Statement by
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SOME UNRESOLVED ISSUES ON THE LAW OF THE SEA

Mr. Chairman.

After the introduction I have just received I think I should say, like Yogi Berra, but on my own behalf, that half of the lies which people say about me are untrue. Speaking to an audience as knowledgable as this, as part of a panel as distinguished as this, and replacing as qualified and as important a person in this field as Mr. Evensen, I shall be mindful as a lawyer that the best defence is the plea of truth, and mindful as a diplomat that a good diplomat must always speak the truth. I shall therefore outline my views on the issues before us simply and frankly.

Before doing so I should respond to the comments of the Chairman about British Columbia. As you know, there are great similarities between British Columbia and Texas. Each consists of huge territories; each grows vast areas of wheat; each produces substantial quantities of oil; and each contains immense cattle ranches. The people of each are described as expansive in nature (some say "expansionist" - our Minister of Fisheries is also from British Columbia). It is important however to be aware of one central difference between British Columbia and Texas: namely that we British Columbians are much more friendly towards the United States. This could change, of course, if the proposed tanker traffic between Alaska and the State of Washington comes to pass - but I have promised not to discuss that subject.

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I am pleased to serve on this Panel with such eminent jurists, scholars and diplomats. I am particularly happy to have with us my old friend John Freeland of the United Kingdom. I have with me a newspaper clipping from yesterday's issue of the New York Times which reads in part:

> " While American environmentalists press for tighter regulation of shipping in coastal waters to prevent oil spills arising from collisions and groundings, the British have been agitated by a similar problem arising from tanker accidents in the Dover Strait outside their territorial seas.
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> " Stirred by a series of oil spills on English beaches, Parliament has moved to authorize the British Government to sink or seize any oil tanker threatening to pollute Britain's shores, whether inside or outside the three-mile territorial limit that Britain claims. Canada took similar action a year ago when she set a 100-mile pollution control limit in the Arctic.
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> " Such unilateral encroachments on the traditional freedom of the seas are disturbing because they could contribute to a general breakdown of the international law of the sea. But nations cannot be blamed for moving to protect themselves against pollutants with no respect for arbitrary boundaries established in the days of sailing ships. If the law of the sea is to be saved it must be modified to provide effective international controls over cargoes that threaten distant shores as well as the high seas that are everyman's heritage."

It is nice to have you on board John!

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I must say that the Panel seems a little unbalanced from a governmental point of view, with only Chile, the United Kingdom and Canada represented, and only my friend Paul Engo of the Cameroons here alone to represent the proponents of the old international law based on the archaic concept of the freedom of the high seas...and all that. However, I hope that we will be able to give the audience some indication of the varieties of views which exist within the United Nations on the many unresolved Law of the Sea issues.

There is no dearth of such issues. The problem seems to be one of selection. You have heard an excellent discussion already of the general background from Mr. Engo, from Mr. Freeland, and my old friend and colleague Mr. Zegers of Chile concerning the range of considerations facing the international community. I cannot aspire to their eloquence. I hope, however, to outline some aspects of the problem as we Canadians see them, with a view to suggesting that there is really only one central issue facing the international community, namely, the continued viability in today's world of the concept of the freedom of the high seas as an absolute doctrine. In order to do so I will make a necessarily cursory analysis of some of the major issues which must be tackled by the Preparatory Committee to the third Law of the Sea Conference, and, ultimately by the Conference itself.

One of the main issues is clearly the increasing urgency in establishing an equitable international regime, including machinery, for the seabed and ocean floor beyond the limits of national jurisdiction. As we stated in the Preparatory Committee in Geneva last month, we knew of no problem comparable in the demands it places upon the international community for innovation, imagination, and accommodation. It raises problems ranging from boundaries questions, (always one of the most sensitive issues of concern to states), to arms control matters, to the need for new concepts of resource

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administration, to economic problems relating to possible market disruptions; to basic questions concerning the developmental needs of the third world, to new problems concerning international institutions, which if unresolved could lead to conflicts not only between states, but even perhaps between states and the United Nations itself. All of these complicated problems are inherent in the topic. Which should I discuss? The complexity of issues can be reduced, in my view, to three central issues: (a) the need to define the limits of areas of the seabed and ocean floor beyond national jurisdiction; (b) the need to establish an equitable legal regime for that area; and (c) the need to create international machinery to administer the regime. What are the prospects? What progress is being made?

