UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/AC.138/12/Add.1
30 June 1969

ORIGINAL: ENGLISH

COMMITTEE ON THE PEACEFUL USES OF THE SEA-BED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION

STUDY ON THE QUESTION OF ESTABLISHING IN DUE TIME APPROPRIATE MACHINERY FOR THE PROMOTION OF THE EXPLORATION AND EXPLOITATION OF THE RESOURCES OF THE SEA-BED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION, AND THE USE OF THESE RESOURCES IN THE INTERESTS OF MANKIND

Report of the Secretary-General

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NOTE

The previous part of this study gave an account of the adoption of resolution 2467 C (XXIII) and of the views expressed by the representatives of Member States, and examined the possible functions and powers which might be exercised by international machinery established to promote the exploration and exploitation of the resources of the sea-bed and ocean floor beyond the limits of national jurisdiction. This part of the study is concerned with the possible forms which such international machinery might take and with various organizational questions which would need to be considered if international machinery were to be set up. Legal issues relating to the law of the sea and to the position of States which do not become parties to any instrument establishing international machinery, are also examined.

III. POSSIBLE FORMS OF INTERNATIONAL MACHINERY AND ORGANIZATIONAL QUESTIONS

A. Possible forms of international machinery

81. The functions considered in section II of the study might be carried out by various forms of international machinery, which are examined below. While the following survey deals with possible forms of international machinery which might be used to perform functions which are not being carried out at the present time, it may be recalled that several bodies now conduct activities which relate to particular aspects of marine resource development. Account would accordingly have to be taken of this fact in the event that it was decided to establish international machinery to promote the exploration and exploitation of the mineral resources of the sea-bed.

82. In the case of registration, a suitable form of international machinery might consist of a secretariat unit or centre which could record and disseminate the information supplied to it. Such a body might submit an annual report on its activities to an existing body (for example, the General Assembly), but would not in principle require the establishment of any special supervisory organs. If, however, it was decided to invest the registration body with more extensive powers, more elaborate machinery would be required, which could exercise regulatory functions and possibly perform functions in connexion with the settlement of disputes. In this case the machinery might need to include a committee and/or an executive council composed of the representatives of States, as well as a permanent secretariat. In this event consideration would have to be given to the question whether this special machinery should be established on its own or whether it would be possible to make use of existing institutions. A United Nations subsidiary organ might provide a suitable framework for the performance of the tasks in question, and for the functioning of bodies composed of State representatives.

83. If international machinery were to be set up with authority to grant licences in respect of sea-bed activities, it would appear to be necessary to create some form of international bureau, institution or organization. Such a body might consist of an executive council and/or a committee or assembly which

met periodically, and a secretariat, for example. While the exact structure of the machinery would vary according to the powers conferred by the constitutive instrument, suitable forms of machinery would range from a body such as a United Nations subsidiary organ to an organization similar to a specialized agency, possessing international legal personality in its own right.

84. If machinery were to be established with exclusive rights to conduct exploration and exploitation of the ocean floor, it is most likely to take the form of a separate international organization. Such an organization, in order to carry out effectively its functions of direct exploitation would have to be endowed with extensive powers and possess international legal personality. For example, it would have to be given the power and facilities to exploit sea-bed resources, to hold property and the locus standi to enable it to make claims with respect to damage or loss. The organization would need an appropriate structure, consisting of several organs composed of government representatives and its own secretariat.

85. As noted in paragraphs 75 to 80 of the previous part of the study, machinery for the settlement of disputes might take a variety of forms. Use might be made of existing machinery, for example, or special procedures or organs might be created to deal specifically with disputes arising out of sea-bed activities. Such procedures or organs might or might not form part of other machinery, such as a registration or licensing body. It is suggested that, in view of the special features involved, the question of the form of possible machinery for the settlement of disputes should be distinguished from that of the forms of machinery which might be suitable to perform more general functions relating to sea-bed activities.

86. Summarizing the preceding discussion, it may be said that, subject to the qualification just mentioned with respect to possible machinery for the settlement of disputes, the main possibilities with respect to the various forms of international machinery would appear to be the following: (i) a secretariat centre or unit, which might be established within an existing organization; (ii) a United Nations subsidiary organ; and (iii) an intergovernmental body having an independent legal status. The choice between these forms would of course depend on the functions to be performed and the extent of the powers vested in the machinery.

87. A distinction which may be noted with respect to these various forms of machinery is that whereas a secretariat unit or subsidiary organ could be set up under existing United Nations procedures, the establishment of an intergovernmental body with international legal personality would require the adoption of a treaty between States. The legal status and powers of machinery forming part of the United Nations would accordingly be derived from the Charter, unless possibly a treaty was adopted establishing additional rights and obligations, as between the States parties, with regard to that machinery. Under the Charter the co-operation of States in the activities concerned - for example, the registration of information about sea-bed activities with a subsidiary organ set up by the General Assembly - would depend on the response of individual States to the resolution of the General Assembly requesting them to provide such co-operation. If, on the other hand, a treaty were concluded, the co-operation of the States parties in the performance by international machinery of particular functions might be made a matter of specific legal rights and obligations. This would apply most obviously in the case of an autonomous intergovernmental body set up to perform functions relating to sea-bed activities, where the conclusion of a treaty would be required both to establish the organization and to create the obligations of States with respect to it. The distinction between new, independent, machinery established by treaty and machinery established by existing United Nations procedures, while it exists, is not, however, an absolute or overriding one. As is shown in the following portion of this section, the subsidiary organs set up by the General Assembly vary considerably in structure and, in some instances at least, enjoy a considerable measure of autonomy from the parent organ under a constituent resolution which may be regarded more or less as a comprehensive statute. Furthermore, in at least one instance, a United Nations subsidiary organ has been given functions under a treaty imposing obligations on the States parties to it, though not on United Nations Member States as a whole. In the case of sea-bed exploration and exploitation, it would thus be possible to provide, by means of a specially concluded agreement under United Nations auspices, for the acceptance by the States parties of various related obligations and rights, and for the performance by United Nations machinery of the functions envisaged in that agreement. Such an arrangement would, of course, require the acceptance, according to United Nations procedures, of the request made by the States parties to the agreement.

B. Organizational questions

88. If it was decided to establish new machinery in the form of an organization, such as a United Nations subsidiary organ or a separate international agency, various problems would need to be considered in relation to the structure and internal functioning of the new body. Some of the issues which would be raised are examined below, under the following headings: (1) Procedures for the establishment of new machinery; (2) Membership; (3) Voting arrangements; (4) Financial arrangements; and (5) Secretariat. Under the first heading, relating to procedures for the establishment of new machinery, reference is made, inter alia, to the possible establishment of a centre or unit within the United Nations Secretariat in connexion with performance of the functions listed in section II of the study. Selected examples are given below of the practice followed by the United Nations with respect to the issues concerned in the case of bodies previously established, and of the relevant practice of the specialized agencies.

1. Procedures for the establishment of new machinery

89. In the event that it was decided to entrust additional functions relating to the exploration and exploitation of sea-bed resources to the United Nations Secretariat, the necessary action to establish a special centre or unit could be taken by the Secretary-General, in his capacity as chief administrative officer of the Organization; such action might be taken following the adoption of a resolution by the General Assembly, for example, or in response to a request made by some other body.

90. A United Nations subsidiary organ to perform functions relating to the development of sea-bed resources, on the other hand, could be established by a resolution of the General Assembly under Article 22 of the Charter. A large number of subsidiary organs, varying greatly as to their structure, composition and duration, have been established on previous occasions by the General Assembly to perform a variety of tasks.[43/] An element common to these bodies is the fact

43/ A comprehensive survey of the practice followed is to be found in the section dealing with Article 22 contained in Repertory of Practice of United Nations Organs, vol. V, Supplement No. 1, vol. I, and Supplement No. 2, vol. II.

that the parent organ, to whom they normally report, may change their structure and the conditions under which they operate. Despite the existence of this power, a number of General Assembly subsidiary organs, such as UNCTAD and UNIDO, have been granted a considerable measure of operational independence and have been established under detailed resolutions resembling the statutes of autonomous organizations. It has been the practice when creating United Nations subsidiary organs to include in the constitutive resolution provisions relating to the functions, structure, membership, voting and financial arrangements with respect of the new body. The structure of many of these subsidiary organs includes the existence of (i) an executive head, (ii) an intergovernmental body which provides over-all guidance, and (iii) a secretariat whose officials work solely for the relevant subsidiary organ. In the event that it was decided to set up a separate intergovernmental organization it would be necessary to conclude a treaty, binding on the States parties thereto. As previously indicated, a treaty could also be used to define the functions of a United Nations subsidiary organ.

91. Information about the method under which various forms of existing (or previously existing) bodies were established is given below, under the following headings: (a) machinery established within the Secretariat; (b) United Nations subsidiary organs established by General Assembly resolution; (c) United Nations subsidiary organs performing functions under treaties; and (d) international organizations established by treaty.

(a) Machinery established within the Secretariat

92. The form of Secretariat arrangements which might be made would vary according to the extent of the functions to be performed; it would be possible, for example, to establish a division or centre for the purpose, or to make use of or enlarge the existing Secretariat units dealing with sea-bed affairs. As regards previous practice, it may be noted that the receipt and dissemination of information by the Secretary-General about outer space activities, under Article XI of the Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space,[44/] is performed by the Outer Space Affairs Division established

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44/ General Assembly resolution 2222 (XXI), annex.

within the Department of Political and Security Council Affairs. A brief description of several centres which have been established within the Secretariat for various purposes is given below.

93. The Centre for Development Planning, Projections and Policies, which was established by the Secretary-General in October 1965, incorporates the former Economic Projections and Programming Centre which had been set up in response to General Assembly resolution 1708 (XVI). The Centre prepares economic surveys and studies relating to economic planning and projections, and provides development planning advisory services. The Centre for Housing, Building and Planning was established by the Secretary-General in June 1965 within the Department of Economic and Social Affairs, following the endorsement by ECOSOC (resolution 1024 (XXXVII) Part C) of recommendations made in 1964 by the Committee on Housing, Building and Planning. In addition to providing the secretariat for this Committee, the Centre prepares studies and reports and provides advice to Governments on questions within the area of its responsibility. It also organizes pilot projects in the field of housing, building and planning, including bilateral assistance, under General Assembly resolution 1508 (XV).

