FOR IMMEDIATE RELEASE

EXTERNAL AFFAIRS
AFFAIRES EXTERIEURES
OTTAWA
LIBRARY / BIBLIOTHÈQUE

STATEMENT
DISCOURS

EXTERNAL AFFAIRS
AFFAIRES EXTERIEURES
OTTAWA
LIBRARY / BIBLIOTHÈQUE
REFERENCE

STATEMENT BY THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS OF CANADA, THE HONOURABLE ALLAN J. MACEACHEN, AT THE LAW OF THE SEA CONFERENCE IN NEW YORK, APRIL 12, 1976

"SETTLEMENT OF DISPUTES IN THE LAW OF THE SEA CONVENTION"

Mr. President, it is my privilege to be able to address this Conference for the third time, and it is with great pleasure that I note the very considerable progress made in New York, Caracas and Geneva, and at the many inter-sessional meetings which have also been held. I take this occasion, Mr. President, to congratulate you, the Chairmen of the Committees and of the various informal working groups for the work which has been accomplished to date under their guidance. Much has been done, Mr. President, indeed much more has been done than many believed possible when the Conference convened over two years ago.

I note also with real gratification the very evident determination of delegates with whom I have had the honour of speaking to make every effort to bring the work of this Conference to a successful conclusion. This has been and will continue to be a very significant factor in the negotiating process. However, all too much remains to be done. On a variety of questions it is not yet clear whether a consensus can be reached. Mr. President, time is running out.

I stated in an address to the Thirtieth Session of the United Nations General Assembly in New York on September 22, 1975 that "the viability of an increasingly interdependent world order rests on the creation of an international economic system which provides a more equitable distribution of resources and opportunities to all peoples." I went on to say that "This principle must be reflected in the new Law of the Sea". It is of direct relevance to the subject matter of our debate today that I said also on that occasion that the future Law of the Sea should be based on the revolutionary new legal concepts of the economic zone and the common heritage of mankind, and that it"must lay down duties to go hand in hand with every new right recognized". I wish to reaffirm most emphatically what I said then, namely, that this new law "must be based on principles of equity rather than power". It is a corollary to these premises that compulsory third party settlement adjudication procedures provide the best guarantees of just and equitasble solutions to disputes which may arise out of the proposed treaty. Mr. President, the crucial role of third party compulsory adjudication processes in the peaceful settlement of disputes arising out of the proposed Convention on the Law of the Sea does not

... 3

need emphasizing. The dangerous and unacceptable alternatives to such peaceful settlement procedures are all too clear.

The problem of dispute settlement has received relatively little attention by the Conference to date. However, I believe it is of fundamental importance if we are to have a viable and lasting Convention on the Law of the Sea.

The Government of Canada strongly supports the inclusion of a comprehensive system of compulsory dispute settlement in the Law of the Sea Convention. Both at the United Nations and at other international fora it has long been Canadian policy to press for the inclusion of provisions for the compulsory settlement of international disputes in international conventions. It is the belief of my Government, Mr. President, that any State adhering to an international legal instrument should be prepared to show its willingness to abide by the terms of that instrument by agreeing to its conduct in relation to that instrument being judged by an impartial system of compulsory third party dispute settlement.

If we are successful in reaching agreement on a comprehensive Law of the Sea Convention it will be one of the most important and complex legal instruments ever to be negotiated within an international conference. It should be borne in mind that, while some of the rules set out in the

Convention will be based upon rules whose meaning is already widely understood, a great many of the rules of the future Convention will be new and radical - even revolutionary. Even with the very best will in the world, differences will arise from time to time between States as to the interpretation and application of its provisions, despite all the efforts which are presently being made to ensure clarity and the development of adequate mechanisms concerning dispute avoidance. Such differences must, of course, first be the subject of negotiation, and it would be undesirable in the view of the Government of Canada to supplant this fundamental process in international relations. However, it is equally clear that from time to time disputes will arise in which States will find themselves in a position in which only the reference of a disputed question to an independent third party can provide a solution to the dispute. We believe that reference of such disputes concerning the interpretation and application of the Law of the Sea Convention to third party settlement can be of value both to parties to the dispute, and, in the long run, to all States in providing an important means of elucidation and interpretation of the text. It goes without saying that independent and impartial third party settlement procedures benefit the less powerful States in particular, since such processes ensure equality before the law.

