DOCUMENT A/CONF.62/L.139*

Memorandum dated 27 April 1982 from the Legal Counsel to the Special Representative of the Secretary-General to the Third United Nations Conference on the Law of the Sea

[*Original: English*]
[*28 April 1982*]

OPINION OF THE LEGAL COUNSEL IN RESPONSE TO QUESTIONS RAISED IN LETTER DATED 22 APRIL 1982 FROM THE REPRESENTATIVE OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE PRESIDENT OF THE CONFERENCE

1. In a memorandum dated 20 April 1982, you had requested the Legal Counsel to provide a legal opinion concerning the competence of the Conference on the Law of the Sea to include the private enterprises referred to in its definition of pioneer investors in paragraph 1 (*a*) (ii) of draft resolution II governing preparatory investment in pioneer activities relating to polymetallic nodules (A/CONF.62/L.132, annex IV). On the basis of the reasons given in a memorandum dated 21 April 1982 (A/CONF.62/L.133, annex), I concluded that the approach adopted in draft resolution II is legally permissible and consistent with the practice of the United Nations.

2. In a letter dated 22 April 1982 from the representative of the Union of Soviet Socialist Republics addressed to the President of the Conference (A/CONF.62/L.133) the Soviet delegation stated that it did not agree with the conclusion of the 21 April 1982 memorandum and considered that the inclusion in the resolution of the provisions had no legal basis. That letter raises several questions and invites the Secretariat to respond to them.

3. As will be seen, the questions raised in the Soviet delegation's letter of 22 April 1982 are far broader in scope and in substance than the technical question posed and addressed in the previous opinion. The present questions in addition involve many policy issues which only the Conference itself is competent to decide. This reply is therefore based on the relevant documents of the Conference and on the discussions that took place during the consideration of this subject. The opinion of the Office of Legal Affairs on those questions posed are set out below.

I. *Whether the Conference would go too far in designating private companies, granting them the status of pioneer investor and placing them on the same footing as States. These issues involve substantive questions about the application of the proposed convention, which will be matters primarily of concern to the States Parties to the future convention*

4. It may be noted that during the past eight years, the Conference has been engaged in the preparation of a comprehensive, generally acceptable convention on the law of the sea. It has now reached the final, decision-making stage. Since the Conference has competence to draft provisions for the convention, it is also competent to propose how certain provisions should be applied, as well as the form and manner in which such competence are to be exercised.

5. It may be recalled that the decision to use resolutions of the Conference to establish the Preparatory Commission and to make provisions for the preparatory investment enjoy wide support. All the draft proposals on the first subject and two and the three draft proposals on the latter subject (TPIC/3 and TPIC/5) favoured the use of resolutions. Most members rejected the protocol approach proposed on preparatory investment by the four-Power draft (TPIC/2). It should also be noted that during the discussions on this subject no other form was suggested.

6. The proposed approach, of incorporating in a Conference resolution the decision regarding preparatory investment in pioneer activities, is legally acceptable and is consistent with past practice. However, since it is important that the consequences of the proposed resolution should also bind the future Authority, it is necessary that provision be made in the convention to recognize such consequences. In this connection, it may be noted that, in proposing draft resolutions I and II, respectively establishing the Preparatory Commission and providing for the treatment of preparatory investments, the co-ordinators of the working group of 21, and subsequently the Collegium, recommended that consequential provisions should be made in article 308, in order to ensure that the registration of pioneers, the allocation of pioneer areas and the priority given to them should be binding on the Authority upon entry into force of the convention (A/CONF.62/C.1/L.30, para. 30 and A/CONF.62/L.93, para. 5 (*c*) (iv)). Paragraph 13 of draft resolution II further makes the intention clear that the Authority and its organs are to recognize and honour the rights and obligations arising from this resolution and the decisions of the Preparatory Commission taken pursuant to it (A/CONF.62/L.132, annex IV). Consequently, it would seem that the combination of a Conference resolution, together with the inclusion of a provision in the convention recognizing decisions taken thereunder, would represent a valid and effective approach to this question.

7. As already mentioned in the previous opinion, the rationale for making provisions to deal with investments made by States and other entities was expressed by the co-ordinators of the working group of 21 in their report recommending draft resolution II (A/CONF.62/C.1/L.30). That rationale appears to have wide support in the Conference. It is also relevant to point out that article 153 and annex III, article 4 of the draft convention envisage the carrying out of "activities in the Area" by, *inter alia*, States Parties or State entities as well as by private companies. It is, therefore, not inconsistent with the convention to make provisions in draft resolution II for the participation of private entities or groupings thereof.

II. *What would be the legal effect of such a decision if explicit objections were raised or opposing votes were cast?*

8. This question must be viewed in the light of the relevant rules of procedure of the Conference (A/CONF.62/30/Rev.3). Thereunder, such a decision will have the legal effect normally attributed to a Conference resolution adopted in accordance with its rules of procedure. In so far as draft resolution II is concerned, it is to be noted that, according to the decision of the Collegium, this Resolution together with the other draft Resolutions and the draft convention "form an integral whole" to be adopted by the Conference at the same time with the understanding that the resolutions will be embodied in the final act (see A/CONF.62/L.93, para. 6). In this connection, the decisions of the Conference taken at its 175th plenary meeting should be borne in mind. It is understood however that the Conference would prefer to adopt the convention and the relevant resolutions by consensus.