94. The Centre for Industrial Development, which has been superseded by the establishment of UNIDO, was created within the Department of Economic and Social Affairs in July 1961, upon the recommendation of the Committee for Industrial Development, a standing committee of ECOSOC. (The Committee, pursuant to General Assembly resolution 2152 (XXI) has now been abolished, following the establishment of UNIDO and of its principal organ, the Industrial Development Board.) The Centre was headed by the Commissioner for Industrial Development, following his appointment in June 1962 by the Secretary-General. The Centre served as the secretariat for the Committee for Industrial Development. In addition, the Centre's activities included the making available to Governments, on request, of information on technical aspects of industrialization programmes, on the mobilization of national resources for industrialization and on the furtherance of arrangements, bilateral and multilateral, for the development of industry. Those functions and others are now being carried out by UNIDO.

(b) United Nations subsidiary organs established by General Assembly resolution

95. UNCTAD. By resolution 1995 (XIX) of 30 December 1964, the General Assembly created the United Nations Conference on Trade and Development (UNCTAD). In this instance, the initiative for the establishment came from the General Assembly itself, without reference to a subsidiary body. The resolution provided that the members of UNCTAD would be those States which are Members of the United Nations or members of the specialized agencies or of IAEA. It also established as the principal organ of the Conference the Trade and Development Board, which carries out the function of the Conference when the latter is not in session.45/

96. UNICEF. Upon the recommendation of ECOSOC, adopted at its third session (resolution 10 (III) of 30 September 1946), the General Assembly established UNICEF by resolution 57 (I) of 11 December 1946, subject to subsequent review as to its future continuation. Upon review during its eighth session the Assembly reaffirmed the provisions of the establishment of UNICEF, with the exception of any reference to time-limits (resolution 802 (VIII)). In accordance with paragraph 3 (b) of resolution 57 (I), the Executive Director is appointed by the Secretary-General after consultation with the Executive Board.

97. UNRWA. The General Assembly established UNRWA under resolution 302 (IV) of 8 December 1949, as a temporary agency. The mandate of the Agency has been renewed for varying periods by the General Assembly most recently, in accordance with resolution 2452 B (XXIII) of 19 December 1968, until 30 June 1972. It should be noted that, in this instance, the decision to establish the organ was based on a report of the Secretary-General (document A/1060 and Add.1) and on a report of a body (the United Nations Economic Survey Mission for the Middle East), the latter being itself a creation of a subsidiary organ of the General Assembly (the United Nations Conciliation Commission for Palestine). The executive head of UNRWA (since 1962, the Commissioner-General), in accordance with the establishing resolution, is appointed by the Secretary-General, in consultation with the Advisory Commission of UNRWA.

45/ The membership of the Board is discussed in paragraph 106 below.

(c) United Nations subsidiary organs performing functions under treaties

98. A number of United Nations subsidiary organs perform functions which are defined in international agreements, particular examples being the bodies concerned with narcotic drugs and the Office of the UNHCR. In the case of the Office of the UNHCR, the Office was created by the General Assembly and given functions under a separate Convention. In the case of the various bodies concerned with narcotic drugs, some of these were established under treaties concluded before the establishment of the United Nations and subsequently brought within the framework of the United Nations; under the 1961 Single Convention on Narcotic Drugs, however, functions were given to United Nations bodies. Further details of the organs concerned are given below.

99. Narcotic drugs bodies. Prior to the 1961 Single Convention on Narcotic Drugs, the main regulatory machinery consisted of the Permanent Central Opium Board (PCOB) and the Drug Supervisory Body, which had been established by treaties concluded in 1925 and 1931 under the auspices of the League of Nations. Under a Protocol of 1946, approved by General Assembly resolution 54 (I), these bodies were brought within the framework of the United Nations, and were considered as "organs of the United Nations" for the purposes of various General Assembly resolutions. Accordingly, their expenses were included in the budget of the United Nations and their staff appointed by the Secretary-General.

100. Under the 1961 Single Convention on Narcotic Drugs the States Parties agreed to entrust various control functions to the Commission on Narcotic Drugs (a functional commission of ECOSOC, which had been previously established) and to the International Narcotics Control Board. It was stated in Article 6 of the Convention that the expenses of the Commission and Board would be borne by the United Nations, in such manner as the General Assembly might decide. Article 44 of the Convention provided that, upon the entry into force of the Convention, its provisions would, as between the States parties, terminate and replace the provisions of the earlier treaties relating to narcotic drugs. Following the entry into force of the Convention, the International Narcotics Control Board took over the functions of the PCOB and Drug Supervisory Body.

101. UNHCR. The Office of the UNHCR was established by General Assembly resolution 319 (IV) of 3 December 1949. That resolution, inter alia, requested ECOSOC to prepare a draft resolution, which would include provisions for the functions of the Office of UNHCR, for submission to the fifth session of the Assembly. The draft resolution prepared by ECOSOC was subsequently adopted by the Assembly as an annex to resolution 428 (V) of 14 December 1950 (referred to as the Statute of the Office of the United Nations High Commissioner for Refugees), and the Office came into being on 1 January 1951. At the same session the General Assembly took action to elaborate a draft Convention relating to the Status of Refugees in respect of which UNHCR would have certain responsibilities and functions. The Assembly, in an annex to resolution 429 (V) of 14 December 1950, set out a draft definition of the term "refugee" which was similar to that contained in the Statute of the Office of UNHCR and which, with certain revisions, was incorporated into the Convention relating to the Status of Refugees. The operative paragraphs of resolution 429 (V) read as follows:

"The General Assembly,

...

1. Decides to convene in Geneva a conference of plenipotentiaries to complete the drafting of and to sign both the Convention relating to the Status of Refugees and the Protocol relating to the Status of Stateless Persons;

2. Recommends to Governments participating in the conference to take into consideration the draft Conventions submitted by the Economic and Social Council and, in particular, the text of the definition of the term 'refugees' set forth in the annex hereto;

3. Requests the Secretary-General to take the steps necessary for the convening of such a conference at the earliest possible opportunity;

4. Instructs the Secretary-General to invite the Governments of all States, both Members and non-members of the United Nations, to attend the said conference of plenipotentiaries;

5. Calls upon the United Nations High Commissioner for Refugees, in accordance with the provisions of the Statute of his Office to participate in the work of the Conference."

The Convention, which was adopted at the Conference of Plenipotentiaries and came into force on 21 April 1954, establishes in effect a legal régime for refugees within the territories of the States parties to the instrument. The Office of UNHCR is responsible for supervising the application of the provisions of the Convention, in accordance with Article 35 thereof.

(d) International organizations established by treaty

102. There are many examples of the establishment by multilateral treaty of international organizations enjoying independent legal personality: the United Nations itself, the specialized agencies and IAEA. Were this procedure to be adopted the constitutive instrument, i.e. the treaty defining the powers and structure of the organization, would be binding on the States parties. If the Committee decided that an international organization to perform functions relating to sea-bed activities should be established by treaty, it might submit various recommendations to that effect to the General Assembly. The recommendation might take the form of requesting the General Assembly to authorize the Committee (or a sub-committee of the present Committee), or a specially constituted Preparatory Committee, to elaborate a draft instrument (Convention, Statute, Constitution, etc.) for submission to a subsequent session of the General Assembly, with a view to transmitting the draft instrument to a diplomatic conference of plenipotentiaries, to be convened under the auspices of the United Nations. The General Assembly itself could decide by resolution to convene such a conference, which would be requested to consider the adoption of a suitable instrument, and to open it for signature.

103. The question of the relationship between the organization and the United Nations would also need to be considered. The organization might be established by treaty as a specialized agency, within the meaning of Articles 57 and 63 of the Charter, or as an organization enjoying a different type of relationship with the United Nations, such as that between the United Nations and IAEA. A reference to the nature of the relationship between the new organization and the United Nations might therefore be included in the draft treaty (and possibly in the Committee's recommendation also).

2. Membership

104. The subject of membership will be examined under two main headings: (a) membership in the governing bodies of United Nations subsidiary organs; and (b) certain aspects relating to membership in specialized agencies.[46/]

(a) Membership in the governing bodies of United Nations subsidiary organs

105. UNCTAD. Resolution 1995 (XIX) of 30 December 1964 provides that the members of UNCTAD shall be those States which are Members of the United Nations or members of the specialized agencies or IAEA. The fact that all States members of UNCTAD are convened periodically at the Conference, together with the establishment of a principal organ of the Conference, the Trade and Development Board, differentiates UNCTAD from certain other subsidiary bodies, where provision is made for the participation by States in one intergovernmental body only, as will be seen below.

106. As regards membership in the Trade and Development Board, the resolution provides as follows:

> "4. A permanent organ of the Conference, the Trade and Development Board (hereinafter referred to as the Board), shall be established as part of the United Nations machinery in the economic field.
>
> 5. The Board shall consist of fifty-five members elected by the Conference from among its membership. In electing the members of the Board, the Conference shall have full regard for both equitable geographical distribution and the desirability of continuing representation for the principal trading States, and shall accordingly observe the following distribution of seats:
>
> (a) Twenty-two from the States listed in part A of the annex to the present resolution;
>
> (b) Eighteen from the States listed in part B of the annex;
>
> (c) Nine from the States listed in part C of the annex;
>
> (d) Six from the States listed in part D of the annex.

46/ That is, Associate membership, status of observers, and membership in governing bodies. It was not considered necessary to examine the membership provisions as such of the specialized agencies.

6. The lists of States contained in the annex shall be reviewed periodically by the Conference in the light of changes in membership of the Conference and other factors.

7. The members of the Board shall be elected at each regular session of the Conference. They shall hold office until the election of their successors.

8. Retiring members shall be eligible for re-election.

9. Each member of the Board shall have one representative with such alternatives and advisers as may be required.

10. The Board shall invite any member of the Conference to participate, without vote, in its deliberations on any matter of particular concern to that member."

The annex referred to in paragraph 5 consists of a series of groupings of States from which the members of the Board are to be elected. It is of interest to note that whereas other subsidiary bodies of the United Nations provide for the election by the General Assembly or by ECOSOC to the relevant governing and principal organ, the UNCTAD resolution provides that this should be accomplished by voting within the subsidiary body itself.

107. UNDP. General Assembly resolution 2029 (XX) of 22 November 1965, which, by combining EPTA and the Special Fund, established UNDP, provides that:

"The General Assembly,

4. Resolves that a single intergovernmental committee of thirty-seven members, to be known as the Governing Council of the United Nations Development Programme, shall be established to perform the functions previously exercised by the Governing Council of the Special Fund and the Technical Assistance Committee, including the consideration and approval of projects and programmes and the allocation of funds; in addition, it shall provide general policy guidance and direction for the United Nations Development Programme as a whole, as well as for the United Nations regular programmes of technical assistance, it shall meet twice a year and shall submit reports and recommendations thereon to the Economic and Social Council for consideration by the Council at its summer session; decisions of the Governing Council shall be made by a majority of the members present and voting;

5. Requests the Economic and Social Council to elect the members of the Governing Council from among States Members of the United Nations or members of the specialized agencies or of the International Atomic

Energy Agency, providing for equitable and balanced representation of the economically more developed countries, on the one hand, having due regard to their contribution to the United Nations Development Programme, and of the developing countries, on the other hand, taking into account the need for suitable regional representation among the latter members and in accordance with the provisions of the annex to the present resolution, the first election to take place at the first meeting of the Economic and Social Council after the adoption of this resolution."

