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Report of the coordinators of the working group of 21 to the First Committee

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DOCUMENTS OF THE FIRST COMMITTEE

DOCUMENTS A/CONF.62/C.1/L.27 AND ADD.1

Report of the co-ordinators of the working group of 21 to the First Committee

*DOCUMENT A/CONF.62/C.1/L.27**

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CONTENTS

I. Conduct of negotiations

During the first part of the ninth session of the Conference, the working group of 21 conducted 15 meetings to deal with the outstanding issues before the First Committee, commencing where it terminated at the eighth session. It was as usual chaired over-all by the Chairman of the First Committee, Mr. P. B. Engo of the United Republic of Cameroon who also co-ordinated the negotiations on issues involving the Assembly and the Council. Mr. F. Njenga of Kenya, Chairman of negotiating group 1, co-ordinated the negotiations on matters relating to the system of exploration and exploitation. Mr. T. Koh of Singapore, Chairman of negotiating group 2, co-ordinated those concerning financial arrangements. Mr. H. Wuensche of the German Democratic Republic continued consultations with the group of legal experts on the settlement of disputes relating to Part XI.

The Chairman of the First Committee, as principal co-ordinator, received reports from all the co-ordinators on the negotiations and consultations conducted by them and submits this report which contains the results obtained.

II. System of exploration and exploitation[22]

A

1. When entrusted with the task of conducting the negotiations on the system of exploration and exploitation and the resource policy, I was perfectly aware of the magnitude of the undertaking and the enormous responsibility the Conference had put in my hands. Although the basic structure of the parallel system had been accepted in the previous stages of negotiations, some essential aspects related to its functioning, particularly the ways to ensure the effective operation of the two parallel sides of the system, were still subject to scrutiny and controversy. On some concrete points, the opposing views seemed to be irreconcilable as on the question of transfer of data and technology to the Authority or the production policy, to put only the most striking examples of divergent positions.

2. To overcome the enormous difficulties arising from the establishment of the system, it was necessary not only to have time but, above all, patience, intelligence and spirit of compromise. Of all these, my colleagues in the delegations participating in the negotiations proved to have plenty. Today, thanks to the strenuous efforts of all ooof them and to their determination to put an end to the exhaustive and prolonged negotiations, I am able to report some success. We have come to the end of our assignment with a set of provisions related to the system that, compared to the previous texts, considerably improve, in my opinion, the chances for a viable parallel system to implement the principle of the common heritage of mankind.

3. I am aware that the text I am proposing does not entirely reflect the aspirations of any State or group of States. It could not be otherwise with a text that intends to be a genuine compromise. But I hope that the new provisions put us in reach of a feasible and possible agreement. I request that the delegates should examine each of the articles in this proposal without prejudice or preconceived fears, keeping in mind that for each concession made, a concession has been received.

4. Numerous suggestions were made by the delegations during the negotiations in the working group of 21 and during the private and intensive consultations I carried out during this session, as well as during the past sessions. I decided to incorporate in the text only those proposals which received wide support and did not alter the sometimes very fragile balance of conflicting interests I tried to reflect in the text. The articles of Part XI of the revised informal composite negotiating text (A/CONF.62/W.P.10/Rev.1) with respect to which substantial t..amendments have been made, and of the provisions of annex II, some of which have also t..been amended, will be found in the appendix to this report. I shall make some comments t..on those amendments which, in my view, are the most significant.

5. In Part XI there were three important issues still unresolved. The first of these refers to the principle contained in article 140 according to which activities in the area shall be carried out for the benefit of mankind as a whole. Some delegations had, and I believe still have, strong objections regarding the way in which this principle has been worded in this provision. They think that there is no valid reason to extend the sharing of the benefits derived from the exploitation of the area beyond the group of States which will become parties to the convention. It was suggested in this respect that the words "amongst States Parties" should be added to paragraph 2 of article 140. This proposal did not get broad support among many of the delegations. Moreover, it is my impression that any restriction such as the one proposed would contradict other provisions of the convention, as well as the wording and the spirit of resolution 2749 (XXV) of the General Assembly, which refer to the benefit of mankind as a whole. Therefore, I abstained from introducing any substantive change to this provision.

6. The other two remaining issues in Part XI related to

* Incorporating document A/CONF.62/C.1/L.27/Corr.1 of 31 March 1980.

[22] Report submitted by Mr. Njenga, co-ordinator for questions relevant to negotiating group 1.

article 151 on production policies and to paragraph 6 of article 155, related to the so-called moratorium on the activities in the area in case of failure of the review conference to reach an agreement.

7. As you know, during the seventh session, I proposed to entrust a group of experts with the difficult task of dealing with the thorny problem of the resource policy. I will report later on behalf of Mr. Nandan, on the work done during those negotiations.

8. The problem of the moratorium established in paragraph 6 of article 155 has proved to be one of the most intractable issues that we have had to face during our negotiations. Thanks to the constructive contribution of some delegations and the spirit of understanding of all those who participated in the negotiations, a satisfactory compromise is probably in sight. This compromise is based on a new procedure according to which the review conference may decide, in case no agreement has been reached five years after its commencement, to adopt by a two-thirds majority of the States Parties and to submit to them such amendments to the system as the Conference determines necessary and appropriate. Such amendments shall enter into force for all States Parties on the thirtieth day following their ratification, accession or acceptance by three quarters of the States Parties. I think that this text overcomes the objections made to the previous texts by some developed countries that a moratorium could lead to the cutting off of ocean mining activities at a time when these minerals would be most needed by the world economy. On the other hand, the text I submit now satisfies, in my opinion, the condition required by the developing countries in the sense that the procedure for review of the system should not prejudge the new system. I hope that the new version of paragraph 6 of article 155 will receive the support of the Conference.

9. I would also draw your attention to two other changes in article 155. The first may be found in the opening words of paragraph 1. This provision now reads: "Fifteen years from the first of January of the year in which the earliest commercial production commences under an approved plan of work . . .". This change is a part of the agreement reached in the group of experts chaired by Mr. Nandan which they assured me is a consequential change necessitated by the new formula proposed in article 151. Also in paragraph 1 of this article I have introduced drafting changes in order to formulate in a more logical way the purposes of the system of exploration and exploitation that the review conference has to consider in detail.

10. The second is an addition to paragraph 13. It was suggested that after the reference to the rights of States and their general conduct in relation to the area, the following words should be added: "and their participation in exploration and exploitation of its resources in conformity with the present Convention". I heard no objections to this proposal. Therefore I decided to incorporate those words in the text.

11. I wish also to point out some changes in the wording of article 133 on "Use of terms". Some of them are purely editorial, as the deletion of the definition of the term "activities in the Area", since this has already been included in article 1 of the convention. The description of the resources of the area contained in subparagraph (*b*) of this article has been changed following the advice of the experts on this matter.

12. The goals of the amendments introduced in the new article 5 of annex II, on the transfer of technology are twofold: on the one hand, they aim at making the undertakings of the operator binding and more precise, thus strengthening the position of the Enterprise when dealing with the operator or the owner of the technology. On the other hand, the amendments aim at establishing some realistic limitation to these obligations with respect to their duration, and to the kind of technology to be transferred.

13. As an example of the first kind of amendments, I would like to draw your attention to the first paragraph of the new suggested text. It has been made clear in this text that the obligation to make available to the Authority a general description of the equipment and methods to be used by the operator, is not tied to the approval of the plan of work or to the signature of the contract. This information has to be transmitted to the Authority, when the plan of work is submitted to it by the applicant. The provision relating to this undertaking contained in paragraph 1 (*a*) of article 5 has been separated from the second part of that paragraph, concerning the obligation to inform the Authority of revisions, whenever substantial technological change or innovation is introduced. This latter obligation will arise, normally, once the contract has entered into force. Paragraph 2 in the new suggested formula takes care of that obligation.

14. Another innovation is that in the new text it has been made clear that all the obligations of the operator concerning transfer of technology constitute terms of the contract. Therefore these undertakings are as binding as any undertaking in the other terms of the contract. Violations of those terms may bring about the penalties established in article 17 including suspension or termination of the contract. In this respect, I wish to draw your attention to the new drafting changes related to the settlement of disputes arising from the undertakings required by this article.

15. Following what I perceive as the prevailing tendency amongst the delegations, I have eliminated the special procedure set forth in paragraph 2 of article 5. In the opinion of many delegations, this text established a cumbersome and possibly protracted procedure for settling disputes in relation to the transfer of technology.

16. I hope that the solution I am proposing in paragraph 4 of the suggested text will meet with general approval. This solution consists of submitting all the disputes on this matter to the compulsory disputes settlement procedure established in Part XI, section 6, leaving open the possibility for the parties to submit to binding commercial arbitration, in accordance with the rules of the United Nations Commission on International Trade Law or any other procedure that may be acceptable, disputes as to whether the offers made by the owner of the technology are within the range of fair and reasonable commercial terms and conditions. Only time will show whether this general procedure will be more expeditious than the more detailed procedures in the revised negotiating text. The proposal has the merit of flexibility, inasmuch as it recognizes that the time it takes to settle a dispute will be determined by the complexity of the issue to be resolved.

17. The suggested compromise text maintains, almost unchanged, the text of paragraph 1 (*c*) of article 5, concerning the undertakings of the operator when he is legally entitled to transfer the technology. It is now paragraph 3 (*a*) in the new text. But important amendments have been introduced in the case where the operator uses a technology owned by a third party. In this case, the operator has to obtain from the third party a written assurance that he will make that technology available to the Enterprise to the same extent as it is made available to the operator, and on fair and reasonable commercial terms and conditions. An important amendment consists of the obligation of the operator to obtain from the owner of the technology a legally binding and enforceable assurance whenever it is possible to do so without additional cost to the operator. It is my understanding that if the Enterprise considers that a legally enforceable undertaking is necessary, it will be ready to meet such financial consequences as may be entailed.

18. I wish to point out that I amended the text in paragraph 3 (*b*) of article 5 as it appeared in document WG.21/Informal Paper 8. In the new version, the provision refers to the technology owned by a third party that the operator "intends" to use. This change has been made in order to take care of the

wishes of some developing countries to go back to the wording in paragraph 1 (*b*) of article 5 of the revised negotiating text, according to which the contractor undertakes to use the technology which he is not legally entitled to transfer only if he has obtained written assurance from the owner of such technology. In the new wording, I tried to stress the fact that the written assurance precedes the actual use of the technology by the operator.

19. The developing countries also requested reintroduction of the reference to the penalties, specifically blacklisting, mentioned in paragraph 1 (*b*) of article 5 in the revised negotiating text, in case the owner of the technology refuses to honour his assurance. I do not think that the reference to blacklisting is necessary, since the Authority, in assessing the merits of an application, has the inherent power to blacklist an applicant or a third party owner of the technology whose past assurances have been unreliable.

20. Subparagraphs (*c*) and (*d*) of paragraph 3 in the new text describe two possible ways open to the Enterprise to obtain the technology when its owner is not the operator, and once an assurance has been obtained from him. The Enterprise may decide to deal with either the operator who has obtained the assurance from the owner of the technology, or directly with the owner of the technology. In both cases the operator has specific obligations. In the first case, the operator shall take all feasible measures to acquire the legal right to transfer the technology to the Enterprise. Once the operator has obtained such legal right, the technology may be transferred to the Enterprise in accordance with paragraph 3 (*a*). In assessing whether the operator has taken all feasible measures, account may be taken of the relationship existing between the operator and the owner of the technology. The last two sentences in paragraph 3 (*c*) deal with this particular situation, and they are clear enough not to be explained here. In the second case, that is, when the Enterprise decides to negotiate directly with the owner of the technology, the operator shall facilitate its acquisition for the Enterprise. This has been set forth in paragraph 3 (*d*).

21. In addition to all these obligations, the new formula has incorporated, in paragraph 5, a procedure similar to that contained in paragraph 3 of article 5 of the revised negotiating text. According to this procedure, when the Enterprise is unable to obtain technology to commence in a timely manner, the recovery and processing of minerals, either the Council or the Assembly may convene a group of States Parties, composed of those which are engaged in activities in the area, of those which have sponsored entities engaged in such activities, and of others having access to such technology, to deal with the crisis. The group shall consult and take whatever effective measures are necessary to ensure the availability of the technology to the Enterprise.

22. As I said earlier, some of the changes have been introduced with the purpose of making more precise and definitive the scope and duration of these obligations. The following are such changes: first, referring to the information to be transmitted to the Authority about equipment and methods to be used by the operator, the term "non-proprietary" was added in paragraph 1, qualifying the word "information". Secondly, in the definition of "technology" for the purposes of this article that you may find in paragraph 8, the word "specialized" was added to make more specific the kind of technology to which this article refers. In the same paragraph I decided to make another amendment to document WG.21/Informal Paper 8 of the working group of 21, consisting of the insertion of the word "viable" before the word "system". By making this amendment, my intention was to establish in a clear and acceptable manner that the technology we are talking about in this provision covers all the operations referred to in all paragraphs of article 5, particularly in paragraph 5, which refers to the recovery and processing of minerals from the area. In other words, the system has to be comprehensive. I think that this addition is enough for this purpose and no other more specific terms in the definition are required.

23. Moreover, a new paragraph has been added referring to the time-limit for those undertakings under article 5. The request made by some developed countries for the establishment of a time-limit did not raise serious objections. Since the purposes of the obligations under this article are to enable the Enterprise to undertake the conduct of activities in the area, and to begin commercial production of minerals as soon as possible, it was agreed that these obligations should not be permanent. Furthermore, it is unrealistic to expect any owner of technology to accept such obligations in perpetuity. The problem arises as to how to fix a time-limit. The majority of delegations seemed to favour establishing a time-limit after the Enterprise commences commercial production of minerals from the area. I came to the conclusion that a 10-year time-limit, during which the undertakings related to transfer of technology may be invoked, would be acceptable by most of the delegations. This has been reflected in new paragraph 7.

24. With respect to the obligations to transfer technology to developing countries, they are restricted to the situations where, for one reason or another, the same technology has not been transferred to the Enterprise.

25. In article 6 on approval of plans of work submitted by applicants, changes were made in the provisions containing rules to prevent the monopolization of the area by an enterprise or State. These changes aim at clarifying the situations in which the Authority may withhold the approval of plans of work and at establishing more realistic standards than those set forth in the previous draft for the prevention of monopolization. I think that the new paragraph 3 (*c*) and the present wording of paragraph 3 (*d*) (i) and (ii) fulfil in an acceptable manner those goals. I only wish to pinpoint the reduction of the maximum aggregate size of mine sites that a State may hold from 3 per cent to 2 per cent of the total sea-bed area which is not reserved.

26. Various amendments have been introduced in article 7 on selection of applicants. Some, as in the introductory sentence of paragraph 2, and particularly that in paragraph 5, were made for the sake of clarification. Two new provisions have been added to this article: the new paragraph 2 (*c*) refers to applicants who have already invested most resources and effort in prospecting or exploration amongst those to whom the Authority will give priority. The new paragraph 3 takes care of applicants who have not been selected in a period, providing for priority in subsequent periods until they receive a contract.

27. I considered very useful the suggestions made during the discussions in the sense that some objective standards would be set forth in article 8 on reservations of sites for the submission of the data to the Authority by the applicant. Since we had no time to elaborate on those standards, I decided to add a provision containing a reference to some standards related specifically to polymetallic nodule data. It will be necessary, in due course, to make rules and regulations relating to other minerals.

28. Minor changes were introduced in paragraph 3 and paragraph 4 of article 8 *bis*. In paragraph 3, the terms "and conditions" were added after the word "requirements". In paragraph 4, I changed the first sentence to make it consistent with the wording used in other provisions of Part XI and annex II.

29. Paragraph 1 of article 10 on joint arrangements was simplified by deleting some terms which were not necessary or which were misplaced. I also decided to add a sentence providing that joint arrangements with the Authority shall have the same security of tenure as other contracts with the Authority. In paragraph 3 of the same article, I deleted the term "in the reserved sites", which, in my view, was a wrong reference.

30. Some delegations made very useful suggestions referring to article 13 on transfer of data. In order to clarify the kind of data which is subject to the rules contained in such provision, I decided to introduce amendments in paragraphs 2 and 3. According to the first amendment in paragraph 2, equipment and design data are exempted from the presumption of the non-proprietary character set forth therein. At the end of the first sentence of paragraph 3, concerning the prohibition to disclose data by the Authority, I have added the following words: "but the data on the reserved sites may be disclosed to the Enterprise". The reasons to exclude this kind of data from the prohibition set forth in paragraph 3 are obvious.

31. In article 16 on "Rules, Regulations and Procedures" minor amendments were introduced in paragraphs 1 (*a*) (iv) and (x); paragraph 1 (*d*) and paragraph 2 (*d*) in order to harmonize the language of these provisions with that of related provisions. In paragraph 2 (*a*) the addition of a reference to article 151 in the second sentence responds to the need to relate this provision with the resource policy.

32. The addition of the last words in paragraph 2 of article 17 aims at giving more flexibility to the Authority concerning the imposition of penalties and allowing it to apply, when appropriate, a lesser penalty than suspension or termination of the contract in the cases covered under paragraph 1 (*a*) of the same article.

33. Lastly, in article 19 I have added a final sentence the purpose of which is to avoid that, by the way of transfer of rights arising out of a contract, a contractor circumvents the rules preventing monopolization of the area.

ANNEX

Part XI. The Area

Article 133. Use of terms

For the purposes of this Part

(*a*) "Resources" means mineral resources *in situ*. When recovered from the Area, such resources shall be regarded as minerals.

(*b*) Resources shall include:

(i) Liquid or gaseous substances at or beneath the surface such as petroleum, gas, condensate, helium, and also sulphur and salts recovered in liquid form;

(ii) Solid substances occurring on the surface or at depths of less than three metres below the surface, including polymetallic nodules;

(iii) Solid substances at depths of more than three metres below the surface;

(iv) Metal-bearing brine at or beneath the surface.

