NOTES FOR SPEECH TO IIASA - THURSDAY, MARCH 7, 1974

SUBJECT MATTER OF PROPOSED LAW OF SEA CONFERENCE

Since 1967, the United Nations has been preparing a Convention on the regime to be applied to the area of the seabed beyond national jurisdiction, at the instigation of Ambassador Pardo of Malta. Since 1970, the so-called Seabed Committee has had an expanded mandate to prepare for a major Law of the Sea Conference to commence June 20, 1974 in Caracas and a year later in Vienna on all important law of the sea issues, including not only the seabed beyond national jurisdiction and the related question of the international authority to be established to regulate it but other major problem areas such as the breadth of the territorial sea and the legal principles applicable to the territorial sea, i.e.:

- does the right of innocent passage exist for loaded oil tankers and warships in the same way it does for other merchant vessels;
- the nature and extent of coastal state control and ownership of adjacent fisheries areas and the distance seaward over which coastal states may exercise such control or ownership (i.e. should the coastal state have "sovereign rights" over the fisheries resources or merely management rights and duties plus preférential rights to the resources);

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- the breadth of the continental shelf and the degree of sovereignty or jurisdiction exerciseable by the coastal state (i.e. should the rule laid down in the 1958 Geneva Convention on the Continental Shelf of coastal states sovereign rights "to the point of exploitability" be maintained or should some other definition of the outer edge of coastal jurisdiction be established and should the coastal state be entitled to all of the revenues of exploitation of the continental shelf or should there be some sharing of revenue with the international community);
- the nature and extent of coastal state jurisdiction for the purpose of the preservation of the marine environment; (i.e. should the coastal state have the right and duty to enforce traffic claims as is permissible with aircraft or should the regulation on merchant and naval shipping be left entirely to the flag state which may be thousands of miles from the area concerned; and should the coastal state have any right to prescribe hull construction standards, manning requirements and navigational aids, and the routing, rules of the road, intentional and accidental discharge of pollutants, dumping of noxious substances, etc. in areas sensitive environmentally or due to intensity of traffic, or should all such matters be left to the state of registry of the ship concerned);
- the definition and the regime applicable to international straits (i.e. should coastal states rights applicable to the territorial sea be suspended in the case of international

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straits, likening such straits to areas of the high seas and permitted wholly unfettered rights of navigation for both commercial and naval vessels and for both surface and submerged naval vessels, or should coastal state responsibility be heavier in such areas of greatest concentration);

- the rights and limits concerning the freedom of scientific research (i.e. should pure scientific research be differentiated from research for commercial and security reasons and should the coastal state have the right to participate in research and even the right to reject it in cases of doubt as to the "purity" of the research);
- what regime should be applied to the area beyond national jurisdiction (i.e. shoul d the rules be based on a "first come first served" basis or should principles of equity be applied in determining who should be allowed to exploit and who should get the benefits, who should determine environmental protection standards and conservation regulations; how should permits be issued as between competing claimants; should permits be issued to states only or to multinational enterprises; and should the proposed international authority be permitted to actually exploit either solely or in joint venture with other enterprises; and how should states be represented in the governing body of such an institution; shoul d there be weighted voting, etc.).

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REASONS FOR CONFERENCE

There is now wide-spread agreement that existing rules of the law of the sea are inadequate and must be restructured to reflect contemporary needs. The two fundamental principles underlying the whole traditional law of the Sea are:

(a) state sovereignty;

(b) freedom of the high seas.

Proposals submitted to the Seabed Committee have created three new principles:

(c) need to manage ocean space;

(d) related concept of economic zone; and

(e) concept of common heritage of mankind.

Origin of Existing Principles

During the seventeenth century, conflict of views existed as to whether states should assert jurisdiction over wide areas of the sea (arguments by Seldon, Papal Bulls, British Customs Acts, etc.) or whether state sovereignty should be limited to narrow maritime belt with remaining area constituting high seas subject to principle of "freedom of high seas" (argued by Grotius at request of Netherlands Government). General agreement was reached among European powers that it was in their respective national interests to confine sovereignty claims to narrow territorial sea of three miles wherein which total sovereignty would be claimed subject only to explanation of right of innocent passage and that whole area beyond would constitute high seas.

