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INTERNATIONAL LAW IS MADE:
SOME INFORMAL REMARKS

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THE SEA WHERE INTERNATIONAL LAW IS MADE: SOME INFORMAL REMARKS

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For me my first understanding of the how international law worked “surfaced” in the fall of my second year at Dalhousie Law School. By then steeped as I was in a ton of “black letter” law I thought I had a grip on how to analyse statutes and research cases with the best of them. A colleague and I had been set the problem by Professor Hugh Kindred of debating the international law aspects of the passage of the supertanker MANHATTAN through the Northwest Passage in 1969. He was to argue the Canadian side of the issue and I the American. As part of his argument he contended that the Northwest Passage did not represent an international strait because it was frozen. To demonstrate his point he used photos taken in his earlier life as a Canadian naval helicopter pilot showing a great expanse of frozen whiteness. How was I to respond? Well simply enough I told the seminar that my client, the United States was in the photo. Bemusement from the assemblage. “You see I am under the ice in a nuclear submarine.”

The lesson I learned that day was two fold. In international oceans law the facts are generally more important than the statutes; and indeed, what is more often the case than not, is that we are still at a stage of legal development not unlike that of the early common law where precedent is constantly being used as a precursor to treaty law.

The actual MANHATTAN transit of the Northwest Passage did have a legal impact. The first transit was a novelty in Canada particularly when she got stuck in the ice and required the services of the Canadian Coast Guard icebreaker JOHN A. MACDONALD, appropriately named after Canada’s first Prime Minister, to complete her journey. However, when a second American vessel, this time the USCG Polar Star went through in the summer of 1985 without incident and without assistance Canada’s view of how to create international law hardened and domestic legislation was rushed through declaring the Canadian Arctic an archipelago with no international straits within it. I can tell you it was not a pretty site to see the Director General of our Legal Bureau running off

¹ Consul of Political, Economic and Public Affairs, Canadian Consulate General, Los Angeles, California. These remarks were presented at a colloquium sponsored by the Canadian Studies Program, University of California, Berkeley, on September 24, 2003 in Boalt Hall School of Law.

portmanteau in hand to brief then Foreign Minister Joe Clark on how this had happened. The US refused to recognise the legislation and we continue to monitor the issue in both countries - agreeing to disagree as we both look to time to make us victors. Global warming, it would appear is giving the US the upper hand on this one as vessels have been transiting relatively ice free straits in recent years.

But it has been ever thus. The three mile limit which maritime nations, including the US have pressed so hard to retain, was born from the maximum range that shore cannon could fire during the Napoleonic wars. A principle which had been an example of the coastal states' exercise of maximum sovereignty over two centuries reversed itself to become a tenet held most fiercely by seafaring rather than coastal nations. In the same fashion the sacrosanct 200 nautical mile limit for exclusive economic zones was bred by the humble anchovy. Anchovy you say. What has the anchovy to do with this pillar of modern law of the sea. Well simply put the Humbolt current passes along the coast of Chile and Peru bringing with it vast schools of anchovy. Following the anchovy are many predator fish, most notably from a commercial perspective, tuna. The Humbolt current lies an average 180 miles off the Pacific coast of Chile and Peru. Thus these states began and sustained a drumbeat in favour of a "200 mile limit" throughout the entire UNCLOS III as it was known until the idea became a norm.

This leads me to the next issue which is how to deal with the ever-shrinking high seas. It was thought in the 1970s, merely 30 years ago, that 200 nautical mile Exclusive Economic Zones covered all exploitable resources both mineral and aquatic. Oddly enough the loss of a Soviet submarine in the mid Pacific and the space race led to the next step in the development, or rather non-development, of international law. UNCLOS III was in its final stages and a deal to complete this most complex of international treaties had been a key provision which would allow the transfer of fishing and seabed mining technology to the third world - a noble effort at wealth distribution. However, when the submarine was lost Howard Hughes won a contract to build the GLOMAR EXPLORER, a vessel advertised as a deep ocean drill ship but in fact a vessel built by the CIA to recover the Soviet sub using navigation and recovery technology from the American space program. Suddenly a legitimate case could be made for this super sophisticated technology to be transferred to third world nations, a threat to land based mining firms, and potentially re-exported to the Soviet-bloc. This time the US and Canada were on the same side of the issue along with Britain, France, Germany and Belgium - all of whom were NATO allies with major mining interests. We fought like Trojans every step of the way. On one occasion at a meeting in Jamaica my delegation leader Phillippe Kirsch, now Chief Justice of the International Criminal Court, had to leave a session early on the final day to catch a flight. The Chairman, who was from the third world, sensed an opening and

tabled a resolution counter to our interest. While I had been a foreign service officer for seven years by then this was my first stint in the arcane world of multi-lateral negotiations. Nonetheless I got on the Speakers list, with nothing to say, and raced from desk to desk encouraging my much more senior colleagues to join the fray. It was a close run thing but we managed to talk out the time before the session adjourned for Easter and we lived to fight another day. This time the world economy came to our rescue. In the late 1980s commodity prices collapsed and deep seabed mining ceased to be an economic option and so it remains to this day.

