Resources
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Canada and the Law of the Sea Convention: Selected Issues

Introduction

The Third United Nations Conference on the Law of the Sea (UNCLOS III) was convened for two reasons. The first was the failure of its predecessors in 1958 and 1960 to produce a comprehensive yet internationally acceptable codification of the law of the sea. The second catalyst was the gradual increase in state jurisdiction in the offshore. The international law definition of "continental shelf" did not set a fixed seaward limit to jurisdiction. However, since the late 1960s hydrocarbon exploration has been taking place at depths - and distances from the shore - which would have been inconceivable in the 1950s. Additionally, international recognition of fisheries jurisdiction to 200 nautical miles has been secured by acceptance of unilateral claims, backed up in some cases by the threat or use of force; in the absence of agreement, there were fears that claims might go beyond this limit.

The first session took place in Caracas, Venezuela in 1974; the final session on December 12, 1982 at Montego Bay, Jamaica. Reaching agreement involved compromise, and the Conference proceeded on the basis of consensus. The Convention deals with established concepts in the law of the sea (freedom of the seas, territorial sea, pollution prevention, continental shelf), and with more recently developed ideas such as the exclusive economic zone and international regulation of deep seabed mining. Western European countries and the United States, dissatisfied with the seabed mining provisions, took no part in the signing ceremony. Other countries have also refused to sign, but for different reasons. The Treaty will enter into force one year after the sixtieth ratification and will eventually replace the four Conventions on the Law of the Sea concluded at Geneva in 1958, all of which have entered into force (although Canada has ratified only the Convention on the Continental Shelf).

This issue of *Resources* is devoted to an examination of selected aspects of the Convention which are of major importance to Canada: its relevance to hydrocarbon development in offshore Canada, marine pollution and ice covered areas, and the deep seabed mining provisions.

The opinions presented are those of the authors and do not necessarily reflect the views of the Institute.

UNCLOS III and Exploitation of the Canadian Continental Margin

Canada was an enthusiastic participant at UNCLOS III, broadly in sympathy with the principle of setting a fixed limit to national jurisdiction in the offshore. There were other national objectives. Like many other coastal states, Canada was anxious to see the acceptance of the concept of the 200 nautical mile exclusive economic zone to complement the existing regime of the continental shelf. This comment examines some aspects of the impact of the Convention on the exploration for, and production and transportation of, hydrocarbons in the Canadian offshore.

The Convention retains the existing concept of recognizing the exercise of sovereign rights (as opposed to sovereignty or ownership) for the purpose of resource exploration and production, but sets new rules for the determination of the extent of offshore jurisdiction, both seaward and as between opposite and adjacent states. In addressing the former issue the Conference faced a problem encountered in 1958: how to frame a juridical definition of the continental shelf (or indeed, the continental margin) which would be acceptable to those states (such as Fiji and the United Kingdom) which had a substantial continental shelf in geographical terms, and those states (such as Chile and Peru) which had virtually none. The 1958 Convention set the limit of the shelf at the 200 metre isobath or to depths where exploitation was feasible (the 200 metre isobath is the worldwide mean depth of the edge of the continental shelf). But UNCLOS III was meeting at a time when the 200 nautical mile fishing zones were being claimed by an increasing number of countries; thus the limits for mineral resource jurisdiction could hardly be less. At the same time, countries such as Canada, which has licensed activities on the continental shelf beyond the 200 nautical mile limit, would be unlikely to accept a redefinition of state jurisdiction which curtailed their jurisdiction. Article 76, therefore, recognizes mineral jurisdiction seaward to a minimum of 200 nautical miles. Where the natural prolongation of the landmass (*i.e.,* the seabed out to the edge of the continental margin) extends beyond this limit the coastal state enjoys jurisdiction over this area as well, out to an absolute limit determined under the Convention either by distance from the coast or ocean depth. However the Convention obliges state parties to enter into revenue sharing agreements with the International Sea-bed Authority (which will administer the area beyond the limits of state jurisdiction) in respect of mineral production

beyond the 200 nautical mile limit, with the Authority's share limited to 7%. Control over exploration and production remains the prerogative of the coastal state.

