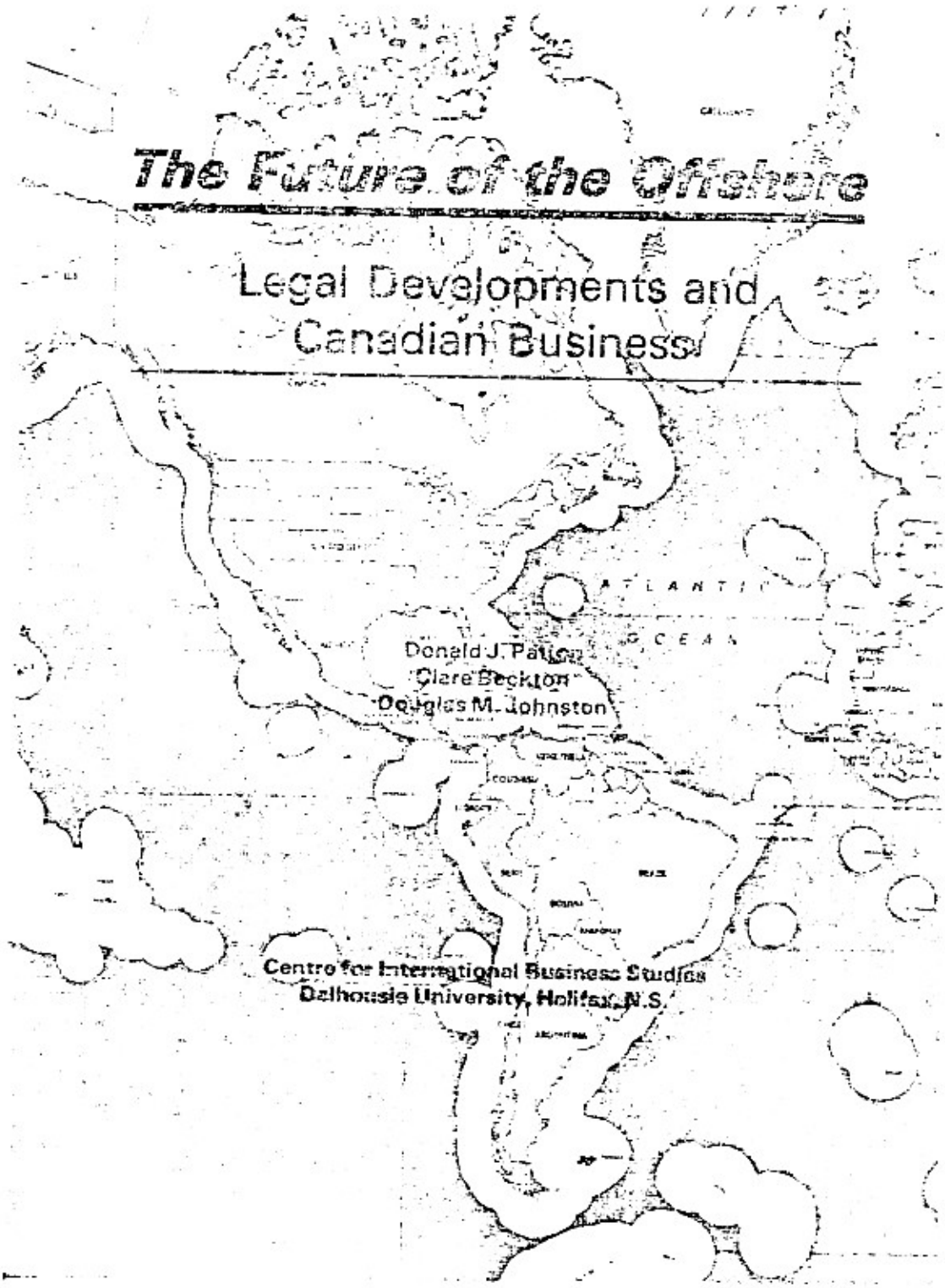

The Future of the Offshore

Legal Developments and Canadian Business

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A conference sponsored by

the Centre for International Business Studies,
School of Business Administration

and

the Public Services Committee, Faculty of Law
Dalhousie University, Halifax, Nova Scotia.

Professor Beckton, that you have received such a gratifying response to the invitations to participate in this Conference. I know that it will be a good Conference, and I hope that many who are participating will derive very substantial benefit as a consequence.

Professor Beckton: Thank you very much indeed, Premier Regan, for those fine words of welcome and for taking the time from what I know is a very busy schedule to come and be with us today.

LEGAL DEVELOPMENTS AND ADMINISTRATIVE STRUCTURE*

Professor Beckton: The first morning of our session is designed to present a legal and administrative over-view of the new two-hundred-mile economic zone. We are going to start with the new legal environment and to give the major address this morning we are pleased to have with us Mr. Alan Beesley, who is the Assistant Undersecretary and Legal Adviser to External Affairs (Canada). To give us a constitutional perspective, and I think Newfoundland's position, we are very pleased to have with us Mr. Leo Barry, from the firm of Thoms, Fowler, Rowe and Barry in Newfoundland. Finally, for a concluding comment we have with us Professor Douglas Johnston of our own Faculty of Law. I would like to call upon Mr. Beesley.

