

International Seabed Authority: The First Four Years

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The mineral resources of the seabed beyond national jurisdiction are the common heritage of mankind, as provided in Part XI of the United Nations Convention on the Law of the Sea of 1982. The original Part XI regime effectively precluded industrialized States from joining the Convention for more than a decade, putting at risk the whole project for a modern constitution for the oceans. But the objections to Part XI have largely been overcome with the adoption of the 1994 Part XI Implementation Agreement.¹

The International Seabed Authority came into being on 16 November 1994 with the entry into force of the Convention. The Authority has an Assembly, Council, Secretariat (headed by a Secretary-General), as well as a Legal and Technical Commission and a Finance Committee.² In due course, the "Enterprise" is to be set up, to conduct mining directly alongside other mining enterprises.

¹ The views expressed are personal, not those of the United Kingdom Government.

United Nations Convention on the Law of the Sea, 1982: A/CONF. 62/122 and Corr.1-11, *ILM* 21 (1982), 1261; Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted by the United Nations General Assembly on 28 July 1994: A/RES/48/283 of 28 July 1994, *ILM* 33 (1994), 1309; *The Law of the Sea. United Nations Convention on the Law of the Sea. Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Index and excerpts from the Final Act of the Third United Nations Convention on the Law of the Sea*, Division for Ocean Affairs and the Law of the Sea 1997, UN Publication Sales No. E.97.V.10; Consolidation of Part XI of the Convention and the Implementation Agreement (ISA/98/04); M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982 — A Commentary*, (referred to as Virginia Commentary).

² For the Authority's documentation see p. 239; *Selected Decisions and Documents of the First, Second and Third Sessions* (ISA/98/01), referred to as Selected Decisions 1/2/3; *Selected Decisions and Documents of the Fourth Session* (ISA/99/01), referred to as Selected Decisions 4; *Report of*

The Authority is based in Kingston, Jamaica. All States Parties to the Convention are *ipso facto* members of the Authority. As of 16 November 1998, there were 130 parties to the Convention (and hence 130 members of the Authority), a measure of the success of those who put in place the 1994 Part XI Implementation Agreement with the overriding objective of securing universal acceptance of the Convention.

This article aims (in Section III.) to describe the work of the Authority in the four years between its establishment in November 1994 and the termination of provisional membership in November 1998. Certain introductory matters will be touched on in Section I. In Section II. some salient features of the Authority will be highlighted. Tentative conclusions are offered in Section IV.

I. Introductory

1. The Negotiations Leading to the Establishment of the Authority

In the late 1960s and the 1970s, the new regime for deep seabed mining, then under negotiation, was seen by some as a source of untold wealth and as an inspirational precedent for the New International Economic Order. Others — more skeptical — doubted the tales of great riches and feared the precedent. Negotiation of the new regime, to give sub-

the Secretary-General covering the period November 1994 to June 1997, ISBA/3/A/4: Selected Decisions 1/2/3, 45–60; *Annual Report for 1997/98*, ISBA/4/A/11: Selected Decisions 4, 52–63. On the work of the Authority, see J. Koch, “Die Internationale Meeresbodenbehörde in Kingston”, *VN* 44 (1996), 210 et seq.; H.P. Rajan, “The Meetings of the International Seabed Authority — the first, second and third sessions”, *Journal of Indian Ocean Studies* 4 (1997), 218 et seq. For earlier writings, see W. Hauser, *Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention*, 1982; R. Wolfrum, *Die Internationalisierung staatsfreier Räume*, 1984; F. Paolillo, “The International Arrangements for the International Seabed and their Impact on the Evolution of International Organizations”, *RdC* 188 (1984), 135 et seq.; E.D. Brown, *Seabed Energy and Mineral Resources and the Law of the Sea*, Vol.2, 1986, Chapters 3 to 6; the contributions of R. J. Dupuy/J.P. Levy/F. Orrego Vicuña/F. Paolillo, in: R.J. Dupuy/D. Vignes, *A Handbook on the New Law of the Sea*, 1991, 579 et seq.; R. Wolfrum, “International Sea-Bed Authority”, in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, 1995, 789 et seq.

stance to the "common heritage of mankind" principle embodied in the 1970 Declaration of Principles,³ was inextricably bound up with the complex interplay of interests in the Seabed Committee⁴ and at the Third United Nations Conference on the Law of the Sea;⁵ the ultimate failure of the deep seabed negotiations to reach an acceptable consensus

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- ³ R. Wolfrum, "Common Heritage of Mankind", *EPIL* Instalment, Vol. I, 1992, 692 et seq.; T. Fitschen, "Common Heritage of Mankind", in: Wolfrum, *United Nations*, see note 2, 149 et seq.; K. Baslar, *The Concept of the Common Heritage of Mankind in International Law*, 1998.
- ⁴ A. de Marffy-Mantuano, "The Pardo Declaration and the Six Years of the Seabed Committee", in: Dupuy/Vignes, see note 2, 141 et seq.; L. Henkin, *Law of the Sea's Mineral Resources*, 1968; L.B. Sohn has recently referred to Pardo's extraordinary prediction of at least US\$ 5 billion profit annually from seabed mining as a "mirage": "Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea", *Colum.J. Transnat'l L.* 36 (1997), 285 et seq., (288); S. Oda, *The Law of the Sea in Our Time — The United Nations Seabed Committee 1968–1973*, 1977.
- ⁵ Official Records of the Third United Nations Conference on the Law of the Sea, Vols I to XVIII; see also R. Platzöder (ed.), *Third United Nations Conference on the Law of the Sea, Documents*, Vols I to XVIII. J.R. Stevenson, B. Oxman, with various contributions in: *AJIL* 68 (1974), 1 et seq.; 69 (1975), 1 et seq., 763 et seq.; 71 (1977), 246 et seq.; 72 (1978), 57 et seq.; 73 (1979), 1 et seq.; 74 (1980), 1 et seq.; 75 (1981), 211 et seq.; 76 (1982), 1 et seq.; B. Oxman, "The Third United Nations Conference on the Law of the Sea", in: Dupuy/Vignes, see note 2, 163 et seq.; T.B. Koh/S. Jayakumar, "Negotiating Process of the Third United Nations Conference on the Law of the Sea", *Virginia Commentary I*, 29 et seq.; B. Oxman, "The Law of the Sea", in: C.C. Joyner (ed.), *The United Nations and International Law*, 1997, 309 et seq.; D.H. Anderson, "Law-Making Processes in the UN System — Some Impressions", *Max Planck UNYB* 2 (1998), 23 et seq.; E.L. Miles, *Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea 1973–1982*, 1998. For accounts of the Part XI negotiations, see L.S. Ratiner, R.L. Wright, "The Billion Dollar Decision: Is Deepsea Mining a Prudent Investment?", *Lawyer of the Americas* 10 (1978), 713 et seq.; M.G. Schmidt, *Common Heritage or Common Burden?*, 1989; R.G. Darman, "The Law of the Sea: Rethinking U.S. Interests", *Foreign Aff.* 56 (1977/78), 373 et seq.; L.S. Ratiner, "The Law of the Sea: A Crossroads for American Foreign Policy", *Foreign Aff.* 60 (1981/82), 106 et seq., (121); J.K. Sebenius, *Negotiating the Law of the Sea*, 1984; W. Wertebaker, "A Reporter at Large: The Law of the Sea", *The New Yorker*, 1 August 1983, 38 et seq. and 8 August 1983, 56 et seq.; W.C. Brewer, "Deep Seabed Mining: Can an Acceptable Regime ever be found?", *Ocean Development and International Law* 11 (1982), 25 et seq.

put at risk the whole effort to draw up a universally accepted treaty on the modern international law of the sea.

The Convention was adopted in December 1982. Thereafter States devoted considerable time and resources to preparing for its entry into force, in particular in the Preparatory Commission, which met twice a year between 1983 and 1994.⁶ The Commission's role had been seen as critical during the latter stages of the Conference. Some felt that by drafting satisfactory rules, regulations and procedures to be applied provisionally (as provided in article 308 para. 4 of the Convention) pending formal adoption by the Authority (by consensus in the Council), the Commission could give cast-iron assurances to skeptical industrialized countries and their industry. Even after the clear rejection of Part XI by industrialized countries it was suggested that the Commission could somehow remedy the major defects in Part XI; but the

⁶ The Preparatory Commission was established by Resolution I of the Conference, and remained in existence until the conclusion of the first session of the Assembly of the International Seabed Authority on 18 August 1995. See Virginia Commentary Vol.V, 467 et seq. The report of the Preparatory Commission for presentation to the Assembly of the International Seabed Authority (i.e. excluding its report on Tribunal matters) is in document LOS/PCN/153 (Vols I to XIII, plus index), and was presented to the Assembly in August 1995 (ISBA/A/L.6). For the documentation of the Preparatory Commission see, *The Law of the Sea: Documents 1983-92*, R.Plätzöder (ed.), Second Series, Vols I to XV (referred to as Platzöder) and *Law of the Sea Bulletin, Special Issues II* (April 1988) and *III* (September 1991). On the work of the Preparatory Commission, see J.P. Levy, "Establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea", in: Dupuy/Vignes, see note 2, 821 et seq.; Paolillo, see note 2; Brown, see note 2, Chapter 7; P. Kirsch, D. Fraser, "The Law of the Sea Preparatory Commission after Six Years: Review and Prospects", *CYBIL* 26 (1988), 119 et seq.; J.P. Levy, "Un nouvel instrument de développement progressif du droit de la mer: La Commission préparatoire de L'Autorité internationale des fonds marins et du Tribunal international du droit de la mer", *AFDI* 34 (1988), 735 et seq.; M. Hayashi, "Registration of the First Group of Pioneer Investors by the Preparatory Commission for the International-Sea-Bed Authority and for the International Tribunal for the Law of the Sea", *Ocean Development and International Law* 20 (1989), 1 et seq.; Schmidt, see note 5, 288 et seq.; E.D. Brown, *The International Law of the Sea*, Vol. I, 1994, 448 et seq.; 473 et seq.; J.P. Levy, *Collection espaces et ressources maritimes*, 1 (1986), 137 et seq.; 2 (1987), 134 et seq.; 3 (1988), 115 et seq.; 4 (1990), 105 et seq.; 5 (1991), 89 et seq.; 6 (1992), 129 et seq.; 7 (1993), 10 et seq.; 8 (1994), 6 et seq.

Commission had no power to alter the Convention. The non-participation of the United States, together with the reserved position of the United Kingdom and the Federal Republic of Germany (which did attend as observers) and of other developed countries, as well as developing-country objection to anything which might deviate from the Convention's provisions, precluded any role for the Commission in making Part XI acceptable; the Commission may indeed have had a negative impact. Its drafts and studies were largely overtaken. Its most significant work lay in implementing (often effectively amending) the provisions of Resolution II of the Conference concerning registered pioneer investors. There was growing realization that the Part XI deep seabed mining regime was unworkable, would preclude participation in the Convention by most industrialized countries, and was based on wildly optimistic estimates of the potential and time scale of deep seabed mining, and that the common heritage would not benefit mankind as a whole. In the words of one commentator, "a zone without any foreseeable economic uses had held the whole Convention hostage for more than a decade".⁷

In the 1990s the Convention's deep seabed mining regime was radically revised as a result of consultations under the auspices of the United Nations Secretary-General leading to the 1994 Part XI Implementation Agreement. It was during this phase that cooperation intensified among a group of ten most interested industrialized countries (the "G10" pioneer investors and potential applicants: Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Russia, United Kingdom, United States of America), as well as between industrialized countries and the most interested developing countries, including Brazil, Indonesia and Jamaica. With the adoption of the 1994 Agreement, industrialized States were willing to join the Convention, and the centrepiece of the new regime — the International Seabed Authority — was established in Kingston, Jamaica.

⁷ A. de Marffy-Mantuano, "The procedural framework of the Agreement implementing the 1982 United Nations Convention on the Law of the Sea", *AJIL* 89 (1995), 814 et seq.

2. The Present Status of the Convention and 1994 Implementation Agreement

The United Nations Convention on the Law of the Sea was adopted on 30 April 1982 by a vote of 130 in favour, 4 against (Israel, Turkey, United States of America, Venezuela), with 17 abstentions (including the United Kingdom, Federal Republic of Germany, Belgium, Netherlands, Italy, Spain, Soviet Union and other States of Eastern and Western Europe). It was opened for signature on 10 December 1982, immediately received 119 signatures and by the closing date for signature (9 December 1984) had received 159 signatures (155 States, European Economic Community, Cook Islands, Niue and United Nations Council for Namibia). But it was soon clear that the Convention, as adopted, would not secure the participation of industrialized States because of the provisions for deep seabed mining. The Federal Republic of Germany, the United Kingdom and the United States did not sign; most other industrialized States signed, but made it clear that they would not proceed to ratification without significant improvements in the deep seabed mining provisions. There was a real prospect that the Convention would come into force with minimal developed State participation.

This prospect, together with major changes in attitudes to economic matters, stimulated efforts to render the deep seabed mining provisions universally acceptable. Following fifteen rounds of informal consultations in New York between July 1990 and June 1994,⁸ under the aegis

⁸ A/48/950; earlier reports are contained in A/45/721 and A/46/724. The August 1993 "Boat Paper" is reproduced in: *International Journal of Marine and Coastal Law* 9 (1994), 59 et seq.; J. Koch, "Kommentar: Die Europäische Gemeinschaft als Partei seerechtlicher Verträge", *AVR* 32 (1994), 336 et seq., lists the representatives of Australia, the United Kingdom, Italy, the United States, Jamaica, Brazil, Nigeria and Indonesia as those who handed the draft to the United Nations Legal Counsel (the actual drafting group being smaller). And see UN Publication Sales No.E. 97.V.10, see note 1, 208 et seq.; S.N. Nandan, "The Efforts undertaken by the United Nations to Ensure Universality of the Convention", in: E.L. Miles, T. Treves, *The Law of the Sea: New Worlds, New Discoveries*, 1993, 349 et seq.; W. Scholz, H. Djalal, J. Koch, *Seerechtliche Gespräche in der Vertretung der Freien und Hansestadt Hamburg beim Bund* (published 1993/94); D.H. Anderson, "Efforts to ensure universal participation in the United Nations Convention on the Law of the Sea", *JCLQ* 42 (1993), 654 et seq.; *id.*, "Further efforts to ensure universal participation in the United Nations Convention on the Law of the Sea", *ICLQ* 43 (1994), 886 et seq.; R.

of two successive Secretaries-General (Javier Pérez de Cuéllar and Boutros Boutros Ghali), the Agreement on the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 was adopted by the General Assembly of the United Nations on 28 July 1994 and opened for signature on 29 July 1994.⁹ The main changes made by the Agreement are:

Platzöder, "Substantive Changes in a Multilateral Treaty Before its Entry into Force: The Case of the 1982 United Nations Convention on the Law of the Sea", *EJIL* 4 (1993), 390 et seq.; B. Oxman, "United States Interests in the Law of the Sea Convention", *AJIL* 88 (1994), 167 et seq.; J.R. Stevenson, B. Oxman, "The Future of the United Nations Convention on the Law of the Sea", *AJIL* 88 (1994), 488 et seq.; J. Koch, "Die Verhandlungen über die Lösung der Probleme des Tiefseebergbauteils des SRÜ aus der Sicht der deutschen Delegation", in: Berichte des Bundesamtes für Seeschifffahrt und Hydrographie Nr. 4, *Das UN-Seerechtsübereinkommen tritt in Kraft: Inhalte und Konsequenzen für die Bundesrepublik Deutschland*, 1994; J.P. Queneudec, "Le "nouveau" droit de la mer est arrivé!", *RGDIP* 48 (1994), 865 et seq.; J.P. Levy, "Les bons offices du Secrétaire Général des Nations Unies en faveur de l'universalité de la Convention sur le droit de la mer", *RGDIP* 48 (1994), 871 et seq.; de Marffy-Montuano, see note 7; D.H. Anderson, "Legal implications of the entry into force of the United Nations Convention on the Law of the Sea", *ICLQ* 44 (1995), 313 et seq.; P. Gautier, "De 1982 à 1994: les étapes d'une modification "singulière" — De la partie XI de la Convention des Nations Unies sur le droit de la mer de 1982", *RBDI* 28 (1995), 56 et seq.; K. Davidson, "Law of the Sea and Deep Seabed Mining: The Agreement Modifying Part XI of the UN Law of the Sea Convention", in: *Center for Oceans Law and Policy Proceedings* 1995, 303 et seq.; J.I. Charney, "Entry into Force of the 1982 Convention on the Law of the Sea", *Va.J.Int'lL.* 35 (1995), 381 et seq.