108. The annex referred to in the resolution provides as follows:

"1. Nineteen seats on the Governing Council of the United Nations Development Programme shall be filled by developing countries and seventeen seats by economically more developed countries, subject to the following conditions:

(a) The nineteen seats allocated to developing countries of Africa, Asia and Latin America and to Yugoslavia shall be filled in the following manner: seven seats for African countries, six seats for Asian countries and six seats for Latin American countries, it being understood that agreement has been reached among the developing countries to accommodate Yugoslavia;

(b) Of the seventeen seats allocated to the economically more developed countries, fourteen shall be filled by Western European and other countries and three by Eastern European countries;

(c) Elections to these thirty-six seats shall be for a term of three years provided, however, that of the members elected at the first election the terms of twelve members shall expire at the end of the year and the terms of twelve other members at the end of two years;

2. The thirty-seventh seat shall rotate among the groups of countries mentioned in paragraph 1 above in accordance with the following nine-year cycle:

First and second years: Western European and other countries;
Third, fourth and fifth years: Eastern European countries;
Sixth year: African countries;
Seventh year: Asian countries;
Eighth year: Latin American countries;
Ninth year: Western European and other countries.

3. Retiring members shall be eligible for re-election."

109. UNICEF. Membership in the Executive Board, the intergovernmental body of UNICEF, is provided for in the establishing resolution 57 (I), of 11 December 1946; subsequently, on the recommendations of the General Assembly, adjustments and reorganizations were made by ECOSOC resolutions, most recently under ECOSOC resolution 610 B (XXI). The Executive Board consists of thirty States, Members of

the United Nations and members of the specialized agencies, designated by the ECOSOC. The Executive Board reports to ECOSOC and carries out its duties "in accordance with such principles as may be laid down by ECOSOC and its Social Commission". It should thus be noted that although UNICEF is a subsidiary organ of the General Assembly, its Executive Board has been constituted by ECOSOC, to which it reports, and that programmes are adopted in accordance with the principles established by ECOSOC and its Social Commission. An arrangement which has similar features has been made with respect to UNHCR.

110. UNHCR. As in the case of UNICEF, the office of UNHCR, although an organ of the General Assembly, enjoys a close relationship to ECOSOC: the High Commissioner reports annually to the General Assembly through ECOSOC and the intergovernmental body, the Executive Committee of the High Commissioner's Programme, is elected by it. The Executive Committee now consists of thirty members (ECOSOC resolution 965 B (XXXVI). The reports of the Executive Committee are attached to the annual reports of the High Commissioner and submitted through the Council to the Assembly.

111. UNIDO. The provision for membership in UNIDO follows some features of the arrangements made with respect to UNCTAD and its Trade and Development Board; however, whereas membership in the latter is voted by UNCTAD at its periodic sessions, the arrangements for membership in the Industrial Development Board, laid down in General Assembly resolution 2152 (XXI) of 17 November 1966, are as follows:

> "3. The Industrial Development Board (hereinafter referred to as the Board), established as the principal organ of the Organization, shall consist of forty-five members, elected by the General Assembly from among States Members of the United Nations and members of the specialized agencies and of the International Atomic Energy Agency for a term of three years, provided, however, that of the members elected at the first election the terms of fifteen members shall expire at the end of one year and the terms of fifteen other members at the end of two years.
>
> 4. In electing the members of the Board, the General Assembly shall have due regard to the principle of equitable geographical representation and shall accordingly observe the following distribution of seats:

(a) Eighteen from the States listed in part A of the annex to the present resolution; 47/

(b) Fifteen from the States listed in part B of the annex;

(c) Seven from the States listed in part C of the annex;

(d) Five from the States listed in part D of the annex.

The lists of States contained in the annex shall be reviewed by the Board in the light of changes in the membership of the United Nations or of the specialized agencies or of the International Atomic Energy Agency.

5. Retiring members shall be eligible for immediate re-election.

6. Each member of the Board shall have one representative with such alternates and advisers as may be required."

47/ The annex to resolution 2152 (XXI) is as follows:

"A. List of States indicated in section II, paragraph 4 (a): Afghanistan, Algeria, Botswana, Burma, Burundi, Cambodia, Cameroon, Central African Republic, Ceylon, Chad, China, Congo (Brazzaville), Congo (Democratic Republic of), Dahomey, Ethiopia, Gabon, Gambia, Ghana, Guinea, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Jordan, Kenya, Kuwait, Laos, Lebanon, Lesotho, Liberia, Libya, Madagascar, Malawi, Malaysia, Maldive Islands, Mali, Mauritania, Mongolia, Morocco, Nepal, Niger, Nigeria, Pakistan, Philippines, Republic of Korea, Republic of Viet-Nam, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, South Africa, Sudan, Syria, Thailand, Togo, Tunisia, Uganda, United Arab Republic, United Republic of Tanzania, Upper Volta, Western Samoa, Yemen, Yugoslavia, Zambia.

B. List of States indicated in section II, paragraph 4 (b): Australia, Austria, Belgium, Canada, Cyprus, Denmark, Federal Republic of Germany, Finland, France, Greece, Holy See, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America.

C. List of States indicated in section II, paragraph 4 (c): Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, Venezuela.

D. List of States indicated in section II, paragraph 4 (d): Albania, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Poland, Romania, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics."

112. The UNIDO precedent may be of interest since it embodies the arrangements for the establishment of the most recent subsidiary organ of the General Assembly. It may be recalled that the arrangements which existed prior to the establishment of UNIDO, in this area of activities, were a department within the Secretariat (the Centre for Industrial Development) and a standing committee of ECOSOC (the Committee for Industrial Development).

(b) Certain aspects relating to membership in specialized agencies

113. Associate membership. Associate membership is provided for in certain of the constitutive instruments of the specialized agencies: WHO, FAO, IMCO and ITU.[48/] Such membership is generally open to a territory or group of territories which are not responsible for the conduct of their international relations; applications for associate membership are normally made by the member of the organization which is responsible for conduct of the international relations of the territory in question.

114. The arrangements for the participation of associate members in the proceedings of WHO are rather extensive[49/] and for that reason are given here in detail. In WHO associate members have the following rights and duties:

(a) the right to participate, without vote, in the plenary organ of the Organization and in its main committees;

(b) the right to participate, with vote, and hold office, in certain other committees or sub-committees of the Organization;

(c) the right to submit proposals to the Executive Board of the Organization (however, an associate member is not eligible for membership in the Executive Board);

(d) the right to propose items for inclusion in the provisional agenda of the Assembly;

(e) the right to receive all the relevant documentation;

(f) Associate members are obliged to contribute to the budget of the Organization, but on a basis which reflects their special status.

48/ Articles 8, 3, 9 and 3 respectively, of the pertinent constitutive instruments.

49/ Resolution adopted by the World Health Assembly, First session, 21 July 1948.

115. Status of observers. It has not been the practice to include reference to the possible status of non-member States as observers in the constitutive instruments of specialized agencies. However, provision for observer status has normally been contained in the rules of procedure of the plenary organs of the agency. It is customary for observers from non-member States to exercise the following rights:

(a) the right to attend the general conferences;

(b) the right to attend committees;

(c) the right to attend regional meetings (e.g. in the case of FAO);

(d) the right to participate in the general conference or committee or regional meeting. This usually involves permission to speak on invitation but it does not include the right to vote;

(e) the right to submit written statements;

(f) the right to be notified in advance of the date of the conferences and to be provided with all the necessary documents.

116. Membership of executive bodies. Each of the specialized agencies has two main deliberative organs, one of which is composed of representatives of all States members and the other having a much more limited composition. With respect to the criteria determining membership of the limited organ, in some cases a proportion of the membership is reserved for certain States specified by name, or for States that have a major interest in the subject-matter with which the organization is concerned. In other cases no criteria are stated, apart from that of equitable geographical jurisdiction, as in article 24 of the WHO Constitution.

117. The Governing Body of the ILO is an example of an executive body in which several interests are represented and provision is made for the representation of States in a particular category. Article 7 of the ILO Constitution provides:

> "1. The Governing Body shall consist of forty persons:
> twenty representing Governments;
> ten representing the employers; and
> ten representing the workers.
>
> 2. Of the persons representing Governments ten are appointed by Members of chief industrial importance."

The Governing Body is required to determine which of the Members of the Organization are "Members of chief industrial importance" and must ensure that

questions relating to the selection are considered by an impartial committee before being decided by the Governing Body. Appeals against decisions of the Governing Body are receivable by the Conference of the Organization.[50/]

118. Similar provisions are contained in the constitutive instrument of a number of the specialized agencies. One may note the provision in the Convention of IMCO:

> Article 17: "The Council shall consist of sixteen members and shall be composed as follows:
>
> (a) Six shall be Governments of the nations with the largest interest in providing international shipping services;
>
> (b) Six shall be Governments of other nations with the largest interest in international seaborne trade;
>
> (c) Two shall be elected by the Assembly from among the Governments of nations having a substantial interest in providing international shipping services; and
>
> (d) Two shall be elected by the Assembly from among the Governments of nations having a substantial interest in international seaborne trade...."

119. Similar language is used to describe the composition of the IMCO Maritime Safety Committee:

> Article 28: "The Maritime Safety Committee shall consist of fourteen members elected by the Assembly from the members, Governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of members. Governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas."

120. Other examples may be noted. The Articles of Agreement of IBRD, section 4 (1) concerning the appointment of Executive Directors, provide that:

> "There shall be twelve Executive Directors, who need not be Governors and of whom:
>
> (i) Five shall be appointed, one by each of the five members having the largest number of shares;
>
> (ii) Seven shall be elected according to Schedule B by all the Governors other than those appointed by the five members referred to in (i) above."

50/ Article 7 (3), ILO Constitution.

121. Article 50 (b) of the ICAO Convention stipulates that:

> "In electing the members of the Council, the Assembly shall give adequate representation to (1) the States of chief importance in air transport; (2) the States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation; and (3) the States not otherwise included whose designation will insure that all the major geographic areas of the world are represented on the Council...."

122. When dealing with the question of the composition of the executive body it is also customary to include a provision to the effect that a Member of the Organization which is not represented on a limited organ may nevertheless participate in the activities of that organ if the State's own interests are especially concerned. Article 53 of the ICAO Convention provides for instance:

> "Any contracting State may participate, without a vote, in the consideration by the Council and by its committee and commissions of any question which especially affects its interests. No member of the Council shall vote in the consideration by the Council of a dispute to which it is a party."

