

DOCUMENT A/CONF.62/L.85

Report of the Chairman of the Drafting Committee

[Original: English]
[5 March 1982]

1. An intersessional meeting of the Drafting Committee was held in New York from 18 January to 26 February 1982 in accordance with the decision taken by the Conference at its 153rd plenary meeting,¹⁸ on 24 August 1981.

2. From the opening days of the meeting the language groups, the co-ordinators and the Drafting Committee maintained an intensive schedule of meetings in the early morning hours, evenings, weekends, holidays and luncheon periods in addition to the regular meetings during United Nations working hours.

3. The language groups submitted a series of proposals on annexes III and IV. The co-ordinators completed consideration of Part XI, but were unable to give consideration in the time available to annexes III and IV provided for in the timetable decided on by the Conference.

4. The Drafting Committee is now submitting a series of proposals to the informal plenary meetings on articles 147 to 185 of Part XI. These recommendations are set out in addenda 1 to 8 to this report. Other matters regarding this Part are still under review.

5. There were 273 meetings of the language groups, 18 meetings of the co-ordinators of the language groups open to all delegations, under the direction of the Chairman of the Drafting Committee, and 7 meetings of the Drafting Committee. Representatives of 38 delegations participated in the

meetings. The Drafting Committee maintained its previously established informal working methods, with informal consultations continuing to play an increasingly significant role.

6. In accordance with the timetable proposed at the 154th plenary meeting, the Drafting Committee gave priority to Part XI and annexes III and IV. The volume, importance and complexity of these provisions, which create new legal concepts and new international institutions, are without precedent in international law, and have made it impossible for the Committee to complete consideration of all items on its agenda, in accordance with the timetable set by the Conference. As an indication of the number and range of issues addressed, the Drafting Committee has formulated 1,143 recommendations concerning Part XI during the intersessional meeting, as compared to a total of approximately 1,500 recommendations relating to all other Parts of the draft convention to date.

7. It is recommended that the language groups of the Drafting Committee meet as frequently as possible during the first weeks of the eleventh session of the conference with a view to early completion of their work on annexes III, IV, VI, VII and VIII, Parts XVI and XVII, preamble, article I and transitional provision, followed by the necessary meetings of the co-ordinators of the language groups and the Drafting Committee.

8. It is recommended also that sufficient time and the necessary facilities be provided for the Drafting Committee to enable it to carry out its work during the eleventh session.

¹⁸ 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).

DOCUMENT A/CONF.62/L.86*

Report of the President on the question of participation in the convention

[Original: English]
[26 March 1982]

1. The President held many informal meetings and consultations on the question of participation in the convention, during the first three weeks of the eleventh session. He reiterated the understanding that the question of participation was a package. The consultations commenced by examining the President's draft texts on the question of participation by international organizations, contained in annex 2 of document FC/27. The discussion of the President's text was undertaken on an article-by-article basis. The revised text, based upon these discussions, is contained in annex I to this report.

Intergovernmental organizations

2. The first article to be considered was paragraph 1 (d) of article 305, concerning signature by international organizations. This was discussed in conjunction with article 1, paragraph 1, of annex IX, which contained the definition of international organizations for the purpose of participation in the convention. The view was expressed that it would not be necessary to repeat the qualifying criteria for participation, in the context of signature requirements, as long as they were already contained in the definition. Some also felt that there

was a lack of symmetry between paragraph 1 (d) of article 305, which requires that at least one member State of the organization be a signatory to the convention before the organization may sign, and article 3, paragraph 1 of annex IX, which requires that a majority of States members of the organization be Parties to the convention before the organization may become a Party. It therefore appeared that it would be adequate to include a mere cross-reference to the definition contained in article 1, paragraph 1 of annex IX, and to include requirements regarding signature in a separate article of the annex.

Signature of the convention

3. The new article 2 of annex IX requires that a majority of the member States of the international organization sign the convention before the organization can sign.

