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THE 1994 AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE 1982 UN CONVENTION ON THE LAW OF THE SEA: PROVISIONS DEALING WITH PRODUCTION POLICY FOR DEEP SEABED MINERALS

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I. INTRODUCTION

1. One of the ten items included in the mandate of the Committee on Trade and Environment (CTE) is to deal with the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environment agreements (MEAs) (Item 1). A related item is to deal with the dispute settlement mechanisms in the multilateral trading system and those found in MEAs (Item 5). The CTE has been interested in the trade-related provisions of the 1994 Agreement relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea (hereinafter "the Implementing Agreement"). The Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations, as the Secretariat of the 1982 United Nations Convention on the Law of the Sea (hereinafter "the Convention"), expresses its appreciation to the Chairman of the CTE for the invitation to prepare a background paper on the trade-related provisions of the Implementing Agreement, contained in Section 6 of its Annex.

2. This paper will present basic information on the provisions of Section 6 of the Annex to the Implementing Agreement. Section 6 of the Annex to the 1994 Agreement relating to the implementation of Part XI of the Convention contains an explicit reference to the applicability of the provisions of the GATT and its relevant codes and successor or superseding agreements concerning subsidies in the deep seabed mining area. Section 6 also refers to recourse to the GATT dispute settlement procedures.

3. An analysis will be provided of the principles that formed the basis of the provisions, and of the process of how these provisions were arrived at. This is intended to facilitate the discussion of two main issues that are being addressed by the CTE: (i) the consistency of trade-related provisions of MEAs with the provisions of the World Trade Organization (WTO); and (ii) the convergence of the dispute settlement procedures in trade-related matters under MEAs with those of the WTO.

II. THE REGIME FOR THE INTERNATIONAL DEEP SEABED AREA AND ITS RESOURCES

A. The United Nations Convention on the Law of the Sea

4. The Convention lays down a comprehensive regime for the world's oceans and seas; it provides the legal framework and detailed rules governing all ocean uses and access to their resources. The seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, has been defined as the "Area" by the Convention (Article 1(1)). The UN General Assembly, in resolution 2749 (XXV) of 17 December 1970, declared that the Area as well as its resources are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as

a whole. This totally new concept in international relations and in international law was given practical meaning in the Convention. Part XI of the Convention and the related Annexes (Annexes III and IV) lay down the regime for the international deep seabed Area and its resources.

5. The fundamental reason that the possibilities for conflicts are minimized between the trade agenda and the environment agenda pursued under the Convention is that the Convention is one of the foremost multilateral agreements formulated with the principle of sustainable development as a central theme. This balance between trade and developmental objectives, on the one hand, and environmental objectives, on the other, with respect to marine and coastal resources and environment achieved under the Convention is so sound and effective that the UNCED took it as the basis of developing Chapter 17 of Agenda 21.[1] In this context, it can be said that the principle contained in the Marrakesh Ministerial Decision on Trade and Environment is already implicit in the Convention: there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment on the other.

6. The Convention is considered an MEA although it is recognized that there is no definition of what exactly constitutes an MEA. However, one important matter needs to be borne in mind: the Convention provides the framework for ocean and coastal development and for trade in goods and services from the marine and coastal sector. In particular, Part XI of the Convention and the related Annexes lay down the regime for the development and management of the resources of the international deep seabed Area. Article 150, under Part XI, sets forth the overall policy in relation to exploration for and exploitation of these resources: such activities shall "be carried in such a manner as to foster healthy development of the world economy and balanced growth of **international trade** …" (emphasis added). In this sense, the Convention can also be considered a multilateral trade agreement. This is another important reason that there is a harmony between the trade agenda and the environment agenda pursued under the Convention.

B. Production policy for deep seabed minerals under the Convention

7. Resources of the international deep seabed Area are defined by the Convention as all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed (Article 133(a)).

