI and the related annexes.¹⁸² In that regard, among the concerns cited by the United States were:

- (a) the imposition of burdensome regulations on a vast expanse of the seabed, about which little was known but which might prove economically and strategically important in the future;
- (b) preferential treatment for the Enterprise, including provisions for its financing through contributions to the Authority;
- (c) mandatory transfer of technology to the Enterprise and to developing States;

¹⁷⁸ See A/CONF.62/L.62 (1980), XIV Off. Rec. 135-39 (Chairman, First Committee).

¹⁷⁹ A/CONF.62/C.1/L.28 and Add.1 (1980), XIV Off. Rec. 161-84 (Coordinators, WG.21).

¹⁸⁰ A/CONF.62/L.62, XIV Off. Rec. 135 (para. 7).

¹⁸¹ A/CONF.62/WP.10/Rev.3* (ICNT/Rev.3, 1980), articles 133 to 191, and Annexes III and IV. Reproduced in II Platzöder 179, at 240-68 and 313-38.

¹⁸² For an explanation of the U.S. position, see the statement by the U.S. representative (James L. Malone) at the 145th plenary meeting (1981), paras. 57-61, XV Off. Rec. 12. See further the statement by Bernard H. Oxman, Deputy Head of the U.S. delegation, at the 60th meeting of the General Committee (1981), para. 14, *ibid.* 50.

- (d) limitations on the production of manganese nodules from the deep seabed, to protect land-based producers;
- (e) lack of guaranteed representation for the U.S. on the Council of the Authority;
- (f) the Review Conference, through which amendments could become binding on the U.S. even without its acceptance of those amendments;
- (g) revenue-sharing obligations on seabed mining contractors;
- (h) revenue-sharing obligations on the production of hydrocarbons from the continental shelf beyond 200 nautical miles from the coast; and
- (i) lack of provisions for preparatory investment protection.¹⁸³

As a result of the U.S. decision to review the Draft Convention, little substantive progress was made in the negotiations on Part XI and Annex III at the tenth and resumed tenth sessions.

Notwithstanding the U.S. position, the First Committee held four formal meetings during the tenth session. Two of those meetings were devoted to a general debate on the issue of the Preparatory Commission. As the Chairman of the First Committee reported:

[T]he question of the Preparatory Commission had been considered by the plenary Conference at its informal meetings, as part of the President's consultations on the final clauses. It became clear that the issues involved were so closely related to the issues on Part XI that the First Committee was the more appropriate forum for the negotiating process.¹⁸⁴

Consequently, the matter was taken up in the First Committee, within the framework of WG.21, in a negotiating group co-chaired by the President of the Conference and the Chairman of the First Committee. Using the President's report as the basis of the negotiations,¹⁸⁵ discussions in WG.21 focused on, *inter alia*, the composition, mandate, decision-making system, and the financing of the Preparatory Commission. The other two meetings of the First Committee were devoted to discussion of two reports by the Secretary-General. The first addressed "Potential financial implications for States Parties to the future

¹⁸³ For details on these and other issues of concern to the U.S., see the statement by Ambassador Malone, Chairman of the U.S. delegation, on 28 April 1981 before the [U.S.] House Committee on Merchant and Fisheries, Sub-Committee on Oceanography, reproduced in 81 Dept. of State Bull. 48-51 (July 1981).

¹⁸⁴ A/CONF.62/L.70 (1981), XV Off. Rec. 148, para. 5 (Chairman, First Committee). See further the Chairman's report at the 150th plenary meeting (1981), *ibid.*, 27, paras. 1-12.

¹⁸⁵ The President's report on the informal plenary meetings on the Preparatory Commission appears in A/CONF.62/L.55 (1980), XIII Off. Rec. 90-94.

Convention” and related to financial contributions by States Parties to the administrative budgets of the Authority and the Tribunal (and to other organs to be established) and the methodology for determining the level of contribution to the budget of the Enterprise.¹⁸⁶ The second report dealt with the “Effects of the production limitation formula under certain specified assumptions.”¹⁸⁷ In addition, the location of the headquarters of the Authority was discussed for the first time (see further Commentary on Article 159). Other items raised for discussion included: (i) the issue of production policies, in particular the impact of the production limitation formula; (ii) the matter of the unfair economic practices with respect to the production, processing, transport, and marketing of minerals in the Area and commodities derived from those resources; and (iii) representation on the Council.¹⁸⁸

Those discussions continued throughout the resumed tenth session (1981).¹⁸⁹ In addition, the issue of preparatory investment protection (to protect investments in seabed mining made prior to entry into force of the Convention) was raised, although discussion of this matter was deferred to the eleventh session. Although the First Committee was not able to complete negotiations on all the issues before it, the Draft Convention was issued on 28 August 1981.¹⁹⁰ The introduction to that text indicated that consultations and negotiations on outstanding issues would continue at the next session.

28. In January 1982, President Reagan announced that the United States was returning to the negotiations “to work with other countries to achieve an acceptable treaty” and that the United States was “committed to the multilateral treaty process for reaching agreement on the Law of the Sea.”¹⁹¹ President Reagan outlined the U.S. objectives with respect to changes it considered necessary to correct unacceptable elements of the Draft Convention, focusing specifically on the regime for seabed mining.

29. At the eleventh session (1982), the first three weeks were devoted to further consultations and negotiations on issues still pending. In the First Committee, WG.21 continued to negotiate provisions relating to the Preparatory Commission and the treatment of preparatory investments.¹⁹²

¹⁸⁶ A/CONF.62/L.65 (1981), XV Off. Rec. 102-19 (Secretary-General).

¹⁸⁷ A/CONF.62/L.66 (1981), XV Off. Rec. 119-45 (Secretary-General).

¹⁸⁸ See A/CONF.62/L.70, *supra* note 184, paras. 33-36.

¹⁸⁹ The Chairman’s report on those negotiations appears in A/CONF.62/C.1/L.29 (1981, mimeo.). Reproduced in VII Platzöder 51-59. See also A/CONF.62/L.81 (1981), XV Off. Rec. 241 (Chairman, First Committee); and the Chairman’s report to the Plenary at the 155th plenary meeting, paras. 58-64, *ibid.*, 42.

¹⁹⁰ A/CONF.62/L.78 (Draft Convention, 1981), articles 133-191, and Annexes III and IV, XV Off. Rec. 172, at 194-206 and 255-34.

¹⁹¹ See the President’s statement on 29 January 1982, reprinted in *Public Papers of the Presidents of the United States: Ronald Reagan*, Vol. 1 (January 1 to July 2, 1982), at 92.

¹⁹² For the report on those negotiations, see A/CONF.62/C.1/L.30 (1982), XVI Off. Rec. 271-75 (Coordinators, WG.21). See also the report to the Plenary by the Chairman of the First Committee at the 157th plenary meeting (1982), XVI Off. Rec. 8, paras. 5 and 6.

