A Constitution for the Oceans: Comments and Suggestions Regarding Part XI of the Informal Composite Negotiating Text

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*In this Article, Mrs. Borgese critically examines the provisions of Part XI of the Informal Composite Negotiating Text and continues the trend she began last year** by indicating the relationship between the law of the sea and efforts of the developing nations to restructure the world political and economic system. She continues with an acute critique of the present draft of the negotiating text and makes provocative suggestions for reforming the draft to accommodate the quest of developing nations for a new world economic order.*

INTRODUCTION

The Sixth Session of the United Nations Conference on the Law of the Sea concluded its work on July 15, 1977.[1] A week after its adjournment, a new document was released—the Informal Composite Negotiating Text (ICNT).[2] It was drafted under the direction of the Conference President, Ambassador H. Shirley Amerasinghe, working in close cooperation with the Chairmen of the three working Committees—Paul Engo of Cameroon, Andres Aguilar of Venezuela

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** In Borgese, *The New International Economic Order and the Law of the Sea*, 14 SAN DIEGO L. REV. 584 (1977), Mrs. Borgese argued that there is a significant relationship between the new international order and the law of the sea that must be dealt with in a total problem-solution approach.

1. Wash. Post, Aug. 14, 1977, § 1, at 1, col. 1.

2. Informal Composite Negotiating Text, U.N. Doc. A/Conf. 62/WP. 10 (1977) [hereinafter cited as ICNT].

and Alexander Yankov of Bulgaria—plus the Chairman of the Drafting Committee, Alan Beesley of Canada, and the Rapporteur, Kenneth Rattray of Jamaica. The new document will serve as a basis for discussion at the Seventh Conference Session, scheduled to open on March 28, 1978, in Geneva. After the conclusion of the next session, it should be turned over to the Drafting Committee, which will transform it from a "negotiating text" into a Draft Convention to be voted on during the Eighth Session and, hopefully, adopted by 1979.

The Sixth Session was exceptionally long. The original schedule of seven weeks was immediately extended to eight weeks, and work was unusually hard. Some working groups worked literally day and night. There was the usual frustration and waste accompanying any undertaking of this magnitude and complexity, but there were breakthroughs on major points, and the release of the ICNT clearly marked the beginning of a new and conclusive phase of the Conference. This is not merely because the ICNT is a *new* document, but because it is a document qualitatively different from previous Conference documents.[3] It articulates a small but significant number of breakthrough proposals, and it recasts, harmonizes, and unifies the work of the three Committees into the work of one Conference. The Conference has thus achieved a Draft Ocean Space Convention.

The term *Draft Ocean Space Convention* is used purposively, for this was the title of a working paper introduced by the Delegation of Malta in the United Nations Seabed Committee in 1971,[4] and this working paper must be acknowledged as the prototype or ancestor of the ICNT. In form and content there are basic similarities between the two documents. The Maltese Draft consists of thirty-one chapters in five parts and 205 articles. The ICNT consists of sixteen parts and 303 articles with seven annexes. Both documents begin with a general, noninstitutional part, streamlining and bringing up to date the traditional law of the sea.[5] Both continue with a section on limits dealing with the traditional titles, such as baselines, straight baselines, mouths of rivers, bays, and so forth,[6] followed by sections containing general rules for the conduct of States in ocean space,[7]

3. Previous Conference documents include the Revised Single Negotiating Text, U.N. Doc. A/Conf. 62/WP. 8/Rev. 1 (1976) [hereinafter cited as RSNT]; and the Informal Single Negotiating Text, U.N. Doc. A/Conf. 62/WP. 8 (1975).

4. Draft Ocean Space Treaty—Working Paper Submitted by Malta, *in* Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 26 U.N. GAOR, Supp. (No. 21) 105, U.N. Doc. A/8421 (1971) [hereinafter cited as DOSC].

5. ICNT, *supra* note 2, pts. I to II, § 1; DOSC, *supra* note 4, pt. I.

6. ICNT, *supra* note 2, pt. I, § 2; DOSC, *supra* note 4, pt. II.

7. ICNT, *supra* note 2, pts. II, §§ 3-4 to III; DOSC, *supra* note 4, pt. III.

sections on ocean space under national jurisdiction,[8] and sections on ocean space under international jurisdiction.[9]

There are three major differences between the noninstitutional parts of each document. First, in the Maltese Draft the general provisions[10] are more complete, incorporating much of the material (scientific research, for example) which in the ICNT has been left for a later section.[11] The ICNT reflects to some extent the former, not yet completely dissolved division of the three Parts of the three Committees. Second, in the Maltese Draft *national ocean space* is a unified concept which includes internal waters, territorial sea, contiguous zone, economic zone and economic shelf to a distance of 200 miles from clearly defined baselines.[12] This is a far more modern, streamlined, and workable concept than the traditional divisions and categories found in the ICNT.[13] Third, in the Maltese Draft, *international ocean space* beyond clearly defined limits of national jurisdiction is likewise a unitary concept, encompassing seabed, water column and surface, the whole constituting the "common heritage of mankind."[14] The ICNT, however—more or less consistently—conceives only the international seabed as common heritage, while the superjacent waters are still subject, with some necessary adaptations, to the traditional regime of the "freedoms of the High Seas."[15] The ICNT's approach causes many difficulties and contradictions.

In both documents, the noninstitutional part is followed by an institutional part, describing the structure and functions of new ocean institutions.[16] The main differences are first, that the Maltese Draft provides an institutional framework for the management of all uses of ocean space and resources and a dispute settlement system.[17] The ICNT provides a complete institutional framework for only *one* of these uses—the mining of minerals from the international seabed[18]—and a dispute settlement system.[19] Other uses of ocean space

8. ICNT, *supra* note 2, pts. IV-VI; DOSC, *supra* note 4, pt. III.
9. ICNT, *supra* note 2, pts. VII, IX, XI-XIII; DOSC, *supra* note 4, pt. IV.
10. DOSC, *supra* note 4, pt. I.
11. ICNT, *supra* note 2, pt. XIII.
12. DOSC, *supra* note 4, pt. II.
13. The ICNT also creates a new division, archipelagic waters. ICNT, *supra* note 2, pt. IV (Archipelagic States).
14. DOSC, *supra* note 4, pt. IV.
15. ICNT, *supra* note 2, pt. XI, §§ 1-3.
16. *Id.*, pts. XI, §§ 4-6, XV; DOSC, *supra* note 4, pt. V.
17. DOSC, *supra* note 4, pt. V.
18. ICNT, *supra* note 2, pt. XI, §§ 4-6.
19. *Id.*, pt. XV.

and resources—management of living resources, navigation, and scientific research—are dealt with, more or less, through the existing institutional framework. Within this framework, however, the ICNT foresees and requires structural and functional modifications. Second, the institutional part of the Maltese Draft is unified.[20] The institutional part of the ICNT, however, is disrupted by the insertion of a second noninstitutional part dealing with environmental policy, scientific research, and the transfer of technology.[21] These were the provisions of the former Part III of the Single Negotiating Text[22] which in the Maltese Draft, have been absorbed in the other noninstitutional and institutional parts. Third, the institutional sections on seabed mining and dispute settlement are far more developed and advanced in the ICNT than they are in the Maltese Draft.

Thus it is clear that the Maltese Draft—amazingly ahead of its time in 1971—has remained, in some respects, still ahead of the ICNT. In other ways it has been surpassed by the political developments, the changing concepts and interests, and the collective work of the greatest international conference in history. It is a rather awesome experience to see this mammoth meeting, despite all difficulties, despite itself, move ineluctably, as though driven by the dynamism of some technological or economic or political imperatives transcending the Conference, in the direction of giving a new order to the oceans and to the world.

Comments and Suggestions

The regime that will govern the management of the resources of the deep seabed beyond the limits of national jurisdiction is described in Part XI of the ICNT, entitled "The Area." Part XI may be divided into two parts: a noninstitutional part, on principles, conduct of activities, resource policy, and so forth, comprised of sections 1 through 4; and an institutional part, on the structure and functions of the Authority, comprised of sections 5 and 6. Perhaps it would be better, and more in conformity with the organization of the other parts of the ICNT, if Part XI were formally divided. Thus, it would become Parts XI and XII of the ICNT.

Part XI begins with Article 133, "Use of terms." This should be moved to, and consolidated with, Part I of the Convention, which is also entitled "Use of Terms." The next section, Article 134, concerns scope or limits. Paragraph 1 of Article 134 provides that "[t]his part

20. DOSC, *supra* note 4, pt. V.
21. ICNT, *supra* note 2, pts. XII-XIV.
22. Informal Single Negotiating Text, U.N. Doc. A/Conf. 62/WP. 8/pt. III (1975).

of the present Convention shall apply to the 'Area.'[23] This seems somewhat superfluous because Part XI is in fact entitled "The Area." Paragraphs 2 and 3 of Article 134 provide for the modalities of delimiting the Area. Paragraph 2, however, should be rephrased, inasmuch as it refers to "limits referred to in paragraph 1 of this article,"[24] but paragraph 1 does not mention any limits. The corresponding paragraph of the Revised Single Negotiating Text (RSNT) did note limits,[25] but it has been rephrased in the ICNT;[26] therefore, paragraph 2 must be rephrased accordingly. Paragraph 4 states that "[n]othing in [Article 134] shall affect the validity of any agreement between States with respect to the establishment of limits between opposite or adjacent States."[27] Paragraph 5 provides that the "[a]ctivities in the Area shall be governed by the provisions of . . . Part XI of the present Convention."[28] Again, the language appears to be somewhat superfluous because the concept is stated throughout the ICNT in clear and unmistakable terms.

