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An Overview of the July–August 1971 Preparatory Session on the Law of the Sea

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INTRODUCTION

My task this morning is to provide some perspective on the current stage of international negotiations on the law of the sea. While I recognize that most of you are primarily interested in fisheries or marine science, it is necessary to consider these individual topics in relation to the overall picture because the subject is being dealt with as a whole within the United Nations preparatory committee on the law of the sea.

Many of you are aware that last December (1970) the United Nations General Assembly scheduled a comprehensive law of the sea conference for 1973. Two preparatory sessions have taken place — one in March and the other in July-August 1971. The March session was largely devoted to organizational and procedural matters. The 6-week meeting during July and August was spent in a general debate during which approximately 70 states articulated important substantive positions. For many of these countries, this was the first expression of national positions on the law of the sea. While we cannot say that substantive negotiations have reached much more than a preliminary stage, we can say that remarkable progress has been achieved in the last year, especially when comparison is made with the progress that was made in the prior 3 years when many of these issues first surfaced in the United Nations.

The general debate last summer took place in the Main Committee and three Subcommittees of the whole. As you may recall, Subcommittee I is to prepare draft treaty articles on an international regime for the seabed area beyond the limits of national jurisdiction. Subcommittee II is to compile a comprehensive list of, and draft treaty articles on, subjects and issues relating to traditional law of the sea matters such as the territorial sea, international straits and fisheries. Subcommittee III is to deal with preservation of the marine environment and scientific research. The Main Committee, under Chairman Amerasinghe of Ceylon, will generally coordinate the activities of the Subcommittees and handle unassigned issues appropriate for its attention.

I should now like to concentrate on some of the principal events which

transpired in each of the three Subcommittees during this past July-August session.

Subcommittee I

Almost all states agreed at one time or another during the 23 meetings of Subcommittee I, that international machinery consisting of an Assembly, Executive Body and Secretariat was needed. Most also felt that satisfactory dispute settlement procedures were desirable but varying views were expressed on how they were to be established. Considerable disagreement was expressed over voting procedures in the executive organization. Many developing countries urged a "one state, one vote" system while the Soviet Union advocated a consensus system which was tantamount to a veto. Other states, including the United States, favored a form of weighted voting which would reflect some logical relationship between a state's voting power and its responsibility or interest.

A controversy arose over the possible economic impact on the prices of land-based sources of raw material as a result of the extraction of these minerals from the seabed. Several Latin American and Middle Eastern countries in particular, felt that cause for concern existed and they supported a general statement by the Secretary General of the United Nations Committee on Trade and Development (UNCTAD) which indicated that adverse consequences were possible. A comprehensive study by the United Nations Secretariat had concluded that no cause for concern existed except for a few, relatively minor instances. Dr. McKelvey of the United States Delegation delivered a well-reasoned, factual statement which reached essentially the same conclusion as the United Nations Secretariat study.

On this issue, the way in which the question is asked can structure the answer. Perhaps a question as pertinent as possible adverse consequences for present land producers is: what are the possibilities for less expensive resources for all states as a result of seabed exploitation. In any case, there was a split between those who thought controls on production were necessary and those who believed that the uninhibited action of world supply and demand would take care of most of the problems. This latter group feared that the proposed cures might be an "overkill" more harmful than the supposed illness.

A number of developing states argued that the international agency should be established with the power itself to exploit seabed resources. France, the United Kingdom and the United States opposed such an international operating agency, mainly because it appeared financially impractical and because it raised many unnecessary political problems.

The degree of practical difference between an operating agency which issues joint service contracts and an international authority which licenses exploitation could be made clearer. There may be as much of a semantic as a real problem on this point. I believe that more precise exposition of the positions of various delegations on this issue might pave the way for a narrowing of differences over what now appear to be largely doctrinal views.

The primary undercurrent in the first Subcommittee was on the question of the outer limits of national jurisdiction over the natural resources of the seabed. Many countries did not take a position on this hotly disputed subject. Among those who did, a goodly number spoke in terms of a 200-mile resource zone — that, of course, would include control over both minerals and fish. Importantly,

however, in the view of almost all, freedom of navigation and overflight would not be affected in such a zone.

A newly formed group of landlocked and shelf-locked states advocated narrow seabed limits by suggesting that the international seabed area begin at either the 200-meter isobath or 40 miles from shore (at the choice of the adjacent coastal state). The landlocked and shelf-locked group also suggested the creation of an intermediate zone. This would consist of an adjacent 40-mile belt denoted as a "coastal state priority zone" wherein coastal state consent would be required for resource exploitation.

The United States, as most of you know, has proposed that a trusteeship zone be established for the seabed between the 200-meter isobath (or 12 miles — whichever is further seaward) and an outer limit which has yet to be determined. In the trusteeship zone there would be a mixture of delegated coastal state rights and international elements. At the July-August meeting, the United States stressed that finding an appropriate, acceptable mixture of rights and duties was our most important objective regarding the seabed, and that we were flexible on the method of determining the outer limits of the trusteeship zone.

Subcommittee II

Territorial Sea and International Straits: The general debate in Subcommittee II was less detailed than in Subcommittee I during July-August, 1971. A large number of states (including the United States in a draft Article I) did support a 12-mile territorial sea. However, certain conditions were attached. For the United States, this meant world-wide acceptance of a provision for free transit through and over international straits. For others, support for a 12-mile limit was tied to recognition of coastal state control over resources in a broad zone adjacent to such a territorial sea breadth. A few states pressed for full maritime sovereignty out to 200 miles but the overwhelming majority of states did not believe national sovereignty should affect navigation or overflight beyond 12 miles.