Article 140. Benefit of mankind

1. Activities in the Area shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions as specifically provided for in this Part of the present Convention.

2. The Authority shall provide for the equitable sharing of benefits derived from the Area through an appropriate mechanism in accordance with paragraph 2 (*j*) of article 160.

Article 150. Policies relating to activities in the Area

Activities in the Area shall be carried out as provided by this Part in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international co-operation for the over-all development of all countries, especially the developing States and with a view to ensuring:

(*a*) Orderly and safe development and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste;

(*b*) The expansion of opportunities for participation in such activities consistent particularly with articles 144 and 148;

(*c*) Participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in the present Convention;

(*d*) The increase in the availability of the minerals produced from the resources of the Area as needed, in conjunction with minerals produced from other sources, to ensure supplies to consumers of such minerals;

(*e*) Just and stable prices remunerative to producers and fair to consumers for minerals produced both from the resources of the Area and from other sources, and the promotion of equilibrium between supply and demand;

(*f*) The enhancing 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 preventing monopolization of activities in the Area; and

(*g*) The protection of developing States from adverse effects on their economies or on their export earnings resulting from a reduction in the price of affected mineral, or in the volume of that mineral exported, to the extent that such reductions are caused by activities in the Area, as provided in article 151.

Article 155. The Review Conference

1. Fifteen years from the 1st of January of the year in which the earliest commercial production commences under an approved plan of work, the Assembly shall convene a conference for the review of the provisions of this Part and the annexes thereto which govern the system of exploration and exploitation of the resources of the Area. The Conference shall consider in detail, in the light of the experience acquired during that period, whether the provisions of this Part governing the system of exploration and exploitation of the resources of the Area have achieved their aims in all respects, including whether they have benefited mankind as a whole; whether, during the 15-year period, reserved areas have been exploited in an effective and balanced way in comparison with non-reserved areas; whether the development and use of the Area and its resources have been undertaken in such a manner as to foster healthy development of the world economy and balanced growth of international trade; whether monopolization of activities in the Area has been prevented; whether the policies set forth in articles 150 and 151 have been fulfilled; and whether the system has resulted in the equitable sharing of benefits to be derived from activities in the Area, taking into particular consideration the interests and needs of the developing States.

2. The Conference shall ensure that the principles of the common heritage of mankind, the international régime designed to ensure its equitable exploitation for the benefit of all countries, especially the developing States, and an Authority to conduct, organize and control activities in the Area are maintained. It 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 exploration and exploitation of its resources in conformity with the present Convention, the prevention of monopolization of activities in the Area, the use of the Area exclusively for peaceful purposes, economic aspects of activities in the Area, scientific research, transfer of technology, protection of the marine environment, and of human life, rights of coastal States, the legal status of the superjacent waters and air space and accommodation as between the various forms of activities in the Area and in the marine environment.

3. The Conference shall establish its own rules of procedure.

4. Decisions adopted by the Conference under the provisions of this article shall not affect rights acquired under existing contracts.

5. Five years after the commencement of the Review Conference, if agreement has not been reached on the system of exploration and exploitation of the resources of the Area, the Conference may decide during the ensuing twelve months, by a two-thirds majority of the States Parties, to adopt and submit to the States Parties for ratification, accession, or acceptance such amendments to the system as it determines necessary and appropriate. Such amendments shall enter into force for all States Parties on the thirtieth day following their ratification, accession, or acceptance by three fourths of the States Parties.

Annex II

Basic conditions of prospecting, exploration and exploitation

Article 1. Title to minerals

Title to minerals shall pass upon recovery in accordance with the provisions of the present Convention.

Article 2. Prospecting

1. (*a*) The Authority shall encourage the conduct of prospecting in the Area.

(*b*) Prospecting shall be conducted only after the Authority has received a satisfactory written undertaking that the proposed prospector shall comply with the present Convention and the relevant rules and regulations of the Authority concerning protection of the marine environment, co-operation in training programmes according to articles 143 and 144 and accepts verification by the Authority of compliance. The proposed prospector shall, together with the undertaking, notify the Authority of the broad area or areas in which prospecting is to take place.

(*c*) Prospecting may be carried out by more than one prospector in the same area or areas simultaneously.

2. Prospecting shall not confer any preferential, proprietary, exclusive or any other rights on the prospector with respect to the resources. A prospector shall, however, be entitled to recover a reasonable amount of resources of the Area to be used for sampling.

Article 3. Exploration and exploitation

1. The Enterprise, States Parties and the other entities referred to in paragraph 2 (*b*) of article 153, may apply to the Authority for approval of plans of work covering exploration and exploitation of resources of the Area.

2. The Enterprise may apply with respect to any part of the Area, but applications by others with respect to reserved areas are subject to the additional requirements of article 8 *bis* of this annex.

3. Exploration and exploitation shall be carried out only in areas specified in plans of work referred to in paragraph 3 of article 153, and approved by the Authority in accordance with the provisions of this annex and the relevant rules, regulations and procedures of the Authority.

4. Every plan of work approved by the Authority shall:

(*a*) Be in strict conformity with the present Convention and the rules and regulations of the Authority;

(*b*) Ensure control by the Authority of activities in the Area in accordance with paragraph 4 of article 153;

(*c*) Confer on the operator exclusive rights for the exploration and exploitation of the specified categories of resources in the area covered by the plan of work in accordance with the rules and regulations of the Authority. If the applicant presents a plan of work for one of the two stages only, the plan of work may confer exclusive rights with respect to such a stage.

5. Except for plans of work proposed by the Enterprise, each plan of work shall take the form of a contract to be signed by the Authority and the operator or operators upon approval of the plan of work by the Authority.

Article 4. Qualifications of applicants

1. Applicants, other than the Enterprise, shall be qualified if they have the nationality or control and sponsorship required by paragraph 2 (*b*) of article 153, and if they follow the procedures and meet the qualification standards established by the Authority by means of rules, regulations and procedures.

2. Sponsorship by the State Party of which the applicant is a national shall be sufficient unless the applicant has more than one nationality, as in the case of a partnership or consortium of entities from several States, in which event all States Parties involved shall sponsor the application, or unless the applicant is effectively controlled by another State Party or its nationals, in which event both States Parties shall sponsor the application.

3. The sponsoring State or States shall, pursuant of article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with its obligations under the present Convention and the terms of its contract. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has enacted legislation and provided for administrative procedures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

4. Except as provided in paragraph 6, such qualification standards shall relate to the financial and technical capabilities of the applicant and his performance under previous contracts with the Authority.

5. The procedures for assessing the qualifications of States Parties which are applicants shall take into account their character as States.

6. The qualification standards shall require that every applicant, without exception, shall as part of his application undertake to:

(*a*) Accept as enforceable and comply with the applicable obligations created by the provisions of Part XI, rules and regulations of the Authority, decisions of the organs of the Authority, and terms of his contracts with the Authority;

(*b*) Accept control by the Authority of activities in the Area, as authorized by the present Convention;

(*c*) Provide the Authority with a written assurance that his obligations under the contract will be fulfilled in good faith;

(*d*) Comply with the provisions on the transfer of technology set forth in article 5 of this annex.

Article 5. Transfer of technology

1. When submitting a proposed plan of work, every applicant shall make available to the Authority a general description of the equipment and methods to be used in carrying out activities in the Area, as well as other relevant non-proprietary information about the characteristics of such technology, and information as to where such technology is available.

2. Every operator under an approved plan of work shall inform the Authority of revisions in the description and information required by paragraph 1 above whenever a substantial technological change or innovation is introduced.

3. Every contract for the conduct of activities in the Area entered into by the Authority shall contain the following undertakings by the operator:

(*a*) To make available to the Enterprise, if and when the Authority shall so request and on fair and reasonable commercial terms and conditions, the technology which is to be used by him in carrying out activities in the Area and which he is legally entitled to transfer. This shall be done by means of licence or other appropriate arrangements which the operator shall negotiate with the Enterprise and which shall be set forth in a special agreement supplementary to the contract. This commitment may be invoked only if the Enterprise finds that it is unable to obtain the same or equally efficient and useful technology on the open market and on fair and reasonable commercial terms and conditions;

(*b*) To obtain a written assurance from the owner of any technology that the operator intends to use in carrying out activities in the Area which is not covered under subparagraph (*a*) and is not generally available on the open market that the owner will, if and when the Authority so requests, make available to the Enterprise to the same extent as made available to the operator, that technology under licence or other appropriate arrangements and on fair and reasonable commercial terms and conditions. This assurance shall be made legally binding and enforceable whenever it is possible to do so without additional cost to the contractor;

(*c*) To take all feasible measures, if and when requested to do so by the Enterprise, to acquire the legal right to transfer to the Enterprise in accordance with subparagraph (*a*) any technology he uses in carrying out activities in the Area which he is not legally entitled to transfer and which is not generally available on the open market. In cases where there is a substantial corporate relationship between the operator and the owner of the technology, the closeness of this relationship and the degree of control or influence shall be relevant to the determination whether all feasible measures have been taken. In cases where the operator exercises effective control over the owner, failure to acquire the legal rights from the owner would create a presumption that such measures have not been taken;

(*d*) To facilitate the acquisition by the Enterprise under licence or other appropriate arrangements and on fair and reasonable commercial terms and conditions of any technology covered by subparagraph (*b*) above should the Enterprise decide to negotiate directly with the owner of the technology and request such facilitation;

(*e*) To take the same measures as those prescribed in subparagraphs (*a*), (*b*), (*c*) and (*d*) for the benefit of a developing country or group of developing countries which has applied for a contract under article 8 *bis* of this annex, provided that these measures shall be limited to the exploitation of the reserved part of the Area proposed by the applicant, and provided that activities under the contract sought by the developing country or group of developing countries would not involve transfer of technology to a third country or the nationals of a third country. Obligations under this provision shall only apply with respect to any given contractor where technology has not been requested or transferred by him to the Enterprise.

4. Disputes concerning the undertakings required by paragraph 3,

like other provisions of contracts, shall be subject to compulsory dispute settlement in accordance with Part XI, and monetary penalties, suspension, or termination of contract as provided in article 17 of this annex. Disputes as to whether offers made are within the range of fair and reasonable commercial terms and conditions may be submitted by either party to binding commercial arbitration in accordance with the arbitration rules of the United Nations Commission on International Trade Law or other arbitration rules if and when prescribed in the rules, regulations and procedures of the Authority.

5. In the event of the Enterprise being unable to obtain appropriate technology on fair and reasonable commercial terms and conditions to commence in a timely manner the recovery and processing of minerals from the Area, either the Council or the Assembly may convene a group of States Parties composed of those which are engaged in activities in the Area, those which have sponsored entities which are engaged in activities in the Area and other States Parties having access to such technology. This group shall consult together and shall take effective measures to ensure that such technology is made available to the Enterprise on fair and reasonable commercial terms and conditions. Each such State Party shall take all feasible measures to this end within its own legal system.

6. In the case of joint ventures with the Enterprise, technology transfer will be in accordance with the terms of the joint venture agreement.

7. The undertakings required by paragraph 3 shall be included in each contract for the conduct of activities in the Area until the Enterprise has begun commercial production of minerals from the resources of the Area, and these undertakings may be invoked until ten years after the Enterprise has begun such commercial production.

8. For the purposes of this article, "technology" means the specialized equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis.

Article 6. Approval of plans of work submitted by applicants

1. Six months after the entry into force of the present Convention, and thereafter each fourth month, the Authority shall take up for consideration proposed plans of work.

2. When considering an application for a contract with respect to exploration and exploitation, the Authority shall first ascertain whether:

(*a*) The applicant has complied with the procedures established for applications in accordance with article 4 of this annex and had given the Authority the commitments and assurances required by that article. In cases of non-compliance with these procedures or of absence of any of the commitments and assurances referred to, the applicant shall be given 45 days to remedy such defects;

(*b*) The applicant possesses the requisite qualifications pursuant to article 4.

3. All proposed plans of work shall be dealt with in the order in which they were received, and the Authority shall conduct, as expeditiously as possible, an inquiry into their compliance with the terms of the present Convention and the rules, regulations, and procedures of the Authority, including the operational requirements, the financial contributions and the undertakings concerning the transfer of technology. As soon as the issues under investigation have been settled, the Authority shall approve such plans of work, provided that they conform to the uniform and non-discriminatory requirements established by the rules, regulations, and procedures of the Authority, unless:

(*a*) Part or all of the proposed area is included in a previously approved plan of work or a previously submitted proposed plan of work which has not yet been finally acted on by the Authority;

(*b*) Part or all of the proposed area is disapproved by the Authority pursuant to paragraph 2 (*w*) of article 162;

(*c*) The production limitation set forth in paragraph 2 of article 151 or the obligations of the Authority under a commodity agreement or arrangement to which it has become a party as provided for in paragraph 1 of article 151 prevents the approval of any applications or requires a selection among applications received during the period of time specified above;

(*d*) 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 sites that, together with either part of the proposed site, would 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 sites in application of article 8 of the present annex, which in aggregate size constitute 2 per cent of the total sea-bed area which is not reserved or otherwise withdrawn by the Authority from eligibility for exploitation pursuant to paragraph 2 (*w*) of article 162.

4. For the purpose of the standard set forth in paragraph 3 (*d*), a plan of work proposed by a partnership or consortium shall be counted on a *pro rata* basis among the sponsoring States Parties involved according to paragraph 2 of article 4 of this annex. The Authority may approve plans of work covered by paragraph 3 (*d*) if it determines that such approval would not permit a State Party or persons sponsored by it to monopolize the conduct of activities in the Area or to preclude other States Parties from activities in the Area.

Article 7. Selection of applicants

1. Where the selection must be made among applicants because of the production limitation set forth in paragraph 2 of article 151, or because of the obligations of the Authority under a commodity agreement or arrangement to which it has become a party, as provided for in paragraph 1 of article 151, the Authority shall make the selection on the basis of objective and non-discriminatory standards set forth in rules and regulations drawn up in accordance with this article.

2. The Authority shall consider all qualified applications received within the preceding period of time referred to in paragraph 1 of article 6, and shall give priority to those which:

(*a*) Give better assurance of performance, taking into account the financial and technical qualifications of the proposed operator and performance, if any, under previously approved plans of work;

(*b*) Provide earlier prospective financial benefits to the Authority, taking into account when production is scheduled to begin;

(*c*) Have already invested most resources and effort in prospecting or exploration.

3. Applicants who are not selected in any period shall have priority in subsequent periods until they receive a contract.

4. 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, to participate in activities in the Area and to prevent monopolization of such activities.

5. The Authority shall have priority to exploit the reserved areas either solely through the Enterprise or through joint ventures with States Parties or with private entities sponsored by them whenever fewer reserved sites than non-reserved sites are under exploitation.

6. The Authority shall make its decisions pursuant to this article as promptly as possible after the close of each period.

Article 8. Reservation of sites

Each application, other than those proposed by the Enterprise or by any others for reserved sites, shall cover a total area, which need not be a single continuous area, sufficiently large and of sufficient estimated commercial value to allow two mining operations. The proposed operator shall indicate the co-ordinates dividing the area into two parts of equal estimated commercial value and submit all the data obtained by him with respect to both parts of the area. Without prejudice to the powers of the Authority pursuant to article 16 of this annex, the data to be submitted concerning polymetallic nodules will relate to mapping, sampling, the density of nodules, and the composition of metals in them. Within forty-five days of receiving such data the Authority shall designate the part which is to be reserved solely for the conduct of activities by the Authority through the Enterprise or in association with developing countries. This designation may be deferred for a further period of forty-five days if the Authority requests an independent expert to assess whether all data required by this article has been submitted to the Authority. The area designated shall become a reserved area as soon as the plan of work for the non-reserved area is approved and the contract is signed.

Article 8 bis. Activities in reserved sites

1. The Enterprise shall be given an opportunity to decide whether it intends to carry out activities in each reserved site. This decision may be taken at any time, unless a notification pursuant to paragraph 4 is received by the Authority, in which event the Enterprise shall take its decision within a reasonable time. The Enterprise may decide to exploit such sites in joint ventures with the interested State or entity.

2. The Enterprise may conclude contracts for the execution of part

of its activities in accordance with article 11 of annex III. It may also enter into joint ventures for the conduct of such activities with any willing entities which are eligible to carry out activities in the Area pursuant to paragraph 2 (*b*) of article 153. When considering such joint ventures, the Enterprise shall offer to States Parties which are developing countries and their nationals the opportunity of effective participation.

3. The Authority may prescribe, in the rules, regulations, and procedures of the Authority procedural and substantive requirements and conditions with respect to such contracts and joint ventures.

4. Any State Party which is a developing country or any natural or juridical person sponsored by it and effectively controlled by it or by other developing country which is a qualified applicant, or any group of the foregoing, may notify the Authority that it wishes to submit a plan of work pursuant to article 6 with respect to a reserved site. The plan of work shall be considered if the Enterprise decides, pursuant to paragraph 1, that it does not intend to carry out activities in that site.

Article 9. Separate stages of operations

If an operator, in accordance with paragraph 2 (*c*) of article 3 of this annex, has an approved plan of work for exploration only, he shall have a preference and a priority among applicants for a plan of work for exploitation with regard to the same areas and resources: provided, however, that where the operator's performance has not been satisfactory such preference or priority may be withdrawn.

Article 10. Joint arrangements

1. Contracts may provide for joint arrangements, when the parties so agree, between the contractor and the Authority through the Enterprise, in the form of joint ventures or production sharing, as well as any other form of joint arrangement which shall have the same protection against termination, suspension or revision as contracts with the Authority.

2. Contractors entering into such joint arrangements with the Enterprise may receive financial incentives as provided for in the financial arrangements established in article 12 of this annex.

3. Joint venture partners of the Enterprise shall be liable for the payments required by article 12 to the extent of their joint venture share, subject to financial incentives as provided in article 12.

Article 11. Activities conducted by the Enterprise

1. Activities in the Area conducted under paragraph 2 (*a*) of article 153 through the Enterprise shall be governed by the provisions of Part XI, and the relevant annexes, the rules, regulations and procedures of the Authority and its relevant decisions.