⁹ A/RES/ 48/263, adopted by a recorded vote of 121 to 0, with 7 abstentions (Colombia, Nicaragua, Panama, Peru, Russian Federation, Thailand, Venezuela), A/48.PV.99 et seq.; See B. Oxman, L.B. Sohn, J.I. Charney, "Law of the Sea Forum: The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea", *AJIL* 88 (1994), 687 et seq.; D.H. Anderson, T. Treves, S.N. Nandan, "Legal effects of mechanisms for adjusting Part XI", in: *Proceedings of 18th Annual Seminar of the Center for Oceans Law and Policy*, University of Virginia, 1994; L.B. Sohn, "International Law Implications of the 1994 Agreement on implementation of the seabed provisions of the Convention on the Law of the Sea", *AJIL* 88 (1994), 696 et seq.; J.I. Charney, "U.S. Provisional Application of the 1994 Deep Seabed Agreement", *AJIL* 88 (1994), 705 et seq.; D.H. Anderson (with comments by Davidson and Rattray), "Resolution and Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea: A General Assessment", *ZaöRV* 55

- greatly reduced costs for States Parties;
- postponement in establishing the Enterprise, and enhanced provision for joint ventures with that organ;¹⁰
- new decision-making procedures to safeguard special interests;
- eliminating the review conference (at which the interests of industrialised countries could have been overridden);
- no mandatory transfer of technology;¹¹
- no production limitation, but clearer antisubsidy provisions;
- no compensation fund for land-based producers;
- substantially reduced fees for miners, and financial terms of contracts to be settled in due course, based on comparable terms for land-based mining.

The Agreement also gives additional emphasis to environmental concerns. It was provisionally applied from 16 November 1994 and entered into force on 28 July 1996. As is provided in the General Assembly resolution by which the Agreement was adopted, and in the Agreement itself, the provisions of the Agreement and Part XI of the Convention are to be interpreted and applied together as a single instrument: in the event of any inconsistency between the Agreement and Part XI, the provisions of the Agreement prevail.¹² Moreover, the Agreement pro-

(1995), 275 et seq.; M. Hayashi, "The 1994 Agreement for the Universalization of the Law of the Sea Convention", *Ocean Development and International Law* 27 (1996), 31 et seq.; G. Jaenicke, "The United Nations Convention on the Law of the Sea and the Agreement relating to the implementation of Part XI of the Convention. Treaty problems in the process of revising the deep seabed mining regime of the Convention", in: U. Beyerlin et al., *Recht zwischen Umbruch und Bewahrung*, 1995; D. Nelson, "The new deep seabed mining regime", *International Journal of Marine and Coastal Law* 10 (1995), 189 et seq.; D. Vignes, "La fin du schisme des fonds marins", *RBDI* 28 (1995), 153 et seq.

¹⁰ G. Jaenicke, "Joint Ventures for Deep Seabed Mining Operations", *ZaöRV* 55 (1995), 329 et seq.; V. Roeben, "A Case Study on a Joint Venture Project", *ZaöRV* 55 (1995), 348 et seq.

¹¹ P.T. Stoll, "The Transfer of Technology under the Implementation Agreement", *ZaöRV* 55 (1995), 391 et seq.

¹² This formula has been repeated in most instruments adopted with reference to Part XI since 1994; see, for example, the Introductory Notes to the Rules of Procedure of the Assembly and Council. The suggestion that the Agreement "modifies de facto" provisions of the Convention (ISBA/3/

vides that, after its adoption, any ratification of, or accession to, the Convention also represents consent to be bound by the Agreement, and that no State may establish its consent to be bound by the Agreement unless it has previously or at the same time become party to the Convention.

Under the Convention and Agreement, the members of the Authority comprise all States Parties to the Convention and (until 16 November 1998) all States which under the Agreement were members of the Authority on a provisional basis, that is to say, those non-States Parties to the Convention that were applying the Agreement provisionally. (In each case "State" includes the entities referred to in article 305 para. 1 lit.(c) to (f) of the Convention.) In accordance with the terms of the Agreement, provisional membership terminated on 16 November 1998. Thereafter membership in the Authority corresponds to participation in the Convention.

As of 16 November 1998, there were 130 parties to the Convention (128 States; one self-governing associated State — Cook Islands; and one international organization — European Community). There were 95 parties to the 1994 Implementation Agreement. So as of that date 35 parties to the Convention were not yet parties to the Agreement.¹³ All of these are States which consented to be bound by the Convention before the adoption of the Agreement; their failure so far to become party to the Agreement is probably due to bureaucratic reasons.

Those States Parties to the Convention not yet parties to the 1994 Implementation Agreement of necessity participate in the work of the Authority under arrangements based on the Agreement. If they were to adopt a strict approach, insisting on attending the Authority in accordance with the provisions of the original Part XI, and not Part XI as implemented by the Agreement, there would be two separate categories of members and, in effect, two Authorities. Such duality of regimes would be unworkable. A practical approach is essential if the Agreement is to have the effect intended by the General Assembly when it adopted the Agreement and with which the States Parties to the Convention are in full agreement. States supporting the General Assembly resolution "may be considered as having tacitly accepted the situation where the Convention is being applied in the Authority as modified by

A/4, para 3: Selected Decisions 1/2/3, 46) is somewhat imprecise; it modifies the application of the provisions as a matter of law.

¹³ For the latest information on participation in the Convention and the Agreement see Internet website <http://www.un.org/Depts/los/losconv.1>.

the Agreement".¹⁴ There are precedents for such a practical approach, where amendments to the constituent instruments of international organizations have come into force for some but not all members.¹⁵ It is, nonetheless, to be hoped that all States Parties to the Convention become parties to the Agreement at an early date.

On 16 November 1998 the parties to the Convention included four of the five permanent members of the Security Council (the United States of America being the exception), thirteen of the fifteen European Union members (all except Denmark and Luxembourg), as well as a wide range of States from all regions. Most States with major maritime and industrial interests are parties, including Australia, China, India, Indonesia, Japan, Republic of Korea, Mexico, New Zealand, Philippines, Russian Federation, South Africa and many coastal States in South America (including Brazil and all of the Southern Cone). The European Community is a party, some provisions of the Convention (including in Part XI) being within its competence.¹⁶ The Convention is already among the most widely accepted multilateral treaties, and widely accepted by those with the greatest interest.

¹⁴ Hayashi, see note 9.

¹⁵ For example, the successive Acts of the Unions created by the Paris and Berne Conventions, and the successive constituent instruments of the UPU and the International Telecommunication Union.

¹⁶ The European Community's competence in relation to Part XI is limited essentially to trade policy and antisubsidy measures in article 151 and Agreement, Annex, Section 6. In its declaration concerning competence made upon formal confirmation, the European Community stated (under the heading "Matters for which the Community has exclusive competence") that "By virtue of its commercial and customs policy, the Community has competence in respect of those provisions of Parts X and XI of the Convention and of the Agreement of 28 July 1994 which are related to international trade"; and (under the heading "Possible impact of the Community policies") that "Mention should also be made of the Community's policies and activities in the fields of control of unfair economic practices, government procurement and industrial competitiveness as well as in the area of development aid. These policies may also have some relevance to the Convention and the Agreement, in particular with regard to certain provisions of Parts VI and XI of the Convention.": *Official Journal of the European Communities*, L. 179, of 23 June 1998, 129 et seq.; *LOS Bulletin* No. 37, 7 et seq. The Community has so far played little part in the work of the Authority, except as regards its controversial financial contribution, on which see p. 216. Koch, see note 8; Paolillo, see note 2, 219 et seq.

Among States not parties (as of 16 November 1998) are Canada and the United States of America (which had both been very active provisional members of the Authority). Canada signed the Convention in 1982, but has not so far moved to ratify. In his October 1994 message transmitting the Convention and Agreement to the Senate, the United States President affirmed that

“the Agreement meets the objections the United States and other industrialized nations previously expressed to Part XI. It promises to provide a stable and internationally recognized framework for mining to proceed in response to future demands for minerals.”¹⁷

From December 1997 the US Administration made extraordinary efforts to persuade the Senate to act on the Convention. In a speech on 12 June 1998 President Clinton said:

“We must join the rest of the world in ratifying, at long last, the Convention on the Law of the Sea. The character of our country, and frankly, the nature of a lot of the economic and political success we have enjoyed around the world has rested in no small part on our continuous championing of the rule of law at home and abroad. The historic Convention on the Law of the Sea extends the rule of law to the world’s oceans.

.... This Convention assures the open seaways that our Armed Forces and our fishing, telecommunications and shipping industries require. But it also, I will say again, gives us the framework to save the oceans while we grow as a people and while we grow economically.

This year, during this legislative session, the United States Senate should, and must confirm its leadership role by making America a part of the community of nations already party to the Convention on the Law of the Sea.”¹⁸

Despite high hopes, the Senate did not act before the mid-term elections in November 1998. Nevertheless, it is expected that renewed efforts will

¹⁷ 103rd Cong., 2nd Sess, Sen. Treaty Doc. 103 et seq., III (1994); *AJIL* 89 (1995), 112 et seq. For other United States policy statements see *AJIL* 88 (1994), 733 et seq. Not everyone is convinced: see, for example, P.M. Leitner, *Reforming the Law of the Sea Treaty*, 1996.

¹⁸ Remarks by the President to the National Oceans Conference, Monterey, California (White House Press Release, 12 June 1998).

be made by the Administration to obtain Advice and Consent at an early date.¹⁹

3. The Prospects for Deep Seabed Mining

The principal function of the Authority is to regulate deep seabed mining, which most have assumed means essentially the recovery of manganese nodules. As described below, the Authority is currently working on a draft Mining Code, and has already approved seven plans of work for exploration for manganese nodules. Yet in his report on the work of the Authority dated 31 July 1997, the Secretary-General of the Authority said that

“In addition to polymetallic nodule resources, other known mineral resources drawing considerable interest are cobalt-rich manganese oxides, polymetallic sulphide deposits along ocean-floor spreading centres and red clay deposits,...”

and suggested that given the interest shown in subsea mineral resources other than polymetallic nodules the Authority should keep itself informed.²⁰ Gas hydrates (methane hydrates), which exist in large quantities below the seabed, may be of commercial interest in the future as a source of energy. The Authority is planning to hold a workshop on “other resources” in 1999. And in August 1998 the Russian Federation requested the Authority to adopt regulations for the exploration of cobalt-bearing crusts and hydrothermal polymetallic sulphides, arguing that the exploitation of these resources may become commercially viable sooner than manganese nodules.

On one view genetic resources may be the most immediately exploitable resource associated with the Area. These are living resources, in particular the remarkable marine life associated with hydrothermal vents. Such genetic resources are not referred to in the Convention; and fall within the high seas legal regime, not the Part XI regime (except perhaps incidentally, in connection with the Authority’s environmental responsibilities). After reviewing the Convention on Biological Diversity and the Convention on the Law of the Sea, certain authors have proposed that States should seek to develop a specific regime for the Area’s genetic resources or for all genetic resources beyond national ju-

¹⁹ UNGA, 69th Plen. Mtg. of 24 November 1998.

²⁰ ISBA/3/A/4, paras 48–49: Selected Decisions 1/2/3, 56.

isdiction. The report of the Independent World Commission on the Oceans, while acknowledging that "the genetic resources of the deep seabed at present fall outside the competences of ISBA" and that "the mandate of ISBA is confined to non-living resources", suggests that "the potentials of the genetic resources of the seabed should become the subject of urgent study, focusing on their legal, environmental and economic implications, and negotiation leading to their inclusion within an appropriate international regulatory regime".²¹

Nevertheless, the chief interest thus far has been in polymetallic (manganese) nodules. Three sectors in the Area appear to be of primary interest — the Clarion-Clipperton area between mainland United States and Hawaii, the south-western Pacific basin, and the central Indian Ocean basin. In addition several other areas would, it has been suggested, justify exploration for first-generation mining, including the Peru basin, the South Atlantic only, and the central south equatorial Indian Ocean.²²

In January 1994 the Group of Technical Experts established by the Preparatory Commission concluded that it was unlikely that commercial deep seabed mining would take place before 2010, and was unable to make an assessment of the time when commercial production might be expected to commence.²³ Since then a huge deposit of nickel has been found in Labrador, Canada, with the result that commercial deep seabed mining may now be decades away. In March 1998 a United States delegate informed the Council of the Authority that

²¹ L. Glowka, "The Deepest of Ironies: Genetic Resources, Marine Scientific Research, and the Area", *Ocean Yearbook* 12 (1996), 154 et seq.; T. Scovazzi, "Biodiversity in the Deep Seabed", *Yearbook of International Environmental Law* 7 (1996), 481 et seq.; D. K. Anton, "Law for the Sea's Biological Diversity", *Colum.J.Transnat'l L.* 36 (1997), 341 et seq.; *The Ocean — Our Future*, 1998, 70-71. A recent report of the Parliamentary Assembly of the Council of Europe (The Oceans: Provisional Report, Doc. 8177, 17 July 1998) also describes this as one of the hottest current issues.

²² ISBA/3/A/4, para. 49: Selected Decisions 1/2/3, 56, citing V.E. McKelvey, "Subsea mineral resources", *US Geological Survey Bulletin* No. 1689A, 1986. Polymetallic nodules may also be found within national jurisdiction.

²³ LOS/PCN/BUR/R.32, reproduced in: LOS/PCN/153, Vol. III, 223 et seq. See also P. Hoagland, "Manganese Nodules: Price Trends: Dim Prospects for Commercialization of Deep Seabed Mining", in: Seoung-Yong Hong (ed.), *The Role of the Oceans in the 21st Century: Proceedings*, Law of the Sea Institute, 27th Annual Conference, 1995, 331 et seq.

“The accidental discovery of the Voisey Bay giant nickel-copper-cobalt and precious metal massive sulphide deposit in Labrador, which will be one of the lowest cost nickel producers in the world, may throw a wrench into plans for deep seabed mining for a very long time to come. And if deep seabed mining is undertaken, it can only be expected to augment, and not replace land deposits.”²⁴

Yet deepsea mining may take place for non-commercial reasons, for example, economic security, national prestige, reducing imports, or increasing employment. Such motives may be less in evidence than in the past, but have not entirely vanished. Indeed, as described below, no less than seven “registered pioneer investors” have applied for and been awarded plans of work for exploration by the Authority. It remains to be seen whether they will continue to make significant investments in deep seabed mining, and if and when others will join them in seeking plans of work.

4. Deep Seabed Mining and General International Law

There was much controversy in the 1970s and 1980s about the status of deep seabed mining under general international law. The view held by the most interested industrialized States was that deepsea mining was a freedom of the high seas, open to all States and to be exercised with due regard for the interests of other States.²⁵ Under this approach it was not possible to secure exclusive rights to mine sites, though a degree of exclusivity could be achieved through reciprocating agreements based on domestic legislation.²⁶ The view that exclusive rights could be acquired

²⁴ Statement by Ms Maureen Walker in the Council on 25 March 1998. Mr. Yuri Kazmin (Russian Federation) spoke in similar terms.

²⁵ T.G. Kronmiller, *The Lawfulness of Deep Seabed Mining*, 1980/ 1981; G. Jaenicke, “The Legal Status of the International Seabed — The Controversy about the Legality of National Legislation on Deep Sea Mining”, in: R. Bernhardt (ed.), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte*, 1983, 429 et seq.; Brown, see note 2, Chapter 2.

²⁶ Seven States passed domestic legislation: US Deep Sea-bed Hard Minerals Resources Act of 28 June 1980 (Public Law 96-283), *ILM* 19 (1980), 1003 et seq., 20 (1981), 1228 et seq. and 21 (1982), 867 et seq.; FRG Act on Interim Regulation of Deep Seabed Mining of 16 August 1980, as amended by Law of 12 February 1982, *Bundesgesetzblatt* 1980, Part I, 1457, *ILM* 19 (1980), 1330 et seq. and 21 (1982), 832 et seq.; UK Deep Sea Mining (Temporary Provisions) Act 1981 (c. 53) of 28 July 1981, *ILM* 20 (1981), 1218 et seq.;

(through a form of occupation) was not accepted by any State and was expressly rejected by the most interested industrialized States.²⁷ Arguing on the basis of the 1970 Declaration of Principles and the 1969 "Moratorium" resolution, developing States went further and claimed that deep seabed mining was unlawful under customary international law and could only take place pursuant to the international regime to be set forth in a future Convention.²⁸

There have been a number of developments since the 1980s, not least the wide acceptance of the 1982 Convention and 1994 Agreement, including by most directly interested States. The Convention provides that the Area and its resources are the common heritage of mankind (article 136) and that there shall be no amendments to this basic principle (article 311 para. 6). The Convention prohibits deep seabed mining other than under the Part XI regime, and requires States Parties not to recognize any claim, acquisition or exercise of rights with respect to minerals recovered from the Area otherwise than in accordance with that regime (article 137). Relatively few States have enacted domestic legislation to give effect to the Part XI regime. Some (including some of the most directly concerned) States Parties have done so, or rely on the direct effect of the relevant provisions of the Convention; yet others

French Law on the Exploration and Exploitation of Mineral Resources of the Deep Seabed of 23 December 1981, *ILM* 21 (1982), 808 et seq.; Soviet Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources of 17 April 1982; Japanese Law on Interim Measures for Deep Seabed Mining of July 1982, *ILM* 22 (1983), 102 et seq.; Italian Law No. 41 of 20 February 1985 on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, *ILM* 24 (1985), 983 et seq.: all seven laws are reproduced in Brown, see note 2, Vol.3. Reciprocating agreements and conflict resolution (overlapping areas) agreements were also concluded: see J.M. Broadus, P. Hoagland, "Conflict Resolution in the Assignment of Area Entitlements for Seabed Mining", *San Diego L. Rev.* 21 (1984), 541 et seq.; Brown, see note 2, Vol. 2, Chapter 8, Vol. 3; Brown, see note 6, 456 et seq.

