STATEMENT BY

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New Articles 64 and 65: Review Clause

JUNE 7, 1977

Mr. Chairman,

I would like to offer a few observations on the question of a review process after a fixed period. In so doing, I am not attempting to give the official view of the Canadian Government but rather to offer some purely personal views of a rather general nature. I do not propose to comment on the juridical issues which have had rather extensive treatment.

The first point I should like to make is that we are embarked on an undertaking unlike any other. It is understandable why there is skepticism about the effectiveness of a review conference, on the basis of the experience of other precedents. It may be unwise, however, to base our conclusions upon experiences which may not be (if I may be forgiven for using the term) a precise parallel. It is clear that our respective attitudes on the desirability of a review process are going to be coloured by our attitudes about the regime we develop. Nevertheless, it does seem to me that the great advantage of some form of review process - and, at this stage, I would not like to prejudge the precise nature of the review procedures - is that it could build an element of flexibility into the treaty which could reassure all of those who may entertain misgivings for one reason or other about the proposed deep seabed regime.

I consider also that some provisions should not be subject to review. I refer, for example, to the provisions in Article 22 specifying that the

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organization, control, and conduct of activities in the area should be subject to the purview of the Authority. As suggested by other speakers, and by myself on an earlier occasion, such provisions should clearly be enshrined as jus cogens.

I wonder whether the solution to the problem may not be along the lines of the position outlined by the distinguished delegate of Brazil.

For those who are concerned that we are setting the regime in concrete, we could ensure that, at a given point in time, the viability of the regime would be re-examined on the basis of actual experience, some 20-25 years of practical experience.

I feel quite strongly that many delegates who now have reservations, for example, about the dual approach might themselves want to take advantage of it as time goes on - provided, of course, we produce a solution that is genuinely non-discriminatory and one which will allow real, as distinct from theoretical, opportunities for any state or its nominee to participate in the development of the proper reserved area, while also benefitting from the activities of the Enterprise. I continue to believe also that non-mandatory joint ventures can play a large role in ensuring that benefits are not confined to a few. Even if I am wrong in this assumption, I have difficulty accepting the argument that any review process is bound to be illusory, promising assurances that cannot be realized. I concede, however, that this could be the result of our labours, unless we take the necessary precautions to ensure that the review process will be meaningful, and will not become irrelevant because of the range of vested interests which may gradually accrue in favour of a continuation of the pre-existing regime without change.

Perhaps the solution is, as suggested by Brazil, that we build in a safeguard, consisting of a provision which specifies in clear language that, as of a given date, no further contracts will be issued, for either the reserved or non-reserved area, until a decision is reached as to whether the regime will

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continue unchanged or will be altered. Contracts already let would, of course, have to be protected but if we are looking for an incentive to make the review process meaningful, the Brazilian proposal may provide the answer. It would give everyone an incentive - those committed to the dual or parallel approach, those committed to the unitary approach, those who have been converted by experience from one to the other, those who are fearful about discrimination, those who are not, those who have reservations about the suggested financing proposals, those who do not - it would give all of us, firstly, an opportunity and, secondly, a built-in incentive to carry out, at a specified time, a genuine review of the regime which we will, I hope, have developed - a review which would be based on our actual experience as to how the regime works.

The only other observation I would make, Mr. Chairman, is that a mandatory five-year review might well have the effect of producing a never-ending continuous seabed review conference. It would probably take us two years to prepare for a review conference and two years to carry it out, with a brief pause before beginning the preparations for the next review conference. Mr. Chairman, quite apart from the costs of such a process, those of us who have been involved in this exercise for nearly 10 years would need no further reason for a certain lack of enthusiasm for any provision which could create a continuing seabed review conference. Surely, we can leave some matters to the proposed organs of the Authority, which we expect would include a Council, an Assembly, and even perhaps a Tribunal, as well as an Enterprise. Let's take some things on faith - but not too much, which is why I rather like the Brazilian proposal. Thank you, Mr. Chairman.

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ARTICLE 23: ANTI-MONOPOLY PROVISION

JUNE 2, 1977

Mr. Chairman,

I should like to associate myself with what has just been said by the distinguished delegate of Sweden. Like him, I am inclined to favour a positive formulation stipulating equal rights of all states for access to the non-reserved area rather than a negative anti-monopoly provision along the lines suggested by the distinguished delegate of the USSR. I should like to make clear that my delegation does not oppose an anti-monopoly provision in principle but, for the reasons outlined by a number of other speakers, we tend to share the view that the complexities of the problem make it inadvisable to spell out in the proposed treaty a detailed anti-monopoly provision. I would not rule out the possibility of some such formulation as a part of the annex but, even then, it would have to be drafted with particular care to avoid the creation of more problems than we would resolve.

