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The Billion Dollar Decision: Is Deepsea Mining A Prudent Investment?

LEIGH S. RATINER*
AND
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I. INTRODUCTION

Mining companies are accustomed to taking risks. The nature of the business requires the investment of enormous sums of capital to develop an ore deposit years before production will ever be brought to the marketplace. By that time, the volatile metals markets may have experienced wide price swings which can reduce the financial returns on the project below acceptable levels and can, indeed, even wipe out the investment made earlier. Sometimes a project requires many millions of dollars in research and development expenditures on new mining technologies or processing methods before commercial recovery can begin; the mining company must assume the risk that this new technology will not prove economically feasible.

Land miners in the United States can locate mineral deposits and secure clear legal rights to develop them, and only then are they faced with technological and, ultimately, market risks. Usually, these technical risks are manageable, because relatively little technology of a pioneering nature is involved.

Ocean miners, however, are in a fundamentally different position. The attempt to locate a deposit in the oceans requires the development of new techniques for prospecting never before used in the mining industry. Once a deposit is identified, pioneering technology must be developed to recover minerals from three miles beneath the sea's surface and to extract metals from ore never before processed. Because the technological risks are novel, feasibility studies for an ocean mine must go well beyond what the land miner would be

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required to prove to justify an initial investment, and the location of a seabed deposit, because of the large extent of the deposits, is necessarily a somewhat lesser component of determining overall feasibility than would be true for a land-based deposit. Of equally serious concern, the ocean miner under present law cannot acquire universally-recognized rights to the deposit. Metals-rich manganese nodules are not found within any nations's territorial or resource jurisdiction. Under the international law of the freedoms of the high seas, which is not unanimously accepted by other nations as being applicable to deep seabed mineral resources, the ocean miner has the legal right to recover nodules, but he may not have the right to exclude other parties from mining the same deposit. These latter, "exclusive" rights can only be clearly assured through not yet concluded multilateral or bilateral agreements among nations.

But, even if the ocean miner accepts all of these risks which his land mining colleagues do not face, he confronts one further risk—the risk that well-intentioned diplomats will write a new body of law to govern his investment after he has made it. And he has no assurance that the new body of law will not prohibit him from recouping his investment, not to mention earning a reasonable return.

Grappling with these uncertainties, the ocean miner must be continually alert to the every-changing political climate of the future. Capital expenditures for research and development, prospecting, and exploration can be justified so long as there remains a reasonable chance that the political and legal climate will one day justify the decision to commercialize the investment. At some point, however, the ocean miner must become sufficiently confident of the political future as to make the final decision on whether to invest in excess of a billion dollars. As preparations are made for this decision, each of the variables are analyzed in a continuing process. During the interim, the extent to which corporations can commit further funds to ocean mining will be a function of their assessment of these variables in combination. If at some point the technology, the political future, and the markets all look unfavorable, even modest capital programs will be terminated. Today, the situation for ocean miners can be summarized as follows: The technology looks feasible; the markets are poor but are likely to improve significantly in the mid-1980's; and the political future is dismal.

The purpose of this article is to explain how one reaches the conclusion that the political future is dismal, in as careful and precise a manner as possible. The political future for ocean mining is still

being created. The law has yet to be written, and the rules and regulations do not exist. If the 150 nations which have been attempting to write that law for over ten years can understand why deepsea mining is unlikely to occur under the scheme they have developed, they still have an opportunity to repair it.

Much has been said about the competing policy objectives at stake in the Third United Nations Conference on the Law of the Sea. Statements are frequently heard from responsible American public officials that our national interest in the development of secure supplies of seabed minerals is only one among a variety of important national interests to be served by the emerging law of the sea treaty. In truth, such statements are usually a euphemism for the willingness of some to accept a treaty that effectively forestalls any deepsea mining, or at least creates a very poor investment climate for deepsea mining, if they can attain other objectives which they consider to be of a higher priority. This article will not deal with the question of such priorities. Instead, it focuses on the much narrower issue of whether deepsea mining can occur under the legal regime presently contemplated by the draft law of the sea treaty.

The problem is best explained by the old adage—"you can lead a horse to water, but you can't make him drink." Indeed, no matter how thirsty the horse may be, if he is certain the water is poisoned, he may take his chances on finding another trough. There are many other attractive investment opportunities for the mining industry, and thus the probability is virtually non-existent that ocean miners will assume substantial political risks under any future regime. While most lawmakers are keenly sensitive to the fact that the laws they make must be minimally suitable to their constituencies, it is by no means clear that the delegates to the Law of the Sea Conference have yet acknowledged this phenomenon. As is demonstrated by an analysis of the present draft treaty articles, there is a glaring inconsistency between the prerequisites for private investment in deepsea mining and the political environment which would evolve under the new regime. This inconsistency can only mean that the resources of the deep seabed, the so-called "common heritage of mankind," may never become metals in the marketplace to benefit consumers nor generate revenues to benefit the lesser developed nations. And this result would be directly contrary to the economic interests of the international community as a whole. It would be entirely supportive, however, of the economic interests of a small group of countries who produce these same minerals on land.

These countries know quite well that a stable international investment climate is required before ocean mining can proceed, and they have successfully managed over the more than ten years of this Conference to prevent a treaty that could provide this stability from being finalized. By escalating their demands in the negotiation, they have effectively discouraged ocean mining, which they believe may one day compete with the raw materials they themselves produce. The success of this small group of countries has been phenomenal. Not only have they deterred ocean mining by preventing agreement on a treaty regime, but they have simultaneously ensured that the treaty drafted by the Conference would itself deter the development of these resources, even if the industrialized countries with an economic stake in ocean mining were, as a result of their perception of the balance of national interests involved in the Conference overall, ever prepared to sign it. As long as the negotiations continue, these mineral producing countries will benefit from the investment uncertainty for ocean mining created by the negotiations. And, if the negotiations result in a treaty like the one now pending before the Conference, this deterrent to ocean mining will have been memorialized.

For this handful of countries, the only threat to their economic interest is the risk that the ocean mining investment climate may be stabilized by the actions of industrialized countries independent of the Law of the Sea Conference. Until now, they have believed that the industrialized countries would sign virtually any treaty to avoid having to establish an alternative investment climate through measures strenuously opposed as a matter of principle and ideology by the Third World. That belief may now be shaken by the rapid progress of the United States, Federal Republic of Germany, United Kingdom, Netherlands, France, Belgium, and others toward the enactment of reciprocal legislation creating that much-needed stabilized investment climate.

It is sometimes argued by well-meaning but non-expert followers of the law of the sea that, through legislation, the United States and others are about to make an unprecedented land grab on the bottom of the oceans. In fact, the more persuasive argument is that this handful of countries, producing on land the same metals as are likely to come from the sea, are the land grabbers: they would seize control of the deep seabed for the purpose of limiting its usefulness to mankind. Needless to say, the overwhelming majority of people in the world consume these raw materials and do not produce them. While it can be argued that industrialized countries benefit the most from

the ready availability of raw materials at competitive prices, the major beneficiaries will also include those Third World countries who seek to industrialize their economies.

To explain why the minerals-producing countries have been so influential in the deep seabed negotiations to date would require a detailed assessment of the evolution of new international economic order positions held by the Third World countries in all international forums. It is sufficient for the purposes of this article to recognize that the politics of the Law of the Sea Conference are complex. In respect to deepsea mining, they have produced the anomalous result of a treaty that is contrary to the economic interests of most countries but which persists, because it satisfies the political interests of those countries, and the negotiations are in the hands of politicians and not economists.

Even politicians, however, must be subject to judgment. Surely most recognize that a treaty that discourages the development of the common heritage of mankind will not only blemish their personal records but will also set back global efforts to achieve cooperation in a new era of technological development and world interdependence. Before this process goes much further, it would seem useful to spell out as clearly as possible why the treaty presently under negotiation will have this result.

As ten years of intensive multilateral negotiation on the basic components of an international deep seabed regime have elapsed, and the range of final decisions have narrowed, it is not too difficult to predict the content of any treaty to be concluded within the next two to three years. The reason is that the deepsea mining negotiations, for all their extreme swings in the past, are now like a pendulum whose arc is ever diminishing; indeed, the pendulum has almost come to rest. Thus, while one can be wrong about final details, it would be difficult to be wrong about the basic content, assuming that the time period remaining for negotiation is relatively short. To continue the analogy, the pendulum would have to be reactivated, if the objective were to move the final balancing point to another position on the arc more conducive to deepsea mining investment. And it would require a fairly lengthy additional time period before the parameters of the negotiation would once again narrow and predictions about the future investment climate would become reliable. Since, in virtually every detail of the complex set of draft treaty articles which have been produced by the Conference so far, the prospective ocean mining company is confronted with obstacles to private

capital participation in the development of this resource and generalized hostility to any development at all, it would clearly be in the interests of most concerned to substantially lengthen the time period remaining for negotiation of an international deepsea mining regime.

II. EVALUATING THE PROSPECTS FOR PRIVATE INDUSTRIAL DEVELOPMENT OF DEEP SEABED MINERALS UNDER THE DRAFT TREATY

In order to evaluate the investment climate which would be faced by a private venture seeking to engage in deep ocean mining under the present draft treaty articles, a number of questions must be explored. Although interrelated, these questions can, for organizational purposes, be divided into four categories:

1. *The ability to acquire and maintain access to deep seabed mineral deposits.*

The prospective ocean miner needs first to ascertain what legal rights he is accorded to conduct ocean mining under the draft treaty articles, what conditions may legitimately be imposed on his operations, and under what circumstances may such rights granted be abridged or revoked.

Any legal regime for regulating mining activities is likely to contain some discretionary leeway for the entities entrusted with administering it. In the case of the draft law of the sea treaty, however, the incidence of discretion is enormous. Thus, an analysis of the actual terms of the draft treaty relating to access reveals only an incomplete picture. To fully respond to the investor's questions concerning access, certain practical assumptions have to be made about how the written word is likely to be implemented by the newly-created political institution, the International Seabed Authority.

2. *The ability of the prospective ocean miner to compete in the marketplace.*

To a large extent, these questions involve the economics of his contemplated project and of metals markets in general, but the role of governmental bodies in shaping the competitive environment cannot be ignored. By regulating and controlling entry into the market, production controls, and by creating a supranational mining company—the Enterprise—the draft law of the sea treaty fundamentally alters the international investment climate to which market economy investors are accustomed.

3. *The longevity of the ocean mining investment climate.*

Mining companies are almost as concerned with the prospects for future growth in a new minerals field as they are with the se-

curity of investment made in a specific project. For ocean mining, the probability that a particular company will be permitted to undertake a second project, or expand the capacity of the first, is a critical factor, since the high initial research and development expenditures required to commercialize this novel technology cannot easily be justified by the economic returns from a single operation of limited size and duration. Under the draft law of the sea treaty, the status of private industry ocean mining is only foreseeable for the first twenty to twenty-five years. At the end of this period, the entire legal system for regulating ocean mining investment may be changed by a Review Conference, and the implications for mining operations undertaken both before and after the Conference must be understood.

4. *The testing of the assumptions made previously about the probable behavior and operation of the International Seabed Authority.*

How is this new institution organized and what political interests will control its decisions? How effectively will the provisions of the treaty itself govern the actions of this multi-purpose regulatory and mining body? By assessing the "constitutional" framework of the International Seabed Authority and the relative strength of the political forces that will operate within this body, the prospective ocean miner can complete his evaluation of the overall investment climate which will prevail under the new international regime.

The principal reference tool for making this assessment of the future deep seabed investment climate is the Informal Composite Negotiating Text (hereinafter "ICNT") produced at the Sixth Session of the Conference in 1977.¹ To the extent that provisions of this draft treaty concerning the deep seabed were the subject of revision by working groups during the Seventh Session of the Conference at the Geneva meeting, the revised articles are used as substitutes for the corresponding provisions of the ICNT, even though the status of these articles is very much in doubt at this writing.²

1. Informal Composite Negotiating Text, U.N. Doc. A/Conf. 62/WP.10, July 15, 1977 [hereinafter cited as ICNT].

2. The Seventh Session of the Conference convened in the spring of 1978 in Geneva, Switzerland, created three negotiating groups to consider specific outstanding issues in Part XI of the ICNT, "The Area," and the relevant annexes. Negotiating Group 1 produced revised articles concerning the system of deep seabed exploitation. LOS Conf. Doc. NG1/10/Rev. 1, May 16, 1978. Negotiating Group 2 produced revised articles concerning the financial arrangements of the Authority and of the Enterprise and the financial terms of contracts. LOS Conf. Doc. NG2/4; NG2/5, May 4, 1978; NG2/7, May 12, 1978. Negotiating Group 3 reached no agreement on revisions

III. ACQUIRING AND MAINTAINING ACCESS TO DEEP SEABED RESOURCES

For a number of years, the international negotiations on a deep seabed regime at the Law of the Sea Conference have been characterized by a fundamental dispute over the entities which should be permitted to engage in ocean mining. The industrialized countries with the capability to develop the resources originally insisted that only states and their nationals should have the right to exploit the deep seabed, while the developing countries, acting collectively through their caucus, the Group of 77, insisted that a supranational public company should engage in ocean mining to the exclusion of states and private industry. This latter concept of an international operating monopoly espoused by the Group of 77 became known euphemistically as "direct exploitation."

The power of the International Seabed Authority (hereinafter "Authority") to mine the deep seabed on its own has continued to be a fundamental tenet of the Third World position. The primary reason is that direct exploitation symbolizes the control over deepsea resources which developing countries argue was conferred upon them in principle when the United Nations General Assembly declared the deep seabed and its resources to be "the common heritage of mankind."³ In Third World thinking, "common heritage" is identical to "common exploitation." Other motivations of probably less importance underlying this position include a belief that developing countries can only participate in ocean mining through an international agency sympathetic to their aspirations, a conviction that public enterprises maximize returns to governments and a desire by land-based producers of the same minerals found in the deep seabed to use direct exploitation as a mechanism for controlling world minerals markets. The concept of direct exploitation involves not only the Authority's undertaking mining activities by itself but also its ability to associate with private industry when it wants and how it wants, in the same manner as a sovereign state.

to the ICNT concerning the composition and voting procedures of the organs of the Authority. LOS Conf. Doc. NG3/2, May 12, 1978. Even in those cases where new articles resulted from face-to-face negotiation between principally concerned states, as in the case of the U.S.-Canadian negotiation on Article 150 *bis*, there is very great doubt that such articles will finally survive in the treaty.

The Seventh Session resumed for a four week meeting in New York, New York, in August-September 1978. See note 2 *supra* and accompanying text for description of the results of this resumed session.

3. G.A. Res. 2749 (XXV), 8097 U.N. GAOR (1970).

As a result of the Third World's insistence that the treaty authorize direct exploitation and the industrialized countries' desire to get on with the job of formulating a new international regime, the so-called parallel system of exploitation was born. Under this concept, first publicly accepted by the United States in 1975, the treaty would accord states and their nationals rights to undertake ocean mining but at the same time create an Enterprise, the mining arm of the Authority, to engage in direct exploitation in competition with states and private companies.⁴

This two-track system of access is allegedly embodied in the ICNT, as it would be amended by the revised articles drafted during the Seventh Session of the Conference.⁵ In fact, the notion of equal or parallel access for states and private industry, on the one hand, and the Enterprise, on the other, is not implemented in these documents. The reason is simply that the Third World, because of its ideological attachment to direct exploitation through the Enterprise, is not willing to accept a parallel system of exploitation without significant discrimination in favor of the Enterprise built into the system.⁶ Accordingly, there has been introduced into the ICNT financial and other subsidies for the Enterprise, forced technology transfer from private industry and, in general, the ability to "negotiate" (in other words, to deny access by not successfully concluding the negotiations) with applicants on the state and private industry side of the parallel system in order to ensure that the Enterprise realizes its mandate of direct exploitation as quickly as possible. Moreover, they have only been prepared to accept this one-sided parallel system, if at all, for a temporary period of twenty to twenty-five years.⁷

4. See Statement of Henry A. Kissinger, Secretary of State, before the American Bar Association Annual Convention, Montreal, Dept. of State Press Rel. No. 408, Aug. 11, 1975.

