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GROTIUS AND THE PIRATES

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INTRODUCTION

We have been privileged to hear three stimulating speeches, any one of which is a tough act to follow, especially in the presence of Ambassador Nandan, a friend and colleague for many years. Who would envy me, speaking after Minister Tobin and Premier Wells, two of Canada's foremost orators? Fortunately, my role is a modest one, which is simply to set the stage for our discussions of the law of the sea. In so doing, I shall try to be mindful of the inscription on a plaque given to me by Leonard Legault when he thought I was retiring, which reads: "Old lawyers never die; they simply lose their appeal."

THE THESIS

It is my thesis that, firstly, the international community has entered a transitional period in the history of the law of the sea. We are witnessing the close of a major law-making process, and the beginning of one of consolidation, implementation and enforcement. How we act, and when we act, will most certainly determine the fate of the world's oceans and their living resources. Second, we seem finally to have reached a turning point, and must now decide whether we shall continue to pursue approaches based on competing rights, or whether we move beyond these primitive concepts and begin to accept the responsibilities that go hand in hand with rights in any viable system of law. One wearies of hearing that we must fill real or imagined lacunae in the law. While the law-making process is continuous, what we need most is not more law, but more respect for the law. Unenforced law undermines the Rule of Law itself. Third, we must further develop the scientific and institutional basis for an Ecosystem Assessment and Management regime which is vital to sustainable fisheries. That process, already begun, must be maintained and accelerated. Such basic shifts in thinking are difficult to achieve, but they can be encouraged and developed on such occasions as this very Colloquium.

QUESTIONS FOR CONSIDERATION

Thus the first question I would like to pose is, has the system of international law of the sea failed us, or have we failed the system? Has the law been inadequate, or have we, in the way we have applied it?...

I propose to illustrate the relevance of these questions by referring to a very recent document, comprising a check-list of action required by states pursuant to the Fisheries and Enviromental provisions of the 1982 UN Convention of the Law of the Sea. It is presented in the form of an annotated Chart, entitled "Conservation and Management of the Marine Environment" and was prepared by Professor Douglas M. Johnston and Phillip M. Saunders, under the auspices of the World Conservation Union (IUCN). I had the honour of distributing this document at the Ceremonies in Kingston, Jamaica, celebrating the coming into force of the Convention, on November 16,1994. It was received with great interest, and clearly made an impact on the participants.

I wonder how many of us here today would raise our hands if we were asked which of us has analyzed that document, and compared it to Canada's existing and proposed legislation, including the new Canada Oceans Act? Has anyone proposed that the check-list be updated so as to embody the requirements of the August 3, 1995 Draft Agreement for the implementation of the provisions of the 1982 UN Convention relating to Straddling and Highly Migratory Fish Stocks? Is legislation already being drafted by Canadian officials to implement the 1995 Agreement? If so , are we all in accord as to which of the provisions of the 1995 Agreement are directed towards the more effective implementation and enforcement of the 1982 Convention and which ones embody new law? Is everyone agreed on whether non parties to the 1982 Convention are entitled to ratify or accede to the 1995 Agreement? Are both Treaties included within the "The New International Law of Fisheries" which is to be the focus of our discussions? Can we seriously discuss the new law without addressing these issues? I hope these questions will be adressed and discussed seriously.

To facilitate our deliberations, I must revisit the past briefly, and propose to divide my comments as follows:

I Grotius as the High Priest: 1608 - 1967
II Grotius defrocked: 1967 - 1982
III Grotius, Selden and the Ecology: 1982 - 1994
IV Grotius and the Pirates: 1994 - 1995

I GROTIUS AS THE HIGH PRIEST

Presumably, everyone here knows that Hugo Grotius is commonly regarded as the father of international law.

Every law student and every old sea dog is aware of the victory by Grotius over Selden in their classic dispute over the basic concepts on which the law of the sea should be founded. Selden argued persuasively for extended coastal jurisdiction in his treaties " MARE CLAUSUM", and Grotius argued more persuasively in his "MARE LIBRUM" for freedom of the high seas, except for a narrow territorial sea. Grotius was so successful that his teachings went unchallenged for over three hundred and fifty years, that is to say from 1608, the date of "MARE

LIBRUM",. to 1958, the date of the first UN Law of the Sea Conference.

