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COMMITTEE ON THE PEACEFUL USES OF THE SEA-BED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION

SUB-COMMITTEE II

PROVISIONAL SUMMARY RECORD OF THE SEVENTY-SECOND MEETING*

held at the Palais des Nations, Geneva,
on Thursday, 9 August 1973, at 3.25 p.m.

Chairman:	Mr. GALINDO POHL	El Salvador
Rapporteur:	Mr. ABDEL-HAMID	Egypt

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CONSIDERATION OF QUESTIONS REFERRED TO THE SUB-COMMITTEE BY THE COMMITTEE UNDER THE TERMS OF THE "AGREEMENT REACHED ON ORGANIZATION OF WORK" AS READ OUT BY THE CHAIRMAN AT THE 45TH MEETING OF THE COMMITTEE HELD ON 12 MARCH 1971 (A/AC.138/SC.II/L.21-43) (continued)

Mr. MALINTOPPI (Italy) referred to the observations made by certain delegations, including those of Indonesia, Malaysia, Spain, the Soviet Union and the United States, concerning the draft article on straits (A/AC.138/SC.II/L.30) submitted by his delegation. He thanked the delegations which had welcomed the document; although some delegations had expressed reservations and even objections to certain features therein, they had nevertheless appreciated his delegation's efforts aimed at the solution of one of the most thorny problems on the Sub-Committee's agenda. The task involved would be both difficult and delicate, for the Sub-Committee as well as for the Conference to be held in 1974; all the countries concerned should therefore make the greatest effort to understand the views of others and to work in a spirit of compromise and international co-operation.

The Italian draft article consisted of two parts. The first sought to underline the basic principles governing navigation or overflight of straits - in other words, freedom of transit. There was only one limit - of a technical nature - to that freedom, consisting of possible regulations for the channelling of sea and air traffic. The second part dealt with the exception to those principles, namely, straits not more than six miles wide, lying between coasts of the same State and close to other routes of communication between the parts of the sea connected by the straits. His delegation had indeed expressed the view, on a previous occasion, that overflight, being already governed by international instruments, was outside the Sub-Committee's terms of reference. He nevertheless reiterated the opinion expressed by his delegation on 17 August 1971 that the Conference should not refrain on that account from any further study which it might wish to make, and that his delegation's views had been of a preliminary nature not necessarily representative of its Government's official position. In any case, the plenary Committee had subsequently included the question of overflight in the list of possible subjects and issues.

His delegation had always taken the view that to solve the problem of straits required an equitable compromise between the various interests represented. The coastal States' interests must be co-ordinated with those of other States, without detriment to the interests of the international community. The problem was more acute in the

case of straits which provided the sole natural access route to an inland sea, where most of the coastal States might have no control over the maritime access routes. Because of the resulting imbalance between the interests of the different groups of States, it was difficult to understand why legislation should favour rights of control rather than rights of freedom.

Maritime history had shown that coastal States' control of straits had in most cases given away to greater freedom of passage. He cited the Copenhagen Treaty of 1857, by which Denmark had ceased to collect tolls from vessels passing the Sound and the two Belts, and the Declaration of 1865 by Spain and the United Kingdom following which vessels passing through the Straits of Gibralter had no longer been required to display their flag. Freedom of passage through these straits had been reaffirmed by the Franco-British Declaration of 8 April 1904, the Franco-Spanish Convention of 3 October 1904, and the Franco-Spanish Treaty of 27 November 1912.

His delegation's draft article accorded with the true interests of the international community and in no way contradicted, either in general or in the specific matter of access to enclosed seas, the system adopted by the first Geneva Convention in 1958. Moreover, his delegation shared most of the Soviet delegation's views, expressed on 24 July 1973, concerning that Convention. The principle underlying his delegation's proposals could hardly be regarded as contrary to a convention to codify international law, since that principle - freedom of passage - had been reflected in article 25 of the Geneva Convention and in articles 36(1) and 37(2) of the Vienna Convention of 1969 on the Law of Treaties.

A number of arguments had been put forward against increased freedom of passage through straits, the two most important of which had already been adduced during the Sub-Committee's deliberations. The first argument was that the treaties and the declarations in question were of a relative nature and did not imply absolute recognition for third States of the principle of free passage. The second argument was that they had dealt with the question of passage through straits merely as a side issue. The fact remained, however, that all States had enjoyed freedom of passage through the straits in accordance with the spirit and the letter of those treaties and declarations. That freedom of passage was the sole aspect of those treaties and declarations which had been of true benefit to the international community as a whole, and there was perhaps some historical justice in the fact that many new States now benefited from that particular aspect of a general policy of which their territories had previously been the victims.

The exception to freedom of passage referred to in paragraph (B) of his delegation's draft article, since it presupposed three cumulative conditions, was clearly exceptional. In his delegation's view, a strait could be regarded as a purely "national" feature only if it fulfilled all those conditions. It was true that many States, including his own, claimed a territorial limit greater than the six miles mentioned in that paragraph. The figure had been chosen, however, because it was so small as to avoid any controversy arising from differing views about the extent of territorial waters. The purpose of the third condition - proximity to other routes of communication - was to avoid denying to a coastal State its interests in a strait which was not the sole means of international maritime communication in the area concerned.

Any reference to "acquired rights" had been deliberately avoided in the draft article, because the term was subject to varying interpretations, was highly contentious in connexion with scientific matters and was difficult to define in international law.

His delegation felt that the principle embodied in paragraph (A) of its draft article was acceptable to all, but it was well aware that further clarification of paragraph (B) might be required. The draft article had been prepared in a spirit of goodwill and with a sense of international solidarity, which, with calmness and a spirit of friendliness, would be essential in the discussions which lay ahead.

