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AVOIDING INTERNATIONAL CONFLICTS

The Third United Nations Conference on the Law of the Sea: Canadian Interests and Common Concerns

Introduction

Participants are aware that until relatively recently the Law of the Sea was founded upon two fundamental principles of international law: state sovereignty over the territorial sea; and the freedom of the high seas, applying to the oceans beyond the territorial sea. The 1958 and 1960 Geneva Conferences on the Law of the Sea gave impetus to the pressures for the extension of jurisdiction seawards, in spite of the failure of the conference to agree either on the breadth of the territorial sea or a contiguous fishing zone (the functional approach). The Convention on the Continental Shelf is a case in point. The decolonization process added to these pressures as new states questioned the "old international law", influenced by certain countries, particularly some of those in Latin America, who advanced territorial sea or patrimonial sea claims extending 200 miles from shore. In 1967, the USSR proposed to a number of states that agreement be reached

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on a 12-mile territorial sea, coupled with a high seas corridor in international straits. Later, in the same year, Malta introduced into the UNGA the concept of "the common heritage of mankind" pursuant to which the seabed beyond national jurisdiction would be reserved for purely peaceful purposes for the benefit of mankind as a whole, particularly the developing countries. The Maltese proposal resulted in the establishment of the UN Ad Hoc Seabed Committee. The pressures for recognition of increased coastal jurisdiction, including the reaction to Canada's Arctic Waters Pollution Prevention Act, coupled with the USSR initiative, the counter-proposals to it, relating to fisheries (as well as the territorial sea and straits), and the developments in the UN on the seabed issue,coalesced in 1970 in the expansion of the mandate of the Seabed Committee to encompass the preparations for a Third UN Law of the Sea Conference on a broad range of issues. The Conference began in late 1973 in New York. Five Sessions have now been held with the Sixth planned to begin in May 1977.

Nature of the Conference

The Third UN Conference on the Law of the Sea is a global law-making exercise concerned with important legal, political and economic issues. Since the early stages of the work of the Seabed Committee, the law-making has been directed far more toward progressive development then to codification of international law. The "revised single negotiating text" which has emerged from the Conference gives ample evidence that what is occurring is a major

restructuring of international law along new and radical lines. Moreover, the "law reform aspects" of the Conference are coupled with new approaches to international institutions. Both the substance of the new legal regime being negotiated and the composition, powers and mandate of the proposed international seabed authority raise basic questions affecting every state, land-locked as well as coastal.

Issues under Consideration

The concrete issues under negotiation at the Law of the Sea Conference embrace a wide variety of interrelated questions including: conservation of living resources; preservation of the marine environment; the nature and extent of coastal jurisdiction over living and non-living resources; the regime applicable to non-living resources beyond national jurisdiction; the delimitation of claims as between states; the regime of passage through international straits; freedom of scientific research in areas subject to coastal state jurisdiction; permissibility of military uses of the oceans; transit rights of land-locked states; and the peaceful settlement of disputes. Almost all of these issues engage the interest of every state and, indeed, most reflect the interests of the international community as a whole. Every one of the major issues engages Canadian interests. Whatever national or group positions may be on particular issues, it is becoming increasingly accepted that it is in the interests of all states that agreement be reached as soon as possible on the rules of international law

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applicable to ocean space. It is recognized that there is an increasingly urgent need for certainty of the law, coupled, of course, with the necessary flexibility in application. What may not be so widely recognized is the long-term consequences for the international community of the choice we are facing of avoiding or inviting international conflicts, depending on the success or failure of the Conference.

New Concepts Emerging from the Conference

Two radically new concepts are emerging from the Conference, namely, the economic zone and the common heritage of mankind. The first embodies elements from both the high seas and the territorial sea regime but is a doctrine sui generis. While it is asserted by some that the economic zone constitutes the high seas, the strongly held view of the vast majority is that it constitutes neither high seas nor territorial sea. The concept of the common heritage of mankind takes little or nothing from the territorial sea regime nor even from the pre-existing contiguous zone concept. At the same time, it is the antithesis of the high seas regime. While the waters superjacent to the international seabed area may continue to be subject to the laissez faire doctrine of freedom of the high seas, except as amended by international fisheries conservation, environmental and disarmament treaties, the seabed below and its resources will be subject to a regime

of international management, governed by a new international authority.

Two other relatively radical new concepts are also emerging from the Conference, namely, the "freedom of transit" regime for passage through international straits and the archipelagic concept. Whereas pre-existing law provided for the right of innocent passage through international straits, which permitted coastal state determination of the innocence of the passage and required submarines to navigate on the surface, the proposed new regime does not contain these safeguards for the strait state. While the new proposals were intended to take account of the fact of the 12-mile territorial sea upon straits not previously enfolded by the territorial sea of one or more states, the new rules of freedom of transit will apply to all international straits, although different regimes are provided for two classes of straits. No definition is given of international straits similar to that ennunciated in the Corfu Channel case, characterizing international straits as those customarily or traditionally used for international navigation, although that is how states such as Norway, Chile and Canada interpret the provisions. The archipelagic concept, while not totally new in that certain states such as the Philippines and Indonesia (and, for that matter, Canada) have asserted special jurisdiction over archipelagic waters for many years, it is only now that precise

rules are being formulated concerning rights of passage through sealanes, heights at which overflight can occur, the ratio of land to water, etc.

