"CONFLICTING APPROACHES TO THE CONTROL OF THE OCEANS"

Draft Notes for Use by Mr. J.A. Beesley at the American Society of International Law Meeting, April 29 and 30, 1971, Washington, DC

Conflicting Interests

Conflicting interests in the uses of the sea are as old as and even older than the law of the sea itself. Broadly categorised the essential conflict has revolved and continues to revolve about the special interests of the coastal state in the uses of the sea adjacent to its shores, on the one hand, and, on the other hand, the general interests of all nations in the uses of all reaches of the sea. The historical record is summarised by Professors McDougal and Burke (in their 1958 article entitled "Crisis in the Law of the Sea: Community Perspectives Versus National Egoism") in the following terms:

> "...the oceans of the world were at one time claimed for the exclusive use of a limited number of states, but concern for the more general interest of the whole community of states ultimately succeeded in freeing the larger expanses of the oceans for relatively unhampered use by all. The knowledge is equally familiar, however, that coastal states never surrendered their claim to exclusive and comprehensive authority over certain adjacent areas of the sea and that, even after a consensus had developed that states were not to exercise continuing and comprehensive authority beyond a relatively narrow belt of such waters, it was quickly discovered that the

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occasional exercise of some coastal authority beyond this belt had necessarily to be honoured if the special interests of the coastal state were to be given adequate protection."

This capsule outline does not bring out the fact that the concept of freedom of the seas emerged from the long struggle waged by the nations of Europe for mastery of the seas. (Thus, the popular mind, not attuned to legal niceties, celebrated not the freedom of the seas but rather the fact that "Britannia rules the waves"). While it is true that general or community interests have tended to be associated with and protected by the doctrine of freedom of the seas, it must be recalled that that doctrine, in practical terms, has been translated into the exclusive jurisdiction of flag states over their vessels on the high seas which, however one may look at it, more closely resembles an extension of sovereignty than an abnegation of sovereignty. In other words, although the freedom of the seas has served the general interests of the international community, it has also been an instrument for the interests of the flag states - the major maritime powers. The interests of these states, to say the least, are not necessarily and always synonymous with the interests of the international community, as becomes evident when one considers the pollution of the marine environment which has resulted from the strict application of the doctrineof freedom of the seas.

The basic dichotomy of interests in the uses of the sea is thus less simple and clear-cut than it appears at first glance and than

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it is often presented. There are in addition to coastal and general interests what may best be described as flag interests, which like coastal interests are national in nature but have developed a protective coloration all their own. The situation is further blurred by the fact that almost all littoral countries of the world may be said to have both flag interests and coastal interests, to which they have attached varying weight at particular times and in particular circumstances. The balance of interests, which until recently has been weighted in favour of the flag states' right to sail the high seas unfettered by any law but their own, has begun to right itself in response to new opportunities and new problems created by modern technology. The process of readjusting the balance of interests is, however, proving difficult and has generated controversy not only as to the changes to be made in the law of the sea but also as to the manner of effecting those changes.

Conflicting Approaches

Western legal thinking has traditionally recognised custom and treaties as the two major "sources" of international law and has emphasised the predominance of custom. In Kelsen's words,

> "...the two principal methods of creating international law are custom and treaties. Custom is the older and original source of international law, of particular as well as of general international law. At present, treaties play an increasingly important part in the development of international law. Hence the international legal order is

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composed of norms created by custom - customary international law and norms created by treaties - conventional international law. In the past, at any rate, general international law has been customary law, there being no treaty to which all states of the world have been contracting parties".

As intimated in this quotation from Kelsen, Western thinking in recent years has begun to place greater emphasis on treaties as a source of international law. In this respect the West has moved closer to Soviet legal theory, which Professor McWhinney has described as demonstrating a "clear....preference, over the years since 1917, for treaties, but particularly bilateral treaties, as the prime source of international law". Certainly this preference for the treaty approach has been pronounced with respect to the development of the law of the sea and in effect has been asserted as a virtual bar to its further development by customary means, that is by state practice. Thus, for instance, the United States and the USSR have both insisted on the need for multilateral solutions to problems of the law of the sea and in varying degrees have deplored unilateral extensions of coastal state jurisdiction. The United States has publicly objected to Canada's recent actions in extending its territorial sea from three to twelve miles, in establishing a 100-mile pollution prevention zone adjacent to its Arctic coasts, and in asserting both fisheries and anti-pollution jurisdiction in certain bodies of water off its east and west coasts, on the grounds that these actions constitute "unilateral extensions of jurisdiction on the high seas" for which international law "provides no basis". Canada in turn has taken the position that its actions were

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consistent with customary international law and the development of the law on the basis of the well-established principle of state practice.