5. "[T]he [Seventh Session] revealed a more sophisticated understanding of the economic stakes at issue and a broad acceptance of the aim of making the parallel system of seabed exploitation workable." See Statement of Elliot L. Richardson, Ambassador at Large, Special Representative of the President for the Law of the Sea Conference, May 22, 1978.

6. "The Group [of 77] is clearly of the view that it is in the nature of this [parallel] system that the Enterprise must enjoy a preferential status in the exploitation of the resources in the deep seabed area. See Statement of the Chairman of the Group of 77, Ambassador S.N. Nandan, before the General Committee, U.N. Conference on the Law of the Sea, New York, August 17, 1978.

7. It should be recalled that, when the U.S. Secretary of State in 1976 suggested the idea of a temporary regime to be reviewed in 25 years, he stated then that the temporary regime must be a pure parallel system—not the one-sided regime of the ICNT. See Statement of the United States Delegation on Secretary Henry A.

Analysis of the parallel system of exploitation now contained in the draft treaty articles demonstrates that the Authority would have the power to maximize achievement of Third World objectives. In broad terms, these objectives can be stated as:

- (1) The restriction of seabed minerals production so as to insulate Third World producers of the same minerals from competition;
- (2) the concentration of all ocean mining, to the extent that it does not compete with Third World production, under a single intergovernmental mining agency, the Enterprise, subject to developing country control; and
- (3) the limitation of developed country and private industry ocean mining activities to that level necessary for the early acquisition by the Enterprise of the requisite capital and ocean mining technology, skills and know-how.

To understand why the modified ICNT's version of a parallel system of exploitation would not permit private industrial ventures to engage in ocean mining as a matter of right on "their" side of the access system, it is first necessary to examine the process by which a private company would acquire and maintain access under the draft treaty on a step-by-step basis. For discussion purposes, the provisions on access are divided into three basic stages: Relevant Authority decisions prior to application for a contract; the procedure for application and award of contracts; and Authority decisions affecting contract operations. In describing the treaty process, it is assumed at this stage in the analysis that the Authority will interpret its mandate under the language of the text so as to acquire the broadest degree of discretion possible to satisfy those objectives identified as important by the Third World collectively. This assumption will be tested in the subsequent analysis of the powers and decisionmaking procedures of the Authority's organs.

A. Authority Decisions Prior to Application

Prior to the time a company applies for a contract to engage in ocean mining, the Authority is empowered to take a number of actions that will affect the company's decision whether to move forward with investment.

1. Adoption of Resource Policy. A variety of production control and other economic objectives are described in the draft treaty under the

Kissinger's Participation in the Law of the Sea Conference, Press Release USUN-98(76), Sept. 1, 1976.

rubric of "resource policy." In the revised articles,⁸ the Authority's resource policies are divided into two categories: general policies relating to ocean mining and production policies.⁹ The general policies include vaguely stated objectives, such as expanding developing country participation in ocean mining;¹⁰ ensuring transfer of technology and revenues to the Authority and developing countries;¹¹ providing "adequate" supplies of seabed minerals for consumers;¹² ensuring "just and stable prices remunerative to producers and fair to consumers";¹³ "preventing monopolization" of ocean mining in the context of a policy that all states should have the opportunity to engage in ocean mining;¹⁴ and protecting developing country producers from a decline in the volume or prices of their mineral exports caused by ocean mining, no matter how slight.¹⁵

The production policies established in the draft treaty are for the purpose of implementing the general policy of protecting Third World producers.¹⁶ There are essentially four separate mechanisms:

- (1) The Authority is empowered to enter commodity agreements for seabed minerals, provided that "all interested parties" participate, and to control seabed production and prices pursuant to such agreements, provided that the controls are consistent with the terms of existing contracts.¹⁷
- (2) The draft treaty establishes an artificial production ceiling on seabed nickel for the first twenty years of ocean mining production.¹⁸

8. LOS Conf. Doc. NG1/10/Rev. 1, May 16, 1978 [hereinafter cited as NG1]; NG2/4, NG2/5, May 4, 1978; NG2/7, May 12, 1978 [hereinafter cited as NG2].

9. NG1, Arts. 150, 150 *bis*.

10. ICNT, Art. 148; NG1, Art. 150(b).

11. NG1, Art. 150(c). In this case, a strong argument exists that the technology transfer provisions of NG1 para. 4(c)(ii) and para. 5(j)(iv) of Annex II, and the financial arrangements established in para. 7 of Annex II, NG2, provide the exclusive means by which the Authority can implement this policy. However, the draft treaty also provides for "joint arrangements" between companies and the Enterprise, which may open the door to the Authority's adopting additional requirements with respect to joint ventures for the purpose of implementing this policy. See NG1, Art. 151(3); ICNT, Annex II, para. 5(i).

12. NG1, Art. 150(d).

13. *Id.* Art. 150(e).

14. *Id.* Art. 150(f). This policy accords the Authority sufficient discretion to adopt a state quota limiting the number of contracts any one state may sponsor, even if a quota is not ultimately included in the treaty. See ICNT, Annex II, para. 5(1).

15. NG1, Art. 150(g). In this case, the method of implementing the general policy is expressly provided in NG1, Art. 150 *bis*.

16. *Id.* Arts. 150(g), 150 *bis*.

17. *Id.* Art. 150 *bis* (1).

18. *Id.* Art. 150 *bis* (2).

- (3) The Authority is directed to regulate production of seabed minerals other than nodules pursuant to regulations, which must be approved by states in the same manner as amendments to the convention.¹⁹
- (4) The Authority is directed to establish a system of compensation for developing country producers adversely affected by ocean mining.²⁰

The one-nation, one-vote Assembly is responsible for determining these policies in general terms,²¹ and the Council is responsible for determining the specific policies in conformity with the Assembly's decisions.²² Thus, before a company applies for a seabed mining contract, the Authority may have adopted certain policies which limit that company's ability to obtain access, for example, the establishment of a quota on the number of mining operations that may be undertaken by companies of the same nationality or granting of special priorities and preferences for applicants prepared to waive their immunity from subsequent price and production controls adopted under a future commodity agreement.²³ Industrialized countries will have little influence over Assembly decisions, and whatever influence they have over Council decisions may be irrelevant, since the Council is subordinate to the Assembly.²⁴ Finally, the adoption of such discretionary policies will not be subject to challenge in the Seabed Disputes Chamber.²⁵

2. Adoption of Rules and Regulations. The subjects of the Authority's regulations are theoretically limited.²⁶ However, the limited list of permissible subjects includes such open-ended headings as "administrative procedures," which could be argued to cover any standard the Authority wishes to use for awarding or denying contracts;²⁷ technology transfer and the "direct participation" of developing countries, which accords discretion to adopt any regulatory requirements for the benefit of developing countries;²⁸ and implementation of the

19. *Id.* Art. 150 *bis* (3).

20. *Id.* Art. 150 *bis* (4).

21. ICNT, Art. 158(1).

22. *Id.* Art. 160(1).

23. See NG1, Art. 150 *bis* (1) (last sentence); see also *supra* note 14.

24. See general discussion of the Assembly and Council *infra*.

25. See ICNT Art. 191 and discussion of the Seabed Disputes Chamber in text accompanying note 235 *infra*.

26. See ICNT, Annex II, para. 11(a) and discussion of the procedure for adopting the Authority's rules and regulations, in text accompanying note 186 *infra*.

27. *Id.* para. 11(a)(1).

28. *Id.* para. 11(a)(2)(xii).

Council's decisions on resource policies.²⁹ In brief, the draft treaty arguably permits these regulations to impose any obligation on contractors which the Authority believes is necessary to implement vague policies, such as increased developing country participation in ocean mining (for example, a requirement that all processing plants be located in developing countries)³⁰ and restrictions on the number of contracts which may be awarded to the nationals of any one state.³¹ Since the Assembly ultimately has the power to adopt the Authority's regulations, there is a real risk that requirements on contractors will be excessive.³² Moreover, the legality of these regulations would not be subject to judicial review in the unlikely event that a regulatory requirement could not be justified on the basis of these generally stated policies.³³

3. Regulation of Prospecting. The draft treaty establishes certain obligations for companies conducting deep seabed minerals prospecting, which may rise to the level of Authority regulation of such activities.³⁴ Before conducting prospecting, a company must:

- (a) notify the Authority of the broad area of the seabed in which prospecting will be undertaken;
- (b) undertake to comply with the Authority regulations concerning environmental protection, data transfer, and training of Authority personnel; and
- (c) agree to permit the Authority to "verify" its compliance with these and any other regulations that may relate to prospecting.³⁵

While certain obligations imposed on contractors conducting exploration and exploitation, such as revenue and technology transfer,

29. *Id.* para. 11(a)(4).

30. *Id.* para. 11(a)(4); ICNT, Art. 148; NG1, Art. 150(b).

31. ICNT, Annex II, para. 11(a)(4); NG1, Art. 150(f).

32. See general discussion of the Assembly *infra*.

33. See ICNT, Art. 191 and discussion of the Seabed Disputes Chamber, in text accompanying note 235 *infra*.

34. ICNT, Annex II, para. 2(a). "Prospecting" is arguably not an "activity in the Area" as defined in Article 133(a) of the ICNT; thus, it should not be governed by any provision of the draft treaty other than para. 2 of Annex II, ICNT. Nevertheless, para. 11(a)(1) of Annex II, ICNT, authorizes the adoption of regulations concerning "administrative procedures relating to prospecting," and para. 11(a)(2) contains a long list of possible subjects for operational regulations, which are expressly limited to operations under contracts in only a few instances. See also note 97 *infra* and accompanying text.

35. ICNT, Annex II, para. 2(a).

are clearly inapplicable to prospectors, the draft treaty is silent on the nature of any other obligations that might be imposed on a company seeking to prospect. Of key importance is the failure to specify the extent of data turnover requirements that may be imposed on prospectors, to extend protections for proprietary data to prospectors,³⁶ and to establish the nature of any penalties that may be imposed on prospectors for noncompliance with regulations.

B. Application and Award of Contracts

The procedure by which a company applies for and is awarded access to deep seabed minerals in the form of a contract contains many ambiguities and, thus, accords the Authority considerable discretion. The application process can be broken down into four steps:

- (a) Determination that the applicant is qualified;
- (b) selection of those qualified applicants who will be considered;
- (c) negotiation of the contract; and
- (d) approval and disapproval of contracts.

1. **Qualification Procedure.** The first step in the contracting process is a determination by the Authority (presumably the Technical Commission) that the applicant is in compliance with the Authority's application procedures and has the requisite qualifications.³⁷ Both the administrative procedures and the qualifications will be set forth in the regulations described above.³⁸ The draft treaty expressly requires the applicant to:

- (a) Satisfy the Authority's regulations with respect to financial standing, technological capability, and satisfactory performance under any previous contracts;³⁹
- (b) include in his application any information the Authority requests concerning his mining technology;⁴⁰
- (c) submit to the Authority either two mine-sites or a single mine-site twice as large as required by the applicant, from which the Authority will reserve one site for itself;⁴¹ and

36. *See id.*, para. 8.

37. *Id.* para. 5(b). Article 163(2)(xiv) of the ICNT provides that the Technical Commission reviews formal written plans of work, including contract applications. *See* further discussion of the Technical Commission *infra*.

38. ICNT, Annex II, para. 4(a).

39. *Id.*

40. NG1, Annex II, para. 4(c)(ii).

41. ICNT, Annex II, para 5(j)(i). Although the obligation to submit two mine-sites is phrased in terms of the contractor, it is self-evident that at least the coordinates

- (d) provide the Authority with "satisfactory assurances" that he will comply with all of the obligations imposed on contractors under the draft treaty, including mandatory technology transfer.⁴²

These requirements are so vague that they accord the Authority enormous discretion to decide whether the applicant is "qualified." Additional criteria could be utilized, since the draft treaty's listing of the requirements is not exhaustive.⁴³

If the applicant is rejected at this stage, it is very unlikely that he would have recourse to judicial review, since the Authority's decision would no doubt be considered as discretionary.⁴⁴ A rejected applicant may have turned over to the Authority proprietary information about his technology, as well as commercially valuable information concerning the location of two attractive nodule deposits. The protections for proprietary data in the draft convention only extend to contractors, not to applicants.⁴⁵ Moreover, a fair reading of the text is that there are no prohibitions on the Authority's disclosing proprietary information to the Enterprise, which is part of the Authority.⁴⁶ By submitting an application then, the company may transfer to another ocean mining competitor—the Enterprise—a significant portion of the value of its preapplication commercial work effort.

2. Selection Procedure. The second step in the contracting process is the selection from among conflicting applications, if any, of those companies with whom the Authority will negotiate the terms of access. The draft treaty includes several devices which convert conflicting applications from the anomaly they would be in a non-discretionary, first-come, first-served system to an undoubtedly frequent occurrence:

First, the Authority considers applications for contracts only three times per year.⁴⁷ There is no requirement that applications be sealed until considered and no prohibition on the Authority's advertising proposed areas, either publicly or selectively. The result is Au-

identifying the location of the proposed area or areas must be included in the formal written plan of work, or application. See note 131 *infra* and accompanying text.

42. ICNT, Annex II, para. 4(c); NGI, Annex II, para. 4(c)(iii), *bis, ter, quater, quinte*.

43. See ICNT, Annex II, para. 4(a).

44. See ICNT, Art. 191 and discussion of the Seabed Disputes Chamber in text accompanying note 235 *infra*.

45. ICNT, Annex II, para. 8.

46. See *id.*; ICNT, Art. 156(2).

47. ICNT, Annex II, para. 5(a).

thority discretion to circumvent a first-come, first-served system and to encourage conflicting applications for the same areas. Since the Enterprise may operate in non-reserved areas,⁴⁸ it is conceivable that the Enterprise would be informed of private company applications, so that the Enterprise could submit a conflicting application.⁴⁹ The reason for such a practice would be that the Authority's bargaining leverage in the case of conflicting claims is substantially enhanced under the draft treaty.⁵⁰

Second, the production ceiling in the draft treaty is allocated on an annual basis.⁵¹ During the first five years of the twenty-five year interim period, the ceiling is calculated on the basis of the full growth segment in world nickel consumption.⁵²

After that time, the ceiling is reduced to sixty percent of the nickel consumption growth.⁵³ In rough calculations, the ceiling would permit the issuance of as few as one contract per year from, say, 1987 to 2000.⁵⁴ Thus, there is a substantial likelihood that there will be more than one application for the increase in seabed production which is allowed under the ceiling in any given year.

Third, the amount of new seabed production that may be undertaken by private companies under the ceiling in any given time period is further restricted by the high probability that a substantial portion of the ceiling will be allocated to the Enterprise. While the Enterprise may only reserve part of the ceiling pursuant to a plan of work approved by the Council,⁵⁵ the procedures for Council approval

48. *Id.* para. 5(j)(v).

49. There is some ambiguity about whether an Enterprise application is subject to the same procedures as apply to private companies. Compare ICNT, Annex II, para. 6 (the Enterprise is only subject to the Authority's regulations) with NG1, Art. 151(3) (Enterprise plans of work shall be drawn up in accordance with Annex II). See also discussion of the Enterprise *infra*.

