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INTRODUCTION:

INTERPENETRATION OF DOMESTIC AND INTERNATIONAL LAW

The subject under discussion this morning is "Offshore Mineral Rights Considered from an International and Constitutional Law Point of View". Since my function as Legal Adviser of the Department of External Affairs relates to international Law, I shall confine my comments essentially to that aspect of the problem. It is important to note at the outset, however, that in the law of the sea there is no clear dividing line between the respective ambits of international and national law, as will be apparent from my comments and those of the other panelists. Indeed, there is, in my view, no other field of law in which there is such an intimate and organic inter-relationship between law on the domestic plane and law on the international plane.

I propose to illustrate this point by commenting on two propositions relevant to our discussion today:

(a) the offshore mineral rights dispute between the federal and provincial governments is an internal Canadian problem and international law has nothing to say about internal constitutional matters of a federal state;

(b) international law is however determinative of Canada's rights as a state vis-a-vis other states and the international community as a whole.

INTERPENETRATION VIEWED FROM THE PERSPECTIVE OF MUNICIPAL LAW

Dealing firstly with proposition (a), there is I think ample

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evidence of judicial recognition of the interpenetration of domestic and international law even on this seemingly internal problem. Viewing the inter-relationship from a domestic point of view, I submit that it was an internal Canadian constitutional question which was in issue in the 1913 decision Atty.Gen. for B.C. vs. Atty-Gen. of Canada re: B.C. Fisheries, wherein the Privy Council expressed the opinion that an international conference would be required in order to settle uncertainties concerning the juridical nature of the territorial sea, and went on to say: "Until then the conflict of judicial opinion which arose in the Queen vs Keyn is not likely to be satisfactorily settled, nor is a conclusion likely to be reached on the question whether the shore below low-water mark to within three miles off the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and public purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn, C.J. in that case. But apart from these difficulties, thereis the decisive consid eration that the question is not one which belongs to the domain of international law alone." In that same decision the judicial committee of the Privy Council declined to express any opinion on the question whether the Crown has a right to property in the bed ofthe sea below low-water mark to what is known as the three-mile limit. "The questions raised thereby affect not only the Empire generally, butalso the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a Conference it is not desirable that any municipal tribunal should pronounce on it."

When the question of provincial propriety rights to the territorial sea subsequently arose in Atty. Gen. for Canada vis. Atty.Gen for Quebec a 1921 decision, the Judicial Committee of the Privy Council once again

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refused to decide the question of property in the subsoil of the territorial sea.

> "It is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, inasmuch the point is one which affects the Empire as a whole."

Can anyone deny the internal, indeed, the local nature of the dispute considered in the 1963 decision of the Supreme Court of Nova Scotia in Re Dominion Coal Company Limited on the right of the County of Cape Breton to assess for municipal taxes the underwater working of a coal company to which there was a tunnel from shore? Yet the decision once again was that "This Court should refuse to be drawn unnecessarily into a pronouncement of such a nature as the proprietary interest in the maritime belt".

Whatever doubt may have existed, however, concerning the possible relevance of certain principles of international law to Canadian "internal" constitutional disputes was dispelled, surely in the 1968 Advisory Opinion of the Supreme Court of Canada in the Reference concerning the Offshore Mineral Rights of British Columbia. The opinion turned in large part on principles of international law, in particular the recognition or non-recognition in English law of the international law concepts of the territorial sea and the continental shelf at the time of the entry of B.C. into Confederation.

To quote only one passage from the Opinion, in a direct reference to the issue as to the juridical nature of British territorial waters and the subjacent seabed, the Court stated that the Territorial Waters Jurisdiction Act of 1878 "did not enlarge the realm of England, nor did it purport to deal with the juridical character of British territorial waters and the seabed beneath them. We have to take it, therefore, that even after the

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enactment of the Territorial Waters Jurisdiction Act the majority opinion in Reg. vs. Keyn that the territory of England ends at low-water mark was undisturbed." In a subsequent passage, which may or may not be obiter dicta, the Court said:

> "There can be no doubt now that Canada has become a sovereign state.....
>
> "It is Canada which is recognized by international law as having rights in the territorial sea adjacent to the Province of British Columbia.....
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> "Canada has now full constitutional capacity to acquire new areas of territory and new jurisdictional rights which may be available under international law.... .....Canada is recognized in international law as having soverignty over a territorial sea three nautical miles wide. It is part of the territory of Canada."

If this passage is really relevant, then presumably it is so only to the extent that it affirms that Canada as an independent state has the rights in question, whether or not they accrude to the provinces or to the federal government.

In a later, much more controversial passage, the Court not merely recognized the interpenetration of municipal and international law but virtually merged them by blurring the distinction between the Crown in the Right of Canada, and Canada the international entity, in the following passage:

> "Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea."

Fortunately, this curious passage is not an essential part of the ratio decidenda of the case, and I cite it merely to dispose of it as not of relevance to our discussion nor to the point I am making about the interpenetration of municipal and international law even, on occasion, on constitutional issues.

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Before leaving the B.C. Offshore Mineral Rights reference, it is appropriate to note the complexity of one of the mixed questions of municpal and international law on which the Supreme Court of Canada made an authoritative pronouncement, namely the interpretation to be given to Regina vs. Keyn, treated by the Supreme Court as decisive on certain issues at stake in the B.C. Reference. Having cited that decision the Court expressed its conclusions up to that point as follows:

> "1. The realm of England where it abuts upon the open sea only extends to low water mark; all beyond is the high sea.
>
> "2. For the distance of three miles, and in some cases more, international law has conceded an extension of dominion over the seas washing the shores.
>
> "3. This concession is evidenced by treaty or by long usage.
>
> "4. In no case can the concession extend the realm of England so as to make the conceded portion liable to the common law, or to vest the soil of the bed in the Crown. This must be done by the act of the Legislature."

The importance of this authoritative interpretation of Regina vs. Keyn cannot be overemphasized, as indicated in the following excerpt from an opinion which I gave on December 15, 1961 on the B.C. offshore mineral rights dispute:

"Decision in R. v. Keyn

The unsatisfactory state of the then existing English case law and legislation on the subject was brought out in the Franconia Case (R. vs. Keyn). Because of the importance of the questions involved, thirteen judges, comprising the Court of Crown Cases Reserved (a 14th having died during the hearing) considered the question whether a German national who had committed a crime within three miles of the Port of Dover came within the jurisdiction of the Central Criminal Court, which would have had jurisdiction (a) if the act had occurred within the body of a county of England or (b) if it fell within the historical jurisdiction of the Lord

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High Admiralty. It was held, by a majority of only one, that the Court lacked jurisdiction.