Discussions on other issues also were undertaken or continued in WG.21, including those relating to: (i) unfair economic practices; (ii) the composition of the Council; (iii) production policies; (iv) the Review Conference; (v) the separation of the powers of the principal organs of the Authority; and (vi) the basic conditions for prospecting, exploring, and exploiting resources of the Area, as set out in Annex III. The Secretary-General had submitted a report on the "Possible impact of the Convention, with special reference to article 151 [production policies], on developing countries which are producers and exporters of minerals to be extracted from the Area."¹⁹³ That report was discussed at the 55th meeting of the First Committee, following which an addendum to the report, addressing the issue of production ceilings, was prepared.

The most significant development, however, was the submission at the commencement of the session of a long list of proposed amendments to the deep seabed mining provisions by the delegation of the United States. This document, sixty-eight pages in length, had been prepared following the review of the provisions relating to deep seabed mining by the Reagan administration and became known as the "Green Book."¹⁹⁴ The Group of 77, after considering the proposed amendments for two days, rejected the U.S. proposals as a basis for negotiations. In an attempt to break the deadlock, a group of eleven delegations (Australia, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden, and Switzerland) tried to draft a series of amendments that would meet the objectives set out in President Reagan's statement but would also be acceptable to the Group of 77.¹⁹⁵ The proposals of the Group of 12 would have met most of the Reagan criteria; in particular they would have required substantial concessions on the part of the Group of 77 in relation to such controversial issues as: (i) a guaranteed seat for the U.S. on the Council; (ii) compulsory transfer of technology; and (iii) the Review Conference.¹⁹⁶ Following discussions in informal meetings, the Chairman of the First Committee reported that in light of the "sweeping amendments" proposed in that document, with the exception of some industrialized countries, "all other interest groups represented, including many western countries, had

¹⁹³ A/CONF.62/L.84 and Add.1 (1982), XVI Off. Rec. 177-96 (Secretary-General).

¹⁹⁴ So named for its green cover. Circulated as WG.21/Informal Paper 18 (1982, mimeo.) (U.S.A.). Reproduced in VI Platzöder 278-303. Also reproduced in VIII Platzöder 304-37. See also the explanatory statement by the United States (Ambassador Malone) at the 164th plenary meeting (1982), paras. 68-97, XVI Off. Rec. 64.

¹⁹⁵ The proposed amendments were contained in A/CONF.62/L.104 and Add.1 (1982), XVI Off. Rec. 219. The original eleven delegations were later joined by the Netherlands and became known as the Group of 12, under the leadership of J. Alan Beesley (Canada). See Koh and Jayakumar, *supra* note 135, at 80 (para. 44).

¹⁹⁶ All these issues were addressed in the 1994 Agreement.

expressed the view that the 'Green Book' could not possibly provide a good basis for negotiations."¹⁹⁷

With the cessation of formal negotiations, discussion of the Draft Convention proceeded in the Plenary. A number of formal amendments were proposed to different articles of Part XI and Annexes III and IV.¹⁹⁸ As a result of informal consultations, several changes were accepted for inclusion in the Convention, without the need for a vote.¹⁹⁹ A memorandum from the Collegium indicated the changes that had been accepted for inclusion in the Draft Convention.²⁰⁰ The President of the Conference, together with the Chairman of the First Committee, continued until the eleventh hour to try to persuade the U.S. to accept the proposals of the Group of 12. Nevertheless, the leader of the U.S. delegation, Ambassador James L. Malone, refused to consider the proposals, and on 30 April 1982, the Conference proceeded to take a decision on the Draft Convention. At the request of the United States, the Convention was put to a recorded vote and was adopted by 130 in favor, 4 against, with 17 abstentions.²⁰¹ The United States, along with Israel, Turkey, and Venezuela, voted against the Convention.²⁰²

30. Negotiations on outstanding and highly contentious issues under the First Committee's mandate continued up to the end of the eleventh session. As a result, the articles negotiated in the First Committee were among the last to be taken up by the Drafting Committee. The Drafting Committee reviewed most of the general provisions (articles 133 to 146) and those on the settlement of disputes relating to Part XI (articles 186 to 191) during the tenth session (1981); at the informal intersessional meeting,

¹⁹⁷ See A/CONF.62/L.91 (1982), para. 33, XVI Off. Rec. 204, 206 (Chairman, First Committee); and 157th plenary meeting, para. 19, XVI Off. Rec. 10.

¹⁹⁸ The formal amendments proposed are reproduced in XVI Off. Rec. 216-33.

¹⁹⁹ The President's report on those consultations, and the texts accepted, is contained in A/CONF.62/L.132 and Add.1 (1982), paras. 10-25, XVI Off. Rec. 236.

²⁰⁰ A/CONF.62/L.93 (1982), XVI Off. Rec. 210-13 (Collegium).

²⁰¹ It has been suggested that had the U.S. delegation shown more willingness to work within the proposals made by the Group of 12, a satisfactory compromise might have been reached. Unfortunately, many delegations assumed that the sweeping changes proposed in the Green Book were an indication of the desire of the U.S. to delay the work of the Conference. Perceived intransigence on the part of the U.S. provoked intransigence elsewhere, particularly within the Group of 77. See "Synopsis," *San Diego Law Review*, Vol. 20, No. 3, at 691; Leigh Ratiner, "The Law of the Sea: A Crossroads for American Foreign Policy," 60 *Foreign Affairs* 1006 (1982).

²⁰² For the vote, see the 182nd plenary meeting (1982), paras. 26-28, XVI Off. Rec. 154. See also the statement by the U.S. representative (Ambassador Malone) following the vote, also at the 182nd plenary meeting, paras. 39-45, *ibid.*, 155. The Eastern European bloc abstained because they were not satisfied with the provisions of resolution II, which recognized more pioneer sites for western industrialized countries, although later most of the Eastern European bloc signed the Convention at Montego Bay.

held in Geneva from 29 June to 31 July 1981; and at the resumed tenth session (1981). The remaining articles, including Annexes III and IV, were taken up at the eleventh session (1982) and the intersessional meeting of the Drafting Committee held in Geneva from 12 July to 25 August 1982.²⁰³

31. Not to be overlooked at this time as a key factor in the negotiations was the fact that a number of industrialized States had already begun to take unilateral action, reciprocally coordinated with like-minded States, to protect the investments that their nationals had already made in seabed mining. Between 1980 and 1985, six States passed legislation under which each participating State agreed to recognize one another's claims to seabed mining sites and to enact similar national laws so as to provide for the regulation of seabed mining activities by their nationals on the high seas.²⁰⁴ All of the Governments concerned insisted that their legislation was interim in nature; that it did not involve any claim to sovereignty or sovereign rights over the deep seabed or its mineral resources; that they remained committed to the entry into force of a Convention embodying the principle that seabed mineral resources are the common heritage of mankind; that they were not legally bound by the terms of UN General Assembly resolutions on the subject; and that mining conducted with due regard to the interests of other States on the high seas was, under the current law, a legitimate exercise of a high seas freedom. The legislation provided favorable conditions for the issue of licenses to nationals of the States concerned, with provisions for mutual recognition of licenses granted by another reciprocating State. Unlike the Convention regime, the legislation of the reciprocating States made no provision for site-banking, production controls, or mandatory transfer of technology. On the other hand, it did contain diligence provisions by, for example, requiring the licensee to make periodic and reasonable investments for exploration. The legislation also provided for the imposition of levies, albeit at a much lower rate than that envisaged under the Convention regime, on deep seabed mining operations and for the payment of the proceeds into a fund intended to be the vehicle

²⁰³ On the work of the Drafting Committee, see Vol. I of this series, at 135.

