THE MARITIME AWARD SOCIETY OF CANADA FORUM

POLITICS, MANAGEMENT AND CONFLICT IN THE CANADIAN FISHERIES

April 13, 1996 University of Victoria

"PURPOSES AND PRINCIPLES OR PLATITUDES AND PRONOUNCEMENTS"

J. Alan Beesley, O.C., Q.C.

Introduction

Mr. Chairman, fellow participants and distinguished guests: it is an honour and a challenge to be invited to participate in a forum on such important political, scientific, ecological, economic and legal issues, engaging such an eminent group of interdisciplinary experts. My role is merely that of Chairperson, and the programme makes clear that I have only fifteen minutes for my opening remarks.

The morning programme is extremely well organized, so as to provide an orderly progression of ideas and a cross section of views and positions on both East Coast and West Coast fisheries problems, ranging from scientific uncertainty and conflicting economic interests to divergent political objectives, and alternative options, including both institutions and means of enforcement.

I note, however, that the title of the morning session, "The Science and Politics of Imperilled Canadian Fisheries" does not directly address the role or function of law in the management of fisheries, so I will offer some comments on legal aspects as part of the foundation and background for our discussions.

Subject

The title of my brief address is: "Purposes and Principles, or Platitudes and Pronouncements".

The first two terms are borrowed from the UN Charter, and the last two from Lester B. Pearson, found in the following quotation, which I have cited before in other places:

> "Diplomacy is largely the art of making an indescretion sound like a platitude, and politics that of making a platitude sound like a pronouncement."

Thesis

My thesis is as follows:

(1) No system of national law devised thus far has been able to prevent breaches of the law ranging from fraud to violence, in spite of generations of experience, the development of sophisticated legal superstructures and the establishment of strict penal systems, so it is simplistic and superficial to dismiss or deny the existence of international law for being unable to avoid or punish such breaches of law on the international plane; and

(2) In addition to the continuing process of development of customary international law through state practice, somewhat analogous to the common law process, there exists a vast and rapidly expanding network of bilateral and multilateral treaties, many of them global in scope, which effectively regulate relations amongst states on issues as diverse as boundaries, trade law, arms control, health standards, the environment and fisheries; and

(3) Contrary to widespread public perceptions, states do tend to observe and implement their treaty obligations to one another, because it is in their self interest to do so; and

(4) Weaknesses in the application of international law often

arise not from inadequacies in the law elaborated through negotiations among states, but from the unwillingness or hesitation of states (such as Canada, and those with similar constitutions) to enact the necessary domestic legislation and establish the required mechanisms; and

(5) On issues as complex and interrelated as oceans affairs, a global constitution of the oceans is required, particularly in the field of fisheries; and

(6) The 1982 UN Law of the Sea Convention comprises just such a Constitution of the Oceans, embodying as it does not only a comprehensive set of substantive legally binding rules of law on uses of the oceans, but the most complete set of dispute avoidance and dispute settlement mechanisms in existence; and

(7) Although the Convention has been in force since November 16, 1994, Canada has not ratified it, nor has the USA nor the EU, with the consequence that each feels free to assert the Convention rights on a "pick and choose" basis, while not accepting corresponding obligations; and

(8) The Convention has thus not had the impact intended by its negotiators, particularly in avoiding and settling disputes amongst states.

1982 UN Convention on the Law of the Sea

The question arises as to why Canada, generally recognised as the state which gained most from the hard fought twelve year law of the sea negotiaions, should have failed to ratify the Convention, nearly fifteen years after the conclusion of the negotiations, and the signature of the Convention by 119 states;

Indeed, Canada has not even harmonized its national legislation with the Convention, although not hesitating to cite the Convention on a selective basis, while repeating its promises to ratify it, most recently in the Speech from the Throne on February 27, 1996. One wonders whether we have been hearing over

the years Statements of Purposes and Principles, or Platitudes and Pronouncements. Is the Convention just another "scrap of paper"? If so, why did Canada sign it on December 10, 1982 ? Have successive Canadian governments recognized that, as a signatory to the Convention, Canada is "obliged to refrain from acts which would defeat the object and purpose of the treaty"? That is precisely what Canada's obligations are, pursuant to Article 18 of the Vienna Law of Treaties Convention, which Canada acceeded to in 1970.

