COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.11.1995
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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

ON THE SIGNATURE OF THE AGREEMENT FOR THE IMPLEMENTATION OF THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10th DECEMBER 1982 RELATING TO THE CONSERVATION AND MANAGEMENT OF STRADDLING STOCKS AND HIGHLY MIGRATORY FISH STOCKS

Communication from the Commission to the Council

Part A

Explanatory Memorandum

On 4 August 1995, the United Nations' Conference on Straddling Stocks (stocks of fish which are found both inside and outside exclusive economic zones) and Highly Migratory Species adopted, without a vote, a draft Agreement[1] for the purposes of applying the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 as regards the conservation and management of these stocks.

The Community has now to decide whether to sign this Agreement with a view to later ratification.

This decision should take into account both the context of the development of international relations in fisheries and the negotiating instructions given by the Council.

A detailed evaluation of the draft Agreement is attached in Annex B.

The Community has played an important role in the development of international fishing relations both by defending the interests of countries fishing the high seas and in affirming its commitment to effective measures to conserve and manage resources.

This central role of the Community would be put in doubt if it were to reject the conclusions of this conference. It would then be in a very minority position which would exclude any possibility of renegotiating the terms of the Agreement and could only lead on to undesirable developments in international relations concerning fisheries.

The Community has achieved the goals that it set itself in the most important areas of the negotiations, in particular on the three points which were considered as primordial by the Council of fisheries ministers held on 15 June 1995, namely the necessarily open character of regional fisheries organizations, safeguarding of the jurisdiction of flag states and a balance in obligations as between coastal states and flag states.

In the area of the management and conservation of fishery resources, the Agreement introduces a number of improvements which should make it possible to deal positively with the current difficult situation which is the source of manifold tensions among countries involved in fishery activities.

This proposal is designed to make it possible for the Community to sign this Agreement on 4 December, which is the date on which it will be opened for signature by the states concerned at the headquarters of the United Nations.

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[1] Document A / CONF.164/33 of 3 August 1995.

This signature is an exclusive competence of the Community, on the basis of the requirement under the common fisheries policy that uniform rules apply on identical terms to all Community nationals. This exclusive competence of the Community, which the Commission is determined to defend, will result in an undertaking on behalf of all the Member States, which in turn are responsible for adopting measures for the effective implementation of the Agreement to their vessels and nationals.

Part B

Proposal

On the basis of the evaluation given above and in Annex B, the Commission proposes that the Council decide that

(A) At the earliest opportunity, the European Community should sign the Agreement for the purposes of applying the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory species, at the same time depositing with the Secretariat-General of the United Nations a statement in conformity with Article 47, paragraph 2 (a) of the Agreement as well as interpretative statements in accordance with Annex A hereto;

(b) the President of the Council should appoint the person entitled to sign the Agreement in the name of the European Community.

ANNEX A

Statements by the Community to be deposited at the time of the signing of the Agreement

A. Statement of competence in accordance with Article 47(2)(a)

B. Interpretative statement

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DECLARATION OF THE EUROPEAN COMMUNITY MADE PURSUANT TO ARTICLE 47(2) OF THE Agreement FOR THE IMPLEMENTATION OF THE PROVISIONS OF UNCLOS RELATING TO THE CONSERVATION AND MANAGEMENT OF STRADDLING STOCKS AND HIGHLY MIGRATORY SPECIES

Article 47(2)(a) of the Agreement stipulates that in cases where an international organization as referred to in Annex IX, Article 1, of the Convention has competence over all matters governed by this Agreement, at the time of signature or accession, such international organization shall make a declaration stating:

(i) that it has competence for all matters governed by this Agreement,
(ii) that, for this reason, its Member States shall not become States parties, except in respect of their territories for which the international organization has no responsibility and
(iii) that it accepts the rights and obligations of States under this Agreement.

Pursuant to this provision the European Community hereby declares

(i) that it has competence over all matters governed by this Agreement
(ii) that for this reason its Member States shall not become States Parties, except in respect of their territories for which the European Community has no responsibility and
(iii) that it accepts the rights and obligations of States under this Agreement

Draft interpretative statement

1. On signing the Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory species, the European Community declares that it considers that the Agreement constitutes a major effort in ensuring the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks and in promoting international cooperation to that end.

2. The European Community notes that Article 21 is not applicable before the expiry of the period of two years mentioned in that Article. This transitional period gives no State the right to maintain or apply unilateral measures pending the establishment of inspection schemes by regional or subregional fisheries management organizations or arrangements.

3. For the purposes of applying Article 21 of the Agreement, it is the understanding of the European Community that when the flag state declares that it will exercise its jurisdiction over a fishing vessel flying its flag on the high seas, the authorities of the inspecting State shall immediately abandon the vessel and leave to the discretion of the flag state the measures to be taken with regard to that fishing vessel, in accordance with Article 19 of the Agreement. Any dispute regarding this issue must be settled in conformity with the procedures provided for in Part VIII of the Agreement (Peaceful settlement of disputes). No State shall invoke such disputes to justify keeping control, on the high seas, of a vessel which does not fly its flag.

4. The European Community stresses that the use of force in Article 22 is an exceptional measure based on the strictest respect of the principle of proportionality and that any abuse will expose the inspecting State to international liability.

