A Preliminary Discussion over the Legislation on Anti-monopoly in the Area

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Abstract: The term “monopoly” has never been given a clear definition in the United Nations Convention on the Law of the Sea (hereinafter “the Convention”), though it is mentioned in many provisions on the system of the “Area” under the Convention, which also contains anti-monopoly provisions in respect of polymetallic nodules. During the formulation of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, the International Seabed Authority (hereinafter “the Authority”) held that the provisions under Annex III of the Convention related to the anti-monopoly criteria with regards to polymetallic nodules could not be effectively applied to polymetallic sulphides and cobalt-rich ferromanganese crusts, hence the Authority determined to set out new anti-monopoly provisions in the two new Regulations. Even so, the two Regulations as finally adopted by the Authority still failed to clearly stipulate anti-monopoly criteria. However, the Authority has adopted some relevant resolutions, requiring its Legal and Technical Commission (LTC) to, in due course, elaborate the appropriate criteria that might be used to prevent monopolization with respect to the exploration and exploitation of polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area and report its consideration to the Council of the Authority. This article seeks to further define the issue of anti-monopoly in the Area based on a review of the relevant discussions during the formulation of the Convention and the associated Regulations by the Authority. Meanwhile, it shares predictions and suggestions regarding the issue after taking into special consideration the unique legal status of the Area.

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Key Words: International seabed area; Regulations; Anti-monopoly

I. Introduction

The United Nations Convention on the Law of the Sea (hereinafter “the Convention”) declares that the Area and its resources are the common heritage of mankind, and that the right over resources in the Area should be exercised by the International Seabed Authority (hereinafter “the Authority”) on behalf of mankind as a whole. The Authority has four organs: the Assembly, its highest authority; the Council, its executive organ; the Enterprise, through which the Authority carries out international seabed mining operations; and the Secretariat, which performs daily tasks assigned by the Assembly and Council and acts on the Enterprise’s behalf. In addition, the Authority has established two specialized permanent subsidiary bodies, namely, the Legal and Technical Commission (LTC) and the Finance Committee.

In accordance with the Convention, all activities of exploration and exploitation of the Area resources shall be carried out in compliance with relevant provisions under the Convention as well as the rules, regulations, and procedures prescribed by the Authority. In an effort to regulate the exploration and exploitation of the three types of resources in the Area – polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts – the Authority adopted the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area in 2000, the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area in 2010, and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area in 2012.\(^1\) The anti-monopoly provisions under the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area are little more than a reiteration of the anti-monopoly criteria

on the prospecting and exploration for polymetallic nodules specified under Annex III, Article 6, Paragraph 3(c) of the Convention.\(^2\) During the formulation of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, though the LTC proposed that anti-monopoly criteria be incorporated into the two Regulations, it had, at the same time, expressed its view that the anti-monopoly criteria established specifically for polymetallic nodules in the Annex III of the Convention were not applicable to polymetallic sulphides and cobalt-rich ferromanganese crusts for the following two reasons: first, provisions found in the Annex III of the Convention clearly state that itself apply only to polymetallic nodules; second, if the same provisions were applied to the prospecting and exploration of polymetallic sulphides and cobalt-rich ferromanganese crusts, the implementation would run counter to the dictates of science.\(^3\)

However, due to major divergences among the parties involved, the Authority failed to clearly stipulate anti-monopoly criteria in the two Regulations above, instead providing only a general principle: “The Legal and Technical Commission may recommend approval of a plan of work if it determines that such approval would not permit a State Party or entities sponsored by it to monopolize the conduct of activities in the Area with regard to polymetallic sulphides (or cobalt-rich ferromanganese crusts) or to preclude other States Parties from activities in the Area with regard to polymetallic sulphides (or cobalt-rich ferromanganese crusts).”\(^4\) In a decision released by it, the Council of the Authority requested that

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2 If part or all of the area covered by the proposed plans of work meet the following conditions, the Authority shall not approve such plans: … (c) the proposed plan of work has been submitted or sponsored by a State Party which already holds: (i) plans of work for exploration and exploitation of polymetallic nodules in non-reserved areas that, together with either part of the area covered by the application for a plan of work, exceed in size 30 per cent of a circular area of 400,000 square kilometres surrounding the centre of either part of the area covered by the proposed plan of work; (ii) plans of work for the exploration and exploitation of polymetallic nodules in non-reserved areas which, taken together, constitute 2 per cent of the total seabed area which is not reserved or disapproved for exploitation pursuant to article 162, paragraph (2)(x).