Mr. RIPHAGEN (Netherlands) referred to three questions which had arisen in the Sub-Committee's debates - the position of geographically disadvantaged States, the settlement of disputes and the legal nature of States' rights in respect of the uses of the sea.

With regard to the first question, his delegation felt that many of the proposals already made would extend the sea areas within national jurisdiction and thus reduce the area recognized as the "common heritage of mankind". The Secretary-General was to be congratulated on his report on the economic significance of the various limits proposed for national jurisdiction (A/AC.138/87). Table 5 in that report showed how small the area "beyond the limits of national jurisdiction" would be if limited to the sole sea area beyond the 3,000-metre isobath or to the area beyond 200 nautical miles. Many States were already disadvantaged even under the current international law of the sea; States with little or no coastline derived no advantage from exclusive fishing rights in the territorial sea, and recognition of exclusive rights of exploration and exploitation of the continental shelf was of no benefit to coastal States which did not have one. The gap would increase enormously, however, if the proposals illustrated in table 5 of that report were adopted. For that reason, his delegation felt that the preliminary working-paper A/AC.138/55 deserved more attention than it had hitherto received.

If the sea area regarded as the common heritage of mankind did in fact become reduced, the geographically disadvantaged States should at least have an equitable share in the benefits accruing to the advantaged States in order to redress the increased imbalance. Such a system of sharing had been mentioned at previous meetings by several other delegations which had sponsored draft articles.

With regard to such a method of bridging the gap between the geographically advantaged and disadvantaged States, the first question was to define those States. To consider only land-locked States as geographically disadvantaged was unjustified; other States could also be so categorized. The criterion was not communication between land and sea but the right to benefit from the sea's resources. Many States, although possessing coastlines, could not benefit from an extension of the limits of national jurisdiction to 200 nautical miles or to the 3,000-metre isobath. That fact was noted in document A/AC.138/SC.II/L.39, which however did not, in his delegation's view, take sufficient account of the fact that not all the parts of one State's territory would be necessarily at the same advantage or disadvantage. Whatever the measuring device used, in reality a small number of States would be obviously at a great advantage and a large number obviously at a great disadvantage, while some States would belong to neither category. In practice, therefore, it would be feasible to limit the sharing method to the first two categories of States.

On the other hand, the distinction between geographically disadvantaged and geographically advantaged States should not be confused with the economic distinction between developing and developed States. His country was second to none in the efforts it was making to contribute to the development of developing States, both bilaterally and multilaterally. It did not feel, however, that, in the present context of allocation of national resource jurisdiction in the seas, the distinction between developed and developing States was generally relevant. Among the geographically advantaged States there were both developed and developing countries; it so happened that most of the geographically advantaged States were developed countries. There was no justification for a system under which a developing coastal State should have to share the benefits of the sea area under its jurisdiction with developing land-locked or shelf-locked States, whereas a developed coastal State would not have the same obligations with regard to developed land-locked or shelf-locked countries.

He stressed that his delegation did not feel that the stage of development of the various States was irrelevant or in all contexts involving the law of the sea. On the contrary, it would be a decisive factor, for example, in the system of distribution of the net income of the International Seabed Authority.

With regard to the determination of the types of benefits that should be shared, he said that a particular state "benefited" from resources of sea areas under its jurisdiction in that firstly, the State might reserve for its nationals the exploitation of those resources; secondly, the State might regulate in respect of the products of that exploitation in order to serve its own economy; and, thirdly, the State might, through licence fees or taxes, receive substantial revenues from the exploitation of those resources. Those three types of "benefits" clearly had a different socio-economic significance and did not necessarily go together, either in fact or in law. Thus, it might well be that a particular country was not interested in whether the exploitation of resources was carried out by its own nationals or foreign operators, and was interested only slightly in the revenues it might derive from such exploitation, but was vitally interested in the supply of the products involved for direct home consumption or processing activities in its land territory. If some countries were at present more interested in either the possibility of fishing activities by their nationals or the regular supply of the fish itself for home consumption, others might now or in the near future be more anxious to be assured of the regular supply of, say, hydrocarbons at reasonable prices. Again, other countries might rather forego any revenue benefits for the sake of controlling the supply of certain raw materials from a sea area in view of the interest of land-based producers in their own territory.

In view of that diversity of possible interests, it seemed to his delegation that any general scheme of sharing of benefits between geographically advantaged and geographically disadvantaged States should apply to all the three "benefits" and to all resources, living and non-living. One of the merits of the proposal by Uganda and Zambia (A/AC.138/SC.II/L.41) was that it covered both the non-living and living resources and related to the sharing of all three "benefits". The same was true with respect to the paper submitted by the Chinese delegation (A/AC.138/SC.II/L.34), although the method of sharing proposed was somewhat different. On the other hand, the fifteen-Power draft articles on the exclusive economic zone envisaged only a possible sharing in respect of living resources. The draft articles proposed by the delegations of Afghanistan, Austria, Belgium, Bolivia, Nepal and Senegal (A/AC.138/SC.II/L.39) applied the full sharing concept, relating to all three

benefits, to living resources only. With regard to non-living resources, that proposal, like that of the United States of America (A/AC.138/SC.II/L.35) did not provide for the sharing of any benefits as between geographically advantaged and geographically disadvantaged States. However, documents A/AC.138/SC.II/L.39 and L.35 envisaged a transfer of revenues to the International Authority and as such deserved sympathetic consideration. Nevertheless, while such a system took away part of only one of the benefits from the geographically advantaged States, it certainly did not transfer the benefits to the geographically disadvantaged States as such.

