The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for Other International Economic Organisations?

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I. Introduction

Section 3 of the Annex to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (Implementation Agreement)[1] has considerably modified the rules of the Convention on the Law of the Sea concerning the decision-making of the International Sea-Bed Authority (Authority). These modifications were necessary to broaden the consensus of the international community concerning the acceptability of the deep seabed regime in general and the rules on the decision-making of the Authority in particular. The modifications do not only reflect the change of the global political environment which has taken place since the adoption of the Convention on the Law of the Sea (UNCLOS) in 1982 but also take into account insights gained with other international organisations concerning the adequate structuring of a decision-making process designed to create legally binding norms and to decide on economic matters.

Any such decision of an international organisation has to balance the interests of the member States with respect to given issues or – in other words – is the result of an integration of different State-oriented intentions or expectations into a common volition. Thus, the rules on decision-making have to reflect the character of the decisions to be taken.

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[1] Text in: ILM 33 (1994), 1309.

They have to be modelled so as to allow the reception of the interests of all the States involved and not to exclude the consideration of a particular one beforehand[2]. A decision-making process resulting merely in the passing of recommendations, such as the resolutions of the United Nations General Assembly, may or indeed must be differently structured compared to that of an international organization having law-making powers or, as in the case of the International Sea-Bed Authority, the function to attribute exclusive rights concerning deep seabed mining. The differentiation between the various decision-making processes is legitimated by the principle of efficiency[3]. Any attempt to establish a decision-making process disregarding the various decisions to be made ignores the preconditions flowing from the interrelationship between the structure of the decision-making process and the character of the decisions to be made. This has been emphasized by the Secretary-General of the United Nations in indicating the structural changes he envisaged as a consequence of the Agenda for Development[4].

A decision-making process obtains its particular features from the rules on the composition of the respective organ, its voting procedure, the attribution of the right to initiate proposals and the relationship between the various organs participating in the making of a given decision[5]. As most international organisations must decide upon issues of a different character, various organs with different mechanisms on decision-making have been set up. In the more recent treaties establishing an international organisation, such as the United Nations Industrial Development Organization, some issues can only be decided upon together by two or more organs, each having a different decision-making structure. Here, the organs are composed differently and they follow a different voting proce-

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[2] In the United States Delegation Report, Eleventh Session of the Third United Nations Conference on the Law of the Sea, New York, March 8–April 30, 1982, app. H, it was argued that the International Sea-Bed Authority failed to give a proportionate voice to the nations most affected by its decisions.

[3] Robert E. Riggs/Jack C. Plano, The United Nations: International Organization and World Politics, 2nd ed. 1994, 55.

[4] Development and International Cooperation: An Agenda for Development, Report of the Secretary-General (A/48/935, 6 May 1994) and Report of the Secretary-General to the 49th Session of the General Assembly – An Agenda for Development – Conclusions and Recommendations, Revised Draft 21 Sept. 1994, para 22 et seq.

[5] Rüdiger Wolfrum, Decision-Making in the Council: An Assessment and Comparison, in: ders. (ed.), Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Régime, 1991, 59.

dure[6]. This is equally true with respect to the International Sea-Bed Authority. Its functions are divided, in general, between the Assembly and the Council as well as the Commissions. There are, however, and this is a specific feature of the Authority, quite a number of questions which can only be decided upon by two organs, one having the right of initiative, the other one having the right of final decision. This approach, in accordance with recent practice, has been significantly strengthened by the Implementation Agreement.

II. Composition and Decision-Making in the Council According to Article 161, UNCLOS, and Section 3 of the Annex to the Implementation Agreement

1. Composition

According to section 3, paragraph 15 of the Annex to the Implementation Agreement the Council shall consist of 36 members elected by the Assembly among the members of the Authority[7]. The composition of the Council is based upon two conflicting principles, namely the principle of equitable geographic representation and the principle of the representation of special interests. In practice, both principles are used in international organisations for the composition of limited membership organs. For example, the composition of the Economic and Social Council of the United Nations is governed by the principle of geographic representation. Representation on the basis of special interests as an additional factor, however, has become a frequent feature of executive organs of international organisations. The composition of the executive organs of the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), the International Atomic Energy Agency (IAEA), the United Nations Industrial Development Organization (UNIDO) and of the Common Fund for Commodities, among

[6] Articles 9, para. 4 (a) and (e); 14, para. 2; 15; 18; Constitution of the United Nations Industrial Development Organization. United Nations Conference on the Establishment of the Industrial Development Organization as a specialized agency. UN doc. A/Conf. 90/19 of 8 April 1979.

