DEVELOPMENTS AT THE U.N. CONFERENCE ON THE LAW OF THE SEA

REMARKS BY SIR ANTHONY MASON*

As I am neither a seafaring gentleman nor a migratory fish I do not propose to pursue Mr. Dabb through the stormy seas on which he has so skilfully launched us. I shall confine my remarks to some aspects of the expanding sovereignty of the Coastal State, the difficulty of establishing a satisfactory regime to protect the marine environment and the perennial problem of dispute settlement.

But first a word about the Conference on the Law of the Sea itself. Its primary objective is to formulate an International Convention which will provide acceptable solutions to controversial problems and thereby attract a large proportion of States, including the super powers and the maritime powers, to accept it and to become parties to it. It is not an objective which is easily attained, for the graveyards are filled with lawyers who have drafted International Conventions that have failed to attract worthwhile support. Fortunately the United Nations Conference on the Law of the Sea will, in a sense, succeed even if it fails. This because it has already established strong support among the general body of nations for major advances in the rules of International Law relating to the sea. As Mr. Dabb has reminded us, International Law consists of rules that are broadly acceptable, not of rules that are universally acceptable and capable of enforcement.

Three developments at the Conference which will profoundly affect the peoples of the Pacific, especially the South Pacific are:

1. The support for the concept of the mid-ocean Archipelago State (Indonesia, the Philippines, Papua New Guinea, Fiji and the Bahamas), a development which has been explained in the Paper and in the comments already made,

2. The increasing acceptance of an extension of the width of the territorial sea from three miles to twelve miles, and

3. The emergence of an exclusive economic zone (EEZ) having a radius of 188 miles from the outer margin of the territorial sea; a zone which surrounds every territory, including every inhabited island.

Taken together, these three developments constitute a very large subtraction from the area of waters over which the traditional principle of freedom of navigation has prevailed so far. Inland and historic waters apart, the high seas comprised all the waters of the globe excluding territorial waters. The new developments affect not less than 36% of the ocean surfaces. That is the aggregation of the areas of approximately 120,000 square miles - the 200 mile EEZ's - which will surround each territory.

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Likewise, the proposals will include within the territorial waters of the Coastal States many straits which are more than six miles and less than twenty-four miles in width. In other instances, the principal navigable passage in a strait will fall within the extended territorial sea of a Coastal State. It is said that no less than 100 international straits are affected.

It comes as no surprise then that the super powers (as the U.S.A. and Soviet Russia have been described) and the maritime powers have expressed anxiety at these developments. The loss of freedom of navigation over such a large area of the ocean is to them a matter of importance. The right of innocent passage in territorial waters which is guaranteed by the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone - which incidentally has been ratified by no more than forty-five States - is not regarded by them as a satisfactory protection in the waters to which it relates. Article 14(4) of that Convention provides that "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the Coastal State". It leaves unanswered the question whether the passage of warships and nuclear-powered vessels is innocent for the purposes of the Convention.

With a view to meeting this difficulty, and the one posed by the inclusion by Archipelago States of territorial waters within their baselines, the Revised Single Negotiating Text (RSNT) makes provision for a right of innocent passage which is more elaborately defined and qualified than that expressed by the Geneva Convention. It provides that the Coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with the draft, and that the Coastal State shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage. These provisions, admirable in themselves, are found in a context in which the text spells out in some detail practices and activities which are prejudicial to the peace, good order and security of the Coastal State, and in which the text acknowledges the rights of the Coastal State to regulate safety of navigation, to protect installations, to preserve the marine environment and conserve living resources, to prevent the infringement of its customs, fiscal, immigration and sanitary laws and to require compliance with sea-lanes and traffic separation schemes. The right of innocent passage extends to warships, subject to its compliance with the laws and regulations of the Coastal State relating to passage through the territorial sea.

Likewise, with a view to ensuring appropriate rights of passage through international straits between one area of the high seas or an EEZ and another area of the high seas or an EEZ, the RSNT creates a right of transit passage for all ships and aircraft, which shall not be impeded. It is defined as the exercise of freedom of navigation and overflight solely for the purpose of continuous and expeditious transit. Certain duties are imposed on ships and aircraft, and, as in the case of innocent passage, the right of the Coastal State to regulate and control various activities, including the designation of sea-lanes and the separation of sea-lanes, is acknowledged. Again it is provided that regulations so made shall not have the practical effect of denying or hampering the right of transit passage.