   The European Community considers furthermore that the wording of the Agreement on this issue must be rendered more specific in accordance with the relevant principles of international law in the framework of the regional and subregional fisheries management organizations and arrangements foreseen.

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ANNEX B

Evaluation of the results of the United Nations Conference on straddling stocks and highly migratory fish stocks

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Evaluation of the results of the United Nations Conference on straddling stocks and highly migratory fish stocks

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On 4 August 1995 the United Nations Conference on Straddling Stocks (stocks of fish which are found both inside and outside exclusive economic zones) and Highly Migratory Fish Stocks adopted, without a vote, a draft Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 as regards the conservation and management of these stocks.[1]

In a letter[2] addressed to the President of the Conference the Community said its competent authorities would evaluate the Agreement in order to verify whether the terms of reference[3] which the United Nations General Assembly had given the Conference had been properly observed.

The evaluation had also to take into account, at Community level, the negotiating directives[4] drawn up by the Council in the light of the political priorities laid down in the conclusions of the Council meeting of 15 June 1995 on fisheries.[5]

The purpose of this paper is to set the Commission's assessment before the Council and Parliament so that they can make the necessary evaluation.

I.Part One - General evaluation

I.1. Political and economic aspects

I.1.1. *Context of international fisheries relations*

The Agreement was signed in a climate of worsening relations between states fishing on the high seas and coastal states. This situation was not confined to relations between the Community and Canada but also concerned many other countries in other regions of the world.

The outcome of the Conference must be assessed in the light of the evolving pattern of the law of the sea with its changes and conflicts since the second world war under the expansionist pressure of the coastal states.

For centuries relations between coastal states were based on the theory of the freedom of the seas and the jurisdiction conferred upon them by common law was generally confined to three miles.

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1 Document A/CONF.164/33 of 3 August 1995.
2 Document A/CONF.164/L50 of 7 August 1995 (see Annex III).
3 Document A/RES/47/192 of 29 January 1993 (see Annex III).
4 Document 8819/95 Pêche 289 of 14 July 1995 (see Annex III).
5 Minutes Fisheries Council of 15 June Doc. 8098/95 of 22 June 1995 (see Annex III).

The legal concept of territorial waters was not adopted until the 1958 Geneva Convention and states did not really subsequently harmonize the limits they applied, which varied from 3 to 12 miles. Beyond them, the principle of the freedom of the high seas continued to apply.

The concept of an exclusive economic zone (EEZ) of 200 miles emerged in the seventies and after a period of disagreement was enshrined in the 1982 United Nations Convention on the Law of the Sea (UNLOSC). The same Convention consolidated the maximum extent of the territorial sea at 12 miles and struck a balance of interests between the coastal states and the states with an interest in the traditional freedom of the high seas.

New concepts have since been put forward such as the "mar presencial" or custodial jurisdiction or the reference to the possibility of extending the EEZ to 250 or even 300 miles. The unilateral measures adopted by Canada at the beginning of 1995 when it applied national decisions on the high seas to conserve fisheries resources tend in the same direction, although at the same time they were probably designed deliberately to put pressure on the Conference.

This context must be taken into consideration in looking at the need to reach a balanced solution in order to put an end to disputes in international fisheries relations.

The outcome of the Conference must be viewed in a general context of efforts to strengthen and stabilize the legal framework for international fisheries relations and ward off the danger of insidious legislation by the coastal states. The international instruments which have to be considered in this context are, in addition to the Agreement, the following:

- the United Nations Convention on the Law of the Sea, which entered into force in November 1994;

- the Agreement adopted under the FAO in 1993 encouraging vessels fishing on the high seas to observe international conservation and management measures;

- code of conduct for responsible fisheries, due to be approved by the FAO Conference in October 1995.

The objective of stabilizing the legal framework for international relations is in itself strengthened by the incorporation in the draft Agreement of Part VIII on the peaceful settlement of disputes.

All the provisions of the Agreement should make it possible actually to apply the principle of international cooperation laid down by the UNLOSC for effective management and conservation of fisheries resources and to introduce arrangements for supervising and monitoring fishing on the high seas which will help tackle the problem of fishing by vessels flying the flag of states which do not meet their international obligations in this respect.
The Community cannot directly or indirectly back up failure by certain parties to act responsibly in supervising fishing on the high seas, since this would be bound to encourage certain states to take unilateral, illicit action that could ultimately give rise to undesirable developments in the law of the sea.

It should also be noted that the imprecision of some of the Agreement's provisions entails a risk of disputes over interpretation, conflict at sea and inadmissible claims of jurisdiction by certain coastal states, which would undermine the objective of stabilizing the legal framework for international relations in this sphere. In order to reduce as far as possible the dangers of such a development, the Community should make certain interpretative statements when signing (see Annex A).

I.1.2. *Context of the Conference*

A. *International context*

Overfishing worldwide has led many countries to initiate a process of improving systems for managing and conserving fisheries resources.

This process, launched under the FAO in the eighties, led the United Nations Conference on Environment and Development (UNCED) to draw up chapter 17 of Agenda 21 on the protection of oceans and seas when concluding its discussions in Rio de Janeiro in June 1992.

The complexity of the matter led to the convening of an intergovernmental conference on straddling fish stocks and highly migratory species.

