Will Canada Ratify the Law of the Sea Convention?

TED L. MCDORMAN*

INTRODUCTION

Canada, a major ocean user, has the longest coastline in the world, and is a littoral state on three oceans. Canada has extensive economic interests in fisheries and offshore hydrocarbon and mineral development which make it a major trading nation with a consequent interest in shipping. Not surprisingly, Canada was a major participant during the Third United Nations Conference on the Law of the Sea (LOS Convention or UNCLOS III) when the ocean regime for the future was being discussed.1 After a decade of negotiations, the Conference produced the 1982 United Nations Convention on the Law of the Sea,2 one of the major accomplishments of international diplomacy, consisting of 320 articles and nine annexes.

The 1982 LOS Convention attempts to establish the law and to act as a guidepost for state action in almost all aspects of human interaction with the seas. An overwhelming majority of states have signed the LOS Convention. However, the Treaty will come into force only for those states ratifying it one year following the receipt of the sixtieth ratification. As of November 15, 1987, thirty-four states have ratified.

* Visiting Assistant Professor, University of Victoria, Faculty of Law, Victoria, Canada; University of Toronto, B.A. 1976, LL.B. 1979, LL.M. 1982, Dalhousie University.


The LOS Convention strikes a balance between the interests of coastal and maritime states. The major thrust of the Treaty is to restrain the seaward extension of coastal state jurisdiction, ensuring continued navigational freedoms for maritime states. This thrust is most evident from the Treaty's transit passage regime which guarantees unrestrained vessel passage through international straits; the restraints placed upon coastal states regarding enacting and enforcing laws interfering with a vessel's right of innocent passage through the territorial sea; and the virtual freedom of navigation that continues to exist in the 200 nautical mile exclusive economic zone.

An equally important part of the LOS Convention is the recognition of an area of the ocean remaining open to traditional high seas freedoms. Furthermore, the deep ocean floor lying beyond national jurisdiction is to be for the "Common Heritage of Mankind," with its resources to be harvested for the benefit of all nations. It was this desire to ensure that an area of the seabed be recognized as the Common Heritage of Mankind that inspired the United Nations in the mid-1960s to commence a reevaluation of ocean law. The minerals of the deep ocean floor which became identified with the international seabed area were nickel, copper, cobalt, and manganese. These minerals were found in polymetallic nodules at a depth of 5,000 meters in the Pacific, Indian, and Atlantic oceans. In the early stages of UNCLOS III these polymetallic nodules were perceived to have great wealth-generating potential. Although this potential is recognized, it will not be until well into the twenty-first century that the mineral wealth will be harvested.

At UNCLOS III, the Canadian negotiators were uncommonly successful in promoting Canada's interests and in having the Canadian position accepted in the wording of the LOS Convention. Canada's posture was that of a coastal state, seeking the seaward expansion of national jurisdiction in order to recover and control the resources existing in its adjacent offshore areas, while enabling Can-

---

3. Id. arts. 37-44.
4. Id. arts. 17-27.
8. An optimistic perspective on the long-term economics and abundance of polymetallic nodules is presented by E. Borgese, supra note 7, at 32-34.
ada to protect its coastal marine environment.9

Four specific Canadian interests were recognized by the LOS Convention. Article 234 deals with Canadian concerns regarding a special environmental regime for Arctic waters.10 Article 76 recognizes the right of a coastal state to exercise jurisdiction over the geologic continental shelf, where the shelf extends beyond 200 nautical miles, as is the case on Canada's east coast.11 Article 151 provides protection for land-based suppliers of mineral resources from competition of deep seabed mineral resources, an obvious value to Canadian mineral interests.12 Finally, Article 66, the “salmon provision” initiated by Canada, recognizes the state of origin's special right to conserve and manage salmon stocks while virtually banning salmon harvesting on the high seas.13

The complexity of the LOS Convention resulted in every state's hopes not being fulfilled. Although Canadian negotiators were very successful, some negotiating goals were unattainable. The best example is the innocent passage regime in the Treaty, which Canada had hoped to have included in the Treaty provisions. This regime would allow coastal states to legislate and enforce national standards of vessel construction, design, equipment and manning. It would also permit coastal states to declare as non-innocent, any passage which threatened to pollute.14 However, the Treaty only allows coastal states to enact and enforce international standards regarding vessel construction, design, equipment and manning, with passage being non-innocent only when pollution is willful and serious. Canada has

---

12. Although the production limitation provision was not originated by Canada, it became defined as a Canadian issue. See Hage, Canada and the Law of the Sea, 8 MARINE POL'Y 2, 10 (1984); Filardi, Canadian Perspectives on Seabed Mining: The Case of the Production Limitation Formula, 13 OCEAN DEV. & INT'L L.J. 457 (1984).
13. Hage, supra note 12, at 6; Johnson, Canadian Foreign Policy and Fisheries in CANADIAN FOREIGN POLICY, supra note 1, at 79-82, 89-90.
viewed these provisions as being less than ideal but an improvement over the pre-existing legal standard.\textsuperscript{15}

Compromises, a major part of the UNCLOS III process, made the Treaty an indivisible whole, a package deal. As a result, if states accept only those parts of the Treaty they like, while rejecting the rest, the entire negotiating process will be viewed by many as a failure. Hence, while a buffet approach to the lengthy LOS Convention is an appealing one, the idea of individual states picking and choosing only the positive aspects of the text is decried by the major parties that negotiated the Treaty. At the closing ceremonies, UNCLOS III President T.T.B. Koh of Singapore stated:

Although the Convention consists of a series of compromises and many packages, I have to emphasize that they form an integral whole. This is why the Convention does not provide for reservations. It is therefore not possible for States to pick what they like and to disregard what they do not like. In international law as in domestic law, rights and duties go hand in hand. It is therefore legally impermissible to claim rights under the Convention without being willing to assume the corollary duties.\textsuperscript{16}

At the signing ceremony for the LOS Convention, Canadian External Affairs Minister Allan J. MacEachen extolled the virtues of the Treaty and stated how important the new Treaty was for Canada.

The Convention sets out a broad range of new rights and responsibilities. If States arbitrarily select those they will recognize or deny, we will see not only the end of our dreams of a universal comprehensive convention on the law of the sea but perhaps the end of any prospect for global cooperation on issues that touch the lives of all mankind. We must not — we cannot — allow that to happen. The United Nations Convention on the Law of the Sea, and that alone, provides a firm basis for the peaceful conduct of ocean affairs for the years to come. It must stand as one of the greatest accomplishments of the United Nations and worthy of the support of every nation.\textsuperscript{17}

Despite the success of Canada at the negotiating table, the fact that Canada is one of the major beneficiaries of the new law of the sea, the recommendation of the House of Commons Special Joint Committee on Canada’s International Relations that Canada ratify the Treaty,\textsuperscript{18} and the confident words of some Canadian officials about ratification,\textsuperscript{19} five years after completion of the LOS Conven-

\textsuperscript{17} Id. at 16.
\textsuperscript{18} INDEPENDENCE AND INTERNATIONALISM: REPORT OF THE SPECIAL JOINT COMMITTEE ON CANADA’S INTERNATIONAL RELATIONS 43 (1986).
\textsuperscript{19} It has been reported that in response to the question whether Canada might not ratify the LOS Convention, the Legal Adviser to External Affairs, Len Legault said, “That’s a policy question I can’t answer, but put it this way: I’ve never thought of it.”
tion Canada has offered few hints about its decision on ratification. As a signatory to the Treaty, Canada is obliged not to take action which would "[d]efeat the object and purpose" of the Treaty until such time as ratification takes place or until a policy of non-ratification is formally announced. This article will outline the issues that must be faced, and the concerns that must be balanced in answering the question of whether Canada will ratify the 1982 LOS Convention.

The question of Canadian ratification of the LOS Convention will be addressed from three perspectives: as a question of oceans policy; of economic policy; and of foreign policy. These three perspectives are not mutually exclusive and the division suggested is recognized as artificial; however, the perspective which is dominant at the time the decision on the Treaty is made will determine the outcome. Before turning to the question of Canadian ratification, it is first neces-

THE LOS CONVENTION: THE FIRST FIVE YEARS

United States' Actions

The major event that has colored the first five years following the completion of the LOS Convention occurred just prior to the Treaty's conclusion. In the final negotiating sessions, the United States reassessed the goals they were seeking to attain through the completion of a new, comprehensive ocean treaty. The goal of previous administrations had been to protect navigational rights. Evaluating the situation in the early 1980s, the Reagan Administration viewed navigational rights as sufficiently protected by customary international law evolving from state action pursuant to UNCLOS III. The goal of the Reagan Administration in the UNCLOS III


negotiations was to stress security of supply of strategic minerals.\textsuperscript{23} This was a change from the previous policy of trading-off access to deep seabed minerals for protection of navigational rights. The United States became very concerned about the deep seabed regime envisioned in the LOS Convention, especially the role that the International Seabed Authority was to play with respect to the harvesting of and the access to minerals on the deep ocean floor. Despite last minute efforts at compromise and several important concessions,\textsuperscript{24} the United States viewed the LOS Convention provisions regarding the deep seabed regime as "fatally flawed" and decided not to sign the Treaty.\textsuperscript{25} Also, the United States declined to participate in the Preparatory Commission, the body designed to establish the technical regulations regarding seabed mining that are to guide the International Seabed Authority.\textsuperscript{26}

