FLO/L.H.J. Legault/jl

FISHERIES DIPLOMACY

Notes for a Statement by Mr. J.A. Beesley to the Fisheries Council of Canada Annual Meeting, May 4, 1971, Ottawa

So much of my time in the Department of External Affairs has been spent on international fisheries problems that I would trade in my striped pants for a souwester — if I owned a pair of striped pants. While most people might see little connection between fisheries and diplomacy — apart from the diplomat's supposed skill with a red herring — the fact remains that fish loom very large indeed in the diplomatic history of Canada both as a colony and as an independent nation. What I propose to talk about today is the past decade or so of that history. In doing so, I know that I will touch on ground that is familiar to many of you, but I hope you will bear with me because I believe it is important to review what we have already accomplished in order to have a better understanding of our prospects with regard to what we hope to accomplish.

The 12-mile fishing limit is today not only a familiar concept but an established fact. Most countries of the world now exercise exclusive jurisdiction over fisheries at least as far as 12 miles from their shores. It is too easy to forget, however, that this is a recent development which was not achieved without considerable difficulty. When the first Geneva Conference on the Law of the Sea was convened in 1958, an important majority of the then members of the United Nations claimed and recognised a territorial sea of only three miles, and exercised fisheries jurisdiction only

... 2

within that three-mile limit where they enjoyed full sovereignty. By that time, the Canadian Government (with some prompting, I believe, from your Council) had decided that the three-mile limit was not wide enough to protect Canada's coastal fisheries and the interests of Canadian fishermen. Using the traditional approach, Canada would have simply proposed a wider limit for the territorial sea in order to obtain a wider area of exclusive fishing rights. Many countries, however, including Canada's closest friends and allies, considered that their strategic and shipping interests made it essential to maintain the three-mile limit for the territorial sea. The solution Canada proposed for this dilemma was simple but radical: separate fisheries jurisdiction from sovereignty, keep the three-mile limit for the territorial sea, but extend fisheries jurisdiction nine miles beyond that limit (that is, a total of 12 miles from the baselines from which the territorial sea is measured).

Canada played a leading role at the 1958 Conference on the Law of the Sea. We fought hard for our 3-plus-9 proposal, which we modified during the course of the conference to make it 6-plus-6 - six miles of territorial sea and six miles of exclusive fishing zone. We made a tremendous impact but we were unable to secure the international agreement we wanted. Two years later, in 1960, a second conference was held in Geneva to attempt to resolve the two questions which the first conference had failed to settle -- the breadth of the territorial sea and the limits of

... 3

fisheries jurisdiction. This time we had the United States on our side in putting forward the 6-plus-6 proposal, but even so we fell short of success by one vote. We did not, however, even then, abandon our efforts to secure some form of international agreement based on the 6-plus-6 formula. Together with Britain we canvassed countries round the world and obtained the support of over 40 Governments for such a proposal. Unfortunately, however, the USA did not give us its support and once again we came to a dead end.

Against this background of intensive and prolonged multilateral efforts to produce agreed rules of law on the breadth of the territorial sea and the contiguous fishing zone, Canada finally decided to go it alone in 1964. The Government then adopted the Territorial Sea and Fishing Zones Act providing for the application of the straight baseline system to the coasts of Canada and establishing a nine-mile fishing zone contiguous to our three-mile territorial sea. The United States Government publicly disagreed with this action but two years later it followed suit and established its own nine-mile contiguous fishing zone. So did other countries, such as Australia, New Zealand, Britain, France, and so on and on, until at last a highly controversial proposal achieved the status of accepted customary international law. That is an achievement for which Canadian fisheries diplomacy, and the courage of the Canadian Government in breaking its own trail when all other possibilities had been exhausted, deserve considerable credit.