It might be useful, instead, if Article 134 on scope or limits contained a paragraph about the rights and legitimate interests of coastal States. Article 142, for instance, might be relocated here. Article 135, which deals with the legal status of the superjacent waters and airspace, might also be relocated here. The result would be a concise and complete Article on *scope* or *limits* consisting of five paragraphs.

The basic principle governing the conduct of States in the international seabed area is treatment of the area as the common heritage of mankind. It cannot be stressed enough that the adoption of this principle by the General Assembly as a norm of international law marked the beginning of a revolution in international relations.[29] It has the potential to transform the relationship between poor and rich countries. It must and it will become the basis of the new international economic order, of which the Law of the Sea Convention, whether

23. ICNT, *supra* note 2, art. 134(1).
24. *Id.*, art. 134(2).
25. RSNT, *supra* note 3, pt. I, art. 2(1).
26. Article 2(1) of the RSNT reads: "This Part of the Convention shall apply to the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, hereinafter called the 'Area'." *Id.* Article 134(1) of the ICNT states only: "This Part of the present Convention shall apply to the 'Area'." ICNT, *supra* note 2, art. 134(1).
27. ICNT, *supra* note 2, art. 134(4).
28. *Id.*, art. 134(5).
29. *See* G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 28) 24, U.N. Doc. A/8028 (1970). For a history of the ramifications of this resolution, *see generally* B. BUZAN, SEABED POLITICS 65-302 (1976).

one likes it or not, is both a forerunner and an essential part. It is surprising, therefore, that the Conference has done so little about *elaborating* the concept of common heritage and giving it a clear definition in legal and economic terms. For the outsider or newcomer to international law and the law of the sea, it is difficult to conceptualize the precise meaning of this new concept, which remains somewhat rhetorical and ethereal. Yet the components of a definition are all in the ICNT, and one might use the components to formulate two basic articles:

First Article

The Area and its resources are the common heritage of mankind.

Second Article

For the purposes of this Convention "common heritage of mankind" means that:

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or person, natural or juridical, appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized.

2. The Area and its resources shall be managed for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or landlocked, and taking into particular consideration the interests and needs of the developing countries as specifically provided for in this Part of the Convention.

3. The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or landlocked, without discrimination and without prejudice to the other provisions of this Part of the present Convention.

4. Necessary measures shall be taken in order to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area, in accordance with Part VII of the present Convention.

These paragraphs exemplify the four legal and economic attributes of the common-heritage concept as they have developed in discussions and writings since their introduction in 1967.[30] More briefly, they are non-appropriability, management for the benefit of mankind as a whole, use for peaceful purposes only, and conservation for future generations. The first of these two proposed articles is actually Article 136 of the ICNT.[31] Paragraph 1 of the second article is identical to Article 137(1) of the ICNT,[32] while paragraphs 2 and 3 of this Article 137, differentiating *resources* and *minerals*, have been omit-

30. Ambassador Pardo of Malta first introduced the common heritage concept in the United Nations General Assembly in 1967. B. BUZAN, SEABED POLITICS 67 (1976).

31. ICNT, *supra* note 2, art. 136.

32. Article 137 is entitled "Legal status of the Area and its resources." *Id.*, art. 137.

ted. They might be transposed, however, to Part I, "Use of Terms," at the beginning of the Convention.[33] Paragraph 2 of the proposed articles corresponds to Article 140 of the ICNT,[34] while paragraph 3 is identical to Article 141 of the ICNT.[35] Paragraph 4 corresponds to the chapeau of Article 145.[36] The subparagraphs of these ICNT articles could be moved into a later section. Thus, a rather complete and lapidary definition of the common heritage of mankind can be drawn from Articles 136, 137, 140, 141, and 145 of the ICNT.

In the ICNT, these articles are interrupted by other articles concerning principles such as "General conduct of States in relation to the Area,"[37] "Responsibility to ensure compliance and liability for damage,"[38] and "Rights and legitimate interests of coastal States."[39] These might appropriately *follow*, rather than interrupt, the articles and paragraphs which essentially define the common-heritage concept.

The next section of Part XI, section 3, concerns the "Conduct of activities in the Area." Throughout the ICNT, there is some confusion about the term *activities in the area*. In Part I, "Use of Terms," for example, " 'Activities in the Area' means all activities of exploration for, and exploitation of, the resources of the Area;"[40] that is, the term *activities* is narrowly construed to relate only to the exploration and exploitation of the Area. In section 3 of Part XI, however, this term is *broadly* construed. In Part XI the term *activities* includes marine scientific research, the transfer of technology, the protection of the marine environment, the protection of human life, and the disposal of archaeological and historical objects.[41]

Section 3 of Part XI also contains an article entitled "Accomodation of activities in the Area and in the marine environment,"[42] which includes paragraphs on "installations." Perhaps these would

33. *Id.*, pt. I.
34. Article 140 is entitled "Benefit of mankind." *Id.*, art. 140.
35. Article 141 is entitled "Use of the Area exclusively for peaceful purposes." *Id.*, art. 141.
36. Article 145 is entitled "Protection of the marine environment." *Id.*, art. 145.
37. *Id.*, art. 138.
38. *Id.*, art. 139.
39. *Id.*, art. 142.
40. *Id.*, art. 1(1)(3).
41. *See id.*, pt. XI, § 3.
42. *Id.*, art. 147.

be better placed in a separate section. There is also an article entitled "Participation of developing countries in activities in the Area."[43]

Obviously the activities in the Area include, above all, development of resources of the Area. This notion, however, is articulated in section 4 of Part XI, which consists of four articles, three of which are poorly organized and inappropriately titled. They are, "Policies relating to activities in the Area,"[44] which in reality sets forth the *purposes* of the Authority; "Functions of the Authority,"[45] which is an inappropriate subtitle in a section on the development of resources of the Area; and "Periodic review,"[46] likewise an inappropriate subtitle for this section.

The title of Article 150, "Policies relating to activities in the Area," and the title of section 3 of Part XI, "Conduct of activities in the Area," are confusing because although in section 3 *activities* are construed broadly, in Article 150 they refer only to the exploration and exploitation of resources. Thus the scope and purpose of the Authority remains ambiguous: Is it to be a Seabed Authority, bearing broad, political responsibilities for the governance of a substantial area of ocean space? Is it a Seabed Resource Authority, or a Seabed Mineral-Resource Authority? Is the competency of the Authority merely economic? And, is the Authority itself really an "Enterprise"?

As early as 1968 it appeared that the new ocean regime would be partly political, partly scientific, and partly economic; that is, it would be partly a government and partly a business, and it would have to combine economics, science, and politics in a new way.[47] The Conference is still wrestling with this problem, and there appears to be a dichotomy of perceptions: developing countries appear to perceive the Authority as a *comprehensive* institution, while industrialized States perceive it as a business. This ambiguity complicates the discussion of the structure of the Council,[48] the relations between the Council and the Enterprise,[49] and the privileges and immunities of the Enterprise.[50]

Perhaps the most satisfactory approach to coping with this fundamental difficulty would be to insert a section on *Purposes* after the

43. *Id.*, art. 148.
44. *Id.*, art. 150.
45. *Id.*, art. 151.
46. *Id.*, art. 152.
47. *See* E. BORGESE, THE OCEAN REGIME (1968) (Center Occasional Paper, Center for the Study of Democratic Institutions).
48. *See generally* ICNT, *supra* note 2, pt. XI, § 5(3).
49. *See generally id.*, § 5(5).
50. *See generally id.*, § 5(7). *See also id.*, Annex III.

Principles section.[51] This *Purposes* section should include the much labored Article 150, paragraphs 1(a) through 1(g), without sub-subparagraphs A through D,[52] and paragraph 2,[53] with the addition of further subparagraphs after subparagraph (a). The additional subparagraphs should include: (a_1) the advancement of marine scientific research and international cooperation to this end; (a_2) the protection of the marine environment and of the living resources of the Area; (a_3) the preservation and equitable disposal of archeological and historical objects; and (a_4) the protection of human life and fair, safe conditions for work in the Area.

The proposed section on *Purposes* then should be followed by the section on the *Conduct of Activities*.[54] This section should begin with an article on the exploration and exploitation of the mineral resources of the Area to be carried out by the Authority on behalf of all mankind in accordance with this Convention.[55] This could be formulated as a slightly modified version of Article 151(1).[56] Then, the *Activities* section should be followed by a section on *Resource Policy*, consisting of sub-subparagraphs A through D of paragraph 1 of Article 150.[57] A section on *Mode of Exploitation* or—even better perhaps—*Management*, should follow *Resources Policy*. The final section should be *Review*, consisting of two articles: "Periodic review,"[58] and "The Review Conference."[59]

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51. The *Principles* section of the ICNT is Part XI, § 2.

52. Sub-subparagraphs A-D contain detailed provisions for the protection of developing States from economic consequences of the Area's exploitation. ICNT, *supra* note 2, art. 150(1)(g)(A)-(D).

53. Paragraph 2 of Article 150 states:

> (a) The Authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area.
>
> (b) Special consideration for developing countries, including particular consideration for the land-locked and geographically disadvantaged among them, specifically provided for in this Part of the present Convention, shall not be deemed to be discrimination.
>
> (c) All rights granted shall be fully safeguarded in accordance with the provisions of this Convention.

Id., art. 150(2).

54. *Id.*, pt. XI, § 3.

