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Report by the Chairman of the First Committee on the work of the working group of 21 and of negotiating group 3

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environment, overhead and administrative costs specifically related to the operations of the contract area and any net operating losses carried forward from prior accounting years.

(l) The costs referred to in subparagraphs (h) and (k) above in respect of interest paid by the Contractor may only be allowed if, in all the circumstances, the Authority approves, pursuant to annex II, paragraph 4 (a), the debt-equity ratio and the rates of interest as reasonable, having regard to existing commercial practice.

(m) The costs referred to in this paragraph shall not be interpreted as including payments in respect of corporate income taxes or similar charges levied by States in respect of the operations of the Contractor.

Paragraph 7 septies

(a) In all cases the price used for the sale of metals shall be the price for the metals in the most basic form in which they are customarily traded on an international market.

(b) If an international market provides a representative pricing mechanism for the metals in the most basic form in which they are customarily traded, the average price on such market shall be used. In all other cases, the Authority shall, after consulting the Contractor, determine a fair market price in accordance with paragraph 7 octies below.

Paragraph 7 octies

(a) All costs, expenditures, proceeds and revenues, and all determinations of market price and value, referred to in paragraph 7, shall be the result of free market or arm's length transactions. In the absence thereof, they shall be determined by the Authority, after consulting the Contractor, as though they were the result of free market or arm's length transactions taking into account relevant transactions in other markets.

(b) In order to ensure enforcement of and compliance with the provisions of this subparagraph, the Authority shall be guided by the principles adopted for, and the interpretation given to, arm's length transactions by the Commission on Transnational Corporations created by the Economic and Social Council, the Group of Experts on Tax Treaties between Developed and Developing Countries and other international organizations, and shall adopt rules and regulations specifying uniform and internationally acceptable accounting rules and procedures, and the means of selection by the Contractor of certified independent accountants acceptable to the Authority for the purpose of auditing in compliance with the said rules and regulations.

Paragraph 7 novies

The Contractor shall make available to the accountants, in accordance with the financial rules and regulations and procedures of the Authority, such financial data as are required to determine compliance with this paragraph.

Paragraph 7 decies

All costs, expenditures, proceeds and revenues referred to in this paragraph shall be determined in accordance with generally recognized accounting principles and the financial rules, regulations and procedure of the Authority.

Paragraph 7 undecies

The payments to the Authority under paragraph 7 *quinquies* and *series* above may be made either in a freely convertible currency or in a currency agreed upon between the Authority and the Contractor, or at the Contractor's option, in the equivalents of processed metals at market value. The market value shall be determined in accordance with paragraph 7 *quinquies* (b).

Paragraph 7 duodecies

All financial obligations of the Contractor to the Authority, as well as all his fees, costs, expenditures, proceeds and revenues referred to in this paragraph shall be adjusted by expressing them in constant terms relative to a base year.

Paragraph 7 terdecies

In all cases other than contracts for all stages of operations, the Authority shall establish the schedule of production charge applicable under the single system and the schedules of production charge and the Authority's share of net proceeds applicable under the mixed system, bearing in mind the objective set out in paragraph 7 (c) and the schedules set out in paragraph 7 *quinquies* and *series*.

Paragraph 7 quater decies

The Authority may, taking into account any recommendations of the Economic Planning Commission and the Technical Commission, adopt rules and regulations that provide for incentives, on a uniform and non-discriminatory basis, to Contractors to further the objectives set out in paragraph 7.

Paragraph 7 quindécies

In the event of a dispute between the Authority and a Contractor over the interpretation or application of the financial terms of contract, either party may submit the dispute to compulsory and binding commercial arbitration.

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Report by the Chairman of the First Committee on the work of the working group of 21 and of negotiating group 3

[Original: English]
[25 April 1979]

The First Committee meets today for reasons of imperative necessity. In the first place, the Committee must be informed of the results of all negotiating efforts regarding matters falling within its mandate. It has primary responsibility for examining these, together with important suggestions advanced by the Chairman of such subsidiary bodies as were established under special negotiating procedures.