2. Any plan of work proposed by the Enterprise shall be accompanied by evidence supporting its financial and technological capability.

Article 13. Transfer of data

1. The operator shall transfer, in accordance with the rules and regulations and the terms and conditions of the plan of work, to the Authority at time intervals determined by the Authority, all data which are both necessary and relevant to the effective implementation of the powers and functions of the principal organs of the Authority in respect of the area covered by the plan of work.

2. Transferred data in respect of the area covered by the plan of work deemed to be proprietary may only be used for the purposes set forth in this article. Data which are necessary for the promulgation of rules and regulations concerning protection of the marine environment and safety other than equipment design data shall not be deemed to be proprietary.

3. Data transferred to the Authority by prospectors, applicants for contracts for exploration and exploitation, and contractors deemed to be proprietary shall not be disclosed by the Authority to the Enterprise or outside the Authority, but the data on the reserved sites may be disclosed to the Enterprise. Such data transferred by such persons to the Enterprise shall not be disclosed by the Enterprise to the Authority or outside of the Authority. The responsibilities set forth in paragraph 2 of article 168 are equally applicable to the staff of the Enterprise.

Article 14. Training programmes

The contractor shall draw up practical programmes for the training of personnel of the Authority and developing countries, including the participation of such personnel in all activities covered by the contract, in accordance with paragraph 2 of article 144.

Article 15. Exclusive right to explore and exploit

The Authority shall, pursuant to Part XI and the rules and regulations prescribed by the Authority, accord the operator the exclusive right to explore and exploit the area covered by the plan of work in respect of a specified category of minerals and shall ensure that no other entity operates in the same area for a different category of minerals in a manner which might interfere with the operations of the operator. The operator shall have security of tenure in accordance with paragraph 6 of article 153.

Article 16. Rules, regulations and procedures

1. The Authority shall adopt and uniformly apply rules, regulations and procedures for the implementation of its functions as prescribed in Part XI on the following matters:

(*a*) Administrative procedures relating to prospecting, exploration and exploitation in the area.

(*b*) Operations:

(i) Size of area;

(ii) Duration of operations;

(iii) Performance requirements including assurances pursuant to paragraph 6 (*c*) of article 4;

(iv) Categories of resources;

(v) Renunciation of areas;

(vi) Progress reports;

(vii) Submission of data;

(viii) Inspection and supervision of operations;

(ix) Prevention of interference with other activities in the marine environment;

(x) Transfer of rights and obligations by a contractor;

(xi) Procedures for transfer of technology to developing countries in accordance with article 144 and for their direct participation;

(xii) Mining standards and practices including those relating to operational safety, conservation of the resources and the protection of the marine environment;

(xiii) Definition of commercial production;

(xiv) Qualification standards for applicants.

(*c*) Financial matters:

(i) Establishment of uniform and non-discriminatory costing and accounting rules, as well as the method of selection of auditors;

(ii) Apportionment of proceeds of operations;

(iii) The incentives referred to in article 12 of this annex.

(*d*) Rules, regulations and procedures to implement decisions of the Council taken in pursuance of paragraph 4 of article 151 and of paragraph 2 (*d*) of article 164.

2. Regulations on the following items shall fully reflect the objective criteria set out below:

(*a*) Size of area:

The Authority shall determine the appropriate size of areas for exploration which may be up to twice as large as those for exploitation in order to permit intensive exploration operations. The size of area shall be calculated to satisfy the requirements of article 8 of this annex on reservation of sites as well as stated production requirements consistent with article 151, in accordance with the term of the contract taking into account the state of the art of technology then available for ocean mining and the relevant physical characteristics of the area. Areas shall neither be smaller nor larger than are necessary to satisfy this objective.

(*b*) Duration of operations:

(i) Prospecting shall be without time-limit;

(ii) Exploration should be of sufficient duration as to permit a thorough survey of the specific area, the design and construction of mining equipment for the area, the design and construction of small and medium-size processing plants for the purpose of testing mining and processing systems;

(iii) The duration of exploitation should be related to the economic life of the mining project, taking into consideration such factors as the depletion of the ore, the useful life of mining equipment and processing facilities and commercial viability. Exploitation should be of sufficient duration as to permit commercial extraction of minerals of the area and should include a reasonable time period for construction of commercial scale mining and processing systems, during which period commercial production should not be required. The total duration of exploitation, however, should also be short enough to give the

Authority an opportunity to amend the terms and conditions of the plan of work at the time it considers renewal in accordance with rules and regulations which it has issued subsequent to entering into the plan of work.

(*c*) Performance requirements:

The Authority shall require that during the exploration stage, periodic expenditures should be made by the operator which are reasonably related to the size of the area covered by the plan of work and the expenditures which would be expected of a *bona fide* operator who intended to bring the area into commercial production within the time-limits established by the Authority. Such required expenditures should not be established at a level which would discourage prospective operators with less costly technology than is prevalently in use. The Authority shall establish a maximum time interval after the exploration stage is completed and the exploitation stage begins to achieve commercial production. To determine this interval, the Authority should take into consideration that construction of large-scale mining and processing systems cannot be initiated until after the termination of the exploration stage and the commencement of the exploitation stage. Accordingly, the interval to bring an area into commercial production should take into account the time necessary for this construction after the completion of the exploration stage and reasonable allowance should be made for unavoidable delays in the construction schedule.

Once commercial production is achieved in the exploitation stage, the Authority shall, within reasonable limits and taking into consideration all relevant factors, require the operator to maintain commercial production throughout the period of the plan of work.

(*d*) Categories of resources:

In determining the category of mineral in respect of which a plan of work may be approved, the Authority shall give emphasis, *inter alia*, to the following characteristics:

(i) Resources which require the use of similar mining methods; and

(ii) Resources which can be developed simultaneously without undue interference between operators in the same area developing different resources.

Nothing in this subparagraph shall deter the Authority from granting a contract for more than one category of mineral in the same area to the same applicant.

(*e*) Renunciation of areas:

The operator shall have the right at any time to renounce without penalty the whole or part of his rights in the area covered by a plan of work.

(*f*) Protection of the marine environment:

Rules and regulations shall be drawn up in order to secure effective protection of the marine environment from harmful effects directly resulting from activities in the area or from shipboard processing immediately above a mine site of minerals derived from the mine site, taking into account the extent to which such harmful effects may directly result from drilling, dredging, coring and excavation as well as disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents.

(*g*) Commercial production:

Commercial production shall be deemed to have begun if an operator engages in activity of sustained large-scale recovery operations which yield a sufficient quantity of materials as to indicate clearly that the principal purpose is large-scale production rather than production intended for information gathering, analysis or equipment or plant-testing.

Article 17. Penalties

1. A contractor's rights under the contract concerned may be suspended or terminated only in the following cases:

(*a*) If, in spite of warnings by the Authority, the contractor has conducted his activities in such a way as to result in serious, persistent and wilful violations of the fundamental terms of the contract, Part XI and the rules and regulations of the Authority; or

(*b*) If a contractor has failed to comply with a final binding decision of the dispute settlement body applicable to him.

2. The Authority may impose upon the contractor monetary penalties proportionate to the seriousness of the violation in any case of violation of terms of contract not covered under paragraph 1 (*a*), or in lieu of suspension or termination or in any case covered under paragraph 1 (*a*).

3. Except in cases of emergency orders as provided for in paragraph 2 (*v*) of article 162, the Authority may not execute a decision involving monetary penalties, suspension or termination until the contractor has been accorded a reasonable opportunity to exhaust the judicial remedies available to him pursuant to section 6 of Part XI.

Article 18. Revision of contract

1. When circumstances have arisen, or are likely to arise, which, in the opinion of either party, would render the contract inequitable or make it impracticable or impossible to achieve the objectives set out in the contract or in Part XI, the parties shall enter into negotiations to adjust it to new circumstances.

2. Any contract entered into in accordance with paragraph 3 of article 153 may be revised only with the consent of the parties.

Article 19. Transfer of rights and obligations

The rights and obligations arising out of a contract shall be transferred only with the consent of the Authority, and in accordance with the rules and regulations adopted by it. The Authority shall not unreasonably withhold consent to the transfer if the proposed transferee is in all respects a qualified applicant and assumes all the obligations of the transferor and if the transfer does not confer to the transferee a plan of work the approval of which would be forbidden by paragraph 3 (*d*) of article 6 of this annex.

Article 20. Applicable law

1. The law applicable to the contract shall be the provisions of Part XI, the rules and regulations prescribed by the Authority, the terms and conditions of the contract, and other rules of international law not incompatible with the present Convention. Any final decision rendered by a court or tribunal having jurisdiction by virtue of the present Convention relating to the rights and obligations of the Authority and of the Contractor shall be valid and enforceable in the territory of each State Party.

2. No State Party may impose conditions on a contractor that are inconsistent with Part XI. However, the application by a State Party of environmental or other regulations to sea-bed miners it sponsors or to ships flying its flag, more stringent than those imposed by the Authority pursuant to paragraph 2 (*f*) of article 16 of this annex shall not be deemed inconsistent with Part XI.

Article 21. Liability

Any responsibility or liability for wrongful damage arising out of the conduct of operations by the contractor shall lie with the contractor, account being taken of contributory factors by the Authority. Similarly, any responsibility or liability for wrongful damage arising out of the exercise of the powers and functions of the Authority shall lie with the Authority, account being taken of contributory factors by the contractor. Liability in every case shall be for the actual amount of damages.

B

PRODUCTION POLICY[23]

1. The group which was convened during the eighth session in Geneva to review the provisions of article 151 dealing with production policies resumed its discussions which had been suspended at the end of the session in New York last year. Meetings of the group were held on a number of occasions between 2 and 21 March and, in addition, a small group representing the main special interests was convened on several occasions. I also held private discussions with a number of individual delegations.

2. The discussions continued, more or less, from where they were at the last session and this report should be read in conjunction with my report to the First Committee at the end of the New York session in August 1979. The group expressed concern that the results of our previous discussions should not be forgotten or ignored. Accordingly, so as to ensure a continuity of the record, I will refer back to certain matters which were covered in the previous reports.

3. The first question raised for discussion was the problem which has been referred to as "speculative tonnage", or tonnage allocation which has been made to a contractor on application but where there is still some considerable doubt and uncertainty about the possibility of the project getting into

[23] Report submitted by Mr. Nandan.

operation. This matter was discussed at the previous session and it was generally agreed that to tie up tonnage allocation in this way could make the whole tonnage allocation scheme unreal. Therefore, I have drafted a proposal for a scheme to prevent such specualtion. Under this scheme, a contractor is prevented from applying and obtaining a production allocation more than five years before he is ready for actual commercial production. This period for obtaining actual production authorization is not related to the date of the contract but rather directly to the date of commercial production under a plan of work. This scheme would avoid a situation where a contractor who does not intend to go into operation for say seven years, would nevertheless be able to exclude one who may be operating within say five years.

4.. Some delegations have expressed concern that this proposal could result in a contractor receiving a contract to exploit but then being unable to get a tonnage allocation when requested. The problem of those who, by their administrative structure or policy, must have a longer lead time is appreciated. But any such delay is likely to be a short one in the light of the floor mechanism that has been introduced into the production limitation formula.

5. The question of synchronizing the interim period with the date of holding the review conference was fully discussed at previous sessions. Attention was again drawn to this matter but there does not seem to be any reason to change the amendment to the first line in article 155 which I proposed in my previous report and which was generally accepted.

6. Some comments were made concerning the proposed clause which allows for a degree of flexibility in the annual production. The principle received general support and the comments were mainly on matters of clarification. The proposal requires that a supplementary authorization be obtained should the 8 per cent per annum allowed flexibility in production level be exceeded for more than two consecutive years. Such a supplementary authorization must not exceed 20 per cent of the original allocation under any plan of work. The discussion on this proposal raised two further points. First, it was felt that the grant of a supplementary authorization should not be allowed to prejudice any other applicant and this reservation has now been reflected in the text. The second point was that there should be an upper limit to the tonnage which could be allocated under any one plan of work, in fact for any one mine site. The proposed tonnages ranged from 30,000 tons of nickel per annum up to 60,000 tons but I found it is difficult arbitrarily to assess a figure without reference to some realistic basis. The discussions on financial arrangements have been based on an average mine site producing 3 million dry tons of nodules per annum which would provide 38,800 tons of nickel. These figures are based on the model of the Massachusetts Institute of Technology and seem to be generally acceptable as a basis. In the interest of consistency, I have therefore adopted the same figures for an average mine site and this, allowing for the 20 per cent escalation provided for in the proposal, would be 46,500 tons of nickel per annum. I have accordingly provided that this shall be the maximum tonnage permitted to be produced under any one plan of work.

7. It was pointed out by one delegation that a production control scheme which was based on the actual metal produced for sale may be more difficult to administer than one based on the recoverable contained metal of the nodules. This is, to some extent, a technical and administrative problem, the reason being that where control is linked with the metal produced, the Authority will be dependent on having access to properly audited sales accounts. On the other hand, when it is linked to the contained recoverable metal in the nodules, the Authority will need to have an agreed metal recovery percentage factor and will have to obtain truly representative samples giving the metal content of the nodules. It was appreciated that the suggested method would discourage any attempt to deliberately depress nickel recovery and enhance the production of other metals because control is exercised on the amount of nickel that could, under normal operating conditions, be produced. However, during discussions at a previous session in Geneva, the practical difficulties of applying this method were fully examined by a technical group and, in the end, the group recommended the adoption of a system based on actual nickel produced. There does not appear to be any cogent reason to change this decision.

8. The greater part of the time available was occupied in the discussion of the proposals put forward for the amendment to paragraph 2 of article 151, which was the most critical issue in the acceptance of the production limitation formula. The purpose of the amendment was to ensure that the tonnage allocated to sea-bed production would never fall below a certain amount irrespective of the tonnage calculation in accordance with existing scheme paragraph 2 of article 151. This has been referred to, rather misleadingly, as the floor for production allocation but it should be more aptly called a minimum allocation ceiling; in other words, it is the minimum level to which the tonnage ceiling for sea-bed production would be allowed to fall.

9. The possible problems that the existing land-based producers may face with the introduction of sea-bed mining have been discussed over many sessions and it is not intended to go into the matter in this report. The culmination of these discussions is the proposed production limitation formula in article 151. The concerns and problems of the potential sea-bed miners and also those of the great number of countries who are neither major consumers nor producers have also been discussed in several committees and in particular within this group. These discussions have led me to the opinion, and I think that this reflects a widespread viewpoint, that the interests of the various parties would be most fairly served by the amendment of article 151 to allow for the inclusion of a minimum ceiling.

10. The discussion at the last session indicated that delegations favoured the idea of establishing the minimum ceiling in terms of a specific tonnage rather than as a percentage of the annual growth in consumption. This resulted in several proposals, including one from myself, which were based on such a specific tonnage schedule. At the opening of this session, two of the proposals had been withdrawn and discussion centered on the three remaining proposals which had been submitted by the delegations of Belgium, the Soviet Union and from myself. However, during the interim period, circumstances had changed and the timing of the first commercial production now seems somewhat more uncertain. This raises problems in trying to apply a fixed tonnage schedule because it would be relevant only at a certain point in time and would have to be adjusted in accordance with a growth index to allow for changes in the date of commercial production. Interest then returned to the scheme which could be calculated on a percentage of tonnages and would be independent of time. At about this time the United Kingdom proposed a completely new scheme which would be based on total world consumption of nickel instead of the increment in world consumption. The scheme aroused considerable interest but it was pointed out that if this scheme were to be preferred then four new arbitrary figures would have to be discussed and agreed upon and it did not seem that this could be achieved at this late stage in the negotiations.

11. The discussions then returned to proposals that the guaranteed minimum ceiling be expressed as a notional minimum increment percentage rate of world nickel consumption which would be built into the mechanism contained in the article 151 formula. A further proposal was put forward which would be based on a flat rate increment in world nickel consumption and calculated from an initial build-up tonnage. This flat-rate percentage increment would be independent of the

proposed 60/40 split in the growth segment provided for in article 151.

12. After lengthy discussion on the various proposals, it was apparent that total agreement on the matter was not likely to be attained on any of them. The two sides were obviously not able to agree on any specific figures on the level of the minimum ceiling. Nevertheless, I believe that real differences had been so narrowed that a compromise proposal from the Chairman at this time would be appropriate. I have, therefore, proposed a compromise. Compromises, by their very nature, cannot meet the maximum demands of all the interested parties, but I believe that this proposal does achieve a fair balance. The proposal was fully explained by me in the negotiating group and in consultations. It is now set out in the annex below, together with all other suggested changes. I would, however, like to explain some of the reasoning which prompted me to propose this particular scheme.

13. Firstly, it was apparent that no ordinary system could meet all of the demands of all of the interested parties; those who were concerned with a certain tonnage availability at the commencement of operations, those whose interests were more concerned with the middle of the interim period and those concerned with the end. Nothing but an extraordinarily complicated system or an arbitrary list of tonnages could accomplish that, and neither was desirable. I felt therefore that we should stay as close as possible to the original mechanism in article 151; it is by no means a simple system but we are at least beginning to understand it.

14. Secondly, why select 3 per cent as the minimum ceiling growth rate of world nickel consumption? I admit that it is difficult to arrive at any figure which will command total confidence. There are a number of estimates of future world consumption of nickel, but none of these are identical. The latest data available to me are the United States Bureau of Mines estimate which indicates an average annual growth rate up to the year 2000 as a possible high of 3.8 per cent and a possible low of 2.2 per cent. Other authorities have comparable figures such as those mentioned by one delegation, of 3.6 per cent and 2 per cent. The latest available statistics indicate the actual 15 year trend line of nickel consumption up to the year 1979 is approximately 3.97 per cent, though this has shown a falling trend over recent years. I should like to point out that any changes in the 15 year trend line, which is the foundation of the whole scheme, would be gradual and predictable. A sudden change in any one year of the 15 years could not itself cause a dramatic change in the 15 year average. On the basis of available data I consider that in using this figure of 3 per cent I have achieved an even balance between the risk that the figures might be too high to the disadvantage of the land-based producers or that they are too low, which would frustrate the plans of the sea-bed mining industry. It should be clearly understood that this 3 per cent is subject to a 60/40 split as already provided for in article 151.