I do not suggest that ratification of the Convention would be a panacea for all of Canada's fisheries problems. I do suggest that the Northwest Atlantic Fisheries Organization established by the NAFO Convention on October 24, 1978, and the 1985 Pacific Salmon Treaty, are inadequate without the legal underpinning of the 1982 Law of the Sea Convention. Moreover, astounding as it may seem, there is even reason to believe that Canada may now attach a higher priority to ratifying the 1995 UN Agreement on Straddling Stocks and Highly Migratory Species than to the 1982 Convention on which the later "mini-treaty" is based. (For example, the February 27 Speech from the Throne refers to "legislation to ratify the UN Straddling Stocks Agreement and the Law of the Sea Convention", in that order). Perhaps no one has yet noticed that the Straddling Stocks Agreement, while signed by Canada and the USA, has not been signed by the European Union or any of its member states. It is one thing to sign - and ratify - regional agreements (such as NAFO and the Pacific Salmon Treaty) before ratifying the Convention elaborating the rules of law on which they are based, but it is quite another to ratify them instead of that Convention; it is still another to consider ratifying an amending agreement (such as the Straddling Stocks Agreement) before - and perhaps even instead of - the basic Convention being amended, (although that term is not used). Are we now seeing the world through salmon pink coloured glasses? Is that why we are now engaged in a dispute with the USA over the

status of Canadian internal waters? Perhaps we should remove the scales from our eyes. With a case in the International Court over turbot and a dispute concerning Canadian territory as a spin-off from the salmon dispute, does anyone have the impression that perhaps these are important foreign policy issues and not merely fisheries matters ? I should be interested to hear the views of those present.

The Purposes and Principles of the Convention

Let us consider the Law of the Sea Convention from a more detached perspective.

The "Brundtland" Commission on Environment and Development stated in its 1987 report:

" The most significant ..... action that nations can take in the interest of the oceans' threatened life support system is to ratify the Law of the Sea Convention."

The Rio Conference in chapter 17 of Agenda 21 stated:

"International law, as reflected in the provisions of the UN Convention of the Law of the Sea....., 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."

The former Secretary-General of the UN, Mr. Perez de Cuellar, addressing the International Law Association in Montreal in 1982 described the Law of the Sea Convention "possibly the most significant legal instrument of its century".

What of the official Canadian attitude to the Convention ? Perhaps the statement of the then Canadian Secretary of State for External Affairs, the Honourable A.J. MacEachen, delivered to the Final Session of the Law of the Sea Conference in Jamaica on December 6, 1982, provides a clue: "The Law of the Sea Convention, and the Convention alone, provides a firm basis for the peaceful conduct of ocean affairs for years to come."

Salmon

Let us consider what the Convention has to say about salmon. To quote again from the statement by Mr. MacEachen:

"The Convention recognizes the primary interest and responsibility that the state of origin has in respect of salmon that spawn in its rivers." That statement referred to Article 66 of the Convention, on Anadromous Stocks, which reads in part, as follows:

"Article 66. (1) States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks."

This provision is commonly referred to as the "ownership" principle, but it is couched as a legal rule.

(2) "The state of origin of anadromous stocks shall ensure this conservation by the establishment of appropriate regulatory measures for fishing in all waters landward of the outer limits of its exclusive economic zone and for fishing provided for in paragraph 3(b).

.....The state of origin may, after consultations with other states referred to in paragraphs (3) and (4) fishing these stocks, establish total allowable catches for stocks originating in its rivers."

This provision is commonly referred to as the "conservation" principle.

(4) "In cases where anadromous stocks migrate into or through the waters landward of the outer limits of the exclusive economic zone of a state other than the state of origin, such state shall co operate with regard to the conservation and management of such stocks."

This provision lays down the legal obligation of co operation, not directly addressing intermingling stocks, but coming close.