... 4

The 1964 Territorial Sea and Fishing Zones Act helped to open a new frontier of international law. But it did more than that. It permitted the Government to push Canada's territorial sea and fisheries jurisdiction even further than 12 miles out to sea. This was done by the establishment of straight baselines from headland to headland and from island to island, along the coasts of Labrador and Newfoundland in 1967, and along the east coast of Nova Scotia and the west coasts of Vancouver Island and the Queen Charlotte Islands in 1969. It prevented the establishment of new foreign fisheries in the areas comprised within the Canadian 12-mile limit and even in the large bodies of water on the east and west coasts where the Government did not promulgate straight baselines. It did not, however, automatically exclude from all these areas the fishing vessels of those countries which had traditionally fished off Canada's east coast, in some cases for hundreds of years. I would like to explain in some detail why this was not done, and why these same traditional fishing practices are still being pursued today, although we hope the end is now in sight. The considerations I will outline have been and no doubt will remain fundamental to Canada's international fisheries policy.

Canada, it might be argued, could have proceeded independently from the outset and could have created a nine-mile contiguous fishing zone or extended its territorial sea to 12 miles without attempting to achieve international agreement on these questions at the 1958 and 1960 law of the sea conferences and through other multilateral

... 5

efforts thereafter. It might also be argued that Canada could have established straight baselines everywhere along its coasts immediately after the adoption of the Territorial Sea and Fishing Zones Act in 1964, and at the same time could have put an immediate end to the traditional fishing practices of foreign countries within the Canadian 12-mile limit instead of authorizing the continuation of these practices pending the conclusion of phasing-out negotiations. Canada, however, has always respected the rule of law in national and international affairs. While the extension of Canada's fisheries jurisdiction could only be undertaken by Canada, such a course of action had obvious implications for the interests of other countries. In protecting its own interests Canada was not willing simply to ignore and to ride rough-shod over the interests of other countries. Canada wished to act in accordance with international law and custom, and in particular with the basic principle of international law laid down by the International Court of Justice in the 1951 Anglo-Norwegian Fisheries case. In that case the Court declared that:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law."

It is to the 1951 Anglo-Norwegian fisheries case that we owe the recognition of the straight baseline system which Canada has used to its advantage. It would have been anomalous, to say

... 6

the least, if Canada had accepted this part of the Court's decision but had rejected the limitations which the Court declared must apply to the freedom of action of coastal states in extending their jurisdiction. In this connection, I wish to quote from a statement made by Prime Minister Trudeau in the House of Commons in October 1969, which is particularly relevant here:

> "Membership in a community...imposes — and properly — certain limitations on the activities of all members. For this reason, while not lowering our guard or abandoning our proper interests, Canada must not appear to live by double standards. We cannot at the same time that we are urging other countries to adhere to régimes designed for the orderly conduct of international activities, pursue policies inconsistent with that order simply because to do so in a given instance appears to be to our brief advantage. Law, be it municipal or international, is composed of restraints. If wisely construed they contribute to the freedom and the wellbeing of individuals and of states. Neither states nor individuals should feel free to pick and choose, to accept or reject, the laws that may for the moment be attractive to them."

These were the considerations which led the Government to exhaust every multilateral avenue before moving on its own with the adoption of the Territorial Sea and Fishing Zones Act in 1964. Rather than arbitrary unilateralism, Canada chose the slow and difficult path of progressive development of customary international law. In 1964 and since, we have pioneered in that development. While we have on occasion pressed against the furthest frontier of the law, we have refused to operate outside it. With respect to the traditional fishing practices of foreign states off our coasts, Canada, like some other countries, has rejected the argument that such practices

