

STATEMENT BY J. ALAN BEESLEY,
AMBASSADOR OF CANADA TO THE
THIRD UNITED NATIONS CONFERENCE
ON THE LAW OF THE SEA,
TO THE 11TH SESSION OF THE
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Mr. President,

In light of the time constraints, I may be obliged to deliver only parts of my written statement, in which case we propose to distribute the whole text, in accordance with the practice which has been followed on other occasions in the Conference. The statement I propose to deliver will proceed from the general to the particular in outlining the Canadian perspective on the Convention. Thus while we will concentrate on the three major agenda items, we think it appropriate to place our statement in a broader context. Our reason for doing so is our concern at the apparently widespread belief outside the actual Conference that this Conference is all about sea-bed mining and little else. This is a very dangerous misconception, for reasons I propose to address.

Scope of the Conference

In a major foreign policy address by the Secretary of State for External Affairs of Canada to the 36th Session of the UNGA on September 21, 1981, Dr. MacGuigan made the following statement concerning the unusual -- perhaps unique -- scope of the exercise in which we are engaged: "I wish to emphasize that the Conference is not merely an attempt to codify technical rules of law. It is a resource Conference; it is a food Conference; it is an environmental Conference; it is a marine science Conference; it is an energy Conference; it is a conservation Conference; it is an economic Conference; it is a maritime-boundary-delimitation Conference; it is a territorial-limitation and jurisdictional Conference; it is a transportation, communications and freedom-of-navigation Conference; it is a Conference which regulates all the uses of the oceans by humanity. Most importantly, it is a Conference which provides for the peaceful settlement of disputes concerning the oceans. It is, in other words, a Conference dedicated to the rule of law among nations."

Mr. President, the point I wish to stress is this is not a conference which should be looked on from the narrow perspective of sea-bed mining, important though it is. Decisions based on this kind of tunnel vision view of the Draft Convention will inevitably be misguided and unbalanced.

Importance of the Conference

In that same statement Dr. MacGuigan addressed the next and closely related point I wish to emphasize, namely the fundamental importance of the Conference to peace and security, in the following words: "In our attempt to advance the rule of law at the Third United Nations Conference on the Law of the Sea, I should like to associate myself with the statement made by the Secretary-General at the opening of the tenth session of the Law of the Sea Conference on March 9, 1981, when he said: 'Apart from the achievement of the specific objectives of this Conference, I attach the highest importance to the impact which its success may have in strengthening the role of the United Nations in finding viable solutions to great global issues.'"

Canada's Secretary of State for External Affairs went on to say: "The Third United Nations Conference on the Law of the Sea ranks in importance with the San Francisco Conference founding the United Nations itself. It represents an extremely important element in the North-South dialogue. It has significant implications for peaceful East-West relations. It touches on the interests of every State great or small, rich or poor, coastal or land-locked. The achievement of a universal agreement on a Law of the Sea Convention is fundamental to world peace and security."

I should now like to turn from the general purposes of this Conference to some of our current and more specific concerns, before returning again at the end of my statement to some more fundamental issues.

Preparatory Commission

I would like to compliment you, Mr. President, and Mr. Engo, for developing the compromise proposal on the Preparatory Commission contained in Annex II of the Working Group of 21 report. The provision on membership, whereby the Commission will consist of all states which have signed or acceded to the Convention with those which have signed the Final Act participating fully as observers, is acceptable to my delegation. Utilizing the rules of procedure of this Conference as the basis for the Commission's rules of procedure is also a reasonable compromise which will permit the Commission to get down to work without protracted debate on procedural questions. We are also pleased that the Commission has been given the important task of studying the problems encountered by developing land-based producers most seriously affected by sea-bed mining. The very essence of the great new emerging concept of the common heritage of mankind will be called into question if in pursuing this basic goal we do so without regard to the damage which may be caused to the few in our effort to benefit the many.