The principle on which Canada's west coast salmon negotiations have been based is the "equity" principle, not embodied in the Anadromous Species rules of the Convention. I suggest, however, that the judicious application of the conservation and ownership rules would have much the same effect as the equity principle. The difference, of course, is that the Law of the Sea rules are enforceable as between parties to the Convention.

Binding Settlements of Disputes

Let us now consider the possibilities if both Canada and the USA, neither of which is a party to the Convention, had both ratified it. In such event, either party could invoke the third party dispute settlement provisions of the Convention. To alter the focus a little, let us consider the situation if both states were now to ratify the Convention.

As pointed out by Mr MacEachen, when he was Canada's Secretary of State for External Affairs:

" Provisions on the peaceful settlement of disputes have been made a fundamental part of the Law of the Sea Convention -- an historic achievement for an international treaty of such magnitude. Parties to the Convention will be obligated to ensure that disputes on the interpretation of the Convention will be settled by peaceful means agreeable to the parties concerned. Of course only parties to the Convention will be bound by these provisions, but those that might challenge the Convention and wish to remain outside of it must recognize the disservice they do not only to the attainment of agreed rules for the uses of the oceans but to the peaceful resolution of conflicts."

It is only necessary to add that it is a well established principle of international law that a state cannot hide behind its constitution. (Since no reservations are permitted to the Law of the Sea Convention, neither Canada nor the USA could ratify the Convention with a federal state reservation; thus Alaska could no longer act as if it were an independant sovereign state, but would be obliged to act as if it were a part of the USA.)

The relevant rule of international law is embodied in Article 27 of the Vienna Convention on the Law of Treaties, which reads in part as follows:

"Article 27

Internal Law and Observance of Treaties

A party may not invoke the provisions of internal law as justification for its failure to perform a treaty."

Part XXV of the Convention is devoted to the Settlement of Disputes, consisting of some twenty provisions (Articles 279 to 299), plus Annex II, providing for a Commission on the Limits of the Continental Shelf; Annex V on Compulsory Conciliation procedures; Annex VI setting out of the Statute of the International Tribunal for the Law of the Sea (consisting of fourty-one articles); Annex VII, on Arbitration; Annex VIII, on Special Arbitration, (for various issues, including fisheries matters). The totality of these provisions provide what has been described by the leading expert on the issue, Professor Louis B. Sohn as "a veritable code for the settlement of disputes which may arise in the future with respect to the interpretation and application of the Law of the Sea Convention..... This is the way to the rule of law and to ensuring that the peace of the world is not jeopardized by a dangerous escalation of law of the sea controversies."

In a Forum such as this, which includes naval officers, legal and other enforcement experts, as well as politicians, diplomats, academics , scientists, officials, and other stakeholders such as aboriginal peoples spokepersons and members of the public, is there anyone who would question the desirability of settling disputes peacefully through binding third party processes ? Does anyone envisage such a system coming into force to resolve Canada's fisheries disputes if Canada does not ratify the Convention ?

East Coast Problems

It is evident that there are unresolved legal questions arising out of the West Coast fisheries dispute which raise basic foreign policy issues, including, now, territorial sovereignty. What of Canada's East Coast fisheries issues ? Are they minor fisheries problems, or does the threat and near use of force on the turbot dispute also raise basic foreign policy issues, of particular

interest to those at this Forum concerned with enforcement ? Does Canada's dispute in the International Court of Justice with Spain constitute just another tedious question of passing interest to international lawyers, or does it also raise fundamental foreign policy issues ? I hope we will have time to address these questions.

In the meantime, what might usefuly be said of the legal aspects of Canada's East Coast fisheries dispute ?

I had occasion recently to review this question in the context of an address I gave on November 17, 1995 to the St. John's Colloquium on Fisheries. Straddling stocks is the problem of major concern on Canada's East Coast.

This is what Mr MacEachen had to say on that subject:

> "Canada joined with many other coastal states in developing a provision to conserve fish stocks that 'straddle' the economic zones of neighbouring states or the two hundred mile limit. Without international co operation, such stocks cannot be effectively managed and conserved."

These words have proven prophetic.