... 7

represent acquired rights. At the same time, however, the Government has not terminated these practices unilaterally but has entered into phasing-out negotiations because such a course of action was consistent with the principles of friendly relations among states and was desirable for the purpose of securing international agreement to the extension of Canada's fisheries jurisdiction, as well as to avoid possible protests and international litigation. I have already reviewed some of the progress Canada has been able to achieve with regard to the protection of its coastal fisheries while operating within the restraints cited by Prime Minister Trudeau in his statement of October 1969. We all know, however, that the pressure on Canada's coastal fisheries has grown virtually to the breaking point in recent years. Thus it became progressively more evident that the action taken under the 1964 Territorial Sea and Fishing Zones Act was no longer sufficient and that further protective measures were required. Accordingly, the Government in 1970 adopted a number of important amendments to the Territorial Sea and Fishing Zones Act extending Canada's territorial sea to 12 miles and permitting the establishment of new exclusive fishing zones in areas of the sea adjacent to the Canadian coast. In introducing these amendments in the House of Commons, the Secretary of State for External Affairs, the Honourable Mitchell Sharp, pointed out that technological developments had transformed fishing activities "from a harvesting to a mining process". Since neither customary nor conventional international law had developed adequately to prevent the depletion

of the living resources of the sea, he said, Canada could not "wait longer for the international community to realize the danger and move to meet it. Once again, Canada, after long and serious deliberations, has decided to go it alone". At the same time that it adopted the amendments to the Territorial Sea and Fishing Zones Act, and the related Arctic Waters Pollution Prevention Act, the Government declared that Canada would no longer be bound to accept the jurisdiction of the Court in any disputes relating to the conservation, management or exploitation of fisheries resources or the prevention of pollution of the marine environment, in areas adjacent to Canada's coast. The Government reserved Canada's position with respect to the compulsory jurisdiction of the International Court of Justice not because it proposed to do anything illegal but because international law had ceased to provide a certain guide for measures relating to fisheries conservation and the protection of the marine environment, because existing law was either inadequate or non-existent and did not provide a firm basis for judicial decision, and because the need for action was immediate and urgent and could not await universal agreement on these issues. This reservation did not free Canada to act arbitrarily or unreasonably. It did, however, allow the Government to take the necessary measures to protect Canada's vital coastal interests in keeping with the fundamental principle of self-defence and self-preservation, and in accordance with long-established state practice, without the possibility of having these measures seriously delayed or frustrated by years of litigation which might in fact have aggravated disputes without resolving them.

... 9

Under the amended Territorial Sea and Fishing Zones Act the Government has now completed the delimitation of Canada's fisheries jurisdiction with the establishment of exclusive fishing zones in the Gulf of St. Lawrence, Bay of Fundy, Queen Charlotte Sound, Dixon Entrance and Hecate Strait. Canada has historic and other claims to these bodies of water but has enclosed them within what we have called "fisheries closing lines" rather than straight baselines because the Government continues to believe that it is important to separate the question of fisheries jurisdiction from the more controversial problem of sovereignty in order to minimize any impact upon the interests of other states. The Government has made clear, however, that the promulgation of these closing lines did not involve any prejudice to or abandonment of Canada's sovereignty claims. Despite the functional approach adopted by Canada in asserting limited jurisdiction rather than outright sovereignty, other countries have questioned the establishment of the new Canadian fishing zones. The United States in particular has objected that Canada's unilateral action in establishing these zones is contrary to international law.

Notwithstanding differences of views with other countries, however, we have been able to make rapid progress towards resolving the problems associated with foreign fishing activities in Canadian coastal waters since the amendment of the Territorial Sea and Fishing Zones Act and the promulgation of the fisheries closing lines. We have negotiated a reciprocal fishing privileges agreement

... 10

with the United States which allows the nationals of both countries to continue their traditional fishing practices up to three miles from the coast of the other country. We have also concluded two agreements with the USSR providing for: (a) abstention from trawl fisheries by Soviet vessels in a designated area of the high seas off Vancouver Island; (b) in compensation for this abstention, permission for Soviet vessels to fish and to conduct loading and unloading operations in designated areas of Canadian waters off the Queen Charlotte Islands; (c) authorization for supply vessels of the Soviet fishing fleet to call at Vancouver and Prince Rupert for supplies; and (d) the implementation of provisional rules of navigation and fisheries safety off the B.C. coast in order to minimize the incidence of collisions and damage to fishing gear. These agreements reflect the give and take which is essential to arriving at an accommodation in international fisheries diplomacy. The same principle of give and take applies to the phasing-out negotiations which we began in 1964 and which we are now, hopefully, in the process of bringing to a successful and early conclusion with the European countries which have traditional fishing practices on Canada's Atlantic coast, namely Britain, Norway, Denmark, France, Italy, Portugal and Spain. I am happy to be able to inform you — if you have not already heard the news — that we have just had a very friendly and very useful round of talks with the Norwegians on this matter. During these talks both sides put forward constructive proposals as to the possible basis for agreement between the two countries on the future conduct