8. At the time the negotiators in the Third United Nations Conference on the Law of the Sea were formulating the provisions of Part XI of the Convention, i.e. during the late 1970s and the early 1980s, the growth in metal demand was impressive; at the same time, the research and development efforts for mining and processing technologies for polymetallic nodules were pointing to very encouraging outcomes.[2] Under these circumstances, land-based miners of the metals in question became concerned about losing their market share to this new, seemingly attractive source of metals. The prospective deep seabed miners, on the other hand, were apprehensive that as newcomers they might not be allowed into the market.

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[1]Chapter 17 deals with the 'protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources'. See United Nations, Agenda 21: Programme of Action for Sustainable Development, UN, New York, 1993, paragraph 17.1.

[2]Research in the past few decades suggests that several types of metalliferous minerals may be found in the international deep seabed Area. These minerals are: polymetallic nodules; manganese crusts; polymetallic sulphides; and metalliferous red clay. Polymetallic nodules contain about 55 metallic and non-metallic elements out of which copper, nickel, cobalt and manganese are of economic interest.

9. With this backdrop, the production policy related to deep seabed polymetallic nodules, as laid out in Article 151 under Part XI of the Convention and Articles 6 and 7 of Annex III to the Convention, had two basic features:

- With a view to achieving a balance between the supply from land-based sources and that from the new seabed sources, the International Seabed Authority would limit production of metals from polymetallic nodules. The production limitation formula was linked to the growth of demand for nickel - total production from seabed sources in any year would not exceed 60 per cent of the growth in demand for nickel. Production authorizations will be issued by the International Seabed Authority to individual seabed miners within the overall limit set by the formula.

- In case a selection among applicants for production authorizations was called for, the International Seabed Authority would make such selection applying certain criteria.

The International Seabed Authority ("the Authority") is the organization through which its members shall organize and control activities of exploration for, and exploitation of, the resources of the international deep seabed Area, particularly with a view to administering these resources (Convention, Article 156(1)).

C. Formulation of the provisions of Section 6 (Production policy) of the Annex to the Implementing Agreement

10. The Convention was adopted in April 1982 and entered into force in November 1993, with the 60th ratification. As of September 1997, 120 States have ratified or acceded to the Convention. In the early 1980s, it was acknowledged that there were problems with some aspects of the deep seabed mining provisions of the Convention which had prevented some States from ratifying or acceding to the Convention.

11. In the early 1990s, it was felt that in the years that had elapsed since the Convention was adopted, certain significant political and economic changes had occurred which had had a marked effect on the regime for deep seabed mining contained in the Convention. Prospects for commercial mining of deep seabed minerals had receded into the next century, which was not what was envisaged during the negotiations at the Third United Nations Conference on the Law of the Sea. The general economic climate had been transformed as a result of the changing perception with respect to the roles of the public and private sectors. There was a discernible shift toward a more market-oriented economy. In addition, there was the emergence of a new spirit of international cooperation in resolving outstanding problems of regional and global concerns. These factors contributed to a favourable atmosphere to deal with the problems in respect of the deep seabed mining regime. Thus began a series of consultations under the aegis of the Secretary-General of the United Nations on outstanding issues relating to the deep seabed mining provisions of the Convention. These informal consultations took place in the years 1990 to 1994.

12. There was general agreement among participants in the Secretary-General's consultations that the formula in the Convention was no longer practical. There was also general agreement that it was neither necessary nor prudent at this stage to establish a new set of detailed rules for the implementation of production policy in the light of the expected delay in commercial deep seabed mining and the lack of adequate data on its impact. There was broad agreement that it was better at this stage to establish certain principles on the basis of which detailed rules and regulations might be established when commercial production becomes imminent. The Implementing Agreement thus sets forth such principles of production policy related to deep seabed polymetallic nodules, in Section 6 of its Annex.

