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Chairman – L. W. Strasburger, *Strasburger Inspection Service, New Orleans, Louisiana*

Update LOS 1973

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In the time allotted today, I shall attempt to bring you up to date on those items covered by discussions in Geneva during this past summer. As you can well imagine, I view this attempt with great trepidation for two basic reasons. First, I identify within this group a number of persons better qualified than I to speak on the subject, while some others of you may not yet have had the opportunity to acquaint yourselves with the most recent developments. Secondly, the issues of LOS have now reached the level of complexity, both procedurally and substantively, as to almost defy analysis even if time were available.

For these reasons, I will provide a broad-brush description of the issues and where they stand (as I see them) without in-depth analysis, addressing myself to both procedural and substantive problems.

As many of you know, the LOS meeting in Santiago is no longer even a dim prospect. As late as October 26, 1973, debate was continuing in the General Assembly in New York as to where and when the actual negotiating session of plenipotentiaries would begin. Although no votes had been taken, the front-running proposal contender seemed to be a 2 week session early in December in New York for organizational work, followed by a 10 week negotiating session from May 14 to July 19, 1974, to be held in Caracas, Venezuela. Also being debated in New York are issues related to who should be invited and how voting should be accomplished. With regard to membership, it appeared rather certain that the "all States" formula would be adopted (in lieu of "Seabeds" or "Vienna" Formula). And with regard to voting, the general concensus was that a simple majority would carry the vote in a sub-committee, while a two-thirds majority would be required in plenary. From the latest information, it seems that the General Assembly is not directly confronting the issue of when voting should begin, leaving room for further discussion as to how long the concensus rule should hold before final political decisions are to be made.

Now, let us look at the issues and positions taken at Geneva. With regard to substance, the Committee on the Seabeds considered six issues of major importance: (1) *the nature and structure of a regime* and the *machinery* for the utilization of the deep seabeds—that is, the area beyond the limits of national jurisdiction; (2) *resource jurisdiction* of coastal states beyond the territorial sea (with respect to the seabeds); (3) fisheries; (4) the breadth of the territorial seas and the question of passage through international straits; (5) pollution of the marine environment and (6) freedom of the conduct of scientific research. These topics were further refined in a list of issues which had previously been adopted by the Committee and assigned to one or more of the three subcommittees for consideration.

The Committee made its most discernable progress in the preparation of draft treaty articles on the general principles governing the use of the deep seabed and the machinery by which it might be governed. The goal toward which the committee strove was, of course, treaty articles universally agreed upon for future action at a political meeting which, at the time, was projected for Santiago, but now will be held elsewhere. Under the consensus principle, this objective was of course impossible. Despite the fact, the drafting group of sub-committee I was able to reach a workable formula. The chairman first solicited draft articles and condensed them into a working paper which incorporated all of the variations, on each subject. This document was then utilized by the delegates to attempt to narrow differences and, if possible, to arrive at a set of draft articles showing major areas of agreement, and, where not possible, to narrow the areas of disagreement to a small number which were then listed as alternate texts or bracketed language.

Several areas of disagreement were identified in sub-committee I. These related primarily to the choice of machinery, an issue which proved to be more complex than the nature of the regime for the deep seabeds itself. The first area concerned the character of the governing body, or the international authority to be established for the area beyond national jurisdiction. There was a clear split between the developing and developed nations. Both agreed that the international seabeds "authority" should consist of an assembly (or legislative arm) and a council (or executive arm). But different delegations had different ways of viewing the functions of these entities. The question was basically one of the allocation of power and control. Most developing countries thought that the effective power should rest in the assembly with each represented nation having one vote. The U.S. view, typical among the developed countries, was that the *council* should play the primary role with voting allocated among the members according to a formula which would weight the vote taking into account the size of the investment a nation has in the oceans. Under this view, the assembly would still be given broad recommendatory powers. A second area of disagreement concerned the *system* by which deep sea resources should be exploited. One view was that there should be a deep sea enterprise which would be the operating arm of the seabeds authority with exclusive rights to exploit the deep seabed, either directly, through contracts, or joint ventures. On the other hand, the developed countries preferred a system of licensing under the authority. The

difference is that under the enterprise system, no entity would have a right to explore or exploit until approved by the enterprise, while under the licensing system, any qualified operator meeting internationally established standards would have a *right* to a license. Other issues concerning the seabeds included the question of price and production controls, which were favored by most developing nations which export mineral ores or products, and the composition of the council. A tribunal was also proposed in sub-committee I, but this issue will be discussed at a later point.

