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MR. CHAIRMAN, DISTINGUISHED MEMBERS OF CONGRESS,

LADIES AND GENTLEMEN:

Introduction

I am deeply honoured by your kind invitation to meet with you today together with my colleague Paul Engo, Chairman of the First Committee of the Law of the Sea Conference.

I am aware that I am here in my capacity as Chairman of the Drafting Committee of the Conference. However, since I have the dubious distinction of being the only Chairman of a Committee which has never met, I propose to express to you today my purely personal views on the importance of the Conference and the consequences of its success or failure.

Importance of the Law of the Sea Conference

It is often said that the Law of the Sea Conference is the most important international conference since that held in San Francisco when the United Nations was founded. Be that as it may, there is no doubt that the Conference is grappling with fundamental issues of tremendous importance to every nation state. It has a mandate so broad that it embraces new questions ranging from the rights of landlocked states with respect to ocean resources to traditional concepts relating to rights of passage through international straits. Thus, there is no state which would remain unaffected by the results of the Conference, whether it succeeds or fails, a basic point to which I shall return.

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The Pre-existing Law

It is essential to bear in mind the state of the law as it was when we began the Conference in order to attempt an appraisal of the progress made, the prospects of success and the consequences of failure. In simple terms, the pre-existing Law of the Sea was based on two fundamental principles of international law, namely, state sovereignty and freedom of the high seas - the principles established by Grotius nearly 350 years ago. Translated into specific terms, this has meant that for over three centuries the nation states of the world have accepted the concept of a narrow marginal part of the territorial sea over which states assert total sovereignty, subject only to the principle of innocent passage, and that the area beyond has been open to the use of states on the basis of freedom of the high seas. These principles proved adequate for their time, although it has been alleged that the principle of the freedom of the high seas gradually became translated and distorted into the right to overfish, a licence to pollute and the "roving sovereignty" of the flag state. One change in the traditional law of particular relevance to our discussion today was the acceptance in 1958 of the "exploitability test" as the outer limit for coastal state jurisdiction over the continental shelf as reflected in the Geneva Convention on the Continental Shelf, another point to which I shall return.

Pressures For Changes In The Law

Since the 1958 and 1960 Law of the Sea Conferences there have been increasing pressures for changes in the Law of the Sea to better reflect the spectrum of interests represented by all those countries which have received independence since 1958. Coincident with these demands have been an increasingly widespread recognition of the need for new rules to conserve the living resources of the sea, to preserve the marine environment and to regulate the exploitation of both the living and non-living resources of the oceans.

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Background To The Conference

In 1967, two important developments occurred which led directly to the creation of the Law of the Sea Conference as a means for effecting these changes in the law. It is well known that in that year Ambassador Pardo of Malta introduced into the United Nations his progressive and imaginative concept of the common heritage of mankind. It is not so widely known that in that same year the USSR canvassed a large number of countries to solicit support for an agreement upon a 12 mile territorial sea coupled with a high seas corridor through international straits. The significance of these two separate but eventually inter-related developments is as important today as it was in 1967 as indications of the basic preoccupations of the developing countries on the one hand and the major maritime powers on the other.

The Preamble Of The Conference

The "Seabed Committee" created in 1968 as a result of the Malta initiative became transformed in 1970 into a preparatory committee for the Law of the Sea Conference. I had the honour of introducing the resolution which laid down the terms of reference of the Conference, and I can speak from personal experience in attesting to the fact that there was a widespread determination to tackle all of the interrelated issues of the Law of the Sea and a total rejection of any attempt at a "manageable package" approach, limited to a few issues. Criticisms are often made of the decision to embark upon such an ambitious undertaking. A point of fundamental significance to bear in mind in this connection is that it was argued by the major maritime powers that the operation was feasible since the basic trade-off between them and the developing countries would be recognition of resource claims in return for recognition of freedom of navigation. Presumably, no one anticipated at that time that the major developed nations of the world would later be in the forefront in the rush for resources, and, in

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the process, undercut the whole foundation of their bargaining position. This has already occurred with respect to the 200 mile fishing zones established by the USA, Canada, the USSR and the EEC; án example, we are told, soon to be followed by Japan. It is also proposed, as you know, that some of these same countries should take the lead in asserting unilateral jurisdiction over the resources of the deep ocean seabed in the face of strong opposition from the developing countries. The implications for any state attaching importance to freedom of navigation are obvious, but I should like to elaborate upon this question a little later.

