Proposal suggesting a new wording for articles 6 and 7 of annex II

(Anti-dominant position clause)

Article 6, paragraph 3

All plans of work proposed by qualified applicants shall be dealt with in the order in which they were received, and the Authority shall conduct, as expeditiously as possible, an inquiry in connexion with operational requirements, financial contribution, and transfer of technology as provided in the relevant provisions of this Convention and this annex. As soon as the issues under investigation have been settled, the Authority shall approve such plans of work, provided that they conform to the uniform and non-discriminatory requirements established by the rules, regulations and procedures of the Authority, unless:

(a) . . . .
(b) . . . . (no change)
(c) . . . .
(new wording)

(d) The approval of the proposed plan of work enables a State Party:

- either to have more than two approved plans of work, in reserved and non-reserved sites, of which the whole or a part of the surface lies within any square bounded by two meridians 6° apart and by two parallels 5° apart,
- or to have approved plans of work, in non-reserved and reserved sites, the surface of which exceeds 20 per cent of the portion of the Area comprised within any square as defined in the preceding subparagraph, excluding such areas as the Authority has declared unexploitable in pursuance of article 162, paragraph 2 (w), of part XII of this Convention.

Article 6, paragraph 4 (new wording)

For the purposes of applying the rule set forth in paragraph 3 (d):

(a) "State Party" means not only the State Party itself, but also State entities, or persons natural or juridical which possess its nationality or are effectively controlled by it or its nationals.

(b) Plans of work of consortia, those of companies and those of the Enterprise, when the latter has entered into a joint arrangement with any entity qualified to conduct activities in the Area, are considered to be owned by
States Parties on a pro rata basis according to the participation of their nationals in the consortia, companies or joint arrangements with the Enterprise, in so far as both the number and the surface of the work plans are concerned.

Article 7

Replace paragraphs 2 and 3 by a single paragraph:

The Authority shall consider all qualified applications received within the preceding period of time, as prescribed in the rules, regulations and procedures, and shall make its selection on the basis of an equitable determination of merit, taking into account the resources and effort already invested by the applicants in prospecting and exploration, and on the basis of the need to provide for all States Parties, irrespective of their social and economic systems or geographical locations, opportunities to participate in activities in the Area.

To this end, an application submitted by a national or nationals of one of the State Parties which are not as yet in possession of an approved plan of work shall have priority over an application submitted by a national or nationals of one of the State Parties which already possess two or more approved plans of work. The concept of a plan of work possessed by a State Party is that defined in article 6, paragraph 4.

EXPLANATORY NOTE ON THE FRENCH PROPOSAL TO AMEND ARTICLES 6 AND 7 OF ANNEX II

(Anti-dominant position clause)

Since the outset of these negotiations the French delegation has unceasingly stressed the need to include in the Convention an anti-dominant position clause which is not merely a stylistic clause.

This concern is based on the fact that the common heritage of mankind must not be "cornered" by a few countries whose companies are further advanced than the others in the specialized technology required for sea-bed exploration.

This note will review rapidly the principles on which the drafting of anti-dominant position clauses should be based and will compare the provisions at present in the IONT with those proposed by France.

GENERAL PRINCIPLES

Anti-dominant position clauses should include provisions of two types:

Absolute limitations which are applicable even when no competing applications for a plan of work have been submitted by nationals of other countries. Such limitations can conceivably be at two levels:

- the global level
- the regional level;

Relative limitations which are applicable when the Authority must select from among several applicants. In such cases these provisions give priority to the nationals of some countries over those of others.
A. ABSOLUTE LIMITATIONS

1. Absolute limitation at the global level

(a) The ICNT

The ICNT provides that a State Party cannot possess plans of work covering more than 3 per cent of the Area.

The total international sea-bed Area is approximately 200 million km². Three per cent of the Area therefore represents approximately 6 million km², or some 100 plans of work of average size. The limitation embodied in this provision would not come into effect, therefore, until a country had already acquired about 100 sites.

It is obviously irresponsible to say that it would amount to an anti-monopoly provision.

(b) The French proposal

The French proposal contains no provision for limitation at the global level.