55. Section 3 now begins with an article on marine scientific research. *Id.*, art. 143.

56. Article 151(1) provides: "Activities in the Area shall be carried out by the Authority on behalf of mankind as a whole in accordance with [*inter alia*] the provisions of this article . . . ." *Id.*, art. 151(1).

57. *See* note 52 *supra*.

58. ICNT, *supra* note 2, art. 152.

59. *Id.*, art. 153.

The structure of the noninstitutional part then would be straightforward, streamlined, logical, coherent, and complete. It would consist of seven sections: 1. Limits, 2. Principles, 3. Purposes, 4. Activities, 5. Resource policy, 6. Management, and 7. Review.

Comments Concerning Individual Articles

Articles 150-153 of section 4 of Part XI are part of the so-called Evensen compromise; that is, they are part of the package laboriously elaborated first in Geneva in March, 1977, by a group meeting under the chairmanship of Minister Evensen of Norway, and then by the Chairman's Negotiating Group, again working under Evensen's direction during most of the Sixth Session. This group produced three sets of articles: the first concerns the system of production;[60] the second deals with the structure of the Authority;[61] and the third involves dispute settlement.[62] We are concerned here with the first of these groups of articles.

Article 150: Policies Relating to Activities in the Area

The first package has been adopted by the ICNT in its entirety. In addition to Articles 150-153, it is comprised of Articles 144, 169(4), 173(3), Annex II, paragraph 6, and Annex III, paragraph 10.[63] Anyone who will take the trouble to compare the Evensen Text (ET) (upon which there was little agreement) with the ICNT must come to the conclusion that the differences are relatively minor. Several changes, for instance, are merely drafting alterations. Thus, in the ET the end of the chapeau of paragraph 1 of Article 150 read "with a view to,"[64] while in the ICNT it reads, "specifically so as to insure."[65]

60. Suggested compromise formula on articles 9, 11, 22, 23, 41, 49, 64, 65, annex I, paragraph 8, annex II (June 11, 1977), *reprinted in* 2 FORSCHUNGSINSTITUT FÜR INTERNATIONALE POLITIK UND SICHERHEIT, STIFTUNG WISSENSCHAFT UND POLITIKE, DOKUMENTE DER DRITTEN SEERECHTSKONFERENZ DER VEREINTEN NATIONEN—NEW YORKER SESSION 1977, at 420 (1977) [hereinafter cited as ET, pt. I].

61. Chairman's Negotiating Group: Suggested compromise formulation on Organs of the Authority (June 29, 1977), *reprinted in* 2 FORSCHUNGSINSTITUT FÜR INTERNATIONALE POLITIK UND SICHERHEIT, STIFTUNG WISSENSCHAFT UND POLITIK, DOKUMENTE DER DRITTEN SEERECHTSKONFERENZ DER VEREINTEN NATIONEN—NEW YORKER SESSION 1977, at 452 (1977) [hereinafter cited as ET, pt. II].

62. Norway: Settlement of Disputes (July 9, 1977), *reprinted in* 2 FORSCHUNGSINSTITUT FÜR INTERNATIONALE POLITIK UND SICHERHEIT, STIFTUNG WISSENSCHAFT UND POLITIK, DOKUMENTE DER DRITTEN SEERECHTSKONFERENZ DER VEREINTEN NATIONEN—NEW YORKER SESSION 1977, at 473 (1977).

63. Articles 150-153 comprise Part XI, § 4 of the ICNT, which is entitled "Development of resources of the Area." Article 144 deals with technology transfer to the Enterprise and to developing States. Articles 169(4) and 173(3), and Annex III, paragraph 10, provide for funding of the Enterprise. Article 169(4) also provides for technology for the Enterprise. Annex II, paragraph 6, states in general that activities in the Area conducted under Article 151 are to be governed by Part XI.

64. ET, pt. I, *supra* note 60, art. 9.

65. ICNT, *supra* note 2, art. 150.

For another example, subparagraph (a) of the ICNT version of Article 150, paragraph 1, adds the words "and rational management" after "orderly and safe development" of the resources of the Area as one of the purposes of the Authority. Although "rational management" has become an expression favored more by the developing States than by the industrialized States, who can really reject it as an aim? What is the difference between "orderly and safe development" and "rational management"? Furthermore, the ET called for the avoidance of "unnecessary waste"[66] while the ICNT eliminates the word "unnecessary" and recommends the "avoidance of waste."[67]

The small, purely verbal, and in no way substantive concession to the developing countries in subparagraph (a) is immediately compensated for by an equally verbal and nonsubstantial, but more comprehensive concession to the industrialized States. The ET contained a paragraph on the equitable sharing and other economic benefits[68] which was condensed from five lines to one and a half in subparagraph (b).[69] Some of the ET's language, however, reappears later in Article 151(9) of the ICNT.[70]

Subparagraph (c) on the transfer of technology has been merely condensed. Subparagraphs (d) and (e) have also been condensed, but all the elements of Article 9 of the ET are included in Article 150(1) of the ICNT.[71]

Paragraph 2 of the ET has been renumbered as subparagraph (g) and, consequently, subparagraphs (a), (b), (c), and (d) from the ET have become sub-subparagraphs A and B(i) and (iii) in the ICNT. In

66. ET, pt. I, *supra* note 60, art. 9(a).
67. ICNT, *supra* note 2, art. 150(1)(a).
68. ET, pt. I, *supra* note 60, art. 9(b).
69. ICNT, *supra* note 2, art. 150(1)(b).
70. Article 151(9) reads:

> The Authority shall establish a system for the equitable sharing of benefits derived from the Area, taking into special consideration the interests and needs of the developing countries and peoples, particularly the land-locked and geographically disadvantaged among them, and countries which have not attained full independence or other self-governing status.

Id., art. 151(9).
71. These elements include increasing availability of raw materials; securing adequate supplies to consumers of such minerals originating in the Area as are also produced outside the Area; maintaining just, reasonable, and remunerative prices for minerals originating in the Area which are also produced elsewhere; and promoting equilibrium between supply and demand. *Id.*, art. 150(1).

the ET's subparagraph (a), the words "[f]acilitating, through existing forums . . . measures necessary"[72] have become "acting through existing forums . . . shall take measures necessary to"[73] in the ICNT sub-subparagraph A. Moreover, the language "as referred to above," has been omitted from the ET and replaced by "in accordance with the rules of procedure established for such organs" at the end of sub-subparagraph A of the ICNT.[74]

In sub-subparagraph B(i) of the ICNT, "shall limit" has replaced "limiting," and "60 per cent" has replaced "two thirds of the cumulative growth segment of the nickel demand." This small percentage variation was the result of negotiation during the Session. Finally, one sentence has been added to the sub-subparagraph: "The Authority shall resume the power to limit the production of minerals from nodules in the Area if the said arrangements or agreements should lapse or become ineffective for any reason whatsoever."[75] Sub-subparagraph B (ii) of the ICNT, which was subparagraph (c) in the ET, has remained unchanged.

In sub-subparagraph B(iii) of the ICNT, "the annual constant percentage rate" from the ET has become the "annual constant percentage rate of increase," and the "20-year period prior to the entry into force of this Part of the Convention" has become "the 20-year period to 1 January 1980."[76] In addition, there are several changes in technical language and methodology. These obviously have been suggested by experts in the technology and economy of marine mineral mining. It is not likely that they came from developing countries.

The ICNT adds a sub-subparagraph C, providing that "the Authority may regulate production of minerals from the Area, other than minerals from nodules, under such conditions and applying such methods as may be appropriate."[77] This notion, however, seems to be implicit in the concept that the Area and its resources are the common heritage of mankind. It should not be of great concern to the nodule mining consortia, but it may be disquieting for the oil companies because it is increasingly likely that there are hydrocarbons in the Area and, certainly, in the Antarctic continental shelf, which may yet be included in the Area. Whether and when these resources become economically exploitable is another question.

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72. ET, pt. I, *supra* note 60, art. 9(2)(a).
73. ICNT, *supra* note 2, art. 150(1)(g)(A).
74. *Id.*
75. *Id.*, art. 150(1)(g)(B)(i).
76. *Id.*, art. 150(1)(g)(B)(iii).
77. *Id.*, art. 150(1)(g)(C).

Article 151: Functions of the Authority

The changes in Article 151[78] are even less significant than the changes in Article 150. The ET's language, "[a]ctivities in the Area shall be conducted, organized and controlled by the Authority,"[79] has been changed to "shall be carried out,"[80] and the ICNT adds that they shall be carried out "on behalf of mankind as a whole,"[81] a rhethorical and unobjectionable addition.

One apparently significant change has been the addition of paragraph 2(ii), which provides for the exploitation of the Area by States and companies "which, through contractual or other arrangements, undertake, in accordance with this Part of the present Convention, to contribute the technological capability, financial and other resources necessary to enable the Authority to fulfil its functions pursuant to paragraph 1 of this article."[82] The real impact of this addition, however, is more rhetorical than substantial, because the *negotiations* between the Authority and applicants for contracts are delineated in the ICNT as they were in the ET and deal precisely with the points mentioned here.[83] Without making any other changes, the ICNT adds paragraphs 7 and 8, which deal with the conduct of activities in the Area,[84] and paragraph 9 from the ET, on benefit sharing.[85]

Paragraph 7 of Article 151 provides:

> The Authority shall carry out marine scientific research concerning the Area and its resources, and may enter into contracts for that purpose. The Authority shall promote and encourage the conduct of marine scientific research in the Area, harmonize and co-ordinate such research, and arrange for the effective dissemination of the results thereof.[86]

About this paragraph, a writer in *Science* Magazine recently commented:

> [P]reviously in the negotiations it had been agreed that research on the deep seabed would be allowed to proceed independent of, and without

78. Article 22 of the ET corresponds to Article 151 of the ICNT.
79. ET, pt. I, *supra* note 60, art. 22(1).
80. ICNT, *supra* note 2, art. 151(1).
81. *Id.*
82. *Id.*, art. 151(2)(ii).
83. *Id.*, art. 151(3)-(6).
84. Article 151(7) is similar to Article 143, which deals with marine scientific research. Article 151(8), concerning technology transfer, is similar to Article 144.
85. Article 151(9) corresponds to Article 9(b) of the ET.
86. ICNT, *supra* note 2, art. 151(7).

