Third United Nations Conference on the Law of the Sea

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

Document:-
A/CONF.62/106

Letter dated 29 August 1980 from the Chairman of the Group of 77 to the President of the Conference

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

8. The Executive Secretary informed the Committee that, subsequent to the preparation of his memorandum, credentials in due form had been received from Ecuador, and a telegram had been received from the Ministry of Foreign Affairs for Fiji.

9. The Chairman proposed that, in the light of past practice, the Committee should accept the credentials referred to in paragraphs 3 and 4 above and that, as an exceptional measure and subject to later validation, it accept the communications referred to in paragraphs 5 and 6 above in lieu of formal credentials.

10. The representative of Hungary recorded his delegation's objection to the acceptance of the credentials of the delegation of Democratic Kampuchea, stating that, in the view of the Hungarian delegation, these credentials are null and void.

11. The representative of China objected to the statement by the representative of Hungary, stating that, in the view of the Chinese delegation, the credentials of Democratic Kampuchea are valid.

12. The Chairman noted that the views and reservations expressed would be reflected in the report of the Committee. Subject to these views and reservations, summarized in paragraphs 10 and 11 above, the Committee decided to approve the following draft resolution.

"*The Credentials Committee,*

"*Taking into account* the views expressed during the debate;

"*Accepts* the formal credentials of the representatives that have been received;

"*Accepts* as an exceptional measure and subject to later validation, the communications referred to in paragraphs 6 and 7 of the Executive Secretary's Memorandum of 27 August 1980 in lieu of formal credentials."

DOCUMENT A/CONF.62/106

Letter dated 29 August 1980 from the Chairman of the Group of 77 to the President of the Conference

[*Original: Arabic/English, French/Spanish*]
[*23 September 1980*]

On behalf of the Group of 77, I am submitting through you the document entitled "Legal position of the Group of 77 on the question of unilateral legislation concerning the exploration and exploitation of the sea-bed and ocean floor and subsoil thereof beyond national jurisdiction", and I request that it be circulated as a document of the Conference.

(*Signed*) E. K. WAPENYI
Representative of Uganda
to the Third United Nations Conference
on the Law of the Sea
and Chairman of the Group of 77

LEGAL POSITION OF THE GROUP OF 77 ON THE QUESTION OF UNILATERAL LEGISLATION CONCERNING THE EXPLORATION AND EXPLOITATION OF THE SEA-BED AND OCEAN FLOOR AND SUBSOIL THEREOF BEYOND NATIONAL JURISDICTION

The year 1970 was an important turning-point in the elaboration of the new law of the sea. On 17 December, the General Assembly of the United Nations adopted two important resolutions: the first was a "Declaration of principles governing the sea-bed and the ocean floor beyond the limits of national jurisdiction" (resolution 2749 (XXV)); the second concerned the convening of the Third United Nations Conference on the Law of the Sea (resolution 2750 C (XXV)). These resolutions were the outcome of the activities and work carried out on the subject in the United Nations since 1967.

The Declaration of principles affirms the existence of an international Area free from State sovereignty, which cannot be subject to appropriation by any means, by States or private persons. This Area constitutes the Common Heritage of Mankind, and its resources must be exploited for the benefit of mankind as a whole and, in particular, of the developing countries. Thus the Area can only be subject to an international régime and managed and regulated only by appropriate international machinery.

The Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction and the Third United Nations Conference on the Law of the Sea were instructed by the second resolution to prepare a draft and subsequently a convention relating to the régime and the international machinery "on the basis of the Declaration of principles". The negotiations have been going on for more than seven years with the participation of all members of the international community, which only agreed to participate in the process on the basis of the principles expressed in the Declaration of 17 December 1970. This declaration of principles constitutes therefore the framework of the negotiating process and fundamental legal basis of the whole new undertaking of codification and progressive development of the law of the sea under the auspices of the United Nations.