4 Article 23, Paragraph 7 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area.
the LTC duly elaborate the appropriate criteria that might be used to prevent monopolization of activities in the Area with respect to polymetallic sulphides and cobalt-rich ferromanganese crusts and report to the Council for its consideration.\(^5\) During its consideration of the Draft Amendments to Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area at the 19th Annual Session of the Authority in July 2013, the LTC, after a general discussion of the question of anti-monopoly in the Area, held that the question should be put as a priority in its future work.

II. A Review of the Anti-monopoly Question in the Area

According to the Convention, the exploration and exploitation of the resources in the Area shall be carried out by the Enterprise of the Authority independently or together with other States or enterprises, namely in association with the Authority by States Parties, or by State enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided under the Convention.\(^6\) In other words, the Enterprise, States (States Parties), and entities (including natural or juridical persons and other organizations), all can be engaged in the exploration and exploitation of resources in the Area.

The term “monopoly” is mentioned explicitly in four articles of the Convention: (1) Article 150 (g), “Policies relating to activities in the Area” states

\[\text{the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area.}\]

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6 Article 153 of the Convention.
(2) Paragraph 1(d) of Article 155, concerning the “Review Conference”, notes that the Review Conference shall consider in detail “whether monopolization of activities in the Area has been prevented.” Article 155, Paragraph 2 prescribes that

[The Review Conference] shall also ensure the maintenance of the principles laid down in this Part with regard to the exclusion of claims or exercise of sovereignty over any part of the Area, the rights of States and their general conduct in relation to the Area, and their participation in activities in the Area in conformity with this Convention, [and] the prevention of monopolization of activities in the Area ...

(3) Annex III, Article 6, Paragraph 4, “Approval of plans of work,” stipulates that

The Authority may approve plans of work covered by paragraph 3(c) if it determines that such approval would not permit a State Party or entities sponsored by it to monopolize the conduct of activities in the Area or to preclude other States Parties from activities in the Area.

(4) Annex III, Article 7, Paragraph 5 states on the subject of “Selection among applicants for production authorizations” that

Selection shall be made taking into account the need to enhance opportunities for all States Parties, irrespective of their social and economic systems or geographical locations so as to avoid discrimination against any State or system, to participate in activities in the Area and to prevent monopolization of those activities.

Not only has the term “monopoly” been explicitly mentioned in these provisions, but there are also specific provisions that address the anti-monopoly

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criteria with regards to activities of polymetallic nodules in the Area in Annex III, Article 6, Paragraph 3(c), “Approval of plans of work,” which stipulates that

the proposed plan of work has been submitted or sponsored by a State Party which already holds: (i) plans of work for exploration and exploitation of polymetallic nodules in non-reserved areas that, together with either part of the area covered by the application for a plan of work, exceed in size 30 per cent of a circular area of 400,000 square kilometres surrounding the centre of either part of the area covered by the proposed plan of work; (ii) plans of work for the exploration and exploitation of polymetallic nodules in non-reserved areas which, taken together, constitute 2 percent of the total seabed area which is not reserved or disapproved for exploitation pursuant to article 162, paragraph (2)(x).

Otherwise, the Authority will not approve any application for a plan of work.