> regard to, whatever "Authority" and rules were created for deep ocean mining. But the Engo text broke this agreement and included the heading "Marine Scientific Research" under the chapter on "Conduct of Activities in the Area." It stated, in Article 151.7, "The Authority shall carry out marine scientific research concerning the area and its resources. . . ." Furthermore, this apparently capricious change seems to have the backing of no less a figure than the conference's originator and chairman, Hamilton S. Amerasinghe of Sri Lanka.[87]

Comparing the two texts, one cannot help being surprised by this comment in *Science* because the ICNT has introduced no substantial changes. Article 10 of the Revised Single Negotiating Text (RSNT), corresponding to Article 143 of the ICNT, dealt with scientific research in the Area by States, other entities, and the Authority.[88] Paragraph 2 of Article 10 provides that "[t]he Authority may itself conduct scientific research in the Area and may enter into agreements for that purpose."[89] The ICNT separates, more neatly, the activities of States and other entities in the Area from the functions of the Authority. Because Article 151, paragraph 7, deals with the functions of the Authority, the provision thus was simply moved unchanged from Article 143 (formerly Article 10 of the RSNT) to Article 151 of the ICNT. No substantial change was made.

Engo did not break any agreement, nor did he "[include] the heading 'Marine Scientific Research' under the chapter on 'Conduct of Activities in the Area.' "[90] Rather, he added a section title, "Conduct of Activities in the Area,"[91] to a sequence of articles which was already a part of the RSNT.[92] There were no section titles in the RSNT, but there are section titles throughout the ICNT, so one had to be added. It cannot be denied, nevertheless, that the ICNT Article 151 "Functions of the Authority" is rather confusing; and, as mentioned above, a "compositing" of the articles on conduct of activites in the area and Article 151 on functions of the Authority seems necessary and helpful.

Annex II: Basic Conditions of Exploration and Exploitation

Annex II, paragraph 6, "Activities conducted by the Enterprise," remains unchanged from the ET,[93] except for the omission of an

87. Shapley, *Ocean Scientists May Wash Hands of Sea Law Treaty*, 197 SCIENCE 645, 645 (1977).
88. RSNT, *supra* note 3, pt. I, art. 10.
89. *Id.*, art. 10(2).
90. Shapley, *Ocean Scientists May Wash Hands of Sea Law Treaty*, 197 SCIENCE 645, 645 (1977).
91. ICNT, *supra* note 2, pt. XI, § 3.
92. Section 3 of the ICNT is composed of Articles 143-149. The corresponding Articles in the RSNT are Articles 10-13, 16, and 18-19. RSNT, *supra* note 3, pt. I.
93. Annex II, paragraph 6, of the ICNT corresponds to Annex I, paragraph 8, (new) of the ET.

incomplete text reference in the ET. The changes in the very comprehensive paragraph 5, "Selection of applicants," formerly Annex I, paragraph 8 (bis) of the ET, are minimal. The phrase "where the parties so agree" has been omitted in subparagraph (i) of the ICNT. This is merely a *drafting* change, and not a substantial one, because the paragraph provides that "[c]ontracts . . . *may* provide" not "[c]ontracts . . . . *must* provide."[94] The word "may" clearly implies the agreement of the parties.

In the ET subparagraph (j)(i), describing the "banking system," provided that the Authority should make its selection "as soon as the Authority has been able to examine the relevant data from prospecting, evaluation, or exploration, as may be necessary to decide that both parts are equal in estimated commercial value."[95] The ICNT subparagraph (j)(i) omits the words "from prospecting, evaluation, or exploration," inasmuch as there had been no agreement on the question of exploration and at whose expense it was to be carried out. Thus, the omission is a concession to the industrialized States which insisted that it would be too costly for States or consortia to bear the costs of exploration for the Area to be reserved for the Authority.

In the ET, what is now subparagraph (j)(iii) of the ICNT referred to "joint arrangements" and provided for participation by developing countries. The ICNT adds one sentence: "The nature and extent of such participation shall be determined by the Authority."[96] The ICNT adds two subparagraphs, however, (j)(iv) and (j)(v). Subparagraph (j)(iv) provides that the Authority may require the Contractor to make available to the Enterprise on *fair and reasonable terms* the same technology to be used in the contractor's operation. If there is no agreement on the matter, it is to be referred to *arbitration*.[97] Can one really object to such a provision? Does it basically change the text?

Subparagraph (j)(v) provides that "[n]othing in this subparagraph shall be interpreted as preventing the Enterprise from carrying out activities in accordance with the present annex in any part of the Area not subject to contract or joint arrangement."[98] Because the

94. ICNT, *supra* note 2, Annex II, para. (i) (emphasis added).
95. ET, pt. I, *supra* note 60, Annex I, para. 8(j)(i).
96. ICNT, *supra* note 2, Annex II, para. 5(j)(iii).
97. *Id.*, para. 5(j)(iv).
98. *Id.*, para. 5(j)(v).

Area is the common heritage of mankind, this right seems to be unobjectionable.

Article 169(4): Financing the Enterprise

In the ET, the paragraph that eventually became Article 169(4) of the ICNT read: "The Enterprise shall in accordance with article 49, paragraph 3, and Annex II, paragraph 6(a), be provided with such funds as it may require to carry out its functions."[99] The ICNT adds "and shall receive technology as provided in Article 144, and other relevant provisions of the present Convention."[100] There are no other changes in the article.

Annex III: Statute of the Enterprise

There are no substantial changes in Annex III, paragraph 10, concerning the financing of the Enterprise. There are two additions, however, sub-subparagraphs 10(a)(v) and 10(a)(vi), which resulted from discussion by the negotiating group and are not controversial. The list of *assets of the Enterprise* is completed in the ICNT by these two sub-subparagraphs: "(v) Net income of the Enterprise after transfer of revenues to the Authority in accordance with paragraph 7. (vi) Other funds made available to the Enterprise including charges to enable it to carry out its functions and to commence operations as soon as possible."[101]

The segment of the ET that became subparagraph 10(c)(ii) of the ICNT provided that "States Parties shall make every effort to support applications by the Enterprise for loans in capital markets, including loans from international financial institutions."[102] The ICNT adds "and to cause appropriate changes where necessary in the constitutive instruments of such institutions."[103] This addition is the result of discussion in the Negotiating Group, and there was no objection to it during the discussion.

Paragraph 10(d) of the Annex, providing that "[t]he funds and assets of the Enterprise shall be kept separate and apart from those of the Authority,"[104] has been adopted nearly verbatim from the RSNT[105] at the insistance of the industrialized countries.

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99. ET, pt. I, *supra* note 60, art. 41(4).
100. ICNT, *supra* note 2, art. 169(4).
101. *Id.*, Annex III, para. 10(a)(v)-(vi).
102. ET, pt. I, *supra* note 60, Annex II, art. 6(c)(ii).
103. ICNT, *supra* note 2, Annex III, para. 10(c)(ii).
104. *Id.*, para. 10(d).
105. RSNT, *supra* note 3, pt. I, Annex II, para. 6(d).

Article 144: Transfer of technology

Similarly, the changes in the portion of the ET that is now Article 144, concerning the transfer of technology, are minimal.[106] In paragraph 1, the ET reads: "The Authority and States parties shall cooperate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States benefit therefrom. In particular they shall promote . . . ."[107] The ICNT reads "shall initiate and promote."[108] Subparagraph (a) delineates what they shall promote. The ET reads "[p]rogrammes for the promotion of transfer of technology,"[109] but because "[to] promote: programmes for the promotion of" is stylistically awkward, the ICNT omits the words "promotion of." In addition, the ET reads "facilitating the access of the Enterprise and of developing countries to the relevant technology, under just and reasonable conditions,"[110] while the ICNT reads "under fair and reasonable *terms* and conditions."[111] There are no other changes.

Articles 152 and 153: Periodic Review and the Review Conference

There are no changes in either Article 152, "Periodic review," or Article 153, "The Review Conference," with one important exception. The ICNT adds a paragraph 6 to Article 153, which reads:

> If the Conference fails to amend or to reach agreement within five years on the provisions of this Part of the present Convention governing the system of exploration and exploitation of the resources of the Area, activities in the Area shall be carried out by the Authority through the Enterprise and through joint ventures negotiated with the State and entities referred to in paragraph 2(ii) of Article 151, on terms and conditions to be agreed upon between the parties thereto, provided however that the Authority shall exercise effective control over such activities.[112]

This point is treated again below in greater detail.[113]

106. The ET provision corresponding to Article 144 of the ICNT is Article 11.
107. ET, pt. I, *supra* note 60, art. 11(1).
108. ICNT, *supra* note 2, art. 144.
109. ET, pt. I, *supra* note 60, art. 11(1)(a).
110. *Id.*
111. ICNT, *supra* note 2, art. 144(a) (emphasis added).
112. *Id.*, art. 153(6).
113. *See* text accompanying notes 120-23 *infra*.

