NB. page 6

RECENT CANADIAN MARINE LEGISLATION: AN HISTORICAL PERSPECTIVE

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I. The Sea as Space, Resource and Environment

Most international lawyers are classists, or neo-classicists, at heart. They are vulnerable to the attractions of simplicity, symmetry, clear-cut distinctions, harmony, order and repose. The classical predilivities of the international lawyer shaped the first-order principles of the law of the sea. Even today the crucial concept of balance between inclusive and exclusive authority can be seen as neo-classical, derived directly from the classic contest between Grotius and Selden.

Yet the international society we know today is complex, lopsided, confused, dissonant, disorderly and hectic. In brief, we live in a fitful and intemperate age of political romanticism. The contemporary law of the sea is, therefore, generally conceived as performing a defensive role, restraining dangerous excesses that threaten to disturb the existing balance between shared and unshared authority at sea.

For some the classical tradition goes beyond asserting this kind of balancing role for the law of the sea to maintaining the Grotian or neo-Grotian position that the balance should be kept in favour of shared authority over the largest possible extent of the world's oceans. The freedom of the high seas should be defended against all encroachments. Concessions should be made only in the face of strong evidence of universal consent.

The classical tradition lasted up to World War [illegible] when the international law of the sea was developed within a rather simple framework of concepts. Norms were few and general. Reciprocity and uniformity were the cardinal principles governing the allocation of state authority. The sea itself was a spatial concept, global in comprehension. The primary legal issue was the legal status of the area in question. For users of the sea -- men and vessels -- the criterion of nationality provided the link between status and function.

It was natural and easy for states in the classical period to accept one another's claims to possession of exclusive, all-purpose authority in coastal waters. Claims to a uniform seaward extension of territorial integrity were supported by the common need of maritime states to shore up their social, political, military and psychological defences. National economic interests were also served by the grant of monopoly to the coastal state over the resources within its territorial waters, but for most maritime states economic interest was served much more significantly by the assurance of unimpeded opportunities in the great expanse of the high seas.

After the Second World War cynicism and despair gave way to a measure of confidence and a renewed faith in the prospect of human development. Highly organized and universal devotion to developmental objectives provided a moral climate conducive to acquisitive national philosophies. Partly because acquisitive wars could no longer be tolerated in

the international society, the sea became a new frontier, as one after another the maritime states began to stake out their claims to the wealth of the sea. The sea had become a resource. A more functional, resource-related approach to the law of the sea fell logically into place. The role of marine resource law was seen, in neoclassical perspective, as that of a restraint on the most excissive acquisitive claims by states to the universal patrimony of marine resources.

Short-sightedly, the neo-Grotians conceded that a national regime over the wealth of the continental shelf was a safe compromise with the proponents of closure; the legitimacy of national development objectives in the sea was accepted uncritically; mineral exploitation of the shelf seemed free of the conservation issues that complicated disputes over renewable resources; the fact of unequal benefit could not be blamed on human choice; and it was a relief, after all, to be able to respond to a claim made by all coastal states on the basis of reciprocity.

By 1958 it was clear that fishery disputes were the most difficult of all marine resource issues to resolve. The new marine technology widened disparities in fishing capability and thereby aggravated the problem of finding a classically simple formula that could accommodate conflicting fishery needs and interests. Since then it has been argued more frequently by fishing states that their fishing needs and interests are unique

or special. This alleged loss in comparability has resulted in a de-emphasis on uniformity and reciprocity and is reflected in a trend away from universal formula to special regime, from special regime to regional organisation, from regional organisation to bilateral negotiation, and from bilateral negotiation to unilateral assertion. For political, economic, and even scientific reasons, many maritime states are adopting an increasingly particularistic, less widely cooperative approach to their marine needs and interests, an approach that has disturbing diplomatic, legal, and even moral implications.

The latest phase in the history of the law of the sea is of very recent date. The environmental crisis is composed of elements that seem to present an opportunity for the neo-Grotians to re-group in defence against expansionist, acquisitive claims by states. Developmental logic is now fashionably suspect. Coordination of resource management policies is a new imperative. Cooperation and the merger of managerial units have already resulted from the acceptance of the need for a new emphasis in comparative studies and an integrative approach to resource policy planning. Whatever the outcome of the forthcoming Stockholm and Geneva Conferences, it is difficult to believe that concern for the state of the biosphere will not have an intellectual impact on the latest attempt to modernize the law of the sea.