As pointed out by Jan Schneider in her provocative article in the Virginia Journal of International Law (Vol 18, Number 1, Fall 1977) "Grotius' views were the commonly accepted theory and practice for hundreds of years, even as late as the First and Second UN Conferences on the Law of the Sea in 1958 and 1960." She points out that "as far as the maritime waters and their resources were concerned, Grotius continued to reign supreme at UNCLOS I on the Convention on the High Seas, the Convention on the Territorial Sea and the Contiguous Zone, and the Convention on Fishing and the Living Resources of the High Seas." It is for these very reasons, of course, as I can attest personally, that Canada has never ratified these Conventions. Somewhat unkindly, Jan Schneider goes on to comment: "Although UNCLOS II dealt solely and explicitly with the question of the limits of territorial waters, its participants were unable to reach an agreement on even a small extension, the majority refusing to accept anything wider than the traditional three - mile territorial sea and twelve mile contiguous zone."

Jan Schneider does concede that: "Selden's ideas, nevertheless, made some inroads on history in the Convention on the Continental Shelf, which did allow coastal State assertion of sovereign rights to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said area." Once again, I can attest personally that it was precisely because of such considerations, of particular interest to the area where this Conference is being held, that Canada ratified the 1958 Geneva Continental Shelf Convention, on February 6, 1970, at a time when such extensive coastal claims were already being strongly opposed by the champions of the common heritage of mankind. It should be added, in a spirit of objectivity, that certain provisions from the 1958 Conventions were later incorporated , on a highly selective basis, into the 1982 UN Law of the Sea Convention, in those cases where the disciples of Grotius had won over the followers of Selden.

QUESTIONS FOR CONSIDERATION

If we are to draw any lessons from this brief revisiting of the past, the first, I suggest, is the incredible continuity of thinking concerning the basic concepts and the fundamental choices reflected in the history of the law of the sea. It is clearly a history of competing rights. Should we follow Grotius, or Selden, or chart a new course, drawing on the lessons of each? A secondary but very concrete point is that Canada must eventually decide between the 1958 UN Convention on the Continental Shelf and the 1982 UN Convention on the Law of the Sea, Part VI of which spells out in precise ,albeit complex terms the extensive claims accorded to countries such as Canada. An underlying question being asked, which takes us from the past

not only to the present but the future is, should Canada continue to assert the rights accorded to coastal states under the 1982 Convention, while not becoming a party to the Convention? I hope there will be some discussion on these points, and I would encourage a little creative tension.

PRESSURES FOR CHANGE

It is necessary to turn now from the modest attempts to modify the Law of the Sea in 1960 to the radical, almost revolutionary restructuring of the law reflected in the eventual 1982 UN Convention. How did we get from there to here - and beyond? It didn't just happen. The developments of which I speak reflected deeply divergent views of what the law should be, and even of what the law already was. It was clear to some of us, even in the mid-sixties, that the traditional concept of the freedom of the seas according to Grotius was no longer viable. Neither, however, was the wholly opposite approach argued by Selden of unchecked coastal jurisdiction. Accommodations between the two competing doctrines seemed to be essential. However, the system still in place at that time was that of Grotius. It was necessary, if we were to change the law, to unfrock Grotius, a shocking act, to which I plead guilty. The doctrine of Grotius reflected a functional approach, valid for its time, and it was a very long time. Clearly, however, it no longer sufficed. Serious and wide-spread pressures for change began to develop. The commentary by Lee A. Kimball contained in the 1995 IUCN publication "The Law of the Sea: Priorities and Responsibilities" provides an objective analysis of the pressures for changes in the law, written from the point of view of disinterested N.G.O.s.,

It is not difficult to summarize the state of the law of the sea by 1967, when the first steps were taken which led to the launch of the Third Law of the Sea Conference. Put simply, the law was in a state of chaos due to the inability of the 1958 and 1960 Law of the Sea Conferences to adjust to the demands for change in the traditional law of the sea.

It is not necessary to recount the series of claims and counter claims that arose between the second and third law of the sea conferences.Fisheries and boundaries disputes broke out between developed states, and newly independant countries began to challenge the strictures of the past, which they had had no hand in developing. The advent of new technology, particularly factory trawlers and super tankers, began to drive this process. The law of the sea was approaching anarchy, and it was ripe for change. If we recall the long-winded joke about which profession is truly the oldest, it will be noted that the engineer indignantly defended his professions' claim by saying "Before the creation of the world, clearly an engineering feat, there was only chaos," whereupon the lawyer allegedly replied. "And who do you think created the chaos?"