²⁰⁴ United States: Deep Seabed Hard Mineral Resources Act, 1980, XIX ILM (1980), at 1003; see also related Deep Seabed Mining Regulations for Exploration Licenses, 15 September 1981, effective 15 October 1981, XX ILM (1981), at 1228. Federal Republic of Germany: Act of Interim Regulation of Deep Seabed Mining, 1980, *Bundesgesetzblatt*, Part I, 9080, No. 50 (22 August 1980), at 1457. An English translation is in XX ILM (1981), at 393. United Kingdom: Deep Sea Mining (Temporary Provisions) Act 1981, *ibid.*, at 1217. France: Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, *Journal officiel*, 24 December 1981, at 3499. Japan: Law on Interim Measures for Deep Seabed Mining, 1982. Italy: Law No. 41 of 20 February 1985: Regulations on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, *Gazzetta Ufficiale*, No. 52, 1 March 1985, at 1593-1596. See Tullio Treves, "Codification du droit internationale et pratique des Etats dans le droit de la mer," *Recueil des cours de l'Academie de droit internationale*, Vol. 223 (1990) at 243.

through which a share of the profits from the “common heritage” may be channeled to “mankind.” A further element of the regime thus established was a series of multilateral agreements designed to resolve conflicts arising from overlapping claims and an undertaking by States Parties to refrain from issuing licenses for any area that overlapped areas covered by authorizations already granted.²⁰⁵ The legislation thus introduced was strongly opposed by the Group of 77, as well as by the USSR and China, who asserted that any measure taken unilaterally by a State would have no validity in international law and was therefore incapable of giving rise to any rights whatsoever.²⁰⁶

These developments not only caused the Group of 77 to resist any further accommodation of the U.S. position during the latter phase of UNCLOS III, but also were to lead to further controversy in the Preparatory Commission in 1985, following the grant of exploration licenses under the reciprocal legislation to a number of U.S. consortia in areas also subject to claims under the pioneer investor regime contained in resolution II.²⁰⁷ Ultimately, much of the work of the Preparatory Commission was to become an attempt to find a *modus vivendi* between the parallel regimes pending a

²⁰⁵ Agreement concerning interim arrangements relating to polymetallic nodules of the deep seabed among France, Germany, United Kingdom and United States, 2 September 1982, UKTS 46 (1982); XXI ILM (1982), at 950-962. Provisional understanding regarding deep seabed matters among Belgium, Germany, France, Italy, Japan, Netherlands, United Kingdom and United States, 3 August 1984, XXIII ILM (1984), at 1354-1360.

²⁰⁶ Statement by Mr. Wapenyi (Uganda) on behalf of the Group of 77 at the resumed ninth session, 28 July 1980, A/CONF.62/100, XIV Off. Rec. 3, at 4, reiterating the position of the Group of 77 as stated on 15 September 1978 (Statement by Mr. Nandan (Fiji) as Chairman of the Group of 77, IX Off. Rec. 103) and on 19 March 1979 (Statement by Mr. Carias (Honduras) as Chairman of the Group of 77, XI Off. Rec. 3). The position of the Group of 77 was that the effect of the Declaration of Principles was to expressly exclude the possibility of extending freedom of the high seas to the seabed and to subject exploration and exploitation of the resources of the seabed to the international regime to be established. Unilateral legislative action by any State or group of States before such an international regime was established would therefore be contrary to the Declaration of Principles and international law. The Group of 77 had therefore called upon all States to exercise restraint and refrain from unilateral legislative or other action.

²⁰⁷ Leading to the adoption by the Preparatory Commission on 30 August 1985 of a declaration that “(a) the only regime for exploration and exploitation of the Area and its resources is that established by the [Convention] and related resolutions adopted by [UNCLOS III], (b) Any claim, agreement or action regarding the Area and its resources undertaken outside the Preparatory Commission which is incompatible with the [Convention] and its related resolutions shall not be recognized.” And the Preparatory Commission “rejects such claim, agreement or action as a basis for creating legal rights and regards it as wholly illegal.” LOS/PCN/72. Reproduced in 1 Platzöder PrepCom 333.

final resolution of the outstanding issues with respect to Part XI in the period from 1990 to 1994.

THE PREPARATORY COMMISSION 1983-1994

32. The Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea was formally established by resolution I, annexed to the Final Act of UNCLOS III. The mandate of the Preparatory Commission, *inter alia*, was to

prepare draft rules, regulations and procedures, as necessary to enable the Authority to commence its functions, as well as to make recommendations for the early entry into effective operation of the Enterprise.

Under resolution II, the Preparatory Commission was also empowered to administer the interim regime for pioneer investors.

The Preparatory Commission met from 1983 to 1994, usually twice a year, and concluded its work with an extensive report,²⁰⁸ which was presented to the Authority at its first meeting.²⁰⁹ To address the questions set out in resolution I, the Preparatory Commission was divided into four Special Commissions, each with its own mandate.²¹⁰ The mandate of Special Commission 1, under resolution I, paragraphs 5(i) and 9, was to

undertake studies on the problems which would be encountered by developing land-based producer States likely to be most seriously affected by the production of minerals derived from the Area with a view to minimizing their difficulties and helping them to make the necessary economic adjustments, including studies on the establishment of a compensation fund.

Special Commission 1, chaired by Hasjim Djalal (Indonesia), therefore dealt with preparing studies and making recommendations on the potential impacts of future seabed mining on land-based producers, especially developing countries. While it also examined the feasibility of establishing a compensation fund, and the possible modalities of such a fund, it did not deal directly with procedural preparations for the functioning of seabed

²⁰⁸ The final report of the Preparatory Commission relating to the International Seabed Authority is contained in LOS/PCN/153, Vols. I to XIII (1995). That relating to the International Tribunal for the Law of the Sea is contained in LOS/PCN/152, Volumes I to IV (1995).

²⁰⁹ The first meeting of the Assembly of the Authority was held in three parts: from 16 to 18 November 1994, from 27 February to 17 March 1995, and from 7 to 18 August 1995.

²¹⁰ The summary that follows is adapted from the progress report from the Chairman of the Preparatory Commission contained in LOS/PCN/L.103 (1992, mimeo.).

mining institutions established under Part XI.²¹¹ Special Commission 2, which was chaired by Lennox Ballah (Trinidad and Tobago), acting under resolution I, paragraph 8, was charged with taking “all measures necessary for the early entry into effective operation of the Enterprise.” Special Commission 2 also studied the economic viability of seabed mining. Special Commission 3, under the chairmanship first of Hans Sondaal and then of Jaap Walkate (both of the Netherlands) and later of Greg French (Australia), had as its mandate the preparation of “draft rules, regulations and procedures . . . to enable the Authority to commence its functions, including draft regulations concerning the financial management and the internal administration of the Authority” (resolution I, paragraph 5(g)). In other words, it had to prepare draft rules, regulations, and procedures governing the exploration of the Area and the exploitation of its resources—the so-called “seabed mining code.”²¹² The mandate of Special Commission 4, under the chairmanship of Gunther Görner (GDR) and later of Anton Bouteiko (Ukraine), was to “prepare a report containing recommendations for submission to the meeting of States Parties . . . regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea.”²¹³ The reference to “practical” arrangements implies that Special Commission 4 was to make recommendations on, *inter alia*, the formal structure of the Tribunal, judicial procedure and internal rules, headquarters agreements, privileges and immunities, and internal administrative, personnel, budgetary, financial, and funding requirements—in effect, all requirements for the initial functioning of the Tribunal.