Unilateral Action and Customary Law

In their 1958 article on "Crisis in the Law of the Sea" Professors McDougal and Burke analyzed the various forms of claims to authority over the sea and concluded that "most significant claims have been asserted unilaterally rather than by explicit agreement following negotiations between states". Professor McDougal, in an earlier article on "The Hydrogen Bomb Tests and the International Law of the Sea", described the process by which unilateral action may or may not be received into international law in the following apt terms:

> "From the perspective of realistic description, the international law of the sea is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding state and including both national and international officials

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weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them....

"The authoritative decision-makers put forward by the public order of the high seas to resolve all these competing claims include, of course, not merely judges of international courts and other international officials, but also those same nation-state officials who on other occasions are themselves claimants. This duality in function...or fact that the same nation-state officials are alternately, in a process of reciprocal interaction, both claimants and external decision-makers passing upon the claims of others, need not, however, cause confusion: it merely reflects the present lack of specialization and centralization of policy functions in international law generally. Similarly, it may be further observed, without deprecating the authority of international law, that these authoritative decision-makers projected by nation states for creating and applying a common public order, honour each other's unilateral claims to the use of the world's seas not merely by explicit agreements but also by mutual tolerances - expressed in countless decisions in foreign offices, national courts, and national legislatures - which create expectations that effective power will be restrained and exercised in certain uniformities of pattern. This process of

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reciprocal tolerance of unilateral claim is, too, but that by which in the present state of world organization most decisions about jurisdiction in public and private international law are, and must be, taken."

Professor Lauterpacht, in his 1950 article on "Sovereignty Over Submarine Areas", discerned two "parallel streams...in the freedom of the seas in the last three centuries". The first he characterized as "insistence, averse to compromise, on the full right of freedom from any kind of interference". The second he saw as the "phenomenon of unilateral action, apparently or actually in conflict with the principle of the freedom of the seas...". This second, parallel stream in the practice of states, he wrote,

> "has found expression in measures which on the face of it are not unreasonable such as the assumption of protective jurisdiction for customs and revenue purposes, for the enforcement of health and sanitation law, and, to a limited extent, for safeguarding the security of the state in time of emergency. These encroachments upon the principle of the absolute freedom of the sea have met with no persistent protests. They have been crystallized in what are generally referred to as claims to the contiguous zone. In contradistinction to the formal extension of the limit of territorial waters, there is now - with some weighty exceptions including, to some extent, Great Britain - a general disposition to recognize the justification of the claim

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to the contiguous zone for purposes outlined above - as distinguished from the assertion of exclusive jurisdiction for the economic benefit of the nationals of the state. Within these limits the conception of the contiguous zone is now in the stage of approximation to a customary rule of international law. It is essentially grounded in unilateral action. Occasionally, unilateral action - for the very reason that it is unilateral - tends, notwithstanding its intrinsic reasonableness, to assume the form of an innovation so startling as to lay itself open to initial criticism. This was probably, to some extent, the case with regard to the Anti-Smuggling Act adopted by the United States in 1935 and the Proclamation issued by it in 1945 in the matter of fisheries (concurrently with that on the continental shelf)."

The examples of unilateral action by the USA as cited by Professor Lauterpacht are, of course, not exhaustive. In addition to the 1935 Anti-Smuggling Act and the two proclamations issued by President Truman in 1945, the United States has unilaterally extended its jurisdiction beyond the limits of its territorial sea with the establishment in 1950 of the Air Defence Identification Zone (ADIZ) extending more than 300 miles out to sea in which foreign aircraft approaching the United States are required to identify themselves and make certain prescribed reports. Still more recently, in 1966, the United States unilaterally established a 9-mile exclusive fishing zone contiguous to

its territorial sea, having protested a similar action by Canada two years before. The nuclear tests conducted by the United States have also constituted unilateral appropriations, however justified and however temporary, of vast areas of the high seas. Another form of unilateral interference with the freedom of the high seas by the United States was the "quarantine" of Cuba in 1962. The point is not, of course, that this action was illegal, but rather that the doctrine of freedom of the seas does not, in the words of Christol and Davis, "serve as a proscription against a reasonable restriction on the free use of the seas by all states where this restriction is grounded on a valid peace, security, or self-defence basis and the responsive action is necessary and proportional to the threat".