THE NEW LEGAL ENVIRONMENT

J. Alan Beesley

Thank you very much. I am particularly indebted to you, Professor Beckton, for outlining in clear terms the parameters of the topic of my address.

THE CHALLENGES AND OPPORTUNITIES

I am going to try and speak to you very personally and frankly and explain to you, as I see it, some of the challenges and some of the opportunities inherent in this major new development in international law, the emerging consensus on the 200 mile Economic Zone. Necessarily, I shall have to digress to some extent into other related issues that have been discussed and are still under negotiation in the Law of the Sea Conference, and I think that brings me to the first point I'd like to make.

* See appendices 1 - 4 for related documentation

THE DANGERS

There is, I believe, a real danger that governments in many parts of t world will begin to lose interest in the other issues at stake in the Confere as a result of the degree of success attained on the 200 mile limit. There countries which could well take the position that this was their major obj tive, and, while there are many other inter-related issues, the question aris for them whether they can afford the human resources, the financial reso ces, to cope with the problem of taking people away from their regu continuing jobs and requiring them to devote periods of as much as eig weeks at a time in an attempt to resolve issues which, if not peripheral, a not so directly related to their national interests. I would like to come back that point at the close of my address.

THE POSSIBILITIES

I am increasingly convinced that while the difficulties in the way of co cluding the Conference are still considerable, new possibilities now exist reaching solutions, provided we are prepared to maintain our present fir commitment to the Conference solution and other governments are prepare to do so. Even more important perhaps is that I am more and more aware the potential benefits of agreement as compared to the disastrous consequen ces of failure. This is a point to which I shall return.

THE ENVIRONMENTAL IMPERATIVE

Turning now to the 200 mile Economic Zone, I consider it essential tha we recognize that the 200 mile fishing limit cannot be seen as an issue i isolation from other important matters under negotiation in the Law of th Sea Conference, nor from other problem areas which are more and more today the subject matter of foreign policy and diplomacy. To illustrate my point, I am going to quote first from a statement relating to the Law of the Environment and then I am going to quote another statement broadening the perspective. In an article in the Yale Law Journal, Jan Schneider states:

> "The traditional legal order of the environment is essentially a laissez-faire system oriented toward the unfettered freedom of states. Such limitations on freedom of action as exist in the traditional legal order have been formulated from perspectives other than the specifically environmental."

I am quoting this passage here to make the point that we ought not to overemphasize the importance of the fisheries jurisdiction we have just gained, if in so doing we ignore the obligations relating to the environmental jurisdiction which must go hand in hand with it. It is not enough to attempt to conserve the fisheries if we do not attempt at the same time to preserve the marine environment. I am aware that even those most committed to the preservation of the environment can occasionally cause incidents, but the fact

remains that there must be a common commitment to the preservation of the marine environment as an essential part of the process of conserving the living resources of the sea.

RESOURCES, ENVIRONMENT AND ENERGY

I should like to explain now why I say that there is a broader perspective also to be taken into account. The longer I am concerned in international law-making, the more I am aware of the extent to which everything relates to everything else. I found this particularly during my term in Vienna where I worked with the International Atomic Energy Agency as Canadian Governor, with the United Nations Industrial Development Organization as Canadian Permanent Representative, with the Secretariat of OPEC (with whom I consulted regularly, albeit informally) and with the International Institute of Applied Systems Analysis, the international organization where they attempt to put it all together. There is hardly a major development in the field of energy that does not have environmental consequences. There is hardly an environmental measure which does not have economic consequences. There is a built-in tension, of course, between preservation of the environment and economic development, but it is a tension which, in my view, need not lead to incompatible policies; rather it is one which must lead to a reconciliation of these twin objectives.

CHANGING PERSPECTIVES: THE INCREASING URGENCY

The second quotation I wanted to make, from the same article, is:

> "Technological development has made possible vastly increased rates of resource depletion, energy consumption and population growth. . . The perceived imminence of critical pollution and scarcity thresholds has precipitated a sense of global environmental crisis. It consequently is imperative that the legal order respond to these new conditions."

Now what is interesting is that this quotation was written several years ago. I think it was a valid assessment of the atmosphere then pertaining. However, it is now nearly five years since the Stockholm Conference, since 1972, the "Year of the Environment", and we have now had 1973, the "Year of the Energy Crisis". I am personally hopeful that 1977 will prove to be the year of action, a year in which we have, in some parts of the world at least, a new energy crisis coupled with a suddenly re-awakened public consciousness of the disastrous effects of marine environmental spills. I think that 1977 can prove to be the year, particularly in light of the election of a President of the United States who is environmentally oriented, when we try to reconcile these seemingly competing priorities.