Based on the analysis of the above provisions in connection with “monopoly,” we can conclude that there are two purposes for the Convention to emphasize anti-monopoly: first, to ensure and enhance the opportunities for State Parties to participate in the exploration and exploitation of resources in the Area; second, to prevent a small number of States or entities from monopolizing the exploration and exploitation of resources in the Area. In an effort to eliminate “monopolization,” the Convention does so mainly by limiting the mining area eligible for States’ applications to explore and exploit polymetallic nodules. This is to prevent a single State from acquiring control over a certain part (or percentage) of the Area.

It should be noted that although the Convention has only imposed direct restrictions on the application of States for the exploration and exploitation of polymetallic nodules, this does not imply that it has imposed no limits on the applications of entities. If a State applicant has acquired through application a contract on exploration in a certain part of the Area or a certain percentage of the Area, that State shall be no longer eligible to put forward another application, as a State applicant, or sponsor new applications. Entities must be sponsored by a State to apply, and if the State is no longer qualified to sponsor new applications due to the above reason, then entities within the said State shall also not be eligible to submit a new application. In addition, certain restrictions have been imposed on the application of pioneer investors by Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules under an annex to the Final
Act of the Third United Nations Conference on the Law of the Sea. Paragraph 4 of the Resolution stipulates that, “no pioneer investor may be registered in respect of more than one pioneer area.” As the “pioneer investors” referred in the Resolution can be both States and entities, the provision also shows the intent of State Parties to the Convention to impose restrictions on the application of entities.

Without a unified definition in law, the term “monopoly” is rich in meanings, which, according to some scholars, can be interpreted from the perspectives of the actor, state, and action of a monopoly as well as market powers. Anti-monopoly legislation is generally designed to mainly prevent the abuses of monopoly. This type of legislation can be domestic or international in scope. The former aims at encouraging competition, preventing the excessive concentration of economic power and curtailing abuse of market edge. For instance, Article 3 of the Anti-monopoly Law of the People’s Republic of China states that monopolistic behaviors comprise the following: (1) monopolistic agreements concluded by business operators; (2) abuse of dominant market positions by business operators; and (3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition. Due to the lack of unified and widely-accepted international anti-monopoly legislation, monopolistic behaviors, such as cross-border merging, export cartels, unreasonable transfer pricing, and restrictive clauses in technology transfer, are regulated chiefly by means of the extraterritorial application of domestic anti-monopoly legislation and bilateral treaties between States.

Careful comparison shows that the anti-monopoly provisions for the Area are quite at odds with domestic and international anti-monopoly legislation. Above all, according to relevant regulations of the Authority, which provide for, among other things, the qualifications and conditions of applicants, applications shall be submitted to the Authority for its consideration in the order in which they are received before approval can be acquired for the exploitation of resources in the Area. In this way, even if some applicants enjoy a monopolistic advantage in such areas as economy, science or technology, this will in no way restrict competition

from other applicants for participation in the exploration and exploitation of resources in the Area. Furthermore, the exploration and exploitation of resources in the Area shall be carried out in compliance with the Authority’s relevant regulations on exploration and exploitation and a contract shall be entered into between operators and the Authority. According to the Convention and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, the plans of work for exploration approved by the Authority shall specify production estimates, including the highest estimated annual mineral output under the plan of work. These institutional arrangements prevent contractors from monopolizing output, interfering with price, and affecting trade by abusing their market advantage.

The question of anti-monopoly in the Area then becomes more of a political issue than a legal one. In the Area, several known types of high-quality mineral resources are geographically concentrated and limited in amount. In signing the relevant treaties and drafting relevant regulations, the parties concerned attempt to impose restrictions on the mining area that can be applied with regards to a particular type of resources in the Area and the total mining area which can be applied for by a particular State or entity in the whole Area. With an aim to prevent the best or the bulk of resources from being monopolized by several States or entities, these collective restrictions make it possible for States who impose them or their entities to have their own share in the Area. Achieving a globally inclusive framework should be the ultimate objective of anti-monopoly legislation in the Area.