In spite of this, the United States of America, on 28 June 1980, adopted a law (96-283) unilaterally authorizing its nationals to explore and exploit the resources of the international Area; the Federal Republic of Germany is also in the process of adopting unilateral legislation. Other similar attempts are being made in other industrialized countries. These laws provide for reciprocal recognition or the conclusion of future limited agreements between the countries concerned, for the interim regulation of the exploration and exploitation of the resources of the international area, in the absence of a convention of a universal character in force for those States.

The legislation or planned legislation and future limited agreements constitute a violation or a manifest intention to violate the fundamental principles of international law applicable to the Area. Therefore, the unilateral legislation adopted and the activities which will be undertaken are wrongful acts which are bound to engage the responsibility of the States involved and gravely endanger the positive results of the Third United Nations Conference on the Law of the Sea.

1. Wrongfulness and non-invocability of unilateral legislation and limited agreements

The principle of the common heritage of mankind is a customary rule which has the force of a peremptory norm

On 7 March 1966 the Economic and Social Council, having examined the question of the mineral resources of the sea-bed, adopted resolution 1112 (XL) requesting the Secretary-General "to make a survey of the present state of knowledge of these resources of the sea, beyond the continental shelf, and of the techniques for exploiting these resources...and to attempt to identify these resources now considered to be capable of economic exploitation, especially for the benefit of developing countries...and of the practicality of their early exploitation". The fact that the development of technology envisaged the possibility of exploring and exploiting these resources, raised the mat-

ter of the legal status of the Area, as well as of the legal régime applicable to such exploration and exploitation. On 17 August 1967, Mr. Pardo, the representative of Malta to the United Nations, proposed to put on the agenda of the twenty-second session of the General Assembly the question of the utilization for exclusively peaceful means of the sea-bed and the ocean floor and the subsoil thereof outside the limits of national jurisdiction and their exploitation in the interests of mankind as a whole. The General Assembly decided, in the course of this session, to create a Committee with a mandate to study this question.

Since 1967 and until the adoption of the Declaration of Principles all States have declared themselves in favour of the concept of the common heritage of mankind, both in the Committee and during successive sessions of the General Assembly.

It should be added that the small minority of States who abstained in the vote on the Declaration of Principles, which was adopted by 108 votes without objection, finally recognized within the Conference that the declaration was the expression of current international law regarding the sea-bed (see, in particular, the declarations of the Eastern European countries at the 109th meeting of the Conference on 15 September 1978).[4]

It is now accepted that a customary rule may be crystallized through the intermediary of a declaration of the United Nations. The position was clearly established, moreover, by the International Court of Justice in its Advisory Opinion of 21 June 1971 on the legal consequences for States of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council resolution 276 (1970). After affirming that "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them", the Court added that "A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960)".[5]

In addition, the International Court of Justice, in the North Sea Continental Shelf Cases Judgment of 20 February 1969, has noted that: "the passage of only a short period of time is not necessary, or of itself, a bar to the formation of a new rule of customary international law"...but "an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".[6]

The same applies to resolution 2749 (XXV), whose substance was supported by a vast majority of States. Thus, in deciding to convene a Third United Nations Conference on the Law of the Sea, the General Assembly was careful to point out, in paragraphs 1 and 6 of its resolution 2750 C (XXV), that the Declaration of Principles established the progress made so far and should serve as the basis for future negotiations.

An examination of the attitude of States in different international fora clearly shows that the principle of the common heritage of mankind was accepted as a customary rule of international law.

The successive positions taken by States and international organizations have confirmed the development of this custom since it was conceived as the foundation of the public order of the oceans. Thus the General Assembly, in resolution 2750 C (XXV), declared that "the elaboration of an equitable international régime for the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction would facilitate agreement on the questions to be examined" at this Conference and stated that "the progress made so far towards the elaboration of the international régime for the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction through the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, adopted by the General Assembly on 17 December 1970".