The Conference's terms of reference for drawing up recommendations to be adopted by the General Assembly were set out as follows:

- the Conference must approach fishing on the high seas in the widest possible sense and must not focus solely on those of the straddling stocks which are in the high seas;

- consideration should also be given to highly migratory species and improving cooperation between states;

- the FAO has been closely involved in providing the necessary scientific or technical information;

- the Conference may not be considered as a way of revising the relevant provisions of the UNLOSC. The discussions and outcome of the Conference must be in accordance with the provisions of that Convention, particularly as regards the respective rights and obligations of the coastal states and states interested in fishing on the high seas.

The United Nations General Assembly confirmed and clarified the terms of reference given to the Intergovernmental Conference by adopting Resolution 47/192 on 22 November 1992.

As soon as the preparatory work commenced, a number of serious rifts emerged between the parties concerned.

On the one side were the coastal states, which either requested that the exercise be confined to the high seas and designed to recognize their "specific interests" for biological

resources in the part of the high seas adjacent to the waters under their jurisdiction or went as far as asking for the right to impose unilateral conservation measures on the part of the stocks outside their EEZ.

On the other side were the states attached to the principle of the freedom of the high seas established by the UNLOSC, and these included the European Community.

From this initial stage what are termed the coastal states received the support of many developing countries and also countries with a tradition of deep-sea fishing, such as Norway and Russia.

As the Conference progressed, the Community succeeded in having basic principles concerning compatibility and cohesion in the management of stocks on the high seas and in the EEZ taken into account.

The final stage of the negotiations, centred on implementing measures, was marked by acceptance by a growing number of states of the solutions proposed by the President of the Conference with the active support of certain countries such as the United States. The Community played a major role in these negotiations by frequently leading the countries which fish on the high seas and at the same time defending rational principles of management and conservation of fisheries resources.

The value placed by the Community on rigorous management principles was not always viewed positively by our partners and all the Community's negotiating objectives were not attained.

The draft Agreement on straddling and highly migratory stocks was nevertheless widely supported by the international community so that there is little likelihood that it could be successfully renegotiated. Rejection of the Agreement should make us reflect and we would have to be prepared for the consequences for the Community's international fisheries relations.

B. Community context

The need to avoid trying to renegotiate the relevant provisions of the United Nations Conference on the Law of the Sea was the *leitmotiv* of the negotiating directives adopted by the Council.

Other particularly important factors for the Community were incorporated in these directives:

- the need to cooperate to achieve rational management of all stocks;
- the decisive role of the regional fisheries organizations and the need for them to be open;
- willingness for effective implementing machinery to be established with the maintenance, irrespective of the circumstances, of the jurisdiction of the flag state;
- the need to strike a balance between the rights and obligations of the coastal states and those of states fishing on the high seas.

Over and above these objectives, the negotiating directives stressed the need to negotiate in a spirit which would obtain a consensus between the Member States themselves and also for approving the outcome of the Conference. By maintaining the consensus between the Member States until the end of the negotiations, the Community was able to put forward strong positions. It was sometimes difficult to work out common positions between the Commission and the Member States but Community coordination worked throughout.

Without ignoring the flaws in the text negotiated, we may say that the Community therefore achieved most of its objectives on the points which the Council considered at its meeting on 15 June 1955 to be the most important politically:

- the fact that regional fisheries organizations have to be open, it having been recognized that: "States having a real interest in the fisheries concerned may become members of such organization" and that: "The terms for participation ... shall not preclude such states from membership ... nor shall they be applied in a manner which discriminates..." (Article 8(3));
- maintenance of the jurisdiction of the flag state, it being stated that "the inspecting state shall, at the request of the flag state, release the vessel to the flag state". (Article 21(12));
- the balance in the respective obligations of the coastal states and the flag states is reflected in the wording of Article 7.

The Community succeeded in obtaining substantial improvements to many other parts of the text but it did not manage to prevent the negotiations from producing a less successful outcome on a number of points. The most important of these are set out in Part Two of this paper.

Annex I contains a detailed analysis of the various points of the Agreement with regard to the objectives defined above.

I.1.3. *Effects on resource management*

The Agreement reached by the Conference adds aspects of fisheries resources management and conservation which are a useful complement to the existing law of the sea provisions although the agreed text falls short of the optimum sought by the Community on certain points.

The introduction of the concept of a precautionary approach must be considered as an important and positive innovation for improving fisheries

The reference to the "biological unity ... of the stocks" is a way of countering coastal countries' attempts to limit the application of the Agreement solely to the high seas and requires a cohesive policy for the management and conservation of resources within and outside the EEZ on the basis of the equal rights of all the states concerned.

The principle of "compatibility" expressed in the Agreement makes it possible to adopt in international waters measures which are not merely aligned on the measures taken by the coastal state in its EEZ; although they are covered by different legal systems they must tend towards the same objective of optimum management of the same stocks.

The Agreement strengthens the international cooperation obligation already contained in the UNLOSC. This obligation concerns different aspects of the conservation and management covered by the draft Agreement.

First of all it stresses the essential role to be played by regional fisheries organizations in implementing fisheries resources management and conservation measures. The role of these organizations is strengthened by the introduction of supervision.

It also strengthens cooperation on the assembly and communication of information and cooperative efforts in scientific research, which is essential for rational use of fisheries and for evaluating resources in order to coordinate conservation and management measures more effectively.

