THE TREATMENT OF INTELLECTUAL PROPERTY UNDER THE LAW OF THE SEA TREATY

An Outline

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Definitions

1. The Area: The portion of the seabed outside any national jurisdiction (Article 1, section 1).

2. The International Seabed Authority: Referred to as "the Authority." All member states are members of the Authority (Article 156, section 2).

3. The Enterprise: The "organ of the Authority which shall carry out activities in the Area" (Article 170, section 1).

Applicable Provisions

The provision of the Law of the Sea Treaty (LOST) that deals explicitly with intellectual property (IP) is Part XI, Article 144 ("Transfer of Technology").

Under section 1 of this article, the Authority is required:

(a) "to acquire technology and scientific knowledge" relating to activities in or on the international seabed ("the Area"); and

(b) "to promote and encourage the transfer to developing states of such technology and scientific knowledge so that all States Parties benefit therefrom.

Article 144, section 2 requires the Authority and member States to "cooperate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States Parties may benefit therefrom."

Specifically, the Authority and member states "shall initiate and promote:

"(a) programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, *inter alia*, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;

"(b) measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area."

As originally drafted, Annex III, Article 5 of the Convention set up an onerous and detailed regime for the compulsory licensing of the technology that would come within the ambit of Article 144, *supra*. These provisions were effectively abrogated, however, by Section 5 ("Transfer of Technology") of the Agreement Relating to the Implementation of Article XI of the Convention (the "Agreement"). Paragraph 2 of that section states: "The provisions of Annex III, article 5 of the Convention shall not apply."

Paragraph 1 of Section 5 of the Agreement stipulates:

"In addition to the provisions of article 144 of the Convention, transfer of Technology for the purposes of Part XI shall be governed by the following principles:

"(a) The Enterprise, and developing States wishing to obtain deep seabed mining technology, shall seek to obtain such technology on fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements;

"(b) If the Enterprise or developing States are unable to obtain deep seabed mining technology, the Authority may request…the contractors and their respective sponsoring State or States to cooperate with it in facilitating the acquisition of deep seabed mining technology by the Enterprise or its joint venture, or by a developing State or States seeking to acquire such technology on fair and reasonable terms and conditions, consistent with the effective protection of intellectual property rights. States Parties undertake to cooperate fully and effectively with the Authority for this purpose and to ensure that contractors sponsored by them also cooperate fully with the Authority."

Analysis

The operative provision of the Convention relating to IP rights is Part XI, Article 144 of the Convention, as amended (supplemented) by Section 5 of the Agreement. This article contains no express authorization for compulsory licensing; in fact, it expressly requires that the acquisition of technology be "consistent with the effective protection of intellectual property rights." A literal (and strict) interpretation of this provision, therefore, would seem to require that all acquisition of technology under this article should be by means of voluntary, arms-length, commercial transactions that do not vitiate any IP rights (particularly patent rights).

Nevertheless, it is possible that Section 5 of the Agreement could be interpreted to implicitly sanction the use of compulsory licensing to achieve the broad objectives of technology transfer that the Authority is required to pursue under section 1 of Article 144. Specifically, one could argue that a compulsory license (which leaves a patent valid and enforceable against any non-licensee) is "consistent with the effective protection of intellectual property rights." Moreover, the Agreement does not alter the Authority's mandate, under Section 1 of Article 144, to acquire technology and to facilitate its transfer to developing states. In other words, Section 5, paragraph (b) of the Agreement would have to be interpreted in a manner that allows the Authority to carry out its obligations under Section 1 of Article 144. Thus, if the desired technology is not otherwise available to the Enterprise, the Enterprise is empowered to "request" that contractors "cooperate with it in facilitating the acquisition" of that technology. This power could be exercised, for example, by conditioning access to the Area by a contractor on the transfer the relevant technology, albeit on "fair and reasonable commercial terms and conditions."

In summary, the Authority has a broad mandate to acquire and facilitate the transfer of technology under Section 1 of Article 144. Under Section 5 of the Agreement, the Enterprise (through which the Authority would act under this article) would need to look first to the open market to acquire such technology [paragraph (a)], but, failing that, it could seek to employ more or less coercive means to fulfill its mandate, depending on the Enterprise's interpretation of paragraph (b) of Section 5 of the Agreement. Under an expansive interpretation of these provisions, the only limitation would be the right of the IP rights holder to demand "fair and reasonable" compensation. Moreover, if access to the Area is conditioned on a contractor's agreement to license (or otherwise share) the technology, the contractor may be forced to accept whatever the Enterprise deems to be "fair and reasonable commercial terms and conditions," or else forfeit such access. In the case of deep sea mining technology (which is the particular focus of Section 5 of the Agreement), all meaningful commercial use of such technology would be in the Area. Therefore, failure of an IP rights holder to come to terms with the Enterprise could render such technology worthless, or at least reduce its value to whatever the Enterprise is willing to pay for it.