The very nature of these principles, according to which mankind as a whole owns the resources, of which the régime is established by a treaty of a universal nature and the management of which is to be entrusted to an international organization, makes them incompatible with regional interests based on unilateral legislation or limited agreements. It is therefore not possible to depart from these principles by individual agreement; this is set down in the terms of Articles 53 and 62 of the Convention on the law of treaties.[7] Modification of the principles requires the elaboration of new norms fulfilling the same conditions and characteristics. As a result, the principle of the designation of the Area as the common heritage of mankind can only be considered as a rule having universal application and it cannot coexist with individual regulations of one or more States.

The Group of 77 has frequently drawn the attention of the Conference and of international authorities to the legal status of the sea-bed as the common heritage of mankind and to the illegality of all unilateral measures. The ministers for foreign affairs of States members of the Group of 77 have declared, in particular in their resolution adopted on 29 September 1979 and reiterated on 14 March 1980, that "Any unilateral measures, legislation or agreement restricted to a limited number of States, on the sea-bed mining, are unlawful and violate well-established and imperative rules of international law". Given that the principle of the Common Heritage of Mankind is a customary rule which has the force of peremptory norm, the unilateral legislation and limited agreements are illegal, and are violations of this principle.

Unilateral measures and violation of the principle of the common heritage of mankind

The violation of this principle derives first from the will, embodied in the unilateral legislation, to dispose of parts of the sea-bed and to reserve their exploitation for the nationals of certain States. Moreover, the sea-bed is an international area and the common heritage of mankind, for which its resources must be managed by an international machinery: "No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the Area or its resources incompatible with the international régime to be established and the principles of this Declaration" (resolution 2749 (XXV)).

The unilateral legislation pretends not to contest the legal nature of the area as the common heritage of mankind, but attempts to justify the issuing of exploitation licenses by invoking the principle of the freedom of the high seas. Such a claim has no legal foundation.

In addition to the fact that the principle of the freedom of the high seas has never been applied to the resources of the Area because of the absence of technological developments in this Area, article 2 of the 1958 Convention on the High Seas[8] makes no mention of exploration and exploitation of the sea-bed in its enumeration of the various freedoms. Consequently, the International Law Commission of the United Nations has drawn attention to the deliberate nature of this omission, which was due to the fact that such exploitation had not yet acquired sufficient practical importance to justify special regulation.

The exploration and exploitation of the sea-bed and subsoil re-

[4] *Ibid.*, vol. IX.

[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31.

[6] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 47.

[7] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

[8] United Nations, *Treaty Series*, vol. 450, No. 6465, p. 82.

quires a special régime different from the principle of the freedom of the high seas, which only applies to superjacent waters. Therefore resolution 2749 (XXV) recognized that "the existing legal régime of the high seas does not provide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources". Indeed, while pointing out that the Area is the common heritage of mankind, the Declaration also specifies that its status as such will not affect the "legal status of the waters superjacent to the area or that of the air space above those waters".

The unilateral legislation also violates the principles of non-appropriation and non-discrimination inherent in the concept of the common heritage of mankind. Described as interim legislation, these laws nevertheless attempt to create situations establishing vested rights for national investors, and these situations will be imposed even after the entry into force of the future international convention. This illegal appropriation of the international Area infringes on the principle of non-discrimination, which entails regulation of access to the resources by an international organization on the basis of principles freely negotiated by all States, given that: "The Area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof" and that "The exploration of the Area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries."

II. The consequences of unilateral measures and limited agreements

The danger of affecting the negotiations

Inasmuch as the unilateral laws are intended to confront the international community with *faits accomplis*, they are in breach of the principle of good faith in the conduct of negotiations, contrary to the procedure of consensus contained in the gentleman's agreement, and seriously jeopardize the progress achieved so far in the Conference being prejudicial to the prospects of the early adoption of a comprehensive convention.