The problem of unimpeded passage through and over straits used for international navigation received sufficient attention at this session to conclude that much negotiating effort will be required before this question is satisfactorily resolved. The United States believes that since many important straits would be overlapped by territorial seas if 12-miles became the norm, we need more legal assurances to ensure satisfactory maritime communications than is provided under the doctrine of "innocent passage". Under "innocent passage", the coastal state could claim a good deal of discretion about what is "innocent" and what is not. At best, the concept still does not include a right of submerged transit or overflight.

I seriously doubt that states bordering international straits would be well-advised to seek the legal authority to control maritime traffic. Internal and external pressures could be brought to bear for or against allowing passages by particular flag states or types of ships. Confusion and uncertainty could result. Maritime communications are too vital to be left subject to such caprice. In any event, the United States proposed in Article II that "free transit" be provided for movement through and over international straits. The right contemplated by the United States is a narrow one — that of going from one point to another in lanes designated by the coastal state. Spain, bordering the Straits of Gibraltar, argued strenuously for permitting only the mere right of "innocent passage" and

spoke out strongly against "free transit". I think some of her concerns were probably based on misunderstandings about our intentions in Article I, but, in any case, we hope any differences can be resolved.

Indonesia, the Philippines and Fiji discussed the status of their claims based on the archipelago theory. In the past, this concept has been thought to mean the drawing of straight baselines around the outermost fringes of islands and declaring the waters enclosed therein to be "internal". However, Fiji, an observer at the July-August meeting, suggested that the enclosed ocean space should be territorial seas and not internal waters, thereby permitting innocent passage. Perhaps an increased appreciation of the damaging effect of the archipelago theory on international navigational interests was being indicated and the thoughtful Fijian presentation merits close study for clues about possible accommodations of interests.

Fisheries: Resolution of the fisheries issue may well be the keystone to a successful law of the sea conference in 1973. One reason is that almost every state has some interest in fishing either as a producer or consumer, or both.

A large majority of the coastal states were inclined towards an expansion of their national control over fisheries. However, this view was in sharp contrast with the outlook of the major distant water fishing states such as Japan and the USSR. A more middle approach was suggested by some other states which indicated a preference for a fisheries zone with international elements.

For its part, the United States introduced its draft Article III on fisheries which was intended to reflect a practical approach to a problem which has long been a source of friction in the international community. We stated that we welcomed discussion on all aspects of fisheries and, in particular, suggested that negotiations between the coastal and distant-water fishing states most concerned would be appropriate on the question of traditional rights. Article III proposed a "species" approach with a coastal state preference over coastal and anadromous stocks based on a coastal states actual fishing capacity. Fisheries management responsibility was lodged in international (including regional) organizations, or in coastal states in the absence of such organizations. An expert commission would deal with disputes unless the parties agreed to another method of peaceful settlement.

The draft Article on fisheries submitted by the United States received little detailed attention at this session, but it is likely that specific reactions will be forthcoming at the next meeting of the Committee.

I shall not go into the procedural matters, which may still prove to be a stumbling block to progress in the law of the sea negotiations, except to say that a number of states were involved in drafting a "list" or agenda for the 1973 conference. Work on this problem is continuing.

Subcommittee III

Subcommittee III held a dozen meetings in Geneva but there was not a great amount of substantive discussion on the subject of preservation of the marine environment. This was probably due to the on-going work in Intergovernmental Maritime Consultative Organization (IMCO) and the Stockholm Conference on the Human Environment set for 1972. Many Delegations were not eager to duplicate efforts underway in other fora, and most expected the results of these other efforts to be channeled into Subcommittee III.

Canada, consistent with her national legislation, did actively advocate the

right of coastal states unilaterally to establish broad anti-pollution zones adjacent to the territorial sea. This would be done within the framework of a "custodianship" concept and a delegation of powers from the international community to the coastal state. Spain, Australia and others also supported marine pollution control zones in adjacent high seas areas. Japan thought that the maximum achievement at this time would be a new legal instrument for control of oil pollution. Other states favored regional arrangements but most of these were inclined toward basing regional arrangements on internationally agreed principles.

The United States stressed the desirability of internationally agreed standards as well as the important role of the specialized agencies of the United Nations and various inter-governmental groups in coping with marine pollution. We suggested that, taking into account the work done in these entities, Subcommittee III should draft the necessary treaty articles to provide a broad international legal framework which would leave technical details to appropriate specialized bodies.

The question of freedom of scientific research in the oceans was the subject of some differences of opinion. On the one hand were those nations such as the United States which considered freedom of scientific research a basic principle of the high seas which should be subjected to a minimum of restriction. On the other, there were states which expressed the view that scientific research should be regulated.

The varying views were not even close to reconciliation at the July-August session. In my opinion, this is an issue which merits much more attention from academic, industrial and even governmental experts in the United States than it has received in the past.

CONCLUSION

A general movement toward certain broad parameters of agreement was seen at this past summer's meeting of the Seabed's Committee. While meaningful negotiations are just beginning, the number and quality of the presentations in Geneva did indicate that systematic progress was being made as articulation of national interests is a necessary first step. However, there are many perplexing problems (which cannot be treated in isolation) which must be resolved before acceptable treaty articles can be drafted at a 1973 Conference on the Law of the Sea.