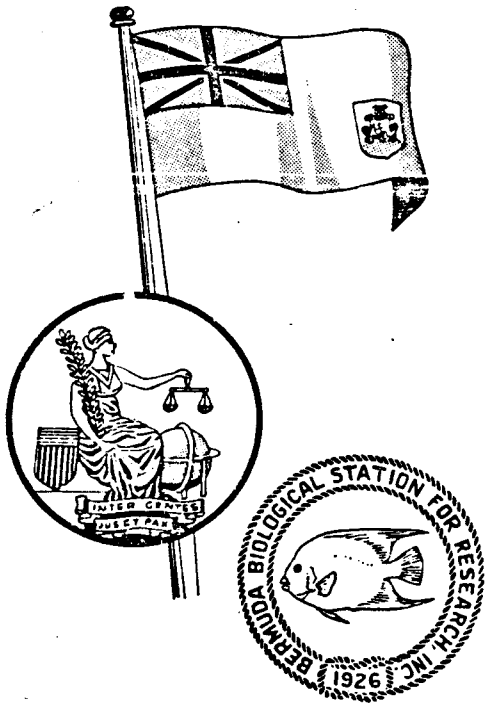
IMPLICATIONS TO WESTERN NORTH ATLANTIC COUNTRIES OF THE NEW LAW OF THE SEA



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COMMENTS: UNITED NATIONS CONFERENCE ON LAW OF THE SEA III

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I did want to give my purely personal views as to what was achieved at the last session of the conference and what was not. There are differences of views on that question, even controversy, and a good deal of pessimism about the conference or disappointment and I would like merely to try and put it in perspective as I see it.

Going perhaps from the areas where we made some progress to where we did not, I would say briefly that on the economic zone there was some real progress made on issues which had simply eluded us to date — where we had tended to debate questions with one another rather than attempt to negotiate. For example, there was a very informal working group on the right of access of the land-locked, just access, physical access, to and from the sea and according to my understanding the right of transit was resolved. That is something that is not directly related to the economic zone as such but has always been linked with it. Secondly, there was a working group on the right of access as the term is used in another sense by the landlocked and geographically disadvantaged states to the living resources of the economic zone. Now that issue was not resolved, due to some continuing differences over whether the right of access (or the right to share, in other words) should be confined to the surplus beyond coastal state needs or whether there should be at least some kind of moral commitment on the part of the coastal states even where there is no surplus. Then there was also the problem which wasn't fully resolved, and may never be of course, of defining a geographically disadvantaged state and that question is linked with the other problem I mentioned earlier about who is the neighbour of the coastal states to whom this special preference should be given, if there is one to be given to geographically disadvantaged states. There are two comments that can be made.

Firstly, this was the only time to date when there were actual concrete negotiations in a working group on these issues: it was called the "10 plus 10" group and it wasn't set up under the formal offices of the conference; however, a formula was circulated toward the end of the session which was not universally accepted but which really did come close for the very first time to resolving the basic issues. This is of particular significance from a number of points of view, even from the purely negative aspect: those who may not care about the landlocked or geographically disadvantaged, if there are any who feel that way, should be aware at least that this group represents a potential blocking third for the conference. For that reason alone, they have to be taken into account. But for broader reasons of equity, if coastal states are going to acquire new resources then one has to take into account those such as the landlocked and geographically disadvantaged who cannot claim very much because of the facts of geography. After all these years it took us this long to get to the point where we were sitting down negotiating solutions instead of exchanging rhetoric or — worse still — playing the numbers game, whereby each interest group would announce how many members there were in that particular group. I think the reason it finally ended was because the coastal group outstripped the other group. The coastal group now numbers 77, so that there are two groups of 77. Joking aside, that was progress, real progress. We haven't got a solution, but we may be on the verge of one.

There was another working group on the question discussed at some length this morning, the problem of giving a concrete and specific definition of the outer edge of the continental shelf. Although the geological definition did not satisfy many of the critics, it also represented the first time that the wide shelf group had sat down with the others who disagree on claims beyond 200 miles and tried to negotiate on that very question. It had to be done on a contingent basis because certain states took the position "we are not saying we'll never agree to anything beyond 200 miles, but, for the sake of argument, what kind of definition can you produce if we do agree, and what kind of revenue sharing scheme would be in place if we did agree on it?" That was real progress for anyone concerned with the negotiations and aware that for so many years the problem has tended to be handled by arguments back and forth on the respective legal and moral positions. This really was the first occasion when there were intensive concrete negotiations on the definition of the outer limit of the shelf and on the actual formulation for revenue sharing. We didn't resolve either one, but, looking back on the negotiating process as it occurred on various other issues, this is the phase that occurred just before the resolution of such conflicts, if there is ever to be one.

On another question relating to the economic zone, the balance of interests between maximising freedom of scientific research and ensuring some degree of coastal control over research touching on its resource rights, it looked right up to the end as if there were a deadlock between a relatively few developed countries and the rest — the rest comprising far more than a mere majority because it included developed and

developing. Nevertheless, a formula was floated near the end of the conference, albeit in a way that, unfortunately, probably got it off to a bad start, through the fault of no-one, but simply because of the way it happened to have been handled and the timing of it. That formula, which I won't define for the moment, probably does contain the seeds of an acceptable compromise, one that has eluded the conference for many years. So, too, on this very important question of scientific research, I think it's fair to say we are closer to a resolution of the problem as a result of the last session.

