

Transcript

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Interviewed by Mr. S. Wright
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NEW LEGAL CONCEPTS CREATED BY THE LAW OF THE SEA CONFERENCE

Mr. Wright: We are going to discuss first of all the exclusive economic zone which, after all, is not so exclusive. The notion about this zone is still rather vague, or has it been now rather closely defined? At one time it was high seas, wasn't it?

Mr. Beesley: It was certainly high seas in the eyes of many states in the world, but for some years, of course, some states have asserted a 200-mile territorial sea and in some cases they've done that for decades. However, the economic zone concept is itself one of the essential compromises that has emerged from this Conference. It comprises certain limited forms of jurisdiction extending into the high seas some 200 miles from shore, but the waters themselves under the compromise adopted are neither territorial sea nor high seas. It's a new concept entirely and it's a new kind of legal creature, if you wish, or legal concept.

Mr. Wright: What does this actually mean? I mean, navigation-wise, no new laws have actually been adapted, or adopted.

Mr. Beesley: Yes, there have been some new laws. If I could put it this way. When we began the Conference, the law had not changed much in the last 300 years from the concept of a narrow territorial sea over which a state has territorial rights as the name implies. In other words, complete sovereignty, subject only to the right of innocent passage. Beyond the

narrow marginal belt around the coastline of coastal states was the high seas, over which no one had any jurisdiction or any control. On the high seas, the only kinds of jurisdictions that could be asserted were, for example, to suppress slavery or piracy, and then the kind of jurisdiction that flag states can assert over their own vessels, but only over their own vessels. That was the state of the law when we began. But by that time, or the time this Conference began, there were many conflicting claims and counterclaims concerning the rights of coastal states to claim some form of jurisdiction extending beyond a narrow territorial sea, and what we considered in the Canadian Government and in the Canadian Delegation to be the appropriate course was to adopt a functional approach which is, namely, to assert only those kinds of jurisdictions necessary to meet the particular objective, the particular need. Now translating that into what's happened in the Conference, it has become generally agreed that coastal states shall have fisheries jurisdiction out to 200 miles. It has been generally agreed that coastal states shall have jurisdiction for the preservation of the marine environment within that area. It's been generally agreed that coastal states shall have jurisdiction over the conduct of marine scientific research within that area. And it's been generally agreed that coastal states shall have resource rights over the seabed within that area. But those are the precise jurisdictions that are accepted and

none other than those, and that's the essential compromise. In other words, it's a package of jurisdictions - rather than the total bundle of jurisdictions which compromise sovereignty - and that's the essence of the compromise. Now, the rights to navigate are not affected in any major way by this new concept but, at the same time, since I mentioned the preservation of the marine environment, it's impossible to preserve the marine environment without having some kinds of jurisdiction, some rights, which could conceivably interfere with freedom of navigation, and that's been one of the difficult issues that we've negotiated over many years, and we've almost settled that - in essence, we have, but there are still some tag ends to be finished up and an example of what I mean is that a number of states including, for example, France and the USA, major maritime powers, are saying at this Session the same things that countries like Canada, New Zealand, Nigeria, others - India, have been saying for some time; namely, that in the light of the Amoco Cadiz incident, it's obvious that coastal states do need better protection than they've had in the past, better even than is provided by the text that we've developed. So, an example of what we're doing at this Session is a redevelopment or further negotiation of the rights of the coastal state to preserve the marine environment. That's only one of the elements comprised in the concept of the economic zone. For Canada, it's one of the most important, I

might add.

Mr. Wright: I would just like to add one thing. There is, of course, the jurisdiction or the field of activity of IMCO in this particular matter, but we are thinking about the big tankers and so on, the construction of big tankers, the use of big tankers. This particular interest on the part of the Conference - would it not be about the sea lanes?