Progress Made

How does one answer the question: How much progress has the Conference made? The answer is that it has made tremendous progress on a wide range of issues. We are light-years away from where we began. A preoccupation with remaining difficulties should not obscure this fact. Had we been embarked on a mere codification exercise, which is essentially what was entailed in the 1958 and 1960 U.N. Conferences on the Law of the Sea, when we were unable, in spite of great success on a wide variety of questions, to reach agreement on a 6 mile territorial sea and a 6 mile contiguous fishing zone, we should have long since finished our work. What we have been involved in, however, is a basic rethinking and re-structuring of the law, a process which must inevitably take much longer, taking into account the number, range and complexity of the issues and the fact that over 150 nation states are involved in the exercise. You are all aware of the radically new concepts which have emerged from the Conference. Of these, amongst the most important are the economic zone; the common heritage of mankind; freedom of transit through straits; and the archipelagic state. Interestingly, the régime of the territorial sea is also being altered in an important respect.

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The Economic Zone

The economic zone embraces, in brief, coastal state sovereign rights over fisheries and the seabed resources in an area extending out to 200 miles from shore, coupled with limited and defined coastal state jurisdiction for the purpose of preserving the marine environment and regulating marine scientific research. The origin of this concept was an attempt to find an accommodation between those countries, mainly the major maritime powers, committed to a narrow territorial sea, and those claiming a territorial sea or patrimonial sea extending to 200 miles.

The Common Heritage

The common heritage concept, as developed in the Conference, embodies the creation of an International Authority to regulate and control the exploitation of the deep ocean seabed resources, (including in particular manganese nodules), and the establishment of an "International Enterprise" which would have the right to exploit these resources for the benefit of the "common heritage of mankind". Obviously, the proposed international area begins where national jurisdiction ends, namely, at the outer limit of 200 miles of the economic zone (or the outer limit of the continental shelf, in those cases where the land territory of the coastal state, i.e. the continental shelf,extends beyond). As Paul Engo has pointed out, we have finally achieved what I would not hesitate to call a "break-through" on the common heritage principle at this Session of the Conference. I refer to the widespread acceptance of "guaranteed access" permitting states and private enterprise as well as the proposed international institution to exploit the resources of the seabed.

Freedom Of Transit

The freedom of transit concept has been developed as a direct consequence of the impact of the widespread acceptance of a 12 mile territorial

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sea upon those international straits which would be enfolded by the territorial sea of one or more "strait states". It means exactly what it says, namely, the right of free transit through such straits, a substantive and even radical change of the pre-existing law, based as it was, on the principle of "non-suspendable innocent passage". In brief, the new rule would provide for little or no coastal state control over vessels passing through international straits, thus maximizing freedom of navigation in such areas.

Archipelagic States

The archipelagic state concept, in essence, comprises recognition by the international community that the waters within straight baselines joining the outermost islands of archipelagic states constitute territorial sea, but subject to provisions relating to freedom of navigation in "sea-lanes" through straits used for international navigation. The point of importance is that the length of the baselines has become a secondary issue and the precise rules relating to passage through sea-lanes have become the important question.

Territorial Sea

I referred to the fact that the régime of the territorial sea is, in my view, being altered in a most important respect. At the present time, the USA, the USSR and Canada all have legislation (the USA Port and Waterways Authority Act, in the case of the USA) which permits coastal states to legislate concerning the design, construction, manning and equipment of foreign vessels passing through the territorial sea of the coastal state. No state has ever alleged that this legislation is contrary to existing international law. Yet the provisions of the Revised Single Negotiating Text eliminate this right completely, and do not even permit the coastal state to pass such legislation to implement internationally agreed rules. It seems clear that unless some radical alterations are made in the RSNT, the USA Port and Water-

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ways Authority Act will have to be amended. If I may speak for a moment as a Canadian, I regret that the USA and Canada appear to have lost this battle to preserve the environment and that we must continue to accept the threats to our respective coastlines posed by sub-standard unseaworthy tankers loaded with oil. Even the "compromise" likely to emerge from any further negotiations is most unlikely to be of the kind which would eliminate the need to amend the legislation of our two countries. All I can tell you on that issue is that I don't intend to give up the fight.