Summary

This comparison of the ET and the ICNT has been painstaking, even pedantic. The purpose has been to refute certain recent comments from industrialized countries that the ET was a "breakthrough," providing an acceptable basis for discussion, but which, unfortunately, had been irresponsibly brushed aside in the ICNT and replaced by the totally unacceptable propositions of the Chairman of the First Committee.[114] The foregoing discussion clearly demonstrates, however, that all the major elements of the ET[115] have actually remained intact in the ICNT. The ET has been fully incorporated into the ICNT and the changes are minimal.[116] Most of the changes are merely stylistic, and, considering that the ET was not a negotiated or approved text but rather an informal *basis for discussion*—a fragmentary piece that required integration with other parts of the RSNT—the changes are legitimate. The fact is that with the exception of Article 153(6), which is discussed below,[117] the ICNT adds nothing that is not already provided for in some article of the RSNT or the ET.

The conclusion is that the "Evensen compromise" is itself unacceptable, and the Chairman of the First Committee has been a scapegoat.

The Inevitable Failure of the Evensen Compromise

The "parallel system" was first proposed by the United States, which buttressed its proposal with the offer of a substantial financial contribution to the Enterprise.[118] This might simply have been a way of buying free access to the Area for private companies and industrialized States. Having consumed the gift, the Enterprise would pose no further threat. This system was unacceptable to the majority of States as incompatible with the principle of the common heritage of mankind. Alternatively, the "parallel system" was to be a true par-

114. *See* Shapley, *Ocean Scientists May Wash Hands of Sea Law Treaty*, 197 SCIENCE 645 (1977).

115. Major elements include the resource policy including production limitations; the "parallel system" providing for the exploration and exploitation of the Area by (a) the Enterprise and (b) States and companies on the basis of contracts with the Authority; the "banking system," under which areas sought by a contractor must be divided between the contractor and the Authority; the qualification of applicants; the financial arrangements; and the revision clause.

116. Marne A. Dubs, Director of the Ocean Resources Department of Kennecott Copper Corporation, interprets the ET as "nearly as unacceptable to the developed nations as the Engo text, and . . . view[s] Engo's revisions as 'essentially minor changes.'" Wash. Post, Aug. 14, 1977, § 1, at 1, col. 1, & at 11, col. 2.

117. *See* text accompanying notes 120-23 *infra*.

118. Wash Post, Aug. 14, 1977, § 1, at 1, col. 1.

allel system in which the Enterprise was to assume a position to operate on equal footing with established industry (in fact the only possible basis for negotiation). But the difficulties inherent in this approach were simply insurmountable, and they have remained so. Minister Evensen has loyally, fairly, and with admirable energy and resourcefulness attended to his mandate to shape the details of the "compromise." But it was an impossible mandate from the outset. The reasons for the necessary, inevitable failure of the Evensen Compromise have been set forth in some detail elsewhere[119] and will be merely summarized here:

1. The production control provisions, apparently overly complicated, are really meaningless. What is worse, they may generate consequences opposite those intended because they are based on the erroneous assumption that the Authority has a monopoly on the nodules and that it can actually control nodule mining. The fact is that according to the articles on the limits of national jurisdiction, at least twenty-five percent of the nodules will fall under national jurisdiction. In this situation, either the complex and almost unintelligible provisions are such that they do not effectively limit production beyond the technological and financial capacity of States and companies, or, if the limit really falls below that capacity, production will simply move from the international Area to areas under national jurisdiction. Thus the Authority will not limit production but merely limit itself out of business. The much labored sub-subparagraph B of Article 150(1)(g), therefore, should be omitted altogether from the ICNT, not in order to cater to the advocates of a free market economy, but rather, in simple recognition of reality.

2. The parallel system completely changes the status and the function of the Enterprise. The Enterprise had been conceived as an instrument through which the Authority would earn a considerable income which would enable it to function independently of the contributions by States upon which traditional international institutions depend. It would enable the Authority to re-invest in ocean development and to redistribute wealth in favor of the poorer nations. Now the Enterprise is a bottomless financial drain on the

119. PROCEEDINGS, PACEM IN MARIBUS VII (spec. ed. Univ. of Malta Press 1977); A. PARDO & E. BORGESE, THE NEW INTERNATIONAL ORDER AND THE LAW OF THE SEA (2d ed. 1976) (Occasional Paper No. 5, International Ocean Institute); *id.* (1976) (Occasional Paper No. 4, International Ocean Institute).

Authority. Instead of benefitting all States, rich or poor, through the common utilization of the common heritage, the Enterprise now divides rich and poor nations. The rich States and companies do their own mining while the Enterprise becomes the status symbol of the poor. As it remains a status symbol, however, there is no economic incentive to get the Enterprise off the ground. The poor States simply do not need the Enterprise because nodule production from the deep seabed contributes nothing to their internal development. Moreover, those of the poorer nations which are land producers of the nodule minerals must give priority to the land-based development of their own minerals, while those which are importers of these minerals import on such a small scale that investment in the sophisticated, costly, and risky seabed mining industry at this point would be totally disproportionate. Thus, the Enterprise would depend totally on "foreign aid," which should have been transcended by the principle of sharing in the common heritage. If the principle of the common heritage is to be applied, the international area must be indivisible. To paraphrase one Delegate to the Law of the Sea Conference, there must be a marriage of the common heritage and capital and technology. Otherwise, the common heritage remains an illusory dream.

3. The "banking system" is potentially meaningful and beneficial to the Authority against a backdrop of resource scarcity and total control by the Authority, on the one hand, and of abundant capital, technology and managerial skill on the other. Instead, with an abundance of resources and a scarcity of capital, technology and skill, in combination with the availability of nodules outside the Area, it is rendered meaningless. And this situation is bound to prevail in seabed mining for the next twenty-five years. In the present situation, States and companies give the Authority what they do not need and what, incidentally, the Authority already has in abundance: nodules. What the Authority needs, and what States and companies do *not* give under the "banking system," is capital, technology and managerial skill.

4. The problem of "financing the Enterprise" in this situation becomes totally unmanageable. The Conference, in fact, finds itself locked in the horns of a dilemma with no way out. Either the Enterprise is truly financed and enabled to compete with established industry (and despite the fact that the financial burden on the industrialized States is such that they cannot accept it, only this solution is acceptable to most States), or the burden is lightened to the point where the industrialized States can accept it, in which case the Enterprise cannot get off the ground. There is no way out of this dilemma. The problem is structured incorrectly. If one side goes up, the other goes down, and that is all there is to it.

These four basic, insurmountable difficulties are built into the Evensen compromise formula. In no way are they generated by the minor, mostly verbal modifications introduced by Chairman Engo.

The Nigerian/Austrian Alternative

As though admitting that there was no way to resolve the dilemma, Chairman Engo seems to have clung despairingly to one article, the article on the Review Conference.[120] If it were permissible to read between the lines of the new paragraph 6 of Article 153, the text would read: "We have failed in our attempt to establish a fair and workable system of resource exploitation for the foreseeable future. But let us not abandon our object entirely; let us, instead, prepare a framework which will ensure that such a system will be created twenty-five years from now. And in five concise lines he legislatively seeded the Nigerian/Austrian alternative on a unitary joint venture system[121] to bear fruit twenty-five years from now. A rather daring move, a counsel of despair!

That the unacceptable paragraph 6 is unlikely to make the unacceptable system of exploitation proposed by the ICNT acceptable, however, is already evident from the reactions of government spokesmen and the press in many countries. But paragraph 6 may have one basic merit. It may, at long last, force the Conference to discuss the Nigerian/Austrian alternative, which has been hovering over the horizon for years.

The Austrian proposal abandons the idea of the Enterprise. As an alternative it provides for a flexible *Enterprise system*[122] which guarantees access to States and companies. These, however, may operate in the Area only through association with the Authority. In

120. ICNT, *supra* note 2, art. 153.

121. The Nigerian/Austrian alternative on a unitary joint-venture system began to take shape when it was formally introduced by Nigeria at the end of the Fifth Session of the Conference. Statement by the Hon. Dan Ibekwe (Sept. 17, 1976). Austria elaborated the Nigerian proposal during the March, 1977, working session of the Evensen Group in Geneva. Paper Submitted by Ambassador Wolf, *in* Report of informal consultations in Geneva 50 app. (Apr. 28, 1977), *reprinted in* 1 FORSCHUNGSINSTITUT FÜR INTERNATIONALE POLITIK UND SICHERHEIT, STIFTUNG WISSENSCHAFT UND POLITIK, DOKUMENTE DER DRITTEN SEERECHTSKONFERENZ DER VEREINTEN NATIONEN—NEW YORKER SESSION 1977, at 310, 351 (1977).

122. E. BORGESE, THE ENTERPRISES (1977) (Occasional Paper No. 6, International Ocean Institute).

cooperation with the Authority, they must form new Enterprises for which the Authority provides half of the investment capital and appoints half of the members of the Board of Directors (mostly from developing countries), the other half to be appointed by States and companies in proportion to their respective investments. Profits would be shared in proportion to investment.

Initially there would probably be as many Enterprises as there are mining projects. The Enterprises would form a unitary System based on cooperation, not competition, between the Authority and established industry. The system would radically improve the problem of financing and technology transfer, and it would immensely simplify the problem of the technical annexes to the Convention. In fact, much of this material could be scrapped. Finally, the system would fairly divide risks and income, and it would maximize participation by developing countries in all Enterprises. An additional advantage would be that the system may be easily adapted to operate in areas under national jurisdiction.