50. See notes 58-61 *infra* and accompanying text.

51. NG1, Art. 150 *bis* (2)(b). It should be noted that the allocation of the ceiling is based on the year of commencement of commercial production, not the year the contract is approved.

52. *Id.* Art. 150 *bis* (2)(a), (b).

53. *Id.*

54. The actual number of contracts that may be issued under the production ceiling contained in Article 150 *bis* of NG1 will depend on the Authority's calculations of the actual rate of growth in world nickel consumption pursuant to the formula contained in the draft article. Moreover, projections are difficult because the allocation of the permissible production ceiling is based on the year in which the applicant intends to bring his planned project into commercial production, and the time-period between application and the commencement of commercial production may vary among projects.

55. NG1, Art. 150 *bis* (2).

of Enterprise plans of work make it very unlikely that industrialized countries would be able to ensure rejection of Enterprise projects that are of a speculative or unsound nature, and thus will not reach commercial production.⁵⁶ To the extent that a safeguard against Enterprise speculation with the production ceiling might be found in the requirement that the Enterprise comply with the Authority's operational regulations (including diligence requirements), it is made ineffective by the Authority's discretion to negotiate the applicability of these regulations to particular operations.⁵⁷

Given these powers to encourage conflicting applications—either for the same area or for the same portion of the production ceiling—the procedure for selecting among applicants is critical. In the case of conflicting applications, the draft treaty permits the Authority to negotiate with the applicants in order to decide which of them is comparatively best qualified or has the best application.⁵⁸ Among the criteria which are expressly permitted to be examined are:

—Which applicant offers the most attractive opportunity for developing country participation in this project?⁵⁹

—which applicant's technology is most attractive as the subject of forced transfer to the Enterprise and possibly developing countries?⁶⁰ and

—which applicant is prepared to enter a joint venture with the Enterprise or, if there is more than one joint venture offer, which is most attractive to the Enterprise?⁶¹

Having made the selection among conflicting applicants, the Authority then enters a negotiation with one of them on the terms of a contract.⁶² Unquestionably, an applicant rejected at this stage has no recourse to judicial review, since the Authority's selection is entirely discretionary.⁶³

3. Negotiation of Contract Terms. The third step in the contracting process is the negotiation of contract terms,⁶⁴ a negotiation which expressly covers:

56. See notes 74-76 *infra* and accompanying text.

57. ICNT, Annex II, para. 6 (Enterprise must comply with operational regulations). Cf. *id.* para. 5(d)(i) (negotiation of the contract deals with application of regulations).

58. *Id.* para. 5(g).

59. *Id.* para. 5(d)(ii).

60. NCI, Annex II, para. 4(c)(ii); ICNT, Annex II, para. 5(d)(iii).

61. ICNT, Annex II, para. 5(g).

62. *Id.* para. 5(g).

63. See ICNT, art. 191 and discussion of the Seabed Disputes Chamber in text accompanying note 235 *infra*.

64. ICNT, Annex II, para. 5(c).

- operational requirements under the regulations;
- financial obligations;
- participation of developing countries;
- technology transfer; and
- ensuring that the contract is in “full conformity” with the convention and the Authority’s regulations.⁶⁵

Based on other provisions of the draft treaty, the negotiations may also cover:

- the possibility of a joint venture with the Enterprise;⁶⁶
- the settlement of contract disputes; whether they will be submitted to the Seabed Disputes Chamber, binding arbitration or some other form of arbitration;⁶⁷ and
- the waiver of basic rights accorded contractors under the convention, such as immunity against subsequent price and production controls decided under a commodity agreement.⁶⁸

The Authority has tremendous power in these negotiations to insist on terms and conditions unfavorable to the contractor, as long as its demands can be justified under the broad language of the Authority’s “resource policies” and implementary regulations.⁶⁹ In fact, by using its discretionary power to give “financial incentives” to operators who offer developing country or Enterprise participation in a project, the Authority need never adopt directly coercive positions in the contract negotiation in order to satisfy its objectives.⁷⁰

There are no effective safeguards against the Authority’s using its power to “negotiate” as a means of arbitrarily denying access. The contract application will probably not be submitted to the Council by the Technical Commission until the “issues under negotiation are settled.”⁷¹ And industrialized countries are unlikely to have sufficient voting power in the Council to obtain an affirmative decision ordering the Technical Commission to release the application under negotiation.⁷² Here, again, the applicant is unlikely to have recourse to

65. *Id.* para. 5(d), (e).

66. *Id.* para. 5(i).

67. See ICNT, Art. 188.

68. See ICNT, Annex II, para. 5(e); NG1, Art. 150 *bis* (1) (last sentence).

69. See notes 8-33 *supra* and accompanying text.

70. See NG2, Annex II, para. 7 *septies*.

71. See ICNT, Annex II, para. 5(f); NG1, Art. 151(3).

72. See general discussion of the Council *infra*.

judicial review for the purpose of either forcing a conclusion to the "negotiation" or challenging the Authority's position on the contract terms.⁷³

4. Award of Contracts. The only standard limiting the Authority's discretion to refuse to conclude a contract in the draft treaty is the requirement that it approve a contract "[a]s soon as the issues under negotiation . . . have been settled."⁷⁴ The Technical Commission is not actually empowered to disapprove a contract application but may only recommend appropriate action to the Council.⁷⁵ However, as mentioned above, there is no requirement that the Technical Commission submit all applications to the Council for decision.

If the Technical Commission submits a contract proposal to the Council, there is some chance that opponents of the contract will be unable to block its approval. The reason is that the contract will be deemed to have been approved by the Council, unless a three-fourths majority votes to disapprove the contract within sixty days.⁷⁶ Shifting the burden in this manner may give industrialized country members, if they invariably vote together, the power to ensure that all contract proposals submitted are approved. However, the industrialized countries on the Council may not always vote together on this issue, since they are ultimately competitors.

C. Decisions Affecting Contract Operations

Once a company concludes a contract with the Authority, a number of provisions of the draft treaty render very uncertain the security of any investment made under that contract. For example, the exclusive rights to a specific deposit accorded the contractor—which are indispensable to security of tenure—are shared "with the Authority" under the draft treaty.⁷⁷ This provision suggests the na-

73. See ICNT, Art. 191 and discussion of the Seabed Disputes Chamber in text accompanying note 235 *infra*.

74. ICNT, Annex II, para. 5(f).

75. ICNT, Art. 160(2)(x), 163(2)(xiv).

76. *Id.* Art. 159(7), 160(2)(x). Under more stringent proposals for Council voting, advocated by the United States, requiring concurrent majorities in several chambers, this tacit approval procedure for contracts would be likely to assure contract approval. See general discussion of the Council *infra*. However, it is important to note that the procedure is equally applicable to the approval of Enterprise contracts, and thus substantially diminishes the ability of industrialized countries to block unfair and discriminatory advantages for the Enterprise. Further, the blocking power is only useful once the Technical Commission submits the contract. Under any Council proposal on the table, industrialized countries would not have the power to obtain an affirmative vote directing the actions of the commissions.

77. ICNT, Annex II, para. 10.

ture of the Authority's control over contract operations, but other aspects of the draft treaty pose an even more substantial threat to security of investment:

First, while the draft treaty expressly provides for security of tenure for operators,⁷⁸ there are no limitations on what rights the Authority may require the contractor to waive as the price of obtaining a contract.⁷⁹ Hence, every contract may empower the Authority to impose price and production controls,⁸⁰ require the contractor to comply with regulations issued subsequent to the contract,⁸¹ require the contractor to waive access to the Seabed Disputes Chamber in favor of Authority-governed arbitration,⁸² or otherwise impose obligations to comply with subsequent policy decisions of the Council and the Assembly.⁸³

Second, the rules and regulations incorporated into the contract may be "provisional" in that they have been adopted by the Council but not the Assembly.⁸⁴ Hence, Assembly action can lead to fundamental changes in the terms of a contract upon which investment has been based.

Third, although contract disputes are theoretically reviewable, the policy, or discretionary decisions of the Assembly and Council are not;⁸⁵ neither is the substance of rules and regulations.⁸⁶ Thus, Assembly policies and new regulations that adversely affect contract operations cannot be challenged in the Seabed Disputes Chamber or in an arbitral commission.⁸⁷ Given the supremacy of the Assembly,⁸⁸ and Third World control over it,⁸⁹ the result is continual uncertainty for the contractor over whether his investment will be impaired by

78. NG1, Art. 151(6); ICNT, Annex II, paras. 12 and 13. In the event the contract is with the Enterprise, it is unclear whether the contractor has security of tenure or any recourse to dispute settlement. ICNT, Art. 187(2). Joint arrangements entered pursuant to Article 151(3) of the NG1 revised articles *may* have security of tenure protection under Article 151(6); but nowhere is it clear that the Authority cannot force private operators into other forms of joint ventures.

79. See ICNT, Annex II, para. 5(d), (e).

80. See NG1, Art. 150 *bis* (1).

81. See ICNT, Annex II, para. 5(d) (i).

82. See ICNT, Art. 188.

83. See *id.* Annex II, para. 5(d), (e).

84. ICNT, Art. 158(2) (xvi), 160(2)(xiv).

85. ICNT, Art. 191.

86. *Id.*

87. *Id.* Art. 188.

88. *Id.* Art. 158(1).

89. See general discussion of the Assembly *infra*.

the actions taken by the annual Assembly session. Moreover, the likelihood of radical change is heightened at five-year intervals, by the requirement that the Assembly undertake a review of the system to "improve the regime."⁹⁰

Finally, contracts would defer many critical details to later negotiation with the Authority, and the discretionary nature of such negotiations means that, in general, the contractor would have no choice but to comply or risk revocation of his contract. For example, it is possible for the Authority to defer its decision on which of the two mine-sites submitted it will reserve, forcing the contractor to explore both sites.⁹¹ The system for determining the level of royalty and profit-sharing payments owed by the contractor is highly discretionary, and the Authority could require higher payments than would be fair on the basis of the contract terms.⁹² Furthermore, the terms and conditions under which the contractor would be required to license his technology to the Enterprise will be negotiated after the contract is concluded,⁹³ although in this instance alone provision is made for binding arbitration of disputes.⁹⁴

D. Conclusions

The preceding discussion leads to the inescapable conclusion that a prospective ocean mining company could not reasonably predict whether it would be able to obtain a contract to engage in ocean mining under the present draft treaty; nor can such a company be assured that the terms and conditions included in any contract awarded would allow profitable operations or effectively insulate the investment from the imposition of new requirements that impair its value.

Nevertheless, in the event that an applicant obtained a contract and could be assured of its fair and reasonable administration by the Authority, the applicant would need to evaluate carefully the impact of direct exploitation by the Enterprise on its competitive position under the draft treaty, before investing over a billion dollars.

90. ICNT, Art. 152.

91. See ICNT, Annex II, para. 5(j)(i).

92. See NG2, Annex II, para. 7.

93. NG1, Annex II, para. 4(c)(ii) *ter*.

94. *Id.* para. 5(j)(iv). Note that there is no description in the draft treaty of the arbitration procedure to be used or the law to be applied.

IV. THE ROLE OF THE ENTERPRISE IN THE PARALLEL SYSTEM OF EXPLOITATION

Of all the major issues arising in the deep seabed negotiations, the problems attendant on operations by the Enterprise have received the least thoughtful consideration. As a result of the Conference's failure to come to grips with the establishment of a supranational public mining company, the details of the organization, powers, and functioning of the Enterprise are deferred to the future, with the draft treaty containing only the most general authorizations and guidance.

This absence of detail does not mean, however, that the role of the Enterprise in the parallel system of access purportedly established under the draft treaty can be discounted. A practical assessment of the probable operation of the new international regime demonstrates that the Enterprise will assume primacy in ocean mining in the earliest years of development. This can occur in two ways: (1) Either access to deep seabed resources will only be accorded to states or private companies if they enter into some relationship with the Enterprise, or (2) Enterprise operations will be so heavily subsidized and favored by the Authority that ocean miners not entering associations with it will be at a great competitive disadvantage. The fact that the Enterprise will be created and initiate its activities in a virtual vacuum, subject to the discretion of a Governing Board elected by the Assembly, the policies of the Assembly, and an unspecified supervisory role for the Council, only heightens the concern about its monopolist potential.

In order to examine how the establishment of the Enterprise affects the investment climate for mining under the draft treaty, it is useful to consider several broad issues: How is the Enterprise organized and who controls its activities? What comparative advantages do Enterprise operations have over other ocean miners? What costs and benefits are experienced by private industrial entities which do business with the Enterprise?

A. Organization and Control of the Enterprise

The Enterprise would be an organ of the Authority,⁹⁵ established within the framework of the international legal personality of the Authority.⁹⁶ The exclusive purpose of the Enterprise would be to carry

95. ICNT, Art. 156(2).

96. *Id.* Art. 169(2).

out "activities in the Area," deep seabed mineral exploration and exploitation, directly for the Authority.⁹⁷

Under the draft treaty, the Enterprise is comprised of a Governing Board, a Director-General and appropriate staff.⁹⁸ The Governing Board, responsible for the conduct of Enterprise operations,⁹⁹ would be composed of fifteen members elected by the Assembly upon the recommendation of the Council on the basis of equitable geographical representation, taking into account "special interests."¹⁰⁰ It is unclear whether Board members are intended to serve in an individual, personal capacity or in an official capacity as representatives of states.¹⁰¹ Even assuming that such members serve as individuals, the Governing Board will be dominated by nationals of developing countries, who will clearly account for the simple majority required to adopt Board decisions.¹⁰²

The Director-General would also be elected by the Assembly upon the recommendation of the Council.¹⁰³ As chief of the operating staff of the Enterprise, the Director-General would be responsible for conducting the ordinary business of the Enterprise, subject to the direction of the Governing Board.¹⁰⁴ The draft treaty provides that the critical factors in appointing the staff of the Enterprise shall be efficiency, technical competence, wide geographical representation, and keeping the size of the staff to a minimum.¹⁰⁵

Thus, the structure of the Enterprise is conventionally hierarchical: the Governing Board controls the Director-General, who in turn controls Enterprise personnel. Since the Governing Board would be composed on an equitable geographical basis, taking into account

97. See *id.* Art. 169(1); Annex III, para. 1(a). The definition of "activities in the Area" is presently restricted to exploration and exploitation. *Id.* Art. 133 (a). Under a restrictive interpretation, then, the Enterprise would not be empowered to conduct prospecting or to engage in processing and marketing activities. *But see id.* Annex III, para. 11(e) ("the Enterprise shall exercise all such powers incidental to its business as shall be necessary or desirable in furtherance of its purposes"); para. 11(d) (Enterprise has title to "processed substances produced by it" and its products "shall be marketed").

98. *Id.* Annex III, para. 4.

99. *Id.* para. 5(a).

100. ICNT, Art. 158(2)(iv); Annex III, para. 5(b).

101. Paragraph 5(b) of Annex III, ICNT, provides that the Governing Board shall comprise "qualified, competent and experienced members," suggesting that such members may serve in an individual capacity.

102. ICNT, Annex III, para. 5(d).

103. *Id.* para. 6(a).

104. *Id.* para. 6(b).

105. *Id.* para. 6(d).

special interests, those industrialized countries with an economic interest in ocean mining are unlikely to exert much influence over the internal decisions of the Enterprise. To the extent that such influence represents an important safeguard against unfair and discriminatory practices by the Enterprise, it will have to be exercised through other organs of the Authority, principally the Council.