13. The crucial policy perspective of the production policy under Section 6 of the Annex to the Implementing Agreement is the application of the free market principles replacing the controlled economy principles implicit in Article 151 of the Convention. Fair competition is the fundamental mechanism for the application of free market principles. Right from the outset, in the Secretary-General's consultations, once it was agreed that the controlled economy principles behind the production policy under Part XI of the Convention would be discarded, emphasis was placed on ensuring fair competition between land-based and seabed miners. It followed logically that participants in the Secretary-General's consultations would look up to the existing multilateral system of ensuring fair competition - the General Agreement on Tariffs and Trade (GATT). Such reliance on the GATT was accentuated because of the coincidence of the time periods when the protracted negotiations in the Uruguay Round were coming to a successful culmination and also when the Secretary-General's consultations on the outstanding issues related to the deep seabed mining regime were progressing well.

14. One fundamental principle on the basis of which the Convention was formulated was that "the problems of ocean space are closely interrelated and need to be considered as a whole" (Convention, preamble). Once an integrated approach to ocean affairs was taken by the negotiators in the Third United Nations Conference on the Law of the Sea, they recognized that a vast amount of laws and rules already exists among international organizations, along individual sectors or particular disciplines or specific aspects of ocean affairs. This led to a strategy of utilizing the respective competence of the existing international organizations. In this context, numerous provisions in the Convention make reference to "competent" or "appropriate" or "relevant" international organizations, in some cases such organizations being expressly identified.

15. An examination of the production policy in Section 6 of the Annex to the Implementing Agreement demonstrates that it is actually an amalgam of fair trade measures. In laying down these trade measures, following the strategy taken in the Convention, participants in the Secretary-General's consultations deferred to the authority of the competent international organization, which in this case is the GATT. This is the ultimate reason that the possibilities of conflicts between the trade measures pursuant to the Implementing Agreement and the WTO measures would be minimal, if any.

16. The provisions contained in Section 6 of the Annex to the Implementing Agreement evolved over several rounds of consultations. The first version of the text was discussed and agreed upon during the December 1991 round. This version includes the following basic principles: (a) anti-subsidy principle (refer to paragraph 1(c) of Section 6); (b) anti-discrimination principle (refer to paragraph 1(d) of Section 6); (c) principle relating to the problem of unfair economic practices (refer to paragraph 7 of Section 6); and (d) dispute settlement procedures set out in the Convention (refer to paragraph 1(f)(ii) of Section 6). (The text of Section 6 of the Annex to the Implementing Agreement is reproduced in Annex I to this paper). The Convention itself had provisions relating to the problem of unfair economic practices (Article 151(8)). At the end, the agreed provision in the Implementing Agreement was the same as in the Convention. Thus, Article 151, paragraph 8, of the Convention was retained in the Implementing Agreement. Article 151, paragraph 8, specifically mentions "rights and obligations relating to unfair economic practices under relevant multilateral trade agreements". A legislative history of this provision points to the fact that the GATT was considered to be the main "relevant multilateral trade agreement".

17. Since the early rounds of the consultations, the three main themes that were repeatedly emphasized were the need for non-subsidization, for non-discrimination between land-based mining and deep seabed mining, and for measures against unfair economic practices. During the June 1992 round, a significant development occurred that initiated the linkage to the GATT. In the context of the above mentioned needs, participants in the Secretary-General's consultations pointed out the direct relevance and applicability of the related provisions of the GATT. The dispute settlement procedures of GATT were also emphasized, and it was urged that since the Convention already included recourse

to such procedures, one should revert back to the Convention provisions in this connection. It was no coincidence that the deference to GATT in trade-related matters and an explicit recognition of the authority of GATT in such matters came at a time when the Uruguay Round of Multilateral Trade Negotiations was coming to a successful conclusion and there was general agreement among the participating Governments in the Negotiations about the provisions related to non-subsidization, non-discrimination and the measures against unfair economic practices.

18. Thus, the version of the text of the provisions on "Production policy" available for consideration at the January 1993 consultations had an explicit reference to the applicability of GATT rules as far as anti-subsidy provisions with regard to deep seabed mining were concerned. It also made an explicit reference to the recourse to the dispute settlement procedures of multilateral trade agreements, essentially GATT.