15. As a further safeguard, I have incorporated a mechanism which would protect the land-based producers from any possible distortion of their existing market because of the minimum production ceiling. The safeguard mechanism will ensure that irrespective of the guaranteed tonnage, sea-bed production under the minimum ceiling will not be allowed to exceed 100 per cent of the growth segment for that year as calculated under the original provisions of article 151. In other words there is no question under the guarantee of forcing the land-based producers out of their existing market and, in fact, under all practical and foreseeable situations, the actual ceiling tonnage allocation for the sea-bed production will remain below the 100 per cent, thus leaving some growth segment for the land-based producers. It should be noted that no production restrictions apply to land-based or potential land-based producers and they can compete in the whole of the world market. It was suggested that the 100 per cent tonnage allocation for real growth allowed in the safeguard clause should be limited to the growth from the date of commercial production instead of from the beginning of the interim period as in the text. However, this would be quite inconsistent with the method of calculation as originally conceived and set out in the existing text. I would therefore be most reluctant to complicate the scheme by ignoring an already accepted factor in the scheme.

16. A feature of this proposal is the use of a minimum growth rate trend line of 3 per cent, but this has to be based on some actual tonnage figure. Technically, it would be possible to take this at any point along the existing and current trend line. However, by projecting the new trend line in the manner described in the proposed text, it would be consistent with the mechanism in the original text of paragraph 2 of article 151. I also believe that the safeguard clause would come into operation if there is any significant difference in the tonnages when calculated from any other base point.

17. I would then like to refer to other matters connected with article 151 and specifically paragraph 1, which were not raised during this session but were fully discussed at the previous sessions and referred to in my statement of 20 August 1979. These were matters of some importance and I again refer to two amendments which I proposed in paragraph 1 as a result of discussions. The purpose of the first one was to clarify the meaning of the phrase "all interested parties." I have proposed that this be expanded in such a way that the first sentence would read: "Acting through existing forums or such new arrangements or agreements as may be appropriate, in which all interested parties, including both producers and consumers, participate."

18. The second point of concern relates to the fourth and following sentences in paragraph 1 which contains detailed provision concerning the Authority's role in future commodity arrangements and agreements. There are differences of view concerning some aspects of these details. I myself am inclined to agree with the suggestion that rather than trying to decide these complex details now in the abstract, they be left to the appropriate commodity forums and conference and had, in fact, suggested that amendment in my previous reports. However, some delegates put considerable significance in the wording of this sentence and have expressed grave disquiet at any suggestion to delete it. Accordingly, I have decided to retain the sentence.

19. Towards the last few days of the discussion on the minimum level of ceiling, several matters were raised as discussion points by the land-based producers. A list of these points were distributed by them. Some of these matters had already been discussed at various times and I refer to the question of eliminating the proposed five year build-up period for tonnage allocation, the question of decreasing the division of the growth segment of nickel consumption from the proposed 60 per cent for sea-bed production and the question of pro-rated cut-back of sea-bed production during over-supply. The outcome of the previous discussion on these points was reported by me at the time and, since no new discussion took place during this session, there is no point in my adding to any previous comments.

20. A further matter was raised in the list and that was the question of redefining the end of the interim period. This has been mentioned within the group but I feel that it is a matter which should be more appropriately dealt with in a more representative group, in particular in the group dealing with article 155.

21. The question of stockpiling was also raised as a matter for discussion. This is a very wide subject ranging from stockpiling of metals for the purpose of manipulating the market to the stockpiling in order to stabilize the market and it could refer to the stockpiling of raw materials. This is a matter which I feel is closely connected with the question of commodity

agreements referred to in paragraph 1 of article 151. I do not think that we can elaborate any more on the subject beyond the point that has been incorporated in paragraph 1 without the danger of restricting the Authority's freedom of action in negotiating these agreements.

22. Two further matters were raised together with draft proposals by the Australian delegation. This was done in the last few days of the negotiations and, as a result, no meaningful discussion of them could take place.

23. The first matter was the question of unfair trading practice and the possibility that preferential treatment would be given to sea-bed production which would be discriminatory against the land-based suppliers in their traditional markets. This matter was also raised by the land-based producers. The second matter raised referred to the possibility of subsidization of sea-bed mining in excess of that normally provided for land-based industry.

24. Both these matters are important and the Conference should find opportunity to discuss them further. The Australian delegation attaches great importance to its proposals and has conditioned its acceptance of any form of production control on the solution of these two issues.

25. It would, I hope, be readily apparent that the subject-matter is much wider than that of the level of production under the production ceiling formula. It, in fact, deals with the general policy of development of the sea-bed mining industry and the marketing of the minerals derived. I suggest, therefore, that the proposal be considered in a more representative negotiating forum than one which is limited to major land-based producers and major consumers of minerals.

26. Finally, it is my impression that the draft changes that I have suggested in my text, in particular those relating to paragraph 2 (*b*) of article 151, are acceptable to a substantial majority of the participants in the negotiating group including the land-based producers and the consumer countries. It is my hope that the few delegations which continue to have some hesitation will eventually find that, in all circumstances, this is the best compromise possible if the Conference is to make progress.

27. In conclusion, I should like to thank the members of the group on Production Policy for their friendship and co-operation. I would also like to express my gratitude to the Chairman of negotiating group 1, Mr. Njenga, and to the Chairman of the First Committee for their advice and encouragement. I also wish to record my special appreciation to Mr. E. Langevad for his unfailing assistance given to me, and my thanks also to members of the secretariat who readily gave their assistance.

ANNEX

Article 151. Production policies

1. Without prejudice to the objectives set forth in article 150 and for the purpose of implementing the provisions of subparagraph (*g*) of article 150, the Authority, acting through existing forums or such new arrangements or agreements as may be appropriate, in which all interested parties, including both producers and consumers, participate, shall take measures necessary to promote the growth, efficiency and stability of markets for those commodities produced from the resources of the Area, at prices remunerative to producers and fair to consumers. All States Parties shall co-operate to this end. The Authority shall have the right to participate in any commodity conference dealing with those commodities. The Authority shall have the right to become a party to any such arrangement or agreement resulting from such conferences as are referred to above. The participation by the Authority in any organs established under the arrangements or agreements referred to above shall be in respect of the production in the Area and in accordance with the rules of procedure established for such organs. The Authority shall carry out its obligations under such arrangements or agreements in a manner which assures a uniform and non-discriminatory implementation in respect of all production in the Area of the minerals concerned. In doing so, the Authority shall act in a manner consistent with the terms of existing contracts and approved plans of work of the Enterprise.

2. During the interim period specified in subparagraph (*a*), commercial production shall not be undertaken pursuant to a previously approved plan of work until an operator has applied for and has been issued a production authorization from the Authority during a period beginning not more than five years prior to the planned commencement of commercial production under that plan of work unless the Authority prescribes another period in its rules and regulations. In his application for the authorization, the operator shall specify the annual quantity of nickel expected to be recovered under the approved plan of work. The application shall include a schedule of expenditures to be undertaken subsequent to receiving an authorization by the operator reasonably calculated to allow him to begin commercial production on the date planned. The Authority shall issue a production authorization for the level of production applied for unless the sum of that level and the levels already authorized exceeds the nickel production ceiling, as calculated pursuant to subparagraph (*b*) in the year of issuance of the authorization, during any year of planned production falling within the interim period. When issued, the production authorization and approved application shall become a part of the approved plan of work.

(*a*) The interim period shall begin five years prior to 1 January of the year in which the earliest commercial production is planned to commence under an approved plan of work. In the event that the earliest commercial production is delayed beyond the year originally planned, the beginning of the interim period and the production ceiling originally calculated shall be adjusted accordingly. The interim period shall last 25 years or until the end of the review conference referred to in article 155 or until the day when such new arrangements or agreements as are referred to in paragraph 1 enter into force, whichever is earlier. The Authority shall resume the power provided in this paragraph for the remainder of the interim period if the said arrangements to agreements should lapse or become ineffective for any reason whatsoever.

(*b*) The production ceiling for any year of the interim period beginning with the year of the earliest commercial production shall be the sum of (i) and (ii) below:

(i) The difference between the trend line values for annual nickel consumption, as calculated pursuant to this subparagraph, for the year immediately prior to the year of the earliest commercial production and the year immediately prior to the commencement of the interim period; plus

(ii) Sixty per cent of the difference between the trend line values for nickel consumption, as calculated pursuant to this subparagraph, for the year for which the production authorization is being applied for and the year immediately prior to the year of the earliest commercial production;

(iii) Trend line values used for computing the nickel production ceiling pursuant to this subparagraph shall be those annual nickel consumption values on a trend line computed during the year in which a production authorization is issued. The trend line shall be derived from a linear regression of the logarithms of actual nickel consumption for the most recent 15-year period for which such data are available, time being the independent variable. If the annual rate of trend line increase so derived is less than 3 per cent, the trend line used to find the ceiling shall instead be derived by projecting a new trend line based on the original trend line value for the first year of the relevant 15-year period increasing at 3 per cent annually. Provided that the limit established for any year of the interim period may not exceed 100 per cent of the growth in nickel consumption from the beginning of the interim period as calculated along the original trend line.

(*c*) The Authority shall reserve for production by the Enterprise pursuant to approved plans of work a quantity of 38,000 tons of nickel from the available production ceiling calculated pursuant to subparagraph (*b*).

(*d*) If, pursuant to subparagraph (*b*), the operator's application for an authorization is denied, the operator may reapply to the Authority at any time.

(*e*) An operator may in any year produce less than or up to 8 per cent more than that level of annual production of minerals from nodules specified in his production authorization, provided that the over-all amount of production shall not exceed that specified in the authorization. Any increase over 8 per cent and up to 20 per cent in any year or any increase in the third and subsequent years following two consecutive years in which increases occur shall be negotiated with the Authority, which may require the operator to obtain a supplementary production authorization to cover additional production. The Author-

ity shall not authorize the production, under any plan of work, of a quantity in excess of 46,500 tons of nickel per year. Applications for such supplementary production shall be taken up by the Authority only after all pending applications by operators who have not yet received production authorizations have been acted upon and due account has been taken of other likely applicants. The Authority shall be guided by the principle of not exceeding the total production allowed under the production limitation in any year of the interim period.

(*f*) The Authority shall ensure by means of rules and regulations issued pursuant to annex II, article 16, that the levels of production of other metals such as copper, cobalt and manganese extracted from the nodules that are recovered pursuant to a plan of work will be no higher than those which would have been produced had the operator produced the maximum level of nickel from those nodules pursuant to this paragraph.

3. The Authority shall have the power to limit the level of production of minerals from the Area, other than minerals from nodules, under such conditions and applying such methods as may be appropriate. Regulations adopted by the Authority pursuant to this provision will be subject to the procedure set forth in article ... (entry into force of amendments to the present Convention).

4. Following recommendations from the Council on the basis of advice from the Economic Planning Commission, the Assembly shall establish a system of compensation for developing States which suffer adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral or the volume of that mineral exported, to the extent that such reduction is caused by activities in the Area.

III. Financial arrangements[24]

1. The work which I did at this session comprises three parts: the financing of the Enterprise, the financial terms of contracts and the statute of the Enterprise.

2. Because of the importance of the question of financing the Enterprise and its linkage to the financial terms of contracts, I will discuss the former question separately from the statute of the Enterprise, even though the provisions relating to the financing of the Enterprise are to be found in article 10 of the statute of the Enterprise.

3. I will now say a word about the manner in which the work was conducted at this session. First, I consulted extensively with delegations in the Group of 77 and with delegations of the developed countries. Secondly, the working group of 21 held one meeting to discuss the question of the financing of the Enterprise. Thirdly, several meetings were held of the group of financial experts. These meetings were open to all delegations and were extremely well attended.

4. The texts which formed the basis of our work consisted of: article 12 of annex II on the financial terms of contracts as well as the text of article 3 and of paragraph 3 of article 10 of annex III which I submitted at the end of the resumed eighth session in August 1979.[25] To facilitate the discussion of the question of the financing of the Enterprise, I issued a paper, WG.21/Informal Paper 7, and the co-ordinators of the working group of 21 issued a paper, WG.21/Informal Paper 6 on the question of the Statute of the Enterprise.

The financial package

5. Although the financial terms of contracts and the financing of the Enterprise are logically distinct and separate issues, it has always been understood in negotiating group 2 that there is an inseparable linkage between the two issues and that they form a negotiating package. It was always understood by delegations that for the proposal on one issue to be acceptable, the proposal on the other issue must also be acceptable and that there could be trade-offs between the proposals on the two issues.

Financing the Enterprise

6. At the end of the resumed eighth session, I proposed a new paragraph 3 to article 10 of annex III. The paragraph contains the following four salient points. First, the Enterprise is assured of the funds necessary to carry out one fully integrated project. The amount of the funds to be given to the Enterprise is to be fixed in relation to an integrated mining project which would enable the Enterprise to process up to four metals, namely: cobalt, copper, manganese and nickel. The reason why the four metals are mentioned is not in order to compel the Enterprise to process the four metals even if it is uneconomic to do so but in order to establish a criterion for computing the amount of the funds to be given to the Enterprise. In my proposal, the amount of the funds would be determined by the Assembly, upon the recommendation of the Council, on the advice of the Governing Board of the Enterprise. The second salient point is that 50 per cent of the funds to be given to the Enterprise would be in the form of long-term interest-free loans from States Parties. The remaining 50 per cent of the funds would be raised by the Enterprise as interest-bearing loans which would be guaranteed by States Parties. The third salient point is that the scale for determining the contributions of States Parties for loans and debt guarantees would be determined in accordance with the schedule referred to in paragraph 2 (*e*) of article 160, which is based upon the United Nations scale. The fourth salient point concerns the repayment of the interest-free loans to States Parties. Under my proposal, the repayment of interest-bearing loans would have priority over the repayment of interest-free loans. I have also proposed that the Assembly, upon the recommendation of the Governing Board of the Enterprise, would adopt a schedule for the repayment of the interest-free loans to the States Parties.

7. In the discussions held at this session, several issues were raised concerning the financing of the Enterprise. A few delegations of industrialized countries wanted to reopen the discussion of the ratio between interest-free loans and interest-bearing loans. They demanded the alteration of the ratio of one-to-one to a ratio of one-part interest-free loans to two-parts interest-bearing loans. I have refused to change the one-to-one ratio for several reasons. First, I consider a debt-equity ratio of one-to-one as not being abnormal in the light of the survey of debt-equity ratios of mining companies contained in the annex to my report of the last session. Secondly, whilst it is true that some mining companies have a capital structure made up of two-parts debt to one-part equity, it is also true that the Enterprise will be a new institution with no assets and with no track record. According to some experts, the Enterprise may find it more difficult to borrow funds than well-established mining companies. Thirdly, I consider the ratio of one-part interest-free loans to one-part interest-bearing loans as being an inseparable part of the financial package.

8. One delegation from an industrialized country has again put forward the proposal that the Enterprise should, after an initial period, pay interest on the loans from States Parties. I have also rejected this demand because I regard the proposal I put forward at the last session that the loans should be long-term and interest-free as another essential element in the financial package. The danger is that if we start tampering with parts of the financial package, the whole package may fall apart.

9. Several delegations have raised the point that Governments would like to know the extent of their financial obligations towards financing the Enterprise, preferably before they sign the convention and, in any case, before they ratify it. They have therefore suggested that the amount of the funds to be made available to the Enterprise should be specified in the convention and that the amount be qualified by an escalating factor to take account of inflation. I have come to the conclusion that it would be unwise to adopt this approach. The reason is that the current estimates concerning the capital requirement

[24] Report submitted by Mr. Koh, co-ordinator for questions relevant to negotiating group 2.

[25] See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XII, document A/CONF.62/C.1/L.26.

to undertake an integrated mining project may turn out to be very different from the capital which will actually be required. The difference between the amount specified and the amount actually required could not be taken care of by an escalating factor which would only take account of inflation. One delegation has suggested that, in addition to the provision for the escalation of costs, the amount specified could be reviewed either by the Council or by the Assembly. This approach would, however, rob the amount specified of the certainty which some delegations demand. Another suggestion was made during the discussions. The suggestion is to let the preparatory commission look into this question. The merit of this approach is that the preparatory commission would be working at a time closer to the actual commencement of seabed mining and would, therefore, have access to much more reliable data than we now do. Whatever the amount fixed by the preparatory commission may be, it could be subject to an escalating factor in order to take account of inflation. Having considered the three options, i.e. the option of letting the Assembly fix the amount in the future, the option of specifying the amount in the convention and the option of asking the preparatory commission to determine the amount, I have come to the conclusion that the third option is the best. It will not satisfy those who want to know the amount before they sign the convention but it will at least enable them to know before they ratify it. I have therefore added one sentence to the end of paragraph 3 (*a*) of article 10 to reflect this option.

10. Another issue raised in the discussions concerns the repayment of the interest-free loans to States Parties. Two demands were made by some industrialized countries. The first is that the Council should have some role in the process of deciding the repayment schedule. Members of the Group of 77 were able to accept this proposal. I have therefore reflected this in my redraft of paragraph 3 (*f*) of article 10. The second proposal is that the repayment schedule should be determined by the rules and regulations of the Authority. This proposal was not found acceptable by the Group of 77.

