Convention Text Inadequate
ASOC Analysis Shows Grave Deficiencies

Beeby 7, the "Draft Convention", retains many of the glaring deficiencies of Beeby 6 which were identified in this meeting's first issue of ECO, published on 2 May. There are, however, a few improvements.

The problem areas include liability, the functions of the Commission, observers within the Convention, prospecting, exploration and development permit application, examination and decision, and the powers of the Commission to review decisions made by the Regulatory Committees. The composition of the Regulatory Committees, and their new decision making procedures, have preoccupied the negotiators and will be further discussed.

On the positive side, the link between the Advisory Committee and the other institutions of the regime has been made clearer. However, the true powerlessness of the Committee has also been revealed.

LIABILITY
The liability provisions in the draft Convention are worse and will substantially compromise environmental protection. Most of ECO's previous objections on liability remain. There is a heightened possibility of limits to liability for environmental damage, and substantial defences against liability are allowed.

The obligation to undertake remedial action has gone, and the paragraphs on restoration do not compensate for it. Beeby 7 allows the operator to "buy" its way out of responsibility for restoration. There is no specific requirement for the operator to undertake restoration where this is possible, only a provision for a third party to be reimbursed if it undertakes the restoration itself. This is a very retrograde step. Restoration should be mandatory for the operator, with payments in lieu only if restoration is physically impossible. Unless directly affected, another Party or operator is unlikely to undertake restoration work on their own initiative.

Liability for prospecting damage may now be covered pending the coming into effect of the Protocol, by recourse to the national courts of the country concerned. This is good.

Changes to the functions of the Commission improve the draft. One gives the Commission the responsibility to ensure that key environmental parameters and ecosystem components are monitored. Thus, baseline data on which to base later decisions will (hopefully) be collected before exploration starts.

SERIOUS PROBLEMS
The Article dealing with the Regulatory Committees' examination of exploration applications has been reoriented radically, so that the fundamental purpose of the examination is to elaborate a Management Scheme. Although the Committee "may decline the application" if the activities cannot be made consistent with the Convention, it is under no obligation to do
An application which is inconsistent with the Convention could thus still be approved by a Committee.

Even more serious are the further narrowing of provisions for review of the decisions of the Regulatory Committee by the Commission. Formerly, a review was possible on the narrow grounds of a violation of the Convention or an abuse of power. Now, the sole ground for such review is where a violation of the Convention is alleged. This gives no protection against an abuse of power by a “cabal” in a Regulatory Committee making self-interested decisions rather than those in the best interests of the Antarctic environment. Even if it were determined that a violation of the Convention had occurred, the Commission may only “request” the Committee to reconsider its decision.

OBSERVERS IGNORED
The provisions for cooperation between the institutions of the regime and non-governmental organisations are also inadequate. The Convention omits any requirement for cooperation with organisations which are national, rather than international. The same restriction has been applied to observer status within the Commission, Advisory Committee and Special Meeting of Parties. Further, there is no provision for observer status on Regulatory Committees. This effectively deprives the vast majority of NGOs of any role whatsoever in the Convention. Even then, however, there is no guarantee that any NGOs will ever be accorded observer status.

REGULATORY COMMITTEES
The composition of the Regulatory Committees is more or less unchanged, though there will now be "at least" three developing countries, including claimants and non-claimants. Decision making on these Committees will be by a 2/3 or 3/4 majority, and there must be a simple majority in each of the two "chambers" (claimants and non-claimants) for certain decisions. There is no special role for either the relevant claimant(s) or for the sponsoring state. This is at least even-handed.

The effect of the changes in structure and voting means that a Management Scheme will be approved with the agreement of a majority of both the main interest groups. The previous draft called for a simple majority only, with the consent of the claimant(s) and sponsoring state required. It would now theoretically be possible to approve a Management Scheme without the consent either of the claimant or the sponsoring state.

The VERDICT
In summary, ECO finds the new draft negotiating text to be a little improved in some minor areas, and much worse on some major issues. Almost all the deficiencies identified by ASOC paper 1988-2 remain. ECO hopes that there is still some real will to correct them, and urges all states to review once more the changes proposed in the ASOC paper, with a view to their incorporation in the final text of the Convention.

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