Mr. Beesley: No, it's broader than that. What we're negotiating here is an umbrella treaty, a treaty that would lay down the major obligations and certain fundamental obligations which are quite new, obligations, in short, to preserve the marine environment. The Intergovernmental Maritime Consultative Organization has worked for many years - much more in the field of safety of life at sea, for example, than preservation of the marine environment, but in a number of cases they have developed instruments, they've developed treaties - multilateral conventions - which have had an important environmental effect. The difficulty has been firstly that they have not been ratified as rapidly as they ought to have been, and so that even the somewhat minimal effect they would have had on the construction of tankers and on other things - the discharge of oil at certain distances from shore, for example - they haven't had the impact that was hoped for because they simply haven't been ratified by enough countries. And that's one of the weaknesses, of course, of leaving it all

to IMCO. It is a conference of shipping nations, and you don't usually go to the offender if you want a set of laws to prevent the offence. You go to some other authority, and in this case it's either the coastal states who will in any event act unilaterally to preserve their own environment because it's become so important, or you go to a global treaty-making exercise such as this, and that's what's happened. So, it's not a conflict between the Law of the Sea Conference and IMCO, but it's, rather, a case of coordination. We lay down the global provisions - this is the umbrella treaty - but IMCO conventions and other conventions such as the London Dumping Convention will be subsumed within this umbrella treaty and there will be provisions specifically dealing with other treaties in the same field. But this is the major environmental law-making conference, not IMCO - it never has been.

Mr. Wright: May I come back to the economic aspect of this zone?

Mr. Beesley: Yes.

Mr. Wright: After all, it's called the economic zone.

Mr. Beesley: Exactly.

Mr. Wright: Some even call it the exclusive economic zone.

Mr. Beesley: Yes. It's termed that in the treaty, in fact - the draft treaty.

Mr. Wright: But in the views of some, it's not so exclusive

because others will be allowed to come in and to profit to some extent from the riches of the sea.

Mr. Beesley: That's correct.

Mr. Wright: I remember being present at the debate about other countries coming in to reap some of the living resources of the sea. Now may I first of all ask you whether there is already in application in Canada a law concerning this economic zone - and I'm thinking of fisheries in particular.

Mr. Beesley: Yes, we've had such a law since January 1, 1977 and it is based on the results of the negotiations to date. It incorporates the results of the negotiations as is the case of the legislation of many countries who have now established a 200-mile economic zone. I'm thinking, for example, of countries which have moved since we did but have nevertheless taken similar action - USA, Mexico, Norway, the EEC, USSR, Japan - these countries have all legislated or are in the process of legislating and in every case they have reflected the results of the Conference in very concrete form. They haven't all acted differently, as might have been the case. They've abided by the provisions of the treaty we've been drafting even though it isn't yet completed, even though it isn't in force and, in effect, one can argue that it's the Conference that gave birth to the economic zones which various countries have already implemented around the world. At the same time, there are some unfinished questions connected with

the economic zone, including in particular the rights of landlocked countries and those countries who call themselves geographically disadvantaged - because they can't claim the same extent of economic zone as some states because they don't face the open sea - and those questions are still under negotiation.

Mr. Wright: But it is still the coastal state - in this case Canada - that is, in fact, laying down the law how much it can fish.

Mr. Beesley: Exactly.

Mr. Wright: Now, how do you establish this?

Mr. Beesley: Well firstly we do it, in the case of Canada, on the basis of scientific information, gained not merely from our own sources, but through various regional organizations. For example, ICNAF, the North Atlantic fisheries association, has now become a new group, and it's intended precisely to help fulfil the kind of purpose you just mentioned. It's an organization which is still under negotiation, in effect, but it replaces ICNAF, the regional North Atlantic fisheries arrangement, and its major purpose is to do just what we're discussing - to provide an input of scientific information from all the nations fishing in the area, which means in large part the nations fishing in Canada's economic zone and in the economic zone of the United States, plus those areas outside the zone, and by collating all the information

available from all these sources, it's possible to come up with a fairly precise determination of what the allowable catches ought to be. I should check my figures on this, but I believe there are 16 nations involved, so we don't have to rely only on our own information.

Mr. Wright: But the treaty as it is being drafted now does not provide for an international advisory body to say how much.