THE 200 MILE LIMIT AND THE NEW ECONOMIC ORDER

Against that general background, I would like to emphasize firstly that,

when we are talking about the 200 mile limit, we are not just talking a
Canada's objectives or Canada's achievements. Many other countries
been involved in this tremendous diplomatic law-making exercise, incluc
in particular, many developing countries. It is no secret that the Cana
delegation approached the whole negotiating process in the Conference, i
the very outset, by forming alliances with countries with similar range
interests. In most cases, at that time, these countries were develo
countries. Later, gradually, other developed countries began to adopt sin
positions, but in the early stages there was stiff opposition to the radical
idea of the development of a 200 mile fishing zone. This may sug
perhaps, that some were thinking ahead further and earlier than others.
at the same time, I believe it brings out the fact that certain countries are
going to benefit by the 200 mile limit. They are going to have to accept s
fices. That suggests in turn, to me, that those of us who can benefit from
200 mile limit should do so to the maximum possible degree, but not to
total exclusion of the interests of other states. I think it is to the credit of
Canadian Government and of the industry advisers who have participate
every session of the Law of the Sea Conference that Canada has pioneere
developing the concept of optimum sustainable yield which does allow s
foreign fishing of those stocks surplus to coastal state needs. The reason I
making this point is that the developing countries, increasingly, see
negotiations in the Law of the Sea Conference as directly related to th
negotiations occurring in other forums, such as the CIPEC, the attempt
create a forum for discussion between developed and developing countries
energy and energy related issues. They see them as closely related to
negotiations which have gone on in UNCTAD, which raise questions rang
from debt reduction to commodities agreements. They certainly see them
related to the IEA discussions. In short, the developing countries
adopting a sophisticated approach to the range of issues having econor
implications for them. Their major thrust, as I think is well known,
towards what they describe as a new world order. It is my view that if
Canadians do not take this into account, then we won't be serving our lo
term interests. As I see it, the legal environment consists not merely of
kind of legal regime we are establishing with respect to our immediate oce
management. It is broader than that. It includes all those legal, political a
economic constraints on the one hand, and opportunities on the other, th
have to be taken into account if we are really going to make a success even
what we have already managed to achieve, in obtaining agreement in the 2
mile limit.

CANADA'S LAW OF THE SEA DIPLOMACY

I won't discuss, at any length, what went into the achievement
Canada's 200 mile limit. You all know that we have negotiated for years
the Law of the Sea Conference to lay the foundation for it, relying greatly
the support of the developing and developed countries of the coastal grou

and I do not think anyone could contradict me when I say there is now, at least, an emerging consensus on the 200 mile limit. It is well known that Canada has also undertaken intensive diplomatic efforts in persuading ICNAF members to accept this concept. It is relevant that within ICNAF were some of the staunchest opponents of the 200 mile fishing zone. It is also well known that Canada has negotiated bilateral treaties on fisheries with countries such as the USSR. We were the first country to do so. We have been able to negotiate similar treaties with other distant water fishing states such as Poland, Spain, Portugal and, of course, Norway. In so doing, we have helped translate a principle into a binding rule of law.

The latest developments in ICNAF provide an example of how opposition can be turned into support. I believe that all those concerned with this exercise deserve great credit. I am certainly not suggesting any personal credit whatsoever, because the recent series of extremely tough negotiations, the bilateral negotiations with the countries mentioned and in ICNAF, were carried out by other people, particularly Leonard Legault, Alf Needler and Mike Shepard, all of whom, in my view, deserve a tremendous amount of credit, not just for the diplomatic negotiating skill they have shown, but for the dedication they have devoted to this whole exercise over a period of many months. Such developments do not just happen. They depend very often on the human element, the personal effort and commitment of the individuals charged with the task.

THE LEGAL CONTENT OF THE ECONOMIC ZONE CONCEPT

Now, I would like to turn for a moment to the actual legal content of the Economic Zone. I think most everyone here must know that it comprises not only fisheries jurisdiction, including both exclusive management powers and sovereign rights over the living resources (subject only to the concept of optimum sustainable yield). It also comprises environmental jurisdiction that goes hand in hand with the fisheries rights and responsibilities. In that case, the basic accommodation analogous to the optimum sustainable yield concept is between coastal and flag states, and it consists of the establishment of international standards by international organizations, coupled with enforcement by coastal states. Canada is still not satisfied with some of these enforcement provisions, and they are still under negotiation. The third, and closely related element of the Economic Zone, is coastal control and regulation of scientific research. This is a classic example where Canada finds itself in the middle. On the one hand, we want to encourage the maximum degree of scientific exchange, but, at the same time, we are very conscious as a coastal state of the need to protect our own interests and not have others learning about our own resources before we do ourselves.

If I may, I would like, at this stage, to put in a personal plug, for which I have no official authority whatsoever, for what Dalhousie is trying to do, by providing a center of excellence, which could be utilized in the process of ensuring the transfer of technology to the developing countries in the field of

scientific research and in the field of fisheries management. If there is a
an immediate need, that has to be addressed urgently, it is the basic rec
ment for fisheries management expertise in many widely separated pa
the world. It may be that Canada does not have a totally unblemished
eries management record — no country has — but we have a good di
expertise and background, including a series of rather difficult pol
decisions at various stages by various governments; decisions cutting
entry into the West Coast salmon fishing industry, for example; deci
even closing down, in one case, an important salmon fishery, relating t
East Coast fisheries. I am not recommending these approaches; I am s
that these are examples of the kind of difficult decisions inherent in real
eries management, and everyone has to face up to the implications of
approach. We cannot simply adopt an acquisitive approach, of having
a kind of grab of these resources, and then allow them to degenerate fa
than they have in the past, through not husbanding the resources. It is, in
event, our clear legal obligation to do so.