Definition of international organizations

4. Also in connection with article 1, paragraph 1 of annex IX, several colleagues felt that it would be desirable to specify more clearly the kind of international organizations contemplated. In particular, the view was expressed that the intergovernmental nature of these organizations should be clearly

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specified. This suggestion was unopposed. As a consequence, it has been reflected in the new article 1 of annex IX.

Application of Part XVII

5. In connection with the discussions of article 1, paragraph 2 of annex IX, there was a lengthy debate as to the meaning and effect of the expression "*mutatis mutandis*" with respect to Part XVII of the convention. The application of each of the final clauses with respect to international organizations was examined and it was felt that the expression "*mutatis mutandis*" could adequately cover most cases. With respect to the application of certain provisions, however, a political decision was involved. This was found to be true with regard to the application of article 308, paragraph 1, concerning the number of instruments of adherence required for the entry into force of the convention. It was considered preferable to expressly disregard the instrument of adherence of the organization in the application of this provision in order to avoid the problem of double representation.

Amendments

6. With regard to the application of the provisions concerning amendments (articles 312 to 316) it was agreed that an organization could propose amendments only insofar as it has competence over the subject-matter of the proposed amendments. A similar approach has been adopted in regard to the application of article 316, paragraphs 1 and 2, concerning Entry Into Force of Amendments.

Denunciation

7. Several issues were raised in connection with the application of article 317, concerning Denunciation. In particular, the conditions under which an organization could denounce the convention were discussed. It was generally felt that the organization should continue to be a party to the convention as long as any of its member States is a Party to the convention, and as long as it continues to meet the qualifications contained in article 1, paragraph 1 of annex IX, regarding competences transferred to it.

Majority requirement

8. With regard to the discussions of article 3, paragraph 1, it was evident that the solution proposed in FC/27 continued to represent the best compromise on the required number of member States that should ratify or accede to the convention before the organization could adhere to it. As regards paragraph 3 of article 3, some felt that it might be better placed in the context of article 4, since the extent of participation by the organization is intrinsically linked to the rights and obligations of the organization under the convention.

The position of member States which are not Parties to the convention

9. Regarding article 4, discussions centred on paragraphs 4, 5 and 6. The representatives of the European Economic Community opposed the formulation contained in paragraph 4 for the reason that the Community is bound, by its constituent instruments, to act in a non-discriminatory manner with regard to all of the nationals of its member States. Other colleagues supported the formulation and thought it was necessary to prevent member States which are not parties to the convention from benefiting from the organization's participation in the convention. Several informal proposals by Brazil, Peru and the Soviet Union were presented on this point. The new paragraph 5 of article 4 is based on the Soviet Union's formulation.

Granting of national treatment

10. In connection with paragraph 5 of article 4, some felt that it negated the principle contained in paragraph 4 and that therefore it would be necessary to provide a cross-reference to paragraph 4 in order to ensure that the organization's granting of national treatment does not confer benefits under the convention on member States which are not parties to it.

Declarations and notifications

11. The discussion of article 5 on declarations of transfers of competence centred on paragraph 6. In connection with this paragraph, there was some discussion on the need to require that declarations specify the provisions of the convention affected. The fear was expressed that such specification might not be accurate in all cases and might mislead third States, since the transfers of competences which have taken place in the past have not necessarily been based upon the provisions of the convention. In any case, it was felt that if any doubt were to exist, paragraph 5 of article 5 provides an adequate procedure for resolving that doubt. In the face of the strong opposition of the European Economic Community, the requirement to specify the provisions affected has been dropped from the new text of annex IX.

Presumption of competence

12. In connection with the discussions of articles 5 and 6, concern was expressed that there could be discrepancies between the declarations and notifications made by States and those of the organization. Although it was pointed out that paragraphs 4 and 5 of article 5 might cover the case, these concerns were not allayed since it was felt that the provision of information under these two paragraphs might not necessarily be timely, and that during the period of delay third States would require guidance. Therefore, it was felt that in the case of doubt, there must be a presumption of competence with one party or the other, and that a provision to this effect should be added. This argument was strengthened by the fact that, in accordance with article 6, paragraph 1, responsibility lies with the party which has competence and that therefore the distribution of competences must be clear. The new paragraph 3 of article 5 contains such a presumption.

