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Final report by the Co-Chairmen on the activities of the workshop

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7. Several delegations supported the approach embodied in workshop paper No. 1, while some others supported workshop paper No. 3.

8. The question was then considered as to how to proceed further in productive negotiations. On 26 August it was decided that a more informal and smaller forum for negotiations should be established. This negotiating group, which consisted of 26 members, was composed as follows: Australia, Brazil, Canada, Czechoslovakia, Ecuador, France, German Democratic Republic, Germany (Federal Republic of), Ghana, Indonesia, Iran, Iraq, Jamaica, Japan, Mexico, Norway, Poland, Portugal, Senegal, Sri Lanka, Tunisia, USSR, United Kingdom, United Republic of Tanzania, United States of America, Zambia. It was clarified that the co-ordinators for various groups, who were not included in the above list, might also participate in the negotiating group like other members. Other delegations might also participate in discussions in the group. The negotiating group was an *ad hoc* group. Its composition did not constitute a precedent for any other purpose. It was given the task of negotiating the system of exploitation, in particular articles 22 and 23 and the related provisions of annex I, and producing such results as could command a consensus in the workshop. Informality would be maintained to enable the group to produce these results. It was to be chaired by the two Co-Chairmen of the workshop in the same way as the workshop itself. The Co-Chairmen would report regularly to the workshop on the results in the negotiating group after every four meetings, although flexibility would be maintained.

9. Four meetings of the negotiating group were held during the week on the subject-matter allocated to it.

DOCUMENT A/CONF.62/C.1/WR.4

Weekly report by the Co-Chairmen on the activities of the workshop

[*Original: English*]
[*3 September 1976*]

1. The workshop held one meeting on 2 September during the period 30 August to 3 September, the rest of the week being devoted to seven meetings of the negotiating group on the system of exploitation of the international sea-bed area.

2. Discussions in the negotiating group concentrated on article 22 of part I of the revised single negotiating text[65] and related paragraphs 7 and 8 of annex I, with particular attention to proposals contained in workshop paper No. 1. The Co-Chairmen, at the request of the group, prepared a paper listing two sets of points which the Authority will consider in respect of entering into negotiations with an applicant and entering into a contract with it. This paper was prepared on the basis of the ideas contained in the workshop papers and the suggestions made in meetings of the group.

3. The Co-Chairmen made an oral report to the workshop meeting on the work done in the negotiating group at its last five meetings.

4. At the meeting of the workshop, one delegation made certain suggestions concerning article 22 as contained in workshop paper No. 1, with a view to helping establish a middle ground between the methodologies set forth in the three workshop papers.

5. It was pointed out, during the meeting of the workshop, that there was only a limited period of time available before the end of the session and that it would be desirable at least to initiate discussion on another item, for example, the Assembly and the Council of the Authority. It was agreed to start discussion on this item about the middle of the next week (8 September), keeping in mind the need to allow time to the negotiating group on the system of exploitation to make progress in its work.

[65] *Ibid.*

DOCUMENT A/CONF.62/C.1/WR.5 AND ADD.1

Final report by the Co-Chairmen on the activities of the workshop

[*Original: English*]
[*9 September 1976*]

*DOCUMENT A/CONF.62/C.1/WR.5**

ORGANIZATION OF WORK

1. At its 26th meeting on 5 August 1976, the First Committee decided to establish a workshop in order to conduct its work in an informal setting. The workshop was co-chaired by Mr. Jagota (India) and Mr. Sondaal (Netherlands). It held 13 meetings from 9 August to 8 September. The Co-Chairmen prepared joint weekly reports on the workshop for submission to the Committee (A/CONF.62/C.1/WR.1 to 4).

2. The workshop commenced its discussion with the system of exploitation of the international sea-bed area, particularly article 22 of part II of the revised single negotiating text,[66] and the related paragraphs in annex I on the basic conditions of prospecting, exploration and exploitation.

