Grotius and the New Law*

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Elisabeth and I were friends and colleagues for 35 years. From the early days of the United Nations Law of the Sea Conference and later during a series of Pacem in Maribus Conferences, Elisabeth played a unique role blending idealism, perseverance, and commitment, reflected in a continuum of concrete proposals and related negotiations. No one who came to know Elisabeth was unaffected by her. I also had the good fortune to go skiing with her in Switzerland and recall the occasion as one characterized as much by laughter and good fellowship as athletic skill. I will miss Elisabeth and her approach to life, both professionally and personally.

INTRODUCTION

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

The Thesis

It is my thesis that, firstly, the international community has entered a transitional period in the history of the law of the sea. We are witnessing the close

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of a major law-making process, and the beginning of one of consolidation, implementation, and enforcement. How we act, and when we act, will most certainly determine the fate of the world’s oceans and their living resources. Second, we seem finally to have reached a turning point, and must now decide whether we shall continue to pursue a competitive rights-based approach, or whether we move beyond these primitive concepts and begin to accept the responsibilities that go hand-in-hand with rights in any viable system of law. One wearies of hearing that we must fill real or imagined lacunae in the law. While the law-making process is continuous, what we need most is not more law, but more respect for the law. Unenforced law undermines the Rule of Law itself. Third, we must further develop the scientific and institutional basis for an Ecosystem Assessment and Management regime that is vital to sustainable fisheries. That process, already begun, must be maintained and accelerated.¹ Such basic shifts in thinking are difficult to achieve, but they can be encouraged and developed on such occasions as this very Colloquium.

Questions For Consideration

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

I propose to illustrate the relevance of these questions by referring to a very recent document, comprising a checklist of action required by States pursuant to the Fisheries and Environmental provisions of the 1982 United Nations Convention of the Law of the Sea. It is presented in the form of an annotated Chart, entitled “Conservation and Management of the Marine Environment” and was prepared by Professors Douglas M. Johnston and Phillip M. Saunders, under the auspices of the World Conservation Union (IUCN).² I had the honour of distributing this document at the Ceremonies in Kingston, Jamaica, celebrating the coming into force of the Convention, on 16 November 1994. It was received with great interest, and clearly made an impact on the participants.³


3. EDITORS’ NOTE.—The following text needs to take into consideration that: (1) Canada’s Oceans Act was enacted in 1996 and came into force in 1997; and (2)