With regard to the question whether the sharing should take place on a global or regional basis, it was clear that the ideal solution would be sharing on a global basis, for two main reasons. First, in many instances, the concept of region was difficult to apply and, secondly, there were regions or sub-regions which comprised only geographically advantaged - or for that matter, only geographically disadvantaged - States. It was interesting to note that the proposals before the Sub-Committee, in so far as they recognized a sharing concept, provided rather for sharing within a region or a sub-region or between so-called neighbouring States only. That might be a practical approach inasmuch as it might facilitate in certain regions or sub-regions the choice of the method of sharing which consisted in the exploitation of resources by or under the supervision of a regional or sub-regional body. If such sharing was limited to the region, however, it would seem reasonable that geographically advantaged States located in a region which did not comprise geographically disadvantaged States should at least share benefits with the organized international community.

With regard to the method of sharing, his delegation thought that the choice in the first instance should be left to the States concerned. If the States in question did not discriminate in law or in fact between exploitation by national and by foreign operators, did not regulate the production or distribution of the product of exploitation and did not require licence fees, there was probably no need for any arrangement at all. On the other hand, a system of common management of resources might imply a measure of collaboration between States, which could hardly be forced upon a specific group of States. In some cases, therefore, a division of benefits between the States concerned might be the only feasible method of sharing.

The actual sharing clearly required negotiations between the geographically advantaged and disadvantaged States concerned. In his delegation's opinion, some international machinery should be established in order to ensure that such negotiations led to an appropriate solution. Among the proposals which recognized the sharing concept, only the draft articles submitted by Afghanistan, Austria, Belgium, Bolivia, Nepal and Senegal (A/AC.138/SC.II/L.39) contained a provision in that respect. In his delegation's view, the convention or conventions which resulted from the Committee's deliberations should contain different procedures for the compulsory settlement of different types of disputes. His delegation envisaged a specific procedure for the settlement of disputes relating to the delimitation of sea areas. In that regard, his delegation would favour a settlement procedure which combined the elements of negotiation, conciliation and arbitration. The United States draft convention A/AC.138/25 contained a system of that kind and his delegation felt that a similar system was appropriate also for disputes relating to the sharing of benefits between geographically advantaged and geographically disadvantaged States.

His delegation noted with regret that many of the proposals before the Sub-Committee were either silent on the matter of dispute settlement or merely said that parties should seek a peaceful settlement through means of their own common choice. One proposal went even further - that submitted by Canada, India, Kenya, Madagascar, Senegal and Sri Lanka - and provided in effect that all disputes should be settled by only one of the parties to the dispute, thereby excluding even those peaceful international means referred to in Article 33 of the Charter of the United Nations.

That absence of compulsory international settlement procedures was all the more surprising as many of the proposals generally recognized that a number of different States might have rights or legally protected interests in relation to different uses of one and the same sea area. The recognition that different States had rights in relation to the same area really required a compulsory dispute settlement procedure as an inherent part of the substantive international rules rather than as a kind of "extra" which might or might not be adopted as a supplement to such rules.

His delegation was aware that many States were reluctant to admit as a general rule that all international disputes should be subject to a compulsory settlement procedure. It should be recalled, however, that the Declaration of Principles of

International Law concerning Friendly Relations and Co-operation among States expressly declared that "Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality". His delegation could not imagine a generally acceptable international agreement on the law of the sea without such compulsory dispute settlement procedures. The balance between the different uses of the sea and the accommodation of the interests which different States had in those uses could not be achieved by applying the notion of division of territorial sovereignty still prevailing with regard to land.

There were special reasons for acceptance of a system of compulsory judicial settlement of disputes in law of the sea matters, in addition to general arguments in favour of such a system. But while there was still a wide divergence of views on the content of the new international law of the sea, most delegations would agree that the new law would have to differ rather fundamentally from the classical pattern of international law. The classical pattern of distribution of all the so-called "objects" of international law over individual sovereign States, coupled with a minimum of obligations, was clearly no longer sufficient with respect to that particular object which was the seas, ocean space, or marine environment. There was a growing awareness that the specific nature and characteristics of that object also required the application of a special legal technique in the rules and procedures which would govern its uses. The word "management" was often used to reflect that tendency. Management was typically an object-oriented notion and by the same token implied a high degree of co-ordination of activities. In his delegation's view, if the marine environment was to be managed, the matter of settlement of disputes in that field should also be considered in that perspective. One consequence of such consideration would be that much more weight should be given to the simple fact that disputes that were not promptly settled generally hampered effective management. Another consequence would be that much less weight should be given to the age-old argument that "sovereign" persons acting individually or collectively could not be subject to anyone's judgement but their own. There seemed to be general agreement that management should take place within the framework of legal rules. However, neither the opponents of the national emphasis nor those of the international emphasis presumably would be in favour of "le gouvernement des juges". Indeed, the role of the international judiciary organ should be strictly limited to the interpretation of those legal rules.