Commenting on paragraph 6 of Article 153, President Amerasinghe wrote in his Explanatory Note: "As there have been many and varied references to joint arrangements, and in this case to joint ventures, a thorough discussion of such methods of exploitation and their implications would serve a most useful purpose."[123]

The time has come.

The Structure and Function of the Seabed Authority

Section 5, "The Authority," and section 6, "Settlement of Disputes," of Part XI of the ICNT describe the structure and functions of the Seabed Authority. Perhaps they should be divorced from Part XI to form a separate part concerning the Seabed Authority.

There are no substantial changes in Articles 154 to 156 from the ET to the ICNT. Paragraph 4 of Article 156, however, has been redrafted and clarified.[124] The underlying dispute arose when some industrialized States expressed concern about possible encroachments by the Assembly on the activities of the Council and its organs, whereas other States emphasized the interdependence of all organs of the

123. Informal Composite Negotiating Text Explanatory Memorandum by the President, U.N. Doc. A/Conf. 62/WP. 10/Add. 1, at 6 (1977).

124. Article 156(4) reads:

> The principal organs shall each be responsible for exercising those powers and functions which have been conferred on them. In exercising such powers and functions each organ shall act in a manner compatible with the distribution of powers and functions among the various organs of the Authority, as provided for in *this Part* of the present Convention.

ICNT, *supra* note 2, art. 156(4) (emphasis original).

Authority, with the Assembly being the supreme body. The new text clearly establishes a "separation of powers."

Articles 157 to 164 of Part XI of the ICNT constitute the second "Evensen package."[125] If the changes made by the Chairman of the First Committee in the first Evensen package concerning the mode of exploitation were very minor (with one exception), those made in the second package are next to none.

Paragraph 7 of Article 157, for instance, provides that "[d]ecisions on questions of procedure, including the decision to convene a special session of the Assembly, shall be made by a majority of the representatives present and voting."[126] The words "including the decision to convene a special session of the Assembly" have been added to the ICNT. They are not in the ET, although they were in the RSNT.[127] In paragraph 10, "one fourth of the members of the Authority"[128] from the ET has become "one quarter of the members of the Authority"[129] in the ICNT.

In another minor change, references to the Seabed Tribunal, wherever occurring, have been replaced by references to the Seabed Disputes Chamber, and the mode of dispute settlement has been harmonized with Part XI, section 6, "Settlement of Disputes."

A small, purely stylistic change was made in paragraph 1 of Article 158, where the words "shall be entrusted" had occurred twice.

In the very controversial Article 159, on the composition, procedure, and voting of the Council, the changes are minimal. As in the ET,[130] half of the thirty-six members of the Council are elected on the basis of special interests and half according to regional representation.

In the ET the first group of Council members (four) in subparagraph (a), which is to be elected from technologically advanced States, must include at least one representative from the Eastern (Socialist) European region. No such provision was made for the second group (four) in subparagraph (b), which is to be elected from major importers of the kinds of minerals to be derived from the

125. ET, pt. II, *supra* note 61.
126. ICNT, *supra* note 2, art. 157(7).
127. RSNT, *supra* note 3, pt. I, art. 25(7).
128. ET, pt. II, *supra* note 61, art. 25(10).
129. ICNT, *supra* note 2, art. 157(10).
130. ET, pt. II, *supra* note 61, art. 27.

Area. The ICNT adds the provision, however, that this group too must include at least one State from the Eastern (Socialist) European region.[131] There appears to be no reason why this should upset the balance of the mining consortia or the minds of its members.

The next group (four) in subparagraph (c) is to be elected from among States which, on the basis of production in areas under their jurisdiction, are major exporters of nodule minerals. The ICNT adds that this group must include at least two developing States.[132] This addition, however, should not be understood to increase the representation of developing countries on the Council because mineral exporting developing countries are not included in the next category (six) in subparagraph (d) concerning developing countries. Furthermore, subparagraph (e) has been adjusted so that the members to be elected from developing countries under this subparagraph may number *two less*. The purpose of this subparagraph is to balance the whole system of elections to the Council to insure "equitable geographical distribution of seats in the Council as a whole."[133]

One substantial change was made in paragraph 7, Article 159, concerning the voting procedure. On this subject the ET provision had a paralyzing effect: "All decisions on questions of substance shall be taken by a two-thirds majority of the members present and voting, provided that such majority includes a simple majority in four of the five categories specified in paragraph 1."[134] The ICNT raises the required majority from two-thirds to three-fourths of the members present and voting but eliminates the crippling requirement of a majority in four of the five groups. This proviso is replaced by a far simpler one: "provided that such majority includes a majority of the members participating in that session."[135]

There have been minor changes in Article 160(2) of the ICNT. Subparagraph (ii) reads "a list of candidates" where the ET read only "candidates."[136] Enumerating the powers and functions of the Council, the ET read: "[a]dopt necessary and appropriate measures . . . to protect against adverse economic effects."[137] The ICNT reads in subparagraph (xii): "[a]dopt on the recommendation of the Economic Planning Commission necessary and appropriate measures."[138]

131. ICNT, *supra* note 2, art. 159(1)(b).
132. *Id.*, art. 159(1)(c).
133. *Id.*, art. 159(1)(e).
134. ET, pt. II, *supra* note 61, art. 27(6).
135. ICNT, *supra* note 2, art. 159(7).
136. ET, pt. II, *supra* note 61, art. 28(2)(ii).
137. *Id.*, art. 28(2)(xi).
138. ICNT, *supra* note 2, art. 160(2)(xii).

Among the functions of the Rules and Regulations Commission, the ET had a provision 2(iv): "[a]dvise the Technical Commission on all legal aspects of its work."[139] This has been omitted in the ICNT, Article 164.

In conformity with other parts of the Convention, "this Part of the Convention" in the ET becomes, throughout, "this Part of the present Convention" in the ICNT. Additionally, the ICNT substitutes "the present Convention" where the ET uses "this Convention."

There are no other changes in this crucially important section on the structure and functions of the Authority. The composition of the Council, nevertheless, is not yet satisfactory. It is unduly complicated, which reflects the lack of clarity with regard to the scope, purpose and functions of the Authority mentioned above. If the Authority is a business, its controlling organ should be structured like that of a business enterprise; that is, it should represent financial power and financial interests. If it is a forum to negotiate commodity agreements, it must be a forum for the meeting of producers and consumers of the commodity. If it is a Seabed Authority, an Authority with broad political responsibilities for the rational management of a large area of ocean space which is the common heritage of mankind, then it is the whole international community that must be represented in the controlling organs. And the principles of representation or participation must be as comprehensive, nondiscriminatory, and simple as possible.

The Seabed Authority is both an intergovernmental organization and a business. It is a political, economic, scientific institution. It is a prototype which will influence the evolution of all international organization. Increasingly, international and national institutions alike will be compelled to achieve this new synthesis which responds to the need for interdisciplinary decisionmaking in contemporary society.

The solution suggested by the ICNT (which is exactly the same as that suggested in the ET) is not successful. The powers and functions of the Council enumerated in Article 160 do not correspond to the functions of the Authority described in Article 151. The function of the Council described in Article 160 is essentially to administer the nodule mining business. While the pertinent provisions are de-

139. ET, pt. II, *supra* note 61, art. 32(2)(iv).

lineated in great detail, there is no reference to scientific research, conservation of the environment, or other matters included under the heading "Conduct of activities in the Area" and "Functions of the Authority."

Scientific research, environmental policy, and the transfer of technology are entrusted to the Technical Commission, an organ of the Council. In the RSNT, the Enterprise was also empowered to carry out and to promote scientific research,[140] but this has been cancelled in the ICNT. Nothing is said about how to coordinate scientific research between the Enterprise and the Technical Commission or the nature of the Council's function.

Of course it may be assumed scientific research is included in the implied powers and functions of the Council because it has the power "to establish . . . the specific policies to be pursued by the Authority on any questions or matters within the competence of the Authority."[141] It is surprising, nevertheless, that scientific research is not mentioned among the functions of the Council, which are described as those of a business administration. However, this strengthens the arguments favoring interest representation, weighted voting, and independence from the Assembly. If, instead, Article 160 delineated the entire range of responsibilities which the Council bears for the Authority, demand for a more participational system would be justified based on simple principles of State equality, geographical distribution (regional representation) and rotation of seats within each region, so that every State gets its turn on the Council. Thus, the political and economic aspects of the Authority would be combined and separated more efficiently. The Council would be a political body; the Enterprise (Enterprise system) would be an economic body, a business wherein financial interests would be duly represented.

The ICNT provides an example of a highly responsible body composed, more or less, according to these principles: The Law of the Sea Tribunal.[142] Article 3 of the Tribunal's statute provides that "[n]o two members of the Tribunal may be nationals of the same State,"[143] and "[t]here shall be not less than three members from each geographical group as established by the General Assembly of the United Nations."[144] This very simple system could easily be adapted to the Council. The Law of the Sea Tribunal has twenty-one members,[145] the Council has thirty-six.[146] Accordingly, it might be pro-

140. RSNT, *supra* note 3, pt. I, Annex II, para. 7(a).
141. ICNT, *supra* note 2, art. 160(1).
142. *See id.*, Annex V.
143. *Id.*, Annex V, art. 3(1).
144. *Id.*, Annex V, art. 3(2).
145. *Id.*, Annex V, art. 2(1).
146. *Id.*, art. 159(1).

vided that "there shall not be less than five members from each geographical group" in the Council.