In addition, the “Informal Plenary” of the Commission, under the guidance of the Chairman of the Preparatory Commission, Joseph Warioba (Tanzania), and later José Luis Jesus (Cape Verde), also dealt, *inter alia*, with the preparation of the rules and procedures of the organs of the Authority. The implementation of resolution II governing preparatory investment in pioneer activities related to polymetallic nodules was dealt with by the General Committee of the Preparatory Commission. Under the rules of procedure of the Preparatory Commission, powers to register and certify pioneer investors in seabed mining were delegated to the General Committee, which, in this respect, operated as a replica of the thirty-six-member Council.²¹⁴

²¹¹ The Provisional Report of Special Commission 1 is contained in LOS/PCN/130 (1993, mimeo.), Chap. II. Reproduced in LOS/PCN/153 (1995, mimeo.), Vol. VI, at 4-34.

²¹² The Draft Final Report of Special Commission 3 is contained in LOS/PCN/SCN.3/1992/CRP.17 (1992, mimeo.). Reproduced in LOS/PCN/153 (1995, mimeo.), Vol. XIII, p. 3.

²¹³ Resolution I, para. 10. The report is contained in LOS/PCN/152 (1995, mimeo.), Vols. I-IV.

²¹⁴ The Provisional Report of Special Commission 2 is contained in LOS/PCN/130 (1993, mimeo.), Chap. III. Reproduced in LOS/PCN/153 (1995, mimeo.), Vol. X, at 8-28.

33. The Preparatory Commission conducted its work against a very difficult political background. From the outset, the United States decided that it would not participate in the work of the Preparatory Commission. In order to make progress, the Special Representative of the Secretary-General for the Law of the Sea in charge of servicing the meetings of the Preparatory Commission adopted a strategy aimed at avoiding further polarization of views between developed and developing States and signatories and non-signatories of the Convention. One of the measures taken by the Secretariat in this regard was to assume the responsibility for presenting the basic negotiating texts for the rules and regulations that were to be prepared by the Plenary and the Special Commissions. This strategy had the effect, on the one hand, of preventing States from presenting their own draft texts with extreme positions and, on the other hand, of providing delegations with a common text from a neutral source so that it became possible to work on areas where there was broad agreement and set aside for later discussion those issues where major differences existed.²¹⁵ Unfortunately, however, the Preparatory Commission was not able to tackle the fundamental issues where major differences existed with respect to the regime in Part XI. Nevertheless, it was possible to keep participating States actively engaged in the discussion of questions on which a large measure of agreement existed and where progress could be made in the preparatory work necessary for the entry into force of the Convention.

34. As the number of ratifications or accessions to the Convention approached sixty, there became a real prospect that the Convention would come into force with minimal developed State participation.²¹⁶ On the other hand, in the Preparatory Commission there was a growing acceptance in the Group of 77 that, for economic and technological reasons, the prospects for deep seabed mining were substantially less imminent than had been projected in the 1970s and early 1980s and a concomitant willingness to open a dialogue on outstanding differences.²¹⁷ By this time, it was apparent that private investment in deep seabed mining had virtually ceased and that State-operated

²¹⁵ For a review of the role of the UN Secretariat in the Preparatory Commission, see Satya N. Nandan, "The efforts undertaken by the United Nations to secure universality of the Convention," in Miles and Treves (eds.), *The Law of the Sea: New Worlds, New Discoveries*, Proceedings of the Twenty-Sixth Annual Conference of the Law of the Sea Institute, Genoa, Italy, 1992.

²¹⁶ By 1989, for example, there were 42 ratifications, all by developing States (with the exception of Iceland). At this time, all ratifying States represented only 4 per cent of the budget of the United Nations. Without participation by any of the industrialized States, it was clear therefore that the establishment of a viable international regime was doomed to failure. Jean-Pierre Lévy, *Le Destin de l'Autorité Internationale des Fonds Marins*, Pédone, 2002 at 124.

²¹⁷ Mumba S. Kapumpa (Zambia), Chairman of the Group of 77, Reflections on the Future Work of the Preparatory Commission and the Convention (1 September 1989, mimeo.), statement delivered to the 52nd meeting of the Preparatory Commission, 1

research activities were continuing at greatly reduced levels. As a consequence, the Preparatory Commission had already taken some pragmatic steps to scale down the anticipated size and activities of the Authority.²¹⁸

SECRETARY-GENERAL'S INFORMAL CONSULTATIONS 1990-1994

35. In light of the fundamental ideological, political, and economic changes that had taken place, both with respect to seabed mining and with respect to international relations generally following the disintegration of the Soviet bloc, it became opportune to open a dialogue between key industrialized States and developing countries on the outstanding issues with respect to the problems in Part XI with a view to ensuring universal participation in the Convention when it entered into force. Despite initial skepticism on the part of the United States, the then Secretary-General of the United Nations, Javier Pérez de Cuéllar, on the advice of his Special Representative for the Law of the Sea, took the initiative to convene informal consultations involving some thirty interested States, including three non-signatories to the Convention, Germany, the United Kingdom, and the United States, as well as others representing all interest groups.²¹⁹ The first

September 1989. See UN press release SEA/1089. In 1989, in its resolution under the item "Law of the Sea," the General Assembly had "welcomed the expressions of willingness to explore all possibilities of addressing issues, as referred to in the statements made at the end of the meeting of the Preparatory Commission . . . from 14 August to 1 September 1989, in order to secure universal participation in the Convention" and invited "all States to make renewed efforts to facilitate universal participation in the Convention." A/RES/44/26.

²¹⁸ For example, the Preparatory Commission had decided to scale down the size of the Secretariat of the International Seabed Authority in order to match its expected reduced activities. It had also decided that the Enterprise would not enter into direct mining operations until such operations were commercially viable.