Participation

We have studied the proposals which you have put forward, Mr. President, in your report of March 26 on the question of participation in the Convention. There are few issues of greater difficulty or of more significance to the political acceptability of the Draft Convention. May I compliment you for your success in surmounting yet another seemingly insoluble problem. Your suggestions with regard to the participation of international organizations and national liberation movements are generally acceptable to my delegation, and appear to provide the basis for moving a step closer to the consensus we have all been seeking for so many years.

Preliminary Investment Protection (PIP)

It is the view of my delegation that any regime governing investments in sea-bed mining made prior to the entry into force of the Convention constitute a major concession to the pioneer sea-bed mining states, and must therefore meet two major objectives: first, from the point of view of the sea-bed miners, it must provide the pioneer investor with certainty that his investment will be recognized and provide the basis for the issuance of a production authorization when his plan of work with respect to a minesite has been approved; and, second, from the point of view of the Group of 77 and many other states together constituting the vast majority, it must be brought squarely within the framework of the policies and provisions of the Draft Convention dealing with the development of resources of the Area since otherwise it would defeat the Convention that it is intended to complement. Clearly, therefore, the exceptions permitted to pioneer investors must not extend to actual production before the Convention comes into force. Such an arrangement would make a mockery of the whole concept of the common heritage of mankind, and transform it into a rule to benefit the few at the expense of the majority.

Mr. President, the proposal that you have put forward in Annex II of Document A/Conf 62/c.1/L.30 does, to a large extent, meet these objectives and, thus, constitutes a good basis for compromise. We would expect that, as a result of comments on the text, certain drafting ambiguities will be clarified and that there will be a general understanding reached on the precise terms used in the proposal. The comments which follow are directed to this end.

If we are to reach agreement on protection of pioneer investments then it is essential to ensure that all pioneer investors are treated in the same manner and that the text does not accidentally introduce any elements of discrimination between them. For example, the definition of the expression "pioneer investor" contained in article 1(a) states in part that a pioneer investor, to be recognized as such, must have spent "no less than 10 percent of that amount in the location, surveying and evaluation of a specific portion of the area". It is the understanding of my delegation that the words "a specific portion of the Area" do not refer to a single potential minesite or even two minesites, for the operator and the Enterprise, but that they may be interpreted as including a broader "area" or even separate "areas" which, taken together, can be considered as constituting a "specific portion of the Area". There are companies, including some from my own country, which have expended substantial sums in vital pioneering technological development activities carried out over extensive regions of the Area beyond national jurisdiction. Such entities should not be penalized because they did not jump the gun by staking out individual minesites well before any authorization by the Conference to so do. An interpretation to the effect that the words "specific portion" refer only to one single continuous area of a confined size or a single potential minesite could introduce an unacceptable element of discrimination as between the various consortia to which PIP is intended to apply. To eliminate any potential ambiguity in that respect, paragraph (1)(a) should be amended accordingly.

Mini-Treaty

Mr. President, I should like now to refer to an alarming rumour which has swept through the Conference during the past few days, to the effect that certain states intend to sign the mini-treaty in May. I find this hard to believe in light of the major concessions to the very states in question which would be granted by the Resolution on Preliminary Investment Protection. If agreement is reached on these provisions, it would be on the very clear understanding that they would be accepted in lieu of the mini-treaty. Any state that proceeds with a mini-treaty which is not only outside the terms of the Draft Convention but actually contrary to it, would not only be acting in bad faith but would put at risk any and all concessions to the major sea-bed miners which may be negotiated at this session. A mere boundary arbitration agreement, going no further and published in the UN Treaty Series would, of course, be quite another matter, but our information, which we hope will prove to be incorrect, is that least one state has decided to press ahead with the mini-treaty without one word changed. Mr. President, I hope you would join with the Canadian delegation in warning against the very serious consequences of any such action.

Mr. President, having dealt with the three major agenda items for Committee I, I should like now to comment on two others.

