Law of the Sea: What It Is and How It Will Change Fishing and Marketing Practices in the Caribbean

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Law of the Sea is an extensive subject and I am not certain that I can give it adequate treatment in a short address. The question to be answered in the first instance is, what is the law of the sea? And then how is that Law of the Sea, when identified and defined, likely to change fishing and marketing practices as they exist in the Caribbean?

For the purpose of this address, the term Caribbean is restricted to the Caribbean archipelago or the insular Caribbean territories stretching from the Republic of Cuba in the northwest through the Greater and Lesser Antilles to Barbados and Trinidad and Tobago. These islands form the northern flank of the semi-enclosed Caribbean Sea, which is bounded in the south by Mexico's Yucatan Peninsula, Central America, Colombia and Venezuela. The fisheries resources under reference in this session are mainly those living resources to be found in the Caribbean Sea, which has been erroneously labelled the "American Mediterranean."

Economically, most of the insular Caribbean territories are under-developed; a few of the hard-core least developed countries in the world are to be found in the archipelagic chain. These are territories, small in size with high population density, high unemployment, a low level of social services and limited or non-existent land-based natural resources. These islands lack, therefore, the vital resource base for industrial development. Historically, these economies have been dependent upon agriculture which they have had to market either in Europe or North America. That pattern of dependency appears to persist. Moreover, terms of trade for their products, which have generally been adverse, have steadily deteriorated, leaving the economies of the most of the islands in a state of continuing instability, and, in some cases, utter stagnation.

For too long have these territories stood with their backs to the sea. Now that they have turned around to face the sea, they find the sea that washes their shores not to be rich in resources. Professor Julien Kenny of the University of the West Indies has in another place described the Caribbean Sea as "virtually a living desert." It is considered an area of low productivity when compared to the waters of the North Atlantic, where rich nutrient salts from deep layers are said to return to the surface regularly by convectional overturns. Some small areas of rich local fisheries do exist, but these tend to cling or adhere to the mainland. I would hope to show later how the new Law of the Sea in respect of fisheries zones affects adversely the insular territories, if it is true that most of the living resources of any worth are to be found in the lower

southern third of the Caribbean Sea.

To return now to the first question - What is the Law of the Sea? In its simplest terms, the Law of the Sea can be described as that body of rules, customs and practices currently accepted by the international community for regulating the numerous and often conflicting and competing uses of the seas and oceans. These uses have undergone radical changes over the years. Simple line and net fishing on an essentially artisanal scale has given way in most places to fully mechanized distant water trawlers and factory ships employing gadgetry of great sophistication. Sail has given way to steam and more recently a number of nuclear powered vessels sail the seas. Offshore oil and natural gas exploitation in submarine areas beyond the 200-m isobath has become a traditional pursuit. Advancing technology has made feasible the exploiting of the sea bed at great depths for mineral resources, particularly polymetallic nodules. As a result, it became urgent for the international community to find rules to regulate new forms of exploration and exploitation of the seas and oceans and to establish order in ocean space so as to avoid conflicts and rivalries. The old rules that had evolved over many centuries could not cope with these new technological advances.

What were these old rules and how did they evolve? Historically, the law of the sea developed in the wake of the intense rivalries of imperial European powers for control of the seas and oceans. Such control was necessary to protect their overseas empires. National interest has been the motivating force in the evolution of the international law of the sea. That evolution can conveniently be traced from the time of that famous Dutchman Grotius who published in 1609 his classic statement on Mare Liberum (the freedom of the sea). Grotius is said to be the father of that doctrine. His work was not the result of independent or disinterested juristic reflection. Grotius' concern as a Dutchman was to defend his country's right to navigate freely in the Indian Ocean and in other seas and oceans, over which Spain and Portugal had asserted monopoly use and political domination.

