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CANADA, CHINA AND THE RULE OF LAW

An Address by the Honourable Mark MacGuigan, Secretary of State for External Affairs, Peking, August 20, 1981

I am pleased, today, to comment on China's contribution to the development of international law. It is an area in which my country and yours have rich legal traditions that can be yet further enriched by greater contact between them and by working together for an international order based on the rule of law.

The idea of law is a universal phenomenon. The notion of objective legal norms binding on everybody – on ruler and ruled alike – has been more or less well understood and more or less well applied in different societies and at different periods. In my comments, I will attempt to bring out the importance of law in human affairs, and especially in international relations, for I am convinced that it is the idea of law, above all else, that can help us to span the distances imposed by geography, ideology, and varying levels of development.

Parallel in evolution

It is well known that ancient Chinese law influenced eastern Asia in much the same way that Roman law influenced western Europe. It is perhaps not so well known that there has also been a certain rough parallel in the evolution of law in China and in common law countries like my own. China's legal history was marked by the conflict between the legalist and Confucian schools of thought, with the legalists upholding a kind of statute law system incorporated in the *Tables of the Law,* and the Confucianists upholding a kind of traditional customary law system reflected in the norms of proper behaviour. In the shared legal history of Canada and Britain, one finds a somewhat analogous tension or interplay between statute law and traditional customary law or common law. In both your case and ours, the end result was a compromise between the two approaches.

I have touched on legal history only to underline why we in Canada welcome so warmly the new interest in law which is manifest in China today. You have a vast wealth of experience to draw upon that can be instructive not only to you but to countries that have followed other roads. Your new initiatives in both internal and international law can enable you once again to make a unique contribution to the legal heritage of the world.

Rule of Law

It is sometimes thought that what is most remarkable about Canada and other countires of the West is our advanced technology and material well-being. However, the source of our progress is not technology, but rather the rule of law, which protects citizens from arbitrary action by the state and guarantees the fundamental values of a free society – freedom of conscience and religion, freedom of speech and of the press, freedom of assembly and of association. It is this freedom in the framework of the rule of law which renders possible our social dynamism, economic progress and even technological innovation. For us the rule of law has proved to be the matrix

both of collective progress and of personal fulfilment.

Canadians have noted with deep interest your enactment of organic laws for the courts and the procuratorate, as well as a criminal law and a law of criminal procedure, and a variety of other laws and regulations. These speak for themselves in recognizing the need to protect the individual and further the rule of law. Other measures have been the re-establishment of the Ministry of Justice, together with its local bureaux and offices, and the drafting of regulations for the legal profession.

It has been especially gratifying to see the re-emergence of the Chinese Society for International Law and *The Chinese Yearbook of International Law,* as well as the publication of articles in English by such scholars as Li Yunchang and Chen Zhucheng in the *Beijing Review* and elsewhere. These developments have been paralleled by the expansion of your law schools and the growth of scholarly and professional exchanges with universities and other organizations in Canada and elsewhere. Our scholars have been honoured to work with and learn from Professor Wang Te-Ya, Professor T.C. Chen, Dean Shou-Yi Chen, and others. We look forward to more exchanges in the future.

In the field of international law, it is noteworthy that China has made its presence felt with particular effect in two areas of particular concern to Canada — namely, international environmental law and the law of the sea.

Environmental integrity

Canada and China worked closely and constructively together at the Stockholm Conference on the Human Environment. Like China, Canada occupies one of the largest land masses in the world and fronts on one of the longest coastlines in the world. Both our countries must inevitably be concerned with the protection of their environmental integrity, which necessarily also implies the protection of the environment in areas beyond national jurisdiction. It is true of course that the principles of sovereign equality and non-interference allow states to regulate activities within their boundaries as they see fit. Sovereignty, however, does not confer unbridled licence. Canada has long subscribed to the view that no state should use its territory or allow it to be used in such a way as to injure the environment of another state or of the international commons. Indeed, Canada was a party to the now classic Trail Smelter Case that first enunciated this basic tenet of international environmental law. China's view of sovereign equality and non-interference, I am pleased to note, similarly takes into account the need to avoid injury to the vital interests of others.