[7] The legislative history of article 161 is described by Kathryn E. Yost, The International Sea-Bed Authority Decision-Making Process: Does it Give a Proportionate Voice to the Participant's Interests in Deep Sea Mining, in: San Diego Law Review 20 (1983), 659–678.

others, take into account the representation of certain interests[8]. In financial institutions such as the World Bank, the International Fund for Agricultural Development (IFAD) and the International Monetary Fund, members with the largest number of shares are assured representation in the executive organs.

The adequate representation of particular interests is achieved through different techniques. Most interesting in this respect is the composition of the Governing Council of IFAD. Each member of the Fund is represented in the Governing Council, in which all the powers of the Fund are vested. The total number of votes in the Council is 1,800. These are distributed equally among the three categories of member States (category I: members belonging to OECD; category II: members belonging to OPEC; category III: other developing States). The distribution of the votes within the membership categories is determined by the categories themselves[9]. Other, more recent examples in that respect are the Executive Boards of the United Nations Development Programme, United Nations Population Fund, the United Nations Children's Fund[10] and, more clearly, the Global Environment Facility[11]. The members of the Council of the Global Environment Facility are divided into recipient countries, having 18 seats, and non-recipient countries, having 14. The seats of the recipient countries are distributed in accordance with the principle of equitable geographic distribution among the regions, referred to as constituencies, namely Africa with 6, Asia and Pacific with 6, Latin America and Caribbean with 4 and Central Europe, Eastern Europe and the former Soviet Union with 2 seats. These constituencies establish amongst themselves the principles on how to allocate these seats. The non-recipient constituencies are to be formed through a process of consultation among interested participants; the grouping of the States is to be guided by total contributions.

Although the rules concerning the composition of the various bodies with restricted membership may seem to vary considerably they have at

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[8] For a general evaluation of international organizations in this respect see: Werner J. Feld/Peter S. Jordan, International Organizations: A Comparative Approach, 1983, 133.

[9] Category III allocates its 600 votes equally among its members, while categories I and II allocate only 17.5 per cent and 25 per cent, respectively, of their votes on an equal basis. The remainder is shared in proportion to the members' contributions.

[10] E/1994/6, 13 January 1994.

[11] Instrument for the Establishment of the Restructured Global Environment Facility, Annex E, Text, in: ILM 33 (1994), 1283.

least two of three features in common. They all identify groups of States which are supposed to have the same or at least similar interests. Further, in some cases, these groups have a certain autonomy to identify those States actually representing the group. Finally, they design mechanisms which ensure that in the decision-making process those interests represented by the identified groups are to be taken into consideration. These three features are very clearly reflected in the composition and the rules on decision-making of the Council of the Authority.

Section 3, paragraph 15 of the Annex to the Implementation Agreement identifies four different interest groups which have to be represented in the Council. Four members must belong to those States Parties which have either consumed more than 2 per cent in value terms of total world consumption or have had net imports of more than 2 per cent in value terms of total world imports of the commodities produced from the categories of minerals to be derived from the Area. Among this consumer group one State from the Eastern European region having the largest economy in that region in terms of gross domestic product and the State, on the date of the entry into force of the Convention, having the largest economy in terms of gross domestic product, have guaranteed seats if such States wish to be represented in this group. The Implementation Agreement has changed article 161, paragraph 1 (a), UNCLOS, with a view to accommodating the interests of the United States and of Russia. By referring to the "State, on the date of entry into force of the Convention" instead of the "largest consumer", the United States now has a guaranteed seat in the Council. Russia's seat is equally protected under the notion of the "largest economy" in the Eastern European region. The structuring of this group is clearly interest-oriented. However, it differs from the example of the World Bank, UNIDO and the Global Environment Facility since the seat of the State with the largest economy does not allow for adjustments responding to changes in the economic development of States. In that respect the composition of the Council of the Authority slightly resembles the composition of the Security Council as far as permanent membership is concerned.

Four seats of the Council are attributed to the eight States Parties having made the largest investment in preparation for and in the conduct of activities in the Area either directly or through their nationals. Under article 161 paragraph 1 (b), UNCLOS, one further seat was guaranteed to the States of the Eastern European region. This provision has been omitted by the Implementation Agreement.

Although the Implementation Agreement accommodated the interests of the United States and Russia they did not do so in respect of the industrialized States as such. Neither the investor group nor the consumer group are necessarily composed of industrialized States only. Particularly the investor group may include developing States, too.

Another four members of the Council represent those States Parties which are major net exporters of the categories of minerals to be derived from the Area. This group has to include at least two developing States whose exports of such minerals have a substantial bearing upon their economies.

