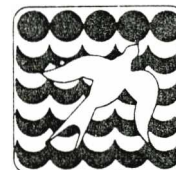




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BRIEF

CANADIAN FOREIGN POLICY, THE LAW OF THE SEA, AND OCEAN DEVELOPMENT

Summary

In the evolution of the law of the sea and ocean development, the international community has reached another cross-roads. 1994 is a year of decision. As the United Nations Convention on the Law of the Sea is about to enter into force (November 16, 1994), there are ominous signs of erosion of the Law. On the positive side, however, the convergence of UNCLOS and UNCED developments has already begun to impact on the restructuring of the United Nations system and offers to Canadian foreign policy new opportunities for initiative, leadership, with its political and, possibly, economic rewards.

This brief will deal with the two most dangerous points of the erosion of the Law of the Sea Convention and suggest policy reactions. It will then analyze the positive developments and suggest some possible initiatives.

Summary of Recommendations

1. Canada should assert a somewhat independent and critical position with regard to the Draft Resolution and Draft Agreement relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea. This will serve its long-term interests.
2. Canada should balance its unilateral emergency action with regard to straddling fish stocks with greater emphasis on regional cooperation, moving from a sectoral to a comprehensive approach including joint monitoring, surveillance and enforcement.
3. Canada should establish an institutional framework for integrated coastal and ocean management, comprising an interministerial mechanism under the chairmanship of the Prime Minister, an Ocean Forum enabling the widest possible participation in integrated policy-making, and a reconstituted and improved "ICOD," either as an independent organisation or as a part of a more comprehensive policy analysis institution.
4. Canada should enhance regional cooperation with special emphasis on the North-West Atlantic and the Arctic. Enhanced regional cooperation might include the establishment of Regional Commissions for Sustainable Development.
5. Canada should promote inter-Agency cooperation and integration at the United Nations, as well as the establishment of a United Nations "Ocean Forum," conceivably under the aegis of the United Nations Commission for Sustainable Development, where States and non-State entities could consider the interdependent problems of ocean space in their interaction and as a whole (*horizontal integration*) and coastal, national, regional, and global policies could be properly integrated (*vertical integration*).
6. Canada should take the initiative for the establishment of regional centres or systems for research and development in marine industrial technology (joint technology development), in accordance with the mandates both of the Law of the Sea Convention and UNCED.

I. *Erosion of the Law of the Sea Convention*

1. *Draft Resolution and Draft Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea (15 April 1994).*

We are about to send to the General Assembly, for adoption, an agreement which fundamentally changes one Part of the United Nations Convention on the Law of the Sea, with effects on other Parts of that Convention, just at the time when this Convention, duly ratified by 61 States, is about to come into force.

We all agree that universal, or near-universal, acceptance of the Convention is necessary if its implementation is to be effective.

We all agree that times are changing and that the March of Science and Technology, combined with structural changes on the commodity market, has made many articles of Part XI obsolete and inapplicable today.

We all agree that there must be political accommodation in the real world in which we are living.

This accommodation has been put forward under the assumption that, if it were adopted, the United States would accede to the Convention and thereby make its acceptance universal. There are many indications, however, that this assumption may be unfounded, and that the Senate will not give its consent to accession.

I would like to stress, also, that the procedure proposed by the Draft Resolution and Draft Agreement leaves a number of problems of international law unresolved. I see in it a violation of the Vienna Convention on Treaties which may be setting a dangerous precedence.

I feel that the "Authority" established by the "Agreement" is fundamentally in conflict with the very spirit of the Law of the Sea Convention. It never could

have been the intention of the Convention to have the Authority practically dominated by a "finance committee" which, for the sake of "cost-effectiveness," can totally suspend its activities, including even the meetings of its governing bodies. It never could have been the intention of the Convention to give to three industrialised States veto power over any decision of the Council. It never could have been the intention of the Convention to have the effective establishment of the Enterprise depend on a vote of the Council subject to this voting procedure!