In certain international straits, in particular a strait between one area of the high seas or an EEZ and the territorial sea of a

foreign State, the requirement of innocent passage prevails. Suspension of innocent passage through these straits is prohibited.

The type of passage applicable to the EEZ is still controversial. Maritime powers want freedom of navigation in the EEZ. They want it treated as a zone of the high seas in which the Coastal State has certain functional rights only. Other States see it as more akin to the territorial sea. A third possibility is to treat it as a zone *sui generis*.

Whether the rights of innocent passage and transit thus proposed will be a sufficient protection to the super powers and the maritime powers is an important issue yet to be resolved. But it is an issue which is obviously capable of resolution, provided that the Coastal States and the super powers and maritime powers are willing to arrive at a reasonable accommodation. The RSNT provides a basis for such an accommodation.

Pollution.

Existing International Law provides quite inadequate safeguards against pollution of the marine environment by oil and toxic materials, whether the pollution is land based or vessel sourced. There are no less than six International Conventions of general application dealing with the topic. They have all been formulated by the Inter-Governmental Marine Consultative Organisation (IMCO), an organisation dominated by the major ship-owning States and the States having the largest interests in seaborne trade. Of these Conventions only one has entered into force. In general they concede to the Coastal or Port State jurisdiction only to take action in respect of vessel-sourced pollution occurring within the territorial waters of that State. Breaches occurring outside that area are left to be enforced by the Flag State. This, it has been thought, is quite unsatisfactory.

It is the absence of a satisfactory international regime for the protection of the environment that has led to unilateral exclusive regulation of zones adjacent to land territory such as the Canadian *Arctic Waters Pollution Prevention Act* 1970 which imposes absolute liability for damage to the environment done by deposit of wastes by persons carrying on any undertaking, exploring or exploiting natural resources, ships and cargo owners. It applies to an area of water extending 100 miles from land territory.

There is a real risk that unilateral action by Coastal States will result in conflicting approaches. It has been suggested that Coastal States may seek to prescribe standards for ship construction, crewing and operational procedures. Unless regulation of this type is implemented on a uniform basis it could conceivably hamper ship construction, impair the free flow of shipping, and thereby prejudice international trade.

Efforts to evolve a new regime have centred on provisions in the RSNT for international co-operation for the prescription of acceptable standards and controls, surveillance and enforcement by individual States. Specific obligations are imposed on the Flag State to enforce standards and to take action in respect of breaches by its

ships. In addition, it is proposed that the Port State should have the right to take action in respect of any infringement by a ship on the high seas prior to its putting into port.

Even this proposal has its limitations. What unilateral action can a Coastal State take when pollution occurs on the outward voyage? The problems are not merely jurisdictional and evidential, but they depend for their resolution on the co-operation of all States in policing and enforcing acceptable standards. It is an area in which there is a real need for further progress.

Dispute Settlement.

Although it is a hopeful sign that the RSNT provides for the compulsory settlement of disputes by a decision binding on the parties, States have an option to select one or more of three tribunals or a system of special procedures. This may prove troublesome. But in a very real sense, as Mr. Dabb has pointed out, the final attitude of individual States to the settlement of disputes will be determined by their over-all evaluation of the final text of the draft Convention, especially its substantive provisions. At the present time there may be a number of States which favour compulsory jurisdiction because they believe that the substantive provisions will suit their interests. If it transpires that the final text is less favourable to their interests they may well become stern opponents of compulsory jurisdiction. Only when the likely shape of the text emerges more clearly will it be possible to assess with some accuracy the prospects of achieving substantial acceptance of this provision.

The drafting of an International Convention is a preliminary exercise in which legal questions tend to predominate unduly, submerging other considerations which become paramount when the moment of truth arrives and the Convention is open for accession. It is then, and not before, that individual States decide whether they will become parties to it. They then make a political decision on an examination of national interest. Past experience tells us that views expressed by a particular State at the antecedent Conference are by no means a reliable guide to the prospects of its consequent ratification.

