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"The Future of International Oceans Management"

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Introduction

One of my favourite Lester B. Pearson quotations, which I find myself recalling with increasing frequency in recent months, reads as follows:

> Diplomacy is largely the art of making an indiscretion sound like a platitude and politics that of making a platitude sound like a pronouncement.

Since I am not a politician and have no authority to make pronouncements, it is for you to judge whether my after-dinner chat contains any indiscretions and or platitudes.

I propose to begin with my perception of developments since the conclusion of the 1982 Law of the Sea Convention. Next I shall raise some questions as to the possible underlying reasons for such developments. Then I shall attempt to address what the future might hold in store for oceans management. Finally, I shall try to suggest how we might attempt to cope with the impact of future shock on the Law of the Sea and Oceans Management.

May I preface my remarks by reminding you all that I am a foreign service officer temporarily promoted from Ambassador to Professor, and that the comments which follow do not purport to express the views of the Department of External Affairs nor the Faculty of Law of U.B.C. I need only add that I shall try to be cognizant of the dictum enscribed on a plaque given to me by a colleague

some years ago, which reads "Old lawyers never die. They simply lose their appeal." Nevertheless, I shall be making an appeal to you tonight.

The point of departure for the future

Presumably we would all agree that the starting point of any attempt to contemplate the future of International Oceans Management is the Law of the Sea Convention. We all know that it was concluded in 1982, closed for signature on December 9, 1984, and that it attracted 159 signatories, a figure quite unprecedented in international law. Similarly, we know that it has now been ratified by 35 states and will enter into force when it receives 60 ratifications or accessions. We are all aware also that three major western states, the U.S.A., the U.K. and the Federal Republic of Germany, have not signed the convention. It is important to note also, however, that all three have made clear that apart from Part XI, relating to deep sea bed mining, the treaty reflects existing international law. What may not be so well known, is how many states, both signatories and non-signatories, have retained or passed legislation or proclamations which may be incompatible with the allegedly non-controversial provisions of the Convention. It is said, for example, that one major maritime power has protested 76 or more such claims, although these protests have not been made public. Thus, the Convention may be more a point of departure for measuring future action and less of a Bible, or Ten Commandments, than is generally believed, a point to which I shall return.

If the Convention is a less than a firm platform for crystal ball gazing concerning the allegedly non-controversial parts of the Convention, this is even more the case for Part XI, which outlines the deep seabed regime, based on the concept of "the common heritage." Again, we are all aware of the "mini treaty", confined, as far as we know, to the settlement by non-signatories and some

signatories of overlapping claims. Presumably all those present are aware also of a recent related development of potentially great significance, namely the successful resolution within the Preparatory Commission, in negotiations led by Canada, of the complex problem of overlapping claims amongst both signatory and non-signatory states. Similarly, we should all be cognizant of the major importance of the recent registration by the Preparatory Commission of the first four claims by "Pioneer Inventors", namely India, France, Japan and the U.S.S.R. No doubt everyone recalls the "Pioneer Investor" resolution passed at the end of the LOS Conference which accorded a virtual monopoly of the first generation of mine sites to nine countries: Belgium, Britain, Canada, France, Italy and the United States, as well as India, Japan and the U.S.S.R. It may not be as widely known that the Preparatory Commission has very recently passed a resolution which makes a number of *de facto* changes to the Conference resolution on the Protection of Pioneer Investors, incorporating changes and benefits for both applicants and potential applicants.

It follows that insofar as deep seabed mining is concerned in any attempt to envisage the future oceans regime we should bear in mind not only Part XI and the mini-treaty, but subsequent developments within or under the aegis of the Preparatory Commission. To raise just one question, will the settlement of overlapping claims between signatories and non-signatories encourage non-signatories to view the convention more favourably, as expected, or will such action be regarded as clearing the way for non-signatories to proceed outside the Convention on the basis of a new mini-treaty, as feared?

If the crystal ball were not already cloudy enough, we cannot consider a future oceans management regime which does not address fundamental problems

concerning the conservation of the living resources of the oceans and the preservation of the marine environment. On these vital questions, we must not only take into account the fisheries and environmental provisions of the Convention, but the extent to which they are being implemented or ignored. Indeed, along with the Convention, the Stockholm principles, and subsequent state practice, as well as interrelated treaties, and the wide range of ongoing programmes within the UN system, we should also consider the implications of the Report of the Bruntland Commission on Environment and Development, entitled "Our Common Future" if we are serious about attempting to look into the future in order to influence it positively.

It can be seen from the foregoing that it is no easy task we have set for ourselves. Necessarily, therefore, I shall have to be somewhat selective, and attempt to concentrate on certain basic issues, with little time to do more than make passing reference to others of equal importance, such as scientific research, or the continental shelf regime, or the specifics of the Part XI seabed regime.

The past as prologue

Some schools of modern philosophy teach that the past and the future increasingly coalesce into now. To illustrate this point, almost exactly thirteen years ago, in June, 1975, I was asked to address a NATO SACLANT symposium on "The Future Regime of the Oceans". Presumably the organizers wished to demonstrate that they were not fearful of supping with the devil, or at least the devil's advocate, since I represented a state accused of "creeping jurisdiction". This is what I said in 1975 to the NATO SACLANT Symposium:

> My basic thesis is that the members of the NATO Alliance have a vital interest, individually and collectively in the future legal regime

> of the oceans since an agreed constitution of the oceans is the prerequisite to a peaceful and stable world order; that the present uncertainty and confusion in the Law of the Sea contributes to instability and could lead to possible threats to the peace; that a breakdown of the current efforts within the UN to achieve a multilateral treaty on the Law of the Sea would result in the kinds of unilateral action which could lead to much greater instability; and that it is thus essential for every country represented here to make a major effort to ensure that the Law of the Sea Conference reaches agreement on a new legal regime of the oceans.