Article 151, Production Policies

The production policies enshrined in Articles 150 and 151 are clearly designed to encourage deep sea mining while at the same time phasing in deep sea-bed mining in the interests of lessening the inevitable disruptive effects on established patterns of land-based production and marketing. I wish to emphasize that this provision was very carefully developed with the specific purpose of ensuring the rational phasing-in of this major new source of minerals which the seabed represents. It was never intended and it certainly did not become a rigid control mechanism designed to stifle or prevent present seabed production as it is so often portrayed by its few opponents. The Canadian delegation could not have lent itself to such an exercise. In any event, since it is well known that we are both a pioneer seabed miner and a land-based producer of some consequence -- we are, indeed, the world's largest nickel producer -- we consider that we have some credentials on this issue.

It has been the view of my delegation throughout the protracted negotiations lasting over a period of five years that a fair compromise on this issue is one that will make seabed mining an economically feasible and attractive activity, while ensuring a reasonable degree of effective safeguards -- perhaps minimal is a better word -- for land-based producers over the 20-year phase-in period of the production formula. Thus the second point of importance to note is that the formula applies for a limited and specified period. Our efforts and those of others have resulted in the formula contained in Article 151, which is sometimes criticized for its complexity. Mr. President, the apparent complexity of the formula is in part a reflection of the complexity of the issue itself, but it is due in no small way to the later addition of a "floor", and a so-called "safeguard", to the formula over the strenuous objections of the Canadian delegation. My delegation has often expressed dissatisfaction with this aspect of the formula. The floor has significantly reduced the formula's effectiveness for the land-based producers, and has tilted the balance in favour of seabed miners. The floor, demanded by countries professing to be free-market economies, guarantees a right to over-produce, irrespective of market conditions. It should be noted also that the countries insisting on the floor have flatly rejected an anti-subsidization clause. However, despite these shortcomings, the formula represents the only positive element in the draft Convention that specifically addresses the concerns of land-based producers as a whole, and adopts a preventive

rather than a vaguely remedial approach. As such, it is an essential element of the package on Part XI. During the first stage of this session some states have gone so far as to demand the deletion of the formula. We find this demand incredible, since its acceptance would irremediably destroy any remaining balance reflected in these provisions of the draft Convention. I wish to emphasize that the deletion of the nickel production formula would be unacceptable to my delegation. Indeed, Mr. President, the deletion of the production formula from the draft Convention would seriously affect Canada's view of the Convention and could raise serious doubts about Canada becoming a party to the Convention in such event.

It may be appropriate, in the light of my foregoing comments, to turn now to the closely related issue of unfair economic practices.

Unfair Economic Practices

My delegation has co-sponsored, together with the Australian delegation, a proposal to introduce in the Draft Convention a provision to the effect that States Parties shall avoid unfair economic practices in the production, processing, transport and marketing of minerals and commodities derived from the resources of the Area. This proposal would simply apply to minerals derived from the seabed, a principle which is generally accepted in international trade and implemented in the General Agreement on Tariffs and Trade. My delegation continues to be puzzled by the fact that the staunchest opposition to this proposal comes from the group of States which loudly profess their attachment to the free market philosophy and refer repeatedly to such philosophy as a justification for their position on a wide range of other issues before this Conference. I would hope that the delegations concerned will review their positions on this issue in the short time still available to us and join with us in seeking to resolve this apparent inconsistency.

Mr. President, I should now like to offer a few observations on some questions which have arisen out of the further meeting of Committee II.

Article 63 "Straddling" Stocks

My delegation has been an active co-sponsor of document C2/informal meeting/54/Rev/1 which proposes a change to Article 63(2) on stocks which "straddle" the 200-mile exclusive economic zone. This amendment is designed to provide for the conservation of these so-called "straddling stocks", something which would be of benefit not only to the coastal states but also to those countries with distant water fishing interests. It has falsely been characterized as some kind of disguised extension of coastal jurisdiction. Such an interpretation flies in the face of the clear and ...7

unambiguous language of the very modest changes being sought.