With regard to the legal nature of the rights of States in respect of uses of the sea, his delegation stressed the need for a clear and correct terminology. The rights of all States in that respect should, in so far as their legal nature was concerned, be considered as equal. That did not mean that in all the areas all States had the same rights. The equality in question referred only to the legal nature of the rights. All rights of all States in respect of sea areas were "sovereign" in the sense that they appertained to sovereign States. But those rights were not necessarily rights of sovereignty over some object. Although that might seem to be a minor drafting point, it covered an important point of substance. For instance, there would seem to be a difference of substance between the United States proposal in document A/AC.138/SC.II/L.35, which conferred on the coastal State the exclusive right to explore and exploit the natural resources of the sea-bed and subsoil in the Coastal Sea-bed Economic Area and the working paper submitted by Australia and Norway in document A/AC.138/SC.II/L.36, which gave to the coastal State sovereign rights over the natural resources in a given zone, even if that zone covered the same area as the so-called sea-bed economic area. The conclusion to be drawn from that situation was two-fold. First, in drafting the Convention, members should avoid the terminology "sovereign rights" in describing the rights of States. Secondly, whenever within a particular area of the seas, two or more States had rights in respect of a particular use of the sea, members should not consider the rights of any of those States as a right of sovereignty over such area or over any object within that area. Indeed, such rights of different States in respect of a use of the sea in one or the same area were necessarily functional rights and their mutual accommodation should not be prejudged by considering any of those rights as rights of sovereignty over some object. Such mutual accommodation of the rights of different States in respect of uses of the sea in the same area should be provided for in the Convention itself and, incidentally, should be subject to a procedure of compulsory settlement of disputes.

In his delegation's opinion, it would be incorrect to prejudge the mutual character of such accommodation by qualifying the right of one State in respect of that area as a right of sovereignty, while withholding that qualification to the right of another State in respect of the same area. Thus, for instance, if within an economic zone or patrimonial sea or coastal sea-bed economic area, the coastal State was given the exclusive right to explore and exploit some resource in that area, that right was no more a sovereign right than the rights of other States in respect of navigation in and overflight over that area.

His delegation remained of the opinion that in case of extension of coastal States' rights far beyond territorial waters, some form of international jurisdiction over such areas should be accepted, along the lines suggested by the United States delegation. He stressed, in that connexion, the need for a combination of international and national jurisdiction, in order to protect the interests of the international community as a whole. His delegation was convinced that without acceptance of such international jurisdiction, no generally acceptable solution could be reached in the forthcoming Conference on the Law of the Sea.

Mr. TUNCEL (Turkey), introducing his delegation's draft proposal for a study on islands (A/AC.138/SC.II/L.50), said that its text was clear and took into account a statement made by the representative of the International Hydrographic Organization, which had offered its services to the Sub-Committee. The Committee had been told of the need for a general study on the geomorphological aspect of islands for the purpose of establishing criteria for the delimitation of sea areas. In conclusion, he recalled that the General Assembly had in its resolution 3029 (XXVII) invited the competent intergovernmental organizations to co-operate with the Secretary-General in the preparations for the Conference on the Law of the Sea, and he commended his delegation's proposal to the Sub-Committee.

Mr. YANKOV (Bulgaria) observed that the close interrelation between the question of the breadth of the territorial sea and the question of international straits had acquired particular significance in view of the claims for further expansion of the boundaries of the territorial sea. Consequently, a number of straits used for international navigation which had previously been regarded as part of the high seas might come under the jurisdiction of coastal States as part of their territorial sea. On that basis, a new claim had emerged to the effect that the régime of navigation of foreign vessels in the territorial sea, i.e. the régime of innocent passage, should be applied to straits used for international navigation.

In respect of the first question, namely, the breadth of the territorial sea, he wished to stress that the coastal State exercised its sovereignty over the territorial sea subject to the principles and rules of international law, especially with regard to the right of innocent passage through the territorial sea. In addition, each State had the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles. In his view, that limit represented a reasonable balance between the economic, political, security and other interests of coastal States and those of the international community. Moreover, it was one adhered to by nearly 100 States.

No matter what the future law of the sea might be, all national claims for excessive expansion of the territorial sea should be considered as unjustified, for such expansion would lead to considerable restrictions on the freedoms of the high seas. Any attempt to consider the high seas as res nullius and to secure inadmissible expansion of the territorial sea by unilateral action was equivalent to annexation, for geo-political reasons.

Furthermore, balancing equitably the interests of coastal States and those of the international community, particularly with regard to fisheries, special arrangements should be worked out on the basis of generally agreed international instruments. Contiguous zones, entailing special rights for coastal States, might be established. However, they should be reasonable in size and determined in precise legal terms in relation to the rights and duties of coastal and other States.

The main problems relating to the régime of the territorial sea and the contiguous zone should be negotiated as a package deal. The principal concern should be to avoid any impediment to the normal functioning of the global system of navigation, both in the territorial sea and in straits used for international navigation, equitable use of marine resources, and the establishment of a viable framework for international understanding and co-operation. In line with those observations, his delegation wished to submit for consideration by the Sub-Committee the draft articles on the nature and characteristics of the territorial sea and its breadth contained in document A/AC.138/SC.II/L.51.

An attempt was being made to place the régime for the territorial sea and the régime for transit through straits traditionally and normally used for international navigation on an equal footing. In that connexion, he had endeavoured to follow the arguments for a restrictive régime in respect of such straits, but would refrain from commenting on the Spanish representative's statement at an earlier meeting. The Sub-Committee's main endeavour should be to reach common ground for agreement.

The argument in support of the attempt he had referred to was that international straits which became part of the territorial sea should be subject to the same régime of navigation as for the territorial sea itself. The motivation for unifying the two régimes was marked by such political considerations as safety of navigation, prevention of marine pollution and the security of the coastal State. Naturally, the concern of the coastal States merited careful attention. He wished to emphasize that the forthcoming Conference on the Law of the Sea should pay due regard to their interests

and to their growing concern for security and for protection of the marine environment. The increase in sea-going traffic demanded special care on the part of both the users of the straits and the coastal States concerned. Special preventive and enforcement measures had to be devised and internationally agreed upon in order to meet the challenge of the new technological dimensions in the field of shipping. Effective international safety standards and special provisions concerning liability for damage had to be negotiated and incorporated into the respective international instruments. In that regard, the provisions contained in the Soviet draft articles (A/AC.138/SC.II/L.7), together with others, would form a suitable basis for further elaboration.