I continue to hold those views, and I shall indicate why they may have continuing relevance.

The convention regime

It is said that when two lawyers meet the result is at least three legal opinions. Let us therefore do what all lawyers do, and look first at the facts, and then at the law, and then attempt an informed opinion or so.

Views sometimes differ, also, on the facts - even, or perhaps especially - amongst lawyers. One example of a widely held view concerning the outcome of the Conference is that expressed by an Ottawa-based non-governmental educational institution entitled, interestingly, "The Common Heritage" as follows:

> The Law of the Sea Conference ... culminated in ... a general agreement among 130 nations ... one of the most significant international agreements since the United Nations was formed in 1946.

We are all aware, of course, of similar statements by successive Secretaries of State For External Affairs of Canada, as well as the series of such pronouncements by the Secretary General of the United Nations, and I shall refrain from quoting them, in spite of their great importance, because they are so well known.

A somewhat different point of view is expressed in a recent "Backgrounder" bulletin, (dated January 15, 1988), issued by a well-known Washington D.C. based non-governmental organization with a somewhat similar name, called "The Heritage Foundation", which reads in part:

> Senate Foreign Relations Committee Chairman Claiborne Pell is planning to hold hearings on the moribund Law of the Sea Treaty, which the Reagan administration wisely has concluded could harm American economic and security interests.

Yet another perspective, directed particularly at the extent to which the Convention, as actually negotiated, protects the navigational and overflight security interests of major maritime powers, is advanced by Lewis Alexander, former U.S. State Department Geographer and a long-time expert member of the U.S. delegation to the LOS Conference, in his well documented treatise published in 1986, entitled "Navigational Restrictions within the new LOS Context":

> The 1982 Law of the Sea (LOS) Convention, emerging after nine years of negotiation, spells out a regime for navigation and overflight that is clearly responsive to the needs and interests of the United States and other major maritime countries. The high seas freedoms embodied in the rules and regulations for the Exclusive Economic Zone, the transit passage arrangements for international

> straits, together with the provisions for archipelagic sea lane passage, and the limitations placed on the extent and nature of the territorial sea and archipelagic waters, contribute to a system of freedoms that are supportive of U.S. commercial and military interests.

There is no need to dwell at length on the specifics of the new regime, comprising a comprehensive Constitution of the Oceans consisting of over 320 articles, which emerged after twelve years of negotiations. It is important to note, however, in light of subsequent developments, that the basic outline of the major new principles embodied in the Convention was already evident in 1975, and was spelled out in my SACLANT address. Thus we are not talking about two Conventions, but two or more perceptions of it.

Having noted that views appear to differ on the merits of the Law of the Sea Convention, and thus the "facts" of the case, let us now take a cursory look beneath the surface, if you will pardon the expression, and consider what effect, if any, the Convention, while not yet in force, has had on state practice.

Subsequent state practice

Since there seems to be little if any dispute that the Convention provisions do provide, whether as codification or progressive development, the necessary protection of navigational and overflight interests, it is appropriate to turn to subsequent state practice to determine the present state of the law. The most recent report of the UN Secretary General on that subject, dated November 5, 1987, reads in part:

> The United Nations Convention on the Law of the Sea continues to provide a focus for ocean-related activities and for marine affairs in

> general. It has attracted increasing support, with more than half of the ratifications or accessions required for its entry into force having been deposited, following the unprecedented number of signatures appended to it. It has exerted an immense influence on marine affairs in general. As States resort increasingly to the seas and oceans to supplement their developmental needs, there has been a marked trend towards the establishment of maritime regimes consistent with the norms embodied in the Convention.

A similarly encouraging view is expressed in the Foreward to a publication issued in 1987 by the Office of the Special Representative of the Secretary-General for the Law of the Sea, entitled "The Law of the Sea: Current Developments in State Practice."

Even if there is a perception that the UN is located on the sunny side of the street, those views should be taken seriously since they were based on the material received in the Office over the four years following the adoption of the United Nations Convention on the law of the Sea (December 1982 - December 1986). Nevertheless, for the sake of consistency, said by Johnson to be the hobgoblin of little minds, I will quote again from the U.S.-based Heritage Foundation and then from Lewis Alexander.

The Heritage Foundation "Backgrounder" Bulletin No. 64 dated January 15, 1988 reads in part as follows:

> **Predictions of Global Anarchy.** The LOST does address important non-seabed subjects, such as navigation, fishing, and scientific exploration. In these areas, however, the treaty largely codified

> emerging customary international law. When the U.S. voted against the treaty at the U.N. more than five years ago, there were dire predictions that a U.S. refusal to participate in a new Law of the Sea regime would trigger global anarchy and lawlessness. Yet no such problems have arisen. Foreign countries have accepted American claims to an exclusive economic zone similar to that provided by the treaty; the navigation rights accorded U.S. ships are the same as those allowed any other nation. When freedom of the seas is threatened, as in the Persian Gulf, the lack of a universal LOST is irrelevant. Though the U.S. was the only major nation to vote against the LOST that April, since then no important industrialized state has ratified the pact, including the USSR. As long as the U.S. refuses to sign, the LOST is effectively dead.

