# ARCHIVES HISTORIQUES DE LA COMMISSION

COLLECTION RELIEE DES DOCUMENTS "COM"

COM (84) 549

Vol. 1984/0218

COMMISSION
OF THE
EUROPEAN COMMUNITIES

General Secretariat

COM(84) 549 final

Brussels, 5 October 1984

*FOR OFFICIAL USE ONLY*

# COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

concerning the negotiations for a global framework convention for the protection of the ozone layer

---

# INTRODUCTORY MEMORANDUM

1. On 19 January 1982 the Council decided to authorize the Commission to participate in the negotiations for a global framework convention on the protection of the Ozone Layer in order to enable the Community to become a contracting party.

2. The Community, together with its Member States, has taken part in all the preparatory sessions and working groups which have now produced a text which could form the body of a future Ozone Layer Convention.

3. The participation clause originally proposed reads as follows : "This Convention shall be open for signature at _____ from _____ to _____ by any State and by regional economic integration organisations, constituted by sovereign States, which have competence in respect to the negotiation, conclusion and application of international agreements in matters covered by this Convention." The USSR has demanded a modification; that the words "and a majority of whose Member States are signatories to the Convention" should be added. The USA has also requested a similar qualifying clause "and at least one of whose Member States is a signatory to this Convention".

4. Acceptance of such a clause would be to accept that the Community has second-class status in international law, or that in other words, it is a perpetual legal minor, which cannot act in its own right without the assistance of its Member States. Such a doctrine is clearly unacceptable legally or politically.

5. The Council is therefore requested to complete the negotiating directives that it gave to the Commission on 19 January 1982, by instructing the Commission and Member States not to accept such a subordination or linkage clause, and instead to ensure that a clause similar to that originally proposed is obtained. At the same time the Commission and Member States should undertake démarches with the appropriate Governments in order to ensure support for its position.

6. The Council is requested to give the above directions as rapidly as possible, since the next working session on the draft Ozone Layer Convention will take place from 22nd to 26th October 1984.

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL CONCERNING THE NEGOTIATIONS FOR A GLOBAL FRAMEWORK CONVENTION FOR THE PROTECTION OF THE OZONE LAYER

## 1. Introduction

On 19 January 1982 the Council decided to authorize the Commission to participate in the negotiations for a global framework convention on the protection of the Ozone Layer (hereafter referred to as the Ozone Convention (O.L.C.) in order to enable the Community to become a contracting party. In that Decision, the Council gave the Commission a negotiating mandate, because Community competence in relation to the danger to the ozone layer is well-established by Council Decisions and Resolution (1) concerning chloro-fluorocarbons in the environment, and its already existing cooperation with the United Nations Environment Programme (UNEP) concerning the ozone layer.

The Community, together with its Member States, has taken part in all the preparatory sessions and working groups which have now produced a text which could form the body of a future Ozone Layer Convention. The negotiations have not been easy and have given rise repeatedly to problems concerning the clause which will permit Community participation. The last session (second part of the third session), held in Vienna 16-20 January 1984, of the Ad Hoc Working Group of Legal and Technical Experts for the Elaboration of a Global Framework Convention for the Protection of the Ozone Layer was the occasion for serious confrontation

---

(1) 80/372/EEC, O.J. L90 of 3/4/1980
82/795/EEC, O.J. L329 of 25/11/1982
Resolution of 30 May 1978, O.J. C133 of 7/6/1978

../..

between the Community and the USSR. There was also grave disagreement between the Community and the USA, and no solutions were found to these disagreements.

The UNEP Governing Council at its last session (May-June 1984) passed a Resolution recommending that a fourth session of this Working Group should be convened in 1984, and should complete its work on the Convention, which should then be adopted and signed at a diplomatic conference during the first three months of 1985.

The Community, to make sure that it can be a signatory to the Convention on a satisfactory basis, must act rapidly to overcome the existing problems concerning the clause permitting its participation.

In the directives for the negotiations annexed to the Council Decision of 19 January 1982, it is stated

"2. The directives for the negotiations shall be determined, as the need arises, in the framework of the usual procedures.

3. The negotiations should also aim at ensuring that appropriate provisions enabling the Community to become a Contracting Party be contained in the Convention."

The Commission has therefore deemed it necessary to request specific directives from the Council concerning the nature of the Community's future participation in the O.L.C.

2. Problems raised by the Community participation clause.

The O.L.C. is a universal convention within the framework of the United Nations (UNEP). It would therefore create difficulties to seek a participation clause mentioning the Community specifically. The Community had suggested informally that a clause such as that in the Geneva Convention on long-range transboundary air pollution

../..

1979 (LRTAP) might be used.(1) The formula 'regional economic integration organisation' avoids the problems of a clause mentioning the Community specifically, and has already been accepted in several Conventions, notably LRTAP, where it was accepted by the Eastern Bloc as well as by the USA.

The formula was accepted as the basis of a negotiating text in the meetings of the working groups for O.L.C. (2) However, the USSR demanded that after 'regional economic organisations' a phrase should be added 'and a majority of whose Member States are signatories to this Convention'. The Community and its Member States having declared that this was unacceptable, the USA then put forward its so-called compromise proposal; 'and at least one of whose Member States is a signatory to this Convention'.