123. In conclusion, the relevant provisions of the constituent instruments of the specialized agencies may be summarized as follows: the specialized agencies are composed of two main deliberative organs, one being composed of representatives of all Members and the other being more limited in size. With respect to the limited organ various criteria have been adopted for the purpose of determining membership:

(i) The names of certain States, or merely their number may be specified, with reference being made to the necessity for equitable geographical distribution;

(ii) States with a major interest in the subject-matter dealt with by the Organization may be specially represented;

(iii) If part of the limited organ is composed of States with a major interest in the questions dealt with by the Organization, the rest of the limited organ will usually be composed of States chosen to represent the interests of the other States and to ensure as far as possible that the various areas of the world are represented.

124. It is desirable that any criterion (or criteria) for determining membership of a limited organ should be formulated in as clear and precise a manner as

possible, and that detailed provision should be made concerning the body to apply the criterion, together with machinery for appeal from a decision of that body. It may be recalled that an Advisory Opinion was requested from the International Court of Justice to determine the meaning of the term "largest ship-owning nations" from amongst whom part of the membership of the Maritime Safety Committee of IMCO is to be selected.51/

125. It is usual to stipulate, either in the constitutive instrument or in the rules of procedure that a member not represented on a limited organ may nevertheless participate in its proceedings if the State's own interests are involved.

3. Voting arrangements

(a) Voting in United Nations subsidiary organs

126. In many instances subsidiary organs have simply followed the rules of procedure of the parent body, including those relating to voting. Some of the more important subsidiary organs, such as UNDP, UNCTAD and UNIDO, have, however, adopted their own rules of procedure relating to voting, which are summarized below.

127. UNDP. The rules of procedure of the UNDP Governing Council specify that each member of the Council shall have one vote; decisions are made by a majority of the members present and voting; abstaining members are not considered as voting. It is further specified that "/a/ny Member dissenting from a decision of the Governing Council may require that his views be recorded in the records of the meeting". (Rule 25). Because of the fact that the Governing Council is a consolidation or merger of the Technical Assistance Committee (a subsidiary body of ECOSOC) and the Governing Council of the Special Fund (a subsidiary body of the General Assembly), it was anticipated that procedural questions might give rise to difficulties. In an effort to meet any problems which might arise the following rule was incorporated in the rules of procedure of the Governing Council:

51/ I.C.J. Reports 1960, p. 150.

> Rule 29. "If, in connexion with the conduct of business of a meeting, any procedural question arises which is not covered in the present rules, it shall be decided by the President, taking into account the corresponding rules of procedure of the Economic and Social Council, if applicable. A member may appeal against such ruling of the President. Such an appeal shall immediately be put to the vote, and the ruling of the President shall stand unless overruled by a majority of the members present and voting."

128. UNCTAD. In the resolution establishing UNCTAD (General Assembly resolution 1995 (XIX) of 30 December 1964) a distinction was made as follows between the voting majority required in meetings of the Conference and that required in meetings of the Trade and Development Board:

> "Voting. 24. Each State represented at the Conference shall have one vote. Decisions of the Conference on matters of substance shall be taken by a two-thirds majority of the representatives present and voting. Decisions of the Conference on matters of procedure shall be taken by a majority of the representatives present and voting. Decisions of the Board shall be taken by a simple majority of the representatives present and voting."

129. Pursuant to the foregoing, both the Conference and the Board have included references to voting in their respective rules of procedure. In addition, rule 50 (3) of the rules of procedure of the Conference provides:

> "If the question arises whether a matter is one of procedure or substance, the President of the Conference shall rule on the question. An appeal against this ruling shall immediately be put to the vote and the President's ruling shall stand unless the appeal is approved by a majority of the members present and voting."

In other aspects relating to voting, the rules of the Conference as well as of the Board follow the pattern established by the rules of procedure of the General Assembly.

130. Of relevance to the voting arrangements provided for in the establishing resolution of UNCTAD are the procedures set forth in paragraph 25 (a) to (n) which, as stated therein, were designed to provide a process of conciliation prior to voting and

> "... to provide an adequate basis for the adoption of recommendations with regard to proposals of a specific nature for action substantially affecting the economic or financial interests of a particular State".

Among the topics dealt with in the respective sub-paragraphs of paragraph 25 are: levels of conciliation; requests for conciliation; initiation of conciliation;

subjects regarding which conciliation is appropriate or excluded; nomination procedures and reports of the conciliation committee; and the good offices of the Secretary-General of UNCTAD.

131. UNIDO. Voting in the Industrial Development Board is governed by operative paragraphs 8 and 9 of General Assembly resolution 2152 (XXI) of 17 November 1966, which provide that each Member shall have one vote, and that decisions of the Board shall be taken by a simple majority of "the Members present and voting". The rules of procedure of the Board provide (Rule 48.2) that, as is the case in the rules of procedure of the General Assembly, the above phrase means "Members present and casting an affirmative or negative vote". Members abstaining are considered not voting. Other provisions deal with the method of voting, conduct during voting, roll-call voting, and voting on amendments and on proposals.

(b) Voting in specialized agencies and other international organizations

132. Entitlement to vote. The acts of individual representatives participating in meetings of the deliberative organs or specialized agencies and other intergovernmental organizations are generally acts on behalf of their respective Governments. The procedures at Conferences of the ILO differ, however, in that since delegations include representatives of employers and of employees, the novel principle was introduced that: "/e/very delegate shall be entitled to vote individually on all matters which are taken into consideration by the conference".52/

133. Unanimity, majority and special majority voting. The requirement of a unanimous vote is exceptional in the specialized agencies and other general international organizations, although such votes may be required with respect to certain decisions of various regional bodies, such as ECSC, EEC, EURATOM, EFTS and OECD.

134. Voting within specialized agencies is normally on the basis of a simple majority, except as otherwise specified with respect to certain categories of decisions in the constituent instrument or rules of procedure of the deliberative organs; in the latter case decisions are normally by two-thirds majority. The

52/ Article 4 (1), the ILO Constitution.

following are typical of arrangements within the specialized agencies and IAEA regarding matters subject to simple majority or special majority voting. In the case of the General Conference of UNESCO, for example, the following distinction is drawn: "The General Conference shall, in adopting proposals for submission to the Member States, distinguish between recommendations and international conventions submitted for their approval".[53/] In the first instance a majority vote is sufficient; in the latter, a two-thirds majority is required. The following general provision has been included in article 43 of the IMCO Convention:

> "The following provisions shall apply to voting in the Assembly, the Council and the Maritime Safety Committee:
>
> (a) Each member shall have one vote.
>
> (b) Except as otherwise provided in the Convention or in any international agreement which confers functions on the Assembly, the Council, or the Maritime Safety Committee, decisions of these organs shall be by a majority vote of the members present and voting and, for decisions where a two-thirds majority vote is required, by a two-thirds majority vote of those present.
>
> (c) For the purpose of the Convention, the phrase 'members present and voting' means 'members present and casting an affirmative or negative vote'. Members which abstain from voting shall be considered as not voting."

135. In the case of applications for membership, most of the specialized agencies require a two-thirds majority vote in favour; WHO, however, requires only the affirmative vote of a simple majority.

136. IAEA requires a majority vote except in cases of decisions of the General Conference regarding financial questions and those of the Board of Governors regarding the budget, in which instances a two-thirds majority is required. The same is true regarding votes on amendments to the Statute and/or suspension of the privileges and rights of membership.[54/]

137. Weighted voting. In the financial organizations of the specialized agencies and in the European communities a system of weighted voting has been adopted. Article 12 (section 5 a) of the Articles of Agreement of the IMF provides that:

53/ Article 4, para. 4, UNESCO Constitution.

54/ Article 5 (c), IAEA Statute.

"(a) Each member shall have two hundred and fifty votes plus one additional vote for each part of its quota equivalent to one hundred thousand United States dollars.

(b) Whenever voting is required under Article V, Section 4 or 5, each member shall have the number of votes to which it is entitled under (a) above, adjusted:

(i) by the addition of one vote for the equivalent of each four hundred thousand United States dollars of net sales of its currency up to the date when the vote is taken, or

(ii) by the subtraction of one vote for the equivalent of each four hundred thousand United States dollars of its net purchases of the currencies of other members up to the date when the vote is taken; provided, that neither net purchases nor net sales shall be deemed at any time to exceed an amount equal to the quota of the member involved."

The Articles of Agreement of the IBRD provide in article 5 (section 3 a) that, "Each member shall have two hundred and fifty votes plus one additional vote for each share of stock held".

138. The Treaty establishing the EEC also contains provisions concerning weighted voting.

Article 148

"1. Except where otherwise provided for in this Treaty, the conclusions of the Council shall be reached by a majority vote of its members.

2. Where conclusions of the Council require a qualified majority, the votes of its members shall be weighted as follows:

Belgium 2

Germany 4

France 4

Italy 4

Luxembourg 1

Netherlands 2

Majorities shall be required for the adoption of any conclusions as follows: Twelve votes in cases where this Treaty requires a previous proposal of the Commission, or - twelve votes including a favourable vote by at least four members in all other cases.

3. Abstentions by members either present or represented shall not prevent the adoption of Council conclusions requiring unanimity."

139. No specialized agency, apart from the financial organizations, has adopted a weighted voting system of the kind illustrated above. One may note that a number of the commodity agreements, such as those concerned with wheat and sugar, have adopted a system of weighted voting however.

140. The following conclusions with respect to voting arrangements can be advanced on the basis of the foregoing examination:

(i) The requirement of unanimity for decisions within international organizations has waned and is now the exception rather than the rule.

(ii) Within the specialized agencies most decisions are taken on a majority vote.

(iii) However, most organizations require special two-thirds majorities with respect to certain questions. A number of organizations follow in this respect the example of the United Nations Charter, which enumerates in article 18 a number of "important questions" which require a two-thirds majority.

(iv) Some financial and economic organizations such as IBRD, IMF and the EEC have adopted a system of weighted voting.

(v) Some organizations, for example the EEC, provide for majority voting, special majority, weighted voting or unanimity, depending on the issue concerning which a vote is being taken.

(vi) Votes are usually cast on behalf of States Members rather than individually. However, the ILO Constitution makes provision for individual votes.

4. Financial arrangements

(a) Practice with respect to United Nations subsidiary organs

141. It is the practice in the establishment of subsidiary organs either to provide:

(i) that all expenses of the organ are to be borne by the regular budget of the United Nations; or

(ii) that administrative expenses of the organ are to be borne by the regular budget of the United Nations and that other expenditures are to be financed by voluntary contributions; or

(iii) that all expenses, both administrative and operational, are to be financed by voluntary contributions.