11. In order to ensure that the interest-free loans and the debt guarantees will be freely usable by the Enterprise, I have proposed a paragraph stating that the funds made available to the Enterprise shall be in freely usable currencies or in currencies which are convertible in the major foreign exchange markets into freely usable currencies. My proposal was accepted by all delegations and is now incorporated in paragraph 3 (*g*) of article 10. A final issue raised by several delegations concerns the manner in which paragraphs 3 (*a*) and (*b*) will be implemented in practice. Under article 301, the Convention will come into force if 70 States ratify the Convention. The scale referred to in paragraph 2 (*e*) of article 160, which will be used for determining the contributions of States under paragraphs 3 (*a*) and (*b*), is based upon the assumption that all Member States of the United Nations will become parties to the Convention. We must also bear in mind that it is our common desire to provide the Enterprise with the funds referred to in paragraph 3 (*a*) as soon as possible. Three problems, therefore, arise. First, if the States initially ratifying the convention pay according to the United Nations scale and there is a shortfall, how will this shortfall be covered? Secondly, will States acceding to the Convention at a later stage also be required to contribute to the funds of the Enterprise? Thirdly, will the States which ratified the Convention initially and which contributed more than their share, according to the United Nations scale, towards the funds of the Enterprise be reimbursed for their supplementary contributions? I have tried to provide answers to these three questions in paragraphs 3 (*c*) and 3 (*d*) of article 10.

12. In the event of a shortfall, States initially ratifying the Convention will share among themselves, according to the same scale, the shortfall by way of both interest-free loans and debt guarantees, subject to a limit that the shortfall shall not be greater than 25 per cent of the funds necessary to carry out one fully integrated project, in accordance with article 3 (*a*). States acceding to the convention at a later stage will contribute to the funds of the Enterprise on the basis of this scale. And, in answer to the third question, these contributions and guarantees from States acceding to the Convention at a later stage will be used exclusively by the Enterprise to reimburse States Parties for their supplementary contributions by way of interest-free loans and to substitute their debt guarantees on interest-bearing loans by the debt guarantees of the States ratifying the Convention at the later stage.

The financial terms of contracts

13. At the end of the resumed eighth session, I proposed a new text of article 12 of annex II containing the financial terms of contracts. I have already remarked upon the linkage between my proposal on the financing of the Enterprise and the financial terms of contracts in the negotiations. I should also emphasize that the system of financial payments, as well as the rates of those payments, contained in article 12, represent a very delicate balance.

14. From the discussions in the group of financial experts, as well as from the extensive consultations I have held with delegations, I have found that the system of financial payments in article 12 is acceptable to all delegations.

15. Concerning the rates of financial payments, I have found that the majority of the industrialized market-economy countries, all the industrialized centrally-planned-economy countries and the majority of the members of the Group of 77 can live with the proposal made at the last session.

16. There were, however, some delegations which were not satisfied with the rates proposed.

17. The delegation of India felt that the production charge rate in the second period should be restored to 5 per cent. It also suggested that the attributable net proceeds floor of 25 per cent should be raised to 35 per cent. It also suggested that the rates be raised so that the income of the Authority will be restored to the levels achieved under the proposal contained in the revised negotiating text.

18. In contrast to India's views, the delegations of Belgium, France and Japan complained that the rates are too high. The Federal Republic of Germany suggested two modifications.

19. Japan would like to reduce the production charge rates in the mixed system from 2 per cent and 4 per cent to 1.5 per cent and 2.5 per cent, and would like to define "return on investment" on the basis of the cost-ratio attributable net proceeds.

20. The Federal Republic of Germany would like to raise the return on investment, referred to in paragraph 6 (*a*) of article 12 from 15 per cent to 20 per cent. It would also like to lengthen step one in the incremental schedule from 0 per cent to 10 per cent, to 0 per cent to 15 per cent, and change step two from 10 per cent to 20 per cent, to 15 per cent to 25 per cent.

21. The delegation of Belgium felt that the rates were too burdensome, especially on a contractor engaged in mining only. Under the mixed system, Belgium would reduce the production charge rates from 2 per cent and 4 per cent to 0.5 per cent and 2 per cent. Belgium would also like to alter the three incremental steps for determining the Authority's share of the contractor's attributable net proceeds, as well as the rates applicable in the two periods. In the first period, the Belgium proposal would reduce the tax rates from 35 per cent to 10 per cent, from 42.5 per cent to 20 per cent, and from 50 per cent to 30 per cent. In the second period, Belgium would also like to reduce the rates from 40 per cent to 30 per cent in the first increment.

22. The proposal of France is identical to that of Belgium with only one difference. The difference is that in the first increment in the second period the rate should be 20 per cent.

23. In the discussions in the group of financial experts on

article 12, one delegate from a developing land-based producer country said that he had undertaken a preliminary study comparing the system of financial payments contained in article 12 with the tax systems applicable in his country and in several other developed and developing countries. His general conclusion was that the financial burden of a contractor, under article 12, was roughly comparable with the tax burden of a mining company operating in his country and in other countries. As a representative of a land-based producer, he was therefore satisfied that article 12 would not lead to an artificial diversion of investment from land-based to sea-bed mining and was therefore consistent with the objective in paragraph 1 (*f*) of article 12.

24. Having considered carefully the comments and reactions of delegations, I have come to the conclusion that the rates of financial payments contained in article 12 represent the best compromise that can be achieved. They appear to enjoy widespread and substantial support from delegations in the various interest groups. I have therefore decided not to alter either the scheme of financial payments or the rates contained in my proposal of August 1979.

25. The French delegation proposed that we should provide for contracts for exploration including the financial terms of such contracts. Under the French proposal, a contract for exploration would last six years. The application fee for such a contract would be $100,000. The annual fixed fee would be $200,000. The contractor would commit himself to spend a minimum of $10 per square kilometre per year. Members of the Group of 77 rejected the French proposal for several reasons. First, they feared that a contractor would do very little prospecting and the Authority would therefore be provided with very little prospecting data for its choice of sites. Secondly, they saw the proposal as a means of escaping the payment of part of the annual fixed fee of $1 million. Finally, they pointed out that the negotiations had always proceeded on the assumption of contracts for exploration and exploitation and it was too late in the day to change this basic assumption.

26. I have made a number of changes to that text, of a drafting nature or of a minor character, which I will now proceed to explain.

27. I have added one sentence to paragraph 3 in order to take account of the negotiations on article 151. This sentence says that if the approved commencement of commercial production is postponed because of a delay in the allocation of the production quota, in accordance with article 151, the annual fixed fee shall be waived for the period of postponement. This addition was accepted by the group of financial experts and supported by the Chairman of the group of experts negotiating on article 151.

28. In paragraph 4 I have made three minor changes. In the introductory sentence of the paragraph, the word "month" has been replaced by the word "year". This change was made in response to a suggestion by a member of the European Economic Community that a contractor would not be able to make an informed choice between the two systems of financial payments within a month of the commencement of commercial production. The suggestion was that the contractor should make his choice within a year. This suggestion was accepted by most of the experts from the Group of 77 who spoke on the point. In subparagraphs (*a*) and (*b*), I have deleted the references to the single system and the mixed system because these terms are not used anywhere else in article 12.

29. In paragraph 5 I have made two minor changes. In subparagraph (*a*) (ii) the words "years 11-20" have been replaced by "years 11 to the end of commercial production". The reason for this change is that, although we assume that the period of commercial production will be 20 years, we should provide for the contingency that the Authority may permit commercial production to extend beyond 20 years, in which event the contractor should continue to be liable to make financial payments. In subparagraph (*b*) a reference to paragraph 8 has been included.

30. In paragraph 6 I have made a number of drafting changes to clarify various concepts and definitions. In subparagraph (*a*) I have inserted the words "as a result of the payment of the production charge at 4 per cent" in order to make explicit what was implicit in the subparagraph. In subparagraph (*b*), a reference to paragraph 8 has been included. Subparagraph (*d*) has been redrafted so that the definition of when the first period of commercial production ends and the second period of commercial production begins is clear. I have made no changes to the substance of this subparagraph. In subparagraphs (*e*), (*g*), (*h*), (*j*), (*l*), (*o*) and (*p*) only editorial changes have been made. In subparagraph (*k*) I have made a small amendment to reflect the generally acceptable accounting practice of allowing net operating losses to be carried forward, as well as backward. Subparagraph (*n*) collects in one place the definitions of various terms when applied to a contract for mining only.

31. In paragraph 7 (*a*) the order of the last two sentences has been inverted.

32. I have amended paragraph 12 in order to bring it into line with paragraph 3 (*g*) of article 10 of annex III.

33. I have made a minor change in paragraph 15 in order to bring it into line with the text of paragraph 2 of article 188, proposed by the Chairman of the group of legal experts on disputes settlement in Part XI.

THE STATUTE OF THE ENTERPRISE

34. With agreement of the Chairmen, Mr. Engo, and Mr. Njenga, I conducted consultations with delegations on annex III, the statute of the Enterprise. To assist delegations in the discussion, a paper (WG.21/Informal Paper No. 6) was prepared and issued. I would like to explain the framework within which that paper was prepared and the considerations which have led me to propose a number of changes to the statute of the Enterprise. First, I have respected the powers which the Assembly, on the one hand and the Council, on the other hand, enjoy over the Enterprise. I have therefore made no attempt to amend either article 160 or article 162. Secondly, I have respected the structural relationship between the Authority and the Enterprise. Thirdly, I have attempted to give the Enterprise a commercial orientation in order to ensure that it will conduct its business operations in an efficient manner. Fourthly, I have attempted to reflect the idea that the Enterprise should enjoy autonomy in running its business operations subject, of course, to the convention and its annexes. Fifthly, I have tried to take account of the pioneering nature of the Enterprise as the first international commercial organization the world proposes to establish. I will explain briefly the changes I propose to the statute of the Enterprise.

Article 1

35. Paragraph 1 has been redrafted to bring it in line with paragraph 7 of article 170 of the convention. A new paragraph 3 reflects the proposition that, subject to the provisions of the convention, the Enterprise shall operate on sound commercial principles.

Article 2

36. Paragraph 2 is new. It proposes that, subject to the provisions of the convention and its annexes, as well as the general policies of the Assembly and the directives of the Council, the Enterprise shall enjoy autonomy in the conduct of its operations.

Article 5

37. In this article I have proposed both substantive and drafting changes. I shall confine my comments to the substantive changes.

38. In my proposal, the Assembly elects the members of the Governing Board, paying due regard to the principle of equitable geographical representation.

39. France proposed that representation of the Governing Board should take account of the financial contributions to the Enterprise of States Parties. In their view, "as long as the Enterprise has not repaid the whole of the loans furnished or guaranteed by the States Parties, the members of the Governing Board shall be nominated by States Parties which together have furnished or guaranteed at least 70 per cent of those loans". They also added that the Governing Board should include at least two representatives of each geographical region.

40. Members of the Group of 77 rejected the French proposal for several reasons. First, they pointed out that a board composed according to the French proposal would look like a board of creditors. This was never the understanding in the negotiations on this point. Secondly, they criticized the French proposal because it was inconsistent with the notion that the Enterprise belonged to all States Parties, irrespective of the amount of their financial contributions. Thirdly, they argued that the French proposal could create conflicts of interest and could also hamper the growth and viability of the Enterprise.

41. In paragraph 1, I have added a new sentence stating that, in submitting nominations of candidates for election to the Governing Board, members of the Authority shall bear in mind the need to submit candidates of the highest standard of competence, with qualifications in relevant fields so as to ensure the viability and success of the Enterprise. The formulation is based upon suggestions made by several African delegations and the USSR and it found wide support.

42. In paragraph 3 I have raised the majority required for decisions from a majority of the votes cast to a majority of the Board. I feel that this change is desirable because of the importance of the decisions of the Governing Board. In the same paragraph I have also included the idea that if a member of the Board has a direct conflict of interest on a matter before the Board he shall refrain from voting on the matter.

43. In paragraph 4 I have proposed that each member of the Board shall be remunerated. The amount of remuneration shall be fixed by the Assembly upon the recommendation of the Council. In fixing the amount, the Assembly and the Council will, of course, take into account whether the Board will function in continuous session or meet only periodically.

44. In paragraph 5 I have suggested that members of the Governing Board should act in their personal capacity. In consequence, they shall not seek or receive instructions from any Government or from any other source in discharging their duties.

45. In paragraph 6 I have included a proposal made by several delegations from Africa that if a vacancy occurs on the Board, the vacancy should be filled by the Assembly and not by the Governing Board.

46. In paragraph 9 I have adopted a French proposal that any member of the Authority may ask the Governing Board for information in respect of its operations which particularly affect that country. The Board shall endeavour to provide such information.

Article 5 bis

47. Although this paragraph is new, the powers and functions which I propose to confer on the Governing Board are mostly not new but are to be found scattered in various provisions of the convention and the annexes. It is normal in the constitution or statute of an institution to specify its powers and functions. This is the reason why I have drafted this new article. The formulation of the 14 subparagraphs has been exhaustively discussed in the group of financial experts and should therefore not be controversial.

Article 6

48. In this article I have proposed only a few minor amendments. In paragraph 2 I have clarified the fact that the Director-General of the Enterprise shall be directly responsible to the Governing Board for the conduct of the business of the Enterprise.

Article 9

49. Under this article the issue whether the Enterprise shall be liable to, or exempted from, making payments to the Authority in accordance with article 12 of annex II was raised. The developing countries and the developed countries held opposing views. The developing countries argued that the Enterprise should be exempted from such payments for the following reasons.

50. First, they argued that the Enterprise was part of the Authority and that it was illogical for the Authority to tax its own operating arm. They drew an analogy between the Enterprise with a department of a national government. Secondly, they argued that the financial relationship between the Authority and the Enterprise made it unnecessary to require the Enterprise to make payments to the Authority under article 12 of annex II. The argument was that the funds of the Enterprise were subject to being transferred to the Authority by decision of the Assembly. Since the Assembly could transfer any portion of the net income of the Enterprise to the Authority there was, therefore, no need for the Enterprise to make payments under article 12 of annex II. Thirdly, they argued that the Enterprise was, in many important financial and operational respects, different from States Parties and private corporations. The argument that equals should be treated equally therefore did not apply. Consequently, the fact that contractors would have to make these payments did not mean that the Enterprise must also make such payments. Fourthly, they argued that there was no fear of the Enterprise selling its nodules or metals below market prices if it was exempted from payments to the Authority because there was another provision in annex III which required the Enterprise not to give non-commercial discounts.

51. The developed countries argued that the Enterprise should make similar payments to those by contractors, under article 12 of annex II, for the following reasons. First, they argued that the Enterprise was a commercial organization. It was analogous to a state corporation or public enterprise operating in the market and not analogous to a department of a national government. They argued that in most countries, state corporations and public enterprises of a commercial nature were subject to tax. Secondly, they argued that entities operating on the two sides of the parallel sytem should be treated equally and that this principle would be infringed if the Enterprise were exempted from such payments. Thirdly, they argued that an obligation on the part of the Enterprise to make similar payments would strengthen the commercial orientation of the Enterprise and subject it to the normal financial discipline of commercial institutions. Fourthly, they argued that to require the Enterprise to make such payments would give more income to the Authority for distribution to mankind. Finally, it was argued that it would help States Parties to determine whether the Enterprise was viable and successful.

52. Having weighed the opposing arguments carefully I suggest the following compromise.

53. For an initial period, not to exceed 10 years from the commencement of commercial production, the Enterprise should be treated like an infant industry or a pioneer industry. In many developing countries and in some developed countries such industries are granted exemption from taxation for a limited period. According to two experts I have consulted in the United Nations Centre for Transnational Corporations, a tax holiday of 10 years would be more than adequate to enable the Enterprise to stand on its own feet and to be able to make financial payments to the Authority.

54. Members of the Group of 77 should not feel undue concern about this compromise proposal because whatever funds the Authority takes from the Enterprise can be given

back to the Enterprise in accordance with paragraph 2 (*b*) of article 173.

Article 12

55. Paragraph 5 of article 12 raises another difficult issue. This paragraph states that the Enterprise, its assets, property and revenues shall be immune from national taxation. The developed countries complained that this paragraph was an infringement upon their national sovereignty in that it was the sovereign prerogative of a Government to decide whether or not it wished to tax the Enterprise if the offices or facilities of the Enterprise were located in their territories. The developed countries, however, would have no objection if the Enterprise were to negotiate with the Governments of the host countries in which its offices and facilities were located for immunity from taxation.

56. Upon careful analysis, this problem does not look as difficult as it did at first. It is clear that, under article 7, the Enterprise cannot decide to locate these offices or facilities in the territory of a member State without its consent. Therefore, I have redrafted paragraph 5 to state that the Enterprise "shall negotiate with the host countries in which its offices and facilities are located for immunity from direct and indirect taxation". I have no doubt that this provision is adequate because there are many developing countries which have stated publicly that they would like to host the offices or facilities of the Enterprise and would be prepared to exempt the Enterprise from taxation.

CONCLUSION

57. My proposal of the financial terms of contracts, article 12 of annex II, is contained in annex A.

58. My proposal on the Statute of the Enterprise, including the financing of the Enterprise, is contained in annex B.

59. From the discussions in the working group of 21, in the group of financial experts, and from the extensive consultations my colleagues and I have held with delegations in all the interest groups, and in the various regional groups, I have come to the conclusion that these two proposals enjoy widespread and substantial support and that their inclusion in the second revision of the informal composite negotiating text will afford us a substantially improved prospect of achieving a consensus.

60. I should like to end my report by thanking you once again for the warm support and wise advice which you have given me in the conduct of my work.

61. I should like to record my appreciation to the group of financial experts for their co-operation. I would also take this opportunity to express the debt I owe to the unique team which has worked with me in negotiating group 2. The achievements in my negotiating group have been due largely to the efforts of Mr. Bailey of Australia, and of Mr. Pal, Mr. Yoshida and Mr. Langevad of the secretariat, Mr. Kirthisingha of the United Nations Conference on Trade and Development and Mr. Sebenius of Harvard University. I must also record my deep appreciation to Miss Smith. In preparing the paper on the Statute of the Enterprise I was also greatly assisted by Mr. Lee and Mr. Paolillo of the secretariat.