I should like to associate myself also with the views expressed by the distinguished delegates of Sweden, Ecuador and Switzerland in support of the amendment proposed by the distinguished delegate of Czechoslovakia in favour of a preference with respect to benefits from the area in favour of developing, landlocked and geographically disadvantaged countries. Thank you, Mr. Chairman.

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ARTICLE 9: PRODUCTION CONTROL FORMULA

JUNE 3, 1977

Mr. Chairman,

I wish to intervene very briefly, as did the Japanese delegation yesterday after the close of the debate on Article 9, to comment on the Paper circulated by the Japanese delegation with your consent.

I should like to thank the Japanese delegation for their interest in the Canadian analysis of the effects of the Group of 77 formulation upon the numbers of mine sites which will be available for exploitation. Rather than circulate a written comment or reply to the Japanese Paper, however, I would simply refer the Japanese delegation to the Secretariat Paper entitled "Hypothetical Computation of Production of Nickel from the Area", dated May 27, 1977. The Secretariat study provides effective answers to all of the series of points raised in the Japanese Paper and, in the process, supports the Canadian analysis of the effects of the Group of 77 formula. Thank you, Mr. Chairman.

STATEMENT BY CANADIAN REPRESENTATIVE, MR. L.H.J. LEGAULT
IN COMMITTEE II ON ARTICLE 20(2), PART II RSNT
JUNE 23, 1977

Mr. Chairman, this Committee has spent many weeks--indeed months--debating the question of the status of the economic zone. Meanwhile, an equally important question has been largely ignored, namely the status of the territorial sea. This is a matter of the gravest concern for the Canadian delegation, as it should be for all coastal states.

Article 20, paragraph 2 of Part II of the RSNT constitutes a sweeping and unwarranted restriction on the existing sovereignty of coastal states in their territorial sea. Indeed, it has the effect of virtually transforming the status of the territorial sea into that of the economic zone, while at the same time efforts are being made by some advocates of Article 20, paragraph 2, to give the economic zone the status of the high seas. What is ironic in this situation, on the other hand, is that some advocates of strong coastal state jurisdiction in the economic zone seem to be prepared to allow the territorial sea itself to take on something of the character of the high seas.

The sovereignty of the coastal state in its territorial sea has long been one of the most fundamental and most important principles of the Law of the Sea. The severe restrictions placed on that sovereignty in Article 20, paragraph 2, would have the most serious consequences for the coastal states' rights and powers of self protection. Not all of these consequences can be foreseen at this time. Those that can are not acceptable to the Canadian delegation, and we believe to many other delegations as well.

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The Canadian delegation has never taken the stand that we might find it difficult to ratify the new Law of the Sea Convention without reservation unless our position is met on this or that matter, although we have heard this from others. We may now, for the first time, be facing such a situation in the Canadian delegation. It would be difficult for any Canadian Government to accept that the sovereignty now enjoyed in the territorial sea -- a sovereignty constrained only by the right of innocent passage of foreign ships -- should be swept away. For us, the only appropriate solution to this matter is the deletion in its entirety of paragraph 2 of Article 20.

We have heard arguments that these restrictions on coastal state sovereignty in the territorial sea are necessary in order to avoid a so-called "patchwork quilt" of coastal state regulations for the prevention of pollution in the territorial sea. We have rebutted these arguments in detail in the past and do not intend to do so again at this time. The best evidence that these arguments are spurious is the evidence of history. The regime of sovereignty combined with the right of innocent passage in the territorial sea is the regime we have known for centuries and the regime we know today. No such patchwork quilt has developed up to this time, nor have we heard any convincing indication that such a danger is now upon us. Surely the burden of proof that a fundamental change in the law is required must rest with those advocating such a change.

At the time of the Torrey Canyon disaster, the then Prime Minister of the United Kingdom concluded that this maritime casualty had demonstrated that the old rule of the territorial sea was not enough for the protection of the coastal states' environment. Now we are hearing that the old rule of the territorial sea is not enough for the protection of shipping interests. Yet it is not cases of interference with shipping that have multiplied since

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the Torrey Canyon affair. Rather it is cases of maritime casualties and oil pollution disasters at sea that have multiplied to the point where scarcely a week goes by without fresh reports of incidents that ought to remind us of the need for protection of the marine environment.