The expert opinion of that wise old man of the sea, Lewis Alexander, which seems to fall between the two just cited, is as follows:

> Questions arise, however, from the standpoint of State practice. Some countries had enacted legislation that was inimical to the Convention articles on navigation and overflight even before the signing of the LOS Convention; others have adopted such policies since the 1982 signing ceremony. There are cases where Convention articles have been interpreted in ways that are inconsistent with their intent, given their negotiating histories. Still other cases exist where States have asserted rights in their offshore waters that were never condoned by the Convention. These trends have not abated, and may in time increase.

Before we dip deeper into state practice, if we feel complacent or reassured by any of the foregoing statements, let us bear in mind that the differences of perception mentioned thus far refer almost solely to the supposedly non-controversial provisions of the Convention.

Let us consider some of the concrete evidence of state practice cited by Alexander in support of his conclusions.

Evidence of current state practice

With respect to the breadth of the territorial sea - the problem which eluded solution in both the 1958 and 1960 Law of the Sea Conference - Alexander points out that in 1979, not long before the conclusion of the Conference, some twenty-five states claimed a territorial sea in excess of twelve miles; while in 1986, four years after the conclusion of the Convention, twenty-three states still maintained such claims, fifteen of them to 200 miles. He states that in 1986, 30 countries, including two developed countries, had domestic regulations in excess of the Convention territorial sea provisions. According to his calculations, at that time the twelve-mile limit was being exceeded by 17% of the coastal states.
Later, Alexander asks, almost plaintively:

> "How can one explain Gambia's rationale for a two hundred mile territorial sea claim, when the belt is only thirty miles in width? What rationale does Ecuador have for delimiting a straight baseline regime that terminates at a point in the ocean fifty-two miles from the coast?"

I am not in a position to comment on these observations. It may be worth noting, however, at this stage, that there are difficulties even for experienced law

of the sea experts, other than geographers and cartographers, in determining the precise nature and extent of claims advanced. William Burke notes, for example, in his impressive magnum opus modestly presented as a "Teaching Outline" that "Among known changes since 1985 are the partial extension of the Federal Republic of Germany's territorial sea to 16 miles in the German Bight". Alexander cites the same example in a footnote. A study of the relevant reference in the 1987 Document "Current Developments in state practices" issued by the Office of the Special Representative of the UN Secretary General does not make this clear, except to experts, since, for obvious reasons, it would not be approprite for the UN secretariat to make such comments. The Federal Republic of Germany is, of course, one of the non-signatory NATO countries which consider that the Convention codifies customary law apart from Part XI, and I am not in a position to express a view on the correctness of these conclusions by Burke and Alexander.

In Lew Alexander's analysis of the straight baseline system, he concedes that some of the 51 states which have applied the system "have conformed rather well with the Convention provisions", but expresses the view that "Among the exceptions . . . is the system announced by Vietnam in 1982". His criticism seems to be based on his findings that, as described by Vietnam, the baseline begins at a point thirteen miles from shore and then extends south and then west for a distance of about 840 nautical miles to an island 80 miles offshore, and three others 50 miles offshore. He states as well that the four longest of the ten baselines of Vietnam are 162, 161, 149 and 105 miles in length. Again I am not in a position to comment.

Later in his analysis of "different strokes for different folks" he states that "inappropriate coasts would include all or part of those of Ecuador, Iceland,

Senegal, Cuba, Albania, Italy and Spain - all of which are th objects of straight baseline systems." It will be observed that three of these states are developing countries, three are western, and the other is Albania, well-known to Law of the Sea experts from the Corfu Channel case. (Alexander also notes, incidentally, that the USA has avoided the use of the straight baseline system, and observes that "one advantage of the decision is that it allows the United States to criticize what it considers excessive claims by other coastal states"). Once again, I cite his observations without taking a position on them.

In the case of the archipelagic state concept, Alexander lists 19 states which have proclaimed such status, and identifies amongst them Cape Verde Islands and the Maldives as states whose baselines do not conform to the Convention. He also lists seven other island states, not claiming archipelagic state status thus far, which he says are not physically qualified for Archipelagic status.

It is the Economic Zone concept, however, which provides, according to Alexander, the most numerous examples, (some forty-six) of non-compliance with freedom of navigation and overflight provisions of the Convention. Interestingly, forty-one are developing countries, and five are developed countries, of which four are western states and one is the USSR. He refers also to the findings of Juda that in a survey of the legislation of 59 coastal states, 24 of them make no specific references to international community rights.

Alexander goes on to make a detailed analysis of other aspects of the economic zone enshrined in national legislation. Here he raises disturbing questions about the preservation of the environment, as well as navigation and overflight. He lists 20 states, including two western countries, whose economic

zone legislation is silent on navigation or overflight. He lists nine others whose legislation explicitly permits the regulation of navigation by the coastal state in the economic zone, one of which is the USSR. Nine developing countries are cited as asserting "exclusive jurisdiction" for environmental protection in the economic zone. He lists 11 developing countries which have not legislated to preserve the environment in the economic zones. He goes on to analyze problems concerning the use of low-tide elevations, and the use of uninhabitable rocks to "generate their own exclusive economic zone or continental shelf "contrary to the Convention". He cites the use by the UK of Rockall Island, without comment, although he asks if such rocks must form part of the same continental shelf as the claiming state and notes that "The United States utilizes its oceanic islands and islets, even those that would appear to be uninhabitable, to generate an exclusive economic zone", and suggests that "it seems wisest to assume that other countries will do likewise". Once again, I cite these observations without comment.