This is because we believe that the parts of the Area containing deposits of nodules sufficiently rich to be exploited in the next few decades amount to merely a few millions of square kilometres, or a tiny percentage of the total Area. Consequently, the comparison between the surface of the plans of work possessed by a State party and that of the Area seems to us insignificant, and we think it preferable, and sufficient, to avoid "cornering" (accaparement) at the level of the richest nodule-bearing regions (at the "regional level").

However, the French delegation is prepared to study with interest any proposal for limitation at the global level that has real merit.

2. Absolute limitation at the regional level

(a) The ICNT

The ICNT stipulates that a plan of work cannot be approved in the case of a State party which has already three plans of work in a non-reserved area within a circular area of 400,000 km² which is centred upon a point selected by the applicant in his new application and situated at any point of the surface to which the new application relates.

In our opinion, this limitation is deceptive for the following reasons:

(i) Centre of the circle to be selected by the applicant

The centre of the circle is selected freely by the applicant in his new application.

It can therefore readily be supposed that the new site applied for either will be somewhat elongated in shape, or else will not be a single continuous area as authorised by the ICNT (annex II, art. 8, para. 1).
On the basis of these two assumptions, the applicant can place the centre of the reference circle at a point sufficiently distant from the plans of work possessed by himself or by the nationals of his country to ensure that the circle of 400,000 km² no longer contains the three plans of work and that his application is admissible.

Figure 1 (annex 1) illustrates this case. It assumes that three plans of work, A, B, and C, submitted by the nationals of a single country, P, have already been approved. A fourth application, D, by a company of the same country will be admissible, even though the site is very close to the first three sites, if the shape contemplated is sufficiently elongated.

One could well select point D as the centre of a circle, I, of 400,000 km² within which country P did not already possess three approved plans of work (fig. 1). If the centre of the circle was not left to the discretion of the applicant, plan of work D could be denied by demonstrating that it was inside circle II, within which nationals of his country had already three plans of work.

(iii) Limitation to three plans of work in a non-reserved area

Three plans of work cover a substantial surface area, since it is generally admitted that, in order to produce 3 million tons of cadmium (dry weight) a year for 20 years, a site must be between 40,000 and 80,000 km².

Three plans of work therefore represent some 150,000 to 200,000 km².

But the plans of work may belong to consortia composed of nationals of several States parties. In such a case, according to article 5, paragraph 2, a plan of work shall be divided on a pro rata basis among the States parties of the nationals concerned.

If the nationals of a single State party have a majority interest of 60 per cent in five consortia, the State party can be considered as having only three plans of work (5 x 60% = 3). In such a case the State party controls production in from 250,000 to 350,000 km² of the area.

In addition, the nationals of the same State party can be invited by the Enterprise to participate in joint arrangements in some of the reserved sites, although this is not taken into account in the present version of the ICMNT, which refers to three plans of work in a non-reserved area.

Figure 2 (annex 2), which is more complex than figure 1, illustrates this assumption. It also supposes that the two sites between which the Authority must choose can themselves be composed of several parcels (for example, two parcels for each of the two sites). When the Authority has decided to accord one plan of work, the latter will not be for a single continuous area but will cover two parcels.

It should be especially easy to place there the centre of the circle under the ICMNT method.

A commentary explains figure 2.

(b) The French proposal

The French proposal sets a double limitation applicable to the inside of a surface of reference:
Limitation of number: we propose two plans of work (not three).

Limitation of relative surface: we propose 20 per cent.

This double limitation applies to all the plans of work, in both non-reserved and reserved sites.

If the plans of work are in the possession of consortia in which the nationals of a single country have a two-thirds participation, these limitations correspond respectively to three sites and to 30 per cent of the area granted to those consortia.

The "surface of reference" proposed is that bounded by two meridians 60° apart and by two parallels also 60° apart. The result is more or less a square (or rather a trapeze), although such terms are not fully correct since the surface does not lie in a plane but on the earth's sphere.

This surface, like the circle of the present text, has an area of approximately 400,000 km². But, whereas the circle of the present text is left to the discretion of the applicant, since he selects the centre, the square is not selected by the applicant; the conditions must be fulfilled within any square of 6 degrees by 6 degrees that can be drawn on a map.