In making these various unilateral assertions of authority over the high seas the United States has been careful to explain the distinction between the sovereignty exercised by a coastal state in its territorial sea and internal waters and permissible forms of jurisdiction exercised by coastal states beyond the limits of the territorial sea and internal waters. The Deputy Legal Adviser of the Department of State, Mr. Jack B. Tate, in a statement on March 3, 1953 before the US Senate Committee on Interior and Insular Affairs described the United States position in the following terms:

> "In adhering to the 3-mile limit, the United States does not preclude itself, of course, from taking all steps necessary to prevent or repel threats to its national security.

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"Preventive measures such as the establishment of Defensive Sea Areas for national defense purposes have been established in the past, and some are still in effect under current legislation. (62 Stat. 799, 18 U.S.C. 2152, deriving from the Act of Mar. 4, 1917.)

"Nor does the United States preclude itself from exercising jurisdiction on the high seas, beyond the 3-mile limit, for certain purposes. A good example is the legislation, enacted as early as 1790, providing for the exercise of jurisdiction within 12 miles from the coast for purposes of customs control. Legislation for the same purpose is in effect (Anti-Smuggling Act of Aug. 5, 1935, 49 Stat. 517, 19 U.S.C. 1701-1711).

"The claim made by the United States in the Presidential proclamation of September 28, 1945, to jurisdiction and control of the national resources of the subsoil and seabed of the Continental Shelf off its coast is one more example of the compatibility between the United states position on the 3-mile limit and the protection of its interests. This Government did not claim sovereignty in this proclamation or an extension of its boundaries beyond the limit of 3 miles of territorial waters. Indeed it specified in the proclamation that the character as high seas of the waters above the Continental Shelf and the right to their free and unimpeded navigation are in no way affected."

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It should be noted here that in other fields than the law of the sea, the United States has also sought to develop customary international law by unilateral action, as was the case, for instance, with respect to the so-called "Monroe doctrine" first put forward by the United States in 1821 on the basis of necessity and self-preservation. Similarly, both the United States and the USSR made various uses of outer space before the development of agreed rules of law authorizing and regulating such uses. Thus, despite recent tensions between the customary and conventional approaches to the development of international law, the customary approach has been and remains securely grounded in doctrine and practice, not the least in the practice of the United States.

Canadian Position on Conflicting Approaches

Canada's record of support for and participation in efforts to achieve multilateral solutions to problems of international law is second to none and Canada has consistently demonstrated its good faith in its persistent attempts to produce agreed rules of law with respect to the uses of the sea in particular. Canada was an active participant at the Hague Codification Conference of 1930, and it is evident of the change not only in the Canadian position but in the law itself that Canada at that conference opposed the recognition of the concept of separate jurisdictions beyond the territorial sea under the specific conditions which the Hague Preparatory Committee proposed in 1929. The Canadian position at the 1958 and 1960 Geneva Conferences on the Law of the Sea had altered in favour of the concept of a contiguous fishing zone extending no further than 12 miles from the baselines of a narrow

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territorial sea and Canada made major efforts at these conferences to bring about an agreed rule of law on this concept. Subsequent to the failure of the 1958 and 1960 conferences Canada joined with other countries in an extensive and vigorous multilateral campaign to bring about agreement on the questions of the territorial sea and contiguous fishing zone, but these efforts resulted in failure when the USA declined to participate in them. At the 1969 Brussels IMCO Conference on Marine Pollution, Canada made strenuous efforts to bring about international agreement on effective pollution prevention measures but the results of that conference fell disappointingly short of Canada's expectations and did not produce the desired protection for the marine environment and the interests of coastal states. Still more recently, Canada helped to bring about a compromise resolution at the 25th Session of the United Nations General Assembly on the convening of a third conference on the law of the sea in 1973. Canada is participating actively in the preparations for that conference as well as in the preparations for the 1972 Stockholm Conference on the Human Environment which will inevitably have an impact on the future development of the law of the sea.