ANNEX A

Annex II

Article 12. Financial terms of contracts

1. In adopting rules, regulations and procedures concerning the financial terms of a contract between the Authority and the entities referred to in paragraph 2 (*b*) of article 153 in accordance with the provisions of Part XI, and in negotiating the financial terms of a contract in accordance with the provisions of Part XI and those rules, regulations and procedures, the Authority shall be guided by the following objectives:

(*a*) To ensure optimum revenues for the Authority from the proceeds of commercial exploitation;

(*b*) To attract investments and technology to the exploration and exploitation of the Area;

(*c*) To ensure equality of financial treatment and comparable financial obligations on the part of all States and other entities which obtain contracts;

(*d*) To provide incentives on a uniform and non-discriminatory basis for contractors to undertake joint arrangements with the Enterprise and developing countries or their nationals, to stimulate the transfer of technology thereto, and to train the personnel of the Authority and of developing countries;

(*e*) To enable the Enterprise to engage in sea-bed mining effectively at the same time as the entities referred to in paragraph 2 (1b) of article 153; and

(*f*) To ensure that the financial incentives provided to contractors under paragraph 14 of this article, or under the terms of contracts reviewed in accordance with article 18 of this annex, or under the provisions of article 10 with respect to joint ventures, shall not result in subsidizing contractors with a view to placing them at an artificially compstitive advantage relative to land-based miners.

2. A fee shall be levied for the administrative cost of processing an application for a contract of exploration and exploitation and shall be fixed at an amount of $500,000 per application. If the cost incurred by the Authority in processing an application is less than $500,000, the Authority shall refund the difference to the applicant. The amount of the fee shall be reviewed from time to time by the Council in order to ensure that it will cover the administrative cost of processing such an application.

3. A contractor shall pay an annual fixed fee of $1 million from the date of entry into force of the contract. If the approved commencement of commercial production is postponed because of a delay in the allocation of the production quota, in accordance with article 151, the annual fixed fee shall be waived for the period of postponement. From the commencement of commercial production, the contractor shall pay either the production charge or the annual fixed fee, whichever is greater.

4. Within a year from the date of commencement of the commercial production, in conformity with paragraph 3, a contractor shall choose to make his financial contribution to the Authority either by:

(*a*) Paying a production charge only; or

(*b*) Paying a combination of a production charge and a share of net proceeds.

5. (*a*) If a contractor chooses to make his financial contribution to the Authority by paying a production charge only, it shall be fixed at a percentage of the market value of the processed metals produced from the nodules extracted from the contract area in accordance with the following schedule:

(i)	Years 1-10 of commercial production:	5 per cent
(ii)	Years 11 to the end of commercial production:	12 per cent

(*b*) The said market value shall be the product of the quantity of the processed metals produced from the nodules extracted from the contract area and the average price for those metals during the relevant accounting year, as defined in paragraphs 7 and 8 below.

6. If a contractor chooses to make his financial contribution to the Authority by paying a combination of a production charge and a share of net proceeds, such payments shall be determined as follows:

(*a*) The production charge shall be fixed at a percentage of the market value of the processed metals produced from the nodules extracted from the contract area in accordance with the following schedule:

(i)	First period of commercial production:	2 per cent
(ii)	Second period of commercial production:	4 per cent

If, in the second period of commercial production, as defined in subparagraph (*d*), the return on investment in any accounting year, as defined in subparagraph (*m*), falls below 15 per cent as a result of the payment of the production charge at 4 per cent, the production charge shall be 2 per cent instead of 4 per cent in that accounting year.

(*b*) The said market value shall be the product of the quantity of the processed metals produced from the nodules extracted from the contract area and the average price for those metals during the relevant accounting year as defined in paragraphs 7 and 8 below.

(*c*)(*i*) The Authority's share of net proceeds shall be taken out of that portion of the contractor's net proceeds which is at-

tributable to the mining of the resources of the contract area, referred to hereinafter as attributable net proceeds:

(ii) The Authority's share of attributable net proceeds shall be determined in accordance with the following incremental schedule:

Return on investment	*First period of commercial production*	*Second period of commercial production*
Greater than 0 per cent, but less than 10 per cent	35 per cent	40 per cent
Equal to or greater than 10 per cent, but less than 20 per cent	42.5 per cent	50 per cent
Equal to or greater than 20 per cent	50 per cent	70 per cent

(d) The first period of commercial production referred to in subparagraphs *(a)* and *(c)* above shall commence in the first accounting year of commercial production, and terminate in the accounting year in which the contractor's development costs with interest on the unrecovered portion thereof are fully recovered by his cash surplus, as set out below. In the first accounting year during which development costs are incurred, unrecovered development costs shall equal the development cost less cash surplus in that year. In each subsequent accounting year, unrecovered development costs shall equal the unrecovered development costs of the preceding accounting year, plus interest thereon at the rate of 10 percent per annum, plus development costs incurred in the current accounting year and less contractor's cash surplus in the current accounting year. The accounting year in which unrecovered development costs become zero for the first time shall be the accounting year in which the contractor's development costs with interest on the unrecovered portion thereof are fully recovered by his cash surplus. The contractor's cash surplus in any accounting year shall be his gross proceeds less his operating costs and less his payments to the Authority under subparagraph *(c)* above. The second period of commercial production shall commence in the accounting year following the termination of the first period of commercial production and shall continue until the end of the contract.

(e) The term "attributable net proceeds" shall mean the product of the contractor's net proceeds and the ratio of the development costs in the mining sector to the contractor's development costs. In the event that the contractor engages in mining, transportation of nodules and production primarily of three processed metals, namely, cobalt, copper and nickel, the amount of attributable net proceeds shall not be less than 25 per cent of the contractor's net proceeds. Subject to subparagraph *(n)*, in all other cases, including those where the contractor engages in mining, transportation of nodules, and production primarily of four processed metals, namely, cobalt, copper, manganese and nickel, the Authority may, by regulations, prescribe appropriate floors which shall bear the same relationship to each case as the 25 per cent floor does to the three metal case.

(f) The term "contractor's net proceeds" shall mean the contractor's gross proceeds less his operating costs and less the recovery of his development costs as set out in subparagraph *(j)* below.

(g)(i) In the event of the contractor engaging in mining, transportation of nodules and production of processed metals, the term "contractor's gross proceeds" shall mean the gross revenues from the sale of the processed metals, and any other monies deemed to be reasonable attributable to the operation of the contract in accordance with the financial rules, regulations and procedures of the Authority;

(ii) In all cases other than those specified in subparagraphs *(g)*(i) and *(n)*(iii) the term "contractor's gross proceeds" shall mean the gross revenues from the sale of the semi-processed metals from the nodules extracted from the contract area, and any other monies deemed reasonably attributable to the operation of the contract in accordance with the financial rules, regulations and procedures of the Authority.

(h) The term "contractor's development costs" shall mean:

(i) All expenditures incurred prior to the commencement of commercial production which are directly related to the development of the productive capacity of the contract area and the activities related thereto for operations under the contract, in conformity with generally recognized accounting principles, including *inter alia*, costs of machinery, equipment, ships, construction, buildings, land, roads, prospecting and exploration of the contract area, research and development, interest, required leases, licences, fees; and

(ii) Similar expenditures to those described in subparagraph (i) above, incurred subsequent to the commencement of commercial production, necessary to carry out the plan of work, except those chargeable to operating costs.

(i) The proceeds from the disposal of capital assets and the market value of those capital assets which are no longer required for operations under the contract and which are not sold shall be deducted from the contractor's development costs during the relevant accounting year. When these deductions exceed the contractor's development costs the excess shall be added to the contractor's gross proceeds.

(j) The contractor's development costs referred to in subparagraphs *(h)* (i) and *(n)* (iv) shall be recovered in 10 equal annual instalments from the date of commencement of commercial production. The contractor's development costs incurred subsequent to the commencement of commercial production, referred to in subparagraphs *(h)* (ii) and *(n)* (iv) shall be recovered in 10 or fewer equal annual instalments so as to ensure their complete recovery by the end of the contract.

(k) The term "contractor's operating costs" shall mean all expenditures incurred after the commencement of commercial production in the operation of the productive capacity of the contract area and the activities related thereto, for operations under the contract, in conformity with generally recognized accounting principles, including, *inter alia*, the fixed annual fee or the production charge, whichever is greater, expenditures for wages, salaries, employee benefits, utilities materials, services, transportation, processing and marketing costs, interest, utilities, preservation of the marine environment, overhead and administrative costs specifically related to the operation of the contract, and any net operating losses carried forward or backward as specified below. Net operating losses may be carried forward for two consecutive years except in the last two years of the contract when they may be carried backward to the two preceding years.

(l) In the event of the contractor engaging in mining, transportation of nodules and production of processed and semi-processed metals, the term "development costs of the mining sector" shall mean the portion of the contractor's development costs which is directly related to the mining of the resources of the contract area, in conformity with generally recognized accounting principles, and the financial rules, regulations and procedures of the Authority, including, *inter alia*, application fee, annual fixed fee, and, where applicable, costs of prospecting and exploration of the contract area, and a portion of reseach and development costs.

(m) The term "return on investment" in any accounting year shall mean the ratio of attributable net proceeds in that year to the development costs of the mining sector. The development costs of the mining sector for the purpose of this subparagraph shall include expenditures on new or replacement equipment in the mining sector less the original cost of the equipment replaced.

(n) In the event of the contractor engaging in mining only:

(i) The term attributable net proceeds shall mean the whole of the contractor's net proceeds;

(ii) The term contractor's net proceeds shall be as defined in subparagraph *(f)* above;

(iii) The term contractor's gross proceeds shall mean the gross revenues from the sale of the nodules and any other monies deemed to be reasonably attributable to the operation of the contract in accordance with the financial rules, regulations and procedures of the Authority;

(iv) The term contractor's development costs shall mean all expenditures incurred prior to the commencement of commercial production as in subparagraph *(h)* (i), and all expenditures incurred subsequent to the commencement of commercial production, as in subparagraph *(h)* (ii), which are directly related to the mining of the resources of the contract area, in conformity with generally recognized accounting principles;

(v) The term contractor's operating costs shall mean the contractor's operating costs as in subparagraph *(k)*, which are directly related to the mining of the resources of the contract area in conformity with generally recognized accounting principles;

(vi) The term return on investment in any accounting year shall mean the ratio of the contractor's net proceeds in that year to

the contractor's development costs. Contractor's development costs for the purpose of this subparagraph shall include expenditures on new or replacement equipment less the original cost of the equipment replaced.

(*o*) The costs referred to in subparagraphs (*h*), (*k*), (*l*) and (*n*) above, in respect of interest paid by the contractor may only be allowed if, in all the circumstances, the Authority approves, pursuant to article 4, paragraph 1, the debt-equity ratio and the rates of interest as reasonable, having regard to existing commercial practice.

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

7. (*a*) The term "processed metals", referred to in paragraphs 5 and 6 above, shall mean the metals in the most basic form in which they are customarily traded on international terminal markets. For this purpose, the Authority shall specify, in the financial rules, regulations and procedures, the relevant international terminal market. For the metals which are not traded on such markets, the term "processed metals" shall mean the metals in the most basic form in which they are customarily traded in representative arm's length transactions;

(*b*) In the event of the Authority being unable otherwise to determine the quantity of the processed metals produced from the nodules extracted from the contract area referred to in paragraphs 5 (*b*) and 6 (*b*) above, the quantity shall be determined on the basis of the metal content of the nodules extracted from the contract area, processing recovery efficiency and other relevant factors in accordance with the rules, regulations and procedures of the Authority, and in conformity with generally recognized accounting principles.

8. If an international terminal market provides a representative pricing mechanism for processed metals, nodules and semi-processed metals from the nodules, the average price on such a market shall be used. In all other cases, the Authority shall, after consulting the contractor, determine a fair price for the said products in accordance with paragraph 9 below.

9. (*a*) All costs, expenditures, proceeds and revenues and all determinations of price and value referred to in this article 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 paragraph, 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 *Ad Hoc* Group of Experts on Tax Treaties between Developing and Developed 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.

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

11. All costs, expenditures, proceeds and revenues, and all prices and values referred to in this article shall be determined in accordance with generally recognized accounting principles and the financial rules, regulations and procedures of the Authority.

12. The payments to the Authority under paragraphs 5 and 6 above shall be made in freely usable currencies or currencies which are convertible in the major foreign exchange markets into freely usable currencies, 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 5 (*b*). Freely usable currencies shall be defined in accordance with the rules and regulations of the Authority.

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

14. The Authority may, taking into account any recommendations of the Economic Planning Commission and the Legal and 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 1.

15. In the event of a dispute between the Authority and a contractor over the interpretation or application of the financial terms of a contract, either party may submit the dispute to binding commercial arbitration, unless both parties agree to settle the dispute by other means, in accordance with paragraph 2 of article 188.

ANNEX B

Annex III

Statute of the Enterprise

Article 1. Purpose

1. The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to paragraph 2 (*a*) of article 153, as well as transportation, processing and marketing of minerals recovered from the Area.

2. In carrying out its purposes and in the performance of its functions, the Enterprise shall act in accordance with the provisions of the present Convention, including its annexes, and the rules, regulations and procedures of the Authority.

3. In developing the resources of the Area pursuant to paragraph 1, the Enterprise shall, subject to the provisions of the Convention, operate on sound commercial principles.

Article 2. Relationship to the Authority

1. Pursuant to article 170, the Enterprise shall act in conformity with the general policies of the Assembly and the directives of the Council.

2. Subject to the above, the Enterprise shall enjoy autonomy in the conduct of its operations.

3. Nothing in this Convention shall make the Enterprise liable for the acts or obligations of the Authority, or the Authority liable for the acts or obligations of the Enterprise.

Article 3. Limitation of liability

Subject to paragraph 3 of article 10 of this annex, no member of the Authority shall be liable by reason only of its membership for the acts or obligations of the Enterprise.

Article 4. Structure of the Enterprise

The Enterprise shall have a governing board, a director-general and the staff necessary for the performance of its duties.

Article 5. Governing Board

1. The Governing Board shall be composed of 15 members elected by the Assembly in accordance with paragraph 2 (*c*) of article 160. In the election of the members of the Board due regard shall be paid to the principle of equitable geographical distribution. In submitting nominations of candidates for election to the Board, members of the Authority shall bear in mind the need to submit candidates of the highest standard of competence, with qualifications in relevant fields so as to ensure the viability and success of the Enterprise.

2. Members of the Board shall be elected for a period of four years and shall be eligible for re-election. In the election and re-election of the members of the Board, due regard shall be paid to the principle of rotation.

3. Each member of the Board shall have one vote. All matters before the Board shall be decided by a majority of the members of the Board. If a member has a direct conflict of interest on a matter before the Board he shall refrain from voting on the matter.

4. Each member of the Board shall receive remuneration to be paid out of the funds of the Enterprise. The amount of remuneration shall be fixed by the Assembly, upon the recommendation of the Council.

5. Members of the Board shall act in their personal capacity. In discharging their duties they shall not seek or receive instructions from any Government or from any other source. The members of the Authority shall refrain from all attempts to influence any of them in the discharge of their duties.

6. Members of the Board shall continue in office until their successors are appointed or elected. If the office of a member of the Board becomes vacant, the Assembly shall appoint another member for the remainder of the unexpired term.

7. The Board shall function normally at the principal office of the Enterprise and shall meet as often as the business of the Enterprise may require.

8. A quorum for any meeting of the Board shall be two thirds of the members of the Board.

9. Any member of the Authority may ask the Governing Board for

information in respect of its operations which particularly affect that member. The Board shall endeavour to provide such information.

Article 5 bis. *Powers and functions*

The Governing Board shall direct the business operations of the Enterprise. Subject to the provisions of the present Convention and its annexes, the Governing Board shall exercise all the powers necessary to fulfil the purposes of the Enterprise, including powers:

(i) To develop plans of work and programmes in carrying out its activities as provided for in article 170;

(ii) To prepare and submit plans of work to the Council in accordance with paragraph 3 of article 153 and paragraph 2 (*j*) of article 162;

(iii) To authorize negotiations on the acquisition of technology, including that provided for in paragraphs 1 (*b*), 1 (*c*) and 3 of article 5 of annex II and to approve the results of such negotiations;

(iv) To establish terms and conditions and to authorize negotiations for entering into joint ventures and other forms of joint arrangements as provided for in article 8 *bis* and article 10 of annex II, and to approve the results of such negotiations;

(v) To recommend that portion of its net income that should be retained as its reserves in accordance with paragraph 2 (*f*) of article 160;

(vi) To approve the annual budget of the Enterprise;

(vii) To authorize the procurement of goods and services in accordance with paragraph 3 of article 11 of this annex;

(viii) To submit an annual report to the Council as provided for in article 8 of this annex;

(ix) To submit to the Council for the approval of the Assembly rules in respect of the organization, management, appointment and dismissal of the staff of the Enterprise, and to adopt regulations to give effect to such rules;

(x) To elect a Chairman from among its members;

(xi) To adopt its own rules of procedure;

(xii) To borrow funds and to furnish such collateral or other security as it may determine;

(xiii) To enter into any legal proceedings, agreements and transactions and to take any other actions in accordance with article 12 of this annex;

(xiv) To delegate, subject to the approval of the Council, any of its powers to the Director-General and to its committees.

Article 6. Director-General and staff

1. The Assembly shall, upon the recommendation of the Council, and the nomination of the Governing Board, elect the Director-General who shall not be a member of the Board. The Director-General shall be the legal representative of the Enterprise. He shall participate in the meetings of the Board but shall have no vote. He may participate in meetings of the Assembly, and the Council, when these organs are dealing with matters concerning the Enterprise, but shall have no vote at such meetings. The Director-General shall hold office for a fixed term not exceeding five years and may be re-elected for further terms.

2. The Director-General shall be the chief executive of the Enterprise and shall be directly responsible to the Governing Board for the conduct of the business of the Enterprise. Subject to the rules and regulations referred to in article 5 *bis* (ix), he shall be responsible for the organization, management, appointment and dismissal of the staff.