Mr. Beesley: It makes it open for this to occur, but it doesn't make it mandatory, you're quite right, in legal terms, for us to so decide or so choose. On the basis of this treaty, if and when it comes into force, we would not have to consult with others; but if I could add a personal P.S. on that, it's our expectation - it's more than a hope, it's our expectation - that in order to maximize the yield, but in a way that is the optimum yield, not necessarily the maximum yield, it's necessary for the coastal state to have careful regard to husbanding the resources and harvesting them rather than mining them as occurred in the past by distant water fishing states, and for that reason it's necessary to consult very closely with the other countries doing the fishing as well. A coastal state could say simply, it's up to us, and we can make the decision, and that's that, and some may do that. But the wiser course is to consult and to be sure that, both from a scientific and a political point of view,

that the decisions are the right ones because if states are excluded on the grounds that there is no surplus to the needs of the coastal state in question, and then it turns out at the end of the season that they had set far too small a quota or none at all for other states, there would be both political as well as scientific arguments, as you can imagine.

Mr. Wright: I had some discussions with other delegates about this matter and it seems to me that, for instance Africa, they are thinking particularly in regional terms, that is that the African countries would go into economic zones around the African continent. As far as Canada is concerned, of course, there are no landlocked countries in the middle of Canada and the same applies to the United States. Now you are taking the point of view that after all you will be going into your waters and others may come in. Who are the others?

Mr. Beesley: Well, there's quite a long list. If we were to ask, who is our neighbour, you might be surprised at the answers because some countries six or seven thousand miles away from Canada's shores consider themselves our neighbours and they are all happily fishing in our economic zone. That could change, of course, depending on how the stocks come back and how the Canadian fishing effort develops because our own fishermen have suffered severely as a result of the overfishing of these other states. It's not our own over-

fishing - we've never overfished. We haven't, quite frankly, had the capacity to do it. We haven't had these vast factory fleets that have sailed the oceans of the world fishing at will to the point that certain stocks are depleted, and some are fished to commercial extinction. So, if I talk about the countries (I prefer not to name them), but I can tell you that they're both from west Europe and eastern Europe; in one case - I don't mind naming this one - Cuba, who is a little closer to Canada. But then there are countries such as Japan who are not next door to us. And so there's a large number of states interested in continuing to fish in our economic zone. Of course, it's our policy - the Canadian Government's policy - to continue to permit such fishing, but only on the basis of the allowable catches that are determined on the study of scientific evidence, as I have mentioned. And as you've pointed out yourself, the decision lies with us, and that's the way we want it.

Mr. Wright: This brings me to the next point. How do you control it?

Mr. Beesley: That's not difficult. It depends what you mean by "control it." Do you mean how do you enforce it, or police it?

Mr. Wright: Enforce it.

Mr. Beesley: Well, I think it's easy to get a misconception concerning the difficulties of enforcement on the basis of

some of the fisheries disputes that have occurred throughout the world - for example, the one between Iceland and the United Kingdom. If it's a case of a state trying to assert jurisdiction which is vigorously resisted by one of the states affected, then there's obviously going to be a clash of interests and perhaps a confrontation. But we didn't do it that way, and that's not meant as a criticism of the way any other state has done it. We negotiated agreements with each of the countries affected by our fishing legislation, and as a consequence, it's in their interest to respect our jurisdiction as much as it is in ours to ensure against any kind of disputes by concluding treaties with them, and so we've concluded bilateral treaties with the whole host of countries who had been fishing in our waters and wished to continue to do so, and the result has been a very smooth transition. I don't think I would be overstating it at all to say that it's the smoothest in the world. Of all the countries who have established a 200-mile exclusive fishing zone, ours has been the one that has happened with the least disruption, the least dispute, the least difficulty. But it didn't just happen, like magic. It meant an intensive effort of bilateral negotiations with individual countries, limited multilateral negotiations in ICNAF - the regional organization I mentioned - and, of course, long-standing policy going back to before the outset of this Conference aimed at the development of new