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This reflected at the time (approximately 300 years ago) a reasoned "functional" approach to the problem. As pointed out by Grotius "the sea can not be exhausted by promiscuous use neither by navigation nor by fishing". From the point of view of European powers, these principles adequately reflect their colonial,naval and commercial interests since it permitted them to rove the oceans of the world, to maintain and to protect lines of communication with their colonies, and to sail up to three miles from the shores of any state and even within the three mile belt if the purpose were "innocent". In simple terms, while the "doctrine of freedom of the high seas" was developed over succeeding generations into a rubric approach to the status of an eleventh amendment, it in fact reflected the concept of "roving sovereignty", since under the doctrine of flag state jurisdiction only the flag state had any jurisdiction over the ship. Interestingly, the concept of jurisdiction did not in this case carry with it the concommitant concept of state responsibility. Thus, if ships of a particular state over-fished an area or polluted it, there was no resultant responsibility on the part of the flag state. The high seas regime was therefore in essence a reflection of a laissez-faire approach or a "first come first served" principle which tended to favour the strong over the weak. Only in more recent times have these fundamental principles of international law been called into question.

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From the time of Grotius until after the First World War only colonial, naval and commercial interests were reflected in the law. Between the two World Wars and more particularly immediately after the Second World War pressures arose to reflect the economic interests of coastal states in the law of the sea, particularly on fisheries matters, but also with respect to the seabed and sub-soil. Only in very recent years has there been pressure to reflect in the law of the sea environmental considerations. Thus, of the four Law of the Sea Conventions negotiated in Geneva in 1958, only the Convention on the Continental Shelf departed from the traditional concepts of the law of the sea. For this reason, it proved impossible to agree on the breadth of the territorial sea and contiguous fishing zones with the consequence that since 1958 there has been a series of unilateral acts by states establishing their maritime boundaries for various purposes resulting in a completely chaotic situation with no single agreed rule. For these reasons, it has been accepted even by the extremists at both ends of the spectrum (i.e., the three-milers at one end and the two hundred-milers at the other) that it is in everyone's interest to attempt to produce agreed rules of law.

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Impact of the 1972 Stockholm Environmental Conference

The Stockholm Conference and two years of preparations by preparatory working groups represent a first attempt to develop a multi-disciplinary and inter-disciplinary approach towards environmental problems including the marine environment. Canada played an extremely active and controversial role in pressing not only for programs of action but for development of international law of the environment. The Stockholm Conference was looked on as an opportunity to develop basic legal principles which could later be translated into technical rules by IMCO and basic norms by the Law of the Sea Conference. The basic Canadian approach, reflected in the Canadian draft declaration of principles tabled in the preparatory working group on environmental declaration, reflected four fundamental legal principles:

(a) duty not to pollute environment of neighbour states;

(b) duty not to pollute areas beyond national jurisdiction;

(c) duty to consult whether action could have adverse consequences on neighbour states or area beyond national jurisdiction; and

(d) duty to compensate for damage done to such areas.

The Canadian approach also emphasized the need to manage ocean space to preserve the environment and conserve its living resources.

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The results of the Stockholm Conference were:

(a) unanimous agreement on "Statement of Objectives" which assert need for management of ocean space and recognize the special position of the coastal state in this management process;

(b) declaration on the human environment, including one principle directly applicable to marine pollution (see principle 7 quoted on separate page) and two basic principles concerning duty not to pollute (see principles 21 and 22 quoted on separate page). While it proved impossible to reach agreement on duty to consult due to dispute between Brazil and Argentina over activities being carried out by Brazil in Amazon forest area which Argentina claims will affect its environment, it proved possible later to agree on the text of a resolution reflecting a watered-down version of the principle.

(c) declaration of 21st principle on the preservation of the marine environment;

(d) agreement on the holding of a conference to complete the draft of an ocean dumping convention in London in October 1973, since concluded. (Interestingly, the Convention reflects the duty to consult in the case of emergency dumping of prohibited substances.)

Nature of International Law: Viability of Convention Approach

Self interest is the major motivation of states in agreeing to regulate their regulations in treaty form because

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of the interrelationship of the issues referred to in point 1 above. There is an interest on the part of each state in cooperating to resolve the problems of other interest groups in order to ensure satisfactory accommodation of points reflecting its interests. Basic purpose of conventions is to ensure through regulation of conduct of states that situations will not arise which could interupt commerce, pollute the environment and even lead to armed conflict, particularly on right to mine resources of the deep ocean bed and rights to freedom of transit through international straits. While international law lacks coercive element essential to Austinian concept of law, it is surprisingly effective on all issues other than restraint on use of force. Thus, criticisms of international law are usually criticisms of primitive structure of international society or criticisms of the United Nations. (Comment from "War and Peace" paper, if appropriate.)

