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158th Plenary meeting

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158th meeting

Tuesday, 30 March 1982, at 10.45 a.m.

President: Mr. T. T. B. KOH (Singapore)

Consideration of the subject-matter referred to in paragraph 3 of General Assembly resolution 3067 (XXVIII) of 16 November 1973

1. The PRESIDENT asked members of the Conference to focus their statements on the various textual proposals that had been put before the Conference, so as to enable the Collegium at its next meeting to ascertain the extent of support for them. It was essential that the three outstanding issues still before the Conference—the treatment to be accorded to preparatory investments, the resolution establishing the Preparatory Commission and the International Tribunal, and the question of participation in the convention—be resolved at the current stage of the work programme if the convention was to be adopted by 30 April 1982.

2. Mr. de SOTO (Peru), speaking as Chairman of the Group of 77, said that the Group had not yet had time to take a final position on the question of participation in the convention, owing to the last-minute submission, after years of delay, of proposals regarding a régime covering preparatory investments by those States which had insisted on the inclusion of such a régime.

3. The draft resolution establishing the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea, (A/CONF.62/C.1/L.30, annex I) provided a better basis for reaching consensus than the previous draft resolution (A/CONF.62/L.55)[1] on that question. Some related issues were, of course, still pending: for example, it was the understanding of the Group of 77 that paragraph 4 of article 308 of the draft convention (A/CONF.62/L.78)[2] would be deleted, since the decisions of the Preparatory Commission should be only recommendations, especially as concerned rules, regulations and procedures relating to exploration and exploitation. The Group of 77 also understood that consensus would be more likely if paragraph 4 of article 163 stipulated that at least two members of the Economic Planning Commission should be drawn from developing countries which were producers of the minerals to be extracted from the Area. The Group of 77 had also taken note of the addition of subparagraph (*i*) to paragraph 5 of the draft resolution, but felt that it would be advisable to establish a special commission analogous to the one proposed in paragraph 8 to deal with the problems referred to in subparagraph (*i*).

4. It was the view of the Group of 77 that the draft resolution governing preparatory investments in pioneer activities relating to polymetallic nodules (A/CONF.62/C.1/L.30, annex II) provided a framework within which the Conference could prepare an acceptable régime for the treatment of preparatory investments. The draft resolution sought to keep within the bounds of such a régime by confining acceptable activities to exploration, limiting acceptable activities to one mining site per applicant and preserving the principal elements of the system envisaged in the draft convention. The draft resolution none the less had rather serious shortcomings, which might have been avoided had those countries most interested in protecting their nationals in the preparatory phase not delayed so long in submitting a working draft of their proposals. The problems raised by the draft resolution would have to be resolved in the debate.

5. Mr. AGUILAR (Venezuela) recalled that the negotiations and consultations during the first stage of the eleventh session had focused primarily on Part XI of the draft convention and on related matters such as the Preparatory Commission and the protection of preparatory investments. On those questions Venezuela shared the position of the Group of 77.

6. Part XI of the draft convention did not reflect the position of the Group of 77 but was rather the result of a difficult compromise between the developed countries with planned market economies and the members of the Group. The Group of 77 had made repeated concessions over the years to achieve consensus and even if the provisions of Part XI of the draft convention did not fully satisfy it, they offered the best basis for an agreement acceptable to all parties. The mining enterprises attached understandable importance to obtaining adequate protection and guarantees during the period between the adoption of the convention and its entry into force. Venezuela therefore supported the establishment of a provisional régime applicable to pioneer mining activities which would itself be grounded in the principles and provisions of the draft convention. The exploitation of natural resources constituting the common heritage of mankind must be governed by a legal régime of universal scope. Any exploitation based on unilaterally-established rules or reciprocal agreements among a small group of countries, arrived at outside the convention, would therefore be unacceptable.