The 200 nautical mile limit would place substantial areas off the west coast and parts of the Arctic archipelago within Canadian jurisdiction, and the new definition of the continental margin (which comprises the continental shelf and continental slope) clearly encompasses extensive areas of the east coast offshore. States party to the Law of the Sea Convention will be obliged to make public their determination of the seaward extent of their jurisdiction on a once-and-for-all basis. Canada has made such a determination of sorts in respect of a part of the adjacent offshore: the map appended to the Canada-Nova Scotia Offshore Resource Agreement (March 1, 1982) indicates the seaward extent of the Scotian shelf, stating that this is a domestic application of Article 76 of the Convention. These offshore limits are measured either from the low water mark, or from straight baselines which may be drawn along a coast which is deeply indented or fringed with islands (like the coast of British Columbia). Canada has yet to determine all her baselines - especially around the Arctic archipelago, but adherence to the Convention would place greater areas of offshore under Canadian resource jurisdiction than would have been possible in the immediate future under the 1958 regime. But while the Convention permits the seaward extent of offshore jurisdiction to be settled, this is unlikely to survive a determined attack from countries wishing to claim greater areas. In such an event resistance by members of the international community opposed to such expansion, and by the International Sea-bed Authority, will be imperative.

The Convention sets out principles concerning two other aspects of state jurisdiction in the offshore relevant to petroleum activities - pollution of the sea and jurisdiction over offshore facilities. Protection and Preservation of the Marine Environment is dealt with in Part XII. The general principle is the avoidance of marine pollution in the exercise of the exploitation of offshore resources. Article 208 would oblige state parties to adopt legislation prohibiting pollution from offshore facilities under their jurisdiction. Canadian legislation is broadly in accord with this principle, but there are potential problems arising out of the legal definition of offshore installations.

The juridical classification of offshore installations and facilities is a potential problem at international and domestic law. Are drillships "ships"? Likewise floating cranes, oil barges, self-propelled drilling rigs? Are artificial islands "islands"? What law applies, and which state has jurisdiction over these facilities? Artificial islands are not "islands" under the Convention, but some confusion regarding other facilities persists. The Convention does not define "installations and structures" on the shelf; is a floating crane anchored beside a drilling facility "installed"? The question is important because Article 80 would recognize "exclusive" coastal state jurisdiction over "installations and structures" with regard, *inter alia,* to customs, fiscal, health, safety and immigration matters. There is a great deal of transnational movement of such facilities, often with a full complement of crew. From the Canadian perspective, legislation extending the ordinary law to offshore facilities, Canadian and otherwise, and defining offshore facilities, is still required. The Convention may be seen as a conceptual framework which must be filled out by state practice and other agreements; it remains to be seen how practical the framework is in the light of legal concepts already developed in the course of extensive offshore operations in many parts of the world.

Ian Townsend Gault

Marine Pollution and Ice Covered Areas: Article 234

Article 234
Ice-covered areas

> Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

The enactment by the federal government of the Arctic Waters Pollution Prevention Act (R.S.C. 1970 (1st Supp.), c.2) in 1970 following the transit of the *SS Manhattan* through the North West passage raised the question of whether Canada had legislated in violation of international law, by *inter alia* providing for the specification of construction, design, and navigational standards for all vessels in a 100 nautical mile zone adjacent "to the mainland and islands" of the Canadian Arctic. Since then, Canada has sought to justify its position to the international community most notably at UNCLOS III. Largely due to the Canadian initiative, the final Convention contains a clause (Art. 234) specifically addressed to coastal state jurisdiction over vessel source marine pollution in ice - covered areas. Potentially the provision may be utilized by the U.S. (Alaska), Canada, Norway (Spitsbergen), Denmark (Greenland), and the Soviet Union.

This provision, however, will not resolve questions of the extent and nature of Canadian jurisdiction over Arctic waters in the event that further commercial proposals are made to ship oil, liquefied natural gas, or hard minerals either from Canadian or Alaskan locations using foreign flag vessels throughout the year. Article 234 is confined to coastal state jurisdiction within the exclusive economic zone (EEZ), *i.e.,* that 200 nautical mile zone lying seaward of the territorial sea. But are Canadian Arctic archipelagic waters merely an EEZ area? Is Canada forced to rely on Article 234 or can its jurisdiction be justified upon other principles of international law?

The answer to this question could hardly be more uncertain. For most of this century, beginning with the sector theory, the Canadian government has equivocated on the precise status of these waters. Are the waters historic internal waters? Are they internal waters on the theory that straight baselines could be drawn around all or major parts of the archipelago? Do any of the waters constitute an international strait? Or, are the waters simply constituted by the usual