III. Discussions on the Question of Anti-monopoly in the Area during the Formulation of the Convention

In the early stages of Convention negotiations, relevant parties noted the necessity of preventing any individual State or entity from dominating the exploitation of resources in the Area. During discussions on Convention provisions touching on the Review Conference and policies governing the activities within the Area, the former Soviet Union proposed that a special provision be added that would prevent a State or a private corporate group from monopolizing the exploration and exploitation of resources within the Area. In the discussions concerning the Convention’s provisions on the Review Conference, Norway pointed out that the Review Conference should review whether the monopolization
of activities within the Area have been effectively prevented, which it held should be considered as one of the guiding principles for any review.\textsuperscript{12} Both of these States’ suggestions were adopted by the Convention.

Many States offered specific suggestions on defining anti-monopoly criteria in the Area. In a working paper submitted by eight European States in 1974, it was proposed that an applicant should not hold more than six contracts in respect of each category of resources.\textsuperscript{13} As has been provided for under Annex I, Article 8(f) of the Informal Single Negotiating Text 1975, for contracts secured by State Parties or natural or judicial persons sponsored by them, the contracted area shall not exceed a certain percentage of the total area open for exploration and exploitation in the Area.\textsuperscript{14} At the follow-up of the seventh meeting in 1978, the former Soviet Union suggested that an anti-monopoly provision should contain three elements: first, restrictions should be imposed on the total number of contracts that can be obtained by a State Party or by its State-owned or private enterprises; second, under circumstances where there is more than one applicant applying for contracts of exploration in the same area at the same time, applicants who have not obtained any contract before take precedence over those who are holding contracts or have previously obtained a certain number of contracts; third, restrictions should be imposed on the number of contracts that can be obtained by a State Party that applies for exploitation in a particular part of the Area for the purpose of avoiding the concentration of mining sites with the best prospects.\textsuperscript{15}

In a compromise proposal he drafted and revised in 1979, the president of the First Consultative Group proposed detailed anti-monopoly criteria for the exploitation of polymetallic nodules in the Area, paving the way for the adoption of similar provisions in the Convention. The proposal stated that

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(v) the following proposed plans of work submitted or sponsored by State Parties have been approved: (i) three plans of work for exploration and exploitation within a circular area of 400,000 square kilometers in mining
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\item \textsuperscript{13} Belgium, Denmark, France, Germany (Federal Republic of), Italy, Luxembourg, Netherlands, United Kingdom of Great Britain and Northern Ireland: Working Paper, A/CONF.62/C.1/L.8.
\item \textsuperscript{14} Informal Single Negotiating Text, Part I, A/CONF.62/WP.8/PartI.
\end{itemize}
area which have not been designated as a reserved area pursuant to Article 5(3); and (ii) plans of work for exploration and exploitation in an mining area within 3 per cent of the total seabed area which has not been designated as a reserved area pursuant to Article 5(3) or has been disapproved for exploitation pursuant to article 162, paragraph (2)(x) by the Authority.\textsuperscript{16}

Several amendments were made to the anti-monopoly criteria on the exploration and exploitation of polymetallic nodules in the Second Revised Draft of the Informal Composite Negotiating Text, some of which were later codified in Article 6(3)(c) of Annex III to the Convention. The amendments contained in this article include the following: first, unlike other provisions found in Annex III, this provision only applies to contracts in respect of polymetallic nodules, excluding other types of resources; second, the restriction of three mining sites within a circular area of 400,000 square kilometers laid out in Item (i) was loosened under Article 6(3)(c)(i) to prevent only activities that exceed in size 30% of a circular area of 400,000 square kilometres; third, the upper limit of “3% of the total non-reserved seabed area” stated in Item (ii) was lowered in Article 6(3)(c)(ii) to “2% of the total non-reserved seabed area.”\textsuperscript{17}

The above review of the discussions on the formulation of anti-monopoly provisions in the Convention allows the following conclusions to be drawn: first, although great attention was attached to the question of anti-monopoly in the formulation of the Convention, interests remain divided among negotiating parties, leading ultimately to ambiguous anti-monopoly provisions in the Convention; second, in terms of the parties subject to anti-monopoly provisions, the Convention, while restricting applications put forward by States and entities, fails to take into consideration limitations on the number of applications or the total mining area that can be sponsored by a State; third, with regard to detailed anti-monopoly criteria, though the Convention has imposed direct restrictions only on State applications in respect of polymetallic nodules, the applications of entities may also be affected by such restrictions; fourth, anti-monopoly provisions in the Convention only restrict the application in respect of a single type of resources in the Area, but these provisions do not limit the total number of applications in respect of all types of


resources.