The aquatic aspect of the 200 mile limit has also been tested, first by the fishermen of Point Judith, Rhode Island and later by those of Spain and Portugal. In the late 1970s as UNCLOS III took shape Canada and the United States realised that our 200 mile EEZs would overlap. Nowhere was this of greater economic import than in the Gulf of Maine between Cape Cod and Nova Scotia. A deal was struck after months of negotiations led by Lloyd Cutler for the US and Marcel Cadieux for Canada. The deal was generally considered more favourable to the US than Canada. However, in the selling of the deal process the American side somehow ran afoul of the good fishermen of Point Judith. They blocked the deal. It went to the International Court of Justice for adjudication and Canada came out with much greater resource benefits. In this instance the American effort to “make the law” did not pay off.

Meanwhile the ever bountiful Grand Banks of Newfoundland whose grounds extend for over 200 miles to sea began to feel the pressure of overfishing. Canada declared a 200 mile EEZ in the 1980s which moved the foreign vessels further out. However beyond the EEZ on The Nose and Tail of the Bank - these are the real names of these hydrographic features - vessels continued to fish with impunity and extremely efficient technology and even on the banks themselves vessels were re-flagged to open registry countries who were not members of the regional fisheries agency NAFO and went about their business.

To address these concerns which were serious enough to place 40,000 out of work when the cod stock collapsed we made international law both by precedent and treaty. First to deal with the “flag of convenience” vessels we took an admiralty law approach. We hired a young lawyer and gave him the sole task of finding out everything we could about these vessels on a worldwide basis. Who owned them? Who registered them? Who mortgaged them? Who insured them. We showed photos of “Bahamian” registered vessels to a visiting Korean delegation; told them who in South Korea owned them; and then Fisheries Minister John Crosbie, a Newfoundlander told them Korea would not get any of

the business involving construction of the multi-billion dollar Hibernia offshore projects. The “Bahamian” vessels disappeared.

We made in person démarches throughout the Caribbean to the small island states who registered these vessels. All were accommodating but none were capable of controlling their registry. We found greater luck in Panama with its massive open registry. Here we did not say “deflag” as that would undermine the state’s income. Rather we suggested with a nod and a wink that they might not re-register a vessel when its time expired, noting that fishing vessels are very small and their tonnage not a real income generator for Panama. Our goal was get a vessel without a flag and treat it under the rules of piracy. You should have seen the look on the face of the naval JAG lawyer in Ottawa when I told her what we proposed to do. The key is that when a vessel with no flag is approached by a government vessel on the high seas it becomes the registry of the government vessel and must submit to its jurisdiction and courts. And that is exactly what we did. With a lawyer on retainer in Panama City to obtain a certified copy of the documentation, it was faxed to a Canadian fisheries protection vessel on the Grand Banks in the Canadian EEZ on Easter Saturday 1993. The skipper when boarded showed his registration only to find himself trumped by a more recent document saying this registration had not been renewed. Before his owners could react the vessel was under escort to St. John’s. Tying up the vessel, its cargo, and most importantly, its earning capacity drove all of the flag of convenience vessels from the region in a matter of weeks.

The second aspect of treaty law was much more daunting. It takes time to develop consensus and have an international conference to prepare a text - three full years in this instance for the High Seas Fisheries Treaty and even longer to get the required ratifications by states that they will abide by the treaties and that the important states sign on. In this instance an additional eight years. In the meantime Canadians could not settle for waiting patiently while our livelihood went on the market in Europe. Accordingly, we took the extraordinary step of drafting domestic legislation which gave our patrol vessels the right to stop, inspect, and seize foreign fishing vessels on the high seas. It was the stuff which led to the war of 1812 and caused real strain with our NATO partners Spain and Portugal. However, in the Canadian national interest we had to set a precedent and make law while we waited for the international community to catch up. We also had to take the precaution of putting in a reservation at the International Court in the Hague so that our “friends” in Europe could not successfully sue Canada if we acted. Diplomatic protests were received. The American one being particularly telling for its manner of delivery. We received a call from the US Embassy that “the Third Secretary would be dropping off a note.” When I said I would be certain to be there to receive it, my American diplomatic colleague said

this would not be necessary. The message was clear - the US opposed unilateralism in form while supporting Canada's position in fact. Then we waited until early March 1995 when the Spanish vessel ESTAI was observed fishing on the Tail of the Bank and refused to stop for inspection. Once again at this point we "made" law as we went. The ESTAI locked her wheelhouse doors and set course for Spain while calling for the Spanish navy to protect her. Two NATO countries were challenging each other and the question was who would blink first. Then for all the world's TV cameras to watch Canada brought in an offshore rescue vessel belonging to the Canadian Coast Guard and used to fight fires on oil platforms. Towering rainbows of sea water were pumped over ESTAI for all the world looking like the arrival of an ocean liner on its maiden voyage. The ESTAI hove to in less than 30 minutes for the professional seamen aboard both vessels knew that on the North Atlantic at that time of year the spray from the water cannon would form into tonnes of ice per hour on the upper deck and the ESTAI would capsize. Canada rejoiced. Spain fumed. Meanwhile the fishermen of the UK flew Canadian flags on their vessels as Spain and Portugal were to enter the EU fishing regime within six months.

Now in the fall of 2003 - last week to be exact - the European Union has ratified the High Seas Fisheries Convention agreed in 1995. Canada is about to terminate its domestic legislation and finally ratify the Law of Sea Convention which we signed in 1982. The international law which Canada has sought to establish in treaty having been brought about both by hard negotiation and skilled "diplomacy" in the making of the making of international law at sea.

A final sidebar. The EU did take Canada to the International Court over our domestic legislation but they lost due to the reservation which we had entered.