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SECOND COMMITTEE

PROVISIONAL SUMMARY RECORD OF THE ELEVENTH MEETING

Held at the Parque Central, Caracas,
on Monday, 22 July 1974, at 12 noon

Chairman:	Mr. AGUILAR	Venezuela
Rapporteur:	Mr. NANDAN	Fiji

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STRAITS USED FOR INTERNATIONAL NAVIGATION (A/9021, A/CONF.62/C.2/L.3 and A/CONF.62/C.2/L.11)

Mr. LACLETA (Spain) pointed out that his delegation was one of the co-sponsors of A/AC.138/SC.II/L.18 which dealt, inter alia, with straits used for international navigation, and that item 4.1 of the Committee's programme of work (Innocent passage) was closely related to item 2.4 (Innocent passage in the territorial sea). Under item 4.1 the Committee would consider how the principles examined during consideration of item 2.4 would apply to particular situations. To this end the amended text of informal working paper No. 1 submitted by the Chairman, should be available since the Committee could not consider particular cases without an over-all view of the question.

The CHAIRMAN said that he would consult the officers of the Committee to obtain their views on the amended version of the working paper he had presented, and that delegations were clearly entitled to refer, in their interventions, to items related to the matter under consideration, specifically to item 2.4 in this instance.

Mr. KAZEMI (Iran) referred to the earlier statement of the views of his delegation on the question of straits used for international navigation in which it had stressed firstly, that the sovereignty of the coastal State in its territorial sea was subject only to the exercise of the right of innocent passage of ships; secondly, that passage through straits used for international navigation must not affect the legal status of the territorial sea when the straits were situated within the territorial sea of one or more States; thirdly, that rules could be devised to safeguard transit through the straits while taking into account the need to protect the security and other interests of the coastal State.

The Iranian delegation considered that some of the draft articles before the Committee tended to be prejudicial to the legal status of that part of the territorial sea which constituted a strait used for international navigation. Moreover, any proposed rules regarding passage through those straits should be based on existing rules, particularly those contained in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. The breadth of the territorial sea, whether it was three, six or twelve nautical miles, did not affect the actual passage of ships through the navigable channels of certain straits. The system for separating traffic developed by IMCO revealed that the navigable channels of a certain number of straits were located three nautical miles or even less from the coast. Mr. Kazemi also pointed out that, at

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(Mr. Kazemi, Iran)

least in times of peace, coastal States had seldom imposed restrictions on transit through straits used for international navigation.

In the light of the foregoing considerations, the Iranian delegation considered that any draft articles concerning straits should take into account the nature and scope of the coastal State's sovereignty over its territorial sea and should not prejudice its security and good order; however, while certain exceptions to the sovereignty of the coastal State might be envisaged in the interest of international trade and communication, the draft articles should in no way alter the status of the territorial sea encompassing the straits.

Mr. FENGO (Denmark) pointed out that Denmark, as a seafaring nation with international straits within its territorial waters, was concerned with the rules applicable to international straits. The existing rules governing innocent passage through the territorial sea which were codified in the Convention on the Territorial Sea and Contiguous Zone were the result of a delicate balance between the different interests of the coastal State and international navigation. In the case of straits, the interests of international navigation were even more protected than in other parts of the territorial sea. Consequently, there was no need to revise the present régime of innocent passage through international straits.

A general agreement establishing a maximum limit of 12 miles for the territorial sea would result in the creation of a large number of new straits. Several delegations had pointed out that there was no justification for restricting navigation through and overflight over vital straits that had long been considered as high seas. In the case of "new" straits up to a breadth of 24 miles there might be a need for a new régime of free transit passage, in order to take due account of the interests of coastal States, particularly with respect to security and protection against pollution. On the other hand, his delegation failed to see the need to modify the rules of innocent passage through straits less than six miles wide, where the right of free passage and overflight had never existed. On the contrary, it could be argued that the increased size and speed of ships as well as the increased traffic in straits justified giving increased consideration to the interest of the coastal State.

With regard to the present régime of innocent passage, Denmark, as a seafaring nation, considered it important that the passage of ships should not be subject to

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(Mr. Fergo, Denmark)

arbitrary restrictions on the part of the coastal States; since the Geneva Convention was not sufficiently clear in this respect, the Danish delegation had submitted, jointly with the Finnish delegation, draft articles aimed at defining the concept of innocent passage.