²⁷ "Deepsea Ventures, Inc.: Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection and Protection of Investment", filed 15 November 1974, and the responses of Governments thereto: *ILM* 14 (1975), 51 et seq., and 795 et seq.

²⁸ UNCLOS, Official Records, Vol. IX, 103-105; A/CONF.62/77. The so-called "moratorium" resolution is A/RES/2574D (XXIV) of 15 December 1969; the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction is A/RES/2749 (XXV) of 17 December 1970.

appear to rely, for the time being, either on the prohibitions contained in their interim deep seabed mining legislation or, perhaps, simply on the fact that none of their nationals is likely to wish to engage in deep sea mining in the foreseeable future.²⁹ These developments make it harder to maintain that customary international law permits unilateral deep seabed mining, though some might say that they are insufficient to change the underlying position. The position under customary international law is, however, probably academic, since nearly all potential seabed mining States are parties to the Convention and Agreement. It is hoped that those remaining outside will join soon; and in any event it is increasingly unlikely that commercial deep seabed mining would be contemplated outside the international regime. The risks, including legal risks, are simply too great. The position under customary international law would be of interest only if the international regime were to collapse entirely, which is improbable.

II. Salient Features of the Authority

The Authority is one of three international institutions established by the 1982 Convention on the Law of the Sea, the others being the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf. In addition, the meetings of States Parties have certain specific, essentially house-keeping functions under the Convention. A number of existing international institutions also have an important role in the implementation of the Convention; in particular, the General Assembly of the United Nations conducts an annual review of overall developments concerning the implementation of the Convention, based upon a most useful annual report by the United Nations Secretariat.

The three new institutions are autonomous. They are not part of any other international organization, and they are not directly related one to another. The Authority has no role in connection with the determination of the outer limits of the continental shelf, a matter exclusively

²⁹ For deepsea mining legislation enacted to give effect to Part XI see the German Deep Seabed Mining Act; New Zealand United Nations Convention on the Law of the Sea Act 1996 (No. 69), Part II.

for coastal States and the Commission. And the Seabed Disputes Chamber of the Tribunal is independent of the Authority.³⁰

No two international organizations are alike: each has its own specific role, peculiarities of organization and practice, character and style. At first sight the Authority is an international organization along classic lines, with an Assembly composed of all the members; a Council with limited membership; a Legal and Technical Commission and a Finance Committee, each consisting of individual experts; and a Secretariat, headed by a Secretary-General. But the Convention also makes provision for the eventual establishment of an Enterprise, an organ of the Authority which is to carry out activities in the Area directly; and it confers upon the Authority a central role in connection with the common heritage of mankind, in particular extensive regulatory powers in relation to deep seabed mining. In due course the Authority is to be self-financing.

Before looking in detail at the work of the Authority three salient features will be mentioned. *First*, the Authority is an international organization with precisely defined and limited powers and functions (essentially concerned with "activities in the Area"). This is emphasised in the Agreement

"The powers and functions of the Authority shall be those expressly conferred upon it by this Convention. The Authority shall have such incidental powers, consistent with this Convention, as are implicit, in and necessary for, the exercise of those powers and functions with respect to activities in the Area."³¹

This unusual provision expressly confirms, and by doing so reinforces in its application to the Authority, the concept of implied powers for international organizations. The provision expressly limits implied powers to those that are both consistent with the Convention and

³⁰ N.J. Seeberg-Elverfeldt, *The settlement of disputes in deep seabed mining*, 1998. The Assembly of the Authority has not exercised the power under article 35 para.2 of the Tribunal's Statute to adopt recommendations of a general nature relating to the representation of the principal legal systems of the world and equitable geographical distribution in the Chamber. Both Tribunal and Authority will doubtless be scrupulous in avoiding a relationship agreement which might convey even the appearance of bias on the part of the Chamber.

³¹ Agreement, Annex, Section 1, para.1, repeating article 157 para.2 of the Convention.

Agreement and implicit in and necessary for the exercise of express powers and functions.

The Authority is the organization through which States Parties to the Convention organize and control exploration for, and exploitation of, the mineral resources of the deep seabed beyond the continental shelf (as defined in article 76 of the Convention). This is to be done in accordance with the regime for deep seabed mining established in Part XI of the Convention and the 1994 Implementation Agreement. The deep seabed beyond the outer limits of the continental shelf is referred to as "the Area"; the Area and its mineral resources are the "common heritage of mankind".³² The term "activities in the Area" is a term of art referring to exploration for, and exploitation of, the mineral resources of the Area, not to activities on or under the deep seabed in general.³³ The Authority also has certain functions in relation to "prospecting", as well as the distribution of benefits from "activities in the Area". The Enterprise, which is to be an organ of the Authority, will have functions going beyond "activities in the Area", and including transport, processing and marketing of minerals produced from the Area.

The other potential tasks of the Authority concern marine scientific research in the Area;³⁴ technology and scientific knowledge relating to "activities in the Area";³⁵ the distribution of certain revenues from the continental shelf beyond 200 miles from territorial sea baselines;³⁶ assistance to developing countries which suffer serious adverse effects from "activities in the Area";³⁷ promotion of international cooperation concerning "activities in the Area" and encouraging the progressive development of international law relating thereto and its codification;³⁸

³² Convention arts 1 para.1(1), 133 lit.(a) and 136.

³³ Convention article 1 para. 1(2). This use of terms narrows the apparently sweeping terms of the 1970 Declaration of Principles. The strictly limited meaning of "activities in the Area" makes suggestions that the Authority should concern itself with the laying of fibre-optic cables on the ocean floor or with genetic resources misconceived (see SB/4/9 and Paolillo, see note 2, 193 et seq.).

³⁴ Convention article 143 paras.2 and 3; see also article 256.

³⁵ Convention arts 144 and 273.

³⁶ Convention article 82.

³⁷ Agreement, Annex, Section 7.

³⁸ Convention article 160 para.2 lit.(j).

and the review, and proposal of amendments to, certain provisions in Part XI.³⁹

Second, the Convention as implemented by the 1994 Agreement is intended to safeguard the interests of those countries, for the most part a few highly industrialized countries, without whose cooperation deep sea mining will not take place, while at the same time ensuring a proper balance between the interests of deep seabed miners, land based producers and other industrialized and developing States. It does so in large measure through the composition and decision-making rules of the Council and Finance Committee, and through the careful relationship between Assembly, Council and Finance Committee.

The Council is composed of 36 members, divided into five Groups (A, B, C, D and E) and for decision-making four Chambers (A, B, C, and developing countries in D/E). Groups A, B, C and D are represented on the Council by those members nominated by the Group; the Assembly's role in electing the candidates of these Groups is therefore a formality. Decisions of substance in the Council require either consensus, or a two-thirds majority of members present and voting provided that such decisions are not opposed by a majority in any one of the four Chambers. Decisions requiring consensus (such as adopting or amending rules, regulations and procedures) can be blocked by a single vote. Other decisions of substance can be blocked by three negative votes within Chamber A, Chamber B or Chamber C, or a somewhat larger number of developing countries within Chamber D/E. Abstentions within a Chamber would reduce the number of negative votes required.⁴⁰

The Finance Committee consists of 15 persons elected by the Assembly. Groups A, B, C and D must be "represented" by at least one member. (The question whether each interest Group is entitled to nominate a candidate was not decided.) And so long as the Authority is funded by its members, the Committee as elected by the Assembly must include representatives of the five largest financial contributors.

³⁹ Agreement, Annex, Section 4; Convention arts 314 to 316.

⁴⁰ R. Wolfrum, "The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for other International Economic Organizations?", *ZaöRV* 55 (1995), 310 et seq. For comments on the original decision-making procedures see E.L. Richardson, "Decision Making in the International Seabed Authority", *Marine Policy* 5 (1981), 256 et seq.

Decisions of the Finance Committee on questions of substance are to be taken by consensus.

Paras 4 and 7 of Section 3 of the Annex to the Agreement contain key safeguards

“4. Decisions of the Assembly on any matter for which the Council also has competence or on any administrative, budgetary or financial matter shall be based on the recommendations of the Council. If the Assembly does not accept the recommendation of the Council on any matter, it shall return the matter to the Council for further consideration. The Council shall reconsider the matter in the light of the views expressed by the Assembly.

7. Decisions by the Assembly or the Council having financial or budgetary implications shall be based on the recommendations of the Finance Committee.”

These procedures have been scrupulously followed, with many decisions requiring successive action by Council and Assembly, or Finance Committee, Council and Assembly.

Third, a recurring theme in the work of the Authority is cost-effectiveness. Every international organization is expected to be cost-effective. In the case of the Authority this principle is enshrined in its constituent instrument. Para. 2 of Section 1 of the Annex to the Agreement provides

“2. In order to minimize costs to States Parties, all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective. This principle shall also apply to the frequency, duration and scheduling of meetings.”

Paras 3 and 4 of Section 1 give specific effect to this principle by providing that the setting up and functioning of the organs and subsidiary bodies of the Authority shall be based on an evolutionary approach, and that the functions of the Economic Planning Commission shall be performed by the Legal and Technical Commission. Para. 5 lists the priority matters for the Authority to be performed in the period before the approval of the first plan of work for exploitation (expected to be some time off). For an initial period, at least, the Secretariat of the Authority is to perform the functions of the Enterprise; thereafter, the Council is to “take up the issue” of the functioning of the Enterprise independently of the Secretariat. If joint-venture operations with the Enterprise “accord with sound commercial principles”, the Council

“shall issue a directive ... providing for such independent functioning”.⁴¹

The frequency, duration and location of meetings are important matters for the Authority’s budget; meetings also represent a significant direct cost to those States which send delegations to meetings in Kingston.⁴² Efforts have therefore been made to rationalize arrangements for meetings. In the first full year of activity (1995) there were five weeks of meetings, divided into two parts; in 1996, 1997 and 1998 there were four weeks, also divided into two parts. In 1999 there is to be a single three-week session.

Equally important for the Authority’s budget are staff costs and the costs of premises. Both have been kept modest, though some savings may be possible. In present circumstances there seems little prospect of significant expansion.

The principle of cost-effectiveness set out in the Agreement may be taken to override explicit provisions in the Convention. Thus provision is made in the draft Financial Regulations for a biennial budgetary period (despite reference in the Convention to an annual budget). And while article 161 para. 5 of the Convention provides that the Council shall meet “not less than three times a year” and “function at the seat of the Authority”, in practice there has been a single session, and in September 1998 invitations issued for a possible meeting of the Council in New York in October 1998.⁴³

III. The Authority’s Work During its First Four Sessions

The first part of the first session of the Assembly was held at Kingston, Jamaica, from 16 to 18 November 1994. The opening date was fixed in the Convention as the date of entry into force, but that fell during the main part of the United Nations General Assembly and it was not con-

⁴¹ Agreement, Annex, Section 2, paras 1 and 2.

⁴² The number of delegations attending sessions of the Authority has remained reasonably constant, and tends to hover just below the quorum for Assembly decisions. A certain number of members (Argentina, Brazil, Chile, China, Costa Rica, Cuba, Germany, Haiti, Italy, Jamaica, Mexico, Netherlands, the Republic of Korea) have established “permanent missions” to the Authority, based in their bilateral diplomatic missions.

⁴³ Note No. 194/98 from the Secretary-General to Council members. In the event, it was not necessary to hold this meeting.

venient to hold a longer, substantive meeting. The first part of the session was mainly ceremonial, commemorating the entry into force of the Convention, and consisted of statements by the Secretary-General of the United Nations and over fifty States. Understandably, speakers addressed the Convention in general and not just the work of the Authority.

In November 1994 the formal position under Part XI of the Convention was as follows:

- The provisions of Part XI that were objectionable to industrialized countries and, indeed, generally considered unworkable were "implemented" by the 1994 Agreement so as to make Part XI acceptable and, it was hoped, workable. While by November 1994 the changes had only been made on a provisional basis, there were high expectations that the 1994 Agreement would enter into force at an early date (which it did, on 28 July 1996).
- The Preparatory Commission had decided, at its final session in August 1994, to consider as its final report the provisional final report already adopted in 1993 and to recommend to the Authority that it take into account the terms of the 1994 Agreement in the consideration of the recommendations and the report of the Preparatory Commission in order to ensure consistency as necessary.⁴⁴ Most drafts prepared by the Commission were not finally adopted, and were in fact in important respects superseded by the 1994 Agreement.

The Authority, a new, autonomous and largely unprecedented international organization, thus began life with a constituent instrument contained in two instruments (Part XI of the Convention, as — provisionally — modified by the 1994 Agreement); draft rules which were largely overtaken and which had no status and no obvious immediate role. Its establishment was the outcome of protracted and ideologically charged negotiations. The Authority's autonomy was (and remains) a major practical difficulty. The future was anything but certain when delegates gathered in Kingston in November 1994; by November 1998 the picture is somewhat clearer.

⁴⁴ Statement by the Chairman of the Preparatory Commission in LOS/PCN/L.115/Rev.1 and Corr.1, paras 47 and 49, reproduced in: LOS/PCN/153 (Vol. III), 177-178. The Rapporteur-General of the Preparatory Commission, Mr. Rattray (Jamaica), presented its final report to the Assembly in August 1995 (LOS/PCN/153 (Vols. I-XIII)). For the Commission's documentation, see note 6.

It is convenient to divide the work of the Authority into organizational matters and substantive work. An overview of the first four sessions is at pages 237 et seq.

1. Organisational Matters

(i) Election of Assembly President

The first, ceremonial part of the first session of the Assembly was chaired by the Secretary-General of the United Nations, and the Jamaican Prime Minister and Foreign Minister. At the second part of the first session the United Nations Legal Counsel acted as temporary President until, on 27 February 1995, the Assembly elected by acclamation Ambassador Djalal (Indonesia) as its President for the session. This election was uncontested, and established at the outset a good precedent for consensus in the Authority's affairs. Four Vice-Presidents were similarly elected by acclamation (Algeria, Canada, Mexico, Russian Federation), ensuring that the bureau consisted of one member from each of the five regional groups. Ambassador Djalal continued as President "Pro Tem" throughout the second session in 1996. The President of the Assembly in its third session in 1997 was Mr. Wako (Kenya), and at the fourth session in 1998 Dr. Bachleda-Curus (Poland). In no case was the election contested, and regional group rotation is establishing itself (Asia, Africa, Eastern Europe, probably to be followed by Latin America and the Caribbean in 1999, and Western Europe and Others in 2000). In the President's absence (for example, in August 1997), the chair was taken by a Vice-Chairman.

(ii) Rules of Procedure of the Assembly

In accordance with its terms of reference under Resolution I annexed to the Final Act of the Conference, the Preparatory Commission had, over a number of sessions, prepared draft rules of procedure for the Assembly. This draft needed substantial revision to take account of the 1994 Agreement.⁴⁵ During the second part of the first session, in March 1995,

⁴⁵ LOS/PCN/WP.20/Rev.3, reproduced in: LOS/PCN/153 (Vol. V) 3 et seq. Earlier drafts and proposals are reproduced in Platzöder Vol. III. The United Nations Secretariat's suggested revisions to take account of the 1994 Agreement were in documents ISBA/A/WP.1 and ISBA/A/WP.2.

the Assembly established a working group consisting of 10 States, two from each regional group (Brazil, Germany, Egypt, Indonesia, Jamaica, Poland, Republic of Korea, Russian Federation, Senegal, United Kingdom). The working group chose its Egyptian member (Mr. Aboulmagd) as chairman and, pursuant to a decision of the Assembly, decided to invite the United States (not a member of any regional group) to participate in its work as an observer. The group reviewed each draft rule in turn. The work was largely technical (though one or two matters proved contentious), and the group was able to reach agreement on all the rules, with the exception of part of Rule 86 (on rotation).

The working group's principal task was to revise the draft rules so as to take account of the Agreement. At the curious insistence of Brazil (a State Party to the Convention not applying the Agreement provisionally) references in the rules to the Agreement were avoided. This was done by reproducing, where necessary, the provisions of the Agreement; adding three footnotes; and including an Introductory Note recording that

“According to the Agreement, its provisions and Part XI of the Convention are to be interpreted and applied together as a single instrument; these rules and references in these rules to the Convention are to be interpreted and applied accordingly.”