Canada's dedication to the search for multilateral solutions to problems of international law is not, however, inconsistent with the unilateral initiatives which Canada has taken to protect its vital coastal interests in response to urgent needs. Canada does not consider multilateral action and unilateral action as mutually exclusive courses or clear-cut alternatives. The contemporary international law of the sea comprises both conventional and customary law. Conventional or

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multilateral treaty law must, of course, be developed primarily by multilateral action, drawing as necessary upon principles of customary international law. Thus multilateral conventions often consist of both a codification of existing principles of international law and the progressive development of new principles. Customary international law is, of course, derived primarily from state practice, that is to say, unilateral action by various states, although it frequently draws in turn upon the principles embodied in bilateral and limited multilateral treaties. Law-making treaties often become accepted as such not by virtue of their status as treaties, but through a gradual acceptance by states of the principles they lay down. Despite the increasing reliance on treaties, the complex process of the development of customary international law is still relevant and indeed, in Canada's view, essential to the building of a world order.

The regime of the territorial sea, for example, derives in part from conventional law, including in particular the Geneva Convention on the Territorial Sea (which itself was based in large part upon customary principles) and in part from the very process of the development of customary international law. During the period when it was possible to say, if ever there was such a time, that there existed a rule of law that the breadth of the territorial sea extended to three nautical miles and no further, that principle was created by state practice, and can be altered by state practice, that is to say, by unilateral action on the part of various states, accepted by other states and thus developed into customary international law. How then can we be dogmatic about the merits of either approach to the exclusion of the other? If it is true

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that national egoism can pervert the development of customary law by state practice it is also true, as Gidel points out, that "the system of conventions is at the mercy of egoism". Unilateralism carried to an extreme and based upon differing or conflicting principles could produce complete chaos. Unilateral action when taken along parallel lines and based upon similar principles can lead to a new regional and perhaps even universal rule of law. It was with this possibility in mind that Canada proposed at the August, 1970 meeting of the Preparatory Committee for the 1973 Law of the Sea Conference that the coastal states of the world, acting unilaterally but in concert, should immediately define the minimum non-contentious area of the seabed beyond national jurisdiction. This would be done by fixing a deadline for the coastal states to define their continental shelf claims or, alternatively, the maximum limit beyond which they will not claim under any circumstances, on the clear understanding that these claims would not prejudge the future development of the law on the precise definition of the area of the seabed beyond national jurisdiction. Canada's hope is that in this way it would be possible to fix a true moratorium on national claims to the seabed, to guarantee the reservation a very large percentage of its area for the benefit of mankind, and to lay the foundation for the development of an agreed rule of law on this question.

While agreement by the international community reached through a multilateral approach can produce effective rules of law, rigid doctrinaire insistence upon the multilateral approach as the only legitimate means of developing the law can lead to the situation which has prevailed since the failure of the two Geneva Law of the Sea Conferences to reach agreement upon the breadth of the territorial sea and fishing zones. States have been forced, in the absence of agreed rules,

to take steps in advance of existing law. Counter-claiming states have similarly been compelled, by the doctrinal strait-jacket they have imposed upon themselves, to deny the validity of these steps, however reasonable or however justified, and to insist that the law must remain static and subject to the narrowest possible interpretation until explicit new rules of conventional law have been developed. The choice, accordingly, has been between stagnation and chaos, and this false dilemma has been compounded by the fact that insistence on conventional development of the law in some cases has masked a basic reluctance to develop the law along the lines desired by the claiming states regardless of the method chosen.

In no other field of law is the inter-penetration of national and international law so evident. It is Canada's view that this organic relationship of law on the national and international planes is not to be feared but to be welcomed since it prevents us from being bound by strait-jackets fashioned in the distant past to contain pressures which can no longer be ignored. What is required, in Canada's view, is a judicious mix of the two approaches taking into account the complex set of inter-related and sometimes conflicting political, economic and legal considerations, both national and international, and based also upon the imperatives of time itself. The seriousness of the problem can determine the urgency of action, which in turn can sometimes dictate the means chosen.