7. Venezuela would not make a statement on the report (A/CONF.62/L.86) submitted by the President at the previous meeting on the important question of participation in the convention until it had had the opportunity of studying it carefully.

8. The various issues just mentioned had rightly been given priority in the first stage of the Conference. He felt it necessary, however, to point out certain other difficulties which Venezuela had with the draft convention. After reviewing the new draft of articles 74 and 83, Venezuela had concluded that it could not accept the solution provided by the joint consideration of articles 15, 74 and 83 of the draft convention. Venezuela had recalled on numerous occasions, whenever the question of delimitation was considered, that it had entered reservations to articles 12 and 24, paragraphs 2 and 3 of the convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone[3] and on article 6 of the Geneva Convention of 29 April 1958 on the Continental Shelf,[4] when it had ratified those conventions. Since article 15 of the draft convention was a virtual restatement of article 12 of the first of those Conventions, his delegation, at the plenary meeting of 28 August 1981, had expressed its reservations on the proposed new drafting of articles 74 and 83, and at the same time reiterated its consistent reservation on article 15 of the draft convention.

9. The wording of articles 74 and 83 adopted at the previous session did not specifically indicate the criteria or procedures to be followed by the States concerned in order to achieve an

[1] See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XIII (United Nations publication, Sales No. E.81.V.5).

[2] *Ibid.*, vol. XV (United Nations publication, Sales No. E.83.V.4).

[3] United Nations, *Treaty Series*, vol. 516, No. 7477, p. 206.

[4] *Ibid*, vol. 499, No. 7302, p. 312.

equitable solution, but merely referred to international law as defined in article 38 of the Statute of the International Court of Justice. As sources of international law, article 38 cited international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and, as subsidiary means for the determination of rules of law, judicial decisions and teachings of the most highly qualified publicists of the various nations. In the absence, then, of particular conventions the rules expressly recognized in general international conventions by the States parties to a dispute would necessarily apply, and, if those conventions contained a provision similar to article 15 of the draft convention, it could be argued that, for lack of any other substantive provision, the criterion established in that regulation would apply by analogy not only to the delimitation of the territorial sea but also to the delimitation of the exclusive economic zone and the continental shelf. In short, since article 15 as currently worded was totally unacceptable to his delegation, the mere possibility of such an interpretation compounded the difficulties.

10. The reference to article 38 of the Statute of the International Court of Justice, moreover, relegated judicial decisions, which had played such an important role in the development of law in that field, to the status of a subsidiary means for the determination of applicable rules. It was a well-known fact that both the jurisprudence and the practice of States had diverged considerably from the solutions espoused by the Geneva Conventions of 1958 because it was considered that their literal application could lead in many cases to inequitable situations.

11. Articles 15, 74 and 83 of the draft convention were closely linked and, for that very reason, the intentionally neutral wording arrived at for articles 74 and 83, though understandable, created additional difficulties for his delegation. Without wishing to reopen debate on a question which had been the object of long and difficult negotiations and yet wishing at the same time to be able to become a party to the convention, Venezuela proposed that States should be specifically entitled to express reservations on articles 15, 74 and 83, as was done in the case of the corresponding provisions of the Geneva Conventions of 1958, or else that article 15 should be given the same wording as articles 74 and 83.

12. Regarding the question of the settlement of disputes over delimitation, article 298, paragraph 1 (*a*) (ii) of the draft convention should be taken to mean that States were in no way obliged to resort to other means of resolving disputes if they did not expressly agree to do so, when negotiations between the parties based on the report of the conciliation commission had not resulted in an agreement. In order to clarify the text as it stood, Venezuela proposed the following wording for that provision: ". . . the parties, unless they agree otherwise, may submit the issue, by mutual consent, etc. . . ."