Interpretation of R. vs. Keyn by Legal Authors

Because of its possible importance in the dispute the case will be considered in some detail. There is a sharp difference of views amongst the text writers on several aspects of the case. Some consider that the decision merely settled a technical question of admiralty jurisdiction. Jessup, after a lengthy and detailed discussion of the case, concludes that "the actual decision in this case turned upon the authority of a local court to take jurisdiction in the absence of express legislative authority. The many remarks which are found relative to the status of territorial waters are clearly dicta". H. A. Smith comes to a similar conclusion: "The decision of the majority was based on technical reasons of English law which were removed by Statute two years later." Fulton, writing much earlier, says the decision was confined to holding that in the absence of express statutory enactment the Central Criminal Court had no power to try the offense, inasmuch as the original jurisdiction of the Admiral did not enable him to try offenses by foreigners on board foreign ships. Colombos confines the decision to the finding that British jurisdiction ceased at low-water mark and that a person could not be indicted unless the offense was committed in British territorial waters or on a British ship. In Keith's view the case decided merely that "The Admiral's jurisdiction did not apply to foreigners who committed an offense from a foreign ship on persons in a British ship in British territorial waters". He says also that "the decision is probably unsound". Fauchille asserts that the court held that English Courts had no jurisdiction to hear criminal and tort cases when the offense was committed not more than three miles from the English coasts, the littoral state being capable of exercising its judicial power in this zone only in the interest of its defense and safety. Latour seems to hold a similar view.

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Other writers, however, considered that the case went much further and decided that the territorial limits of England ended at low-water mark. Sir Cecil Hurst refers to the decision as "a case which shows equally clearly that the waters within the three-mile limit, the marginal belt, which is usually designated as 'territorial waters' are not part of the national territory." Halsbury's Laws of England cites the decision as authority for the proposition that "the realm of England only extends to the low-water mark, and all beyond is the high seas". D.P. O'Connell, in a very extensive treatment of the case and its possible significance in Australian law concludes that "R. vs. Keyn thus clearly decided, though by a narrow majority, that the territory of England ends at the low-water mark and that the jurisdiction of the Admiral which begins at that point did not, historically, embrace foreign nationals."

There is also disagreement as to whether the decision was in accordance with customary international law at that time. Oppenheim considers that this "decision that an English Admiralty Court did not have jurisdiction over the three-mile belt" resulted from "the uncertain position in international law in the matter of a state's jurisdiction in its territorial waters", whereas in Jessup's view "the many remarks which are found relative to the status of territorial waters under international law are clearly dicta....and it was only the minority" of the thirteen judges sitting on the case which "did not feel that international law accorded complete rights over such territory to the littoral sovereign". According to H.A. Smith, "Eleven out of thirteen judges held that there was nothing in international law to prevent the assumption of jurisdiction."

Yet another aspect of the case is the question whether it cast doubt for a time on the doctrine of incorporation of international law into English common law. The case is considered by Oppenheim (somewhat inconsistently, perhaps, in the light of his comments quoted above) as having

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for a time cast doubt on the question whether the law of nations is a part of the law of England. "The unshaken continuity of the observance of the common law doctrine to which Blackstone gave expression that the law of nations is part of the law of the land and which has been repeatedly acted upon by the courts suffered a reverse as the result of The Franconia (R. vs. Keyn) in 1876) but West Rand Central Gold Co. vs. the King decided in 1905 must be regarded as reaffirmation of the classical doctrine." Starke interprets the decision similarly.

Judicial Interpretation of Regina vs. Keyn

The disagreement as to the implications of thecase is not confined to text writers. In Harris vs. the Owners of Franconia which arose out of the same incident as R. v. Keyn, Coleridge, C.J., who had sat in that case said "the majority of the judges in R. v. Keyn were of the opinion that the territory stopped at low-water mark." In another decision Blackpool Pier Co. vs. Fylde Union, Coleridge, C.J. and Grove, J., (another of the minority judges in R. v. Keyn) held that a pier which extended 500 ft. beyond low-water mark was for the purposes of the Poor Laws outsidethe realm of England.

The Law Officers appear to have entertained similar views as to what was decided in R. v. Keyn. In an opinion on an Order in Council providing for jurisdiction over British subjects in Western Polynesia they said on March 1, 1877 that R. v. Keyn appeared to decide that "the sea washing the shores of a state to the distance of three miles is not part of such a state", and on March 16, 1877, "that the case of The Franconia seems to us to place limits upon the exercise of any jurisdiction on board foreign ships below low-water mark, and to show a distinction between land and the sea below low-water mark, though within the three-mile zone"; and in relation to the application to the Gold Coast of Section 432 of the Merchant Ship Act, 1854, they said "since the case of R. v. Keyn and the Territorial Waters Act, 1878, the United Kingdom must be held to terminate 9/

at low-water mark".

More recently, however, the case has been interpreted somewhat differently in two decisions of the Judicial Committee of the Privy Council. In a 1913 decision, Atty. Gen. for B.C. vs. Atty. Gen. of Canada Re: B.C. Fisheries, the Privy Council expressed the opinion that an international conferencewould be required in order to settle uncertainties concerning the juridical nature of the territorial sea..."the obscurity of the whole topic is made plain in the judgement of Cockburn C.J. in that case," that is to say, the Queen v. Keyn.

Two years later, in Secretary of State for India vs. Chellikani Rama Rao the Judicial Committee decided for the Crown in a dispute between the Crown and a private person respecting the ownership of certain islands which had formed in the bed of the territorial sea, and in referring to R. v. Keyn stated: "That case had reference on its merits solely to the point as to the limits of Admiralty jurisdiction. Nothing else fell to be decided. It was marked by an extreme conflict of judicial opinion."

The Supreme Court of the U.S.A. has cited the decision (in connection with the date at which the three-mile limit became generally recognized), as indicating that "as late as 1876 there was still considerable doubt in England about its scope and even its existence."