It is not widely known that in the early 60's Canada and the UK tried to-gether to develop a law of the sea Convention,

outside the UN, based on the failed proposals of the second conference, nor that their efforts were abandoned only when the USA refused to support the initiative, after giving lengthy consideration to the results of their joint representations to many countries.

THE NEW LAW OF THE SEA

It is more widely known that in 1967 two new and seemingly unrelated diplomatic initiatives were launched, each of which was supported by the USA. The first and most well known initiative was the famous three hour speech in the UN by Ambassador Arvid Pardo of Malta, in November 1967, in which he proclaimed the concept of the common heritage of mankind to be applicable to the sea bed and ocean floor beyond national jurisdiction. Ever afterwards, all continental shelf claims, indeed, all coastal claims to jurisdiction beyond the territorial sea, including fishing zones, were regarded, or at least portrayed, as examples of unbridled greed, encroaching upon the common heritage. It was during this same period that the USA and the USSR jointly proposed, outside the UN, in a series of coordinated demarches a regime for a territorial sea extending to a maximum of twelve miles, coupled with freedom of navigation through a high seas corridor in international straits. A third element proposed to the two super-powers by Canada and some other states demanded preferential coastal fishing rights in the adjacent high seas. The joint two-power proposal was later amended to include a fourth element, binding adjudication of disputes on fisheries, a first for the USSR.

These parallel initiatives eventually met and coalesced, on December 17, 1970, in a UN Resolution convening the Third UN Law of the Sea Conference. By then it was clear, in the UN Sea Bed Committee, created in 1967, that the two initiatives had one element in common - resistance to extensions of jurisdiction by coastal states. The disciples of Grotius were at it again. Since this approach did not reflect Canada's interests, the Canadian delegation played an extremely active role in the negotiations leading to the decision to convene a third UN Law of the Sea Conference. I had the privilege of chairing those negotiations and subsequently introducing into the UN the draft resolution emerging from them, on which the decision to hold the Third Conference was based. This decision reflected the Canadian view that a conference limited to the three issues of the territorial sea, passage through straits, and coastal fishing rights, the so-called "manageable package", favoured by the super-powers, would never succeed, and that the agenda must be comprehensive and deal with the whole range of issues left unresolved or resolved imperfectly by the past two UN Conferences. Thus resolution 2750 (XXV) decided on an agenda including the regime and international machinery for the seabed resources beyond national jurisdiction; a definition of the international area; the regime of the high seas; the continental shelf; fishing and conservation of the

living resources of the high seas, including the preferential rights of coastal states; the preservation of the marine environment, and the prevention of pollution; and the regime for scientific research as well as the three issues proposed by the super powers.

Shorty after the introduction of the resolution proposing the convening of the third law of the sea conference, I had the privilege of introducing into the General Assembly, on behalf of all the sponsors of the resolution, a series of procedural "understandings", including the "package deal" on which the Conference negotiations thereafter were based.

II GROTIUS DEFROCKED

Positions diverged sharply on every issue.It had to be demonstrated why the law of the sea required a radical re-structuring- a basic law reform process, rather than a tinkering with the law, as in 1958 and 1960. We set out to debunk the mystique surrounding the two absolutist concepts on which the law of the sea had been founded - the sovereignty of states, and the freedom of the high seas.

I am accused of defrocking Grotius, because I was the first to quote in the UN the following excerpt from his famous 1608 treatise "MARE LIBRUM".

> "Most things become exhausted with promiscuous use. This is not the case with the sea. It can be exhausted neither by fishing not by navigation, that is to say in the two ways in which it can be used."

Yes, I did say it, and was the first to do so. However, I defended Grotius for not having been able to foresee the days of factory trawlers and super tankers, nor that the freedom of the high seas would be transformed into the right to over-fish and a licence to pollute. I characterized the traditional concept of the freedom of the high seas as a doctrine tailored to the needs of sailing ships and global empires, but increasingly irrelevant to the needs of the 20th Century. I deliberately attacked sacred cows, and was occasionally gored. Nontheless I described flag-state jurisdiction as roving sovereignty, and derided as ludicrous a systen of law which entitled a state to sink a polluting ship but not to direct it into safe shipping lanes.