By accepting the principle that the international Area is part of the common heritage of mankind, and by taking part in the Conference which is to elaborate an international régime and international machinery, all States have also assumed an obligation to negotiate in good faith the convention on the law of the sea.

The International Court of Justice had defined the scope of this kind of obligation in 1969, in the North Sea Continental Shelf Cases, as follows: "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation...they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it".[9]

By adopting unilateral legislation, certain States do not abide by this obligation since they prejudice the search for a compromise to reach an agreement. Moreover, this obligation is also derived from the same Declaration of Principles which provides that:

> "On the basis of the principles of this Declaration, an international régime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The régime shall, *inter alia*, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof, and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of developing countries, whether landlocked or coastal."

They risk, consequently, to eventually cause by their conduct harm to the process of elaboration of the convention, since they are creating a situation which is incompatible with the principles of good faith and the equality of the parties in drawing up an international agreement.

Non-recognition of unilateral legislation

All States are required not to recognize the unilateral legislation and limited agreements, which cannot be invoked against them and cannot produce any legal effect. This obligation of non-recognition is incumbent on all States by reason of the peremptory nature of the rule reserving the international Area as the common heritage of mankind. Since such national legislation has no legal force, the unilateral measures and restricted agreements can provide no legal title for exploration of the area or exploitation of its resources. Consequently, all States must avoid any relations or contacts connected with the unilateral exploitation of the sea-bed, whether for the supply of technology, labour or transport facilities, or for the use of harbours of the marketing of resources taken from the international Area. As declared in the resolution adopted by the ministers for foreign affairs of States members of the Group of 77, on 29 September 1979, "Such unilateral acts will not be recognized by the international community, and that, these acts, being unlawful, will entail international responsibility on the part of States who commit them, and an investor will not have legal security for his investments in activities in pursuance of such acts."

Absence of guarantees for investments

All activities of exploration of the Area or of exploitation of its resources which lie outside or not in conformity with the future Convention on the Law of the Sea, are contrary to the rules of international law. It follows that installations in the sea for the building of transport ships as well as the final product are exposed, at all times, to sanctions from all States. As a result, all States which have adopted unilateral legislation cannot call upon diplomatic protection in order to guarantee their activities carried out under this legislation.

The legislation or planned legislation claims to offer legal security to the investments of their nationals. But this security cannot be established by unilateral legislation or limited agreements. Only an international Convention established under the auspices of the United Nations is capable of providing adequate security to investments, as can be seen clearly from resolution 2749 (XXV): "All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international régime to be established".

International responsibility

In international law, the law of a State is a simple act capable of engaging its responsibility if it is in breach of an international obligation. Moreover, no State can invoke its internal law to justify any breach of its international obligations. The responsibility of a State is engaged by the reason of its wrongful conduct, especially if there is a breach of obligations *erga omnes* deriving from peremptory rules of international law.

A State which has adopted unilateral legislation engaging its responsibility is required to take necessary measures so as to conform with the peremptory norm of international law. As to the limited agreements, they are void *ab initio*, since they are incompatible with the peremptory norm. Moreover, if the exploration of the Area or the exploitation of its resources has already begun under such legislation, the State is required to restore the resources entirely or, if that is impossible, to pay compensation equivalent to such restoration, so as to re-establish the situation which would have existed if the acts in question had not taken place.

[9] *I.C.J. Reports 1969*, p. 48.

The responsibility of the State may also be engaged by reason of failure to keep watch on the activities of its nationals, whether natural or legal persons, in the international Area, which are contrary to international law. The State must, indeed, prohibit such activities by every means at its disposal: In accordance with resolution 2749 (XXV): "Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international régime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organizations or on their behalf. Damage caused by such activities shall entail liability."

Available means of action

Every State, as a member of the international community, has, first of all, an objective remedy and an interest in acting to ensure respect of a principle of imperative law, in accordance with the terms of the 1970 judgement of the International Court of Justice in the Barcelona Traction, Light and Power Company Case: "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[10] The Vienna Convention on the Law of Treaties provides, in article 66, that "any one of the parties to the dispute concerning the application or the interpretation of article 53 or 64" (relating to *jus cogens*) "may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration".