The new environmental approach to the law of the sea involves biological or ecological concepts that will replace eventually the purely spatial concepts of the pre-scientific

classicists and will modify the economic concepts of the developmentalists. It should not be thought, however, that the environmental apprach is hostile to the classical or neo-classical tradition. Balance is the critical concept in ecology. But for envoronmentalists balance relates to the preservation of mutually interdependent biological processes, not to the juxtaposition of complementary legal concepts or the moderation of political claims. Legal asymmentry and political immoderation are environmentally dangerous only if they tend to produce an imbalance in biological relationships.

Nor is the environmental approach to the law of the sea opposed to the general need for resource development. But now, at the beginning of the third stage of the law of the sea, we can observe that the sea is dying. The overriding threat now is not so much that of resource depletion through overuse as that of environmental decay through misuse.

II. Focus on National Marine Policy

If new developments in the law of the sea are to be appraised by environmental criteria, as well as by existing legal and political criteria, then so too must new national claims to maritime jurisdiction. The Canadian Arctic Waters Pollution Prevention Act, enacted by Parliament in 1970, is a new kind of unilateral national initiative in the law of the sea. Unlike the unilateral national initiatives of the second stage, this Canadian statute

is non-acquisitive in purpose: that is, it is not designed to facilitate the acquisition of marine resources by the coastal state in areas beyond the normally accepted limits of the territorial sea. Moreover, it is distinguishable from conservation legislation, for the protective authority claimed extends beyond a single resource, or a single set of resources, to the entire environment. There are, of course, economic reasons for environmental protection in the Arctic, for all users of the region, but these reasons are less immediate and less basic than the biological or ecological.

The unilateral form of the intiative has, unfortunately, distracted attention from the fact that the purpose and the substance of the legislation owe no more to the closed sea philosophy of Selden than to the open sea philosophy of Grotius. It can be argued that Selden's central argument was self-defence, but it is equally true that Grotius' transcendental concern was for the perpetuation of nature in the service of mankind. The issue can no more be resolved in purely spatial terms, than simply by reference to the right of access to scarce resources.

As a claim to environmental authority, the Canadian initiative can be fairly judged only by inquiry into the larger context of emerging Canadian national marine policy and by comparison of that policy with the marine policy emerging in other countries. This may sound like a bold and unusual

approach in the context of the law of the sea, but it is likely to be regarded as a realistic and conservative approach in the context of international environmental problems. In the environmental stage of the law of the sea it must be questioned whether Geneva logic can afford to be much more restrictive than the logic of Stockholm. In other words, the modernization of the law of the sea in the environmental era should, ideally, be undertaken by national governments in the wake of a massive effort to organize knowledge about the marine environment, it uses and abuses; and a rational, modern international marine policy based on that knowledge is most likely to emerge after a systematic comparison of national marine policies. The usefulness of comparative studies of national marine policies is more evident, however, as an approach to the study of marine disputes, which is a surprisingly ill-developed study, considering the number of such disputes and their relevance to the development of the law of the sea.

The scope of a study of national marine policy cannot be defined in an arbitrary way. It should in any event vary with the nature and extent of the maritime interests of the state in question. In some cases, however, it may be desirable to inquire into non-policy as well as policy. At the moment, for example, Canada has a merchant marine non-policy that certainly needs to be examined in the context of Canadian national marine policy.

However its scope is to be defined in any one study, "national marine policy" can be regarded as having "soft" and "firm" components. Expressions of policy may range from positions adopted consistently for purposes of diplomatic negotiation though various kinds of government decisions to permanent constitutional requirements. The outside observer's difficulty in discovering the "softer" components of national marine policy may lead him into excessive dependence on the "hard" data provided by national legislation. It should, therefore, be borne in mind that the rest of this paper, focussing on Canadian marine legislation, is likely to be distortive, over-emphasizing the "firmer" components of Canadian marine policy.

III. The Legislative Component Canadian Marine Policy

Canadian sea-consciousness is extremely spotty. Beyond the Pacific and Atlantic coastal provinces and outside the marine-related industries, Canadians rarely give thought to the natinn's maritime interests. The Canadian naval service is felt to be the offspring of the British naval tradition. With its vast, largely unrealized hinterland, Canada internalises its expansionist aspirations to a high degree. The Canadian marine economy has never been systematically planned though a single national marine investment policy. On the other hand, the sea has never seemed to threaten the Canadian way of life, even in time of war. As for Canada's Arctic, few citizens

considered its maritime aspect before the Manhattan voyages. In the environmental period the traditionally casual attitude toward Canadian marine interests is now changing and taking on a protective character, in line with Canadian public attitudes towards the Far North and the Great Lakes Basin. Faced with this change in public sea-consciousness, it is certain that Canadian governments will be encouraged to adopt further protective legislation with respect to the Canadian marine environment.