---

(1) "Article 14: 1. The present Convention shall be open for signature at the United Nations Office at Geneva from 13 to 16 November 1979 on the occasion of the High-Level meeting within the framework of the Economic Commission for Europe on the Protection of the Environment, by the Member States of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe, pursuant to paragraph 8 of Economic and Social Council Resolution 36 (IV) of 29 March 1947, and by regional economic integration organizations, constituted by sovereign States, members of the Economic Commission for Europe, which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by the present Convention."

(2)"This Convention shall be open for signature at _____ from _____ to _____ by any State and by regional' economic integration organizations, constituted by sovereign States, which have competence in respect to the negotiation, conclusion and application of international agreements in matters covered by this Convention."

../..

The origin of the USSR's proposals is clear. It is based on the formula used in the Law of the Sea Convention(1). The motivation for the USSR's proposals is even clearer. In recent times, in various UN fora (UNGA, Second and Sixth Committees, FAO), the USSR has been contesting the Community's right to speak in its own right, and promulgating the legal theory that international organisations are always legally subordinated to their member States.

3. The Law of the Sea Participation Clause

It is suggested that the Law of the Sea Convention is not a valid analogy for other treaties, universal or regional. The Law of the Sea Treaty was a very far-ranging Treaty dealing with legal issues from right of innocent passage to fisheries and environment and deep-sea mining. Unlike the Ozone Convention, it also relates to military or other matters outside the scope of the Community's non-exclusive powers.

The Law of the Sea Convention was a wide-ranging package deal involving reciprocal rights and duties to which it was important to have every ratifying party openly and obviously committed. It represents a delicate balance between rights obtained and responsibilities incurred. There was a perhaps legitimate concern on the part of third States that the participation of an international organisation

---

(1) ANNEX IX. PARTICIPATION BY INTERNATIONAL ORGANISATIONS:

Article 1. Use of terms: For the purposes of article 305 and of this Annex, 'international organisation' means an intergovernmental organisation constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters.

Article 2. Signature: An international organisation may sign this Convention if a majority of its member States are signatories of this Convention. At the time of signature an international organisation shall make a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to that organisation by its member States which are signatories, and the nature and extent of that competence.

might allow one of its member States which was a non-signatory to take advantage of the Convention (via its participation in the international organisation), without assuming the duties inherent in the Convention. This is not the case in the O.L.C., which imposes responsibilities for the future benefit of all mankind. It was only under the special political and legal circumstances of the Law of the Sea Convention that the Community consented, as a political compromise, to a participation clause which required the prior membership of a majority of its Member States. The Commission submits that the Law of the Sea Convention is a case 'sui generis', and that the participation clause in it should not be used as a precedent for other Conventions, in so far as it involves subordination of the Community's participation to participation by its Member States.

The participation clause in the Law of the Sea Convention in fact raised two issues; one of subordination which will be discussed in more detail below, and secondly that of the specification of its competence by an international organisation in a formal declaration.

The question of the competence declaration has been thoroughly discussed by the Council on several occasions in relation to the Law of the Sea Convention. It has been acknowledged by the Community that third States may need to be assured that the totality of legal obligations under that convention will be assumed by the Community and its Member States, and that there is no question of any loophole occurring. Clauses involving a declaration of competence in a general form have been accepted by the Community in the Law of the Sea Convention, the Convention on the Protection and Development of the Marine Environment of the Wider Caribbean Region, and the Convention on International Trade in Endangered Species. The details of who is responsible for what is however an internal matter for the Community, to be decided in the Council, and should not be discussed with third States: detailed statements of Community competence are inappropriate and undesirable.

.../..

The Court has stated that " it is not necessary to set out and determine as regards other parties to the Convention, the division of powers between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene... The important thing is that the implementation of the convention should not be incomplete" (Ruling 1/78, 1978 ELR 2151 ad para.35).

## 4. Subordination Clauses from the International Point of View

As seen above, the Community accepted a subordination clause in the Law of the Sea Convention because of the particular circumstances. The Community has also accepted such a clause in the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, which reads "by any regional economic integration organisation exercising competence in the fields covered by the Convention and that Protocol and having at least one member State which belongs to the Wider Caribbean Region ....." In this latter case the subordination clause was considered as acceptable, because the Caribbean Convention is a regional convention, and it is only good sense that international organisations should participate only in those conventions where they have a geographical interest. In a regional convention, such a clause does offer guarantees to third States of genuine involvement by the international organisation concerned.(1)

Such guarantees and assurances are not needed by third states in relation to the Ozone Layer Convention. This Convention is not a 'package-deal' and it is a universal, not regional, convention. Therefore, there is no justification for third states demanding the subordination of the participation by the Community to that of its Member States. The guarantees which are necessary having been given in the declaration of competence, it is in fact interference by third states in the Community's internal processes to demand such subordination. The position of the United States is especially curious in this case. The USSR is consistent with its policies in trying to subject the Community legal existence to the most stringent conditions. But the presence of one Member State in the Convention cannot afford to the USA or other third states any additional guarantee of any kind.

