Third United Nations Conference on the Law of the Sea

1973-1982
Concluded at Montego Bay, Jamaica on 10 December 1982

Document:-
A/CONF.62/L.43

Report of the Chairman of the First Committee on the negotiations in the First Committee

Extract from the *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XII (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Resumed Eighth Session)*

Copyright © United Nations
2009

List of Documents

Third Committee; parts XV and XVI and annexes IV to VII to the plenary Conference, operating as a committee.

Any delegation that wishes to submit formal amendments should endeavour to do so before the suspension of the session.

At this point, the session should be suspended to enable Governments to study the final draft convention and any amendments submitted.

Final stage

During the first 10 calendar days of the resumed session the committees should examine the draft convention. Any amendments not previously submitted would have to be submitted formally on the first day of this period. During that period of 10 calendar days the Chairmen, with the assistance, as appropriate, of the officers of their Committees, would have to pursue their efforts to facilitate the attainment of general agreement, having regard to the progress made on all matters of substance which are closely related to one another.

By the end of this period a decision on all pending amendments will be taken by the Committees.

The subsequent steps which would be taken during the resumed session could be determined by the Conference on the recommendations of the General Committee on the first day of the resumed session, so that the convention can be adopted before the end of the fifth week of the resumed session, having due regard to the rules of procedure and to the Gentlemen's Agreement appearing as an appendix to the rules of procedure.

DOCUMENT A/CONF.62/L.43

Report of the Chairman of the First Committee on the negotiations in the First Committee

[*Original: English*]
[*29 August 1979*]

1. Negotiations on matters falling within the mandate of the First Committee and consequently in part XI of the revised informal composite negotiating text (A/CONF.62/WP.10/Rev.1), were, during this resumed session, continued in the working group of 21 established at Geneva last spring. In that group very intensive negotiations were followed by what the co-ordinators, including myself as Chairman, consider to be productive consultations on some of the critical questions relating to the hard-core issues.

2. I do not wish to duplicate by a further explanatory note the comprehensive report of the First Committee (A/CONF.62/C.1/L.26), which is annexed to this report. The 46th formal meeting of the First Committee was held on 22 August 1979 to consider it and some delegations placed on record their preliminary comments, both on the report and on the contents of the suggestions contained in document WG 21/2 (see appendix A).

3. I must also report that most delegations refrained from commenting on details because they needed time to study the suggestions. Perhaps more important, most of the delegations considered that it was undesirable to comment prematurely on what clearly represented only some elements of the package that must emanate from the hard-core issues before the First Committee.

4. It would appear, none the less, that it was generally agreed that much valuable work has been done at this resumed session and that consequently the results should be preserved at least for the purpose of providing a satisfactory starting point at the next session of the Conference—which will also be the final phase of our work.

5. All of these are to be found in the summary records of the proceedings before the First Committee.

6. The planning of the final phase, therefore, is the main preoccupation of my comments today. One overriding feature of our negotiations is the truth that a consensus on the outstanding issues before the First Committee must, of imperative necessity, address an important reservoir of mini-packages. The major package itself is not always easy to identify; some delegations often regard it as changing its character with each step made in our negotiations. For convenience, therefore, the major package must be regarded as part XI of the negotiating text as a whole.

7. The mini-packages of which I speak are comparatively easier to identify; but even here, there is hardly total agreement among the opposing sides as to their scope and content. The difficulty would appear to lie, in the first instance, in the variety of perspectives entertained by the two major interest groups, notably the developing and the developed countries. A more complex situation is posed by the perspectives of delegations with interests that cut across this traditional dichotomy. Among the developed countries are the major as well as the minor industrialized countries, both with varying degrees of interests.