Although general adherence to a Convention providing for compulsory process is probably the best of all possible results, pessimists regard it as unlikely. Why, they ask, should Governments sacrifice their own freedom of action, part of their sovereignty if you like, by committing to an international tribunal, particularly a tribunal of judges or lawyers, issues which are essentially political in character - the answers to which may have fundamental and far-reaching effects on the States concerned. There has been a marked reluctance to accept the compulsory jurisdiction of the International Court of Justice or even to bring cases before it. Very many States have not accepted it - others have attached wide reservations. In recent years there has been a wealth of international disputes, yet the ICJ has experienced an acute shortage of work and in that time there has been little recourse to international arbitration.

It should be recalled that the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone did not require compulsory settlement of disputes; this despite the fact that the Convention was silent on the most controversial question of the day - the breadth of the territorial sea. As the proposed Convention on the Law of the Sea is far more controversial in character, there is likely to be a

correspondingly greater reluctance to accept compulsory jurisdiction, the more so as it is proposed that jurisdiction may be exercised at the instance of inter-governmental organisations or a natural person or corporation. Under the Statute of the ICJ, States were answerable only to States; they could not be brought to court by anyone else.1

In general, newly independent States have not been enthusiastic about compulsory process. They have considered it to be a subtraction from their newly won sovereignty. And at the Conference on the Law of the Sea a number of Coastal States have expressed reluctance to allow their regulation of the EEZ to be determined by judicial or arbitral tribunals. It is hardly realistic to insist on enforcement of a decision against a recalcitrant State, especially if the State in question is powerful. There is even some difficulty in conceiving that Soviet Russia or the U.S.A. would agree to submit to a non-binding judicial or arbitral decision in a case in which its vital interests are threatened. The attitude of France in the recent Nuclear Test Case is illustrative of the point.

One criticism that might be made of the present text is that it too frequently attempts to convert political issues into legal questions with a view to making those questions susceptible of determination by a court or tribunal. It may be advisable to consider alternative procedures more suited to the resolution of political issues - negotiation, mediation and conciliation, culminating perhaps in an advisory opinion by an authoritative tribunal as a last stage. It may be enough to secure an advisory opinion which will influence the parties directly or indirectly by its effect on world opinion, leaving the final outcome to be decided by the parties as a political question.

There is, in addition, a very real need to give thought to dispute avoidance as well as to dispute settlement. A dispute which has arisen is the more difficult to settle, because the parties have already taken a position. Some emphasis should be given to procedures which will require parties to consult before taking steps which may be definitive, e.g. a Coastal State regulating fisheries in the EEZ or a Coastal State prescribing standards for the avoidance of pollution.

If there is a risk that compulsory settlement provisions will deter a significant number of States from acceding to the Convention, then those provisions should be sacrificed. It is better to secure adherence to a Convention incorporating detailed substantive provisions than imperil the acceptability of the entire Convention or dilute the substantive provisions in order to make compulsory settlement more attractive, an endeavour which may fail in any event. The primary object of the exercise is to secure a Convention which comprehensively defines the rights of States on the topics in question, a Convention which is ratified by a large proportion of the community of nations, including the maritime nations and the so-called super powers.

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1. In the *Reparations for Injuries Suffered in the Service of the United Nations* case (1949) ICJ Reports 174, however, the ICJ ruled that the United Nations, as an organisation, has the capacity to bring an international claim.

Even a broadly acceptable Convention that is widely ratified will not solve all our problems. If we assume the observance of such a Convention by all Governments, a bold assumption in itself, almost certainly there will be continued trespassing by fishing vessels in the EEZ's, and the familiar problems of detection, arrest and enforcement. So also with offences relating to pollution - a number of the traditional difficulties will remain.

By now you will have deduced that I am not optimistic that compulsory jurisdiction will be generally accepted. However, that is not a fatal flaw - a Convention without compulsory jurisdiction may well prove effective. And, as I said earlier, the Conference itself has accelerated in a remarkable way the development of International Law.

The success of the Conference is an argument for the establishment of a permanent Conference or Commission on the Law of the Sea. Such a Commission could maintain a continuing oversight of the Law of the Sea and its problems. It could encourage and promote uniformity of approaches and standards. In collaboration with other United Nations agencies, it could prescribe standards. The U.N. Regional Economic Commissions and UNCITRAL provide instructive examples. They have promoted uniformity of contract and commercial documents and commercial practices.

A U.N. Commission could keep abreast of technological advances; it would identify new problems as they arise and evolve, with the aid of scientific and technological developments, new procedures for conserving resources, protecting the environment and exploiting the resources of the oceans.