The prospects are uncertain because while progress is being made in some areas, there is little or none in others. On limits, no progress has been achieved thus far, beyond a moratorium resoltuion calling upon states not to encroach upon the area beyond national jurisdiction. The resoltuion gives no guidelines, however, as to where that area begins or ends. We in Canada have no special difficulty on this question, since we are parties to the 1958 Geneva Convention on the Continental Shelf, which represents existing international law. We differ of course with those who read the Convention selectively, stressing the 200 meter isobath while ignoring the overriding provision laying down the exploitability test. We accept, however, that the Convention is a Continental Shelf Convention, not an abyssal depth convention, and that there is thus a limit to national jurisdiction and that the area beyond the shelf is also beyond national jurisdiction. I refer here to the geological shelf; that is to say, the continental margin.

In what direction are we likely to proceed on this issue? No one can say. It is possible to foresee, perhaps, an accommodation based on a non-discriminatory application of a 200-mile/200-meter distant depth formula--

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non-discriminatory in that those few states like Canada whose geological shelf extends beyond such distances and depths would retain their present jurisdiction out to the edge of the continental margin. Our problem, as you know, is that the Canadian shelf, like that of certain other states such as Argentine, is deeply glaciated, and we are not prepared to accept any proposition whereby shallow shelves should be sacrosanct while deeper shelves would be truncated. I will come back to this important issue of non-discrimination a little later.

On the second important sub issue - the regime - some considerable progress has been made. It was no small feat for the 126 members of the United Nations to have been able to work out, under the brilliant leadership of Ambassador Amerasingh of Ceylon, a Declaration of Principles intended to lay the legal foundation for the proposed regime. While the declaration is not wholly satisfactory to anyone, it is broadly acceptable as a compromise to nearly all. Even here, little work has been done as yet on the very concrete and practical problems which must be tackled in the elaboration of a really effective resource management system. It is our own view that final success or failure in the elaboration of such a system which must be development-oriented, protecting both coastal states and offshore developers as well as the interests of the international community as a whole - particularly the developing countries, will determine whether or not the endless hours and enormous funds already expended in the U.N. on the seabed question, will in the end produce substantial benefits for humanity as a whole, or will, instead, merely hamper development and even hinder exploration. I should like to emphasize therefore the importance which the Canadian Government attaches to developing an effective and practicable resource management systems. Much work will have to be done on this question. (You may, incidentally, have noted that I referred to "humanity as a whole". Our Prime Minister recently married. Two days before he married he gave a

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speech on women's rights. I don't know if there is any connection between these two events, but nonetheless the Canadian delegation to the Law of the Sea Preparatory Committee has since substituted the phrase "common heritage of humanity" and "benefit of humanity" for the former phrase in vogue. There are some who might say with Winston Churchill that "man embraces woman" but we want to ensure the converse as well.)

On the third sub issue, the proposed international machinery, once again little has been achieved beyond the Secretariat studies and some useful U.N. debates and discussions. There is as yet no action. What are the prospects?

On this as well as the preceding sub issue, we think that they are good, providing progress can be made on the first, namely, the question of limits. Unfortunately, there are some extremely complicated procedural questions involved, due to the insistence of a number of states that limits be considered prior to the elaboration of the regime in much greater detail than has occurred thus far. Many states are understandably nervous about considering the question of limits until they have some better idea of the nature of the regime, but on the other hand other states are cautious about the nature of the regime in the absence of any clear guidelines on limits.

What are the prospects? There is some considerable reason for pessimism. Unless the Preparatory Committee can begin to conduct its affairs differently than heretofore, we wont be able to make the 1973 target date, nor any other. At last month's Geneva meeting, the Committee was unable to meet at all for the first two weeks of the session, due to the procedural difficulties I have mentioned, based largely upon differences of views concerning priority of treatment of the various subjects to be included on the agenda of the third Law of the Sea Conference.