With respect to the seabed, the fourth element in the concept o
Economic Zone, we have no difficulty with that aspect, since we have
asserted our jurisdiction over the seabed, not merely out to 200 miles, b
the edge of the continental margin by virtue of our accession to the
Geneva Convention on the Continental Shelf, which lays down the expl
bility test as the outer limit of coastal jurisdiction. I would only remin
present here that if they think the Conference can be ignored, one of the
highly controversial issues today in the Law of the Sea Conference is just
far from shore coastal jurisdiction extends over the seabed. There is
believe, a developing agreement, not approaching yet a consensus, on
continental margin concept. But that is a battle still to be won, and the p
to be paid is undoubtedly revenue-sharing with respect to the resources o
continental shelf between 200 miles and the outer edge of the margin. T
issues are still under negotiation.

THE SEABED BEYOND NATIONAL JURISDICTION

Now, I want to say a brief word about the area beyond national juris
tion, because this provides the best example of the kinds of clashes of int
that are now coming into play in a way that will either produce a breakd
of the Conference or a definitive solution. I think it is simplistic to state,
said so often, that this is the one issue on which the developed and develo
countries are really at loggerheads, where the Group of 77 and the devel
world have reached a stalemate. This is the appearance, but, in fact, there
many developing countries who agree with positions taken by a numbe
developed countries. As you perhaps know, I have to go from here to Ge
for consultations in what is called the "Evensen Group", consisting of
informal consultations, not really under the aegis of the United Nations,
chaired by Minister Jens Evensen of Norway. The whole focus of these
two weeks of negotiations will be an attempt to make a breakthrough on
issued of deep sea ocean mining. The crux of the problem is, in esse

whether we really meant what we said when we declared in a UN resolution that there is an area beyond national jurisdiction which will be reserved for purely peaceful purposes; which will be set aside for the common heritage of mankind; and whose benefits will go mainly to the developing countries. At the same time, insofar as Canada is concerned, there is no question of our accepting a regime which would exclude the participation of governments such as our own or of the private sector. That issue is, of course, one of the questions on which we still have not reached agreement. I am not suggesting that it is going to be an easy task, because it isn't. Canada has as great a stake in that issue, I suppose, as any country, as the world's leading nickel producer, because it is possible that developments could occur outside the Conference, if the Conference breaks down, which could produce such a free-for-all for those nickel nodules (misnamed manganese nodules) that Canada would be hard-put to keep up with the race, if we chose to enter it — a race primarily amongst the developed countries which would, I think, make the old gold rush days look like peanuts by comparison. There are riches out there.

IMPLICATIONS FOR LANDBASED NICKEL PRODUCERS

Elliot Richardson stated to the Senate in his confirmation proceedings that he estimates that around 1995 the USA could be deriving 51 percent of its needs for nickel from the seabed. Now, it hardly behooves a country like Canada to begrudge the USA or any other state that kind of opportunity. At the same time, I think that we have to take into account the effects of developed countries going out into the deep seabed, possibly subsidizing their development of seabed mining, perhaps for strategic reasons, and conceivably at the expense of the Canadian landbased nickel industry. That, however, is another issue on which we are not alone. The developing countries who are, or soon will be, landbased nickel producers (countries such as Indonesia, Guatemala, Colombia, Cuba and Brazil) are, in fact, far more concerned than we are. Thus, on this, as on many other issues, whereas initially at the close of the Fourth Session of the Conference it appeared that we were almost isolated and, in the process, characterized not only as one of the major protagonists but, once again, as on the environmental issue, the maverick of the western world, now we have many allies on this issue. As things have developed, we are somewhere in the middle with a position between some of the most extreme demands of some developing countries. Frankly, that is where we like to be, because when we try and work for a genuine accommodation of interests, it is not that we are compulsive boy scouts; in helping resolve these conflicts of interest, we are also protecting our own interests, both our immediate national interests and our long-term interest as a responsible member of the international community in an equitable and thus lasting accommodation. It is a dual role which must be played, often a difficult one, to protect the national interest while seeking a general accommodation reflecting the interests of the international community as a whole. That, however, is our task.

THE PERSPECTIVE OF THE INTERNATIONAL LAW-MAKER: ADVOCATE FOR THE ENVIRONMENT

Now, I know full well I have strayed beyond the 200 mile limit, but I have done so deliberately. Indeed, I would like to go a little further. I want to try and focus, for a moment, on the task of the negotiator in the development of environmental law on the international plane (and, indeed, on the domestic plane) by reading a few excerpts from the transcript of a Colloquium in The Hague held under the aegis of The Hague Academy of International Law. The words are my own:

> "We seem to have very quickly achieved a certain consensus on some points, the chief of which may be the fragmented and somewhat incomplete nature of whatever we mean when we talk about International Environmental Law . . . It does seem to me, through listening attentatively as I have, that it is obvious that one must have an integrated approach to international environmental law, and I would suggest that this pre-supposes an inter-disciplinary approach."

This is, I think, a point that really has to be taken on board by all of us concerned, either with fisheries or the environment or both, vis-à-vis the seabed as well as the living resources of the water column, in the light of the Argo Merchant and other recent marine disasters.

To return to the transcript of The Hague Academy Colloquium:

> "It seems also that there is a trend in what some of the speakers have said to the effect that the law has developed largely in response to catastrophes and that the law is therefore more responsive and perhaps remedial than preventative. It would seem also that there is general agreement that there is need for a global approach."