While it may not be generally recognized, the long-term implications of acceptance or rejection of these new concepts goes well beyond their immediate ambit, and their intrinsic importance, admittedly great. It is their very novelty that carries with it important consequences for the international community. No matter how comprehensive the proposed draft convention may be or how carefully drafted the provisions giving birth to these new concepts, their very newness is bound to give rise to differences of interpretation and application. It is thus essential that we have in place binding third party settlement procedures, when these new treaty rules go into force. Conversely, precisely because these new concepts already have considerable status in international law but lack as yet any concomitant safeguards which can be developed only in a multilateral convention, there would be great dangers if the Conference were to fail - a point I will return to later.

Developments to Date

In broad terms, the concept of the economic zone, while tracing its origins on the one hand to the "functional approach", pursued for two decades by Canada and other countries, and on the other hand to the 200 mile claims of Latin America and other countries, can be said to have actually emerged from the Conference negotiations. The concept has been defined in treaty law language

and the principles embodied in it may be said to have crystalized to the point where they are on the verge of gaining acceptance as rules of international law. Some say they already have this status. This is particularly true with respect to fisheries jurisdiction and was already the case with respect to sovereign rights over the resources of the continental shelf but, to a lesser extent, it applies now also to coastal jurisdiction for the preservation of the marine environment, the regulation of scientific research and the exploration and exploitation of the seabed to 200 miles where there is no continental shelf. The concept of the common heritage of mankind is now almost universally accepted, although its precise legal content is still under intensive negotiation. Unfortunately, whereas differences of views continue to exist on important questions relating to the economic zone (such as the fisheries and seabed rights of land-locked and geographically disadvantaged states and the precise degree of coastal control of scientific research), there is a complete stalemate on the issues relating to the regime and international institutions to be established for the seabed beyond the national jurisdiction. The Fifth Session made concrete progress on the economic zone, but relatively little on the common heritage. Useful negotiations took place also on other issues, such as the status of the economic zone, the regime for passage through international straits and the rules for delimitation of seabed boundaries as between adjacent or opposite states. For the first time, serious discussion occurred also on the rules applicable

to peaceful settlement of disputes. No discussion occurred, however, on final clauses nor, as a consequence, on the key questions of participation and reservations. No progress was made on breaking the deadlock concerning the seabed beyond national jurisdiction.

Prospects for the Conference

No-one can say with certainty whether the Conference will succeed or 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 of human and financial resources and the self-restraint required of states while the Conference continues on claims they wish to advance. It is generally accepted that the next (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 regime, then there will be great pressure to conclude the negotiations on the economic zone, international straits, delimitation of boundaries and other 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 the next session, governments will be willing to continue to commit themselves to pursue the Conference to a successful conclusion.

Consequences of Success or Failure

A successful Conference would mean agreement on over 300 treaty articles which together would lay down binding rules of

law applicable to an area comprising seventy 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 lay down new principles concerning the management of ocean space. They would result in a major re-allocation of resources as between distant water fishing states and coastal states, and as between developed and developing states, coupled with a transfer of powers and jurisdiction on most issues other than military from the most powerful states to the less powerful. The new rules of law would bind states to peaceful settlement procedures on most issues (while leaving open wide loopholes relating to coastal resource rights and military uses.)

A failed Conference would mean that while the 200 mile limit has come into existance as a fact of international life, none of the safeguards embodied in the draft treaty would necessarily apply. The 200 mile concept is far more likely to become a 200 mile territorial sea than a 200 mile economic zone confined to specific jurisdiction, coupled with stringent safeguards. The 12 mile territorial sea is a fact of international life but its application to international straits would not be coupled with agreed rules concerning rights of passage. 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 seven years of work on the international regime applicable to

the seabed beyond national jurisdiction would be lost. Some developed states might take unilateral action authorizing their own nationals and other legal entities to explore and exploit the deep seabed beyond the limits presently claimed by any state. Certain developing states might respond by new unilateral action asserting national jurisdiction over these same areas. They have said they would do so. Conflicts over fishing rights, environmental jurisdiction, undersea resources rights, conflicting delimitation claims, rights of passage in straits and claims to the deep ocean seabed could "surface" all over the globe. The conclusion 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 general interest of the international community and the particular interest of Canada meet in the conclusion that there is an over-riding need for a successful conclusion to the Law of the Sea Conference.

