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Statement by the delegation of the Federal Republic of Germany

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posals of the distinguished Mr. Manner brought a consensus closer and that we would therefore accept their inclusion in the second revision of the negotiating text, as actually done in accordance with the procedure in A/CONF.62/62 by decision of the Collegium, giving due weight to the substantial support which they received at that session (articles 74 and 83, para. 1, and article 298, para. 1).

18. At that session we participated actively in discussions and contacts regarding the second revision of the negotiating text with the delegations most concerned, and heard the views of other countries.

19. These discussions and contacts confirmed our conviction that the present text is still the one which comes closest to a final consensus. It has all the elements which make it possible, and the inclusion of the reference to international law in its preamble represents precisely the necessary point of balance between opposing positions.

20. No one has any grounds for arguing that on one side there are the spokesmen or interpreters of a new international law, and on the other side there are the advocates of anachronistic or outdated principles. International law covers norms, principles, customs and practices of States, which have been taking shape in a process of accumulation and innovation which the present convention must properly reflect.

21. The discussions just held between the 20 most interested countries shed light on various points to which my delegation attaches signal importance. Various problems arise from the inclusion of the so-called "equitable principles" while, at the same time, there is no consensus on their definition nor is any provision made for a third party to settle cases in which they are invoked by one or both parties to a dispute. Since it is established that delimitation is to be by agreement between the parties, and mandatory settlements are ruled out, the parties are left to their own devices in a field where subjectivity reigns supreme and the mere wishes of the parties are sovereign and in which the interpretation of the principles may lead to a conflict of equities in which "each has his own equity". If there is no judge, and there are no binding decisions by third parties, the application of "equitable principles" to a delimitation could lead to inequitable solutions.

22. Our delegation believes that the next revised version should retain the present text. There are no circumstances that would warrant any change, unless some other proposal arises from the negotiations.

23. We have spared no effort to help to improve the text still further, but there are two requirements for this in our view: the first requirement is continued consideration in package form of the three constituent elements of the problem: delimitation criteria, interim measures and the settlement of disputes; the second requirement is that a serious effort should be made to render the present text more precise, and give it a sense of balance, without forgetting that the second revision, as drafted, does not represent the position of the group of countries which uphold the principle of the median line or equidistance line, but reflects the compromise that was reached with the participation of all, including neutral countries or countries not directly involved.

24. A compromise for the achievement of a new consensus might start with negotiations on the second revision without jeopardizing the compromise represented by that text which must be maintained in the new revised version.

FINAL CLAUSES AND GENERAL CLAUSES

25. We are prepared to support the incorporation of the general clauses and the final clauses, on which the action of the President has been decisive and commendable, as has the contribution of Mr. Evensen and the co-ordinator of the Group of 77, Mr. Marsit.

26. We played a very active part in the discussion on these clauses, stating our views at the time, and they are duly reflected in the consensus. There are some issues, to be resolved in the plenary Conference, which will depend on the solution appearing in the third revision on the issues amenable to revision by this procedure according to document A/CONF.62/62. We specifically include a better formulation on mandatory recourse to conciliation, when it has been consolidated in the delimitation package. With regard to the clause on reservations, we tentatively agree, in principle, with the present text. We believe that only a few restrictive reservations should be accepted on specific articles, and we agree with the point made in A/CONF.62/L.60 that: it must be clearly understood that article 303 does not permit exceptions by any State party to optional exceptions made by any other State party under paragraph 1 (*a*) of article 298, and that that text does not permit either of reservations to exceptions or of exceptions to reservations.

27. Lastly, our delegation is in favour of the inclusion in the convention of a generic text authorizing the participation of inter-State agencies such as the European Economic Community, the Andean Group, the South Pacific Commission and others which exist or may be established in any region of the world, subject, however, to two conditions: that this does not prejudice the object and purpose of the convention and that no advantages of any kind are created for these entities or for any other Member State that are incompatible with the convention.

DOCUMENT A/CONF.62/WS/16*

Statement by the delegation of the Federal Republic of Germany

[*Original: English*]
[*10 March 1981*]

1. In submitting this written statement, which elaborates the oral intervention of the ninth session's general debate, the delegation of the Federal Republic of Germany reiterates its desire that the Conference adopt an acceptable draft of the convention on the law of the sea, as soon as possible.