In my view, those comments are as valid today as when they were made three years ago. It is unfortunate that this should be so, but it is. The cold comfort that one can derive from the situation is that there has now been a recurrence of marine disasters sufficiently serious and numerous to re-awaken the public consciousness and, I hope, the public conscience.

To return again to the transcript of the Colloquium, the major point I want to make is contained in the following quotation:

> "...what may be required here is not merely an intellectual awareness of the problem and an intellectual engagement, but perhaps engagement of the spirit. The question of the whole philosophy which one must adopt vis-à-vis this problem arises... I think the reason why the lawyer must be an activist in this field is partly that the law has proven so inadequate, that it has fallen so far behind. It has been so fragmentary, we have tended to say, well what branch of the law are we talking about now, is it nuisance, are we talking about tort law or is it state responsibility, or shouldn't this really be private international law or possibly municipal law, shouldn't we

be worrying about making remedies available in our municipal courts?... It seems to me that the lawyer here must be much more of an activist than the traditional view of the lawyer's role. My personal view, of course, is that the lawyer concerned with international law must always be an activist because the law is never in a quiescent state, it is always developing, always changing, and merely to keep abreast of the law the lawyer must be an activist. But in this field particularly, while we needn't take the warnings of the alarmist as the basis for our activities, we must not listen too much either to those who would say the problem is so over-stated that we can all relax about it... It seems to me that our path is clear. We must try to develop the law."

DEVELOPING COUNTRIES AND THE ENVIRONMENT

Reference was made in that Colloquium and in our discussions here to the fact that both environmental problems and the perspectives one adopts concerning the preservation of the environment vary as between developed and developing states. This is a real problem, a genuine one, and it is one that has to be addressed and resolved. It is simply not feasible, nor, in my view, equitable to impose on developing countries the same environmental standards that we have to adopt ourselves, for example, on automobile emission standards. Yet, by the same token, if we build a double standard, for instance, into the Law of the Sea Convention, then we provide no protection to anyone, least of all the developing countries. To take a concrete example, if the practice is encouraged or permitted to continue whereby vessels are sold to any one willing to buy them once they are no longer seaworthy, then I fear that such a practice will eventually damage everyone, because it will, ultimately, destroy the marine environment. I know that this very problem is being addressed in Inter-Governmental Maritime Consultive Organisation, in United Nations Environment Programme and in other places, but so far there has been more talk than action. It is one thing to draft a convention, it is another to bring it into force. It is one thing to draft a convention with grandfather clauses, it is another to face up to the dangers of a situation in which all the ships, including those who have the benefit of the grandfather clause, may be the ones coming close to the shores of certain states. I have no hesitation in stating flatly that I personally strongly concur in the long-standing view of the Canadian Government that there has to be an element of coastal state jurisdiction on that issue if we are to produce a convention that has any concrete effects on the preservation of the marine environment.

THE EUROPEAN PERSPECTIVE

It is also important, however, to take into account that not everyone in the Law of the Sea Conference agrees even on the basic environmental principles. We tend to take it for granted, in North America, that the so-called Trail Smelter principle — the principle that a state cannot so utilize its

environment as to damage that of another — is widely accepted internatic law. The Europeans are very hesitant about accepting that principle. T prefer a system of co-ordinated legislation, and, in some cases, they h developed very forward-looking and imaginative approaches, such as agreement just reached on the North Sea drilling operations. There is suggestion in that Treaty, however, that the damage done by one state another raises questions of liability and compensation. The problem handled instead by insurance provisions. This is a topic of some interest Canada right now, and one on which I won't comment further, since it g to the root of some of the unresolved issues concerning the preservation of marine environment on which negotiations are still underway. That leads to the next point I would like to make.

THE GLOBAL PERSPECTIVE

If we are considering the legal environment in its broadest sense — other words, the environment in which the law is created, rather than the l of the environment — then I think we have to take into account some of i basic political and economic changes that have occurred in recent years refer, for example, to the tremendous growth in influence and power of t Group of 77. That is one obvious fact of life. I am not at all sure that this i negative development. Some seem to think so, but I am not one of them was a necessary, inevitable, and, in my view, desirable development. There also a growth in power of the EEC, as they gradually abandon the tribal approach (unlike Canada). There is also the growth of the USSR as a ma naval and fishing power. There is also, as I mentioned earlier, a very imp tant new fact of life, the election of an environmentally-oriented President the United States of America. A further fact of life, in my view, is that have an environmentally-oriented Parliament and Government of Canad There are now new pressures that did not previously exist for action environmental issues. Unfortunately, there are strong counter-pressures well. All these are facts of life of the international environment, in the broa est sense of the term.

I would like to turn now to a separate but related point. We all kno that there are a host of unresolved economic issues on which we will have make accommodations with the developing countries — questions involvi trade as well as aid — and we have to do it, not merely because the Group 77 demand it, but because, in my view, it is inequitable not to do so. It is relatively new concept on the international plane that we should be o brother's keeper. We have finally gone a long way — some say too far — accepting it domestically and it has taken a long time. The problem is now translate the concept into facts on the international plane.

The Law of the Sea provides many, many concrete and precise exampl where we either adopt an equitable approach or we do not obtain a treat For example, if we do not work out an accommodation that takes int account the interests of the landlocked states, and those states who can g very little benefit from the 200 mile limit, then even if we leave asid

questions of equity, that group would probably constitute a blocking third which could prevent agreement in the Conference on all the other issues of importance to us. So equity and common sense and self-interest all point in the same direction. That is the overview as I see it.