It means that fisheries will be placed more firmly in the context of environmental issues, since account will be taken of the fact that species belong to the same ecosystem and of the need to maintain biodiversity and reduce discards. It also incorporates precise references in the direct management of the levels of fishing effort.

These various aspects should help improve fisheries management overall and they are aimed at the same objectives as the common fisheries policy.

In order to make the provisions of the Agreement fully effective, the Community must not only make an effort to participate and make proposals within the various fisheries organizations to which it belongs but also encourage the setting-up of organizations of this kind wherever necessary.

II. Part Two - Particular difficulties

II.1. Use of force

The reference to the use of force is a subject of serious concern to the Community, as it has emphatically made known throughout the negotiations and in the address delivered at the end of the Conference.

This reference is new in relation to the texts examined at previous sessions of the Conference. Because on the high seas they could undertake certain policing operations on vessels other than those flying their flag, certain coastal states felt this implicitly allowed the use of force. At the request of certain Member States, the Community asked for the use of force to be explicitly prohibited in order to remove this ambiguity.

While regretting that the President of the Conference did not take fuller account of the Community's objections, the Commission notes that the text put to the Conference limits the use of force to legitimate defence and cases where inspectors are prevented from carrying out their duties.

The use of force should be an exceptional measure based on observance of the principle of proportionality and any excessive or misplaced use of force by the inspecting state should entail its international responsibility.

The financial responsibility clause specific to the policing operations under this Agreement should act as a deterrent against undue use of force.

In order to limit the possible disadvantages of this reference, the Commission considers its necessary:

- on the one hand, when the Agreement is being signed, to produce a formal declaration by the Community giving an interpretation that is in accordance with international law of the circumstances in which force might be used to apply the Agreement and to urge the strict observance of the principle of proportionality;

- on the other hand, to make systematic approaches to the regional fisheries organizations of which the Community is a member to have protocols adopted by them on the particular circumstances in which civilized nations' legal and administrative systems allow the use of force.

II.2. General enforcement

The outcome of the negotiations does not fully coincide with the Community's views on this point either.

The Community position on the principle of tacit consent to control operations on the high seas by a vessel other than the flag vessel made acceptance conditional upon the existence of a control system multilaterally approved by the regional fisheries organizations concerned.

This condition is not fulfilled in the draft Agreement. As a result of the Community's objection, however, the Conference adopted an overall control system which guarantees that a minimum amount of procedure will be followed in the event of boarding on the high seas. It has furthermore been acknowledged that the rules of the regional organizations take precedence over the procedures laid down in the draft Agreement, the latter being applicable only two years after the adoption of the Agreement.

The Community should therefore use this period to get the regional fisheries organizations of which it is a member to adopt rules of procedure which guarantee effective implementation of the management and conservation measures decided on by those organizations and real protection of the individual rights of the Community fishermen who fish in the waters covered by these organizations.

The Commission will consequently make appropriate proposals to the Council for each of the organizations to which the Community belongs. These proposals will be adapted in line with the characteristics of the fishing activities managed by each of these organizations.

II.3. Application to the developing countries

The specific reference to developing countries is new in relation to the UNLOSC.

Article 3(3) allows these countries to derogate from the strict requirements of the Agreement regarding conservation and management within their exclusive economic zones.

Even if a developing country were to make use of this derogation, however, it would still be obliged, in view of the general principle of taking due account of others' rights and obligations ("due regard principle"), to take a minimum number of the conservation measures needed to avoid undermining the conservation measures taken by the states fishing in the adjacent sector of the high seas.

The other provisions of the Agreement concerning the developing countries, set out in Part VII, largely correspond to the guidelines generally followed by Community development aid policy on fisheries.

III. Part Three - Competence

1. In the preparatory work of the United Nations Conference on straddling stocks and highly migratory species, the Commission and the Member States preferred to avoid entering into fruitless, acrimonious discussions on spheres of competence at a time when the Community should be concentrating on problems of substance arising during the various sessions of the Conference. In this way the Commission and the Member States focused their efforts on drawing up the common position in order to ensure that the Community took part in the Conference in as effective, cohesive and unified a manner as possible.

The issue of the allocation of competence arose when the revised negotiating directives were being worked out for the final session of the Conference in August 1995. At its meeting on 30 May, the Working Party on the External Fisheries Policy had asked the Council's Legal Service to provide it with a written opinion on the allocation of competence between the European Community and its Member States in order that the draft New York Agreement could be signed and concluded on the basis of the draft text which existed following the fifth session of the Conference. The Council's Legal Service considered in its opinion delivered on 26 June that the draft Agreement in its entirety came within the sole competence of the Community under the common fisheries policy and that the final clauses should be adapted accordingly. This position backs up the argument for exclusive competence which the Commission has always put forward in these circumstances.

In its decision of 13 July authorizing the Commission to negotiate at the New York Conference (Doc. 8819/95 PECHE 289), the Council stressed, however, that the revised negotiating directives did not prejudge the issue of the allocation of competence between the European Community and its Member States on the basis of the draft text resulting from the fifth session of the Conference.

In its statement of 30 June to the Permanent Representatives Committee the Commission noted that the Council's decision not to prejudge the issue of competence enabled the Commission to negotiate neutral final clauses.