8. In the world of developing countries, there are those who, as land-based producers or potential producers of the minerals that are the focus of impending exploitation in the deep sea-bed, must share a community of interests with some developed countries, also producers of the same minerals. Among the industrialized countries, the rate of development in economic and technological terms has been so uneven that our negotiating efforts must address seriously the apprehension of the majority with regard to monopoly threatened by the accelerated technological developments of a significant minority among them. There is also a curious community of interests among a number of countries opposed to discrimination in the award of contracts, even though the immediate motivations may be diverse.

9. The discussion of packages is thus complex and, indeed, delicate, especially because there is a tendency to equate them with the extreme priorities of individual delegations. There is a tendency to talk of "important national interest" in loose terms, without the more desirable approach of attempting to reconcile one's so-called national interests with the many diverse national interests of others within the international community and this Conference.

10. In the final analysis, I believe that the only packages that must preoccupy us in the search for compromise and consensus over part XI of the negotiating text are:

(1) Those which must reconcile the declared realistic interests of the few industrialized countries on the one hand, and, on the other hand, those of the vast majority of mankind represented by predominantly developing countries; and

(2) Those which must reconcile the declared realistic interests of two other opposing categorizations of countries. On the one hand, the family of current producers of the minerals in their national territories we seek to exploit in the area, whose economies depend significantly upon their export to the industrialized countries; on the other hand, the highly industrialized countries whose industrial growths consume these minerals, provide healthy markets for the producer countries and who, with contemplated activities in the area, seek assured access to the new source of these minerals through active participation as producers therein.

11. It can only be hoped that, in this monumental reconciliation effort, all concerned will preserve the collective needs of the young and fragile international community in which we can only survive together or perish like unthinking mortals, who punch each other senselessly into smelting lava from an erupting mountain.

12. One point that must be noted at this stage is that it is impossible to meet all the individual national interests of

List of Documents

each delegation. The scope of the diversity makes this clear. An important feature in successful negotiations is that each side must be seen to gain something, even if losses may be encountered in the process. Each negotiation must relate to a collectivity of interests, making it possible to protect some and to give up others on the basis of reciprocity.

13. At this Conference, we cannot, at this stage, insist on viewing the individual interests of each nation represented here, in isolation from the collectivity. We have all come with a set of interests which are "national"— each with a package, as it were. The negotiations must necessarily be among packages.

14. This question is an important one, because I honestly do not believe that in the programme the Conference has adopted for the next phase of our work it would be desirable for amendments and decisions to be made on the basis of individual articles in isolation from the mini or major package to which it belongs. The Conference must not contemplate, for instance, an amendment to an article in an annex which was worked out and agreed to *ad referendum* subject to agreements elsewhere. It is a package, not an isolated idea that should as a whole be the subject of proposals for amendment. If we do not reach a clear decision on this now, it may raise insurmountable problems when we invoke the final procedures for the adoption of a convention.

15. I shall now attempt to underline what I see as the elements of the outstanding mini-packages which we must together strive to resolve in the next session.

A. The system for activities

16. One broad underlying consideration, which is a type of *jus cogens* for us, is that we are endeavouring to work out an international régime for a limited pioneering period; that the system under current study is the parallel system and that we have all agreed that it falls apart if we do not ensure that both sides of the system work and work efficiently. It became the basis for negotiations only on this understanding. Therefore all sides must endeavour to agree on incorporating fundamental elements which will adequately ensure the effective functioning of the parallel system from the very beginning and throughout the contemplated period of time before the review conference.

17. Broadly speaking, a limited number of areas must be addressed under this heading:

(1) The direct operators now identified are the Authority through the Enterprise in the reserved area and, on the other hand, States parties and other entities in the contract area. Joint arrangements between the Enterprise and other entities in both reserved and non-reserved areas are a possibility which must be examined more closely.

It is essential here that each category of operator be qualified in accordance with the rules and regulations. The real issue is that the Enterprise must be given, through the convention, full capacity to become an effective operator in the area. Technology must be seen to be available to it, and it must be financially strong not only during the critical first five years but beyond.