... 11

of fishing and sealing activities. If approved, these proposals would permit the adoption of realistic conservation measures for the seal fishery and would involve the phasing-out of Norwegian fishing operations on Canada's east coast and the recognition by Norway of Canadian jurisdiction in the 12-mile territorial sea and fishing zones on both the east and west coasts. The proposed agreements will be submitted to the Canadian and Norwegian Governments and a further meeting between the two countries will be held in Ottawa in mid-June of this year.

We have made a good beginning with our Norwegian friends and we trust that this will set the pattern for our forthcoming talks with the other European countries concerned. I need not remind you that so far as France is concerned, a very special situation arises because of the fishing rights which France has acquired by treaty off Canada's Atlantic coast. The Government has made clear that it intends to respect its treaty obligations, but this does not mean, of course, that discussions will not touch upon certain problems associated with French treaty rights and that Canada can take no action to resolve some of these problems. As you know, the Government has already applied the 12-mile exclusion rule for both Canadian and foreign trawlers within the Gulf of St. Lawrence and has served notice to the French Government that this non-discriminatory rule will be binding on French vessels after the three-month waiting period required under the provisions of the 1904 Convention between France and Great Britain to which Canada has succeeded.

... 12

I believe I have said enough to demonstrate that Canada has practiced very intensive and successful fisheries diplomacy since 1958 and that we have come a long way since that time. We have done so through a judicious mix of unilateral and multilateral action and by devising new and imaginative concepts which have contributed to the progressive development of international law. We have not been able, however, to act as though Canada was alone in the world. We have also had to bear in mind the intimate interrelationship between fisheries problems and other equally important aspects of the law of the sea, relating, for instance, to defence interests, to shipping interests, to the mineral resources of the continental shelf, and perhaps above all to the preservation of the marine environment. We have had to proceed carefully to ensure that any action we took with respect to fisheries would not have any undesirable fall-out or prejudice Canadian interests in other areas of the law of the sea, for instance with regard to obtaining international support for Canada's position on the protection of the waters of the Arctic archipelago. The question that now arises is, where do we go from here?

In replying to that question I would like to refer to a statement made by Senator Robichaud, a former Minister of Fisheries with whom you are all familiar, in introducing the 1970 amendments to the Territorial Sea and Fishing Zones Act in the Senate last June. On that occasion, Senator Robichaud said:

> "It must be recognized...that the preservation of the living resources of the sea is a world-wide problem which cannot be resolved by Canada alone,

... 13

> or by simply extending the limits of national jurisdiction over fisheries, notwithstanding the importance of such an action. There is a need for multilateral action as well as for increased efforts towards internationally agreed solutions."

Canada in fact has been extremely active on the multilateral front in the last few years. We have held consultations with other interested countries with respect to the convening of a law of the sea conference which would deal effectively with the problem of fisheries conservation on a world-wide scale. Following these consultations, Canada was instrumental in bringing about a compromise resolution in the United Nations General Assembly last December whereby it was agreed that an international conference should be held in 1973 to attempt to reach agreement on the whole range of outstanding issues in the law of the sea. Canada is a member of the Preparatory Committee for that conference, which held its first meeting in Geneva in March of this year. At that meeting Canada stressed the importance of reaching an accommodation with regard to the conflict between the interests of coastal states seeking to extend their jurisdiction and the interests of distant-water fishing states seeking to restrict such extensions. That accommodation, however, will not be easy to find in light of the wide differences between the various approaches which have been suggested. At one extreme we find the more "conservative" distant-water fishing states, such as Britain, Japan and the USSR to name only a few, who wish to preserve to the greatest possible extent the high seas regime of freedom of fishing and to make only the most limited concessions, if any, to the special interests of the coastal states. At the other

... 14

extreme are the more "radical" coastal states, particularly the Latin American 200-milers, who want every country to be free to fix its own limits of exclusive fishing rights in accordance with its particular needs and circumstances. Somewhere in between are such countries as the USA, Malta and Canada.