Certain rules were revised substantially or inserted to bring the draft into line with the provisions of the Agreement (Rules 83, 84, 85, 86, 95 and 96). Others were amended to reflect the principle of cost-effectiveness (Rules 35 and 42). In addition, three footnotes recall the provisions of the Agreement concerning the Enterprise and financing the Authority.

The most contentious issue was a proposal to include in the rules a reference to the principle of cost-effectiveness already contained in Section 1, para. 2, of the Annex to the Agreement. Objection was made to any such reference on the not unreasonable ground that it was inappropriate to repeat an issue of principle in the rules. In the event, it was agreed not to include any such reference, on the understanding that the principle of cost-effectiveness would apply whenever decisions had to be taken on the holding and duration of sessions of the Assembly. Rule 1, it was noted, provides the necessary flexibility to enable regular sessions of the Assembly to be held less often than once a year, thus reflecting the fact that article 159 para. 2 of the Convention (which provides that the Assembly shall meet in regular annual sessions) is to be applied subject to the Agreement. This was further confirmed by the Introductory Note to the Rules cited above. Despite agreement on this

point in the working group, the representative of the Russian Federation expressed reservations at the 14th meeting of the Assembly concerning the absence of an express reference in the rules to cost-effectiveness; in response the representative of Jamaica explained that Rule 1 gave the necessary flexibility.

Two important changes to the draft rules proposed by the Preparatory Commission reflect the need to keep costs down. The Assembly had already decided early in the second part of its first session to limit the number of Vice-Presidents to four, rather than to follow the practice in the United Nations General Assembly, the Law of the Sea Conference and the Preparatory Commission of having a large number of Vice-Presidents so as to form a General Committee based on some form of geographical or group representation. Consistent with this decision the working group suggested eliminating the proposed General Committee and relying instead on a bureau consisting of the President and four Vice-Presidents.⁴⁶ This avoids unnecessary formal meetings, with interpretation and written reports. Of the functions envisaged for the General Committee those concerning the agenda were omitted since it was not considered necessary, in the case of the plenary body of an international organization with precisely defined and limited powers and functions, to make elaborate provision for the preparation of a draft agenda. Draft agendas are prepared by the Secretariat and adopted, with or without amendment, directly by the Assembly without need for a filter. Other functions of a General Committee (in particular, reviewing progress of the work of the session) may be carried out as appropriate by the bureau and/or chairmen of the regional groups, who may meet informally (without interpretation and written reports) as necessary. In fact, the bureau has rarely met; instead, the President has held frequent consultations with the chairmen of the five regional groups and the coordinators of the interest groups.

The second important departure based upon cost-effectiveness from the draft offered by the Preparatory Commission is to the rule on rec-

⁴⁶ Rules 28 and 35 of the Rules of Procedure. Rule 28 provides that the President and four Vice-Presidents shall be elected "in such a way as to ensure the representative character of the Bureau". This language was retained from earlier drafts providing for a thirty-six member General Committee. In practice it means that the bureau consists of one representative of each regional group, as was the case in the Preparatory Commission: see the consensus statement of understanding of 8 April 1983 in UN Press Release SEA/517, Platzöder Vol. VIII, 14.

ords. The draft had proposed that summary records be kept of the plenary meetings of the Assembly. The preparation of summary records is costly; it was estimated that such a provision could double the cost of meetings. Moreover, the trend in international organisations is not to have summary records, it is being considered sufficient to make and retain sound recordings. While Rule 42 provides that the Assembly may keep summary records "if it so decides", it is not anticipated that summary records would in fact ever be kept unless exceptional circumstances (which are very unlikely to arise) were to make this essential on a particular occasion. In any event, as the Secretariat pointed out to the working group before the new rule was adopted, on practical grounds (lack of personnel and funding) it would not in fact be possible for the Assembly to decide on the spot to have summary records of any particular meeting. Arrangements would have to be made well in advance.

One issue not raised in the working group which could have led to very significant savings was that of languages. Use of six languages seems unnecessary for an essentially technical body. Suggestions have recently been made to review this language regime on grounds of economy. Other obvious areas for economy are the number and location of meetings.

Many other changes, mostly editorial, were made to the draft rules drawn up by the Preparatory Commission. Reference was included in Rule 60 to the participation in decision-making by entities other than States (for the time being, Cook Islands and the European Community), an issue which as regards international organizations had for some reason apparently proved controversial in the Preparatory Commission. Rule 82 on observers was amended to reflect more accurately the provisions of the Convention (arts. 156 para. 3 and 169 para. 2).⁴⁷ Rule 92 on amendments to the rules was brought closer to the corresponding rule in the General Assembly, in particular by inserting a reference to prior consideration by a committee, so reducing the risk of ill-considered amendments.

Rule 23 of the Rules of Procedure provides that credentials may be issued by the Minister for Foreign Affairs "or person authorized by him". This allows credentials to be issued by an official rather than the Minister (including, for example, a Permanent Representative in New York), provided that the official is authorized by the Minister and so

⁴⁷ The Secretariat's draft rules had reflected the special role given to observers in the Preparatory Commission, which were brought into line with normal practice by the working group.

indicates in the credentials. In its report at the third part of the first session, the Credentials Committee reminded delegations that credentials should be duly signed by the government officials referred to in the rule, and it was noted orally that the credentials should preferably state that the official signing was authorized by the Minister for Foreign Affairs.⁴⁸

Rule 45 states that a majority of the members of the Authority shall constitute a quorum. This provision, which repeats verbatim article 159 para. 5 of the Convention, was not discussed in the working group, but its importance was highlighted by events at the resumed fourth session in August 1998 (see 216–217). The precise calculation of the quorum may not be without difficulty (in particular, as regards the position of international organizations which are members and — for the time being — as regards the Federal Republic of Yugoslavia, which the Secretariat — like the United Nations Secretariat — treats as a member). More seriously, the risk exists that any delegation which finds a decision or draft decision unacceptable may at any time seek to invoke the absence of a quorum. If the present pattern of attendance in Kingston continues this risk is high. A quorum is more likely to be attained at meetings in New York, especially given the flexible rule on credentials described above. The question of the status of decisions taken without a quorum (where the absence of a quorum can be established) is an interesting one.⁴⁹ But if such decisions are not challenged promptly (that is, in a timely manner once the challenging State becomes aware, or should have become aware, of the facts) they must stand.

Under the excellent guidance of its Egyptian chairman, the working group was able to agree on a complete set of draft rules of procedure for submission to the Assembly, with the exception of two bracketed sentences in draft Rule 86 (concerning the determination of the members whose terms were to expire at the end of two years).

The draft rules were introduced at the 14th meeting of the Assembly on 16 March 1995. There ensued a lengthy debate on the bracketed sentences in Rule 86 and (instigated by New Zealand) on whether the draft should be adopted forthwith or deferred to allow delegations not represented on the working group more time for consideration. The President of the Assembly concluded that there was no difficulty with the substance of the sentences within brackets, and proposed that they

⁴⁸ ISBA/A/7.

⁴⁹ R. Sabel, *Procedure at International Conferences*, 1997, 79 et seq.

be included in the resolution adopting the Rules of Procedure. This was agreed by the Assembly and a resolution was then circulated.⁵⁰

After submitting certain amendments to the draft rules at the 15th meeting of the Assembly (which were not considered), the New Zealand representative indicated that she would not oppose the adoption of the rules as proposed by the working group. They were duly adopted on 17 March 1995.⁵¹

(iii) Election of the Council (1996, 1998)

After seven weeks of informal consultations at meetings of the Authority, plus intersessional consultations in New York, and heated debate, the Assembly elected the first Council on 21 March 1996.⁵² The arrangement is probably the most complex ever reached for the composition of an international organ. Participants may well have overestimated the practical importance of membership in the Council; observers are able to play a full role in the discussions, and it is only in the rare event of recourse to voting that Council membership, and Council membership in a particular Group, may be significant. The election of one half of the Council in March 1998 proved relatively uncontentious.

1996 Council Election

The provisions of the Agreement and Convention concerning the election of the Council are complex. It is not surprising that their interpretation and application gave rise to major difficulties on the occasion of the first election.⁵³ The provisions in question are Section 3, paras 9

⁵⁰ One point raised by New Zealand was also raised by Belgium: the first sentence of Rule 86 repeats article 161 para. 4 of the Convention. New Zealand and Belgium argued that this language had been overtaken by the more specific language on rotation in Section 3 para. 10, of the Annex to the Agreement. In response, it was pointed out that Section 3 para.10, and article 161 para. 4, were both still applicable and dealt with rotation in different contexts. Each provision was reflected accurately in the draft rules (Rules 83.2 and 86).

⁵¹ ISBA/A/WP.3, published as ISA/97/001. The resolution is in ISBA/A/L.2: Selected Decisions 1/2/3, 3.

⁵² ISBA/A/L.8: Selected Decisions 1/2/3, 15–17.

⁵³ ISBA/A/L.1/Rev.1, paras 7–24: Selected Decisions 1/2/3, 4–7; ISBA/A/L.7/Rev.1, paras 4–10: Selected Decisions 1/2/3, 8; ISBA/A/L.9, paras 4–11 and Annexes I–VII: Selected Decisions 1/2/3, 18–19, 21–35; ISBA/3/A/4, para.

lit.(b), 10 and 15, of the Annex to the Agreement, and article 161 paras 3 and 4, of the Convention.⁵⁴ They are reproduced verbatim in the Assembly's Rules of Procedure (Rules 83 to 87), with three minor additions. Rule 83 para. 1 provides that a State which fulfils the criteria for membership in more than one Group will be included in the lists of all relevant Groups (a statement of the obvious, since this is already clear from the Agreement). The second sentence of Rule 86 is likewise a statement of the obvious, though its inclusion may give some indication of how rotation will work in practice. Rule 87 on by-elections is new; there is nothing on by-elections in the Agreement or Convention.

The procedure for nominating and electing the 36 members of the Council laid down in the Agreement and Convention is as follows

- The Assembly is to establish lists of countries fulfilling the criteria for membership in the four Groups specified in Section 3, para. 15 lit.(a) to (d), of the Annex to the Agreement: Group A major consumers/importers; Group B investors; Group C exporters; Group D developing States Parties representing special interests.⁵⁵
- Groups A, B, C and D nominate those of their members which are to represent them on the Council.⁵⁶
- The Assembly elects the 36 members of the Council in the following order: the four nominated by Group A, the four nominated by Group B, the four nominated by Group C, the six nominated by

14: Selected Decisions 1/2/3, 48. "Secretariat Brief: The Agreement Relating to Part XI of the Convention on the Law of the Sea", Asian-African Legal Consultative Committee, *Report and Selected Documents of the 34th session*, Doha, Qatar (1995), 35-61; Koch, see note 2, 212-213; Rajan, see note 2, 219 et seq.

⁵⁴ While the Agreement does not expressly provide that article 161 para. 2, or article 308 para. 3, of the Convention shall not apply, this would appear to be the effect of disapplying article 161 para.1, of the Convention: article 161 para. 2, begins with the words "In electing the members of the Council in accordance with paragraph 1" and article 308 para.3, refers to "the purpose of article 161" and "the provisions of that article". On article 308 para.3, see Oxman, *AJIL* 75 (1981), 245 et seq. The draft rules suggested by the United Nations Secretariat (ISBA/A/WP.1; ISBA/A/WP.2) dropped the provision in the Preparatory Commission's draft corresponding to article 161 para.2; there is no such provision in the Rules of Procedure adopted by the Assembly.

⁵⁵ Agreement, Annex, Section 3 para.9 lit.(b); Rule 83.1 of the Rules of Procedure.

⁵⁶ Agreement, Annex, Section 3 para.10; Rule 83.2 of the Rules of Procedure.

Group D, and finally eighteen elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region (Africa; Asia; Eastern Europe; Latin America and Caribbean; Western Europe and Others) has at least one member elected in Group E.⁵⁷

In addition, it should be noted that in the first election, the terms of half of the members of each Group was two years instead of four years.⁵⁸ Members of the Council are eligible for re-election, but due regard should be paid to the desirability of rotation.⁵⁹ Where the number of potential candidates in any of Groups A to E exceeds the number of seats available, as a general rule, the principle of rotation shall apply and States members of each of those Groups should determine how this principle shall apply in those Groups.⁶⁰

These provisions gave rise to a number of difficulties on the occasion of the first election of the Council: how to determine which States fulfilled the criteria for membership in Groups A to D; the nomination by each Group of the required number of candidates; where appropriate, the application of the principle of rotation within each Group; the selection of the members of each Group to be elected for a two-year term; and the application of the principle of ensuring an equitable geographical distribution of seats in the Council as a whole. Election of the various Groups was closely interrelated, but for ease of presentation they will be considered in turn.

⁵⁷ Agreement, Annex, Section 3 para.5; Rule 84 of the Rules of Procedure. See also the informal understanding read by the President of the United Nations General Assembly at the time of the adoption of A/RES/48/263, to the effect that once there is widespread participation in the Authority and the number of members of each regional group is substantially similar to its membership in the United Nations, each group would be represented in the Council by at least three members: A/PV/101 and Doc.A/48/950, Annex II. The composition of the Council under the Agreement (unlike decision-making) does not differ greatly from that in the Convention: see Oxman, see note 54, 218 et seq., (on the Informal Consolidated Negotiating Text/Rev.1); Paolillo, see note 2, 227 et seq. For earlier versions see the Informal Single Negotiating Text, article 27 paras.1 to 3 (unchanged in the Revised Single Negotiating Text).

⁵⁸ Article 161, para.3, of the Convention; Rule 85 of the Rules of Procedure.

⁵⁹ Article 161, para.4, of the Convention; Rule 86 of the Rules of Procedure.

⁶⁰ Agreement, Annex, Section 3 para. 10; Rule 83.2 of the Rules of Procedure.

Group A — Major Consumers/Importers

Group A is represented on the Council by

“Four members from among those States Parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent in value terms of total world consumption or have net imports of more than 2 per cent in value terms of total world imports of the commodities produced from the categories of minerals to be derived from the Area, provided that the four members shall include one State from the Eastern European region having the largest economy in that region in terms of gross domestic product and the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product, if such States wish to be represented in this group.”⁶¹ (Para. 15 lit.(a), Section 3, Annex)

Differing views were held on the interpretation of the criteria for Group A, in particular whether a consuming or importing State must meet the 2% threshold for the value of each mineral concerned (assumed to be manganese, copper, cobalt and nickel) or only for the combined value of all four minerals.⁶² Of the members of the Authority at the second part of the first session in March 1995, Belgium, France, Germany, Italy, Japan, Republic of Korea, Russian Federation, United Kingdom and United States would qualify under both interpretations; China only under the latter interpretation.

In accordance with the Assembly's decision that those States which considered themselves qualified in Groups A to D should meet, meetings of the “group of states which would fulfil the criteria for membership in the group defined in paragraph 15(a) of the Agreement” (as the meetings were described in the Journal of the Authority) took place with the United States representative as coordinator. In addition to the ten States mentioned in the preceding paragraph Brazil also attended. The Group took a number of decisions at this stage:

⁶¹ The proviso was intended to refer to the Russian Federation and the United States of America (on the assumption that they would be members of the Authority).

⁶² ISBA/A/L.1/Rev.1, para 11: Selected Decisions 1/2/3, 5. Informal papers were prepared by the Secretariat setting out relevant statistics for certain Groups, including Group A, but these proved contentious and were subject to correction.

- The Group decided not to recommend a list of States meeting the criteria of para. 15 lit.(a), but rather to take a flexible and inclusive approach to its deliberations. If all those qualified were able to participate in meetings at which consensus was actually reached it did not matter that others which might not be qualified were also present. This was a pragmatic response to the difficulty of interpreting the criteria, and was without prejudice to the resolution of that question in the case of future elections.
- The Group decided to nominate Japan, Russian Federation, United Kingdom and United States for election to the Council in Group A, three other candidates (Belgium, Germany and Italy) having withdrawn on the understanding that the application of the principle of rotation in future elections would provide opportunities for their election to the Council as representatives of the Group.
- The Group noted the readiness of the United States to be elected for a two-year term and the readiness of the Russian Federation to consider being elected for a two-year term, on certain conditions.⁶³

There were no significant developments in Group A in August 1995, pending a solution in Group B. The above decisions were unchanged when the Council was eventually elected in March 1996.

Group B — Investors

Group B is represented on the Council by

“Four members from among the eight States Parties which have made the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals.”
(Para. 15 lit.(b), Section 3, Annex)

The States which considered that they might fall within this Group met first with Canada and then with Germany as coordinator. They agreed to exchange data on investments expressed in terms of constant 1994 United States dollars. As a result of this exchange there was agreement within the Group that the eight largest investors for the purposes of Section 3, para. 15 lit.(b) of the Annex to the Agreement were, in order, Germany, United States, Japan, Russian Federation, China, India,

⁶³ Report of the Coordinator of Group A, ISBA/A/L.1/Rev.1 and Corr.1, paras 11 to 13; Selected Decisions 1/2/3, 5. The revision of ISBA/A/L.1 followed the rather contentious debate at the 15th Plen. Mtg.

