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INFORMATION DIVISION
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No. 58/10 NEW STATEMENT ON TERRITORIAL SEA AND CONTIGUOUS ZONE

(Text of a statement prepared for delivery by The Hon. George A. Drew, P.C., Q.C., Chairman of the Canadian Delegation to the International Conference of the Law of the Sea, in committee March 31, 1958 at Geneva, Switzerland. (See also S & S 58/9))

Mr. Chairman, we now come to the discussion of the articles which undoubtedly present the greatest difficulty. What has taken place already, or rather what has not taken place, serves to demonstrate that in seeking agreement upon a codification of the Law of the Sea, we have indeed undertaken an extremely formidable task. It may well be, however, that what we have learned during these extended discussions may assist us greatly in finding common ground for a solution of the difficult questions with which we are now confronted.

In putting forward the Canadian proposal, we do so with no claim that we have discovered any magic formula, but only in the hope that it may offer the possibility of agreement between the widely differing points of view which have already been expressed. May I explain why we attach so much importance to success at this conference, and particularly to agreement in regard to the articles now under consideration. During the thousands of private discussions which have taken place, many illuminating opinions have been expressed. I recall one comment which suggested to me how necessary it is that we recognize very clearly what the alternative to agreement would be. This was the remark to which I refer: "Why would it be such a disaster if we failed to reach agreement at this time? After all, nothing very disasterous followed the failure of the 1930 conference at The Hague". I doubt if this statement represents any substantial measure of opinion at this conference. I am confident it does not. It did suggest, however, that we should keep very clearly in our minds how great the difference is between the two conferences. In the first place, there is the difference in the size of the two conferences. At The Hague in 1930, there were 42 delegations. There are 87 delegations now meeting here in Geneva. Many of the new delegations are those from countries which have come to nationhood since 1930. Some of them are sharing for the first time the processes by which the representatives of nations, embracing the

greater part of humanity, do seek to solve their common problems, Surely it need not be argued that particularly for them, and certainly for all of us, there would be immense value in a positive demonstration that so many different nations can work successfully together for their mutual benefit.

The situation today is very different to that of 1930 in many ways. We are all well aware of the rapidly increasing demands for wider zones of control over the living resources of the sea. In recent years claims have been made far beyond three, six, or twelve mile limits. In 1953 we recall that three states extended their territorial claims up to 200 miles for the purpose of exploiting the living resources of the sea adjacent to their coasts. I merely mention these facts for the purpose of drawing attention to a trend which cannot be ignored. I submit that there is plenty of evidence that many states are only postponing action until they see whether there will be agreement at this conference. If there is no agreement on the breadth of the territorial sea and contiguous zone, can there by any doubt that many more countries will soon make their own decisions?

There is no doubt that the establishment of a contiguous fishing zone of twelve miles would result in at least a temporary reduction in the catch of some of the fleets fishing in waters distant from their own home ports. However, we have found that among the nations fishing in Canadian waters the loss in most cases would not be serious, and for one country there would be no loss whatever. To the distinguished delegates of those states which are in this position, may I most respectfully submit that the question is not whether they are going to continue to fish within three miles of the coasts of other nations, but whether they are going to fish outside of a much larger zone established by international law or outside of a zone of any size which may be established by the unilateral action of any coastal state.

It may be said that it would not be legal for a state to take unilateral action which would greatly extend the sea area under its control. But what enforceable law will they be breaking, if we do not agree upon some law here? How will any nation fishing in distant waters prevent the application of the laws and regulations made by the coastal state, if we do not reach agreement? Certainly not by force. The days are gone when action of that kind would be considered seriously. If that assumption is correct, then the simple truth is that whatever the unilateral decision of any state may be, it will be very difficult for any other state to disregard claims that are asserted.

That brings us to another point. States which have already made claims to a wider zone than 12 miles may very naturally say to themselves, "What do we get out of this that can be put before our people as a definite achievement, if in fact we have accepted less than we already claim?". Surely the answer is that we will have all joined in creating a regime of law and that this in itself is of immense value and worth a great deal to all of us.

If the question is asked by a state which has asserted claim to more than a 3-mile territorial limit, "What do we get by going back to 3 miles when we are already well beyond that?", I believe the answer is that instead of uncertainty and increasing chaos, we all take back to our own people a regime of law. Surely not one of us can be in any doubt about the practical value of regime of law. Once that has been achieved, then we will have established a solid foundation upon which to build a constantly improving code of international laws. The first code might not be satisfactory in every detail to any single delegation. It is hardly likely that this would be possible. But let us see what happens in the case of our domestic laws. Once we adopt a law like a highway traffic act, a real estate act, or any similar law affecting the daily lives of our people, the practice is usually adopted of making a periodic re-examination of those laws so that improvements may be made on the basis of actual experience.

