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NOTES FOR AN ADDRESS
BY THE SECRETARY OF STATE
FOR EXTERNAL AFFAIRS,
DR. MARK MACGUIGAN,
TO THE 9TH ANNUAL CONFERENCE
OF THE CANADIAN COUNCIL
ON INTERNATIONAL LAW,
OTTAWA, OCTOBER 24, 1980

"BEYOND THE LAW OF THE SEA CONFERENCE"

Poseidon, Kafka tells us, even Poseidon became bored with the sea, and let fall his trident.

The Law of the Sea Conference has been with us for seven years -- twelve, if one counts back to the first meeting of the old Seabed Committee. Governments are increasingly anxious to bring it to an end, to put their delegates to fresh uses, and to turn their attention elsewhere. The very success of the Conference has contributed to declining interest, as consensus on the 200-mile zone has allowed governments to resolve their most pressing problems by unilateral extension of jurisdiction. Indeed, in this sense the Conference has already ended, has already brought about radical changes in law and practice from which there can be no going back.

It would be a mistake, however, to succumb to lassitude or self-satisfaction now that some key objectives have been achieved and a new Law of the Sea Convention will almost certainly be signed in Caracas next year. Staying power is vital in negotiations like these. Even more important, however, is the need to step back, now, at this critical stage, to look at what we have fashioned so far, in the light of what we set out to do; to look beyond the Conference, beyond Caracas in 1981, and ask if this work of ours will take hold and endure. If not, then signing a new Convention will be something like the ceremonial donning of the Emperor's new clothes, adding nothing to the real achievements of the Conference, and only briefly masking its failures.

The results of the Law of the Sea negotiations may be reviewed from various perspectives. For my purposes tonight, I will try to examine them in terms of the interests of the three major groupings at the Conference: the coastal states, the major maritime powers, and the developing countries -- all seen through Canadian eyes, of course.

With regard to the coastal states, I believe I can fairly say that Canada has played a remarkable role in articulating their objectives and in helping to achieve them, both within and outside the Conference framework. Canada was at the forefront of the great wave of unilateral, bilateral, regional and multilateral initiatives which in the 1970's swept the Law of the Sea out of the smothering embrace of Hugo Grotius. The overriding objective of the coastal states was extended resource jurisdiction, and this of course they have achieved in the new concept of the economic zone.

Canada deserves a good part of the credit for making the economic zone a more balanced, functional and widely acceptable concept. Under the Canadian approach, the coastal state acquired not only national rights but also international responsibilities and obligations. Thus the coastal state must ensure the rational management of the living resources of the economic zone, and must let other states have access to any "surplus". Greater functionalism has also been introduced with the establishment of special principles for the management of species with special characteristics, such as salmon, tuna and marine mammals.

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Despite considerable opposition, Canada also succeeded in bringing a measure of environmental management to the economic zone and secured the entirety of Canadian environment objectives in respect of Arctic waters. Finally, Canada played a central role in gaining recognition for the coastal state's sovereign rights in respect of seabed resources beyond the 200-mile limit to the outer edge of the continental margin; in return, the coastal state is called upon to share with the international community some of the revenues accruing from mineral exploitation in these areas beyond 200 miles.

The coastal states have obviously done well at the Conference -- and none better than Canada -- in others' eyes at least. And here I should emphasize that categories overlap, so that the coastal state grouping comprises both developing countries and major maritime powers, accordingly it seems clear that the economic zone will be an enduring feature of the new Law of the Sea and will tend to promote the order and stability which are among the fundamental objectives of any legal system. The stresses which will arise are likely to flow from problems of implementation rather than deficiencies of conception. Thus even the most responsible coastal states already tend to emphasize national resource rights and to minimize international obligations within the economic zone. Canada is not free of pressures in this direction in the fisheries field, but a variety of factors are at work which help to maintain some balance here. In the U.S.A., new legislation under consideration by Congress -- the Fisheries Protection Act -- virtually does away with the idea of any kind of obligation to foreign fishermen in the economic zone.

Still other stresses will arise as a result of the continued insistence of the U.S.A. and Japan that coastal state jurisdiction does not extend to tuna. But this is a problem for the two countries concerned rather than one affecting the integrity of the economic zone concept. Perhaps the greatest strain on that concept will arise from the lack of adequate provisions for the conservation and management of coastal fish stocks which "straddle" the 200-mile limit. Despite prolonged and vigorous efforts, Canada has not been able to secure agreement on such provisions to meet Canadian concerns in respect of fisheries on the "nose and tail" of the banks on the Atlantic Coast. Overfishing beyond 200 miles in these areas can damage the stocks within the 200-mile limit. Regional and bilateral mechanisms will help, but this gap in the new Law of the Sea will remain a troublesome factor.

Turning to the major maritime powers, the results of the Law of the Sea Conference also seem satisfactory from their perspective, recalling again that most of these countries are coastal states as well. As major maritime powers, their overrriding shared objective has been to maintain the greatest

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possible freedom of navigation, subject to some environmental safeguards, they have improved their position in this respect. So also with the two superpowers and their shared objective of maximum naval mobility. In both cases, the crucial elements of the new Law of the Sea will be the 12-mile territorial sea and the proposed new regime of free transit passage through international straits. And here let me make clear immediately that the Northwest Passage is not an international strait.