142. Financing procedures in accordance with (i) were adopted in the case of UNCTAD: in paragraph 29 of General Assembly resolution 1995 (XIX) of 30 December 1964 it is provided that "/t/he expenses of the Conference, its subsidiary bodies and secretariat shall be borne by the regular budget of the United Nations which shall include a special budgetary provision for such expense". In respect of contributions by States not members of the United Nations, which participate in the Conference, separate arrangements for assessments have been made, in accordance with the resolution. There is no specific reference in resolution 1995 (XIX) to the applicability of the United Nations financial rules and regulations.

143. Examples of subsidiary organs which operate according to the format of (ii) above are UNIDO and UNHCR. In the case of UNIDO, General Assembly resolution 2152 (XXI) of 17 November 1966, includes extensive provisions in respect of financial arrangements: it provides that administrative and research activities are to be borne by the regular budget of the United Nations, which shall include separate budgetary provisions for such expenses (paragraph 21). It further provides that:

"22. Expenses for operational activities shall be met:

(a) From the voluntary contributions made to the Organization, in cash or in kind, by Governments of the States Members of the United Nations, members of the specialized agencies and of the International Atomic Energy Agency;

(b) Through participation in the United Nations Development Programme on the same basis as other participating organizations;

(c) By the utilization of the appropriate resources of the United Nations regular programme of technical assistance.

"23. Voluntary contributions to the Organization for its operational activities under paragraph 22 (a) above may be made, at the option of the Governments, either:

(a) Through announcement at a pledging conference to be convened by the Secretary-General of the United Nations on the recommendation of the Board; or

(b) In accordance with regulations 7.2 and 7.3 of the Financial Regulations of the United Nations; or

(c) By both of these methods.

"24. The voluntary contributions referred to in paragraph 22 (a) above shall be governed by the Financial Regulations of the United Nations, except for such modifications as may be approved by the General Assembly on the recommendation of the Board.

"25. Disbursement of the funds referred to in paragraph 22 (b) above shall be for purposes consistent with the policies, aims and functions of the Organization, including such policies and programmes as may be established by the Board, and shall be made by the Secretary-General of the United Nations in consultation with the Executive Director of the Organization."

144. In the case of UNHCR, expenditures for administrative expenses are borne by the budget of the organization, and other expenditures are financed by voluntary contributions from governmental as well as other sources. A grant-in-aid is made each year to the United Nations budget by the UNHCR (representing the contribution toward administrative expenses relating to the functioning of the office) from the voluntary funds administered by the High Commissioner.

145. Examples of subsidiary organs which are financed in accordance with (iii) above are UNITAR and UNICEF. In the former case, all expenses, including expenses for operational services and administrative costs are borne by voluntary contributions from governmental and other sources. The Statute of UNITAR provides that the Executive Director may accept contributions, provided that contributions for a specific purpose may not be accepted if the purpose is inconsistent with the purposes and policies of the Institute.[55/] Article VIII of the Statute states further that the Controller of the United Nations shall perform all necessary financial and accounting functions for the Institute; that the funds administered by and for the Institute shall be subject to audit by the United Nations Board of

55/ Article VIII, UNITAR Statute.

Auditors; and that the general administrative, personnel and financial services of the United Nations shall be utilized by the Institute.[56]

146. In the case of UNICEF, operative paragraph 2 (a) of General Assembly resolution 57 (I) provides in effect that the Fund shall bear those administrative expenses which cannot be provided from the established services of the United Nations budget. As in the case of UNITAR, UNICEF and UNHCR are among the subsidiary organs which submit financial reports and accounts to the annual sessions of the General Assembly.

(b) Practice in respect of the specialized agencies

147. Although the concept of a common budget for the United Nations and specialized agencies has not materialized there is a certain amount of budgetary co-operation between them. Apart from the constituent instruments of the IBRD

56/ The relevant provisions of Article VIII read as follows:

"(3) The funds of the Institute shall be kept in a special account to be established by the Secretary-General of the United Nations in accordance with the Financial Regulations of the United Nations.

(4) The funds of the Institute shall be held and administered solely for the purposes of the Institute. The Controller of the United Nations shall perform all necessary financial and accounting functions for the Institute including the custody of its funds and shall prepare and certify the annual accounts showing the status of the Institute's special account.

(5) The Financial Regulations and the rules and procedures of the United Nations shall apply to the financial operations of the Institute subject to such special rules and procedures as the Executive Director in agreement with the Secretary-General may issue after consultation with the Board of Trustees and the Advisory Committee on Administrative and Budgetary Questions of the United Nations.

(6) Funds administered by and for the Institute shall, as provided in the United Nations Financial Regulations, be subject to audit by the United Nations Board of Auditors.

(7) The general administrative, personnel and financial services of the United Nations shall be utilized by the Institute on conditions determined in consultation between the Secretary-General and the Executive Director, it being understood that no extra cost to the regular budget of the United Nations is incurred."

and the IMF which make no reference to budgetary co-operation, the constitutions of certain other agencies do reflect this idea. The ILO Constitution envisages "such financial and budgetary arrangements with the United Nations as may appear appropriate",[57] and UNESCO's Constitution anticipates that any agreement with the United Nations may "provide for the approval and financing of the budget of the Organization by the General Assembly of the United Nations".[58]

148. The relationship Agreements between the United Nations and the specialized agencies and IAEA, in respect of budgetary and financial arrangements, fall into four main groups:

(a) ILO, FAO, UNESCO, ICAO, WHO, WMO and IMCO: The Agreements in question reflect the initial hope that arrangements might be achieved to include the budget of the agency "within a general budget of the United Nations", and provided that consultations would be held with a view to concluding a supplementary agreement to that end. In each Agreement it is specified inter alia that prior to the conclusion of such a supplementary agreement (i) consultations on the annual budget of the agency would be held, (ii) the proposed budget of the agency would be transmitted annually to the General Assembly, and that the Assembly could make recommendations thereon, (iii) agency officials would participate without vote in the deliberations of the Assembly on this matter, and (iv) the agency agreed to conform as far as practicable with the standard forms and practices recommended by the United Nations.[59]

(b) The UN-UPU Agreement merely provides in article X that the budget of the Union would be transmitted to the United Nations and that the General Assembly might make recommendations thereon to the UPU Congress. The UN-ITU Agreement contains, in addition to provisions identical to those just described, provisions in article XI for the participation of representatives in the deliberations of the Assembly on the budget of the ITU.

(c) The UN-IAEA Agreement, is, in respect of the provision in question, more similar to the Agreements described in (a) above than to any other, except that

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57/ Article 13 (1), ILO Constitution.

58/ Article 10, UNESCO Constitution.

59/ See, for example, article XIV of the United Nations-ILO Agreement.

the Agreement is silent on the possibility of any future arrangement by which IAEA's budget would be included within a general budget of the United Nations. Moreover, IAEA agrees inter alia to transmit its annual budget to the United Nations for "such recommendations as the General Assembly may wish to make on the administrative aspects thereof".[60/]

(d) Neither the Agreement between the United Nations and the IBRD, nor that between the United Nations and the IMF contains provisions similar to those of the other specialized agencies; the only related provisions being those expressed in article X, paragraph 3 of the respective Agreements, which states that

> "... The United Nations agrees that, in the interpretation of paragraph 3 of Article 17 of the United Nations Charter it will take into consideration that the (Agency) does not rely for its annual budget upon contributions from its members, and that the appropriate authorities of the (Agency) enjoy full autonomy in deciding the form and content of such budget."

149. The budget of a specialized agency or similar organization will normally include the administrative costs of running the organization (salaries of staff, printing, costs of conference services, etc.) and costs which result from a decision of policy that a particular activity be undertaken. Within the specialized agencies the preparation of the budget estimates is usually entrusted to the administrative head of the organization. This is expressly recognized in the Constitutions of ILO, FAO, WHO and IMCO. The actual approval or acceptance of the budget is a matter for the plenary organ.

150. If the organization is not self-supporting the question of apportionment arises. The ITU and UPU follow a system whereby a number of "classes" are established. In the case of UPU seven classes have been established: each member or associate member is, according to the class in which it finds itself, obliged to pay so many "units" of the total budget. The more usual solution, however, is to fix a percentage quota for each member. This may be done either in the constituent instrument, or by the decision of the plenary organ as in the case of the WHO.[61/]

60/ Emphasis added. Article XVI, para. 3.

61/ Article V (5.1) of the Financial Regulations of WHO.

151. Other arrangements exist with regard to the IBRD and the IMF, which are financially self-sufficient. As provided for in the Articles of Agreement of IBRD[62] each member subscribes a given number of shares of the capital stock of the Bank. Whereas as regards original members, the minimum number of shares to be subscribed are established in Schedule A to the Articles of Agreement, the minimum number of shares to be subscribed by other members is decided by the Bank itself. The Articles of Agreement also contain provisions dealing with method[63] and time periods[64] of payment of subscriptions for shares.

152. As regards the IMF the provisions for financing include the following: each of the original members of the Fund are assigned a quota under the Articles of Agreement; other members are assigned quotas by decision of the Fund itself. This quota, which serves as the basis of the subscription of that member in the Fund, is adjustable periodically. Payment of the amount of the subscription by a member, in turn, makes that member eligible to purchase currencies from the Fund. Any proposed increase in the quota of any member must be with the agreement of that member. The same is true with respect to deductions in quotas.

153. The question of the periodicity of submission by the specialized agencies of their budgets for approval by the respective legislative bodies, and of the form and presentation of the budgets, was considered by the Ad Hoc Committee of Experts to Examine the Finances of the United Nations and the Specialized Agencies. In its second report[65] to the General Assembly at the twenty-first session, that committee recommended, inter alia, that the specialized agencies should adopt biennial budget cycles and should endeavour to arrive at a uniform presentation in respect of their budget submissions to legislative bodies.

154. In conclusion it may be said that the appropriate method of financing new international machinery will depend upon the nature of that machinery (and in turn upon the functions which that machinery is to perform);

(i) Were that machinery to be in the form of a subsidiary organ of the United Nations it would be possible to provide that it be financed wholly

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62/ Article 2, section 3.

63/ Article 2, section 7.

64/ Article 2, section 8.

65/ Document A/6343.

or partly out of the budget of the United Nations. Alternatively, it could be financed wholly or partly out of voluntary contributions.

(ii) Were the machinery to be in the form of a specialized agency or similarly constituted international organization, arrangements for some degree of budgetary co-operation with the United Nations could be envisaged; alternatively precedents exist for organizations, such as the IBRD and IMF, enjoying a greater degree of financial and budgetary independence from the United Nations. Moreover, various alternatives for financing such machinery would be available. These arrangements could either be provided for wholly or partially on the basis of formulae to be contained in the constitutive instrument, or left to the decision of the plenary body of the organization.

