TEXT OF STATEMENT BY MR. J.A. BEESLEY, REPRESENTATIVE OF CANADA TO THE UNITED NATIONS PREPARATORY COMMITTEE FOR THE THIRD LAW OF THE SEA CONFERENCE, PLENARY SESSION, PALAIS DES NATIONS, GENEVA, August 5, 1971

Mr. Chairman,

You will recall that during our March session the Canadian Delegation made a fairly comprehensive statement on the general Canadian position on a number of the major issues facing us, and it may be wondered why we are now intervening again. We are aware that a number of delegates who are new members of this Committee are intervening for the first time and we are reluctant to impinge upon the time which might more appropriately be left to them. However, it would seem to us that the time may have come to take stock of the situation and to ask ourselves what it is that we are all seeking to achieve and whether the means or concepts we have been using are the appropriate ones. We fear that without such a reappraisal, which should involve the formulation of a clearer conceptual idea of the new order we wish to establish over and under the seas, we might find ourselves in the position of one who starts assembling a giant puzzle simply trusting that he has all the pieces and that they will ultimately fit together into a magnificent picture. Such stock-taking could, of course, be undertaken at some future stage of our proceedings but, for the Canadian Delegation, this moment is perhaps better than some later date since we have still fresh in our memories the numerous semi-official conferences on the law of the sea we have recently attended, together with other delegates here present, as well as a series of bilateral negotiations and discussions we have had with some eight countries since last March.

As a consequence of this rather gruelling schedule of activities, we have had an unusual opportunity to exchange views on a multi-disciplinary basis with representatives of governments, industry, the academic community, learned societies and other experts on a wide variety of issues. This has proven extremely enlightening and I might say encouraging to us. We have in the process simply been forced to open our minds to new concepts, to develop new insights into ancient problems, and to rethink long-standing traditional concepts. In other words we have found that our exchanges of views have generated new ideas. I would like therefore to take this opportunity of sharing

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with the members of the Committee some of our thinking arrived at throughout these recent experiences, and particularly such insights as we have gained into the possible future development of the law of the sea.

I would suggest, to begin with, that there is a fundamental question we must all put to ourselves in preparing for the 1973 Law of the Sea Conference, namely, what interests are intended to be served by the Law of the sea? A useful approach in attempting to determine the interests concerned is to analyse them under the broad headings of coastal interests on the one hand and maritime or flag interests on the other. In the category of coastal interests we would include: those relating to the protection and management of both the living and mineral resources of the sea, the preservation of the integrity of the marine environment in general and the coastal environment in particular, the protection of the territorial integrity and security of the state, and the enforcement of customs, fiscal, immigration or sanitary regulations. In the category of maritime or flag interests we would include those relating to the traditional freedoms of the high seas and the exclusive jurisdiction of flag states, i.e. freedom of navigation, freedom of overflight, freedom of fishing and freedom to lay cables and pipelines, but also those other interests relating to what some might also wish to be included among the traditional freedoms of the sea, namely freedom of military activity, freedom of dumping, or, in short, the free and unfettered exercise of power.

This broad general distinction between coastal interests and flag interests, between coastal states and flag states, is neither absolute nor all-embracing. In addition to the legitimate interests of the land-locked states in the future development of the law of the sea, almost all the littoral countries of the world may be said to have both flag interests and coastal interests, and the weight they attach to either type of interest may vary from time to time and according to prevailing circumstances. Yet the history of the law of the sea is the history of the conflict between these various interests, and the present crisis in the law of the sea arises from the intensification of that conflict as a result of both technological and political developments that have upset the balance of interests reflected in the traditional law of the sea. To redress that balance

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will require, as a first step, a re-appraisal of the interests involved, stripped of any protective coloration they may have assumed in the past and taking into particular account the degree to which they approximate national interests on the one hand or community interests on the other.

The first major point of importance which has struck us with considerable impact is that the world is today embarked upon a period of radical evolution - almost revolution - in the whole field of the law of the sea, which shows a striking similarity to the period in the 17th and 18th centuries when the then major maritime powers were endeavouring to determine whether their interests were best served by narrow marginal belts comprising total sovereignty or wider belts comprising the exercise of limited jurisdiction based on a functional approach to concrete problems, that is to say, contiguous zones, which had their origin in the 17th century. The conflict of views which occurred in that period is so similar to that which we are now witnessing that we consider it relevant and worthwhile to examine briefly that period of history in order to seek some guidelines from the experience of the past for the law of the future.