The Common Interest and the Canadian National Interest

On each of the issues on the agenda of the Conference, it has been necessary for participating states to develop positions and, in so doing, to attempt to determine the point at which their national interests can be reconciled with the interests of other states and, ultimately, with the interests of the international community as a whole. It is well known that from the outset of the preparations of the Conference Canada has worked closely within a group of coastal states, comprising African, Latin and Asian

states, as well as a few developed countries, such as Norway, Iceland, Australia and New Zealand, to work towards these necessary accommodations. While this group has understandably sought to protect its own interests, it has attempted to go beyond them in seeking solutions. There is a general international community interest in the management of ocean space, a revolutionary rejection of the previous laissez faire regime. Canada has been one of the most active states in pressing for rational management concepts. There is a general international community interest in the conservation of living resources. Canada has been in the forefront of those pressing for acceptance of this concept. There remain differences of views on how best to achieve this objective. Canada is amongst those who have insisted on coastal state management conservation and harvesting rights of living resources in areas adjacent to coastal states. There is widespread recognition that the interests of the international community as a whole are engaged in the need to preserve the marine environment. Canada has led the attack on the laissez faire approach to preservation of the marine environment and has urged acceptance of specific coastal jurisdictions and the imposition of new responsibilities upon flag states. Canada has been extremely influential in gaining acceptance for global umbrella provisions laying down fundamental obligations to preserve the marine environment and has also been instrumental in developing the basic jurisdictional compromise consisting of international standard setting, coupled with coastal enforcement (and coastal standard setting in ice-covered areas).

There is widespread agreement that it is essential to preserve freedom of navigation in international straits. Canada has supported this principle but called also for new rules to go hand in hand with the new "right of transit" which would protect the coastal strait state environment. There is virtually universal agreement on the need to safeguard the freedom of scientific research and widespread agreement on the right of the coastal state to refuse to consent to scientific research related to coastal state resources. Canada has actively participated in the attempts to develop a balanced approach to preserving the necessary scientific freedoms, while ensuring safeguards of coastal rights. There is universal agreement on the basic concept of the peaceful use of ocean space. There is little, if any, agreement as to what pre-existing military uses remain permissible.. There has been no extension of the principles embodied in the Seabed Arms Control Treaty. On the contrary, it is generally agreed that military uses will constitute a total exemption from the proposed treaty provisions on compulsory third party settlement procedures. Canada has pointed out the anomalies of a peaceful settlement treaty which would exempt military uses and has called for the expansion of the Seabed Arms Control Treaty to encompass other types of installations and devices, in both cases without success. It is generally agreed that the new Law of the Sea should be so formulated as to make a major contribution to the development of a new economic order. Canada was one of the first to argue that concepts of equity should be embodied in the new Law of the Sea.

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Canada has pressed for a regime for the seabed beyond the national jurisdiction which would benefit the developing countries primarily while also enabling the developed states to participate in the exploration and exploitation of the seabed resources. Canada was the first to propose the "parallel access approach" whereby the proposed international enterprise and also states and private entities would be permitted to engage in such activities. Canada was one of the first developed countries to give strong support to the creation of an international seabed authority, which would have concrete management powers going well beyond licencing and registration claims. On fisheries, Canada has pressed for acceptance of the concept of the "optimum sustainable yield" whereby the harvesting of the living resources of the sea would be maximized and the surplus beyond the coastal state needs made available to other states. Canada, almost alone of the coastal states, has expressed willingness to consider being bound, even on resource questions, to third party adjudication, in the event of gross abuse of powers. Canada has pressed for acceptance of coastal state sovereign rights over continental shelf resources out to the edge of the continental margin but has played a leading role in developing a concrete definition of the edge of the margin and was the first state to propose revenue sharing related to continental shelf resources. Canada has not hesitated to assert and defend its national interests in the Law of the Sea

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Conference but, at the same time, has consistently attempted to work out equitable solutions on every issue under negotiation in the Conference.

Conclusions

Since the beginning of the deliberations of the Seabed Committee and from the outset of the Law of the Sea Conference, Canada has played a highly visible and active role in focusing attention on important issues and seeking to develop agreed solutions to them. While Canada's interests are in large measure protected by the present draft treaty provisions of the revised single negotiating text, it is not possible to predict with any degree of certainty which provisions of the revised single negotiating text will be accepted, if any, and which will not. This uncertainty, and the importance of the issues under negotiation, requires a continuing commitment of the Canadian Government and people to the Conference. If a falling away of public interest and the adoption of a unilateral approach to all issues is to be avoided, important opinion making groups, such as the Canadian Council on International Law, must play an active role. Views may well differ sharply on the approaches taken by Canada to particular issues. There should be no difference of views, however, on the need to continue to press on with perseverence, patience, imagination, hard work and our full diplomatic resources in pursuance of the Conference solution.