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LAW AND ARMS CONTROL ON THE SEABED

An Address by the Honorable Mitchell Sharp, Secretary of State for External Affairs, to the International Law Association, Toronto, November 5, 1969.

Mankind's recent "giant step" into outer space has captured the public imagination in a way no pioneering venture has ever done before. But the conquest of the "ocean space" of our own planet may hold out a more immediate challenge and perhaps even greater promise for the future. Spectacular advances in marine science and technology are rapidly making the seabed and ocean-floor accessible to the scientist, the entrepreneur and, inevitably, to the military planner.

If the predictions of "standing-room only" on the earth in a 100 years time come true, we may be pushed into the sea. At the very least, a protein-hungry and mineral-short world will be increasingly seeking to exploit the natural resources of the ocean. A new colonial scramble for the seabed is by no means an academic possibility. Nor is the extension of the arms race to the ocean-floor.

The world still has the opportunity to achieve a new order or international co-operation under the sea. Governments are going to need all the help they can get from those who are interested in how international law is made and those who have ideas about what international law ought to be.

The international community focused its collective attention on the seabed in 1967 when Malta put before the United Nations General Assembly a proposal calling for the reservation exclusively for peaceful purposes of the seabed and ocean-floor beyond the limits of present national jurisdiction, and for the use of their resources in the interests of mankind. I should like first to deal with the suggestion that the resources of the seabed beyond the limits of national jurisdiction should be used in the interests of mankind, and later with the "peaceful uses" element.

The basic questions that have to be answered can be briefly stated: How far does or should the national jurisdiction of coastal states extend? What legal regime should be developed to govern the exploration and exploitation of the resources of the area beyond the continental shelf -- that is, beyond the limits of national jurisdiction? And what international machinery, if any, will be required to give effect to this legal regime?

At present, it is clear that coastal states enjoy exclusive sovereign rights for the exploration and exploitation of the resources of their continental shelves. These rights do not depend on occupation or on any express proclamation. No one may explore or exploit the continental shelf without the express consent of the coastal state, even if the coastal state itself is not conducting such exploration or exploitation. How the continental shelf should be defined for this purpose is much less clear.

The Convention on the Continental Shelf drawn up at Geneva in 1958 left the legal continental shelf with elastic inner and outer limits. The inner limit is the edge of the territorial sea, which, according to national claims, ranges from three to 200 miles in breadth. The outer limit is a double one, being a water depth of 200 meters or, beyond, to whatever depth will allow exploitation of the underlying resources. However elastic this definition may be, there can be no question that the Convention relates to the continental shelf, and not to the whole of the deep ocean-bed. In other words, the Continental Shelf Convention recognizes that there <u>is</u> an area of the seabed and ocean-floor beyond the limits of national jurisdiction.

To determine the boundary of the area beyond national jurisdiction, it will be necessary to fix a new definition of the continental shelf by international agreement. As a country with vast and promising offshore areas, Canada is intensely concerned with the development of a new definition of the shelf. The 1958 Geneva Convention obviously provides a basic point of reference. Another basic point of reference is the geographical and geological reality which underlies the juridical concept of the shelf. The International Court of Justice, in the North Sea Continental Shelf Cases, confimed the principle that the coastal state's rights over the continental shelf flow from the fact that this submarine area constitutes a natural prolongation of the coastal state's land territory. We are taking the position that the redefinition of the continental shelf must recognize coastal-state rights over the "submerged continental margin", which consists of the continental shelf and slope and at least part of the rise. Any arbitrary distance-plus-depth formula which disregarded existing international law and geographical-geological factors would be unacceptable to Canada, and doubtless to a significant group of other coastal states.

There is an interrelation between the ultimate definition of the limits of national jurisdiction and the nature of the regime to be developed for the area beyond. A curious "After you, Alphonse" situation characterizes this interrelation. Some states are more interested in protecting the resources of their own shelves than in benefit they might obtain under a particular regime for the internationalized area. Therefore, they may be satisfied to define national jurisdiction independently of the development of the regime for the area beyond. Others wish to know how much they might benefit from a particular regime for the internationalized area before deciding on the extent of seabed they wish to claim. Some developing countries might press for the broadest possible internationalized area if they succeeded in obtaining an international regime designed for their particular benefit. Some highly-developed countries might see an advantage in bringing the widest possible international area under a competitive regime in which their advanced technology would assure them of a dominant position. Many states are simply uncertain where their interests lie.

In the elaboration of a legal regime for the internationalized area of the seabed, general principles of international law must certainly apply. This

does not mean, however, that it has the same status as the high sea and that the freedoms of the sea necessarily apply to the seabed. What we must do is to develop a new concept for the seabed beyond national jurisdiction, in the same way that a new concept was developed for the continental shelf.