The fourth interest group consists of six developing States Parties representing special interests[12].

The other half of the members of the Council are not elected so as to represent special interests, but according to the principle of equitable geographical representation. However, the 18 seats under this category do not have to be distributed according to this principle. Instead, through the distribution of these seats an equitable geographical distribution of the seats in the Council as a whole shall be achieved. The application of this principle meant that an overrepresentation of a group under one or all special interest categories lowers the share of States from the same region under the principle of equitable geographical distribution. Section 3, paragraph 15 (e) of the Annex to the Implementation Agreement like article 161, paragraph 1 (e), UNCLOS, however, contains a safeguard clause in this respect. Each geographical region has at least one guaranteed seat under this rule[13]. Theoretically, this clause may lead to an overrepresentation of one or more regional groups.

According to article 161, paragraph 2 (c), UNCLOS, which remained unmodified, nominations are to be submitted to the Assembly by the group of States Parties to be represented in the Council. Section 3, paragraph 10 of the Annex to the Implementation Agreement has further specified this provision with a view to strengthening the autonomy of the groups of States concerning their representation in the Council. Each group shall nominate as many candidates as the number of seats required to be filled. If there are more potential candidates than seats the principle of rotation shall apply. However, it is up to each group to implement the

[12] These special interests include large populations, nations which are land-locked or have short coastlines, major importers of the minerals to be derived from the Area, potential producers of such minerals, and least-developed States.

[13] The geographical regions shall be Africa, Asia, Eastern Europe, Latin America and Caribbean and Western Europe and Others.

rotation principle. Due to these rules the role of the Assembly concerning the election of the members of the Council is limited. It may only confirm the proposals made by the respective groups of the States Parties[14].

The term "group of States Parties" as used in section 3, paragraph 10 of the Implementation Agreement embraces the interest groups referred to in section 3, paragraph 15 (a) to (d) of the Annex to the Implementation Agreement as well as the regional groups listed in section 3, paragraph 15 (e). Hence, for the determination of the electorate and the eligible States Parties, the exact definition of the interest groups is of utmost importance. Since the definition of the interest groups given in the Convention as well as in the Implementation Agreement is all but precise[15] the Implementation Agreement mandates the Assembly to establish lists of countries fulfilling the criteria for membership in the interest groups[16].

It is difficult to make a prognosis as to the future composition of the Council at present. The estimates vary. Mostly, it has been assumed that

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[14] Felipe H. Paolillo, The Institutional Arrangements for the International Sea-Bed and their Impact on the Evolution of International Organizations, in: Recueil des Cours 188 (1984/V), 135–338 (246); Rüdiger Wolfrum, Die Internationalisierung staatsfreier Räume, 1984, 547. Although this system was already to be applied under article 161, UNCLOS, it has been discussed and caused controversy in the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. The draft rules of procedure of the Assembly of the International Sea-Bed Authority (UN doc. LOS/PCN/WP. 20/Rev. 2) contain a bracket in draft rule 95 (97) – which indicates that the elections of the Assembly should be made from among candidates proposed by the groups only. This was the reason why the respective provision was introduced into the Implementation Agreement without stating that article 161, paragraph 2, UNCLOS, was not to be applied.

[15] See in this respect Wolfrum (note 5), 63.

[16] In respect of the consumer group it is not clear whether the 2 per cent figure refers to any commodity or an average of all commodities. Further, the consumption of a metal can be measured at a number of points of its conversion. The mode of calculation is equally important for the identification of the major importer. The Secretariat of the Council of the European Community, on 9 November 1994, produced a first draft of an indicative list of States which would fulfil the criteria for membership in the various groups of States in the Council of the International Sea-Bed Authority. The findings illustrate that the proper identification of States faces considerable difficulties.

As to the exporter group section 3, paragraph 15 (c) of the Implementation Agreement, as did article 161, paragraph 1 (c), UNCLOS, only speaks of the major net exporters and refrains from defining such term. It is questionable as to whether having a share greater than 2 per cent of world exports already would qualify a State as a major net exporter. Here again, it still needs to be established whether the calculation should be based upon one mineral or an average thereof. All these points have to be clarified by the Assembly in preparing the respective lists.

the Western European States will get seven[17] or eight seats[18], the Eastern European States two and the developing States nine or eight seats distributed to the interest groups. The number of seats each of these groups will receive under the principle of equitable geographical distribution depends upon the formula used[19]. Since this notion is used differently in the United Nations it needs further specification through the Assembly.

The composition of the Council will equally depend upon the question which States will finally ratify the Convention on the Law of the Sea and the Implementation Agreement or will accede thereto.

