The attached report addressed to the President of the Conference and the Chairman of the First Committee by Minister Evensen on the results of the informal intersessional consultations held in Geneva from 28 February to 11 March 1977 under his chairmanship is hereby forwarded to the delegations of States participating in the Conference, in conformity with the decision taken at the 76th meeting of the Conference on 17 September 1976.

H.E. Mr. Hamilton Shirley Amersinghe
President of the Third United Nations Conference on the Law of the Sea

H.E. Minister Paul Bemba Eno
Chairman of the First Committee
Third United Nations Conference on the Law of the Sea

Informal consultations in Geneva, 28 February-11 March 1977, on matters relating to the First Committee of the Law of the Sea Conference, in particular the system of exploitation

I have pleasure in submitting to you the report set out below on the intersessional consultations which I had the honour of chairing in Geneva from 28 February to 11 March 1977.

I. Background and general information

The general background for the meeting was the widespread feeling that further progress in the Conference now hinges particularly on the questions pertaining to the sea-bed and ocean floor beyond national jurisdiction. The need for intersessional consultations on this issue was expressed in a number of statements at the conclusion of the last session of the Conference. I refer inter alia to the statement made at that time by the Chairman of the First Committee, the distinguished representative of Cameroon.

In response to this situation the Secretariat, acting at my request, convened the meeting in Geneva through its letter of 17 December 1976, which was sent to all heads of delegation of States participating in the Conference. Approximately 170 persons from 25 States participated (Enclosure 1). In keeping with the normal tradition for such intersessional activities the meetings were completely informal. The discussion was of a personal character and did not commit any delegations by the statements made.

Prior to the meetings I circulated to all heads of delegation some suggested compromise formulations, elaborated by me and tentative in form and contents, pertaining to articles 22, 23 and certain related provisions of the annex (Enclosure 2). I emphasized that these draft formulations were not meant to be regarded as an alternative to the RBCM, but only as an attempt to identify a possible approach to compromise solutions on points which had proved difficult during the last session of the Conference. I also emphasized that these new
formulations should not have any kind of priority in the discussion vis-à-vis other new proposals that had been—or might be—made.

The meetings addressed themselves to five key elements of the system of exploitation. These were:

1. The main provisions governing the award of contracts of exploration and exploitation (articles 22-23 and related provisions of annex I).
2. The rules on the financing and setting up of the Enterprise.
3. The resource policy provisions (article 9).
4. The issue of a permanent versus transitional régime, including the question of a review clause.
5. The dispute settlement aspects.

Of these, the fifth issue was dealt with only in a cursory manner, though a number of important interventions were made. As to items 1 and 4, these were to a large extent joined in the discussion. I shall therefore join them together also in this report.

In trying to sumarize the gist of the discussion on each of these issues I shall not try to report in an exhaustive manner. I apologize in advance both for such faults of omission as I will undoubtedly be guilty of, and also for perhaps in many cases doing less than justice to the views expressed.

II. Provisions on award of contracts and on review conference

With regard to the provisions governing the award of contracts the main known positions were again reiterated by participants as their point of departure. Thus one group of participants emphasized the need for rules which would give States, and private entities sponsored by States, a clear right to carry out production in the area.

Another group of participants took the position that the question of the extent to which activities by States and private entities should occur, should be for the Authority to decide. Willingness was nevertheless expressed to consider a "mixed system", giving a right to carry out activities also for States and private entities, provided (1) that this system would apply only in a transitional period and (2) that the need to equip the Enterprise with the necessary finance and technology would be met in a satisfactory manner.

From these points of departure, a number of qualifications were introduced in the discussion, pointing in the direction of a possible compromise. Of particular importance in this connexion was a proposal submitted by Ambassador Castañeda of Mexico (Enclosure 3). The possible compromise emerging from these discussions, was composed of the following main elements:

(a) A mixed system which would ensure the right to conduct activities of exploration and exploitation in the area both for the Authority, through its Enterprise, and for States and private entities.