The United States viewed the deep seabed regime to be established by the LOS Convention as detrimental to its interests for the following reasons: the decision-making in the regime did not fairly reflect the political and economic interests or the financial contribution of participating states; access to the seabed resources was not guaranteed to qualified entities; the regime was perceived as being detrimental to the development of deep seabed resources; and the regime would set an undesirable precedent for other international organizations.\textsuperscript{27} The United States was also unhappy with the LOS

\begin{itemize}
  \item \textsuperscript{23} Id. at 1011. On the importance of access to strategic minerals, see The Law of the Sea Convention, excerpts from a White House Office of Policy Information Paper (April 15, 1983), reprinted in 26 No. 2 OCEANUS 74-76 (1983); Pendley, The U.S. Will Need Seabed Minerals, 25 No. 3 OCEANUS 12-17 (1982). One commentator has described the changing position on the LOS Convention as being the result of a perception that the United States and Soviet Union were about to engage in a resources war over strategic minerals and the LOS Convention might inhibit U.S. access. Kimball, Turning Points in the Future of Deep Seabed Mining, 17 OCEANUS 74-76 (1986).
  \item \textsuperscript{24} For details regarding the last negotiating session in 1982, see Recent Developments in the Law of the Sea 1981-1982, 20 SAN DIEGO L. REV. 679, 679-704 (1983); Report of the U.S. Delegation-Eleventh Session, March 8 to April 30, 1982, reprinted in Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea 532 (M. Nordquist & C. Park eds. 1982). Canada's role in trying to bridge the gap between the Group of 77 and the United States at the last negotiating session is described in Hage, supra note 12, at 12-13. The most important concession formulated in the last session was the resolution on Preparatory Investment Protection (PIP) ultimately adopted as Resolution II of UNCLOS III.
  \item \textsuperscript{25} For discussion concerning the decision to reject the LOS Convention, see Larson, The Reagan Rejection of the U.N. Convention, 14 OCEAN DEV. & INT'L L. 337 (1985).
  \item \textsuperscript{26} On the Preparatory Commission, see Paolillo, The Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea, in ESSAYS ON THE NEW LAW OF THE SEA 321 (B. Vukas ed. 1985).
  \item \textsuperscript{27} The reasons why the Treaty was rejected by the United States have been set out in numerous places, for example see statement of Ambassador James L. Malone to UNCLOS III, April 30, 1982, reprinted in Nordquist and Park, supra note 24, at 594-97; Bandow, UNCLOS III: A Flawed Treaty, 19 SAN DIEGO L. REV. 475 (1982);
\end{itemize}
Convention amendment process which might make amendments binding on parties whether they concurred with the proposed amendment or not.28 Also, the United States did not like the transfer of technology provisions that were part of the deep seabed mining regime.29

Despite the perceived problems with the Treaty noted above, the real difficulty the United States had with the LOS Convention was ideological. The deep seabed provisions promoted wealth redistribution principles as espoused in the New International Economic Order.30 Former United States law of the sea negotiator Leigh Ratiner explained the United States’ rejection of the Treaty: “[The LOS Convention] established a mixed economic system for the regulation and production of deep seabed minerals and, as a matter of principle, the Reagan Administration could not, consistent with its free enterprise philosophy, have done otherwise [than reject the Treaty] when the time came to vote.”31

The United States non-participation immediately raised questions about the future of the LOS Convention and whether it would be


worth pursuing without United States involvement. An overwhelming majority of states voted in favor of the Treaty in 1982. and 159 states and other entities have signed the LOS Convention. The only major United States allies not to sign the Treaty are the United Kingdom and the Federal Republic of Germany, although both participate in the work of the Preparatory Commission as observers. Few states thus far have rejected the LOS Convention outright; even the United Kingdom and the Federal Republic of Germany have kept their options open. Malcolm Rifkind, British Minister of State, Foreign and Commonwealth Office, stated in the British House of Commons that although the United Kingdom was not going to sign the Treaty:

It would be open to the United Kingdom, or to other countries which have not signed, to become a party to the convention if in the future it is improved in a way that we would find appropriate. . . . We have not followed the United States. We have insisted on participating in the [P]reparatory [C]ommission and have shown our willingness in certain circumstances to accept the desirability of signing the convention, while the United States has taken a harsher position on most of the issues.

The general mood is that the LOS Convention can succeed without the United States, although it remains to be seen whether the western nations will move out of step with the United States.

United States policy regarding the LOS Convention has been to express general support for the provisions of the Treaty not dealing with the deep seabed mining regime, although on specific issues the United States has continued to disagree with the Treaty. One such issue is coastal state jurisdiction over tuna, provided in Article 64 of the LOS Convention. The United States has continued to assert that tuna does not fall within coastal state jurisdiction.

32. Only four states voted against the Treaty: the United States, Venezuela, Turkey and Israel. Seventeen states abstained: Belgium, Bulgaria, Byelorussia, Czechoslovakia, the German Democratic Republic, the Federal Republic of Germany, Hungary, Italy, Luxembourg, Mongolia, the Netherlands, Poland, Russia, Spain, Thailand, the Ukraine, and the United Kingdom. The 130 votes in favor included Australia, Canada, China, Denmark, France, Iceland, Ireland, Japan, New Zealand, Norway, Switzerland and Sweden.

33. The only non-signatory states as of October 31, 1986 were: Albania, Ecuador, the Federal Republic of Germany, Holy Sea, Israel, Jordan, Kiribati, Peru, San Marino, Syria, Tonga, Turkey, the United Kingdom, the United States, and Venezuela. Four entities have signed the Treaty: the Cook Islands, Namibia, Niue and the European Economic Community.


36. Id. See generally Harrison, Costs to the United States in Fisheries by Not Joining the Law of the Sea Convention in Consensus and Confrontation: The United States and the Law of the Sea Convention 351 (J. Van Dyke ed. 1985)
The United States proclaimed an exclusive economic zone in 1983 and has taken pains to present its view that those parts of the LOS Convention that protect navigational rights are part of customary international law, most particularly the right of transit passage through international straits. It remains unclear whether the transit passage regime which permits unmolested travel of vessels through international straits is part of customary international law, or is a right available only to parties contracting to the LOS Convention. Generally, the United States has asserted its perceived navigational rights on the basis of the LOS Convention.

The United States has attempted to undermine the envisioned LOS Convention regime regarding the deep seabed by unilaterally granting licenses to United States firms for deep seabed mineral exploration. Additionally, the United States has attempted to build alliances with like-minded deep seabed mining states to establish a regime that would operate outside the LOS Convention. The United States has been unable to entice other mining states into a separate regime, although in August 1984 eight states, including the United States, concluded an agreement entitled the Provisional Understanding Regarding Deep Seabed Mining. This agreement established


38. See Hoyle, Discussion in J. Van Dyke, supra note 36, at 292. Hoyle states: “The U.S. position is that the nonseabed provisions of the Convention are existing international law” (emphasis in original). The United States view that transit passage rights are part of customary international law is well described by Harlow, Comment, 46 No. 2 LAW & CONTEMP. PROBS. 125, 128 (1983).
40. See Statement of President Reagan, supra note 35. See also Department of State statement of March 26, 1986, reprinted in U.S. DEP'T OF STATE BULL., May 1986, at 79.
procedures to avoid conflicts respecting deep seabed mining sites. While some American spokesmen viewed this eight-party Agreement as the commencement of a viable deep seabed regime outside the LOS Convention, states which are parties to the agreement and signatories to the LOS Convention quickly pointed out that the Agreement was consistent with the Treaty.

The "Group of 77" and the Eastern Bloc Countries condemned the 1984 Agreement. In response to United States action, these countries forced the Preparatory Commission to adopt, in August 1985, a declaration stating that any claim, agreement or action respecting deep seabed minerals made outside the LOS Convention regime was "wholly illegal." In 1986, this declaration was extended to condemn the seabed licenses granted by the United Kingdom and Federal Republic of Germany, with most of the western nations again expressing their reservations about the confrontational nature of the declaration.

The Preparatory Commission

The major focus of attention in the post-UNCLOS III era has been upon the work of the Preparatory Commission. This Commission was established by a resolution of UNCLOS III and assigned the task of drafting the detailed, technical rules necessary to implement the provisions of the LOS Convention on deep seabed mining.

See Kimball, supra note 23, at 378. Similar comments were made following the 1982 four party agreement. See Cohen, International Cooperation on Seabed Mining, in B. Oxman, D. Caron, & C. Buredi, supra note 27, at 101, 106.

Kimball, supra note 23, at 378 and in particular note the Japanese view that the 1984 Provisional Understanding is not at variance with the LOS Convention. Hayashi, Japan and Deep Seabed Mining, 17 OCEAN DEV. AND INT'L L.J. 351, 360 (1986).

The Group of 77 is the name given the developing countries' bloc that has emerged within the United Nations system. The Group of 77 was established in the 1960s in order to pursue the common interest of developing countries at the United Nations Conference on Trade and Development (UNCTAD). It is currently comprised of well over 100 countries. See Friedman & Williams, The Group of 77 at the United Nations: Emergent Force in the Law of the Sea, 16 SAN DIEGO L. REV. 555 (1979).


Council on Ocean Law, Oceans Pol'y News, 3-4 (May 1986). The declaration was approved by a vote of 59 to 7, with 10 abstentions. Canada voted against the declaration.

Resolution I of UNCLOS III, Establishment of the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law...
The Preparatory Commission has been left the unenviable task of ensuring that these rules clarify and modify the Treaty to make the LOS Convention deep seabed mining regime acceptable to the major mining states. All of the deep seabed mining states have made it clear that a satisfactory set of operating rules for deep seabed mining is necessary before there can be ratification. External Affairs Minister MacEachen conveyed Canada's position at the signing ceremonies for the LOS Convention:

> The future will depend on how well the Preparatory Commission does its work with respect to sea-bed mining and the outer continental shelf. We know that some Governments have difficulties with the sea-bed mining provisions of the Convention. We hope that these problems can be solved through the development by the Preparatory Commission of rules, regulations and procedures. Canada looks to their satisfactory solution. If the Preparatory Commission adopts a realistic and pragmatic attitude the future is assured.

The work of the Preparatory Commission has proceeded at a steady pace. At times, this work has been overshadowed by attempts to entice the seabed mining states to protect their interests in deep seabed mining by participating in the LOS Convention regime.