He also stressed that some straits, such as the Danish straits leading to the Baltic Sea, had never been subject to the right of free passage but had been under a special régime serving the interests of the coastal State and the international community; such a type of arrangement should remain in effect.

Turning to the draft articles submitted by the United Kingdom (A/CONF.62/C.2/L.3), he stated that chapter three, article 1, did not reflect the obvious difference between straits up to a breadth of 24 miles and other straits where navigation took place a few miles from the coast, because of the narrow breadth of such straits. The amendment submitted by Denmark and Finland (A/CONF.62/C.2/L.15) could therefore be considered as a variant of the United Kingdom text. He suggested also that it might be wiser to deal elsewhere with the question of overflight of straits.

The Danish delegation also believed that the wording of chapter three, article 10, required some clarification. It preferred the wording of article 1, paragraph 3 (c) of A/CONF.62/C.2/L.11. With these reservations and since the proposed régime for transit passage set forth in A/CONF.62/C.2/L.3 was limited to straits of a certain breadth, the Danish delegation considered the draft articles submitted by the United Kingdom acceptable. With reference to document A/CONF.62/C.2/L.11 which stated in article 1, paragraph 2 (f) that the "coastal State shall not place in the straits any installations which could interfere with or hinder the transit of ships", he pointed out that Denmark had geographically the character of an island country, the main island being separated from the other main parts of the country, as well as from their neighbour Sweden, by narrow international straits. It was of vital social and economic importance for Denmark and its neighbouring countries to be able to build bridges or tunnels across those straits, and the Danish Parliament had already taken a decision in principle to that effect. Existing plans took full account of the delegation not to hinder the free passage of ships in transit. His delegation hoped that the reference in article 1, paragraph 2 (f) to the placement of installations in straits did not modify the right of coastal States to build traffic links of the nature referred to, on the understanding that transit through the straits would be able to continue unhampered.

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Mr. MANNER (Finland) said that the proposals concerning straits used for international navigation stemmed from a concern that the approval and application of a new rule on the maximum breadth of 12 nautical miles for the territorial sea, and the consequent extension of the territorial waters of the coastal States, could, in some instances, lead to a change in the prerequisites for international navigation previously based upon the principle of freedom of the high seas. Finland, a maritime nation whose economy was essentially dependent on freedom of international navigation, shared that concern and was ready in principle to support such proposals. However, its final attitude would depend upon whether his delegation's comments were taken into account.

The proposals under consideration concerned straits used for international navigation between one part of the high seas and another. How should the expression "used for international navigation" be interpreted? It would seem that the proposals applied only to straits in which freedom of navigation had previously been based on the principle of the freedom of the high seas. However, his delegation doubted whether that expression in itself would be enough to restrict the application of the proposed provisions to those instances where passage through the strait had earlier been based upon the principle of freedom of the seas. If such doubts were justified, it should be noted that none of the texts submitted so far made an express exception for circumstances where the breadth of the territorial waters in a strait connecting two parts of the high seas would remain unchanged, in spite of the new provisions, and where the prerequisites for transit passage would thus also remain unchanged. Such was the case especially with regard to straits within or leading to enclosed sea areas, and being either completely within the territory of one coastal State, or passing through the territorial seas of States which already bordered on each other. If no special rules had been agreed upon, the provisions concerning innocent passage were applicable and could be applied also in the future. The situation had not changed and therefore there was no reason to require the opening of such a strait to free passage, in other words to place the strait under the régime of the high seas as far as navigation was concerned. If that were due purely to an oversight, it could easily be corrected by adding an appropriate provision to that effect.

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(Mr. Manner, Finland)

If, however, the intention was to alter the present status of straits the change in status, which was not indispensable in order to safeguard the interests of merchant shipping, and was not a consequence of measures taken by the coastal States concerned, would interfere with the vital interests of those States and disregard their right to equal treatment. Neither fishing nor other peaceful uses of the high seas required the proposed change in the status quo of straits traditionally used for international navigation based on the rules of innocent passage. Particularly in the case of States pursuing a policy of neutrality, such as Finland, any such measure could lead to unfortunate consequences.

In the view of his delegation it was of utmost importance that the above-mentioned points of view be duly taken into account in the final drafting of the articles concerning navigation through international straits. The defects of the proposed articles were particularly serious in respect of straits which were narrow, and of which the internal waters constituted a large part. A practical remedy would be to provide that the minimum breadth of straits in which freedom of passage would apply should be six nautical miles.