In annex II, articles 8, 8 *bis* and 10 have attempted to take care of a range of issues: adequacy of prospecting and exploration data, and especially data for acceptance for reservation of mine sites; operations in the reserved area by the Enterprise at the commencement to be guaranteed for at least one fully-integrated project with financial burden carried largely by developed countries and with interest-free loans (considered as equity contribution) and interest-bearing loans in a ratio of 1:1; joint venture provisions for both reserved and contract areas; and some provisions for a system of technology transfer.

I believe that an important issue which must be tackled with seriousness after some reflection is that of adequate assurances of transfer of technology to and the financing of the Enterprise. As I have said, the parallel system will not work unless this is ensured.

(2) The second area within the system relates to an agreed resource policy, especially regarding the critical element of production limitation in article 151. With regard to the latter, the issue is between two needs for assurances: that sea-bed mining industry can commence and develop in an orderly and reasonable manner; and that this new industry does not introduce further chaos into the economics of the mineral industry, particularly with regard to the economies of the land-based producer countries. It is, however, important to observe that there is widespread feeling that the new industry must develop in a way that benefits mankind as a whole. I do not wish to do any more than make this a passing reference to a subject which remains the object of intensive but inconclusive informal negotiations co-ordinated by the Chairman of negotiating group 1, Mr. Njenga, Kenya, actively assisted in continuing consultations by Mr. Nandan of Fiji. It is my hope that armed with further and more appropriate instructions from their Governments, delegations will be better prepared for flexibility and a spirit of mutual accommodation.

(3) The third element in the package remains the agreement on the financial terms of mining contracts. The Chairman of negotiating group 2, Mr. Koh of Singapore, has constantly encouraged different negotiating parties to have a better understanding of the interests and concerns of the other parties; to understand also that each negotiating party has certain irreducible minimum interests that must be accommodated. I wish to endorse and encourage that approach.

18. The issue to be borne in mind remains that with which I commenced. The parallel system of exploration and exploitation was accepted on certain conditions understood by both sides. One of these conditions was the undertaking by developed countries to assure the Enterprise of the funds required to carry out one fully-integrated mining project. It must, on the other hand, be noted that the proposals made by the Chairman of negotiating group 2 on the financing of the Enterprise, as well as those on the financial terms of mining contracts, are linked.

19. Two years ago, when we embarked on the job of seeking to regulate a new industry, the problem seemed intractable. Our assumptions and estimates about capital requirements, operating costs and revenues are, at best, uncertain. Comparisons with land-based mining have offered us only limited help. We had to seek for a solution which has necessarily to be flexible to take into account the uncertainties of actual financial outcomes and, at the same time, generate an adequate and stable income for the Authority for the purpose of carrying out its functions and obligations. The proposed financial terms of contracts are intended to achieve these objectives of stability and flexibility.

20. The problems outstanding, as I have said, must remain a mini-package in itself. That package must be viewed as an integrated whole. Negotiating parties must resist the temptation to accept only those parts of the package which favour them and demand further negotiations on other parts of the package. All negotiating parties must endeavour to weigh the pluses and minuses of the package, and answer whether, taken as a whole, they can live with it. It is undesirable to cause Mr. Koh to enter into an unending pursuit of new figures and new provisions in a manner that gives the erroneous impression that the negotiations are being held between him and the opposing sides.

List of Documents

B. INSTITUTIONAL PROBLEMS

21. The composition of the Council, its voting procedure and the relationship between the Council and the Assembly in terms of their respective powers and functions, constitute yet another mini-package. Each element may not appear linked with the other to a non-participant in the negotiating effort, but it must be recognized that from a political standpoint they are very closely linked. I shall attempt a brief survey of the broad aspects:

(1) The issue of the composition of the Council involves two aspects. The first is the categorization of special interests as contained in article 161, paragraph 1. This aspect has in principle been resolved with regard to general characteristics. Suggestions so far made relate to the enlargement of the scope of each. In the fourth category, reserved for developing countries, for instance, the plea for adding the interests of potential, land-based producers, island States etc. is a matter of detail which the Group of 77 should be able to resolve. Other suggestions, including the addition of the interests of countries with migrant workers, can be considered within the existing framework. The second relates to the numbers for each categorization. The provisions contained in the revised negotiating text were the product of intense negotiations and enjoy some consensus. However, it must be recalled that the suggestions of a group of less industrialized among the developed countries for some increase in the chances of their representation may, if accepted generally, lead to inevitable change in the size of the Council and consequently in a renegotiation of the numbers of the two major categorizations, i.e. the interest groups in article 161, paragraphs 1 (*a*)-(*d*) and that represented by paragraph 1 (*e*). A spirit of understanding on all sides should resolve this question at the next session.

(2) For convenience, we may wish to consider the relationship between the Assembly and the Council. This element has a number of considerations which are also linked. The first consideration relates to the powers and functions of the Authority itself. The developing countries insisted that these shall be specified but that implied powers and functions are recognized under international law. The industrialized countries have argued that these should be the sum total of those of all given to the organs and no more. The new text proposes a new approach which grants incidental powers consistent with the provisions of the convention, implicit in and necessary for the performance of these powers and functions. This appears to invite consensus, although, it must be remembered, it remains part of a package. Regarding the powers and functions of the principal organs, the central focus was the implications of the phenomenal "supreme" organ. The developing countries feel that the Assembly, looked at as the organ in which all States parties are members, must have a superior policy role over other principal organs; other organs, including the Council, must account to it; residual powers must be conferred upon it in addition to discussions on any question on part XI of the negotiating text. The developed countries prefer the Assembly as a deliberative or plenary organ, which must not be "supreme"; it may make general policies on the recommendations of the Council; that there should be strict separation of powers and non-interference. The new suggested amendments of article 162 may well provide a satisfactory compromise.

(3) The last element relates to the problem of a specific relationship between the discussions of the Council and its subsidiary organ. The report of the working group of 21 explains in sufficient detail the solution which appears to have emerged from consultations.

The results of negotiations on these considerations have, I believe, enhanced the chances of the package to which they belong.

C. THE DECISION-MAKING PROCEDURE IN THE COUNCIL

22. The report of the working group of 21 is adequately explanatory on this question. I continue to believe that this issue is a critical one. The developing countries have done their best to try to accommodate the industrialized countries in this field. As a result, negotiations are continuing in a far healthier atmosphere than ever before.

23. I can only state that this is perhaps the last thorny issue not yet resolved. The elements of resolution may well be with us and no one dares to show too much enthusiasm before a break-through is found to the actual decision-making system. As the report of the working group of 21 indicates, some matters of principle still underlie the questions of figures. I do not believe that the negotiations will let this issue hold back an over-all attainment of consensus on the entire package.

24. That is the guidance I wish to provide for the next phase of our work in the First Committee, as far as the core issues are concerned. I must state that there remains a wild field of less difficult but all-important negotiations regarding part XI of the negotiating text. We must continue with our present speed and determination if we are to conclude our work. Some of these issues will indeed be taken last of all, and may be resolved by the normal procedures of the Conference. Environmental questions have been raised after consultations and they would, as usual, appear to present no difficulties. As you know, they remain an informal paper in the working group of 21.

D. SETTLEMENT OF DISPUTES

25. I must refer briefly to the treatment of questions relating to the settlement of disputes touching upon part XI of the negotiating text as well as other parts of the document. My consultations convinced me that the First Committee must first conclude substantial work on those aspects under review by the group of legal experts under Mr. Wuensche, of the German Democratic Republic, before any co-ordination may be done with the plenary exercise. As you must know, most of the participants in these questions in that group are also involved with the efforts in plenary. They will best advise our co-ordinating efforts on financing, perhaps sometime early during the next session.