I wish to emphasize that this proposal has been co-sponsored by 16 countries and has been supported by over 45 delegations. Only one small group of delegations has opposed its acceptance. We have tried many times to negotiate with this small minority, and while they have appeared willing to consider the question in private discussion we have found that each time the issue is raised publicly at the Conference they have opposed its consideration. We wish to publicly reassure these few countries again that their concern is wholly unfounded. The opposition of such a small group of states should not stand in the way of the wishes of more than 45 delegations for a necessary change to Article 63(2). I address an appeal to these few delegations to understand that their actions not only impede our efforts to ensure the Convention is broadly acceptable, but also affect the continuing development of close and friendly bilateral relations on fisheries questions.

Article 21 - Laws and Regulations of the Coastal State Relating to Innocent Passage

The Canadian delegation views with concern the proposal by some nations to introduce a substantive change to Article 21 by placing a requirement on warships to notify or seek authorization before exercising their right of innocent passage in the territorial sea. The debate on this provision has made clear that if such a change were made it would effectively undermine any hope of achieving a universally accepted convention on the Law of the Sea. The benefits that the Conference is attempting to achieve in all other areas will be threatened if the major maritime states and their allies reject the Convention because of a substantive change to Article 21.

On the other side of the coin, the debate on this Article has also indicated how sharply views vary on what constitutes customary international law. A definitive view can only come through a universally accepted convention, and any major maritime state which might be seriously considering remaining outside of the Convention should recognize that a global UN convention on the Law of the Sea is their only guarantee of protecting freedom of navigation. I shall return to this point.

Mediation Efforts

Mr. President, before turning to the concluding part of my statement, I should like to make a few observations about the attempts made by the Group of 12 to play a modest role in assisting the Conference to work towards consensus. I am sure it is no secret that the Canadian delegation hosted the working luncheon at

which the Nordicanzac Group (or the Group of 12 as it has become known) was founded. The members of the Group, as you know, include Australia, Austria, Canada, Denmark, Iceland, Ireland, Finland, the Netherlands, New Zealand, Norway, Sweden and Switzerland. It is obvious that a common bond linking all these delegations is that they are all small or middle industrialized countries. We found at our first meeting, however, that the real bond which united us all was our common interest in achieving a Convention at this session. Indeed, I might more properly characterize the attitude of this group as one of determination to conclude this conference on April 30 with a Convention accepted by consensus. It was to this end that the group produced the working paper on Part XI and, at a later stage, the draft resolution on Preliminary Investment Protection. I should emphasize, of course, as other members of the group have done, that the paper was drafted and put forward by the heads of delegation of these countries in their personal capacities. We are gratified at the favourable reaction to our efforts, particularly the kind comments of the distinguished Chairman of Committee I, Ambassador Paul Engo of Cameroon, as well as the favourable comments made by the distinguished delegates of the UK, Japan, France and the Federal Republic of Germany. We are under no illusions about the difficulties entailed in bridging the gap between these five industrialized countries and the Group of 77. It may be worthwhile mentioning, however, in accordance with your request, Mr. President, and that of the Chairman of Committee II, that we are pursuing our mediation efforts and attempting to get a genuine negotiation under way between the major five industrialized countries, the Group of 77, the Socialist group and other interested parties. If our efforts contribute even in the smallest measure towards developing agreement on a Convention, then we will have considered the hours of time and the extensive work devoted by our group to have been well rewarded.

Drafting Committee

Mr. President, I should like to make a brief reference, if it is not out of order, as Chairman of the Drafting Committee. I will not repeat the two reports that I have already delivered to Plenary. I wish to refer only to the new proposals by the distinguished Chairman of Committee II, Ambassador Yankov, relating to the Committee III text.

As chairman of the Drafting Committee, I wish to thank Ambassador Yankov for the drafting suggestions in his report to the Plenary. He and I are aware that some delegations have raised questions concerning some of these proposed changes and I wish to assure the Conference that Ambassador Yankov and I have already taken steps to ensure that the Drafting Committee will examine these proposals in the usual way.

Balance of Interests

I should like to conclude with the following comments.