²¹⁹ Following initial approaches made in 1989 to Germany, the United States, and the United Kingdom, Secretary-General Pérez de Cuéllar wrote in 1990 to Secretaries of State James Baker (U.S.) and Douglas Hurd (U.K.) and to Chancellor Kohl (Germany) inviting them to exchange views with the Secretary-General on how the problems that the industrialized countries had with the deep seabed mining provisions of the Convention could be resolved and indicating his assessment that, based on consultations with all interest groups in the law of the sea, it was opportune to attempt to deal with outstanding issues. The three recipients responded by welcoming the initiative of the Secretary-General, while at the same time reiterating their objections to the provisions of Part XI. While the U.K. and Germany indicated a willingness to work with the Secretary-General, the U.S. response was less forthcoming. In his response, Secretary of State Baker noted that the U.S. would "carefully consider genuine opportunities for reform of the seabed mining provisions" but stated that the U.S. was "not prepared to consider a broader-based multilateral discussion unless and until we are confident there is a real understanding that such a dialogue must lead to constructive market-oriented results."

such Consultation took place in July 1990.²²⁰ In all, fifteen rounds of Informal Consultations took place in New York between July 1990 and June 1994.²²¹

The initial objective was to identify the issues that were of most concern to some of the key States and that had prevented agreement on the Convention as a whole. The consultations identified nine issues as representing areas of difficulty. These issues were broadly similar to the issues identified by the Reagan administration in 1981 as factors that would prevent U.S. participation in the Convention. The key issues were identified in a summary issued by the Secretary-General on 31 January 1992 as follows:

²²⁰ In essence, there were two phases to the Consultations. The objective of the first phase, from 1990 to 1992 and involving a small group of some thirty key States, was to identify the issues that were of most concern to key States that had prevented agreement on the Convention as a whole and to examine possible approaches to their resolution. The second phase of the Informal Consultations, lasting from 1992 to 1994, was open to all interested delegations. As many as ninety delegations took part in the Consultations. The objective of this phase was to consider the possible solutions for the implementation of Part XI based on a market-oriented approach.

²²¹ 19 July 1990; 30 October 1990; 25 March 1991; 23 July 1991; 14-15 October 1991; 10-11 December 1991; 16-17 June 1992; 6-7 August 1992; 28-29 January 1993; 27-28 April 1993; 2-6 August 1993; 8-12 November 1993; 31 January-4 February 1994; 4-8 April 1994; and 31 May-3 June 1994. See Report of the Secretary-General, Consultations of the Secretary-General on outstanding issues with respect to the deep seabed mining provisions of the United Nations Convention on the Law of the Sea, A/48/950. No official records were kept during the Informal Consultations. Indeed, until the latter stages of the Consultations, when a number of draft versions of the 1994 Agreement and accompanying draft resolution were issued, no official documents were issued. The negotiating technique adopted by the participants was first to identify the issues, then to reach general agreement on possible solutions to some problems, while isolating areas of difficulty for later discussion. To assist participants, the Special Representative of the Secretary-General for the Law of the Sea, Satya N. Nandan (1983-92), issued a series of Information Notes, supported at critical stages in the negotiations by more comprehensive summaries of the issues upon which agreement had been reached and the areas of disagreement. These Information Notes and summaries were issued informally, in English only, and did not form part of the official documentation issued by the United Nations. None of the documents were identified by symbol or number. In proceeding in this way, participants in the Informal Consultations were, in effect, continuing the tradition that had been established during UNCLOS III of dealing with the most difficult issues in private negotiating groups under the guidance of a few key individuals. While this method of negotiation had the advantage of flexibility and did not commit any participant to a firm position, thus allowing all possible solutions to be fully explored, a consequence of this is that no official record of the Consultations exists. The Information Notes and summaries have been published by the International Seabed Authority in *Secretary-General's Informal Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Collected Documents*, International Seabed Authority, 2002. That publication also includes an extensive bibliography of the considerable body of published literature on the negotiations, much of it written by participants.

(1) costs to States Parties, (2) the Enterprise, (3) decision-making, (4) the Review Conference, (5) transfer of technology, (6) production limitation, (7) compensation fund, (8) financial terms of contracts, and (9) environmental considerations. Having identified the issues, the next step was to identify possible solutions for the implementation of Part XI based on a market-oriented approach. By 1992, the informal consultations had reached general agreement on possible solutions to the problems of costs to States Parties, the Enterprise, decision-making, the Review Conference, and transfer of technology. Following the technique of isolating areas of difficulty for later discussion, it was also generally agreed that detailed solutions regarding production limitation, the compensation fund, and financial terms of contracts could be deferred until commercial production of seabed minerals was imminent. In the meantime, agreement could be reached on the general principles for dealing with those issues or setting the parameters within which rules, regulations, or procedures will be established at a later time. It was agreed to remove the issue of environmental considerations from the list of issues, as this was considered to no longer be controversial.

36. From 1992–1994, the Consultations were opened to all delegations. Some seventy-five to ninety delegations participated in these negotiations. When the consultations reconvened in January 1993, it was generally felt among participants that the stage had been reached when a text should be prepared in a form that could be the basis of an agreement.²²² In April 1993, an Information Note was prepared that set out various procedural approaches with respect to the use to be made of the results of the consultations. The four approaches could be summarized as follows: (i) a contractual instrument such as a protocol amending the Convention; (ii) an interpretative agreement consisting of understandings on the interpretation and application of the Convention; (iii) an interpretative agreement on the establishment of an initial Authority and an initial Enterprise during an interim regime accompanied by a procedural arrangement for the convening of a conference to establish the definitive regime for the commercial production of deep seabed minerals when such production became feasible; and (iv) an agreement additional to the Convention providing for the transition between the initial phase and the

²²² The preparation of such an agreement raised complex and novel legal issues. On the one hand, it was not desirable to convene a further diplomatic conference, but on the other hand, it was noted that the Vienna Convention on the Law of Treaties did not deal with amendment of a treaty prior to its entry into force. Further, the final clauses of the 1982 Convention dealt only with amendments to the 1982 Convention itself after its entry into force. These and other issues were discussed, and possible solutions identified, in a note dated July 1991 prepared by Shabtai Rosenne for the Under-Secretary-General for Ocean Affairs and Law of the Sea, reproduced in 29 *Israel Law Review* 491, 501 Appendix (1995).

definitive regime, in particular, the Authority would be mandated to develop solutions for issues still outstanding on the entry into force of the Convention.

Certain basic elements emerged from the review of these approaches. It was generally agreed that whatever approach might be adopted, it must be of a legally binding nature. It was also pointed out that a duality of regimes must be avoided. For the next round of Consultations, held from 2–6 August 1993, an Information Note dated 4 June 1993 was circulated that updated the Information Note of 8 April 1993 to reflect the observations made during the previous round of Consultations. During the course of this round of Consultations, a paper dated 3 August 1993 prepared by representatives of several developed and developing States was circulated among delegations as a contribution to the process of the Consultations. It was understood that the paper, which was commonly known as the “Boat Paper,” did not necessarily reflect the position of any of the delegations involved, but that it was considered to provide a useful basis for negotiation.²²³ Thereafter, while addressing the substantive issues contained in the Information Note dated 4 June 1993, delegations also made references to the relevant portions of the “Boat Paper.” That paper was divided into three parts: (i) a draft resolution for adoption by the General Assembly; (ii) a draft Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea as an annex to the resolution; and (iii) two annexes to the draft Agreement. Annex I contained the agreed conclusions of the Secretary-General’s consultations and Annex II was entitled “Consequential adjustments.”