The first such enticement was Resolution II of UNCLOS III, the PIP resolution, which provided that entities which were involved in deep seabed mining prior to the completion of the LOS Convention (pioneer investors) would have their investment protected under the international regime. The PIP resolution was a major concession made to the industrialized countries by the developing countries at the last negotiating session. The weight of this concession was made clear from the statement of UNCLOS III Conference President Ambassador Koh:

> I know that what I am asking you to do is to agree, essentially, to make a series of unilateral concessions to the United States and other industrialized countries. But I ask you to bear in mind that the concessions which I am asking you to do not hurt in any significant way, the interests of your group or of your countries. I believe it is a price worth paying in order to

---

50. Kimball, supra note 23, at 375.
51. UNCLOS III, supra note 16, at 15.
enhance the prospects of attracting universal support for our Convention.\(^4\)

Much of the high profile work undertaken by the Preparatory Commission relates to registering the pioneer investors, and dealing with overlapping claims that might be made by them. The Preparatory Commission established that only states which signed the Treaty by December 10, 1984, could seek registration as pioneer investors. Nineteen countries opted to sign the Treaty at the last minute,\(^5\) including the European Economic Community which, by consensus, agreed to sign despite the decisions of the United Kingdom and the Federal Republic of Germany not to sign.\(^6\)

Implementation of Resolution II will require the Preparatory Commission to register the mine sites claimed by the pioneer investors. France, India, Japan and the Soviet Union have stepped forward to indicate their desire to have their mine sites registered and to apply for pioneer status. This action assures these countries of preferential treatment and protection of their mine sites from subsequent miners. The Soviet Union, in particular, has pressed to have its mine sites recognized by the Preparatory Commission in order to attain a preferred status, since it appears that their claims overlap with sites of states currently outside the LOS Convention regime.\(^7\) Several states, including Canada, argued that all overlaps between states currently seeking pioneer status and overlaps with potential applicants had to be resolved before registration could take place.\(^8\)

On September 5, 1986, the Preparatory Commission completed work on an understanding for resolving disputes respecting the overlapping claims to mining sites. The understanding takes into account the interests of the four states seeking immediate pioneering status and the potential applicants for mining sites recognized and named in Resolution II.\(^9\) An important part of the understanding, which

---

\(^4\) Kimball, supra note 23, at 379.

\(^5\) However, the E.E.C. did attach a declaration to its signature indicating that several of its members took the view that deficiencies and flaws existed in the deep seabed regime. The E.E.C., as an entity, does not have direct competence regarding deep seabed mining. See Hardy, The Law of the Sea and the Prospects for Deep Seabed Mining: The Position of the European Community, 17 OCEAN DEV. AND INT'L L.J. 309 (1981); Simmonds, The Community's Declaration upon Signature of the U.N. Convention on the Law of the Sea, 23 COMMON MKT. L. REV. 521 (1986) and comments of British Minister of State, Foreign and Commonwealth Office, Malcolm Rifkind, supra note 34, at 561.

\(^6\) Id. at 379-80.

Ratification as a Question of Oceans Policy

One of the major purposes of the UNCLOS III was to promote uniformity and to prevent the continuing chaos of inconsistent state action respecting the oceans. The most important reason why states are pressing forward with the Conference is widespread dissatisfaction with the existing legal regime, or lack of, it in the oceans. Some believe that respect for certain aspects of the traditional law of the sea is breaking down and that interests protected by that traditional law are being jeopardized. This has been the reaction, for example, to unilateral extensions of the territorial sea and other forms of coastal state jurisdiction. Some believe that the traditional law does not adequately protect current or anticipated interests. This has been the reaction by many states to the conservation and economic problems created by the development of large and highly mobile distant-water fishing fleets. Some believe that the absence of sufficiently precise legal rules to deal with new or newly perceived problems and uses, such as pollution of the marine environment and the development of technology to exploit the deep seabeds, could prejudice their interests.

64. An overview from the United States perspective of events taking place in the 1960s that led to the need for a comprehensive treaty is given in A. Hollick, supra note 21, at 160-70.
65. Stevenson & Oxman, The Preparations for the Law of the Sea Conference,
As a matter of oceans policy the LOS Convention has been extremely important for Canada, since it has provided legitimacy to previous Canadian actions and a stability in ocean matters that benefits Canada. With or without ratification, the advantages of the LOS Convention will probably accrue to Canada. However, it must be determined whether Canadian ratification of the LOS Convention will enhance these advantages and whether other advantages from ratification exist which outweigh any negative aspects the Treaty may have upon Canada's future oceans policy and Canada's predilection to be a non-ratifying "free rider."

The Myth of Unilateralism

Canadians have a perception that, in ocean matters, Canada can take and has taken unilateral action to protect its interests. This perception arose from government action in the 1960s and 1970s when Canada was in the forefront of states which were expanding and consolidating national jurisdiction over the marine environment and the living resources in its adjacent offshore areas. Canada's first unilateral expansion of jurisdiction came in 1964 when Canada claimed a nine nautical mile fishing zone in addition to the traditional three nautical mile territorial sea. Established domestically, this expansion was ineffective in decreasing foreign fishing within the zone and has been described as a "disastrous flop." Also in the 1960s, Canada desired to establish straight baselines along its coasts, in order to ensure that the waters landward of the baselines were under complete Canadian jurisdiction. The United States objected to many of the proposed lines and indicated that it would directly challenge the lines. Canada revised its proposals and, although the baselines announced in 1970 were protested by the United States, no direct challenge was made.

Canada's most adventurous unilateral action was the 1970 Arctic

67. A. Hollick, supra note 21, at 172.
68. Id., at 172-73. In the Arctic, an area of particular sensitivity, Canada opted not to proceed with its proposed straight baselines following criticism from both the United States and the United Kingdom. See McConchie & Reid, Canadian Foreign Policy and International Straits, in Canadian Foreign Policy, supra note 1, at 166 and Gotlieb, Canadian Diplomatic Initiatives: The Law of the Sea in Freedom and Change: Essays in Honour of Lester B. Pearson, 145-47 (M. Fry ed. 1975). Only in 1985 were the straight baselines in the Arctic put in place. Territorial Sea Geographical Coordinates (Area 7) Order, P.C. Order 1985-2739, Sept. 10, 1985, SOR/85-872.

Canada has still not utilized straight baselines to enclose the waters of Hecate Strait, the Bay of Fundy and Gulf of St. Lawrence as internal waters. In 1971 Canada did draw fisheries closing lines in an attempt to prevent foreign fishing in those waters. The fisheries closing lines are a uniquely Canadian phenomenon. See Herman, Proof of Offshore Territorial Claims in Canada, 7 Dalhousie L.J. 3, 7 (1982) and Johnson, supra note 13, at 68.
Waters Pollution Prevention Act\textsuperscript{69} which created a 100 nautical mile pollution prevention zone around Canada’s Arctic coast. Without question, Canada was “ahead” of international law with this action. The United States, among others, vigorously protested the legislation.\textsuperscript{70} The legislation did not come into force until 1972 because of consultations taking place with the affected parties. This resulted in legislation that imposed restrictions on vessels traveling in Canada’s Arctic waters which was generally acceptable to the affected parties.\textsuperscript{71} At UNCLOS III, Canada diligently strove to ensure that the final treaty would support Canada’s Arctic legislation, resulting in the previously mentioned Article 234.

Finally, Canada’s 200 nautical mile fishing zone established in 1977,\textsuperscript{72} was initially perceived by the public as a unilateral announcement. However, by the time it was put in place all the affected parties had concurred.\textsuperscript{73} Moreover, it was clear by 1977 that the 200 nautical mile zone had wide support at UNCLOS III. Thus, no state, even the United States which almost simultaneously announced its own 200 nautical mile fishing zone, was upset by Canada’s action.

In summary, it should be clear that Canada’s past reliance on unilateralism in ocean matters is largely mythical. To be successful, Canada, a middle state without the power of a major state, must proceed in step with international trends, although, of course, Canada can assist in developing new trends.

\textit{Customary Law and Treaty Law}

As a major user of the oceans, Canada benefits from the existence of a stable, definable ocean law. This benefit would be enhanced by Canadian ratification of the LOS Convention and promotion of the

\textsuperscript{69} Arctic Waters Pollution Prevention Act, R.S.C., 1970 (1st Supp.), c. 2 as amended.


\textsuperscript{71} M’Gonigle & Zacher, Canadian Foreign Policy and the Control of Marine Pollution, in CANADIAN FOREIGN POLICY, supra note 1, at 119-20.

\textsuperscript{72} Canada extended its fishing zones to 200 nautical miles by regulations under the Territorial Seas and Fishing Zones Act: Fishing Zones of Canada (Zones 1, 2 and 3) Order, CAN. CONS. REGS. ch. 1547; Fishing Zones of Canada (Zones 4 and 5) Order, CAN. CONS. REGS. ch. 1548; and Fishing Zones of Canada (Zone 6) Order, CAN. CONS. REGS. ch. 1549.

\textsuperscript{73} See Johnson, supra note 13, at 86-87.
Treaty, because the more states that ratify the Treaty, the stronger it will be. Also, reliance upon a treaty is more certain and stable than reliance upon customary international law.

The LOS Convention is a major guidepost for state action regarding the oceans; accordingly, much of the non-institutional aspects of the LOS Convention may emerge as customary state practice, alleviating the necessity for ratification. Already, state practice arising from UNCLOS III, has led to certain aspects of the LOS Convention emerging as part of customary international law. In this way, states are able to adopt parts of the Treaty irrespective of ratification. Which parts of the Treaty have emerged as customary international law is an open debate.74 However, the major jurisdictional regime created by the LOS Convention, the 200 nautical mile exclusive economic zone, is now part of customary international law,75 and eighty-six states have promulgated laws and decrees establishing a 200 nautical mile fishery or economic zone.76 Regarding the territorial sea, 100 states have adopted the twelve nautical mile limit and three states have recently modified their previous limits of more than twelve nautical miles to conform with the LOS Convention.77 While the ability to declare and adopt part of the LOS Convention as customary law poses as an attractive alternative, it must be noted that unlike treaty law, customary international law dealing only in broad concepts, is difficult to determine and enforce.78 Moreover, selective acceptance of provisions relying upon customary law would severely undermine the package deal approach adopted at UNCLOS III and return the oceans to the chaos of conflicting

---

75. Case Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 33 [hereinafter Libya v. Malta case].
claims and tensions that UNCLOS III was designed to rectify.

A potentially important part of the careful balance struck in the LOS Convention was the development of elaborate dispute settlement provisions which increase reliance on treaty law rather than customary law. While Canadian interest in the work of UNCLOS III on dispute settlement provisions was unenthusiastic and there are difficulties with the provisions, the institutionalization of dispute settlement for ocean problems may prove very beneficial to the development of a stable international ocean regime. Canada has recently altered its policy on the acceptance of the International Court of Justice’s compulsory dispute settlement by removing its reservation regarding:

[D]isputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.

Moreover, Canada has recently utilized third party dispute resolution to settle two recent east coast disputes with the United States and France. However, it can also be suggested that the dispute res-


82. Text of the reservation is reproduced in 9 I.L.M. 598 (1970). Notice of removal of this part of Canada’s reservation to the compulsory dispute settlement by the International Court of Justice is reprinted in 24 I.L.M. 1729-30 (1985). Canada changed its position as part of its show of confidence in its argument that the waters of the Arctic are within Canadian jurisdiction. The issue that precipitated Canada’s policy change was the transiting of the Northwest Passage by the U.S.C.G. vessel Polar Sea in the summer of 1985. See McDorman, In the Wake of the Polar Sea: Canadian Jurisdiction and the Northwest Passage, 27 LES CAHIERS DE DROIT 623-46 (1986).