(b) The duration of this mixed system to depend on the decisions made at a review conference which would be convened automatically 20 or 25 years after the entry into force of this part of the Convention.
(c) The mandate of this review conference to be limited in a way which in effect would amount to a predetermination of some key principles in the permanent régime.

(d) Viable solutions for the financing and setting up of the Enterprise, ensuring its ability to enter into operations at an early stage.

A compromise solution consisting of these elements seemed to attract fairly broad support and would be worth while to explore further. In order to find a solution on this basis which could be accepted by all sides as being sufficiently balanced it would with regard to the review aspects seem desirable to focus the further negotiations particularly on the following three main questions:

1. How far should one go in limiting the mandate of the future review conference by predetermining the nature of the permanent régime?

2. Under what rules of procedure would the future review conference operate with regard to its decision-making, and what would be the legal effect of its decisions?

3. Should contracts with the Authority entered into before the holding of the review conference be subject to such changes as might follow from this conference?

Particularly with regard to the last of these three questions, opinions were sharply divided. Some felt that contracts made in the initial period should expire or be phased-out after a certain date. Others felt that this would put at an undue disadvantage those States and private entities who will not be in a position to acquire contracts in the first 10 to 15 years.

On the concrete provisions which will govern the award of contracts we had a paragraph by paragraph discussion of the suggested compromise formulae circulated by me (Enclosure 2). I shall not include in this general report all the amendments which were suggested. The main points should, however, be noted.

Thus with regard to article 22 of my suggested compromise text a number of participants suggested that paragraph 1 should be amended so that it would make clear that the Authority would have the main responsibility not only for organizing and controlling, but also for conducting, the activities in the area. Here several participants made the point that an amendment in this direction would not necessarily be incompatible with the retention of a clear right to contracts for States and private entities. Under this view, States and private entities conducting activities in the area under a contract with the Authority would be regarded as acting on the Authority's behalf, but would nevertheless have a right to such contract, in accordance with the provisions of the annex.

Some representatives went further and expressed the view that activities by States and private entities under article 22, paragraph 2 (ii) should occur only "as determined by the Authority". Another group of participants expressed their strong disagreement with this suggestion. In their view this would be tantamount to removing the right to contract with the Authority which must be an essential ingredient in any package solution.

At this point in the discussion a paper was submitted by some participants containing the outlines of a model for an exploitation system which might meet the basic requirements both of developing and of industrialized countries (Enclosure 4).
In connexion with article 22 mention must also be made of the difficulties which some participants have with regard to the use of the word "control" in paragraph 1 and "controlled" in paragraph 4. These participants felt that the control referred to, should be limited to fiscal and administrative aspects and that therefore the word "supervision" would be more appropriate.

With regard to article 23 the main question discussed was whether paragraph 1 should be included. A number of participants felt that article 22 would be a more appropriate placing for this provision, while others preferred to place it in article 5. With regard to the substance of the article a number of points and suggestions were made which I shall not take up in this general report.

Coming to annex I, we had a long discussion on the suggested new paragraph 8, dealing specifically with activities conducted through the Enterprise. Here the crux of the matter was whether the wording should be formulated in such a manner as to clearly envisage the need for a number of special rules for the Enterprise. Those participants who favour the Enterprise being placed in a non-preferential footing as compared to States and other entities, were anxious to avoid formulations which might be regarded as pointing in the direction of separate rules for the Enterprise.

The opposing view was expressed by participants from the Group of 77 who stated that in their opinion the new paragraph was important as an "embryo" provision, to be supplemented by other provisions giving the Enterprise a special position.

In any case there seemed to be agreement that the annex should make clear, either by positive or negative definition, which of its rules would be applicable also to the Enterprise. This clarification need not, however, necessarily be done in the text of the new suggested paragraph 8 but could, in the view of some participants, perhaps be better achieved through a reformulation of paragraph 19.