progression of internal waters, territorial sea, and exclusive economic zone? It is difficult to determine the character of Canadian claims in this regard but the question is fundamental to the application of Article 234. If the waters are historic internal waters, then reliance on Article 234 is unnecessary throughout the Canadian archipelago. Its significance would be confined to the Beaufort Sea region, the area to the north of the archipelago and perhaps areas of the Davis Strait - areas where Canada would be unable to make either an historic or straight baselines internal waters argument. Of course, Canada's equivocal claims are but one aspect of the problem. Equally, if not more important for the purposes of international law, are the reactions of other states to Canadian claims to particular forms of coastal jurisdiction. It is unlikely, for example, that the U.S. will quietly acquiesce to a Canadian claim of historic internal waters which would have the effect of denying U.S. flag oil tankers a right of innocent passage through Canadian archipelagic waters on transit from Prudhoe Bay to the eastern seaboard. Nevertheless, if Canada is not to be forced back to reliance on Article 234, it is imperative that an unambiguous practice be developed to bolster an assertion of historic internal waters. The recent Green Paper on Lancaster Sound issued under the authority of the Minister for Indian Affairs and Northern Development represents a step in the right direction in this context. The paper contains a clear and explicit claim to the waters of Lancaster Sound as Canadian internal waters based on a "series of legislative and administrative acts" manifested over a lengthy period of time.

If, in the last resort, the Article must be used to buttress Canadian Arctic marine jurisdiction, it will still present difficult problems of interpretation, for the Article is not free from ambiguity. For example, is the coastal state permitted to enact and enforce laws which have the effect of prohibiting passage through these areas, or does the phrase "due regard for navigation" require that navigation by appropriate vessels be permitted at all times of the year? A broad use of the Article might be based on the following argument.

Canada, as a coastal state, may adopt and enforce laws preventing, reducing, and controlling vessel source marine pollution. Marine pollution, as defined in the Convention, includes the introduction of energy into the marine environment which is likely to result in deleterious effects such as hindrance to marine activities including fishing and other legitimate uses of the sea. It has been argued that the regular passage of ice breaking vessels would so fracture the ice that traditional Inuit use of the sea ice and its resources will be severely jeopardized if not prevented. Surely such a disruption will come within the definition of marine pollution as defined by the Convention, thus permitting Canadian legislative and enforcement action. However, it is to be noted that such legislation must be both non-discriminatory and have due regard to navigation.

Article 234 therefore poses two different problems for Canada: to which waters should it be applied, and if forced to rely upon it, how broadly may it be interpreted?

N.D. Bankes

Seabed Mining: How Canada Fared

One of the major obstacles that confronted UNCLOS III in the negotiation of a Convention acceptable to both developed and developing states was the conclusion of an agreement on a regime for seabed mining, that is, for the recovery of polymetallic nodules lying on the deep seabed. Ultimately, the price for such an agreement was the refusal of the United States to sign the Convention, with potentially serious consequences for the stability of seabed development.

In brief, the Convention establishes an International Sea-bed Authority with responsibility to develop the resources of the seabed beyond the limits of national jurisdiction (the Area). It also sets out in some detail the composition, powers, and procedures of the Authority's principal organs - the Assembly, the Council, and the Secretariat - and of the organ created to carry out activities in the Area, the Enterprise. While the Enterprise will be the public international vehicle for exploiting the seabed, provision is also made for parallel access by private consortia, subject to certain terms and conditions. Essentially, it was the nature of this access - how much? on what terms? under whose control? - that caused a serious rift in the Conference, and led to the eventual refusal of the U.S. to sign the Convention. One of the major areas of disagreement with respect to access is of special concern to Canada - production controls.

At the Conference, Canada was one of the countries most concerned with the regulation of seabed mining. Of the four minerals recoverable in significant quantities from polymetallic nodules - nickel, copper, cobalt, and manganese - Canada is a leading producer of two, nickel and copper. It was, therefore, a primary goal of the Canadian delegation that, whatever the regime introduced for seabed mining - public, private, or a combination of both - there should be some controls in place to ensure an orderly transformation of the market, such that land-based producers would not be confronted suddenly with massive new additions to supply.

Canada's major concern was with respect to the nickel industry, where the relative impact of seabed production would be much greater than for copper. Certainly Canadian sulphide deposits of nickel have a clear cost advantage over recovery from nodules. However, Canadian authorities have been concerned that, for reasons such as national security, countries may be willing to subsidize - overtly or indirectly - such seabed operations. This is a possibility that has been mooted frequently in the U.S., especially with respect to such minerals as manganese and cobalt. For different reasons, it has also been suggested that the Enterprise may be heavily subsidized, both directly and indirectly, in its operations.