84. Dispute Concerning Filleting within the Gulf of St. Lawrence, award of July
olution provisions of the LOS Convention may restrict a state’s freedom of action in pursuing vital national interests.\textsuperscript{66}

It is interesting to note that the only state in the Western European and Others (WEO) bloc to ratify the LOS Convention is Iceland.\textsuperscript{68} The necessity for a stable international ocean law was an important part of their decision. Iceland’s major concern has always been the protection of its fishing industry. Since 1949 Iceland has pressed for coastal state rights over the resources adjacent to its coast within a reasonable limit. Iceland unilaterally acted to protect its ocean interests in the early 1970s with the enforcement of a 200 nautical mile fishing zone. This action led to a serious problem with fishermen from the United Kingdom and the Federal Republic of Germany, and a subsequent case before the International Court.\textsuperscript{67} Iceland rejected reliance on the International Court in this matter, arguing that vital national interests were at stake. Through UNCLOS III Iceland sought multilateral support for its actions.\textsuperscript{88} At the UNCLOS III signing ceremonies the Icelandic delegate commented that the LOS Convention "represents [a] formidable result," primarily because of the acceptance of the economic zone regime which was so important to Iceland.\textsuperscript{68} On a previous occasion the rep-

---

\textsuperscript{66} 17, 1986 from the Arbitral tribunal established by the Agreement of October 23, 1985 between Canada and France. The case involved interpretation of the Agreement between Canada and France on their Mutual Fishing Relations, done at Ottawa, Mar. 27, 1972, reprinted in U.N. LEG. SERIES, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, 570 (1974).

\textsuperscript{67} Compulsory dispute settlement of international disputes has never been attractive to states. Diplomacy remains the manner in which states prefer to settle disputes. See Giustini, Compulsory Adjudication in International Law: The Past, The Present, and Prospects for the Future, 9 FORDHAM INT’L J. 213 (1986). Given the important exceptions that exist to compulsory dispute settlement under the LOS Convention, Articles 297 and 298, on very few issues will compulsory dispute settlement actually exist.

\textsuperscript{68} Iceland ratified the LOS Convention on June 21, 1985.


Thus, the Fisheries Jurisdiction Cases constitute the first situation in which a State, Iceland, persisted in its contumacy through all phases of the cases in question. In so doing, it set a precedent for the rash of non-appearances that followed. One can sympathise with Iceland, as a small nation which is almost totally dependent upon its fisheries and on the conservation and management of its fisheries. But one is not debarred thereby from asking whether its failure to appear and to take any procedural actions really served that nation’s interests. Nor is one permitted to ignore the probability that Iceland’s behaviour resulted in irreversible damage to the cause of international adjudication (emphasis in original).

Id. at 57-58.

\textsuperscript{88} See H. Jonsson, supra note 87, at 184-87, 196-207.

\textsuperscript{89} UNCLOS III, OFF. REC, supra note 16, at 101.
resentative, referring to the 200 nautical mile zone, stated: “for a nation like Iceland, whose economy was overwhelmingly dependent on the exploitation of the living resources of the exclusive economic zone, that result alone [acceptance of a 200 nautical mile economic zone] made the long struggle eminently worthwhile.” 90 Japan, as well, perceives that stability is an important product of the LOS Convention; given Japan's dependence on the oceans it has “virtually no alternative” but to accept the Treaty. 91 With these two states taking this view of the Treaty, Canada, with its extensive ocean interests, should view the Treaty similarly.

Entitlements Under the LOS Convention

Canada’s need to proceed in its oceans policy in step with the international community does not in itself provide a reason for ratification of the LOS Convention. A review of the LOS Convention, in particular the entitlements created by the Treaty, reveals that a prima facie pressing need for Canada to ratify the LOS Convention does not exist. Canada put in place a twelve nautical mile territorial sea in 1970 92 and a 200 nautical mile fishing zone in 1977. Another component of the Convention’s 200 nautical mile exclusive economic zone concerns marine pollution, and again Canada has already taken measures to protect the marine environment. Part XX of the Canada Shipping Act, 93 dealing with vessel-source marine pollution, was enacted in 1970, partly in response to the *Arrow* oil tanker disaster on Canada’s east coast. 94 The effect of extending Canada’s fishing zones in 1977 was to extend the vessel-source pollution provisions of the

90. *Id.* at 69-70.
91. Hayashi, *supra* note 44, at 353-54. Japan has been unwilling to follow U.S. policy respecting the LOS Convention. One commentator noted that this was “a startling and potentially powerful signal about Japanese postwar foreign policy development.” Rattiner, *supra* note 22, at 1012. Naohiro Kumagai, Deputy Director-General, Law of the Sea Office, Japanese Ministry of Foreign Affairs, commented in 1981:

If the United States opposes participation in the convention and seeks a reciprocal states regime, Japan would face a very difficult dilemma: whether to go along with the United States of America or to be on the other side of the world community. This problem might be one of the most important choices in the post-war history of Japanese foreign policy.

Kumagai, *Commentary*, in *THE LAW OF THE SEA AND OCEAN DEVELOPMENT ISSUES IN PACIFIC BASIN* 37 (E. Miles & S. Allen eds. 1983). Kumagai’s comments gave a clear warning that Japan would not necessarily be following the United States policy on the LOS Convention.

Canada Shipping Act to 200 nautical miles. During the late 1960s and 1970s Canada was viewed as being intensely committed to protection of the marine environment. At UNCLOS III Canada put forward the idea that a pollution control zone regime should be part of the emerging economic zone. This idea was ultimately not accepted. Thus far, Canada has not adopted comprehensive economic zone legislation, preferring to deal with the various aspects of the zone through sectorial legislation.

Canada has also exercised rights over the full extent of the legal continental shelf. Oil and gas permits for offshore areas were issued by the Federal Government in the 1960s and early 1970s covering 1.2 million square miles. Although most of the permits were for areas within 200 nautical miles, some permits were issued for shelf areas 400 nautical miles from the coast and lying as deep as 3,500 meters off the coast of Newfoundland.

While the legal entitlements created by the LOS Convention have already been adopted by Canada, ratification of the LOS Convention would validate Canada’s actions, putting them on a legally stronger base, being grounded on a firm treaty rather than on ever-shifting customary law. This may be of particular importance regarding Canada’s claims in the Arctic.

Article 234 of the LOS Convention, which permits a state to enact and enforce environmental legislation respecting ice-infested waters is more rigorous than the international standard, and is an important part of Canada’s strategy to assert and exercise jurisdiction over the waters of the Canadian Arctic. However, it is difficult for Canada to utilize this provision to justify the 1970 Arctic Waters Pollution Prevention Act since it is unique and part of a treaty not ratified by Canada. The Act was also severely criticized by many states, particularly the United States, as being overly expansionistic and not in conformity with international law. However, the leading Canadian

95. Section 727(2) of the Canada Shipping Act extends the pollution prevention provisions of the legislation to encompass Canadian waters and fishing zones.


98. See Johnson, supra note 13, at 66.
Arctic specialist views Article 234 as an emerging part of customary international law. Also, the only state that has seriously objected to recent Canadian Arctic claims is the United States. Nevertheless, ratification of the LOS Convention would be of assistance to Canada in its claim that the waters of the Arctic archipelago are internal waters.

**Limits on Jurisdiction**

Many hope the LOS Convention will prevent further seaward extensions of national jurisdiction by acting as a brake on coastal state expansion. During UNCLOS III Canada was concerned with the limitation being placed on its seaward national jurisdiction respecting both the water column and the continental shelf. While the LOS Convention consolidates and supports many of Canada's claims to offshore jurisdiction, Canada did not acquire everything it desired. Ratification, arguably, may not be consistent with a flexible oceans policy necessary for responding to future developments, since it may hamper future offshore claims. In the past, Canada has shown a reticence to ratify multilateral treaties which might impose a constraint on its ability to expand its jurisdiction. For instance, Canada did not ratify three of the four Geneva Conventions completed in 1958, since the treaties “could be construed to mean that the unilateral declaration by a state of extending fishing jurisdiction would be illegal.”

**Fishing Resources and the 200 Nautical Mile Limit**

During UNCLOS III, Canada argued for an extended national fishing zone, contending that the resources adjacent to its coasts were in serious decline and, since Canada is the state with the predominant interest in the living resources adjacent to its shores, Canada should be delegated the custodial function of protecting the liv-

---

100. The United States will most likely not ratify the LOS Convention. See infra text accompanying notes 183-84.
101. This was the original goal of the United States which, since the Truman Proclamations, has been “trying to roll back and limit expansive moves of other states.” HOLLICK, supra note 21, at 19.
103. Johnson, supra note 13, at 64.
ing resources. The result of this approach was the 200-nautical-mile fishing zone which was being adopted globally by the end of the 1970s. The custodial aspect of coastal state fisheries jurisdiction, however, was largely ignored in the relevant provisions of the LOS Convention. The fisheries regime that has now emerged gives almost exclusive control over the resources in the 200 nautical mile zone to the coastal state. The international community arbitrarily selected the 200-nautical-mile distance as the extent of the zone.

The potential functional effectiveness of a coastal state regime within EZ limits is obviously impaired by the setting of uniform spatial limits which have no particular relevance to the various managerial activities to be carried out by a coastal state within the zone. The arbitrariness of 200-mile EZ limits, as they are likely to be defined, is especially evident in fishery management and pollution prevention.

This is particularly true for Canada’s east coast where the 200 nautical-mile limit is too narrow to be useful for ocean management, since approximately one-quarter of the famous Grand Banks of Newfoundland fishing grounds are located beyond the 200 nautical mile limit. Hence, foreign vessels can fish with impunity outside Canada’s fishing zone with their actions having a serious impact on the resources located inside the zone. Canada has attempted to combat this problem through the North Atlantic Fisheries Organization (NAFO), a multilateral organization for the distribution of quotas in waters adjacent to Canada’s 200 nautical mile zone. Moreover, Canada has sought to guarantee responsible behavior by foreign fishing fleets outside the zone with quota allocations within the Canadian zone.