2. The Federal Republic of Germany is a geographically disadvantaged State. It has always taken a major interest in all kinds of uses of the sea. As a result of the extension of coastal States' jurisdiction it suffers considerable disadvantages. Moreover, as an industrialized State, being highly dependent on imports of raw materials as well as on export of technology, it has vital interests at stake with respect to the sea-bed régime envisaged by this Conference.

3. The general aim of this Conference is to establish a legal régime modifying the traditional freedoms of the high seas, that is to say the principle which over centuries has governed all uses of the sea. It is essential not to lose sight of the nature of this process, from which it follows that, whenever the future convention has to be interpreted and applied, this must, to the furthest possible extent, be done in favour of the pre-existent and inherent principle of the freedoms of the high seas.

FIRST COMMITTEE

4. First Committee matters are of paramount interest to the Federal Republic of Germany because it needs a continuous supply of raw materials, because it is heavily involved in scientific and industrial research and development of sea-bed mining tech-

* Incorporating documents A/CONF.62/WS.16/Corr.1 and 2 of 17 March 1981.

nology, and because of the Federal Government's consistent policy of promoting a free and equitable system of world trade, for the benefit of all, particularly the developing countries. These aims have been emphasized by the resolutions unanimously adopted by the German Bundestag on 24 June 1977 and 26 June 1980.

5. It is thus of crucial importance for the Federal Republic of Germany to have guaranteed access to sea-bed resources without discrimination and on economic terms. Financial and other burdens of industrialized countries and their industries must be in reasonable proportion to their economic benefits and institutional arrangements must safeguard the vital interests of both investors and consumers.

6. With respect to resource policy we still consider the general concept reflected in articles 150 and 151 to be rather unbalanced. It obviously creates disadvantages for sea-bed mining activities by giving excessive protection to traditional market positions of land-based producers. Therefore some claims in article 150 should be altered in order to assimilate the chances of sea-bed mining and land-based production within the resource policy of the International Sea-Bed Authority. We still feel that sea-bed mining should not merely serve as a buffer stock "as needed". We appreciate that in subparagraph (*h*) of article 150, a balancing provision has been introduced; this idea should be strengthened.

7. In general, we disapprove of any form of permanent limitation of sea-bed mining production. But we also appreciate the necessity of giving developing countries, whose economies are highly dependent on land-based production, sufficient protection during the initial phase of sea-bed mining. The resource policy should give all sources of production equal opportunities. We have therefore carefully examined article 151, paragraph 2 of A/CONF.62/WP.10/Rev.3 and consider that the combination of minimal and maximal levels, which, at the same time, equally helps sea-bed mining and protects land-based production, represents considerable progress. This requires that the floor, which is an indispensable correlate to any production ceiling, be sufficiently high. We are concerned that the A/CONF.62/WP.10/Rev.3 formula might discourage potential investors and thus postpone the development of technology and the launching of the parallel system until well into the future. We are disappointed that some delegations have asked for even more restrictions on sea-bed mining. They seem to forget that protectionism has always been a method of preventing the introduction of new technologies and economic progress in general.

8. As for Council voting, we welcome the solution contained in A/CONF.62/WP.10/Rev.3 because it has improved the chances of a consensus on the future convention. In this context we are concerned about the procedure for approval of plans of work. The concept depends entirely upon the impartiality of the members of the Technical and Legal Commission. Therefore it will serve its purpose only if the convention as well as the rules and regulations provide for safeguards ensuring fair and absolutely unbiased proceedings within the Commission.

9. Transfer of technology will certainly be the key for launching the parallel system, but due to the regulations contained in A/CONF.62/WP.10/Rev.3 it may turn out to be one of its main impediments. We are concerned that the provisions on third-party technology might prove to be a major disincentive jeopardizing the parallel system. The obligation to transfer third-party technology will result in high additional costs for the contractor because of litigation and delays.

10. As to transfer of technology to States, we have often shown readiness to co-operate bilaterally and to come to generally acceptable solutions within the framework of the United Nations Industrial Development Organization and the United Nations Conference on Trade and development, but we completely disagree with the idea of linking access for national contractors with the obligation to transfer technology to States. In the context of the parallel system, which is meant to balance the access to sea-bed mining of both the national contractors and the Enterprise, transfer of technology to States clearly goes beyond the basic idea. Even without such obligation the system provides sufficient ways and means for States to obtain the required technology by engaging in joint ventures either with the Enterprise or with national contractors. Therefore we reiterate our desire to make express provision for joint ventures between developing and developed countries in the reserved areas. This would promote not only transfer of technology to developing States but also their early participation in sea-bed mining activities.