France and Netherlands.⁶⁴ However, in March 1995 there was no agreement as to which four should represent the Group on the Council. All five of the eight which were eligible (Group A having already decided to nominate Japan, Russian Federation and United States to represent Group A in the Council) maintained their candidacies.⁶⁵ At the third part of the first session in August 1995 there was no significant progress within Group B. In March 1996, Netherlands withdrew its candidacy on the understanding that it would be elected in 1998 for four years, and India agreed to a two-year term on condition it would be elected in 2000 for four years.⁶⁶

Group C — Major Exporters

Group C is represented on the Council by

“Four members from among States Parties which, on the basis of production in areas under their jurisdiction, are major net exporters of the categories of minerals to be derived from the Area, including at least two developing States whose exports of such minerals have a substantial bearing upon their economies.” (Para. 15 lit.(c), Section 3, Annex.)

Section 3, para. 15 lit.(c) of the Annex to the Agreement, unlike para. 15 lit. (a), does not contain any percentage figure. Meetings of this Group were attended by 19 States, of which six (Australia, Chile, Gabon, Indonesia, Poland and Zambia) were candidates for the four seats avail-

⁶⁴ Those participating in the meetings but not within the top eight were, in order: United Kingdom, Republic of Korea, Belgium, Poland, Canada and Italy. The data exchanged gave the following order (figures — in constant 1994 US\$ supplied by a participant): Germany (435,470,000); United States (390,917,300); Japan (381,000,000); Russia (343,300,000); China (156,010,000); India (151,550,000); France (149,129,540); Netherlands (108,935,673); United Kingdom (93,500,000); Republic of Korea (83,800,000); Belgium (65,508,047); Poland (63,300,000); Canada (54,611,200); Italy (50,000,000).

⁶⁵ Report of the Coordinator of Group B, ISBA/A/L.1/Rev.1, paras 14 and 15: Selected Decisions 1/2/3, 5–6.

⁶⁶ The Republic of Korea (not among the eight largest investors in 1996) and Japan both made statements asserting that the determination of the eight largest investors could only be made at the time of the election, and therefore reserved their position on the decisions taken by Group B in 1996 concerning the elections in 1998 and 2000: ISBA/A/L.8, Annexes II and III: Selected Decisions 1/2/3, 22. In the event, no attempt was made in 1998 to reopen the 1996 decision to elect the Netherlands.

able. By the end of the second part of the first session in March 1995 agreement seemed to be emerging within the Group to nominate Australia, Chile, Indonesia and Zambia, though Gabon and Poland had not withdrawn. A point of concern within this Group was the balance between developed and developing countries. The Agreement provides that "at least" two of the four members nominated by the Group should be developing countries; even if on this occasion only one industrialized country was nominated by the Group it was understood that at future elections two industrialised countries might be nominated. As in Group A there was agreement that at this stage it was not appropriate to draw up a definitive list of countries eligible for election under para. 15 lit.(c).⁶⁷ At the third part of the first session in August 1995 Group C largely resolved its problems. Under the eventual agreement, Australia and Chile received two-year terms, while Indonesia relinquished its seat in 1998 to Poland for the remaining two years of a four-year term, and Zambia did likewise for Gabon.

Group D – Developing States Parties Representing Special Interests

Group D is represented on the Council by

"Six members from among developing States Parties, representing special interests. The special interests to be represented shall include those of States with large populations, States which are land-locked or geographically disadvantaged, island States, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals and least developed States." (Para. 15 lit.(a), Section 3, Annex)

Thirty-two States attended meetings of Group D, of which twelve declared their intention of seeking nomination to the Council to represent this Group. Others indicated an interest in nomination in either Group D or Group E. In view of the discussions taking place in the other Groups, Group D made little progress at the second part of the first session in March 1995,⁶⁸ and there was no significant forward move-

⁶⁷ Report of the Coordinator of Group C, ISBA/A/L.1/Rev.1, paras 16 to 19: Selected Decisions 1/2/3, 6.

⁶⁸ Report of the Coordinator of Group D, ISBA/A/L.1/Rev.1, para. 20: Selected Decisions 1/2/3, 6.

ment in August 1995 either. It was only in March 1996 that agreement was reached.⁶⁹

Group E – Equitable Geographical Distribution

Section 3, para. 15 lit.(e) of the Annex to the Agreement provides that 18 members of the Council shall be elected “according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole”, and that each of the five regional groups shall have at least one member elected under the subparagraph. The application of this provision proved very contentious. Consultations were conducted by the President of the Assembly with the chairmen of the five regional groups and the United States⁷⁰ throughout the second part of the first session in March 1995, but without result.⁷¹ A full scale debate took place in the Assembly on 9 March 1995.

No significant progress was made in August 1995, but in March 1996 a complex solution was found whereby the overall equitable geographical distribution in the Council as a whole (thirty-six members) would be Africa 10; Asia 9; Eastern Europe 3; Latin American and Caribbean (GRULAC) 7; Western Europe and Others (WEOG) 8. This totals thirty-seven, so it was agreed that “burden sharing” would apply: in the first year GRULAC would only have 6 seats, in the second year WEOG only 7, in the third year Africa only 9 and in the fourth year Asia only 8. Having regard to the informal understanding of 28 July 1994 (whereby Eastern Europe would not drop below 3 seats), the Eastern Europe Group made it clear that they could not accept any decision to apply to “burden sharing” to their Group.⁷²

⁶⁹ Belize claimed that it (as well as Guinea-Bissau and Guyana) were “island States” for the purposes of Group D, since as low-lying coastal States they were members of the Alliance of Small Island States and had participated as such in the Barbados Conference on the Sustainable Development of Small Island Developing States: ISBA/A/L.8, Annex V: Selected Decisions 1/2/3, 23.

⁷⁰ Thus following the pattern established at the Conference. “Although the United States did not participate in the WEO Group, it was always invited, as an observer, by the President of the Conference to meetings of the representatives of regional groups. These observers were always asked to speak on the topic under discussion”; Koh and Jayakumar, see note 5, 83.

⁷¹ ISBA/A/L.1/Rev.1, paras 21 to 24.

⁷² ISBA/A/L.9, Annex VI: Selected Decisions 1/2/3, 23–24, see note 53. A curious element in the compromise is that the Group subject to “burden-

1998 Council Election

In March 1998 the Assembly elected half the members of the Council for a four-year term beginning in January 1999.⁷³ In doing so it followed the agreement reached in March 1996, which effectively decided most of those to be elected. As in 1996 complex arrangements were made for split terms, though to a lesser extent so there will be somewhat more continuity. More Council members will serve the full four-year term. No account was or indeed could be taken of the possibility that the Council might include provisional members which might cease to be members on 16 November 1998. All members had to be treated equally; the possibility that the status of some would change during their term could only be dealt with when it occurred.

(iv) Terms of Office of Council Members

In March 1998 the Secretary-General suggested that the terms of office of Council members should be harmonized with the calendar year. After extensive consultations this was agreed. The Assembly adopted a decision extending the terms of office of existing members to 31 December 1998 or 31 December 2000 respectively, with those newly elected beginning their terms only on 1 January 1999. This decision did not in any way affect the arrangements reached within the Groups in 1996 and 1998.⁷⁴ The decision was taken despite some legal qualms on the part of GRULAC, which requested an opinion from the Office of Legal Affairs. The Chief of that Office declined to give a formal legal opinion in response to a request from a regional group, since the request had not been received from an organ of the Authority (letter of 23 March 1998), but clearly there were not considered to be any legal barriers to the arrangement.

(v) Election of the Secretary-General (1996)

Article 166 para. 2 provides that

sharing⁷³ may nominate a member as some kind of special observer to the Council: Jamaica was so nominated in the first year. But such observer has no rights over and above other observers.

⁷³ ISBA/4/A/L.6: Selected Decisions 4, 40-41.

⁷⁴ ISBA/4/A/5: Selected Decisions 4,40; ISBA/4/A/9, paras 11 to 13: Selected Decisions 4, 51.

“The Secretary-General shall be elected for four years by the Assembly from among the candidates proposed by the Council and may be re-elected.”

Article 162 para. 2 lit.(b) provides that the Council shall propose to the Assembly a “list of candidates” for the election of the Secretary-General, and article 160 para. 2 lit. (b) that the Assembly shall elect the Secretary-General “from among the candidates proposed by the Council”. In 1996 there was some debate as to whether these provisions (which differ from the corresponding provisions of the Charter of the United Nations) required the Council to propose more than one candidate.

There were four candidates: Nandan (Fiji), Preval (Cuba), Rattray (Jamaica) and Warioba (Tanzania). The election campaign was hard-fought, though members of the Authority were determined to elect the first Secretary-General by consensus if possible. In the event the Council agreed that there should be a secret indicative vote at an informal meeting of all delegations to the Authority present in Jamaica. But when that meeting convened two of the candidates announced their withdrawal. In these changed circumstances, the Council met and, without prejudice to the question of interpretation referred above, did not object to the two remaining names going forward to the Assembly. An informal meeting of all delegations on 21 March 1996 then proceeded to a secret indicative vote, following which Warioba withdrew and the Assembly by acclamation elected Nandan as Secretary-General for a four-year term.⁷⁵

(vi) Establishment of Secretariat

The Secretariat is one of the principal organs of the Authority. Article 166 para. 1 provides that

“The Secretariat of the Authority shall comprise a Secretary-General and such staff as the Authority may require.”

The Agreement provides that the setting up of the organs of the Authority shall be based on an evolutionary approach, taking into account the functional needs of the organs concerned in order that they may discharge effectively their respective responsibilities at various stages of the development of deepsea mining. In establishing the Secre-

⁷⁵ ISBA/A/L.9, paras 12–17: Selected Decisions 1/2/3, 19–20; Koch, see note 2, 214.

tariat, the Secretary-General, with the support of the Finance Committee, has adhered strictly to this principle. As the Secretary-General recently said:

“Immediately after taking up office, as Secretary-General I was called upon to establish a small core Secretariat, which assisted in reviewing the future staffing requirements of the Secretariat. Consistent with the principles of cost-effectiveness and the evolutionary approach to the establishment of the Authority in general, it was proposed that the development of the Secretariat should be phased-in over a period of time with the eventual size of the Secretariat numbering some 44 staff members (ISBA/A/9/Add.l). This number is much lower than the Secretariat establishment of 257 suggested in a study presented to the Conference in 1981 (A/CONF.62/L.65) and certainly a far cry from the exaggerated and unrealistic number of 3000 that was mentioned in some unofficial publications and seminars. The Secretariat that is being established aims to be efficient, technically competent and appropriate to the needs of the Authority as they evolve.”⁷⁶

In fact additional posts were not requested for 1999, and the approved establishment of the Secretariat remains at 36 posts.⁷⁷ Some 30 posts are currently filled, recruitment of the remainder being deferred.

The Secretariat has four divisions: Office of the Secretary-General; Office of Legal Affairs; Office of Resources and Environmental Monitoring; and Office of Administration and Management.⁷⁸

The staff members' terms of service are in accordance with the common system of salaries, allowances and other conditions of service of the United Nations and the specialized agencies. Staff members participate in the United Nations Joint Staff Pension Fund, as requested by the Assembly on the recommendation of the Council.⁷⁹ This facilitates secondment from and to organizations in the United Nations system.

⁷⁶ Statement at the Law of the Sea Institute, 31st Annual Conference, Miami, 30–31 March 1998.

⁷⁷ ISBA/4/A/11, paras 24–25: Selected Decisions 4, 56.

⁷⁸ ISBA/3/A/4, Annex: Selected Decisions 1/2/3, 52–53, 59–60.

⁷⁹ ISBA/C/8: Selected Decisions 1/2/3, 35; ISBA/3/A/4, para. 38: Selected Decisions 1/2/3, 53–54; ISBA/A/15: Selected Decisions 1/2/3, 25–26; ISBA/4/A/11, para. 26: Selected Decisions 4, 52–63. See also article 11 of the Relationship Agreement between the Authority and the United Nations.

(vii) Election of Council President

The President "Pro Tem" of the Assembly (Djalal) acted as President "Pro Tem" of the Council until, on 15 August 1996, the Council elected by acclamation Ambassador Ballah (Trinidad and Tobago) as its first President. There were originally two candidates: Mr. Koch (Germany) and Ambassador Ballah. Following an informal secret indicative vote of Council members Koch withdrew his candidature. Ballah assumed office immediately, and remained in office until the election by acclamation of his successor (Koch) on 16 March 1998.

(viii) Rules of Procedure of Council

As with the Assembly's Rules of Procedure considerable changes were needed in the draft Rules of Procedure of the Council prepared by the Preparatory Commission,⁸⁰ primarily to take account of the Agreement. The Secretariat prepared a further draft taking into account the Agreement and the approach taken by the Assembly to its Rules,⁸¹ which was considered in a working group of the Council chaired by Mr. Marsit (Tunisia, now Judge). The work benefited greatly from the work already done on the Assembly's Rules and was largely uncontentious. The Council adopted its Rules of Procedure on 16 August 1996.⁸²

(ix) Election of Finance Committee and Organization of its Work

The Assembly elected the 15 members of the Finance Committee in August 1996.⁸³ This election proved less contentious than the election of the Council, but nevertheless took up much of the second part of the second session.

Section 9, para. 3 of the Annex to the Agreement makes provision for the composition of the Finance Committee as follows

"Members of the Finance Committee shall be elected by the Assembly and due account shall be taken of the need for equitable geographical distribution and the representation of special interests. Each group of States referred to in Section 3, paragraph 15 (a), (b),

⁸⁰ LOS/PCN/WP.31/Rev.3, reproduced in: LOS/PCN/153 (Vol. V), 58-74.

⁸¹ ISBA/C/WP.1.

⁸² ISBA/C/12, published as ISA/97/002.

⁸³ Koch, see note 2, 214; Rajan, see note 2, 225-226.

(c) and (d), of this Annex shall be represented on the Committee by at least one member. Until the Authority has sufficient funds other than assessed contributions to meet its administrative expenses, the membership of the Committee shall include representatives of the five largest financial contributors to the administrative budget of the Authority. Thereafter, the election of one member from each group shall be on the basis of nomination by the members of the respective group, without prejudice to the possibility of further members being elected from each group.”

The election of the Committee has therefore to take “due account of the need for equitable geographical distribution and the representation of special interests”. Each of Group A to D in the Council has to be represented by at least one member. Until the Authority has sufficient “own resources” a Committee member from each of the five largest contributors to the administrative budget is to be elected. In August 1996 the five largest contributors were France, Germany, Japan, United Kingdom and United States of America. The agreement on the 1996 election, while nothing like as complex as that for the Council, involved a GRULAC seat being surrendered to Asia on 1 January 1999; and a WEOG seat being surrendered to Eastern Europe on 1 July 1999. The agreement was said to be without prejudice to the overall composition of the Committee in future elections and in particular the claims of the regional groups. It further said that the situation “may need to be reviewed” after 16 November 1998.⁸⁴

The members of the Committee serve in their individual capacity and are elected for a five-year term. In the light of the special circumstances of the first election it was agreed that the five-year period would begin on 1 January 1997.

As a temporary measure Mr. Marsit (Tunisia- now Judge), though not a member of the Committee, was requested by the Assembly to chair its short first session in August 1996, when a draft budget had to be prepared urgently. In March 1997 Mr. Rama Rao (India) was elected chairman by acclamation in the Committee; he continued as chairman in 1998.

⁸⁴ ISBA/A/L./Rev.1, paras 14–15: Selected Decisions 1/2/3, 9; ISBA/A/L.13, paras 6–12: Selected Decisions 1/2/3, 30–31; ISBA/3/A/4, paras. 15 and 16: Selected Decisions 1/2/3, 48–49.

Draft Rules of Procedure for a Finance Committee had been drawn up by the Preparatory Commission,⁸⁵ but these of course predated the new provisions in the 1994 Part XI Agreement and needed substantial revision. A revised draft has been prepared by the Secretariat,⁸⁶ but the Committee has not yet considered it.

(x) Budgets for 1994–1996, 1997, 1998 and 1999

Until 31 December 1997 the administrative expenses of the Authority were met from the regular budget of the United Nations.⁸⁷ Thereafter they are to be met by the members of the Authority in accordance with a scale of assessment adopted by the Assembly, until such time as the Authority has its “own resources” from deep seabed mining. The failure of many members (including the largest contributor) to pay on time or at all in 1998 led to a considerable cash-flow problem, and on 20 August 1998 the Assembly adopted a resolution appealing to members to pay contributions as soon as possible.⁸⁸

Up to the end of 1995 provision was made in the UN regular budget for US\$ 776,000 (not counting conference services). There being no Secretary-General of the Authority to prepare a draft budget for 1996, the Assembly entrusted the UN Secretary-General with preparing a budget.⁸⁹ Pursuant to this decision the UN General Assembly adopted a budget of US\$ 2,627,100 for 1996 (including US\$ 1,318,900 for conference services).