What the United States has proposed is to limit the territorial sea and exclusive fishing zone to a maximum of 12 miles but to permit the coastal state to obtain, under a very complex formula, certain limited preferential rights with respect to fisheries resources beyond 12 miles, on the basis of economic interests and scientific evidence of the need for conservation measures, and subject to compulsory settlement procedures in cases of dispute. What Malta has proposed is a single limit of 200 miles for coastal state jurisdiction for all purposes including fisheries, subject, however, to certain rules and limitations which have not yet been clearly defined but which would be intended to protect the interests of the international community as a whole within the area to be recognised as being under the jurisdiction of the coastal state. Canada, for its part, has expressed serious reservations about the utility of complex proposals which could involve endless disputes and thus be largely ineffective both from the point of view of conservation and from the point of view of protecting coastal interests. Canada's own preference, as it has been expressed by the Minister of Fisheries, is for a new regime which would apply in the area between the outer limits of the territorial sea or exclusive fishing zones and the outer limit of the continental shelf.

... 15

In this area the coastal state already enjoys the exclusive right to exploit sedentary species; what Canada wishes to obtain is the further right to manage (but not the exclusive right to exploit) the free-swimming species of the continental shelf for conservation purposes. This right to manage would be exercised on a non-discriminatory basis but the coastal state would be entitled in certain agreed circumstances to obtain a preferential share of those species of particular socio-economic importance to the coastal population. Another important principle for which Canada is also seeking to obtain recognition is the absolute prohibition of high seas fishing for those species, like salmon, which depend for their existence on the maintenance of their spawning grounds by certain coastal states.

It is difficult to say at this time whether or not the nations of the world will be able to agree on a new regime for fisheries conservation at the 1973 Law of the Sea Conference, or what precise form that regime may take. It seems clear, however, that the climate for international recognition of the special interests of the coastal state — and its special responsibilities — has considerably improved since 1958. More and more countries appear to have realized that the only alternatives to a rational system of fisheries conservation, management and exploitation are chaos and conflict, on the one hand, or the depletion of the living resources of the sea, on the other hand. Certainly Canada will be at the forefront of those seeking to ensure that neither of these unhappy alternatives is forced upon the world.

... /6

Canada will bring to the 1973 Law of the Sea Conference a long and rich experience in international fisheries diplomacy. I would like to say that that experience has been built up through close and productive cooperation between the Department of External Affairs and the Department of Fisheries. We in the Department of External Affairs are proud of the contribution we have been able to make from the point of view of international law and diplomacy, and we are equally proud of the equal contribution made by the scientists and administrators in the Department of Fisheries. We take with a grain of salt certain observations which we have heard from Dr. Needler, for instance, in discussions with his counterparts from other countries. When Dr. Needler is about to pull off a negotiating coup, he likes to disarm the unsuspecting by referring to himself and his foreign counterpart across the table as "simple fishermen" who could quickly resolve their problems if it were not for the complexities and objections raised by their diplomatic and legal advisers. When Dr. Needler is not being a simple fisherman for tactical purposes, however, I believe he agrees that our role on the legal side of External Affairs is not to point out difficulties but rather to find solutions, not to raise objections but rather to accommodate Canada's important fishing interests within the framework of Canada's international interests in general. We see more in the sea than a fish-pond but we know too that the real wealth of the sea lies in its living resources and that their conservation is tied to the preservation of the marine environment as a whole.