5. Secretariat

155. As has been stated by a number of representatives, it would be desirable that, whatever the type of machinery to be established, the secretariat should be based on the principles of universality and equitable geographical distribution. Having regard to the highly technical subject-matter with which the machinery might be concerned, this principle would need to be complemented by the principle that the individual members of the staff of the new machinery should possess a thorough-going and broad knowledge of their respective fields of competence. Persons of experience and capacity in the topics in question are relatively few in number, however, and their services may be expected to be in acute demand with the increasing development and advancement of technical capability with respect to marine activities.

156. Should it be decided that the new machinery under discussion would most efficaciously be established as a unit or branch within an established secretariat, the appointment of staff would be dealt with according to existing procedures, unless it was decided that special arrangements should be made. In the case of a unit within the United Nations Secretariat, the officials appointed would be staff members of the Organization within the meaning of Article 101 of the Charter. It would also be possible to provide for the appointment of an executive head of the unit by the Secretary-General.

157. If it was considered that the new machinery should be in the form of a United Nations subsidiary organ, it may be of interest to note that, in the past, various practices have been followed with respect to the method of appointment of the staff concerned.

158. UNCTAD. General Assembly resolution 1965 (XIX) of 30 December 1964, provides as follows:

> "26. Arrangements shall be made, in accordance with Article 101 of the Charter, for the immediate establishment of an adequate, permanent and full-time secretariat within the United Nations Secretariat for the proper servicing of the Conference, the Board and its subsidiary bodies.
>
> ...
>
> 28. Adequate arrangements shall be made by the Secretary-General of the United Nations for close co-operation and co-ordination between the Secretariat of the Conference and the Department of Economic and Social Affairs, including the secretariats of the regional economic commissions and other appropriate units of the United Nations Secretariat as well as with the secretariats of the specialized agencies."

159. UNHCR. It is provided in the annex to General Assembly resolution 428 (V) of 14 December 1950 that the staff of the High Commissioner shall be appointed by him and that they "shall be chosen from persons devoted to the purposes of the Office...". Whereas the Secretary-General of UNCTAD, in accordance with paragraph 27 of the establishing resolution is appointed by the Secretary-General of the United Nations "and confirmed by the General Assembly", the United Nations High Commissioner for Refugees is elected by the General Assembly on the nomination of the Secretary-General.

160. UNIDO. With respect to UNIDO, the provisions for the appointment of the Executive Director and the staff are similar to those adopted in the establishment of UNCTAD. The relevant paragraphs of General Assembly resolution 2152 (XXI) of 17 November 1966 read as follows:

> "17. The Organization shall have an adequate permanent and full-time secretariat, which will be appointed in accordance with Article 101 of the Charter of the United Nations, and which will avail itself of the other appropriate facilities of the Secretariat of the United Nations.

18. The Secretariat shall be headed by the Executive Director, who shall be appointed by the Secretary-General of the United Nations and whose appointment shall be confirmed by the General Assembly. He shall be appointed for four years and shall be eligible for reappointment."

161. UNITAR. In accordance with the Statute of the Institute, the Executive Director of UNITAR is appointed by the Secretary-General after consultation with the UNITAR Board of Trustees. It is provided in article V, paragraph 1, of the Statute that "the staff of the Institute shall be appointed by the Executive Director and shall be responsible to him in the exercise of its functions".

162. Should it be considered desirable to take steps toward the establishment, by multilateral treaty, of a separate international organization, suitable provisions for a secretariat could be included in the constitutive instrument.

IV. GENERAL LEGAL ISSUES

163. The general legal issues dealt with in the present study are considered in the following chapters:

1. The relation between the existing law of the sea and international machinery.

2. The position of States which do not become parties to an agreement establishing international machinery.

1. The relation between the existing law of the sea and international machinery

164. This chapter seeks to relate the existing law of the sea[66/] to the performance by international machinery of the various functions previously considered and to indicate the extent to which that law might need to be adapted if such machinery were to come into operation. In view of the uncertainty which exists under the present law of the sea with respect to some of the most crucial issues and since no decision has yet been taken as to the kind of machinery, if any, to be introduced, the present chapter does not, however, attempt to proceed beyond an initial analysis of the main questions raised. The aim of the account which is given below has accordingly been to isolate the principal legal issues which present themselves in various contexts of the potential development of sea-bed resources, so that Member States may review the situation in the light of the legal considerations involved, but not to attempt to deal exhaustively with these issues at this stage or to give full and detailed answers to the problems posed.

165. Before examining specific aspects of the matter, it may be noted that there is one major issue which would affect any of the functions concerned, namely that

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66/ Information on the content of that law is to be found in Survey of Existing International Agreements concerning the Sea-Bed and the Ocean Floor and the Sub-soil thereof, underlying the High Seas beyond the Limits of Present National Jurisdiction, document A/AC.135/10/Rev.1, and Legal Aspects of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Sub-soil thereof, underlying the High Seas beyond the Limits of National Jurisdiction, and the Use of their Resources in the Interest of Mankind, document A/AC.135/19/Add.1.

of the precise delimitation of the area of the sea-bed and ocean floor beyond the limits of national jurisdiction in which exploration and exploitation activities may take place. This issue would have to be examined in the light of the need for the successful implementation of any of the proposed functions and for the avoidance of disputes. Although attention is therefore called to the importance of this question, the choice of criteria and the factors to be considered in making this delimitation, are not, however, examined in the present study. As stated in paragraph 3 of the study, it has nevertheless been assumed that such an area exists.

166. The issues examined are discussed under the following headings: (a) legal régime relating to the exploration and exploitation of the resources of the sea-bed and ocean floor; (b) jurisdiction and control over ships, installations and other devices used for the exploration and exploitation of sea-bed resources; (c) respect for existing uses of the high seas; and (d) pollution.

(a) Legal régime relating to the exploration and exploitation of the resources of the sea-bed and ocean floor

167. A basic question which arises in the present context is to establish what legal principles and rules are applicable, or should be applicable, to the exploration and exploitation of sea-bed resources situated beyond national jurisdiction. Consideration of this question is required in order to determine whether the arrangements which might be made for the exercise of registration, licensing or operational functions by international machinery, would require changes to be made in the existing law of the sea.

168. Different opinions have been expressed as regards the fundamental issue involved. One view is that the governing principle in this sphere is that contained in article 2 of the Convention on the High Seas, which provides, inter alia, that the high seas are open to all nations and which refers to the exercise of the freedoms stated in that article (namely, freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom to fly over the high seas), and of others which are recognized by the general principles of international law, by all States. It is said that the activities on the sea-bed form part of the freedoms of the sea which are available, under existing international law, to all States. Reference has been made in this context to the legislative history of

article 2 of the Convention and other articles of the Geneva Conventions on the Law of the Sea.[67] A distinction has been drawn between claims of sovereignty or of exclusive control over particular areas for indefinite periods, and the use which might be made of particular areas by individual States solely for exploration and exploitation purposes. It has been pointed out that although the extent of States' rights and duties in this regard has not been made the subject of special regulation, international law does not prohibit exploration and exploitation activities on the part of States beyond the limits of national jurisdiction.

169. Another view is that, since in accordance with the terms of article 2 of the Convention on the High Seas, sea-bed resources are not under the sovereignty of any State, they are a common property or heritage of mankind. Accordingly, those resources may only be exploited under conditions agreed upon by the international community and chosen so as to safeguard the interests of all countries and peoples.

170. This difference in views has a bearing on the question whether the existing law of the sea should be revised or supplemented by the introduction of arrangements for the exercise of registration, licensing or operational functions by international machinery. On the basis of one approach, the existing law would provide a legal framework within which sea-bed activities might be conducted without recourse to the establishment of international machinery, and therefore the question of a change in the law does not arise. Those holding contrary views consider that the present international law is insufficient and should be modified or supplemented so as to permit the operation of an agreed form of international machinery.

67/ An account of the legislative history is contained in document A/AC.135/19/Add.1. In its commentary on the present article 2 of the Convention on the High Seas the International Law Commission noted that it had only specified four freedoms, but was aware that others existed. After a reference to freedom of scientific research, the commentary continued:

> "The Commission has not made specific mention of the freedom to explore or exploit the sub-soil of the high seas. It considered that apart from the case of the exploitation or exploration of the soil or sub-soil of a continental shelf... such exploitation had not yet assumed sufficient practical importance to justify special regulation."

Yearbook of the International Law Commission, 1956, vol. II, p. 278.

(b) Jurisdiction and control over ships, installations and other devices used for the exploration and exploitation of sea-bed resources

171. The normal rule is that, when ships are on the high seas the State under whose flag the ship sails has sole jurisdiction.[68/] So far the same rule has been applied in the case of vessels, installations and other devices engaged in sea-bed exploration and exploitation. In the case of ships the normal rule has been applied, and in the case of fixed installations jurisdiction has been exercised by the coastal State under whose authority they were installed. Having regard, however, to the possibility of establishing a system of international registration or licensing, or of direct exploitation by an international body, the question of jurisdiction and control requires examination on a further scale, in order to set out the range of possibilities.

172. If a registration or licensing system were to be adopted whereby activities might be registered by, or licences granted to, States, ships might operate under the flag of the State which registered the activity or received the licence. In this case no change would be required in the standard rule according to which vessels while on the high sea are subject, save in exceptional circumstances, to the exclusive jurisdiction of the flag State in respect of civil, criminal and administrative matters. The same rule might be applied also to the installations and other devices used for the exploration and exploitation of sea-bed resources in the particular areas concerned. In each instance, however, the content of national jurisdiction might need to reflect the fact that, under the establishing instrument, the registration or licensing authority might possibly

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68/ Article 6, Convention on the High Seas, provides:

"1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality."

be given power to make regulations concerning sea-bed activities (for example, working practices and safety regulations) or that international agreements might be concluded dealing with such matters.

173. In the case where a State permitted activities registered in its name, or a licence granted to it, to be utilized by a non-national enterprise which employed a vessel or installation operating under the flag of another State, difficult questions might arise; in such circumstances either the normal rule, whereby the flag State has sole jurisdiction, might apply, or special provision could be made for a system of concurrent jurisdiction.

174. In the event that activities might be registered by, or licences granted to, entities other than States, it would be necessary to decide whether the normal rule should apply, or some form of "international" jurisdiction should be devised, or whether some other solution should be adopted.