How can we overcome this procedural deadlock which is blocking further substantive progress by the Committee? Canada has put forth a suggestion --

-- not a formal proposal -- merely an idea which entails a course of action involving three elements. The first would be to create a real moratorium. States would be called upon to define their continental shelf claims by a specified date. Those uncertain as to how far they may wish to claim would specify a line beyond which they would never claim. If necessary a rider could be included to the effect that no state could claim beyond 200 miles or to the edge of the continental margin. They would advance such claims in the knowledge that their action would not predetermine international law on continental shelf limits but would nonetheless estop them, and other states, from extending jurisdiction beyond such declared limits. The effect of such coordinated action by states would be the immediate definition of the non-contentious area of the seabed - the area which no one claims, which I think would be substantial. No longer would the existence of such an area be a matter of speculation, conjecture and controversy. It would then exist in fact as well as in theory. The effect would be to concretize the whol problem. The U.N. could then turn to the question of the precise delimitation of the limits of the area beyond national jurisdiction in a much more relaxed atmosphere, under much less pressure. It may be said that such a procedure would encourage wide claims by states, but our own view is that such a procedure would not cause any state to claim any more than it would eventually claim in any event. Moreover such action would not prejudge the development of international law except in one respect, namely, that subsequent negotiations could have the effect of expanding the non-contentious area but could not have the effect of diminishing it. (It is interesting to note that a few days after we put forth our idea in Geneva the Bureau of the Preparatory Committee proposed, and the Committee agreed, that the Secretary General circulate a request to all member states of the U.N. to give particulars of their Law of the Sea legislation which would of course include all of their claims to marine jurisdiction.)

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A second element in our suggestion is that the U.N. would, simultaneously with the definition of the non-contentious area, establish a skeletal international machinery to cope with immediate problems which cannot await the outcome of the U.N. Conference in 1973 or later. The present resistance to establishing machinery before the area is defined would no longer have a logical basis. Investors such as those involved in the Deep Sea Mining Venture could proceed with some safety of investment. There would be an authority which could protect the interests of the international community while ensuring certainty of title to the investor. Such machinery need carry out only limited functions at first, although it would require the capacity to perform the whole range of functions which must ultimately be carried out. There would be no need to develop a full scale elaborate and expensive international bureaucracy. A beginning, however, could be made. Experience could be developed and applied well before the crucial period of widespread exploitation of the resources of the abyssal depths.

The third element in our suggestion is somewhat more radical than the first two. It would consist of the voluntary acceptance by all coastal states of an "international development tax". Such a "tax" would consist of a fixed percentage of all revenues which governments derive from offshore development beyond internal waters. (It would not be possible to provide for all revenue beyond the territorial sea because of disagreement of the breadth of the territorial sea.) The fund thereby created would be used not only to defray operating costs of the new international machinery but for international development purposes. We have made rough guestimates that the revenues might amount to anything from 1.5 million to 15 million dollars per month.

The situation therefore is that we already have a set of principles for the regime. With the three-step course of action which I have just

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outlined we would also have an area, an administering authority, and administration funds. We think the idea is worth consideration. We won't press it, unless there is sufficient support, in which case we would table a working paper, perhaps in the summer session in Geneva and, assuming the response was favourable, later table a resoltuion in the U.N. If delegations prefer to continue the procedural arguments for a few years then we will not, of course, insist on putting forth our ideas as a formal proposal.

So much for the Seabed. What are the other major issues? You have already heard references to the resolution passed at the XXVth UNGA agreeing on the third Law of the Sea Conference, a Resolution I might say which was the product of extensive and lengthy negotiations in which Mr. Zegers and I participated rather actively. That Resoltuion made specific mention of a number of issues. One of these is the question of the territorial sea and international straits. Canada now has a 12-mile territorial sea so we do not need a Conference on that issue. (We established our territorial sea unilaterally, of course, - the way every other state has established its territorial sea.) We have no international straits - just non-international straits such as the Northwest Passage - so we don't need a U.N. Conference on that question. However we recognize that these issues are of considerable importance to a number of other countries, particularly our neighbours to our north and our south, as well as to other major maritime powers such as the U.K. We recently stated in Geneva that we considered it would be very foolish to downgrade the importance of this issue if we really want to achieve a comprehensive settlement of the Law of the Sea. I need hardly point out that there is a relationship and interpenetration of the many unresolved issues of the Law of the Sea, and it thus is in our view necessary to include the problems of the breadth of the territorial sea and passage through international straits within the balancing process - in this case, a balance between the

