

COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMISSION COMMUNICATION TO THE COUNCIL

Third United Nations Conference on the Law of the Sea

Participation by the Community in the future Convention

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Subject : Third United Nations Conference on the Law of the Sea.
- Participation by the Community in the future Convention

Heads of delegations to the Conference on the Law of the Sea, assembled in London on 6 november, decided to submit to the examination of a group of legal experts the draft articles on the participation of international organizations which President KOH had put before the Conference in August.

The Council will find below the Commission's comments on the draft and the new approach which in its view should guide the continuation of the negotiation on this important matter.

2. PRELIMINARY OBSERVATIONS

It will be recalled that in March on the eve of the tenth session of the Conference, the Member States of the Community put before the Conference informal draft articles to serve as a basis for discussion on the "clause" governing the participation of international organizations (1). Essentially, the text of the Ten opened the Convention to participation by international organizations having competence for the fields it covered, giving them, within their area of competence, the same rights and obligations as States party to the Convention.

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(1)

On 17 February, the Council expressly reserved the right to examine at the appropriate time the implications of Community participation. In so doing, it was referring in particular to the question of the Community's representation in the organs set up by the future convention.

Moreover, since this would be a Convention involving the participation of the Community and all or some of its Member States, each in so far as it was concerned (1), the draft resolved the question of representation (voting rights in the organs) and responsibility in the event of non-compliance with the undertakings given under the Convention, avoiding any cumulation of legal value.

2. BRIEF ANALYSIS OF MR KOH'S TEXT

On certain essential points, Mr KOH's draft diverges substantially from the informal proposal of the Ten and the Council must be made aware of the fact that straightforward acceptance of the draft would be likely to affect the Community's future activity in matters of international relations while laying it open to contradictions of a legal nature for the following reasons :

- (a) In contrast to the proposal of the Ten (which establishes no such link) Mr KOH's draft makes participation by the Community subject to the requirement that the majority of the Community Member States should themselves be parties to the Convention directly (see Article 305 d) and 3 § 1 in draft Annex IX to the Convention).

It is scarcely necessary to point out here that the Community's external commitments are entered into on a sufficiently sound legal basis by applying the procedure laid down in the Treaty of Rome, which assigns exclusive competence to the institutions (Council, Commission, European Parliament), without the additional condition that a certain number of Member States should participate.

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(1) "Mixed" agreements in Community parlance.

- b) The informal proposal of the Ten stipulated, with regard to the identification of the respective areas of competence of the Community and the Member States, a flexible and pragmatic information procedure, triggered at the request of any non-member state party to the Convention and operating "in connection with any specific question which has arisen". Such a procedure, when used in the management of "mixed" agreements covering complex fields, makes it possible to determine on a case-by-case basis and at the appropriate time, the areas of competence and responsibilities as and when practical questions arise and need to be resolved.

If Mr Koh's text is followed, international organizations will be obliged, when they sign, to make a declaration specifying with regard to the content of the Convention those areas for which they are competent. The declaration will have to mention "the nature and extent" of the transfers and the articles of the Convention concerned (Annex IX, articles 2, 5 (1) and (6)). Any change in the distribution areas of competence will have to be notified promptly (Article 5(3)); further more, the Member States will themselves have to give notification, initially and in the event of changes, of transfers of competence (Article 5(2)). Exhaustive and binding as they are, the "declarations, communications of information or notifications referred to in Article 5" will make it possible to weigh up, at any moment, the degree of participation of the international organization and assess the position to be given in the body envisaged (Article 3(3)).

Because of their strict formalism, such requirements would be bound to lead to serious disputes, quite apart from the practical difficulty of their application in the case of the Community, given the essentially evolving nature of the responsibilities assigned to the latter by the Treaty of Rome.

- c) Mr Koh's draft also stipulates, in Article 4(4) that "an international organization shall not implement the Convention in such a manner as to benefit a State member which is not party to the Convention". If the

Member States of the Community did not all participate in the Convention, or if one or more of them were to withdraw, the EEC might find itself obliged to disregard certain fundamental principles of the Treaty of Rome (e.g. non-discrimination and freedom of the establishment in the fisheries sector). This is clearly unacceptable.