11. The basic condition for rendering transfer of technology acceptable and workable will be the right understanding of what is meant by "fair and reasonable commercial terms and conditions". We appreciate that the definition given by the delegation of the Federal Republic of Germany has become the basis of a common understanding.

12. With regard to the financial terms of contract, we are still afraid that the financial burden might discourage private investors. This will certainly slow down the development of technology and thus the whole process of the parallel system. We therefore uphold our proposal to adjust the financial burden to the high risks, especially during the initial phase. On financing the Enterprise, which will require a considerable contribution by the Federal Republic of Germany, we hold that this contribution will only be justified if a realistic chance of access to sea-bed mining is given to our companies from the very beginning of the parallel system. Such access also requires adequate preparatory measures in order to promote development of technology prior to entry into force of a law of the sea convention. For this reason and in accordance with international law the Federal Republic of Germany has given effect to an act of interim regulation of sea-bed mining. Correspondingly, an acceptable law of the sea convention should include provisions concerning interim investment protection.

13. The review clause, in particular article 155, paragraph 4, raises constitutional problems. We reserve the right of our Parliament to approve any substantial amendments to a law of the sea convention. In any case the review conference may not jeopardize access to sea-bed mining for States and their nationals.

14. The delegation of the Federal Republic of Germany is pleased to note that in the long negotiating process the gap between the expectations of some delegations and realistic conditions of a practicable parallel system has narrowed considerably. We still hope therefore to achieve acceptable solutions.

Second Committee

15. The provisions on the territorial sea represent in general a set of rules reconciling the legitimate desire of coastal States to protect their sovereignty and that of the international community to exercise the right of passage. The right to extend the breadth of the territorial sea up to 12 nautical miles will significantly increase the importance of the right of innocent passage through the territorial sea for all ships; this is a fundamental right of the community of nations. For this reason we continue to favour an improvement of article 19, paragraph 2 (*l*). In addition, we hold that, under general principles of law, the right to extend the territorial sea up to 12 nautical miles must not be exercised to the detriment of other States.

16. A prerequisite for the recognition of the coastal State's right to extend the territorial sea is the régime of transit passage through straits used for international navigation. We understand article 38 to limit the right of transit passage only in cases where a route of similar convenience exists in respect of navigational and hydrographical characteristics, which include the economic aspects of shipping. This should have been stated more clearly in the text.

17. A point of great importance is the exclusive economic zone, which is a new concept in international law. Coastal States will be granted precise resource-related rights and jurisdiction. All other States will continue to enjoy the high seas freedoms of

navigation, of overflight and of all other internationally lawful uses of the sea. Those uses will be exercised in a peaceful manner, that is, in accordance with the principles embodied in the Charter of the United Nations.

18. In articles 56 and 58 a careful and delicate balance has been struck between the interests of the coastal State and the freedoms and rights of all other States. This balance includes the reference contained in article 58, paragraph 2 to articles 88 to 115 which apply to the exclusive economic zone in so far as they are not incompatible with Part V. In this delegation's view nothing in Part V is incompatible with article 89 which invalidates claims of sovereignty.

19. Of similar importance to us is the regulation of the freedom of transit enjoyed by land-locked States. This transit through the territory of transit States must not interfere with the sovereignty of these States. Therefore, this delegation holds that, according to article 125, paragraph 3, the rights and facilities provided for in Part X in no way infringe upon the sovereignty and legitimate interests of transit States. The precise content of the freedom of transit has in each single case to be agreed upon by the transit State and the land-locked State. We are prepared to negotiate such agreements. In the absence of such agreement concerning the terms and modalities for exercising the right of access, the access of persons and goods to transit through the territory of the Federal Republic of Germany is only regulated by national law, in particular with regard to means and ways of transport and the use of traffic infrastructure.

20. The Government of the Federal Republic of Germany is very much concerned about the unilateral action of many coastal States who assert not only interim but definite and final claims of national jurisdiction over extended maritime zones before the entry into force of a generally accepted international convention. As already expressed on many occasions and as a matter of principle, the Federal Republic of Germany is of the opinion that such unilateral extension of coastal State maritime jurisdiction should not be enacted outside and before a generally accepted international convention. The Federal Republic of Germany therefore is not in a position to grant recognition in law to such unilateral extensions unless their conformity with international law is proven by the particular circumstances of the individual case.

Third Committee

21. As for the provisions relating to preservation of the marine environment, we consider the wording contained in A/CONF.62/WP.10/Rev.3 to be satisfactory in principle. Drafting improvements might still be necessary.