19. There was a long history of consideration of measures against subsidization, discrimination, unfair economic practices and trade restrictions, in general, in Special Commission 1 of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea. The Preparatory Commission was set up by the Third United Nations Conference on the Law of the Sea with a mandate to take measures to ensure the entry into effective operation without undue delay of two institutions established by the Convention--the International Seabed Authority and the International Tribunal for the Law of the Sea. Special Commission 1 was established by the Preparatory Commission to study the problems which would be encountered by developing land-based producer States likely to be seriously affected by deep seabed production. In the deliberations of Special Commission 1 also, the measures of GATT were often mentioned.

20. Further consolidation and refinement of the provisions related to non-subsidization, non-discrimination and measures against unfair economic practices occurred during the January 1993 round of the Secretary-General's consultations and subsequent rounds. Such consolidation and refinement addressed basically three matters: (a) the general applicability of the provisions of the GATT was recognized with respect to the exploration for and exploitation of the resources of the international deep seabed area; this broadened the authority of the GATT in comparison with previous texts which mentioned GATT in relation to specific matters only, e.g., non-subsidization, unfair economic practices, etc.; (b) the complexity of the issue of subsidization, as addressed in the provisions of the GATT, was recognized; thus, a need to add a definition of "subsidy" was avoided, and at the same time, the permissibility of subsidization under certain circumstances was accepted - this was accomplished by simply linking the provisions of Section 6 to the relevant ones of GATT; and (c) whenever applicable, the authority of free trade agreements and of customs union agreements was also recognized.

21. Non-subsidization and non-discrimination measures were further strengthened by providing for action by States Parties and for contractual obligations of seabed miners with respect to non-subsidization. A State Party may at any time bring to the attention of the Council (the executive organ of the Authority) activities which in its view are inconsistent with the requirements of non-subsidization and non-discrimination as laid out in Section 6. In circumstances where a determination is made under the GATT that a State Party has engaged in subsidization which is prohibited or has resulted in adverse effects on the interests of another State Party and appropriate steps have not been taken by the relevant State Party or State Parties, the affected State Party may request the Council to take appropriate measures. The acceptance by a contractor of subsidies other than those which may be permitted under the GATT shall constitute a violation of the fundamental terms of the contract forming a plan of work for the carrying out of exploration or exploitation activities in the international deep seabed area.

22. The above elements that also enjoyed general agreement were reflected in the final version of the text of the provisions on "Production policy", contained in Section 6 of the Annex to the Implementing Agreement.

D. Dispute settlement procedures under the Convention

23. Further refinement was also achieved in the provisions related to dispute settlement. It was recognized that many States which were not signatories to the GATT could not have recourse to the dispute settlement procedures of the GATT. For such States provision needed to be made - a general agreement emerged that such States could have recourse to the dispute settlement procedures set out in the Convention itself.[3]

24. Since the Convention is unique in that the mechanism for the settlement of disputes is incorporated into the document thus making it obligatory for Parties to the Convention to go through the settlement procedure in case of a dispute with another party. During the drafting of the Convention, some countries were opposed in principle to binding settlement to be decided by third party judges or arbitrators, insisting that issues could best be resolved by direct negotiations between States without requiring them to bring in outsiders. Others, pointing to a history of failed negotiations and long-standing disputes often leading to a use of force, argued that the only sure chance for peaceful settlement lay in the willingness of States to bind themselves in advance to accept the decisions of judicial bodies. What emerged from the negotiations was a combination of the two approaches, regarded by many as a landmark in international law.

25. If direct talks between the Parties fail, the Convention gives them a choice among four procedures, some new, some old: submission to the International Tribunal for the Law of the Sea, established by the Convention itself; adjudication by the International Court of Justice; submission to binding international arbitration procedures; or submission to special arbitration tribunals with expertise in specific types of disputes. All of these procedures involve binding third-party settlement, in which an agent other than the Parties directly involved hands down a decision that the Parties are committed in advance to respect.