Significance of R. v. Keyn

It may be wondered why the case has been given such extensive treatment; a court hearing the present dispute might for instance decline to consider the case on the ground that it was decided after B.C.'s entry into Confederation. Such an approach seems unlikely, however, for the following reasons:

(a) whatever may be deemed to be the actual ratio decidendi of the case, the judges considering it reached their decision on broad general principles of maritime law; and

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(b) it is arguable that the case es t ablishes that even after the date of B.C.'s entry into Confederation, Crown rights to the seabed and subsoil of the territorial sea had not been recognized in English law;

(c) the individual judgements in the case indicate both the uncertainties of the law at the relevant period and that the law was in a state of flux with respect to questions in issue;

(d) if nothing else, the case is illustrative of English legal thought of the period as to the juridical nature of the marginal sea.

Views of the Nineteenth Century Legal Writers:
Juridical Nature of Territorial Sea

There is evidence that the concept that the territorial sea was part of the national territory and included within the national boundaries had been accepted by the mid-19th century by many international lawyers, including the Advocate General of Great Britain; ((D.P. O'Connell, in his Article "Problems of Australian Coastal Jurisdiction"B.Y.B. 1958 Vo.XXXIV, beginning at p. 199, cites, at p. 207 some 38 nineteenth century international lawyers who, he says, had accepted this proposition, and only two who had not.) As to English official views, in 1851, the Advocate General, an officer of the Admiralty had delivered an opinion in the course of which he advised that "it is now generally understood and admitted that the territory of a country within which the rights of sovereignty may be exercised extends to a distance of three miles from the shore". He went on to define this strip as part of the "territory" of the maritime state. As a result of this opinion the Lords of the Treasury expressed the view it would be desirable to repeal the existing legislation which authorized seizure beyond "the limits of territorial jurisdiction"; Masterson, "Jurisdiction in Marginal Seas" (1929) p.140 and 163.

Moreover, the Select Committee on British Channel Fisheries (Parl.Pap. 1833, vol. 14. No. 676, p.59) which reported in 1833 stated that it understood that "one league from the shore at sea is considered to be the territory of the adjoining country". According to O'Connell it was on the

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basis of this report that the Fishery Convention with France of 1839 was negotiated, in which it is clear that the British Government acted on the assumption that fisheries in the territorial waters are exclusive to the littoral State. (British and Foreign State Papers, vol. 27, p. 983, Art.3.))). But there may be some conflict of opinion as to whether or not international law also admitted a property right in territorial waters. There also appears to be a considerable difference of views among the text writers as to whether such concepts were recognized in English law at the relevant period." We are now in the fortunate position of having this confusing and contradictory position clarified by the Supreme Court in its Advisory Opinion.

I should now like to turn to the question of the interpenetration of the two systems of law perceived from the optic of international law.

INTERPENETRATION VIEWED FROM THE PERSPECTIVE OF INTERNATIONAL LAW

The International Court of Justice laid down the classic dictum on interpenetration in the Anglo-Norwegian Fishing Case: "the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law." This pronouncement is surely one to which no good jurist cannot take exception. However the passage in question raises by its specific language, the controversial question of unilateralism versus multilateralism, on which I propose now to comment briefly.

It will be recalled that subsequent to the failure of the 1958 and 1960 Law of the Sea Conferences to reach agreement on the breadth of territorial sea and a contiguous fishing zone, Canada established in 1964

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a nine mile fishing zone contiguous to its three mile territorial sea by national legislation. Interestingly, a number of states which protested this unilateral act by Canada, followed suit with similar legislation very shortly thereafter. More recently, Canada has passed legislation such as the Arctic Waters Pollution Prevention Act of 1970 and the amendments to Canada's Territorial Sea and Fishing Zones Act, passed at the same time, extending Canada's territorial sea to twelve miles and providing the legislative basis for establishing new exclusive fishing zones. Since then Canada has passed amendments to the Canada Shipping Act and asserted fisheries and pollution control jurisdiction over the Gulf of St. Lawrence, Queen Charlotte Sound and various other semi-enclosed bodies of water. All of this legislation has been protested by various states on the grounds of its unilateral nature.

It will be recalled also, however, that the Prime Minister, in announcing the Arctic legislation, made clear that Canada intended to act both unilaterally and multilaterally in developing international environmental law. (Those of you familiar with the results of the Stockholm Conference will know how actively and successfuly Canada has been pursuing these twin objectives.) The issue of unilateralism was raised by various delegations in the United Nations during the discussion of the possibility of a third Law of the Sea Conference. The Canadian position on this question was made clear in the First Committee of the United Nations on December 4, 1970 in the following terms:-

"Mr. Chairman, there have been a number of references during our debate to the relative merits of unilateralism as compared to multilateralism as methods of developing the Law of the Sea. The Canadian position

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on this issue is well-known. In brief, we do not consider multilateral action and unilateral action as mutually exclusive courses; they should not, in our view, be looked on a clear-cut alternatives. The contemporary international law of the sea comprises both conventional and customary law. Conventional or 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 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. 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. For these reasons we find it very difficult to be doctrinaire on such questions. 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? Unilateralism carried to

an extreme and based upon differing or conflicting principles could produce complete chaos. Unilateral actions when taken along parallel lines and based upon similar principles can lead to a new regional and perhaps even universal rule of law. Similarly, agreement by the international community reached through a multilateral approach can produce effective rules of law, while 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. In no other field of law is the interpenetration of national and international law so evident. It is our view that this organic relationship of law on the national and international plane is not be feared but to be welcomed since it prevents us from being bound by straight jackets fashioned in the distant past devised to contain pressures which can no longer be ignored!"

It will be noted that the example of interpenetration of unilateral and multilateral action used in the foregoing statement is the régime and breadth of the territorial sea. I should point out, however, that the doctrine of the continental shelf provides an equally valid example of this interelationship between national and international law. (The same applies to the question of pollution control jurisdiction asserted by the coastal state, a point I wish I had more time to discuss, given the fact that the Stockholm Environment Conference has occurred since our last meeting, when I was a member of a panel discussion on international environmental law.

For the moment it is worth noting that a number of controversial principles of international environmental law advanced by Canada were endorsed at the Stockholm Conference and even the mush disputed three Canadian principles on coastal state pollution preventions were refered to

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the 1973 IMCO Conference for information and to the 1973 Law of the Sea Conference for appropriate action.)

Having referred briefly on the interrelationship of unilateral and multilateral action in the development of international law, it is appropriate perhaps to turn now to question (b), namely what international law has to say about the offshore rights which accrue to Canada as a whole, leaving aside whether they appertain to the federal or provincial governments. I shall begin by commenting briefly on state practice in this field.