At the last round of Consultations held in 1993 (8–12 November), participants had before them the Information Note dated 4 June 1993 and a new version of the “Boat Paper” consolidating the two annexes to the original paper into one.²²⁴ At this November meeting, participants completed the review of all the items contained in the Information Note dated 4 June 1993. After having completed consideration of those issues, delegations embarked upon a renewed examination of the issue of “Costs

²²³ The “Boat Paper” was so-called because of a picture of a boat on the cover. It was prepared by an informal group of representatives that met mainly at the Permanent Mission of Fiji to the United Nations, chaired by Ambassador Satya N. Nandan (Fiji). The core members of the group included representatives, acting in their personal capacities, from the delegations of Australia, Brazil, Fiji, Germany, Indonesia, Italy, Jamaica, Kenya, Nigeria, the United Kingdom, and the United States. In later stages this group was expanded to some sixty delegations and became the main negotiating forum for the Agreement, the drafts from which were presented to the Secretary-General’s Consultations.

²²⁴ In addition, a non-paper entitled “Agreement on the Implementation of Part XI and Annexes III and IV of the United Nations Convention on the Law of the Sea” was submitted by the delegation of Sierra Leone, but had little impact on the discussions. Reproduced in *Informal Consultations and Collected Documents*, p. 223.

to States Parties and institutional arrangements,” but this time the focus was on the draft Agreement contained in the “Boat Paper.” During the first round held in 1994 (31 January-4 February), the Consultations examined a revised version of the “Boat Paper,” dated November 1993. This revision took into account the discussions that had taken place during the Secretary-General’s Informal Consultations held in November 1993. The work of this round of Consultations focused on some crucial issues:

- (a) Decision-making, in particular the question of the relationship between the Assembly and the Council, and the question as to which group of States in the Council should form the chambers for the purpose of decision-making in the Council;
- (b) Whether the administrative expenses of the Authority should be met by assessed contributions of its members, including the provisional members of the Authority, or through the budget of the United Nations; and
- (c) The issue of provisional application of the Agreement and of provisional membership in the Authority.

During this round of Consultations progress was made on the latter two issues.

The second round of the Secretary-General’s Informal Consultations in 1994 was held from 4 to 8 April. The meeting had before it a further updated version of the “Boat Paper” entitled “Draft resolution and draft Agreement relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea” dated 14 February 1994. Participants undertook an article-by-article review of the draft Agreement. Attention was then focused on the two most important issues facing the Consultations: decision-making in the Council, and the Enterprise. These issues, which lay at the heart of the Consultations, proved most difficult to resolve. From the outset of the Consultations it was evident that these issues could only be resolved in the final stages of the process, when a clearer picture of the results of the Consultations had emerged. With respect to decision-making, the debate was directed at the system of chambered voting, in particular whether the category or group of States consisting mainly of developing States should be treated as a chamber for the purposes of decision-making in the Council. The discussion relating to the Enterprise centered on the type of mechanism that would trigger the commencement of its operations. Revisions were made to the draft Agreement in the light of the debates on the various issues. The revisions related to provisional application of the Agreement, provisional membership in the Authority, the treatment of the registered pioneer investors, and production policy. Based on these revisions, the draft resolution and draft Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea were revised in their entirety and a revised text was issued on 15 April 1994, the last day of the meeting.

The last round of Consultations took place from 31 May to 3 June 1994. The primary purpose of this final round was the harmonization in the various language versions of the draft resolution and draft Agreement. The Consultation had before it the draft resolution and draft Agreement dated 15 April 1994, which had been further revised on the basis of discussions in the previous round of Consultations and a corrigendum to the document dated 23 May 1994. Two documents (SG/LOS/CRP.1 and SG/LOS/CRP.2) containing suggested amendments of a drafting nature prepared by the Secretariat were also submitted in order to facilitate the process of harmonizing the language versions of the text. At the close of the meeting, delegations were presented with a revised text (SG/LOS/CRP.1/Rev.1), dated 3 June 1994. That document elicited a few drafting comments that were reflected in the texts. A proposed solution relating to a particular aspect of representation in the Council raised by the Eastern European Group was set out in an informal understanding as follows:

Once there is widespread participation in the International Seabed Authority and the number of members of each regional group participating in the Authority is substantially similar to its membership in the United Nations, it is understood that each regional group would be represented in the Council of the Authority as a whole by at least three members.²²⁵

37. On July 28, 1994, the General Assembly, during its resumed forty-eighth session, adopted resolution 48/263, to which the Agreement was annexed, by 121 votes in favor and none against, with seven abstentions.²²⁶ In accordance with the Agreement, any instrument of ratification or formal confirmation of or accession to the Convention following its adoption shall also represent consent to be bound by the Agreement. No State or entity may establish its consent to be bound by the Agreement unless it has previously established or establishes at the same time its consent to be

²²⁵ Informal Understanding to be read by the President of the General Assembly at the time of the adoption of the resolution on the Agreement, annex II to A/48/950. Available at <http://www.un.org/Depts/los/general_assembly/documents/48_950_English.pdf>.

²²⁶ A/48/L.60. The co-sponsors of the draft resolution were Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Belgium, Benin, Botswana, Brazil, Cameroon, Canada, Chile, China, Denmark, Fiji, Finland, France, Germany, Greece, Grenada, Guinea-Bissau, Guyana, Iceland, India, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, Luxembourg, Malta, Marshall Islands, Micronesia (Federated States of), Myanmar, Namibia, Netherlands, New Zealand, Norway, Papua New Guinea, Portugal, Republic of Korea, Samoa, Senegal, Seychelles, Singapore, Solomon Islands, Spain, Sri Lanka, Sweden, Trinidad and Tobago, United Kingdom, United Republic of Tanzania, United States of America, Uruguay and Venezuela. Among the 121 votes in favour of the Agreement was that of South Africa: its first vote in the General Assembly after its exclusion in 1974. Abstaining from the vote were Colombia, Nicaragua, Panama, Peru, Russian Federation, Thailand, and Venezuela.

bound by the Convention. Article 4 sets out the usual procedures for establishing consent to be bound; that is, signature followed by ratification, accession, or through the simplified procedure set out in article 5. Article 5, entitled "Simplified procedure," addressed the situation of States or entities that had completed the process of participation in the Convention prior to 28 July 1994. Applying the doctrine of "tacit consent," article 5 provides that such States shall be considered to have established consent to be bound by the Agreement twelve months after the date of its adoption "unless that State or entity notifies the depositary in writing before that date that it is not availing itself of the simplified procedure." An important feature of the Agreement is its provisional application. This was done not only to facilitate universal acceptance of the Convention, but also to promote universal participation in the International Seabed Authority by allowing for provisional membership in the Authority until such time as the necessary formalities could be completed prior to ratification of or accession to the Convention. Article 7 of the Agreement provided that if, on 16 November 1994 (the date of entry into force of the Convention), the Agreement had not entered into force, it would be applied provisionally pending its entry into force, subject to certain exceptions. This was an important provision designed to avoid the possibility of a duality of regimes existing upon entry into force of the Convention. Pursuant to article 6, the Agreement would enter into force thirty days after forty States had established their consent to be bound by it, provided that those forty States included seven of the States referred to in paragraph 1(a) of resolution II and that at least five of those States were developed States. This latter provision was a good faith assurance of participation in the Convention by seabed mining States, which had been sought by the Group of 77 in return for their agreement to the substantive changes to the regime made by the Agreement.