In spite of the uncertainties mentioned, it is to be expected that the Western European States will occupy between eight and ten seats, the Eastern European States between three and four, and the developing countries between 22 and 25 seats of the Council. Thus, the group of developing countries may have a two-thirds majority.

These figures, based on the traditional blocs of European, Eastern European and developing countries, are, however, no reliable indicator as to the future voting in the Authority. It is most likely that the interests each State attaches to deep seabed mining will play a much more decisive role in this respect than membership in the traditional blocs. The fact that a State is a pioneer investor[20], or a major producer of minerals which are also derived from the Area, or a major producer of deep seabed mining technology, or an importer or consumer of the relevant minerals is likely to influence the voting behaviour of members in the Council more significantly than its forming part of a particular geographical group. Apart from that, concerns for the impact deep seabed mining may have upon the marine environment may equally influence voting behaviour in the Council.

2. Voting System

The Council has no uniform voting system. Instead, the Convention distinguishes between different categories of issues, each with a separate voting system. The original system was significantly modified by the Im-

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[17] Wolfrum (note 14), 551.

[18] Paolillo (note 14), 241; Bernard H. Oxman, The Third United Nations Conference on the Law of the Sea: the Ninth Session (1980), in: AJIL 75 (1981), 211–256 (218–219); Yost (note 7), 673.

[19] See in this respect Wolfrum (note 5), 64, with further references.

[20] From among the developing countries Cuba, India and the Republic of Korea have registered as pioneer investors.

plementation Agreement, which transformed the voting procedure into a system based upon chambers, the term "chamber" being explicitely used in section 3, paragraph 9 of the Annex to the Implementation Agreement. However, different categories of issues with different voting systems still exist. With regard to each category, the nature of the decision, for example, a decision concerning the approval of plans of work or on financial issues, together with the voting system applied is to be seen as offering an adequate protection to those State interests most significantly affected. The Implementation Agreement further strengthens the role of the Council *vis-à-vis* the Assembly. These changes provide for the protection of certain interest groups of States parties; they endorse the intention that decisions in the Council be taken by consensus on objective grounds rather than according to political motives.

The Convention on the Law of the Sea as modified by the Implementation Agreement identifies at least four different categories of decisions in the Council for which particular voting procedures exist. However, all efforts to reach a decision by consensus have to be exhausted before the Council may proceed to vote. Thus, consensus is the principle means by which decisions are to be taken. The same applies to the decision-making in the Assembly. In emphasizing the consensus rule the Implementation Agreement, in practice, referred to the rules of procedure of the Third UN Conference on the Law of the Sea which, however, only applied to questions of substance[21]. Thus, section 3, paragraph 5 of the Annex to the Implementation Agreement requires to the Council to first decide that it has exhausted all efforts to reach consensus before it can resort to a vote. In order to ensure that this decision is not taken lightly, section 3, paragraph 6 of the Annex to the Implementation Agreement allows for the deferment of the decision in order to facilitate further negotiations.

For the adoption of decisions falling within the first category, namely questions of procedure, the rule requiring the simple majority of members present and voting applies (article 161, paragraph 8 (a), UNCLOS, in connection with section 3, paragraph 5 of the Annex to the Implementation Agreement). However, there are some exceptions to this rule[22].

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[21] See Tommy T.B. Koh/Shanmugam Jayakumar, Negotiating Process of the Third United Nations Conference on the Law of the Sea, in: Myron Nordquist (ed.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. I, 1985, 29 (99).

[22] The request for advisory opinions (article 191, UNCLOS) or the establishment of subsidiary organs (article 162, paragraph 2 (d), UNCLOS), mostly qualified as mere procedural questions, are considered questions of substance in the Convention and require higher majorities, accordingly.

Decisions on all matters belonging to the second category of questions, namely questions of substance, are taken by a two-thirds majority of members present and voting, provided that such majority includes a majority of the members of the Council. This category embraces most questions of substance since the former category of questions to be decided by a three-fourths majority has been abandoned. As compensation therefor, section 3, paragraph 5 of the Annex to the Implementation Agreement introduces a further element which allows for the now-existing voting procedure based upon a chamber system. It requires that such decisions not be opposed by a majority in any of the chambers referred to in section 3, paragraph 9 of the Annex to the Implementation Agreement. Chambers are constituted by the three interest groups of States (consumers/importers, investors and exporters). The developing countries, under the fourth interest group and from among the 18 members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, are treated as a single chamber for the purpose of voting.