law , in fact, I would go further - the development of a system of law to replace what was earlier a non-system of non-law. That's been our aim. It's not simply a desire to grab the resources. Over the period of this Conference, we've watched the resources dwindle. We've watched stocks become depleted. I mentioned before this interview Dr. Needler, who is one of the foremost Canadian experts on fisheries, and I believe it's widely recognized he's one of the world's best experts. He has believed, although he is a scientist, for well over 10 years that the only way to stop the over-fishing is to give the power to the coastal state to set the catch, to set the allowable catch, and to police it if necessary. But going back to your question. It's a totally different situation if one is attempting to enforce or police a zone against the wishes of the other countries in question. Compared to what we're doing, which is simply ensuring that treaty obligations are implemented properly, it's a totally different operation and it doesn't mean that we have to be having disputes on the seas in the economic zone with these various states. On the contrary, what is necessary is surveillance with the capacity to enforce. But it's rare that one has to actually arrest ships. We do that whenever it's necessary and whatever the country, but it's a very rare occurrence given the numbers of ships fishing and the numbers of countries involved, and I believe that too will be the

worldwide pattern. I don't see this as something leading to disputes. I see it as exactly the opposite - as something that avoids disputes, because without this Conference and without the kind of concept that we developed in it, namely the economic zone, I believe that coastal states would in any event have acted but they wouldn't have done it on the basis of this emerging principle of customary international law called the economic zone, and there would have been very serious disputes, as there could still be on other issues where we haven't gone that far in the Conference in developing a general consensus.

Mr. Wright: This leads me to the next question in regard to the economic zone, and we've got to think of course that about 90 per cent of the fish lives on top of what is called the continental shelf.

Mr. Beesley: That is correct.

Mr. Wright: Now, your continental shelf goes far beyond the 200-mile zone in certain parts, I'm not saying everywhere.

Mr. Beesley: That's correct.

Mr. Wright: Now, this Conference is also emerging with this idea that the coastal state should have certain rights on the continental shelf, but there we are in an area that's really high seas, really belongs to the common heritage of mankind. Now, what is your attitude to that?

Mr. Beesley: Well firstly, just as a point of clarification,

this Conference has never adopted the concept that the high seas beyond the 200-mile limit belong to the common heritage of mankind. I have no objection if people like to say that, but the specific concept of the common heritage of mankind has only been applied to the seabed beyond national jurisdiction and even people who have been in the Conference for some years occasionally mix the two up because we're not all lawyers and we're not all Law of the Sea experts. But I think it's important to note that we've never adopted a resolution in the U.N. or in this Conference saying that the waters are the common heritage of mankind. But having said that, the distinction may not be that important because beyond the 200-mile limit the waters are high seas. Nevertheless, the seabed, or the continental shelf if you wish, has long been subject to a different regime in the areas adjacent to the coasts of a coastal state. I am referring to the 1958 Geneva Continental Shelf Convention; 1958 seems like a long time away for some - it just seems like yesterday perhaps for others - but there are some participants in this Conference who were also present in 1958, and what that treaty laid down, and Canada is a party to it, is that a coastal state shall have the sovereign rights - not sovereignty, but sovereign rights - in other words, the kinds of rights that would be consistent with sovereignty - sovereign rights over the resources of the

continental shelf out to 200 meters or to the point of exploitability. Obviously it doesn't take anyone trained in the law to realize that if the continental shelf - the physical shelf, the extension of the land mass, or as the International Court put it in the recent decision, the extension of the territory of the continent - if it goes beyond 200 meters, not 200 miles but 200 meters, then it still is resources belonging to the coastal state out to the point of exploitability.

Mr. Wright: Well, the point of exploitability, of course, changes as technology advances.