In accordance with article 6, paragraph 1, the Agreement entered into force on 28 July 1996. On the same date, in accordance with article 7, paragraph 3, provisional application of the Agreement terminated. Nevertheless, in accordance with the provisions of section 1, paragraph 12(a), of the annex to the Agreement, States and entities that had been applying the Agreement provisionally and for which it was not in force were able to continue to be members of the Authority on a provisional basis, pending its entry into force for such States and entities, by sending a written notification to the depositary to that effect prior to 16 November 1996 and by making an application to the Council of the Authority for an extension of membership on a provisional basis after 16 November 1996. In accordance with section 1, paragraph 12(a), of the annex to the Agreement, the Council was able to extend such membership beyond 16 November 1996 for a further period or periods not exceeding a total of two years, provided that the Council was satisfied that the State or entity concerned had been making efforts in good faith to become a party to the

Agreement and the Convention. Provisional membership, for all States, terminated on 16 November 1998.²²⁷

PART XI. THE AREA

38. Part XI is divided into a number of sections and subsections. Section 1 (articles 133 to 135) contains general provisions relating to the Area and Part XI as a whole. Article 133 sets out some terms applicable to Part XI and related provisions. Article 134, in combination with article 1, paragraphs 1(1) and (3), indicates the scope of application of Part XI, while article 135 addresses the legal status of the waters and air space superjacent to the Area. Section 2 (articles 136 to 149) sets out the "Principles Governing the Area." Its provisions are based in large part on the Declaration of Principles, with elaboration where necessary or appropriate. In this way, some indication is given of the nature of the regime and the types of activities that might be undertaken in the Area, and of the rights and obligations of States and other entities in respect of those activities. For the most part, these articles were accepted early in the negotiations at UNCLOS III, with discussion focusing on elaboration of the general principles. Many of the principles set out in section 2 address subjects that are covered in greater detail in other provisions of the Convention, including those concerning responsibility to ensure compliance and liability for damage, the rights and interests of coastal States, the promotion of marine scientific research, the promotion and encouragement of transfer of technology to developing countries,²²⁸ protection of the marine environment, protection of human life, accommodation of other activities besides seabed mining, the participation of developing States in activities in the Area, and archaeological and historical objects found in the Area.

39. Section 3 (articles 150 to 155) sets out policies relating to the "Development of Resources of the Area." These are the only articles in Part XI that relate directly to the development of deep seabed resources. The basic policies relating to activities in the Area (article 150) reflect divergent interests with respect to deep seabed mining, balancing the interests and needs of industrialized States with those of developing States, and of the land-based producers and the consumers of the minerals to be

²²⁷ On 15 November 1998, the following were members of the Authority on a provisional basis: Bangladesh, Belarus, Canada, Qatar, Switzerland, Ukraine, United Arab Emirates, and United States of America. In accordance with the Agreement, these States ceased to be members of the Authority on 16 November 1998. Bangladesh and Ukraine subsequently ratified or acceded to the Convention and the Agreement and therefore became members of the Authority.

²²⁸ Among these principles, those relating to the transfer of technology under article 144 have been elaborated upon in the 1994 Agreement, Annex, Section 5. See further article 144, Commentary *infra*.

obtained through seabed mining. The production policies for the resources of the Area (article 151) were among the most difficult and contentious issues at UNCLOS III. These were the subject of intensive negotiations in the First Committee right up to the end of the Conference. Further radical changes were introduced through the 1994 Agreement.²²⁹ The question of the Review Conference (article 155) was also a matter of great controversy at UNCLOS III and was finally resolved by being effectively eliminated by the 1994 Agreement.²³⁰

Section 4 (articles 156 to 185) covers the institutional elements of the International Seabed Authority, the organization through which States Parties are, in accordance with Part XI of the Convention and the Agreement, to organize and control activities in the Area. Much of the discussion in the early stages of UNCLOS III, and in the Sea-Bed Committee before it, focused on determining the form of the international machinery to be established, the powers and functions to be given to that machinery, and on the organs of the machinery necessary to exercise those powers and carry out those functions. Section 4 represents the culmination of those discussions. In addition to general provisions in subsection A (articles 156 to 158) on the establishment, nature, and fundamental principles of the Authority, subsections B to D (articles 159 to 169) set out details concerning various organs of the Authority—the Assembly, Council, and Secretariat, together with the subsidiary bodies of the Council, namely the Economic Planning Commission and the Legal and Technical Commission.²³¹ The composition of each organ, as well as its powers and functions, are addressed separately.²³² Subsection E consists of a single article (article 170) dealing with the Enterprise, the organ of the Authority that is to “carry out activities in the Area directly, . . . as well as the transporting, processing and marketing of minerals recovered from the Area.” The Statute of the Enterprise, addressing its legal capacity and functions, is set out in Annex IV. In addition, the 1994 Agreement, Annex, section 2, contains new provisions concerning the Enterprise, including its initial functions. Subsection F (articles 171 to 175) deals with the financial arrangements of the Authority,

²²⁹ In accordance with the 1994 Agreement, Annex, section 6, most of article 151 “shall not apply,” and new guiding principles have been established. See further article 151, Commentary *infra*.

²³⁰ The 1994 Agreement, Annex, section 4, addresses the issue of the Review Conference. See further article 155, Commentary *infra*.

²³¹ Under the 1994 Agreement, Annex, section 9, a Finance Committee is established to deal with financial matters relating to the functions of the Authority. Furthermore, the Agreement, Annex, section 2, elaborates on the decision-making procedures within the organs of the Authority.

²³² The 1994 Agreement contains detailed provisions regarding the composition and procedures, powers, and functions of the Council, setting aside certain provisions of articles 161 and 162 in the process. The Agreement also deals with the relationship between the various organs of the Authority.

including its funding, annual budget, and administrative expenses. Here again, various provisions of the 1994 Agreement have introduced significant changes to the system set out in the Convention.²³³ Subsection G (articles 176 to 183) contains provisions on the legal status of the Authority and on the privileges and immunities enjoyed by the Authority and by persons connected with the Authority. Subsection H (articles 184 and 185) contains provisions allowing the suspension of the exercise of certain rights and privileges enjoyed by members of the Authority.

40. Section 5 concerns the settlement of disputes relating to activities in the Area governed by Part XI and Annexes III and IV. It relates to the jurisdiction and functions of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, established under article 287 read with Annex VI, articles 14 and 35 to 40 (see further Vol. V of this series, at 360 and 399-416). The Chamber's jurisdiction is governed by Part XI, section 5, together with Part XV and Annex VI. The provisions of Part XI, section 5, were introduced to the First Committee through the Group of Legal Experts (See paragraph 25), although it was the Drafting Committee that was charged with producing a draft of Annex VI. The references to the Authority in Annex VI came from the Group of Legal Experts and from the First Committee directly. The evolution of the specific provisions of Part XI, section 5, is addressed in the Commentaries on individual articles below. The history of the negotiations on dispute settlement generally is elaborated in Volume V of this series.²³⁴

41. Annexes III and IV are integral parts of the regime established under Part XI and the 1994 Agreement. Annex III sets out the "Basic Conditions of Prospecting, Exploration and Exploitation" and, as such, forms the legal basis upon which activities in the Area may be undertaken. Again, the 1994 Agreement introduced important changes to the regime set out in Annex III. The Convention envisages that the provisions of Annex III are to be further elaborated through the rules, regulations, and procedures of the International Seabed Authority. In July 2000, the Authority adopted the first set of such regulations, on prospecting and exploration for polymetallic nodules in the Area.²³⁵ The impact of the regulations on

²³³ See, for example, Annex, Section 1, para. 14, concerning the borrowing power of the Authority; Annex, Section 8, para. 2, concerning the financial terms of contracts; and Annex, Section 9, relating to the Finance Committee.