With regard to the three Commissions to be established by the Council,[147] there has been some tidying up to streamline their operations and to avoid overlapping responsibilities. The functions of the Technical Commission, however, still appear to be too heterogeneous, ranging from scientific research to the inspection and auditing of all books, records and accounts related to the financial obligations of the Authority, and including the supervision of all operations concerning activities in the Area.[148] Perhaps it would contribute to orderliness and comprehensiveness to maintain the Economic Planning Commission as it is, but to rename the other two Commissions the "Commission for Science and Technology" and the "Legal Commission." The responsibilities of the latter would include all activities related to rules and regulations.

In section 5 of Part XI of the ICNT, "The Authority," there are no substantial changes in subsections 4 through 7, concerning the Secretariat, the Enterprise, finance, and legal status, privileges and immunities.[149] The "Legal Status, privileges and immunities" section[150] has generated an interesting discussion (repeated and intensified in connection with the legal status, privileges and immunities of the Enterprise), arising, once more, from the ambiguity of the nature of the Seabed Authority: Is it a political institution, or is it a business? Those who consider it to be a comprehensive political institution intended to manage the common heritage of mankind would like to see privileges and immunities maximized. Those who see it as a business, competing with other private and profit-making businesses in the production of nodule minerals, would like to see privileges and immunities so minimized as to keep the whole system competitive. That the Authority and its Enterprise, which should represent all mankind, can be considered as a competitor of private

147. The Council is to establish an Economic Planning Commission, *id.*, art. 161(a), a Technical Commission, and a Rules and Regulations Commission, *id.*, art. 161(b). These Commissions are described in Article 162 (The Economic Planning Commission), Article 163 (The Technical Commission), and Article 164 (The Rules and Regulations Commission).

148. ICNT, *supra* note 2, art. 163(2).

149. Part XI, § 5(4)-(7) corresponds to Part I, Articles 41-60 of the RSNT. RSNT, *supra* note 3, pt. I, arts. 41-60.

150. ICNT, *supra* note 2, pt. XI, § 7.

and State companies is one of the consequences—and basic weaknesses—of the parallel system.

Settlement of Disputes

Section 6 of Part XI, "Settlement of Disputes," has been vastly improved after the unanimous decision of the Conference to abolish the dual system established by the RSNT. That system provided for a Law of the Sea Tribunal[151] and a separate Seabed Tribunal,[152] with very little coordination between the two. The ICNT abolishes the Seabed Tribunal and provides more functionally for a Law of the Sea Tribunal,[153] with a special Chamber for cases arising from Part XI of the Convention.[154]

This simplifies the dispute settlement section of Part XI considerably. The provisions of the third "Evensen package" concerning dispute settlement[155] have been adopted by the ICNT without any substantial changes and only two very minor rhethorical changes.

Article 190 of the ICNT, "Advisory opinions," which provides that the Seabed Disputes Chamber "shall give advisory opinions when requested to do so by the Assembly, the Council or any of its organs, on any legal question arising within the scope of their activities,"[156] adds only one sentence to the ET: "Such advisory opinions shall be rendered as a matter of urgency."[157] The addition is useful because paragraph 10 of Article 157 provides that, on the request of one quarter of the members of the Authority, an advisory opinion must be sought on any matter concerning the conformity with the Convention of a proposed action before the Assembly, and voting on such a matter is stayed pending the delivery of the Chamber's advisory opinion.[158]

The second addition appears in Article 191, entitled "Scope of jurisdiction with regard to decisions adopted by the Assembly or Council." The added line which is tacked onto the end of the article reads: "in no case shall it [the Sea-bed Disputes Chamber] substitute its discretion for that of the Authority."[159] The addition is

151. RSNT, *supra* note 3, pt. IV.
152. *Id.*, pt. I.
153. *See* ICNT, *supra* note 2, Annex V.
154. *Id.*, pt. XI, § 6.
155. Norway: Settlement of Disputes (July 9, 1977), *reprinted in* 2 FORSCHUNGSINSTITUT FÜR INTERNATIONALE POLITIK UND SICHERHEIT, STIFTUNG WISSENSCHAFT UND POLITIK, DOKUMENTE DER DRITTEN SEERECHTSKONFERENZ DER VEREINTEN NATIONEN—NEW YORKER SESSION 1977, at 473 (1977).
156. ICNT, *supra* note 2, art. 190.
157. *Id.*
158. *Id.*, art. 157(10).
159. *Id.*, art. 191.

rhetorical rather than substantive because it merely summarizes the preceding paragraph. The addition is intended to assuage any fears that the Chamber, rather than the Assembly, might become the supreme organ of the Authority in what many have termed a system of "*gouvernement des juges*."

The section on dispute settlement must fulfill three basic requirements: First, it must identify the issues that are subject to jurisdiction; second, it must ensure that all parties involved (not only States, but companies, juridical persons, international organizations, and so forth) have access to the dispute settlement system; and third, it must set forth the basic obligation to seek peaceful settlement of disputes according to the procedures established for resolving the issues subject to jurisdiction. This notion, as was pointed out during the debate, does not include commercial arbitration, which can be dealt with in the usual ways. But it might encompass issues concerning the repudiation of contract, the legality of decisions by various organs of the Authority, or potential disputes between States about the interpretation and application of the Convention. Considering the peculiarity of the new law, the emergence of new concepts of equity, the difficulties of resource management, and the novelty of the basic concept of the common heritage of mankind, inter-State disputes might be numerous and substantial. Section 6 achieves these basic purposes.

Article 191, as already mentioned, was the result of lengthy discussion about the interrelationship and the relative strength of the Assembly and the Council on the one hand, and the Dispute Settlement Chamber on the other.

Article 192 attempts to achieve a compromise on a new, politically sensitive issue: the relations between States and nongovernmental entities in proceedings before the tribunals. States more conservative in matters relating to international law insisted that private companies or persons could not have standing before the tribunal and that the State "sponsoring their activities" must act on their behalf. Other delegations, however, would give nongovernmental entities full access to the tribunals, and they have pointed out that this would be in the best interest of States because obligatory intervention could magnify and politicize issues which might otherwise be resolved without such intervention. Article 192 provides a compromise by establishing that "[w]hen in a dispute . . . , a national of a

State Party is a party, the sponsoring State shall be given notice thereof, and shall have a right to intervene in the proceedings."[160] In conjunction with Part XI one should consider Part XV, Articles 287 (2), 288 (3) and 291 (2), all of Annexes II and III, and Articles 15, 22, and 37 through 41 of Annex V.

The articles referred to from Part XV describe in general terms the dispute settlement system, including its binding character, as it is applicable to the seabed, and also the establishment of a Seabed Chamber and its accessibility to entities other than States.

Annex II, setting forth the basic conditions for exploration and exploitation of the Area in elaborate, and therefore rapidly obsolescent terms, could be drastically reduced or dispensed with altogether if the analysis of this article were correct and the "parallel system" were to be replaced by a unitary joint-venture system. If this occurred, Annex III, which is the "Statute of the Enterprise," would have to be modified,[161] especially with regard to the articles on composition of the "Governing Board"[162] and "finance."[163] Most of the other articles could remain basically unchanged.

The articles of Annex V constitute a significant breakthrough for the ICNT. Decisive progress has been made in creating a comprehensive dispute settlement system, harmonizing the different parts of the Convention. The dispute settlement system is in fact a prototype of the kind of integrative machinery that is required by the interaction of uses of ocean space and resources and which, eventually, will have to be carried over from the juridical to the political and administrative levels.

Of particular interest in this context is the method of election of the judges of the Seabed Chamber. All judges of the Law of the Sea Tribunal are nominated by States and elected at a meeting of States Parties convened periodically for this purpose. From the total of judges thus elected, the Assembly of the Seabed Authority selects those who are to constitute the Seabed Chamber.[164] It is a most ingenious way of linking this prototype of integrative machinery with one of the basic marine activities organizations. This approach might have a germinal influence on other parts of the system at a later stage.

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160. *Id.*, art. 192.
161. E. BORGESE, THE ENTERPRISES (1977) (Occasional Paper No. 6, International Ocean Institute).
162. ICNT, *supra* note 2, Annex III, para. 5.
163. *Id.*, para. 10.
164. *Id.*, Annex V, arts. 4, 37.

CONCLUSION

The development of the Law of the Sea will continue in the context of the emergence of a new international order, including a new international economic order during a third and a fourth Development Decade. The ICNT is a unique document the likes of which the international community has never dealt with before. Whatever its weaknesses and imperfections—and it is unfinished business—it is a landmark on the long road ahead.

APPENDIX

Comparison of Three Texts on the Regime for the Deep Seabed Considered at the Third United Nations Conference on the Law of the Sea

by

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Subject	Revised Single Negotiating Text Part I and Annexes I-III	Evensen Text	Informal Composit Negotiating Text Part XI and Annexs II, III, V
1. Organs	Principal organs are the Assembly, Council, Tribunal and Secretariat. Other Organs established include the Enterprise, Economic Planning Commission, Technical Commission and Rules and Regulations Commission. Arts. 24, 29.	Same as RSNT but the text assumes that the Tribunal will not be an organ of the Authority. Rather, it would be a panel of the Law of the Sea Tribunal. Art. 33.	Same as Evensen. Art. 156, 187; annex V.
2. Functions of Assembly vs. Council	The Assembly is the supreme organ of the Authority with the power to prescribe general policies and to entrust organs with powers not entrusted in the text. It also elects members	Similar to the RSNT. The power of the Assembly to "prescribe" general policies is changed to the power to "establish" such policies.	Same as Evensen except that subjects not entrusted to a specific organ are impliedly kept under greater Assembly control. Art. 158(1).