Settlement of disputes

13. There was a lengthy discussion of paragraph 1 of article 7, concerning the settlement of disputes. Some felt that a "*mutatis mutandis*" provision in connection with Part XV is inadequate, especially since there are certain portions of Part XV which cannot *ipso facto* be applied to international organizations. However, aside from this exception, it was agreed that the intention of article 7, paragraph 1, is to provide for the application of the entire system of the settlement of disputes under the convention in respect of organizations party to it. The President was asked to find an appropriate formulation. The new article 7 of annex IX should take care of this problem.

Associated States and Territories which enjoy full internal self-government recognized by the United Nations

13 (bis). Although the participation of these entities was not discussed at the present session, their capacity and competence to participate was examined in detail at earlier sessions as referred to in the President's reports. There was no doubt that they did possess the requisite qualifications. Article 305, paragraph 1 (b), (c) and (d), now presented in annex I below, provides for their signature and the subsequent articles for ratification and accession by these entities.

National liberation movements

14. Attention was next turned to the question of participation in the convention by national liberation movements. The President reiterated the views expressed on both sides of the issue at the last sessions (documents FC/25, FC/26 and FC/27), and requested that only new views be presented in an effort to find a satisfactory solution. Some maintained the view that national liberation movements should be allowed to be full parties to the convention, while others insisted that nothing could or should be included in the convention on the subject.

15. The President subsequently continued consultations with some delegations immediately concerned with the question. Discussions focused on the degree of participation of certain national liberation movements in the 1977 Additional Protocols¹⁹ to the 1949 Geneva Conventions for the Protection of victims of armed conflict and it was agreed that those Protocols could offer some guidance, particularly with respect to the fact that national liberation movements which participated in the work of the Conference on those Protocols were allowed to sign the final act of that Conference in their capacity as observers.

16. As a result of these negotiations, the President proposes a compromise proposal on national liberation movements comprising the following five elements:

- (i) National liberation movements which have been participating in the Third United Nations Conference on the Law of the Sea shall be entitled to sign the final act of the Conference, in their capacity as observers;
- (ii) National liberation movements which have been participating in the Third United Nations Conference on the Law of the Sea and which sign the final act of the Conference shall have the status of observers before the Preparatory Commission;
- (iii) National liberation movements which have been participating in the Third United Nations Conference on the Law of the Sea and which sign the final act of the Conference shall have the status of observers before the Assembly of the International Sea-Bed Authority;
- (iv) National liberation movements which have been participating in the Third United Nations Conference on the Law of the Sea and which sign the final act of the Conference may attend any meeting of the parties to the convention, in the capacity of observers;
- (v) Any communication sent to parties to the convention by the depositary shall also be sent to national liberation movements which have been participating in the Third United Nations Conference on the Law of the Sea and which sign the final act of the Conference.

17. The national liberation movements which have been participating in this Conference and which sign the final act will, therefore, be able to participate in the Preparatory Commission and the International Sea-Bed Authority as observers. This will enable them to present the views of the peoples they represent and request the adoption of appropriate measures for the protection of the interests of those peoples until they attain their autonomy or independence.

18. The President proposes to implement the five elements of the compromise regarding national liberation movements in the manner outlined in annex II to this report.

The transitional provision

19. The question of the transitional provision was taken up at the conclusion of the discussions on participation. The

spokesman for the Group of 77 explained again the principles behind the Group of 77 draft article presented at the resumed tenth session in Geneva. There did not seem to be any controversy regarding the principle upon which the transitional provision is based, i.e. that the peoples of the territories mentioned therein should be the beneficiaries of the resources of such territories. However, the language used to express this principle, as well as the question of its placement with regard to the convention, continued to be problematic. It was suggested that the transitional provision could become a resolution of the Conference. This idea seemed to present the best compromise. The draft resolution contained in annex III to this report is the result of negotiations among the most concerned delegations conducted by the President.

