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Preparation of the tenth session of the Third
United Nations Conference on the Law of the Sea

(New York, 9 March - 17/24 April 1981)

(Commission communication to the Council)

1. The tenth session of the Third United Nations Conference on the Law of the Sea will be held from 9 March to 17/24 April 1981. This session should be the last negotiating session before the final signing session scheduled for September 1981 in Caracas.

After six years of intensive negotiations, agreement to a large degree already exists or is about to be achieved on an important range of issues :

- the maximum breadth of the territorial area (12 miles) ;
- the establishment of 200 miles economic zones ;
- the delimitation of the continental shelf (200 miles or more) ;
- the navigation regime in territorial waters, in the straits used for international navigation, in the economic zone and in the high seas ;
- the conservation and management of fisheries resources ;
- the protection of marine environment ;
- the marine scientific research ;
- the procedure for dispute settlement ;
- the international area beyond the limits of national jurisdiction will be subject to an international system for the exploration and exploitation of resources, in particular polymetallic nodules (containing nickel, copper, cobalt, or manganese). This system will be administered by an international Authority. The main organs of this Authority will be an Assembly, of which each State Party will be a member, and a Council, which will be the executive organ of the Authority, with a restricted membership of 36. The Authority could allocate responsibility for the exploration and the exploitation of the sea-bed to private companies or state holdings or to an international Enterprise of a commercial nature, the establishment and statute of which will be determined by the future Convention.

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The main topics still to be dealt with at the tenth session will be :

- the clause concerning participation in the Convention by non-states, including the Community ;
- definition of the terms of reference of the Preparatory Commission of the International Sea-Bed Authority so that the exploration and exploitation system can become operational as soon as possible following the entry into force of the Convention ;
- an examination of the treatment to be accorded to preparatory investment operations carried out before the entry into force of the Convention, provided that these operations do not prejudice its aims and objectives.

2. These topics on the agenda of the next session concern matters falling within the Community's sphere of competence or include aspects of major significance for the future of the common market.

The Community has participated in the Conference from the outset on the basis of the Council Decision of 19 July 1976. In the course of the negotiations new questions have arisen, such as that of setting up a Preparatory Commission of the International Sea-Bed Authority, which call for decisions by the Community authorities to avoid jeopardizing the Community's effective participation in the operation of the future Convention.

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I. Community participation clause

1. The Council of Ministers decided on 19 July 1976 that negotiations should be initiated at the Third United Nations Conference on the Law of the Sea for the inclusion in the instruments being drafted by this conference of a clause to enable the European Economic Community to become a contracting party to the said instruments.

During the sessions in 1976 and 1977 and 1978, the Community has in letters to the President of the conference from the head of the delegation representing the Presidency drawn attention to the need for the European Economic Community to become a contracting party to the instruments which the conference is elaborating. The letters, which have been distributed as official conference documents, and statements made in plenary in May 1978 and in August 1979 by the delegations representing the Presidency, explained that in view of the transfer of competences which has occurred, the Member States cannot undertake engagements with respect to third States on matters examined at the conference over which the Community has competence and that, therefore, it is necessary for the Community to become a party to the future convention on the Law of the Sea together with its Member States.

The Member States of the Community submitted in August 1979 a text of a Community clause to the conference (1). The clause is formulated in general terms and would open the convention for signature and approval or accession by customs unions, Communities or other regional economic integration groupings, constituted by sovereign

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(1) Doc. F.C./5 of 3 August 1979 - reproduced in Annex I

States which exercise powers in areas covered by the convention.

Throughout the negotiations which have been conducted with third countries on the subject of this clause the main objective has been to make sure that the Community may become a contracting party to the convention with the same rights and obligations as States Parties in relation to areas where powers have been transferred to it, including the possibility for the Community to act on its own behalf as plaintiff or defendant in a dispute settlement procedure on matters falling under its competence.

Consultations carried out with a large number of delegations at the conference have resulted in the drafting of a new text which reflects what seems necessary to insert in the Community participation clause in order to get sufficient support for its inclusion in the future convention. This text, which is of a purely informal character, has been distributed to a number of delegations at the closing day of the last session on 29 August 1980 (1).

2. This text should make it sufficiently clear that the Community by its approval of/or accession to the convention will become a member of the International Sea-Bed Authority, which will be in charge of the policy for the exploitation and exploration of the international sea-bed area.

The necessity of including a Community clause in the future Law of the Sea Convention has now been accepted by a large majority of the participants in the conference. It is equally evident that further efforts are required in order to obtain a satisfactory formulation of this clause, since for political reasons certain countries are opposed to see the Community participating as a contracting party to international conventions or want to further their own causes before they would lend their support to a Community clause.

.../...

(1) Reproduced as Annex II

II. Preparatory Commission of the International Sea-Bed Authority

1. During the first part of the ninth session in New York in March/April 1980, the President of the Conference presented the participants with a report, the result of unofficial negotiations, on the setting up of a Preparatory Commission to enable the International Sea-Bed Authority and its organs to become operational as soon as possible after the date of entry into force of the Convention.

The draft resolution (1) attached to this Communication examines the objectives, composition and procedure for the setting up of this Commission, together with its structure and functions.

2. At the last Geneva session, the Conference did not continue the study of this matter, but it became evident during the negotiations that the Preparatory Commission would have an open brief, enabling it to deal in practice with all questions not solved before the signing of the Convention.

This process of progressively extending the Preparatory Commission's powers is foreshadowed by point 8 of the draft resolution : "The Commission may deal with any other matter falling within its sphere of action, including ...".

This means that a precise definition cannot yet be made of the definitive extent of the Preparatory Commission's functions, but it is already obvious that certain of the matters it will be discussing fall within the Community's sphere of competence.