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legitimate needs of coastal states for full sovereignty over a belt of water adjacent to their coastline, and the equally legitimate needs of all states for passage through such waters. As a major trading nation lacking its own maritime fleet, Canada does not need to be persuaded of the importance of maintaining the free passage of commerce. One of the crucial problems, however, in our view, relates to the concept of innocent passage. We consider that this concept needs clarification and redefinition. What kinds of passage are innocent in today's world? What kinds of safeguards are necessary for the security of coastal states? As we stated last month in Geneva, in our view the notion of "innocence" must be modernized. It is our contention that if a serious attempt is made to do this, then we have an opportunity to leave behind us the present situation of confrontation and polarization, whereby overly conservative attitudes by some states produces radical responses by others, which in turn increases the rigidity of the conservative position by a circular process. We are concerned also that failure to resolve this problem could threaten the success of the Conference on many other related issues. It is impossible to say how this issue will be resolved, but our own belief is that those countries which have made the most extensive claims might be prepared to limit their claims to specific types of jurisdiction in return for the acquiesence on the part of those states which oppose any claims beyond 12 miles.

Another major and complex issue arises out of the increasingly urgent need for an accommodation within a new legal framework between the growing demands of distant-water fishing states for new sources of supply to meet their accelerating needs and the increasing concern on the part of coastal states to protect the living resources of the waters off their coasts. There are no easy solutions to this problem. From a political point of view it seems clear that distant-water fishing states will have to accept some restraints on their

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activities. Their activities are at present almost wholly unregulated and beyond the restraints of law, on the basis of the increasingly archaic doctrine of the right to fish at will, founded in turn on the traditional concept of the freedom of the high seas. Equally clearly, coastal states will have to accept that there is at some point a limit to the distance to which coastal states can extend exclusive fisheries jurisdiction. It is not easy to visualize a legal framework within which such restraints will be imposed nor the precise legal basis for such restraints. Unfortunately, the complexity of the problem tends to suggest to many people the need for equally complex solutions. Our own approach is the one which most fisheries experts seem to be gradually accepting, namely, one based on preferential rights of coastal states. The accommodation might be access by all to the high seas beyond national jurisdiction, on the basis of conservation principles administered by the coastal state on behalf of the international community, pending the establishment perhaps, ultimately, if it proves necessary, of some form of international regulatory authority. Undoubtedly, unless some such accommodation is worked out, more and more coastal states will find themselves obliged to act as Canada has done to safeguard their offshore fisheries resources.

Another question specifically referred to in the U.N. Resolution is scientific research. There is controversy concerning the nature, extent and legal basis of the coastal states' interests in this field. The Continental Shelf convention provides that the consent of the coastal state is required for research concerning the continental shelf and undertaken there. Even the USA position on ocean data acquisition system as communicated to UNESCO drew attention to the need to safeguard the coastal state against activities above the shelf inimical to its interests. Thus while some states wish to ensure the maximum freedom of marine scientific research with non-

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interference from any source - an objective which I am sure many in this group share - more and more coastal states are becoming alive to the need to at least clarify the basis for the protection of coastal states' interests.

What are the prospects? Perhaps the solution lies somewhere along the lines of freedom of research in return for freedom of access to information. This audience is aware, however, of the sensitivity of the question of access to information gained with much difficulty and at great expense. It will not be easy to work out an accommodation which protects the interests both of coastal states and those wishing feedom of research.

Another major issue also referred to in the U.N. Resolution and one which in our view could ultimately make or break the Conference, is that of pollution. In no other field is there such an inadequate, almost non-existent legal framework consisting only of one fundamental principle, namely, freedom of the high seas (supported by a few IMCO conventions limited in scope and application.) Under IMCO law a state can take remedial measures outside its territorial sea, including even the sinking of a ship involved in a maritime casualty and causing or threatening pollution, but cannot take preventative measures to avoid such a casualty such as ordering the ship out of certain areas or into port for repairs. The rationale of such a curious legal principle is the concept of "flag state jurisdiction" which gives very short shrift to the rights of coastal states. For example, flag state jurisdiction brooks no interference by the coastal state up to the moment of the disaster, but flag state jurisdiction disappears like magic at the moment a major pollution disaster occurs. Such jurisdiction does not carry with it the logical corollary of state responsibility; liability is left to the ship owner and the cargo owner. This is a very curious system of laws, which coastal states are no longer prepared to tolerate.