I do not propose to cite here the many provisions of the Convention laying down the legal obligation to conserve the resources of the oceans, both within and beyond 200 miles. It is worthwile, however, to recall that the Convention provides (whether or not this is now also a rule of customary law) in Article 63 (2), as follows:

> "(2) Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal state and the states fishing for such stocks in the adjacent area shall seek either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area."

It will be noted that the operative phrase is "shall seek", which thus lays down a binding legal obligation and not a mere non-binding duty.

Appended to the text of these comments is a brief analysis of

the cumulative effects of this Article, which read together with Articles 87, 116, 117, 118, and 300, clearly impose legal obligations on all states to conserve straddling stocks. (These provisions are also embodied in the 1995 UN Agreement on Straddling Stocks, as are a series of new provisions ranging from the precautionary principle to enforcement measures.) It is my position, which I do not propose to discuss here, that the European Union and its member states, particularly Spain and Portugal, seriously and repeatedly breached the provisions of the Law of the Sea Convention through systematic over-fishing of straddling stocks. I recognize that this is not the time and place to discuss that issue. I have, however, appended the texts of my comments on that question, from my November 17 speech in St. John's. In the meantime, I would note that the EU has not ratified the Convention, although Austria, Germany, Greece and Italy have done so. As for the 1995 Agreement on Straddling Stocks, neither the EU nor any of its member states have even signed that Agreement; Canada, of course, has signed but not ratified that Agreement.

The 1995 "mini-treaty" on Straddling Stocks is so important, assuming that it eventually comes into force, that I am also attaching to this statement an extract from my St. John's speech summarizing its provisions. The agreement tightens up and improves the relevant provisions of the Law of the Sea Convention on those issues it addresses.

In sum, Canada's position on straddling stocks would, in my view, be much stronger if Canada had ratified the Law of the Sea Convention and if the Convention had been brought into force quickly, rather than twelve years after its adoption.

Overview of the Convention

The Law of the Sea Convention does not merely codify pre-existing law. The major part of the Convention consists of progressive

development of the law; that is to say, it creates new rules of law. However, these proposed new rules do not constitute "instant law". Some are enforceable only amongst or between parties to the Convention. One example is the proposed rule of "transit passage". I know it is a new rule, because I, personally, coined the term "transit passage". (Some maritime powers argued that it represented customary law even before the Conference concluded, and still do, although they are still not parties to the Convention.)

This concept of "instant law," applicable on a highly selective basis, was rejected by Canada and most other states during the law of the sea negotiations. It never occurred to me that anyone would try to apply such an approach to Canada's Inside Passage, but it seems to be occurring. Even on this type of frivolous issue, it would strengthen Canada's legal position if Canada were a party to the Convention.

I note in passing that under the Convention pre-existing internal waters retain their status as internal waters,and that the Convention does not recognize or create any right of passage through such waters, neither on the basis of past neighbourly usage nor any other basis.

Even the twelve mile territorial sea limit constituted new law, or progressive development, but no one would argue to-day that it has not become accepted as a rule of customary law. The Exclusive Economic Zone concept was also wholly new, but it too has now attained the status of customary law. The "ice covered waters" rule, based on Canada's Arctic Pollution Prevention Act, is also received customary law now, although some might argue to the contrary. As for the straddling stocks and anadromous species rules, views undoubtedly differ as to whether this new law is now customary international law, but I would argue that it is. We cannot assume, however, that all parts of the Convention are now customary law and thus binding on parties and non-parties alike, although some would say that that seems to be the Canadian view.

What then are the practical implications for Canada of not ratifying ? Some of the many questions which arise are as follows:

Can Canada claim a seat on the Council of the Sea Bed Authority, charged with the management of sea-bed mining beyond national limits, as foreseen by Mr. MacEachen, without ratifying the Convention ? Not without a *very* special exception.

Can Canada assert its rights as a "pioneer investor" to mine the deep ocean sea-bed, as forecast by Mr. MacEachen, without becoming a party to the Convention ? Canada repeatedly said no throughout the negotiations. I still do.

Can Canada claim a seat on the Sea-Bed Tribunal without becoming a party to the Convention establishing it ? Of course not.