It is to be noted that at that time (the early 17th century) Britain and several other European nations were opposed to the Grotian concept of freedom of the seas. Accordingly, Britain claimed sovereignty over the English seas and in 1609 prohibited foreigners from fishing along the British and Irish coasts. The freedom of the seas, as expounded by Grotius, was not to be extended to mean a freedom to fish in British waters. As a reaction to the Grotian concept of freedom of the seas and on the basis of national self-interest, British jurists, like Selden and Westwood, advocated in 1635 the diametrically opposed concept of Mare clausum or closed sea. The adoption by Britain of the Mare clausum concept up to the end of the 17th century reflected to a large extent the attitude of a state which was at the time a relatively weak naval power when compared with its main rival, Holland. It is interesting to note that as Britain gained naval supremacy, it espoused fully the Grotian doctrine of freedom of the seas and particularly freedom of navigation. Interestingly too at the time, Dutch fisheries had declined

considerably while Britain had become the most powerful fishing nation in the world. By 1793, the United States, not yet a major naval power, strongly protested against British and French interference with U.S. shipping as a result of Anglo-French conflicts. Ironically, however, during the American Civil War, the United States imposed a naval blockage off its southern coast in spite of strong British objections. Maritime conflicts and rivalries among imperial metropolitan powers continued unabated in the 19th century. What appeared, however, to be settled practice was that each state was entitled to a 3-mile breadth of territorial sea according to the "cannon-shot" rule, but that beyond that narrow belt of sea, freedom of the seas reigned. That freedom was written in large terms. It was a freedom to fish and to plunder, to pollute and to undertake, among other things, marine scientific research.

By the 20th century, particularly as a result of World Wars I and II, states were becoming increasingly concerned with their security and found the cannon-shot rule inadequate to meet their security requirements. A cannon shot could by then be fired more than 3 nautical miles. The breadth of a territorial sea based on the cannon-shot rule had clearly become obsolute. In view of the fact that a state enjoyed sovereignty in its territorial sea, it was also concerned with protecting the resources contained therein. Hence economic as well as security needs caused some states to increase unilaterally the breadth of their territorial sea. This resulted in some states, so-called law-abiding states, maintaining a 3-mile territorial sea; while others appreciated their territorial sea jurisdiction to 6, 9 or 12 miles. Calls were therefore made for some order to be put into the law. In the second half of the 20th century, three major international efforts were made to codify and progressively develop the international law of the sea. These were: (1) the 1958 United Nations Conference on the Law of the Sea (UNCLOS I); (2) the 1960 United Nations Conference on the Law of the Sea (UNCLOS II) and (3) the 1974 United Nations Conference on the Law of the Sea (UNCLOS III) (its first procedural session was held in 1973). What really gave urgency to the holding of UNCLOS I was the 1945 proclamation by President Truman of the exercise of sovereign rights by the United States over the sea-bed and subsoil of the submarine areas adjacent to its coast (possibly up to a 200-m depth). Latin American countries of South America, which had narrow continental shelves, reacted to the Truman proclamation by declaring their sovereignty over a 200-mile territorial or patrimonial sea adjacent to their coasts. Their rationale appeared to be that a 200-m isobath off the Atlantic coast of the United States would be about 200-miles wide. These declarations gave Peru, Ecuador and Chile vast jurisdiction over rich areas of living resources.

Resulting from UNCLOS I were: (1) Four conventions embodying the international regime of the Law of the Sea; (2) An optional protocol of signature concerning the compulsory settlement of disputes and (3) Nine resolutions on other subjects including one on the convening of UNCLOS II.

The four 1958 Conventions adopted were as follows: (1) The Convention on the High Seas (CHS) which came into force on 30

September 1962. By 31 December 1979, 56 States had become parties to this Convention; (2) The Convention on the Continental Shelf (CCS) which came into force on 10 June 1964. By 31 December 1979, 53 States had become parties to this Convention; (3) The Convention on the Territorial Sea and the Contiguous Zone (CTSCZ) which came into force on 10 September 1964. By 31 December 1979, 45 States had become parties to this Convention and (4) The Convention on Fishing and Conservation of the Living Resources of the High Seas (CFC) which came into force on 20 March 1966. By 31 December 1979, a mere 35 States had become parties to this Convention.

