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Corrigendum

Page 27, IRAQ, the entries should read

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GE78-84907

STATEMENT

by

Ambassador V. Villadsen, Chairman of the Delegation of Denmark,
on behalf of the member-states of the European Communities

in

Negotiating Group No. 1

on

April 14, 1978

Mr. Chairman,

Speaking on behalf of the nine member states of the European Economic Community I have the honour to make the following statement on art. 151 and related issues:

1. It would in our opinion facilitate our discussion of the matter at hand and help to clarify the negotiating text if it were agreed that art. 151 should only deal with the system of exploration and exploitation proper. This means that the heading should be changed accordingly and that the paragraphs dealing with other subject-matters, that is para 7, 8 and 9, should be considered together with the main provisions on these matters.

2. Regarding the system of exploration and exploitation itself we continue to believe that a system which gives both to the Enterprise and to States, state enterprises and juridical or natural persons assured access to activities in the Area on an equal footing would be a balanced outcome of our negotiations. This so-called parallel or dual system is in our view a reasonable compromise.

3. The present text of article 151 does not seem to reflect clearly enough the parallel system. There are in paragraphs 1, 2 and 3 expressions which seem to distort the parallel system. I refer to the terms "activities carried out by the Authority", "on the Authority's behalf", and "in association with the Authority".

4. We must furthermore stress that the new idea which has been introduced in para 2 (ii), i.e. the idea that access for states, state enterprises, etc. to carry out activities in the Area should be conditional upon an undertaking to contribute to the technological capability, financial and other resources necessary to enable the Authority to fulfil its functions under paragraph 1, in our opinion is contrary to the concept of the parallel system. In practice it is likely to lead to a situation in which the resources of the Area will not be exploited for the benefit of all mankind. This provision in art. 151 and related provisions in Annex II disregard the legitimate interests of the holders and suppliers of technology and presuppose that the contractors are always the owners of the required technology. The contractors will, however, in many cases be using technology under license from others and will not under the terms of such licenses be allowed to transfer the technology to the Authority and Enterprise as envisaged in the said provisions. Transfer of technology to the Authority and the Enterprise should not be made a condition for obtaining a contract.

5. Having said this, Mr. President, let me in the same breath make it very clear that the countries for whom I speak are ready to co-operate in order to facilitate the acquisition by the Enterprise of the necessary technology. To that effect we should like to offer the following suggestions: Each contractor should undertake to make available to the Enterprise a general description of the equipment and methods to be used in the non-reserved area. In addition the contractor should undertake - upon request by the Enterprise - (a) to negotiate arrangements under which the technology which is to be used by the contractor and which the contractor has the right to transfer is made available to the Enterprise, and (b) to facilitate, to the greatest extent feasible, the acquisition by the Enterprise of technology which is to be used by the contractor and which the contractor does not have the right to transfer. The request by the Enterprise should in our view be made within a certain time, say 2 years, after the conclusion of the contract in order not to make the contractor subject to an uncertain situation for too long. The transfer as well as the acquisition of technology should be under license - as already envisaged in the ICNT, Annex II - and on commercial terms and conditions.

6. In order to ensure that the negotiations are conducted in good faith and to assist the parties in reaching agreement, we could accept that if negotiations are not concluded within a reasonable time, either party may

refer any matter arising in the negotiations to a conciliation procedure. It should in that connection be stipulated that the conciliation commission is to make its recommendations to the Enterprise and the contractor within a specified short period of time. The recommendations of the commission should form the basis for further negotiations between the parties.

Whatever the outcome of such negotiations may be, the contract of exploration and exploitation should not be affected.

7. I hope, Mr. Chairman , by this statement to have answered some of the questions previously put as to what the member states of the EEC propose as an alternative to the last part of article 151 para 2 (ii), which we want deleted. We shall be listening with interest to comments made on the thoughts here expressed and are prepared to work with others toward a solution acceptable to all.

D R A F T

M E M O R A N D U M

THE RIGHTS OF THE LLGDS IN THE ECONOMIC ZONE

It has been well established in international law that the rights to marine resources of all States, whether coastal or land-locked, began where the territorial sea of the coastal State ended, i.e., to all the maritime areas outside of a belt of territorial sea of not more than 12 nm. measured from the relevant baselines.

The present efforts on the III UNCLOS for creating the EEZ concept must, therefore, take into account the existing rights of the land-locked and geographically disadvantaged States compensating these States for the losses which would be suffered by them from the establishment of such a zone. Most of the maritime resources are located in the belt close to the coast. If the coastal State were to be granted exclusive resource rights and jurisdiction over a 200-mile marine belt off its coast, this would mean that the LLGDS would be deprived of their rights to participate in the exploration and exploitation of the most valuable and easily accessible part of the marine areas, which, under present international law, is open to all States.