The nature and extent of Canadian claims to protective environmental authority beyond territorial limits at sea will depend very largely, of course, on the speed and adequacy of international action. It will depend, on the one hand, on the outcome of bilateral diplomacy concerning specific pollution problems, such as Canadian-U.S. negotiations for the establishment of a regulatory regime governing oil tanker traffic in the Northeast Pacific, and possibly in other regions. It will depend also on the outcome of Stockholm, Geneva, and the 1973 IMCO Conference on Marine Pollution. There is already clear evidence that the Canadian government intends to press hard for a comprehensive, scientifically meaningful, international approach to the problems of protecting the total marine environment. To be scientifically meaningful, environmental law has to focus on preventive

rather than remedial measures. This approach does, however, involve enormous difficulties, and requires some faith in the scope of political inventiveness and legal imagination. It is likely to fail in the absence of significant international action after Stockholm in dealing with non-marine environments.

The Arctic Waters Pollution Prevention Act, the Canada Water Act, recent amendments to the Canada Shipping Act and the Fisheries Act, and (arguably) the Clean Air Act, are all conspicuous examples of new Canadian marine legislation which is environmental in orientation. It would be wholly misleading, however, to suggest that all recent Canadian marine legislation fits this description. The 1970 amendments to the Territorial Sea and Fishing Zones Act and the Fisheries Act were designed to extend Canada's territorial sea from three to twelve miles and to authorize the establishment of exclusive Canadian fishing zones on the high seas in areas adjacent to the new 12-mile territorial sea. The first purpose was to bring Canada into line with most other States though the extension of a spatial concept which is becoming less meaningful, in rational terms, under the stress of specific developmental objectives that are now commonly entrusted to separate national or international regimes of a functional nature. The second purpose, of course, was to extend the Canadian national fishery regime under the rubric of national resource development policy.

The 1970 extension of Canada's territorial sea did not produce a strong reaction abroad. As an expansionist territorial claim, the amendment to the Territorial Sea and Fishing Zones Act has been less provocative to neo-Grotians than the original statute, enacted in 1964, which took the more controversial step of adopting straight baselines for the measurement of territorial and fishing limits to close extensive areas off the coasts of British Columbia, Nova Scotia, Newfoundland and Labrador under the regime of internal waters. In 1951 the principle of straight baselines was accepted by the International Court of Justice and applied to the Norwegian coastline. The principle was endorsed in the 1958 Convention on the Territorial Sea and Contiguous Zones and applied to all areas where coasts are heavily indented or where there is a fringe of islands. At the time of writing straight baselines have been promulgated and applied to only a few sectors in the areas designated in the 1964 Canadian statute. However gradually applied, the Canadian straight baseline policy is in sharp contrast with the present United States practice of keeping the areas of internal waters at a minimum by following the low-water line wherever possible.

Under the 1970 amendment to the 1964 Act Canada proclaimed "fisheries closing lines" in the Dixon Entrance-Hecate Strait, Queen Charlotte Sound, the Bay of Fundy, and

the Gulf of St. Lawrence, [illegible] its, pioneered by Iceland, [illegible] concept of straight baselines. The Canadian fisheries closing lines, by contrast with straight baselines, do not affect the legal status of the areas enclosed; they relate only to the extent of Canadian fisheries jurisdiction. Closing lines for the designated areas came into existence in February 1971, but it should be noted that the Dixon Entrance line has been disregarded in recent U.S. charts (8152 and 8102) that delineate the U.S. territorial sea and contiguous zone.

This resource-oriented, non-territorial claim (to fisheries closing lines) has been described as a measure "to assert Canadian jurisdiction over fisheries conservation and management in an additional 80,000 square miles of coastal waters and to extend to those waters the effective range of Canada's anti-pollution programmes". But it is clear that this legislation is primarily an expression of economic interest, rather than of environmental concern. This was implicitly conceded by the Secretary of State for External Affairs and the Minister of Fisheries and Forestry when they announced the government's intention to negotiate the phasing out of fishing activities by countries which have traditionally fished in the areas enclosed within the promulgated fisheries closing lines; namely, Britain, Norway, Denmark, Portugal, Spain, Italy, and France. France, which has treaty rights in specific

areas off Canada's east coast, presents a special case. The United States also has treaty rights in the Canadian Atlantic region, but a separate Canadian agreement confirmed that American fishing activities would not be affected by the Canadian fisheries closing lines during the period of the agreement, which is due to expire in 1972.

