1971 Villanova Ocean Conference
Comments of J. Alan Beesley*
on Paper #8 (Bernard Oxman)
"The Case for the U.S. Draft
Treaty for an Ocean Regime"
May 1, 1971

Note: These comments, taken from the tape-recordings of the Conference Session, do not necessarily represent the views of the speaker's government.

Thank you very much. I am here to talk about the Nixon proposal, but I shall actually say very little about it because of this time limit of which I have just been reminded. I had better begin therefore with the Nixon Proposal, though I would rather develop a logical progression of ideas on other issues and conclude with comments on it. Canada has not taken a public position thus far concerning the proposal and I do not propose to do it today. I would, however, like to draw attention to one or two implicatins of the Proposal, as we see them.

Firstly, as you will note, the Proposal places considerable emphasis on the cessation of national sovereign rights at the 200 metre isobath. We have done our own studies of the implications of the 200 metre isobath, even though we have not considered it a particularly revelant guide to national limits, but have looked instead to the exploitability test enshrined in the Continental Shelf Convention.

Our studies of the 200 metre isobath and its possible relevance indicate that it is not generally representative of the shelf break, and in fact, not only does the shelf break occur throughout the world at depths usually considerably less than, or greater than, this figure, but the world average is estimated by marine geologists to be only about 132 metres. So if there is an attempt to strike an average as a basis for determining the beginning or the end

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mile baseline provision contained in the draft treaty would enable the enclosure of the Santa Barbara Channel where some promising oil discoveries have been made in 450 metres of water, as well as several troughs cutting the shelf elsewhere.

Now, without intending any criticism or commendation of the Proposal, it is, I think, relevant to note that in our own case Canada would lose something like eighteen percent of its shelf, quite apart from the slope and the rise. Some two-fifths of Norway's large Arctic shelf would fall into the trusteeship zone. Denmark and Iceland would fare little better. Whereas, in the case of the United Kingdom - although her oil and gas reserves in the North Sea area would not be affected- some fifteen percent of her total physical shelf would fall into the trusteeship zone, involving areas adjacent to Rockall Bank and the Falkland Islands. It indicates to us that we have to be careful in choosing any depth criteria as a sole basis for determining national jurisdiction. Now this is a truism, of course, but one that is very valid today when we are faced with this vexing and delicate problem of determining the area beyond national jurisdiction.

There is another comment I might make - and I would not wish to enter into the particular discussion, either the domestic one as to the desirability from the point of view of the U.S.A, of the trusteeship approach, or the other one between developing countries and the U.S.A. as to the validity of the trusteeship concept or the trusteeship nomenclature. But I would like to say that we ourselves find that it is necessary on the basis of our own experience concerning the Canadian continental shelf that the authority, whoever it is, be it international or coastal state or trustee, must be a clear-cut authority in order to deal with foreign companies, often extremely powerful multinational companies, with wide ranging interests. It is necessary also to have authority

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in the other sense of the term, namely the power of sanctions, and some practical means of dealing with them and determining issues.

We are worried, not so much at the looseness or the vagueness of some of the proposals in the Nixon Proposal, but rather at the elasticity of some of them. We find that, indeed, it is not clear who would have the real authority even on operational issues. We wonder if this would make for an effective resource management system. The foregoing are merely preliminary comments and are not intended in any sense to suggest that apart from these questions we find the Proposal acceptable. But it does seem to us that the Proposal brings out these kinds of issue rather clearly.

Perhaps the only thing I would like to say, other than what I have just said about the Proposal, is that whatever one's views may be as to its merits or demerits, it is, in our view, a very constructive attempt to attack a problem facing the international community with some new concepts - whether we end up accepting them or not. It isn't the same tired old approach based on traditional concepts which in many respects no longer have much application. And it also has another merit in that, in one way or another, it raises almost every one of the issues which we have to face. For that reason alone we believe that the State Department and the other agencies concerned in the drafting of this Proposal, and indeed the U.S. Government itself, in putting forth the Proposal, are to be congratulated and deserve a good deal of credit for the approach they have taken. I must also say that the general approach we find being taken by the U.S.A. delegation in the preparatory conference, and in the discussions in the UN, encourage us a good deal because we find that there is flexibility and a willingness to consider new approaches. And this leads me into the part of my statement which I will undoubtedly not be allowed to finish.