22. With respect to marine scientific research, we regret the considerable erosion of the traditional freedom of research although, according to A/CONF.62/WP.10 /Rev.3, this freedom will remain in force for States, international organizations and private entities in some maritime areas, e.g. the sea-bed beyond the continental shelf and the high sea. However, the exclusive economic zone and the continental shelf, which are of particular interest to marine scientific research, will be subject to a consent régime, a basic element of which is the obligation of the coastal State under article 246, paragraph 3, to grant its consent "in normal circumstances".

23. In this regard we consider it important to recall that the creation of favourable conditions and the facilitation and promotion of marine scientific research are general principles recognized in the text and governing its interpretation and application.

24. Some delegations have expressed concern over a possible infringement of their sovereign rights for exploration and exploitation by the marine scientific research régime on the continental shelf beyond 200 nautical miles. We believe that this régime, which denies the coastal State the discretion to withhold consent under article 246, paragraph 5 (*a*), outside the areas it has publicly designated in accordance with the prerequisites stipulated in paragraph 6, takes the coastal States' interest more than sufficiently into account. The concern voiced by some delegations relating to the obligation to disclose information about exploitation or exploratory operations in the process of designation is taken into account in article 246, paragraph 6, which explicitly excludes details from the information to be provided.

25. We are aware that considerable administrative efforts are to be undertaken by coastal States, who will have to give reasonable notice of designation of an area as well as its enlargement, reduction or termination. This obligation will enable researching States or organizations to take the designation into account already in the planning and preparatory stage of a project.

26. The general principle of the promotion of scientific research would certainly have been implemented better by a wider application of the compulsory judicial dispute settlement, which could have contributed to reducing insecurities resulting from a new legal régime. One element which may result in such insecurities is that the exercise of the coastal State's discretion both to deny consent in accordance with article 246, paragraph 5, and to designate specific areas in accordance with paragraph 6 is exempted from compulsory conciliation.

27. As regards development and transfer of marine technology we appreciate that international co-operation is to be promoted. We understand the relevant provision to include co-operation with private entities.

Plenary Conference

28. Participation of the European Economic Community in the convention is essential to the member States of this supranational organization. Only the Community can assume rights and obligations under the convention relating to competences which this Community has assumed from its member States. This legal necessity cannot be evaded.

29. It has always been and still is the firm belief of the Government of the Federal Republic of Germany that, in the interest of international peace and security, disputes between States over the application of rules of international law should be settled by international adjudication and that, consequently, new international conventions should contain effective and comprehensive judicial settlement procedures. Therefore, we regard it as a major achievement of this conference that compulsory judicial settlement of disputes has been made a basic rule and integral part of the future law of the sea convention. We welcome the wide range of disputes covered by judicial settlement procedures while at the same time we note regretfully that some important categories of disputes have been excluded from these procedures. We refer in this respect particularly to disputes on the delimitation of maritime zones and on the exercise of coastal States' rights within their maritime zones in respect of fisheries and scientific research.

30. On the other hand, among the positive elements of the dispute settlement system in A/CONF.62/WP.10/Rev.3 there is one to which we attach particular importance as part of the overall compromise package: that is article 297, which provides the necessary complementary judicial protection of the freedoms and rights of navigation, overflight and other internationally lawful uses of the sea to which other States and their nationals remain entitled in the maritime zones of coastal States under the provisions of the convention, by subjecting disputes relating to an infringement of these rights by actions of the coastal State to compulsory judicial settlement.

31. The delegation of the Federal Republic of Germany restates its offer to provide for a suitable seat for the future International Tribunal for the Law of the Sea. To this end, it has submitted the candidature of Hamburg, the international commercial and shipping centre with a long maritime tradition.

32. The establishment of a preparatory commission will be indispensable in order to ensure that the convention and its institutions will be effective as soon as the convention enters into force. The work of this commission is to be based on the same widespread support which is required for the adoption of the convention itself, because it will considerably influence implementa-

tion, application and interpretation of the convention. Therefore the commission should be as representative as possible.

33. Signature of the convention as condition of membership might lead to only a relatively small number of members and therefore to doubts whether the results of such a commission can be regarded as representative of the States participating in the law of the sea Conference. This danger should be avoided in view of the important tasks which will be assigned to this commission, one of the most important being the elaboration of rules and regulations which will be applicable as long as they are not altered by the sea-bed Authority. Therefore membership of the commission should depend on the signature of the final act of the Conference.