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(1) UN DOC. A/CONF/62/L.55 of 1 April 1980 reproduced in Annex III

3. Certain aspects covered by Part XI of the Convention, entitled "The Area", are more directly connected with the future work of the Preparatory Commission, and there will also be all the subjects assigned to it under point 8 of the draft resolution quoted above.

With regard to Sea-Bed resources, the Community and its Member States informed the delegations to the Conference on 5 May 1978 of the various aspects of the Community's competence in this sphere ; to that end, a paper containing information supplementing the statement made in Plenary by the representative of the State holding the presidency of the Council of the European Communities at the time was distributed at the Conference.

This paper pointed out that the Community's sphere of competence in the commercial policy field (Article 113 EEC) to a certain extent overlay that covered by the provisions of the Part XI of the future Convention.

It noted that Part XI (Article 150 of the present draft Convention - unofficial text of August 1980) lays down, inter alia, that activities in the Area "shall be carried out in such a way as to foster healthy development of the world economy and balanced growth of international trade ", provisions which are very similar in substance to those contained in Article 110 of the Treaty relating to the objectives of the EEC's common commercial policy.

The paper also pointed out that under its powers in the commercial policy sphere the Community was a contracting party to a number of international commodities agreements, in the UNCTAD framework, was taking part in the formulation of international agreements on further commodities, in particular copper. The Commission also pointed out that since the paper of 5 May 1978 had been circulated the Community had become a contracting party to new international commodity accords : olive oil agreement (1979) natural rubber agreement (1979) and that the future Convention on the Law of the Sea made provision for the use of the commodity agreement technique (Article 151 of the draft convention - unofficial text of August 1980)

" to promote the growth, efficiency and stability of markets for those commodities produced from the resources of the Area, at prices remunerative to producers and fair to consumers". Article 151 lays down that "all interested parties including both producers and consumers" will participate in any commodity conferences dealing with products obtained from the Area.

4. Furthermore, the draft participation clause incorporates, as regards procedure, certain aspects which come within the Community's recognized sphere of competence, with particular regard to its participation in the organs of the Sea-Bed Authority, since it lays down that " the participation provided for in this article shall in no case entail an increase of representation, nor may the States members of the organization exercise individually the rights they have transferred". (1)

This wording points up the links which exist between the participation clause and the forthcoming discussion on the Preparatory Commission. The participation clause can be applied for the first time in respect of Community participation in the Preparatory Commission. Community participation in this organ is necessary in that it foreshadows its participation in the definitive organs of the Sea-Bed Authority, especially the Assembly. This objective cannot be attained if observer status is retained.

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(1) Paragraph 4 of the text of the draft clause reproduced in Annex II.

Consequently, it would be necessary for the Member states to request that the Preparatory Commission be open to all parties signatory to the Convention⁽¹⁾, in order to ensure that the Community can become a full member of this Commission.

III. Protection of preliminary investment

1. At the end of the first part of the ninth session in New York, in March-April, the United States Delegation, after consulting industrialists interested in exploiting the sea-bed, presented an unofficial working paper on investment protection during the transitional period (IA/1 of 2 April 1980). The paper states that private companies do not wish to continue their work on exploration and development of exploitation technology unless they have a guarantee that the site on which each company concentrates its activity will be definitively awarded to that company when the Convention ultimately enters into force.

The US paper was not discussed at the spring or summer sessions.

2. The question of the protection of preliminary investment must be negotiated in 1981, since:

- on the one hand, even if the text of the final act or Convention is signed in Caracas in September 1981, it cannot be expected to enter into force for six or seven years; the Preparatory Commission must finish its work (in about 1984) before the ratification process can be commenced by the Western industrialized states;

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(1) It is laid down in point 2 of the draft resolution that only States signatory to the Convention will be represented in the Preparatory Commission

- on the other hand, the United States and the Federal Republic of Germany have adopted laws defining the interim arrangements for exploitation of the sea-bed up to the entry into force of the Convention (it would seem that other industrialized countries are preparing to adopt similar legislation). These laws were considered necessary, despite the objections raised by the Group of 77, in order to give a legal framework to the research, development and exploration activities of the various private companies so that the sea-bed can be exploited without awaiting the definitive entry into force of the Convention.

Certain developing countries refuse to recognize preparatory investment under the cover of national legislation in the international Area. It is nevertheless considered necessary for private industry to continue its work in order to permit systematic exploitation of the sea-bed resources in the reasonably near future by the international Enterprise *inter alia*.

3. The future exploitation of polymetallic nodules on the deep sea-bed is of undoubted importance for the Community's raw materials supplies; two of the metals which can be extracted from the nodules (manganese and cobalt) can be considered as being of vital importance.

In six Community countries industrial companies have taken part, on a national basis or as part of international consortia, in programmes researching and developing the technology of extracting and processing polymetallic nodules. These companies must take a decision on whether to continue their efforts.

4. The delegations of the Member States of the Community must work in close conjunction both before and during the next session in order to find a solution which provides initial investors with guarantees while taking into account the positions adopted by the developing countries.

5. Since the Federal Republic of Germany has adopted interim national legislation relating to the exploitation of the sea-bed and other Member States seem likely to follow suit, the Commission considers it necessary to organize a coordination procedure to ensure that the different national laws are compatible and to avoid possible distortions of competition.

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By way of conclusion, the Commission recommends that the Council decides to continue the negotiations in the Third United Nations Conference on the Law of the Sea in order to obtain:

- a) the participation of the Community in the Convention as a Contracting Party;
- b) the participation of the Community as a member of the Preparatory Commission of the International Sea-Bed Authority;
- c) a satisfactory solution for the protection of preliminary investment operations conducted before the entry into force of the Convention.