NINETEENTH CENTURY CONCEPTS: STATE PRACTICE

There have been for very many years certain kinds of exploitation of the seabed and subsoil, such as the carrying on of sedentary fisheries or the tunnelling of mines that run out from the coast under the sea. Examples are the chank fisheries and the pearl fisheries of the Gulf of Manaar, the subject of regulation by local ordinances throughout the 19th century, and claimed from early times by the successive Portuguese, Dutch and British masters of the neighbouring territory; the oyster beds off the east coast of Ireland, regulated by the Sea Fisheries Act of 1868; the claims of the Bay of Tunis to extensive rights to the sponges on a bank outside the three-mile limit off the coast of Tunis; and Mexican legislation regulating pearl fisheries off the Mexican coast outside the three-mile limit. Gidel gives an impressive list of mines in England, Scotland, Australia, Chile, Japan and Canada (Nova Scotia and Vancouver) but in none of them does it appear that the mines extend from the coast beyond the three-mile limit.

Taken together, however, these examples do not amount to a substantial amount of state practice. Consequently, legal concepts as to the juridical basis for such activity remained undeveloped. As pointed out by Lauterpacht:

" ...in the period when the principle" (the freedom of the seas) "first became part of international law....the notion of the exploitation of the resources of the subsoil of the sea was too remote from

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reality to call for or to admit of serious consideration. At the end of the nineteenth century the subject acquired a certain - essentially still theoretical - importance in connexion with some English enactments such as the Corwall Submarines Act, 1958, and the plans to construct a tunnel under the Channel between Great Britain and France. On the part of the great majority of writers there was no disposition to deny the lawfulness of such appropriation of the subsoil of the sea, especially if the operations for that purpose started from the territorial waters of the coastal state."

The question of the ownership of the seabed and subsoil has been the subject of discussion by international lawyers since the time of Vattel who, in writing on the question asked "Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property?" There can be no doubt, however, that the doctrine of the Continental Shelf as we now know it is relatively recent in origin.

RECENT STATE PRACTICE: EMERGENCE OF CONTINENTAL SHELF DOCTRINE

The legal doctrine of the Continental shelf, that is to say, the nature and extent of the sovereign rights of a coastal state over its submerged land-mass is now firmly established in international law. Differences of views exist however concerning the precise limits of the continental shelf and even, in recent years, concerning the precise rights of a coastal state with respect to its continental shelf. It is commonly accepted that the continental shelf concept has its origin in the unilateral proclamation by President Truman on September 28, 1945 which asserted the rights of the USA over "the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States." No attempt was made in the Truman Proclamation to postulate a juridical basis for the claim. The claim rested simply on the "need for new sources of petrleum and other minerals" and that such claim by littoral states was "reasonable and just". Thus the doctrine of the continental shelf as it is now known is of very recent origin. The term "continental shelf" was not even in use by earlier generations of lawyers. As Mouton points out, the term "continental shelf" was used by Spain in 1916

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but with respect to fisheries.

The first international instrument embodying a form of the doctrine pre-dated the Truman Proclamation when in 1942 the U.K.and Venezuela concluded a treaty relating to the Gulf of Paria. The emergence of the doctrine in a juridical context was, however, precipitated by the Truman Proclamation which was followed in the space of five years by declarations and claims of various kinds to the continental shelf in the western hemisphere by four British colonies and thirteen of the Latin American Republics; in the Far East by the Philippines; in the Middle East by Pakistan, Saudi Arabia and nine sheikdoms under British protection. (It is interesting to note that it was this series of unilateral acts which gave a great thrust forward to the development of a basic doctrine of international law, a point to which I shall return.) As previously pointed out, this is not to say that the exploitation of the natural resources of the seabed and subsoil was not known prior to the emergence of the doctrine of the continental shelf, but there was very little state practice.

CONTEMPORARY INTERNATIONAL LAW: CONVENTION ON THE CONTINENTAL SHELF

It was against the foregoing background that in 1958, just a little more than a decade after the Truman Proclamation, over eighty states met in Geneva at the first United Nations Conference on the Law of the Sea to attempt to reach agreement on the many issues dealt with in the draft convention produced by the International Law Commission, the official organ of the United Nations for the codification and progressive development of international law. One of the results of that Conference was agreement on the Geneva Convention on the Continental Shelf, which is now in force, having been ratified by more than forty states (including Canada). The Convention provides that coastal states enjoy exclusive sovereign rights for the exploration and exploitation of the resources of their continental shelves.

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These rights do not depend on occupation or on any express proclamation. No one may explore or exploit the continental shelf without the express consent of the coastal state, even if the coastal state itself is not conducting such exploration or exploitation.

As defined in the 1958 Geneva Convention, the continental shelf comprises "the seabed and subsoil of the submarine areas adjacent to the coast outside the area of the territorial sea, to a depth of 200 metres, or beyond that limit, to where the depth of superjacent waters admit of the exploitation of the natural resources of the said areas". This definition has been supplemented by the decision of the International Court of Justice in the 1969 North Sea Continental Shelf Cases, in which the Court said: "What confers the ipso jure title which international law attributes to the coastal state in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal state already has dominion - in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea."

The definition of the continental shelf in the 1958 Geneva Convention, it should be noted, is an elastic one, in two ways. First the Convention defines the inner limit of the continental shelf as being the outer limit of the territorial sea, which is to say that the juridical continental shelf begins where the territorial sea ends. There is, however, no fixed rule of international law on the maximum breadth of the territorial sea, some states claiming as little as three miles, some as much as 200 miles although the most prevalent limit claimed by states is now 12 miles. The second elastic element in the Convention's definition of the continental shelf is the "exploitability test" under which a coastal state may extend the limits of its jurisdiction over the seabed to the depths permitted by advances in technology which enable the exploitation of seabed resources at ever greater

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depths. (This is not to day, however, that the coastal state can extend its jurisdiction indefinitely. It is the Canadian position that the Convention is what it was intended to be, namely, a Continental Shelf Convention and not a deep ocean seabed convention.)