We described the Torey Canyon incident as marking the turning point from "Brittania Rules the Waves" to "Brittania Waives the Rules".We defended Canada's unilateral action on fishing zones, the twelve mile territorial sea, and the Arctic Waters Pollution Prevention Act as legitimate examples of action directed to-wards developing customary international law by state practice, just as the territorial sea itself and the straight baseline system from which it may be measured had been created. We cited the Truman Proclamation and the Aleutian Exclusion Zone for nuclear testing as precedents. I personally returned protest notes from allies presenting identical notes. It was a very wearing period, stressful, risky, but stimulating and creative, as the law began to change. At times it was fun, but never a laughing matter. The

Latin American states expressed gratification that they were being characterized by us as pioneers rather than outlaws. We questioned why flag-state jurisdiction mysteriously disappeared as an oil tanker sank, leaving only an oil slick devoid of any flag state responsibility for the damage. We cited this as a classic example of the need for rights and responsibilities to go hand in hand. For the first time, recently independant countries from Asia, Africa and the Pacific began calling into question the legal rules they had no part in developing. Questions were asked about the morality as well as the legality of such rules.

In the midst of this controversy, I was elected to the Chairmanship of the Drafting Committee of the Conference, and thus became a member of the Collegium, the Conference decision-making group. The job also entailed the arduous task of overseeing the processing and acceptance of over 7000 drafting changes to the Convention, aimed at transforming political, economic and legal principles into legal rules.

This rather unusual diplomacy was not merely confrontational; it was coupled with serious negotiations seeking functional accommodations. It was part of a deliberate policy, combining unilateral, bilateral and multilateral negotiations directed towards the attainment of clear policy objectives. As part of that process, there was a very active public programme of speaking engagements, participation in seminars, articles in learned journals, appearances on TV and radio programmes, liason with academics and parliamentarians, and even visits to Washington to meet with US Congressmen. There was also active collaboration in the development of two films, the CBC documentary "Who Owns the Sea" and the Newfoundland government film "Norma and Gladys". This demanding and complex process was consciously aimed at changing peoples's thinking. It was recognized that individual decision-makers, not abstract entities called states, had to be persuaded that the principles they had learned in school and university had become outmoded. This was a very difficult task, for whole generations of statesmen, diplomats, scholars, jurists, bureaucrats and even news people had teethed and grown up with the conviction that freedom of the high seas was tantamount to being the 11th Commandment. Rightly or wrongly, shock treatment was chosen as the means of forcing people to re-think their instinctive attitudes. I recall vividly a conference at Ditchley House, one of the stately homes of England available for special meetings, which the then Minister for Northern Affairs, Jean Chrétien and I attended together, to discuss Canada's Arctic Pollution Prevention Act. We expected to be given a chilly reception, and we were. The Arctic was warm by comparison. Nevertheless, we survived, and gave as good as we got.

We never attacked traditional concepts without proposing "functional" accommodations of interests. We called for acceptance of the notion of "custodianship" or "Stewardship". We suggested the legal device of "delegation of powers" to coastal states, to make clear that they were not God given. One British

wit wrote a poem, reading in part: "Our rights are too measley, according to Beesley; through delegation of powers, it all will be ours." I found that unkind....

III GROTIUS, SELDEN AND THE ECOLOGY: 1982 - 1094

It will be noted that if Noah was the first to be concerned with biological diversity, and Jonah the first real marine biologist with insider information, then Grotius might at least be regarded as the first ecologist for his doctrine linking uses of the sea to sustainability. It would be wrong, however, to discount Seldon as a mere exponent of overfishing and pollution. Selden at least attempted to take into account as relevant the nature of the resources the law could claim in asserting "there remains not either in the nature of the sea itself, nor in the Law of either Divine, Natural, or of Nations, any thing which may so oppose private Dominion thereof, that it cannot be admitted by every kind of law."On the other side of the debate, Grotius conceded that in the case of fish in small, enclosed water, " the question is by no means settled how long these may be said to belong to no one." (Grotius on the Law of War and Peace, p. 296.) Neither of these great legal gurus was quite as arbitrary as his followers,as is often the case.

It was clear to those of us charged with the negotiations that there were no doctrinal guide-lines or traditional approaches on which we could rely. So we developed new legal concepts, such as the exclusive economic zone, going well beyond the territorial sea but stopping well short of sovereignty, limiting coastal jurisdiction to resources, marine pollution, and scientific research. Equally novel legal regimes and mechanisms were devised to reflect the concept of the common heritage. One whole part of the Convention, (Part XII) consists of an Umbrella Treaty on the Protection and Preservation of the Marine Environment. Even the regime devised for passage through international straits owed more to Grotius than Selden. (The term "transit passage" is actually attributed to a member of the Canadian delegation.)

