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THE INTERNATIONAL CONSTITUTION FOR THE OCEANS:

CANADA AND THE RULE OF LAW

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INTRODUCTION

It is an honour to be a contributor to a Forum concerned with such vital issues as the fate of the oceans, especially under the aegis of United Nations Association and the Vancouver Aquarium.

Surely we would not be gathered here tonight if we did not share a common concern for the oceans of the world - not merely their rapidly dwindling resources, but our uses and misuses of the oceans, as dumping grounds and unregulated highways. It behooves Canadians in particular to be concerned for this common heritage because we are the stewards and caretakers of a coastline longer than that of any other country. The question I wish to address tonight is whether we are discharging our obligation of stewardship.

In addressing that question I propose to discuss whether Canada is adhering to the Rule of Law of the Oceans, or opting in and out of the Law of the Sea as we see fit.

CANADA AND THE RULE OF LAW

Lester B. Pearson quotes and endorses in his memoirs the following extract from an address by Louis St.Laurent, made while Minister for External Affairs, as part of the Gray Lecture at the University of Toronto in 1947:

"respect for the rule of law has become an integral part of our external and domestic policy...

... the freedom of nations depends upon the rule of law amongst states."

I hope that everyone present would agree that this statement still reflects Canadian foreign policy.

INTERNATIONAL COMMITMENTS

The following observation by Mr. Pearson is also taken from his memoirs:

" Everything I learned during the war confirmed and strengthened my view as a Canadian that our foreign policy must not be timid or fearful of commitments but activist in accepting international responsibilities. To me, nationalism and internationalism were two sides of the same coin. International co-operation for peace is the most important aspect of national policy. I have never waivered in

this belief even though I have learned from experience how agonizingly difficult it is to convert conviction into reality."

The foregoing quotations also represent my deep personal convictions, as will be evident from the comments which follow.

VALIDITY OF INTERNATIONAL LAW

Some of the premises on which my views on the Law of the Sea are based are 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, 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.

PRESSURES FOR A NEW LAW OF THE SEA

It is not necessary to recount the series of claims and counter claims that arose between the second (1960) and third (1967-1982) law of the sea conferences. Fisheries and boundaries disputes broke out between the 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 (1960) conference, nor that their efforts were abandoned only when the USA refused to support the initiative, after giving lenghty consideration to the results of their joint representations to many countries.

ORIGINS OF THE NEW LAW OF THE SEA

It is more widely known that in 1967 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 extension of jurisdiction by

coastal states. 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 priviledge of personally 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 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.

Shortly 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 a second resolution, consisting of a series of procedural "understandings", including the "package deal" on which the Conference negotiations were based.

POLITICAL/LEGAL DISPUTES: CANADIAN DIPLOMACY

Positions diverged sharply on every issue. It had to be demonstrated why the law of the sea required a radical restructuring - 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, the father of international law, 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 nor by navigation, that is to say in the two ways in which it can be used."

However, we 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. We 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 20 th Century. We

deliberately attacked sacred cows, and were occasionally gored. Nontheless we described flag-state jurisdiction as roving sovereignty, and derided as ludicrous a system of law which entitled a state to sink a polluting ship but not direct it into safe shiping 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 strait baseline system from which it may be measured had been created. We cited the Trumam 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, stresssful, risky, but stimulating and creative, as the law began to change. At times it was fun, but never a laughing matter.

CANADIAN ACTIVISM

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 oil slick devoid of any flag state responsibilty 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 controvery, 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.

CANADIAN OBJECTIVES

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 Canadian public programme of speaking engagements, participation in seminars, publication of articles in learned journals, appearances on TV and radio programms, liaison 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 people'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 11 th 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.

CANADIAN PROPOSALS AND CONCEPTUAL APPROACHES

We never attacked traditional concepts without proposing as alternatives "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 measly, according to Beesley; through delegation of powers, it all will be ours." I found that unkind....

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, extending 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 a Umbrella Treaty on the Protection and Preservation of the Marine Environment, often referred to as the Canadian articles.

Throughout the lengthy 12 year 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.

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 anadromous species 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, by means of new alliances; Canada was active in seeking solutions.

There was fierce resistence from 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 state 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 delimination rules. The problems seemed insoluble.

PROCESS

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 reaching all decisions by consensus which eventually 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 sea ocean sea-bed by Dr. Kissinger, which had been accepted by the Conference and included in the Convention after many months of painful negotiations.