The position of the LLGDS with regard to the EEZ was clearly set out in a proposal submitted to the Conference in 1974 (A/Conf.62/C.2/L.39) by 22 LLGDS. While authorizing the coastal State to establish a zone for the purpose of exploring and exploiting the living and non-living resources therein, the proposal also provided for a right of the LLGDS to participate in the exploration and exploitation of the natural resources of the zone of neighbouring coastal States "on an equal and non-discriminatory basis". It was left to the States concerned to decide upon appropriate agreements to facilitate the orderly development and the rational exploitation of the living resources in this area. However, the actual participation by the LLGDS in the exploration and exploitation of the non-living resources of the EEZ was to be governed by equitable arrangements. Unlike the coastal State, the LLGDS were to be precluded from transferring their rights to third States, except for the purpose of obtaining technical or financial assistance. Furthermore all States were to make contributions to the International Authority out of the revenues derived from the exploitation of non-living resources. These provisions were to be without prejudice to regional or

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sub-regional agreements. Disputes relating to these rights were to be subject to the compulsory dispute settlement procedure to be establisehd by the future Convention.

The proposals formulated by various coastal States at the beginning of the Conference reveal that these States were well aware of and in principle recognised, the necessity to grant LLGDS the right to participate in the exploration and exploitation of the natural resources in the EZ.

The draft articles presented by various coastal States show however that quite a number of these States intended to concede merely advantages, not rights, to the LLGDS, for their exercise was to depend on the discretionary power and exclusive jurisdiction of the coastal State. Other proposals limited participation to preferential rights granted to land-locked States with regard to the surplus as determined by the coastal State.

The differences of view between the coastal States and the LLGDS continued to persist in the Conference up to the present. The following is a brief analysis of some of the drafts which have been elaborated within the framework of the Conference : the draft of the Group of 77, the Evensen Paper and the draft of the Group of LLGDS.

The "Working Paper on the Exclusive Economic Zone" elaborated by the Group of 77 was, to a large extent, in line with the position claimed by the LLDGS. Article 5 therein provided that nationals of land-locked States should have rights to living resources equal to those enjoyed by the nationals of the coastal State, or that a fair and equitable share of these resources should be alloted to them. Developing GDS were to be given a similar share.

Compared with this draft, the relevant articles in the Evensen Paper constituted a complete setback : the land-locked States were to have "access" to the exploitation of the living resources. However, this "access" was not a "right" but only a favour to be granted and revoked at the coastal State's discretion. In the case of the GDS they had to be contented with a mere pactum de negotiando, which was moreover subordinated to the economic needs of the coastal State. It was only when its nutritional needs made a GDS dependent on its participation in the living resources of the EZ of other States that the coastal State concerned was to be under a legal obligation to conclude an agreement granting preferential rights.

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In a paper submitted to the Chairman of the Second Committee at the Third Session of the Conference, the LLGDS went a long way towards meeting the views of the coastal States by providing that the terms and conditions for the exercise of the participating rights in the EZ should be the subject of "equitable agreements". They also agreed to draw a distinction between LL and GDs by providing that the former should exercise their rights on an equal and non-discriminatory basis whereas the rights of the GDs were to be exercised on an equitable basis only. They further provided for the equitable distribution of the rights of the LLGDS among the EZ of the coastal States of the region so as not to overburden a particular one among them. The LLGDS also incorporated the point that developed LLGDS can exercise their rights only in the EEZs of developed coastal States.

The text included in the SNT offered no just solution to the legitimate claims of the LLGDS at all. Article 57 provided for a right of participation by LL on an equitable basis only. This "right" is more an "advantage" than a "right" because it was to be contingent upon the powers of the coastal State as defined in Articles 50 and 51. The position of the GDs under Article 58 was even more precarious; for participation on an equitable basis was to be limited to developing States withou an EZ and to developing States.

The value of these advantages was further lessened by the fact that the LLGDS were to have no preferences over the rights of other States. The participation of the LLGDS was to be left to the complete discretion of the coastal State concerned. That such provisions cannot constitute the compensation legitimately claimed by the LLGDS stands to reason.

In yet another attempt to bring about a compromise, the LLGDS, in a paper submitted to the Chairman of the Second Committee at the Fourth Session, proposed that the right of the LL to participate in the living resources be only on an "equitable basis" and not an "equal" one. The rights of participation provided for developing GDs were similar; the rights of developed GDs were also similar subject only to the added proviso that they have already been habitually fishing in that was to become the EZ of a certain region. This was in harmony with the basic tenet that the rights to exploit maritime resources should be distributed according to economic needs and interests.