Secondly, it must respond to the needs outlined in procedures set in motion by document A/CONF.62/62.⁴⁴ The plenary Conference has adopted a programme which provides for the revision of the informal composite negotiating text.⁴⁵ Modifications or revisions to the said text have, in the language of recommendation 10 in document A/CONF.62/62, to "emerge from the negotiations themselves and should not be introduced on the initiative of any single person, whether it be the President or a Chairman of a Committee, unless presented

to the Plenary and found, from the widespread and substantial support prevailing in Plenary, to offer a substantially improved prospect of a consensus".

The least we can do is to give some indications to the plenary Conference of the scope of constructive work that has been done in this Committee so far, following the birth of the informal composite negotiating text. Our traditions have imposed on those who must preside over our deliberations the grave responsibility of producing suggestions which, in their judgement and having regard to the discussions, offer improved prospects of consensus. Our procedural traditions have undergone some metamorphosis. We were all, Chairmen and members together, called upon to make a co-operative effort to bring about an evolution in the ideas now reflected in the informal composite negotiating text that could substantially improve the prospects of such a consensus. Your role as delegates remains central. That of the Chairman must remain one of suggesting when ideas are necessary.

You may recall that three negotiating groups were set up to deal with the hard-core issues relating to our mandate. In the light of an issue raised in the plenary Conference, I also, in consultations with the President, established a group of legal

⁴⁴Official Records of the Third United Nations Conference on the Law of the Sea, vol. X (United Nations publication, Sales No. E.79.V.4).

⁴⁵*Ibid.*, vol. VIII (United Nations publication, Sales No. E.78.V.4).

experts to examine legal questions in so far as they related to part XI of the informal composite negotiating text. One of the Vice-Chairmen of the First Committee, Mr. Wünsche, chaired the meetings of that group.

On a proposal made by the Group of 77 to enhance our negotiating effort, and following consultations with the President and the various geographical and interest groups, I established the working group of 21. It brought together for the first time spokesmen and representatives of opposing interest groups in a forum of restricted membership. This must be recognized as a major achievement; all of you in general, and the Group of 77 in particular, must be congratulated for your co-operation in that attainment.

The working group of 21 was chaired by me as principal co-ordinator, in co-operation with the Chairmen of negotiating groups 1 and 2 and of the group of legal experts, who co-ordinated the work in respect of the mandates of their respective groups. It had before it documents NG1/16, NG2/4 (A/CONF.62/C.1/L.22, annex I), NG2/5,⁴⁶ NG2/12 and Corr.1 and 2, NG3/6 and GLE/2 (A/CONF.62/C.1/L.25 and Add.1, annex V).

The working group of 21 had as a mandate direct negotiations between interest groups on outstanding issues within this Committee, on the basis of the reports of negotiating groups 1, 2 and 3, as well as that of the group of legal experts. It was to report to the First Committee, that report being, in substance, drawn up, or at least adopted, by the members themselves.

Unfortunately, owing to lack of time and the initial difficulties that this new group inevitably had to face, it was not possible for it to consider and adopt a report to this Committee in the normal form. Consequently, it was decided to request the Chairmen of the four negotiating fora to which I have alluded to make direct reports to the First Committee on the work of the working group of 21 in so far as it touched upon its suggestions. It was understood that these reports would incorporate any new suggestions the Chairman concerned may wish to make in the light of the negotiations in the working group of 21. This must be looked upon as an emergency measure and not as an imposition upon the group.

Thus, you will receive today the reports of the various chairmen covering not only the work of the negotiating groups over which they preside, but updated versions of those reports reflecting work done in the working group of 21.