Prospects for the Conference

I have attempted to give a capsule summary of the background to the Conference and of the nature of some of the changes being proposed in the pre-existing law. I would now like to turn to the question of prospects for success of the Conference and the consequences of failure. The first point I should like to make is that there is an increasing danger in many parts of the world of a loss of interest in the Conference on the part of governments, legislative bodies and the public as a consequence of the widespread establishment of a 200 mile fishing zone, which represented a major objective for many states. The second point I should like to make is that it is no longer accurate to judge the success of the Conference by the stalemate, approaching paralysis, which had pertained for a period in Committee I on the deep ocean seabed régime. Indeed, it might now be said with some accuracy that Committee I has caught up to the work of Committee II, concerned with all the basic jurisdictional issues, and Committee III, concerned with the preservation of the marine environment, the conduct of marine scientific research and the transfer of technology. Yet, nevertheless, pressures are mounting in various countries for unilateral legislation to licence deep ocean seabed mining.

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What then, against this background, are the prospects for the Conference, the consequences of the success or failure and the relationship to these questions of unilateral legislation on the deep ocean seabed? I had occasion to address these questions recently in a speech I delivered in San Francisco at the Annual Meeting of the American Society of International Law, in which Ambassador Elliot Richardson also participated. The points I made were as follows:

It is impossible to make any firm predictions concerning the fate of the Conference. It seems likely that the Conference will require at least another two years to conclude its work.

No one can say with certainty whether the Conference will succeed of fail. What is certain is that there remains a good chance that the Conference can succeed, provided governments do not refuse to continue with the exercise because of the time it is taking and the costs involved, in terms not only of human and financial resources, but the self-restraint required of states on claims they wish to advance while the Conference continues. It is generally accepted that this (Sixth) Session of the Conference is likely to prove the "make or break" Session. If the basis for agreement is worked out on the seabed régime, then there will be great pressure to conclude the negotiations on the other unresolved issues. Even so, at least one further full substantive session may be required, in addition to considerable work by the Drafting Committee. It seems likely, however, that if visible progress is made at this Session, governments will be willing to continue to commit themselves to pursue the Conference to a successful conclusion.

Consequences of Success or Failure

I have pointed out in a series of recent speeches that a successful

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Conference could mean agreement on over 500 treaty articles, including annexes, which would together comprise a comprehensive constitution of the oceans--an area, we are often reminded, consisting of over 70 percent of the earth's surface. These rules of law would not exist in a vacuum. They would bind states to act in new ways. They would elaborate a wholly new regime for the rights of passage through international straits. They would lay down totally new principles concerning the management of ocean space. They would, for example, oblige all states to undertake the fundamental commitment to preserve the marine environment, to conserve its living resources, and to cooperate in the carrying out of scientific research. They would establish a single twelve-mile limit for the territorial sea throughout the world. They would result in a major re-allocation of resources as between distant water fishing states and coastal states, and more importantly perhaps, from developed to developing states. They would give recognition to the concept of the archipelagic state, consisting of sovereignty over the waters of the archipelago, with clearly defined rights of passage and over-flight through sea-lanes. They would bind states to peaceful settlement procedures on most--unfortunately not all--issues. They would, moreover, establish something new in the history of man--an international management system for a major resource of the planet earth--the seabed beyond national jurisdiction. They would reserve this area for purely peaceful purposes. They would subject it to a legal regime governed by an international institution unlike anything known either in the UN system or outside it. The international community would actually become engaged in economic development activities whose benefits would be shared by mankind as a whole. Interestingly, the UN, in the process, could engage in economic competition with states and, perhaps, private enterprise.

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These new rules, if accepted by the international community and coupled with binding peaceful settlement procedures, would undoubtedly make a major contribution to a peaceful world. Of equal importance perhaps, they would lay down an essential part of the foundation for a new international economic order, since it would effect a transfer, by consent, of powers and jurisdiction on many issues from the richer and more powerful states to the poorer and less powerful.