During the lengthy period of the law of the sea negotiations, there were strongly divergent views amongst states, ranging from claims to a 200 mile territorial sea to a flat rejection of any claims beyond 3 miles. There was, at least, general acceptance of the need to develop the law, and not merely codify it, as it became apparent that the attempts to contain coastal claims were not succeeding.

It is not inappropriate to be critical of the results of the Conference. It is foolish, however, to ignore the realities of the negotiations. On every issue, and Canada was necessarily involved in most, there was an often lengthy and always arduous negotiation between competing interest groups. Canada had much to do with the creation of some key interest groups, such as the coastal group, the marine pollution group, the continental shelf "margineers" group, the "equidistance" boundaries group, the nickel production ceiling group, etc., always formed through

informal working luncheons, later carried on with shirt sleeves and sandwiches. Such groups were needed to draw the lines of disagreement and launch negotiations to resolve them.

There was fierce resistance by powerful maritime states to the 12 mile territorial sea, because of its potential impact on international straits, and even broader opposition to the 200 mile economic zone; the continental shelf claims of Canada and its allies beyond 200 miles were rejected by the land-locked states and even coastal states supporters of the 200 mile economic zone who had no physical shelf beyond that limit; important high seas fishing states flatly rejected new fisheries rules relating to straddling stocks and anadromous species, and some also opposed the 200 mile fishing zones. Coastal states clashed over boundary delimitation rules.

It is sometimes forgotten today that the Conference had agreed to reach all decisions by consensus, and that all issues were to be treated as inter-related. Accommodations had to be hammered out -and were- on each of these issues, within various formal or informal groups established for the particular purposes, and the results had to be woven together into an integrated whole, in accordance with the "package deal" concept. Then the results had to be processed through the Drafting Committee, to translate them into legally binding language. It should not be forgotten, either, that it was the very state which had most vigorously insisted on decisions by consensus which demanded a vote in the closing hours of the Conference, a development which shocked delegations from around the world. Ironically, the issue chosen by President Reagan to bury the Convention, unsuccessfully as it turned out, was the mining system proposed for the deep ocean sea-bed by Dr. Kissinger, which had been accepted by the Conference and included in the Convention after many months of painful negotiations.

What is the relevance of these references to the 1982 Convention? It is, I suggest, that there is in existence a vast body of law comprising a comprehensive Constitution of the Oceans, which has not yet been implemented. The Convention only came into force on November 16, 1994. The question might well be asked whether the fisheries disputes of the past decade would have dragged on if the Convention had been in force, and the binding dispute settlement mechanisms had been utilized. It is not an easy question to answer. To ask this question is not to disparage the achievements reflected in the Agreement on the Implementaion of the Provisions of the 1982 Convention Relating to Straddling and Highly Migratory Fish Stocks. Indeed,I chaired the first international gathering of experts, intended as a preparatory meeting leading to a UN Conference. That meeting of experts was held here in St. John's at the Marine Institute in September, 1990. Ambassador Nandan was present at that meeting. There was no disagreement as to our common objective. It was just such an Agreement as was achieved this summer in New York under the skillful guidance of Ambassador Nandan, although only the most optimistic amongst us would have predicted the measure

of success achieved.

Before considering the 1995 Agreement, it is worthwhile to examine the legal regime established by the 1982 Convention, if only to ensure that we don't throw out the baby with the bath water. There are two other important reasons for considering the legal regime on fisheries established by the Convention. Firstly, it represents existing law, and may for some time to come,pending entry into force of the 1995 Agreement. Second, it provides the only legal basis for judging the legality of the actions by Spain, the European Union and Canada.

THE FISHERIES REGIME OF THE 1982 UN CONVENTION

Let us begin by considering how that Convention is regarded by knowledgeable experts, as follows:

From "Our Common Future", World Commission on Environment and Development (1987)"

"The United Nations Convention on the Law of the Sea was the most ambitious attempt ever to provide an internationally agreed regime for the management of the oceans. The resulting Convention represents a major step towards an integrated management regime for the oceans. Indeed, the most significant initial action that nations can take in the interests of the oceans' threatened life support system is to ratify the Law of the Sea Convention."

