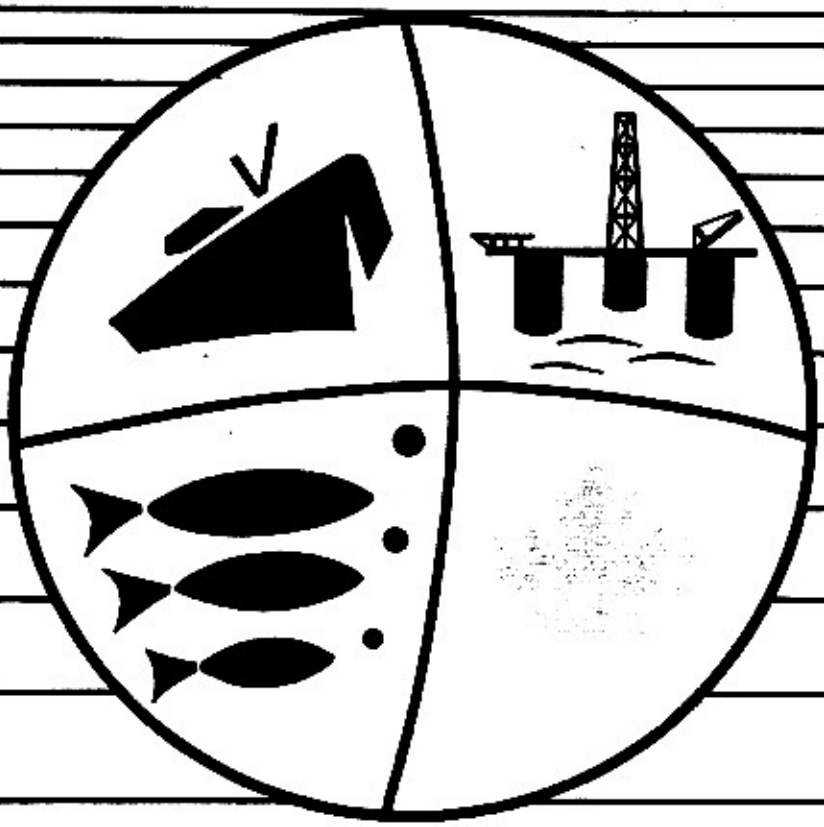
OCEAN INDUSTRY IN ATLANTIC CANADA

Proceedings of a Conference
Held in Halifax, Nova Scotia
March, 1980



LAW OF THE SEA: PROSPECTS FOR SUCCESS AND CONSEQUENCE OF FAILURE

Luncheon Address

HIS EXCELLENCY J. ALAN BEESLEY, Q.C.
PERMANENT HEAD, CANADIAN DELEGATION
LAW OF THE SEA CONFERENCE

I had come here prepared for a highly academic discourse which I've scrapped completely, having chatted with some of you before lunch and I'll skip quickly through all of my anecdotes about Australia, and the U.N., and get to the heart of the matter, which is: what's going on down there in New York at the Law of the Sea Conference that matters to those of you here today? I'd like to spend maybe five minutes, on the background, however, because it's necessary to see the big picture, so to speak, in order to obtain an accurate analysis of how important the various parts of the exercise are, and to assess the chances of succeeding on the aspects of the Conference of particular interest to those here today.

I think we have to begin by noting that we are talking about a very comprehensive Conference, dealing with virtually all the issues that touch upon the uses of the ocean and the underlying seabed--an