We are all aware of the classic conflict between Selden and Grotius during the 17th century, which was ultimately resolved in favour of the latter, i.e., in favour of freedom of the high seas. We attach great importance to the maintenance of the freedom of the high seas but not as an absolute doctrine. It is interesting to note the continuity of views on these questions, such as the three-mile territorial belt. Whether or not, as is often suggested, the "cannon shot rule" of Bynkershoek is the actual origin of the three mile territorial sea, according to Fulton the first occasion on which this principle for delimiting territorial waters, afterwards so celebrated, appears to have been advanced was on May 6, 1610, a year after the proclamation forbidding unlicensed fishing by James I when, during a formal conference between the Dutch Ambassador with the English Commissioner the Dutch Delegation said "by the law of nations the boundles and roling sea was a common to all people as the air 'which no Prince could prohibit'." No Prince, they said, "could 'challenge further into the sea than he can command with a cannon, except gulfs, within their land, from one point to another'." Unfortunately, the very well founded concept of freedom of the high seas as it developed over the next few centuries has become both in practice and in law not so much freedom of the high seas for all but merely a kind of roving jurisdiction - sovereignty following the flag - for those powerful enough to make their wishes felt. As Gidel pointed out in 1934: "The larger the maritime power of a state the more it will tend to limit the width of the territorial sea. A great maritime power does not have to ask international law for means to exercise special powers in large areas of the sea beyond its shores; its own means assure this exercise." According to Lauterpacht, it is this rigidity of attitudes which cause writers such as Gidel, who had in the past looked with disapproval on any possible tendency to encroach upon the freedom of the seas,

to become emphatic in warning against the exaggerations of the "tyranny" of the traditional conception.

The ingenious doctrine of flag state jurisdiction is one example of the "tyranny" of the traditional conception, but another equally compelling example is the way in which the freedom of the high seas has become transformed not only to a licence to pollute but a right to over fish. Surely no one can any longer doubt the dangers of continuing to condone the laissez-faire on the high seas whereby, as we have pointed out before now, fishing has been transformed from a harvesting process to a mining process, from a pruning to a vacuum-cleaning operation. So far as coastal interests are concerned, these have been relegated to such protection as they could find in the concept of a narrow territorial sea, but even here, however, flag interests were also protected by the limitations placed upon the sovereignty of the coastal state by the doctrine of innocent passage.

What happened to the developing concept of the contiguous zone, the potential basis of accommodation as a half-way house, so to speak, between coastal state sovereignty in the territorial sea and the exclusive flag-state jurisdiction on the high seas? While it largely disappeared in theory it remained very much evident in practice, for some, if not all states. According to Lauterpacht in his 1950 article in the British Year Book "Sovereignty over Submarine Areas", there are "two parallel streams" in the history of the freedom of the seas in the last three centuries; the first of which is the strict insistence, in reliance on established international law, on full freedom from interference from other states on the high seas, the second being the [illegible] assertion of jurisdiction of varying kinds by coastal states, resulting in the conception of the contiguous zones then, that is to say, in 1950, in the stage of approximation to a customary rule of international law.

The law does not develop, however, by a mysterious process of magic. It is pointed out by Buckminister Fuller that with the advent of the first "spherical" empires in the history of man, a conflict developed between those whom he calls the "in pirates" and those he calls the "out pirates", which in his view recurred during the interval between the First and Second World Wars and which is recurring yet again today, with the scenario remaining much the same, while some actors change roles, and new actors appear on the stage. The question we should be asking ourselves, in our view, is whether we can any longer afford as a method of settling international law a renewal of battle between "in pirates" and the "out pirates". Surely neither

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power nor numbers can provide an effective yardstick with which to measure the efficacy of law - the more so if it is the problems of the future rather than those of the past which we are seeking to resolve. What then, Mr. Chairman, are the general interests of the international community which we should all be trying to protect? What indeed are the issues which can unite rather than divide us?

The great overriding community interests in the uses of the sea are surely freedom of communication; the rational exploitation and conservation of the living and mineral resources of the sea; the protection of the marine environment; and the reservation of the seabed beyond the limits of national jurisdiction exclusively for peaceful purposes and the use of its resources for the benefit of humanity, particularly developing countries. It is our conviction that legitimate national interests can not only be reconciled with these community interests but indeed are complementary to and even dependent upon them. The way to the future accommodation of interests necessarily lies therefore in an imaginative adaptation of certain old concepts - old concepts which perhaps have not always been properly understood - together with the creation of some concepts which may be both new and radical.