By the terms of the draft treaty, the Enterprise is subordinate to both the Assembly and the Council.¹⁰⁶ Although it is subject to the directives and control of the Council, it is given implied independence to act in accordance with the Assembly's general policies.¹⁰⁷ Also, the Enterprise apparently has greater powers to implement the "resource policies" established in the treaty than those of the Council itself.¹⁰⁸ The net effect of these provisions is to render uncertain the extent of the Council's control over the Enterprise and correspondingly, the influence of industrialized countries over its operations.

It is clear that the Council exercises certain important powers over the Enterprise:

—First, it is empowered to approve or disapprove the Enterprise's proposals for mining, or plans of work.¹⁰⁹ Under the "automatic" Council procedure for the approval of plans of work, however, the ability of industrialized country Council members to block Enterprise projects which they find objectionable is probably non-existent.¹¹⁰

—Second, the Council would issue directives to the Enterprise and supervise its operations.¹¹¹ Industrialized countries on the Council may possess sufficient voting strength to collectively veto unsatisfactory directives to the Enterprise, but council members from developing countries will inevitably have the same power to block supervisory decisions which industrialized countries seek.¹¹²

—Third, the Council would approve the sources and levels of debt financing for the Enterprise,¹¹³ and would make the initial decision

106. See ICNT, Art. 169(1); Annex III, para. 2(a).

107. *Id.*

108. Compare ICNT, Annex III, para. 1(b) (Enterprise shall act in accordance with the resource policy set forth in Article 150) with ICNT, Art. 160(2)(xii) (Council shall adopt on advice of the Economic Planning Commission measures in accordance with Article 150(1)(g) only).

109. ICNT, Art. 160(2)(x).

110. See notes 74-76 *supra* and accompanying text.

111. ICNT, Art. 160(2)(i), (ix).

112. See general discussion of the Council *infra*.

113. NG2, Annex III, para. 10 *bis* (a).

as to the amount of Authority revenues that would be turned over to the Enterprise to fund its operations.¹¹⁴ However, the Assembly makes the final determination as to the degree to which the Enterprise is subsidized from the Authority's own funds.¹¹⁵

Just as industrialized country influence on the Council is unlikely to ensure effective supervision over the implementation of the access system for private contractors by the Technical Commission, the Enterprise would also have substantial independence. The predominant role of developing countries on the Governing Board of the Enterprise suggests that it may emerge as a political organ, despite the vague mandate contained in the draft treaty to eschew political considerations.¹¹⁶ Moreover, unlike the Council or the Technical Commission, the Enterprise would not be subject to suit by states or their nationals in the Seabed Disputes Chamber for violation of the convention, misuse of power, or similar grounds.¹¹⁷

B. Comparative Economic Advantages for Enterprise Operations

As originally conceived by the industrialized countries, the basic concept of the parallel system of exploitation was that the Enterprise would undertake ocean mining in direct competition with states and private companies, but would be subject to the same regulatory requirements as those imposed by the draft treaty on other operators. From the start, the Third World resisted this concept of absolute parity because it believed the Enterprise could never acquire the financial, technical, and managerial resources necessary to compete effectively with large multinational corporations. Its response to a proposal that was viewed as an essentially hollow industrialized country concession was to insist that the Authority be empowered to withhold access to the resources from private industrial ventures unless and until those ventures were prepared to assist the Enterprise in getting started in the ocean mining business. In an attempt to intercept what the industrialized countries perceived to be an end-run around their expressed objective of guaranteed or assured access, they began to make a series of additional concessions involving direct

114. *Id.* Art. 160(2)(xv bis).

115. *Id.* Art. 158(2)(vii).

116. ICNT, Annex III, para. 11(f) (only economic considerations should be relevant to Enterprise decisions).

117. *Id.* Art. 187(2)(a), (b) (Seabed Disputes Chamber jurisdiction over suits against the Assembly, Council, or its organs). Parties to contracts with the Enterprise concerning activities in the Area may be able to sue the Enterprise in the Chamber. See ICNT, Art. 187(2)(c).

subsidization of Enterprise operations. The aim of these proposals was to persuade developing countries that the Enterprise could become a viable operating entity reasonably soon after commercial ocean mining began.

The present draft treaty combines all of the direct Enterprise subsidies proposed by the industrialized countries (and some which they did not propose) with a highly discretionary access system that permits the Authority to give the Enterprise virtually all of the indirect subsidies advocated by the Third World. Most of these subsidies are to be extracted from the private companies and state enterprises which seek access to deep seabed minerals, thus increasing their costs of entry into this new field. All of these subsidies would place other operators at a serious economic disadvantage in comparison to the Enterprise.¹¹⁸

1. Direct Enterprise Subsidies. The draft treaty articles contain numerous provisions which expressly grant economic benefits not enjoyed by states or their nationals to the Enterprise. The primary benefits are:

First, the Enterprise would not be required to make financial payments to the Authority in the same manner as other operators.¹¹⁹ Contractors would have to assume a variety of Authority tax obligations under the draft treaty articles, including the payment of initial administrative fees, annual fixed fees, production charges, and possibly a share of net profits.¹²⁰ Theoretically, the level of these financial burdens would be uniform as to all operators, other than the Enterprise, and set forth precisely in the final treaty.¹²¹ The Enter-

118. The exclusive safeguard against unfair price competition by the Enterprise, made possible by the pervasive subsidization of its operations, is a requirement that the Enterprise market its production "at not less than international market prices." ICNT, Annex III, para. 11(d)(ii). This provision is wholly inadequate as a prohibition on the Enterprise's engaging in unfair pricing practices beyond the very earliest years of deep seabed minerals development. The reason is that seabed production of minerals can over time assume such importance in world metals markets as to directly influence international market prices. For example, cobalt production from only a few ocean mine-sites will represent a substantial portion of world cobalt supply; and if the Enterprise can sell its cobalt at lower prices than non-subsidized private company contractors, it can virtually dictate the international price. The same may eventually be true for world nickel, and possibly manganese prices.

119. See NC2, Annex II, para. 7 (applies exclusively to financial terms of contracts).

120. *Id.*

121. See *id.* para. 7(c) (regulations concerning financial obligations should ensure equal treatment of all states and entities obtaining contracts).

prise, on the other hand, would only be required to return an unspecified portion of its profits to the revenue fund of the Authority, such portion to be determined by the Assembly on the recommendation of the Governing Board.¹²² Since the Council is not involved, industrialized countries with an interest in assuring that the Enterprise operates on a competitive basis would have no role to play in this determination. Moreover, the draft treaty expressly provides that the Enterprise would not be required to return any of its profits to the Authority until it becomes "self-sufficient."¹²³

Second, the Enterprise would initially obtain concessionary financing as a result of an obligation assumed by States Parties to guarantee the debts it incurs in financing its early administration and carrying out its first mining project.¹²⁴

Third, after its first project, the Enterprise would be subsidized from the revenues acquired by the Authority from contractors.¹²⁵ Just as the amount of international taxes that the Enterprise would pay to the Authority is a matter in the discretion of the Assembly, the extent to which it would repay "dividends" to the Authority on profits earned from this form of "equity" is similarly left for subsequent Assembly decision.¹²⁶

Fourth, the Enterprise would be immune from all forms of national taxation.¹²⁷ The draft treaty, however, does not prohibit national taxation of ocean mining revenues earned by private contractors, and there is even a dispute raging in the United States as to whether taxes paid by such entities to the Authority would be treated as a credit or a deduction for United States income tax purposes.¹²⁸ The Enterprise would also enjoy additional privileges and immunities, such as immunity from state expropriation.¹²⁹

Fifth, for every contract awarded by the Authority to a state or private company, the Enterprise would obtain priority rights over a

122. *Id.* Art. 158(2)(vii); Annex III, para. 9(a).

123. *Id.* Annex III, para. 9 (b).

124. *Id.* para. 10 *bis* (c).

125. *Id.* Art. 158(2)(vii), 160(2)(xv *bis*), 172(2)(b); Annex III, para. 10(a).

126. *See* note 122 *supra*.

127. ICNT, Annex III, para. 12(e).

128. *See Mining of the Deep Seabed: Joint Hearings on S. 2053 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources and the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 94 (1977) (Statement of Helen B. Junz, Deputy Asst. Sec., Dept. of the Treasury).

129. *See* ICNT, Annex III, para. 12.

fully prospected, and possibly explored, mine-site submitted by the contractor and reserved by the Authority.¹³⁰ Ambiguous language in the relevant draft article suggests that, in addition to acquiring knowledge of the coordinates of this reserved deposit, the Enterprise would also obtain geological and other commercially valuable information concerning the mine-site submitted by the contractor.¹³¹ It should be noted that the Enterprise is not restricted to operations within mine-sites reserved under this provision, but may apply for Council approval to conduct ocean mining anywhere in the deep seabed.¹³²

Sixth, the Enterprise is the beneficiary of mandatory technology transfer obligations imposed on state and private company contractors.¹³³ As the price of acquiring access, each contractor must agree to license or otherwise transfer his ocean mining technology to the Enterprise, if later requested to do so.¹³⁴ Since the transfer would, in effect, be a forced sale, the Enterprise acquires tremendous bargaining power over the terms and conditions of the sale, despite the vague treaty standard that such terms should be fair, reasonable, and commercial.¹³⁵ Not only is the Enterprise empowered as a result of mandatory technology transfer to purchase such technology at discounted value, but it also acquires access to the commercial secrets of its competitors from the time that applications for a contract are made.¹³⁶

2. Indirect Enterprise Subsidies. A careful review of the entire set of treaty articles comprising the deep seabed portion of the draft law of the sea treaty produces the unmistakable impression that the Enterprise is intended to occupy a priority position among the en-

130. *Id.* Annex II, para. 5(j).

131. *See id.* para. 5(j)(i) (last sentence). *See also* notes 149-150 *infra* and accompanying text.

132. ICNT, Annex II, para. 5(j)(v).

133. NG1, Annex II, para. 4(c)(ii), *bis*, *ter*, *quater*, *quinte*; para. 5(j)(iv). Note that the technology subject to mandatory transfer is that to be used in carrying out activities in the Area. *Id.* para. 4(c)(ii) *ter*. Developing countries seeking to undertake ocean mining in reserved areas over which the Enterprise has not exercised its priority would be entitled to the same technology transfer benefits as the Enterprise. *Id.* para. 4(c)(ii) *quinte*.

134. *Id.* para. 4(c)(ii) *ter*. Note that the contractor must also undertake not to use technology that he is not legally entitled to transfer, unless the owner of such technology agrees to license or sell it to the Enterprise. *Id.* para. 4(c)(ii) *bis*.

135. *Id.* para. 4(c)(ii) *ter*.

136. *See id.* para. 4(c)(ii) (applicant must give Authority description of his technology and update this information throughout the term of the contract). *See also* notes 149-50 *infra* and accompanying text.

tities authorized to conduct ocean mining. While the relevant provisions are frequently ambiguous, and in some cases inconsistent, it is clear that a principal objective of the Authority is to ensure that the Enterprise commences operations as soon as possible after entry into force of the convention,¹³⁷ and that it maintains a dominant—if not monopolistic—position throughout the initial twenty year period contemplated for the parallel system of exploitation.¹³⁸

The mechanisms through which the Authority can indirectly subsidize the Enterprise in order to satisfy this objective are pervasive:

First, the technical provisions in the draft treaty governing the procedure by which other operators obtain access to the resources and the terms and conditions of their contracts are not applicable to the Enterprise. Thus, the Enterprise need not satisfy the financial and technical qualifications required of contractors,¹³⁹ nor does its plan of work need to be “in strict conformity” with the convention and the Authority’s rules and regulations.¹⁴⁰ In addition, the Enterprise is not necessarily required to compete with other applicants on the basis of its competence and qualifications in the event that it submits a conflicting application for the same seabed deposit or portion of the seabed production ceiling.¹⁴¹ In short, the draft treaty is rife with provisions that indirectly mandate Authority discrimination on behalf of the Enterprise in the access system.¹⁴²

Second, to the extent that the Enterprise is generally required by the draft treaty to conduct operations in accordance with the convention and rules and regulations,¹⁴³ the excessive discretionary powers granted the Authority to implement the regime,¹⁴⁴ coupled with

137. See, e.g., ICNT, Art. 169(4); NG2, Annex II, para. 7(c); Annex III, para. 9(b).

138. See NG1, Art. 153(6). See also discussion of the Review Conference in text accompanying note 154 *infra*.

139. See ICNT, Annex II, para. 4(a), 5(b)(ii).

140. See *id.* para. 3(c)(i).

141. See *id.* para. 5(g).

142. A key example of this discrimination is found in the basic treaty article establishing the system of exploitation in principle. NG1, Art. 151. This article provides that activities in the Area shall be carried out by the Enterprise (without further qualification), but may only be carried out by states and their nationals “which meet the requirements provided in this part of the present Convention including Annex II.” *Id.* Art. 151(2).

143. See, e.g., NG1, Art. 151(4); ICNT, Art. 169(2); Annex II, para. 6; Annex III, para. 1(b).

144. See discussion of acquiring and maintaining access in text accompanying note 2 *supra*.

the absence of judicial review over the exercise of this discretion,¹⁴⁵ enhances the potential for discrimination in favor of the Enterprise.

Third, although the Authority's "resource policies" apply with equal force to the Enterprise's activities,¹⁴⁶ the practical possibility exists that it will benefit from the seabed production ceiling to the detriment of other ocean miners. Since the Enterprise is not required to compete on an equal footing with other applicants, the Authority may always allocate a portion of the production ceiling which is the subject of conflicting applications to the Enterprise, regardless of whether another applicant is better qualified.¹⁴⁷ In addition, since the Authority may vary the applicability of its antispeculation or diligence requirements, the Enterprise may be permitted to reserve substantial portions of the production ceiling that would otherwise be available to private contractors, whether or not it actually has the wherewithal to bring such projects into commercial production.¹⁴⁸

Fourth, the Enterprise may be indirectly subsidized through its access to the proprietary geological, technical, and other commercially valuable data submitted to the Authority by other operators. The data turnover requirements for contractors are very extensive, and while disclosure of such data by "the Authority" is proscribed, the draft treaty contains no explicit or implicit prohibition on disclosure among the organs of the Authority, for example, from the Technical Commission to the Enterprise.¹⁴⁹ The potential for the transfer of proprietary data to the Enterprise is heightened by provisions allowing the Enterprise to share personnel with the other organs of the Authority.¹⁵⁰

Fifth, the draft treaty grants the Authority sufficient discretion to force applicants for contracts into joint ventures or other business arrangements with the Enterprise as a condition of obtaining access.¹⁵¹ By using its virtually unlimited power to negotiate with applicants concerning the terms and conditions of contracts, the Authority can effectively coerce private companies into some form of partnership

145. See discussion of the Seabed Disputes Chamber in text accompanying note 235 *supra*.

146. See, e.g., NG1, Art. 150, 150 *bis*; ICNT, Annex II, para. 6; Annex III, para. 1(b).

147. See note 141 *supra*.

148. See NG1, Art. 150 *bis* (2); ICNT, Annex II, para. 6; see also *id.* para. 5(d)(i).

149. ICNT, Annex II, para. 8.

150. See NG2, Annex III, para. 10 *ter*.

151. ICNT, Annex II, para. 5(i). See also discussion of acquiring and maintaining access in text accompanying note 2 *supra*.

with the Enterprise.¹⁵² Since the Authority can ultimately refuse to grant the applicant access on any terms, it is self-evident that the terms and conditions of partnerships with the Enterprise will be heavily tilted in its favor.

