

LAW OF THE SEA CONFERENCE
COMMITTEE II

Statement by Ambassador J. Alan Beesley, Q.C.
Head of the Delegation of Canada
New York, April 1, 1976

Mr. Chairman,

The discussion on Part II entitled "Straits used for international navigation" has been a rather lengthy one. However, the importance of the subject undoubtedly warrants the serious attention it has received. I do not propose to take a position at this stage on the substantive provisions of Article 44 but would like to raise certain legal questions and refer to a number of considerations which, in our view, may be relevant to any attempt to form a final judgment about this article.

I propose therefore to confine my comments to the basic question raised by Article 44, namely, that of characterization of straits as international or non-international, and, if the latter, the regime applicable. It is not possible to address this question without referring to other inter-related Articles touching on the question of characterization, but I shall not discuss any matter not related to the basic question of characterization raised by Article 44. I should explain also that my reason for intervening at this stage is that before the Canadian Delegation can make a final judgment concerning Part II, and particularly Article 44, we need to know where it applies, and the regimes which would be established where it does apply. In other words, I am not speaking in support of or in opposition to any of the Articles in Part II, but would like to request clarification on certain strictly legal issues in order to assist us in making a final determination. I should explain also that in speaking at this stage of the debate, we wished to be in a position to take into account certain amendments which have been proposed in

order to clarify the question of characterization and, also certain interpretations given concerning the articles, such as the suggested amendment by Norway on Article 35(1) (a), and the proposal of the UK on Article 44 (a) which in both cases, represent improvements in the text, in our view.

The first question I should like to raise with you, Mr. Chairman, or the distinguished Representative of the UK, is as to the regime which would apply in a strait which has a highseas corridor within it but due to navigational difficulties such as obstructions or impediments, it is necessary to transit the strait through the territorial sea on one side or another of that strait. Our understanding of the pre-existing law is that a strait within which there is a high seas corridor did not fall within the legal definition of an international strait. However, Article 44 combined with Article 36 Section 1 would seem to expand the definition so as to characterize such straits as international straits in legal as distinct from geographical terms. My Delegation has spent many hours studying the interrelationship of Article 36 Section 1, Article 44 of Section 3 and Article 37 Section 2. I do not wish to take the time of the Committee to go into the several possible interpretations which one may adduce by a process of reasoning but I would be interested to hear the views of any who wish to make comments on the collective effect of these three articles. My particular question, as I mentioned earlier, is what regime applies within the territorial sea on either or both sides of a strait in which there is a high seas corridor which is not navigable. A related question is what regime applies in the territorial sea where only a part of the high seas corridor is non-navigable.

A second, related question, is what regime would be applied in such a strait if there is an alternative route of similar convenience outside the strait. I should be grateful for any clarification which could be provided on this point.

Another issue relates to the amendment of the Polish People's Republic to Article 38(1) which was intended to clarify one aspect of the problem which I have just raised. As we read the amendment, however, it may well raise new questions which attempt to solve other questions. I am now referring to the situation where there is an island off a mainland of a state and another island further off that mainland. Under Article 38(1) as drafted it was possible to conclude, in spite of the ambiguity of Article 36, that the regime of non-suspendable innocent passage applied between the island close to the shore and the mainland. What was not clear, of course, was what regime would apply between that island and another island lying further off-shore. I should be grateful for any clarification on this point as well. The amendment proposed by Poland, although well motivated, has a somewhat incongruous result if we understand it correctly. Its effect would be that in the strait adjacent to the mainland the regime which would appear to apply between the mainland and the closest island would be non-suspendable innocent passage. In the strait between that island and the next island adjacent to it but further seawards from it, it is possible to conclude that the regime would be transit passage. If there is open high seas immediately beyond the second island referred to then the regime would appear to be high seas. I should be grateful for any comments anyone wishes to make whether this interpretation is correct. The problem is sufficiently complex that I would fear that master mariners would have to take a course in international law in order to know which of three possible regimes would apply in certain straits. I do not want to express a substantive position on this article or the proposed amendments but I do feel that there is need for clarity on such important issues.

I would note in passing that the articles just mentioned raise a basic legal consideration, namely, whether it is good law to draft articles which make the nature of the regime in a particular strait and the status of that strait dependent upon "convenience". It is obviously essential that we be very clear as to who determines which route is most convenient - the flag state, the coastal state, the ship owner, the cargo owner, the master of the vessel or some third party adjudication mechanism. The question is not an academic one, and I think we must direct our attention to this kind of question as serious lawyers. I would be grateful for clarification on this issue.

A further question directly related to the question of characterization is the effect of usage upon a strait not previously considered an international strait under existing international law. I take it that it is common ground that there are internal straits all over the world as well as international straits. A basic question which arises in this connection is how one determines the status of a strait in the light of Articles 34, 36, 37 and 44, where the strait in question has until now been subject to the regime of internal waters. I have already referred to the drafting improvements proposed by Norway for Article 35 (1)(a). I do not for the moment wish to comment upon the question of the status of the economic zone raised implicitly by this amendment but will confine my comments again to the issue of characterization, and in particular the effect of these articles on waters until now considered to be internal. As I understand it straits previously deemed to be internal will not be affected by this part as a consequence of Article 34. However, the interpretation may be open - not one I might say which my Delegation accepts - that the status of a strait can be altered merely

by usage. I do not wish to take a substantive position on this matter, but I do wish to ask anyone willing to answer as to whether it is intended that the status of a strait may be determined in future by practice, based on usage, determined in some cases by convenience. The advantages of such an approach are obvious in that it provides a very flexible framework of law. What happens, however, if two states disagree as to the status of a strait as the result of differing interpretations of the effect of usage or convenience. I should be grateful for any clarification on this point.

Another question which arises is the effect of Part II upon straits whose regime has been determined by a decision of the International Court, an international tribunal or an arbitral award. While straits whose regime has been determined by international Convention (not necessarily longstanding, if certain amendments are accepted) is protected, there seems to be no provision preserving the pre-existing regime and status of straits which have been subjected to determination by third party adjudication process. I should be grateful for any clarification which can be offered on this point.

A further question raised is the effect of this Part upon straits generally accepted until now as international straits under pre-existing law. I think it is common ground that the term "international strait" has applied in the past only to straits which satisfy the necessary conditions as to connection of one part of the sea and another and which are wholly enfolded by the territorial sea of one or more states. What will be the future legal regime for straits five miles or four miles wide? Will the regime and status of such straits alter as the result of the provisions of Part II or will their regime and status

remain unchanged? In particular, will the regime of non-suspendable innocent passage continue to apply in such straits or will the regime become transit passage? I should be grateful for clarification on this point.

I am aware that it is difficult to consider these articles in any definitive way at this stage pending the results of negotiations on other issues. This is the position of my Delegation. A question arises, for example, as to whether and how responsibility and liability can be determined for damage by flag states to the coastal state as provided for in article 41 or damage by the coastal state to flag states as proposed by the amendment suggested to article 43. I should be grateful for clarification on this issue.

Mr. Chairman, I must apologize for having taken so long to formulate a series of simple questions but, as you will appreciate, we have refrained from intervening throughout the debate and I hope it is clear from the questions I have raised why we have not wished to attempt to adopt a substantive position concerning these articles. We are, of course, prepared to do so in due course in the light of the clarifications we may receive now or in private discussions. Thank you, Mr. Chairman.