Canada has always supported the developing countries in the defence of their just interests. It is the developing countries who lose most, and most unfairly, through this Agreement. They are to lose much of what they had gained in their long struggle for a more equitable economic order.

The "Agreement" abolishes, among other things, the Review Conference provided for by the Convention. And yet, a thorough review of Part XI will be inevitable at the time when sea-bed mining becomes economically feasible and environmentally sustainable -- under circumstances which we cannot predict today.

Recommendation

It appears to be impossible to stop this Agreement. It is likely to be adopted without any opposition.

If Canada could assert a somewhat independent position, which might have a long-term pay-off, Canada should make a statement, first, in the forthcoming final meeting of "Consultations," if there were an opportunity, which is not sure from the way this meeting appears to be planned. More important, however, would be a statement at the General Assembly at the time the Resolution and Agreement is put forward. That statement might convey that

We accept the adoption of the Resolution and the Agreement with some reservations and with the understanding that we will press for a

comprehensive review and revision of the "agreement" at the time when seabed mining will become economically feasible and environmentally safe.

We stress the importance of cost-effectiveness of the new institutions established by the Agreement. This includes also the level of salaries of the officials of the Sea-bed Authority, given the very limited extent of the duties and responsibilities they can exercise under the terms of the Agreement.

On March 15, the Minister of Foreign Affairs, the Hon. André Quellet, announced that "the Government will soon be ratifying the Law of the Sea Convention." He did not attach any conditions, such as changes in Part XI. Canada is therefore in an excellent position to express some reservations and concerns, which, I am convinced will express the reservations and concerns of very many States which, for one reason or another have had to remain silent. It will enhance Canadian leadership for the future.

2. Just like the establishment of the Sea-bed Authority, the establishment of the EEZ generated some problems which have remained unresolved. It was clear from the beginning that even the largest EEZ was not a self-contained management unit, Neither pollution nor fish would be stopped by the political boundary. It would be impossible to manage either the environment or the fish stocks within the EEZ if they were to be left unmanaged outside the boundary.

Two ways were open towards a solution of this problem: regional cooperation to establish regional management systems which should have been harmonised with the national management systems; or further expansion of national jurisdiction.

Both roads were paved with difficulties. International management was resisted and considered as ineffective; the expansion of national jurisdiction would erode the Law of the Sea and return us to the chaos of 1958 and 1960.

Both roads, nevertheless, were embarked on simultaneously. Regional

cooperation, especially through the Regional Seas Programme, developed most promisingly. On the other hand, the crisis in the world fisheries encouraged the appearance of new theories such as Chile's *mar presencial* or, now, Canada's legislation for the protection of straddling stocks.

Canada's position is indeed difficult. To navigate between the Scylla of domestic political pressures *to do something*, and the Charybdis of offending the neighbour to the South, is an arduous task indeed. The policy finally adopted may go some way towards coping with these two secondary problems, but it will not solve the real problem, i.e., the rebuilding of the fish stocks. The reasons for the stock depletion, as we all know, are complex, and overfishing by foreign vessels, in particular, ships under flags of convenience or under no flag at all, is just one of these factors, and not the most important one. The problem cannot be solved by unilateral action -- timid unilateral action, at that, which, while not achieving its purpose, will contribute, nevertheless, to the erosion of Part V of the Convention,

Recommendation

It might serve the long-term interests of Canada to stress in statements, perhaps at the concluding session of the U.N. Conference on Straddling Stocks, that the legislative measures taken by Canada are of a *temporary nature*; that it is a form of *crisis management*; and that Canada intends, now and in the future, to increase its efforts towards finding a regional solution, through regional decision-making and regional enforcement measures to be developed through a strengthened NAFO.

II. *UNCLOS, UNCED, and new opportunities for Canadian Foreign Policy*

The implementation of the Law of the Sea Convention and the implementation of the Conventions and Programmes adopted at the United Nations Conference on Environment and Development should be treated in their interactions. The link-pins between the two are Chapter 17 of Agenda 21 and Part XII of the L.o.S. Convention. The L.o.S. Convention, on the one hand, provides the comprehensive legal framework, the dispute settlement system, and the enforcement mechanisms for the implementation of Chapter 17. On

the other hand, Agenda 21 provides a framework for the integration of ocean policy into general sustainable development within national, regional, and global economies.