These Conventions largely represented a codification of existing traditional customary law and together constituted an international legal regime based on the division of ocean space into successive zones of coastal state jurisdiction. The legal regime established by the four 1958 Geneva Conventions reaffirmed the traditional concept of freedom of the seas. It permitted states sovereignty in a belt of water adjacent to their coasts called the territorial sea, but it gave other states the right of innocent passage therein. States participating in UNCLOS I failed, however, to agree on a precise limit for the breadth of the territorial sea. The right of states to regulate the conservation and exploitation of their offshore living resources was restricted to internal and territorial waters. The high seas are characterized in principle by a virtually absolute freedom of utilization and the absence of national jurisdiction other than that of the flag state. Another aspect of the 1958 regime, based on the widespread reception of the Truman proclamation, is the recognition given to the inherent sovereign rights of states over the mineral resources of the sea-bed and subsoil of the continental shelf, together with those living resources which at the harvestable stage are in constant contact with the sea-bed. Although states enjoyed sovereign rights over crawling species of fish, the freedom of the seas doctrine left the swimming species outside the territorial sea free to be harvested by any state. In addition, that 1958 regime did not stipulate the precise outer limit of the continental shelf of states, leaving that limit to be determined by the criterion of exploitability. However, as technology advanced and submarine areas at greater depths became exploitable, that outer limit became more and more uncertain. UNCLOS II (1960) failed to reach agreement on a uniform breadth for the territorial sea.

Given the rapid advances in the technology of drilling and mining at greater submarine depths and a lack of an effective and comprehensive legal regime, the time was ripe for a radical restructuring of the traditional law of the sea as reflected in the 1958 Geneva Convention. The initial impetus for such a restructuring of the law of the sea came from the Maltese delegate, Ambassador Arvid Pardo, who in a monumental intervention in the First Committee of the United Nations General Assembly on 1 November 1967, called, among other things, for the area of ocean space beyond national jurisdiction to be declared the common heritage of mankind. This initiative on the part of the Maltese delegate reflected five major concerns,

namely: (1) the inadequacy of the existing legal regime of the sea; (2) the imbalances in the uses of the seas; (3) the preponderant role played by a few industrialized countries in the exploitation of what should be common to all; (4) fear of international chaos, anarchy or even belligerency arising from conflicting claims to the resources of ocean space and (5) the vast riches of the deep seas in manganese nodules (copper, nickel, cobalt and manganese) which modern technology in the hands of a few was poised to exploit. Many, including Ambassador Pardo, were of the view that the resources of the deep sea-beds should be shared by all states and not by the few technologically advanced. As a result they sought to have established a regime and machinery to manage those resources for the benefit of all states, particularly developing countries. Pardo, therefore, asked to have determined the area of national jurisdiction and proposed the closing of the open-ended definition of the Continental Shelf as appears in Article 1 of the Geneva Convention on the Continental Shelf (1958), so as to precisely determine the outer limit of coastal state jurisdiction. This was not to be, however. Since the adoption, on 14 December 1960 of General Assembly Resolution 1514 (xv) embodying the "Declaration on the Granting of Independence to Colonial Territories and Peoples," scores of new states had emerged on the international scene: states which did not necessarily exist at the time of, let alone participate in, the First and Second United Nations Law of the Sea Conferences. Ambassador Pardo, quite unknowingly, served those new states well, by providing them with an opportunity to seek a comprehensive review of all matters relating to the law of the sea. The United Nations General Assembly agreed to that review and convened the Third United Nations Conference on the Law of the Sea (UNCLOS III). It was UNCLOS III after some 8 years of arduous negotiations that produced the comprehensive 1982 United Nations Convention on the Law of the Sea.

The Convention consists of 320 articles and 9 Annexes. The Convention progressively develops the law of the sea as contained in the 1958 Conventions, with respect to the territorial sea whose breadth is set at 12 nautical miles. It also provides for a more detailed regime with respect to the exercise of the retained right of innocent passage within the territorial sea. The Convention also establishes the Exclusive Economic Zone of Coastal States at a distance of 200 nautical miles from the baseline from which the territorial sea is measured and also defines the rights and obligations of coastal and other states, including landlocked states, in that zone, particularly with respect to the exploration of its living resources. It also provides a more precise legal definition of the limits of the continental shelf of coastal states and provides for the sharing of revenue obtained from the exploitation of resources beyond 200 nautical miles. The Convention reaffirms the high seas regime and the traditional freedoms of the seas. Also covered by the Covention are the regime of islands, the question of enclosed and semi-enclosed seas and the right of access of landlocked states to and from the sea, involving the freedom of transit.