It is the Canadian view that a comprehensive system of compulsory dispute settlement should be an integral part of the Law of the Sea Convention. It follows that the inclusion of an optional protocol leaving it open to States to accept or reject compulsory third party adjudication would not merely constitute a second best solution but a failure of the Conference on a central issue.

As to the most suitable procedure, we have not yet adopted a firm position. The Canadian Delegation will continue to promote the elaboration of provisions which, while reflecting the basic approach to the subject which I have just outlined, seem likely to command broad support within the Conference.

I welcome the personal initiative of the President in presenting the Conference with a text on the settlement of disputes. While we have reservations as to a number of specific aspects of this text, we welcome its introduction and congratulate you, Mr. President, on the leadership which you have shown in this regard. At this point, I feel it appropriate also to note that your text draws heavily upon the work of an informal group of experts chaired by Ambassador Harry of Australia, Ambassador Galindo Pohl of El Salvador and a distinguished member of the Delegation of

.... 6

Kenya, Mr. Adede. I would like to congratulate the Co-Chairmen upon the valuable contribution which they have made to the work of the Conference. In short, Mr. President the Canadian Delegation is prepared to use your text as a basis for future negotiations upon the subject of dispute settlement. Moreover, we consider that it will be of great assistance in future deliberations concerning procedures appropriate to each element of the Convention.

Without, at this point, embarking upon detailed comments of the text, I would like to outline a few of Canada's fundamental objectives with respect to the compulsory settlement of disputes arising under the Law of the Sea Convention and relate them to the provisions of Part IV of the Single Negotiating Text as it now stands:

1. In establishing the system of compulsory dispute settlement there must be reciprocity between States. The system must be even-handed. It should not be open to States to impose compulsory adjudication on other states with respect to issues on which they are not prepared to be taken to court. It should not be open to States to insist on the right to litigate issues arising in the economic zone while refusing to litigate issues arising in such areas as international straits.

.... 7

2. While in favour of allowing States to choose the system of compulsory dispute settlement which they consider to be the most appropriate, we support the inclusion of a comprehensive system of compulsory dispute settlement in the Law of the Sea Convention applicable to all disputes. We do not favour an optional protocol approach.

3. In our view the procedures should rely, as much as possible, upon existing procedures for dispute settlement such as Arbitration and the International Court of Justice.

4. We think it useful to provide for a limited number of special compulsory dispute settlement procedures appropriate to the special needs of certain types of problems.

5. The system devised should allow for adequate provisional measures, appeals and the standing of parties other than States.

6. Compulsory dispute settlement ought not to be open for use for the purpose of nullifying or unduly limiting rights and duties recognized in the substantive provisions of the Convention.

I propose to comment on each of these basic premises.

1. Clearly the future Convention will place certain matters within the domestic jurisdiction of States. On these matters no international dispute settlement can arise due to

... 8

the nature of the rights involved. However, apart from these matters, my Delegation believes it to be of importance to ensure that there be a comprehensive system of compulsory dispute settlement applicable not only in the Economic Zone but also to disputes arising on the High Seas and in any other area of the seas, such as international straits, where such interests as the freedom of navigation are potentially in conflict with the interests of coastal states. If certain States make the protection of freedom of navigation by compulsory dispute settlement a precondition to agreement it must be borne in mind that coastal States have corresponding rights of environmental integrity and security which are equally in need of protection. These rights must also be protected by compulsory dispute settlement.

2. With respect to the principle that States should be free to choose the system of dispute settlement most appropriate to their needs, provided that the procedure is one which leads to a binding decision, the proposals in Part IV of the Single Negotiating Text appear to be satisfactory since they lay down this principle in clear and unequivocal terms. The corollary of this fundamental principle is that, subject to any specific exceptions made in the Convention, no State should be free to pick and

.... 9

choose the areas of law - or the seas - it wishes to subject to compulsory settlement. Parties to the Convention should be prepared to submit all disputes to binding dispute settlement. Similarly Canada would be opposed to any system which allowed plaintiff States to opt in at the last minute for the purpose of instituting an action against another State, while not having previously made themselves subject to compulsory dispute settlement proceedings brought by other States.