He also lists historic bay claims which "seem to be well-established", including Hudson Bay in the list (while observing that "the United States has never formally recognized this claim"). Interestingly, he includes Syria's claim to the Gulf of Sidra along with Canada's to the Gulf of St. Lawrence in the list of "Bays for which historic claims seem uncertain".

Alexander also discusses the enclosure by straight baselines around "six non-independent archipelagos, in apparent violation of the Convention", listing:

Azores	(Portugal)
Dahlic Archipelago	(Ethiopia)
Galapagos Archipelago	(Portugal)
Favoes Islands	(Denmark)
Madeiva Islands	(Portugal)
Svalbard	(Norway)

It will be noted that only Ethiopia is a developing country, while the others are all western states. Once again, I am not in a position to comment on Alexander's conclusions.

He also refers in another passage to Canada's enclosure of its Arctic Islands (and in the context of pollution control zones acknowledges that "the Canadian zone may be an ice-covered area within the meaning of article 234"). Alexander observes that "Despite these concessions, the Canadian government, in September, 1985, issued regulations to take effect January 1, 1986, whereby the entire Arctic Archipelago was enclosed by a series of straight baselines". (In another passage he describes the Canadian baselines as "illegal"). He discusses both the Soviet and Canadian Arctic claims also in the context of the sector principle.

Alexander goes on to analyze the assertion of prior notification claims for warships navigating through the territorial sea and concludes that twenty states assert such a requirement. He concludes that "over 20 percent of the coastal states of the world have illegal claims to competence within the territorial sea, and that over half of these require prior authorization of warships to transit the territorial sea". Once again, I cite these observations without comment.

Alexander points out later that "The partitioning of ocean space into zones of national jurisdiction and the gradual extensions of these claims to coastal state competence within these zones are processes that UNCLOS III, and the resulting LOS Convention, were designed to curb.

In short, Lewis Alexander's analysis of the facts and the law seem difficult to reconcile with the position that there are no problems concerning the exercise of

freedom of navigation and overflight. His conclusions also suggest that there may be cause for concern for the living resources and the environment.

To quote again from my 1975 NATO SACLANT address which Alexander's conclusions suggest may be of continuing relevance:

> The Law of the Sea has been based on the notion of competing rights, with little or no recognition of the need in every system of law for the imposition of duties to go hand in hand with rights. Areas of the sea have been treated as subject to the assertion of sovereignty of one state or another, with no corresponding duties concerning the fisheries of such areas or the environment itself. The oceans beyond the territorial sea have been subject to the principle of first come first served, a laissez-faire regime defended under the name of freedom of high seas. Freedom of the high seas has meant freedom to over-fish and licence to pollute. These are the freedoms which must be circumscribed. It is the freedom of navigation for purposes of commerce and "other internationally lawful uses" such as legitimate self-defence which must be protected.

Possible explanations for contemporary state practice

In seeking possible explanations for the apparent inconsistencies between the Convention and state practice, it is relevant to recall certain fundamental principles upon which the whole of the third conference on law of the sea negotiations were based, if our purpose is to contain and reverse any such trends.

The first is that all the Convention provisions were negotiated by consensus, as had been agreed at the outset, up to and until the vote on the closing day of the Conference.

A second is that the Conference also agreed at its outset on a comprehensive agenda, and in so doing rejected the selective "manageable package" approach.

The third is that the Conference also agreed at its outset and based all its negotiations on the "package deal approach", whereby it was agreed that all issues were interrelated.

The fourth principle, cited repeatedly throughout the conference, although not an agreed conference principle, was that the basic trade-off between developed and developing states was freedom of navigation in return for resources.

The fifth and most important principle, actually enshrined in the Convention, in that in order to preclude any selective "picking and choosing" amongst the provisions of the COnvention, no reservations to the Convention are permitted.

A final point is that Iceland is the only western state which has ratified the Convention.

The foregoing considerations may or may not provide a partial explanation as to why signatory countries, as well as non-signatories, do not seem to be in compliance with various parts of the Convention. They are certainly part of the background, or res gestae, and even, perhaps, the travaux preparatoire. To illustrte

their relevance, consider the alternative situation which would pertain if all of the major powers had been strongly backing the Convention, by word and deed, during the period of over five years since the conference ended. The surprise, to me, is not that there are conflicting claims and counter-claims both reflecting and creating inconsistencies in state practice, some of which are said to constitute cases of non-compliance with the Convention, including in particular those provisions which are allegedly non-controversial received principles of international law. The surprise, if any, should be that the developing countries have continued to negotiate in good faith in the Preparatory Commission ever since the end of the Conference in a co-operative attempt to make the controversial provisions of Part XI on the sea-bed regime more acceptable to the industrialized states. No-one has denounced the last minute "add-on" benefits of the Resolution on Pioneer Investors, which, as pointed out earlier, resulted in a virtual monopoly of the whole of the first generation of mine sites for the Pioneer Investors, including Canada. On the contrary, every effort has been made to assist in the process of resolving the problem of overlapping claims, including those of entities registered in non-signatory states, even to the extent of agreeing very recently to *de facto* changes in the basic Pioneer Investor Resolution.

In light of these considerations, how long can we expect this cooperative process to continue in the Preparatory Commission without some movement from the developed states? Are we approaching the "Point of No Return"? I would say, regretfully, yes. Have we already passed it? I would say, optimistically, not quite. Are we into the period of the law of the sea at which we can see a "Hinge of History"? I would say, with suitable disclaimers concerning my powers of prophecy, I think so.