Preparation in August 1996 of the 1997 budget took place within the organs of the Authority (though it also had to go through United Nations procedures culminating in A/RES/51/221 of 18 December 1996). The procedures followed within the Authority in August 1996 served as the model for subsequent years. In brief, the Secretary-General of the Authority submitted a draft budget to the Finance Committee, which considered it in much the same way as the Advisory Committee on Administrative and Budgetary Questions (ACABQ) considers budget-

⁸⁵ LOS/PCN/WP.45/Rev.2, reproduced in: LOS/PCN/153(Vol. V), 92–96.

⁸⁶ ISBA/4/FC/WP.2 of 15 June 1998 (replacing an earlier Secretariat draft in ISBA/F/WP.1).

⁸⁷ Agreement, Annex, Section 1, para. 14; A/RES/49/218 of 23 December 1994 and subsequent resolutions.

⁸⁸ ISBA/4/A/12. See also paragraph 11 of A/RES/53/32 of 24 November 1998.

⁸⁹ ISBA/A/L.5.

ary proposals in New York. The Committee met in informal session to hear from and put questions to the Secretary-General and his staff (Office of Administration and Management). The Committee then discussed the draft in private session (without the Secretariat). Following this the Secretary-General submitted a revised budget, which the Committee considered further.⁹⁰ The revised budget, together with the Committee's recommendations thereon, then went in turn to the Council and the Assembly (which adopted them without change). The budget for 1997 was US\$ 4,150,500 (including 1,400,000 for conference services) and was based on an evolutionary approach.⁹¹ That for 1998 was US\$ 4,697,100 (including \$ 1,375,800 for conference services)⁹² and the 1999 budget amounted to US\$ 5,011,700 (US\$ 1,200,300 for conference services).⁹³ In addition a Working Capital Fund was established in the amount of US\$ 392,000, half to be paid in 1998 and half in 1999.⁹⁴

It will be seen that the Authority's budget has increased substantially, doubling between 1996 and 1999. This is nothing exceptional for an organization which is in the process of establishing itself on an evolutionary basis. A large proportion of the budget goes on conference services and on administrative matters, and relatively little on the substantive work of the Authority, though the 1999 budget shows a modest but welcome shift of emphasis in this regard (including a reduction in conference servicing costs). There seems no reason why the overall level of the budget should not now remain relatively stable for the foreseeable future. The failure in 1998 of many States to honour their legal obligation to pay their contribution in full and on time, or at all, may to some degree reflect their reluctance to inject resources into an organization whose role remains, unclear. The current budgetary crisis of the Authority seems likely to continue.

⁹⁰ ISBA/A/9-ISBA/C/5 and Add.1.

⁹¹ ISBA/A/14: Selected Decisions 1/2/3, 27-28.

⁹² For the 1998 budget, see proposed budget in ISBA/3/A/5 -ISBA/3/C/5; revised budgetary requirements in ISBA/3/A/5/Add.1-ISBA/3/C/5/Add.1; report of the Finance Committee in ISBA/3/A/6-ISBA/3/C/8; and Assembly Decision ISBA/3/A/9: Selected Decisions 1/2/3, 60-61.

⁹³ For the 1999 budget, see proposed budget in ISBA/4/A/10- ISBA/4/C/6; revised budgetary requirements in ISBA/4/A/10/Add.1- ISBA/4/C/6/Add.1; report of the Finance Committee in ISBA/4/A/13/Rev.1- ISBA/4/C/10/Rev.1; and Assembly Decision ISBA/4/A/17 : Selected Decisions 4, 64.

⁹⁴ ISBA/3/A/9: Selected Decisions 1/2/3, 60-61.

(xi) Scale of Assessment for 1998 and 1999

According to article 160 para. 2 lit.(e) of the Convention the Assembly is

“to assess the contributions of members to the administrative budget of the Authority in accordance with an agreed scale of assessment based upon the scale used for the regular budget of the United Nations.”

The Agreement, Annex 9, para. 7 provides that decisions of the Assembly and the Council on this matter shall take into account recommendations of the Finance Committee.

The Assembly adopted a scale of assessment for 1998,⁹⁵ the scale being the same as that for the 1997 regular budget of the United Nations, adjusted to take account of differences in membership. On 13 October 1998 the Assembly (meeting in New York) authorized the Secretary-General to establish a scale for 1999, based on that used for the 1998 regular budget of the United Nations.⁹⁶ Two major difficulties have arisen in connection with the assessments: over the amount and nature of the European Community's contribution; and over which year's United Nations scale should form the basis for the Authority's scale.

The European Community is a member of the Authority (until 1 May 1998 on a provisional basis), as are 13 of its 15 Member States. The provisions of the Convention are unclear as to whether the European Community is required to make a contribution to the budget (an assessed contribution). While the budgetary provisions of the Convention and Agreement appear to treat all members alike, article 4 of Annex IX, to the Convention can be read as not requiring an international organization to pay in addition to its Member States unless as an internal matter within the organization it is agreed that contributions will be shared between the organization and its Member States. The practice in other organizations in relation to the European Community is varied. Despite protracted negotiations both on the level and the nature of the European Community's contribution there is as yet no general agreement on these matters.

In 1997 the Assembly (on the recommendation of the Finance Committee and Council) had adopted a scale of assessment for the 1998

⁹⁵ ISBA/3/A/10.

⁹⁶ ISBA/4/A/21: Selected Decisions 4, 67.

budget based on the 1997 United Nations scale (this being the latest available). This decision was not in any way controversial.

In 1998, the Finance Committee considered briefly the question whether the 1998 or 1999 United Nations scale should be the basis for the Authority's 1999 budget, and agreed without difficulty (or even much discussion) that the 1998 United Nations scale should be used. (This point was not explicitly dealt with in the Finance Committee's report, but was reflected in the accompanying indicative scales.) The Finance Committee recommended that the Secretary-General be authorized to establish the actual scale after 16 November 1998, in the hope — which proved in vain — that certain major contributors that were still provisional members would remain members after that date.

The draft budgetary decision before the Council in August 1998 explicitly authorized the Secretary-General to establish the scale on the basis of the 1998 United Nations scale. The Eastern European members of the Council (whose assessments were dramatically less on the 1999 United Nations scale than on that for 1998) moved an amendment to substitute a reference to the 1999 United Nations scale, which amendment was soundly defeated in the Council (3 votes in favour, 29 against, with no abstentions), all other groups supporting the position taken by the Finance Committee; the unamended draft decision was duly adopted by the same overwhelming majority. The delegation of the Russian Federation then made it clear in the corridors that if an attempt were made to adopt the scale of assessment decision in the Assembly they would object on the ground that there was no quorum. Since there were indeed insufficient delegations present in Kingston to constitute a quorum, it was concluded that the least unsatisfactory way to proceed was for the Assembly to adopt the 1999 budget (to which there was no objection) immediately, but to defer a decision on the scale of assessment and reconvene later in New York, where a quorum could more readily be obtained.

This was decided, and a further resumed fourth session of the Assembly took place in New York on 12 and 13 October 1998. On that occasion a quorum was — not without some difficulty — obtained. The Russian amendments⁹⁷ were rejected with 5 votes in favour (Poland, Russia, Slovakia, Slovenia, Ukraine), 76 against and no abstentions, and

⁹⁷ ISBA/4/A/L.8/Rev.1 and ISBA/4/A/L.9.

the original decision ⁹⁸ was adopted by 76 votes in favour, 3 against (Poland, Russia, Ukraine), and 2 abstentions (Slovakia, Slovenia).

(xii) Draft Financial Regulations

The Assembly has not yet adopted the Financial Regulations of the Authority. Draft Financial Regulations were proposed by the Finance Committee in August 1998, but have not yet been considered by the Council.⁹⁹ Pending their adoption the Authority applies *mutatis mutandis* the Financial Regulations of the United Nations.¹⁰⁰

(xiii) Draft Staff Regulations

The Assembly has not yet adopted the Staff Regulations. Pending their adoption the Authority applies *mutatis mutandis* the Staff Regulations and Rules of the United Nations.¹⁰¹ Draft Staff Regulations, largely based on those of the United Nations, have been prepared by the Secretariat for consideration by the Finance Committee.¹⁰² They were not considered by the Committee in August 1998, in part because the United Nations General Assembly was to review the United Nations Staff Regulations later in 1998.

(xiv) Election of Legal and Technical Commission and Organization of its Work

The Convention provides for two organs of the Council, an Economic Planning Commission and a Legal and Technical Commission (arts 163–165). The Agreement, however, provides that the functions of the Economic Planning Commission shall for the time being be performed by the Legal and Technical Commission.

According to article 163 para. 2

⁹⁸ ISBA/4/A/L.7. The 1999 scale of assessment has been issued as ISBA/4/A/23. See also ISBA/4/A/22: Selected Decisions 4, 67–68.

⁹⁹ ISBA/4/C/L.3 and ISBA/4/C/14, para.8: Selected Decisions 4, 76.

¹⁰⁰ ISBA/A/15: Selected Decisions 1/2/3, 29; ISBA/3/A/4, para. 39: Selected Decisions 1/2/3, 54.

¹⁰¹ ISBA/A/15: Selected Decisions 1/2/3, 29; ISBA/3/A/4, para. 40: Selected Decisions 1/2/3, 54.

¹⁰² ISA/4/FC/CRP.1 of 18 March 1998.

“Each Commission shall be composed of 15 members, elected by the Council from among the candidates nominated by the States Parties. However, if necessary, the Council may decide to increase the size of either Commission having due regard to economy and efficiency.”

According to article 165 para. 1

“Members of the Legal and Technical Commission shall have appropriate qualifications such as those relevant to exploration for and exploitation and processing of mineral resources, oceanology, protection of the marine environment, or economic or legal matters relating to ocean mining and related fields of expertise. The Council shall endeavour to ensure that the membership of the Commission reflects all appropriate qualifications.”

When the Council came to elect the Commission, in August 1996, there were 22 candidates. The President of the Council, Ambassador Ballah, proposed — somewhat unexpectedly but to general relief (following the protracted consultations on the Council and Finance Committee elections) — that advantage be taken of the flexibility inherent in article 163 para. 2 to decide to increase the number of seats on the Commission from 15 to 22 and elect all 22 candidates by acclamation. This was done, without prejudice to future elections to the Commission.¹⁰³

The members of the Commission act in their personal capacity, and do not represent Governments. They were elected for a term of five years from 1 January 1997. Their term of office will therefore expire in 31 December 2001. Mr. Lenoble (France) was elected chairman.

The Commission generally meets in private. In August 1997 however, at the insistence of certain countries invoking the need for “transparency” (suggesting that better understanding of the Commission’s reasoning on the provisions of the draft Mining Code would make Council acceptance more likely) and against the unanimous view in the Commission, an understanding was reached within the Council whereby a limited number of observers could be present meetings of the Commission relating to discussions on the draft Mining Code. It was agreed that the presence of the observers would be on a first come, first served basis and normally should not exceed 15 persons. The observers would not participate in the discussions.

Strong arguments were made against opening the Commission to observers. In particular, it was argued that to do so would alter the na-

¹⁰³ ISBA/C/L.3, para. 7: Selected Decisions 1/2/3, 39.

ture of the expert discussions, politicizing them, and to some degree this happened. It was also argued that the Commission would have to deal with confidential matters, in particular commercially confidential data provided by mining operators. The members of the Commission were bound by obligations of confidentiality, whereas observers were not. To this second argument the response was that confidential data would not be discussed during the preparation of the Mining Code.¹⁰⁴

During the Preparatory Commission the United Nations Secretariat had prepared draft Rules of Procedure for the Commission.¹⁰⁵ These were modified substantially by the Authority's Secretariat in order to bring them into conformity with the Agreement and make them consistent with the provisions of the Convention and Agreement,¹⁰⁶ and considered by the Commission in August 1998. On 26 August 1998 the Commission adopted an "informal revised text".¹⁰⁷

(xv) Relationship with the United Nations and Other Bodies

The Authority is an autonomous international organization. It is not a specialized agency of the United Nations; nor does it have a status similar to that of a specialized agency, as does the IAEA. Article 162 para. 2 lit.(f) of the Convention provides that the Council may

"enter into agreements with the United Nations or other international organizations on behalf of the Authority and within its competence, subject to approval by the Assembly."

The Council requested the Secretary-General to negotiate a Relationship Agreement with the Secretary-General of the United Nations; and the United Nations General Assembly made a parallel request to the United Nations Secretary-General. On 14 March 1997 the Agreement between the United Nations and the Authority was signed and provisionally applied in accordance with the parallel resolutions of the two Assemblies. Following its approval by the Assembly of the Authority

¹⁰⁴ ISBA/3/C/L.4, para. 7: Selected Decisions 1/2/3, 65; ISBA/3/C/11, para. 3–4: Selected Decisions 1/2/3, 72.

¹⁰⁵ LOS/PCN/WP.31/Rev.3, reproduced in LOS/PCN/153, Vol. V, 58.

¹⁰⁶ ISBA/3/LTC/WP.3.

¹⁰⁷ Draft Rules of Procedure of the Legal and Technical Commission, dated 27 August 1998.

and the General Assembly of the United Nations, the Agreement entered into force on 26 November 1997.¹⁰⁸

The Agreement's most important provisions, have been summarized as follows:

"The agreement ... establishes a mechanism for close cooperation between the secretariats of the two organizations in order to ensure effective coordination of activities and to avoid unnecessary duplication of work. Such cooperative arrangements are to include cooperation regarding personnel arrangements. It also provides mechanisms for reciprocal representation at meetings, taking into account the status of the Authority as an observer at the United Nations. The agreement establishes mechanisms whereby the Authority and the United Nations will cooperate in exchanging data and in fulfilling their respective functions under the Convention. Most importantly, article 12 of the agreement provides that unless the General Assembly, after giving reasonable notice to the Authority, decides otherwise, the United Nations will continue to make available to the Authority, on a cost reimbursable basis, such facilities and services as may be required for the meetings of the Authority, including translation and interpretation services, documentation and conference services."¹⁰⁹

On 4 November 1996, following a request from the Seabed Assembly, the United Nations General Assembly invited the Authority to participate in the deliberations of the General Assembly in the capacity of observer.¹¹⁰ Such participation is particularly appropriate given the General Assembly's annual debate on Oceans and the Law of the Sea, and its overall coordinating role in this field. The Authority also has observer status with the Meeting of States Parties.

The relationship between the Authority and the International Tribunal for the Law of the Sea needs to be approached with care. As the Secretary-General of the Authority has stressed, the two institutions are separate, and the independence of the Tribunal must be recognized. The Preparatory Commission made a number of rather unsatisfactory sug-

¹⁰⁸ ISBA/3/A/L.2; A/52/260. For the requests see ISBA/C/10; Selected Decisions 1/2/3, 36-37; A/RES/51/34 of 17 January 1997. For the approvals see ISBA/3/A/3; Selected Decisions 1/2/3, 43 and A/RES/52/27 of 26 November 1997.

¹⁰⁹ ISBA/3/A/4, para. 21; Selected Decisions 1/2/3, 50.

¹¹⁰ A/RES/51/6 of 24 October 1996; see also ISBA/A/L.12 and ISBA/A/13; Selected Decisions 1/2/3, 26.

gestions in this regard.¹¹¹ In the debate on the Secretary-General's first report on the work of the Authority a number of delegations "stated that while a good working relationship with the International Tribunal for the Law of the Sea was desirable, it should be borne in mind that the Tribunal was also a court to which the Authority was answerable with regard to any seabed mining dispute".¹¹² Following this debate the Secretariat has commenced discussions with the Registry of the Tribunal with a view to drafting an agreement that would provide for "administrative cooperation" between the two institutions.¹¹³

The Authority may in due course and where "appropriate and necessary" need to establish relations with other international and non-governmental organizations.¹¹⁴ It has already accepted some organizations as observers, including the Permanent Commission of the South Pacific (CPPS), the South Pacific Applied Geoscience Commission (SOPAC), Greenpeace International and the International Ocean Institute.

(xvi) Protocol on Privileges and Immunities

A draft Protocol on Privileges and Immunities had been drawn up by the Preparatory Commission over a lengthy period,¹¹⁵ but was thought to give excessive privileges and immunities and was in places unclear and verbose. An open-ended working group met briefly during the Authority's session in August 1996, but there was no agreement to continue work on the Protocol. The Secretariat of the Authority then prepared a much simpler text, issued on 24 March 1997, which so far as possible avoided duplication with the relevant Convention provisions and which contained more standard provisions than the Preparatory Commission's draft.¹¹⁶ Detailed consideration of the Secretariat draft took place in the resumed open-ended working group of the Assembly chaired by Professor Galicki (Poland), which met in August 1997 and

¹¹¹ LOS/PCN/SCN.4/WP.16/Add.5, reproduced in: LOS/PCN/152, Vol. I, 142.

¹¹² ISBA/3/A/11, para. 7: Selected Decisions 1/2/3, 62; ISBA/3/A/4, para. 23: Selected Decisions 1/2/3, 50-51.