It is for similar reasons that Canada would not favour a system of dispute settlement based upon an optional protocol. Given the nature and extent of new law which would be embodied in the Convention, such an approach could destroy the very basis of an effective system of compulsory jurisdiction.

3. With respect to the issue of the most appropriate comprehensive procedure to be chosen, we have reservations as to the proposals set out in Part IV of the Single Negotiating Text. Article 9 of that text gives primacy to a new "Law of the Sea Tribunal". We wonder if we need a new court at this time when we already have the International Court of Justice and arbitral procedures. What would be the effect of the creation of such a new tribunal upon the existing Judicial Organ of the United Nations? Furthermore, are there not many disputes which

... 10

could be better solved by arbitration whether of a purely judicial character or through recourse to expert advice on such issues, for example, as scientific research? For these reasons Canada would prefer to retain recourse to Arbitration and to the International Court of Justice as the basic procedures to exercise comprehensive jurisdiction. If however, a majority of States at the Conference clearly prefer the creation of a new tribunal of the type proposed, then we would be willing to work with other delegates to establish an appropriate institution.

4. We are prepared to envisage the inclusion of a number of special procedures in the Convention. The variety of issues dealt with by the Convention makes it necessary to tailor certain special procedures to deal with certain particular problems. These procedures can be either of a judicial character or designed to ensure the avoidance of disputes. At present, consideration is being given in Committee I to a judicial organ of the International Seabed Authority, and in Committee III to a special procedure to deal with disputes in the field of marine scientific research. A Continental Shelf Boundary Commission designed to avoid disputes as to the seaward limit of the continental margin is also under consideration. We believe that such special procedures could prove very useful.

.... 11

It must be noted in passing that the link between the special procedures set out in Annex II and Article 6 of the Single Negotiating Text Part IV is unclear. We presume that the procedures in that Annex are set out largely for illustrative purposes. At the present time my Delegation does not consider that the procedures for arbitration by experts set out in Annex II would be appropriate as the principal means of resolving all disputes concerning fisheries, pollution and marine scientific research, although the advice of experts may be of great value in some circumstances. In considering the utility of special functional procedures we believe it necessary to ensure that such procedures are appropriate to the rights to be exercised by States and the problems with which they are designed to deal. In our view special procedures are no panacea and should not replace the comprehensive procedure as a general rule.

5. We note the provisions for appeals from the special procedures to the comprehensive procedures and for provisional measures at the inception of a dispute. We have questions as to the utility of these provisions. However, we are prepared to consider them with other delegations. With respect to the standing of parties to a dispute, as set out in Article 13, we have considerable difficulty

with the suggestion that, as a general rule, private persons and private companies should be placed on an equal footing with States. We are however prepared to examine an exception relating to the standing of private parties before the judicial organ of the International Seabed Authority in contractual matters.

6. One of the most complex and important issues relating to compulsory dispute settlement is that of the extent to which disputes arising out of the exercise of coastal state authority in the economic zone should be subject to compulsory dispute settlement. On the one hand, the resource rights and environmental duties of coastal States in the economic zone will involve the exercise of broad discretion there. On the other hand, these rights and corresponding duties must be exercised in conformity with the Convention and should not lead to interference with the legitimate rights of other States.