3. At its meetings on 18 and 19 August, three papers on the system of exploitation were presented and distributed as workshop papers Nos. 1, 2 and 3. Workshop paper No. 1 contained texts on articles 22 and 23 and on paragraphs 2, 7 and 8 (new 8 (*a*), and 8 *bis*) of annex I. Workshop paper No. 2 contained texts on article 22; workshop paper No. 3 contained texts on articles 22 and 23, and related paragraphs 2 and 5 to 9 of annex I. In the subsequent discussions, not all of the

*Incorporating document A/CONF.62/C.1/WR.5/Corr.1 of 16 September 1976.

[66] *Ibid.*

subject-matter covered in these papers was dealt with; the discussion concentrated on article 22, paragraph 7 of annex I, and some aspects of its paragraph 8.

4. On 26 August, the workshop decided to undertake negotiations in a more informal *ad hoc* group, open to all delegations, but having a central membership of 26 delegations (see A/CONF.62/C.1/WR.3). The Philippines replaced Indonesia as a member in the week of 6 September. The purpose of the *ad hoc* negotiating group was to produce such results as could command a consensus on the system of exploitation.

5. The negotiating group held 12 meetings in all, the Co-Chairmen having reported orally to the workshop on the general progress of work in the group.

6. At its meeting held on 8 September, the workshop decided not to take up the question of the Assembly and Council in view of the shortage of time which would not permit a meaningful discussion on the subject. Several delegates noted that sufficient time should be allocated to this subject at the next session. It was understood that delegations might wish to circulate informally their suggestions on this question.

PAPERS PRESENTED TO THE WORKSHOP

Workshop paper No. 1

7. In this connexion, it was stated that the texts contained in articles 22 and 23 and paragraphs 2, 7, 8 (new) and 8 *bis* of annex I were closely linked and must be considered together. This paper asserted the pre-eminence of the Authority and its full and effective control over activities in the international sea-bed area as a means of ensuring compliance with the provisions of the convention. According to this paper it would be necessary to make the Enterprise a concrete and financially viable entity. The proponents of this paper did not support a parallel system of exploitation as set forth in the revised single negotiating text.

8. According to this paper, activities in the area should be conducted exclusively by the Authority directly, through the Enterprise in accordance with a formal written plan of work, or, as determined by the Authority, through a form of association between the Enterprise and the specified entities pursuant to a contract. The plan of work or the contract would be drawn up or entered into in accordance with annex I and approved by the Council after review by the Technical Commission. For the purpose of securing compliance at all times with the relevant provisions and instruments, the Authority should exercise full and effective control over the activities in the area. States parties should assist the Authority by taking all measures necessary to secure such compliance. The paper further provided that the Authority should avoid discrimination in the exercise of its powers and functions and that all rights granted should be fully safeguarded. Special consideration for developing countries, including the conduct of activities by the Authority in certain parts of the area solely in association with them, should not be deemed discriminatory.

9. Flexibility was maintained in the provision as to when title to minerals and processed substances could be passed from the Authority. The Authority would be required to adopt appropriate administrative procedures, rules and regulations for making an application and for the qualifications of an applicant. Such qualifications included financial standing, technological capability and satisfactory performance under previous contracts with the Authority, if any. In assessing the qualifications of a State party, its character as a State should be taken into account. Every applicant should be treated on an equal footing and would be required to fulfil four specific requirements: the undertaking to comply with and to accept as enforceable all the obligations; acceptance of control by the Authority; satisfactory assurance of fulfilment of obligations in good faith; and the undertaking to promote the interests of developing countries by association or other means. In view of the two main methods of operation embodied in article 22 mentioned above, one new paragraph was added to provide that the procedures for the Enterprise should be governed by such provisions as the Authority might establish in its rules and regulations and by the statute of the Enterprise. Furthermore, its activities should be conducted in accordance with the resource policy and the relevant decisions of the Authority in implementation thereof.