I want to give you some idea of our thinking in Canada on certain other law of the sea issues. I understand that the very eminent jurist

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Wolfgang Friedmann has already spoken to you, and that he has made his well-known eloquent defense of the freedom of the high seas. I suppose his patron saint is Grotius, but for my part, I think I should make clear that I came here not to praise Grotius but to bury him.

If I may revert for a moment to some of the kind words spoken by my friend and colleague, Mr. Oxman, it wasn't accidental that I should be in New York as a representative of Canada, collaborating with many of the people here with us today in attempting to work out a compromise resolution enabling the international community to face up to these problems of 1973, at the very time when the Canadian Government was considering taking a form of unilateral action which it subsequently did take. The reason is quite simple, and I think the best way I can explain the relationship is to quote a section from a passage in a statement I had the duty and the honour to deliver on behalf of Canada in New York in the First Committee of the United Nations last year. The statement in part reads as follows:

> "In brief, we do not consider multilateral action and unilateral action as mutually exclusive courses. They should not, in our view, be looked upon as clear-cut alternatives. The contemporary international law of the seas comprises both conventional and customary law. Conventional or multilateral treaty law must, of course, be developed primarily by multilateral action, drawing as necessary, however, on principles of customary international law. Thus multilateral conventions often consist of both a codification of existing principles of international law and 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 enshrined 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. The complex process of the development of customary international law is still relevant and indeed in our view essential to the building of a world order."

The maintenance of the customary law-making process is essential if only to put pressure upon other countries to face up to issues they would

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otherwise bypass. For these reasons we find it very difficult to be doctrinaire in such questions. The regime of the territorial seas, for example, derives from conventional law, including in particular the Geneva Convention on the Territorial Sea, which itself is based in large part upon customary principles, and in part from the very process of the development of customary international law itself. The statement in question went on to point out that during the period during which it was possible to say - if there ever 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.

I don't propose to go on with that statement but I would like to make clear that we do not consider either the multilateral approach or the unilateral approach should alone be allowed to predominate on the international scene. We think that either, taken to the extreme, can produce the kind of confrontation that we have been seeing since the failure of the 1958 and the 1960 Law of the Sea Conferences to settle certain basic issues. For example, had there been a real effort on the part of the international community to tackle the problem of pollution of the marine environment multilaterally we in Canada might have had rather less reason to take the unilateral action we did. But on the other hand I think, with all modesty, we must ask whether, if we had not taken that action, would there be as much attention now being given to the ecological problem, the problem of the pollution of the marine environment? We had other reasons for doing it, of course. We had a practical problem on our hands at the time and we acted accordingly.

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I must say that this reminds me again of the kind comments of Mr. Oxman. We have a relationship now fairly firmly established - I don't know whether we are friendly enemies or rather, whether friends like us really don't need enemies. I think our relationship is sometimes one whereby he writes the protest notes and I file them. I sometimes help draft the counter protest. This is the way we go. But we don't do it lightly. We do it seriously because we are representing genuinely different approaches to these problems. My own view, however, is that, increasingly, we are coming together and there is less and less polarization of views on the issues that we are facing. I think this began to become clear in the closing days of the Geneva preparatory conference which we saw in March of this year.

I would like to add one further comment before concluding with one of my favourite comments on Grotius - namely, that we have had some of our own ideas about the problem of the seabed, and we have attempted to suggest approaches that might overcome some of the procedural difficulties facing the international community as exemplified in the preparatory committee of the United Nations Conference.