This chambered voting system ensures that three consumers or three investors or three exporters can block substantive decisions in the Council. The figure developing countries need to block such decisions is higher depending upon their representation under the respective categories in the Council[23]. States elected to the Council which are neither developing countries nor belong to a specific interest group have no equivalent possibility to block decisions on a question of substance unless they join in the thirteen votes needed to block an overall two-thirds majority in the Council. This again reflects the dominant position of interest groups in the decision-making process of the Council.

The third category embraces questions to be decided upon by consensus. The Convention on the Law of the Sea was the first international agreement containing a definition of consensus (article 161, paragraph 8 (e))[24], which is described as the "absence of any formal objection".

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[23] The Message from the President of the United States to the Senate, 103d Congress, 2d Session, Treaty Doc. 103-39, 69, speaks of eleven.

[24] Definitions of consensus may be found in other instruments such as the Final Declaration of the Preparatory Meeting for the Conference on International Co-operation where it is stated that consensus is the principle "according to which decisions and recommendations are adopted when the Chair has established that no member delegation has made any objections" (UN doc. A/C. 2/299 of 27 October 1975) or the recommendation annexed to the provisional rules of procedure of the World Population Conference, where it is stated that consensus is understood to mean "according to United Nations practice, a general agreement without a vote, but not necessarily unanimity" (UN doc. E/CONF. 60/2). See

Generally speaking, the notion of consensus refers to two different procedures. Either the formal objection results in the rejection of the proposal to be decided upon or the formal objection only delays the decision, which may be taken later by a majority vote. The consequences of the two procedures are quite different as far as the conduct of negotiations, the decision-making process and the protection of minority groups are concerned. The rules of procedure of the Third United Nations Conference on the Law of the Sea followed the latter approach; the Convention on the Law of the Sea as modified by the Implementation Agreement has adopted both approaches.

According to article 161, paragraph 8 (d), UNCLOS, there are four substantive decisions which require consensus in the sense that one State alone may object and block a decision: Consensus is required for any decision to provide protection to developing States that are land-based producers of minerals from adverse effects from deep seabed mining; any decision to recommend to the Assembly rules and regulations on the sharing of financial benefits from seabed mining; any decision to adopt and apply provisionally rules, regulations and procedures implementing the seabed mining regime or amendments thereto; and any decision to adopt amendments to the seabed mining regime. These issues can, in future, only be decided in cooperation with all members of the Council.

According to article 161, paragraph 8 (e), UNCLOS, the following procedure applies for consensus decisions. Within fourteen days from the submission to the Council of a proposal the President of the Council has to determine whether there might be a formal objection and, if so, the President has to establish and convene a conciliation committee. It is the purpose of such committee to reconcile the differences and to prepare a proposal which can be adopted by consensus. If the committee fails, the grounds upon which the proposal is opposed must be spelled out in a report to the Council, and then the proposed decision is rejected. There is no possibility to proceed to majority voting. This procedure makes cooperation between all members of the Council mandatory as each of them has the possibility to block decisions of the Council.

Some of the questions which have to be decided by consensus are quite relevant for the future of deep seabed activities. Nevertheless, the consensus principle cannot ultimately be used to block deep seabed activities.

Erik Suy, The Meaning of Consensus in Multilateral Diplomacy, in: Robert J. Akkerman/Peter J. van Krieken/Charles O. Pannenborg (eds.), Declarations on Principles – a Quest for Universal Peace, 1977, 259–274; Paolillo (note 14), 236.

On the contrary, the consensus principle now works as a safeguard for such activities.

Since the Preparatory Commission has not finalized its drafting of the rules, regulations and procedures implementing the deep seabed mining regime, this task has to be achieved by the organs of the International Sea-Bed Authority. However, section 1, paragraph 15 of the Annex to the Implementation Agreement contains a safeguard clause to the effect that the non-elaboration of such rules cannot be used to block activities in the Area. The fact that amending such rules requires consensus constitutes a safeguard for such rules and regulations, once in place, and thus for deep seabed activities.

The functions of the Council to protect developing States against adverse effects from deep seabed mining (article 162, paragraph 2 (m), UNCLOS), the second issue to be decided by consensus, are now limited. Section 7 of the Annex to the Implementation Agreement contemplates that economic assistance will be implemented through the establishment of an economic assistance fund. However, such fund will only be established when the revenues of the International Sea-Bed Authority exceed the amount necessary to cover its administrative expenses. Apart from that, it is the Finance Committee whose decision is most relevant in this respect.

The functions of the Council concerning the rules, regulations and procedures on the equitable sharing of financial and other economic benefits are equally limited. In accordance with section 9, paragraph 7 (f) of the Annex to the Implementation Agreement such rules are to be prepared by the newly introduced Finance Committee. Its recommendations predetermine the decision of the Council[25].