¹¹³ ISBA/4/A/11, para. 14: Selected Decisions 4, 52-63.

¹¹⁴ ISBA/3/A/4, para. 22: Selected Decisions 1/2/3, 50; ISBA/4/A/11, paras 15-16: Selected Decisions 4, 55.

¹¹⁵ LOS/PCN/WP.49/Rev.2, reproduced in: LOS/PCN/153 (Vol.V), 126-141.

¹¹⁶ ISBA/3/A/WP.1/Add.1.

March 1998. An informal revised draft was prepared in August 1997 and further revisions followed in March 1998.¹¹⁷ Account was also taken of the Agreement on the Privileges and Immunities of the Tribunal, recently adopted at a meeting of States Parties.¹¹⁸

There were divided views on the need for any Protocol, and prior to its adoption certain delegations (Japan, Sweden and the United States) repeated their doubts.¹¹⁹ The Assembly, nevertheless, adopted by consensus the Protocol on the Privileges and Immunities of the International Seabed Authority on 27 March 1998.¹²⁰ The Protocol was opened for signature in Kingston from 17 to 28 August 1998 and subsequently until 16 August 2000 in New York. As of 16 November 1998 it had been signed by 10 States. It will enter into force 30 days after the deposit of the tenth instrument of ratification, approval, acceptance or accession.

The Protocol deals with the privileges and immunities of the Authority in relation to matters not already covered in the Convention and is based substantially on articles I, II, IV, V, VI and VII of the Conventions on the Privileges and Immunities of the United Nations (UNTS Vol.1 No.4) and of the Specialized Agencies (UNTS Vol.33 No.521).

The most controversial issues were the number of high officers entitled to full diplomatic privileges and immunities and the question whether the Authority should issue its own *laissez passer*. It was eventually agreed that only the Secretary-General and the Director-General of the Enterprise, when elected (that is to say, not a person appointed as interim Director-General pursuant to the Agreement, Annex, Section 2, para. 1),¹²¹ should be entitled to diplomatic-scale privileges and immunities. The intention is that the Authority should rely on United Nations *laissez passer*, as is provided in the Relationship Agreement.

¹¹⁷ ISBA/4/A/L.2.

¹¹⁸ SPLOS/25; for the text of the Agreement see: *Max Planck UNYB* 2 (1998), 411 et seq.

¹¹⁹ ISBA/3/A/L.4, paras.5-8: Selected Decisions 1/2/3, 44; ISBA/4/A/9, para. 20.

¹²⁰ ISBA/4/A/8: Selected Decisions 4, 42-49; ISBA/4/A/11, paras 21-22: Selected Decisions 4, 55-56.

¹²¹ See the Assembly resolution adopting the Protocol, ISBA/4/A/8: Selected Decisions 4, 42-49.

(xvii) Headquarters and Relationship with Host Country

Article 156 para. 4 of the Convention provides that the seat of the Authority shall be in Jamaica. During the Conference there were three candidates for the seat: Malta, Fiji and Jamaica. After protracted lobbying (spearheaded for Jamaica by Prime Minister Michael Manley), the Conference decided by indicative vote (show of hands) in favour of Jamaica. In the course of a debate in the First Committee of the Conference the representative of Jamaica said that "his Government had made extensive preparatory arrangements to provide adequate facilities for the Authority at the earliest possible opportunity" and that "his Government had accordingly made active preparations to accommodate the headquarters of the Authority".¹²²

There was further competition, within Jamaica, between Kingston and Montego Bay. The Convention was signed at Montego Bay, following the decision by Venezuela not to host the concluding session of the Conference because of its own somewhat negative attitude to the Convention (Caracas itself having been substituted for Santiago for the main opening session in 1974, as a result of the coup ousting President Allende in September 1973). For reasons turning essentially on internal Jamaica politics, this issue was not resolved until March 1998, when the newly re-elected Government of Prime Minister Patterson announced the decision in favour of Kingston.

The Preparatory Commission had met in down-town Kingston once each year between 1983 and 1994, in the attractive Jamaica Conference Centre near the harbour, with the Kingston Secretariat of the Preparatory Commission occupying office space in an adjoining building. These arrangements were carried over to the Authority. While the conference space was very satisfactory, the offices caused considerable disquiet on three counts: security,¹²³ cost, and run-down condition. Consideration was given, against considerable Jamaican opposition, to moving elsewhere in Kingston. In March 1998 the Government of Jamaica offered the whole of the building currently occupied in part by the Secretariat for the Headquarters of the Authority (letter of 10 March 1998). The Finance Committee requested the Secretary-General

¹²² 53rd Mtg. of the First Committee of the Third United Nations Conference on the Law of the Sea, paras 27-28, XV Official Records 84.

¹²³ ISBA/3/A/4, para.26: Selected Decisions 1/2/4, 51.

to clarify this offer and compare it with other options but this has not yet proved possible.¹²⁴

The Preparatory Commission had drawn up a draft Headquarters Agreement between the Authority and the Government of Jamaica.¹²⁵ In August 1996 the Council requested the Secretary-General to negotiate a Headquarters Agreement with Jamaica.¹²⁶ A draft Agreement¹²⁷ was considered by the Council and by a working group in March and August 1996, and a number of technical improvements were made. But no agreement could be reached on the key provisions concerning the location of the Authority, with most members insisting that the Authority must have the right to determine its site, in consultation with the Government of Jamaica but without the latter having a veto.¹²⁸

(xviii) Extension of Provisional Membership

The 1994 Implementation Agreement provided that if it entered into force before 16 November 1996 (which it did, on 28 July 1996), States and entities that had been applying the Agreement provisionally might continue as members of the Authority on a provisional basis until 16 November 1996 by sending a written notification to the United Nations Secretary-General. For such provisional membership to continue beyond 16 November 1996 required the Council to be satisfied that the State or entity concerned had been making efforts in good faith to become a party to the Convention, and application for such continuation had therefore to be made to the Authority. The Council approved all requests for extension of provisional membership without debate.¹²⁹

¹²⁴ ISBA/4/A/9, paras 23–25; Selected Decisions 4, 49–52; ISBA/4/A/11, paras 17–20; Selected Decisions 4, 55; ISBA/4/A/18, paras 6–7; Selected Decisions 4, 65.

¹²⁵ LOS/PCN/WP.50/Rev.3, reproduced in: LOS/PCN/153 (Vol. V), 97–125.

¹²⁶ ISBA/C/11: Selected Decisions 1/2/3, 37–38.

¹²⁷ ISBA/3/A/L.3– ISBA/3/C/L.3 and Corr.1.

¹²⁸ ISBA/3/C/L.7, para.10: Selected Decisions 1/2/3, 66; ISBA/3/C/L.11, para.11: Selected Decisions 1/2/3, 74.

¹²⁹ ISBA/A/L.10: Selected Decisions 1/2/3, 25–26 ; ISBA/C/3: Selected Decisions 1/2/3, 32–33; ISBA/C/4: Selected Decisions 1/2/3, 33–35; ISBA/C/9: Selected Decisions 1/2/3, 36; ISBA/3/C/3: Selected Decisions 1,2,3, 64; ISBA/4/C/1: Selected Decisions 4, 69–70; ISBA/4/C/3: Selected Decisions 4, 70.

Such provisional membership could not, however, continue beyond 16 November 1998.

2. Substantive Work

The substantive functions of the Authority are set out in the Convention and the 1994 Agreement. In particular, the Agreement provides in its Annex, Section 1, para. 5, that, pending the approval of the first plan of work for exploitation, the Authority shall concentrate on eleven areas of work (listed in para. 5 lit.(a) to (k)) mostly concerned with plans of work to exploration and with the protection and preservation of marine environment.

Some of these tasks are more urgent than others. In an effort to prioritize the Authority's work in its first few years the Secretary-General prepared a report in 1996,¹³⁰ but this proved controversial and was neither debated nor endorsed.

In the event, given all the uncertainties, the Authority has so far found it preferable to take up substantive matters as and when appropriate, rather than establishing a medium or long-term plan that might or might not correspond to real requirements. During its first four sessions the bulk of the Authority's work has been organizational; such activity is inevitable with a new body and in any event relatively little substantive work could be done as long as the organs, including the Secretariat, were in the course of establishment. The main substantive areas touched on so far are the approval of plans of work for the seven registered pioneer investors, and the preparation of part of the Mining Code.

(i) Approval of Plans of Work for Exploration

Seven registered pioneer investors (RPIs) submitted requests for the approval of plans of work for exploration on 19 August 1997. The Legal and Technical Commission transmitted its report and recommendation thereon to the Council on 22 August 1997.¹³¹ In a decision of 28 August 1997, the Council noted that (in accordance with the Agreement, Annex, Section 1, para. 6 lit. (a) (ii)) seven plans of work for ex-

¹³⁰ ISBA/A/10.

¹³¹ ISBA/3/C/7: Selected Decisions 1/2/3, 69-70.

ploration submitted by the registered pioneer investors (RPIs) "are considered to be approved" and requested the Secretary-General to take the necessary steps to issue the plans of work in the form of contracts, incorporating the applicable obligations under the provisions of the Convention and the Implementation Agreement and Resolution II and in accordance with the regulations on prospecting and exploration for polymetallic nodules in the Area and a standard form of contract to be approved by the Council.¹³² Such contracts can only be issued once the Mining Code is adopted.

The seven registered pioneer investors (RPIs) are-

- Government of India;
- Institut français de recherche pour l'exploitation de la mer (IFREMER)/Association française pour l'étude et la recherche des nodules (AFERNOD) (France);
- Deep Ocean Resources Development Co Ltd (DORD) (Japan);
- Yuzhmorgeologiya (Russian Federation);
- China Ocean Mineral Resources Research and Development Association (COMRA) (China);
- Interoceanmetal Joint Organization (IOM) (Bulgaria, Cuba, Czech Republic, Poland, Russian Federation and Slovakia);
- Government of the Republic of Korea.

These seven RPIs had been registered by the Preparatory Commission pursuant to Resolution II of the Third United Nations Conference on the Law of the Sea. The Commission had in fact relieved the RPIs of virtually all of the obligations originally provided for in Resolution II.

In the case of six of the RPIs the Preparatory Commission had also issued certificates of compliance as required by Resolution II. For reasons of timing this was not possible in the case of the Government of the Republic of Korea, and *in lieu* thereof the Secretary-General of the Authority prepared a statement.¹³³ The Legal and Technical Commission also had to approve the training programme proposed by Korea, which it did in March 1998.

¹³² ISBA/3/C/9: Selected Decisions 1/2/3/, 71-72; ISBA/3/C/11, paras 6-9: Selected Decisions 1/2/3, 73. For the Secretary-General's report see ISBA/4/A/1/Rev.2: Selected Decisions 4, 1-39.

¹³³ ISBA/3/C/6: Selected Decisions 1/2/3, 66-68.

(ii) Draft Mining Code for Prospecting and Exploration of Polymetallic Nodules

Under the Convention the Assembly is to consider and approve the “rules, regulations and procedures of the Authority” provisionally adopted by the Council relating *inter alia* to prospecting, exploration and exploitation in the Area.¹³⁴ The Council is to adopt such rules, regulations and procedures and apply them provisionally pending approval by the Assembly, taking into account the recommendations of the Legal and Technical Commission.¹³⁵ Adoption by the Council requires consensus.¹³⁶ The Agreement elaborates further on the procedures for adoption and on the substance.¹³⁷ The Agreement in particular provides that the Mining Code-

- shall take into account the terms of the Agreement, the prolonged delay in commercial deep seabed mining and the likely pace of activities in the Area;
- shall incorporate applicable standards for the protection and preservation of the marine environment.

Paragraph 16 of Section 1 of the Annex to the Agreement provides that the draft rules, regulations and procedures as contained in the reports and recommendations of the Preparatory Commission shall be “taken into account” by the Authority in the adoption of rules, regulations and procedures. The Preparatory Commission’s drafts are contained in LOS/PCN/153 (Vol.XIII).¹³⁸ But they were elaborated before the Agreement was drafted and adopted and are of only limited assistance to the Authority.

The Legal and Technical Commission worked on a number of successive drafts of the Mining Code:

- a Secretariat draft;

¹³⁴ Article 160 para.2 lit.(f)(ii).

¹³⁵ Article 162 para.2 lit.(o)(ii).

¹³⁶ Article 161 para.8 lit.(d).

¹³⁷ Agreement, Annex, Section 1 paras 15 and 16; Agreement, Annex, Section 1 para.5 lit.(f) and (g).

¹³⁸ J.A. Walkate, “Developments in Special Commission 3 of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea: Drafting the Future Deep Sea-Bed Mining Code”, *NILR* 36 (1989), 153 et seq.

- a revised provisional text (English only) circulated informally at the end of the March 1997 meeting;
- an informal draft of a provisional text circulated informally at the end of the August 1997 session (ISBA/3/LTC/WP.1/Rev.3, dated 27 August 1997 with a request for comments by 31 December 1997. See also ISBA/4/LTC/INF.1 and Add.1 and 2, and ISBA/4/LTC/CRP.1 which incorporates these comments in the form of footnotes.

A key consideration in drawing up the Mining Code is the protection and preservation of the marine environment. The 1994 Agreement itself puts particular stress on environmental concerns (though these were not absent from the original Part XI). As stated in the Secretary-General's report of 31 July 1997:

“One of the key responsibilities of the Authority is to ensure that the natural environment in the Area is protected from serious harm that may be caused by activities in the Area. To achieve this, it will be necessary for the Authority, in consultation with contractors, to establish environmental baselines and to identify the types of environmental data required from contractors to assess likely impacts on the marine environment. At this early stage of development, mining technology is still very much undefined. Also, the types of activities anticipated during exploration consist primarily of non-invasive survey work and are not expected to be of serious concern in terms of environmental impact. A significant body of information on these activities and their effects has already been acquired during the past 25 years. Small-scale mining equipment tests and mining simulation experiments have been carried out through collaborations of industrial, government and academic workers, as well as baseline data collection by industrial explorers and government-funded researchers. With this in mind, the Authority is in the process of synthesizing all available information on the environmental impacts of deep seabed mining in order to assist the Legal and Technical Commission to formulate guidelines for the assessment of environmental impacts of activities in the Area.”¹³⁹

The draft Mining Code recommended by the Legal and Technical Commission in March 1998 (ISBA/4/C/4 and Rev.1) dealt only with the stages of prospecting and exploration, and not with exploitation (which according to the experts, including the Group established by the

¹³⁹ ISBA/3/A/4, para. 54: Selected Decisions 1/2/3, 57.

Preparatory Commission, is probably a very long way off). It was further limited to a single resource, polymetallic nodules.

The Chairman of the Legal and Technical Commission presented the draft to the Council on 23 March 1998. In doing so, he stressed that the Commission had been careful to ensure that nothing in the draft Mining Code departed from or was inconsistent with the provisions of the Convention and Agreement. He further explained the approach of the draft in the following terms:

“The basic approach has been to place all procedural matters in the regulations, consisting of parts I to VIII. Annexes 1 and 2 contain the forms needed for, respectively, the notification of prospecting to the Authority and the application for approval of a plan of work for exploration. Those forms are obviously in conformity with the regulations. The contract and the standard clauses of the contract appeared as annexes to the regulations (Annexes 3 and 4). The contract consists of a short, approximately two paged document, which constitutes Annex 3. It contains the basic elements establishing the contractual relationship and incorporating the standard terms and conditions by reference. The coordinates of the exploration area, the programme of work and the training programme would be attached as schedules to the contract. The terms and conditions of the contract, in the form of standard clauses applicable to all contractors, are entrenched in the regulations as Annex 4.

The Commission considers that this approach helps to clarify the relationship between the contract and the regulations and ensures that contract terms are uniform among contractors. It would also ensure that the requirements of the Convention, the Agreement and the relevant regulations are incorporated as terms and conditions of the contract and removes any possibility of duplication or omission. The differences between different contractors and their plans of work would be reflected in the schedules to the contract depending on their different plans of work or the level of their activities.”

The Council began its consideration of the draft Mining Code on 23 March 1998. The President of the Council invited general statements from Council members and observers on the draft text, and then the Council moved into informal session, with full participation by observers, for a regulation-by-regulation discussion of the draft. From 24 to 26 March, the Council briefly resumed in formal session to hear further general statements, but otherwise continued its informal discussion for the remainder of the first part of the fourth session and throughout much of the resumed session in August 1998. The preamble (very

briefly) and Regulation 1 were discussed in March. Regulations 2-21 were discussed in August.

On the basis of these discussions, the Secretariat together with the President of the Council prepared an informal revision of the preamble and regulations 2-21.¹⁴⁰ Further consideration of the use of terms in Regulation 1 will be necessary when all the regulations have been discussed by the Council. In view of the interrelationship between many of the regulations, a further review of the draft text as a whole will also be necessary. At both the March and August sessions in 1998, a number of representatives called for the Council to prioritize work on the draft Mining Code, but no target for its final adoption was agreed.