Impact of Energy Crisis

There is now a wide-spread tendency to downplay environmental problems by suggesting that last year was the year of the environment and this year is the year of the energy crisis or by suggesting that solutions to the environmental problem and to the energy crisis are mutually inclusive (i.e. no-one should interfere with tranker traffic because of the pressing need for oil). On the environmental question, simple answer is that environmental and energy needs coincide on requirement for safety of navigation

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since apart from potential damage to the environment the international community can no longer afford oil losses caused by inefficiency of present means of transporting oil. Thus, quite apart from solutions devised on either issue, there will have to either be an international authority created to manage the seas of the world or a sharing of authority between flag states and coastal states (as is done in case of air traffic) to ensure safe and efficient navigation. Problem is that while on many issues solutions lie in compromise between opposing interest groups, environmental problem presents case of special difficulty. Fundamental differences of principle exist on this issue. On one hand, some states are arguing that they cannot abdicate their right and their duty to protect the marine environment in areas close to their coasts. Other states are arguing that it is imperative in terms of their strategic interests to ensure that no state be permitted to interfere with "freedom of navigation", usually argued in terms not to maintain commercial links but actually more relevant to naval strategy, particularly in rights of passage of submerged subs. Both sides agree on need to apply management principles to ocean space but one side argues that management is needed most in areas of greatest traffic concentrations such as international straits while other side argues that it is precisely in such areas where there should be no management by any authority (other than to theoretical "management" by a flag state of its own ships wherever they may be).

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Management of the Economic Zone

Failing the establishment of an international fisheries authority (not likely in the foreseeable future), then management authority must be delegated to coastal states subject to strict safeguards. Question of ownership of resources must also be settled probably on basis of rights of coastal states.

Management of the Seabed beyond National Jurisdiction

While management concept must be applied to the area of the continental shelf within national jurisdiction and to the development of the principles applicable to marine scientific research, to the preservation of the marine environment, and, through regional commissions, to the conservation of the living resources beyond national jurisdiction, the area in greatest need of development is the seabed beyond national jurisdiction. Should strip mining of manganese nodules be on first come first served basis? Would a failure of the Conference permit this approach and therefore be favoured by some? Should exploitation of the seabed at abyssal depth be delayed until environmental controls are in balance? Should the base of exploitation be regulated and coordinated in relation to worldenergy and mineral needs? Should possible dislocation of developing country primary resources market be a factor? Should major industrialized powers be given major say in implementation of the management scheme? Should the international authority be an operative agency or a control agency, or both? What, ultimately, will be the impact of the availability of these resources as result of new developments in science and technology.

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The Ocean as a Habitat for Man

What coordinated planning is occurring concerning the use of off-shore floating air strips, off-shore oil terminals, off shore port facilities, under-sea living space, etc. Should the "new international law" attempt to regulate future use as well as existing and past uses? What kind of input can IIASA make to the Law of the Sea Conference concerning these questions? What kind of input can IIASA make on the three basic questions of the untapped energy resources of the seabed, the dangers to existing living resources of the sea, and the danger to the environment itself? Where can developing states look for objective advice on these questions? Does IIASA have a well-developed program on marine science investigation?

PRINCIPLE 7

"States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health."

PRINCIPLE 21

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or contr-l do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."

PRINCIPLE 22

"States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction."

INTERNATIONAL CONVENTIONS

Brief comment on law-making process and on range of existing environmental and arms control conventions (e.g. 1958 Geneva Conventions on the High Seas and the Continental Shelf; 1954 International Convention for the Prevention of Pollution of the Sea by Oil; IMCO-sponsored conventions: 1969 Conventions on Intervention on the High Seas in Cases of Oil Pollution Casualties and Civil Liability for Oil Pollution Damage and the 1971 Convention on an International Fund for Compensation for Oil Pollution Damage; 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under-Water; The International Convention on Civil Liability for Nuclear Damage, 1963; the Brussels Convention on the Liability of Operators of Nuclear Ships, 1963; and the Convention on Third Party Liability in the Field of Nuclear Energy, 1960).

LAW-MAKING PROCESSES

Refer to Trail Smelter and the Gut Dam cases.