It is important also, we think, to be clear as to just what we mean when we speak of the undesirability of unilateral action. The point is well made by Hydeman and Berman in qualifying their conclusion that customary international law permits coastal states to make reasonable assertions of jurisdiction and control in areas of the high seas contiguous

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to their territorial sea in order to protect vital interests in their territory or territorial waters. The qualification posited by these (writing in 1960) authors/is as follows:

> "The customary rule, which seems to exist, is limited to the exercise of jurisdiction and control and does not support assertion of claims to exclusive rights in the resources of the sea. Such claims rely on inherently different rationales and must be tested separately before a customary rule of law can be said to exist. Moreover, the rule may not support positive acts taken for national defense and security, such as naval maneuvers and weapons testing, on the high seas."

The rule of reasonableness in unilateral assertions of jurisdiction may be imprecise but it is not necessarily meaningless for that reason. Nor, in Canada's view, should a reasonable action in one situation be disputed on the mere grounds that it may encourage unreasonable action in different and unrelated circumstances. Finally, whatever position a state may adopt with respect to the general validity of unilateral action, no state can be expected to accept the premise that while all unilateral action is equal, "some is more equal than others".

Conclusion

It is Canada's profound conviction that the international community has reached a crucial turning point as regards development of the Law of the Sea. Effective and early international action is demanded

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to prevent the threatened degradation of the marine environment and the threatened destruction of the living resources that constitute the real wealth of the sea; to ensure an orderly and equitable regime for the exploitation of seabed resources beyond national jurisdiction for the benefit of mankind as a whole; and to provide for a just accommodation between coastal interests and general interests in the uses of the sea. While awaiting such action, states cannot and should not neglect their responsibility to prevent pollution of the sea and to institute regulatory measures for the conservation of its living resources. Similarly, states should not neglect their responsibility to co-operate on a bilateral and multilateral basis for the fulfillment of these purposes. These are interim measures which may be affected by and may have a profound effect on the 1973 Law of the Sea Conference. One thing seems certain, however. If the 1973 Conference fails to produce agreed rules of law, fails to agree on a new order for the Law of the Sea, the consequences will be even more serious than were the consequences of the failure of the 1958 and 1960 conferences. The pressures for the accommodation of coastal interests, and the countervailing pressures for the continued rigid assertion of unfettered flag interests, may well lead to confrontation and conflict in ocean space. That confrontation and that conflict may be all the more severe because of the rejection by some states of the one element in the law of the sea which has made it flexible and responsive to a wide variety of new needs, new situations and competing interests - that is, the customary element which has allowed the progressive development of the law through reasonable and responsible state practice.

CONFLICTING APPROACHES TO THE CONTROL AND EXPLOITATION OF THE OCEANS

A COMMENT

By Alan Tussie

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The extent of the territorial sea has been a matter of international controversy for a long time. From a personal perspective, I see little merit in the United States' proposal of a 12-mile breadth. This proposal will not attract the extremists but would, if accepted by the modest claimants of today, remove substantial areas from the status of high seas. I would have thought it a preferable approach to continue adherence to a narrow concept of territorial sea to preserve a maximum high seas area, and to identify and define other interests of states in the oceans and the seabeds below and to accommodate those on their individual merits.

Mr. Chairman, perhaps I have gotten off my reservation and should return to it. Thus, in closing, I would like to re-emphasize in the strongest terms possible the tremendous importance of the United States continuing its exclusive jurisdiction over the petroleum resources of the continental margin off its shores. This is vitally important to our nation's objectives for decades to come. The fact is that there is no known feasible energy substitute in the foreseeable future. While these are strong words, it would in my opinion border on national catastrophe for the United States to cede to an international organization the power under any circumstances to order it to suspend mineral resource development in its continental margin.

The CHAIRMAN thanked Mr. Olmstead for his eloquent and carefully documented presentation of the United States exclusive interests and for the indication of some of the inclusive interests that this country shares with other members of the international community. Once again the task before the audience, the CHAIRMAN pointed out, was to examine whether the alternatives presented by Mr. Olmstead, or those presented by Mr. Stevenson or those that might be articulated by others, would be the most desirable for purposes of accommodating the different interests at stake.