The question of a provisional regime was discussed. At the spring session (1973) of the seabed committee, the U.S. proposed that the conference consider making certain portions of the treaty operational as soon as it was signed, rather than postpone its effectiveness until the requisite number of States ratified. At the spring session, the proposal was limited to deep seabed mining. During the summer session at Geneva, however, this proposal was expanded to include a provisional regime for fisheries and, perhaps, other appropriate problems. This provisional regime was designed to take into account the pressures presently being felt by certain segments of the industry—pressures which must be alleviated before the passage of time required to achieve ratification.

In addition to the discussion of the nature and characteristics of the regime for the seabeds, the committee debated the question of the extent of the limits of national jurisdiction over seabed resources. You are all familiar with the failure of the 1958 Geneva Convention on the Continental Shelf to deal with this issue. Several attempts during the last few years have been made to create alternatives to the continental shelf regime that presently exists. In Geneva, the concept most frequently suggested was that of an exclusive economic zone—sometimes referred to as a "coastal seabed economic area" or a "patrimonial sea". In this zone, the adjacent coastal state would have the exclusive right to authorize and regulate drilling as well as control the construction, operation and use of offshore installations affecting their economic interests. Among the views of some nations, fishing would be incorporated under the regime of this zone, although the U.S. continued to press for support of the species approach. Under the U.S. proposal for continental margins, such a regime would be created subject to international standards regarding pollution, interference with other uses of the environment, security of investment, revenue sharing and compulsory dispute settlement. The U.S. proposed that this area begin at the 12-mile limit, but the outer limit was not specified. The chief of the U.S. delegation noted that probably the preponderant number of nations favored a 200-mile outer limit, but it is of interest that there was no clear cut agreement that this should be the maximum limit. Some nations preferred that the existing regime for the continental shelf should apply in those areas where the physical shelf extends beyond 200 miles. This was the basic view of some of the Latin American nations, while the Africans preferred a fixed 200-mile limit.

Involved in the resolution of the many complex issues were questions of the breadth of the territorial seas and passage through international straits. Some countries, such as Brazil, called for a 200-mile territorial sea. Most States would prefer a 12-mile territorial sea, although some attached qualifications to their

proposals. For example, the U.S. supported a 12-mile limit provided that there be free passage through and over international straits, subject only to reasonable regulation for safety and pollution control. The Organization of African Unity and the Latin American "Santo Domingo" States conditioned their acceptance of 12 miles on the adoption of a 200-mile economic zone. Peru, Ecuador and Paraguay would accept a 12-mile zone where a regime of innocent passage would apply, but would have a second zone set at 200 miles where the high seas regime would apply insofar as navigation would be concerned. It appeared by the end of the summer that a 12-mile limit would be negotiated, and that since only a small number of nations was directly affected, the straits issue would not become a substantial block to the negotiations.

There was some discussion also on the so-called archipelago concept whereby island groups such as the Philippines, Indonesia, Fiji and the Bahamas would seek expanded areas of jurisdiction by connecting the outermost islands of their groups with straight baselines, thus enclosing their seas within a capsule. Time does not permit a full discussion of that issue here, but I would be glad to respond to questions on the subject later.

Fisheries, is of course, the issue of primary importance to this audience. The disputes at Geneva were long, involved, and lacking in resolution. The questions of fisheries and national jurisdictional limits were crucial and both were discussed in sub-committee II and its working group of the whole. The species approach was supported by the United States, which, as you know, would give the coastal State jurisdiction over the conservation and the regulation of coastal species provided that certain historical rights were reserved and provided further that unutilized species be opened for foreign exploitation. The U.S. proposal also, as you are also aware, contained special provisions protecting fishing for highly migratory species such as tuna, and anadromous species which spawn exclusively within the confines of a particular "host" state.