104. See Johnson, supra note 13, at 72-73.
105. Although these provisions place some limitations on coastal state control over the fisheries within 200 nautical miles, how these limitations are to be interpreted is a difficult question. See Oda, Fisheries Under the United Nations Convention on the Law of the Sea, 77 AM. J. INT’L L. 739 (1983).
109. Concerning this policy in the 1970s, see Johnson, supra note 108, at 58-59. Fishing vessels from Spain have caused the most difficulty for Canada on the East Coast. Attempts have been made to prevent the Spanish from damaging the stocks outside the 200 nautical mile zone by offering quotas within the zone. See D. VANDERZWAAG, THE FISH FEUD, at 84, n.51 (1983). In 1986 several Spanish vessels were arrested for fishing
At UNCLOS III Canada attempted to have the Treaty acknowledge a special right to manage and control overlapping resources for those states where exploitable living resources extended beyond the arbitrary 200 nautical mile limit.\textsuperscript{110} A vague provision, Article 63(2), was included in the LOS Convention to meet the Canadian demand, but the provision is of limited value.\textsuperscript{111}

Those arguing against Canadian ratification believe it would foreclose the possibility, at least for the immediate future, of unilaterally extending Canadian fisheries jurisdiction to the full extent of the adjacent manageable living resources. To ratify and then take such action would be to materially breach the Treaty. Arguably, it would be better not to ratify the Treaty and later, when the timing was appropriate, extend “functional” jurisdiction over the living resources. Already, an unanimous resolution of the Newfoundland House of Assembly in May 1985, called on Canada to extend fisheries jurisdiction over the entire Grand Banks.\textsuperscript{112}

The Continental Margin Beyond 200 Nautical Miles

Canada took the view at the commencement of UNCLOS III that it was entitled to jurisdiction over the full extent of the continental margin which included the continental shelf, the slope, and the rise.\textsuperscript{113} On the Canadian west coast the continental margin does not extend beyond 200 nautical miles. It appears that this is also the case in the Arctic.\textsuperscript{114} On the east coast, however, the continental margin without permits within Canada’s zone, but only after a chase into the mid-Atlantic. The context of this passage is crucial. Trawlers flee after officers board them, Toronto Globe and Mail, May 24, 1986, at A1.\textsuperscript{110} Hage, \textit{supra} note 12, at 6-7 and Buzan, \textit{supra} note 1, at 159.
114. In 1983 Canadian scientists examined the Alpha Ridge which sits north of Ellesmere Island to see if its composition was continental or oceanic. If the ridge was continental in origin Canada may have been able to claim jurisdiction over the seabed beyond 200 nautical miles. The results, however, indicated that the Alpha Ridge was oceanic and hence, on the basis of Article 76, Canada cannot extend its shelf jurisdiction beyond 200 nautical miles. Concerning the Alpha Ridge scientific expedition, see Ohlendorf, \textit{Staking an Arctic Claim}, \textsc{Maclean’s}, 48 (Apr. 4, 1983). Regarding the results, Jackson, Forsyth & Johnson, \textit{Oceanic Affinities of the Alpha Ridge, Arctic Ocean}, 73 \textsc{Marine Geology} 237 (1986).
margin extends well beyond 200 nautical miles.\textsuperscript{115}

At UNCLOS III there was significant pressure placed on states with extensive continental margins to accept their seabed jurisdiction as terminating at the 200 nautical mile limit. The broad margin states rejected this and ultimately a very complicated formula was agreed upon (Article 76) by which the broad margin states can exercise jurisdiction over the continental margin to almost the full extent of the geologic shelf.\textsuperscript{116} Only a small portion of the continental margin is lost to the coastal state, with the formula being drafted so that it is extremely unlikely that any hydrocarbon resources would be lost to the adjacent coastal state.\textsuperscript{117}

For the non-broad margin states, the key aspect of the ultimate compromise was that broad margin states would have to determine their seaward continental margin boundary which would be duly publicized and scrutinized by the Commission on the Limits of the Continental Shelf established by Annex Two of the LOS Convention.\textsuperscript{118} Following this procedure, the outer limit would be firmly fixed. Although Canada largely accepted the formula on the determination of the continental margin outer limit and adopted the wording of Article 76(1) in its legislation,\textsuperscript{119} Canada has expressed its reservations regarding the role of the Commission, noting that it was Canada’s view that the Commission was to be advisory only, and not a body that could make its own determination of the outer limit.\textsuperscript{120}

A state has ten years following ratification or the coming into force of the LOS Convention to comply with Article 76. Those arguing against ratification would take the view that Canada should not be constrained by the Treaty in establishing boundaries, particularly where the role of the Commission is unclear. Moreover, the formula-

\begin{footnotes}
\item[115] See generally McDorman; supra note 11; and Crosby, supra note 11.
\item[116] Id. and Kerr & Keen, supra note 11. Iceland has proceeded to make a detailed claim respecting shelf areas beyond 200 nautical miles explicitly based upon Article 76. Regulation No. 196, May 9, 1985, concerning the Delimitation of the Continental Shelf to the West, South and East, reprinted in 8 LAW OF THE SEA BULLETIN, 10-13 (Nov. 1986). The Icelandic claim is discussed in detail in Symmons, The Rockall Dispute Deepens: An Analysis of Recent Danish and Icelandic Actions, 35 INT’L & COMP. L.Q. 344 at 360-67 (1986). Ecuador and Chile have also made extensive shelf claims that appear to rely upon Article 76. See Ramakrishna, Bowen & Archer, Outer Limits of Continental Shelf: A Legal Analysis of Chilean and Ecuadorian Island Claims and U.S. Response, 11 MARINE POLICY 58 (1987).
\item[118] Concerning the Commission see McDorman, supra note 11, at 206-09 and 1 E. BROWN, SEA-BED ENERGY AND THE LAW OF THE SEA 4.12-4.16 (1984).
\item[120] McDorman, supra note 11, at 206-07.
\end{footnotes}
tion in Article 76 is complex and much of the information required is not available;\textsuperscript{121} therefore, it could be argued that it is better to avoid the obligation than to establish the outer limit and be surprised by new technology or information, since a fixed boundary may be impossible to move. A further aspect of the continental margin beyond 200 nautical miles is the revenue sharing provision (Article 82). This provision obligates states with extended continental margins to return a small percentage of resources found beyond 200 nautical miles to the International Seabed Authority.\textsuperscript{122}

Seabed Mineral Resources Beyond 200 Nautical Miles

Once the International Seabed Authority is in place it will undoubtedly become a powerful advocate against states seeking to expand jurisdiction over seabed resources beyond that which is permitted by the LOS Convention. Most discussions on deep seabed mining have involved polymetallic nodules, but discoveries may bring to light new and potentially more accessible mineral resources on the deep ocean floor. Examples of this are polymetallic sulfides, found around hot water vents on the deep ocean floor containing sulphur, copper, iron and zinc, and cobalt-rich manganese crusts which have been located on seamounts in the Pacific Ocean containing cobalt, manganese, nickel and platinum.

On the Canadian west coast there have been polymetallic sulfide finds that are beyond but adjacent to the 200-nautical-mile limit. No manganese crusts have been located in or adjacent to Canada's 200 nautical-mile zones.\textsuperscript{123} The Juan de Fuca Ridge is the area of most interest for polymetallic sulfides. This ridge follows a zig-zag pattern along the coast of western North America. Four areas of sulfides have been identified; two of them falling within 200 nautical miles off Canada's shore and two falling outside the 200 nautical mile limit.\textsuperscript{124} The LOS Convention appears to include polymetallic sulfides within the minerals to be managed by the International Seabed Authority where they are located beyond national jurisdiction.\textsuperscript{125}

\textsuperscript{121} Kerr & Keen, \textit{supra} note 11, at 145-46, indicate some of the problems with applying Article 76 particularly on the east coast of Canada.
\textsuperscript{122} See infra text accompanying notes 159-60.
\textsuperscript{125} Meese, \textit{The Legal Regime Governing Seafloor Polymetallic Sulfide Deposits}, 17 \textit{Ocean Dev. and Int'l} L. 131, 141-43, 146-49 (1986).
However, some have suggested that the negotiators at UNCLOS III never contemplated polymetallic sulfides as being part of the deep seabed mining regime and, therefore, a jurisdictional vacuum exists into which national jurisdiction may flow. At UNCLOS III the United States unsuccessfully attempted to draw a distinction between polymetallic sulfides and polymetallic nodules. The United States wanted only the latter to come under the jurisdiction of the International Seabed Authority.\(^2\)

Without question the primary focus of the UNCLOS III negotiators in devising the deep seabed mineral regime was on polymetallic nodules and not on sulfides or manganese crusts. It appears, therefore, that some of the provisions of the Treaty are unworkable with respect to sulfides and manganese crusts.\(^2\)

In 1982, the United States gave notice of its claim respecting the polymetallic sulfides on the Juan de Fuca and Gorda Ridges adjacent to the United States west coast. The notice imposes no limit on United States jurisdiction respecting polymetallic sulfides.\(^2\) Ratification of the LOS Convention with the consequent support for the Common Heritage of Mankind principle for resources of the deep ocean floor beyond national jurisdiction would make it very difficult to justify any extension of national jurisdiction to include polymetallic sulfides that do not exist within 200 nautical miles.

**Bilateral Jurisdiction Issues - Boundaries**

Canada has a large number of unresolved bilateral ocean boundaries. With the United States, maritime boundaries do not exist in the Beaufort Sea,\(^2\) between British Columbia and Alaska,\(^3\) seaward of the Strait of Juan de Fuca,\(^4\) and seaward of the recently delin-
Will Canada Ratify UNCLOS III?
SAN DIEGO LAW REVIEW

The French islands of St. Pierre and Miquelon off the coast of Newfoundland create both fisheries and boundary problems between Canada and France. Finally, the agreement between Canada and Denmark delimiting the continental shelf between Greenland and the Canadian Arctic is incomplete as it does not extend into the Arctic Ocean. Additionally, controversy exists over a disputed island that causes a small gap in the boundary line. Canada has always been very careful in reviewing international obligations to determine their impact upon bilateral boundary issues because of the domestic political sensitivity of boundary problems.