Conservation and preservation

While most of the foregoing relates to freedom of navigation and overflight, some economic zone state practice would seem to have implications for both conservation of fisheries and preservation of the environment.

The most recent and, I believe, the best overview of the questions is contained in the Bruntland Commission report on "Our Common Future", which reads in part as follows:

> In the Earth's wheel of life, the oceans provide the balance. Covering over 70 per cent of the planet's surface, they play a critical role in maintaining its life-support systems, in moderating its climate, and in sustaining animals and plants, including minute, oxygen-producing phytoplankton. They provide protein, transportation, energy, employment, recreation, and other economic, social, and cultural activities. . . .
>
> The oceans also provide the ultimate sink for the by-products of human activities. Huge, closed septic tanks, they receive wastes from cities, farms, and industries via sewage outfalls, dumping from barges and ships, coastal run-off, river discharge, and even atmospheric transport. In the last few decades, the growth of the world economy, the burgeoning demand for food and fuel, and accumulating discharges of wastes have begun to press against the bountiful limits of the oceans. . . .
>
> The oceans are marked by a fundamental unity from which there is no escape. Interconnected cycles of energy, climate, marine living resources, and human activities move through coastal waters, regional seas, and the closed oceans. The effects of urban, industrial,

and agricultural growth are contained within no nation's Exclusive economic Zone; they pass through currents of water and air from nation to nation, and through complex food chains from species to species, distributing the burdens of development, if not the benefits, to both rich and poor. . . .

Only the high seas outside of national jurisdiction are truly "commons"; but fish species, pollution, and other effects of economic development do not respect these legal boundaries. Sound management of the ocean commons will require managements of land-based activities as well. . . .

Major fisheries are found mostly in offshore waters, while pollution affecting them comes mostly from inland sources and is concentrated in coastal waters. Formal international management is essential in the areas beyond the EEZs, although greater international co-operation, including improved frameworks to coordinate national action, is needed for all areas. . . .

Today, the living resources of the sea are under threat from over-exploitation, pollution, and land-based development. Most major familiar fish stocks throughout the waters over the continental shelves, which provide 95 per cent of the world's fish catch, are now threatened by overfishing. . . .

Other threats are more concentrated. The effects of pollution and land development are most severe in coastal waters and semi-enclosed seas along the world's shore-lines. . . .

Even the high seas are beginning to show some signs of stress from the billions of tons of contaminants added each year. Sediments brought to the oceans by great rivers such as the Amazon

> can be traced for as much as 2,000 kilometres out to sea. Heavy metals from coal-burning plants and some industrial processes also reach the oceans via the atmosphere. The amount of oil spilled annually from tankers now approaches 1.5 million tons. The marine environment, exposed to nuclear radiation from past nuclear weapons tests, is receiving more exposure from the continuing disposal of low-level radioactive wastes. . . .
>
> New evidence of a possible rapid depletion of the ozone layer and a consequent increase in ultraviolet radiation poses a threat not only to human health but to ocean life. Some scientists believe that this radiation could kill sensitive phytoplankton and fish larvae floating near the ocean's surface, damaging ocean food chains and possibly disrupting planetary support systems. . . .
>
> High concentrations of substances such as heavy metals, organochlorines, and petroleum have been found on the oceans' surface. With continued accumulation, these could have complex and long-lasting effects. The sea-floor is a region of complex physical, chemical, and biological activity where microbial processes play a major role. . . .

The foregoing excerpts from the Bruntland Commission Report suggest that something more than laissez-faire is needed.

The Future Oceans Regime: possible scenarios

What then does the future hold? A continuation of what may be or become the dissolution of the law, or, the beginning of what GATT describes as "Stand-Still and Roll-Back". Like GATT, the Law of the Sea Conference seems to have

proven thus far much better at reaching agreement on such principles than at implementing them.

To illustrate both the constructive possibilities and the dangers, I will repeat the following passage from my SACLANT lecture:

> One hears many dire predictions concerning the fate of the Law of the Sea Conference and the nature of the law which may emerge from it. I would like to quote one such forecast by Richard A. Frank, a lawyer with the Centre for Law and Social Policy, writing in the May 18, 1975 weekend edition of the New York Times.
>
> > "It is the year 2000. The coastal powers have extended their sovereignty to the centers of the oceans. Cargo and military vessels must pay tribute as they pass from one sovereignty zone to another or as they transit straits through which passage once was free. Conflict between the "have" and "have not" countries, as governments jostle over the resources of the seabed, keeps the world in a state of tension. Fish are a rarity; the few species that survive taste rather odd, for they inhabit an element befouled by enormous amounts of pollution. In most coastal areas, swimming in the sea is forbidden by law. The contamination has killed most of the sea's phytoplankton, the primary source of the earth's oxygen. The environment needed to sustain life on earth is wearing away."

I went on to comment as follows:

> I do not accept that view of the law of the future. It is an all too realistic appraisal of the possible consequences of the failure of the Law of the Sea Conference, but it is far removed from the legal regime which seems likely to result from a successful conference.