Can Canada assert the rights embodied in the Convention to a continental shelf extending to the newly defined "legal" limits of the continental margin, anticipated in Mr. MacEachen's speech, without becoming a party ? Merely to ask is to create a lawyers' feeding frenzy.

Can Canada invoke the fourty-five basic legal rules of the Convention contained in Part XII, on Protection and Preservation of the Marine Environment, should, for example, there be a serious oil tanker accident in the Strait of Juan de Fuca, if Canada is not a party to the Convention ? I would answer in the affirmative, but would the USA agree ? These are not minor issues, and they go well beyond the preoccupations of those of us concerned with fisheries management.

Can Canada utilize the Convention to counter claims, however invalid, that the Strait of Juan de Fuca and the Inside Passage are international straits, while Canada remains outside the Convention ? Perhaps, but a middle power such as Canada needs the protection of the Convention when dealing with a major power, particularly if Canada would wish to invoke the Convention in an international tribunal.The North-Sea Continental Shelf decision

is a case in point.

What happens if Senator Foghelmes denounces Convention Article 234 on "ice-covered waters", on the grounds that Canada's Arctic waters are being used to trans-ship Cuban cigars ?
Everyone knows that the article is tailored to Canada's Arctic legislation. If it now customary law, as are the straight base-lines enclosing Canada's Arctic could we cite the Convention in support of Canada's rights ?

One issue of fundamental importance to all states , including Canada,is the guarantee of freedom of navigation provided by the Convention. This issue alone warrants its ratification by Canada.

On fisheries, is it the Canadian position that the series of fisheries mini-treaties created on the basis of, but outside the Convention, are better than the Convention ? Why then are they not working ?

Perhaps the most important issue raised by Canada's present practice of asserting rights under the Convention, without accepting the related obligations, is Canada's credibility. As I suggested to the Conference here last month, "It seems logical to assume that eventually Canada's allies in negotiations of importance to Canada will begin to question Canada's good faith".

These are but a few of the host of questions which are unresolved for countries such as Canada, attempting to "pick and choose" amongst the rights and obligations embodied in the Convention, -the very position Canada opposed so fiercely throughout the negotiations.

Ratification of the Law of the Sea Convention

As pointed out to the March 31 Conference here, I made a plea in a statement to the Ocean's Management Workshop at UBC on March 18, 1988, that Canada, as one of the major beneficiaries of the Law of the Sea Convention,"take the lead" in co operation with other states, "to begin the process of actually ratifyin the

Convention". No such action was taken by Canada. I suggest that it is still not too late to do so.

There is reason to believe that the following states are now in the process of preparing for ratification of the Law of the Sea Convention:

France and Spain; then, Belgium, Finland, Japan, The Netherlands, Russia and the UK, perhaps as early as June 30; others said to be preparing to do so are Denmark, Ireland, Luxemburg and USA. Where would this leave Canada ? To repeat what I said here on March 31, 1996, should Canada,allegedly in search of its idendity, be "Leader, Laggard or Opportunist "?

Conclusion

I should like to close with this quotation from Mr. MacEachen:

> We must maintain the principles that governed our deliberations, in particualr the "package deal'. The "Convention sets out a broad range of rights and responsibilities. If states may arbitrarily select those they will recognize or deny, we will see the end not only of our dream of a universal, comprehensive Convention on the Law of the Sea, but perhaps the end of any prospect for global co operation on issues that touch the lives of all mankind. We must not, we cannot allow that to happen. The Law of the Sea Convention, and the Convention alone, provides a firm basis for the peaceful onduct of ocean affairs for the years to come. It must stand as one of the United Nation's greatest accomplishments, and worthy of support of every nation."

Were these words a Statement of Purposes and Principles or mere Platitudes and Pronouncements ? I believe they express Purposes and Principles which go to the heart of Canada's national interests and international credibility. I flatly reject any suggestion that they be dismissed as mere Platitudes or Pronouncements. I conclude by renewing my plea that Canada live up to its reputation and responsibilities, and not only ratify the Law of the Sea Convention, but take the lead in co-ordinating similar action by other states. Let us decide now whether to fish or cut bait.