NATURE OF THE CONVENTION

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 is now in force but has not yet been implemented. The major point of importance is that, after 12 years of tough negotiations, agreed rules on all the major issues had been hammered out. Out of the years of chaos, a Constitution of the Oceans emerged. The Convention came into force on November 16, 1994. There are now 125 states which have ratified the Convention, including Japan, Russia, The European Union and

nearly all its member states. Only a handful of industrial states have not yet ratified, but these hold-outs include the USA and Canada. The question might well be asked whether Canada's 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 dismiss.

A recent appraisal of the nature and significance of the Convention was provided by the UN Secretary General at the Kingston coming into force 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 Forum, promoted peace, security and sustainable development. Others described it as a "high-water mark" in the progressive development and codification of international law."

CANADA'S INTERESTS

Canada had actively sought acceptance of a major law-making conference on the law of the sea, and was not hesitant in making its views known, even to the extent of parting company with many of its traditional allies. Thus it was not purely fortuitous that the Canadian delegation played such an active role in launching the Conference. Moreover, unlike many of its allies, Canada did not oppose changes in the traditional concepts of the law of the sea, but consciously and actively sought to change those rules which no longer reflected the needs of states, particularly coastal states such as Canada. Thus, one of Canada's fundamental objectives, from the outset, was to achieve agreement on extended coastal state jurisdiction, well beyond the traditional 3 mile territorial sea supported by such major maritime powers as the USA and the UK. Even on the sensitive issue of passage through international straits which could be affected by an expanded territorial sea, Canada did not hesitate to propose new and bold solutions, (eventually culminating in the new conceptual approach called "transit passage"). The Canadian delegation became well known as one of the most radical but creative forces in the conference, participating in the development of the 200 mile "economic zone", the "parallel system" for mining the deap ocean sea-bed, the "port state" jurisdictional approach to environmental enforcement, the "continental margin" as the outer edge of coastal continental shelf claims, etc.

During the negotiations Canada became known not only as the alleged author of "creeping jurisdiction", but as one of the most demanding countries in the Conference. A "short list" of Canadian claims, which were realized and legitimized in the final Convention, included, for example:

- the twelve mile territorial sea;
- the 200 mile fishing , undersea resources, scientific research and environment zone;
- the "ice-covered waters" concept;
- the non-international Arctic straits;
- the off-lying archipelagic claim;
- the "state of origin" rights to anadromous species (such as salmon);
- the "straddling stocks" special regime;
- the deep sea-bed mining "nickel production ceiling";
- the outer margin limits to the continental shelf;
- the equidistance formula for determining boundaries;
- the "pioneer investor" status for early deep sea miners;
- the "straight baseline" system for measuring seaward claims.

Not surprisingly, the Canadian Delegation was also described as the author of the comment "what have you done for us lately".

RATIFICATION OF THE 1982 UN CONVENTION OF THE LAW OF THE SEA

The question arises as to why Canada, generally recognized as the state which gained most from the hard fought twelve year law of the sea negotiations, should have failed to ratify the Convention, nearly sixteen years after the conclusion of the negotiations, and the ratification of the Convention by 125 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.

The partial enumeration I have listed of the Canadian foreign policy objectives achieved in the negotiations and reflected in the Convention would seem to argue strongly in favour of Canadian ratification. It is in Canada's interest, more perhaps than any other state, to ensure that the Convention becomes universal law.

CUSTOMARY LAW ARGUMENT

It is arguable that so much time has elapsed since the Convention was concluded in 1982 that the Convention has become accepted as customary international law, binding even on non parties. Pursuant to this argument, Canada need never ratify, since it can claim the benefits of the Convention without having to accept the binding third party dispute provisions of the Convention. Another version of this argument is that Canada can continue to postpone ratification during its fisheries dispute with Spain in the International Court of Justice while asserting its rights under the Convention such as the twelve mile territorial sea, the 200 mile fishing zone, The Arctic Waters Pollution Prevention Act, etc. This, indeed, appears to be the actual position of the Canadian government at this time.

THE "PICK AND CHOOSE" IMPLICATIONS

Throughout the negotiations Canada, more than any other country, argued against any form of the "pick and choose" approach, whereby those articles in the Convention deemed acceptable by a state could be treated as "instant law", while those not favoured could be characterized as merely provisions in a treaty not accepted by that state. Apart from the cynicism and hypocrisy inherent in such an approach, it undermines and rejects the concept of the Rule of Law. Moreover, in the case of Canada, non ratification carries certain very clear costs and disadvantages.