Law of the Sea

Canada and China have also been effective partners in the elaboration of the emerging new law of the sea. We have contributed to state practice and the evolution of customary law, which now recognizes, for instance, the 12-mile territorial sea and the 200-mile economic zone. We have supported the concept that the resources of the international seabed area are the common heritage of mankind. We are committed to the successful conclusion of the Law of the Sea Conference. And we know that a comprehensive, universal treaty is indispensable to international order and stability.

At the heart of our common approach to the law of the sea is our common realization that the proposed treaty represents more than a constitution for the oceans. What is

at issue is a new equity, a new international economic order, and a new lawmaking process. The economic zone and the concept of the common heritage of mankind are bold inventions that will bring us closer to this new equity and new economic order. But perhaps the most revolutionary change has been in the lawmaking process. The traditional law of the sea resulted largely from the state practice of the Western maritime powers, codified in the 1958 Geneva conventions. Most of the developing countries had no voice in this process. Today, however, they all have a voice and all insist on being heard. Therein lies the revolution: the decolonization of the law of the sea.

Many of you may recall the story of the monkey-keeper by Lieh Tzu. In the land of Sung, long ago, there was a monkey-keeper who dearly loved his monkeys. The day came, however, when he could no longer afford to feed them as well as before. Fearing that they would no longer obey him, he decided to trick them into accepting short rations, "Here are chestnuts for you," he told them. "You'll get three each morning and four each evening. Is that enough?" The monkeys angrily refused his offer. "Very well," he said, "four each morning and three each evening. Is that enough?" Delighted, the monkeys agreed.

But men are not monkeys. The developing countries will not accept keepers, nor short rations — at the Law of the Sea Conference or elsewhere. They are today sovereign and equal members of the international community. In insisting on the exercise of their sovereign equality — in their rejection of keepers and short rations — they have Canada's full support.

Extension of international law

Before concluding, I would like to discuss briefly one other major development in contemporary international law. Traditionally, international law has been concerned with relations between states. Today, the increasing involvement of governments in commercial activities, the burgeoning of international and intergovernmental organizations, and the spread of transnational enterprises, have all combined to extend the domain of international law. This phenomenon demands creative new approaches, for which we can find inspiration in our respective domestic legal traditions.

Both your government and mine are heavily involved in international trade, directly in some cases, and through our various agencies in other cases. Inevitably, many complex practical problems are beginning to surface. We in Canada are about to deal with some of these in a State Immunity Act, which will clarify and codify our judicial practice. We welcome China's encouragement of the work of the International Law Commission on the jurisdictional immunities of states and their property. We are impressed with your efforts to provide stability in international trade and investment through the instrumentality of domestic law. Here too your past affords lessons for us all. Unequal treaties are not true treaties, which can only be based on mutual benefit. The extra-territorial application of foreign laws is a violation of sovereignty. Commercial disputes can best be resolved through direct, amicable consultations, supplemented where necessary by conciliation, arbitration or other proceedings. What is required in all commercial relations, especially where different economic, social and legal systems are involved, is certainty, predictability and confidence.

You are promoting these conditions in China today.

Non-use of force

I have referred a number of times to sovereignty, equality and non-interference. These are the foundation stones of international law. Their obvious corollary is the non-use of force in international relations. Thus, if we are truly attached to the rule of law, we are obliged to condemn the Soviet Union's invasion and occupation of Afghanistan. We are obliged to support international efforts to achieve the complete withdrawal of Soviet troops and to restore to the Afghan people, who are fighting a war of liberation, the right to determine their own future.

It is, however, all too easy to forget that the rule of law is indivisible. None of us can pick and choose where we wish to see it applied. If we frustrate the rule of law in one area — in the uses of the sea, for instance — we encourage its frustration elsewhere. We make it more difficult to pursue the peaceful settlement of disputes and, more important still, the avoidance of dispute.

Law, as I said at the outset, offers us our best hope of overcoming the differences that prevail in the world. Law may never allow us to achieve a universal consensus. It may, however, allow us to come close to realizing an old Chinese ideal: "From union comes mutual affection; from difference, mutual respect." Indeed, as between Canada and China, despite our differences, I believe that we are already going beyond mutual respect to mutual affection.

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