What are the consequences of the other alternative--a failure of the Conference? As I have suggested in a series of interventions in a variety of fora, a failed Conference would mean that while the 200 mile limit has come into existence as a fact of international life, none of the safeguards embodied in the draft treaty would necessarily apply. The 200 mile concept, if left to state practice following a failed Conference, is far more likely to become a 200 mile territorial sea than a 200 mile economic zone confined, as in the RSNT, to specific jurisdiction and coupled, as it is in the RSNT, with stringent safeguards. The 12 mile territorial sea is a fact of international life, and is beyond challenge in the International Court, but its application to international straits would not be coupled, as it is in the draft treaty articles, with specific rules concerning rights of passage. That can occur only through acceptance of the treaty as a whole. New proposals concerning the delimitation of marine boundaries could have sufficient legal weight to erode the pre-existing equidistant-median line rules, but they would not be linked to binding third party settlement procedures, without which the new "equitable" approach would have little meaning. The nine years of work on the international regime and institutions to govern the seabed beyond national jurisdiction would be lost. Some developed states would almost certainly take unilateral action authorizing their own nationals and other legal entities to explore and exploit the

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deep seabed beyond the limits presently claimed by any state. Certain developing states might well respond by new kinds of unilateral action asserting national jurisdiction over these same areas, basing their action on the "exploitability test" of the 1958 Geneva Continental Shelf Convention --while the developed states prove that the area is exploitable, and thus subject to such claims. Indeed, they have said they would do so. Disputes over fishing rights, environmental jurisdiction, under-sea resource rights, conflicting delimitation claims, rights of passage in straits and claims to the deep ocean seabed could "surface" all over the globe.

The conclusion which follows from the foregoing is obvious. The Law of the Sea Conference has gone too far in developing new concepts and eroding the "old international law" for it to be permitted to fail at this stage. The particular interests of individual states, be they powerful or weak, maritime or coastal, landlocked or geographically disadvantaged, merge and coalesce with the general interest of the international community as a whole in the over-riding need for a successful conclusion to the Law of the Sea Conference. This is no longer merely a desirable objective. It is an international imperative.

Conclusions

As I have been pointing out, in the series of recent speeches to which I have referred, it seems clear that the international community is facing the choice, on the one hand, of a very real danger to peace and security - quite apart from the damage to the UN - should the Conference fail, or, on the other hand, of an opportunity to lay the foundations for a world order of the oceans, and, in so doing, demonstrate the heights to which mankind can rise when we are prepared to look beyond our narrow immediate interests to the broader long-term interests of all. In legal terms, the Law of the Sea Conference presents the opportunity to leave behind us

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both the narrow 19th century concept of sovereignty, and its faithful companion, the laissez faire principle of freedom of the high seas, and to create new laws in place of each, embodying a totally new concept, an approach reflecting the need to manage ocean space in the interests of mankind as a whole. For far too long, the Law of the Sea has been based on the notion of competing rights, with little or no recognition of the need reflected in even the most primitive systems of law, whereby duties go hand in hand with rights.

Areas of the sea have been treated as subject to the assertion of sovereignty of one state or another, with no corresponding duties concerning the conservation of fisheries in such areas or the preservation of the environment itself. The oceans beyond the territorial sea have been subjected to the principle of first come first served, a régime which tended to benefit the powerful at the expense of the weak, while defended under the name of freedom of the high seas. When coupled, as it has been, with the doctrine of flag states jurisdiction, and further adopted by the device of flags of convenience, it has become a kind of "roving sovereignty" of the flag state, subject to little or no restrictions, except in the cases of piracy, slavery and narcotics control. Freedom of the high seas has meant, increasingly, the freedom to over-fish and the licence to pollute. These are the freedoms which must be circumscribed, while the essential freedom of navigation for purposes of commerce and "other internationally lawful uses" (including legitimate self-defence) must be protected.

The difficulties in the way of harmonizing the conflicting uses of the oceans and the divergent interests of states in a comprehensive constitution of the oceans are immense. The dangers of failure are increasingly acute. The benefits of success, however, are tremendous. Whatever the imperfections of the proposed treaty, it offers the possibility of an orderly

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régime, in place of the chaotic situation which would otherwise pertain. There is, in my view, a duty upon influential opinion-making groups such as this body to support the efforts of governments to go forward with perseverence and determination toward the resolution of those problems still besetting the Conference. The greatest danger, at this stage, may well be the possibility of unilateral action on the seabed, stemming, admittedly, from years of frustration and mounting impatience. As I see it, it is the duty of every one of us to use our best efforts to encourage our governments and our legislatures not to give up on the Law of the Sea Conference, but to go that last nautical mile, and to make one further effort to reach the objective of a global constitution of the oceans.