2. This is the context in which the Commission negotiated the final clauses, which do not settle the matter of competence. Article 47 makes provision for the Community's accession under the two possible conditions, with either joint competence (Article 47(1)) or exclusive competence (Article 47(2)).

3. The question of competence must now be settled and the Commission considers that the Community has sole competence over the Agreement (see Annex II).

It is therefore only the European Community which may sign and accede to the Agreement in accordance with Article 47(2) of the Agreement.

CONCLUSION

The New York Agreement is the fruit of a lengthy, difficult negotiating process. The states which took part in the Conference were pursuing, in most areas, different interests, which were in many cases incompatible, and this is reflected in the laboriously drafted provisions of the Agreement.

The European Community was in the minority camp of the Conference, particularly when the United States changed direction at the 4th session.

In this difficult context, the European Community took part in negotiations which gave rise to a final text which admittedly causes us problems but nevertheless contains useful aspects helpful to our interests.

Following adoption of the Agreement without a vote by the Conference, the European Community has a choice between three main options:

- Total rejection of the Agreement

  The European Community refuses to sign and ratify the Agreement on the grounds that it is inadequate and unbalanced. The main consequence of this would be to isolate the European Community, which would be excluded from future developments in international fisheries law and would face serious political difficulties in its bilateral relations with countries such as the United States, Canada, Norway, Argentina and other Latin American countries, the Pacific states and many developing countries which are in favour of the Agreement. Even if the Community is not party to the Agreement and even if the Agreement cannot be invoked against the Community, the Agreement will nevertheless constitute international law recognized by a considerable majority of the international community.

- Signing of the Agreement accompanied by a statement that it will be impossible to ratify the Agreement until the text has been improved.
  This approach would mean seeking renegotiation of the Agreement, which could definitely not happen - or if it did, the Community would find itself renegotiating in even more difficult and unfavourable conditions, with doubtful prospects as to the outcome. The European Community would be accused of calling into question the overall balance of the text, based on delicate compromises in which it itself took part. It seems highly unlikely that the discussions would be re-opened and this would not necessarily yield a better result.

- Signing of the Agreement with an interpretative statement on the points which cause the European Community difficulty (use of force - jurisdiction of the flag state on the high seas). Ratification will take place at a later stage.
  This is the option which is most favourable in terms of cost/political benefit ratio and which must therefore be proposed by the Commission. We would in this way avoid being isolated from the rest of the world and we could

  (a) play an active part and so supervise implementation of the Agreement at the level of the regional organizations;

(b) play an active part in any dispute settlement procedures and in developing the resulting case law;

(c) promote our image as advocates of responsible fisheries, along the lines of the role we played at the FAO in the drawing-up of the Code of Conduct;

(d) avoid bilateral difficulties with our main partners, which are in favour of the New York Agreement.

ANNEX I

Technical evaluation of the content of the Agreement

1. The terms of reference adopted for this Conference by Resolution 47/192 of the United Nations General Assembly of 22 December 1991 stipulated, *inter alia*, that the Conference should promote effective application of the provisions of the United Nations Convention on the Law of the Sea concerning fish stocks and that the discussions and outcome of the Conference should be fully in accordance with the relevant provisions of that Convention (subsequently referred to as "UNLOSC").

The title alone of the text of the Agreement adopted without a vote at the closing meeting of the Conference on 4 August 1995 (subsequently referred to as "NYT") illustrates that it is meant to be a legal instrument aimed specifically at implementing the relevant UNLOSC provisions. Article 4 of the NYT lays down that nothing in this Agreement shall prejudice the rights, jurisdiction and duties of states under the Convention and that this Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention. This context shows clearly that the NYT fits properly into a hierarchy of law with the UNLOSC at the top and the NYT second. The NYT is therefore to be interpreted and applied in the light of the Convention and not vice versa. There will certainly be attempts, however, to claim that the Agreement reflects the real aim of the Convention or to raise it to the same level as the Convention. Although it cannot be denied that the Agreement is intended to clarify certain provisions of the Convention on fisheries, it is clear that it cannot go against either the letter or the spirit of the Convention. This interpretation is backed up by Article 311 of the Convention, which prohibits the conclusion of agreements the provisions of which run counter to the principles of the UNLOSC. It is also a consequence of the fact that, unlike the Agreement concerning Part XI, the NYT is not designed to form an integral part of the UNLOSC.

2. Articles 5, 6 and 7 of the NYT contain basic provisions on the measures to be taken to ensure, in a compatible manner, effective conservation of the resources in waters under the coastal states' national jurisdiction and also in waters subject to the rules for the high seas.

Article 5 of the NYT sets out the general conservation principles already laid down in Article 61 of the UNLOSC on coastal states and in Article 119 of the UNLOSC on states which fish on the high seas. It also incorporates the principles which emerged from developments which took place after the UNLOSC, i.e. Agenda 21.

Article 6 of the NYT, which concerns the precautionary approach, does indeed introduce new aspects. It nevertheless stipulates that the measures based on the precautionary approach must be revised in the light of new scientific data. The clause therefore confirms the principle laid down in Articles 61 and 119 of the UNLOSC whereby conservation measures must be taken on the basis of the most reliable scientific data. Article 6(7) of the NYT, which provides for emergency measures, is worded in neutral terms which cannot be said to grant the coastal states special rights.