20. All of the elements of the package on participation in the convention have, therefore, been examined thoroughly. The possible compromises as a conclusion of those discussions are reflected in the annexes to this report: annex I contains the enabling provisions for non-States entities to participate in the convention as parties; annex II contains means of implementation of the five elements regarding involvement by national liberation movements; and annex III contains a draft resolution regarding territories to which the Transitional Provision previously applied.

Acknowledgements

21. The President would like to acknowledge his intellectual debt to his two collaborators from the Secretariat, Mr. Gritakumar Chitty and Miss Linda Hazou. He would also like to record his appreciation to his secretary, Mrs. Gladys Serlinger, for her invaluable assistance.

ANNEX I

Informal proposals on participation in the convention presented by the President of the Conference

PART I. USE OF TERMS

Article 1 bis. Scope

This Convention shall apply *mutatis mutandis* to entities referred to in article 305, paragraphs 1 (b), (c), (d) and (e), which become Parties to this Convention in accordance with the conditions relevant to each, and to that extent "States Parties" means and includes such entities.

PART XVII. FINAL CLAUSES

Article 305. Signature

1. This Convention shall be open for signature by:

(a) All States;

(b) All self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations in accordance with resolution 1514 (XV) of the General Assembly of the United Nations and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters;

(c) All self-governing associated States which, in accordance with their respective instruments of association, have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters;

(d) All Territories which enjoy full international self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters;

(e) International organizations, in accordance with annex IX.

¹⁹ Document A/32/144, annexes.

2. This Convention shall remain open for signature until ... (last day of the twenty-fourth month after the opening date for signature) at the Ministry of Foreign Affairs of the Republic of Venezuela and also, as from ... (first day of the seventh month after the opening date for signature) until ... (last day of the twenty-fourth month after the opening date for signature), at United Nations Headquarters in New York.

Article 306. Ratification and act of formal confirmation

This Convention is subject to ratification by States and the other entities referred to in article 305, paragraphs 1 (b), (c) and (d), and act of formal confirmation, in accordance with annex IX, by the entities referred to in article 305, paragraph 1 (e). Instruments of ratification and of formal confirmation shall be deposited with the Secretary-General of the United Nations.

Article 307. Accession

This Convention shall remain open for accession by States and the other entities referred to in article 305. Accession by entities referred to in article 305, paragraph 1 (e), shall be in accordance with annex IX. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Annex IX

PARTICIPATION BY INTERNATIONAL ORGANIZATIONS

Article 1

For the purposes of article 305 and of this annex, international organizations shall mean international intergovernmental organizations constituted by States to which States members of such organizations have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of such matters.

Article 2. Signature

An international organization may sign this Convention if a majority of its States members are signatories to this Convention. At the time of signature an international organization shall make a declaration specifying the matters governed by the Convention in respect of which competence has been transferred to the organization by its States members which are signatories, as well as the nature and extent of such competence.

Article 3. Act of formal confirmation and accession

1. An international organization may deposit its instrument of formal confirmation or of accession if a majority of its States members deposit or have deposited their instruments of ratification or accession.
2. Such instruments of the organization shall contain the undertakings and declarations required by articles 4 and 5.

Article 4. Extent of participation and rights and obligations

1. The instrument of formal confirmation or of accession deposited by an international organization shall contain an undertaking to accept the rights and obligations provided for States in this Convention in respect of matters relating to which competence has been transferred to it by its States members which are Parties to this Convention.
2. An international organization shall be a Party to this Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications referred to in article 5.
3. Such an international organization shall exercise the rights and fulfil the obligations which would otherwise fall upon its members which are States Parties in accordance with this Convention, on matters relating to which competence has been transferred to it by such States members. The States members of such an international organization shall not exercise the competences they have transferred to it.
4. The participation by such international organizations shall in no case entail an increase of the representation that their States members, which are States Parties, would otherwise be entitled to, including rights in decision-making.