It is important to note that the draft treaty gives the Authority not only a stick to coerce operators into assisting the Enterprise but also a carrot to entice them across the line. The Enterprise would have the ability to give operators better financial terms, since it would be exempt from Authority and national taxation, and possibly to make available concessionary financing that is subsidized by either state loan guarantees or Authority revenues.¹⁵³

Finally, the Enterprise would be virtually assured of attaining a monopoly over ocean mining after the first twenty-five years of production, if the Third World continues to adhere to this objective. The draft treaty provides that a Review Conference would be convened after the first twenty years to develop amendments to the system of exploitation.¹⁵⁴ If the Conference does not reach agreement after five years—an outcome the developing countries collectively can ensure—the Third World-controlled Assembly would be empowered to impose a moratorium on the issuance of new ocean mining contracts to states and private companies while allowing the Enterprise to undertake new projects in both reserved and non-reserved areas.¹⁵⁵

C. *Doing Business With The Enterprise*

As has been demonstrated up to this point in the analysis of the investment climate for private industry ocean mining under the draft treaty, the prospective ocean miner would confront an extremely unstable business environment. He would be uncertain about whether the Authority would ever grant him access to the resources on economically tolerable terms and conditions. He would have no as-

152. *Id.*

153. See notes 119-27 *supra* and accompanying text. The draft treaty articles, however, are somewhat ambiguous as to the extent to which the Enterprise can negotiate its own financial deal with joint venture partners. Paragraph 7 *septies* of Annex II, NG2, provides for tax incentives to those contractors who enter joint arrangements with the Enterprise; whether these incentives apply to financial obligations under contracts only or impliedly impose Authority tax obligations on revenues earned by entities from Enterprise joint venture operations is unclear.

154. NG1, Art. 153.

155. *Id.* Art. 153(6). See also discussion of the Review Conference in text accompanying note 164 *infra*.

surance that subsequent actions of the Authority would not impair the value of his investment. And he would be attempting to compete with a highly subsidized intergovernmental mining entity. In this situation, the prudent businessman would inevitably consider the alternative investment strategy—doing business directly with the Enterprise.

The Enterprise is essentially free to enter into any form of business association with any other entities it chooses.¹⁵⁶ While a prospective ocean mining company would have no assurance under the draft treaty that the Enterprise would be willing to conclude a joint arrangement, it could be virtually certain that, once the Enterprise was satisfied with the terms of the deal, the Technical Commission and Council would approve the proposed plan of work.¹⁵⁷ Under both sides of the parallel system of exploitation established in the draft treaty, therefore, access is discretionary with either the Authority or Enterprise, depending on the circumstances. Under both sides, the applicant must negotiate the terms of access with an entity whose principal objective would appear to be the enhancement of the position of the Enterprise in the field of ocean mining. What, then, are the potential advantages of entering into a partnership with the Enterprise?

First, there is a strong possibility that partnership with the Enterprise may be the only avenue of access available to the private company. This would be true in the event the Authority used its discretion:

- to refuse to contract with private companies;¹⁵⁸
- to allocate to the Enterprise a substantial portion of the permissible production ceiling;¹⁵⁹
- to impose a quota on the number of contracts that may be issued to companies from any one state;¹⁶⁰ or
- to impose a moratorium on issuing contracts to private companies after the Review Conference failed to reach agreement.¹⁶¹

156. See INCT, Annex II, para. 5(i).

157. See notes 74-76 *supra* and accompanying text.

158. See discussion of acquiring and maintaining access in text accompanying note 2 *supra*.

159. See notes 146-48 *supra* and accompanying text.

160. See NG1, Art. 150(f) (general policy of the Authority is to prevent monopolization); ICNT, Annex II, para 5(1) (inclusion of quota in final treaty is agreed in principle).

161. See NG1, Art. 153(6).

Second, there is a good chance that the Enterprise would be prepared to offer a company that voluntarily entered into negotiations with it, better terms and conditions, particularly for the first few joint arrangements concluded. The reason is that the Enterprise would have an interest in attracting private capital, technology, and managerial expertise. Alternatively, the Technical Commission, which negotiates the terms and conditions of contracts, might have an interest in making contract requirements so onerous as to penalize those operators who are unwilling to do business with the Enterprise.

Third, the Enterprise offers the private company the attractive position of working with the Authority's favorite son as opposed to being an unwanted stepchild on the other side of the parallel system. All of the discriminatory benefits enjoyed by the Enterprise in terms of more relaxed regulation and supervision would also inure to the benefit of the Enterprise's partners. In a regulatory system that so heavily depends on the political vicissitudes of the Third World, this advantage can be determinative.

Obviously, doing business with the Enterprise is not the panacea to private industry's dilemma under the draft treaty regime. The negotiation of a joint arrangement is bound to be fraught with difficulties, because the draft articles contain absolutely no guidance concerning the form of such an arrangement nor the basic terms of which it would be comprised.¹⁶² As the Enterprise would hold the stronger bargaining hand in the negotiation of the joint venture agreement—because the applicant's alternatives for ocean mining may be nonexistent or much less desirable—the treaty's failure to establish the basic ground rules of Enterprise joint arrangements could generate serious problems.

Probably the most important requirement that would be absent is that Enterprise participation in the management and profits of the joint venture should correspond to its financial contribution to the joint venture. As long as the Enterprise has its own capital at risk, the chances that it will be a good business partner are maximized. If it is in a position to demand a "free ride" from the other joint venture partners, however, the necessary commonality of objectives will be

162. The Statute of the Enterprise does not even mention the possibility that the Enterprise would enter joint arrangements with private companies, much less provide any guidance as to the form and conditions of such arrangements. ICNT, Annex III. The only restrictions on the Enterprise's discretion which might be applicable in this regard concern a requirement that it generally procure goods and services through competitive bidding. *Id.* para 11(c).

missing, and private industrial ventures will hesitate to enter into joint arrangements.

The key issue raised by a requirement that the Enterprise contribute equity capital to any joint venture it enters centers around the source of such capital. As described in preceding sections of this article, the Enterprise under the present draft treaty would have financial resources initially made available by States Parties through the Authority. If its joint ventures are successful, the Enterprise will earn revenues which it can reinvest in new ocean mining projects. What is clear from a private investor's point of view, however, is that the Enterprise's equity must be genuine risk capital in order to ensure that there is a real community of interests in the joint venture; it cannot be the mere contribution of deep seabed resources or the granting of access, as such are available to contractors under the other side of the parallel system.

Moreover, the possibility that the Enterprise would pursue non-commercial objectives in its participation in the joint mining project, even where it has contributed genuine equity, cannot be ignored.¹⁶³ For example, the draft treaty expressly requires the Enterprise to give preferences in its procurement practices for developing country goods and services.¹⁶⁴ There is the serious risk that the Enterprise (which would be controlled by the Third World collectively, which would in turn, be heavily influenced by land-based producers) would not have as its principal objective in the project, the development of the resources at a profit. Unlike the other participants in the joint venture, it may seek to retard seabed production in order to protect land-based producing countries from competition.

There are no easy solutions to the problem of incompatible objectives in a joint venture with the Enterprise. One approach that might be of some value would be to include in the treaty a set of mandatory principles guiding the Enterprise's policies and decisions, and indeed its actions in any joint ventures it enters. Such principles would need to provide that the Enterprise act in accordance with the profit motive, pursue an aggressive development policy, and follow accepted business norms. Adherence to these principles would, of

163. Note that the Enterprise is not to be influenced by the political character of states in carrying out its functions and is to be guided solely by economic considerations. ICNT, Annex III, para. 11(f). However, economic considerations may cover a variety of Third World objectives and are not necessarily synonymous with commercial or business concerns.

164. ICNT, Annex III, para. 11(C)(ii)(b).

course, be very difficult to police. Yet, legislating these norms in the treaty could assist in creating a sense of purpose and direction that would otherwise be lacking in the early years of Enterprise operations; it could generate investor confidence that the Enterprise and private companies could share similar objectives and successfully undertake a mining project jointly.

Finally, it is unclear whether, under the draft treaty, the Enterprise is required to respect the sanctity of contracts to which it is a party and whether the Enterprise partners would have access to effective dispute settlement procedures.¹⁶⁵

Because the state and private company side of the parallel system of exploitation established under the draft treaty is so defective in its provisions for guaranteed security of tenure and dispute settlement,¹⁶⁶ private industry probably has little to lose, with more to gain, by moving voluntarily into the Enterprise side of the system, rather than being ultimately forced to do so. The key point, however, is that the risks of deepsea mining on either side of the presently envisioned parallel system are probably too high to allow private investment.

V. IMPLICATIONS OF THE REVIEW CONFERENCE

One of the essential components of the draft treaty regime under negotiation is the provision for the Review Conference, to be convened twenty years after the approval of the first contract or plan of work under the convention.¹⁶⁷ The function of this Conference of all States Parties would be to review the treaty's provisions on the system of exploitation and adopt an "agreement" concerning these provisions.¹⁶⁸ Presumably, this agreement would take the form of amendments to the convention, which would enter into force for States Parties according to the convention's final clauses.¹⁶⁹

165. See NG1, Art. 151(6) (*contracts* with the Authority have security of tenure); ICNT, Annex II, para. 13(b) (revision to *contracts* requires consent of both parties); ICNT, Art. 187(2)(a), (b) (the Enterprise may not be sued for violating the convention, misuse of power or similar grounds); Art. 187(c) (Chamber has jurisdiction over disputes "relating to the interpretation or application of any contract concerning activities in the Area").

166. See notes 77-94 *infra* and accompanying text.

167. NG1, Art. 153.

168. See *id.* Art. 153(1), (6).

169. Part XVI of the ICNT presently contains no provisions establishing a procedure for bringing amendments to the Convention into force.

The final article on the Review Conference expressly provides that the decisions of the Conference will "not affect rights acquired under existing contracts."¹⁷⁰ This clause could theoretically be read to assure absolute security of tenure for those states and private companies engaged in ocean mining under contracts issued by the Authority during the twenty-year period before the Conference is convened and during the time in which the Conference is in session.¹⁷¹

For the prospective ocean mining investor, however, the certainty that a Review Conference will be organized twenty years after the operation of the regime commences, nevertheless generates instability. The reason is that The Review Conference's interpretation of this grandfather rights clause is unpredictable for the following reasons:¹⁷²

1. The primary concern is that, while the clause provides that rights shall not be affected, it does not state that the terms and conditions of contracts will remain the same,¹⁷³ thus, leaving the door opened to a mandatory renegotiation of contracts under a new regime adopted by the Conference.
2. It is also likely that the revised system of exploitation will accord the Authority just as much discretionary power as the existing system and that the value of these grandfather rights would be greatly diminished through their implementation.
3. Assuming the Third World continues to support an operating monopoly for the Enterprise, the risk clearly exists that the revised system would reinforce the monopoly position of the Enterprise and thus totally eliminate the contractor's ability to compete in metals markets (already seriously eroded by the subsidies given the Enterprise under the existing system of exploitation).¹⁷⁴
4. It is unclear whether the grandfather rights provision applies to contracts between private companies and the Enterprise.¹⁷⁵

In addition to the unpredictable effect of the Review Conference's outcome on the security of investments made under existing

170. NGL, Art. 153(5).

171. Paragraph 6 of Article 153, NGL, can be read to require the Authority to continue issuing contracts until a new agreement enters into force or the Review Conference has been in session for five years, whichever occurs first. *But see* notes 177-78 *infra* and accompany text.

172. *See* NGL, Art. 153(4) (Conference establishes its own decisionmaking procedures).

173. *Id.* Art. 153(5).

174. *See* note 185 *infra* and accompanying text.

175. *See* NGL, Art. 153(5).

contracts, it will adversely impact the prospective ocean miner's assessment of the growth potential in this new field. In order to justify the expenditure of hundreds of millions of dollars in developing the technological capability to enter ocean mining, a private industrial venture seeks some assurance that it will be able to engage in a second mining project to offset the high risks initially assumed in deploying a new technology. Without this assurance, the economic returns from first-generation ocean mining may not be sufficient to attract the massive private investment required. The chance of obtaining a second contract with the Authority under the draft treaty is already diminished by the seabed production ceiling and the potential for state quotas.¹⁷⁶ The Review Conference provision would all but destroy any opportunity for expansion by this pioneering industry:

First, the Authority is likely to defer the issuance of contracts in the latter years of the period before the Review Conference in order to ensure that new seabed production comes in under a revised system of exploitation, even though the draft article on the Review Conference would appear to mandate the continued award of contracts until the new agreement enters into force.¹⁷⁷ The discretionary system of access under the existing draft convention would certainly allow this slow-down.¹⁷⁸ And the Third World would no doubt seek to use its control over the Authority to gain maximum bargaining leverage at the Review Conference by holding hostage the industrialized countries' access to the resources.¹⁷⁹

Second, the draft treaty would permit this slow-down on the issuance of contracts to be converted into a moratorium after five years of negotiation at the Review Conference.¹⁸⁰ At that time, the Assembly is empowered to decide that no new ocean mining contracts will be issued.¹⁸¹ The Assembly may extend the moratorium to new mining operations by the Enterprise in non-reserved areas, but it need not do so in order to impose the moratorium on new contracts.¹⁸² It is prohibited from adopting a moratorium on the ap-

176. See notes 14, 51-57 *supra* and accompanying text.

177. See NG1, Art. 153(6).

178. See discussion of acquiring and maintaining access in text accompanying note 2 *supra*.

179. See discussion of powers and decisionmaking procedures of the Authority in text accompanying note 186 *infra*.

180. NG1, Art. 153(6).

181. *Id.*

182. *Id.* ("Assembly may decide . . . that no new contracts *or* plans of work . . . shall be approved") (emphasis added).

proval of the ocean mining projects in reserved areas, where the Enterprise and possibly developing countries have priority rights of access.¹⁸³ Thus, the Third World, which would dictate the Assembly's decision on this matter, could deny access to states and private companies while permitting the Enterprise to become the exclusive ocean miner. Since these countries collectively could also ensure that the Review Conference never reached agreement on a revised system of exploitation, the outcome would be a permanent Enterprise monopoly.¹⁸⁴

Third, the negotiating clout granted the Third World in the Review Conference by these provisions would virtually guarantee that it could shape the revised system of exploitation to satisfy its objectives.¹⁸⁵ Accordingly, the prospective ocean miner could not reasonably rely on his own government's ability to protect its interest in continued state and private company access to deep seabed resources.

VI. POWERS AND DECISIONMAKING OF THE ORGANS OF THE AUTHORITY.

The final task in the evaluation of the investment climate for ocean mining which would be established under the draft treaty is to examine the assumption made throughout the analysis that the Authority will use its discretionary powers to achieve the expressed objectives of the Third World. The validity of this assumption in large part depends on who controls the Authority's decisions.

This analysis is divided into two parts. The first part describes the composition, decisionmaking procedures, and powers of the various components of the Authority—the Assembly, Council, technical commissions, and, although not technically an organ of the Authority, the Seabed Disputes Chamber. The second part selects a hypothetical problem that might be the subject of Authority action and illustrates how these decisionmaking components are likely to operate.

A. Composition, Decisionmaking Procedures, and Powers of the Organs of the Seabed Authority

1. The Assembly.

(a) Composition and Decisionmaking.

183. *Id.*

184. *Id.* (moratorium lasts until new agreement enters into force).

185. *See* discussion of Third World objectives in text accompanying note 6 *supra*.