In conclusion, I would like to make the following observations. Firstly, if the basis for the trade-off of freedom of navigation in return for resources has been weakened due to the fisheries resource claims already made by many major maritime states, the basis for such a compromise would be completely undermined by new resources claims to the deep ocean seabed by these same countries.

Secondly, it would be a fundamental error to draw conclusions about the consequences of such action based upon the legislation establishing the 200 mile fishing limit. That legislation, while in advance of the Conference, was based on one of the fundamental new concepts emerging from the Conference, namely the 200 mile economic zone. Unilateral legislation on deep seabed mining would be interpreted as being diametrically opposed to the other important new concept emerging from the Conference, namely the common heritage of mankind. Reactions would be quite different. In these circumstances, the legislators in countries with global strategic interest in freedom of navigation should think very seriously about passing legislation advancing additional resource claims which could have the effect

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of destroying the Law of the Sea Conference.

Thirdly, the situation is well past the point of no return in terms of state practice or, if you prefer, unilateral action. It is no longer possible to go back to the status quo if the Conference fails. The clock cannot be turned back. The 3 mile territorial sea cannot be resurrected. It is worth noting that the 3 mile territorial sea and, indeed, the very concept of the territorial sea - and of the freedom of the high seas - was established by state practice, that is to say, unilateral action in which other states acquiesced. Eighty-six states* have now established a territorial sea of 12 miles or more. It is totally unrealistic at this stage to imagine that such states would be willing to repudiate such legislation except - in the case of claims beyond 12 miles - in the event of a Conference solution.

Fourthly, if the Conference fails, many states can protect their major interests by unilateral action. However, freedom of navigation through straits enclosed by new territorial sea claims and through the 200 mile economic zone or territorial seas established unilaterally by other states cannot be protected by the same kind of unilateral action. Perhaps it can be protected by the use of force or the threat of force or by diplomatic pressure but it cannot be protected by legislation on the part of those states attempting to assert freedom of navigation. It is essential to bear in mind that the objectives seemingly achieved by the results of the Conference to date concerning freedom of navigation cannot be taken for granted should the Conference fail. Obviously the Conference solution is not only the best answer to this problem but may be the only one.

Fifthly, the situation is not one in which a state can protect its interests by refusing to ratify the Convention. Thus, even great powers have been overtaken by events - events in which they have themselves partici-

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pated. I refer primarily to the development of new customary principles of international law through state practice - that is to say unilateral claims - based on the results of the Conference to date. Non-ratification would merely signify non-acquiescence in claims by other states, but it would not eliminate the legislation passed by the vast majority of the existing international community. All it would do is keep open the right to refuse to recognize such claims and dispute them(by such means, for example, as occurred between the United Kingdom and Iceland).

The sixth, and final point, I wish to make is that it is unnecessary and, indeed, counter-productive, at this stage, either to consider contingency plans should the Conference fail, or to consider non-ratification should the Conference agree upon a treaty containing provisions which are not acceptable. The Conference is still underway. The USA has a tremendous influence in that Conference. No state has a greater influence. No state had made a greater contribution to that Conference. No state is more deeply committed to a successful Conference. Surely, the conclusion is obvious.

We all need a successful outcome from the Conference on the Law of the Sea. It is unrealistic that the treaty will be wholly satisfactory to any state. Every state must accept compromises on some issues. We are too far down the pipe, however, to attempt to reverse the flow, to stop the Conference because we want to get off. We have a responsibility to see it through and the responsibility is a shared one: shared by all of the states involved in the Conference and shared by governments and legislators as well as by the public and the press. I know that the U.S. Government is playing an extremely active and constructive role in the Conference and has worked very hard for many years to achieve a successful outcome. I hope I have given you reasons to support this objective.

Territorial Sea Claims as of June 14, 1977

Breadth	Number of States
12	60
15	1
20	1
30	4
50	4
100	2
130	1
150	2
200	11
TOTAL	86

Total number of independent coastal states - 128.