---

(1) However, it might be argued that it is sufficient that the international organisation has as its member a state with territorial interests in the region, and that there is no necessary requirement for this state to be a member of the convention.

5. Subordination Clauses : their compatibility with EEC Law

If for any proposed Convention, it is established that the Community has competence, in respect to matters covered by this Convention, the Commission may request from the Council an authorisation to participate in the negotiations, so that the Community can become a party to the Convention. The Community having international legal personality, having competence for the subject matter of the Convention, and having been authorised to negotiate Community participation, cannot legally accept that the exercise of its powers should be subjected to the condition of prior participation by one or more of its Member States, unless the Community institutions determine, in particular in regard to the special characteristics of the convention, that joint participation by the Community and one or more of its Member States is appropriate.

The Community institutions must oppose subordination clauses because of the negative effects they are bound to have on the Community's legal capacity in the international legal order. The Community would be made to appear as having second-class legal personality in international law, and as needing to have recourse to the assistance of one or more of its Member States in order to exercise its own competence. In other words, the subordination clause undermines the Community's independent international legal personality; such a clause constitutes a 'capitis diminutio' with regard to other subjects of international law.

The Community institutions must do all in their power to protect the autonomy of the Community; they must resist any attack upon its independent personality.

The case of the Law of the Sea Convention shows that there may be situations in which the Community may be led to accept a clause linking its own participation to that of its Member States. However, in the present case, there is nothing in the draft Convention which would justify recourse to such a clause. As it stands, the draft

../..

Ozone Layer Convention contains only very vaguely circumscribed commitments. Only after further development of the Convention (through addition of protocols) will it have to be determined how the Community and Member States should act in complying with such commitments. The present structure of the Convention and the obligations proposed by it do not provide any reason for arguing that, for the purposes of the Convention, an international organisation having competence in the fields covered by it must have its participation linked to participation by one or more of its Member States.

Under these circumstances the subordination clause proposed for the Ozone Layer Convention does not correspond to the particular character of this Convention, but reflects political attitudes of third countries towards the legal personality of the Community.

6. The proposed clause in the Ozone Convention

As already underlined in points 4 and 5, the clauses proposed by the USSR and the USA in the negotiating text for the O.L.C. are not justified from the international point of view and are incompatible with Community law. It should be underlined that the O.L.C. is a Convention to which it is not possible to enter reservations. As is well-established, there is mixed competence in relation to this draft convention : thus no Member State has competence for all the areas covered by the Convention. Therefore, the Member States are not free to sign the Convention and assume its obligations, unless the Community also signs and ratifies it. As a result,

../..

any Member State attempting to sign or ratify the Convention without Community participation would be in breach of its obligations under the Treaty of Rome, and would be subject to an Article 169 procedure.

The O.L.C. is a Convention which is of great interest to the Community and its Member States, and it is essential for the future success of the Convention that the Community and its Member States should be able to sign it, and subsequently participate fully in its work. The USSR also attaches great importance to this Convention. It is suggested that if it comes to a "show-down" with the USSR concerning the subordination clause, and if other parties are in favour of Community participation, the USSR will probably climb down, in order to achieve Community participation, just as it did in the LRTAP Convention. However, in that case, the USA was firmly on the side of the Community. The USA has to be convinced by the Community and its Member States that it cannot benefit from insisting that one Member State must sign before the Community does so, and that there is no logical basis for asking for this. The USA also should be made aware that if the Community does not get a satisfactory response concerning the participation clause, it will not sign the Convention. It must be explained to the USA that to accept such a clause would not be consistent with the Community legal order, and to attempt to force such a clause upon us is interference in internal Community affairs.

## 7. Conclusions

The Commission therefore proposes to the Council that in accordance with its Decision of 19 January 1982 it should hereby give the Commission the following directives for its negotiation of the Draft Ozone Layer Convention. In addition, the Council should decide that the Member States should also act (in concert) on the following.

../..

i) The Commission and Member States should ensure during the negotiations that a clause permitting unfettered Community participation is written into the draft Convention. Such a clause might be on lines similar to the following:

"This Convention shall be open for signature at _____ from _____ to _____ by any State and by regional economic integration organisations, constituted by sovereign States, which have competence in respect to the negotiation, conclusion and application of international agreements in matters covered by this Convention."

ii) The Commission and Member States shall not under any circumstances accept a Community participation clause which would make signature or ratification by the Community subject to previous signature or ratification by any one or more Member States of the Community.

iii) The Commission, and Member States, to the extent that this may be necessary, shall undertake démarches with the Government of the USA to explain to them why the Council has decided that such a subordination clause is not consistent with the Community legal order. Subsequently, the Commission shall undertake similar démarches with other countries including developing countries who are actively concerned in the negotiations of the D.O.L.C.
These actions should be undertaken as rapidly as possible if the negotiations during the fourth session of the Ad Hoc Group are to have an outcome acceptable and satisfactory to the Community.