Canada is as concerned as any State to ensure that there be no undue restriction on the exercise of its resource rights and environmental duties within the economic zone. We do not, however, share the view that no disputes arising in the economic zone should be subject to compulsory dispute settlement. How do we ensure a proper balance of interests between all States concerned? Firstly, we believe that the primary protection of both coastal States and the other users

.... 13

must lie in the drafting of the precise and concrete substantive rights which they are to exercise in the economic zone, and the duties they must fulfil in it, provided for at present in Part II of the Single Negotiating Text. Secondly, we attach great importance to the establishment of adequate bilateral, regional and multilateral procedures for dispute avoidance. In this light it is difficult to envisage dispute settlement with respect to the exploration and exploitation of the resources of the seabed and subsoil of the continental shelf. Similarly, I have difficulty in envisaging dispute settlement concerning fisheries management - except perhaps concerning the failure of a coastal State to meet its obligations in respect of conservation and full utilization. The Single Negotiating Text Part II confers broad management authority upon coastal States and in the view of my Delegation any difficulties which the coastal State may encounter with other States in the exercise of its management jurisdiction over fisheries will be best resolved by negotiation, and by the establishment of various bilateral and multilateral bodies with recommendatory powers designed to avoid disputes. I believe also that coastal States must be free to exercise their jurisdiction over the prevention of pollution and the regulation of marine scientific research in the economic zone, so long as they remain within the specific bounds of the discretion vested in them and do not infringe the rights of other States. In cases of gross

abuse, adjudication should apply both with respect to coastal States and other users, and both in the economic zone and international straits.

How then can we define the situations where compulsory dispute settlement would be appropriate? One solution would be to make an exception stating that there shall be no dispute settlement with respect to disputes arising in the economic zone or international straits, except in the case of a gross abuse or "abus de pouvoir" by either the coastal State or by other users. Another approach would be to state that there could be no compulsory dispute settlement except in the case of interference by the coastal State in certain specific rights of other States such as freedom of navigation or scientific research, or the abuse of such navigational rights by other states in a manner which damages coastal or straits States. I note that a basis for either approach is already to be found in Article 18 of the Single Negotiating Text.

This is a complex question, but I believe that it will be possible to find a middle ground between those who would reject any compulsory dispute settlement in the economic zone and those who would demand it on all economic zone issues.

.... 15

Finally a word about procedure. My Delegation feels that it will be necessary to provide a forum for further work on the settlement of disputes. Since this subject is left to the Plenary Session of the Conference I would suggest that one approach would be to establish a Working Group of the Plenary to continue negotiation upon this subject once it has been properly debated in this forum. I would also suggest that this group be open-ended, but I would hope, Mr. President, that you would use your good offices to ensure that this Working Group was broadly representative of the Conference. Canada would, of course, be prepared to participate in the work of the Group.

In conclusion, Mr. President, my Delegation is prepared to work with other delegations for the resolution of difficult problems concerning the compulsory settlement of disputes now before the Conference. We do so in the belief that a realistic, comprehensive and viable system of compulsory disputes settlement is vital not only for the long-term utility of the text which we are negotiating but also for the promotion of the rule of law in the international affairs and hence the shaping of a peaceful world.

Mr. President, Mr. Chairman, in my address to the Thirtieth Session of the United Nations General Assembly which I referred to earlier I stressed the benefits to this and future generations of a comprehensive treaty on the Law of the Sea. I should like to reiterate at this time what I said then about the desirability of resolving the many difficult Law of the Sea issues with which we are grappling by means of a multilateral agreement of universal application. I should like to reiterate the longstanding position of the Canadian Government that only if the multilateral approach fails will my Government resort to other solutions. I remain of the view, however, that at a certain point in time further delay or procrastination constitutes failure and that point is rapidly approaching. My Government considers it absolutely essential that we conclude the Law of the Sea Conference in 1976.

Mr. President, I cannot over emphasize the importance of the role of binding dispute settlement procedures as an integral part of the multilateral treaty we are all seeking. I pointed out in my address to the Thirtieth Session of the United Nations General Assembly that although in 1945 the founders of the United Nations believed they had devised a system for the settlement of disputes between nations without recourse to the use of

force, it is an unfortunate fact of life that thirty years later this fundamental problem still faces the United Nations. It seems increasingly clear that, contrary to the expectations after both the First and Second World Wars, international society will not develop into an international community by settling first the problems of the use of force. The process, in my view, will, on the contrary, consist of regulating, step by step, so many difficult fields of relations between states so effectively that there will be less and less reason to resort to force and thus less resistance to the gradual acceptance of real constraints upon its use. Success in this Conference will mark a tremendous step forward in the process of laying the foundations for a peaceful, stable and equitable world order.