As a capsule description of the directions taken in the past and those which should be taken in the future, I should like to cite a Canadian academic, Professor Douglas Johnston, who has suggested that the law of the sea over the past few centuries might be divided into three phases. The first, during which the law was based essentially on commercial, colonial and military interests alone, lasted from the time of Grotius up to approximately the Second World War. During the period from the Second World War, approximately, and lasting until very recent times, the law went through an evolution and became resource law as much as commercial and military law. We are now, however, well into a third phase in which the law must necessarily continue to recognize legitimate commercial interests and freedom of communication, and must remain resource-oriented in recognizing the rights of coastal states in certain resources of the sea, but must now be also environmentally-oriented in seeking to protect the maritime environment on which we and many other species are so dependent for life itself.

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Mr. Chairman, if I may take the liberty of so doing, I would like to suggest some tentative ideas as to how this desired accommodation might be achieved and as to the possible general shape of the law of the sea of the future. Firstly, while the interests of the landlocked states must be taken care of adequately, the primary interests of the coastal state in all activities in the marine environment, particularly those adjacent to its shores, must be reflected in the law. Secondly, Mr. Chairman, with the single exception of the seabed, we strongly doubt the possibility of the member states of the UN agreeing to some kind of super-agency which would have powers surpassing those combining the Security Council, IMCO, ICAO, WHO, WMO, the ITU, GATT and the IAEA. Thirdly, and this conclusion follows from the second, much of the administration of the law of the future must be delegated to the coastal states and must be based on resource management concepts. This is clearly the trend of the law of the future, and, I would suggest, is already present in the existing law of the sea albeit in an inchoate and inconsistent manner. What must be brought to the concept of delegation of powers, and indeed to the exercise of those powers already enjoyed by the coastal states be it with regard to the territorial sea, fishing zones or the continental shelf, is the concomitant notions of responsibilities and duties, and the idea that coastal states must act not only in their own interests but as custodians of the vital interests of the international community.

It is these concepts of resource management and of delegation of powers on the basis of custodianship that I had in mind when I spoke of old concepts which, given an imaginative adaptation and application, could form the essential basis for an accommodation of interests. For instance, the concept of delegation of powers to all states concerned already applies on the high seas with regard to the

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suppression of the slave trade and piracy. Why can we not develop an effective resource management system for the management of "free-swimming" fish in areas beyond exclusive national jurisdiction? Why can we not marry the concepts of resource management and delegation of responsibility or powers? Why should the concept of delegation of powers to, and assumption of responsibility by, a particular class of states with a particular concern in a given matter - more specifically, the coastal states - not be applied for instance to the protection of fisheries and the prevention of marine pollution? If the law of the sea is not sufficiently instructive, why can't we learn from the air lawyers who have had no difficulty in establishing a system of delegation of powers through ICAO to its member states. ICAO makes a sharp distinction, of course, between freedom of navigation, i.e. the right of every state to have its flag aircraft travel the skies of the world - and freedom of transport, i.e. all the questions connected with landing rights, conditions for the carriage of cargo and passengers, and so on. Perhaps we can learn a good deal from the air lawyers. It shocks no one, for example, that Canada exercises, under ICAO arrangements, air traffic control authority in a Flight Information Regime comprising the whole of the Arctic sector north of Canada between the 141st and 60th meridians and the North Pole. To sea lawyers, however, the mere idea that any state other than the flag state can exert any form of control over a vessel of that flag state is anathema. It may be, however, that tempering the idea of delegated powers with the idea of responsibility would have a moderating effect on this doctrinaire insistence on exclusive flag-state jurisdiction. It may be too that tempering the doctrine of exclusive flag-state jurisdiction with an equally forceful doctrine of flag-state responsibility would have still other beneficial effects.

How in more precise terms can the concepts of delegation of powers and resource management be applied to the outstanding issues of the law of the sea? One of the most important areas of the law where they can be applied is that of fisheries. It should be possible to develop an effective resource management system, based on the delegation of powers to coastal states, under which the coastal state would assume the responsibility, as custodian for the international community, for the conservation and management of free-swimming fishery resources far

beyond the limits of exclusive national jurisdiction. We can foresee the development of a system which would grant coastal states the right, and indeed the duty, to manage such free-swimming stocks, for conservation purposes, under internationally agreed rules and guidelines. That right to manage would not include the exclusive right to exploit these species, although provision would be made, again under internationally agreed guidelines, for preferential rights on the part of coastal states, in recognition of their admitted special interests. We will be saying more on this subject when we speak in Sub-Committee III later this week.