13. Secondly, it should be made absolutely clear that the procedure established in article 298, paragraph 1 (*a*), did not apply to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, when such disputes had arisen prior to the entry into force of the convention; and that it also did not apply to disputes involving the consideration of any other unsettled dispute concerning sovereignty or other rights over continental or insular land territory. The problem was one of placement, since those provisions did not belong under article 298: it was not a question of optional exceptions but rather of limitations on the applicability of section 2 of Part XV. Venezuela therefore proposed that the provision should be transferred to article 297, through the addition of the two following paragraphs:

"4. Disputes arising prior to the entry into force of this Convention.

"5. Disputes necessarily involving the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory".

The wording of article 298, paragraph 1 (*a*) (i) would then be adjusted accordingly. He would submit a formal amendment to that effect at the appropriate time.

14. Regarding the régime of islands, he was again compelled to raise serious objections to article 121, paragraph 3 of the draft convention. That provision was objectionable because it introduced a distinction between parts of a nation's territory, and that could not be justified on principle or on grounds of equity. In the first place, taking into account the principle that national territory was one and indivisible, just as the sovereignty of a State was one and indivisible, it could not be held that national territory gave rise to rights in some parts and not in others. Paragraph 3 was especially prejudicial to island States and continental States whose continental territory was directly prolonged into the sea by an island territory. That situation was very different from that of maritime States which, for historical reasons, had annexed often very small islands in the middle of the oceans, located at a great distance from their principal territory. Such a provision was unjust and arbitrary since it would necessarily lead to drastically different treatment for very similar island formations.

15. As for the practical application of article 121, paragraph 3, he stressed that any attempt to classify island territories was doomed to failure because of the impossiblility of establishing satisfactory criteria. He had on other occasions underscored the obscurity and ambiguity of each one of the three paragraphs of article 121, and he again asked where the subtle line would be drawn between the islands of paragraph 1 and the rocks of paragraph 3. Some States might recognize the right of a particular island to be considered as having an exclusive economic zone and a continental shelf; others might argue that it was only a rock, in accordance with paragraph 3 of article 121. Article 121 should therefore be deleted.

16. Mr. RATTRAY (Jamaica) said that the Conference was now at the crucial juncture of having to assess if the proposals before it, especially those contained in document A/CONF.62/C.1/L.30, would provide a more meaningful basis for general agreement. In making that assessment it was important to recognize that the proposals were part of a wider package and could not be viewed in isolation. The concessions that had been made on the issues dealt with in document A/CONF.62/C.1/L.30 must be judged against the delicate balance of the package as a whole, and if that balance were disturbed unduly, there was no guarantee that concessions which had been made on other parts of the draft convention would remain intact. All were committed to the principle of consensus and the consultations of the last three weeks had been marked by a search for universality. There came a time, however, to look at what such efforts had produced and to recognize that consensus was only a vehicle and that its unending pursuit could ultimately frustrate the work of the Conference.

17. The Chairman of the Group of 77 had already said that the proposals contained in document A/CONF.62/C.1/L.30 offered improved prospects for consensus and his delegation endorsed that view. The proposals were positive in so far as their overriding thrust was the search for compatibility with the convention. The draft resolutions contained in the annexes to the document must be seen as integral parts of a scheme which itself provided a bridge to the draft convention in a manner wholly compatible with it. The so-called proposals did not seek to protect the major concerns of the

Group of 77; rather they marked an extraordinary concession on the part of the Group, to offer a measure of protection to those States or entities which had made substantial investments in pioneer activities in deep sea-bed mining. It was particularly significant that the proposals made all rights conditional upon ratification of the convention, and that they confined activities to those of exploration, restricted pioneer areas to one per applicant, provided for mechanisms for the resolution of conflicts, and above all sought to preserve the parallel system by ensuring that the Enterprise would have reserve areas and would develop in such a way as to enable it to enter into activities at the same time as States and entities.