Let us think about that statement, not merely in terms of what the international community ought to have done, but in terms of the consequences of not having taken such action.

Let us be more up to date, which requires that we cite the results of the Rio Conference: From Agenda 21, Chapter 17:

" International law, as reflected in the provisions of the UN Convention of the Law of the Sea , referred to in this chapter of Agenda 21, sets forth rights and obligations of states and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources. This requires new approaches to marine and coastal management and development, at the national, subregional, regional and global levels, approaches that are integrated in content, and are precautionary and anticipatory in ambit." Surely that conclusion gives us guidance for our discussions.

A more recent appraisal of the nature and significance of the Convention was provided by the UN Secretary General at the Kingston ceremonies as "one of the greatest achievements of this century", because it comprises a comprehensive constitution of the oceans; established rights and duties going hand in hand under the rule of law, the themes stressed by the Canadian delegation throughout the Conference; made a major contribution toward prevention and resolution of conflict; and, of special relevance to this Colloquium, promoted peace, security and sustainable development. Others described it as a "high-water mark" in the progressive development and codification of international law."

If we have such a remarkable legal basis for oceans management, why are we meeting here? A part of the answer can be drawn from the fourth and fifth Preambles to the 1995 UN Agreement on Straddling and Highly Migratory Fish Stocks, which read:

"Calling for more effective enforcement by flag states, port states and coastal states of conservation and management measures adopted for such stocks";

"Seeking to address in particular the problems identified in Agenda 21, Chapter 17, Programme 6, adopted by the United Nations Conference on Environment and Development, namely that the management of high seas fisheries is inadequate in many areas and that some resources are over-utilized; noting that there are problems of unregulated fishing, over capitalization, excessive fleet size, vessel reflagging to escape controls, insufficiently selective cooperation between states."

There we have quite a catalogue of problems. Some appear to be in the process of resolution, some not. There is much to sink our teeth into in the hours ahead. Let us consider each of these issues, some of which are very controversial, during our panel discussions.

THE "DUTY TO COOPERATE" MYTHOLOGY

If one were to sum up the fisheries conservation law which emerged from the Conference, it would be impossible to attribute the results to Grotius or Selden, or, indeed, anyone but the negotiators. What were the results? Well, contrary to various recent statements, the 1982 Law of the Sea Convention did not merely impose "a general duty to cooperate". Far from it. Article 63 (2) on straddling stocks imposes a legal obligation on states in providing that "states shall seek, directly or through appropriate subregional or regional organizations" to agree upon the measures necessary for the conservation of these stocks. This same language is retained in Article 7 (1)(a) of the 1995 UN Agreement. Article 300 of the 1982 Convention imposes the legal obligation that "States shall fulfil in good faith the obligations assumed under this Convention", not ought to fulfil, or have a mere duty of best efforts to fulfil. Exactly the same language is found in Article 34 of the 1995 Agreement. Article 300 of the Convention also stipulates as a legal obligation that "states shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right". The same language is used in Article 7 (1) (a) of the 1995 Agreement, except for the deletion of the words "jurisdiction" and "freedoms". No where does either instrument suggest that merely to join the appropriate regional organization is to discharge these significant legal obligations.

Where then does one find this mere "duty to cooperate"? Article 118 of the 1982 Convention clearly, - not vaguely, or ambiguously - imposes the legal obligation that:

"States shall cooperate with each other in the conservation

and management of living resources of the high seas." This is not hortatory language. It lays down a legally binding obligation. Article 118 goes on to provide that "States whose nationals exploit identical living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries to this end". These are clear legal obligations, going well beyond a mere duty to cooperate. As in the case of Article 63 (2) it is impossible to argue that a state fulfils in good faith the obligations assumed under the Convention merely by joining a regional organization. The purpose of the obligation to enter into negotiations is clear cut, namely "with a view to taking the measures necessary for the conservation of the living resources concerned".This obligation cannot be met by negotiating to avoid or undermine such measures. And finally, the establishement of regional organizations is not proposed as an end in itself, but is explicitly stated to be "to this end", that is to say the taking of conservation measures.