area, in other words, approximately equivalent to about seventy per cent of the globe on which we live, and we are attempting to settle fundamental jurisdictional claims, and have been partly successful in doing so, although not wholly successful. We've attempted to lay down totally new rules in the place of no rules at all for the preservation of the marine environment. We've been in the process of affecting a major transfer of resources. That has already been largely achieved, but not entirely. With respect to fisheries, it has been achieved. With respect, for example, to the deep ocean seabed beyond national jurisdiction, we haven't yet completed that. We're also involved in questions as old as freedom of navigation in international straits, and even there we have developed totally new concepts. We're also, at the same time, developing radical new concepts such as the Common Heritage, quite unlike anything previously known in the whole history of humanity. This has necessarily been a difficult, complex and a lengthy process. The bad news is that we're not yet finished. The good news is that we've done more than ninety per cent of the task and we have a reasonably good chance of completing it in the Session that began on Monday in New York. I prefer not to get into questions of whether I'm a cautious optimist or an unhappy pessimist. The fact is that I think we can

complete the process. I'm not sure we will, but I think there is a good chance that we will.

Now the reason I'm mentioning these other issues is not merely to underline what the Conference has already achieved, although that's important in determining how likely it is that we can resolve the seemingly intractable issues that still face us. A few years ago the environmental issue looked impossible. Not so long ago the fisheries issue looked impossible. If you think back just to the dispute between Iceland and the U.K. you know what I mean. And so on with the whole range of difficulties, including the one I mentioned, the new concept with respect to passage through international straits. Many of the military uses of the seas have been called into question. Any one of these could have destroyed the Conference, but we have managed to thrash out draft articles, some three hundred in total, plus another two hundred comprising the Annexes.

Nothing is wholly settled. I think that's the first point I'd like to underline. Even the concepts pertaining to freedom of navigation, fundamental to the interests of not only the major maritime powers, but all states, are not yet completely settled because it has been the assumption on which the Conference was based, that nothing is settled until everything is settled. Many of the issues are substantively

interconnected, but even those which may not be intrinsically related have been deliberately linked politically by the negotiators.

Having said that, I think I should mention in passing, that we began this process by two initiatives dated back to 1967, the one by Ambassador Pardo of Malta who launched the new concept of the common heritage of mankind. It's worth noting, though, that it was never meant to apply to anything more than the seabed beyond national jurisdiction. People often misuse that term, sometimes against Canada as well as other states. In that same year, the USSR launched an initiative based on the importance of freedom of navigation, when they suggested to many countries around the world that agreement on a twelve-mile territorial sea coupled with a high seas corridor through international straits. I mentioned that because even today we see these two trends remaining in the Conference. The major interest of the developing countries, in the seabed and in resources generally, and the major interests of the maritime powers in preserving freedom of navigation, are interests common, as I have mentioned, to both super powers and their allies.

What has happened which is of interest to Canada? A good deal. The twelve-mile territorial sea, I

believe, is now a part of customary international law. We have made it part of our national law. We didn't reserve our position in the International Court. No one took us to court.

I think we can say that with respect to the 200 mile fishing zone, if it's not yet completely accepted as a principle of customary international law, the distinction is irrelevant because I don't think anyone will get taken to the International Court on that.

So there are some achievements that we believe are here to stay. But there are many which are contingent. I believe personally that the articles being developed on the environment are here to stay, but there are many who would say that we have a very special position on the Arctic, and acceptance of that position in the Treaty is conditional upon acceptance of everything else, and we might find ourselves back in a confrontation situation with respect to our Arctic Waters Pollution Prevention Act if the Conference should fail.

Similarly, for example, on the salmon. We have been able to negotiate from a minority position special provisions to protect salmon. But there is no guarantee that those provisions will have any after life if the Conference were to fail. All of the series of concensus provisions, which I won't bother detailing,

like freedom of navigation, are based on the new compromise concept, such as the economic zone--a 200-mile limit, but not a 200-mile territorial sea. I think you can take it for granted that if the Conference were to fail, there would be many claims for a 200-mile territorial sea--many more than previously existed, as well as some 50-mile claims, etc. We would find that we would be in a state of turmoil because of the uncertainty as to which law would apply, and because of the very clear disputes that would emerge immediately as states began to advance claims to which other states would object.