Responsible freedom of navigation is of course as much an international need as a national interest, and naval mobility is a critical factor in the global strategic balance. There can be no new Law of the Sea Convention which does not provide for these twin imperatives through a narrow limit for the territorial sea and guarantees of passage through straits. On the other hand, it is equally important to note that these imperatives cannot be secured readily without a new convention. One wonders, however, whether the emerging new straits provisions may not contain the seeds of what could eventually prove to be a de-stabilizing factor, with "straits states" chafing at the restrictions imposed upon them, and with the two superpowers in disagreement about the very definition of an international strait.

As to the developing countries, finally, their great objectives at the conference were a new, more responsive law-making process, a new ideal of equity, and a new international economic order. They have had mixed success in all three areas.

The very presence of the developing countries at the Law of the Sea Conference signals a revolutionary change -- a decolonization -- of the law-making process. The developing countries, in effect, have become subjects rather than objects of international law. As such, they have had a profound influence on the Conference and also on the development of customary law. Indeed we owe them the inspiration for the two great concepts which provide the foundation for the new Law of the Sea -- the economic zone, and beyond the limits of national jurisdiction, the common heritage of mankind.

In seeking a new ideal of equity, the coastal states among the developing countries have looked especially to the benefits they would obtain from the economic zone. Certainly, that zone has brought about a redistribution of resources between distant-water fishing states and coastal states, and to some extent between developed and developing countries. It also offers some hope for transfer of technology from industrialized countries which might wish to enter into joint ventures for the development of economic zone resources in the Third World, although such arrangements have their risks and pitfalls, especially since any evaluation of their merits may itself require quite sophisticated expertise.

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The economic zone of course does not offer much in the way of direct benefits for those developing countries which are landlocked or geographically disadvantaged, although they are to obtain favourable terms of access to fisheries in the zones of their neighbours. They are also to be given special consideration, together with the least developed countries, in the distribution of payments from coastal states from revenues accruing in respect of continental shelf exploitation beyond 200 miles. These various special benefits, of course, depend on the actual conclusion and entry into force of the new Convention.

The greatest expectations of the developing countries, however, have been tied up with the notion of "the common heritage of mankind". Here, above all, they hoped to build a new system of equity and a new international economic order at sea.

Simply put, the notion of the common heritage requires that the resources of the international seabed area -- potato-like nodules containing nickel, copper, cobalt and manganese -- should be exploited under an international regime and machinery" for the benefit of all mankind and the developing countries in particular. This seemingly innocent statement encapsulates truly fiendish complexities of law, economics and technology which I do not pretend to understand and which -- not necessarily for that reason -- I will not attempt to explain. I will only note that the developing countries have pressed for a decisive voice in the running of the new international machinery in all its aspects. They have attached particular importance to the creation of an international enterprise that would play the leading role in mining seabed nodules on behalf of the international community, under conditions that would guarantee that the enterprise has access to the necessary technology. Finally, they have also demanded various forms of protection for their land-based mineral production which might be adversely affected by seabed production of the same minerals.

While it is possible to pinpoint individual successes or failures, it is most difficult to judge the extent to which the fundamental objectives of the developing countries have been accommodated in the emerging international seabed regime. At the same time, this is perhaps the most crucial judgment governments must make in preparing for the final session of the Law of the Sea Conference.

This judgment is difficult not only because the issues involved are so complex but also because their interaction with one's own national interests may colour one's thinking, or appear to do so. Canada, for instance, has been anxious to secure regulation policies covering seabed

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nickel production to protect land-based Canadian production in Ontario and Manitoba. To this end, we have worked closely with developing land-based producers like Indonesia, the Philippines, Zaire, Zambia and Zimbabwe. We have not yet succeeded in this campaign, and of course the major consuming states and potential seabed miners on the other side of the issue are quick to suggest that we ascribe to the developing countries the frustation we feel ourselves.

As to why it is necessary for all of us to make such a judgment of the situation of the developing countries, I would answer first that justice is an end in itself. I would also add that without justice there can be little hope for order and stability in the new Law of the Sea. If the "have" countries are destined to become "have more" countries, and the "have not" countries to become "have less" countries, then the new convention will likely be ratified only by the minority which stands to benefit from its terms. The developing countries, of course, will decide for themselves whether or not to ratify. But by that time it will be too late for the rest of us to have any further influence on their decision. That is why we must review the results of our work now, to determine now whether they give a true expression to the concept of the common heritage of mankind, and to make any accommodations necessary to achieve this end.

The inevitable note of weariness at the close of the Law of the Sea negotiations is mixed with satisfaction and regret -- satisfaction that we have come so far in our effort to create a revolutionary new constitution for the oceans, regret that industrialized countries should now proceed to adopt unilateral seabed mining legislation which is widely seen as infringing upon the very idea of the common heritage of mankind.

The dominant note, however, is hope -- hope that the creative impulse which has animated the renewal of the Law of the Sea will not fail us now. Certainly Canada will do everything possible to rouse Poseidon from his torpor, on the rocky coast where Kafka left him, and where, we are told, "a gull, dazed by his presence described wavering circles around his head". In effect, we have created a new constituion for three-quarters of this planet's surface. Only by sustained vigilance can we hope to see it achieve the order and justice which are its goals.

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