Turning to the question of pollution, we can envisage a comprehensive treaty laying down certain minimal rules of general application, together with related multilateral treaties of regional application laying down special and possibly stricter rules. With regard to both the general and regional rules, the coastal states would be delegated the powers and related duties required for the effective prevention of pollution of their environment, and indeed would in a sense become custodians for part of the marine environment on behalf of the international community. We recognize, however, that the threat to the marine environment and the consequent threat to the human environment as a whole cannot be met entirely in this manner alone. Other approaches will also have to be considered in this connection. It may be, for instance, that something like the concept of universal jurisdiction as it applies to the suppresion of piracy and the slave trade should also be applied to the suppresion of certain types of activities resulting in serious pollution of the marine environment. We are putting forward this idea, however, only as food for thought at this stage.

Turning to the question of marine scientific research, here too the concepts of custodianship, of delegation of powers and resource management, are of direct relevance. Once again we are not suggesting that the rights of states concerning scientific research should be determined unilaterally by coastal states or the maritime powers, but rather through generally agreed rules of behaviour, subject both to the special interests of the coastal state and the essential interests of the international scientific community. Thus,

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if the coastal state has the right to impose a resource management system within its exclusive fishing zones, or is to be delegated other fishery resource management powers for conservation purposes, it should also assume the duty, as custodian for the international community, to protect community interests in scientific research in the areas where it exercises such powers. Similarly with regard to the resource management powers which the coastal state exercises over the continental shelf, the coastal state here too should discharge the duties it has to the international community in respect of scientific research. Difficulties which have arisen in the interpretation of the rules laid down for scientific research in the Continental Shelf Convention may stem not only from lack of clarity in those rules but also from the fact that we have not yet established in the law of the sea the proper relationship between power and responsibility. The elaboration of clearer, more specific rules, and the wedding of responsibility to power, should enable us to achieve a better balance between the protection of coastal interests and the protection of community interests in the growth of human knowledge concerning all aspects of the marine environment.

With regard to the continental shelf, another respect in which the concept of custodianship may have some validity is the proposal which Canada has put forward for a voluntary international development tax on offshore mineral resources within the limits of national jurisdiction. The notion here is that since a coastal state enjoys special rights and privileges with regard to the resources of the continental shelf, then it could recognize some duty towards the international community as a whole, and particularly the developing countries, to contribute to them at least some benefits from these rights and privileges enjoyed by coastal states. Of course, the decision of the International Court of Justice in the North Sea Continental Shelf Cases makes clear that the rights of coastal states over the continental shelf arise by virtue of the shelf being an extension of their land mass, the natural prolongation of the land domain into and under the sea. Nevertheless, we consider that the concept of a duty by the coastal state to the international community has potential application in this sphere, and of course a much more direct one if we think of the various types of trusteeship proposals which are being discussed.

So far as the seabed beyond national jurisdiction is concerned, the fundamental concept guiding the development of future international law with regard to this area of the seabed is, of course, that of the common heritage of mankind. The Canadian Delegation has on numerous occasions stressed the importance of an effective resource management system in the implementation of this concept, and we are gratified that our views on this point appear to have gained fairly wide acceptance. What may be less obvious is that the related concepts of delegation of powers and assumption of responsibility are also directly applicable in the elaboration of this idea of the common heritage of mankind. For instance, the declaration of principles adopted by the General Assembly last year provides that every state shall have the responsibility to ensure that activities in the area, whether undertaken by a Government or under its sponsorship, shall be carried out in conformity with the international regime to be established. As we indicated in our statement on the international seabed regime and machinery, this delegation of authority plus responsibility by the future international machinery to the sponsoring states may represent a practical and effective manner of dealing with a variety of matters involved in the implementation of the international seabed regime, subject to the agreed rules and standards.

We recognize, Mr. Chairman, that the concepts of delegation of powers and resource management have little direct relevance to questions relating to the territorial sea and innocent passage, including passage through international straits. It should be noted, however, that if those concepts were applied to fishery matters many of the problems connected with extension of the territorial sea might well be resolved. We have long believed, and have said on many occasions, that it is quite possible that those states claiming very wide belts of territorial sea would be willing to give up claims to total sovereignty in return for recognition of their right to exercise certain forms of jurisdiction. Quite apart from this important consideration, however, the concept of custodianship, at least, certainly is directly applicable in approaching the problems of innocent passage and international straits. It is by the

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acceptance of this concept, we believe, that we can secure the best protection for that freedom of communication which we consider to be consistent with, and indeed essential to, the interests of the international community as a whole. Thus coastal states should accept that with their sovereignty over the territorial sea there is allied a positive duty for them, again as custodians for vital community interests, to ensure free, safe, certain and uninterrupted passage by sea. To this end it will undoubtedly be necessary to modernize the notion of "innocence" both from the point of view of protecting community interests in freedom of communication and from the point of view of protecting coastal interests in territorial and environmental integrity. What may also be needed is a better definition of international straits, as well as a better definition of what both coastal states and flag states may or may not do, or indeed must do, in the straits so defined. Within that framework the authority left to coastal states could constitute not so much an exercise of sovereignty as the discharge of an international obligation.