The LOS Convention provides no real guidance to states in solving maritime boundary disputes arising from overlapping economic zones or continental shelves, except regarding the delimitation of overlapping territorial seas. Articles 74 and 83, which deal with the economic zone and continental shelf, respectively, are almost identical. These articles, which require parties to solve their disputes by agreement in order to reach an equitable solution, were an unhappy compromise reached only at the last sessions of UNCLOS III. Pending agreement, states are to enter into provisional arrangements. The International Court of Justice in the 1985 Libya-

macy in Deep Water, 38 No. 6 Behind the Headlines, 7, 21, 24-25 (1981). However, the discovery of polymetallic sulfides in this region has created some interest. See Charney, supra note 127, at 42, n.145.

132. Canada and the United States had the International Court deal only with overlapping 200 nautical mile zones. There remains an area of continental shelf beyond this which is still disputed. See Gulf of Maine Case, 184 I.C.J., at 266, para. 21.

133. In January 1987 Canada and France agreed "to initiate negotiations with a view to concluding . . . a Compromise (Special Agreement) which shall submit to compulsory third party settlement" the boundary dispute. The Compromise was to have been finalized by December 31, 1987.


135. Article 15 of the Treaty provides that an equidistance line is to be utilized unless historic title or special circumstances require a different method.

136. Concerning the negotiating history of the provisions, see S. JAGOTA, MARITIME BOUNDARY 219-72 (1985) and Brown, supra note 118, at I.10.2-22.

Malta Continental Shelf Case stated: “The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves, or to courts, to endow this standard with specific content.” Thus, regarding bilateral maritime boundary issues, the LOS Convention is neither a hindrance nor a help to Canada.

Navigational Interests

Although Canada is primarily a coastal state, it is a user of ocean transport and a member of the Western military bloc. Therefore, Canada has an interest in maritime and naval issues and in ensuring that vessels are not subject to arbitrary measures.

The LOS Convention struck a balance between the competing interests of coastal and maritime states on navigation issues, providing stability that benefits Canada. At UNCLOS III, Canada’s position on the key navigational issue of international straits was to allow the maritime states to have their way regarding transit passage, provided that the Northwest Passage was not considered as an international strait. As noted previously, regarding the transit passage regime in international straits, it is uncertain whether a non-party to the LOS Convention is entitled to its benefit. Moreover, given the historic thrust of coastal state control over offshore areas, the LOS Convention must be seen as an important document for states desiring to maintain navigational freedoms. Parties to the Treaty will be in a better position to utilize its wording than non-parties. Canada’s interests in unimpeded navigation would be better protected through reliance on the LOS Convention rather than on customary law. Also, a failure of the Treaty to gather wide support would make it less effective as a restraint upon coastal state action which threatens navigational freedoms.

It can also be argued, however, that since the United States is

139. Hage, supra note 12, at 5 and see McConchie and Reid, supra note 68, at 163. Although a major trading nation, Canada does not have a substantial ship-owning interest. See D. Johnston, supra note 80, at 36-39 and, more generally, Transport Canada, Task Force Deep-Sea Shipping 76 (April 1985). Military concerns played a minimal part in Canada’s posture on navigational issues at UNCLOS III. Regarding the extended zone and enforcement of Canadian laws in the zone, however, the Canadian military has had a significant role. See Middlemiss, Canadian Maritime Enforcement Policies in Canadian Foreign Policy, supra note 1, at 311.
140. Buzan, supra note 1, at 166-67. Generally on Canada and straits, see McConchie & Reid, supra note 68, at 158-201. Concerning the Northwest Passage as an international strait, see D. Pharand, supra note 99, at 88-121 wherein the author concludes that the Northwest Passage is not at this time an international strait, although he leaves open the possibility that, should traffic substantially increase, the waterway could become an international strait.
141. See generally Lee, supra note 39.
going to remain a non-party to the Treaty it will protect navigational interests to the benefit of all states. The United States assertions may be of little benefit to middle-power allies who lack the power of the United States in confrontations with zealous coastal states intent on protecting their own interests.

Conclusion

Participation in the LOS Convention deep seabed mining regime has not been viewed as an oceans policy issue, but as an economic policy issue with important foreign policy implications. Similarly, the intense commitment Canada had to UNCLOS III, the leadership role it played, and the consequent expectations created, are not directly part of an oceans policy perspective on the LOS Convention.

From an oceans policy perspective it would appear that Canada has much to gain from ratification of the LOS Convention. Being a party to the LOS Convention would legitimize and consolidate previous policies and could provide a valuable platform from which to launch a much-needed integrated domestic oceans policy. The LOS Convention, despite some unfavorable provisions, generally provides an acceptable balance of national interests for Canada with its commitment to coastal state rights and its need for protection of navigational rights. Moreover, ratification would enhance the stability of the international ocean regime and allow Canada to rely on the certainty of a treaty, rather than the vagueness of customary law.

An important consideration for not ratifying the Treaty is that ratification would inhibit expanding jurisdiction in the near future. While this may be true, it is important to realize that jurisdictional expansion beyond the limits established in the LOS Convention will be unacceptable for at least several decades and perhaps longer, and Canada is unlikely to move unilaterally. Therefore, the Treaty does not really act as a constraint.

On balance, viewed from an oceans policy perspective, Canada should ratify the LOS Convention.

142. One author is of the view that expanded seaward jurisdiction has reached a "temporary plateau" and that while states may intensify jurisdiction within 200 nautical miles it will be a while before it is acceptable to expand jurisdiction beyond these limits found in the LOS Convention. Alexander, *The Ocean Enclosure Movement: Inventory and Prospect*, 20 SAN DIEGO L. REV. 561, 561-62 (1982).
At UNCLOS III the emerging ocean regime was talked about in economic development terms. The extension of national jurisdiction to 200 nautical miles (and beyond in the case of the continental shelf) was perceived as promising great economic benefits for all states. Many developing states are still coming to grips with their new zones and are deciding how to effectively utilize and maximize the benefits of extended national jurisdiction. Developed states moved quickly to take advantage of expanded jurisdiction. In Canada's case, with the extension of fishing zones to 200 nautical miles in 1977, fishermen immediately reaped the benefits of access to new resources. However, the promised bonanza led to an over-stimulation of the industry and an over-capacity which has resulted in a Canadian fishing sector, particularly on the east coast, which is in poor economic shape.\textsuperscript{143}

Regarding expanded national jurisdiction, all the entitlements in the LOS Convention have already been exercised by Canada. Ratification of the Treaty will provide no direct increased economic benefit except potential benefits from the deep seabed mining regime. However, part of economic policy is security and stability; ratification of the LOS Convention will enhance the security of navigational interests and the stability of ocean law, both of which are important for Canada's trade. The most direct economic policy issues for Canada arising from the LOS Convention are the deep seabed mining regime and the economic costs of ratification.

\textit{The Deep Seabed Mining Regime}

When considering ratification, states with the capability to undertake mining activities on the deep ocean floor have been preoccupied with the workability of the deep seabed mining provisions of the LOS Convention. However, unlike most of the other industrialized deep seabed mining states, Canada's position on deep seabed mining has not been motivated by fears of strategic mineral shortages or ideology. Canada is a major world supplier of most of the minerals that may be harvested from the polymetallic nodules on the ocean floor. The current world surplus of the minerals which are found in these nodules is expected to last for decades.\textsuperscript{144} Canada remained outside much of the UNCLOS III debate on the structure and regulatory machinery for deep seabed mining,\textsuperscript{145} although Canada did

\textsuperscript{143} D. JOHNSTON, \textit{supra} note 80, at 24-30 provides a brief but comprehensive review of the problems of Canada's fishing industry and the most recent Royal Commissions designed to provide answers to the problems.

\textsuperscript{144} \textit{Id.} at 34-35 and Johnson, Clark & Otto, \textit{supra} note 123, at 215-18.

\textsuperscript{145} Hage, \textit{supra} note 12, at 10. \textit{See also} Riddell-Dixon, \textit{Deep Seabed Mining: A
engage in the debate on production controls on seabed minerals.\textsuperscript{148} In fact, through the involvement of INCO and Noranda in United States seabed mining consortia, Canada is in a position to participate as a pioneer investor under Resolution II.\textsuperscript{147} Although the interest of the two Canadian companies in deep seabed mining is difficult to evaluate, given the condition of the mineral market it would seem that their interest is minimal. This would explain why Canada declined to participate both in the group of seabed miners which commenced meeting in 1980 to develop common positions, and in the negotiations between the states with companies in the deep seabed mining consortia that led to the 1984 Provisional Understanding Regarding Deep Sea Mining.\textsuperscript{148}

At the Preparatory Commission, Canada has kept a relatively low profile compared to its role at UNCLOS III. Canada has attempted to be a moderating influence and acts as a bridge between the Group of 77 and those deep seabed mining states that are unhappy with the LOS Convention. Canada helped to prevent the Soviet Union from forcing a confrontation on overlapping claims\textsuperscript{149} and opposed the declarations, approved by the Preparatory Commission, condemning the American, British and German licensing of deep seabed miners.\textsuperscript{150}

It has been the Canadian position that the LOS Convention will not be acceptable unless the deep seabed mining regime will be acceptable.\textsuperscript{151} While Canada has never articulated what would be an acceptable regime, two concerns are potentially important in a ratification decision. First, the Preparatory Commission would have to establish a regime which guarantees fair returns for private investors. The Preparatory Commission has recognized the need to make deep seabed mining attractive to private enterprise and is proceeding to draft rules and regulations with the hope of encouraging private enterprise involvement. This is evident from the discussions at the Preparatory Commission regarding the economic viability of the proposed mining code in the current depressed market, the possibility of

\textsuperscript{146} Hage, supra note 12, at 10-11 and generally Filardi, supra note 12.
\textsuperscript{147} Canada was not involved in the initial drafting of Resolution II, however, despite being sympathetic to the Group of 77, it did see that its companies would be protected. Hage, supra note 12, at 12.
\textsuperscript{148} Id. at 10 and Kimball, supra note 23, at 374.
\textsuperscript{149} Kimball, supra note 23, at 379-80.
\textsuperscript{150} Council on Ocean Law, Oceans Pol'y News 4 (May 1986).
\textsuperscript{151} UNCLOS III, supra note 16, at 15.
joint ventures to commence deep seabed mining, and, in particular, provisions in the September 1986 Understanding which give more discretion to private miners than was initially envisioned under the LOS Convention.\(^{152}\) Second, there would have to be market protection for Canadian land-based minerals. Regardless of Canada’s dissatisfaction with the seabed mineral production limitation provision in the LOS Convention,\(^{153}\) it is highly unlikely that a regime outside the LOS Convention framework would provide any protection for Canada’s land-based minerals.