The Continental Shelf Convention and particularly the definition of the continental shelf contained in it, has come under attack in recent years from a variety of sources including land-locked states, "shelf-locked states" (that is, states with shallow or narrow shelves) from certain international law academics and from various sources interested for a variety of reasons in narrowing the extent of coastal state jurisdiction over the seabed. The criticisms run along the following lines: The major defect of the Convention is that it left the juridical continental shelf with elastic inner and outer limits. The only other limitations laid down by the Convention are found in the concepts of "adjacency" and "equidistance". Thecontinental shelf is defined as being "adjacent" to the coast, but then the critics ask, what does "adjacent" mean on the Pacific or Atlantic coasts of such countries as Canada? and the United States? 10 miles? 100 miles? or more? With respect to "equidistance" the Convention stipulates that, in the absence of agreement and unless another boundary is justified by special circumstances, the continental shelf boundary between two states whose coasts are opposite or adjacent to each other shall be determined by the principle of the median or equidistance line. But what of small islands, for example? Should they be permitted areas under the equidistance principle comparable to those accorded to much larger mainland coasts?

It may be concluded from the foregoing comments that the Geneva Convention on the Continental Shelf is not fully satisfactory. The Convention remains, however, the only international instrument applicable on a widespread scale. There is, moreover, no question but that weaknesses notwithstanding, it embodies a large number of essential rules which, in any event, will have

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to remain an integral part of whatever new law is developed. In spite of the criticisms being made of the Convention, particularly in United Nations discussions, it is proving most difficult, as I shall explain, to offer workable alternatives and the Convention must be regarded as a remarkable achievement even if ultimately it is modified in one or more respects. In the meantime, and this I believe would be the view of any jurist who has considered this problem, it must be accepted that the Convention represents existing international law, however imperfect or incomplete.

It is worth noting in passing that the Supreme Court of Canada in its Advisory Opinion on the Reference concerning Offshore Mineral Rights of British Columbia gave implicit support to the exploitability test. Question 2 put to the Court read as follows:-

"In respect of the mineral and other natural resources of the seabed and subsoil beyond that part of the territorial sea of Canada referred to in Question 1, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the mineral and other natural resources of the saidareas, as between Canada and British Columbia,

(a) Has Canada or British Columbia the right to explore and exploit the said minera l and other natural resources?

(b) Has Canada or British Columbia legislative jurisdiction in relation to the said mineral and other natural resources?"

As is well known by this audience, the Court answered with respect to both questions (a) and (b) "Canada", thus implicitly affirming the exploitability test in the process of explicitly affirming the rights of the Crown in right of Canada over the continental shelf. In terms of state practice, it should be noted also that for many years the Canadian Government has acted on the basis of the exploitability test laid down in the 1958 Geneva Convention on the Continental Shelf, as have many other states, and has issued exploration permits in some areas in depths ranging beyond 2,500 metres, and beyond 200miles. This action has been based on a number of existing federal statutes, particularly the Public Land Grants Act and the Oil and

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Gas Production and Conservation Act which are now in the process of elaboration into a single Continental Shelf Convention. The point I wish to make is that such state practice has constitutive legal effects in international law.

NEW DEVELOPMENTS: U.N. SEABED COMMITTEE DISCUSSIONS

In 1967 Ambassador Pardo of Malta introduced before the United Nations General Assembly a proposal, the implications of which, in the legal political, economic and military fields, are so far-reaching that they will continue to be the subject of intense study and debate for some time to come.

The Maltese proposal called for the United Nations to undertake the "examination of the question of the reservation exclusively for peaceful purposes of the seabed and ocean floor and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind." Not long afterwards, however, the range and scope of law of the sea issues under study in the U.N. was considerably explanded.

Canada was among the 35 countries on the original ad hoc committee set up by the General Assembly in 1967 to conduct this examination and was also represented on the new 42-member permanent committee on the seabed, formed in late 1968 to continue the work of the adhoc group. The mandate of the ad hoc committee was confined to the seabed beyond national limits. However at the 25th session of the General Assembly, this committee was further expanded to comprise 86 members - almost exactly the same number of states which participated in the 1958 and 1960 Geneva Conferences on the Law of the Sea, and at the same time the General Assembly decided that a Third Conference on the Law of the Sea should be held in 1973 and assigned to the expanded Seabed Committee the mandate of preparing for that Conference. (At the 26th session of the General Assembly the Committee was further expanded to 91, including China.)

THE THIRD LAW OF THE SEA CONFERENCE

The decision to convene a new Conference on the Law of the Sea required lengthy and difficult negotiations in light of the wide divergence

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of views regarding the scope of the Conference and the priority attaching to the various issues it will consider. Canada was among those countries (mainly the developing states) favouring a conference broad in scope and according priority to the seabed regime as against the more restricted conference favoured by a number of other states which wanted only matters of direct interest to them included. It has been the continuing Canadian view that no accommodation on the law of the sea issues can be successful unless it is a comprehensive accommodation on all major unresolved issues, in view of the close inter-relationship between these issues. A partial solution will be no solution at all in the long run. With respect to the timing of the Conference, significant differences also existed on this point in the General Assembly debate. In the end it fell to the Canadian delegation to chair the negotiating group seeking an accommodation among these conflicting views and to bring about agreement on the compromise resolution which was finally adopted. That Resolution, introduced by the Canadian delegation on behalf of the many sponors, called for a conference to deal with a broad range of issues, including:

(1) the establishment of an equitable international regime (including international machinery) for the seabed and ocean floor beyond the limits of national jurisdiction;
(2) a precise definition of this area of the seabed;
(3) the breadth of the territorial sea and the question of international straits;
(4) fishing and conservation of the living resources of the high seas, including the preferential rights of coastal states;
(5) preservation of the marine environment and the prevention of pollution;
(6) marine scientific research.

Both the agenda and timing of the Conference, however, are subject to review at the next session of the General Assembly, and the Conference may be postponed if it is considered that insufficient progress has been made in its preparation, a point to which I shall return.

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SEABED BEYOND NATIONAL JURISDICTION

Undoubtedly one of the most complex and difficult tasks of the new Preparatory Committee for the Law of the Sea Conference and of the Conference itself will be the negotiation of an equitable international regime (including international machinery) for the seabed and ocean floor beyond the limits of national jurisdiction, and the precise definition of this area. That definition, of course, underlies the discussion of every aspect of the proposed international regime. The reason for this is simple: the definition of the limits of the seabed beyond national jurisdiction necessarily involves the definition of the seabed within national jurisdiction, that is, of the juridical continental shelf. Here, of course, we are dealing with an area in which, as I have pointed out, there have already been significant developments in international law and in which certain basic rules and principles have already been laid down. This existing legal framework provides guidance for, but also adds complexity to, the task of defining the seabed beyond national jurisdiction. It is necessary therefore, to consider briefly certain developments relating to the seabed beyond national jurisdiction.