The 1982 Convention, in one of its major innovations, establishes a regime for the exploration of the resources of the sea-bed and subsoil beyond the limits of national jurisdiction. It creates a new international organization, the International Seabed Authority (ISA), which is to organize, carry out and control all activities related to the exploration and exploitation of the resources of "the Area," which is the term applied to the sea-bed and subsoil beyond the limits of national jurisdiction. The Convention establishes rules of law to be applied in the delimitation of maritime spaces between states with opposite or adjacent coastlines. The rights and duties of States with respect to the protection and preservation of the marine environment are also prescribed as are criteria to govern the conduct of marine scientific research and the transfer of marine technology. The Convention introduces further a comprehensive and compulsory dispute settlement machinery, including the creation of a new tribunal for the adjudication of disputes arising specifically from the interpretion or application of the Convention. The Convention negotiated and adopted, as it was, in a forum of over 150 Sovereign States, represents an attempt to harmonize the varying interests and perspectives of the participants. Since decisions at UNCLOS III were taken almost entirely on the basis of consensus, the Convention must necessarily reflect a very high degree of compromise.

It can be said that the new law of the sea is embodied in the 1982 United Nations Convention on the Law of the Sea. The question really to be addressed at this stage is, how does this new law impact on fishing and marketing practices in the Caribbean? Given the paucity of reliable information on the nature and extent of fisheries resources in the Caribbean and the marketing practices of island states in the chain, which, with the exception of Cuba and possibly Trinidad and Tobago, have under-developed fishing industries, it is difficult to assess and evaluate the effect the new law is likely to have on fishing and marketing practices. What is clear is that the likely effect will undoubtedly be adverse. This is particularly so because of the concept of the 200-mile Exclusive Economic Zone (EEZ) which is enshrined in the 1982 Convention.

The regime of the EEZ confers on the coastal state, among other things, sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters. In short, it gives coastal states exclusive jurisdiction over 200 miles of living resources.

Applying that EEZ regime to the Caribbean Sea produces curious results. As pointed out earlier, the Caribbean Sea is an area of low productivity as far as living resources go, and whatever resources of worth that exist therein, adhere to the continental mainland. If the sea were to be divided in half along an East-West axis, the resources will lie in the southern half of the sea and in most cases less than 50 miles from the coast of the nearest mainland or islands. The northern half of the sea is not well endowed with living resources. Further, because of the small size of the Caribbean Sea, there is a hotch potch of

overlapping EEZ's. At no point can Trinidad and Tobago, for example, claim a 200-mile EEZ. At its nearest point, it is only 9 miles away from the Venezuelan coast. Dominica is but 22 miles to the northwest of Martinique. St. Vincent is located 25 miles west of St. Lucia and about 100 miles west of Barbados. The whole Caribbean Sea is a network of national jurisdictions. No pocket of high seas exists therein. The resulting delimitation problems will therefore be difficult and complex.

The insular Caribbean territories appear to have suffered as a result of the adoption of the 200-mile EEZ in the new Convention. Prior to the declaration of the EEZ's by mainland states like Colombia and Venezuela, Mexico and those in Central America, the island states in the chain had traditional and habitual access to the resources of those states outside their 12-mile territorial sea limit. Barbados and Trinidad and Tobago had habitually fished in the waters of the Guianas and Brazil. They have both now been deprived of access to those waters. (Trinidad and Tobago has, however, a kind of joint venture fishing agreement with Brazil). Loss of access to those rich fishing grounds has literally destroyed the fishing industry in Barbados and Trinidad and Tobago. Moreover, Barbados has lost to Tobago its flying fish resource and now seeks a fishing agreement with Trinidad and Tobago in respect of flying fish and other species. It appears that Barbados now imports flying fish from Trinidad and Tobago. Prior to the adoption of a 200-mile EEZ and a declaration to that effect by Trinidad and Tobago, Barbados would have been able to fish freely and legally for flying fish off Tobago, outside the 12-mile territorial sea. Jamaica, which is seriously disadvantaged in respect of living resources, much more so than Trinidad and Tobago which is close to the mainland, has lost access to the fishing grounds of Nicaragua and Colombia. According to reports, Jamaica up to 1982 was unable to negotiate successfully bilateral fishing agreements with those two mainland countries.