26. Disputes over seabed activities are to be arbitrated by an 11-member Seabed Disputes Chamber, which has been set up within the International Tribunal for the Law of the Sea. The Chamber will have compulsory jurisdiction over all such conflicts, whether involving States, the International Seabed Authority or companies or individuals having seabed mining contracts.

III. CONCLUDING REMARKS

27. The above information and analysis which, in a sense, constitute a legislative history of the trade-related provisions of the Implementing Agreement, point to the conclusion that it is a quite unique MEA from the perspective of the CTE. Its uniqueness lies in the facts that not only it attributes competence to the WTO in settling disputes involving trade-related measures, notably production subsidies

[3]The number of States Parties to the Convention and also the number of members of the WTO are increasing over time. As of April 1997, the following 31 States are States Parties to the Convention, but not WTO Members (the 13 States marked with an asterisk are WTO observers): Algeria*, Bahamas, Bosnia and Herzegovina, Cape Verde, China*, Comoros, Cook Islands, Croatia*, Georgia*, Iraq, Jordan*, Lebanon, Marshall Islands, Micronesia (Federated States of), Monaco, Nauru, Oman*, Palau, Panama*, Russian Federation*, Samoa, Sao Tome and Principe, Saudi Arabia*, Seychelles*, Somalia, Sudan*, the Former Yugoslav Republic of Macedonia*, Vietnam*, Yemen, Yugoslavia, and Zaire.

and trade restrictions, but also it explicitly recognizes the authority of the WTO in the applicability of trade-related measures with respect to deep seabed mining.[4]

28. The comprehensiveness of the dispute settlement provisions is also unique in that they provide for both Parties and non-Parties to the WTO. But an interesting point is that since the authority of the WTO in the applicability of trade-related measures has been explicitly built into the trade-related provisions, the tribunal/court or arbitrator chosen by the non-parties to the WTO, under the dispute settlement procedures of the Convention, are most likely to apply the rules of the WTO as the substantive law.[5]

29. As has been pointed out, "up to now, there has been no GATT or WTO dispute concerning trade measures applied pursuant to an MEA"[6]; it can be added that neither has there been any trade-related dispute, under the Convention, with respect to deep seabed mining. The current stage of development of seabed mining pointing to the fact that commercial exploitation is unlikely before 2010, further reduces the potential for trade-related disputes in the near future. It can also be argued that the existence of a resource administration agency, the International Seabed Authority, itself may be a deterrent for conflict emergence.

30. It is to be added that in relation to the provision of paragraph 6 of Section 6 of the Annex to the Implementing Agreement, the Authority is at this time in the process of finalizing rules, regulations and procedures for prospecting and exploration of polymetallic nodules.[7] In formulating such rules, regulations and procedures, the Authority has to ensure the implementation of the provisions of Section 6, a fact that takes one back to the authority of the WTO in the applicability of trade-related measures. There are environmental provisions in the draft rules, regulations and procedures for prospecting and exploration, but "the types of activities anticipated during exploration consist primarily of non-invasive survey work and are not expected to be of serious concern in terms of environmental impact."[8] Thus, it is highly unlikely that the trade-related impacts of these minimal environmental provisions would be of serious concern, either.

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[4]In this context, one important matter that may not be under the purview of the CTE but would be of interest to the WTO, can be mentioned: in the "Rules of Origin", while the general concept of origins beyond or outside accepted national jurisdiction is clear from the frequent usage of "high seas, Antarctica and outer space", accommodation may have to be made in the definitions for the "international deep seabed Area". This may also have implications for "double taxation" in relation to payments to be made by future deep seabed miners to their national governments and to the International Seabed Authority.

[5]See World Trade Organization, Committee on Trade and Environment, "Communication from Chile" (WT/CTE/W/2 of 16 February 1995).

[6]World Trade Organization, Committee on Trade and Environment, "Report (1996) of the Committee on Trade and Environment" (WT/CTE/1 of 12 November 1996), paragraph 174.