General Statements on the Draft Mining Code, March 1998

General statements on the draft Mining Code were made by nineteen Council Members and three observers in March 1998.¹⁴¹ Among these, the representative of the Russian Federation anticipated that consideration of the draft would involve difficult legal and political questions, as well as technical issues on which the Legal and Technical Commission was well-placed to advise. On the legal side, a number of delegations stressed the need for consistency with the Convention and Agreement. Procedural issues were also raised. The Commission had not yet completed its rules of procedure. This, it was suggested, made it difficult to know, for example, what competence the Commission has to issue the "guidelines" referred to in the draft. Some questioned the absence of any clear mechanism for the Council to refer questions back to the Commission, although at the resumed session in August, the President of the Council simply took note of questions and undertook to put these to the Commission.

A common theme in almost all general statements was the need to ensure that the Mining Code included effective rules for the protection and preservation of the marine environment. In this context, the representatives of Peru and Chile stressed the need to take account of the rights of coastal states, citing *inter alia* article 142 of the Convention. The Indonesian delegate noted that disruption of fisheries needed to be included in any assessment of environmental hazards. Representatives looked forward to the Authority's environmental issues workshop in

¹⁴⁰ ISBA/4/C/CRP.1 of 1 October 1998.

¹⁴¹ ISBA/4/C/5, paras 9-10: Selected Decisions 4,72.

China in June 1998, and further seminars after that, as likely to shed more light on the extent of the environmental risks.¹⁴²

Another area of general concern was the need for clear rules regarding data to be submitted to the Authority by prospectors and applicants for exploration contracts, and procedures for the handling of confidential information.

Notwithstanding the availability of the carefully constructed Council Groups (Group A, Group B, Group C) as fora for coordination, the general statements also reflected traditional political divisions. The representatives of Brazil spoke on behalf of the Group of 77 to stress developing country concerns, including the need to secure proper training programmes. A number of representatives from developed countries stressed the importance of reconciling proper supervision of seabed mining by the Authority, including environmental and data-related regulations, with the need to ensure that seabed mining would be attractive to commercial investors. The United Kingdom representative noted that if there were no mining there would be no benefit to mankind under the "common heritage of mankind" provisions of the Convention.

*Informal Council Discussion of the Draft Mining Code, March and August 1998*¹⁴³

Many of the issues raised in the general statements were elaborated in the regulation-by-regulation discussions. Some debates were repetitive, illustrating how a few core concerns pervade the whole question of establishing international oversight of deep seabed mining. At all stages of the discussion, the need was stressed for the Code to be as clear as possible, with particular attention to accuracy where language in the draft was taken directly from the Convention and the Agreement.

The discussion of prospecting (Regulations 2-5) illustrated a number of core concerns. In view of the need to ensure consistency with the Convention, most representatives resisted a suggestion that the Mining Code defines prospecting as an "activity in the Area" alongside exploration and exploitation. Nevertheless there was fairly wide agreement

¹⁴² The 1999 budget of the Authority includes provision for a further seminar, planned to take place in Kingston.

¹⁴³ ISBA/4/C/14, para.3: Selected Decisions 4,76. References to Regulations 2-21 are as revised in: ISBA/4/C/CRP.1.

that the regime for prospecting should be subject to the same safeguards on the environment and handling commercial data as exploration. Thus, prospecting is not allowed "if substantial evidence indicates the risk of serious harm to the environment" and prospectors must take measures for the "protection *and preservation*," of the marine environment (not just "protection" as proposed by the Commission). These provisions bring Regulation 2.1bis and 3.4 lit.(d)(i)b respectively into line with article 162 para. 2 lit.(x) of the Convention and Section 1, para. 5 lit.(g) of the Annex to the Agreement.

Similarly, although the Secretary-General is bound to respect the confidentiality of data submitted in annual reports by prospectors, in particular data "of commercial value", it was agreed that there was no reason to restrict access to data submitted by prospectors relevant to findings of archaeological or historical objects; notification of incidents relating to safety at sea or accommodation with other marine activities; or notification of incidents causing serious harm to the marine environment. On the first of these, representatives stressed the need for arrangements compatible with those for underwater cultural heritage under discussion at UNESCO.¹⁴⁴ For the other notifications, the intention was to bring prospecting into line with safeguards for exploration provided respectively by arts 147 and 145 of the Convention. Some also sought to apply article 142 by suggesting priority notification to coastal states nearest to the location of any environmental incident.

Finally, representatives sought to establish certain rights of prospectors, including in Regulation 4 a right of appeal if the Secretary-General finds the notification of prospecting in any way defective.

Notwithstanding broad consensus on these points, the discussion of prospecting did not satisfy all. In particular, there were residual technical concerns about how significant the environmental risks associated with mere prospecting really were, and several delegations remained concerned about excessive levels of confidentiality, which they felt incompatible with the "common heritage".

The underlying themes raised under prospecting recurred during informal discussion of a number of other regulations. For example, arguments about the level of the environmental risk were repeated in discussion of obligations on contractors to demonstrate their financial and technical capacity to respond to serious environmental harm (Regulation 10), and of the environmental impact assessments which would be

¹⁴⁴ UNESCO Doc. CLT-96/CONF.202/5 of April 1998.

needed (Regulation 15). Concerns over the procedural and other rights of contractors not satisfied by their treatment by organs of the Authority were also repeated (Regulations 18 and 21).

Other issues in the informal meetings of the Council included the criteria by which the Commission should consider applications for exploration contracts (Regulation 18) and procedures both for the allocation of areas to contractors and subsequent relinquishment obligations (Regulation 21). Concerns were raised over the limits on the total allocations to any single sponsoring State (Regulation 18.6 lit.(c); and see also Annex III Article 6 lit.(c) of the Convention) and the scope for relinquishment to be deferred on account for example of operational difficulties encountered by the contractor, or because exploration has not been commercially viable in the anticipated contract period (Regulation 21.3).

Overall, the informal Council meetings in March and August 1998 allowed a useful first airing of the various concerns arising under the draft Mining Code. Regulations 28 and 31, which are probably the most important regulations dealing with respectively protection and preservation of the marine environment and with confidentiality, were not reached. There was, however, discussion of these in the margins, with exchanges of ideas and alternative texts among delegations.

The discussion of the Code is complex. As well as recurring environmental, developing country and technical questions, the discussion also relies on participants' knowledge of a wide range of often obscure textual sources in the Convention and Agreement — and the long memories of some individuals who participated either in the negotiation of those texts and/or at the Preparatory Commission discussions.

It remains to be seen how quickly delegations will be ready to commit themselves to adopting the Mining Code. Notwithstanding the calls to prioritize this work, there is still no pressing commercial interest to drive members of the Authority to conclude the Code.¹⁴⁵ The apparent difficulty of reconciling some of the positions taken in the informal Council discussion in March and August 1998 suggest that a lot more discussion will be necessary.

¹⁴⁵ It is worth recalling that the Registered Pioneer Investors which do have a current operational interest, already have terms for exploration agreed by the Authority.

(iii) Assessment of the Authority's Reserved Areas

The areas reserved for the Authority in the Clarion-Clipperton zone are the subject of a comprehensive plan for exploration prepared by the Group of Experts for the Preparatory Commission.¹⁴⁶ A preliminary assessment has been made of the location and abundance of polymetallic nodules in the reserved areas, and possible mineable areas have been identified for future exploration work by the Secretariat, with the assistance of a consultant.¹⁴⁷ Details are not available.

(iv) Development of POLYDAT

The Secretariat has established a secure database (known as POLYDAT) to store and retrieve all data submitted to the Authority as well as to assist in resource assessment work in relation to reserved areas.¹⁴⁸

(v) Request for Adoption of Regulations for Certain Other Resources

On 17 August 1998 the Russian Federation made an oral request in the Assembly of the Authority, pursuant to article 162 para. 2 lit.(o)(ii) of the Convention, that the Authority adopt rules, regulations and procedures for the exploration for cobalt-bearing crusts and hydrothermal polymetallic sulphides.¹⁴⁹ It remains to be seen if and when the Authority will respond.

¹⁴⁶ LOS/PCN/BUR/R/10 and Add.1, reproduced in: LOS/PCN/153 (Vol. III), 157-180.

¹⁴⁷ ISBA/3/A/4, para. 50: Selected Decisions 1/2/3, 56-57.

¹⁴⁸ ISBA/3/A/4, paras 51-53: Selected Decisions 1.2.3, 57.

¹⁴⁹ ISBA/4/A/18, para.14: Selected Decisions 4,66; ISBA/4/A/CRP.2. Article 162 para.2 lit.(o)(ii) provides that: "Rules, regulations and procedures for the exploration for and exploitation of any resource other than polymetallic nodules shall be adopted within three years from the date of a request to the Authority by any of its members to adopt such rules, regulations and procedures in respect of such resource." This provision is to be read together with the 1994 Agreement, in particular its Annex, Section 1 para.15; but note that para.15 lit.(b) and (c) apply only to rules, regulations and procedures relating to exploitation, not exploration.

IV. Conclusions

During its first four sessions (1994–1998) the International Seabed Authority has adopted many of the organizational decisions necessary for its proper functioning as an autonomous international organization. These include:

- election of the Council, Finance Committee and Legal Technical Commission;
- election of the Secretary-General;
- Rules of Procedure of the Assembly and Council;
- Protocol on Privileges and Immunities;
- Relationship Agreement with the United Nations;
- adoption of budgets and scales of assessment.

The Authority has been established on a cost-effective basis, with a relatively small Secretariat and budget. This is a considerable achievement, but much remains to be done. In addition to the adoption of further institutional texts (Financial Regulations, Staff Regulations, Rules of Procedure of the Finance Committee and the Legal and Technical Commission), the need for cost-effectiveness requires constant vigilance. The Authority has also commenced its operational activities, with the award of seven plans of work and progress towards the adoption of a Mining Code, to include rigorous environmental provisions.

What of the future? It is still too early to say whether the Assembly and Council will deal with substance in a business-like way. There are mixed signals. Some slow but solid work has been done. The time taken to establish the organs was frustrating for all concerned, but is unlikely to be repeated. The failure of many members to attend sessions is more serious, and could become a real obstacle to the conduct of business in the future. And the failure of many to pay contributions on time, or at all, is a serious matter, possibly indicating a lack of real interest in the Authority.

Three objectives may be considered for the short to medium-term:

- The members of the Authority need to ensure that nothing is done that will unnecessarily hamper commercial deepsea mining if and when that becomes a real prospect (since otherwise the common heritage will benefit no one), while taking due account of other interests, in particular the need for adequate environmental protection and the need to avoid unfair competition (subsidies).

- Members also need to ensure that the Convention and Agreement are strictly adhered to, in particular that the Authority does not exceed its powers and functions and that procedural safeguards (especially the relationship between Council and Assembly, and in the budgetary sphere Finance Committee) are maintained.
- Members further need to ensure that the Authority remains cost-effective, and that its budget is no more than strictly necessary for its specific and limited functions under the Convention and Agreement. Depending on the prospects for deep seabed mining radical steps may be needed to avoid unnecessary expenditure.

These objectives are important for all present members of the Authority, and for those which may become members in the future. The first objective in particular is important for any countries with serious mining interest which remain outside the Convention, since seabed mining is now unlikely to take place except under the international regime. Those remaining outside will unavoidably have diminishing influence, and be less able to defend such interests as they may have.

First Four Sessions of the Authority: An Overview

First Session, 1994–1995

First part, 16–18 November 1994

- ceremonial

Second part (resumed first session), 27 February–17 March 1995

- Assembly adopts Rules of Procedure
- consultations on election of Council

Third part (further resumed first session), 7–18 August 1995

- interim budgetary decisions
- further consultations on election of Council

Second Session, 1996

First part, 11–22 March 1996

- Assembly elects Council

- Assembly elects Secretary-General

Second part (resumed second session), 5–16 August 1996

- Assembly elects Finance Committee
- Assembly adopts 1997 budget
- Council adopts Rules of Procedure
- Council elects Legal and Technical Commission (LTC)

Third Session, 1997

First part, 17–28 March 1997

- Assembly approves UN Relationship Agreement
- LTC begins consideration of draft Mining Code

Second part (resumed third session), 18–29 August 1997

- Council notes that 7 plans of work are considered approved
- Assembly adopts 1998 budget and scale of assessment
- LTC further considers draft Mining Code

Fourth Session, 1998

First part, 16–27 March 1998

- Assembly elects 18 Council members and regularizes terms of office of Council members
- Assembly adopts Protocol on Privileges and Immunities
- LTC completes consideration of draft Mining Code
- Council begins consideration of draft Mining Code

Second part (resumed fourth session), 17–28 August 1998

- Assembly adopts budget for 1999
- Council recommends decision on 1999 scale of assessment
- Finance Committee proposes draft Financial Regulations
- Legal and Technical Commission proposes draft Rules of Procedure
- Council further considers draft Mining Code

Third part (further resumed fourth session), 12–13 October 1998 (New York)

- Assembly adopts decision on 1999 scale of assessment

The Authority's Documentation

Documents of the International Seabed Authority begin with the letters "ISBA". An index to the main documents of the Assembly and Council for the first three sessions is in Selected Decisions 1/2/3, 75-8, and an index for the fourth session is in Selected Decisions 4, 78-80. These list most formal A (Assembly) and C (Council) documents (each in three series, -/1; -/L.1; and -/WP.1, corresponding to main documents, documents with limited distribution and working papers respectively). Documents of the first two sessions do not have a sessional number (e.g. ISBA/A/1), but from the third session on they do (e.g. ISBA/3/A/1). Some publications have the suffix E (English), F (French) or S (Spanish).

In addition to A and C documents there are the following series:

ISBA/FC (Finance Committee)

ISBA/LTC (Legal and Technical Commission)

ISBA/INF (Information)

As with the Preparatory Commission there are, no verbatim or summary records of meetings. Sound recordings are made and retained.

An account of the meetings may be found in the press releases, but these are not official records and are not necessarily accurate.

Official accounts of the work of the Authority are to be found in the successive statements of the Presidents of the Assembly and the Council on the work of their organs, and the annual reports of the Secretary-General:

ISBA/A/L.1/Rev.1 (Selected Decisions 1/2/3, 3–7):

Statement of the President on the work of the Assembly during the second part of the first session

ISBA/A/L.7/Rev.1 (Selected Decisions 1/2/3, 7–12):

Statement of the President on the work of the Assembly during the third part of the first session

ISBA/A/L.9 (Selected Decisions 1/2/3, 17–25):

Statement of the President on the work of the Assembly during the first part of the second session

ISBA/C/L.3 (Selected Decisions 1/2/3, 43–45):

Statement of the President Pro Tem on the work of the Council during the resumed second session

ISBA/A/L.13 (Selected Decisions 1/2/3, 29–32):

Statement of the President on the work of the Assembly during the resumed second session

ISBA/3/C/L.4 (Selected Decisions 1/2/3, 64–66):

Statement of the President on the work of the Council during the third session

ISBA/3/A/L.4 (Selected Decisions 1/2/3, 43–45):

Statement of the President on the work of the Assembly during the third session

ISBA/3/C/11 (Selected Decisions 1/2/3, 72–74):

Statement of the President on the work of the Council during the resumed third session

ISBA/3/A/11 (Selected Decisions 1/2/3, 61–64):

Statement of the President on the work of the Assembly during the resumed third session

ISBA/4/C/5 (Selected Decisions 4, 70–72):

Statement of the President on the work of the Council during the fourth session

ISBA/4/A/9 (Selected Decisions 4, 49–52):

Statement of the President on the work of the Assembly during the fourth session

ISBA/4/C/14 (Selected Decisions 4, 75–77):

Statement of the President on the work of the Council during the resumed fourth session

ISBA/4/A/18 (Selected Decisions 4, 64–67):

Statement of the President on the work of the Assembly during the resumed fourth session

ISBA/4/A/22 (Selected Decisions 4, 67–68):

Statement of the President on the work of the Assembly during the further resumed fourth session

ISBA/3/A/4 (Selected Decisions 1/2/3, 45-60):

Report of the Secretary-General of the International Seabed Authority under article 166 para. 4, of the United Nations Convention on the Law of the Sea (first annual report, November 1994 to June 1997)

ISBA/4/A/11(Selected Decisions 4, 52-63):

Report of the Secretary-General of the International Seabed Authority under article 166 para. 4, of the United Nations Convention on the Law of the Sea (second annual report, July 1997-June 1998).

In addition, the Authority's publications at present comprise:

International Seabed Authority, Handbook 1997/1998 (ISA/98.03)

Rules of Procedure of the Assembly (ISA/97/001)

Rules of Procedure of the Council (ISA/97/002)

Selected Decisions and Documents of the First, Second and Third Sessions (ISA/98/01)

Selected Decisions and Documents of the Fourth Session (ISA/99/01)

Consolidation of Part XI of the Convention and the Implementation Agreement (ISA/98/04)

The Authority's homepage on the Internet is [http:// www.isa.org.jm/](http://www.isa.org.jm/)