One such new concept, that the seabed beyond national jurisdiction represents the "common heritage of mankind", is in many respects an attractive one. But as a legal principle it raises certain difficulties. One such difficulty is that beginning with the view that the seabed is the common heritage of mankind tends to predetermine the nature of the seabed's legal regime. It might be more constructive to begin with discussion of particular legal principles, which might lead to agreement on a comprehensive regime, rather than to seek initial agreement on a broad concept from which particular principles could then be determined. The theory of the common heritage of mankind raises so many questions as to its possible implications for other areas and other resources that the concept requires much further thought than it has so far received.

Among the various types of legal regime for the seabed which have been suggested so far, those which involve dividing up the entire seabed and ocean-floor among the coastal states already appear to have been rejected by the international community. Those theoretical systems that do not involve national appropriation can be broadly summarized as follows:

(1) Systems under which states and their nationals would exploit seabed resources subject to an agreed body of rules but without any international control agency or machinery beyond a simple registration procedure;

(2) systems under which an international agency, or the United Nations itself, might act as a trustee in controlling exploitation of the seabed by states and their nationals;

(3) systems under which sovereignty over the seabed might be granted to the United Nations, which could itself carry on exploitation activities.

There appears to be general agreement that the regime to be adopted should ensure exploitation of the seabed in the interests of humanity and for the benefit of mankind, having regard to the special needs and interests of the developing countries. The provision concerning the special needs and interests of the less-developed countries has been written into all United Nations resolutions on this subject. Accordingly, many developing countries favor a regime or system which would be based on strong control or ownership by an international agency or by the United Nations itself.

On the question of establishing international machinery, the nature of the regime would determine whether any machinery is required and what its nature and scope should be. Even the most laissez-faire regime would probably require at least a central registry of licences for exploration and exploitation. Control or ownership by an international agency or the United Nations would imply the creation of international machinery of an extensive kind for which no precedent exists.

Those states that favor a supra-national approach to a seabed regime tend to press for strong international machinery, while states which favor a national approach tend to resist anything but the most limited machinery. On this issue there is a rather extreme polarization of views between many developing countries and certain developed countries -- the Soviet Union in particular. The U.S.S.R. strongly opposes the supra-national overtones of the seabed question, and has resisted the study of international machinery in the United Nations.

The Canadian Government's position on these matters, is still developing. We agree that there is an area of the seabed beyond national jurisdiction. We want this area to be reserved for peaceful purposes. We consider that a workable legal regime must be developed if the seabed is to be exploited in an effective, equitable and orderly manner. And we assume that some form of international machinery will be required. In our view, the seabed regime and machinery should provide some revenue for international community purposes, while protecting the legitimate interests of entrepreneurs and coastal states. We intend to be flexible and open-minded in examining all possible systems, but we have serious reservations about the more extreme proposals for international ownership and control.

I should now like to turn to the question of reserving the seabed exclusively for peaceful purposes. The basic Canadian position is that the widest possible range of arms-control measures should be extended to the widest possible area of the seabed and ocean-floor.

We have argued from the beginning that this objective should be understood in the light of the United Nations Charter and other principles of international law. Use of the seabed for offensive military uses should be prohibited, and especially the deployment of nuclear weapons and weapons of mass destruction. However, its use for purely defensive purposes, especially in areas adjacent to the coast, should not be precluded. We were the first country to call for the widest possible area of the seabed to be reserved for peaceful purposes, irrespective of the area which will eventually be subjected to an international legal regime.

The Conference of the Committee on Disarmament which has been considering this question reached an early consensus on the desirability of extending arms-control measures to the continental shelf as well as the area beyond national jurisdiction. There was also early agreement that there should be a narrow coastal band to which the proposed seabed arms-control measures would not apply, largely on the grounds that states have sovereignty over their territorial sea. The United States and the Soviet Union, co-chairmen of the Disarmament Committee, eventually agreed on a limit of 12 miles for this coastal band. This corresponds to the breadth of the territorial sea claimed by the U.S.S.R. and some 55 other states.

The United States and the U.S.S.R. also agreed that this coastal band, or "maximum contiguous zone", should be measured in the same way as the territorial sea. Allowance will be made for the use of the straight-baseline system which Canada has applied to long stretches of its coast, and for the status of historic waters such as Hudson Bay.

The results so far of negotiations on arms control on the seabed have now been incorporated in a draft treaty tabled by the United States and the

Soviet Union. The major achievement reflected in the draft treaty is prohibition of the emplacement of nuclear weapons and weapons of mass destruction on the seabed and ocean-floor. We warmly welcomed this bilateral self-denying agreement by the two great nuclear powers on the most important requirements for a seabed arms-control treaty. In other respects, however, the draft treaty falls short of our expectations and those of many other countries.