[7]A subsidiary organ of the International Seabed Authority, a 22-member expert body called the Legal and Technical Commission, is considering these rules, regulations and procedures. Based on the recommendations of this body, the Council of the Authority is expected to adopt these rules. The latest version of these rules, regulations and procedures are contained in International Seabed Authority, Legal and Technical Commission, "Draft regulations on prospecting and exploration for polymetallic nodules in the Area: Provisional text prepared by the Legal and Technical Commission" (ISBA/3/LTC/WP.1/Rev.1 of 28 May 1997).

[8]International Seabed Authority, Assembly, "Report of the Secretary-General of the International Seabed Authority under Article 166, paragraph 4, of the United Nations Convention on the Law of the Sea" (ISBA/3/A/4 of 31 July 1997), paragraph 54.

ANNEX I

Section 6 of the Annex to the
1994 Agreement relating to the implementation of Part XI of the
1982 United Nations Convention on the Law of the Sea

SECTION 6. PRODUCTION POLICY

1. The production policy of the Authority shall be based on the following principles:

(a) Development of the resources of the Area shall take place in accordance with sound commercial principles;

(b) The provisions of the General Agreement on Tariffs and Trade, its relevant codes and successor or superseding agreements shall apply with respect to activities in the Area;

(c) In particular, there shall be no subsidization of activities in the Area except as may be permitted under the agreements referred to in subparagraph (b). Subsidization for the purpose of these principles shall be defined in terms of the agreements referred to in subparagraph (b);

(d) There shall be no discrimination between minerals derived from the Area and from other sources. There shall be no preferential access to markets for such minerals or for imports of commodities produced from such minerals, in particular:

(i) By the use of tariff or non-tariff barriers; and

(ii) Given by States Parties to such minerals or commodities produced by their state enterprises or by natural or juridical persons which possess their nationality or are controlled by them or their nationals.

(e) The plan of work for exploitation approved by the Authority in respect of each mining area shall indicate an anticipated production schedule which shall include the estimated maximum amounts of minerals that would be produced per year under the plan of work;

(f) The following shall apply to the settlement of disputes concerning the provisions of the agreements referred to in subparagraph (b):

(i) Where the States Parties concerned are parties to such agreements, they shall have recourse to the dispute settlement procedures of those agreements;

(ii) Where one or more of the States Parties concerned are not parties to such agreements, they shall have recourse to the dispute settlement procedures set out in the Convention.

(g) In circumstances where a determination is made under the agreements referred to in subparagraph (b) that a State Party has engaged in subsidization which is prohibited or has resulted in adverse effects on the interests of another State Party and appropriate steps have not been taken by the relevant State Party or States Parties, a State Party may request the Council to take appropriate measures.

2. The principles contained in paragraph 1 shall not affect the rights and obligations under any provision of the agreements referred to in paragraph 1 (b), as well as the relevant free trade and customs union agreements, in relations between States Parties which are parties to such agreements.

3. The acceptance by a contractor of subsidies other than those which may be permitted under the agreements referred to in paragraph 1 (b) shall constitute a violation of the fundamental terms of the contract forming a plan of work for the carrying out of activities in the Area.

4. Any State Party which has reason to believe that there has been a breach of the requirements of paragraphs 1 (b) to (d) or 3 may initiate dispute settlement procedures in conformity with paragraph 1 (f) or (g).

5. A State Party may at any time bring to the attention of the Council activities which in its view are inconsistent with the requirements of paragraph 1 (b) to (d).

6. The Authority shall develop rules, regulations and procedures which ensure the implementation of the provisions of this section, including relevant rules, regulations and procedures governing the approval of plans of work.

7. The provisions of Article 151, paragraphs 1 to 7 and 9, Article 162, paragraph 2 (q), Article 165, paragraph 2 (n), and Annex III, Article 6, paragraph 5, and Article 7, of the Convention shall not apply.