DECLARATION OF PRINCIPLES OF THE SEABED BEYOND NATIONAL JURISDICTION

During the 25th United Nations General Assembly, the same session which decided on the Third Law of the Sea Conference, a Declaration of Principles on the Seabed and Ocean Floor and Subsoil thereof Beyond the Limits of National Jurisdiction, was adopted by Resolution 2749(XXV) of December 17, 1970. That Declaration affirmed fifteen basic principles intended as the basis for the elaboration of a future seabed treaty. Canada has submitted a working paper analyzing these principles (with a view to their possible future incorporation into a treaty) which was tabled in the United Nations under document A/AC.138/59 dated August 24, 1971. Copies of this Canadian working paper are

available this morning to those of you who are interested, and it would serve no purpose to repeat its substance. Major points of importance to note however in the Declaration of Principles are: that the Seabed and Subsoil beyond the limits of national jurisdiction are the common heritage of mankind; that the area shall not be subject to appropriation, sovereignty, or sovereign rights by any means by states or persons; that the area shall be reserved exclusively for peaceful purposes by all states; that all activities regarding the exploration and exploitation of the resources of the area shall be governed by the international regime to be established; and that all such activities shall be carried out for the benefit of mankind as a whole.

It can readily be seen that on the basis of these principles it is possible to argue that it is in the interests of all mankind that coastal states accept narrow areas of national jurisdiction over the seabed so as to allow the maximum possible area to be reserved for the common heritage of mankind. The difficulty for countries such as Canada is that while it is understood that the economic benefits to be derived from the international area would be apportioned equitably among all states, but particularly the developing countries, there is no corresponding principle of equitable contribution to such an area. To put it differently, a handful of states, including Canada, Australia, Argentine and a few others, and possibly Norway, the U.K., the USA and the USSR, would make the major contribution toward the common benefit of mankind. Understandably perhaps, land-locked states would make no contribution. What about the so-called shelf-locked states however, many of which have shelves which may be shallower or narrower than some others but which are nonetheless rich in resources? A case in point is the North Sea, much of which is shallower than the 200 metre isobath. It is interesting that there does not appear to be any example of a state declining to act under the exploitability test to gain access to offshore mineral resources The strongest opposition to the principles comes, not surprisingly, perhaps, from those states which cannot benefit from it but which have nonetheless

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claimed every scrap of continental shelf available to them.

Canada's position has been made clear. The Canadian Government has offered to make a voluntary contribution of a percentage of all revenues from all of its offshore resources. It has not however offered to renounce Canada's existing sovereign rights over the Canadian continental shelf. It will be appreciated that these questions are matters for serious and delicate negotiations. It will be readily apparent, however, I assume, why, particularly in light of past differences of views concerning the respective federal and provincial jurisdictions over the offshore, that Canada has maintained its stand in support of the exploitability test.

I stated, as the leader of the Canadian delegation at the first meeting of the preparatory committee for the 1973 law of the sea conference in Geneva last March 1971, that I know of no question to be considered by the proposed Conference which is comparable to the seabed item in the demands it places upon the international community for innovation, imagination, and accommodation. It raises problems ranging from boundary questions (always one of the most sensitive issues of concern to states), to arms control matters, to the need for new concepts of resource administration to economic problems relating to possible market disruptions, to basic questions concerning the developmental needs of the third world, and to new problems concerning international institutions which is unresolved could lead to conflicts not only between states but even perhaps between states and the United Nations itself. All of these complica ted problems are inherent in the topic. These complex problems can be reduced, in my view, to three central issues: (a) the need to define the limits of the area of the seabed and ocean floor beyond national jurisdiction; (b) the need to elaborate an international regime for the area; and (c) the need to create international machinery to administer the regime. Of these three questions I shall deal principally with question (a), as the one of most direct relevance to the topic of our discussion today, although the other two questions are dealt with <u>in extenso</u> in the working paper I ...26/

mentioned.

LIMITS OF AREA OF SEABED AND SUBSOIL BEYOND NATIONAL JURISDICTION

With respect to limits, I have already outlined some of the factors involved in the discussion of this question. I should now like to review some of the possibilities which have been considered and some of the proposals which have been made with a view to resolving this fundamental issue.

One of the simplest - indeed, I would say simplistic- approaches to determining the boundary between the seabed within the area beyond national jurisdiction would be to adopt the 200-metre isobath as the dividing line, that is, the first element of the definition of the continental shelf laid down in the Geneva convention. A number of variations could and have been made to this approach but all share one basic difficulty. They do not take into sufficient account, if at all, the second element of the shelf definition provided by the 1958 exploitability test. Nor do they take into sufficient account the geographical and geological realities underlying the concept of the continental shelf. Canada's studies of the 200-metre isobath and its possible relevance indicate that it is not generally representative of the shelf break. In fact, not only does the shelf break occur throughout the world at depths usually consider ably 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 limits of national jurisdiction, there would be more logic to 132 metres rather than 200. The essential point, however, is that any arbitrary depth or distance-plus-depth formula which disregards existing international law, state practice and geographical-geological realitites is likely to prove unacceptable to a significant group of coastal states.

Still another proposal, by the land-locked states, would limit coastal state jurisidction to 50 miles. Yet another proposal, by Kenya and supported by a number of developing countries, would limit jurisdiction to

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200 miles for all purposes. A number of Latin American countries have supported the Santo Domingo Declaration which would place limits at 200 miles unless the physical continental shelf extends beyond the point, in which case the continental margin would be the limit.

Perhaps the most complete and most complex proposal thus far advanced with respect to seabed limits is the draft treaty (the "Nixon proposal") submitted to the U.N. by the USA in August, 1970. According to this proposal, new limits of national jurisdiction based upon the 200-metre isobath would be established by coastal states renouncing their exclusive sovereign rights over seabed resources beyond a water depth of 200 metres. Provision would be made, however, for the general use of straight baselines not exceeding 60 miles in length, and for straight baselines not exceeding 120 miles where a trench or trough deeper than 200 metres transects an area less than 200 metres in depth. The offshore areas beyond the new limits of national jurisdiction would comprise the "International Seabed Area" to be governed by an international regime. That portion of the international seabed area between the new limits of national jurisdiction and the outer edge of the submerged continental margin (i.e., the continental shelf plus slope), would become the "International Trusteeship Area", in respect of which the adjacent coastal state would retain certain prescribed rights.