The CHAIRMAN, after noting the pre-eminent contributions of Canadian members to the programs and activities of the Society over the years, next introduced the first commentator, Mr. Alan Beesley, Legal Adviser, Department of External Affairs of Canada.

COMMENTS BY ALAN BEESLEY *

In commenting upon the one theme common to the two previous statements, that is, freedom of the high seas, I would like to put forward some of my own views as well as those of my government. I shall attempt a somewhat historical approach, because we are today again, in my view, at a similar position as were states in the 17th century when they were required to come up with new solutions to relatively new problems.

At the United Nations we will be discussing policies relating to a series of problems such as seabed, continental shelf, territorial seas, passage through straits, fisheries, scientific research and pollution, each one of them

* Legal Adviser, Department of External Affairs of Canada.

extremely complex. I suggest that what is needed on every one of them is an accommodation between maritime and coastal interests, if we are going to have a successful outcome at the Law of the Sea Conference.

I could agree with so much of Mr. Stevenson's exposition of the doctrine of the freedom of the seas that whatever differences we may still have are largely ones of degree and emphasis. We are all aware of the fact that the conflicting uses of the seas are the result of conflicts of interests as old as or perhaps even older than the law of the sea itself. Broadly categorized, the conflict is between the special interests of coastal states in the uses of the sea adjacent to their shores and the general interest of all nations in the use of all the reaches of the sea. With apologies to our Chairman, I would like on this question to quote from his article on "Community Perspectives Versus National Egoism":

> The oceans of the world were at one time claimed for the exclusive use of a limited number of states, but concern for the more general interest of the whole community of states ultimately succeeded in freeing the larger expanses of the oceans for relatively unhampered use by all. The knowledge is equally familiar, however, that coastal states never surrendered their claim to exclusive and comprehensive authority over certain adjacent areas of the sea; and that even after a consensus had developed that states were not to exercise continuing and comprehensive authority beyond a relatively narrow belt of such waters, it was quickly discovered that the occasional exercise of some coastal authority beyond this belt had necessarily to be honored if the special interests of coastal states were to be given adequate protection.

However, this capsule outline of the doctrine of the freedom of the seas does not bring out the fact that the doctrine was the product of efforts on the part of the then European states to master the seas for the promotion of their individual interests. So it is not appropriate to moralize, in my view, about the doctrine of the freedom of the seas as if it were the eleventh commandment. It is, however, a functional doctrine and if it is modified and modernized it can continue to serve certain important objectives. I think most of us have been guilty of regarding the doctrine as immutable in nature. Unless we relinquish the inhibitions generated by such an approach, the doctrine can become a bastion of reactionary attitudes, a yoke around our neck.

We in Canada consider, for reasons I will mention, that the doctrine of the freedom of the seas has tended to become translated, in practical terms, into the exclusive jurisdiction of the "flag states" over their vessels on the high seas, which, when observed closely, is nothing but an extension of sovereignty rather than an abdication of it. Although the freedom of the seas concept has served the general community interest, it has also been the instrument for the interests of the "flag states," which tend to be the major maritime Powers. The interests of these countries, I suggest, are not necessarily synonymous with the interests of the general community. This becomes evident when one considers the marine pollution which has resulted from the strict application of the doctrine of the freedom of the high seas.

Thus, this basic dichotomy between coastal states' interests and the general community interests is a little less simple and clear-cut than it appears at first sight. There are, in addition to the coastal and general community interests, what may be best described as "flag state" interests. These are somewhat of the same nature as coastal state interests, except that they have acquired a protective coloration of their own. The situation is further blurred by the fact that almost all littoral states may be said to have both coastal and "flag state" interests to which they have given varying weight at particular times, under particular circumstances. Canada, however, is predominantly a coastal state and does not have a big maritime fleet under its control. But we do have a substantial interest in trade and are conscious of our dependence on the freedom of the high seas.

This balance of interests which has been weighted, until very recently, rather heavily in favor of the "flag state" freedom to sail the high seas unfettered by any law but its own, has begun to right itself in response to new problems and new opportunities created by science and technology. However, the process of readjustment has proven somewhat difficult and has generated controversy of which we are all well aware.