3. The Director-General and the staff of the Enterprise, in the discharge of their duties, shall not seek or receive instructions from any Government or from any other source. They shall refrain from any action which might reflect on their position as international officials of the Enterprise responsible only to the Enterprise. The members of the Authority shall respect the international character of the Director-General and the staff of the Enterprise and shall refrain from all attempts to influence any of them in the discharge of their duties.

4. In appointing the staff, the Director-General shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on an equitable geographical basis.

Article 7. Location

The Enterprise shall have its principal office of business at the seat of the Authority. The Enterprise may establish other offices and facilities in the territories of any member of the Authority with the consent of that member.

Article 8. Provision of reports and information

1. The Enterprise shall, not later than three months after the end of each financial year, submit to the Council for its consideration an annual report containing an audited statement of its accounts and shall transmit to the Council at appropriate intervals a summary statement of its financial position and a profit and loss statement showing the results of its operations.

2. The records, books and accounts of the Enterprise, including its annual financial statements, shall be audited annually by an independent auditor to be appointed by the Council.

3. The Enterprise shall publish its annual report and such other reports as it deems desirable to carry out its purpose.

4. Copies of all reports and statements referred to in this article shall be distributed to the members of the Authority.

Article 9. Allocation of net income

1. Subject to paragraph 3 below, the Enterprise shall make payments to the Authority under article 12 of annex II, or their equivalent.

2. The Assembly shall, on the recommendation of the Governing Board, determine what portion of the net income of the Enterprise shall be retained as its reserves. The remainder shall be transferred to the Authority.

3. During the initial period required for the Enterprise to become self-supporting, which shall not exceed 10 years from the commencement of its commercial production, the Assembly shall exempt the Enterprise from its payments as referred to in paragraph 1 above and shall leave all the net income of the Enterprise in its reserves.

Article 10. Finance

1. The sources of the funds of the Enterprise shall include:

(*a*) Amounts received from the Authority in accordance with paragraph 2 (*b*) of article 173;

(*b*) Voluntary contributions made by States Parties for the purpose of financing activities of the Enterprise;

(*c*) Amounts borrowed by the Enterprise in accordance with the provisions of paragraph 2;

(*d*) Income of the Enterprise through its operations;

(*e*) Other funds made available to the Enterprise to enable it to carry out its functions and to commence operations as soon as possible.

2. (*a*) The Enterprise shall have the power to borrow funds and to furnish such collateral or other security as it may determine. Before making a public sale of its obligations in the markets or currency of a State Party, the Enterprise shall first obtain the approval of that State Party. The total amount of borrowings shall be approved by the Council upon the recommendation of the Governing Board.

(*b*) States Parties shall make every reasonable effort to support application by the Enterprise for loans in capital markets and from international financial institutions.

3. (*a*) The Enterprise shall be assured of the funds necessary to explore and exploit one mine site and to transport, process and market the metals recovered therefrom, namely, nickel, copper, cobalt and manganese, and to meet its initial administrative expense. The said amount shall be recommended by the Preparatory Commission.

(*b*) States Parties shall make available to the Enterprise an amount equivalent to one half of the funds referred to in paragraph 3 (*a*) above by way of long-term interest-free loans in accordance with the scale referred to in paragraph 2 (*e*) of article 160. Debts incurred by the Enterprise in raising the balance of the funds shall be guaranteed by all States Parties in accordance with the said scale.

(*c*) In the event of the financial contribution of States Parties ratifying the Convention being less than the funds assured to the Enterprise under paragraph 3 (*a*), States Parties shall, upon request of the Authority, provide a supplementary contribution by way of a long-term interest-free loan of not more than 15 per cent of the sum referred to in paragraph 3 (*a*) on the basis of the said scale and by way of a debt guarantee of a sum not more than 10 per cent of the sum referred to in paragraph 3 (*a*) on the basis of the said scale.

(*d*) The supplementary contribution referred to in paragraph 3 (*c*) shall be refunded and the debt guarantees referred to in paragraph 3 (*c*) shall be cancelled as and when contributions in accordance with paragraph 3 (*b*) are received from States Parties ratifying the Convention at a later stage.

(*e*) Upon request by the Enterprise, a State Party may provide a guarantee covering debts additional to the amount it has guaranteed in accordance with or on the basis of the said scale. In lieu of debt guarantee, a State Party may make a voluntary contribution to the Enterprise in an amount equivalent to that portion of the debts which it would otherwise be liable to guarantee.

(*f*) The repayment of the interest-bearing loans shall have priority over the repayment of the interest-free loans. The repayment of interest-free loans shall be in accordance with a schedule adopted by the Assembly, upon the recommendation of the Council and the advice of the Governing Board of the Enterprise.

(*g*) Funds made available to the Enterprise by States Parties in accordance with paragraphs 3 (*b*) and 3 (*c*) above, shall be in freely usable currencies or currencies which are convertible in the major foreign exchange markets into freely usable currencies, and shall be exempt from foreign exchange restrictions. Freely usable currencies shall be defined in accordance with the rules and regulations of the Authority.

(*h*) A "debt guarantee" is a promise of each State Party to creditors of the Enterprise to pay, pro rata in accordance with the appropriate scale, the financial obligations of the Enterprise covered by the guarantee following notice by the creditors to the State Party of a default by the Enterprise in payment of those obligations.

4. The funds, assets and expenses of the Enterprise shall be kept separate from those of the Authority. The provisions of this article shall not prevent the Enterprise from making arrangements with the Authority regarding facilities, personnel and services and arrangements for reimbursement of administrative expenses paid in the first instance by either organization on behalf of the other.

Article 11. Operations

1. The Enterprise shall propose to the Council projects for carrying out activities in accordance with article 170 of Part XI of this Convention. Such proposals shall include a formal written plan of work for activities in the Area in accordance with paragraph 3 of article 153, and all such other information and data as may be required from time to time for its appraisal by the Legal and Technical Commission and approval by the Council.

2. Upon approval by the Council, the Enterprise shall execute the project on the basis of the formal written plan of work referred to in paragraph 1.

3. (*a*) To the extent that the Enterprise does not at any time possess the goods and services required for its operations, it may procure and employ them. Procurement of goods and services required by the Enterprise shall be effected by the award of contracts, based on response to invitations to tender, to bidders offering the best combination of quality, price and most favourable delivery time.

(*b*) If there is more than one bid offering such a combination, the contract shall be awarded in accordance with the following principles:

(i) The principle of non-discrimination on the basis of political or similar considerations not relevant to the carrying out of operations with due diligence and efficiency;

(ii) Guidelines approved by the Council with regard to the preferences to be accorded to goods and services originating in the developing countries, including the land-locked or otherwise geographically disadvantaged among them.

(*c*) The Governing Board may adopt rules determining the special circumstances in which the requirement of invitations to bid may in the best interests of the Enterprise be dispensed with.

4. The Enterprise shall have title to all minerals and processed substances produced by it.

5. The Enterprise shall sell its products on a non-discriminatory basis. It shall not give non-commercial discounts.

6. Without prejudice to any general or special power conferred on the Enterprise under any other provision of this Convention, the Enterprise shall exercise such powers incidental to its business as shall be necessary.

7. The Enterprise and its staff shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to carry out the purposes specified in article 1.

Article 12. Legal status, immunities and privileges

1. To enable the Enterprise to fulfil the functions with which it is entrusted, the status, immunities and privileges set forth herein shall be accorded to the Enterprise in the territories of States Parties. To give effect to this principle the Enterprise and States Parties may, where necessary, enter into special agreements for this purpose.

2. The Enterprise shall have such legal capacity as is necessary for the performance of its functions and the fulfilment of its purposes and, in particular, the capacity:

(*a*) To enter into contracts, forms of association, or other arrangements, including agreements with States and international organizations;

(*b*) To acquire, lease, hold and dispose of immovable and movable property;

(*c*) To be a party to legal proceedings in its own name.

3. Actions may be brought against the Enterprise only in a court of competent jurisdiction in the territories of a member in which the Enterprise has an office, has appointed an agent for the purpose of accepting service or notice of process, has entered into a contract for goods or services, has issued securities, or is otherwise engaged in commercial activity. The property and assets of the Enterprise shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgement against the Enterprise.

4. (*a*) The property and assets of the Enterprise, wheresoever located and by whomsoever held, shall be immune from confiscation, expropriation, requisition, and any other form of seizure by executive or legislative action.

(*b*) All property and assets of the Enterprise shall be free from discriminatory restrictions, regulations, controls and moratoria of any nature.

(*c*) The Enterprise and its employees shall respect local laws and regulations in any State or territory in which the Enterprise or its employees may do business or otherwise act.

(*d*) States Parties shall assure that the Enterprise enjoys all rights, immunities and privileges afforded by States to entities conducting business within such States. These rights, immunities and privileges shall be afforded the Enterprise on no less favourable a basis than afforded by States to similarly engaged commercial entities. Where special privileges are provided by States for developing countries or their commercial entities, the Enterprise shall enjoy such privileges on a similarly preferential basis.

(*e*) States may provide special incentives, rights, privileges and immunities to the Enterprise without the obligation to provide such incentives, rights, privileges, or immunities to other commercial entities.

5. The Enterprise shall negotiate with the host countries in which its offices and facilities are located for immunity from direct and indirect taxation.

6. Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this annex and shall inform the Enterprise of the detailed action which it has taken.

7. The Enterprise in its discretion may waive any of the privileges and immunities conferred under this article or in the special agreements referred to in paragraph 1 to such extent and upon such conditions as it may determine.

IV. The Assembly and the Council [26]

1. It was clear from the beginning of this session that the working group of 21 could not take up the issues under this head until it had substantially advanced imperative progress in outstanding issues relating to the system of exploration and exploitation as well as those concerning financial arrangements. There appeared to be some justification for this approach. The negotiations have constantly had to grapple with insistence by the industrialized countries on the protection of their "vital interests", the scope of which has eluded productive definition. This would, in their view, be best achieved by provisions in the treaty which, on the one hand, assured access to resources through "reasonable" financial terms of contracts, as well as security of tenure and of investments, and, on the other, guaranteed at least a collective capability to block any

[26] Report submitted by Mr. Engo, co-ordinator for questions relevant to negotiating group 3.

decisions of the Council that were inconsistent with those interests. The indications appeared to be that the more satisfactory the provisions on either side, the greater the tendency to diminish commensurately the insistence on the other side. Thus, it was considered prudent to suspend negotiations on the decision-making system, which had degenerated into an impossible numbers-game, and investigate possibilities for resolving issues of importance in matters relating to the system of exploration and exploitation as well as the financial arrangements.

2. It was thus impossible to allocate more than two meetings to issues connected with the Assembly and the Council within the time-limit. However, on the basis of suggestions made within the working group of 21, the Chairman of the First Committee, who co-ordinated negotiating group 3 matters, carried out consultations on the questions discussed. The main areas covered by these consultations were drawn from suggestions made by the Chairman in document A/CONF.62/C.1/L.26.[5] They dealt with, in order, suggested amendment to paragraph 2 (*j*) of article 162, suggested amendments to paragraphs 1 and 7 of article 161, and suggested amendments to new paragraph 1 *bis* of article 157, paragraph 4 of article 158, and paragraph 1 and new paragraph 2 (*o*) of article 160.

3. In addition the United States suggestions contained in WG.21/Informal Paper 4, submitted during the eighth session, was introduced. These relate to what appeared to be non-controversial questions of the protection of the marine environment, strengthening article 165 of the revised informal composite negotiating text.

4. In the process of co-ordination with Mr. Koh's endeavours on financial matters, consequential amendments have been proposed to paragraph 2 of article 158 to enable a proper reflection of the scope of functions (transportation, processing and marketing of minerals) outlined in paragraph 1 of article 171.

Paragraph 2 (j) of article 162

5. This subparagraph presents perhaps the only very sensitive issue relating to the question of interrelationship between the Council, a main organ, and one of its subsidiary organs, the Legal and Technical Commission. It provides not only for the expeditious approval of formal written plans of work following the review of the Legal and Technical Commission, but also that such plans of work shall be deemed to have been approved unless a decision to disapprove it is taken within 60 days of its submission by the Commission.

6. A new suggestion made by the Chairman reporting as co-ordinator, in document A/CONF.62/C.1/L.26, sought to accommodate the serious objections of the developing countries and others who saw the latter provision as eroding the supremacy of the Council over its subsidiary organ. It restricted the operation of a system of automatic approval only to plans of work with no competing application. It also prescribed that a plan may be deemed to have been approved unless a proposal for its approval or disapproval had been voted upon within 60 days.

7. The *ad referendum* or tentative approval of this new approach reported last session was not sustained during the current session. In spite of efforts to improve the foundations of the assumed consensus, no acceptable text emerged. It is for this reason that no suggestion is submitted for consideration with a view to a revision in the revised informal composite negotiating text.

Paragraph 1 of article 161

8. The issue addressed here was the problem of medium-sized mainly Western countries which considered that their chances of being elected to the Council with reasonable frequency was jeopardized by the current categorization of special interests. It was proposed that the Council should be enlarged to ensure a minimum of two seats for each region under subparagraph (*e*). It was generally felt that this issue could not fruitfully be considered until the hard-core issue of the decision-making system had been resolved. Consequently no significant discussion took place.

Paragraph 7 of article 161

9. Reference must be made to the relevant report submitted in document A/CONF.62/C.1/L.26 relating to the above and concerning the decision-making system in the Council. An attempt was made in proposals therein to identify so-called sensitive issues over which the industrialized countries would claim to have "vital interests". Provision was made for questions of substance arising under paragraphs 2 (*b*) to (*i*), (*o*) and (*r*) of article 162, paragraph 2 (*t*), in cases of non-compliance by a contractor or a sponsor, paragraphs 2 (*u*) and 2 (*v*), provided that orders issued under this paragraph may be binding for no more than 10 days unless confirmed by a decision taken in accordance with paragraph 7 (*c*) of article 161, and paragraphs 2 (*x*) and (*y*) shall be taken by a two-thirds majority of the members present and voting, provided that such majority included a majority of the members of the Council.

10. The report indicated a new trend for revising paragraph 7 which sought to promote the resolution of particularly sensitive issues by means of consensus. It would prescribe that decisions on all other questions of substance would be taken by a two-thirds majority of members present and voting, provided that a yet-to-be-negotiated number of members had not cast negative votes. It also provided that when the issue arose as to whether the question was within the subparagraph or not, the question would be treated as within the subparagraph unless otherwise decided by the Council by the majority required for questions under that subparagraph.

11. It was clear during the negotiation that the formula was not entirely satisfactory to the negotiating factions. The major problem was to agree on the unspecified blocking vote.

12. The negotiations and subsequent consultations sought an alternative approach to this problem which de-emphasized the numbers-game and sought the basic elements on which a consensus could be based.

13. It was common ground that all decisions on questions of procedure should be taken by a simple majority of the members present and voting. It appeared also that subject to certain conditions the majority prescribed for questions of substance should be two thirds of the members present and voting, provided that such majority included a majority of the members participating in that session. Some delegations felt that, if those conditions were met, they were even in a position to consider a three-fourths majority favourably.

14. A search for the elements of such conditions was seriously made in an atmosphere conducive to progress. Broadly speaking those elements which appeared to command consensus consisted of:

(*a*) The necessity for attaining consensus or decisions;

(*b*) An over-all majority (as indicated above);

(*c*) Protective blocking minority for interest groupings;

(*d*) Protective blocking by geographical regions—i.e. ensuring that no decisions are taken which are opposed by the totality of any given regions.

15. A separate and important attendant question was the application of the resultant formula to specific issues. The developing countries emphasized that a pre-condition to considering special procedures for so-called "vital interest" areas was that these should be identified in clear terms, in the way of the recommendations in document A/CONF.62/C.1/L.26.

16. With regard to all the elements agreed upon for review, a constructive forward step itself, it was generally felt that any acceptable compromise to be reached must recognize a combination of the four of them outlined above. The mechanism must ideally emphasize the desirability of promoting or en-

couraging consensus as a first resort. There was no disagreement on this point.

17. There was also a common understanding on the second principle, that decisions should be taken by some over-all majority within the Council. In this connexion, suggestions were made to provide for a simple majority, a two-thirds majority or a three-fourths majority. A two-thirds majority seemed to be the most favoured: however, it was suggested that the final figure might be dependent upon a determination of the other qualifications for the decision-making process.

18. The third principle upon which there was common understanding was that there would be a need to protect the special economic interests of the members of the first four categories, subparagraph (*a*) to (*d*) in paragraph 1 of article 161, where these would not otherwise be protected by the provisions of above-mentioned over-all majority for taking decisions. Various proposals emerged in this respect, and the common feeling was that some system of concurrent majorities should be provided, although the specifics of that system could not be agreed upon. Whether such a system is formulated taking into account affirmative votes or negative votes, the resolution of the question, in the final evaluation, rests upon the determination of the number of votes.

19. Many proposals were made regarding the concurrent majorities system. In particular, it was suggested that no decision could be taken unless there is a simple majority in each of three of the first four categories, as stated in subparagraphs (*a*) through (*d*). In the alternative, a suggestion was made to consider that no decision was taken unless there is a simple majority in three of the first four categories taken as a whole. Several other suggestions were made which were variants of these two main approaches, but no agreeable formulation could be reached. The basic agreement regarding that broad approach involved was in itself a major attainment.

20. The fourth element relating to the role of geographical regions was new and generated considerable interest. The suggestion to include the concept of a blocking vote by the regions referred to in paragraph 1 was accepted on terms. Some saw this as a means of ensuring that the so-called political and social interests of regions could be protected. The over-all idea would confer on the unanimous decision of a region the right of blocking through the collective casting of negative votes. There was substantial objection to this approach on the grounds that this would be inequitable given the difference in size of the various regional groups. Some regions would be represented by less than four in the Council. It was suggested that some figure might be added to the regional group provision so that the blocking number would not be too small in the case of such smaller geographical regions. No agreement was reached on this principle, because of this factor.