10. The Authority should determine when to conduct activities in the area in association with entities. With respect to selection of applicants, the Authority would be empowered, on its own initiative, or upon receiving an application, to initiate selection procedures for applicants and to publish and make known a time-limit for receiving other applications.

11. Subject to the foregoing, the Authority should enter into negotiations with the applicant on the terms of a contract, provided that the applicant possessed the requisite qualifications and complied with the procedures established for applications, that the application did not relate to those parts of the area retained solely for the conduct of activities by the Enterprise or by it in association with the developing countries; and that the contract complied with the resource policy and the relevant decisions of the Authority. The terms of a contract to be negotiated were clearly set out in the text. They included the respective contributions of the Authority and the contractor in association, including the contribution of funds, materials, equipment, skills and know-how as necessary for the conduct of operations covered by the contract and the extent of the participation of developing countries therein, as well as the proper financial arrangements. Provisions were also made to cover cases where more than one application is received, whereby selection would be on a competitive basis, and any preference and priority would be accorded at a subsequent stage to an applicant who had previously entered into a contract for a separate stage or stages of operations. The Authority could re-initiate the procedure for selection of applicants, if after a specified period and after negotiations had been entered into, a contract had not been concluded.

12. The Authority was empowered to determine after exploration, that, in a certain part of the contract area, activities should only be conducted by it either through the Enterprise or in association with developing countries, the Enterprise having the first right of refusal. When considering applications for such an area, the Authority was required to ensure that the developing country or countries would obtain substantial benefits. Reference to the issue of a quota or anti-monopoly provision was maintained in the text of workshop paper No. 1.

13. This paper was further supported by other delegations both from developed and developing countries, some of whom stressed that the activities within the international sea-bed area should naturally be conducted directly by the Authority since the Authority would be composed of all countries representing humanity as a whole. They therefore opposed the provisions of workshop papers Nos. 2 and 3 because they ignored the principle that the international sea-bed was the common heritage of mankind. Some other delegations were prepared to support the general approach taken in workshop paper No. 1 as the best basis for working out a more generally acceptable system of exploitation. A general agreement would need to recognize that the convention must give some assurance of access to the area for States parties and other entities, and that its provisions must enable the Enterprise to establish itself as a viable concern.

Workshop paper No. 2

14. According to this paper, the activities in the area should be conducted both by States parties and directly by the Authority. The Authority would determine the part or parts of the area in which it would conduct its activities. The Authority's area would not exceed that in which activities would be carried out by States parties. The activities of States parties would be conducted on the basis of contracts with the Authority and they would come under its effective financial and administrative supervision. States parties might carry out activities through State enterprises or juridical persons registered in and sponsored by States. States parties sponsoring such entities would be responsible for taking all necessary measures to ensure that such entities complied with the provisions of part I of the convention, annex I and the rules, regulations and procedures adopted by the Authority in accordance with article 28. All States parties would have equal rights to participate in activities in the area irrespective of their geographical location, social system and level of industrial development, and particular consideration would be given to the needs of developing countries, including those which are land-locked or geographically disadvantaged. It should be noted that while activities would be conducted in accordance with the basic conditions in annex I, such conditions were not elaborated in this workshop paper. On this point, it was explained that the present provisions of annex I of the revised single negotiating text could not be taken as being totally acceptable. It was stressed that the right of States to conduct exploration and exploitation activities in the area followed naturally from the concept of the common heritage of mankind since States are juridical representatives of mankind under international law, and that these rights should therefore be guaranteed in the convention itself and not left to the discretion of the Authority. Furthermore, the system of exploitation would need to take account of the legitimate rights and interests of the socialist system, which was one of the main systems in the world; no sea-bed régime and machinery would be viable without taking this into account. Although the paper did not contain any quota clause, it was stressed that such a clause should none the less be an integral part of the system of exploitation as presented in this paper.