What constitutes the failure of the Conference in the present situation? The question we must now begin to ask ourselves is whether an incredibly successful Conference has produced an excellent Convention which may be beginning to fail, through the action or inaction of many of those states which worked so hard to achieve it. I remain of the view that the Law of the Sea Convention need not become the Doomsday Book of the Future, for reasons I shall explain. In fairness to Lewis Alexander, however, I feel bound to cite his moderate but nonetheless disturbing conclusions, since I have drawn so heavily on his masterly treatise for supporting documentation and analysis:

> In this Report the ocean enclosure movement has been seen as an incremental process, moving national jurisdictions gradually seaward at the expense of the high seas that are free to the use of all nations. At the moment we may have arrived at something of a temporary "plateau," so far as coastal State claims are concerned, but how long the law of the sea will remain at this "plateau" is an open question. The coming decade may well see some variations of the traditional incremental process. . . .
>
> There is little to indicate that a "roll-back" of State practice to conditions of "global consistency" is likely to occur within the next few years. . . .
>
> What conclusions can be drawn from the materials presented in this Report? A first is that the ocean enclosure movement seems

destined to continue despite the strictures of the LOS Convention. "Illegal" restrictions will be applied against the movement of warships, aircraft and "potentially polluting" vessels in offshore jurisdictional zones, particularly the EEZ but also territorial waters. This trend toward increased restrictions will likely be exacerbated in the event of a cataclysmic oil tanker disaster, or other major pollution threat. . . .

A final conclusion involves the transit passage regime for international straits, as spelled out in the Convention. One form of conventional wisdom in the United States is that the regime of international straits is virtually inviolable, in part because it is in the best interests of the Soviet Union as well as of the United States to protect the transit passage concept. In the abstract this may be true. Neither power desires interference with transit passage in Gibraltar, Sicily, Malacca-Singapore, Formosa or Korea straits - at least not under peacetime conditions. But what if the Soviets came to think of international straits more selectively? Might they not perhaps be tempted to acquiesce in certain coastal States' efforts to interfere with the passage of vessels and aircraft (including those of the United States and its allies) through waterways of relatively greater concern to the U.S. than to the U.S.S.R. For example, straits in The Bahamas or the southern Caribbean in the southern Philippines, or eastern Indonesia might be seen as fitting within this category. . . .

The dichotomy of the international regime of navigation and overflight is one between uniformity and diversity. The LOS Convention has sought, to the maximum extent possible, to establish

> uniform rules and regulations worldwide for the passage of foreign vessels and aircraft through, beneath, and above international straits and offshore juridical zones. . . . At present the forces for uniformity still seem to prevail. How well are they likely to prevail in the coming decade, and in the years beyond?

Having cited, with respect and concern, Lew Alexander's somewhat sombre conclusions, and his provocative closing question, without adopting them as my own, let me suggest a possible alternative scenario, which takes account of the evidence he cites, but postulates an approach which might contain the dangers he foresees.

An alternative scenario

Firstly, as to the future of the Convention other than Part XI, there are clearly a variety of possibilities, including the rather gloomy ones cited, but only one which could arrest any deterioration of the Convention regime and make it stronger. That objective, which was the fundamental purpose of the Law of the Sea Conference, is for states to comply with the provisions of the treaty, by bringing their legislation into conformity with it, even before it is in force. This step is desirable of itself, quite apart from the question of any need for implementing legislation prior to ratification. If states harmonize their legislation on the basis of the Convention, then we would be close to achieving an agreed basis for a stable regime of the oceans. Such action is not likely to occur unless there is widespread and public support for such an obviously desirable objective. Western countries, might begin the process, but in cooperation, I suggest, with the socialist countries and key developing countries. The sooner such action is taken the better. However, the dangers to the Convention and what it represents would have to be

made known publicly, as a first step. Canada might well take the lead, in cooperation with the other "good Samaritans", without prejudging the question of ratification.

A second, more difficult, but more far-reaching step, directed to precisely the same long-term objective, would be for a similar group of states representing different regions and socio-economic systems to begin the process of actually ratifying the Convention, perhaps in coordination with one another, so as to spread responsibility and costs. Clearly, once the Convention is in force, with both western and socialist as well as developing state parties backing it, it will have much more influence. Morever, the peaceful settlement provisions would then be available to settle disputes. Again, Canada, together perhaps, with the other "good samaritans" might play a leading role. I am aware, of course, that the "conventional wisdom", if you will pardon the pun, is to go slow on the ratification process until Part XI is concluded. I am aware of the very sound reasons for giving slowly. Unfortunately, the rest of the Convention could go down the drain by the time Part XI becomes operational. How can we prepare the way for ratification by industrialized states?

Part XI: Seabed Regime

One preparatory step, directed towards both Part XI but also the rest of the Convention, (an idea which has emanated from a European source), might be to open up and extend the period for signature of the Convention, so as to make it easier for non-signatories to opt in, by means of a two-step process as others are doing. Signature alone, by some of the important non-signatories, could greatly strengthen the Convention. This might also be the best way to head off the dangers to the Convention from a new seabed mini-treaty.

With respect to the deep-seabed provisions of Part XI of the Convention, there is much that might be done, none of it easy, to make it more acceptable to industrialized states, provided it can be done without opening up the whole Convention. The U.S.-based Council on Ocean Law, an institution strongly supportive of the Convention, issued in March 1988 a forty-three page, single-spaced summary of seabed mining issues and problems which it considers to be relevant to the Convention and the mandate of the Preparatory Commission. Whether or not one agrees with part or all of the document, it is well worth reading, as it provides a good deal of food for thought.