E. REPORT ON MANPOWER REQUIREMENTS OF THE AUTHORITY AND RELATED TRAINING NEEDS

26. The special representative of the United Nations Secretary-General presented a preliminary report to the First Committee on 22 August 1979. It has been released as document A/CONF.62/82. We did not have time to receive comments on it but there was a general feeling of gratitude for its preparation. I expressed, and once again express, great satisfaction for the continuing work of the Secretary-General. I wish to add that in view of the details which he must provide in his final report, I believe that the Conference will wish to have the matter brought formally before the General Assembly of the United Nations because of some of the financial implications involved. In fact, it is my impression that the delegations agree to this being done.

27. Finally, I wish to register on behalf of the officers of the First Committee my sincere thanks to all who have made our work such a continuing success. Special thanks, in the first place, for the distinguished men who helped co-ordinate the working group of 21: Mr. Njenga, Mr. Koh, and Mr. Wuensche. They, in turn, have presented a list of others who have helped them in their work, including Mr. Nandan and Mr. Brennan of Australia. The team of experts from the United Nations Secretariat, as well as the various delegations, were incredibly helpful. I wish to thank the special representative of the Secretary-General for the characteristically excellent co-operation of his team.

List of Documents

28. We all look forward to the last phase of this Conference and to a viable convention that will instil the conditions of peace into international relations among nations.

ANNEX

DOCUMENT A/CONF.62/C.1/L.26

Report on negotiations held by the Chairman and co-ordinators of the working group of 21

[Original: English]
[21 August 1979]

At this resumed session, the working group of 21 continued its work in the form of meetings and consultations. It was chaired over-all by the Chairman of the First Committee, who also co-ordinated the negotiations on the Assembly and the Council. Mr. Njenga co-ordinated the negotiations on the system of exploration and exploitation. Mr. Koh co-ordinated the negotiations on financial arrangements, Mr. Wuensche acted as co-ordinator but held separate meetings of the group of legal experts, the results of which were reported to the working group of 21. The suggestions resulting from consultations held by the Chairman and the co-ordinators of the working group of 21 are given in document WG21/2 (appendix A). The report of Mr. Wuensche is incorporated in this report as appendix B.

The working group of 21 considered the hard-core issues in the following order: first, the Assembly and the Council: composition of the Council, decision-making system and interrelationship between the Council and the Assembly; secondly, financial arrangements; and thirdly, the system of exploration and exploitation.

I. The Assembly and the Council

The working group of 21 addressed the issues under this heading, bearing in mind the need to assemble a mini-package consisting of the interrelationship of the principal organs of the Authority, mainly regarding the scope of the powers and functions of the Assembly and the Council, and the decision-making system in the Council.

Document WG21/2 contains suggestions which were made during consultations held by the Chairman and co-ordinators following negotiations. Those relating to the Assembly and Council were chosen because it is the impression of the Chairman, in co-ordinating the negotiations, that they had been the basis for intense negotiations. Some of the suggestions were accepted on an *ad referendum* basis. Others, notably the ideas on the decision-making system, did not enjoy complete consensus, especially as the number of members required for a blocking majority remains unsettled and reservations have been expressed by some representatives regarding the list of subjects requiring a special voting régime.

The suggestions, all part of a "package", do not assume more than the role of providing indication as to the trends of negotiations. It is only the reaction of the membership of the First Committee that will dictate the capacity of any ideas to enter into the second revision of the negotiating text.

1. *Interrelationship*

The suggestions attempt to resolve the existing issues relating to the concept of the supremacy of the Assembly, which appeared to present difficulty to the industrialized countries. They also seek to clarify the scope of exercise of the powers and functions of each organ.

First, the suggested revision of article 160 states that the Assembly shall be considered the supreme organ of the Authority. The sources of its supremacy lie in its membership consisting of all the members of the Authority, in its accountability for the other principal organs of the Authority, in its "incidental powers" as defined in article 157 and its residual powers as referred to in new paragraph 2 (*o*) of article 160.