1. *Institutional Change*

Sustainable development requires important changes in our institutional order, adumbrated in the Brundtland report and reinforced by Agenda 21. The new institutional order must respond to the challenges of *horizontal and vertical integration*, i.e., interdisciplinary, trans-sectoral integration between organs of governance, whether national or international; and integration between *levels of governance*: municipal, provincial, national, regional and global. The L.o.S. Convention, anticipated this development with the recognition that "the problems of ocean space are closely interrelated and need to be considered as a whole." This recognition has triggered developments in the same direction. "Integrated coastal and ocean management" has its precise institutional implications. The marine sector is the lead sector in the world of today with regard to institutional change.

Recommendations

1. During the entire period of UNCLOS III, Canada succeeded admirably in integrating the policy interests of various government departments, provinces, political parties, industry, labour, and other interest groups. It was the broad participation in the making of Canadian ocean policy, together with the continuity of its representation at UNCLOS III, that assured to Canada a leading role throughout the long duration of the Conference. Unfortunately, at the end of the Conference, this integrative policy mechanism ceased to exist, and Canada lost its leadership position in the post-UNCLOS era.

At the national level Canada should restore and update its integrative policy- and decision-making mechanisms in the marine sector. Many models, from other countries, both developed and developing, are available for a comparative study. Of these perhaps the Netherlands' model, with some

adaptation, would be the most suitable one. Whichever model is chosen, it should have at least three elements:

- (a) a "Forum" or "Assembly" where all major ocean users, including the scientific community, the fishing community, the technology sector, tourism organisations, consumers and NGOs, could discuss Canadian policy with regard to the interdependent problems of ocean space, which need to be considered as a whole. This forum should meet regularly, perhaps every two years. Its findings and recommendations should be widely publicized.
- (b) An interministerial mechanism, probably under the Chairmanship of the Prime Minister (as in the Netherlands);
- (c) An ocean development institution that should combine some of the qualities of ICOD with some others, which ICOD did not have.
 - (i) It should have a *policy research capacity* so that it could advise the Government on issues of ocean policy;
 - (ii) It should be the Government's arm for development cooperation in the marine sector (like ICOD) and be responsible for projects which CIDA cannot possibly execute directly. The new institute should execute ocean projects both for CIDA and IDRC, so there should be no duplication of efforts.

The disappearance of ICOD has harmed Canadian credibility as a leader in ocean affairs, particularly in the South Pacific and the Caribbean. If the Government were to decide to rebuild it, ICOD's temporary demise could be utilised to correct the weaknesses it had (overbureaucratization; lack of in-house research capacity; absence of policy research).

The "new ICOD" could be an independent organisation; it also could be part of a comprehensive policy analysis institute as recommended by the National Forum on Canada's International Relations.

2. Changes in the structure of national ocean governance will reflect themselves at the regional level. All regional seas today are faced with the task of updating their programmes, moving from "Stockholm" to "Rio," from a sectoral to a trans-sectoral approach, integrating "environment" and "development" concerns. This requires structural changes, to reflect the changes at the national level, and a broadening of the mandate, from "pollution control" to "sustainable development."

In the Mediterranean, Malta has taken the leadership by introducing in the Tunis meeting of States Parties to the Barcelona Convention, a document proposing a revision of that Convention to incorporate the necessary changes.

Canada could take similar initiatives in the *Arctic* as well as in the *North-West Atlantic*. This recommendation should be linked to the recommendation under 1,2. above regarding a more permanent solution of the straddling stocks issue. Enhanced regional cooperation should include joint monitoring, surveillance, and enforcement mechanisms. It might also include the establishment of *regional commissions for sustainable development*. It would offer the most effective instrument for Canada's contribution to the implementation of the seven programmes of Chapter 17 of Agenda 21. Closer and more institutionalised cooperation with our Arctic neighbours might also prove to be a counterweight to dependence on the neighbour to the South. It is in line with the recommendation of the National Forum on Canada's International Relations:

Canada should also consider redeploying some resources to new kinds of organizations like the Inuit Circumpolar Conference and the proposed Arctic Council that can respond to the new political, environmental, and security challenges facing Canada.