THE ROLE OF THE NEGOTIATOR AND THE QUALITIES REQUIRED

I would like to turn in a few moments to the prospects for the Conference and, in particular, the consequences of success or failure. Before doing so, however, I want to touch on the question I raised earlier, the importance of the human element in the law-making process. The question arises in international law-making of the role of the people actively involved in the negotiations, as distinct from those responsible for the basic policy decisions. This negotiating role, as I have mentioned, includes, in the case of Canada's representation at the Law of the Sea Conference, industry advisers; representatives from the provinces, representatives from all parties in Parliament; representatives of various federal government departments; it includes advice and assistance and, on occasion, direct input from the academic community. The policy role is not confined, as is often assumed, to the government but includes the views of the press and, of course, the public at large. The objective is an attempt to develop a co-ordinated, comprehensive approach, which reflects the range of Canadian interests at stake in the Conference. Not infrequently, issues arise which are very close to what I would term moral issues, and that is a very difficult kind of problem to cope with. There is often a conflict between what appears to be in the immediate national interest and what appears to be in the long-term national interest. I recently had occasion to address this problem in the following words:

> "The whole secret of foreign policy and diplomacy is to allow imaginative and creative options to be considered seriously along with the safe and easy course. The easiest thing in the world for a diplomat to do is simply to keep his head down, play it safe and never make any mistakes, while, of course, never achieving anything either. It is possible, of course, in such circumstances, for people to gradually progress up the ladder, but it is not possible by this means to make the kinds of achievements which are necessary in the field of international law. Quite frankly, I believe there is a real national interest in having a first-class team of people from a variety of different backgrounds — certainly not confined to the Department of External Affairs but including the private sector and other representatives of the public sector — consisting of people who know how to follow instructions and know how to work within instructions, but who know how to indulge in creative diplomacy on occasion; individuals who are willing to put to the decision-makers at Cabinet level, be it federal or provincial, radical and creative ideas and, having obtained approval, who are willing to pursue

these ideas and objectives, in some cases — and I am speaking per sonally now — to the point of becoming either a crusader or a pa, in the neck, depending on the point of view."

What is needed in international negotiations of the kind we are di ing is not just an ability to analyze or synthesize, or an ability to be arti orally and in writing. That is important, because an idea gets lost if it presented properly. What is much more important, however, and increa ly so, in my view, is a quality of toughness, of a willingness to take a stan maintain it in the face of pressures, but toughness coupled with flexi and, ultimately, a willingness to pursue national objectives at the ri personal unpopularity. My colleagues and I have certainly achieved that of unpopularity in some quarters, but, by the same token, perhaps w well regarded in other places. This is the situation which your negoti have to face. In addition to the qualities mentioned, there has to be a tre dous capacity for patience and perseverence. In my own case, I have involved in two seven year law-making exercises and I am now involved i that has taken nine years and is still not finished. Yet, I am a very impa person, as anyone who knows me can tell you. The task you have set fi requires self-discipline and even courage — a willingness to charge bac again after each round in the battle, whether we win or whether we los

THE NEED FOR AN OVERVIEW

What other qualities are required? I want to make quite clear that not just talking now about people from my particular profession, diplom I am really talking about the whole of the Canadian delegation. One of salient features of the Canadian delegation in the Law of the Sea Confer and in the bilateral and ICNAF fisheries negotiations is that, in spite of diversity of interests reflected in the delegation, we speak with one voice. has proven to be a tremendous benefit on many occasions. In that respect really are, I believe, the envy of all other delegations. There is a feelin loyalty and solidarity amongst the officials, advisers, provincial represe tives and parliamentarians, that is a very concrete and tangible asset. Ul ately though, and this is the concluding point I want to make on this is somebody, somewhere, has to be capable of bringing a broad visionary o view to bear on the concrete and immediate problems — not merely problems of today, but the problems of the future. If I may cite s examples from other countries, one such person is the Legal Adviser of USSR and one is the Legal Adviser for Norway. The Attorney Genera Tanzania is another such person. I am simply picking them out of a hat s speak. These are people who instinctively adopt both a very broad pers tive and a long-term perspective in addressing specific issues. They do not that they can never budge on this or that issue. It does not mean they are negotiators. The people I have mentioned are extremely competent, cap and effective negotiators, but they look beyond their noses. That is what have to do when we are looking at the 200 mile limit. It may mean sacrifi

for us, but it certainly means that we have to adopt a long-range point of view on how we utilize the resources that are now Canadian.

THE NEED TO ANTICIPATE

The vision of those people to whom I have referred is focussed two or three decades hence, and this is the way good diplomats have to work; it's the way good negotiators must work. I know full well that it applies to private life just as much as public life. When we don't adopt that kind of perspective, then we are busily running around like bees in a hive, trying to solve last year's problems, or perhaps the last decade's problems. We really do have to look ahead a very long distance, even if we can't produce the results which would effectively resolve all the problems of forty to fifty years hence. It is necessary, in other words, to be broadly anticipatory of developments as they may unfold and not merely to react to something happening now. It goes without saying that adopting such a stance very often requires a certain amount of risk-taking, something not traditionally associated with bureaucrats or diplomats. Nevertheless, there is not a week that passes in the Law of the Sea Conference when it is not necessary to make a decision which is seemingly tactical or even procedural but which can have very important consequences. This is the kind of problem your negotiators in the Law of the Sea Conference are facing; that is the kind of approach they have to bring to bear. They are armed with instructions and they can always seek further instructions, but, in the final analysis, it is their job to decide how to implement them.