Secondly, the relationship of powers and functions of the principal organs of the Authority is defined in article 158, paragraph 4, which makes it explicit that each organ, in exercising its powers and functions, shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ. Paragraph 2 (*o*) of article 160 gives the Assembly power to discuss and decide upon any question within the competence of the Authority, and to decide which organ shall deal with any question not specifically entrusted to a particular organ. The revised paragraph 2(*r*) of article 162 gives the Council power to make recommendations to the Assembly concerning policies on any question within the competence of the Authority.

A related issue is that of the interrelationship of the Council and its subsidiary organ, the Legal and Technical Commission. Paragraph 2 (*j*) of article 162 of the revised negotiating text provides that the Council shall act expeditiously in its approval of formal, written plans of work following the review of the Commission. It then provides that such plan of work shall be deemed to have been approved unless a decision to disapprove it is taken within 60 days upon its submission by the Commission. It is this latter provision that has proved to be a highly contested issue, the opponents considering that it erodes the supremacy of the Council over its subsidiary organ.

The suggested article 162, paragraph 2 (*j*) seeks to accomodate this serious preoccupation. It restricts the operation of such automatic approval system only to a plan of work which is not contested by a competing application. It also prescribes that a plan may be deemed to have been approved unless a proposal for its approval or disapproval has been voted upon within 60 days.

On an *ad referendum* basis, it would appear that these suggestions attract consensus.

2. *The decision-making system in the Council*

This has been perhaps the most difficult issue to tackle in the absence of a resolution of other issues in the mini-package. The clause of the revised negotiating text, stipulating that all decisions on questions of substance are to be taken by a three-fourths majority of members present and voting, clearly does not enjoy a consensus. It appears to be generally accepted now that no traditional veto system as known in the United Nations system is acceptable. There has also been widespread rejection of the concept of "chamber" voting, in which identified interest categorization could block a decision.

Consequently, some attempt has been made to identify special or sensitive issues over which the industrialized countries need special protection. The list of these was, however, not forthcoming. It was thought expedient to review issues over which no special régime or procedure of voting was acceptable.

The suggestions relating to article 161 reflect this new approach. It contains three new points. First, the decisions on questions of procedure shall be taken by a majority of the members present and voting. Secondly, certain questions of substance which are enumerated in subparagraph (*b*) shall be taken by a two-thirds majority of the members present and voting provided that such majority includes a majority of the members of the Council. Thirdly, decisions on all other questions of substance shall be taken by a two-thirds majority of members present and voting, provided a specific number of members, still to be settled, has not cast negative votes. When the issue arises as to whether the question is covered by this subparagraph or not, the questions shall be treated as so covered unless otherwise decided by the Council by the majority required for questions under the paragraph.

The acceptance of this system itself will depend on a satisfactory resolution of two main questions. The crucial one is that of the blocking figure under subparagraph (*c*). As the suggestions indicate, that figure is somewhere between 5 and 10, both of which are clearly unacceptable as basis for consensus. The other, perhaps to a lesser extent, relates to the list of issues contained in subparagraph (*b*).

It is generally felt that the system, as stated, is not to be considered as a basis of a viable consensus until these issues are satisfactorily resolved. Consequently, it would appear inadvisable to consider the inclusion of these latter suggestions in any further revision of the negotiating text before that event. However, it is also clear that the system must be kept in view as an idea which may lead to a consensus, if the revised negotiating text continues to present difficulties.

II. Financial arrangements

Annex III: Financing the Enterprise

The Chairman of negotiating group 2 began his report by explaining the revisions which he proposed to annex III, the statute of the Enterprise.

The first revision proposed is to article 3. Mauritius pointed out that there is a need to make a cross-reference between article 3 and article 10 in order to make explicit the fact that article 3 is subject to article 10. The Chairman accepted this point and proposed the addition of the words "subject to article 10, paragraph 3, below". Since