Having said that, we still are faced with the problem of resolving some very difficult issues, some of direct relevance to Canada. The first one I'll mention, is one relating to the 200-mile fishing limit itself. Now let me state my personal opinion without purporting to speak for the Canadian Government. It is my belief that if a serious attempt were made to assert fisheries jurisdiction unilaterally beyond 200 miles, it could jeopardize the Conference and in so doing raise all the questions as to whether the countries which have agreed to fishing arrangements with us by treaty, on the basis of the consensus emerging from theConference, would still honour those obligations if the Conference were to fail. It doesn't mean that we can't protect the stock that straddle the 200-mile line. We have already used the

provision in the text which gives a measure of protection to the coastal state. We're amongst those states that have discovered, however, that it isn't a strong enough provision, given the activities of foreign states just beyond 200 miles with respect to the fish stocks that straddle the line. So there is an attempt on our part to strengthen that ~~opinion~~ provision. It is difficult to say how successful we'll be on that. I want to underline the point that by attempting, for example, to claim unilaterally out to the edge of the areas in question beyond 200 miles with respect to fisheries, and I'm not talking about the seabed beneath, but only with respect to the water column, we would not only create the kind of storm that we hadn't even dreamed of back in the days when we've been in the middle of several confrontations at once on the Arctic, but we could undermine some of the concepts upon which a successful conference depends.

A much hotter issue, and still not quite resolved, is the outer limits of the continental shelf, or to use the term of art under negotiation, the continental margin. In brief, the history on this subject is that we were the first country to insist that we have limits going well beyond 200 miles. We were all alone when we put forth that claim and I can assure you that we felt very lonely at the time, because this was at the very point in time when the concept of the common heritage had first

emerged. It sounded as if we were saying, "Yes, we believe in the common heritage, but only after we've got everything we want", and many delegations said that really there wasn't much common heritage left after we'd got what we wanted. Be that as it may, we did say that our actual physical geological continental shelf did go out well beyond 200 miles and there was no way that we could ever accept that our continental shelf be truncated at 200 miles. Gradually we acquired support. We worked very hard for that support. Gradually some of our allies began to come out of the woodwork and we eventually had a respectable body of countries which took a strong position similar to ours, to the effect that they also had such limits and they didn't intend to abandon them.

The basis for our claim was not purely fictional or based on desire alone. It was the 1958 Continental Shelf Convention. The issue is a controversial one, namely the interpretation of the particular provision outlining the limits of coastal jurisdiction over the continental shelf. Now the stipulation is, you all recall, that the coastal state has jurisdiction to the depth of 200 metres, or to the point of exploitability. That's a pretty elastic definition and at the same time in 1958 it wasn't that objectionable to anyone. Some objected to it for legal reasons but it was never made to appear as greedy,

something that would enable a country to take something away from the international community as a whole until the birth of the common heritage concept in 1962. Some said that our limits should be cut at 200 metres. We simply wouldn't discuss or negotiate on that basis. The result of all this is that we now have in the text, as part of the emerging consensus, a provision based on a draft article co-sponsored by Canada and the Irish Delegation called, by our preference, the Irish formula, that recognizes our jurisdiction out to the edge of the continental margin. As I said, nothing is settled, but that is in the text, and it's a lot harder to get something into that text than to get it out. However, it became evident as much as three or four years ago, and even during the Preparatory Committee before the Conference proper started, that there were great pressures to cut off our shelf at 200 miles and if not, some form of revenue sharing beyond 200 miles. Now, I'm aware of just how topical that issue is. All I can tell you is that it was necessary from the outset ten years ago to operate on the assumption--a hopeful one at the time--that we would find some oil and gas deposits out there, that might go beyond 200 miles, and we were not about to abandon them. In the process, however, tremendous pressures arose from what are, frankly, the vast majority

of the Conference, for revenue sharing of some sort beyond 200 miles out to the edge of the margin. I'm talking now purely about the Continental Shelf resources.