5. The participation of such international organizations shall in no case give any rights provided under the Convention to member States of the organization which are not Parties to the Convention.

6. Only to the extent that it would be in strict conformity with the provisions of this Convention, in particular paragraph 5, the international organization may implement, in accordance with the rules governing it, provisions relating to the mutual granting to the nationals of its States members of national treatment or any other special treatment with regard to matters relating to which competence has been transferred to it by its States members which are States Parties.

7. In the event of a conflict between the obligations of an international organization under this Convention and its obligations arising under the terms of the agreement establishing the organization or any acts relating to it, the obligations under the present Convention shall prevail.

Article 5. Declarations and notifications

1. The instrument of formal confirmation or accession of an international organization shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its States members which have ratified or acceded to the Convention.

2. A State member of an international organization shall, at the time it ratifies or accedes to the Convention or at the time when the organization deposits its instrument of formal confirmation or accession, whichever is later, make a declaration specifying the matters governed by this Convention in respect of which it has transferred competence to the organization.

3. States Parties which are members of an organization which is a Party to the Convention shall be presumed to have competence over all matters governed by this Convention in respect of which transfers of competence to the organization have not been specifically declared, notified or communicated by such States under this article.

4. The international organization and its States members, which are Parties to the Convention, shall promptly notify the depositary of any changes to the distribution of competences, including new transfers of competence, specified in the declarations under paragraphs 1 and 2.

5. Any State Party may request an international organization and its States members, which are States Parties, to provide information as to who has competence in respect of any specific question which has arisen. The organization and the States members concerned shall furnish such information within a reasonable time. The international organization and the States members may also, on their initiative, provide such information.

6. Declarations, notifications and communications of information under this article shall specify the nature and extent of the competences transferred.

Article 6. Responsibility

1. Parties which have competence under article 5 shall bear responsibility for failure to comply with obligations or any other violation of the Convention.
2. Any State Party may request an international organization or its States members which are States Parties for information as to who has responsibility in respect of any specific matter. The organization and the States members concerned shall provide such information. Failure to provide such information within a reasonable time or the provision of contradictory information shall result in joint and several responsibility.

Article 7. Settlement of disputes

1. At the time of deposit of its instrument of formal confirmation or accession, or at any time thereafter, an international organization shall be free to choose, by means of written declaration, one or more of the means for the settlement of disputes concerning the interpretation or application of this Convention, referred to in article 287, paragraph 1 (a), (c) or (d).
2. The provisions of Part XV shall apply *mutatis mutandis* to any dispute between Parties to this Convention, one or more of which are international organizations.
3. Where an international organization and one or more of its States members are joint parties to a dispute, or parties in the same interest, the organization shall be deemed to have accepted the same

procedures for the settlement of disputes as the States members; provided that where a State member has only chosen the International Court of Justice under article 287, the organization and the State member concerned shall be deemed to have accepted arbitration in accordance with annex VII, unless the parties to the dispute otherwise agree.

Article 8. Applicability of Part XVII

Part XVII shall apply *mutatis mutandis* to an international organization, except in respect of the following:

- (a) The instrument of formal confirmation or accession of an international organization shall not be taken into account when applying article 308, paragraph 1;
- (b)(i) An international organization shall have exclusive capacity with respect to the application of articles 312 to 315, to the extent that it has competence under article 5 over the entire subject-matter of the amendment;
- (ii) The instrument of formal confirmation or accession of an international organization to an amendment, the entire subject-matter over which the international organization has competence under article 5, shall be considered to be the instrument of ratification or accession of each of the member States Party to the Convention, for the purposes of applying article 316, paragraphs 1, 2 and 3;
- (iii) With regard to all other amendments, the instrument of formal confirmation or accession of the international organization shall not be taken into account when applying article 316, paragraphs 1 and 2;
- (c)(i) In respect of article 317, an international organization may not denounce this Convention if any of its member States is a Party to the Convention and if it continues to fulfil the qualifications specified in article 1;
- (ii) The international organization shall denounce the Convention when none of its member States is a Party to the Convention or if the international organization no longer fulfils the qualifications specified in article 1. Such denunciation shall take effect immediately.