At a recent seminar held in Jamaica under the auspices of CAIC (The Caribbean Association of Industry and Commerce), it was noted that "with few exceptions, the regional fishing industry has not done well either in terms of being a significant supplier of food or in providing incomes and returns to fishermen." This appears to have been the position even prior to the adoption by Caribbean states of a 200-mile EEZ. The fishing industry remains generally underdeveloped and essentially confined to artisanal fishermen using levels of technology that can only be described as modest.

This brings me to the point of any likely effect which the new law may have on marketing practices. According to C.P. Idyll in U.S. Fishery Interests in the Caribbean, of the fish consumed in the Caribbean a high proportion is imported: in the Lesser Antilles, nearly half; in the Greater Antilles about three quarters; in some mainland countries (not including Mexico) about half. Idyll states further that these large imports impose a heavy drain on foreign exchange and that Caribbean countries would like to increase their own production in order to reduce their reliance on external sources and the drain on scarce foreign exchange. These states cannot increase their own

production from the poor resources under their control. In the absence of meaningful access to the resources of the EEZ's of the mainland countries, the Guianas and Brazil, there will in fact be little production and little to market. They will remain net importers of fish rather than net exporters. It is to be noted that in the 1982 Convention, the access which is to be given to states to the EEZ's of other states is an access to the surplus fish stocks. The existence of a surplus in any year is to be determined subjectively by the state which is giving access to its EEZ. In practice few surpluses will exist and access to living resources of EEZ's will generally be denied.

The United States remains the main market for the import of seafood from the Caribbean region. The insular Caribbean territories export little or no seafood to that market. According to C.P. Idyll, in 1979 the United States imported 121,000 metric tons of shrimp worth $713 million, some 56.5% of the total consumed in that country; most of which came from the Caribbean countries, principally Mexico, Panama, Nicaragua, Colombia, Guyana, French Guiana, Guatemala, Honduras and Venezuela. In that year, the United States imported about 96% of its supply of spiny lobsters - 68,600 metric tons. About 20% of these imports came from Honduras, Mexico, the Bahamas, Nicaragua and Belize. Given the high demand for shrimp and lobster in the U.S. market, the Caribbean will remain an important source of seafood for the United States. However, the insular Caribbean territories will continue to have little or no share of that lucrative market unless they can negotiate access to the resources of the EEZ's of the Guianas, Mexico, Colombia, Nicaragua and Brazil. Present trends indicate that there is little hope for success. It remains my view that the new law of the sea will have marginal effect on the marketing practice in the Caribbean. I cannot help, therefore, but agree with Eric Williams (Threat to a Caribbean Community, 1975) that in respect of access to living resources, the law of the sea represents for the insular Caribbean territories nothing short of disaster. However, it may not be too late to minimize or reduce the effects of that disaster. In view of the fact that attempts to negotiate bilateral fishing agreements have been by and large unsuccessful (with the possible exception of Cuba and Trinidad and Tobago), the insular CARICOM States in the archipelago chain need to take a joint approach to negotiating access to living resources in the EEZ's of other Latin American and Caribbean States. The states to which joint approaches should be made are Canada, the United States, Mexico, Central America, Colombia, Venezuela, the Guianas, Brazil and Argentina. Canada appears to be well disposed to such an approach by CARICOM countries either jointly or unilaterally. What seems to be urgently required is a meeting of CARICOM States to coordinate such an approach and to work out strategies for achieving desired objectives. CARICOM States may need to establish a joint venture company WIFCO, similar to WISCO, which would have the necessary capital and technology to exploit living resources in the whole area and provide adequate feed stock for existing processing plants in the region. It is expected that under the CBI, fish produced in such CARICOM joint venture arrangements would have access to the

United States market and provide well-needed foreign exchange. Such arrangements are likely to provide adequate fish supplies for the nutritional needs of CARICOM peoples. To achieve these objectives, an early meeting of the States forming the Latin American and Caribbean group may now be necessary to discuss the question of access to the living resources of the EEZ's of those States in accordance with the provisions of the 1982 United Nations Convention on the Law of the Sea. That seems to be the proper direction for CARICOM States to go.