THE FISHERIES DISPUTES

The Canadian position on anadromous species (salmon) is based on the primary rights of the "state of origin" of the salmon. This legal rule is embodied in the 1985 Pacific Salmon Treaty, which, in turn, was based on the explicit provisions of the 1982 Law of the Sea Convention. So far, at least, Canada has not publicly claimed the state of origin rule to be customary law, arising out of the Convention, although it may well be, out of a desire, perhaps, to avoid having to base its negotiating position on a Convention it refuses to ratify. It goes without saying that if both Canada and the USA were to ratify, the solution of the fisheries dispute would be within their grasp, through the third party settlement provision of the Convention, which would also encourage negotiations. What an anomalous situation for Canada, as the main author of the Convention provisions on salmon, to be foreclosed from invoking them through remaining outside the Convention by its "pick and choose" approach. This does not sound like the Canadian foreign policy on other issues of which we are so justly proud, such as the ban on land-mines, or the non proliferation treaty, or the comprehensive Test Ban.

On the East Coast, the situation is analogous. Canada relies on the provisions of the NAFO treaty, concluded pursuant to the express provisions of the Law of the Sea Convention, which obliges coastal states to manage straddling stocks through regional organizations such as NAFO. Yet Canada could not invoke the dispute settlement provisions of the Convention when the other side misused the loop-hole in the NAFO agreement year after year. Indeed, far from being able to invoke such provisions, Canada is withholding ratifying the Convention in order to avoid litigating its actions on the turbot dispute, while continuing to maintain that it acted in accordance with international law. Indeed, Canada is challenging the jurisdiction of the International Court to even hear the turbot dispute between Spain and Canada. What a tangled web. Here too is a clear example of opting out of the Rule of Law, through a policy based on the "Pick and Choose" approach.

BENEFITS OF RATIFICATION

If the foregoing is correct, Canada's cases on both coasts would be substantially strengthened by Canada's ratification of the Convention. The underpinning embodied in the specific provisions of the Convention is needed in both cases. More importantly, the dispute settlement provisions of the Convention are badly needed. The opposing parties on the straddling stocks dispute (the EU, Spain and Portugal) are already parties to the Convention, so ratification by Canada would have an immediate positive impact on the dispute. Should we not take such action without further delay, as our opponents have had the courage to do?

SEABED MINING AND CONTINENTAL SHELF BENEFITS LOST

There is a whole list of new institutions which Canada helped create, in some cases virtually demanding them, of which Canada is not a member because of its non-ratification of the Convention. The most important of them are the International Tribunal on the Law of the Sea, in Hamburg, and the Commission for the Delimitation of the Continental Shelf. This is anomalous and disturbing, given the nature and extent of Canada's participation in their creation and the importance of Canadian interests at stake. What is most troubling however, is the far-reaching implications of Canada's new foreign policy of opting in and out of the Rule of Law on a highly selective basis. Middle powers, such as Canada, need the Rule of Law, -not on a fire brigade basis, but as a constant- as the fundamental basis of our foreign policy. Why else are we so vigorous in our peace-keeping activities, in our support for the whole UN system, including in particular the progressive development and codification of international law, which we continue to pursue vigorously, particularly on trade issues.

LEGAL ACTIVISM

Canada continues to be an activist in developing much needed international law, whether it be to bar land mines, create a war crimes tribunal, elaborate environmental rules or develop trade law. However, it is not enough to create law, if we do not implement and apply the law we have helped create. Law-making can even be harmful if it is not coupled with law enforcement, since unenforced law erodes respect for the law. There is more to law than trade...

CONCLUSIONS

It is my belief 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 are beginning 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 those 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.

UN CHARTER OBLIGATIONS

May I conclude with the following quotation from the Preamble to the United Nations Charter, which commits

> *"We the Peoples of the United Nations"* to *"establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."*

The ratification of the 1982 UN Law of the Sea Convention is a classic example of direct action required to implement this fundamental objective of the UN.

I am aware of many Canadians, private persons, academics, journalists, officials and politicians, who share my hope and expectation that Canada will act in accordance with its own ideals and traditions, and demonstrate to the world our undiminished support for the Rule of Law amongst nations by ratifying this uniquely important UN Convention.