It is my sincere hope that, bearing in mind the nature, status and role of the suggestions made by the various chairmen, and that the plenary Conference will in fact provide an important forum of the determinations envisaged by document A/CONF.62/62, we shall not spend too much time here in debating upon them. I am not, however, recommending that the door be shut to constructive comment.

The question we should address ourselves to is whether a particular provision advanced by a chairman in his suggestions does or does not offer substantially improved prospects for consensus over that provided by the informal composite negotiating text. Is it agreed that the provision did not enjoy "widespread and substantial support" in the negotiating group or in this Committee? Otherwise, as it is clear that negotiations on the package will continue and that no one is bound, a new basis for further negotiation need not give individual delegations much trouble. My appeal is launched on that understanding.

I intend to commence with the deliberations in negotiating group 3 because I preside over them myself, and it is more convenient since I already have the floor.

The working group of 21 did not, in fact, take up document NG3/6 because it could not do so in the given circumstances. That document is, thus, the product of the negotiations in negotiating group 3.

⁴⁶ *Ibid.*, vol. X, p. 56.

I should like to state from the outset that there are now two sets of amendments. The single underlining in substantive provisions denotes changes made during the seventh session; the double underlining, the proposed changes; and the broken lines, deletions during the present session.

I am encouraged to state that the suggestions for compromise, involving revision of the informal composite negotiating text provisions which I have made in document NG3/6, emanated from actual negotiations and enjoy a substantive measure of consensus. It is also to be noted that the negotiating groups established by the First Committee itself (i.e. negotiating groups 2 and 3) had unlimited membership and that, in fact, the meetings were fully and freely attended by members of this Committee. I can thus afford to be brief in drawing attention to these obvious areas of progress and in outlining the domains of grave difficulty that still haunt us. The following points may be noted:

(a) Some of the changes suggested are cosmetic or of a drafting nature. I need not refer to them. One example of this categorization may be found in article 157, paragraph 4, in which the substance of article 158, paragraph 2 (ix) has been introduced and appropriate deletion made under the latter article.

(b) The document also reflects agreements for improving on some usage of terms. For instance, article 158, paragraph 2 (iv) postulates a power and function of the Assembly to "appoint" members of the Governing Board of the Enterprise as well as the Director-General of the Enterprise. It was generally agreed that that organ was hardly the appropriate institution for effecting appointments. The function was to "elect". Similar amendments were consequently made elsewhere, for instance in article 160, paragraph 2 (iii).

(c) In the text the subsidiary organs of the Council have been reviewed and significant modifications made to ensure their advisory role as technical institutions. This was outlined in my report to the seventh session.

(d) Consequential modifications have been made to parts of the texts to harmonize the work of the three negotiating groups. Examples are to be found in article 158, paragraph 2 (vi), (vii) and (xii), and also in annex III.

(e) Some deletions have been made because the ideas involved are being considered elsewhere (e.g. article 182).

(f) A new formulation now appears in article 159 relating to the categorization of interests under paragraph 1 (a) and (b). This was introduced while consultations with interested delegations were still in progress. Since those modifications in the informal composite negotiating text went to press, the consultations have been completed, and I have pleasure in announcing the following change which I believe enjoys comfortable consensus: in subparagraph (b), delete the words "including at least" and substitute therefor the phrase "and in any case".

(g) The Group considered all other articles not so far touched upon by the Committee, notably those in subsections 4, 5, 7 and 8 relating, respectively, to the secretariat, the Enterprise, the legal status, privileges and immunities, and the suspension of rights of members. With regard to the secretariat, the term of office of the secretary-general is now fixed at four years. Procedure for disciplinary action has been agreed upon. Significantly, with regard to the Enterprise, it was agreed that the activities it may conduct shall cover those of transportation, processing and marketing of minerals recovered from the area.

The negotiating group also considered in full the provisions of annex III, excluding only those relating to finance which were already being considered by negotiating group 2. The members are to be commended for the spirit of understanding and compromise which produced the consensus reflected in the changes.