**IV. Discussions over the Question of Anti-monopoly in the Formulation of the Two New Regulations**

Two anti-monopoly restrictions mentioned during discussions leading to the formulation of the two Regulations are particularly noteworthy: first, the restriction on the clusters of blocks within one and the same geographical area; second, the restriction on the mining areas available to “affiliated applicants,” a concept first introduced during these discussions. These two restrictions reflect the Authority’s intention and consideration to lay down regulations to prevent monopoly in respect of polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area.

**A. The Restriction of “One and the Same Geographical Area”**

According to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, the area covered by each application for a plan of work for exploration of polymetallic sulphides or cobalt-rich ferromanganese crusts shall be comprised of blocks, which shall be arranged by the applicant in clusters as per the Regulations, and need not be contiguous but shall be proximate and confined within the same geographical area. Specifically, clusters of polymetallic sulphides blocks shall be confined within a rectangular area not exceeding 300,000 square kilometres in size while those of cobalt-rich ferromanganese crusts cannot exceed an area measuring 550 kilometres by 550 kilometres.\(^\text{18}\)

The intent of the above provisions is explicated in relevant documents published by the Authority.\(^\text{19}\) According to the Authority’s analysis, it can be assumed that in the future, contractors will undertake exploitation in several

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\(^{18}\) Article 12 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area.

different mining sites at the same time, for an individual deposit of either polymetallic sulphides or cobalt-rich ferromanganese crusts is much smaller than that of polymetallic nodules. To date, there have been no individual deposits discovered with an exploitation scale large enough to be economically profitable; thus, if contractors were allowed to freely choose clusters of blocks which are neither contiguous nor proximate, they would inevitably “cherry pick” those with better prospects and restrict the applications of other prospective contractors. Therefore, the Authority requires that each exploration area be designated as several clusters made up of discontiguous blocks, such that the exploration project’s surface area covers a rather large swath, increasing the chances that the seabed resources will be found. By confining the plan of work’s mining area to clusters within one and the same geographical area, the monopolization by certain States on the mining areas with the best prospects can be avoided.

It can be concluded from the above that the “one and the same geographic area” restriction is imposed by the Authority to prevent applicants from selecting clusters of blocks that are too widely dispersed and to ensure applicants are not too picky about clusters of blocks, “cherry picking” those with the best prospects and restricting other applicants’ applications. In concrete terms, this suggests that in the future the Authority will impose restrictions on the number of applications allowed or the total mining area available within a particular geographic area in its future anti-monopoly criteria, with the goal of preventing applicants from monopolizing the best mining sites in the Area. After all, if such restrictions were not imposed on applicants, the Authority’s “one and the same geographical area” restriction would become meaningless.

B. The Restrictions on Affiliated Applicants

Restrictions on affiliated applicants were first included in the Model Clauses for Proposed Regulations for Prospecting and Exploration for Polymetallic Sulphides and Cobalt-rich Ferromanganese Crusts in the Area. This document, drafted by the Secretariat of the Authority in 2001, stipulates that

*The total area covered by applications by affiliated applicants shall not exceed the limitations set out in paragraphs 2 and 3 of this regulation. For the purposes of this regulation, an applicant is affiliated with another applicant if an applicant is, directly or indirectly, controlling, controlled by or under...*
common control with another applicant.\textsuperscript{20}