175. The possibility may also need to be considered of the inspection of ships, installations and other devices by an international body in order to verify fulfilment of the conditions under which a claim was registered or a licence granted. If such power were to be granted to an international body the law of the sea would need to be modified accordingly. So far as the present law of the sea is concerned reference may be made to article 22 of the Convention on the High Seas, which provides that, except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting that the ship is engaged in piracy or in the slave trade, or, though showing a foreign flag or refusing to show its flag, is, in reality, of the same nationality as the warship. In these exceptional cases the warship may proceed to verify the ship's right to fly its flag. Inspection of ships, installations and other devices, by an international body would therefore require the adoption of express treaty provisions to that effect.

176. In the event that direct exploration and exploitation activities were undertaken by an international body, it is possible that ships, installations and other devices might be operated by the international agency concerned. Reference may be made in this connexion to article 7 of the Convention on the High Seas, which refers to the question of ships employed on the official service of an

intergovernmental organization flying the flag of the organization. The possibility that ships might be operated by an international organization was referred to during the discussions by the International Law Commission when the Law of the Sea Conventions were being prepared.[69] The question was raised whether a maritime code would have to be prepared to cover the situation or whether the international organization would apply the relevant laws of the State where it registered the ship. The same choice would thus present itself in the event that an international body were established to operate ships, installations and other devices as part of the exploration and exploitation of sea-bed resources.

(c) Respect for existing uses of the high seas

177. It would appear to have been generally accepted during discussions in the General Assembly, in the First Committee, and in the Ad Hoc and present Committee, that future exploration and exploitation of the resources of the sea-bed should be conducted in such a way as to respect the existing uses made of the sea, including the exploitation of other marine resources. The concept that States must pay reasonable regard to the rights of other States with respect to the use of the high seas (whether for the same or different purposes) was incorporated in article 2 of the Convention on the High Seas. After enumerating four of the freedoms of the high seas - freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines and freedom to fly over the high seas - the article declared that: "These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in the exercise of the freedom of the high seas."[70] Assuming this principle to be applicable to activities undertaken in order to explore or exploit sea-bed resources, the question would arise of determining its implications with respect to particular situations or

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69/ References and further information are contained in section 3b (ii) of The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their Status, Privileges and Immunities. Part Two: The Organizations (A/CN.4/L.118/Add.1).

70/ For a summary of consideration of the concept of "reasonable regard" by the International Law Commission and at the 1958 Conference on the Law of the Sea, see A/AC.135/19/Add.1, paras. 42-48.

conflicts of interests. In this connexion reference may be made to the Convention on the Continental Shelf, which contains various provisions concerning respect for existing uses of the high seas.[71] In accordance with the continental shelf

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71/ Articles 3, 4 and 5 of the Convention on the Continental Shelf are as follows:

"Article 3

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters.

Article 4

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf.

Article 5

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.

3. The safety zones referred to in paragraph 2 of this article may extend to a distance of 500 metres around the installations and other devices which have been erected, measured from each point of their outer edge. Ships of all nationalities must respect these safety zones.

4. Such installations and devices, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

5. Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.

(Foot-note 71 continued on following page)

doctrine, the coastal State is given authority, within the limits laid down in the articles concerned, to determine the conditions under which installations and other devices may operate on the continental shelf, their location, and the establishment of safety zones around them; the coastal State's obligations vis-à-vis other users, as contained in those articles, are in respect of the legal status of the superjacent waters and the air space above them, the laying or maintenance of submarine cables or pipelines[72] and the prohibition of "any unjustifiable interference" with navigation (in particular as regards sea lanes), fishing, the conservation of the living resources of the sea, or with fundamental scientific research carried out with the intention of open publication. In its commentary on the future article 5, paragraph 1, of the Convention on the Continental Shelf, the International Law Commission stressed that "what the article prohibits is not any kind of interference, but only unjustifiable interference".[73] The commentary then

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71/ (continued)

6. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

7. The coastal State is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents.

8. The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published."

72/ As regards submarine cables and pipelines, see also articles 26-29, Convention on the High Seas.

73/ Yearbook of the International Law Commission, 1956, vol. II, Commentary on Article 71, para. (1), p. 299.

continued with the following general observations, which may be of interest in the present connexion:

> "The manner and the significance of that qualification were the subject of prolonged discussion in the Commission. The progressive development of international law, which takes place against the background of established rules, must often result in the modification of those rules by reference to new interests or needs. The extent of that modification must be determined by the relative importance of the needs and interests involved.... The case is clearly one of assessment of the relative importance of the interests involved."

178. If the exploration and exploitation of sea-bed resources beyond the limits of national jurisdiction are undertaken, it may be assumed that the same issues (and perhaps others) will need to be considered, in order that the various uses of the marine environment may be conducted as harmoniously as possible. If international machinery endowed with registration, licensing or operational functions were to be established, therefore, it would have to be decided whether, and if so to what extent, power to regulate these matters should be given to the international body concerned. The constitutive instrument (or any special treaty concluded or declaration adopted) might lay down the framework within which States are to respect each other's uses of the sea for different purposes, with the possibility that the international authority might be given a discretionary power to apply these provisions when exercising its functions. Such discretionary authority might include power to make appropriate regulations or to recommend various practices to States; the eventual arrangements might in fact consist of a complex division of responsibilities between the international body and individual States (or others) engaged in exploration and exploitation, designed to ensure that reasonable regard was paid to the interests of other States with respect to different uses of the high seas or its sea-bed.

(d) Pollution

179. If international machinery with registration, licensing or operational functions were to be established, such machinery might be required to exercise any powers granted to it (for example, with respect to the establishment of operating conditions or of international norms of conduct) in such a way as to reduce so far as possible the dangers of pollution or other harmful effects caused by the

exploration and exploitation of the resources of the sea-bed beyond the limits of national jurisdiction. At the present time no general multilateral instrument contains detailed provisions on this question, although it may be noted that the Convention on the High Seas requires States to draw up regulations to prevent pollution resulting from exploration and exploitation of the sea-bed and its sub-soil.[74/] Under the Convention on the Continental Shelf coastal States are obliged to undertake appropriate measures for the protection of living marine resources from harmful agents.[75/] An International Convention for the Prevention of Pollution of the Sea by Oil was concluded under the auspices of IMCO, which has continued to give attention to the problem.[76/]

180. It may be recalled that in resolution 2467 B (XXIII) of 21 December 1968, the General Assembly welcomed the adoption by States of appropriate safeguards against the dangers of pollution and hazardous and harmful effects that might arise from the exploration and exploitation of sea-bed resources, and requested the Secretary-General to submit a study on all aspects of the protection of marine resources to the General Assembly and to the present Committee.

2. The position of States which do not become parties to an agreement establishing international machinery

181. This chapter deals chiefly with the effect, as regards third States, of the conclusion of a treaty providing for the establishment of international machinery to perform functions relating to the exploration and exploitation of sea-bed resources. However, as noted earlier in the study,[77/] international machinery

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74/ Article 24. Article 25, paragraph 2, provides:

> "2. All States shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio-active materials or other harmful agents."

75/ Article 5, para. 7.

76/ UNTS, vol. 327, p. 4, as amended by the Conference of Contracting Governments, held at London, 4-11 April 1962 (UK, Cmnd. 1801).

77/ Section III, B, 1, paras. 89-103 above.

might also be created by means of non-treaty making procedures, in particular through the use of a General Assembly resolution to set up a United Nations subsidiary organ. Before considering the effect of treaties for non-parties it is therefore proposed to examine briefly the question of the effect of resolutions of the General Assembly.

182. It should be noted at the outset, however, that the question of the effect, in legal terms, of a treaty or of a resolution, is not identical with that of the conditions which may need to be satisfied in order that the machinery may operate effectively. Thus, as a number of speakers have emphasized, it would be important for the successful performance of the functions of any machinery presently envisaged that the great majority of States, and indeed preferably all States, should participate in its work, although that might not be a legal requirement for the actual establishment of the machinery in question. As a second preliminary comment it may be pointed out that while this chapter deals with the legal effect of the means used to bring international machinery into operation, the particular means employed might form only part of the over-all arrangements. It might be necessary in practice to look to several instruments, for example, to a series of resolutions, or to a General Assembly declaration of basic principles coupled with a resolution establishing a United Nations subsidiary organ, or to a General Assembly resolution and to a treaty concluded between certain States, or to several treaties dealing with maritime activities, in order to discover the full scope of the legal conditions under which the machinery is intended to operate. The following discussion, therefore, is by way of a preliminary examination in general terms of the issues involved, and does not purport to deal with every possible combination of procedures whereby international machinery might be established and international arrangements made relating to sea-bed activities.

(a) General Assembly resolutions

183. Under the Charter, a General Assembly subsidiary organ might be established if the General Assembly considered this necessary for the performance of its functions[78/] and the pertinent resolution was adopted by the requisite majority.

78/ Article 22.

In view of the attention which the General Assembly has already given to the subject of the development of sea-bed resources, it may be taken as accepted that the General Assembly has functions and responsibilities relating to the development of the mineral resources of the sea-bed. Provided, therefore, the necessary resolution was adopted, a General Assembly subsidiary organ could be established in order to perform agreed tasks relating to sea-bed resources. The resolution would thus have institutional effects within the Organization which, under the system established by the Charter, would be binding even on States Members which abstained from, or even voted against, the resolution.

184. As regards the question of the effect of a General Assembly resolution (or portions of a resolution) directed to the activities of States, the General Assembly has power only to adopt recommendations. If the General Assembly therefore purported to do no more than that (e.g. if it were to recommend to States Members that they participate in a registration or licensing system), no problem about the binding force of the resolution would arise; the resolution would not, in its terms, purport to impose any substantive obligation, although States Members would be under an obligation to consider it in good faith.

185. If, however, the resolution were to go beyond making a mere recommendation, what would be its force? This matter is still controversial, but there is support for the view that a resolution may be of legal significance in the following ways, amongst others, some of which might be relevant in the present context.

(i) A resolution may either be declaratory, or contribute to the growth, of customary international law. This might be the case if, as has been suggested, the General Assembly were to adopt a declaration relating to the legal status of the sea-bed and the development of its resources, and possibly to the operation of international machinery. Relevant factors would be the language of the resolution or declaration,[79] the vote, statements made in the elaboration of the text, and practice before and after the adoption of the instrument; later practice will be relevant where the resolution or declaration contributed to future customary law rather than declaring the existing law.

79/ See generally Use of the Terms "Declaration" and "Recommendation", memorandum by the Office of Legal Affairs, E/CN.4/L.610.

(ii) A State, by its unilateral acts, may accept as an obligation rules stated in a resolution.

(iii) Finally, the resolution may in fact incorporate, or in part execute, an agreement between a group of States. This would be the case if a United Nations subsidiary organ were to be established to perform functions laid down in a treaty.