*Incorporating documents A/CONF.62/L.139/Corr.1 of 29 April 1982 and A/CONF.62/L.139/Corr.2 of 12 May 1982.

III. *Should those private companies be allowed to continue to enjoy such status if the States of which they are nationals should fail to ratify the convention? Is not the whole purpose of enumerating the companies in a decision of the Conference to make it possible for the States concerned to refuse to ratify the convention as soon as the companies receive the benefits?*

9. These questions involve basically political issues. According to paragraph 8 (*a*) of draft resolution II, the pioneer investors are to be required to apply to the Authority, within six months of the entry into force of the convention, for a plan of work for exploration and exploitation. A certifying State is to be deemed to be a sponsoring State for the purposes of annex III, article 4 of the convention, and must, upon the entry into force of the convention, assume the obligations as such. No plan of work for exploration and exploitation may be approved unless the certifying State is a party to the convention. It is further specified that, in respect of the entities referred to in paragraph 1 (*a*) (ii) of the draft resolution (i.e. the four consortia), the plan of work for exploration and exploitation "shall not be approved" unless all the States at present whose natural or juridical persons comprise those entities are parties to the convention (draft resolution II, para. 8 (*c*)). If any such State fails to ratify the convention within a period of six months after it has been notified that an application is pending, its status as a pioneer investor or certifying State as the case may be, "shall terminate", unless the Council, by a majority of three fourths of its members, decides to postpone the termination date (*ibid.*). The termination of the status as a certifying State will in turn terminate any right acquired by any pioneer investors it had certified (*ibid.*, para. 10 (*a*)).

10. Explicit provisions are also made in subparagraph 10 (*b*) and (*c*) of draft resolution II, permitting the pioneer investors to change their nationalities. This reflects another political decision that the Conference has made. A registered pioneer investor may alter its nationality and sponsorship from that prevailing at the time of its registration to that of any State Party to the convention which has "effective control" over it. Such change in nationality is not to affect any right or priority conferred on a pioneer investor. Thus, even though changing nationality and sponsorship is permitted, the requirement of "effective control" must be maintained. So long as there is a requirement of "effective control", "flag of convenience" abuses cannot occur.

11. It is understood that these consequences were presented as political compromises between the proposals of the different interest groups. Certain States had insisted earlier that in the case of the entities referred to in paragraph 1 (*a*) (ii) of draft resolution II, all the States whose natural or juridical persons comprise these entities must be signatories to the convention at the time the entities apply for pioneer investor status; other States strongly objected to this. The present compromise is to require all those States to become parties to the convention when the entities apply for a plan of work.

IV. *Why must a decision of the Conference establish an inequitable system for the granting of the status of "pioneer investor" to juridical persons of States enumerated in paragraph 1 (a) (ii) in draft resolution II? Why should the companies of the latter States be accorded an essentially privileged position?*

12. These also are political questions on which the Conference will have to make a decision. It is true that under subparagraph 1 (*a*) (i) of draft resolution II, as presently drafted, the States therein must sign the convention from the outset, while not all the States referred to in subparagraph 1 (*a*) (ii) must do so. There is also the third category, subparagraph 1 (*a*) (iii), where the States referred to must also be signatories at the outset. The requirement is therefore somewhat different for the three categories of pioneer investors. It may be relevant to point out that, if paragraph 5 of the draft resolution is interpreted to mean that only certifying States which are also signatory States may participate in the conflict resolution envisaged therein, the States mentioned in paragraph 1 (*a*) (ii) may need to become signatories in order to participate effectively in resolving conflicting claims.

DOCUMENT A/CONF.62/L.140

Letter dated 28 April 1982 from the representative of Bangladesh to the President of the Conference

[*Original: English*]
[*28 April 1982*]

I have been instructed by my Government to recall the national position in respect of the drawing of baselines from which areas of national maritime jurisdiction are measured. As you are aware, from the very beginning of the Third United Nations Conference on the Law of the Sea, the Bangladesh delegation has brought to the attention of the Conference the unique configuration of its coastline associated with peculiar geomorphological and geological conditions obtaining off-shore—conditions that lead to a highly fluctuating low-water mark and areas of shallow water so unstable and variable as not to be amenable to conventional charting. Except for the channels leading to the two riverine ports of Chalna and Chittagong, the off-shore area has not historically been navigable and that situation continues to remain so. These considerations have a manifest impact on the drawing of the baseline in an area where the waters immediately off-shore have a closer affinity to the land than to the ocean.

In this background, Bangladesh proposed a formulation based upon depth criteria and bathymetric factors which in the circumstances of the case mark the limits of navigation and charting. When the Bangladesh proposal was originally made, it received substantial and favourable support from a large number of delegations and it is our estimate that such support still exists. It is in this background that the Bangladesh Government considers that article 7 of the draft convention (A/CONF.62/L.78)[36] cannot preclude the founding of its baseline on depth criteria and bathymetric factors.

[36] See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XV (United Nations publication, Sales No. E.83.V.4).