IV. Canadian Marine Legislation and International Marine Policy

As noted above, legislation represents a relatively "firm" mode of expressing national marine policy. When it purports to have extra-territorial effect, it constitutes a direct affront to Grotian and neo-Grotian predispositions in favour of shared authority over the high seas. When it goes further and purports to extend territorial limits, and thereby the range of national sovereignty, it raises basic questions about the making of international marine policy.

In the early 1970's the Canadian adoption of a 12-mile territorial sea can scarcely be regarded as unusually provocative. The principal objection to this kind of territorial claim is that it is becoming logically unnecessary as the rationale for more extensive claims to national maritime jurisdiction for specific purposes. The extension of a state's territorial sea conceals its real maritime needs and interests and renders its national priorities obscure. It will often tend to result in self-deception as well as concealment and obfuscation. But there is still a

substantial symbolic investment in the concept of a territorial sea by states throughout the world and it may still be premature to anticipate its absorption into a system of functional and environmental regimes.

The Canadian adoption of straight baselines is a more controversial piece of legislation. The principle is well established in international law, but the application of the principle to designated areas of the Canadian cost-line and the manner of drawing the baselines are matters that should not be withheld from the jurisdiction of the International Court of Justice. In the absence of effective international controls for the prevention of marine pollution there is prima facie a stronger environmental argument in favour of bringing semi-enclosed coastal waters under the regime of internal waters. It would be interesting to see if the I.C.J. would take notice of such lacunae and go beyond its 1951 resource criterion of socio-economic dependance to espousal of the environmental principle that the nearest adjacent state has a special responsibility for (as well as a special interest in) the preservation of the marine invironment. Once again, however, it should be emphasised that the concept of territory (internal waters) is unnecessary to justify the exercise of national environmental authority over coastal waters.

The Canadian resort to fisheries closing lines to extend fisheries jurisdictinn beyond territorial limits is an interesting device that should be, and is, regarded as preliminary

to negotiations with the foreign fishing states that would be affected. How these states respond to this evidence of Canada's policy emphasis on its coastal interests will no doubt be determined by considerations that transcend the limits of "legal policy". The principle of phasing out foreign fishermen over a period of years in favour of the coastal state is a familiar one in the recent history of fishery diplomacy. As long as the fisheries closing lines legislation remains anticipatory in character -- pending the successful outcome of Canadian phasing out diplomacy -- it should be regarded as a less inflexible component of Canadian marine policy than it appears to be in legislative form.

The Canadian marine pollution legislation made applicable beyond territorial limits has to be viewed as part and parcel of a tough, coherent national environmental policy that is now emerging in the newly-created federal Department of Environment. It is believed that the new marine environmental legislation, still in an early stage of evolution, should be regarded as representing a firm and important component of Canadian national marine policy. It is also apparently an area in which Canadian diplomacy is prepared to offer initiatives in promoting international action without prejudice to Canada's own environmental interests.

In conclusion, it seems necessary to comment on the charge that Canada has abandoned its internationalist tradition in maritime affairs. Canada has never been an important flag state. Only in recent years, with growing attention to the policy implications of the nation's maritime needs and interests, has a Canadian government identified closely with the class of coastal states to which it belongs. As a coastal state Canada can hardly be expected to defend the neo-Grotian tradition at the expense of its coastal interests. The concern should be that a coastal state does not adopt an unreasonable nationalistic marine policy that involves unilateral action and unnecessary encroachments upon the freedom of the high seas. The reasonableness of Canadian national marine policy should be tested by reference to a balance between relatively firm legislative components and relatively flexible diplomatic components. It is still rather early to judge the firmness of the former or the flexibility of the latter, but it should be noted that recent marine legislation at home has not deterred the Canadian Department of External Affairs from adopting an all-inclusive approach to the composition of the agenda for the Third United Nations Conference on the Law of the Sea. In December 1970 the Canadian Representative in the First Committee supported the adoption of an agenda that would include "all the issues to which various states or groups of states attach importance, namely: (a) the breadth of the

territorial seas; (b) transit through international straits; (c) the nature and extent of jurisdiction of the coastal state over coastal fisheries; (d) the rights and duties of states with regard to the conservation and management of the living resources of the sea, including in particular the special interests of the coastal states; (e) marine pollution; (f) scientific investigations; (g) the precise definition of the outer limit of the continental shelf; and (h) the international regime, including machinery, for the seabed beyond national jurisdiction."

Whatever positions may be taken on these issues, this all-inclusive approach to the Geneva agenda is hardly that of a maritime state that has lost the faith in international processes of law making.

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