Is an agreed seabed regime beyond our reach? Perhaps. Suppose, however, that the negotiations within or under the aegis of the Preparatory Commission continue to produce results acceptable to industrialized states, of both west and east, as well as developing countries. Suppose also it proves possible to reach agreement on a minimal or skeletal inexpensive "nucleus" bureaucracy for the International Sea-Bed Authority and the Enterprise, as I have publicly proposed in the past, and Colombia has proposed recently in the Preparatory Commission. Suppose, although this may not be essential, that the purpose of all these arrangements is to enable the resources of the sea-bed and sub-soil beyond national jurisdiction to be exploited essentially on the basis of the concept pressed so hard by Canada and Australia, as well as Chris Pinto of Sri Lanka, during the conference, namely, joint ventures, whereby, for example, private or national public entities might provide the financing and expertise, and the Enterprise might contribute shares of its mine-sites. Suppose also that the U.S.-based Council on Ocean Law is correct in concluding that the production-ceiling and the transfer of technology provisions will have minimal effects, if any, in light of the lengthy

time-span between 1982 and the actual date seabed mining can begin. That is quite a list of suppositions. Nonetheless, they are not, I suggest, beyond the bounds of credibility. If these suppositions could be translated into a concrete course of action, might they not influence the whole process of ratification by signatories, and even accession by non-signatories? Might this not be the best way to reverse the apparent tendency toward noncompliance on all parts of the Convention?

In support of the foregoing scenario, I would cite the whole negotiating history of the Conference, during which North and South, East and West, coastal and land-locked negotiated together in good faith by consensus for nearly twelve years to achieve an integrated system of oceans law, resolving, in the process, a wide range of complex and seemingly insoluble issues, and producing, eventually, a truly remarkable Constitution of the oceans. In further support I note again the undesirable trends which seem to be emerging from state practice on issues outside Part XI, as well as the seabed mini-treaty and related legislation. Thus there are both positive and negative pressures which could be enlisted in support of the Convention, assuming, yet again, that a trade-off is envisaged, along the lines of that advanced throughout the Conference negotiations. Clearly, however, there would be legal as well as political obstacles to be overcome if anything approaching an amendment process is envisaged.

Perhaps inventive lawyers might devise something new, some means of *de facto* amendment, perhaps through a selective process of provisional application, affirming the fundamental provisions of Part XI, and leaving the mining code for the future, so that the process of ratification and accession could be expanded and accelerated. Such a process could create a tremendous momentum in support of the whole of the Convention. None of this would be easy, particularly for states

which have already ratified the Convention, but it is rarely easier to build than to destroy. Indeed, the easiest, but worst policy, I suggest, is to allow the carefully designed and well-founded structure of law embodied in the Convention to deteriorate through neglect or indifference.

Ecological and Environmental Management

Turning from navigation, overflight and seabed matters back to fisheries and environmental issues, it is worthwhile at this stage to see what the Bruntland Commission had to say about Future Oceans Management:

> Looking to the next century, the Commission is convinced that sustainable development, if not survival itself, depends on significant advances in the management of the oceans. Considerable changes will be required in our institutions and policies and more resources will have to be committed to oceans management. . . .
>
> Three imperatives lie at the heart of the oceans management question:
>
> - The underlying unity of the oceans requires effective global management regimes.
> - The shared resource characteristics of many regional seas make forms of regional management mandatory.
> - The major land-based threats to the oceans require effective national actions based on international co-operation. . . .
>
> Mutual dependence has increased in recent years. The Law of the Sea Convention, with the establishment of the 200-mile EEZs, has put an additional 35 per cent of the oceans' surface under national control with regard to management of natural resources. It has also

provided an institutional setting that could lead to better management of these areas, given that single governments may be expected to manage more rationally resources over which they have sole control However, this expectation ignores the realities of short-sighted political and economic goals. . . .

When it comes to the high seas beyond national jurisdiction, international action is essential. The sum of the multiple conventions and programmes now in place do not and cannot represent such a regime. Even the separate UN programmes cannot easily be coordinated, given the structure of the United Nations. . . .

The Commission believes that a number of actions are urgently needed to improve regimes for oceans management. Thus the Commission proposes measures to:

- strengthen capacity for national action, especially in developing countries;
- improve fisheries management;
- reinforce co-operation in semi-enclosed and regional seas;
- strengthen control of ocean disposal of hazardous and nuclear wastes; and
- advance the Law of the Sea. . . .

Coastal governments should launch an urgent review of the legal and institutional requirements for integrated management of their EEZs, and of their roles in arrangements for international co-operation. This review should be undertaken within the framework of a clear statement of national goals and priorities. Reducing overexploitation of fisheries in coastal and offshore waters might be one such goal. The rapid clean-up of municipal and industrial pollution discharging

into critical marine habitats could be another. Others might include strengthening national research and management capacity, and producing an inventory of coastal and marine resources. . . .

Given the increased pressures on coastal and marine resources projected through the year 2000, all coastal states should have a complete inventory of these assets. Drawing on senior experts from national and international agencies, nations could deploy the latest satellite mapping and other techniques to put together an inventory of these resources and then monitor changes in them. . . .

With conventional management practices, the growth era in fisheries is over. . . .

Overexploitation threatens many stocks as economic resources. Several of the world's largest fisheries the Peruvian anchoveta, several North Atlantic herring stocks, and the Californian sardine - have collapsed following periods of heavy fishing. In some of the areas affected by these collapses, and in other rich fisheries such as the Gulf of Thailand and off West Africa, heavy fishing has been followed by marked changes in species composition. . . .