While many nations have expressed their willingness to settle the controversies thus generated through multilateral means, and a certain number of them have also protested unilateral extensions of coastal states, including those of Canada, it must nonetheless be recognized that these unilateral actions have been prompted by genuine needs. The dispute then becomes more one of modalities. On the question of modalities, too, we are witnessing the development of customary international law. Customary law develops essentially through extensive state practice followed by general community acquiescence. We are hopeful that with respect to Canadian practice such community acquiescence will develop with time.

Whether we refer to the seabed or to the continental shelf or to the territorial sea, we find the necessity of arriving at some accommodation of differing interests, and, on the basis of the present structure of the international society, within the United Nations. This means in practice that such accommodations could be worked out only through the discussions that are being held within the U.N. Preparatory Committee for the Law of the Sea Conference. On the basis of the work done so far within the Preparatory Committee, the achievement of accommodation may be a little farther away than the 1973 Law of the Sea Conference unless we take care to increase the momentum of the Committee's work.

On the whole, I believe it is rather pointless to become doctrinaire either about the freedom of the high seas or about the assertion of exclusive interests of the coastal states. Canada has, through some well-known experiences, assumed a favorable vantage point to view the rationale behind the contrasting perspectives. There is, however, a possibility, in our view, for accommodations on the many problems before us, as more and more participants in the Committee realize the necessity of appreciating each other's positions and interests.

Regarding the Nixon proposal, we in Canada have certain difficulties. For instance, the 200-meter outer limit suggested therein would give to the United States all of its geological continental shelf, but Canada would not retain on the basis of that limit all of its geological shelf. Further, while the U.S. State Department's claim about the balance of interests achieved under its draft has much validity, we believe the balancing has been done the wrong way. Our problems are not related so much to the revenue-sharing aspects, as to the competence of a coastal state to control the activities off its shores. Nevertheless, we think the U.S. draft represents an imaginative approach, poses all the problems that need to be considered, and that it constitutes an extremely useful contribution to the work of the Law of the Sea Conference.

With respect to problems of the territorial sea and passage through straits, we are willing to discuss them at the Law of the Sea Conference (although we already have a twelve-mile territorial sea and have only non-international straits). Similarly, the fisheries problem, which might prove to be the most difficult one to negotiate, must be included in the agenda. Here we have on the one hand the demands of distant-water fishing countries, and on the other the claims of coastal countries like Canada and Iceland whose living resources off their shores are in real danger of extinction.

There is also a dichotomy of interests concerning the recognition or denial of freedom of scientific investigation. No country or private academic or business organization would like to share the scientific information, which it collects at an enormous expense, with others without some fee. Equally, no coastal state would sit idly by while foreign countries or corporations conduct research off its shores about which it knows nothing. The U.S.A. took such a position in expressing concern about its vital interests in response to a UNESCO questionnaire on the Ocean Data System.

The management and prevention of marine pollution raises the biggest bundle of issues. We do not think that the existing law is adequate. Essentially, under the doctrine of the freedom of the seas, which we consider as "non-law" for this purpose, every state is free to traverse any part of the oceans and pollute it at its will. The IMCO Conventions are a good start, but still are grossly inadequate. We do not understand why a state is entitled to sink a ship many miles off its shores, but cannot ask the Captain to alter course or bring the ship into port before damage is done to the environment. Equally, it is difficult to understand why the "flag state" jurisdiction is sacrosanct until a catastrophy occurs, and why, when this happens, the flag state jurisdiction disappears like magic, leaving the oil owners or cargo owners or shipowners, or the coastal state, to pick up the tab on liability.

These aspects raise very interesting problems and Canada has, I think, shown that it is as willing and as active as any other state in the United Nations to negotiate through multilateral channels to arrive at an accommodation with respect to all of them. We are hopeful that such accom-

modations can in fact be achieved in 1973 on the basis of our shared perceptions of the common interests of the international community.

The CHAIRMAN congratulated Mr. Beesley on his thought-provoking comments and told him that, whether or not he agreed with his preferences, he was impressed by his sense of relevant authority.

Mr. BERNARD OXMAN, Assistant Legal Adviser, Department of State of the United States, was presented by the CHAIRMAN as the second commentator.