These attempts at a reconciliation by the LLGDS proved abortive. The coastal States did not reciprocate the major concessions made by the LLGDS. The RSNT continued to reflect the coastal State view. If any the LLGDS' position was made worse, for the expression "without prejudice to" in Articles 57 and 58 of the SNT was altered to read "subject to".

A/AC. 105/196
11 April 1977.

A/AC. 105/217
6 March 1978

In a further effort to find some common ground between the positions of the LLGDS and those of the coastal States, the Group of 21 was set up under the chairmanship of Ambassador Nandan of Fiji. The draft elaborated by the Group tried more than any other text to strike a negotiated balance between the interests of the various States concerned. It provided that the LL States should have a right to the surplus of living resources on a preferential basis over third States ; the terms and conditions of this right were to be the subjectof an agreement. In the absence of any surplus, equitable arrangements were to be concluded between the States concerned to allow the LL States to fish taking into account various relevant factors. The GDs (which were referred to as "States with special characteristics") were to have a right to participate in the surplus of living resources as well, but this right was to be subject to the particular circumstances of each case. However, a distinction was drawn between developed and developing GDs, for the latter were to enjoy preference over third States in regard to the surplus ; in the absence of any surplus they were to be allowed to fish under an equitable arrangement taking into account a number of relevant factors.

The text elaborated by the Group of 21 was considered by the LLGDS to form a valuable basis for further negotiation because it constituted a genuine attempt to confront, balance and reconcile the rights, interests and needs of both the coastal States and the LLGDS. That was why it was largely reflected in the draft articles submitted by that Group to the President of the Conference for inclusion in the ICNT.

The text of the Group of 21 did not meet with the approval of the coastal States Group and the latter simply resumed its earlier intransigent position. It refused to recognise any right in favour of LLGDS. Its draft referred only to the "access" granted by coastal States in the exercise of their sovereign rights and subject to the limitations of Articles 50 and 51. It also denied the LLGDS any preference over third States. The draft also provided that a coastal State could close its EZ to a LLGDS if the latter was entitled to participate in the exploitation of another EZ, regardless of whether it exercised this right or not. Developed GDs were excluded entirely. The "access" of the LLGDS was only to the surplus as unilaterally determined by the coastal State. These proposals, which are even more restrictive than the provisions contained in the ICNT are hardly conducive to reaching a compromise to accommodate the legitimate rights, interests and needs of the LLGDS and all other members of the international community. These proposals certainly do not promote the elaboration of a generally acceptable Convention on the law of the sea.

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While the ICNT did not seek to resolve this outstanding issue, it had instead included in it certain other more disadvantageous provisions. While it was true that such provisions had been agreed upon by both sides, these were only a part of the over-all compromise. It was never agreed that such provisions should be included in such piece-meal fashion. Here again, the draftsmen of the ICNT had done in the LLGDS.

The preceding description of the work of the Conference as regards the rights, needs and interests of the LLGDS in the EZ of neighbouring States zields the following conclusions:

(i) The natural resources found beyond the territorial sea -in particular living resources- have traditionally been accessible to all members of the international community, including LLGDS. The creation of an extensive EZ in favour of coastal States amounts to denying the LLGDS access to the resources of such zones without giving them the corresponding advantage, i.e., a substantial EZ of their own. The LLGDS must be compensated for this disadvantage through the grant of a right to participate in the exploration and exploitation of maritime resources of the EZ located in the same geographical area.

(ii) This compensatory participation should take the form of a right and not be limited to a mere advantage which may be granted and withdrawn at the coastal State's discretion ; that right must furthermore be preferential, i.e., take precedence over the rights, needs and interests of third States.

(iii) The description given in this Memorandum shows that in the course of negotiations, the Group of LLGDS has been very flexible and has offered several important concessions ; the same cannot be said with regard to the Group of coastal States which has instaead reverted to its initial position.

(iv) The ICNT limits itself to reproducing the relevant provisions of the RSNT, thus taking into account the rights, needs and interests of the Group of coastal States but not those of the Group of LLGDS. Indeed, the ICNT has made two changes which are reflective of the coastal States' position. General agreement on a new Law of the Sea cannot, however, be achieved on the basis of such an imbalanced text, which can in no way be said to be a negotiated settlement. It is imperative that the ICNT should be modified so as to strike a just and equitable balance between the rights, needs and interests of the coastal States and those of the LLGDS.