186. Accordingly, a resolution or a declaration adopted by the General Assembly could, in the circumstances indicated, give rise to, or be evidence of, specific legal rights and obligations possessed by States.

(b) Treaties and third States

187. There appears to be almost universal agreement that in principle a treaty creates neither obligations nor rights for a State which is not a party to the instrument, unless that State gives its consent. This rule is derived from the Roman law maxim pacta tertiis nec nocent nec prosunt - agreements neither impose obligations nor confer rights upon third parties. In international law, the application of the rule does not rest simply on this general concept of the law of contract, but on the sovereignty, independence and equality of States. There is abundant evidence of the recognition of the rule in State practice, and in the decisions of international tribunals, as well as in the writings of jurists.[80/]

188. The Vienna Convention on the Law of Treaties contains in part II, section 4, entitled "Treaties and Third States", the articles reproduced below:

"Article 34

General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

80/ References and appropriate quotations are to be found in the International Law Commission's commentary on its articles 30 to 34 which, without substantial amendment, became articles 34 to 38 of the Vienna Convention on the Law of Treaties. Reports of the International Law Commission on the second part of its Seventeenth Session and on its Eighteenth Session, General Assembly Official Records, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), p. 56. (Hereinafter referred to as "1966 ILC Report".)

Article 35

Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36

Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37

Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38

Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

189. The Vienna Convention on the Law of Treaties is not yet in force. Having regard, however, to the fact that the articles quoted above were adopted by overwhelming majorities, both in the Committee of the Whole and at plenary meetings of the Conference, and did not involve major departure from the texts prepared by the International Law Commission, which were based on existing law, it is proposed to treat these articles as the most authoritative statement available of the present law on the subject. The position under those articles may be summarized as follows. The general rule is that a treaty does not create obligations or rights for a third State without its consent. In the case of obligations, however, an obligation may arise if parties so intend and the third State accepts in writing, so constituting, in effect, a second or collateral agreement between the parties and the third State. In the case of rights, a third State may assent to acquire a right under a treaty if the parties intend to accord that right to the particular State in question, or to a group of States to which it belongs, or to all States, provided, however, the State concerned accepts the conditions imposed by the treaty. Obligations, once they have arisen, may be revoked or modified if the parties or the third State so consent, unless it had been otherwise agreed; rights may not be revoked or modified by the parties if it is established that the third State's consent is necessary. Finally, a rule contained in a treaty may become binding on a third State as a customary rule of international law. In this case, however, the source of the obligation, for the third State at least, is the customary rule and not the treaty.

190. This last provision might in fact become relevant if a treaty were to be concluded relating to sea-bed activities and the operation of international machinery. As noted in the previous chapter, the representatives of Member States have expressed different views as to the legal principles and rules presently applicable to sea-bed activities. Having regard to this fact and the relatively novel nature of the subject-matter, it would appear difficult to adopt a multilateral treaty which was merely declaratory of existing obligations under customary law; moreover even if the treaty purported to be in part declaratory of existing law, the degree of specific regulation which the treaty might be expected to introduce would in itself constitute a change in the law. A treaty relating to sea-bed activities and the operation of appropriate machinery might thus be regarded

as falling in the category of general law-making treaties, comparable to treaties dealing with the high seas or with outer space.[81] In the words of the International Law Commission's former Special Rapporteur on the law of treaties, the rules contained in such treaties "may come to be regarded as general rules of international law either through the number of accessions* or through general acceptance as custom".[82]

191. Apart from the question of the extent to which a treaty relating to sea-bed activities might be declaratory of existing customary law or be of a norm-creating character, the possibility of arguments based on the creation by treaty of a so-called "objective régime", that is, of a set of obligations and rights valid erga omnes, may also be noted. The examples usually given of objective régimes are of treaties providing for the neutralization of certain areas or for freedom of navigation through international rivers or waterways, but reference may also be made to the effect of instruments, such as the United Nations Charter, which may

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* As in the case of the Kellogg-Briand Pact and the Nuclear Test-Ban Treaty (foot-note in original).

81/ Sir Humphrey Waldock, the International Law Commission's Special Rapporteur on the law of treaties, referred to the Geneva Conventions on the High Seas and on Fishing and Conservation of the Living Resources of the High Seas, and the Nuclear Test-Ban Treaty, as examples of general law-making treaties. It may be recalled that the preamble to the Convention on the High Seas refers to the desire of the States Parties "to codify the rules of international law relating to the high seas". Yearbook of the International Law Commission, 1964, vol. II, third report on the Law of Treaties, article 63, commentary, para. (19).

82/ Third report on the Law of Treaties, idem. The circumstances in which a rule contained in a treaty may become binding on non-parties as "a customary rule of international law, recognized as such" in the words of article 38 of the Vienna Convention, are extremely difficult to define. It may be noted that in the North Sea Continental Shelf Cases the International Court of Justice stressed that the formation of a new rule of customary international law, through the passage of a rule from a treaty into the general corpus of international law, so as to become binding on third States, is a result which is "not likely to be regarded as having been attained". I.C.J. Reports 1969, p. 43.

confer rights or impose obligations on third States.[83] In the event that an agreement were to be concluded relating to the development of sea-bed resources and the establishment of international machinery, it might conceivably be argued therefore that the treaty had created a régime which was to be observed by all States, whether or not formally parties. The weight which might be attached to such an argument would depend on various considerations; the probability, however, that the treaty would fall within the category of general law-making treaties, and the fact that the area concerned was in any case one not subject to the exclusive jurisdiction of any State,[84] would tend to suggest that the argument might be difficult to sustain, even if an international organization was established with functions relating to sea-bed activities and enjoying objective legal personality. Nevertheless, having regard to the possibility that the argument might be raised, the position adopted by the International Law Commission with respect to objective régimes may be noted. Sir Humphrey Waldock, the Commission's Special Rapporteur on the Law of Treaties, originally proposed that an article dealing with the establishment by treaty of objective régimes, should be included in the Commission's draft provisions. In his commentary on the proposed article the Special Rapporteur

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83/ For example, under Article 2, para. 6, of the Charter. It may also be noted that, in its opinion in the case of Reparation for Injuries suffered in the Service of the United Nations, the International Court of Justice, having found that the United Nations possesses international personality, expressly held that this personality was of an objective character not limited to the parties to the Charter. It said:

> "Fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognized by them alone, together with capacity to bring international claims." I.C.J. Reports, 1949, p. 185.

84/ In his discussion of objective régimes the Special Rapporteur on the Law of Treaties distinguished law-making treaties concerned with general international law or with areas not subject to the exclusive jurisdiction of any State, on the ground that any objective régimes that may result from such treaties may be regarded as deriving their force more from custom than from the treaty; the Special Rapporteur drew a comparison with other cases, for example, treaties relating to particular regions and in which the State or States having territorial competence participate. Third report on the Law of Treaties, ibid., paras. (18)-(19).

expressed the view that the question of the possible objective effect of treaties creating international organizations should be omitted from the articles considered by the Commission, and left to be dealt with as part of the law relating to international organizations.[85] The Commission eventually decided, however, not to include a provision dealing specifically with objective régimes, but to regulate the matter through the articles which subsequently became articles 34 to 38 of the Vienna Convention. The Commission did not specify whether, in so doing, it was intending to include the possible objective effect of treaties creating international organizations, or whether it was continuing to follow the Special Rapporteur's suggestion that the point be set aside. The Commission did, however, put forward an article which provided that the provisions of the Convention should be applicable to the constituent instrument of international organizations. The article, which became article 5 of the Vienna Convention, reads as follows:

> "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."

Since it is clear that the Commission did intend, in its articles dealing with third States, to provide for the possibility that arguments might be raised as to the creation of objective régimes, it is suggested that, at least ex facie, the relevant provisions were intended to cover the possible objective effects of a treaty establishing an international organization also.[86]

192. The discussion by the Commission as to whether treaties creating objective régimes should be dealt with as a special case is summarized in its report as follows:

85/ Third report on the Law of Treaties, ibid., para. (20).

86/ An additional reason for following in the present instance the reasoning and method adopted in the Vienna Convention is that the law-making character of a treaty dealing with sea-bed activities is likely to weaken the force of arguments based on the "objective" nature of any machinery established relating to those activities, so as to make it improbable that the approach followed by the International Court in the Reparation for Injuries Opinion (cited in note 83 above) would be preferred to that contained in the Vienna Convention.

"Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective régimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid erga omnes, did not regard these cases as resulting from any special concept or institution of the law of treaties. They considered that these cases resulted either from the application of the principle in article 32 (the subsequent article 36) or from the grafting of an international custom upon a treaty under the process which is the subject of the reservation in the present article (the subsequent article 38). Since to lay down a rule recognizing the possibility of the creation of objective régimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the law of treaties. It considered that the provision in article 32, regarding treaties intended to create rights in favour of States generally, together with the process mentioned in the present article, furnish a legal basis for the establishment of treaty obligations and rights valid erga omnes, which goes as far as is at present possible. Accordingly, it decided not to propose any special provision on treaties creating so-called objective régimes." 87/

192. The Commission's approach was restated at the United Nations Conference on the Law of Treaties by the Special Rapporteur on the Law of Treaties (who participated as an Expert Consultant), who emphasized the special importance the Commission had attached to the future article 36, paragraph 1, when it had decided not to include a provision dealing with objective régimes.88/ He also stressed that the future articles 35, 36 and 37 must be read together and that article 36 assumed the simultaneous operation of article 35. The United Nations Conference, by its adoption of the articles quoted, endorsed the position taken by the International Law Commission. The status of a third State vis-à-vis an agreement which, it might be argued established an objective régime, including the establishment of international machinery, in respect of sea-bed activities, would therefore continue to be determined by the articles of the Vienna Convention previously cited.

87/ 1966 ILC report, article 34, commentary, para. (4).

88/ Official Records, United Nations Conference on the Law of Treaties, First Session, 35th meeting, Committee of the Whole, para. 55.

193. In conclusion it may be said that, in the event that a State declined to become a party to a treaty establishing international machinery relating to the exploration and exploitation of sea-bed resources, it would not acquire any obligations or rights under the instrument. Thus, if a registration or licensing system were to be instituted, the State in question could not be obliged, nor presumably would it attempt, to register its activities or to apply for a licence in respect of them, nor would those activities receive such international recognition as use of the registration or licensing machinery might afford. Provision could, however, be made to allow all States to receive rights under the treaty; the actual exercise of rights by a non-party would, under the Vienna Convention, require acceptance of any conditions and obligations laid down in the agreement. Assuming that the State in question did not accept any rights or obligations under the treaty, its activities would be based on existing customary and conventional law (to the extent to which the State might be a party to other agreements), unless and until a customary rule of international law emerged, possibly derived from the treaty, as envisaged in article 38 of the Vienna Convention.