THE NATURE OF INTERNATIONAL LAW AND THE ROLE OF THE LEGAL ADVISER

I want to say something about the role of the Foreign Ministry Legal Adviser in terms of the kind we are discussing. There are many constraints, some of which I have outlined in an article which I promise not to read (included in the publication "Canadian Perspectives") which attempts to give the perspective of the Legal Adviser. In the field of international law, there is always a high degree of political content. Rarely is a simple "black letter law" approach possible. This pre-supposes a close relationship between the Legal Adviser and the other foreign policy decision-makers. If that does not exist, then the Legal Adviser is not performing his function or not being permitted to do so. If this were true in the past, then it is increasingly true today, particularly with respect to such topical problems as environmental law, the law of the sea and even such questions, which may seem somewhat remote, as the law of outer space, hijacking, international terrorism, and humanitarian rules of law. A further important point to bear in mind, especially in light of the recent establishment of the 200 mile limit, is that there is a very close interpenetration of national and international law. Acts on either plane can have constitutive legal effects on the other. Thus, every Legal Adviser has to have a kind of double vision, looking both to the domes-

tic implications and to the international aspects of acts which others view as lying wholly within the domestic realm.

Another point of importance is that there is no automaticity in national law-making. Policy simply does not become law by a pro magic. Even major world powers have to seek the acquiescence of oth to their actions. Sometimes they can get away without it, but they seek that is what is interesting. A further factor is that there is always a lar ment of responsiveness involved in foreign policy decisions, arising out obvious link in this field between positive acts and the need to react to others. What is equally important to bear in mind is that international dynamic. It is nearly always in a state of flux. At times it is necessary t motion merely to keep abreast of the law. In the field of internationa nothing is immutable, nothing completed, nothing certain. If that app a generality, it certainly applies to the Law of the Sea. This, of course give great scope for progressive development of the law through crea determination, skill and common sense in translating ideas into realit principles into legal obligations.

There is also an inter-relationship between seemingly discrete fie law, such as air law, for example, and law of the sea and outer space la make this point regularly, and one of the difficulties we encounter is th all others share that kind of overview. Another consideration is that th no continuing stream of authoritative and binding judicial decisions. Th no doctrine of *stare decisis* in international law really apart from A 94(2) of the Charter. There is no legislature, in the usual sense of the laying down the laws to be enforced. International law is enforceable on consent. That I think, is the best explanation I can give as to the parti kind of laborious, painstaking, carefully orchestrated and, ultima successful policy which Canada has followed in establishing its own 200 limit. It represents the complete opposite of attempting to do it by force engaging in a cod-war. I spoke of how slow the process is. I am not goi say more on that, but I do want to conclude my comments on this aspe what is involved in the Law of the Sea Conference by the following staten

It is central to the function of the Legal Adviser that he must attem ensure that Canada's role in international affairs is conducted in accord with recognized principles of international law. Now, ideally there is no flict between this aspect of his responsibilities and his basic solicitor-c function of attempting, in whatever small way he can, to protect the coun national interests. Even from a purely national point of view, however, in national law, as the basis for the developing world order, or even the le goal of stable relations between states, benefits all states.

Occasions may arise when international law does not reflect the natio interest, and even, perhaps, the general international interest, and, in s cases, where the law is undeveloped or out of touch with contemporary nee it may be necessary to seek to bring about changes in the law. Well, if th was an example where that was true and where we have devoted our resour to just that objective for many years, it is the field of the law of the sea; bu

want to add a kind of caution. It is also the role of the Legal Adviser to guard against the law merely being regarded as an instrument of policy, an approach inimical to the very concept of the role of law. Again, an example would be to get these resources and then misuse them. The interests of the international community have to be taken into account in order to bring about the kind of accommodation of interests I have mentioned. What all this can mean, in practice, and I speak from personal experience, is that, not infrequently, a simple bureaucrat such as me may have to adopt a position of principle. This can often arise in negotiations with another country and, in such cases, it is not always easy to hang in there when there are great pressures to take the easy way out. I can assure you, however, at least so long as I am involved in the Law of the Sea, - that is the position I will be taking, and I know I am speaking for all the other members of the Canadian delegation also when I say that whether we are involved in a multilateral negotiation or a bilateral one, we will hang in there.

THE CONSEQUENCES OF SUCCESS OR FAILURE OF THE CONFERENCE

I wish to turn now to what may be the major issue facing the Conference very soon, namely, the consequences of success or failure of the Law of the Sea Conference. There is a 12 mile territorial sea in existence as a fact of life. That has implications for certain straits (fortunately no Canadian straits, because we do not have any international straits, or so we say). Speaking seriously, there are countries which are very concerned about the effect of the 12 mile territorial sea on the rules of passage through international straits which were previously high seas as a result of a 3 mile limit. If the Conference succeeds, we have an agreed regime; if the Conference fails, we have created a built-in conflict. The 200 mile limit is another fact of life, but not necessarily the kind of fact of life we may think it is. If the Conference succeeds, I think we can look forward to the kind of Economic Zone which we are trying to establish, basically by consent. If the Conference fails, I think there is a far greater likelihood that there will be a tendency towards a 200 mile territorial sea. The impact of that development upon shipping, upon military problems, upon scientific research, upon almost any of the issues which we have managed to avoid in developing the Economic Zone concept, based on a functional approach consisting of limited jurisdiction - all of this would fall to the ground.