Nevertheless, straits used for international navigation were an integral part of the global system of navigation and the régime for such straits must entail the application of a much more flexible and broader concept based on the main function of international straits as the waterways used for navigation between one part of the high seas and another, or the territorial sea of a foreign State. The functional approach had traditionally been adopted in determining the prevailing rules of maritime law. The jus communicationis function of the sea had always been the principal factor in defining the rights and obligations of coastal and other States, and a point of departure for the codification of the international law of the sea. Consequently, it was the functional approach which had allowed for the introduction of the concept of innocent passage through the territorial sea, as an exception to the exercise of the sovereignty of the coastal State. The Geneva Convention on the Territorial Sea and the Contiguous Zone had gone even further and in some instances applied the functional approach to internal waters. Under article 5, paragraph 2, of the Convention, where the establishment of a straight baseline had the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, the right of innocent passage existed in such internal waters. Accordingly, when straits used for international navigation fell within the area of the territorial sea as a result of extending the limits of the territorial sea, the régime should be much more flexible, aiming at the promotion of efficient and unimpeded international shipping.

The functional approach was much more justifiable when applied to international straits which were the only communication lines between two parts of the world's oceans. The International Court of Justice had defined the most important features of an international strait as its geographical situation, connecting two parts of the high seas, and its use for international navigation. He pointed out that the Geneva Convention on the Territorial Sea and the Contiguous Zone explicitly prohibited any suspension of the innocent passage of foreign ships through straits used for international navigation. Any further extension of the breadth of the territorial sea should therefore not be detrimental to the global system of seagoing traffic.

The functional approach led to an important differentiation between, on the one hand, the régime of the territorial sea and the right to innocent passage, and, on the other, the régime of straits used for international navigation and the right to free passage through such straits. Passage through straits used for international navigation should, of course, be innocent - namely, it should not be prejudicial to the peace, good order or security of the coastal State - and it should comply with the principles of international law. However, if such passage were to provide non-discriminatory and unimpeded transit through straits, it should be a passage without suspension, that being the main function of international straits.

It was obvious that there was a functional difference between navigation through a territorial sea and navigation through straits; that difference could not be concealed by the argument that such straits had become part of the territorial sea. Such an argument was over-simplified, and contradicted the legitimate interests of the international community as a whole.

The same over-simplified approach had been the basis of a number of draft articles submitted to the Sub-Committee, notably those contained in documents A/AC.138/SC.II/L.18, A/AC.138/SC.II/L.27 and A/AC.138/SC.II/L.34. The right of a foreign ship to use the territorial sea of a State was dependent on a number of factors, such as the destination of the cargo, and the relations existing between the flag State and the coastal State. However, there was no question of any such qualifying factors in the case of straits used for international navigation, since passage through such straits

was the guaranteed right of all ships, straits being an integral part of the global system of navigation. In his view, it was not reasonable to consider straits used for international navigation as a mere continuation of the territorial sea resulting from a unilateral extension of the breadth of the territorial sea.

Even more detrimental to the proper functioning of the global system of navigation was the concept of the reserved right of coastal States to establish different régimes with regard to transit through straits under their jurisdiction. Article 14 of the draft articles contained in document A/AC.138/SC.II/L.18 stipulated that coastal States might require prior notification for the passage of nuclear-powered ships through their territorial sea, including any straits therein. However, such notification might be waived, subject to special agreements with certain States. Such a double standard with regard to the use of international waterways was dangerous, since it might well be used for political purposes by the coastal State, with harmful effects not only for international shipping but for international relations in general.

The passage of warships through straits used for international navigation had always constituted an important feature of the régime of navigation. It had been claimed that the establishment of a régime of innocent passage through straits which had formerly been used for free passage would affect only the navigation of military vessels, and would thus lead to a reduction in the arms race. Such a view was unrealistic, since any real control of armaments could only be achieved by international negotiations. It had always been the policy of his country to further such negotiations, with the object of eventually achieving general and complete disarmament. However, it could not be denied that military alliances existed, and that the military uses of the world's oceans were an integral part of the present international balance of power. The security of a large number of States depended on military support being available by sea. It was therefore inadmissible that such States should be dependent for their security upon the discretion of some ten or fifteen other States, which had under their jurisdiction important international waterways.

In the present situation, and for some time to come, there was need for objective and impartial treatment for ships of all States, including warships, with regard to passage through straits which had always been used for free international transit. The right to such free transit had long been recognized by important international institutions, notably the International Court of Justice and the International Law Commission. The latter body had specifically declared that coastal States should not interfere in any way with the innocent passage of warships through straits used for international navigation between two parts of the high seas, and that the coastal State might not make the passage of warships through such straits subject to any authorization or notification.

It was evident that a proper balance should be struck between the rights of coastal States and the responsibility of users of straits in such matters as meeting safety standards and bearing liability for damage.

His delegation considered that the draft articles submitted by the delegation of the Union of Soviet Socialist Republics the previous year (document A/AC.138/SC.II/L.7) would provide an excellent basis for negotiation. Another well-thought out draft article had been submitted by the Italian delegation to the present session of the Sub-Committee (document A/AC.138/SC.II/L.30). That proposal merited careful consideration in that it offered a compromise solution consisting of two régimes applicable to two different kinds of straits, one based on the concept of free passage, and the other based on the concept of innocent passage. It also showed a realistic and flexible approach to the régime of international straits. With regard to the Italian proposal, his delegation would suggest that, as a further measure of compromise, straits connecting parts of the high seas with the territorial sea of a foreign State might be placed under the régime of innocent passage. In his delegation's submission, the breadth of the latter category of straits should be less than 6 nautical miles.