Article 7(1) of the NYT, which deals with the compatibility of the conservation measures to be taken within the zones falling under the coastal states' national jurisdiction and on the high seas expressly confirms the coastal states' sovereign rights within their zones and all states' rights to fish on the high seas. Article 7(2)(a), most of which is worded in line with the drafting proposal made by the Community at the last negotiating session and which therefore meets one of the priority objectives set by the Council at its meeting on 15 June 1995, namely restoring the balance of the text on this point, seems rather to place the emphasis on the measures taken by the coastal state. This seems to tie in with Article 116 of the UNLOSC, which lays down that all states have the right for their nationals to engage in fishing on the high seas subject to the rights and duties as well as the interests of coastal states. This is only one aspect among others to be taken into consideration, the others being for example the conservation measures taken by the regional fisheries organizations and the biological unity of the stocks (also aspects included in the text at the Community's instigation). Consequently, this clause does not make it obligatory for other states to align their action on the measures taken by the coastal state. The balanced nature of this clause stems also from the fact that it is not accompanied by a clause which, if the states concerned fail to agree on compatible measures, compels the court required to give a ruling to lay down protective measures solely on the basis of the coastal state's conservation measures. Already at the third United Nations Conference on the Law of the Sea Argentina and Canada had consistently called for the inclusion of a clause of this kind. The provisions of Article 7(4) and (5) nevertheless guarantee that a proper course of action will be followed.

A problem remains, however, regarding the precise meaning of the words "*mutatis mutandis*" in Article 3(2) of the NYT in relation to the conservation measures to be taken by the coastal state. If it is merely another way of expressing the legal difference between the arrangements applicable in the waters under the coastal states' national jurisdiction on the one hand and those applicable in the waters covered by the rules on the high seas on the other, this clause does not seem prejudicial, but precludes any control by international authorities over measures adopted within the EEZ.

3. The NYT places the emphasis on closer cooperation in order to ensure effective conservation of the fisheries resources. Article 8 of the NYT identifies as a means of cooperation the obligation to join a regional fisheries organization or to agree to apply the conservation measures established by these organizations. The words "agreeing to apply" obviously entail a degree of negotiation and so there is no automatic alignment with the conservation measures. In that sense, these words leave intact the traditional freedom to fish on the high seas. Furthermore, as an essential corollary in this context, Article 8(3) of the NYT sets out the principle that the regional fisheries organizations must be open. This too is a point which the Council regarded as essential at its meeting on 15 June 1995 and on which the Community has obtained full satisfaction. States with a real interest in these fisheries can in this way properly meet their obligation to cooperate. Article 8(4) of the NYT prohibits access to the resources concerned for states who refuse to cooperate as laid down. It should be pointed out that, even under the present system, for a country only starting to fish on the high seas, the "due regard" requirement would be presumed to favour established usage over new

usage and so would entail limits on access for that country if the resource concerned were to become scarce. In that sense, Article 8(4) of the NYT does not seem to be a step back in relation to the existing arrangements.

For Article 11(e) of the NYT which, in relation to the new members or participants, states that, *inter alia,* the needs of coastal states whose economies are overwhelmingly dependent on the exploitation of living marine resources should be taken into account, it should be noted that here too this is only one factor among others to be taken into account and it is not a priority factor. The clause therefore gives no preferential right to the coastal states concerned.

Taken literally, Article 16 of the NYT, which deals with the situation of part of the high seas entirely surrounded by the exclusive zone of a single coastal state ("enclaves") is neutrally worded. It is nevertheless a situation in which it is particularly important to ensure the compatibility of the conservation measures involved. If Article 16 is compared with Article 7, particular significance seems to be accorded in Article 16 to the measures taken by the coastal state concerned. Although it is a very specific case, this clause confirms the general principle of compatibility, which, in normal circumstances, must work both ways.

4. As a corollary to the freedom of the high seas, Article 92 of the UNLOSC gives the flag state sole jurisdiction over vessels flying its flag on the high seas. This jurisdiction of the flag state is exclusive in the sense that, in areas of the sea covered by the arrangements pertaining to the high seas, it prohibits any intervention by another state and prevails over the jurisdiction of the state from which the crew originates. Article 92(1) of the UNLOSC lays down that this principle applies other than in exceptional cases provided for in international treaties or in the Convention itself. An exception to this principle is not therefore contrary to the Convention.

Provision has already been made on this basis for certain exceptions: piracy, the transport of slaves or unauthorized broadcasting. In these cases, the UNLOSC provides not only for the transfer of the right of intervention to a state other than the flag state but also the right for the intervening state to take sanctions against persons on board the vessels concerned. It is also on the basis of the options contained in Articles 92(1) and 110 of the UNLOSC that international joint inspection arrangements have been introduced. On the same basis states quite frequently conclude agreements on the control of partner states' fishing vessels. To quote some examples relevant to fisheries, there is the 1987 fisheries agreement between the Pacific island states and the United States which provides for intervention rights over and above inspection, the 1994 Bering Sea Agreement which gave rise to the concept of continued boarding and finally the agreement between the Community and Canada to step up control in NAFO waters.

The NYT provisions are geared to the idea that any effective conservation scheme must necessarily be accompanied by equally effective arrangements for ensuring that the conservation measures are observed. If the starting point is effective conservation, it is difficult to find a reply to the argument that improved control mechanisms are needed to cope with a situation where the flag state is either unable or unwilling to take the required control measures in respect of its fishing vessels and hence properly to assume its responsibilities as flag state.