The final outline of the deep ocean mining regime has yet to emerge from the Preparatory Commission. It can be argued that ratification of the LOS Convention before all the elements of the deep seabed regime are known is foolhardy, since Canada would have given up its opportunity to evaluate the final details and would have given away its most important negotiating lever. The most recent Canadian government statement about ratification of the LOS Convention noted that “[w]hen the Preparatory Commission completes its complex task, Canada will be in a position to determine whether to ratify the Convention.”\(^{154}\) Waiting for the details of the regime to be finalized may postpone a ratification decision for years, since the actual operation of the regime may have to await significant change in the minerals market. It has already been suggested that some of the work assigned to the Preparatory Commission be postponed until closer to the time when deep seabed minerals are going to be exploited.\(^{155}\) Moreover, if Canada is going to protect the pioneer investor status of INCO and Noranda, the September 5, 1986 Understanding reached at the Preparatory Commission makes it clear that Canada will have to ratify the Treaty prior to its coming into force. This decision point will be reached before deep seabed mining is economically feasible and may be reached before all the details and rules concerning the deep seabed regime are complete.

Although the deep seabed mining regime is of debatable importance to Canadian industrial interests, Canada has not appeared to put a lot of weight upon such interests. One commentator has taken the view that because deep seabed mining is so far in the future and

\(^{152}\) See Council on Ocean Law, OCEANS POL’Y NEWS 2, 3-4, 6-10 (Sept. 1986) and Kimball, supra note 23, at 385-86. Kimball is of the view that it makes more sense for the Preparatory Commission to attempt to make changes to obtain mining state support since once the LOS Convention enters into force it will be much more difficult to make changes.

\(^{153}\) Hage, supra note 12, at 11 (noting that Canada attempted to have changes made to the formula during the 1980 and 1981 sessions but in 1982 defended the formula from attack by the United States).

\(^{154}\) CANADA, DEPARTMENT OF EXTERNAL AFFAIRS, CANADA’S INTERNATIONAL RELATIONS 42 (1986).

\(^{155}\) Council on Ocean Law, OCEANS POL’Y NEWS 3 (Sept. 1986).
the workability of any international regime unclear, "Canadian involvement in the new UNCLOS III regime for deep ocean mining should be based on foreign policy, not on industrial concerns."\(^{156}\)

**Economic Costs**

Ratifying the 1982 LOS Convention will require Canada to take action to ensure that the legal obligations of the Treaty are implemented. For Canada, the economic costs of national implementation would not be great. Many of the major requirements of the LOS Convention regarding legislation, the gathering, utilizing and disseminating of scientific information, and the monitoring of the environment, are either already being undertaken or can easily be met through new practices. However, there is a cost to internally implement the legal obligations of the Treaty. This cost is uncertain, especially in Canada's case because, as one of the major beneficiaries under the Treaty and as a world leader on many ocean issues, implementation should involve Canada in undertaking a "maximalist" approach to the Treaty obligations rather than a narrow, technical, "minimalist" approach. Canada should adopt laws and policies which give the Treaty language the broadest possible interpretation and provide leadership on the aspirational aspects of the text rather than following the strict legal obligations of the Treaty.\(^{157}\) Moreover, Treaty ratification might be used as a reason to systematically reevaluate Canadian oceans policy and restructure Canada's approach to the oceans which would have cost implications.\(^{158}\)

A possible direct economic cost of ratifying the LOS Convention arises from Article 82, which is a revenue sharing provision respecting mineral resources developed on the legal continental shelf within national jurisdiction but beyond the 200 nautical mile limit. This revenue sharing provision was a compromise between the states who argued that national jurisdiction over the continental shelf extended over the entire shelf, and those states which wished to restrict coastal state shelf jurisdiction to 200 nautical miles. Canada was one of the original promoters of this compromise provision.\(^{159}\) The revenue sharing provision obliges coastal states, after a five year grace pe-

---

\(^{156}\) D. Johnston, *supra* note 80, at 35-36.


\(^{158}\) The assumption made in Johnston's study on the future of Canadian oceans policy, D. Johnston, *supra* note 80, is that Canada will ratify the LOS Convention.

\(^{159}\) Hage, *supra* note 12, at 8-9 and McDorman, *supra* note 11, at 200-03.
period, to contribute one percent of the annual volume or value of production at a site beyond the 200-nautical-mile limit. The rate of contribution would rise by one percent per year until the twelfth year, after which the rate would remain at seven percent. Canada expressed reservations about this formula in 1980, claiming that "the suggested rate could make it uneconomic for Canada to explore and exploit its continental margin."160

The LOS Convention establishes several new institutions, all of which are to be funded by parties to the Treaty. The most costly new institution will be the International Seabed Authority (ISA). The ISA is expected to become self-financing through revenue generated by the exploitation of deep seabed minerals. Prior to self-sufficiency, however, the ISA is to be funded by the parties to the Treaty based upon the scale of assessment used for the regular United Nations budget.161 Since the industrialized states contribute the largest amount of the United Nations budget, the non-participation of some or all of them could increase the contribution required by those states which do ratify the Treaty.162 Arguably, should Canada ratify the Treaty, Canada's contribution would be exceptionally large or, at best, extremely variable. Moreover, it can also be argued that the financing of another international bureaucracy is a waste of resources.163

160. Statement of the delegation of Canada dated April 2, 1980, UNCLOS III, Vol. XIII, supra note 16, at 102. It is adjacent to Newfoundland that the revenue-sharing provision may be applicable. As in other Federal states there had existed uncertainty whether the central authority or the adjacent provincial government had legislative competence regarding the continental shelf. On Canada's west coast the Supreme Court of Canada in the B.C. Offshore Reference, [1967] S.C.R. 792 settled the issue in favor of the central authority. The Supreme Court of Canada similarly decided the Hibernia Reference, [1984] S.C.R. 86 respecting the east coast. Following the 1984 decision, in February 1985, Canada and Newfoundland signed an Accord on Joint Management of Offshore Oil and Gas Resources which effectively ensures that Newfoundland will be able to manage, control and benefit from hydrocarbon resources developed on its adjacent shelf. Although the Accord was strongly supported politically, it has been suggested that the purpose of the joint Accord was "to attempt to deny a constitutional fact" and the Accord "may set a cloud of uncertainty above" a situation that had been calmed by the Court decisions. Harrison, Jurisdiction Over Offshore Installations; Canada in OFFSHORE PETROLEUM INSTALLATIONS LAW AND FINANCING: CANADA AND THE UNITED STATES at 68 (I. Gault ed. 1986).

In the Accord no reference was made to international revenue-sharing, Article 82 of the LOS Convention. Newfoundland has not found favor with this provision. Currently the major hydrocarbon activity off Newfoundland is within 200 nautical miles. This was given as the reason for not including reference to Article 82. Yaffe, Obligations Unfulfilled, Ottawa told, Toronto Globe and Mail, May 30, 1985, at A8.

161. LOS Convention, supra note 2, Article 160(2)(c).

162. Uncertainties regarding the funding provisions are commented upon by W. Hauser, THE LEGAL REGIME FOR DEEP SEABED MINING UNDER THE LAW OF THE SEA CONVENTION (trans. by F. Dielmann) 134-35 (1983). The United Kingdom has estimated the costs regarding the international seabed regime, see statement of Malcolm Rifkind, supra note 34, at 562.

163. One of the United States concerns with the establishment of the deep seabed
This concern about the uncertain direct cost of a new bureaucracy has forced a number of the middle-industrialized states to reevaluate their policy of attempting to bring the LOS Convention into force without the major contributors to the United Nations budget. In addition, it has forced the Preparatory Commission to consider ways to build up the ISA bureaucracy slowly, based only upon need.164

One of the aspects of the LOS Convention that the United States found objectionable concerned technology transfer. It was the United States’ view that the LOS Convention provides for the mandatory transfer to developing countries of sensitive or defense-related technology or technology giving United States’ companies a competitive edge.165 This mandatory transfer would discourage potential investment and have an economic cost to companies and states involved in deep seabed mining. In interpreting the relevant technology transfer provisions, the United States opted to take a “worse case” scenario.166 The better view is that there are no strict legal obligations for mandatory transfer of technology. Rather, the provisions “establish certain standards of conduct which to a certain extent reflect the already existing practice.”167 Canada has always viewed that the transfer of technology provisions were “unthreatening” and would not impose a significant economic cost.168

A Canadian ratification and participation in deep seabed mining as a pioneer state may also entail additional costs since part of the September 5, 1986 Preparatory Commission Understanding is that applicants will assist the ISA and the Enterprise in preparing a plan of work and in exploration.169

Conclusion

The ultimate economic cost of implementing the diverse provisions of the LOS Convention will have to await a detailed study. Similarly, the costs of participation in the LOS Convention deep seabed mining regime will have to await further study. Unlike numerous mining regime has been that another international bureaucracy would be created which would be inefficient and ineffective. See Malone, The United States and the Law of the Sea After UNCLOS III, 46 LAW & CONTEMP. PROBS. 29, 32 (1983).

166. Van Dyke & Teichman, supra note 29, at 538.
168. D. Johnston, supra note 80, at 23.
169. Point 14 of the September 1986 Understanding, see supra note 59.
other countries with deep seabed capabilities, Canada has shown little interest in the various United States-inspired regimes that might supplant the LOS Convention regime. Therefore, it is unnecessary to compare economic costs and benefits of mining outside the LOS Convention regime, with the costs of mining under the LOS Convention regime since it appears that Canada's choices, at least for the foreseeable future, are to mine within the LOS Convention regime or not at all.

The restraint on jurisdictional expansion of the LOS Convention is also important when considering ratification of the Treaty on the basis of economic policy. Any restraint placed on the possibility of managing and developing the living resources and polymetallic sulfides beyond 200 nautical miles is detrimental to economic development, and the LOS Convention might inhibit economic development of those resources, although the international acceptance of the limits contained in the Treaty, and not the Treaty itself, is the real inhibition.

From an economic policy perspective, one would have to conclude that ratification of the LOS Convention provides no obvious benefit. The arguments against ratification would be the uncertainty regarding the deep seabed regime, the economic costs that would arise from ratification, and the possibility that the Treaty would deter future economic development.