His Government attached great importance to the establishment of an equitable régime for straits used for international navigation, based on the principle of free passage. His country had access to the world's oceans only through such straits, and since more than 80 per cent of its gross national product was earned through trade, the larger part of it sea-going trade, the question of access to the seas was of vital concern to it. Bulgaria did not wish to see the establishment of a restrictive régime of navigation through international straits, which would bring "sea-locked" countries such as itself into the category of land-locked countries, with all the disadvantages that that entailed. He hoped that realism and goodwill would prevail, in the interests of international understanding and co-operation among all States.

Mr. TOLENTINO (Philippines), introducing his delegations's proposals (A/AC.138/SC.II/L.46 and A/AC.138/SC.II/L.47) said that in the 1958 Geneva Convention, "historic" bays had been excepted from the provisions of article 7, which covered bays whose coasts belonged to a single State. The effect of that exception had been to recognize the "historic" rights of coastal States to such bays, irrespective of their area or the width of their entrance. It was proposed to maintain that exceptional status for "historic" bays under the convention which was expected to emerge from the next United Nations Conference on the Law of the Sea.

Even before the 1958 Conference on the Law of the Sea, a memorandum by the United Nations Secretariat, circulated as a preparatory document for the Conference (A/CONF.13/1), printed in Volume I (Preparatory Documents) of the Official Records of the United Nations Conference on the Law of the Sea, had indicated that historic rights were claimed not only in respect of bays but also in respect of other maritime areas. A subsequent study by the Secretariat on the Juridical Regime of Historic Waters (A/CN.4/143, of 9 March 1962) had stated that it was universally recognized in international law that States might under certain circumstances, on historic grounds, have valid claims to certain waters adjacent to their coasts, and that such "historic waters" constituted an exception from the general rules of international law governing the delimitation of the maritime domain of a State.

On the assumption that there was general agreement with those principles, his delegation was submitting two sets of draft articles which had reference to "historic waters" (A/AC.138/SC.II/L.46 and L.47). The object of those draft articles was to codify into written law what had already long been part of unwritten international law.

It was unavoidable that in the task of formulating international legislation mention should be made of the special circumstances of individual countries, and for that reason he would briefly outline the particular situation of his own country. The Philippines was an archipelagic State, consisting of a compact group of over 7,000 islands in a triangular configuration. Beneath the archipelago lay a submarine platform, indicating the original unity of all the land formations.

For some centuries Spain had exercised sovereignty over the archipelago, including wide areas around it, often more than three miles from the coasts of the outermost islands. When in 1898 Spain had ceded the territory to the United States, the boundaries of that territory were formed by a rectangular frame, the upper border being a line slightly above 21°N latitude, the left border being 118°E longitude, the right border being 127°E longitude and the lower border roughly 5°N latitude.

The territorial sea of the Philippine archipelago, as defined in the Treaty of 10 December 1898, was, at its widest part, 270 miles from shore towards the Pacific and 147 miles towards the China Sea; towards the south the width was only 2 miles. When the Philippines became a republic in 1946 it had continued to exercise sovereignty over that same area of territorial sea. He pointed out that the entire Philippine territorial sea, archipelagic waters, and land area was only half the size of the Hudson Bay, which had been claimed as historic waters by two States in succession. His country intended to continue to exercise sovereignty over those waters, without prejudice to any qualifications or exceptions which might be found to exist in law and to which it might freely agree.

He hoped that members of the Sub-Committee would give sympathetic support to his proposals, the object of which was, first, to give legal status to the concept of "historic waters", and secondly, to exclude territorial sea under historic title from the rules governing the delimitation of the territorial sea. If no exception were made for historic waters, acceptance by the Philippines of a breadth of territorial sea of 12 miles would deprive it of about 230,000 square miles of territorial sea, and acceptance of a width of 50 miles would reduce its territorial sea by more than 135,000 square miles. On the other hand, if a 200-mile limit were approved, it would increase rather than reduce the area of his country's territorial sea. Whatever breadth of territorial sea was ultimately agreed on in a future Convention, the Philippines felt bound to maintain its present limits, and to seek recognition of them in the next Conference on the Law of the Sea.

He drew attention to the draft articles on archipelagos (A/AC.138/SC.II/L.48), of which the Philippines was a sponsor together with Fiji, Indonesia and Mauritius. Under the 1958 Geneva Convention there was a provision permitting the method of straight base lines joining appropriate points to be employed as a measure of the breadth of the territorial sea in localities where the coastline was deeply indented, or where there was a fringe of islands along the coast. However, there had hitherto been no written international law recognizing the same right for archipelagic States, and the draft articles of which he was co-sponsor aimed at redressing the balance in that regard. Under the new draft articles, a continental State would still be in a

better position from the point of view of base lines than an archipelagic State, since the waters enclosed in the base lines would be made subject to innocent passage by foreign ships, even where they had never been previously regarded as part of the territorial sea or of the high seas. There was thus, in principle, a greater concession to international navigation in the waters enclosed by archipelagic base lines than in those enclosed by continental base lines.