- d) Lastly, the draft, even more so perhaps than the text of the Ten, lends uncertainty to the participation of the Community as such as a member of the International Sea-Bed Authority. A number of partners would be tempted to exclude the Community, basing their arguments on the restrictive provisions referred to under (b) and on the uncertainty they attach to the participation of international organizations.

3. PROPOSED APPROACH

- a) The analysis given above shows that on important points the Koh draft is unacceptable as it stands. The Commission feels that the Community could subscribe to it only if it were substantially redrafted, but it realizes that it would almost certainly be impossible to arrive at a solution if an excessively rigid negotiating position were to be adopted, for it has to be recognized that there is a certain amount of logic behind the Koh draft if the nature and scope of the Convention are considered.

The Law of the Sea Convention will be universal in scope, of unlimited duration, and calls for the participation of virtually the whole of the international community. It covers everything connected with the use of the sea, from the delimitation of territorial waters to the exploitation of marine resources.

The non-Community States negotiating at the Conference regard the participation of international organizations with circumspection, particularly as they see behind the EEC the shadow of less clearly

defined organizations. It is therefore not surprising that a draft aimed indiscriminately at all international organizations concerned in one way or another should emphasize the ongoing filtering aspect embodied in the condition regarding declarations on the respective areas of competence of organizations and Member States.

- b) Accordingly the Commission proposes a new approach for the continuation of the negotiations compared with the initial informal draft. This approach, which would probably be less difficult to maintain in the face of the Koh proposals should make it possible to create conditions of accession that can be accepted by the Community and its Member States.

This approach would involve the Community presenting itself to the Convention in the context of a joint and simultaneous operation establishing ^{an} organic link between its own participation and that of all its Member States. This link would operate at the accession to the Convention stage ; however, subsequently, in the implementation of the Convention, the Community and the Member States would act, each in so far as it was concerned, in the light of their respective areas of competence.

This solution would have the advantage of rendering unnecessary the majority participation condition (see 2 (a) above) and the limited territorial application clause (see 2 (c) above). It would, however, still be essential to secure the abandonment of the exhaustive and obligatory declaration arrangements advocated by Mr Koh and the return to the pragmatic information system suggested by the Ten.

Such an approach could involve the inclusion in the Convention of a special clause - derogating in so far as necessary from the common law governing the participation of international organizations - for the benefit of those organizations that became parties to the Convention in the context of a joint operation linking them to their Member States (the scheme proposed by Mr KOH would continue to apply solely to those international organizations not offering the guarantee of the above joint and simultaneous operation).

The joint operation scheme presupposes, however, that firm guarantees of internal discipline would be established, which implies a procedure to ensure the cohesion of the Community -Member States unit thus established. In other words, the Council decision authorizing the signing of the Convention on behalf of the Community, itself based on the articles establishing the Community's external competence, would, on this basis, necessarily be accompanied by a decision, based on Article 116 of the Treaty, setting out the unanimous commitment of the Member States to become parties to the Convention.

- c) If the joint operation solution proposed as the main position cannot be adopted the fallback position would be the idea of autonomous Community participation independently of the participation of the Member States. The negotiations should in any event aim to achieve the following adjustments :
- i) Arguing on the basis of considerations relating to the nature of the Treaty of Rome (which lays down the objectives, principles and procedures but not an exhaustive body of substantive rules) and the essentially developing division of responsibilities between the institutions and the Member States, an attempt will be made first of all to negotiate a return to the formula proposed by the Ten in March with regard to the information procedure concerning areas of competence.
 - ii) The dropping of the condition stipulating the majority participation of the Member States should also be negotiated, reference being made here to Article 5 and 228 (2) of the Treaty of Rome and to the rules of procedure applicable to the conclusion of the Community's external commitments ; all of the above provisions closely associates the Member States with Community action at international level and should therefore give all necessary guarantees for implementation by the European side.

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- iii) Negotiations should also be held to remove the requirement in the draft that an international organization should not apply the Convention to the benefit of a State member that is not party thereto (see point 2 (c) above), as such a provision would be diametrically opposed to one of the fundamental principles of the Community.