This proposal by the United States obviously places considerable emphasis on the cessation, not of all national rights, but of exclusive sovereign rights at the 200 metre isobath. I have already noted the basic difficulties connected with the use of this crierion in seabed boundary proposals. A second point I would like to make is that the shelf break for nearly all continental shelves between the latitudes 50° N latitude, and south of 50° S latitude, the shelf break commonly occurs at depths of....

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of 400 to 650 metres, due to the unrecovered effects of weighting by glacial ice. In contrast the Arctic shelves that escaped this glaciation may break at less than 100 metres, such as in the Laptev and East Siberian Seas north of Russia, in the Chukchi, Bering and Beaufort Seas off Alaska, and in the Beaufort Sea off the Mackenzie River Delta.

These may sound like highly technical matters, but there are quite practical implications for countries like Canada and Argentina, for example, with deeply glaciated shelves. To illustrate, we find from a table constructed by Canadian experts, that although the USSR has the largest physical shelf in the world and twenty-seven percent of it extends beyond 200 metres, only five percent of it would fall beyond national limits into the US proposed trusteeship zone, after closing lines are drawn between islands and 200-metre banks in the Arctic Ocean and between the Kuriles Islands in the Pacific.

— The USA would retain full sovereign rights to all of its physical shelf since the sixty-mile baseline provision contained in the US 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 US 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

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Arctic shelf would fall into the trusteeship zone. Denmark and Iceland would fare little better. In the case of the U.K. - 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 Canada at least that we must be careful in choosing any depth criteria as a sole basis for determining national jurisdiction. Even the simple 200-mile distance criterio would truncate Canada's continental shelf in a number of areas off Canada's east coast. Clearly, there are problems for Canada arising out of this vexing and delicateproblem of determining the area beyond national jurisdiction and, hence, the touchy question of "boundaries" of states.

Another very important proposal with respect to limits is that advanced by Ambassador Pardo of Malta at the March 1971 meeting of the Preparatory Committee for the 1973 Law of the Sea Conference, since elaborated by him in the form of a draft treaty. Dr. Pardo's proposal is that the multiplicity of limits of coastal state jurisdiction in ocean space should be consolidated into a general clearly-defined outer limit of national jurisdiction that recognizes and reasonabl satisfies the totality of coastal state interests in the marine environment. In Dr. Pardo's view there is no alternative but to select the criterion of distance from the coast for this new outer limit of coastal jurisdiction. His suggestion is that in the light of existing claims it has become necessary to establish a distance of 200 miles from the nearest coast as that outer limit, with new provisions to be made with respect to the baselines to be used for measuring such a limit and with respect also to jurisdictional claims which may be founded upon possession of islands. Basically he proposes varying jurisdictions to varying limits for differing purposes, i.e. the Canadian "functional" approach coupled with a large element of international supervision.

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What are the Implications of these Developments for Canada?

As a country with a large and promising offshore area, Canada is intensely concerned with the development of a new definition of the continental shelf. The 1958 Geneva Convention obviously provides a basic point of reference. Another basic point of reference is the geographical and geological realities which underly the juridical concept of the shelf. As previously mentioned, the International Court of Justice, in the North Sea Continental Shelf Cases, confirmed the principle that the coastal state's rights over the continental shelf flow from the fact that this submarine area constitutes a natural prolongation of the coastal state's land territory. It is of interest to note in this connection that even prior to the first United Nations Conference on the Law of the Sea in 1958, the Canadian view, as expressed in an official publication, was that "precision would not be forfeit....if the boundary of the shelf were its actual edge. Where the actual edge might be ill-defined or where there is no shelf in a geographical sense, the boundary might be set at such a depth as might satisfy foreseeable practical prospects of exploitation of the natural resources of the sea bed adjacent to a particular state." The Canadian position has been consistent on this issue.

In what direction is the international community likely to proceed on this issue? No one can say. While some states support a narrow shelf concept based on the 200 metre isobath or an even narrower limit such as 50 miles, others suggest something intended as a middle position, perhaps in the form of a combined 200 mile/ 200 metre distance-depth formula, while still others suggest also

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the need to retain in any mixed definition the present definition of the shelf limit, which is, in effect, the outer edge of the submerged continental margin.

It is not surprising that such states as Canada, Australia, New Zealand, The Argentina, Mauritius, Uruguay, and Nigeria take the position that whatever decision is ultimately made to give precision to the outer limits of the continental shelf, the definition embodied in the 1958 Geneva Convention and the state practice based on it cannot be ignored. Quite apart from the questions of acquired rights both by states and by their nationals, rights based after all on existing customary and conventional international law, the question arises as to what obligation if any those states which have asserted jurisdiction out to the continental margin would have to renounce their sovereign rights over such areas should some treaty régime emerge which conflicts with such rights. The argument being made is that they ought to do so in the interests of the common heritage of mankind. The argument is really a moral one, rather than a legal one, for reasons I shall explain.

LEX LATA APPLICABLE TO SEABED AREA BEYOND NATIONAL JURISDICTION

During the March, 1972 seass of the Seabed Committee (which is in fact the Preparatory Committee for the Third Law of the Sea Conference) the Delegation of Kuwait introduced a Resolution re-affirming in more specific terms an earlier UN "moratorium" resolution calling upon states to take no action in the area beyond national jurisdiction relating to exploration and exploitation of the resources of the area. That Resolution will

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probably come to a vote at the next session of the United Nations General Assembly. The majority of states will probably support it, on political rather than legal grounds. Some states argue, however, that pending the establishment of a new international régime applicable to the seabed beyond national jurisdiction, the general principles of international law, particularly the freedoms of the high seas, apply to the area, pursuant to which states and their nationals may conduct such activities in the seabed area beneath the high seas as they see fit. Some states argue to the contrary that the United Nationsl Declaration of Principles has legal binding force and that any activities in the area beyond national jurisdiction are thus ipso facto illegal. Others argue that while no United Nations Resolution has of itself legal binding force, the Declaration of Principles has a high degree of legal content and states ought not to act in violation of it. In the meantime a number of private companies, acting together in some cases and/in other cases alone, are already engaged in experimental activities in the area beyond national jurisdiction (by anyone's defintion) with a view to perfecting the technology to permit the mining of manganese nodules. Indeed, some half dozen Canadian companies have paid a fixed sum to a consortium in return for which they will be entitled to the information obtained from some of these experiments. A further development is that in the USA there is already a Bill in existence, the Metcalfe Bill, which would provide that the USA and other states could explore and exploit the area in question through a process of reciprocal agreements. The Bill is not supported by the US Administration