Mr. Beesley: Precisely. And that's just the way the coastal states interpreted it at the time and have ever since. That was long before anyone had even conceived of the idea of an international area beyond the jurisdiction of any state which would be set aside for peaceful purposes and for the common heritage. You see, that concept didn't even arise until 10 years after the 1958 Conference and the 1958 Convention. So, as a consequence, no one - I know because I've been involved in the Law of the Sea that long - no one considered in those days that by defining the continental shelf at a certain point, they were somehow taking something away from the common heritage because no one at that stage was thinking of the possibility of a new approach - a wholly new approach - to this resource beyond national jurisdiction. But that's all

happened since and that's one of the problems the Conference is seeking to resolve - the limits of national jurisdiction which at the same time, of course, are the limits of the international area, and that's where there is a division within the Conference which has not yet been resolved although it seems to be very near to resolution.

Mr. Wright: Actually the difficulties are less about fishing than they would be about resources, the mineral resources. I am referring to the nodules, but the nodules are usually found in very deep sea.

Mr. Beesley: That is correct.

Mr. Wright: But also offshore oil and we know that in the next few years we may go 500 meters down to get to the oil.

Mr. Beesley: That is correct. There already is drilling at that depth. But that also, I think, is no surprise to anyone. The question that used to be argued was whether there was any oil out there beyond the claims of coastal states to the continental shelf. People are not arguing that anymore. I've heard some of the geologists discuss this in the language that goes beyond my ken, but it depends in some cases on the direction of the continental drift. If it drifted towards the country in question, the oil may well be within the limits of the national jurisdiction. If it drifted the other way, the oil may well be beyond the limits of national jurisdiction and therefore out there waiting for the proposed international

authority and the proposed international enterprise. So, I don't think it is correct to imagine that all the oil is in any one place. People don't really know, but the more they learn, the more they seem to be of the mind that the resources in the area beyond national jurisdiction are tremendous and they are not only mineral, they may well include petroleum as well.

Mr. Wright: Now there is an idea that when one talks not fishing but about the mineral resources outside the strictly adopted 200 miles, there would be some compensation paid by the coastal state that is exploiting these mineral wells to an authority or to the developing world as a whole.

Mr. Beesley: We're now discussing the resources of the continental shelf, not the fisheries or not the seabed beyond national jurisdiction. There is a whole new regime being developed for that, as you know. One, incidentally - the common heritage - which Canada has strongly supported from the beginning. We were the first developed country to support that concept. But with respect to the continental shelf, there is actually a provision in the text of the treaty we are drafting for revenue sharing derived from the resources of the continental shelf beyond 200 miles. As you know, the continental shelf in geological terms consists of the shelf,

the slope and the rise - that's three descending lines that eventually intersect with the deep seabed. It is rather interesting that on the basis of a study the U.N. has just done, which is about to be published, it is made quite clear by the maps and charts attached to the study that the proposals being put forth by the coastal states with wide shelves leave a substantial area for the international authority beyond the limits that would be the outer limits of national jurisdiction; but in addition to that, in any event, this sounds like a very Canada-oriented discussion, which is not what I intended - but we happen to have been the country which first suggested revenue sharing also. It will apply, if we are successful in working out a precise formula, to the revenues derived from the resources beyond 200 miles out to the edge of the continental margin. Now the reason for that provision - it wasn't a demand from the landlocked or the geographically disadvantaged - they refused to consider it for many years because they refused to consider any claims beyond 200 miles - however, so many states made clear that they were not just making a claim. In some cases, this is territory incorporated into a state through the constitution. It was not a simple matter to get states to give up areas that they had long considered part of their domain even though it's under water. And as a consequence

there has been a compromise developed within the Conference. But the origin of the compromise - it's worth noting - is the coastal states, in particular Canada. The USA was also one of the first to make a proposal, quite a different type of proposal, but nevertheless, like our proposal, it was intended not merely to achieve a compromise or an accommodation but to build an element of equity into the total solution that we were seeking. And that still isn't finished. We still have to work further on that question at this very Session, but there seems again to be much less heat on the issue. Mind you, I am aware of a proposal that will be introduced at this Session that would extend that idea of revenue sharing right into the economic zone right up to the shores of the coastal state. While I believe that it's a proposal that will be put forth in good faith and perhaps pursued vigorously, it's no secret that it doesn't have a chance of success.

Mr. Wright: Thank you very much.