ANNEX II

President's draft decision of the Conference

NATIONAL LIBERATION MOVEMENTS

The Conference decides that the national liberation movements, which have been participating in the Third United Nations Conference on the Law of the Sea, shall be entitled to sign the Final Act of the Conference, in their capacity as observers.

Participation in the Preparatory Commission

The formulation of operative paragraph 2 of the draft resolution establishing the Preparatory Commission contained in document WG.21/Informal Paper 17 reads:

"The representatives of signatories to the Final Act may participate fully in the deliberations of the Commission as observers but shall not be entitled to participate in the taking of decisions."

This would cover the case of national liberation movements. Without prejudice to the formulation eventually agreed upon, a provision along these lines would have to be maintained to specifically cover the case of national liberation movements.

PROPOSED CHANGE TO ARTICLE 156

Article 156. Establishment of the Authority

1. There is hereby established the International Sea-Bed Authority which shall function in accordance with the provisions of this Part.
2. All States Parties are *ipso facto* members of the Authority.
3. Observers at the Third United Nations Conference on the Law of the Sea who have signed the Final Act and who are not entitled to

become Parties to the Convention shall have the right to participate in the Authority as observers, in accordance with its rules, regulations and procedures.

4. The seat of the Authority shall be at Jamaica.

5. The Authority may establish such regional centres or offices as it deems necessary for the performance of its functions.

PROPOSED MODIFICATION TO ARTICLE 319: ADDITION OF NEW PARAGRAPH 3

Article 319. Depositary

1. The Secretary-General of the United Nations shall be the depositary of this Convention and amendments thereto.
2. In addition to his functions as depositary, the Secretary-General of the United Nations shall:
 - (a) Report to all States Parties, the Authority and competent international organizations on issues of a general nature that have arisen with respect to this Convention;
 - (b) Notify the Authority of ratifications of and accessions to this Convention and amendments thereto, as well as of denunciations of this Convention;
 - (c) Notify States Parties of agreements in accordance with article 311, paragraph 4;
 - (d) Circulate amendments adopted in accordance with this Convention to States Parties for ratification or accession;
 - (e) Convene necessary meetings of States Parties in accordance with this Convention.
3. (a) The Secretary-General shall also transmit to the observers referred to in article 156:
 - (i) All reports, as referred to in paragraph 2 (a);
 - (ii) Notifications referred to in paragraphs 2 (b) and (c); and
 - (iii) For their information, texts of amendments, referred to in paragraph 2 (d).
- (b) The Secretary-General shall also invite such observers to participate as observers at meetings of States Parties, referred to in paragraph 2 (e).

ANNEX III

Draft resolution

The Third United Nations Conference on the Law of the Sea,

Having regard to the Convention on the Law of the Sea, opened for signature today at Caracas,

And bearing in mind the Charter of the United Nations, in particular, article 73,

Declares:

1. In the case of a territory whose people have not attained either full independence or some other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under this Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.

2. Where a dispute exists between States over the sovereignty of a territory to which this declaration applies, in respect of which the United Nations has recommended specific means of settlement, there shall be consultations between the parties to that dispute regarding the exercise of the rights referred to in paragraph 1. In such consultations the interests of the people of the territory concerned shall be a fundamental consideration. Any exercise of those rights shall take into account the relevant resolutions of the United Nations and shall be without prejudice to the position of either party to the dispute. The States concerned shall make every effort to enter into provisional arrangements of a practical nature and shall not jeopardize or hamper the reaching of a final settlement of the dispute.

3. *Requests the Secretary-General of the United Nations to bring this resolution to the attention of all member States and the other participants in the Conference, as well as the principal organs of the United Nations, and to request their compliance with it.*