The Assembly would be composed of all States Parties.¹⁸⁶ It would meet at least annually, and provision is also made for special sessions.¹⁸⁷

In all respects, the Assembly would be dominated by the Third World collectively. First, each state party has one vote,¹⁸⁸ and substantive decisions would be made by a two-thirds vote of the members present and voting (assuming it represents a majority of the members participating in any session).¹⁸⁹ Thus, the thirty-odd industrialized countries, even if they voted as a cohesive block (and this is unlikely, if previous experience at the Law of the Sea Conference is a guide), could not prevent adverse decisions. Second, the two procedural devices included in the draft treaty for the purpose of delaying Assembly action in order to protect minority groups (*i.e.*, industrialized countries) require affirmative action by either one-fifth or one-fourth of the members.¹⁹⁰ As a result, highly industrialized countries would not necessarily have these devices available even to slow down Group of 77 steamroller tactics in the Assembly, unless they won support of almost all other "developed" countries.¹⁹¹

186. ICNT, Art. 157(1).

187. *Id.* Art. 157(2).

188. *Id.* Art. 157(5).

189. *Id.* Art. 157(6).

190. Article 157(8) of the ICNT provides that one-fifth of the members of the Assembly may delay a vote on a particular matter for five days; while the Rules of Procedure for the Law of the Sea Conference permit this same cooling-off procedure to be invoked by 15 states, the draft treaty would expand the requisite number to approximately 26-28; Rules of Procedure, Rule 37(2)(a), U.N. Doc.A/Conf.62/WP.30/Rev. 1 (1974). Article 157(10) of the ICNT provides that Assembly action may be delayed, if one-fourth of the members of the Assembly request an advisory opinion from the Seabed Disputes Chamber.

Article 25 of Part I of the 1976 Revised Single Negotiating Text contained more meaningful procedural protections for minority groups in Assembly voting. U.N. Doc.A/Conf. 62/WP.8/Rev.1 (1976) [hereinafter cited as RSNT]. First, the "cooling-off period" could be invoked upon the request of 15 states, rather than one-fifth of the members of the Assembly. RSNT, Part I, Art. 25(a). Second, paragraph 8 of Article 25 provided that Assembly decisions would not come into effect for 90 days following the end of the session in which they were adopted and that, if one-third of the Assembly's members objected to a particular decision during that 90 day period, it would be stayed pending reconsideration at a Special Session. *Id.* And, third, paragraph 8 of Article 25 also implied that important questions of substance would be decided by consensus. *Id.*

191. Highly industrialized countries with a direct interest in undertaking ocean mining at the present time number less than ten. In order to invoke the special procedural protections of Article 157 of the ICNT, these countries would have to garner support from all industrialized countries (including some major land-based producers, such as Norway and Australia), the Socialist bloc countries, and some of the marginally "developed" countries, such as Portugal, Greece, and Turkey.

(b) Powers.

As distinguished from the one-nation, one-vote plenary bodies of other international organizations, the Assembly of the Authority would have substantial powers. It would be responsible for establishing general policies on any issue within the competence of the Authority,¹⁹² an organization which in itself would have an unprecedented power to make binding decisions affecting the economic interests of States Parties.¹⁹³ The draft treaty characterizes the Assembly as "the supreme organ of the Authority,"¹⁹⁴ and requires all other organs, the Council in particular, to act in conformity with the Assembly's general policies.¹⁹⁵ It is self-evident that the characterization of the Assembly as "supreme" would give the Assembly the power to overturn the decisions of other organs.¹⁹⁶ This is even more true since the Assembly alone can interpret the term, "supreme." In addition to its general policy-making powers, and the power to elect the members of the Council and the Seabed Disputes Chamber of the Tribunal,¹⁹⁷ the Assembly is specifically entrusted with the power to adopt, as well as order amendments to the rules, regulations, and procedures that will govern the ability of states and

192. ICNT, Art. 158(1).

193. To illustrate, the present draft treaty empowers the Authority to determine the conditions pursuant to which states will have access to the mineral resources of two-thirds of the earth's surface, to exercise international taxing power with respect to deep seabed mining, and to itself conduct commercial mining, processing, and marketing operations. *Id.* Part XI.

194. *Id.* Art. 158(1).

195. The Council is specifically directed to act in conformity with the Assembly's general policies. *Id.* Art. 160(1). Moreover, both the Assembly and the Council are required to "act in a manner compatible with the distribution of powers and functions" between themselves. *Id.* Art. 156(4). As long as the Assembly is the "supreme" organ, this vague separation of powers provision requires the Council to act in a subordinate role *vis-a-vis* the Assembly.

196. In addition, the legislative history of the draft treaty reenforces the interpretation that the Assembly can override Council decisions. Under the RSNT, the Assembly was also characterized as the "supreme" organ with general policy-making powers. RSNT, Part I, Art. 26, 28. The RSNT, however, expressly required the Assembly to avoid actions which impeded the exercise of specific powers entrusted to other organs such as the Council. *Id.* Art. 24(4), 26(3). The ICNT merely includes a general requirement on all organs "to act in a manner compatible with the distribution of powers and functions among the various organs." ICNT, Art. 156(4). This latter provision permits an interpretation that the Assembly, as the "supreme" organ, can through its policy-making powers overrule the Council; and that interpretation is bolstered by the deletion of the RSNT's separation of powers provision, which would not have permitted the same argument.

197. ICNT, Art. 158(2)(i), (iii).

private companies to acquire access to deep seabed resources.¹⁹⁸ None of the Assembly's decisions on policy or regulations would be subject to review by the Seabed Disputes Chamber.¹⁹⁹

2. The Council.

(a) Composition and Decisionmaking.

Although the composition and voting procedures of the Council is an issue that remains to be seriously negotiated, certain premises now appear to be generally accepted.²⁰⁰ First, the Council will be composed of about thirty-six members, approximately half of whom will represent "special interests," with the other half selected on the basis of equitable geographical representation.²⁰¹

Second, the election of Council members will be entrusted to the Assembly.²⁰² The draft article presently under consideration would give the Assembly wide latitude to decide which states satisfied the criteria for membership in various special interest categories.²⁰³ For instance, there is no assurance that the United States would be elected to the Council under the present formulation,²⁰⁴ although as a practical matter the Soviet Union is guaranteed

198. *Id.* Art. 158(2)(xvi). See also *id.* Art. 160(2)(xiv) (the Council impliedly must amend regulations as ordered by the Assembly), Annex II, para. 11 (illustrating the range of subjects covered by regulations).

199. ICNT, Art. 191.

200. The following discussion draws upon the Chairman's Report for Negotiating Group 3 at the Seventh Session (LOS Conf. Doc. NG3/2, May 12, 1978), as well as the statement of the United States position on Article 159 contained in the unclassified U.S. Delegation Report for the Geneva meeting of the Seventh Session at 19-20.

201. See ICNT, Art. 159(1). "Special interests" represented included countries that have made the greatest contribution to ocean mining, major mineral importers, major mineral exporters, and developing countries, as well as land-locked and possibly coastal states. *Id.*

202. *Id.* Art. 158(2)(i); *id.* Art. 159(1), (3).

203. *Id.* Art. 159(1). For example, there is no requirement that the "ocean mining" category be composed entirely of highly industrialized, or even developed, countries. *Id.* Art. 159(1)(a). The Assembly could decide that the "substantial investment" criterion was satisfied by any country which had participated in deep seabed scientific research programs, and then elect the four "ocean mining" members from among a large group of countries. To take another example, the concept of "major importer" and "major exporter" is not defined. *Id.* Art. 159(1)(b), (c). The Assembly could interpret "major importer" to mean those countries which import the greatest quantity of minerals or, alternatively, those countries for whom mineral imports represent the highest proportion of GNP.

204. *Id.* Art. 159(1). There are perhaps ten countries which might legitimately qualify for membership in the four-seat ocean mining category. Depending upon the

Council membership.²⁰⁵ Thus, the United States would have to rely on Assembly recognition of political realities in the election of the Council, a reliance that may be appropriate for the first Council election, but is of questionable validity over the long-term.²⁰⁶

Third, the voting procedures of the council *may* give industrialized countries the power to block decisions but *will inevitably* give developing countries the same power. The United States has maintained that the industrialized countries represented in the ocean mining and mineral imports categories must have a blocking vote, a position that would give a handful of developing country Council members an equally effective veto.²⁰⁷ The Group of 77 continues to support "majoritarian" decisionmaking.²⁰⁸

(b) Powers.

The Council will be responsible for establishing the "specific policies" of the Authority;²⁰⁹ authorizing mining operations by states and private companies, as well as by the Enterprise;²¹⁰ provisionally establishing the basic conditions governing mining operations through rules and regulations;²¹¹ supervising mining activities;²¹² and implementing price and production controls.²¹³

criteria used, the U.S. might not qualify as a "major importer" and, although it is the world's largest copper producer, would certainly not qualify as a "major exporter."

205. *See id.* Art. 159(1)(a) (one of the four ocean mining seats must be allocated to a Socialist country); Art. 159(1)(b) (one of the four major importers must be a Socialist state).

206. Although Council members are eligible for reelection, "due regard should be paid to the desirability of rotating seats." *Id.* Art. 159(4). While the United States should qualify for Council membership in the ocean mining category, the major importer category, and as a member of the Western Europe and other geographic region, it is highly unlikely that it will be permitted to enjoy permanent Council membership when competing for seats with numerous other ocean mining states and the 30-member WEO group.

207. The current U.S. proposal is that substantive Council decisions would require a three-fourths majority of the Council, including a simple majority in three of the four special interest categories, or four of the five total categories. U.S. Delegation Report for the Seventh Session, at 19-20. This proposal could effectively permit four negative votes (two in the ocean mining chamber and two in the major importers chamber) to block Council action.

208. *See* ICNT, Art. 159(7) (substantive Council decisions require a three-fourths vote of members present and voting, provided it includes a majority of the members participating in the session).

209. *Id.* Art. 160(1).

210. *Id.* Art. 160(2)(x).

211. *Id.* Art. 160(2)(xiv).

212. *Id.* Art. 160(2)(i), (xi).

213. *Id.* Art. 160(2)(xii).

However, it will be mandatory that the Council act "in conformity with" the Assembly's general policies.²¹⁴ Since judicial review of Council policy and other discretionary determinations is precluded under the draft treaty,²¹⁵ the Council presumably has some leeway in implementing the Assembly's decisions. The political and practical significance of this potential independence is limited, however, by the following factors:

- First, the draft treaty can be interpreted so as to require the Council to amend the rules and regulations governing ocean mining operations in accordance with the Assembly's directions.²¹⁶
- Second, the ability of the Council to act in contravention of the Assembly's policies would depend upon the concurrence of developing country Council members, the same political interest group which controls the Assembly. Under some proposals, industrialized countries might be able to block Council actions based upon unacceptable Assembly policies, but the result would be stalemate. Whether the industrialized countries could maintain solidarity in this situation is questionable, since they would be acting in contravention of the treaty requirement that the Council be subordinate to the Assembly.
- Third, the Assembly has the power to reconstitute the Council every two years,²¹⁷ at which time its discretion in deciding which countries represent the special interest categories would permit replacement of recalcitrant industrialized countries.
- Finally, conflict between the Council and the Assembly, or stalemate on the Council as a result of industrialized country blocking action, means that the implementation of the treaty regime would be lodged by default in the Technical Commission.²¹⁸

This latter point is illustrated by the procedure contained in the draft treaty for the Council's approval of contracts for mining by private companies and of plans of work for Enterprise operations.²¹⁹ Once submitted to the Council by the Technical Commission, a contract would be automatically approved, unless the Council takes an affirmative decision within sixty days to disapprove of it.²²⁰ In com-

214. *Id.* Art. 160(1). See also *id.* Art. 156(4).

215. *Id.* Art. 191.

216. *Id.* Art. 160(2)(xiv).

217. *Id.* Art. 159(3) (election of half the membership of the Council takes place every two years).

218. See further discussion of the Technical Commission in text accompanying note 23 *infra*.

219. *Id.* Art. 160(2)(x).

220. *Id.*

bination with a decision of the Council, on which the United States and like-minded countries have a blocking vote, the procedure would appear to assure the automatic approval of contracts. However, the real power in the contract approval process lies with the Technical Commission, since the Council cannot act on the contract until it is submitted by the Commission.²²¹ In the case of a Council stalemate between developing country members and industrialized country members, the Technical Commission would be free of Council supervision and, in its discretion, could refuse to submit contract applications to the Council for approval, insist on contract conditions so onerous that no applicant could be in a position to conclude a contract, or negotiate discriminatory deals with the Enterprise and submit them for automatic Council approval.²²² In none of these situations would the industrialized country members of the Council have the ability to mitigate the adverse impact of the Technical Commission's discretion. Obviously, this problem could be mitigated, though not completely eliminated, by requiring the Technical Commission to take a positive decision within a stated time period so as to ensure that these matters reach the Council.

3. The Commissions.

(a) Composition and Decisionmaking.

The draft treaty establishes three subsidiary organs of the Council—the Economic Planning Commission, the Technical Commission, and the Rules and Regulations Commission.²²³ Members of each of these commissions are elected by the Council, pursuant to criteria concerning qualifications set forth in the treaty.²²⁴ Under the most favorable Council voting proposals, industrialized countries would be able to block election of unqualified or biased individuals to commission membership.²²⁵ The general requirement, however, that the composition of each commission reflect equitable geographic representation, means that the dominant voice on the commissions will be that of the Third World.²²⁶ Since each of the commissions

221. See NG1, Art. 151(3); ICNT, Art. 160(2)(x).

222. The draft treaty procedures for the award of access are sufficiently discretionary as to permit any of these actions. See discussion of acquiring and maintaining access in text accompanying note 2 *supra*.

223. ICNT, Art. 161(1).

224. *Id.* Art. 161(1)(b), 162(1), 163(1), 164(1).

225. See note 207 *supra*.

226. ICNT, Art. 161(1)(b) (Technical Commission and Rules and Regulations Commission shall be appointed "with due regard" to the principle of equitable geo-

adopts decisions through a two-thirds majority vote,²²⁷ the objectivity of commission decisions will depend on the extent to which developing country members view their function as technical, rather than political.

(b) Powers of the Economic Planning Commission.

The Economic Planning Commission probably has the greatest political visibility, because it is responsible for monitoring the impact of ocean mining on world markets and recommending actions that the Council may take to implement the Authority's price and production control powers through conclusion of commodity agreements.²²⁸ Since the Economic Planning Commission has no independent powers, and since its failure to act would, in fact, be a deterrent to the implementation of price and production restrictions,²²⁹ the ability of the United States and like-minded countries to block Council actions recommended by the Economic Planning Commission would probably be an adequate safeguard.

(c) Powers of the Rules and Regulations Commission.

Similarly, the Rules and Regulations Commission, which is responsible for drafting the Authority's initial regulations and any subsequent amendments has no independent functions.²³⁰ If it recommends unsatisfactory regulations, a Council in which industrialized countries exercised a blocking vote would reject its recommendations. The protection afforded by such a power of this Council, however, is subject to two qualifications. First, a stalemate in the Council on the adoption or amendment of regulations may be contrary to deep seabed mining interests, as in the case where initial regulations are delayed and contracts cannot be issued, or where an amendment to the regulations is necessary to permit economic operations or the deployment of a new technology. Secondly, unlike questions concerning price and production controls, the United States may not always be able to rely on the support of like-minded industrialized countries.

graphical representation and special interests); Art. 162(1) (appointments to the Economic Planning Commission shall "take into account the need for equitable geographical distribution").

227. ICNT, Art. 161(8) (commission decisions require two-thirds vote of members present and voting).

228. *Id.* Art. 162(3), (5), (6).

229. *Id.* Art. 160(2)(xii) (the Council may act "upon the recommendation of the Economic Planning Commission").

230. *See id.* Art. 164.

When the Council votes on these regulations, since alternative formulations may have different impacts on ocean mining competitors.