Firstly, I should like to urge again as I did in my statement in Plenary at the Ninth Session in Geneva on August 28, 1980, that all delegations in reporting back to their governments examine our present stage of negotiations with a view to reaching a judgement as to whether it represents a fair compromise between the powerful and the less powerful, the rich and the poor. In particular, and I refer now to the seabed regime, I suggest that the major industrialized countries examine the draft treaty proposals to determine whether they would result in the "have" countries becoming "have more" countries, and the "have not" countries becoming "have less" countries.

Customary Law

Mr. President, I wish now to address a point of vital significance to the success of this Conference and the subsequent fate of the Convention we are determined to adopt. My point is a simple one, namely - the very serious dangers inherent in any attempt by any state considering remaining outside the Convention to rely on its provisions on a highly selective basis to protect its interests. Clearly, of course, there can be no exclusive title to a seabed mine site, and thus no seabed mining, outside the Convention. No one would lend the vast sums required without a guaranteed and exclusive title. There are other and more serious dangers, however, facing those who might still not be convinced that their interests can be protected only by a global UN convention.

It is argued in some quarters that the common heritage is not a customary principle of law, but merely a provision in a Draft Convention which will have no binding force unless and until the Convention comes into force. Curiously, it is also argued by the proponents of this very view, that the freedom of transit regime in international straits is already an accepted principle of customary law. The proponents of such interpretations or policy options are obviously unfamiliar with the fundamentals of treaty law. They might find great difficulty in attempting to operate on the basis of treaty provisions they accept, while rejecting the Convention as a whole because of other provisions they do not like. The potential for disputes leading to actual breaches of the peace are enormous, as certain events have shown. The Convention now is the only way to bring certainty in the law. We have gone too far in rescinding the traditional principles of customary international law and replacing them with new principles for anyone to think that they are free to return to the status quo ante. Even if the Conference fails, that option is closed, and even more firmly if it succeeds.

I should now like to conclude by quoting - a brief excerpt from a statement made by the Honourable Pierre Elliot Trudeau, the Prime Minister of Canada, on November 9, 1981, in New York on the occasion of his receiving the Family of Man Award:

"So long as the nation-state continues to exist as an entity, obsolete though it may sometimes seem, and so long as nation-states remain a key element in the way in which the world is organized, then the integrity of nation-states must be nurtured and safeguarded. But, massed tightly on the planet as we are, a world of selfish and aggressive nation-states will not work. We have seen the results too often before. Thus the essential counterpart of the well-being of individual nations is the willingness to acknowledge a new concept of sharing -- sharing of power, sharing of resources, sharing of responsibilities. We need to develop an equilibrium of national and international goals.

"We shall have to develop a new alertness to the impact of single actions on the common good. We need to ensure that the international economic system and its institutions reflect the political and economic realities of today and tomorrow, not yesterday. It is necessary to integrate new factors into the equations of interdependence, encouraging the perception that new power entails new responsibility. It is necessary to identify those vital sectors for cooperation which compel an international approach. It is necessary to recognize that many nations will be taking decisions about their own economies designed to enhance their self-reliance, and thus their ability to make a more effective contribution to the international system.

"We must extend a profound and wholehearted understanding to countries which find themselves overwhelmed by dependencies. In our efforts to assist others, we must recognize that few countries in the Third World are as blessed with resources, stability and sheer physical space as we were in the early stages of our development in North America. ... and I urge that we address, with a new vigour, fundamental questions of the environment. The biosphere, which envelopes and nourishes us, is an inheritance which we dare not squander. The earth, the air, the lakes and seas -- all claim respect from the hand of man, and should receive the dedicated attention of bilateral and international negotiators. The work of the Law of the Sea Conference should not be lost. It is vital not only to national interests but to international equity and stability."

Mr. President, I sincerely believe that we are now at last close to realizing these high goals. May I pledge the wholehearted commitment of the Canadian delegation to any and all efforts to achieving them.

Thank you, Mr. President.