Even Article 116 of the 1982 Convention makes clear that "all states have the right for their nationals to engage in fishing on the high seas subject to: (b) the rights and duties as well as the interests of coastal states provided for inter alia, in Article 63 paragraph 2" etc. This is clear and unambiguous language, imposing legal conditions. Even Article 87, elaborating the Freedom of the High Seas, including freedom of fishing, explicitly provides that "Freedom of the High Seas is exercised under the conditions laid down by this Convention." Thus the freedom of the high seas is clearly not an unfettered right to over-fish at will, but is a right subject to the obligations cited above.

There is, of course, if one searches for it, a duty to cooperate embodied in Article 117 of the Law of the Sea Convention, which provides that:

"All states have the duty to take, or to cooperate with other states in taking, such measures for their nationals as may be necessary for the conservation of the living resources of the high seas." Clearly, there is a duty imposed on all states, severally and collectively, to take such conservation measures. This language is not vague or ambiguous. It does not leave a gap wide enough to permit a coach and four to be driven through. Presumably this duty could not be interpreted as including a right to over fish quotas imposed unilaterally after unilateral rejection of quotas accepted by all others in a multilateral forum. The article also, of course, imposes the infamous "duty to cooperate", characterized negatively so often. Even with respect to this mere "duty to cooperate", however, it would require very flexible interpretation to conclude that merely to join a regional fisheries organization constitutes fulfilment of the duty. Surely the duty to cooperate applies to the conservation measures recommended, for example, by the scientific Council of NAFO. It is not stretching the rules of interpretation unduly to

say that the duty to cooperate might even extend to the decision-making process of the regional organization in question. Quite frankly, I have no doubt that a duty to cooperate which evaporates once the decision-making process begins is no duty at all, but a mere facade. Of course we are not left with Article 117, which, standing alone, might not comprise a legal regime. On the contrary, the duties imposed by Article 117 are strongly reinforced by the legal obligations imposed in Article 63, 116, 118 and 300, which are repeated in the 1995 UN Agreement. Let us hope, therefore, that these provisions are not meaningless.

Interestingly, the phrase "duty to cooperate" recurs in the 1995 UN Agreement, in Article 5 (in the chapeau); in Article 7(2)(a), where a duty to cooperate for the purpose of achieving compatible measures is imposed; in Article 7(3), referring again to the duty to cooperate to agree on compatible measures; Article 8(1) provides that states shall pursue cooperation in relation to straddling fish stocks"; this goes beyond a mere duty to cooperate; but Article 8(3) refers again to "their duty to cooperate", without citing the source of this duty. Article 8(5), however, clearly stipulates that states "shall cooperate" to establish organizations or arrangements.

Having discussed the Law of Nations, as Grotius would have characterized it, it is now time to determine -or at least consider- whether there have been recent breaches of the law, and even, perhaps, who committed them. Unfortunately, we do not seem to have budgeted for the creation of an ad hoc tribunal to consider this question, so you must make do with me.

In sum, there were times when we considered that Grotius was atrocious, and times when we thought that what is Selden is wonderful, but it is now time to consider Grotius and the Pirates.

IV GROTIUS AND THE PIRATES 1994 - 1996

It is said that Grotius was fascinated by pirates. In any event, he wrote of them more than once, as all of us present undoubtedly recall. Some of his writings are better known than others. During my term on the International Law Commission, -yes, that was me -, I had occasion to turn to Grotius yet again on the subject of environmental crimes. Sure enough, he didn't fail me. I was pleased to be able to quote to the Commission, and, thus, for posterity, the following dictum:

"To-day's pirate may be to-morrow's Head of State". Now, I would ask that this statement not be taken literally. I do not , necessarily, for example, refer to the present Spanish Presidency of the European Union. Not necessarily. Indeed, in many places, except, of course, in St. John's, the problem is to determine who is the pirate. I shall forego asking "Will the real pirate please stand up?" It is no secret that Spain, the EU and even Brittan of Britain has accused Canada of piracy, and named Minister Tobin as the Pirate Chief.

Perhaps enough salt water has flowed under the bridge to

render it unnecessary to ask if the use of the NAFO Objections Procedure 53 times in 10 years constituted an abuse of right, or whether the repeated rejection of quotas based on unanimous scientific advice constitutes negotiating in good faith. Perhaps, and perhaps not. Only time will tell. I hope at least that I have raised questions as to whom should be in the prisoner's dock, if charges of piracy are brought. Indeed, it might be quite crowded in the prisoner's dock..... Perhaps that could be the solution. But just in case, let us not desparage or denigrate the existing legal regime on high seas fisheries until we are sure a better one is in place, one which, we might hope, would eliminate the Jolly Roger from the high seas, whether by means of the recent FAO Code of Conduct, the September NAFO enforcement decisions, the 1995 UN Agreement, or all of the above. I would also add Canada's recent unilateral action as a part of the New Law of Fisheries, or, if you prefer, the Right of Self Protection, as exemplified by the Torey Canyon and Estai incidents.