Mr. DUDGEON (United Kingdom) said that his delegation regarded chapter 3 of Document A/CONF.62/C.2/L.11 now under consideration as one of the most important questions facing the Conference. Acceptance of a territorial sea of 12 miles would result in a large number of straits forming essential links for international navigation, both by sea and air, ceasing to have a strip of high seas down the middle. Hence the need to ensure that unrestricted navigation through those vital links in the world network of communications should remain available for use by the international community. His delegation had been gratified by the amount of interest shown in chapter 3 of its draft. He would like to reply to some very pertinent questions which had been put to it in the course of informal discussions.

Article 1 set out the concept of transit passage through straits connecting two parts of the high seas. The concept they had tried to describe corresponded to what they believed to be the best international practice at that time. They proposed that ships and aircraft exercising the right of transit passage should not be impeded or hampered during their passage. At the same time the right was given "solely for the purpose of continuous and expeditious transit of the strait".

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(Mr. Dudgeon, United Kingdom)

In the context of the geographical situation to which this right would apply, his delegation had first and foremost in mind the strait linking one part of the high seas with another part of the high seas. However, as particular straits were called by other names, paragraph 3 of article 1 stipulated that the article applied to "any strait or other stretch of water whatever its geographical name".

His delegation also had in mind the situation of the long strait which had more than one country bordering one side of the strait. Assuming a strait which had two countries on the western side, States A and B, and one country on the eastern side, State C, the United Kingdom draft proposed, firstly, a right of transit should the ship or aircraft be going all the way through the strait; secondly, a right of transit if the ship or aircraft was proceeding down the first part of the strait between States A and C with a view to calling at a port or airport of State B. Such was the purpose of the words "or a State bordering a strait" at the end of the second paragraph of article 1.

Paragraph 4 of article 1 concerned two exceptional cases. The first was what might be described as a broad strait: if the strait was rather more than 24 miles wide it was unnecessary to provide a special right of transit passage since ships and aircraft could navigate on the high seas through the strait. The second case was that of a strait formed by an island lying less than 24 miles off the coast of another State. There again his delegation saw insufficient justification for according the right of transit passage between the island and the coast of the State, so long as an equally suitable high seas route was available.

Article 2 proposed very stringent restrictions upon what ships and aircraft might do while exercising the right of transit passage. Ships and aircraft must not engage in any activities other than those which were part of their normal passage. They also had to comply with generally accepted standards for navigation and safety, thus providing safeguards for the straits States.

Articles 3 and 4 set out rights in relation to transit passage of States that bordered on straits used for international navigation. Article 3 recognized the value of specifying sea-lanes and prescribing traffic separation schemes wherever it was necessary to promote the safe passage of ships, especially in the light of the volume of sea traffic passing through the waters of straits. Article 3 proposed that such traffic separation schemes be approved by IMCO before being brought into operation. IMCO had, in fact, already approved a scheme of that kind for the straits of Dover,

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(Mr. Dudgeon, United Kingdom)

which was currently operating, and no State could unilaterally alter the regulations. Furthermore, article 4 made express provision that any State bordering on a strait could prescribe laws and regulations in order to give full effect to traffic separation schemes for navigation in straits as well as to international provisions applicable to the discharge of oil or other noxious substances into the strait. Foreign ships exercising the right of transit passage would have to conform with the regulations; should they fail to comply, the possibility of legal proceedings would arise in the case of merchant vessels. In the case of warships and other vessels entitled to sovereign immunity, paragraph 5 of article 4 stipulated that the flag State was directly responsible for non-compliance with such laws and regulations on the part of one of its ships.

With regard to article 8, and in order to clarify the scope of paragraph 1, about which a number of questions had been posed, the United Kingdom delegation pointed out that the article concerned three geographical cases: that of a strait used for international navigation linking a part of the high seas with the territorial sea of a State; that of a strait lying between an island and the mainland of the coastal State, where, in accordance with the provisions of paragraph 4 (b) of article 1, the right of transit passage was not involved; and lastly, that of a broad strait through which a high seas corridor ran down the middle. In those three cases, the United Kingdom delegation considered that there were no grounds to provide for the right of transit passage. Instead, it was proposed that the régime of innocent passage as described in chapter two of the draft should apply. There were, moreover, two exceptional cases involving, in the first instance, a ship crossing from one side of a strait to the other and in the second instance, a ship going along part of a strait bordered by a single State on passage to a port of that State. In those two cases, the United Kingdom delegation considered that the régime of innocent passage should apply and not that of transit passage.