I have already suggested that not all the consequences of Article 20, paragraph 2 can be foreseen at this time. Among those which can be foreseen and which are profoundly troubling are the following:

- The article imposes an absolute prohibition on the enactment of laws relating to the design, construction, manning and equipment of vessels even if these laws are intended to give effect to existing international rules and standards. Hence far greater restrictions are placed on the coastal state's rights to protect its environmental integrity in the territorial sea than are placed on the coastal state's corresponding rights in the economic zone under Article 21, paragraph 4.
- This prohibition extends to other "matters" regulated by generally accepted international rules, unless coastal state regulations are specifically authorized by such rules. "Matters" is left undefined and hence may encompass a wide range of subjects including discharge standards, safety of navigation, minimum keel clearance, and conservation of the living resources of the sea. Indeed, this provision might even prohibit coastal state adoption of more comprehensive liability and compensation standards and could preclude meaningful and effective relief after actual damage has been suffered by the coastal state and its citizens. I cannot see how any government could explain such a situation to the satisfaction of its people.

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- Under Article 20, paragragh 2, coastal states would be completely deprived of the ability to respond to threats to the marine environment not covered by international rules, even if the coastal state were only acting in anticipation of the entry into force of rules already adopted by competent international organizations.
- The difficulty of agreeing on what is an "international standard" and when it is "generally accepted" compounds the problem of applying this article and could have the effect of making it impossible for the coastal state to exercise even the very restricted powers granted by the article.

We are told that the concept of port state jurisdiction would compensate for the loss of the coastal state's sovereignty in its territorial sea. We do not agree. Although we believe that the concept of port state jurisdiction is a most valuable one, it cannot serve as a substitute for the coastal state's broad sovereign powers in the territorial sea, as was recently demonstrated by the mystery spill off Florida.

We are also told that the coastal states' right of environmental self protection will be broadened and strengthened by the provisions of Part III of the RSNT in respect to the economic zone. We wish this were true. Unfortunately, with few exceptions, the provisions of Part III of the RSNT continue to rely on the concept of flag state jurisdiction of the polluter as policeman. Moreover, we have been deeply disturbed by efforts being made in Committee III to dilute what limited powers have been recognized for the coastal state in respect to the preservation of the marine environment in the economic zone. Having recognized the coastal states' environmental jurisdiction in the economic

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zone in Part II of the RSNT, the approach of some delegations now appears to be to empty that jurisdiction of all content under Part III. The basic compromise represented by the concept of the economic zone is thus being seriously eroded.

The pattern established for the coastal states' rights in respect to the preservation of the marine environment in the RSNT is riddled with contradictions, which do not appear to have come about by accident. On the one hand, Article 21, paragraph 3 of Part III of the RSNT would allow coastal states the broad discretion to establish national laws and regulations for the prevention, reduction and control of pollution from vessels. This, however, is precisely what is prohibited by Article 20, paragraph 2 of Part II. On this point, the Part III text must prevail. Otherwise we will have gone backwards. Otherwise we will have exposed coastal states--and the world at large-- to an even greater threat of pollution from vessels, by broadening still further the old license to pollute and applying it right up to the shoreline, where the resource considerations and political considerations are of a far different nature than further out to sea. Otherwise we may make it impossible for some states to accept the new convention.

We are gratified that some major maritime powers at least recognize these dangers. Thus the amendment to Article 20, paragraph 2 inroduced by the USA represents at least a step in the right direction, although in the view of the Canadian delegation even this constructive proposal does not go far enough. In our view, the only possible solution is to delete in its entirety paragraph 2 of Article 20. This is hardly a radical approach. It would simply involve retaining the status quo in respect to coastal state sovereignty in the territorial sea. It would not recognize particular powers for the coastal state, nor on

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the other hand, would it prohibit them.

Mr. Chairman, this issue is of fundamental importance in terms of environmental imperatives. However, its importance transcends even those imperatives and strikes directly at the overall relationship between coastal states and an integral part of their national territory. Again its importance is such that it might be difficult for the Canadian Government at least to become a party without reservation to a Convention containing a provision along the lines of paragraph 2, Article 20. We are open as to where this matter might be discussed, but we must ask that it be discussed, without procedural impediments being raised as they have in the past.