THE 1995 UN AGREEMENT ON STRADDLING AND HIGHLY MIGRATORY STOCKS

I have drawn attention to some provisions of the 1995 Agreement which some might characterize as weaknesses. I most emphatically disassociate myself from any such position. The Agreement incorporates a whole range of legal rules, procedures and decision-making processes which make a major contribution to the "New Fisheries Law". This Colloquium provides us with a timely opportunity to consider them, shortly before the Agreement is presented for signature in the General Assembly, on December 4, 1995. I look forward to hearing and even participating in the deliberations of the multi-disciplinary panels which will certainly be addressing the important innovative provisions of the 1995 Agreement. Some of the positive features of the Agreement which should be discussed are as follows:

(1) its binding nature, itself a major achievement;
(2) its data collection system, a concrete and constructive feature;
(3) its emphasis on the precautionary approach, one of the most positive features of the Agreement;
(4) its data sharing system, important and constructive;
(5) its focus on subsistance fishing, a new approach;
(6) its strengthening of regional organizations, an important and long overdue development;
(7) its transparency provisions, of great potential;
(8) its dispute settlement provisions, which may help make the system workable;
(9) its provisional entry into force, coupled with entry into force after only 30 ratifications or accessions, a preferable approach to the requirement for 60 ratifications of the Law of the Sea Convention, which has delayed its entry into force for so long;

(10)its enforcement provisions, the most important of all its features.

It is highly desirable, I suggest, that we organize our discussions so that time is given to consider each of these features, with particular reference to their future application, implementation and enforcement, including the changes necessary to existing Canadian legislation, as well as the ratification issue.

An important characteristic of the Agreement is that it comprises a three-pronged, multi-disciplinary approach. Not surprisingly, it focuses on enforcement, perhaps its most important legal feature, and the related institutional mechanisms. It also emphazises the long standing need for compatibility of measures in the high seas with those in the economic zone, representing a blend of legal and ecological approaches. Finally, it stresses the scientific basis for the precautionary principle, with concrete requirements for data collection and sharing. The Agreement thus adapts a multi-disciplinary approach, which is the key pre-condition to Ecosystem Assessment and Management, on which the New Law of Fisheries must be based. The validity of this approach is demonstrated convincingly in Lee Kimall's Commentary to the 1995 IUCN document "Priorities and Responsibilities", already cited.

THE ENVIRONMENTAL DIMENSION

Before concluding, I should like to note that I have deliberately omitted any analysis or commentary on that aspect of the new fisheries law which interests me most, the environmental dimension. That is the one area of law which, I suggest, is most in need of continuing development. No one needs to be reminded of the success achieved by Canada at the Stockholm Conference on the Environment in obtaining agreement by consensus on legal principles based on the Trail Smelter case, and in later translating these principles into binding obligations in the 1982 UN Law of the Sea Convention, particularly the Umbrella Treaty contained in Part XII.

It is indicative that Stockholm Principle 21 was adopted and re-affirmed twenty years later at the Rio Conference. Time constraints preclude even cataloguing the wide range of environmental law instruments concluded over the past two decades which are explicitly or implicitly based on the Trail Smelter case, exemplified in Stockholm Principle 21. This environmental law-making process must not only be maintained, but accelerated. I have been much involved personally in recent years in the elaboration of two recent and potentially far-reaching Environmental Conventions, the 1995 IUCN Global Covenant on Environment and Development and the 1995 Quixmala Draft Agreement on the Protection of the North American Environment. I hope that each will make some impact into the thinking of governments. We NGO's try to make a difference.

I hope that our discussions will focus on these issues. In so saying, may I acknowledge our collective debt and gratitude to Ambassador Satya Nandan, who has once again demonstrated his exceptional courage, patience, determination, negotiating skill and wisdom in excercising the leadership needed once again to bring about the 1995 UN Agreement, as he has done so often in the past. I express my thanks and my congratulations to Ambassador Nandan, and my appreciation to the organizers of this Colloquium for having included me in such a timely and useful exercise.