In these circumstances, there are no legal objections to accepting the control system laid down in Articles 21 and 22 of the NYT since international law leaves states every freedom to conclude international agreements with one another on transferring the flag state's powers. It is more a question of advisability.

The priority points set out by the Council on 15 June 1995 included the maintenance, irrespective of circumstance, of the flag state's jurisdiction in accordance with international law. Under the control procedure set out in Article 21 of the NYT and for the stages following inspection, the flag state retains control over its vessels. It decides, at the inspecting state's request, on the subsequent action it considers appropriate. It may attach conditions to its authorization and so limit the action which can be taken by the inspecting state. The flag state can resume control over its vessels at any stage. Lastly, the legal proceedings come within its remit. The fact of being able to impose conditions on the inspecting state is particularly important because this introduces the principle of having specifically to obtain the consent of the flag state. The fact that the flag state is still responsible for the legal proceedings shows clearly that the procedure still falls far short of the action provided for, by way of example, in Article 109 of the UNLOSC concerning unauthorized broadcasting on the high seas.
On the other hand, Article 21 is not completely clear regarding resumption of control over the vessel by the flag state. The European Community should therefore lodge an interpretative statement (see Annex A of the Communication).

The flag ship would not be able simply formally to express its wish to exercise its jurisdiction over the vessel. Article 21 of the NYT obliges the flag state effectively to investigate its vessel and if necessary take enforcement action with respect to it.

The failure of the flag state to act after it has formally declared its willingness to exercise its jurisdiction over its vessel does not give any other state any right of unilateral interpretation in order to assess whether the flag state has met its obligations as set out in Article 19 of the NYT. Any dispute has to be dealt with under the dispute settlement procedure.

5. The following can be gleaned from the above: the NYT does not affect the principle enshrined in the UNLOSC of the 200 nautical mile limit as the maximum limit for waters under the coastal states' national jurisdiction. As described above, the NYT contains nothing which might lead one to say that the coastal states, simply by the fact of being coastal states, are enjoying preferential and special rights for unilaterally imposing conservation measures outside their waters. On the contrary, the NYT confirms that, within these waters, the coastal states do not have absolute sovereignty devoid of any legal obligation regarding in particular the conservation and management of fisheries resources.

In accordance with the UNLOSC, the NYT confirms that fishing on the high seas is not unlimited but subject to the equal right of other states and the rules on effective conservation of the fisheries resources concerned.

In appropriate cases and by international agreement, the Convention makes it possible to restrict the principle of the exercise of sole jurisdiction of the flag state

on the high seas. The control procedure provided for (on a subsidiary basis) in Articles 21 and 22 of the Agreement does not call this jurisdiction fundamentally into question. The Convention enables other members of the regional organizations to initiate the random inspections needed to protect resources while ensuring that as long as they are carried out in accordance with the rules of good faith (Article 300 of the Convention) no misconduct occurs.

ANNEX II

Exercise of Community competence

1. The Community's exclusive competence for the conservation and management of fisheries resources

The Community's exclusive competence for the conservation and management of fisheries resources, based on Article 43 of the EC Treaty and Article 102 of the 1972 Act of Accession, is recognized by the Court of Justice.
Consistent case law (see judgments of 14 July 1976, Kramer, 3/76, 4/76 and 6/76, ECR p. 1279; of 16 February 1978, Commission v Ireland, 61/77, ECR p. 417; of 25 July 1991, Commission v Spain, C-258/89, ECR p. I-3977; and of 24 November 1992, Poulsen and Diva Navigation, C-286/90, ECR p. I-6019) shows that for the high seas the Community has, in matters within its powers, the same legislative competence as that attributed by international law to the flag state or the state in which the vessel was registered.

In its judgment of 24 November 1993 in Case C-405/92 (Etablissement Mondiet SA v S.a.r.l. Armement Islais, ECR 1993, p. 6166), the Court of Justice of the European Communities held that the Community was competent to adopt measures for the conservation of fishing resources on the high seas in respect of vessels flying the flag of a Member State or registered in a Member State.

The question is whether the New York Agreement comes under exclusive Community competence in the light of Court of Justice case law.

2. The draft agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1992 relating to the conservation and management of stocks of fish which are found both inside and outside exclusive economic zones and highly migratory fish stocks

The subject and the objective of the Agreement are set out in the preamble and Article 2. It is laid down in Article 2 that the objective of the Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.
The same objective is set out in the second recital of the preamble.

Part II of the Agreement (Articles 5, 6 and 7) contains the basic provisions on the measures to be taken to attain the objective of conservation and management in order to ensure both the viability and the optimum use of stocks on scientific bases by applying the precautionary approach in accordance with Article 6. The parties are also obliged to ensure that the conservation and management measures taken for the high seas and those taken for zones covered by national jurisdiction are compatible. The parties are subject to the obligations set out in Article 7 in order to ensure this compatibility.

It is obvious that the objective and the provisions of Part II on the conservation and management of the stocks concerned come under the exclusive competence of the Community.

...ement that provides for the means, methods and mechanisms for attaining the ...tive set out in Article 2.