In the Disarmament Committee, Canada advanced a group of interrelated suggestions for disarmament of the seabed. In summary, these suggestions involved:

(1) The prohibition not only of nuclear weapons and weapons of mass destruction, but also of conventional weapons and military installations which could be used for offensive purposes, without, however, banning installations required for self-defence;

(2) the establishment, beyond the 12-mile coastal band, of a 200-mile security zone to which the proposed arms prohibitions would apply in full but where the coastal state could undertake defensive activities;

(3) the elaboration of effective verification and inspection procedures to assure compliance with the terms of the treaty, together with an international arrangement making such verification possible for countries with a less developed underwater technology.

With the exception of the prohibition of the emplacement of nuclear weapons and weapons of mass destruction, these Canadian suggestions are not reflected in the draft treaty put forward by the U.S.A. and U.S.S.R. The co-chairmen's draft does recognize the existing right of states to observe the seabed activities of other states and it does incorporate an undertaking to consult and co-operate in removing doubts concerning compliance with the treaty. It does not, however, provide for the right of inspection and access on the model of either the 1959 Antarctic Treaty or the 1967 Outer Space Treaty.

Non-nuclear coastal states like Canada wish to be sure that there is nothing on the seabed which could threaten their security and that even permissible defensive activities on the continental shelf are limited to the coastal state concerned.

The provision in the draft treaty limiting the prohibition to nuclear weapons and weapons of mass destruction only in our view intensifies the need for the recognition of a broad coastal-state security zone. Demilitarization of the broadest possible area of the seabed would make such a zone much less necessary, since no state would then have any right to make any military use of the continental shelf. With only nuclear and mass-destruction weapons prohibited, the possibility arises that states may attempt to emplace conventional weapons or military installations on the continental shelf of another state. Obviously, no coastal state could accept with equanimity the emplacement of offensive installations near its shores. If any state has the right to make any military use of the continental shelf, even for defensive purposes, it is the coastal state and the coastal state only. The exclusive

sovereign rights of the coastal state to explore the continental shelf and exploit its resources are not compatible with any degree of freedom of military activity on the shelf by other states. The possibilities of conflict between foreign military activities and the coastal state's exploration and exploitation of the shelf are only too obvious.

Without a provision for effective verification and inspection procedures under an international arrangement, states with a less-developed underwater technology will not have any assurance that the nuclear states are complying with the treaty. It is easy to see that particularly troublesome problems would arise if a state emplaced military installations on the continental shelf of another state and then attempted to deny that other state access to the area or installation. In our view, a military installation by a foreign state on the continental shelf would be contrary to existing international law. Canada maintains that the coastal state has an unrestricted right to verify foreign activities on its shelf and it has the right to be notified of and associated with actual inspection procedures undertaken by foreign states.

In summary, the U.S.-Soviet draft treaty is unfortunately silent on a number of important questions. The seabed arms-control negotiations excluded consideration of the problem of submarines armed with nuclear missiles. Thus the draft treaty bars only a potential nuclear presence from ocean space, while leaving the existing mobile presence intact.

The draft treaty is described in its preamble as a step towards the exclusion of the seabed from the arms race and expresses a determination to continue negotiations concerning further measures leading to this end. With this description and this determination we are in complete agreement. The debate in the United Nations General Assembly will indicate whether or not the co-chairmen of the Conference on Disarmament have put forward a treaty which provides a truly multilateral basis for seabed arms-control measures consistent with the other requirements of a regime for the continental shelf and the seabed beyond national jurisdiction.

I have only traced the bare outlines of some of the more vital issues in the developing area of the seabed. I have not, for instance, taken up the problem of marine pollution which may arise from exploitation of seabed resources. This is another crucial aspect of the seabed question, to which the Canadian Government intends to give the most vigorous attention both domestically and internationally. My purpose today has been to illustrate our active concern that the seabed and ocean-floor should be preserved from any form of submarine colonialism and from the vicious circle of the arms race.

Perhaps some of the visions of vast wealth to be had for the taking from the sea are utopian. We know too little about the resources of the seabed, but it is certain that the costs and risks of exploiting them will be high. Perhaps visions of new and nobler forms of peaceful international co-operation under the sea, while the old and imperfect forms continue on land, are equally utopian. We know too much, perhaps, about the nature of man and the nation state, and it is unlikely that either will undergo some sort of "sea change" at "full fathom five". Nevertheless, there is an urgent need for the law of the sea and seabed to keep pace with the exciting but potentially dangerous growth of underwater technology. We intend to make the fullest possible Canadian contribution to the development of this area of international law.

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