We ourselves are concerned and disturbed about the extent to which procedural problems have handicapped the Committee, producing a deadlock on several occasions. We know that the most sensitive issue is the one of limits and we are aware that many states are reluctant to commit themselves either to any proposed regime or to the question of international machinery until they have come to grips with the problem of limits. We are also aware that other states have no intention of committing themselves on limits until they see in more precise detail the nature of the regime they are going to be facing, and how much real power and authority the international machinery will have. It's easy to see that we are on a procedural merry-go-round here since we are involved in a circular process. We have a very

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simple suggestion which we have put forth. We haven't made a formal proposal but have merely offered a suggestion in Geneva, and it is this: that every member state of the U.N. by a given period, a specified date, would make known its claim to its continental shelf. If it didn't have a clear idea as to where its interests lie then it could make known the line beyond which it would never claim. This would have the effect that, as of a given date, we would have an immediate definition of the non-contentious area beyond national jurisdiction. It wouldn't settle the problem of limits and it wouldn't prejudge the question of limits, but it would give us an area of more than fifty percent, perhaps much more, of the seabed area which would no longer be a theoretical consideration or a matter of conjecture but it would be in actual existence, a concrete area. We think that if this were done it would be possible, simultaneously with this proposal, to set up a skeletal international machinery for the purpose of managing the non-contentious area and gradually extending management to the other areas, some of which are still in dispute.

This skeletal machinery would have the necessary powers, for example, to cope with the kinds of problems raised by the Deep Seas Mining Venture, whereas no one is now in a position to authorize the venture, yet no one is in a position to forbid it. How are the investors going to be protected? What kind of a title are they going to require? Are they supposed to hold back any development, any investment, etc? We think our suggested approach presents a possible and feasible answer to this problem.

There is a third element in our proposal, which is really independent of the first two, which would provide operating funds for the skeletal machinery, namely, the suggestion that every coastal state would grant, voluntarily, pending a determinative decision on the regime, to an international development fund, a percentage, perhaps as little as one

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percent of the revenues, the governmental revenues, from all the off-shore activity beyond internal waters; not beyond the territorial sea because there is too much dispute as to the breadth extent of the territorial seas. The territorial sea also would be subject to this international development tax which we think could give funds, perhaps as little as two and a half million dollars a month, perhaps as much as fifteen million a month, to the international community. We think that by this means we could break the procedure deadlock that is facing us and make a considerable leap forward in attacking the problems raised by the third Law of the Sea Conference in 1973. We realize that there are difficulties in the way of acceptance of such a proposal. We don't think it will encourage wide claims, because we doubt if any state is going to be motivated, in the final analysis, by any considerations other than the necessary balancing between its own national interests and the interest of the international community. And we think that this proposal can bring that about.

I want to close where I began. I think that on the question of the seabed, as on the questions of the territorial sea, international straits, fisheries, scientific research, and most important of all, pollution, we are facing a clash between the coastal states and maritime interests. The principle which we must modernize and develop is the principle of innocent passage. We are afraid that the principle of freedom of the high seas as an absolute doctrine has had its day. We think its essence has to be retained, but it has to be modified, clarified and developed in the light of present needs and present moder technology.

I would refer you to Grotius' statement some 360 years ago that "Most things become exhausted by promiscuous use. But that is not the case with the sea. It can be exhausted neither by navigation nor by fishing. That is to say, in neither of the two ways in which it can be used." We fear that traditional concepts of the law of the sea have been 10/

founded upon that very assumption, which was valid for a couple of centuries. But it is not valid any longer when mere navigation can cause pollution of the sea; when the mere right to fish can cause overfishing and a depletion of the resources on which the whole world may be dependent.

We think that these principles simply require modification. We think particularly that the principle of 'flag-state jurisdiction' has to be looked at very carefully and, if not abandoned, at least restricted. We think it ridiculous that under the flag-state jurisdiction principle a state can sink a ship many miles at sea, if necessary, if there is danger of immediate pollution, but the coastal state cannot tell that ship to turn about or come into port or do any other thing. It is entirely under the control of the flag-state, perhaps a flag of convenience. By the same token this very strict flag-state jurisdiction persists right up to the moment of the disaster. But at that moment it disappears; it disappears in a puff of smoke - or oil. From that point on the flag-state has nothing to do with it. That's not its problem. That's up to the coastal state and perhaps the owners of the ship or the cargo owners. We think this has to be changed.

Thank you very much, Mr. Chairman.

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