(c) *At the global level*, Canada's contribution to the restructuring of the United Nations system should include an analysis of the role of the marine sector to this over-archingly important process. This should start with an analysis of the truly innovating features of the Law of the

Sea Convention and its contribution to the evolution of international law and cooperation -- e.g., the concept of the common heritage of mankind; the innovative treatment of "sovereignty" and "sovereign rights" coexisting with "jurisdiction" and "shared jurisdiction" in the same geographical areas; mandatory peaceful settlement of disputes; reservation for peaceful purposes; comprehensive international environmental law, etc.

In institutional terms, the changes at the national and regional level will have to be reflected at the global level. Some progress has already been achieved in inter-Agency cooperation in the marine sector, now under the responsibility of the IOC, but more is needed. Just as at the national and regional level, a forum is needed where States and non-State entities -- regional, scientific, industrial, nongovernmental, etc. -- could consider the interdependent problems of ocean space in their interaction and as a whole and where national, regional and global policies could be properly integrated, thus fulfilling the UNCED postulate of horizontal and vertical integration. This should be done under the aegis of an upgraded U.N. Commission for Sustainable Development within which the marine sector, possibly through the "U.N.Ocean Forum," should play an institutionally well defined role.

Clearly this would be a major contribution to the restructuring of the United Nations system, making of the ocean regime model for and part of a genuinely new national/international order.

3. *Technology transfer* to developing countries is fundamental for the achievement of sustainable development. It can easily be (and has been) demonstrated that *joint technology development* is the most cost-effective method of technology transfer, and the one that corresponds best to the characteristics of *High Technology*. *Joint Technology Development* or *Technology Co-development* means joint research and development projects, during the pre-competitive phase of the industrial process, financed jointly by the private and the public sector. These have become commonplace within and among industrialized countries. Developing countries have practically remained

excluded from this trend.

The L.o.S. Convention mandates the establishment of regional centres for the enhancement of marine science and technology. In studies for the Mediterranean and the Caribbean, UNIDO and UNEP, in cooperation with the International Ocean Institute, have recommended that these Centres (or, rather "systems") be organised and funded along these new lines of industrial development, exemplified in Europe by systems such as EUREKA with its EUROMAR (already taken over, in Latin America, by *Project Bolivar*). This would open joint technology development to North-South cooperation. these joint technology development systems should be established within the framework of updated and enhanced Regional Sea Programmes.

Canada has a strong potential in marine industrial technology. It would have much to gain from North-South, EUREKA-like joint development, through reducing (sharing) costs for R&D, spreading risks, and creating new markets for jointly developed technologies. Canada should be actively promoting the establishment of such systems, for the implementation both of the Law of the Sea Convention and Agenda 21. Joint technology development in the Arctic might serve as a pilot experiment.

III. *Conclusion*

These are building blocks, hopefully including cornerstones, of an integrated oceans policy, consistent with Canadian foreign policy goals with regard to regional priorities in Canada's international relations; engagement in cooperative security efforts; international assistance, including development aid; reform of the United Nations. The recommendations also are in line with those of the National Forum on Canada's International Relations, especially with regard to:

increased flow of people and ideas among government departments and

between the private sector and the bureaucracy;

. greater NGO involvement;

. close connection between foreign and domestic policy;

. Active engagement in the New International Environment

. reform of the UN and other international organisations;

. Canada's defence policy which should be focused on peacekeeping and constabulary services to trouble spots rather than be "threat-based";

. "Comprehensive security," or "human security"

. the New Sovereignty

. Joint technology development

Ocean policy does not occupy a significant place in any of the foreign policy review documents. We would like to support any effort to move it to such a place.