15. This workshop paper was supported by a number of delegations since they considered that the system it proposed took into account the positions of all delegations and could therefore be regarded as a compromise.

Workshop paper No. 3

16. According to this paper, there would be a parallel or dual access system. In introducing this paper, it was pointed out that a parallel system could be a method of accommodating the interests of all States and the international community in general, so as to best reflect the principle of the common heritage of mankind. States parties or other entities and, the Enterprise would carry out activities in the area directly by entering into contracts with the Authority. All such activities would be in accordance with annex I and the rules, regulations and procedures adopted by the Authority. The Authority would have effective fiscal and administrative supervision over all activities in the area to secure effective compliance with part I of the convention, annex I and the rules and regulations of the Authority. States parties who sponsor other entities would assist the Authority by taking all appropriate measures to ensure such compliance. The Authority should promote and encourage activities in the area and should avoid discrimination in granting access and in implementing its powers and functions. The Authority would be forbidden to impair any rights granted under part I of the convention and must fully safeguard such rights. Pursuant to specific articles in part I of the convention dealing with scientific research, technology transfer and the distribution of revenues, the Authority would be empowered to give special consideration to the interests and needs of developing countries, particularly the land-locked and geographically disadvantaged among them. Such special consideration would not be deemed to be discrimination.

17. Title to the resources would be vested in the contractor at the moment the resources were recovered from the area pursuant to a contract. A contract would be entered into by the Authority if the applicant was qualified by virtue of his financial standing and technological capability. The Enterprise and States parties would be presumed to be so qualified. An applicant would also be required to submit a work programme to the Authority which would fully take into account the Authority's rules and regulations. All contractors would be required to accept the supervision of the Authority. Subject only to these requirements, the Authority would award a contract; but if it had received simultaneously an application for a contract in the same area, the contract would be awarded on a competitive basis. If no such competing application were received, a properly qualified applicant would be granted a contract within 90 days and the Authority would not have the right to refuse to enter into such a contract if the financial arrangements criteria set forth in paragraph 9 (*d*) had been satisfied and the contract was in all other respects in strict conformity with the convention and the Authority's rules and regulations. It would be the obligation of the contractor to provide the funds, materials, equipment, skills and know-how as necessary for the conduct of operations under the contract. The paper made clear that the procedural and substantive provisions of annex I relating to contracts would apply *mutatis mutandis* to the Enterprise. It was emphasized that the parallel system could only serve as the basis for a compromise if the Enterprise were on an equal footing with other applicants for contracts.

18. When this paper was introduced it was also indicated that certain matters in articles 28 and 31 would need to be taken up since they were connected with the system of exploitation. In that respect the revised single negotiating text was not acceptable but a system in which the Authority could disapprove contracts when an applicant failed to meet objective criteria specified in the convention could be acceptable. Under this approach, the Authority would be deemed to have approved contracts within a stated period of time unless the Council took a decision to disapprove a contract submitted by the Technical Commission. In those cases, the Council would be required to state in what particular respects the applicant had failed to meet the specified objective criteria and the applicant, in turn, would be given the opportunity to remedy such defects. The contract would then be resubmitted to the Technical Commission, and consequently to the Council. Although workshop paper No. 3 was presented essentially as a counter proposal to workshop paper No. 1, it was felt that this move was desirable in order to lay the groundwork for an accommodation at the appropriate time.

19. Workshop paper No. 3 was supported by a number of delegations from developed countries. These delegations accepted the principle of direct operations by the Authority provided that the convention guaranteed access for States parties and other entitites on equal and acceptable economic terms and that the convention specified the conditions for treating favourably the Enterprise and the developing countries.

