THE EUROPEAN COMMUNITY'S PARTICIPATION IN THE LAW OF THE SEA CONVENTION: SOME INCOHERENCIES IN A COMPROMISE SOLUTION

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1. The lengthy discussion concerning participation in the Law of the Sea Convention resulted in August 1981 in a new text — the President's Revised Draft (FC/27 of 27 August 1981, Annex 2). Further discussion led to a memorandum issued by the Collegium on Changes Incorporated in the Draft Convention (A/CONF. 62/L. 93) and finally to Arts. 305-307 of the Convention and Annex IX. Art. 305 (e) of the Convention and Art. 1 of Annex IX cover "international organizations" constituted by States to which such member States "have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters". Participation by the European Community has remained at the centre of the discussion, although the provisions in question may be of interest to other regional, and possibly also to some universal, organizations.

Under the Annex (Art. 3, para. 1), the Community may become a party to the Convention by signing it and then confirming signature, or else by "ac- cession". However, this depends on the condition that "a majority of its member States" are also States parties to the Convention (Art. 3, para. 1)2. This is a novel solution in the practice of mixed agreements, concluded by the Community alongside its member States3. When States which are members of the Community

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2 Also signature on the part of an organization is made conditional on the circumstance that "a majority of its member States are signatories" to the Convention (Art. 2).
3 There are a few mixed agreements in which only some member States participate alongside the Community — for instance the Barcelona Convention of 16 February 1976 for the Protection of the Mediterranean Sea against Pollution (Arts. 24, 26 and 27). In these agreements participation by any member State is not a condition for the Community to be able to become a party. As TREVES notes in "La decima sessione della Conferenza sul diritto del mare", 69 Rivista (1982), p. 24 ff., an exception is given by the Canberra Convention of 20 May 1980 on the Conservation of Antarctic Marine Living Resources. Under Art. XXIX, para. 2, of this Convention, accession by "regional economic integration organizations" is allowed only if "one or more States" which are members of the organization have already become parties to the Convention.
advocated that the Community's participation in the Convention should not depend on some of, or all, its members also becoming parties, this served two purposes: enhancing the Community's role in international relations and avoiding the risk that lack of ratification on the part of one or more member States would jeopardize the possibility of the Community becoming a party, thereby indirectly affecting the other member States' interests. On the other hand, some of the non-member States held the view that the Community should be entitled to become a party only if all its member States were also parties to the Convention.

Two dubious arguments were reported to have been put forward in favour of such a view: (a) that rights could be transferred to an organization only if they had previously been acquired by its member States; (b) that the organization could not otherwise enforce obligations under the Convention in all its member States (FC/26, para. 15). Both arguments misapprehend the nature of the transferral of competences to an organization: this does not depend on any action taken by member States with regard to the Convention. There appears to be a much stronger argument, based on the different way in which the balance of interests is struck in the various parts of the Convention. If one assumes, for instance, that fishing interests of Western European States have been reasonably protected whereas the same cannot be said of their deep-sea mining interests, and one considers that the Community's competence covers fishing entirely but only some aspects of deep-sea mining, to allow the Community to become a party alone would effectively mean that Western European States could choose to accept only the parts of the Convention which best suit their interests.

The fact of making Community participation conditional on the majority of the States members of the organization also being parties to the Convention may seem a reasonable compromise. However, in the Annex compromise is also sought on other grounds. The Community's rights and obligations under the Convention are limited to "matters relating to which competence has been transferred" to the organization only by member States which are parties to the Convention (Art. 4, para. 3). This limitation would make it impossible for Western European States to take advantage through Community participation of the parts of the Convention which best suit their interests. Moreover, the Annex states that "participation of such an international organization shall in no case confer any rights under this Convention on member States of the organization which are not States Parties to this Convention" (Art. 4, para. 5). Arguably, this provision implies that rights under the Convention can be acquired through

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4 This argument is developed also by Treves cit.