Contrasted with this was the zonal approach which was supported by most of the coastal States interested in fishing. The limit of the zone of coastal control most often mentioned was 200 miles. Within this zone the coastal State would control all species, although there was some support for special rules for anadromous fish. Under the most extensive form of this proposal, such as the proposal introduced by Ecuador, Panama and Peru, the coastal State would have complete legal authority over living resources in national zones to 200 miles, and then in the international zone of ocean space beyond 200 miles, it would enjoy preferential rights to stocks in the sea adjacent to its national zone. As previously suggested, the debates were endless, the procedures poorly structured, and the results negative. At one point in the deliberations, there was an attempt to break the deadlock and move ahead with the drafting of alternatives by holding informal meetings with a group of interested nations utilizing the Canadian draft proposal as a basis for negotiation, but this group met only twice and no agreement was reached in any substantial area. Thus the summer concluded with the work product where it began—a compilation of numerous proposals with no narrowing of the issues.

With regard to pollution of the marine environment and freedom of scientific research, results were not much more encouraging. In the pollution area, there was another clear split. One group, with Canada as the spokesman, advocated the establishment of pollution zones in which the coastal State would have the power to prescribe regulations and enforce them. The other major position was that taken by the United States calling for exclusively international standards in all waters, with enforcement being undertaken by flag and port states, but not coastal states. The latter proposal was argued on the need for uniform regulation of the maritime trades.

Some sub-issues developed under the pollution heading. Some developing nations were concerned that stringent pollution regulations would retard their economic development, hence they pressed for economic exceptions to pollution standards. Also, there were differences of opinion on the proper agency for the development of appropriate international standards, with IMCO coming under particularly heavy attack.

The question of scientific research also developed into a "two-view" dispute. The U.S., on the one hand, argued for a system of obligations to be imposed upon research vessels for research within the economic resource zone. A research vessel, under this system, would be free to conduct scientific research in that zone if, for example, it was certified by its State to be conducting purely scientific research; it permitted full participation by the coastal State; it guaranteed publication of results; it shared data and samples; it met pollution standards; and, it assisted the participating coastal State in assessing the results of the cruise. This proposal was met by a demand that the research vessel seek prior consent before conducting research in the area. While ways to accommodate these views were pursued, the meeting ended in a deadlock.

The remaining item I would like to mention before closing is the subject of dispute settlement. During the closing days of the summer meeting, the United States tabled a set of articles covering the compulsory settlement of disputes in all areas except navigation. Under this draft, parties to a dispute would be free to settle by arbitration, conciliation, or regional arrangements if they wished. However, any party to a dispute could, at any point in the proceedings, insist that the dispute be decided by a Law of the Sea Tribunal, whose judgment would be final. Since the proposal was not tabled until late in the game, there was little time to judge the response to it. However, what little response that was available was essentially negative. This was particularly true of the Soviets, who felt that submission to compulsory dispute settlement would be inconsistent with the long-standing international law principle of equality of sovereigns.

From what I have said thus far, you may gather that the problems facing the assembled nations at Geneva were difficult, complex and puzzling. The greatest progress was noted in sub-committee I. This was in part due to the spectacular leadership of the chairman of the working group, Christopher Pinto of Sri Lanka. It was also due to the fact that there were no jurisdictional issues, thus differences of opinion could be quickly identified and synthesized. The key to the entire meeting was to be found in sub-committee II. This sub-committee, and its working group, could not avoid the difficult and basic disputes

concerning limits of national jurisdiction, resource allocation on the seabeds, and jurisdiction over fisheries. For this reason, it was here that the least progress was made, and the material generated by the committee in preparation of its final report almost defies comprehension. It is this data that remains as the only source of input to the forthcoming conference on these issues . . . hardly an ideal way to begin a set of complex negotiations.

We now stand at the threshold of the conference. No one could approach it with great confidence concerning the outcome, yet there is no reason to believe that further preparatory work would be of any value. It was clear that the delegations to the seabeds committee had gone as far as they were prepared to go before hard negotiations begin, complete with political decisions and trade-offs. Delegations leaving Geneva left with mixed emotions. Some, like Mexico, voiced disappointment. Some, like the Soviets, felt that future negotiations were a waste of time. Some, like Brazil, appeared to be pleased that no progress was being made. All, however, seemed to feel compelled to drive to a conclusion, fearing the alternative—lack of agreement, which could quickly and easily lead to chaos. Whatever comes of the forthcoming conference, it is my judgment that it cannot possibly resolve all of the complex issues it faces. A follow-up is almost a certainty, and we must be prepared within the next few months to make some difficult choices and, perhaps, some unwelcome compromises.