Whereas the territorial sea of a State lay outside its land area, archipelagic waters were often between islands, and might be in the very heart of an archipelagic State, forming a unity with the surrounding islands. He therefore believed that the archipelagic State should have greater flexibility in regulating the passage of foreign ships through archipelagic waters than in the territorial sea. It was logically and juridically untenable that the same rules of innocent passage for a territorial sea should apply to archipelagic waters without regard to the peculiar interests of the archipelagic State. The proposed draft articles made a great concession to international navigation by providing that an archipelagic State could never suspend the innocent passage of foreign vessels through its sea-lanes except when essential for security reasons. That concession was the price being paid by archipelagic States to obtain recognition of their territorial integrity. Whereas other States had internationally accepted inland territory, both land and water, archipelagos had not hitherto been able to secure recognition of the unity of their land and sea domain, and approval of the draft articles and their inclusion in Convention would remedy that inequality.

Any further denial of the rights of archipelagic States to territorial unity would perpetuate their position as second-class members of the family of nations. Territorial solidarity should, both in actuality and in law, coincide with historical and political unity, if a State were not to be fragmented.

In conclusion, he expressed his appreciation of the support given to the principle of the unity of the archipelagic State by the delegations of China, Ecuador, Panama, Peru and Uruguay, as well as by the representative of the Organization of African Unity.

Mr. CHARBI (Morocco) observed that the arguments in support of the proposals contained in documents A/AC.138/SC.II/L.7 and A/AC.138/SC.II/L.30, while subtle and erudite, were not such as to advance the preparations for the Conference on the Law of the Sea. They were indeed retrograde steps in relation to the previous conferences on the law of the sea and, in particular, to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, which, in article 16, specifically recognized the principle of innocent passage in straits forming part of a State's territorial sea. The representatives of the USSR and the Ukraine had, however, maintained that certain international straits were governed by international custom of free passage like the high seas. In fact, the USSR representative had invoked jus cogens and, in support of his thesis had referred to the Franco-British Declaration of 8 April 1904, although the representative of the Ukraine had acknowledged that such colonial arrangements had lapsed. It had certainly not been the practice of Soviet jurists to invoke criteria of international custom established prior to 1917. If they felt it their duty to call upon that law by virtue of the succession of States, it would indeed constitute a new doctrine on their part.

Many straits States, including Morocco, had at the turn of the century simply been the oppressed objects of international law, but they were now subjects of international law and as such were entitled to full consideration for their national and State security and interests. His country was in no sense bound by agreements of which it had been an object - neither the agreement of 8 April 1904 nor that of 27 November 1912. However, Morocco did not intend to arrogate to itself the right to undertake the fortification of the Moroccan coast of the Straits of Gibraltar, a notion which, in the nuclear age, bore the sinister imprint of the practices of the nineteenth century.

Similarly, the Italian representative's apologia for his unequivocal proposal to tailor the principle of innocent passage in straits used for international navigation was quite clear. In that instance, too, the minimal progress made under the 1958 Convention on the Territorial Sea was discarded, as were the principles of the universality of the rules of international law and the sovereign equality of States.

While it had not adhered to any of the conventions on the law of the sea concluded in 1958, his country had nevertheless drawn on their provisions for the purposes of its own national legislation. In fact, its view concerning the law of the sea was that, rather than start anew, the best course was to take account of past experience, filling

in the gaps in previous conventions and refining new concepts outlined by the conferences of 1958 and 1961. One new concept was that States situated on international straits might be classified in what might be called the category of geographically disadvantaged countries. The situation of a coastal State whose territorial waters were at the mercy of all types of aggression could not be regarded as advantageous or privileged. If the Italian delegation wished to introduce innovations based on the most arbitrary criteria, many delegations, including his own, could follow suit, for example by proposing simply that, in the Italian draft articles (A/AC.138/SC.II/L.30), paragraph B (1) should be amended to read: "are not more than 8.5 miles wide."

Mr. PARDO (Malta), speaking in exercise of the right of reply, observed that the Indonesian representative's contention that the island of Natuna was 60 to 70 miles from the coast of Borneo was incorrect. The distance was in fact approximately 130 to 150 miles. However, he wished to apologize for having referred to Bunguran as an island located hundreds of miles from the principal islands of the archipelago. He should instead have mentioned other Indonesian islands. Again, there was no reason not to assert that the island of Wake might be considered by some as part of the Hawaiian archipelago, for it was on the same submarine ridge as Hawaii. Indeed, both Wake and Midway formed an economic entity with Hawaii. It was true that they were far removed from Hawaii, but according to document A/AC.138/SC.II/L.15, distance from the coast was allegedly an irrelevant matter.

His own statement had in no sense been exaggerated, for he had omitted to mention Palmyra Island, which was 800 miles south-west of Hawaii but formed an administrative part of Honolulu city. If it was included in the Hawaiian perimeter, a further 1.8 million square miles would be added to the ocean space of the Hawaiian archipelago, thus bringing it to some 3 million square miles, or 10 million square kilometres, in area.

He had not referred to the phrase "having regard to the existing rules of international law," contained in the four-Power document (A/AC.138/SC.II/L.15), simply because he had not been sure of its meaning. The concept of archipelagic waters was not recognized as a part of international law and there were no rules of international law which permitted an archipelagic State to designate under national legislation sealanes for the exercise of innocent passage through archipelagic waters. However, the meaning of the phrase had now been clarified in the statement made by the representative of the Philippines.

In addition, the Indonesian representative had maintained that archipelagic waters would not constitute internal waters. In his own view, the difference was minimal. If sea lanes were designated under the national legislation of an archipelagic State in the absence of any provisions concerning discrimination against vessels of one State or another, any archipelagic State could, at its discretion, designate sea lanes that were either inconvenient or difficult for vessels of certain States.

While he appreciated the concerns of archipelagic States, he questioned whether it was necessary to meet them by introducing a concept which had serious over-all implications and which would in some cases split the unity of neighbouring States. His delegation was of the opinion that their concern for unity could best be met within the concept either of the exclusive zone or patrimonial sea or Malta's concept of national ocean space.