The substitution of such a "square" for the circle is motivated by the fact that a square is far more easily constructed on a map than a circle for the purpose of verifying whether the conditions are properly fulfilled.

Figure 3 (annex 3) illustrates the above and is accompanied by an explanatory commentary.

B. RELATIVE LIMITATION

(a) The ICGNT

Where the Authority must select from among different applicants because of the production ceiling provided for in article 151, article 7 merely states the principles of "the need to provide for all States Parties ... opportunities to participate in activities in the Area" and "the need to prevent monopolization of such activities".

(b) The French proposal

The French proposal includes in article 7 a more precise provision which, while reflecting the provisions in paragraphs 2 and 3, stipulates that priority shall be given to an applicant whose country has not as yet a plan of work over another applicant whose country already possesses two or more plans of work.
ANNEX 2

COMMENTS ON FIGURE 2

Figure 2 is to be viewed in the context of the present article 6. For the sake of simplification, it represents plans of work whose sides are constituted by North-South lines (meridians) and East-West lines (parallels).

The unbroken lines represent non-reserved sites and the broken lines reserved sites in which companies of country P have been invited by the Enterprise to participate in joint arrangements.

It is assumed that the companies of country P have a 60-per-cent participation in the plans of work A, B, C, D and E and a 30-per-cent interest in A', B' and C'.

Under article 6, only plans of work in non-reserved sites are counted, and country P is considered as having $5 \times 60\% = 3$ plans of work. It cannot therefore be granted another in a circle of 400,000 km$^2$, such as circle I.

However, if a company of country P wishes to apply for plan of work F, it has only to apply for a plan of work comprising two parcels: surface F and a small surface F' situated at 400 or 500 km. This company can then demonstrate that within circle II "centred upon a point selected by the applicant within the requested additional site" his country does not yet have three plans of work.

It can thus be seen that under the terms of the present text, there is a very real opportunity for "cornering".
ANNEX 3

COMMENTS ON FIGURE 3.

Figure 3 has been prepared in connexion with the French proposal, on the same assumptions of 60-per-cent participation by companies of country F in A and B (in non-reserved sites) and 30-per-cent participation in A' and B' (in reserved sites).

It is also assumed that plans of work A and A' represent 50,000 km² and plans of work B and B' 40,000 km². Within "square" I the nationals of country F possess:

Two plans of work with 60-per-cent participation .................................... 1.2
Two plans of work with 30-per-cent participation ........................................ 0.6

Within this same "square", they possess:

A part of A, or 30,000 km² x 60% .................................................. 22,800 km²
A part of B, or 40,000 km² x 60% .................................................. 24,000 km²
A part of A', or 35,000 km² x 30% .................................................. 10,500 km²
A part of B', or 40,000 km² x 30% .................................................. 12,000 km²

\[
\begin{array}{c}
\text{Since the square has a surface area of approximately 400,000 km², country F} \\
\text{possesses considerably less than two plans of work and less than 20 per cent of} \\
\text{the surface area.}
\end{array}
\]

In order to decide whether the Authority can approve a new plan of work of 50,000 km² in which the nationals of country F have an 60-per-cent interest, it is necessary to examine whether a "square" can be found within which the two conditions are not fulfilled.

As regards plan of work C, "square" II is such a square, since plans of work A, B, A' and B' are included in it, as well as C, and consequently country F possesses in it:

\[
2 \times 60\% + 2 \times 30\% + 1 \times 80\% = 2.6 \text{ plans of work.}
\]

On the other hand, in the case of plan of work D (which is farther away than C from plans of work A, B, A' and B'), all the "squares", such as III, which can be drawn include, as a maximum, plans of work A, B and D, or two plans of work for country F (2 \times 60\% + 1 \times 80\% = 2). Furthermore, these plans of work cover less than 20 per cent of the surface area of all the "squares", such as "square" III.

The Authority must therefore refuse to approve plan of work C, which is too close to plans already possessed, but may approve plan of work D, which is farther away and gives more scope for applications from nationals of other countries.