The necessity that amendments to Part XI may only be taken by consensus has gained considerable relevance since section 4 of the Annex to the Implementation Agreement eliminates the Review Conference (article 155, UNCLOS) according to which Part XI and the relevant Annexes could have been altered by a three-fourths majority[26]. A reconsideration of the seabed mining regime is now subject to the normal procedure for adopting amendments to the seabed mining provisions of the UN Convention on the Law of the Sea contained in articles 314 to 316. Article 314

[25] Section 3, paragraph 7 of the Annex to the Implementation Agreement.

[26] See in this respect Hans-Joachim Kiderlen, The Review of Provisions of the UN Law of the Sea Convention and the Powers of the Review Conference, in: Wolfrum (ed.) (note 5), 319.

requires that amendments be adopted by the Council and the Assembly of the Authority while respective decisions in the Council are to be taken by consensus. Here again, the consensus principle works as a mechanism for preserving the present system. In that respect the rules resemble articles 104 and 105 of the UN Charter.

The approval of plans of work constitute the fourth and last category of questions for which a special decision-making procedure in the Council has been established. This procedure ensures the automatic approval[27] of such plans of work which fulfill certain requirements. In this respect the decision taken by the experts in the Legal and Technical Commission determines that taken by the Council.

A plan of work is first examined by the Legal and Technical Commission, which submits it to the Council together with its recommendations. The Commission is required to base its recommendations on whether the applicant meets its financial and technical obligations, whether its proposed plan of work otherwise meets the rules and regulations adopted by the Council, and whether the applicant has included undertakings to comply with the Convention and with rules, regulations and procedures adopted thereto. The requirement that recommendations shall be solely based on these grounds is meant to exclude considerations of a political or economic nature or concerning the general policy of the Authority, or otherwise not directly related to the administrative, legal and technical matters referred to in Annex III of the UN Convention on the Law of the Sea[28].

If the Legal and Technical Commission recommends approval of a plan of work, section 3, paragraph 11 of the Annex to the Implementation Agreement requires the Council to approve the plan within 60 days, unless the Council decides otherwise by a two-thirds majority of its members, including a majority of the members present and voting in each of its chambers. If no decision is taken within this period and if this period has not been prolonged, the application is deemed to have been approved. The effect of this provision is twofold. It requires the Commission to act in a timely manner and it ensures that the affirmative vote of the Legal and Technical Commission carries a maximum weight. The Commission may only be overruled by a significant majority at the same time taking

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[27] Paolillo (note 14), 237, rightly points out that the automatic approval was only accepted from the developing countries under the condition that it would not embrace a production authorization. Section 6, paragraph 7 of the Annex to the Implementation Agreement, however, eliminates the production authorization.

[28] Paolillo, *ibid.*, 239.

into account the interests involved. As few as two members of the consumer or the investor group may bloc a negative decision and ensure that the plan of work is approved. If the Commission recommends against the approval of an application, the Council can nevertheless approve the application based on its normal decision-making procedure for issues of substance.

It is obvious that in the context of this decision-making procedure the composition of the Legal and Technical Commission as well as the decision-making procedure for the adoption of its recommendations is quite crucial. Nevertheless, the UN Convention on the Law of the Sea is not very explicit as far as these two issues are concerned. According to article 163, paragraphs 2 and 3 and article 165, paragraph 1, the members of the Legal and Technical Commission shall have appropriate qualifications as to technical, scientific, ecological, legal or other relevant matters. Additionally, due account shall be taken of the need for equitable geographical distribution and the representation of special interests. This will need further specification in the rules, regulations or procedures to be issued by the International Sea-Bed Authority. In respect of the voting procedure of the Legal and Technical Commission the Third United Nations Conference on the Law of the Sea was unable to reach an agreement[29]. This question has now been settled through section 3, paragraph 13 of the Annex to the Implementation Agreement. Decisions by the Commission are taken by a simple majority after the means to reach a consensus have been exhausted[30]. This ensures that minority views within the Legal and Technical Commission will not impede deep seabed activities.

3. The Relationship between the Council and the Assembly

According to article 160, paragraph 1, UNCLOS, the Assembly, as the sole organ of the Authority consisting of all the members, shall be considered the supreme organ. Although this provision has not been changed by the Implementation Agreement it no longer reflects the full reality of the relationship between the Council and the Assembly. This relationship has been used to protect the interests represented by the in-

[29] The Draft Rules of Procedure of the Legal and Technical Commission provide that decisions on questions of substance shall be taken by a two-thirds majority of the members present and voting. However, before a matter of substance is put to the vote, the Commission shall make every effort to reach agreement on such matters by way of consensus.

