SO YOUR CLIENT WANTS TO ENGAGE IN DEEP SEABED MINING

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An excited client calls their corporate attorney, claiming to have solved the technical problems associated with the mining of manganese nodules on the seabed beyond national boundaries, commonly called the "area."[1] What can clients do to protect their rights and how can they start commercial mining? As might be expected, the answer is not simple.

The Third United Nations Conference on the Law of the Sea was convened in late 1973.[2] The Conference continued until its final meeting on December 10, 1982 in Montego Bay, Jamaica. At that time, the final act was signed and the Convention (commonly called UNCLOS III) was opened for signature. Part XI of the Convention comprehensively regulated activities in the Area, including deep seabed mining.

One hundred seventeen states signed the Convention on the first day, although the United States did not sign the Convention until July 29, 1994. Fiji deposited its instrument of ratification on the same day the Convention opened for signature, becoming the first state bound by the Convention.

As time went on, it became increasingly clear that the developed states were not willing to agree to Part XI concerning the deep seabed portions of the Convention. Part XI was a proverbial *deal breaker* for developing nations, as it was then written. Eventually it became clear UNCLOS III would enter into force on November 16, 1994, one year after the deposit of the sixtieth instrument of ratification.[3]

Recognizing that developed countries were an important part to any successful Convention, and that the deep seabed issues must be resolved, the United Nations Secretary-General began negotiating modifications to Part XI. All of the developed states participated in drafting the amending agreement (Agreement), which was concluded on July 28, 1994.[4] While no one claimed the modifications were perfect from the developing

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1. UNCLOS III, article 1(1).

2. United Nations Convention on the Law of the Sea opened for signature Dec. 10, 1982, U.N. Doc. A/Conf.62/122 (1982).

3. There are presently 128 state parties to UNCLOS III.

4. The Agreement Relation to the Implementation of Part XI of the United Nations Convention of the Law of the Sea of 10 December 1982, U.N. Doc. A/Res/48/263 (1994).

countries' view, they made UNCLOS III generally acceptable to developed countries.

The Agreement entered into force on July 28, 1996. Any ratification or accession to UNCLOS III after July 28, 1994 is also considered a ratification or accession to the Agreement. A state who ratifies or accedes to the Agreement is also deemed to have ratified or acceded to UNCLOS III.

The Agreement contained a provision relating to provisional membership.[5] This provision has been liberally applied to encourage non-member states to participate in UNCLOS III. As of September 30, 1998, eleven states, including the United States of America, were provisional members of the International Seabed Authority.[6] This provisional membership expires November 16, 1998, which has adverse consequences for the United States' economic interests.

The International Seabed Authority was formed under UNCLOS III to organize and control activities on the seabed and ocean floor, including the subsoil thereof, beyond the limits of national jurisdiction. The Authority began functioning on November 16, 1994 and there were 138 members as of September 30, 1998.[7]

The Authority has made significant progress in drafting a seabed mining code for polymetallic nodules.[8] The draft mining code does not cover polymetallic sulfides[9] and cobalt-bearing crusts.[10] These resources will be covered by one or more future codes. The Seabed Authority is expected to finalize its draft regulations for mining polymetallic nodules in August, 1999.

Title to all minerals in the Area belongs to mankind as a whole.[11] Title to the minerals vests in the person who that recovers them from the Area, provided the provisions of the Convention are complied with.[12] This

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5. Agreement section 12.

6. The International Seabed Authority has several organs, including the Assembly (which consists of all members and elects the Council), the Council (an executive body consisting of 36 members divided into various interest groups), Legal & Technical Commission (consisting of 15 members), the Secretariat (which also carries out the functions of the Enterprise temporarily), and an Economic Planning Commission (who functions shall be carried out by the Legal & Technical Commission temporarily).

7. Including 11 provisional members. (Bangladesh, Belarus, Belgium, Canada, Nepal, Poland, Qatar, Switzerland, Ukraine, United Arab Emirates and the United States of America).

8. Such polymetallic nodules have commercially viable amounts of copper, nickel, cobalt and manganese.

9. These polymetallic sulfides contain commercially viable amounts of gold, silver, copper and zinc.

10. Cobalt bearing crusts have a similar metal composition to polymetallic nodules, but contain more cobalt.

11. UNCLOS III article 137(2).

12. UNCLOS III, Annex III, article 1.

gives rise to some interesting title issues. What is the interaction of Uniform Commercial Code § 2-403 with the Law of the Sea Convention? The question will be hypothetical until science can distinguish the products of a deep sea manganese nodule from similar products from other sources. That question is beyond the scope of this article.