The purpose of article 10 was to preserve the effect of the provisions in the existing international instruments relating to particular straits.

In conclusion, he stated that his delegation had endeavoured to find a middle way in its draft between the interests of the international community as a whole and the legitimate concerns of the straits States. He hoped that the explanations that he had given would enable the Committee to form a better understanding of the effect of the provisions embodied in the draft proposals.

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Mr. de ALWIS (Sri Lanka) said that he wished to identify those elements that were common to the various formulations which had been put forward with regard to straits and which should be recognized or included in the articles relating to that question, whilst at the same time adopting a flexible approach to the controversial elements, since he considered that the work of the Committee must essentially be an exercise in reconciliation.

The problem of straits forming part of the territorial sea involved finding an equitable balance between the security and the economic interests of the States bordering on straits, and the right of transit passage of ships which were of a vital importance to the world economy and to international peace and security. In that connexion, it was necessary, instead of invoking strictly abstract or legal concepts, to attempt to find a practical and equitable solution by adopting a realistic and objective attitude.

Every State bordering on a strait within its territorial sea had a legitimate right not only to safeguard the vital interests connected with its security, but also to ensure that no damage resulting from pollution or from some accident affected its marine environment; and in such an eventuality, it must be provided with adequate compensation for damage. With regard to pollution, it was gratifying to observe that that issue did not give rise to any major difficulties of substance. With reference to the effects of the passage of vessels on the security interests of the coastal State, his delegation considered that a distinction should be made between the passage of merchant vessels and that of warships. As a developing country with an export-import economy, desirous of increasing its share in an expanding world trade, Sri Lanka supported the view that it was in the interests of the world economy that passage of merchant vessels should be unimpeded except in circumstances such as force majeure or navigational hazards, and that the right to transit passage should be recognized for all ships without discrimination as to flag, point of origin or destination. That involved the continuance of customary sea-lanes for security reasons. The passage of merchant vessels, which should be presumed to be innocent, must nevertheless be in conformity with the coastal State's laws and regulations with regard to safeguards against damage to its marine environment and its security requirements. That legitimate right of international commercial navigation had not been opposed by coastal States bordering on straits; indeed, they had given indications that they were inclined to show flexibility on that aspect of navigation.

On the other hand, the question of the passage of merchant vessels gave rise to divergent views, although they were not necessarily irreconcilable. The extension of

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(Mr. [illegible])

the territorial sea to a breadth of 12 miles was designed to accommodate the justifiable concerns of the coastal States to ensure their national security. A coastal State bordering on international straits could not be denied the safeguards granted to other coastal States, and its security interests could not be endangered merely because straits used for international navigation existed within its territorial waters. It would be unreasonable to expect the State concerned not to react to the passage along its coasts of an armada of military vessels which might have hostile intentions towards it. Sri Lanka, which was committed to a nuclear-free zone and to zones of peace, obviously could not advocate or encourage the passage of foreign warships. Being not unmindful, however, of current realities, the delegation of Sri Lanka was inclined to adopt a flexible attitude in that respect, subject to certain safeguards in the interests of preserving coastal State security. Furthermore, the supporters of free transit through straits were not unmindful of the legitimate fears of coastal States, since they had already suggested certain codes of self-discipline in the exercise of the right of passage, such as refraining from any acts which might be deemed prejudicial to the peace, good order or security of a coastal State. Sri Lanka, for its part, considered that it would not be unreasonable to include in the new régime provisions providing first, that warships must observe the laws and regulations of the coastal State applicable to the passage of other ships; secondly, that prior notification of the passage of any warship, specifying that such passage would take place within predetermined time-limits without necessarily indicating the actual time of passage, must be given to the coastal State, which could designate the sea-lanes to be used; thirdly, that if a warship failed to comply with the laws and regulations of the coastal State, it could be required to leave the straits immediately along a route to be designated by the coastal State concerned; and, fourthly, that where more than one coastal State was involved, those States should be required to co-operate in establishing a joint administration with a view to avoiding obstacles to transit deriving from a lack of co-ordination on the part of one of them.

The meeting rose at 12.55 p.m.