If there should be no agreement, another conference will be very difficult to arrange. It has taken 28 years to bring this one together since the collapse of The Hague conference in 1930. Remembering all the many claims which have already been made, and to which new claims are being added day by day, it needs no great stretch of the imagination to realize how soon we would find ourselves in a state of hopeless confusion. If for no other reason and there are many other excellent reasons we should do everything within our power to agree upon a workable code which will establish a regime of settled law.

To the distinguished delegates of those states which might appear to be giving up what they already have for the purpose of reaching agreement may I submit that this would certainly not be the first time the same course has been followed with great advantage for everyone. When the principle of mare liberum advocated so successfully by the great Grottius did finally receive general acceptance three hundred years ago many nations not only agreed to freedom of the seas far closer to their shores than had been known for many centuries but some even gave up broad claims they had made to the control of the whole area of some particular seas. The results more than justified the course they followed. It is true that since that time very extensive claims have been made from time to time which bore some resemblance to those made in recent years. For instance in 1821 Russia declared that their sea boundaries would extend to a distance of 100 Italian miles from the Asiatic and American continents. That claim was later adjusted by treaty. Other substantial claims have been made from time to time but until comparatively recent years there has been a steady extension of the principle of the freedom of the seas until the 3-mile territorial limit had been recognized by nations doing about 80 per cent of the maritime traffic of the world.

We have already stated that we see no reason to reverse this trend and we therefore hope that the measurement of the territorial sea will be fixed by agreement at 3 nautical miles. That would be the result of the motion which we have presented for your consideration.

Article 3 is the one article which the International Law Commission did not attempt to draft in a form which could become effective by the approval of this conference. If there is to be a measurement of the territorial sea there must be a substantive motion indicating what the measurement will be. We have placed our proposal in this regard before you in the hope that it will receive the support of a sufficient majority of delegates if and only if changes are also made at the same time in Article 66. We present our proposal in regard to Articles 3 and 66 as part of one motion, because we believe that this is the only way decisions necessary in relation to these two articles can be made satifactorily. I shall try to explain why we think the two are inseparable.

When the International Law Commission decided that there should be a contiguous zone, it said in the draft article that "it is a zone contiguous to the territorial sea". It also said that the contiguous zone may not extend beyond 12 miles. Obviously it must have been the opinion of the International Law Commission that the territorial sea would be less than 12 miles, or the word "contiguous" would have had no meaning. If one was to be the same as the other, then the zone created by Article 66 simply could not be contiguous to anything. It must have been intended, therefore, that it would be less. We are therefore confronted with the question, "How much less is it to be?". The answer to that question for many states will depend on whether control of the fishing rights is to be exercised only within the territorial sea or to the full width of the contiguous zone. An examination of the reasons given by different states for extending their territorial seas by unilateral action within recent years shows that their action has been related almost entirely to the demand for a wider area of control over the living resources of the sea. It does not seem that in any case there was a suggestion that all the rights which can be exercised within the territorial sea were needed or desired, but rather that it was the means by which they could increase the area of control over fishing in the absence of any other recognized method by which that could be done. The ILC draft does not present such an alternative. Our proposal does offer that alternative.

If the contiguous zone gives the same right of control over fishing within the whole of that zone, and I emphasize only over fishing, then it would seem that there is reason to believe that states which are in fact only concerned with the need for a larger fishing zone would in fact be ready, and perhaps anxious, to agree upon a measurement of 3 miles for the territorial sea. But unless they know whether control of fishing is to be exercised within such a wider contiguous zone, and how wide that zone is going to be, then many of them would naturally be unwilling first to make a decision in regard to the width of the territorial sea.

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I have attempted to make it clear why we think that a decision in regard to both articles must be made at the same time under one motion. Now let me explain why we advocate a 12-mile contiguous zone for fishing as well as for the other subjects already included in the draft of Article 66.

First is the fact that in Canada we have had a contiguous zone for fishing of 12 miles ever since 1911. It has applied only to our own fishermen because we have never at any time taken unilateral action which would affect fishermen from other nations. We ask for a 12-mile contiguous zone with the knowledge from our own experience that it will work satisfactorily as long as it becomes part of an international code.

Every nation must of necessity look first to the welfare of its own people. I wish to leave no doubt that the vital interests of hundreds of fishing communities along our east and west coasts and the livelihood of hundreds of thousands of hard-working Canadians are directly affected by, and in a large number of cases entirely dependent upon, fishing.

There is a demand on the part of our fishermen, and the communities in which they live, that they be protected from the unrestricted activity of the new and very large fishing trawlers within an area along the coast which is the natural source of their livelihood. This demand has increased greatly with the advent of the modern mechanized trawlers which are really floating canning factories. Operating in large numbers - and their numbers are increasing all the time - they will scoop up a large part of the living resources on which we have spent a great deal to conserve and protect.