²³⁴ See also, Tullio Treves, "The Jurisdiction of the International Tribunal for the Law of the Sea," *Indian Journal of International Law*, 37, 396-419; Tullio Treves, "New Trends in the Settlement of Disputes and the Law of the Sea Convention," in *The Law of the Sea: The Common Heritage and Emerging Challenges*, Harry N. Scheiber (editor), Martinus Nijhoff, 2000, at 61; Gudmundur Eiriksson, "The International Tribunal for the Law of the Sea," Nijhoff, 2000. As indicated by article 159, paragraph 10, of the Convention and Annex VI, articles 35, paragraph 2, and 37, the Seabed Disputes Chamber is also an integral part of the regime for deep seabed mining.

²³⁵ ISBA/6/A/18, Annex (13 July 2000), reproduced as Documentary Annex II of this volume.

the implementation of the provisions of Annex III is addressed in the Commentaries on individual articles. It should also be noted that there exists a close relationship between the provisions of Annex III, the regulations, and the provisions of resolution II governing the activities of the registered pioneer investors. Annex IV contains the Statute of the Enterprise, including its purposes and its relation to the Authority, and matters relating to its financing and operation. As indicated above, the 1994 Agreement sets out provisions relating to the operations of the Enterprise during its initial phase.

42. Not to be overlooked as part of the regime for seabed mining established under the Convention are resolutions I and II contained in Annex I to the Final Act of the Conference. Resolution I formally established the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea. Resolution II set out rules "Governing Preparatory Investment in Pioneer Activities relating to Polymetallic Nodules." The intention of resolution II was to "protect the substantial investments already made in the development of seabed mining technology, equipment and expertise"²³⁶ and in the research and identification of potential mining areas made by pioneer investors. The four initial registered pioneer investors were India, France (IFREMER/AFERNOD), Japan (Deep Ocean Resources Development Co. Ltd.), and the State enterprise Yuzhmorgeologiya sponsored by the Soviet Union [now the Russian Federation]. These were later joined by the Interoceanmetal Joint Organization (IOM), a consortium sponsored by Bulgaria, Cuba, Czechoslovakia [now the Czech Republic and Slovakia], Poland, and the USSR [now the Russian Federation]; the China Ocean Mineral Resources Research and Development Association (COMRA), sponsored by the People's Republic of China; and the Government of the Republic of Korea.²³⁷

43. The regime for seabed mining under Part XI has undergone significant changes by virtue of the 1994 Agreement. Under article 2, paragraph 1, of that Agreement, the provisions of the Agreement and Part XI and related provisions of the Convention are to be "interpreted and

²³⁶ See LOS/PCN/L.103 (1992, mimeo.), para. 11 (Chairman, Preparatory Commission).

²³⁷ Others who qualified as pioneer investors under resolution II but did not register as pioneer investors were four U.S.-based consortia: (1) Kennecott Consortium, formed in 1974, composed of Kennecott Corporation (U.S.), RTZ Deepsea Mining Enterprises Ltd. (U.K.), Consolidated Gold Fields Plc (U.K.), BP Petroleum Development Ltd. (U.K.), Noranda Exploration Inc. (Canada), and Mitsubishi Group (Japan); (2) Ocean Mining Associates, formed in 1974, composed of Essex Minerals Company (U.S.), Union Seas Inc. (Belgium), Sun Ocean Ventures (U.S.), and Samim Ocean Inc. (Italy); (3) Ocean Management Inc., formed in 1975, composed of Inco Inc. (Canada), SEDCO Inc. (U.S.), *Arbeitsgemeinschaft Meeretechnisch Gewinnbare Rohstoffe* (Germany), and Deep Ocean Minerals Company (Japan); and (4) Ocean Minerals Company (OMCO), formed in 1977, composed of Amoco Ocean Minerals Co. (U.S.), Lockheed Corporation (U.S.), Royal Dutch Shell (Netherlands), and Royal Bos Kalis Westminster (Netherlands).

applied together as a single instrument.” In the event of any inconsistency between the two, the provisions of the Agreement shall prevail.²³⁸ Where a provision of Part XI, Annex III, or Annex IV is affected by a provision of the Agreement, the effect of the relevant provisions of the Agreement is addressed in the Commentary on each individual article.

²³⁸ *Secretary-General's Informal Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Collected Documents*, International Seabed Authority, 2002, contains an extensive bibliography of the published literature relating to the background of the 1994 Agreement. In particular, see David H. Anderson, “Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea,” *International and Comparative Law Quarterly* 42 (3) July 1993, 654-664; “Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea,” *International and Comparative Law Quarterly* 43 (4) October 1994, 886-893; Edward D. Brown, “The 1994 Agreement on the Implementation of Part XI of the UN Convention on the Law of the Sea: breakthrough to universality?” *Marine Policy* 19 (1) January 1995, 5-20; Moritaka Hayashi, “The 1994 Agreement for the Universalization of the Law of the Sea Convention,” *Ocean Development and International Law* 27 (1-2) 1996, 31-39; Joachim Koch, “Revisions in Part XI: A Necessary Compromise,” in Myron H. Nordquist and John N. Moore (eds.), *1994 Rhodes Papers: Entry into Force of the Law of the Sea Convention*, The Hague and Boston: Martinus Nijhoff Publishers, 1995, 151-154; L. D. M. Nelson, “Some observations on the Agreement implementing Part XI of the 1982 Convention on the Law of the Sea,” in *Proceedings of the Twenty-eighth Annual Conference of the Law of the Sea Institute, Honolulu, Hawaii, 11-14; July 1994: Ocean Governance: Strategies and approaches for the 21st Century*, edited by Thomas A. Mensah. Honolulu, Hawaii: Law of the Sea Institute, University of Hawaii, 1996, 203-218; M. C. W. Pinto, “Common Heritage of Mankind: From Metaphor to Myth,” in Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in Honour of Krzysztof Skubiszewski*, Kluwer 1996, at 224; Satya N. Nandan, “Resolving the Problems of Part XI (The Deep Seabed Mining Regime),” Seminar on New National Perspectives on the Law of the Sea, Center for Oceans Law and Policy, University of Virginia, Washington D.C., 19 March 1993; Tullio Treves, *L'entrée en vigueur de la Convention des Nations Unies sur le droit de la mer: la route vers l'universalité*, International legal issues arising under the United Nations Decade of International Law, Doha, Qatar, 22 to 25 March 1994.

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A COMMENTARY

Volume VI

Articles 133 to 191
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Agreement relating to the Implementation of Part XI
Documentary Annexes

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