[30] Section 3, paragraph 2 of the Annex to the Implementation Agreement applied to all organs of the International Sea-Bed Authority.

terest groups. Part XI of the UN Convention on the Law of the Sea already identified several issues with respect to which the Assembly and the Council were to cooperate in reaching a decision. These were the consideration and approval of rules, regulations and procedures on the equitable sharing of benefits[31] and on deep seabed mining activities[32], the adoption of the budget[33], and the establishment of general policies[34].

The Implementation Agreement has modified this system of cooperation between Assembly and Council in three respects, thus making use of the precedent set by the UNIDO. According to section 3, paragraph 1 of the Annex to the Implementation Agreement the general policies of the Authority shall be established by the Assembly in collaboration with the Council. This eliminates the prerogative the Assembly formerly had concerning this issue. Further, section 3, paragraph 4 of the Annex to the Implementation Agreement states that decisions of the Assembly on any matter for which the Council also has a competence shall be based upon the recommendations of the Council. This provision significantly strengthens the position of the Council *vis-à-vis* the Assembly in all matters for which the Council already had a competence by creating a right of initiative of the latter. Such a right is also established on behalf of the Council for decisions on any other budgetary, financial or administrative matter. Decisions having a financial or budgetary implication[35] shall further be based upon the recommendations of the Finance Committee[36]. The composition of the Finance Committee ensures the participation of the four interest groups and, until the Authority has sufficient funds other than assessed contributions to meet its administrative expenses, the participation of the five major contributors[37]. Since decisions in the Finance Committee are taken by consensus and the respective decisions of the Council or the Assembly have to be based upon recommendations of the Finance Committee, the decision-making power with respect to such issues rests with the Finance Committee rather than with the Assembly or the Council.

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[31] Article 162, paragraph 2 (o)(i); 160, paragraph 2 (f)(i).

[32] Article 162, paragraph 2 (o)(ii); 160, paragraph 2 (f)(ii).

[33] Article 162, paragraph 2 (r); 160, paragraph 2 (h).

[34] Article 160, paragraph 1; 162, paragraph 2 (s).

[35] Section 3, paragraph 7 of the Annex to the Implementation Agreement.

[36] Section 9, paragraph 7 of the Annex to the Implementation Agreement contains a list of financial or budgetary issues falling within the competence of the Finance Committee. This list is not exhaustive. The term "having financial or budgetary implications" used in section 3, paragraph 7 of the Annex to the Implementation Agreement is definitely wider.

[37] Section 9, paragraph 3 of the Annex to the Implementation Agreement.

In assessing the relationship between the Council and the Assembly it has to be stated that the Implementation Agreement caused a transfer of competences from the plenary organ, the Assembly, to organs with a limited membership, namely the Council and the Finance Committee. Since the composition of these organs reflects particular State interests and the decision-making procedure is tailored so as to protect such interests this will be the factor dominating the decisions of the International Sea-Bed Authority in the future.

III. Assessment and Conclusion

The decision-making process in the Council as provided for in article 161, UNCLOS, and amended by the Implementation Agreement seems to be adequate given the interests involved and the decisions vested in the Council.

This result has been achieved by invoking three mechanisms which are related to and supplement each other. These mechanisms are the identification of different categories of questions to be decided by a voting procedure which matches the interests involved, the composition of the Council on the basis of a chambered voting system, and a balanced distribution of functions of organs that have different memberships and are governed by different voting procedures. All these mechanisms were already enshrined in the rules on decision-making as established by the UN Convention on the Law of the Sea. The Implementation Agreement emphasized them and sharpened their application. Most of the modifications introduced by the Implementation Agreement could have been achieved by interpreting and further developing the respective rules of the Convention through rules of procedure[38]. However, having done so through the Implementation Agreement has the advantage of providing a higher degree of legal certainty.

Above all, the rules on decision-making are differentiated enough to accommodate the requirements of the various categories of decisions to be made. In that respect the regime is much more differentiated than other similar systems on decision-making. Not only the four categories of questions for which different voting procedures apply are to be taken into account. A further means of differentiation rests in the interlinkage of functions of the Assembly and the Council. The establishment of the general policies of the Authority through a cooperation between Assem-

[38] See for example Wolfrum (note 5), 70.

bly and Council is a prime example in that respect. It is particularly this mechanism which should be used as a model for future international organisations or for future modifications of already-existing rules of procedure.