Now, there are differences of views still about the basis for such revenue sharing, whether it should be profit sharing or whether it should be a percentage of wellhead value. There are differences about the amount. But the one thing that is clear, and since I'm not negotiating here, I can tell you exactly what I really believe; that itis hopeless to expect general agreement on the kind of limits that we're claiming without some form of revenue sharing. This is no big news. You can find it, for example, from the representative of the Government of Newfoundland, who has been in our delegation from the outset. Just as on other questions related to the nickel mining issue, you can talk to the representatives of the Provinces of Ontario or Manitoba, or representatives of the Union. We have had this kind of broad representation from the outset: precisely in order to work together to achieve a generally acceptable solution. I mention this because I know that it is a serious issue and one of very practical importance. The one thing I cannot discuss with you, because it is beyond my mandate, both as a public servant, and because of my particular negotiating task assigned to me, I can't go into questions of federal-provincial

jurisdiction or federal-provincial sharing, but I can answer questions on the Conference developments.

Those are two of the unresolved issues, although as I say, I believe we have virtually succeeded on the outer limits which is the most vital question.

One other issue, which may not be of such interest to this group, is the nature of the legal regime relating to the seabed beyond national jurisdiction--the deep ocean seabed. Canada has a vital interest in that. Partly because we've always joined in support for the common heritage, which is intended to benefit the many rather than the few as the old principle did. There is no doubt that the freedom of the high seas principle, if applied to this part of the world, the ocean floor beyond national jurisdiction, would mean simply first come, first served, as it used to mean in fishing, or do as you wish without regard for the environment, as it used to mean throughout the whole law of the sea. Now we have a totally new approach and we have a number of conference principles which are very radical, I would say almost revolutionary, which are accepted as concensus principles. We've never had a vote in the Conference on any matter of substance. We have agreed that there will be an International Authority to manage the area. We have agreed that there will even be an International Enterprise which will share in the mining of the area

along with private enterprise and states. It is agreed that there will be a fairly complex system of law, most of which has already been negotiated.

Our particular interest, other than the interests of all states, the members of the international community, is that quite clearly the area in question could provide a source of competition for our land-based production of minerals. The manganese nodules, which are so abundantly distributed on the ocean floor, are made up mainly of nickel, copper, cobalt and manganese, and we have no doubt whatsoever that the competition from this source, particularly if subsidized, as apparently will be the case, could displace markets for the Canadian industry and the industry of other countries dependent on production of these minerals. We have managed to achieve again the inclusion in the text of a provision called the nickel production ceiling which places a limit on the rate at which seabed mining can come on stream, so that it will not suddenly arrive and displace the land-based producers. I might mention, of course, that the more displacement there is the more damage to this new concept of the International Enterprise which would also be out mining the area. The problem is simple, it's that the major consumer countries of these minerals--representing 80 to 90 per cent of the consumption of these minerals--are only a few countries, namely the

EEC, Japan and the USA. They are the countries that are the major consumers. They are also the countries, however, who have made it abundantly clear that they intend to be the major miners, and we envisage the situation, looking ahead ten years, or twenty, as we had to do on the shelf, a situation whereby the major consumers become the major miners and therefore the major consumer-seabed miners would become their own suppliers. We could have no market.

The same problem arises, of course, for the Enterprise. The threat to the position we have achieved on this is that the same major consumer countries, who are very powerful countries, with a great deal of influence on individual delegations have proposed what they call a "floor" and that floor concept means that there would be a guaranteed right to produce up to a stated level of tonnage irrespective of market conditions. Now we are opposing that for obvious reasons, because our analysis of the particular tonnages proposed is that they would almost certainly result in an oversupply of these minerals. That issue is the most difficult one on our agenda and I had to leave some of the negotiations on that question to come here. We have already, at this very Session, got deeply into the two questions I mentioned relating to the Continental Shelf. Behind the scenes since the last Session we've been working on

the problem of fisheries resources beyond 200 miles. Now, we're not only alive to these problems, we are fighting hard to protect Canada's interests on all of them.