There are other controversial concepts, such as the archipelagic concept, where we would find that we have created the basis for a good legal argument that there is such a principle, yet not enough to gain universal acquiescence. The same applies to the manner of delimitation of maritime boundaries. We may have managed to erode the pre-existing rule without having brought into play a new rule to replace it. With respect to the seabed beyond national jurisdiction, there are two prospects: an agreed regime, whereby the whole area is managed on a rational basis, in which all interests are accommodated; and with a new institution created for that purpose. Indeed, one part of the ins-

tiution would go into business, something the UN has never done. It mi
the UN some good. Certainly, if it goes into business effectively, it cou
off tremendous benefits, especially for developing countries, but also,
view, benefits of a different order — psychological benefits. I think we co
learn from this concept of the common heritage of mankind how to ha
planetary resource as a common resource, a resource from which we
benefit, but a resource that we can't simply utilize selfishly. I think that
is what is at stake in the Law of the Sea Conference. If we are successful,
is by no means certain we can succeed, then on can see the prospects
orderly regime where there has been only legalized inequity. The diffic
that we have opened up Pandora's Box. We have called into question th
existing law which was based on two simple principles: state sovereignty
narrow territorial sea and total freedom beyond in the high seas. We sa
system as a non-system, involving a licence to pollute and a freedom to
fish; but we have not gone all the way yet; we have not been able to
Pandora's Box. We have not yet been able to achieve agreement on thes
rules of law. As a consequence, a failed Conference would, in my view,
certainly bring about very serious disputes, some of which could produc
threats to the peace. One example, and the one with which I will conclu
that if developed states take unilateral action to licence their own ente
or their own public sector to mine the deep ocean seabed, then no matte
worthy their motives may be or to what extent they may try and reconci
unilateralism with the multilateral negotiations, there is real danger
other developed states will begin to scramble for the resources, whi
developing states will assert jurisdiction of a different kind, using the ex
ability test of the Continental Shelf Convention. The developing cou
know they do not have the military power to head off this kind of scra
but they know that they have a good deal of persuasive power in the fora
the world. This is not, however, the situation we need anticipate. Th
another approach.

NEGOTIATION OR CONFRONTATION

I believe most firmly in negotiating with the developing countr
recently came back from Rio, from an International Atomic Energy A
Conference, where I was deeply involved in negotiations with the African
other developing countries on two highly controversial issues relating to S
Africa. By talking together, by meeting one another instead of walking
one another and allowing ourselves to be pushed into a confrontation
tion, we did what has never before been done in the U.N. system. We p
two important resolutions on South Africa without a vote, and indeed wi
even one single speech — since any speech would have precipitated such a
troversy that we would have found a real threat to the continued existen
the International Atomic Energy Agency. That is what can happen whe
talk to one another as equals and as friends. That is what I did. The same
has occurred in the Law of the Sea Conference many many times. Cana
said to be the country — but there were others — who took the initiative

tablishing the coastal group, which has long consisted of representatives of both developed and developing countries. I think that with that kind of approach to the seabed problem, there really is a prospect for success. I cannot guarantee it, I can only guarantee that that will be our approach. Thank you very much.

Professor Beckton: Thank you very much, Mr. Beesley, for your overview of the two-hundred-mile Economic Zone, for your discussion of the role of the Legal Adviser, for your personal insights into negotiating diplomacy, and for your discussion of the implications of the success or failure of the present U.N. Conference. Thank you again. I would like now to call upon Mr. Leo Barry.

ADDRESS

Leo Barry

Good morning, ladies and gentlemen. I have been assigned the topic of the constitutional implications of offshore development. I'll be speaking mainly of hazards I see in the way constitutional practice is developing in the offshore mineral field. I think the same principles and argument will apply to fishing as well.

As businessmen, many of you just want to get on with the job and there is a tendency to say, "Frankly, to hell with the constitutional dispute, it's holding up matters, let's get down and get to work." Well, I have to endorse the view taken by Mr. Beesley. I think the same principle applies to internal constitutional matters as to international issues, and that is that there are grave hazards in taking the short-term view or approach and not watching the long-term. In my opinion, it is in the long-term advantageous to the business community of Canada, and particularly the business community of the coastal provinces, to question the way practice has been developing in Canada, the way the centralization of power has been tending towards Ottawa.

The offshore minerals dispute between Newfoundland and the federal government arises from a very fundamental disagreement concerning the distribution of powers within the Canadian federation, as these are presently authorized by the British North America Act. Examination of this offshore dispute may assist in coping with a similar disagreement in Quebec which has reached a more serious stage.

Rene Levesque states that in order for Quebec to maintain its distinctive culture and personality it must achieve independence or sovereignty. He reached this position after examining the areas where Quebec, in his opinion, needed certain unfettered powers; the areas of citizenship, immigration, the media, and so on. He concluded that no such distribution of powers would