At the 15th session of the Authority in 2009, India suggested that the total area covered at any given time by plans of work for exploration sponsored by the same State or allocated under a contract for exploration to affiliated entities, even if such affiliated entities sponsored by different States, shall not exceed the limitations set out in the regulation of the Authority. Canada held that the LTC’s proposed text did not address the Council’s primary objectives which, among other things, was to avoid an excessive or undue number of applications from affiliates of the same entity, and that India’s proposed inclusion of the phrase “at any one time” was a useful indicator, because it reduced the possibility of an entity making additional sponsorship applications or conducting new activity. Supporting the view expressed by Canada, the USA observer called for a language that would prevent any one entity from monopolizing activities in the Area.\textsuperscript{21} Germany later expressed its support of India’s proposed text.\textsuperscript{22}

Given the vagueness of the concept “affiliated applicant,” in addition to significantly different viewpoints among the parties, the Authority at last abandoned the proposed text. It turns out that the proposal concerning “affiliated applicant” is based on the provision “no pioneer investor may be registered in respect of more than one pioneer area”, which was specified in Paragraph 4 of Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules under an annex to the Final Act of the Third United Nations Conference on the Law of the Sea. The Authority has elaborated on this issue in the document entitled “Analysis of the Draft Regulations on Prospecting and Exploration for Polymetallic Sulphides and Cobalt-rich Ferromanganese Crusts in the Area, Part I: Provisions Relating to Prospecting, Overlapping Claims and the Anti-Monopoly Provision”, clarifying that

\textit{In the case of polymetallic nodules, under Resolution II, pioneer investors were limited to one exploration site each. For that reason, the draft model}

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clauses for sulphides and crusts prepared by the Secretariat in 2001 (ISBA/7/C/2) contained a provision designed to prevent multiple applications by affiliated applicants... 23

Therefore, if we put aside the exact definition of “affiliated applicant” and consider the issue from the perspective of the Authority’s legislative intent and relevant discussions, we can conclude that the anti-monopoly provisions are designed to restrict the total area covered by the plan of work application submitted by an applicant, regardless of whether it be a State or an entity and whether it have put forward one or multiple applications.

V. Some Predictions and Suggestions Concerning Anti-monopoly in the Area

A. Possible Future Anti-monopoly Criteria

Based on the above review and analysis of the discussions on anti-monopoly during the formulation of the Convention and the Authority’s two new Regulations, it follows that future anti-monopoly criteria established by the Authority may have following characteristics: first, restrictions will be imposed on the area covered by the plan of work for the exploration of one and the same type of resource, rather than the total amount of area in respect of all types of resources; second, as for the parties subject to anti-monopoly provisions, restrictions can be imposed on both State applicants and entity applicants, that is, State-owned enterprises and other entities should be treated equally in this context. Restrictions are not likely to be imposed on the number of applications or the total mining area that can be sponsored by a State; third, for applications put forward by a single/standalone applicant, whether it be a State or an entity, it is likely that restrictions will be imposed on the total mining area covered by its applications, instead of limiting the total number of applications allowed; fourth, for the purpose of preventing some applicants’ monopoly on the best mining sites in the Area, it is likely that

restrictions will be imposed on the total number of applications by an applicant for exploration within a particular geographic area or the total mining area covered by its applications.

B. The Anti-monopoly Criteria Should Not Be Too Rigorous

Since the question of anti-monopoly, as mentioned earlier, arises mainly out of political considerations rather than actual economic or legislative needs, the imposition of rigorous anti-monopoly criteria will undermine the principle that the Area and its resources are the common heritage of mankind. According to the Convention, all rights to resources in the Area lie with mankind as a whole and are exercised by the Authority on its behalf. Therefore, the Authority shall allocate on the basis of equitability revenues and other economic interests gained through its activities within the Area, which include those gained from the Enterprise’s exploration of the reserved areas or its shares in joint ventures with contractors, as well as those gained through its collection of royalties from contractors for exploiting the Area resources in compliance with applicable regulations and contracts. Overtly political measures that hamper capable applicants to explore and exploit the Area resources will undoubtedly discourage such activities and prevent the Authority from receiving the due economic profits of harvesting the Area resources. These profits are intended to be allocated among the international community or used to bring benefits to all mankind. In a word, it is clearly not advisable to ensure the interests of a small number of States or entities applying to explore and exploit the Area resources at the expense of the entire international community’s interests.