One factor leading to the establishment of extended EEZs was the concern of coastal states, both industrialized and developing, over the depletion of fisheries off their coasts. A large number of conventions had been established covering most major fisheries, but they proved inadequate in most cases. Participating countries were in general unable to overcome the difficulties of allocating share to limited common resources. Improved management was seen as an urgent need, and open access was perceived as the main obstacle to it. . . .

The advent of extended EEZs under the Law of the Sea Convention was expected to solve or at least alleviate the problem. Coastal states were required to introduce effective conservation and management of the living resources in their EEZs. They could also control the activities of foreign fishermen and develop their own fisheries. . . .

The Law of the Sea Convention requires states to establish national laws and regulations to "prevent, reduce and control pollution of the marine environment from dumping". It also requires express prior approval by the coastal state for dumping in the territorial sea, in the EEZs, and onto the continental shelf. The legislative history of this Article indicates that coastal states have not only the right to act but a duty to do so. States also have an obligation under the Law of the Sea to ensure that their activities do not injure the health and environment of neighbouring states and the commons. . . .

Moreover, all states should undertake to report releases of toxic and radioactive substances from land-based sources into any body of water to the appropriate Convention Secretariat so that they may begin to report on the aggregate releases into various seas. . . .

The United Nations Conference on the Law of the Sea was the most ambitious attempt ever to provide an internationally agreed regime for the management of the oceans. The resulting Convention represents a major step towards an integrated management regime for the oceans. It has already encouraged national and international action to manage the oceans. . . .

> The Convention reconciled widely divergent interests of states, and established the basis for a new equity in the use of the oceans and their resources. . . .
>
> The Convention removed 35 per cent of the oceans as a source of growing conflict between states. It stipulates that coastal states must ensure that the living resources of the EEZs are not endangered by overexploitation. Thus, not only do governments now have the legal power and the self-interest to apply sound principles of resource management within this area, but they have an obligation to do so. . . .
>
> The Convention also defines the waters, sea-bed, and subsoil beyond the limits of national jurisdiction, and recognizes this as international. Over 45 per cent of the planet's surface, this sea-bed area and its resources are declared to be the "common heritage of mankind", a concept that represents a milestone in the realm of international co-operation. The Convention would bring all mining activities in the sea-bed under the control of an International Seabed Authority. . . .
>
> The Commission believes that the Convention should be ratified by the major technological powers and come into force. Indeed, the most significant initial action that nations can take in the interests of the oceans' threatened life-support system is to ratify the Law of the Sea Convention. . . .

It can be seen from the foregoing that there are ecological and environmental reasons, as seen by the eminent persons comprising the Bruntland Commission, for encouraging states to ratify the Convention. Some of the global

forecasts are truly frightening. William Conway, General Director of the prestigious New York Zoological Society said recently: "If I had to guess and had to hope, I would hope that within the next 200 years, we would have perhaps 20% of the plant and animal species we have today". A little closer to home, David Suzuki, in a CBC programme, is quoted as stating that: "Each year over 500 species of plants and animals are destroyed". Again, Conway stated that "Human population is increasing at the rate of 150 people per minute", while "rain forests are being cut down at the rate of 50 acres every minute every day" - in other words, during the time it took me to say this sentence. All these factors, of increasing population, destruction of rain forests, the increased consumption of land-produced food, and the desertification of vast areas are combining to place an increasing burden on all oceans resources and their environment as we reach out to them as our last remaining resource frontier. The Law of the Sea Convention Council cannot resolve all or even most of these issues, but it can play a central role.

Conclusion

In concluding my 1975 SACLANT address I pointed out:

> Two dangers face the Alliance. One is that it will be necessary to accept new rules, some of which will almost certainly create real problems for the Alliance. The other danger is, in my view, worse, namely, the chaos, instability and the potential threats to the peace which could ensue from a breakdown of the Law of the Sea Conference. Admittedly it does not lie with the states represented here to bring about the success of the Conference. They cannot do it without the cooperation of other states and other interest groups. It does, however, lie with the states represented here to defeat the Law

> of the Sea Conference through adopting unduly rigid attitudes based on traditional concepts of international law that are being rejected by the majority of the states members of the UN.

Is this what has happened, or may be in the process of occurring? I suggest that if that warning was well founded in 1975, and I believe it was, then it has even greater application today. It can be seen how important a role the Convention can play, and indeed, must play, in the global management of the ecosystem of the planet earth. Much more is clearly needed, but we can settle for no less. We must begin to reverse any trends away from the Convention, arrest the process of "picking and choosing" from amongst the provisions of the Convention and start the process of strengthening and building upon the Convention regime for the management of ocean space. We running out of time. We don't have the 24 years which elapsed between the 1958 and 1982 Conventions. We must act before we reach the point of no return. Someone must take the lead. Why not Canada, as one of the major beneficiaries of the Convention?

All those present know well that Tommy Koh and I and many others warned repeatedly of the consequences of a failed Conference. While the Conference and the Convention were successful, their originators and supporters may nonetheless be in the process of failing in their basic objective, the achievement of an agreed regime of the oceans. Moreover, if we wish to arrest and reverse the present trend towards non-compliance, and it is a tall order, then there may not be much time left to do so. We are already well into an situation with all too much resemblance to that which developed between the 1958 and 1982 Law of the Sea Conventions. Do we really want to acquiesce again in a policy of laissez-faire of the oceans until we are past the point of no return? I hope not. I don't think it is too late to retrieve the situation.