18. The Group of 77 had made great concessions, and it was time for other parties to recognize that the search for consensus would be mythical unless all were prepared to do so. It was important to have a convention as the only legitimate expression of a régime that would govern the ocean space and would go beyond the limit of national jurisdictions, in keeping with the Declaration of Principles.[5] No system outside a convention could represent a legitimate scheme under which the deep sea-bed could be explored and exploited. It was as important to achieve a convention at the end of the session as it was to pursue the quest for consensus. The proposals contained in document A/CONF.62/C.1/L.30 offered improved prospects for achieving that goal, and a strict adherence to the Conference timetable would further it.

19. The convention was important to humanity; it was urgent to respond to the cry of all countries for an orderly régime governing the oceans. For that reason Jamaica had set aside $50 million to provide a home for the new International Sea-Bed Authority and Preparatory Commission. It had done so out of the conviction that it was a historic venture and that it was in the interest of all countries to find accommodation within the convention. Jamaica would spare no efforts to bring the Conference to a successful conclusion.

20. Mr. WYLE (Observer for the Trust Territory of the Pacific Isles) said, with reference to the report of the President in document A/CONF.62/L.86, that his delegation was one of those most immediately affected by article 305 of the draft convention. In view of the importance of maintaining the delicate balance of the package, he fully supported the President's proposal on article 305, particularly regarding paragraph 1 (*b*), (*c*) and (*d*).

The meeting rose at 11.30 a.m.

[5] Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the subsoil Thereof, beyond the Limits of National Jurisdiction (resolution 2749 (XXV)).

159th meeting

Tuesday, 30 March 1982, at 3.10 p.m.

President: Mr. I. UL-HAQUE (Pakistan)

Consideration of the subject-matter referred to in paragraph 3 of General Assembly resolution 3067 (XXVIII) of 16 November 1973 (*continued*)

1. Mr. de SOTO (Peru), speaking as Chairman of the Group of 77, said that he wished to add to the proposals that he had made on the Group's behalf at the previous meeting with regard to the draft resolution contained in annex I to document A/CONF.62/C.1/L.30. The Group wished to establish a link between the convention and paragraph 5 (*f*) of the draft resolution in order to show where the Preparatory Commission's recommendations on the compensation fund mentioned in that paragraph would appear in the convention. The Group therefore proposed that the following subparagraph should be added at the end of article 171 of the draft convention (Funds of the Authority):

> "(*f*) payments to a compensation fund in terms of article 151, paragraph 4, whose sources are to be devised by the Economic Planning Commission".

2. With regard to the question of participation in the convention, the Group was profoundly grateful for the President's intensive efforts to reconcile different positions. The Group believed that questions of participation were directly relevant to the viability of the convention itself and that all elements of the "mini-package" on participation proposed in document A/CONF.62/L.86 must be resolved jointly, without prejudice to questions of principle or to the Group's substantive positions on individual elements which might be easier to accept separately than as part of the package. The President's package provided a framework for resolving all problems of participation, but there was still considerable room for improvement, particularly with regard to the question of participation by national liberation movements (annex II) and the substance and form of the Transitional Provision (annex III), if the package was to receive the necessary universal and final approval.

3. Mr. NANDAN (Fiji) expressed satisfaction that draft compromise texts had been prepared on the three outstanding issues of participation in the convention, the establishment of the Preparatory Commission and protection of preparatory investments.

4. With regard to participation, it was always difficult to establish the rights and duties of participants in a convention, especially participants that were not sovereign States. Several entities had sought to participate in the Convention in one way or another, and the proposals put forward in document A/CONF.62/L.86 in that connection should be universally acceptable. He was gratified at the proposal (annex I) to include in article 305 provisions which would permit full participation by several South Pacific self-governing associated States which exercised full jurisdiction over their maritime zones and had full competence in matters governed by the convention. Such States would include the Cook Islands and Niue and the Trust Territory of the Pacific Islands. Satisfactory solutions had also been proposed with regard to the participation of national liberation movements and entities such as the European Economic Community, and he hoped that they would meet with general approval.