Consequently, States members of the Group of 77 are quite free to resort to the competent courts against States responsible for unilateral legislation, limited agreements and the activities of certain natural or legal persons carried out in violation of international law.

Before doing so, States members of the Group of 77, and any other State Member of the United Nations, are in a position to propose to the General Assembly that it consult the International Court of Justice on the legal consequences of any infringement of those fundamental principles applicable to the Area.

The General Assembly may also require the suspension of all unilateral activities in the international Area, pending the functioning of appropriate international machinery.

In addition, it would be desirable, in order to reaffirm the position of the Group of 77 within the Third United Nations Conference on the Law of the Sea and the resolutions adopted by the ministers of foreign affairs of the States members of the Group, that each State, individually, should protest against the adoption of unilateral legislation and address it directly to the country concerned.

Finally, a dispute relating to the wrongful appropriation of mineral resources of the sea-bed may at any given moment endanger the maintenance of international peace and security. Under the terms of Article 37 of the United Nations Charter if the parties to such a dispute fail to settle it by the means indicated in Article 33, they may refer it to the Security Council which, if it finds that there is a threat to the peace, may order various measures, including sanctions, to maintain or restore international peace and security.

[10] *Barcelona Traction, Light and Power Company, Limited, Judgment I.C.J. Reports 1970*, p. 32.

DOCUMENT A/CONF.62/L.57/REV.1

Report of the Chairman of the Drafting Committee

[Original: English]
[1 August 1980]

An informal intersessional meeting of the Drafting Committee was held in New York from 9 to 27 June 1980 for the purpose of continuing the process of harmonization of words and expressions recurring in the second revision of the informal composite negotiating text (A/CONF.62/WP.10/Rev.2) and beginning the process of a preliminary and informal textual review of that text.

There were 81 meetings of the language groups, 21 meetings of the co-ordinators of the language groups under the direction of the Chairman of the Drafting Committee and two meetings of the Drafting Committee as a whole.

The first part of the report is devoted to specific items considered by the Drafting Committee. In accordance with the procedure adopted in the report submitted by the Chairman of the Drafting Committee to the Conference on 22 August 1979 (A/CONF.62/L.40)[11] each section contains: a list of examples which have been chosen from each section of Informal Paper 2/Add.1, an outline of the issues involved, the recommendations of the Drafting Committee and a list of the items still under consideration by the Committee and an indication of the application of the recommendations of the Committee.

The recommendations have been discussed extensively in the language groups and by the co-ordinators of the language groups under the direction of the Chairman of the Drafting Committee before submission to and approval by the Drafting Committee.

The second part lists the deferred items. These items will be further studied by the Drafting Committee at the resumed Geneva Session.

The textual review of the negotiating text

The language groups have begun the process of textual review of the negotiating text which will be continued during the resumed Geneva session. The documents produced by the language groups during this intersessional meeting reporting the results of this work will be circulated to the Conference.

Action taken on previous recommendations

It will be recalled that the report of 22 August 1979 submitted a series of recommendations on recurring words and expressions in the text which might require harmonization.

A letter was sent to the chairmen of the other Committees asking that the recommendations contained in the aforesaid report of the Drafting Committee be incorporated in the revision of the negotiating text. The Chairman of the Drafting Committee received replies from the Chairmen of the Second and Third Committees.

Computerized text

It should be noted that the computerization of the text by the secretariat has already proven valuable to the Drafting Committee during its informal intersessional meeting.

Meeting time and facilities

It is urged that the Drafting Committee be granted ample time and facilities at the Geneva session to enable it to continue its work as expeditiously as possible and that delegations will give

[11] See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XII, United Nations publication, Sales No. E.80.V.12.