C. Preferential Treatment Should Be Given to Developing States and Their Entities

In accordance with the Convention, each application, other than those submitted by the Enterprise or by any other entities for reserved areas, shall cover a total area divided into two parts of equal estimated commercial value, one of which shall be designated by the Authority as the reserved area and the other as the non-reserved area (contracted area) covered by the applicant’s approved plan of work. The provisions regarding the reserved area are particularly important for ensuring the participation of the Enterprise as well as developing States and their entities in
the exploration and exploitation of the Area resources. Annex III, Article 9 of the Convention grants priority to the Enterprise as well as developing States and their entities to conduct activities in the reserved area. Article 9 also grants the Enterprise the authority to decide whether it intends to carry out activities in reserved areas and may decide to exploit such areas independently or in joint ventures with the interested State or entity. When considering entering into such joint ventures, the Enterprise shall offer developing States and their nationals the opportunity of effective participation; if the Enterprise does not intend to carry out activities in a reserved area, developing States and their entities may apply for the exploration and exploitation of the resources in that reserved area.

The Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, while preserving in form the reserved area system, also offer a new option for applicants: an applicant can choose to either fulfill its obligation to have half of the area covered by the application designated by the Authority as the reserved area or, as an exchange, offer the Enterprise a certain percentage of equity participation in a joint venture arrangement. Since both polymetallic sulphides and cobalt-rich ferromanganese crusts are three-dimensional, if the applicant has chosen the former option, it is necessary to first find two mining sites of equal estimated commercial value, which involves a lot of costly explorations. Therefore, with the offer of a new option, many applicants will prefer the latter option to the former. In fact, since the adoption of the two Regulations, the Authority has received five applications in respect of polymetallic

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24 The joint venture arrangement, which shall take effect at the time the applicant enters into a contract for exploitation, shall include the following: (a) The Enterprise shall obtain a minimum of 20 per cent of the equity participation in the joint venture arrangement on the following basis: (i) Half of such equity participation shall be obtained without payment, directly or indirectly, to the applicant and shall be treated pari passu for all purposes with the equity participation of the applicant; (ii) The remainder of such equity participation shall be treated pari passu for all purposes with the equity participation of the applicant except that the Enterprise shall not receive any profit distribution with respect to such participation until the applicant has recovered its total equity participation in the joint venture arrangement; (b) Notwithstanding subparagraph (a), the applicant shall nevertheless offer the Enterprise the opportunity to purchase a further thirty per cent of the equity in the joint venture arrangement, or such lesser percentage as the Enterprise may elect to purchase, on the basis of pari passu treatment with the applicant for all purposes; and (c)… See Article 19 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area.
sulphides and three in respect of cobalt-rich ferromanganese crusts. Among the eight applications, seven chose the new option of offering the Enterprise equity participation in the joint venture arrangement; only the Russian Federation’s application in February of 2013 in respect of cobalt-rich ferromanganese crusts opted for the old method.\textsuperscript{25} The negative growth in the reserved areas will undoubtedly lead to a decrease in opportunities for developing States and their entities to participate in the exploration and exploitation of Area resources. It is submitted that developing States and their entities should be given preferential treatment with regard to anti-monopoly in the Area, enforcing relatively lenient rather than overly-rigid anti-monopoly restrictions.

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\textsuperscript{25} The five applications for exploration of polymetallic sulphides are put forward respectively by the China Ocean Mineral Resources Research and Development Association, the Russian Federation, the South Korean government, the Institut Francais de Recherche pour l’Exploitation de la Mer (IFREMER), and the Government of India, while the three ones for cobalt-rich ferromanganese crusts are respectively by the China Ocean Mineral Resources Research and Development Association, the Japan Oil, Gas and Metals National Corporation, and the Russian Federation.