FURTHER SUGGESTIONS

20. At a later point in the discussions in the workshop, some other concrete suggestions were presented concerning article 22, particularly as formulated in workshop paper No. 1. This was done in order to give the workshop an opportunity

to find a middle ground between that paper and workshop papers Nos. 2 and 3. These suggestions would have the effect of ensuring first, that the exclusive conduct of activities in the area by the Authority should take place in accordance with the provisions of the convention; secondly, that the manner in which the Authority may determine a form of association with States parties or other entities should, again, be in accordance with the provisions of the convention; and thirdly, that the Authority should be able to exercise its control over activities in the area in order to secure continuous and consistent compliance with the convention, the rules, regulations and procedures of the Authority, and any plans of work and contracts approved by the Authority.

DOCUMENT A/CONF.62/C.1/WR.5/ADD.1

CO-CHAIRMEN'S ASSESSMENT OF THE DISCUSSIONS

Main features of the discussions

1. The central question to be resolved by article 22 and the related provisions of annex I would seem to be whether any dual system of exploitation would be permitted, particularly one in which States parties and other entities would be assured of access to the area. A further question would necessarily arise as to whether that part of the system allowing for activities by States parties and other entities would take a higher or lower position compared to the other part of the system whereby the Authority would directly exploit through the Enterprise, or whether it would be necessary to ensure that the two systems worked strictly in parallel. There is the further question of whether such a dual system would be of a permanent or temporary nature. In relation to this central question, the concept of the common heritage of mankind was considered highly important, although there were variations in the way the concept should be implemented. On the one hand, the concept would impose the obligation to ensure that the system of exploitation did not create a monopolistic situation with respect to activities in the area; on the other hand there would be an obligation to ensure, through a viable system, that the resources of the sea-bed would be explored and exploited in an efficient manner.

2. On the issue of assured access, one group of countries would prefer to set out in an exhaustive manner all basic conditions relating to exploration and exploitation. A qualified applicant would be entitled to a contract and the Authority would be obliged to enter into a contract with the qualified applicant. The Authority would have little or no discretionary power in this regard. Another group of countries, on the other hand, placed great importance on retaining certain discretionary powers for the Authority, particularly regarding qualifications and selection of an applicant, and the conclusion of a contract. They regarded this as an important role to be played by the Authority. However, it is doubtful that any delegation supports an automatic assurance of access, since there seems to be general agreement that the Authority will presumably have some degree of discretion in applying the relevant provisions of annex I. The question is rather the degree of allowable discretion and the manner in which that discretion could be used. In expanding the conditions or criteria for the entry into negotiations and the conclusion of contracts or in introducing further value judgements, the most important consideration for the Authority would be to avoid acting in such a manner as could be regarded as inconsistent or even discriminatory. These questions could conceivably be answered in terms of the purposes of the negotiations, inasmuch as the negotiations would be the actual means whereby the Authority would ensure conformity with the provisions of the convention and all applicable rules, regulations and decisions taken by the Authority.

3. Another aspect of the central question raised by article 22 and necessarily related to the purposes of the annex is the principle of ensuring equal rights for all States parties, either to carry out or to participate in activities in the area in order that the Authority may give equal opportunities to all States. Several proposals, in this respect, had stressed the need to give special consideration to the developing countries, and among them to the particular needs of the land-locked and geographically disadvantaged States. While there would appear to be no disagreement on the need to promote the interests of the developing countries in so far as this subject was discussed, it was clear from a number of comments that the convention would need to specify the circumstances in which that principle would take effect, in order to eliminate the possibility of discriminatory treatment. Any special consideration for developing country applicants should be kept separate from the question of the Enterprise, inasmuch as the Enterprise, as the operating arm of the Authority, would serve mankind as a whole.

4. The workshop did not discuss in any detail matters relating to the Enterprise, but it was generally felt that the Enterprise should be a viable institution; in expressing such views, it was also made clear that a viable Enterprise would be a component part of a generally acceptable system of exploitation.

Issues relating to application and selection procedures

5. Three main issues were identified: first, the question of whether an element of competition should be introduced into the selection process, in order that the Authority might obtain the best terms from a contract; secondly, the particular character of States when applying for a contract; and thirdly, the question of whether or not the conditions of paragraphs 7 and 8 of annex I should be formulated on the basis of the Authority's right to refuse to enter into negotiations and conclude contracts.