These are the mechanisms for international cooperation (e.g. organizations and arrangements for managing subregional and regional fisheries, their functions and internal structures, the collection and communication of information and cooperation on scientific research), obligations on the part of non-member states and non-participants in the regional organizations, the measures to be taken by the port state, the means by which the developing countries can participate in the implementation of the Agreement, dispute settlement procedures, safeguard clauses and final clauses.

The Agreement as a whole comes under the exclusive competence of the Community if the parts of the Agreement mentioned above are of an accessory nature in relation to the main objective of the Agreement or if they are covered by the common fisheries policy.

Parts III and IV (Articles 8 to 17) concern international cooperation on fisheries by the parties concerned. This cooperation, which is designed to implement as fully as possible the conservation and management measures laid down in Articles 3 to 7, is also covered by the common fisheries policy.

This is why the Community is a member of many regional and subregional fisheries organizations. For example, the Community is a member of the NAFO, the NEAFC, and the Baltic Sea Commission, and it alone executes the obligations imposed by these agreements. The Community has also concluded many fisheries agreements with other countries containing various types of obligations such as scientific and technical cooperation and aid for training fishermen in the developing countries. It has concluded what is termed a "second-generation agreement" with Argentina and this contains provisions for the setting-up of joint ventures, etc. The Community's exclusive competence on the basis of the common fisheries policy has been recognized in many cases, including agreements which are varied and complex in content.

Articles 18 to 23 lay down the means to be deployed by states in order properly to meet the commitments made in Articles 5 to 7. These provisions are intended for the flag state, which, in accordance with the rules of public international law, is responsible for vessels flying its flag. These Articles do not concern the right to fly a flag as such, for which it is obviously the Member States that are competent.
Articles 18 to 23 oblige the flag states to use the instruments available to them under public international law and their national law to ensure implementation of the measures set out in the Agreement.

In administrative and practical terms it may be the Member States which will have to honour commitments accepted by the Community in an international agreement on the basis of Community competence; this would include control measures and administrative sanctions in the event of infringement. This is customary under the Community's legal system (see Article 228(7) of the Treaty) and has no impact on the scope of the Community's competence for concluding an international agreement. It is only legislative competence which is considered for concluding international agreements and not administrative competence (see Opinion 2/91 of the Court, recital 34).

The rules on the inspection of fishing vessels have already formed the subject of international agreements concluded by the Community, for example with the NAFO or

Canada. Provisions of this type are instruments for implementing conservation or management measures, which may be one of the main subjects of an agreement concluded by the Community under the common fisheries policy. Under the consistent case law of the Court, the Community's competence for legislating on a matter (e.g. Article 43 of the Treaty for the common organization of agricultural markets or the common fisheries policy) includes competence for making Member States adopt implementing measures, which, as and where needed to ensure proper implementation of Community standards, may include control measures and administrative sanctions.

More especially, with regard to the matter of judicial proceedings and sanctions for infringements (Article 19(2)) and legal assistance between parties to the Agreement (Article 20(5)), there is Community competence for implementing administrative sanctions (see judgment of 27 October 1992 in Case C-240/90 - Germany v Commission). As regards penal sanctions and legal assistance (notification of proof to the authorities of other contracting parties), the Member States are bound, under the Treaty, to lay down sanctions of this kind in their respective national legislation, if they are necessary to ensure observance of Community law. A general duty of this kind is recognized by the Court's case law (see judgments of 21 September 1989 in Case 68/88 - Commission v Greece, ECR 1989, p. 2965; of 27 March 1990 in Case C-9/89 - Spain v Council, ECR 1990, p. I-1383 (I-1412) and Community legislative practice (examples are Article 7(1)(b) of Council Regulation (EEC) No 3842/86 (OJ No L 357, p. 1); Articles 31 and 32 of Council Regulation (EEC) No 2847/93 (OJ No L 261, p.1.)). Even this part of the Agreement does not require the Member States' participation in the Agreement because the provision in question does not go beyond this general duty of the Member States and the customary clauses in Community legislation.

The fact that Article 21(5),(6) and (7) lays down a system whereby a state which has carried out an inspection and ascertained that the Agreement has been infringed may board and possibly take control of the vessel does not alter this situation.

It would seem advisable, in order to dispel any possible misunderstandings, to stress that, despite the existence of Community competence for accepting undertakings in this sphere, the Member States still have competence for - and the duty to take - the general and special implementing measures required under Community law. In specific cases, it would be the authorities of the flag state which would have to give - or refuse - authorization for inspection by non-nationals.

On the subject of the Articles on dispute settlement, the Court of Justice decided in its Opinion 1/94 delivered on 15 November 1994 that competence for participating in the mechanisms of dispute settlement arose from competence concerning the main provisions. The principle whereby the decision on the main issue applies to accessory matters applies to the Articles on certain procedures or particular problems, such as Article 14, which covers the collection and provision of information and cooperation in scientific research for the purposes of the conservation and management of fisheries resources.

The provisions of Articles 24 to 26 in Part VII of the Agreement - "Requirement of developing states" - are of an accessory nature in relation to the main objective of the Agreement. These Articles provide for the means for effective participation of the developing countries in the long-term conservation and sustainable use of the stocks. These provisions are not concerned with the economic development of the developing countries but set out the forms of cooperation with these states, which to a certain degree