The system on the composition of the Council results in the establishment of a two level system. Whereas the geographical groups will be represented within the Council in more or less the same way as they are represented in the limited membership organs of the United Nations, the composition of each group of representatives will be based upon special interests. The principle of equitable geographical representation as well as the principle of a representation of special interests have been combined and thus both have been mitigated. This approach is quite innovative and an achievement with respect to the established rules of decision-making in international organisations. It follows and further develops the principles set by the International Atomic Energy Agency, the United Nations Industrial Development Organization and, especially, the International Fund for Agricultural Development, the Common Fund for Commodities and, most recently, the Global Environment Facility. It could also be used as a model for future international organisations with a highly integrative objective. This approach should not be seen as providing protection of special interests alone, but rather as a means also to secure parity among the regional groups.

The regional groups have to be seen as the first level where a clarification and integration of the States' intentions can be sought and achieved. In this respect regional groups play an important role in the preparation of the decision-making in the various organs of international organisations. Such integrative effect is achieved due to the existence of common interests and organisational ties developed outside of the international organisations[39].

The representation of special interests, on the other hand, is based upon a different line of thinking. It proceeds from the conviction that the entering into force and the enforceability of international law in general, which also includes acts of international organisations, largely depends upon the involvement and the endorsement of the relevant act or rule by the State or States affected[40]. In the past, developing States have objected

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[39] See Riggs/Plano (note 3), 79.

[40] Rüdiger Wolfrum, Neue Elemente im Willensbildungsprozeß internationaler Wirtschaftsorganisationen: Strukturelle Neuerungen in den Satzungen von IFAD, UNIDO und Gemeinsamen Fonds, in: Vereinte Nationen 29 (1981), 50–56 (52).

to the inclusion of special interest groups in the decision-making process of international organisations to the extent that this resulted in a privileged position for a small group of States. This objection was first voiced in the declaration of the Group of 77 at UNCTAD I[41] and was later articulated in the Declaration of the United Nations concerning the Establishment of a New International Economic Order[42]. The Charter of Economic Rights and Duties of States[43] speaks of an equal participation of all States in the decision-making process, as the consequence of the equal sovereignty of States. Recently, in the Agenda for Development, the notion of a democratization of international institutions has been used. It is not yet clear whether this is region-oriented or single state-oriented.

Ultimately, the position taken has been modified since the developing States accepted the principle of group parity, which combines the representation of special interests with the principle of equitable geographical distribution, for the composition of the Industrial Development Board and of the Governing Council as well as for the Executive Board of IFAD. The approach followed in these examples has the advantage of providing the relevant groups with the possibility of preliminary clarification of their positions. In particular it better reflects the fact that the position of States within a group may not be homogeneous and that it may be preferable to voice those interests which are most affected by the categories of decisions to be taken. It is, however, crucial for the workability of this system that it provides safeguards for the protection of each group against the possibility to be overruled.

Finally, the voting procedure of the Council forms a viable basis for an integration of the various interests connected with deep seabed activities. It makes co-operation between the groups mandatory since no question of substance may be taken against the majority vote of an interest group. The need for close co-operation amongst the various groups of States has been significantly strengthened compared to the system provided for by Part XI. This, however, was only the logical consequence of establishing a chambered system. If the groups of States are regarded as units for prior clarification of the decisions to be taken in the Council it is only consistent that no decision may be taken against any particular group.

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[41] Proceedings, vol. I, Final Act and Report (UN-Doc. E/Conf. 46/141) para. 6; this plea was reiterated frequently, see Wolfrum, *ibid.*, 52.

[42] GA res. 3201 (S-VI) of 1 May 1974, para. 4 c; GA res. 3202 (S-VI) sec. II 1 (d) and IX; for further details see Marthinus G. Erasmus, The New International Economic Order and International Organizations, 1979, 143 et seq.

[43] GA res. 3281 (XXIX) of 12 December 1974, article 10.

In conclusion, it is to be emphasized that the decision-making process of the Council elaborated in the Implementation Agreement is based on co-operation rather than on confrontation of the different States having a substantial interest in deep seabed mining. Such co-operation is meant to materialize in decisions by means of successive efforts at integration taken on the level of the various interest groups, and regional groups and, finally, on the Council level. This approach, based upon the integration of all interests involved, is in conformity with the leading principle of deep seabed mining. States Parties are called upon to organize and control activities in the Area, giving effect to the legal status of the Area and its resources as the common heritage of mankind. They are, thus, deemed to act as trustees for all States, which makes necessary the integration of all interests involved. This approach makes cooperation among States and particularly among the various groups mandatory.