He wished to thank the Uruguayan representative for the moderate tone he had employed in exercising his right of reply and hastened to assure him that his own delegation's comments at the previous meeting had been entirely general and not personal in character.

Unfortunately, from his notes of the reply by the Peruvian representative, it was difficult to determine precisely where the difference in view lay. He would simply point out that his delegation had, in 1969, been the first to give formal endorsement to a 200-mile jurisdictional zone adjacent to the coast - one claimed by Peru now for many years - and it had been strongly attacked for its pains. Similarly, his delegation had been the first to state officially that the traditional concept of freedom of the seas beyond territorial waters was rapidly becoming obsolete. That concept must be constrained by international standards and rules, by effective machinery for the peaceful settlement of disputes, and by the establishment of international institutions to govern the way in which matters were conducted in ocean space.

Mr. FAVRA (Peru), speaking in exercise of the right of reply, said that the Bulgarian representative's reference to a 200-mile limit for the breadth of the territorial sea as not having been justified was unacceptable. His delegation had on countless occasions justified the sovereignty and jurisdiction of States over adjacent waters, specifying in detail the geographical, biological, economic and social reasons for his country's adoption of a 200-mile limit. However, it was apparent from the expression used by the representative of Bulgaria that the reasons had not been understood.

Mr. YANKOV (Bulgaria), speaking in exercise of the right of reply, said he was astonished at the Peruvian representative's comments. He had merely stated that all national claims for excessive expansion of the territorial sea should be considered unjustified. He had not mentioned Peru, but perhaps the Peruvian representative felt that his country's claim fell in that category. Annexation, whether on land or on the high seas, was always "justified" by alleged national interests. The point was to determine whether such justification was in fact justifiable.

In his view, polemics were out of place. As he had stated earlier, the main endeavour of the Sub-Committee should be to work out common ground for understanding.

Mr. OKHAN (United States of America), speaking in exercise of the right of reply, said that the lines in the international agreements to which the United States had been a party during its administration of the territory which had later become the Republic of the Philippines, had defined land areas and not areas of maritime sovereignty. The United States Government had never received, exercised or transferred sovereignty, except for land areas of the Philippines and the three-mile territorial sea around each island.

In view of the comments of the representative of Malta, it might be useful to add that the United States Government's practice was the same in respect of Hawaii and other United States islands.

Mr. MALINTOPPI (Italy), speaking in exercise of the right of reply, said that he would be glad to make the text of his statement available to the Moroccan representative, for he was sure that a reading of the text would clear away any misunderstandings.

Unfortunately, his delegation could not agree with the Moroccan representative's interpretation of the rights and obligations of States with respect to international straits and, in the case in point, the Straits of Gibraltar. It should be noted that the Franco-Moroccan agreement of 28 May 1956 stated in article II that Morocco assumed the obligations resulting from international treaties signed by France on behalf of Morocco and those resulting from international instruments relating to Morocco which had not given rise to reservations on its part.

Mr. DJALAL (Indonesia), speaking in exercise of his right of reply, wished to point out to the representative of Malta that Natuna was not roughly 130 to 150 miles from the coast of Borneo, for the outermost islands in the Natuna group were approximately 60 to 70 miles from the outermost islands of the Subi group, which Indonesia regarded as forming part of Borneo. Similarly, it was indeed a great stretch of the imagination to assert that Wake Island and Hawaii formed one geographical entity. Of course, it could well be claimed that the whole world was an entity, for all countries were linked together by the crust of the earth.

In respect of the phrase "having regard to the existing rules of international law", it must be remembered that, in the determination of national legislation for the regulation of innocent passage by foreign vessels through archipelagic waters, account should be taken of the provisions of international law on innocent passage. It was true that there was no provision for consultations with other countries on the question of determining sealanes. However, in establishing traffic separation schemes, archipelagic States would bear in mind the recommendations of the international organization to be established. The representative of Malta would realize that the problem of sealanes was closely bound up with that of national security and, in matters of national security, no State would wish to be obliged to consult other countries. Lastly, he knew of no case in which the concern of an archipelagic State for its unity had split the unity of another State.

Mr. TOLENTINO (Philippines), speaking in exercise of the right of reply, said he was fully aware that it was the practice of the United States Government to adopt a 3-mile limit for the breadth of the territorial sea. However, if the United States representative claimed that the agreements entered into by Spain and the United States related solely to the transfer of land area, why was it that they had specified boundaries of up to 180 miles seawards in the direction of the Pacific and 147 miles from land in the direction of the China Sea? Furthermore, in 1932 the Philippines had adopted a fisheries act which had been signed by the Governor-General, who had acted as the representative of United States sovereignty in the Philippines.

Mr. GHARBI (Morocco), speaking in exercise of the right of reply, wished to inform the Italian representative that the Franco-Moroccan agreement of 28 May 1956 had been denounced by Morocco in 1961. It should not be forgotten that the French Resident in Morocco had acted as the Sultan's Minister for Foreign Affairs. Rarely had any truly bilateral agreement been concluded. The 1904

agreement, for example, had been concluded with Morocco as its object, and certainly not on behalf of Morocco. His country was entirely free to consider that such agreements had been imposed on it.

Mr. FAVRA (Peru) said it was true that the Bulgarian representative had not mentioned Peru by name when he had claimed that a 200-mile limit was unjustified. On the other hand, everybody was aware that Peru maintained such a limit. At the present time, many countries were establishing that limit, but in 1958 only three had done so.

The meeting rose at 7 p.m.