Given this background, how has Canada fared with respect to seabed mining at UNCLOS III? The answer must be that, assuming the effectiveness of the Convention, Canada has done about as well as it could have hoped. On the key question of production controls, the Convention adopts essentially the same formula as that introduced in an earlier negotiating draft, the Informal Composite Negotiating Text/ Revision 2 (April 1980). This position, reflected in Article 151 of the Convention, addresses two aspects which have been heavily debated at UNCLOS III: the appropriate share of growth in nickel consumption for which seabed production would be entitled to compete, and a production "floor" for which seabed producers could compete *regardless* of rates of growth in nickel demand. As to the former, despite pressure from countries with interests in seabed technology for a higher figure, nodule producers will be restricted to a

production ceiling of sixty percent of the growth in nickel demand.

More crucial is the second issue - the production floor. The U.S. especially was concerned that low rates of growth in nickel demand, and concomitantly low production ceilings, would unduly restrict seabed exploitation by private interests. This had added importance in that Article 151(5) reserved the first 38,000 tonnes of the initial production quota to the Enterprise. Accordingly, strong pressure was exerted for different variants of production floors - whether in absolute tonnages or as "guaranteed" growth rates. Even the more moderate proposals in this respect reflected assumed rates of demand growth of approximately 4.5 percent, well above most forecasters' expectations.

In this light, the floor finally adopted in the Convention, whereby trend lines are established assuming a minimum rate of growth in nickel demand of three percent (using, of course, the actual growth rate if it exceeds three percent), must be regarded as a satisfactory compromise for Canada. This is especially true given the clear competitive advantage of Canadian sulphide ores compared to other existing producers relying on laterite deposits of nickel. If market penetration from seabed mining does occur, it seems probable that these other producers will suffer most.

While the Convention is acceptable to Canada as a nickel producer, the U.S. has made it clear that it is not a document it can live with, not only with respect to production controls, but also with respect to certain other aspects of the system for exploitation. It therefore remains to be seen whether American intransigence with respect to seabed mining will result in the effective negation of the seabed provisions in the Convention. The crucial test will obviously be whether other major nickel consumers, possessing seabed technology, are persuaded to follow the American example.

Owen Saunders

Natural Resources Law Essay Prize

To encourage student legal research, the Institute is pleased to announce the creation of an annual essay prize in the amount of $1,000.00. The prize will be awarded for the best paper on any aspect of natural resources law and is open to all law students at Canadian universities. The award will be presented only if a paper merits it. The selected essay will normally be published by the Institute.

Papers should be submitted to the Selection Committee, Canadian Institute of Resources Law, by June 30 of the year of application.

Publications

Petroleum Operations on the Canadian Continental Margin - The Legal Issues in a Modern Perspective, by Ian Townsend Gault. Canadian Continental Shelf Law 1; Working Paper 2. 1983. ISBN 0-919269-05-2. 113 p. $8.00

This paper presents an overview of the primary legal issues which arise in the context of oil and gas exploration, development, and production from the Canadian offshore. It commences with a survey of international law applicable to offshore development in Canada, the Convention on the Continental Shelf and relevant provisions of the Convention on the Law of the Sea, and the various conventions and other agreements dealing with liability and compensation for marine oil pollution from ships and installations. Problems arising from the conflicting uses of the seas are also examined.

The section on Canadian law examines conceptual issues - the extent of Canada's continental margin, problems with jurisdiction in the Arctic, the federal-provincial offshore dispute, and the Canada-Nova Scotia Offshore Resources Agreement. The impact of the National Energy Program and the Canada Oil and Gas Act is assessed, and problems with the Program and foreign owned or controlled oil companies are examined. The structure and mandate of the Canada Oil and Gas Lands Administration is outlined.

The paper concludes with an outline of the issues arising in connection with offshore installations and environmental issues including the Federal Environmental Assessment and Review Process, provisions of the Oil and Gas Production and Conservation Act, and attempts to indicate areas of uncertainty where legislative or regulatory action is required.

Resources Law Bibliography.
1980. ISBN 0-919269-01-X. 537 p. $19.95

Environmental Regulation - Its Impact on Major Oil and Gas Projects: Oil Sands and Arctic, by C.D. Hunt and A.R. Lucas. 1980. ISBN 0-919269-001. 168 p. $10.95

Introduction to Oil and Gas Law, by Canadian Association of Petroleum Landmen and Canadian Institute of Resources Law. 1981. 300 p. $30.00

A Guide to Appearing before the Surface Rights Board of Alberta, by Laureen Ridsdel and Richard J. Bennett. Working Paper 1. 1982. ISBN 0-919269-04-4. 70 p. $5.00

Environmental Law in the 1980s: A New Beginning,
Proceedings of a Colloquium, The Banff Centre, November 27-29, 1981, Peter Z.R. Finkle and Alastair R. Lucas, eds.
Proceedings 1. ISBN 0-919269-05-2. 233 p. $13.50

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