Some but rather less progress was made on other issues, also related to the economic zone. For example, the question of the legal status of the economic zone, seemingly a highly academic issue, but not at all academic. It has many practical implications, especially of a military nature. Some states, including the great powers and the major maritime powers, assert very strongly the economic zone constitutes high seas, whereas the majority of the states, including the 77 coastal states I mentioned, insist that the economic zone is neither territorial sea nor high seas, but a zone *sui generis*. Once again, there was no apparent resolution of the problem, but there were indications that a solution was perhaps in sight. There is not much point in going into the elements of the possible solution, but it is, I think, encouraging to know that there were proposals made, including one by the United Arab Emirates, that some of the maritime powers referred to favourably, which contained some elements of a possible solution. We ourselves, the Canadian delegation, also worked on that issue in the hope that we could pull the two sides together.

On the delimitation of the economic zone between adjacent or opposite states, there was no working group and the debate showed that states seem to be pretty well divided as between those who argued for the pre-existing legal rule, which emphasizes the median or equdistant line, and recognizes special circumstances as appropriate, and the new rule, which would be based primarily on equity, and may be a good rule, provided it is coupled with binding dispute settlement procedures. If it isn't, then it seems to me, speaking personally, that the new rule is just a prescription for conflicts, because every state can justify an approach based on equity — unless there is some third party who can say this is equitable. If there is no link with third party adjudication, then I think there is a danger that we are merely eroding an existing rule of law and producing nothing to replace it.

There was also some useful discussion, but nothing I would call concrete negotiations, concerning settlement of disputes, in a very large debate. In spite of the fact that it was hard to orchestrate the discussion, which took place in Plenary, it was a very sensible discussion at a very high level, and although it is impossible to say what will be contained in the new text, which the President will issue on peaceful settlement of disputes, we are rapidly catching up on that subject to the stage of progress on others, even though until recently we had been almost ignoring it; a shameful admission, but it's nonetheless true.

Let me turn now to questions on which we didn't make progress, or where we made relatively little progress. Firstly, the regime of passage through international straits. There was a working group set up on that issue, however, and that's the first time there has been an official informal working group as distinct from the kind which was set up several years ago, which was composed mainly of user states but didn't include the strait states. This time there was a working group that was more balanced and, understandably, because it was set up very late in the session, it didn't make much progress. Nevertheless, the interesting point is that it was set up, and that negotiations were begun, whereas until this session it had been consistently alleged by various delegations that this problem was settled and couldn't be renegotiated. I don't want to go into the implications of that issue; I think they are fairly well known. What is important is that the effort was made and the problem was recognized and it wasn't just brushed under the rug.

A seemingly related question was also discussed, namely, the regime of the territorial sea. There, as we heard earlier, differences of views remain on a whole range of issues, particularly whether coastal states should have standard setting powers in their own territorial sea for the preservation of the marine environment. What was achieved, I think, was general recognition that the article, as now drafted, simply cannot be permitted to be maintained because it would, for example, preclude a coastal state even from setting up standards of a certain order relating to fishing and it would take away rights which in the territorial sea are granted in the economic zone. This is a problem area which is not yet resolved, but some progress was made, beyond a mere debate.

That takes me to the subject of the seabed and the method of its exploration and exploitation. In my own view, little or no progress was made on the common heritage concept. It is the only issue where there are major differences between the developing and developed countries. To some extent, I think this is a false conclusion, because there are a number of developed states who do support many of the concepts supported by the developing countries. There are also many developing countries who don't take simply an either/or approach to this. They are not all taking an extreme position, if I can use such a term; for example, not all developing states, when one talks to them delegation by delegation, insist that only the Enterprise should do the development. Without going into all the reasons, the extremists on both sides adopted some-

what rigid postures during the course of the negotiations and neither side showed much flexibility. When I say neither side, I mean both ends of the spectrum, because there is a spectrum of views here and one element of encouragement I think I can mention is that some of those who represented the middle ground, so to speak, both developing and developed, got a little bit tired of this continuing stalemate and decided that something had to be done to loosen up the negotiations and begin a real negotiating process. There are going to be intersessional negotiations in February in Geneva, and probably another set not much longer afterwards, and then when we do meet again in May, two weeks will probably be set aside only for Committee I in an attempt to really get down to these questions and resolve them. Committee I has to catch up with the rest of the conference. They are way behind and yet it was the one question that was the genesis of th Law of the Sea Conference, or much of it — based on the Pardo proposal — and yet here we are still hung up on these kinds of jurisdictional questions when we should be talking about some of the, if I can use the term, nitty-gritty issues. For example, I wanted to ask Charlie Elliott, does the kind of institution that he sees being developed look to him as the kind that can really go out and do a job of development or is it the kind that will be structured on our existing approach to U.N. institutions? In other words, will the principle of geographical representation outweigh economic considerations, perhaps in some cases of particular expertise in a highly specialized field? If not, how do we achieve this? It's the first time the U.N. is going to go into action as a business, an economic enterprise. That is the kind of question we should be addressing.

I won't say more, but we did not get down to the question of final clauses which may be my baby as Chairman of the Drafting Committee. We did not discuss the question of reservations which could make or break the whole convention ultimately. It's a vital question. We did not discuss the question of participation — what entities should be allowed to become parties. These still have to be resolved. There is a tremendous amount of work to be done in spite of the progress made, but I did want to say at least that the session wasn't a total loss, in spite of the stalemate, perhaps even the retrogression that occurred in Committee I. On some of the most delicate issues that have evaded resolution thus far we worked away, plugged away at them and did achieve a fair amount of progress, perhaps nothing that I can show you as a complete solution, but something that is just short of that. If solutions are feasible, then I think they are almost within reach on many of these questions.