21. In addition to the proposals made which took specific account of the four principles mentioned above, a proposal was made which provides for an over-all majority of three fourths of the Council and a concurrent majority by more than 50 per cent of the producers and consumers of minerals derived from the area. This proposal was discussed to some extent but the method for calculation of numbers under this approach remains to be determined, and no agreement was reached upon it.

22. Although progress was made in the discussion of the above approaches, no single compromise formulation could be reached which would command the widespread and substantial support. It became clear that further negotiations would be needed on this important question. In the meantime, it would be safe to indicate that perhaps, with the resolution of a number of outstanding problems elsewhere, the basis of an emerging consensus may well have appeared on the distant horizon. It is based on this cautious optimistic note that the revised informal composite negotiating text has been reproduced unchanged but with an indicative foot-note.

Article 157

23. The suggested amendment, adding a new paragraph 1 *bis*, was generally agreed upon. It reiterated the scope of the powers and functions of the Authority. In particular it seeks to include other relevant powers and functions of the Authority deriving from Parts of the convention other than Part XI, as well as relevant annexes to the convention. There was consensus for this draft.

Article 158

24. The revision to paragraph 2 has been described above. The revision to paragraph 4 seeks to settle the conflict regarding the distribution of powers between the principal organs of the Authority. It was agreed as drafted.

Article 160

25. The amendments to this article were explained in the report contained in document A/CONF.62/C.1/L.26 submitted to the First Committee at the eighth session of the Conference. The new suggestions to the suggestions therein are underlined and are intended to assure further clarity and proper reference to the inclusion of all relevant provisions of the convention whether or not they derive from Part XI.

26. With regard to the new paragraph 2 (*o*), reference is made to the report to the First Committee at the eighth session as aforesaid.

ANNEX

Article 157

Add new paragraph 1 *bis*:

"The powers and functions of the Authority shall be those *expressly conferred upon it by the relevant provisions of the present* Convention. The Authority shall have such incidental powers, consistent with the provisions of the present Convention, as are implicit in and necessary for the performance of these powers and functions with respect to activities in the area".

Article 158

Revise paragraph 2 to read:

"There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in paragraph 1 of article 170".

Revise paragraph 4 to read:

"The principal organs shall each be responsible for exercising those powers and functions which have been conferred upon them. In exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ".

Article 160

Revise paragraph 1 to read:

"The Assembly, as the sole organ of the Authority consisting of all the members, shall be considered the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided for in the present Convention. The Assembly shall have the power to establish general policies in conformity with the relevant provisions of the Convention on any question or matter within the competence of the Authority".

Add a new paragraph 2 (*o*)

"Discussion of any question or matter within the competence of the Authority and decisions as to whether the Assembly or any other organ shall deal with any such question or matter not specifically entrusted by the provisions of this Convention to a particular organ of the Authority, consistent with the distribution of powers and functions among the organs of the Authority".

Article 161

7. All decisions on questions of substance shall be taken by a three-fourths majority of the members present and voting, provided that such majority includes a majority of the members participating in that session. When the issue arises as to whether the question is one of substance or not, the question shall be treated as one of substance unless otherwise decided by the Council by the majority required for questions of substance. Decisions on matters of procedure shall be decided by a majority of the members present and voting.

Article 162

Paragraph 2

In subparagraph (*f*), after "of the Authority" add "and within its competence".

Revise paragraph 2 (*i*) to read:

"Issue directives to the Enterprise in accordance with article 170".

Revise paragraph 2 (*r*) to read:

"Make recommendations to the Assembly concerning policies on any question or matter within the competence of the Authority".

Article 165

Revise paragraph 1 to read:

"Members of the Legal and Technical Commission shall have appropriate qualifications such as those relevant to exploration, exploitation and processing of mineral resources; oceanology; protection of the marine environment or economic or legal matters relating to ocean mining and other relevant fields of expertise. The Council shall endeavour to ensure that the membership fulfils the need for all appropriate qualifications in the Commission as a whole".

After paragraph 2 (*h*) add the following:

"(*i*) Make recommendations to the Council regarding the establishment of a monitoring programme which shall observe, measure, evaluate and analyse by recognized scientific methods on a regular basis the risks and effects of activities in the Area with respect to pollution of the marine environment; ensure that existing regulations are adequate and complied with and co-ordinate the implementation of the monitoring programme approved by the Council;

"(*j*) Recommend to the Council that proceedings should be initiated on behalf of the Authority before the Sea-bed Disputes Chamber, in accordance with the present Part and annexes thereto as provided in article 187;

"(*k*) Upon a finding by the Sea-bed Disputes Chamber on proceedings resulting from subparagraph (*j*) above, make recommendations to the Council with respect to measures to be taken;

"(*l*) Make recommendations to the Council to issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activity in the Area. Such recommendations shall be taken up by the Council on a priority basis;

"(*m*) Make recommendations to the Council to disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment;

"(*n*) Make recommendations to the Council regarding the direction and supervision of a staff of inspectors who shall inspect activities in the Area to determine whether the provisions of this Part of the present Convention, the rules, regulations and procedures prescribed thereunder, and the terms and conditions of any contract with the Authority are being complied with".

V. Settlement of disputes relating to Part XI[27]

1. The mandate of the group of legal experts as determined by the Conference was to conduct an examination of the outstanding issues on the settlement of disputes relating to Part XI and the relevant annexes. The Chairman was expected to submit a report to the President of the Conference and the Chairman of the First Committee on the outcome of the negotiations conducted by him.

2. At the end of its work during the first part of the eighth session, the Chairman presented his report to the Chairman of the First Committee and the President, setting out fully the status of the work at the conclusion of that part of the session. The report is contained in document A/CONF.62/C.1/L.25 and Add.1.[28] In that report, proposals were made for the redrafting of the articles in section 6 of Part XI.

3. As explained by the Chairman in that report, articles 186 and 187 in document A/CONF.62/WP.10/Rev.1, regarding the establishment of the sea-bed disputes chamber and its jurisdiction, were found broadly acceptable by most members of the group. Article 190, concerning the limitations of jurisdiction with regard to decisions of the Authority, which is closely linked to article 187, carried the same degree of acceptance. Article 189, regarding advisory opinions, was also widely accepted. The consequential clarifications effected in article 159, paragraph 10, regarding the power of the Assembly to request advisory opinions, were equally acceptable.

4. Owing to the limited time available, the other articles of section 6 were not discussed fully by the group and the Chairman reported that four issues remained outstanding at the end of the session.

5. During the resumed eighth session in New York, the group took up the first three of these outstanding issues, namely, the manner of selection of members of the sea-bed disputes chamber of the Law of the Sea Tribunal and the necessary changes to annex V; the issue regarding *ad hoc* chambers of the sea-bed disputes chamber; and the liability of the Authority in cases of staff members violating their duty not to disclose confidential information.

6. The compromise texts emerging from the negotiations, along with the report of the Chairman at the end of the resumed eighth session, are to be found in document A/CONF.62/C.1/L.26.[29] A clear consensus was reached in the Group on the text regarding the first of these issues, concerning the selection of the members of the sea-bed disputes chamber. The text presented on the second of these issues, regarding *ad hoc* chambers, offered the best prospects for widespread support. There was agreement within the group on the draft proposal regarding the third issue, concerning liability of the Authority for acts of its staff members.

7. The fourth controversial issue was the suitability of commercial arbitration for contractual disputes. This remained outstanding at the end of the resumed eighth session.

8. From the commencement of the ninth session, the Chairman conducted intensive consultations on this issue, and it appeared that no useful purpose would be served in convening the group of legal experts as a whole, unless and until his consultations revealed that there could be agreement on the principles to be applied in such cases. The primary difficulty arose from the fact that some interested delegations desired to ensure commercial arbitration in every contractual dispute under paragraph 3 (*a*) of article 187, whether it involved the interpretation of the convention or not, and whether the parties to the contract agreed on this mode of settlement or not. However, a majority of delegations was clearly unwilling to permit a departure from the principle, stressed by them, that any issue of interpretation or application of the convention could only be resolved by the sea-bed disputes chamber. In their view, that was the only means by which it would be possible to achieve unity of jurisprudence in respect of this innovative part, namely, Part XI. This group of delegations held the view that where parties to a contract had agreed, within the contract itself, on a method of settling purely commercial or technical disputes, then that method could be resorted to. They added a proviso, however, to the effect that when commercial arbitration was resorted to, the arbitral tribunal would not be permitted to interpret the convention.

9. As a result of the Chairman's continued consultations throughout the first three weeks of the session, it finally appeared that the different interests were willing to make substantial concessions. There emerged a broad agreement on the principles that could be applied to resolve this issue. There also emerged a clear possibility of agreement on the manner in which these principles could be implemented. This was accompanied by movement towards agreement on the procedural rules to be applied in such commercial arbitration.

10. Therefore, on 20 March 1980, the Chairman convened

[27] Report submitted by Mr. Wuensche, Chairman of the group of legal experts on the settlement of disputes relating to Part XI.

[28] See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XI.

[29] *Ibid.*, vol. XII.

a meeting of the group to outline these proposals. The solution was not the making of any single person or delegation but the co-ordination by the Chairman of a combination of inventive suggestions and compromises from all quarters. The proposal presented by the Chairman was to the effect that, in principle, commercial arbitration would be appropriate for contractual disputes of a commercial or technical nature, provided, however, that the unity of jurisprudence regarding the interpretation of part XI should be maintained at all costs, by providing exclusive jurisdiction regarding such interpretation in the sea-bed disputes chamber. To maintain these two fundamental concepts, without one infringing on the other, the problem was approached in the following manner: to set out the principles that apply; to set out the manner in which these principles should be implemented; and to provide flexibility in determining the arbitration rules to be applied.

(a) *The principles.* Four essential principles are involved, which are as follows: (i) contractual disputes could be submitted to commercial arbitration at the request of a party; (ii) subject to the proviso that the parties have not agreed otherwise in the contract or at any time thereafter; (iii) a commercial arbitral tribunal would not be competent to determine questions of interpreting the convention; and (iv) where such a commercial dispute involves the interpretation of Part XI, that question must be referred to the sea-bed disputes chamber for a ruling.

(b) *Manner of implementing the principles.* In implementing these principles the following guidelines would apply: (i) should the arbitral tribunal find at any time that its decision would depend on a ruling of the sea-bed disputes chamber, then the arbitral tribunal must obtain such a ruling from the chamber; (ii) when the arbitral tribunal is making its award in such a case, it must be consistent with the ruling of the sea-bed disputes chamber; (iii) a ruling may be sought, at the request of a party or *proprio motu*, whenever the tribunal determines that its decision depends upon it.

(c) *Suitable arbitration rules.* In order to maintain flexibility on the arbitral rules, the following three approaches were merged into one: (i) where the parties have agreed in the contract or later agree on the arbitration rules to be applied, such agreement would prevail; (ii) in other cases, the rules of the United Nations Commission on International Trade Law should apply; (iii) should the Authority find these rules unsuitable, or practice prove them inadequate, it could prescribe any additional arbitration rules in adopting its rules, regulations and procedures.

11. When presented to the group, this proposal appeared to be widely acceptable, and the group authorized the Chairman to prepare a draft text on that basis, for consideration at its next meeting.

12. Accordingly, at a meeting held on 21 March, the Chairman submitted a compromise formulation for paragraph 2 of article 188 (see GLE/3, 20 March 1980). The proposal received widespread and substantial support in the group.

13. To summarize the outcome of the group's negotiations on the whole of section 6, together with the consequential changes to related articles and the related annexes, it is necessary to identify the provisions concerned, which are as follows:

(*a*) Articles 186, 189, 190 and paragraph 10 of article 159 (see A/CONF.62/WP.10/Rev.1);

(*b*) Article 187, paragraph 1 of article 188 and article 191, and the related article 168 and article 21 of annex II, and 4, 36, and 36 *bis* of annex V (see A/CONF.62/C.1/L.26);

(*c*) Paragraph 2 of article 188 (see annex).

These provisions constitute a closely interrelated and comprehensive system for the settlement of sea-bed disputes and enjoy such widespread and substantial support that, in the assessment of the Chairman, they reflect a consensus *ad referendum* to the rest of the package. They are presented to the First Committee and the plenary for formal approval prior to inclusion in the revision of the informal composite negotiating text.

14. Other matters considered by the group were:

(*a*) At the eighth session, a suggestion had been made that consideration be given to the question of jurisdiction over labour disputes involving employees of the Authority and the Enterprise. This included questions of workmen's compensation and collective bargaining. There was insufficient time to consider these issues, though they were considered to be of importance. The group felt that, in any event, it would be more appropriate that they form the subject of administrative regulations to be prescribed by the Authority. This would also be in keeping with the United Nations practice where Staff Regulations and Rules govern not only officials but technical project personnel too, with respect to various aspects of labour relations. The question was considered too complex to conduct a detailed examination. It was therefore deferred on the clear understanding that these matters be brought to the notice of the Conference and be dealt with in an appropriate fashion and at an appropriate time by the preparatory commission and the Authority;

(*b*) The only issue involved in paragraph 3 (*a*) of article 187 was the question of joint ventures and joint arrangements. The Chairman pointed out that where joint ventures were distinct and independent legal personalities, then the reference to "juridical persons" in the introductory sentence of paragraph 3 would cover the case adequately. If joint ventures or joint arrangements involved separate persons, each would be a separate natural or juridical person and would not have to be specially provided for. In either case additional provision is not required;

(*c*) A suggestion was made at the beginning of the group's meeting on 21 March 1980, regarding paragraph 1 of article 188 concerning the *ad hoc* chambers. In the view of a few delegations that intervened, this required further negotiation. In their view, *inter alia*, the system was too complex and varied and, rather than providing for chambers within the sea-bed disputes chamber, they suggested that the two alternatives in that paragraph should only refer to chambers of the Law of the Sea Tribunal. Therefore they expressed reservations as regards paragraph 1 of that article;

(*d*) A certain delegation also expressed a desire to incorporate minor drafting changes, for the purposes of clarification, in article 190. In response, another delegation requested that no further changes should be made in any article of section 6, as the texts prepared by the group represented a delicate compromise which could be easily destroyed by any attempt to revise them.

Chairman's recommendations

15. The Chairman wishes to draw the attention of the First Committee and the Plenary to the following additional matters that warrant consideration and appropriate action. First, the text of the proposal for paragraph 2 of article 188 requires that the sea-bed disputes chamber should give rulings when requested by an arbitral tribunal; an appropriate provision should therefore be included in annex V, empowering the sea-bed disputes chamber to do so. Article 40 of annex V was referred to in the discussion of the group as an appropriate place to incorporate such a provision. Secondly, paragraph 2 (*c*) of article 188 provides for the Authority to prescribe arbitration rules in the rules, regulations and procedures adopted by it. This would require an appropriate amendment of article 16 of annex II to enable the Authority to do so.

16. To the extent possible, the group has considered those aspects of settlement of disputes as appeared important and directly relevant to its mandate. The questions referred to in paragraph 15 above and other dispute settlement provisions within the text of the First Committee have not been addressed

by the group and should it be considered necessary such additional negotiations could be carried out by it. This could include the further consideration of the question of labour disputes.

17. In conclusion, the Chairman would like to thank all members of the group of legal experts for their very constructive effort and their co-operation. I would also express my appreciation to the Chairman of the First Committee, Mr. Engo, for the constant co-operation and valuable advice he has given me. Last but not least, I must thank the members of the secretariat, Mr. Chitty and Miss Hazou, who have worked very closely with me. I am also grateful to Mrs. Barakos for her able assistance.

ANNEX

Proposal of the Chairman of the group of legal experts on the settlement of disputes relating to Part XI

Article 188

2. (*a*) Disputes concerning the interpretation or application of a contract referred to in paragraph 3 (*a*) of article 187 shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless at any time the parties to the dispute otherwise agree or have agreed. A commercial arbitral tribunal, to which such dispute is submitted, shall have no jurisdiction to determine any question of interpretation of the present Convention. When such a dispute also involves a question of the interpretation of part XI of the present Convention and the annexes relating thereto, with respect to activities in the area, such question shall be referred to the Sea-Bed Disputes Chamber for a ruling.

(*b*) If, at the commencement of or in the course of such arbitration, the arbitral tribunal determines, either at the request of any party to the dispute or *proprio motu*, that its decision depends upon a ruling of the Sea-Bed Disputes Chamber, the arbitral tribunal shall refer such question to the Sea-Bed Disputes Chamber for such ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the Sea-Bed Disputes Chamber.

(*c*) Unless the parties to the dispute otherwise agree, in the absence of a provision in the contract on the arbitration procedure to be applied in such a dispute, the arbitration shall be conducted in accordance with the arbitration rules of the United Nations Commission on International Trade Law or other arbitration rules as may be prescribed in the rules, regulations and procedures adopted by the Authority.

DOCUMENT A/CONF.62/C.1/L.27/ADD.1

[*Original: English*]
[*1 April 1980*]

The co-ordinator of negotiating group 1 pursued further negotiations following the submission of the report to the co-ordinators of the working group of 21 to the First Committee.

These negotiations led him to believe that it would be helpful for further negotiations if certain improvements could be incorporated in the text proposed in document A/CONF.62/C.1/L.27 (Part II).

These proposed changes are as follows:

Article 150, in the introductory paragraph:

For "shall be carried out as provided" read "shall, as specifically provided in this Part, be carried out."

Article 155, paragraph 5:

For "three-fourths" read "two-thirds".

Annex II, article 5:

In paragraph (*b*), after "conditions." add "If such assurance is not obtained, the technology in question shall not be used by the operator in carrying out activities in the area" and at the end of the paragraph add the following foot-note:

"The question of re-introducing sanctions referred to in paragraph 19 of the present report should be further considered".

In subparagraph (*c*), replace the last sentence with "Rights from the owner shall be considered relevant to the applicant's qualifications for any subsequent proposed plan of work" and at the end of the paragraph add the following foot-note:

"The question of re-introducing sanctions referred to in paragraph 19 of the present report".

In article 151, at the end of subparagraph (*b*) (iii), add a foot-note as follows:

"Details of this paragraph require further consideration".