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but it gives clear evidence of the kinds of difficult political, legal, and economic issues raised by the seabed question. The Kuwait resolution will present difficult decisions for many countries. Obviously it is no answer to say simply that since the area beyond national jurisdiction has not yet been defined there are no restrictions upon the activities of states or their nationals. In Canada's case, leaving aside the desirability of such action, it is doubtful that restrictions could be placed upon Canadian nationals on the basis of existing legislation, short of invoking the Criminal law power. Moreover, industry may well ask how long should states and should industry be asked to wait while the Seabed Committee proceeds in its leasurely way with its deliberations which have been going on now since 1967? Canada has proposed a temporary or transitional solution to the problem, in the working paper previously referred to, but there is no much prospect of its acceptance given the polarity of views on this issue. In the face of this kind of pressure, what are the prospects of an early resolution of these problems?

PROSPECTS FOR SUCCESS OF THE THIRD LOS CONFERENCE

Although the subject under discussion by the Panel is the continental shelf, it can readily be perceived that developments on this question are necessarily inter-related with legal issues pertaining to the breadth of the territorial sea and the nature and extent of the jurisdictions to be exercised by states in the waters above the seabed beyond the territorial sea. Thus it is not possible to attempt to prognosticate concerning the future régime for the continental shelf in isolation from the other questions under study in the Seabed Committee.

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With respect to the range of questions under consideration in the Seabed Committee the greatest amount of progress has been made on the questions of the régime and machinery to be developed for the area beyond national jurisdiction. Some real progress was made on the nature and extent of the régime and machinery applicable to the seabed beyond national jurisdiction during the recently concluded July/August session of the Seabed in Geneva from which I have just returned. On the question of limits, however, relatively little progress has been achieved but certain proposals have been advanced and the negotiation process has begun.

With respect to the territorial sea, there is obviously a trend in favour of a 12-mile territorial sea. Even some of the Latin American states claiming a 200-mile patrimonial sea have given indications of their willingness to settle for 12 miles of full sovereignty in return for recognition by maritime states of certain specific forms of coastal state jurisdiction extending out to 200 miles, while some of the major maritime powers have indicated a willingness to consider such an accommodation.

With respect to fisheries jurisdiction, there is a clear trend in favour of exclusive coastal state jurisdiction over a broad area adjacent to the territorial sea which would be termed an "economic zone" or "patrimonial sea". Even such states as the USA and France have spokent favourably of the concept of economic zones. It is not possible to say how wide such a zone might be but many developing states in addition to the Latin Americans support the 200 mile limit. It is not yet possible to say whether the coastal state would have exclusive ownership over the living resources in such an area, or merely exclusive managerial rights with preferential rights to the resources.

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With respect to pollution control and the régime for scientific research there is again a trend in favour of the inclusion of these forms of jurisdiction within the proposed "economic zone", although on these questions such states as the USA, USSR and other major maritime powers appear to remain opposed. (Canada has just tabled a working paper on marine pollution intended to point the way towards an accommodation on these questions between coastal states and flag states and a separate working paper on scientific research intended to lay the basis for the reconciling of interests between coastal states and the interests of the international community.) Nevertheless, while difficulties are evident on these questions the trend towards coastal state jurisdiction is apparent.

A difficult and as yet wholly unresolved issue is the question of rights of passage through international straits, that is to say, straits used for international navigation which are wholly territorial. The major maritime powers continue to insist on "free transit" while the straits countries continue to support the existing régime permitting merely "innocent passage", that is to say, passage not prejudicial to the "peace, good order and security of a coastal state". All that can be said on this issue is that at least the negotiations have finally begun. A point of some importance is that the draft agenda of the conference, agreement to which has been held up mainly because of differences of views concerning the formulation of this issue, has now, finally, been agreed to a week ago, after nearly two years of negotiation. (A rather radical solution to the straits issue, to which I have been giving consideration on a purely personal basis, is for states to accept a three-mile territorial sea plus an economic zone extending out to 200 miles.)

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On the Continental Shelf question, I have already referred to the various proposals which would lay down specific limits for the continental shelf. Of particular significance was that during the recently concluded summer session of the Seabed Committee, the USA delegation gave indications of a substantial shift from their earlier Nixon Proposal position. /In general if there is a trend it is towards relatively broad limits.

What then, against this background, are the prospects for a successful third law of the sea conference? The proposed Law of the Sea Conference is unlikely to succeed unless it is preceded by adequate preparations. There is reason to believe, however, that two more sessions of the Seabed Committee could complete preparations for the Conference. In that event, an organizational session could be held in the Fall of 1973 during the 28th General Assembly, and the first substantive session of the Conference could begin early in 1974. Such a timetable, however, presupposes a wide-spread will to work towards a successful conference and although there is such a will on the part of the majority of the members of the United Nations it is ovbious that such an attitude is not universal. In this situation countries such as Canada must continue to protect their national interests, including their sovereign rights over their continental shelves, while exerting every effort towards seeking out the basis for an overall accommodation. Canada is attempting to do just that. No delegation is playing a more active role on these questions. No delegation has submitted more working papers intended to provide the basis for eventual accommodation. The broad lines for such an

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overall accommodation are beginning to emerge. So far, however, all that can be seen is the beginning of the blueprint. The structure has yet to be erected. I can assure you, however, that every effort has been and will be made by the Canadian delegation to work in the interests of Canada and the international community, interests which we do not see as being mutually exclusive. In every proposal put forth by the Canadian delegation, and in every working paper tabled by the delegation, the point has been stressed that it is essential to work towards accommodations not only as between conflicting interests of states and groups of states, but as between states and the international community as a whole. The complexity of the problem, and the difficulties of pursuing such an appraach, are fairly obvious. Solutions are less easy to perceive. Canada has one advantage, however, in this field, in that it stands in the eye of the storm swirling around the central issue of unilateralism versus multilateralism and the related although dis tinguishable issues of the interpenetration of national and international law. We should be able to perceive the inter-relationship as well as anyone, as our panel discussion today illustrates.