There are two different classes of work described in the current draft of the mining code: prospecting and exploration. Prospecting is the search for polymetallic nodules with no exclusive rights.[13] A prospector may not recover polymetallic nodules for commercial use.[14] Prospecting can be done in the same seabed area by different prospectors.[15]

In order to prospect, the prospector must notify the International Seabed Authority of its intent to prospect.[16] The notification must be in writing and contain certain information.[17] A form for the notification is provided in the mining code.

The Secretary General acknowledges the date when the prospecting notification is received. This date is a starting date for all actions that the Secretary General must take. Within thirty days after the Secretary General receives the notification, the Secretary General must notify the prospector if:[18]

1) the location is included in any approved plan of work;
2) the location is in a prohibited area;
3) the location is in a reserved area; and
4) the location is in another prospector's area.

Presumably, this information may cause a prospector to change plans (or possibly the Secretary-General to reject the notification). If so, it is important for the prospector to notify the International Seabed Authority of the change in plans.

Within forty-five (45) days, the Secretary General must review and act upon the notification. The details of the notification are entered on a registry. It appears the registry is at least partially confidential, thought the details of the confidentiality are not clear. Commercially sensitive information (and there is no definition of the scope of what constitutes commercially sensitive information) will be kept confidential for ten years. If the prospector is still prospecting at the end of the ten year period, the

13. Mining Code Regulation 1(r).
14. *Id.* at 2(3).
15. *Id.* at 2(5).
16. *Id.* at 3(1).
17. *Id.* at 3(4).
18. Mining Code Regulation 4(2).

prospector may request an extension for up to an additional ten year period.[19]

The prospector must submit annual reports to the Secretary General.[20] Any information submitted to the Secretary General cannot be kept confidential for more than 20 years.

The next stage is exploration.[21] An important difference between prospecting and exploration (other than the issue of exclusivity) is a state party to UNCLOS III must sponsor the entity doing the exploration.[22] A state that sponsors an explorer is derivatively responsible for damage done by the explorer.[23] This means entities not from a state party to UNCLOS III (such as United States corporations) are ineligible to conduct exploration operations directly.

A certificate of sponsorship must come from both the state of incorporation *and* the state of effective control over the explorer.[24] There is no requirement in UNCLOS III or the Agreement that both of these states be parties to UNCLOS III; but that is exactly what the mining code requires. This creates some difficulty concerning the United States because the United States will lose its ability to sponsor explorers when its provisional membership to UNCLOS III expires on November 16, 1998.[25] This may force United States nationals interested in exploration of the Area to incorporate in an UNCLOS III country and create local subsidiary in that country to obtain the necessary level of sponsorship. A state cannot avoid its liability by resigning its sponsorship.[26] If an explorer loses its sponsorship, it has six months to obtain a new sponsor.[27]

The Council evaluates an applicant's exploration application.[28] The Council must review the applicant's financial capabilities, technological capabilities and performance of previous contracts with the Authority. These requirements are designed to prevent wildcat companies from "flipping" lucrative exploration contracts to more established companies at a profit. To prove its financial capability, the applicant must include audited financial statements for the past three years,[29] possibly a *pro forma* balance sheet, a certification from a parent corporation and information about financing terms and sources.

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19. *Id.* at 5(3).
20. *Id.* at 5.
21. *Id.* at 1(n).
22. *Id.* at 9(1).
23. UNCLOS III article 139.
24. *Compare* Mining Code Regulation 8(3)(a) with Mining Code Regulation 9(2).
25. The concept of provisional membership was created by Agreement Annex § 1(12).
26. Mining Code Regulation 25(4).
27. *Id.* at 26(3).
28. *Id.* at 10.
29. *Id.* at 5.

The explorer must pick an area large enough to allow two mining operations.[30] The two areas need not be contiguous and must be of equal estimated value.[31] The area of work (which I assume is the area where the explorer will actually explore) cannot exceed 150,000 square kilometers.[32]

If the Council approves the application, the explorer must provide additional detailed information[33], including a five-year plan. The exploration contract will continue for 15 years,[34] with the possibility of a five-year extension based upon performance.[35]

An explorer's claim shrinks according the following schedule: 20% after the 3rd year; 10% after the 5th year; 20% after 8th years.

This means an explorer may not maintain exclusive control over more than 75,000 square kilometers after eight years.

The present draft of the Mining Code Regulations does not currently provide for exploitation.[36] Needless to say, it is in the United States' interest to influence the drafting of these regulations to protect our interests. For this reason, it is imperative for the United States to ratify its signature to UNCLOS III. The world will work under UNCLOS III, whether or not the United States is a party. Contrary to a century ago, the United States cannot proceed unilaterally. Therefore, our only choice is to become a party to UNCLOS III.

30. *Id.* at 13.
31. Mining Code Regulation 13.
32. *Id.* at 21(1).
33. *Id.* at 15.
34. *Id.* at 22(1).
35. *Id.* at 22(2).
36. Mining Code Regulation 1(m).