(d) Powers of the Technical Commission.

The problems of a Council stalemate as a result of both industrialized country and developing country Council vetoes becomes most acute for the Technical Commission. The Commission has a wide range of independent powers, such as the supervision and inspection of ocean mining activities, the issuance of emergency suspension orders, the initiation of judicial proceedings against contractors and the collection of financial payments from contractors.²³¹ As described above, equitable geographical representation on the Technical Commission means that its developing country members will exercise full control over decisions subject to Council supervision.²³² If the Council is stalemated, it will not be able to exercise supervision over these independent commission functions which have direct impact on the security of investments made under contracts. To the extent that such functions are deemed to be discretionary, contractors will have no recourse to judicial review.²³³

Moreover, the Technical Commission is responsible for ensuring that Enterprise operations satisfy the same conditions and comply with the same regulations as those of contractors.²³⁴ Its diligence and avoidance of discriminatory favoritism regarding the Enterprise would be an important ingredient in the maintenance of a fair parallel system. The inability of industrialized country Council members to assure adequate, affirmative supervision of the Technical Commission means that an entity controlled by developing countries, has the virtually unchecked power to subvert the parallel system and ensure the predominance of the Enterprise.

Finally, as discussed under the description of the Council's powers, the draft treaty, coupled with a Council whose composition and voting procedures are favorable to the interests of the United States, would give the Technical Commission absolute control over the award of contracts.

231. *Id.* Art. 163(2).

232. *Id.* Art. 161(1)(b).

233. *Id.* Art. 191.

234. *See id.* Art. 163(2) (all of the Commission's functions apply equally to contractors and the Enterprise); Annex II, para. 6 (the Enterprise must comply with the Authority's regulations).

4. The Seabed Disputes Chamber.

(a) Composition.

The draft treaty establishes a Seabed Disputes Chamber within the Law of the Sea Tribunal and jurisdiction over certain disputes between the Authority and States Parties or their nationals.²³⁵ Twenty-one Tribunal members are elected to the Chamber by a two-thirds vote of States Parties,²³⁶ and eleven from among the Tribunal are elected to the Seabed Disputes Chamber by the Assembly, pursuant to a two-thirds vote.²³⁷ At neither stage in the election process would highly industrialized countries have a special voice, either through the Seabed Authority's Council or any other body.

If the Law of the Sea Tribunal develops into a politically biased, nonobjective organ, States Parties generally have the opportunity to avoid its jurisdiction and opt for arbitration or the International Court of Justice.²³⁸ This opportunity is, however, foreclosed in the case of deep seabed disputes, unless all parties to the dispute agree to arbitration.²³⁹ If the Chamber is biased in favor of the Authority, it is highly unlikely that the Authority would agree to opt out of its jurisdiction.

(b) Jurisdiction.

The draft treaty provides for compulsory, binding adjudication of disputes where matters, such as the following, are concerned:

- allegations by states, applicants for contracts, and contractors, that an Authority decision or measure violates the convention or the Authority's regulations, exceeds the Authority's jurisdiction, or is a misuse of power;²⁴⁰ and
- the interpretation or application of any ocean mining contract.²⁴¹

However, this apparent jurisdiction is directly contradicted by another provision of the draft treaty which prohibits the Chamber

235. ICNT, Annex V, Art. 15.

236. *Id.* Art. 2(1), 4(4).

237. ICNT, Art. 157(6), 158(2)(iii); ICNT, Annex V, Art. 37.

238. *See* ICNT, Art. 287(1).

239. *Id.* Art. 188, 287(2).

240. *Id.* Art. 187(2)(a), (b).

241. *Id.* Art. 187(2)(c). The Chamber also has jurisdiction over disputes concerning allegations by the Authority that a state party has violated the deep seabed provisions of the treaty; allegations that a member of the secretariat has a conflict of interest or has disclosed proprietary information; suspension of a state party's membership; and deep seabed-related disputes between states parties or between a national of a state party and another state party or its nationals. *Id.* Art. 187(2)(d), (e); Art. 189.

from ruling whether a particular rule, regulation, or procedure is in conformity with the convention.²⁴² The only question which the Chamber may address is whether the Authority has correctly applied the regulation in a particular instance.²⁴³

In addition, the Chamber is prohibited from exercising jurisdiction over the discretionary acts of the Assembly, Council, or the Council's subsidiary organs (e.g., the Technical Commission).²⁴⁴ The "discretionary powers" of the Authority are not defined. Thus, the power to "negotiate" contract terms may be discretionary, and the same would be true of the refusal to conclude a contract or the selection from among conflicting contract applications. Certainly, the general policies of the Assembly, which the Council must follow, would be deemed to be discretionary.

Two further ambiguities in the dispute settlement draft articles are important. First, the compulsory, binding jurisdiction of the Chamber may be avoided if parties agree under a contract to submit future disputes either to binding arbitration procedures contained in the draft treaty or some other, unspecified form of arbitration.²⁴⁵ This open-ended provision, when coupled with broad Authority discretionary power in the negotiation and conclusion of contracts, permits the Authority to insist that contractors agree to an Authority-determined form of arbitration as the price of obtaining a contract. Secondly, the draft articles are unclear as to whether private companies which enter into contracts with the Enterprise have access to the Chamber.²⁴⁶

5. Conclusions.

Based on the structure and relative powers of the various organs of the Authority described above, certain conclusions about the location of political control in the Seabed Authority emerge.

The Assembly, unquestionably dominated by the Third World, is a primary, if not the exclusive, political power center. Its power is

242. ICNT, Art. 191.

243. *Id.*

244. *Id.*

245. *Id.* Art. 188.

246. *Id.* Art. 187(a), (b) (Chamber jurisdiction over contractor challenges to decisions Assembly, Council, or Council's subsidiary organs); *id.* Art. 187(2)(c) (Chamber jurisdiction over interpretation or application of "any contract concerning activities in the Area").

derived primarily from its characterization as the "supreme" organ, its unrestricted policy-making powers and its freedom to interfere with the functions of other organs. In addition, the requirement that the Council—the only counter-force to the Assembly's power—follow its policy decisions, the ability to require amendments to the Authority's rules and regulations governing access, and the freedom from judicial review of its policies and actions on rules and regulations, are other sources of the Assembly's power.

Within the framework of the present draft treaty, the Council cannot be relied upon to serve as an effective check against Third World control over the Authority. If present U.S. objectives concerning the composition and voting procedures of the Council are satisfied (and this may be difficult), the United States and similarly-minded countries would share negative control over Council decisions with developing countries. As a result, the Council would have serious difficulty in making decisions, and its importance as a power center would necessarily diminish in comparison to the "supreme" Assembly and the powerful international bureaucracy, the Technical Commission and Enterprise.

Since a Council with deadlock potential appears to be the most favorable outcome possible in the present negotiations, the only available means of circumscribing Third World control over the Authority is to reduce the power of both the Assembly and the international bureaucracy. The existence of binding dispute settlement under the draft treaty is now totally ineffective as a check on these two organs because there is no assurance that the Assembly elected Seabed Disputes Chamber will be an impartial body. The Chamber has no jurisdiction over the Assembly's political actions and, even if it did, would have to give effect to the Assembly's "supremacy." In addition, the Chamber has no jurisdiction over the discretionary acts of the bureaucracy; even if it did, it would have no objective criteria and standards against which to judge the legitimacy of decisions affecting access to the resources.

B. Decisionmaking in the Seabed Authority—A Probable Scenario

In order to illustrate the present defects in the structure and inter-relationship of the Authority's organs, as constituted under the draft treaty articles, the following hypothetical problem will be considered:

The Group of 77 members of the Authority adopt the position that all processing plants for ocean mining operations should be located

in developing countries in order to implement the principle that the resources are the common heritage of mankind; they seek to influence the Authority to impose this requirement.

At first glance, this hypothetical position of the Group of 77 would appear to be an extreme example because it seems to contradict the terms of the draft treaty, which does not purport to give the Authority regulatory powers over ocean mining-related activities that occur on land.²⁴⁷ Nevertheless, as will be seen in the development of the scenario below, the present draft treaty would permit the Group of 77 to achieve this objective in an immediate and direct manner. Moreover, this same Third World objective could, as a practical matter, be satisfied, even if the United States were to achieve its objectives in the composition and voting of the Council; it might even be achievable in the event Authority actions are subject to complete judicial review.²⁴⁸

Assuming that the Group of 77 agreed to pursue the objective of requiring all ocean mining processing to be located in developing countries, there are a variety of Authority actions permitted under the draft treaty that might accomplish the desired result, such as:

- the Assembly's adoption of a general policy;
- the Council's provisional adoption of a blanket requirement in regulations, followed by Assembly approval;
- the Technical Commission's insistence that processing in developing countries be a condition to the award of any contracts;
- the Technical Commission's use of the location of processing as a criterion for selecting among conflicting contract applications;
- a provision in the regulations for tax incentives to contractors who locate their operations in the Third World;
- forcing all contractors to enter into joint ventures with the Enterprise, which, in turn, insists on locating processing in a developing country.

The following discussion commences with the Assembly debate of the Group of 77's hypothetical position and proceeds through the various steps that could be taken to implement an Assembly resolution that adopts the position as a general policy of the Seabed Authority.

247. See, e.g., ICNT, Art. 133(a) ("activities in the Area" means all exploration and exploitation of deepsea resources); ICNT, Art. 134(5) (activities in the Area are governed by the convention); NGL, Art. 151(4) (the Authority exercises control over activities in the Area).

248. See discussion of the Council and the Seabed Disputes Chamber in text accompanying note 235 *supra*.

1. Assembly Action.

At the first Assembly meeting, the Group of 77 would introduce a resolution declaring the general policy of the Authority to be that processing activities associated with ocean mining, whether they be conducted by states, private parties, or the Enterprise, must be located in developing countries. The Group of 77 would argue that the convention necessarily contemplates that the Authority take into account the location of processing plants in carrying out its mandate to ensure full participation of developing countries in the benefits of ocean mining.²⁴⁹ The argument would be based on the reasoning that the location of a processing plant in a developing country represents the most direct way that that country could benefit from ocean mining and the most logical form of participation, since few developing countries possess the necessary capital to simply purchase outright, substantial equity in an ocean mining project.

Developed countries, on the other hand, would argue that the location of nodule processing plants operated by contractors is a subject outside the Authority's treaty mandate. Because the processing restriction would be viewed by developed countries as an important issue of principle with respect to containing the Authority's regulatory reach to the deep seabed, the draft resolution would be almost uniformly opposed by industrialized countries.

It is possible that the requisite number of these countries would request a Tribunal advisory opinion and, thus, stay an Assembly vote.²⁵⁰ A fair reading of the draft treaty is that the Seabed Disputes Chamber would be permitted to advise on the legality of the proposed Assembly policy, despite the prohibition on its exercising jurisdiction over disputes concerning the discretionary powers of the Assembly.²⁵¹ Thus, an impartial Chamber could render an advisory opinion that the Assembly's proposed general policy would not be in

249. See NG1, Art. 140 (activities in the Area shall benefit mankind, in particular developing countries); ICNT, Art. 148 (effective participation of developing countries shall be promoted); NG1, Art. 150(b) (a general policy of the Authority shall be to expand opportunities for developing country participation). The key operative principle among these is Article 148 of the ICNT, which expressly restricts the Authority's mandate to promote Third World participation to those measures "specifically provided for" in the convention. Since no provision of the draft treaty specifically addresses processing plant location requirements, the Group of 77's legal argument in support of this position would be very weak.

250. ICNT, Art. 157(10), 190.

251. See *id.* Art. 191 (Chamber has no jurisdiction over Assembly's discretionary decisions in disputes under Articles 187 and 189; advisory opinions are authorized under Article 190).

conformity with the convention. In this event, it might be very difficult for the Group of 77 to maintain solidarity in pressing through the draft resolution. However, as discussed above, there is no assurance that the Chamber will be an impartial body, nor is there any guarantee that the Chamber will render the advisory opinion before the end of the Assembly session.²⁵² If it does not, the Assembly, by a simple majority, may decide to convene a "special session" the day following the close of the regular session for the purpose of voting on the draft resolution.²⁵³

Assuming that the developed countries are unable to muster the necessary one-quarter membership to request an advisory opinion, or that the Chamber renders an unsound advisory opinion or fails to submit the opinion in a timely manner, the overwhelming Group of 77 majority in the Assembly would proceed to adopt the proposed general policy, even though every industrialized country votes against it and a number of developing countries abstain.²⁵⁴

2. Council Action.

At the next meeting of the Council, its developing country members would propose that the Council adopt "specific policies to implement the Assembly's resolution."²⁵⁵ They would argue that the Council is bound to follow the "supreme" Assembly's direction and would propose, for example, that the Council take the following actions:

- direct the Rules and Regulations Commission to draft regulations requiring all operators to locate processing plants in developing countries;²⁵⁶
- direct the Enterprise to plan to locate its first processing plant in the Third World;²⁵⁷ and
- direct the Technical Commission, pending the adoption of new regulations, to insist in contract negotiations that all processing be in developing countries or, alternatively, use the location of pro-

252. Although Article 190 of the ICNT requires the Chamber to render advisory opinions "as a matter of urgency," the Chamber may be unable to fulfill a request made late in the Assembly's session.

253. ICNT, Art. 157(7), (10).

254. Assembly resolutions are adopted by a two-thirds vote in which abstentions do not count as negative votes. *Id.* Art. 157(6).

255. *See id.* Art. 160(1).

256. *See id.* Art. 160(2)(i), (xiv).

257. *Id.* Art. 160(2)(ix).

cessing plants as one of the criteria in selecting among conflicting applications for contracts.²⁵⁸

If the Council's composition and voting procedures satisfied present U.S. objectives, it is probable that the developed country Council members would be able to successfully oppose these actions.²⁵⁹ Under the present draft article, however, there would be no restraint on the Council's acting to fully implement the processing plant location requirement by taking the initial steps proposed by the developing country members.²⁶⁰

3. Effective Implementation by Other Organs.

Assuming that the Council's composition and voting procedures are favorable to the interests of the United States, direct implementation of the Assembly's general policy on processing plants by the council would be blocked by the industrialized country members. However, the policy could be indirectly implemented in the following ways:

- First, the Enterprise has the inherent discretion to locate its processing plants in developing countries and in fact, is directed by the draft treaty to comply with the Assembly's general policies.²⁶¹ Under the best of circumstances, developed country members of the Council would not have the voting strength to direct the Enterprise to do otherwise,²⁶² or to disapprove of an Enterprise plan of work including processing in a developing country.²⁶³
- Second, the Rules and Regulations Commission, which is dominated by Third World members, would be free to propose draft regulations in accordance with the Assembly's policy.²⁶⁴ Even if

258. *Id.* Art. 160(2)(i), 163(2)(xiv). See discussion of acquiring maintaining access in text accompanying note 2 *supra*.

259. See general discussion of the Council in text.

260. Under Article 159(7) of the ICNT, possibly ten blocking votes would be required to prevent Council decisions; it is highly improbable that the United States and like-minded countries could account for ten seats. Once the Council adopted these decisions, there would be no opportunity for challenge in the Chamber, since the decisions are either discretionary or concern the substance of regulations. ICNT, Art. 191.

261. ICNT, Art. 169(1).

262. *Id.* Art. 160(2)(ix). See general discussion of the Council in text.

263. *Id.* Art. 160(2)(x).