I must add here that my delegation listened with interest last week to the two valuable statements from New Zealand and Turkey which reflected somewhat differing points of view concerning the problem of straits. It is encouraging, however, that in spite of differences of view, states other than the major maritime powers are beginning to face up to this problem.

We realize, Mr. Chairman, that we are likely to hear a great deal about the danger of creeping jurisdiction in response to the comments we have made about the delegation of powers to, and the assumption of responsibilities by, coastal states. The problem of creeping jurisdiction, or rather the fear on the part of those who consider that there is such a problem, exists in our view because of the historic departure from the functional approach to conrete problems, as embodied in the concept of contiguous zones, and the insistence instead on the two extremes of coastal state sovereignty over territorial sea on the one hand and the exclusive jurisdiction of the flag state on the high seas on the other. The opposition between these two extremes has resulted in strongly held and deeply divergent views concerning the need for, and the desirability and legality of, various limits for various types of national jurisdiction. This situation

in turn is both a consequence and a cause of the lack of any universally accepted rules on limits. It is, we think, essential that we bear in mind that at that precise point in time when we are all seated at the conference table attempting to reach a general accommodation, there will be no problem of creeping jurisdiction whatsoever. So long as a solution can be found to each of the problems facing us then there is no need for anyone to fear that there will be a return to the situation whereby states consider themselves obliged to take unilateral action to assert various types of jurisdiction because of the inadequacies of existing law. Equally important to bear in mind, however, is that if any single major issue is left unresolved such as, for example, military uses of the seabed, then there will again arise the danger of states taking unilateral action to protect their own national interests as they see them. In that case the theory of creeping jurisdiction will once again become a self-fulfilling prophecy.

Mr. Chairman, there are basically two alternatives open to us in approaching the future development of the law of the sea. We can, if we must, follow the precedent of the law of outer space, which was developed essentially by unilateral action by certain powers, later sanctioned in multilateral forums although still implemented unilaterally. Canada is prepared to follow such a course, albeit reluctantly, if it is the one which imposes itself. The other alternative is to achieve through the multilateral forum which will be provided by the 1973 Law of the Sea Conference, a comprehensive and lasting accommodation on all the new and outstanding problems of the law of the sea. This is the course which we prefer, together, I am sure, with the other countries represented here. To achieve such an accommodation, in our view, will require the abandonment of out-moded concepts and the adaptation of legal doctrine to a multidisciplinary and interdisciplinary approach to the problems associated with the uses of the sea. For our part, as I noted at the outset of this statement, we hope we have learned something from our recent exchanges not only with other lawyers, but with biologists, ecologists, oceanographers, engineers and economists. We look forward to receiving from other delegations

the benefit of their experiences and their ideas.

Mr. Chairman, I have referred throughout this speech to the concept of the delegation of rights and powers and the concomitant assumption of responsibilities and duties. I suggest that the essence of international law is no different than any other system of law in that rights necessarily carry with them certain responsibilities. Every system of law of the world differentiates between freedom and licence; every system of law imposes responsibilities wherever it admits rights. This concept is, Mr. Chairman, central to our whole approach to the problems before us. We all know also that international law is based upon consent and that this element of consent is present not only in conventional international law but even in the development of customary law. If we are to develop the law of the sea we must seek the consent of states to the law. That consent, in our view, should be sought by a process of accommodation, and should not be imposed, neither by power nor by numbers, since consent obtained under duress is not a real consent, and no law is enforceable unless it is accepted by the community to which it is intended to apply. Equally important in the field of international law, given the absence of any effective sanctions procedures, is good faith. Even where there is an effective adjudication system a treaty is only as strong as the good faith of the parties to it. Equally true, good faith is essential in the development of the law, that is to say, the negotiation process. Mr. Chairman, whether the law develops along the lines we have suggested suggested or not, we intend to participate fully in every effort to seek accommodation by consent and we shall do so with good will and in good faith. We shall endeavour to bear in mind in our approach to these problems also that if Canada, as a coastal state, has now or shall in the future acquire certain rights, we shall by the same token take on certain responsibilities and undertake certain duties to the international community as a whole, particularly the developing countries.