6. On the first question, which involved selection of applications by the Authority and the establishment of time-limits for the receipt of competing applications, the value of this approach could be queried on the grounds that genuine applicants would be discouraged from conducting activities in the area because of this publicity, and access would be denied as the end result. A response to that query could be that according to the revised single negotiating text, prospecting did not confer any exclusive rights on the prospector and that there would therefore be no question of discouraging activities. However, there may be no real problem in this respect since more than one application for virtually the same area and the same minerals might not in fact occur. It must not be forgotten that since competition was incompatible with the practices of certain countries, this process might therefore be unacceptable; competition could be considered as discriminating against these States and as being inconsistent with the common heritage concept. The objective of optimum benefits for the Authority could presumably be achieved on the basis of the financial arrangements to be contained in paragraph 9 (*d*). Finally, any competitive process through publication of applications would need to take account of the genuine interests of those applicants who had conducted the prospecting involved.

7. On the second question, States applying for contracts could be assumed to have all the necessary qualifications for

entering into negotiations; on the other hand, the character of States could be taken into account only when assessing these qualifications.

8. On the third question, various categories were identified: those which would be evident from the application itself; those which would require further investigation by the Authority; and those which would entail some value judgement on the part of the Authority. The specific items which might belong in each category were not agreed.

9. The following items could fall in the first category: compliance with procedures, rules and regulations concerning the submission of applications; the area to which an application relates, assuming that an investigation was not necessary; compliance with and acceptance as binding of provisions of the convention, the rules and regulations adopted by the Authority and the decisions of its organs; acceptance of control by the Authority at all stages of operations in accordance with the convention; the undertaking that the applicant would fulfil obligations covered by the contract in good faith; compliance with environmental rules and regulations; and prior prospecting activities.

10. The items which might belong in the second category could be the financial standing of the applicant, the technological capability, its satisfactory performance under any previous contracts, its compliance in its work plan with the rules and policies of the Authority, and its compliance, in general, with the resource policy of the Authority, and lastly, its *bona fide* nature.

11. For the third category the following items could be identified: the respective contributions of the Authority and the applicant including the contribution of funds, materials, equipment, skills, know-how, necessary for the conduct of operations covered by the contract; the financial arrangements between the Authority and the applicant; the volume of financial and technological resources which an applicant was willing to place at the disposal of the Enterprise; and the promotion of the interests of developing countries by association or other means. On that last item, the particular needs of the developing land-locked and geographically disadvantaged States could be taken into account.

12. In relation to the items identified, it could be agreed that the Authority should not select applicants solely on the basis of financial and economic considerations but also according to social and political considerations. Furthermore, the selection process could ensure the widest possible participation among all States.

13. It might not be necessary or possible to list all relevant items in one place, and it might be better to tackle the issue of what conditions justified a refusal of a contract by the Authority in the manner already set out in both the revised single negotiating text and workshop paper No. 1 which had not attempted to list all relevant considerations. A more central question might be the actual purpose of the negotiations, which should be to ensure that a contract concluded with an applicant was in accordance with the convention and with all applicable rules and regulations, as interpreted by the Authority. This kind of formulation could be a possible basis for a compromise particularly given the fact that there was no agreement on the question of whether such a list should be exhaustive or not.

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14. The Co-Chairmen wish to point out that the subject of the system of exploitation was not dealt with in all its aspects, leaving a number of important issues—for example, the reservation of areas and the financial arrangements—for future discussion.

15. Although this session does not show any tangible results, the Co-Chairmen are of the opinion that the negotiating process is now under way. It is based on two important requirements: the need to have the real and effective participation of all delegations, and the need to have a thorough and detailed discussion of the issues involved. Only this kind of process can lead to the necessary appreciation of the various positions held and, finally, to durable results.