I do not think our views have been better expressed than in the statement presented by Portugal for consideration at The Hague Conference in 1930. It shows that the problem is the same for most coastal states, particularly those with rugged coastlines. Since Portugal has had such a long and friendly association with Canada in its fishing activities, it is not without significance that their statement should so accurately describe our own situation in these words:

"As lands bordering on the coast are often entirely unproductive or yield very little, their inhabitants would starve or would be compelled to emigrate if they could not find the means of subsistence in fishing, which generally gives them a satisfactory return for their labour. These fisheries, however, might soon disappear altogether if the enormously destructive modern fishing appliances were used in these waters without restriction, or if fishermen coming from other parts deprived the coastal population of resources essential for their food supply and their very existence.

"In order to increase the number of fish and to prevent the disappearance of certain species, measures must be adopted over an area sufficiently wide to enable the action taken to prove effective.

"The restrictions imposed on the use of the various fishing appliances and the measures taken to prevent the disappearance of certain species must, however, be constantly and stringently supervised and controlled if they are not to prove entirely useless. This control is very expensive and mainly or almost exclusively affects the state whose interests are bound up with the exploitation of these waters: it can accordingly be maintained and exercised in practice only by a state within a zone under its sovereignty or assigned to its exclusive use.

"For these various reasons, the breadth of territorial waters for purposes of fishing and with a view to giving states exclusive fishing rights should be much more than six miles".

It is obvious from this statement that Portugal related its own claim to a wider area of control directly to the protection of its own fishermen and the living resources of the sea from which they earn their livelihood. I mention this because it is so directly in point in the present discussion. It does not appear that Portugal has stressed other reasons for requiring more than a 3-mile territorial sea so long as the fishing rights they would have within that area could be carried out to a distance of 12 miles.

I hope therefore that they will find that our present proposal is in harmony with their own proposal put forward so clearly in 1930. I would hope also that it would be equally acceptable to other nations in Europe, once it is recognized that, by agreement or otherwise, control of fishing is going to be demanded over a much wider zone than the 3-mile territorial sea which has been so generally accepted throughout Western Europe in the past. May I add, that in the general debate which has dealt so much with this subject, no convincing reason, I submit, has been advanced why the territorial sea should be more than 3 miles, except that it is a simple method of providing a wider area of control over fishing if there is no other effective way of obtaining that result. The creation of a contiguous fishing zone, however, does achieve the result, gives exactly the same rights over fishing as exist within the territorial sea, and at the same time makes it possible to continue the long-established principle of the freedom of the sea to within 3 miles to the coast.

If our proposed amendment is adopted the measurement of the contiguous zone will be definite. We have proposed that because we believe it desirable in this and in other cases that the measurement be exact. Variable distances to be established

by unilateral action, either in the case of the territorial sea or the contiguous zone, will only lead to uncertainty and confusion. If a nation does not wish to exercise its rights out to the full width of 12 miles, that is of course within its own discretion. If we refer back to the exact form of Article 66, we will recall that it reads: "... the coastal state may exercise the control necessary" ... "to do certain things". However, if we are to establish a code of law, I do submit, with the utmost respect to those who may hold a different opinion, that the best results will be obtained by clearly stated laws. Once a code is adopted by agreement we can then also agree here at this conference upon the time within which there will be regular periodic reviews, at such times as may be agreed upon by the conference, and in that way constantly improve the code once we have established a settled regime of law and built up an expanding jurisprudence on the law of the sea.

One other point I wish to make before I close. It is no longer necessary to stress the increasing importance of air passenger services. The only reason it has been possible to bring together this large number of delegates from such distant points all over the world is that we now have this new means of very fast transportation available. Whether we travel by the airlines of our own country or of some other country, we all benefit by the freedom with which this passenger service can be maintained. As the right to over-fly the territory of other states is not embraced in the principle of innocent passage, any extension of the territorial sea would limit the air routes available in many parts of the world. Freedom of the air and freedom of the sea go hand in hand. It is not enough to say that the territorial sea could be extended, and that agreements could then be made which would permit flying over the extended area. If such agreements are necessary, why extend the territorial sea at all - that is if you achieve the other results you want by a contiguous fishing zone and the other provisions contained in Article 66. Surely it need not be suggested that such agreements may be difficult to complete and even more difficult to enforce.

I thank you for your patience in listening to this lengthy explanation of our proposal. I have simply tried to deal with some of the questions which have been raised since I first explained the proposal that we now formally place before you as one proposal which, we submit, can only be satisfactorily dealt with as one. Whether you agree or disagree with the proposal submitted on behalf of the Government of Canada, I hope you will accept it as a sincere expression of our earnest desire to help in trying to find general agreement upon the form of the two most important articles in the proposed code. I think that if we achieve agreement in regard to these, agreement in regard to any of the other articles which we now face will be much more readily reached.

S/C