As we pointed out last month in Geneva, it is on this issue where we come face to face with the dichotomy between coastal state interests and ...13/

the doctrine of freedom of the high seas. The extension of fisheries jurisdiction by coastal states normally affects only the fishing vessels of relatively few states. Even the exercise of security control measures normally affects only the naval or paramilitary vessels of relatively few states, mainly those who consider that their worldwide strategic interests are dependant on maximum freedom of passage. The need to protect the environment of the coastal state, however, can have serious implications for the activities of all classes of vessels of all nations - in the territorial sea, in exclusive fishing zones, in international straits and on the high seas proper. It is for this reason that we in Canada consider that it is essential to work out a sensible accommodation between coastal and maritime interests.

Which of the complex range of issues raised by the pollution problem should go to IMCO? Which to Stockholm? And which to the third Law of the Sea Conference? Our own view is that the 1972 Stockholm Conference provides an opportunity for an intergovernmental multilateral interdisciplinary approach to the problem, whereby it will be possible not only to make progress on concrete action requiring international cooperation, but to produce a declaration of legal principles laying the foundation for a subsequent multilateral convention. The 1973 Conference of IMCO (the mandate of which is essentially technical) is the place where certain of these principles can be translated into regulatory measures of navigation, safety and pollution prevention. The Third Law of the Sea Conference provides an opportunity for governments to take a comprehensive legal approach to the problem which takes into account the close inter-relationship and interpenetration of these and the other unresolved Law of the Sea issues.

What are the prospects? It is very difficult to say. We can envisage a multilateral convention laying down environmental protection standards, with enforcement left largely, for the foreseeable future, to coastal states.

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Such a convention ought to be based on the principle of the least possible interference with passage, consistent with the protection of the marine environment, but it would clearly have to depart radically from the present laissez-faire approach whereby the high seas are treated as a kind of no man's land where any state may work its will without the slightest regard to the interests of other states or of the international community as a whole.

I said at the outset of my statement that I consider that all of the major unresolved issues of the Law of the Sea resolve themselves, essentially, into one single issue, namely, the viability of the doctrine of the freedom of the high seas. We have heard such an excellent presentation yesterday on this subject by Mr. Clingan that I do not propose to develop that theme at length, as I had intended to do. I shall confine myself to quoting from the statement which I made as Canadian representative to the First Committee of the United Nations during the debate on the Law of the Sea item on December 4, 1970 when I said as follows:

> Grotius writing 360 years ago observed that "most things become exhausted by promiscuous use...but that is not the case with the sea: it can be exhausted neither by navigation nor by fishing, that is to say, in neither of the two ways in which it can be used." Traditional concepts of the Law of the Sea are, of course, founded upon the assumptions reflected in this pronouncement by one of the most learned publicists in the field of the Law of the Sea. Unfortunately, modern technology has radically altered the whole nature of the problems requiring regulations by the Law of the Sea, and the development of the law has not kept pace with the advances of technology. Grotius can be excused for not being able to foresee the far-reaching implications for the law of the sea of modern technology, such as whether nuclear ships and loaded

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supertankers can be capable of innocent passage, whether radio-active waste and nerve gas may be dumped into the ocean on the basis of the principle of the freedom of the high seas, whether and what safeguards are required for offshore drilling, and whether fleets of modern fishing vessels vaster than the Spanish Armada can be left to fish the high seas at will. We cannot be excused however, for ignoring the impact of modern technology upon rules designed for the days of sailing ships and ancient empires. The uses of the sea have multiplied since the time of Grotius. The sea now can be exhausted by "promiscuous use" and it is incumbent upon us to develop new laws to prevent this catastrophy".

Mr. Chairman, I need only add, in the light of the presentations you have already heard this morning from previous speakers, that in the development of such new laws it will be necessary for every member-state of the United Nations to be aware not only of its national interests but of the interests of other states, in attempting to work out accommodations which are acceptable to all. Important opinion-forming groups such as the one I am speaking to today have an essential role to play in influencing their own governments in directions which can lead to such accommodation. It is a responsible task.