COMMENTS BY BERNARD OXMAN *

I would like to address myself chiefly to the points raised by one of the two principal speakers: first, the interests of this country, and indeed of many other countries, to secure an adequate supply of energy resources. This is an important consideration, and many political and other factors can interfere with the flow of these resources to the United States. Without engaging in a battle of statistics, I would like to ask this question: If the United States had sovereign rights under the Continental Shelf Convention over all of the continental margin, including the continental rise off of its coast, would that be sufficient to free future generations of Americans from the necessity of importing critical quantities of energy source materials for their domestic needs? Insofar as it is desirable for the United States or any other coastal country to have available to it a secure source of energy which it can use first, there is absolutely no doubt that the Nixon proposal achieves that goal. I quote from Mr. Stevenson's address. In describing the benefits to the coastal state of the system of trusteeship, he said without equivocation that the coastal state "could ensure that such resources are available first to satisfy its own economic needs." There is absolutely no doubt then as to the commonality of objectives.

There is also a question of achieving these objectives. In this connection, I would like to cite some specific provisions from the United States draft convention which was submitted to the United Nations as a working paper. Specifically I refer here to paragraphs (a), (b), and (c) of Article 28 of that convention. Article 28 (a) says that the coastal state will decide the licensing procedure in the trusteeship zone. Under Article 28 (b), the coastal state is given authority to determine whether a license shall be issued. Thus it is up to the United States or to any other coastal state to decide, if it so chooses, against the development of resources in the trusteeship zone, for example, to keep these resources as reserves, to avoid complications arising out of competing uses of the sea, or for any other reason. Under Article 28 (c), the coastal state can further (without violating Article 3 which is a clause on non-discrimination) discriminate among applicants for licenses in any way it chooses. This is an express

* Assistant Legal Adviser, Department of State.

exception to the non-discrimination provision in Article 3. These provisions read together do invest considerable authority and control in the coastal state over the trusteeship zone, and in this light one really cannot lay charges of wholesale giveaway against the Federal Government of the United States.

It may be that the balance of authority has been shifted in one direction or the other. Indeed, it is pointed out that the balance has been shifted in favor of the international organizations. Again, as Mr. Stevenson noted, this is a problem that can be resolved pragmatically.

It is argued that what is entailed is a relinquishment of sovereign rights in exchange for the uncertain status of trustee. But again I believe that whatever uncertainty there might be in the U.S. draft can be resolved during the negotiating process that is under way, and by the time we get through the Law of the Sea Conference in 1973 we can be sure that the rights of coastal states in this respect will have been clarified.

All these issues involve the definition of the continental shelf as contained in Article 1 of the Continental Shelf Convention. The very first word that appears there is "continental shelf." We know that efforts were made to eliminate this word and substitute for it a term such as "seabed areas." These efforts failed. The term was retained, as noted in the commentary of the International Law Commission, to indicate the nature of the areas in question. Accordingly, I do not think we can address ourselves to the definition without referring to the words "continental shelf" and emphasizing only the term "adjacent." It is equally significant to note that a proposal to include in the definition the term "continental terrace" was rejected by the Geneva Conference. At that time "continental terrace" was understood by geologists to mean continental shelf and the slope. Hence, I often wonder how the proponents of a wide shelf doctrine manage to include the rise under the term "continental terrace." Further, Mr. Garcia Amador, who was mainly responsible for the adoption of the "continental terrace" concept at the Santo Domingo Conference, referred to adjacency as meaning about 25 miles. He also referred to the continental terrace as extending roughly to a depth of 500 meters. These views were part of the record of the legislative history on the definition of Article 1. We also know that Mr. Garcia Amador made other statements more recently which I believe are not relevant as legislative history.

Different outer limits beyond 200 meters were suggested for coastal state rights under the continental shelf doctrine and none of them proved to be acceptable to the states which attended the Geneva Conference on the Law of the Sea. In other words, the issue of outer limits is very much an open question, and it is to be resolved by us now. That is one of the tasks the United Nations is currently facing.

We also have to consider coastal state rights under customary international law. Among the sources of customary law, we look first to the Truman Proclamation, which simply used the term "continental shelf." It is reasonable to assume that it used that term as it was generally un-