264. One of the specifically authorized subjects of the Authority's operational regulations concerns the "direct participation of developing countries in ocean mining." *Id.* Annex II, para. 11(a)(2)(xii). Also regulations may be those necessary to implement Council decisions pursuant to Article 150 (the general and resource policies of the Authority). *Id.* para. 11(a)(4). In this instance, however, an industrialized country

industrialized country Council members blocked their adoption, the draft regulations would be available for the next session of the Assembly. At that time, the Assembly would, without doubt, request the Council to amend the provisional regulations to include the requirement, and it would be mandated that the Council comply.²⁶⁵

– Third, the developing country-dominated Technical Commission would have the inherent discretion to require contractors to locate processing in developing countries as the price of access or to grant priorities among conflicting applicants on this basis, even though a very strict reading of the draft treaty would require the existence of regulations on this point before the Commission should validly impose such a requirement.²⁶⁶ The reason is that developing country Council members would, under all proposals, be in a position to block Council directives which interfered with this Commission practice, and applicants denied access as a result of these practices would be unable to obtain judicial review.²⁶⁷

– Fourth, the Technical Commission could indirectly achieve the same result by forcing all contractors to engage in joint ventures with the Enterprise in order to obtain access,²⁶⁸ and the Enterprise, which is required to comply with the Assembly's policies,²⁶⁹ would insist on basing processing in a developing country.

Thus, the existence of a Council that satisfied the present U.S. objectives would not be an adequate safeguard against the Authority's giving some effect to the general policy adopted by the Assembly in this instance. On the other hand, effective improvement of the dispute settlement provisions, which would allow contract applicants prompt access to an impartial judicial body with the power to review the Technical Commission's discretionary or other decisions in the award of contracts, could substantially reduce the ability of the

veto of Council action implementing the Assembly's general policy concerning developing country participation under Article 150(b) of NC1 would preclude regulations pursuant to this authority. *Id.*

265. See ICNT, Art. 158(2)(xvi), 160(2)(xiv).

266. As a textual matter, the ICNT limits the Commission's discretion in contract negotiations on the participation of developing countries to operational regulations covering the subject and financial incentives also contained in regulations. *Id.* Annex II, para. 5(d)(i), (ii); NG2, Annex II, para 7 *septies*. Selection from among conflicting applications should be made on the basis of the same regulations. ICNT, Annex II, para. 5(g).

267. See ICNT, Art. 191 (exempting discretionary acts of the Technical Commission from review by the Seabed Disputes Chamber).

268. See NC1, Art. 151(3); ICNT, Annex II, para. 5(i). See also discussion of the Enterprise in the text.

269. ICNT, Art. 169(1).

bureaucracy to implement the Assembly's general policy in the absence of complementary regulations.

4. Importance of Adequate Dispute Settlement.

The key benefit of a "good" Council identified in the above scenario would be to prevent the adoption of regulations embodying the requirement that processing plants be located in Third World countries. This safeguard, however, would not be very effective, unless the ability of the Authority's other organs to implement Assembly policies is effectively curtailed by judicial review of all of the Authority's actions. Yet, improvements of the composition and voting procedures of the Council and of the provisions for dispute settlement in the draft treaty, would not completely eliminate the opportunity for the Third World, through its domination of the Assembly, to satisfy this hypothetical objective of developing country control over all seabed nodule processing:

First, the Council only adopts regulations on a provisional basis, while the Assembly has the power of final adoption.²⁷⁰ If the Council were to forward provisional regulations to the Assembly which did not impose a requirement that all processing plants be located in developing countries, the Assembly, controlled by the Group of 77 collectively, could request that the Council amend the provisional regulations; arguably, the draft treaty requires the Council to comply with the Assembly's request.

If the Council amended the regulations and the Assembly subsequently approved such an amendment, the Seabed Disputes Chamber, under the present draft treaty, would be barred from ruling on their legality.²⁷¹ Improvements to the dispute settlement articles, permitting review of regulations, would remove this defect. If the Council, due to an effective industrialized country veto, failed to amend the regulations, the provisional regulations, without the processing plant requirement, would continue in effect.²⁷² However, the conflict created would damage the stability of the international organization and, thus, might influence some industrialized country Council members to seek resolution of the impasse. In this case, the dispute settlement provisions could only be of assistance if they per-

270. *Id.* Art. 158(2)(xvi), 160(2)(xiv).

271. *Id.* Art. 191.

272. *See id.* Art. 160(2)(xiv).

mitted the Chamber to decide political disputes between the Assembly and Council, a highly unlikely outcome.

Second, the draft treaty permits the Assembly's general policy to be effectively implemented through regulations providing financial incentives to contractors who located their operations in developing countries.²⁷³ It would no doubt be more difficult to maintain industrialized country solidarity in blocking regulations that, while undesirable, are nonetheless in conformity with the convention, as opposed to regulations which violate the convention. Thus, there is a high risk that the Council would not safeguard against the adoption of tax reductions which have the net effect of forcing contractors to locate their processing plants in developing countries. Moreover, improvements to the dispute settlement provisions permitting judicial review of regulations and the Authority's discretionary acts would not prevent the *de facto* implementation of the processing location requirement under tax incentive regulations.²⁷⁴

Third, any prudent private company considering ocean mining, when confronted with the Assembly's initial adoption of its general policy, would probably feel forced to plan its operation so as to locate its processing plant in a developing country before it ever applied for a contract. Such a country would recognize that, even in the event that it acquired a contract for operations which did not comply with the Assembly's policy, investment made pursuant to that contract would be very insecure.

The most obvious reason for this instability would be the risk that subsequent to the conclusion of the contract, the provisional regulations would be amended pursuant to an Assembly directive. In the most extreme case, the contract could be terminated, unless the contractor then agreed to build his processing plant in the Third World. Of equal seriousness would be the risk that if he did not construct onshore facilities in a developing country, he would be unable to benefit from tax reductions later enacted in revised regulations implementing the Assembly's policy.

273. NG2, Annex II, para 7 *septies*.

274. In the event that regulations granting tax reductions for the locations of processing plants in developing countries were held invalid because the Authority's powers do not extend to landbased operations, the regulations could simply be redrafted to provide the same benefits for contractors who joint venture with developing countries or the Enterprise. See NG2, Annex II, para. 7(d), 7 *septies*. As a practical matter, the joint venture tax reduction would have the same impact as a processing location requirement, since it would force contractors to negotiate with Third World partners who, in turn, could force location of processing plants in their territories.

A less obvious reason for this insecurity concerns the contractor's daily routine relationship with the international regulators—a relationship that in and of itself goes a long way toward shaping the overall investment climate. If a project were viewed by the members of the Technical Commission and the Secretariat comprising the staff of inspectors as in violation of the Assembly's policy, the prospects for fair and reasonable regulation would diminish. In a system where prompt and effective judicial review of contract disputes is frequently unavailable, where the contractor's government may not retain its seat on the Council and if it does so has inadequate voting strength to properly supervise the international bureaucracy, and where the same bureaucracy holds absolute control over whether the operator will ever obtain a second ocean mining contract, the Authority's "good will" becomes just as indispensable to a secure and attractive investment climate as the written terms of the contract.

A second or "resumed" meeting of the Seventh Session of the Conference in August-September 1978 produced additional revisions to the draft articles contained in the ICNT, which became available too late to have been discussed in this article in any detail.²⁷⁵ In any event, the status of these most recently revised articles is even more uncertain than that of the revisions which emerged from the Geneva session in the spring of 1978.²⁷⁶ Moreover, these revisions, if they are retained, would have little effect on the analysis of the draft treaty presented in the preceding discussion.

The most substantial changes to the ICNT considered by the negotiating groups during the resumed Seventh Session in New York concern the establishment and functions of the subsidiary organs of the Council of the Authority.²⁷⁷ If they were to be incorporated into the draft treaty, these revised articles would have the effect of: (1) Decreasing the powers of the Technical Commission in favor of Council decisionmaking;²⁷⁸ and (2) eliminating the Rules and Regula-

275. During the resumed session, Negotiating Group 1 produced revised articles concerning the "Basic Conditions of Exploration and Exploitation." LOS Conf. Doc. NG1/13, Sept. 12, 1978. Negotiating Group 2 produced a revision of the "Financial Terms of Contracts" provision. LOS Conf. Doc. NG2/10, Sept. 13, 1978. And Negotiating Group 3 produced revised texts concerning the subsidiary organs of the Council. LOS Conf. Doc. NG3/4, Sept. 13, 1978.

276. For example, the chairman of Negotiating Group 1 has explained that certain of these new draft articles will need to be revised further. LOS Conf. Doc. NG1/13/Add. 1, Sept. 14, 1978 (revised articles in LOS Conf. Doc. NG1/13 do not have same status as those in LOS Conf. Doc. NG1/10/Rev. 1).

277. LOS Conf. Doc. NG3/4, Sept. 13, 1978 (revising Arts. 160-63 of the ICNT).

278. *Id.* Arts. 160, 163.

tions Commission and locating its functions in the Technical Commission.²⁷⁹

The first change is not very encouraging to the prospective ocean mining investor. The relocation of political or "executive" functions in the Council may serve to diminish the risk that a politically-motivated, developing country-controlled Technical Commission would take actions inimical to the security of investments made under contracts.²⁸⁰ Such actions are less likely to be undertaken by a Council in which both highly industrialized country members and developing country members exercise a collective veto, as proposed by the United States.²⁸¹ However, ocean miners will no doubt also require affirmative decisionmaking from the regulating body in order to conduct efficient operations under the regime, and the risk of delay and stalemate in Council decisionmaking may be almost as serious as the risk that the technical experts who are members of the commissions will transgress their mandate and enter the political arena.

Furthermore, the second major change proposed in these draft articles, the elimination of the Rules and Regulations Commission, will probably not be well received by those who express an interest in ensuring sound international regulation of ocean mining activities, particularly for the purpose of protecting the quality of the marine environment. Experience tends to demonstrate that combining the functions of rule-making and contracting in the same body results in less effective regulations of the concerned industry.

VII. CONCLUSIONS

In order to justify the billion dollar investment ocean miners are considering, the international investment climate must undergo significant improvement. The most effective means of stabilizing the legal and political uncertainties surrounding recovery operations on the deep seabed is through a universally accepted law of the sea treaty. The criticisms of the draft treaty regime contained in this article are presented in the hope that the prospects for reaching such an agreement might be advanced.

When confronted with the types of criticism found in this article, many developing countries will respond by suggesting that the private companies of industrialized countries should "trust" the Interna-

279. *Id.* Art. 163.

280. See note 223-34 *supra* and accompanying text.

281. See note 207 *supra* and accompanying text.

tional Seabed Authority and, in particular, the developing countries who will dominate it. The underlying rationale for this trust, they will argue, is the universally shared desire to see the common heritage of mankind developed and the practical recognition that such development can only occur through the activities of those companies which presently have the technology and wherewithal to do the job. These countries may be sincerely puzzled that this argument is unpersuasive. To the companies, however, it seems very clear why a billion dollar investment cannot be made on the basis of wishful thinking, as such thinking is controverted by virtually all of the empirical evidence available:

First, for over ten years, a handful of countries producing raw materials have managed to prevent agreement on any treaty which would tend to facilitate private investment. In the past, attempts have been made in the negotiation to resolve land-based producer concerns through fixed production limits in the treaty, in order to eliminate pressures to deter seabed development for production control reasons through the so-called backdoor approach to production control—misuse of discretion, onerous rules and regulations, red tape, and delay. This strategy has not been successful to date and may never be so. It cannot be rationally assumed that a new International Seabed Authority will be free of the manipulative influence of the land-based producers, when they have been so successful for ten years.

Second, the basic principles now embodied in the draft treaty conform closely to those of the new international economic order advocated by the Third World. While the developing countries may feel this new philosophy is just, surely they understand why a private investor is intimidated by it. The concern that developing countries in their collective control of the Seabed Authority may be hostile towards multinational corporations from industrialized countries in fulfillment of new international economic order philosophies is not an idle one; the Conference's experience has demonstrated that the Third World as a political unit is as hostile to private enterprise as its most radical elements, notwithstanding the wide range of represented economic philosophies and systems that should result in moderation.

Third, the draft treaty contains the clearest possible signal that private enterprise should be eliminated from the deep seabed as soon as it has surrendered its know-how and technology to a supranational mining company that will have a monopoly over seabed resources. Wherever possible, the Third World-dominated Authority will discriminate in favor of direct exploitation by the Third World's prodigy,

the Enterprise. While some may argue that the influence of land-based producers and the importance of Third World ideology may diminish once the Law of the Sea Conference is over, there is little chance that favoritism for the Enterprise will disappear. In fact, it will probably increase when the Enterprise comes into existence and begins to pursue its own bureaucratic expansionism.

Finally, there is a basic distinction between investing in a mining project in a Third World country and on the deep seabed that illustrates with clarity why potential investors cannot assume the risk that the Seabed Authority may use its discretionary powers unwisely. Many developing countries anxious to attract foreign investment for their industrialization have developed detailed investment laws and policies designed to establish stable and cooperative long-term relationships with private companies. These arrangements are founded always on the principle that the foreign investor must benefit the overall political, economic, and social objectives established by the host country. To the extent that they have been successful in attracting capital, it is because investors can study the host country's political system, ascertain its reliability, review other investment disputes which that country has had with foreign investors and determine their root causes, and finally, because host countries share with foreign investors a common objective—to develop their resources so as to maximize the economic benefits available for distribution between the investor and the country.

In contrast, the draft treaty on the law of the sea would establish an unknown governing authority, with no past track record, which would have as much discretion as a sovereign state. Moreover, this regime is being proposed for an area not owned by any one country or entity, and therefore, direct economic benefits flowing to a unified body politic from the development of seabed resources are not experienced by individual developing countries. Indeed, if manganese nodules had been found in a sovereign state, it would be very likely that arrangements would already exist for the development of these resources. In short, the draft treaty texts would have to contain substantial incentives for private company participation in ocean mining before it would be possible to overcome the general conviction that investing in an area governed by the Third World collectively is riskier than investing in any single developing country.

The best that can be said for the draft treaty in its present form is that the Authority will have to treat at least a few companies well in order to get the Enterprise on its feet. It is possible that, among

the thirty companies now active in ocean mining, one, two, or three might actually operate profitably through partnership with the Enterprise. But no one company can know whether it would be among the chosen, and in the absence of the establishment of some alternative investment climate during the immediate future, these companies will all be forced to abandon their projects long before they would ever be in a position to vie with each other for favors from the Authority, assuming that any of them would be prepared to rise to that bait.

This article has attempted to set forth in detail the numerous questions which a prudent investor would pose before investing under a law of the sea treaty. It explains why the draft treaty's answers to those questions are unsatisfactory to such an investor. If the international community really wants the resources of the seabed developed for the benefit of all mankind, these questions will need to be answered by a treaty which, on its face, demonstrates fairness, objectivity, and common sense regulation and administration. None of these factors is present today.

If this treaty, or one which closely resembles it, is adopted by the Law of the Sea Conference, there can be virtually no doubt that the treaty will not secure the necessary ratifications to bring it into force. As a result, the cause of advancing international cooperation through the creation of new global institutions will be dealt a blow from which the international community will not easily recover in this century.

For this reason, concerned nations need to rededicate themselves to achieving common agreement on the fundamental principles which will govern the exploitation of the deep seabed and its resources. Unquestionably, these resources should be developed for the benefit of all mankind. But the foundation of the common heritage concept must, by general consensus, be defined as the collective administration and encouragement of deep seabed resource development by all nations, with each nation free to participate in such development on terms compatible with national needs and individual economic philosophies. If this underlying principle is agreed upon, it should be possible for the Law of the Sea Conference to repair the draft treaty regime so that the market-oriented economies, which depend on private initiative and investment to supply vital raw materials, can be confident that the final regime will induce economic development through private enterprise.