On the crucial provisions in paragraph 8 bis dealing with the procedure and conditions for the award of contracts, we spent a long time thoroughly debating a number of substantive proposals. I do not think I am doing an injustice to anyone if I say that in this connexion the suggestions made by Professor Lauterpacht (Enclosure 5) were particularly helpful. His proposals went to the heart and structure of the paragraph. In particular he emphasised the need to make a clear distinction between on the one hand requirements as to documentation of facts and the undertaking of certain commitments and on the other hand a definition of the area of negotiation.

My impression from the discussion is that there is now a fairly broad agreement to the effect that it would be desirable to define certain subject-matters as elements to be negotiated, in particular the financial contributions of the contractor, certain operational requirements like the size of area and perhaps also the participation in the project by developing countries and transfer of technology. The negotiation on these issues would of course have to be conducted within the framework of the provisions of the Convention and of all applicable rules and regulations established by the Authority. In the final analysis the scope for negotiation would therefore not depend only on paragraph 8 bis, but on the degree of specificity of those provisions of the Convention and rules and regulations of the Authority that would be relevant in each case. For example, it was pointed out that in the negotiations on the financial contributions of the contractor, the degree of discretionary power of the Authority would depend on the financial arrangements applicable under
paragraph 9 (d). Some participants suggested that the financial arrangements might well differentiate between a minimum and maximum contribution, leaving it to the Authority to extract through negotiations within these limits the best possible terms.

On the procedure for dealing with applications for a contract, the question as to whether the system for receiving applications should be open and public, with a time-limit enabling general competition for the sites again proved to be a difficult one. A number of participants from industrialized countries stated that such a system would not be acceptable for their Governments. They considered it essential to ensure a right for applicants, when after extensive prospecting they have identified an area for exploration and exploitation, to be able to negotiate with the Authority for a contract, without competition from other entities caused by prior publication of the site. Another solution would amount to a serious discouragement of prospecting activities. It was pointed out that few would undertake such prospecting if the data achieved through the work were to be made public before any contract for the area located could be secured.

As to the requirement in paragraph 8 (b) (a) of my suggested formula, that any application should be held by the Technical Commission for 90 days for the purpose of determining whether in that time period any competing applications would be received, this received a fair amount of criticism. Participants from industrialized countries were of the opinion that a "first come-first served rule" would be easier to apply and also more satisfactory for the applicant. They maintained that in practice the chance of a collision of applications with regard to the site would be fairly small. Participants from the developing countries were more critical of this provision. It did not, however, meet their wish of ensuring competition through prior publication of the sites applied for.

In order to find a basis for compromise on this issue some participants suggested that the paragraph should determine the precise dates on which the Authority would receive applications. This approach might well offer the way out.

On subparagraph (f), dealing with competing applications, the point was made by some participants that the reference to "competitive basis" as the criterion for selecting between the applicants, is not adequate. In the view of these participants there should also be a reference to the need to ensure an equitable distribution of contracts between States and groups of States. Others, however, took a differing view, pointing out that the issue of a quota or anti-monopoly provision should be negotiated in connexion with the separate subparagraph reserved for that issue. One participant emphasized that the meaning of the words "competitive basis" would have to be spelt out more clearly if the reference to 90 days was retained.

There was a lengthy discussion of the provisions in subparagraph (l) on the "banking system". One main criticism was that the text gave the Authority both the task of dividing the area into two, and the right of selecting that part which would be reserved. There seemed to be general support for an amendment which would make it incumbent upon the contractor to divide the area into two parts of equivalent commercial value, while leaving the Authority with the choice between these two halves. There should also in the view of some representatives, be a specific reference to the possibility of the contractor identifying two separate, non-contiguous, areas of equivalent commercial value as the basis for the Authority's choice.

In my compromise formulation it was suggested that in certain cases, namely where the minerals concerned are so concentrated in one particular part as to