* Charney, *United States Interests in Convention on the Law of the Sea: The Case for Continued Efforts*, 11 VAND. J. TRANSNAT'L L. (1978) (in press) (reprinted by permission of the Vanderbilt Journal of Transnational Law).

	of most organs including the Council, and has the final say in financial decisions upon the recommendation of the Council. Arts. 24, 25, 26. The Council prescribes specific policies, supervises activities in the area, makes recommendations to the Assembly and adopts rules, regulations and procedures. Arts. 27, 28.	A major change is a provision giving the Assembly the power to adopt the rules, regulations and procedures provisionally adopted by the Council. A larger role for the Assembly in the budget process is implied. The Council is now given the power to "establish" specific polices. Its decisions on rules, regulations and procedures are subject to the final approval of the Assembly. Arts. 26, 28.	
3. Composition and Voting in the Council	36 members elected by the Assembly; 6 high seabed technology countries including one Eastern (Socialist) European country; 6 less-developed countries (LDC), one from each of six categories: exporters, and importers, of landbased minerals, large population, landlocked, geographically disadvantaged (LL & GDS), and least developed; 24 on the basis of equitable geographic distribution. Decisions on important questions require 2/3 plus one vote of members present and vot-	36 members 4 high seabed technology countries including one Eastern (Socialist) European country; 4 major importers; 4 major exporters; 6 LDCs, with the same six special interests which are listed as "categories" in the RSNT; 18 chosen by geographic distribution—at least two from each region. A matter is deemed substantive unless a substantive vote decides otherwise. A substantive decision requires a majority of four of the five categories	Council composition follows the Evensen Text with the additional specification of one Eastern (Socialist) European country representative among the importers and two developing countries among the exporters and a diminution of the minimum number of representatives from each geographical region to one. Voting is not chambered. Only a 3/4 majority of those present and voting is required on a matter of substance. Art. 159.

Subject	Revised Single Negotiating Text Part I and Annexes I-III	Evensen Text	Informal Composite Negotiating Text Part XI and Annexes II, III, V
	ing. A 2/3 majority determines whether an issue is an important question. Other questions require only a majority of members present and voting. Art. 27.	of members plus 2/3 of all members present and voting. Matters of procedure are decided by a 2/3 vote. Art. 27.	
4. Resource Policy	General obligation to foster healthy development of the world economy, especially with reference to the developing countries, to expand opportunities to participate in the development of resources, and to increase the availability of resources. Protections against substantial declines in mineral export earnings of developing countries caused by seabed production through new international arrangements and a production limit on nickel production in first 20 to 25 years not to exceed the cumulative growth segment of the nickel market. Art. 9.	The policy goals language is similar to the RSNT, although additional policies are listed, including orderly and safe development, balanced growth in international trade, equitable sharing, transfer of technology, just, stable and remunerative prices, and prevention of monopolization. Protection of developing exporting countries from adverse effects on their export earnings and economies is sought by facilitating international arrangements and limiting seabed nickel production by the cumulative growth segment of the world nickel market for the first seven years. Thereafter, until the passage of 20 years after 1980, the limit would be 2/3 of the cumulative growth. Art. 9.	The policy is stated in more mandatory terms. The text raises the policies of transfer of technology to and protection of LL and GDS to the level of major policies. The interim production limit after the first seven years has been lowered to 60% of the cumulative growth segment of the world nickel market. Compensation to developing countries who suffer adverse effects on their export earnings or their economies is authorized. Art. 150.

5.	Anti-monopoly	Policy to ensure equitable sharing of the economic benefits of activities in the area. Art. 9(6). Discussion otherwise deferred. Annex I, para. 8(e).	The prevention of monopolization is a resource policy goal. Art. 9(1)(b). Otherwise, a specific provision is left open. Annex I para. 8(*bis*)(*l*).	Provides that the prevention of monopolization is a resource policy goal, and that anti-monopoly provisions are acceptable in principle. Art. 150(1)(f); Annex II, para. 5(*l*).
6.	System of Exploitation	Parallel system with the Authority on one side and State and private entities on the other. If the applicant for a contract satisfies specified qualifications, the Authority shall enter into negotiations to conclude a contract. The Authority is given limited bases for refusing to contract. If there are conflicting applications, the Authority may negotiate and contract with the best qualified applicant. Contractor has security of tenure. A vested right in rules and regulations in force at time of contract is implied. The system applies equally to contractors and the Enterprise. Applications for a contract for exploration and exploitation require a dual nomination of mine-sites, one of which the Authority will place in the reserved area. Art. 22; Annex I.	A parallel system with dual nomination to be made upon application for a contract to explore and exploit. Applications are periodically opened, and if applications are in conflict because they seek the same area or all cannot conform to the production limitations, selection is to be made on a comparative basis. Where no conflict exists, negotiations to conclude a contract with a qualified applicant are mandatory, and the scope of the negotiation is limited. Annex I, para. 8(*bis*). The contract must be approved by the Council. The Council is deemed to have given its approval if disapproval does not occur within 60 days of submission. Art. 28(2)(ix). The Enterprise is not subject to the requirements set out above. Security of tenure is	Similar to the Evensen text with additional discretionary powers given to the Authority to encourage and perhaps require prospective contractors to transfer technology and to contract directly with the Enterprise. Annex II, paras. 4(c)(ii), 5.

Subject	Revised Single Negotiating Text Part I and Annexes I-III	Evensen Text	Informal Composite Negotiating Text Part XI and Annexes II, III, V
		protected. Dual nominations are required. Annex I, para 8(*bis*).	
7. Financial Arrangements for Exploiters	Alternative tentative texts are attached. Special Appendix.	Not considered.	Charges to a contractor are imposed for filing the application, for the annual right to mine, for the annual right to exploit, for a royalty, and for a profit share. The amount of such charges are left blank. Annex II, para. 7.
8. Financing the Enterprise	A general provision permitting alternate methods of obtaining funds in addition to Assembly appropriations. Annex II, para. 6. Assembly may assess members of the Authority based on a scale of assessments. Art. 48.	Similar to the RSNT but with more detail. A provision for government guaranteed loans and the receipt of funds from contractual relationships between the Enterprise and other entities. Annex II.	Same as Evensen text with an addition that the Enterprise's assets include charges to enable the Enterprise to come into early operation. Annex III, para. 10.
9. Transfer of Technology	The Authority and States shall promote programs and measures. Contractors shall draw up programs for the training of personnel from the Authority and developing countries. Art. 11; Annex I, para. 10(b).	Follows RSNT, but adds the Enterprise as a recipient of technology. Amendment to Art. 11.	An additional stronger role, enabling the Authority to require the transfer of seabed technology from prospective applicants and contractors, is established. Art. 151(8); Annex II, paras. 4, 5.

10. Marine Environment	Measures shall be taken to protect the marine environment from "activities in the area". The text had limited application to beneficiation and processing. Rules and regulations on the subject were authorized but contractors might have a vested right in those rules and regulations in force at the time of contract. Art. 12; Annex I, para. 12. Assessments of the environmental implications of activities in the area are to be conducted by the Technical Commission. Art. 31.	Not considered.	Similar to the RSNT. Additional protections against injuries from beneficiation, transport and processing are included. Art. 145; Annex II, para 11(b)(6). *See also* Arts. 208-23.
11. Scientific Research	No limitation except that it is to be conducted for peaceful purposes. The Authority may conduct scientific research or contract for it. Art. 10.	Not considered.	A stronger role for the Authority is implied. Art. 151(7), 143.
12. Revenue Sharing	The Assembly decides criteria, rules, and regulations for equitable sharing. Art. 26(2)(x).	Similar to RSNT. Art. 26(2)(x).	Mandate that there be a sharing of the benefits with developing countries with emphasis on the LL & GDS and countries that have not attained full independence or other self-governing status. Art. 151(9).

	Subject	Revised Single Negotiating Text Part I and Annexes I-III	Evensen Text	Informal Composite Negotiating Text Part XI and Annexes II, III, V
13.	Dispute Settlement System	Adjudication by the Tribunal unless the parties agree to arbitration. Fairly comprehensive powers to adjudicate disputes among States, applicants, contractors and the Authority, as well as the power to render advisory opinions arising under Part I of the RSNT. Art. 33-40; Annex III.	Similar scope to the RSNT. A significant exception to jurisdiction forbids the dispute settlement organ from ruling upon the conformity with the Convention of any rules or procedures that have been adopted by the Council or Assembly. Art. 37.	Similar to Evensen with the additional apparent exclusion from dispute settlement of disputes over the Authority's refusal to conclude a contract and disputes over the discretionary action of any organ. Arts. 187-92.
14.	Review Clause	None.	Five year periodic review. Twenty year review conference. Basic principles are not reviewable. No provision for other action if no agreement is forthcoming. The making of decisions follows the procedures at L.O.S. III. Arts. 64, 65.	Same as Evensen, with an additional provision mandating the elimination of the parallel system if the conference is unable to reach agreement within 5 years—the so-called "converging system." Art. 153(6).
15.	Provisional Application	Tentative article providing for entry into force upon the 36th notification by a signatory that it will apply the convention provisionally. Art. 63.	Not considered.	Omitted.