**Ratification as a Question of Foreign Policy**

The decision on ratification of the LOS Convention has important implications for general foreign policy. Canada must be concerned with a possible United States' reaction to a decision to ratify the Treaty. Moreover, the ratification decision must take into account Canada's perceived role in the North-South Dialogue. Canada must also consider the importance of ratification to the United Nations system and the impact of ratification on Canada's traditional policy of reliance upon multilateral processes and law, rather than reliance on national power to accomplish its goals.

**The United States**

**Political Concerns**

The United States has been stridently opposed to the LOS Convention, not only because of the detail of the deep seabed mining provisions, but also because the Treaty is perceived as supporting wealth redistribution at the international level and the goals of the New International Economic Order.\(^1\) All states must anticipate the

---

170. *See Ratiner supra* note 22 at 1006.
United States' reaction when considering ratification. This is particularly true of Canada, since the United States has many ways to bring pressure to bear upon Canada. Direct pressure from the United States not to become a party to the LOS Convention has allegedly been exerted on some countries, although apparently not Canada.

Canada and the United States were on opposite sides of many issues at UNCLOS III. On several occasions this spilled over into incidents between the two states. Moreover, Canada and the United States have been involved in a highly publicized ocean dispute, the east coast maritime boundary court case, although this dispute did not directly involve the LOS Convention. There have been and continue to be countless ocean problems between the two countries.

While Canada has tried to assist in appeasing the United States' dislike for the LOS Convention, Canadian representatives were extremely upset with the United States' decision to reject the LOS Treaty, lodging an official protest in 1982 and voicing their distress at the LOS Convention signing ceremony. As one commentator put it, the United States' action respecting the LOS Convention "was a direct menace to Canada," since the Treaty was to be of major benefit to Canada. The United States has been less than

173. In 1979 nineteen United States vessels were arrested on Canada's west coast while fishing for albacore tuna. The United States position was that tuna, as a highly migratory specie, was not included within a coast state's 200 nautical mile jurisdiction over fisheries. Canada took the opposite view. Fines were paid by the United States vessels and the two states attempted to work out their differences over tuna with the result being a 1981 bilateral treaty, Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges, May 26, 1981, United States-Canada, U.S.T., T.I.A.S. No. 10057. See Rasmussen, The Tuna War: Fishery Jurisdiction in International Law, U. ILL. L. REV. 755, 764-65 (1981) and Wang, supra note 131, at 35-36. Regarding tuna and the LOS Convention, see Harrison, supra note 36 at 351.
175. Solving these continuing ocean problems is discussed in D. JOHNSTON, supra note 80, at 74-76.
177. S. CLARKSON, CANADA AND THE REAGAN CHALLENGE 215-16 (1982), see
pleased with Canada's actions at UNCLOS III and regarding the LOS Convention. In fact, Canada has been singled out for comment by United States law of the sea officials. One United States representative to UNCLOS III felt that much of the opposition to the United States' position at the final stages of the conference "was incited by Canada which sought to protect its own self-interest in land-based mineral production."177

The difficult issue for Canada is whether ratification of the LOS Convention would unduly upset bilateral relations. Bilateral relations between the two states are always sensitive and the Reagan Administration is particularly opposed to the LOS Convention. This may lead Canada to realize that ratification could have a serious political cost. However, America's southern neighbor, Mexico, did not feel constrained by the United States.178 On a more general level, Canadian decisions to depart from United States foreign policy are not easily made. As one commentator put it: "the prevailing view in the [Canadian] bureaucracy [is] that making accommodations with American positions is preferable to articulating strategies that give priority to Canadian interests."180 Therefore, it could be argued that the safest political and bureaucratic path would be to accede to the United States' position.

The "Missing-American" Factor

Although Treaty ratifications have been slow in accumulating, it can be safely predicted that the LOS Convention will come into force in the early 1990s.181 The overwhelming number of signatories to the Treaty and the support continually demonstrated for the Treaty at the Preparatory Commission and in the General Assembly leads to no other conclusion. The most recent General Assembly Resolution on the LOS Convention of November 5, 1986, which called upon states to adhere to the Treaty and not take actions to defeat its object and purpose, received 145 positive votes. Only two states voted against the resolution (the United States and Turkey)

generally id. at 204-05, 212-20.
180. S. CLARKSON, supra note 177, at 298.
181. Based on a survey by Australia the most likely date for the entry into force of the LOS Treaty is in the early 1990s. Kimball, supra note 23, at 381.

572
and five states abstained.\textsuperscript{182}

It is, however, difficult to envision a scenario in which the United States will accede to the LOS Convention. Even if an administration less stridently opposed to the Treaty is elected, it is unlikely that the United States would become a party.\textsuperscript{183} Throughout the UNCLOS III negotiations, there was a refrain that the final product would have to be acceptable to the United States Senate,\textsuperscript{184} since ultimately the LOS Convention would have to be supported by two-thirds of the Senate in order for the United States to ratify. This is now unlikely to ever take place because of the complexity of the Treaty, the numerous issues it covers, the special interest groups that find particular aspects objectionable, and most importantly, the political history of the Treaty since it was rejected by a popular conservative President.

How important should this "missing-American" factor be in Canadian calculations respecting the LOS Convention? It could be boldly asserted that without the active support of the United States no major international regime can be successful. This argument is made more compelling if other major western states join the United States in rejecting the Treaty. In such a situation, it can be argued that the International Seabed Authority, the other provisions of the Treaty, and many of the rules and standards established by the Treaty would become mere "paper tigers."

However, even as a "paper tiger," the LOS Convention is likely to command significant world support. Moreover, the existence of the International Seabed Authority and the continual threat to challenge the legality of deep seabed activities taking place outside the LOS Convention regime\textsuperscript{185} will make both private investors and state en-

\textsuperscript{182} Council on Ocean Law, Oceans Pol’y News 1 (Dec. 1986).
\textsuperscript{183} It has been predicted that a future administration will have no choice but to reverse the current United States position on the LOS Convention. Ratiner, supra note 22, at 1021.
\textsuperscript{184} See, e.g., Darman, The Law of the Sea: Rethinking U.S. Interests, 56 FOR- EIGN AFF. 373, 390-91 (1978), where the author warns that a comprehensive law of the sea treaty providing for internationalization of the deep seabed would be unratifiable by the Senate. In a statement made by President Reagan prior to the last negotiating session at UNCLOS III he also warned about the necessity of ensuring the Treaty be acceptable to the Senate. Statement of President Reagan of January 29, 1982, reprinted in M. Nordquist & C. Park, supra note 24, at 554-55.
\textsuperscript{185} The legality of seabed mining activity taken outside the LOS Convention could be directly challenged by any state although the challenge is more likely to come by a request for an advisory opinion of the International Court of Justice. See Moss, Insuring Unilaterally Licensed Deep Seabed Mining Operations Against Adverse Rul- ings by the International Court of Justice: An Assessment of the Risk, 14 OCEAN DEV.
terprises unwilling to invest in independent deep seabed mining ventures. Thus, concerns over independent deep seabed mining, are unlikely to provide reasons for avoiding the LOS Convention regime. This possibility is reinforced by the poor prognosis for the mineral resources market for the foreseeable future and the fact that the Preparatory Commission is working to make the international regime economically attractive. The final blow to United States isolation would be the ratification of the Treaty by a major mining state such as Japan or France. Such ratification is a strong possibility, and would indicate that the international regime is sufficiently attractive and secure for participating miners.

Given that Canada has only a minimal interest in deep seabed mining, and that United States non-participation may not significantly affect the international regime, the "missing-American" factor should not be a major independent consideration in Canada's decision whether or not to ratify the LOS Convention.

The North-South Dialogue

While it is questionable how much economic benefit the least developed countries will derive from the new ocean regime, and in particular, from deep ocean mining, there is little doubt that the


186. Larson, supra note 25, at 291. Larson comments that it is unlikely that private companies will undertake deep seabed mining activities outside the LOS Convention regime because of the potential legal challenge. He further comments that "[i]f it is also doubtful if such a mining operation would have a sufficiently clear legal title to a mine site to borrow the necessary capital for research, development and operations, unless they received a state subsidy." Id. This view was put more forcefully by Ratiner, Reciprocating State Arrangements: A Transition or an Alternative? in A. Koers & B. Oxman, supra note 53, at 195-203. There are also serious concerns whether the LOS Convention provides adequate protection for investors interests. See Johnson, Clark & Otto, supra note 123, at 209.

187. In reference to Japan, see supra note 91 and accompanying text.

188. Borgese, The Law of the Sea: Its Potential for Generating International Revenue, 4 Ocean Y.B. 15, 15-27 (1983). Borgese suggests that what is really necessary is an ocean development tax on all ocean resource harvesting. A concise statement of the proposed ocean development tax is presented in E. Borgese, supra note 7, at 63-66 in which she notes that in 1971 when the proposal was first made, Canada expressed support for a "voluntary international development tax." In 1978 Nepal suggested the establishment of a Common Heritage Fund which ultimately was not actively pursued at UNCLOS III. Boczek indicates that the Nepal proposal, "which would have made real progress in applying the NIEO principle in the law of the sea," came too late in the proceedings to be useful and also ran up against "inconsistent and hypocritical" attitudes
Group of 77 sees the LOS Convention as being of considerable symbolic importance in the continuing North-South Dialogue. The Chairman of the Group of 77 at UNCLOS III, Ambassador Arias Schreiber from Peru, stated: "The structure we have all built together is the most advanced expression of international law for development and a cornerstone of the task of establishing the new international economic order."

Canada was generally supportive of the aims of the Group of 77 at UNCLOS III, and has perceived the Treaty to be an important part of improving North-South relations. On a number of issues at UNCLOS III, Canada sided with the Group of 77 in order to further Canada's own interests. Developing countries have not been shy in pointing this out and in indicating that Canada was obviously one of the winners at UNCLOS III. A failure of Canada to ratify the Treaty could lead to a cooling of relations with numerous developing countries and might seriously undermine Canada's credibility in North-South discussions.

Multilateralism

Canada achieved much at UNCLOS III but there was a cost. Canada's traditional image as a helpful conciliator was only infrequently apparent, being replaced by an image "of an acquisitive, enormously capable, somewhat immodest, frequently aggressive, coastal state." As a middle-power, dependent in foreign policy issues on its image of fairness and balance, Canada's decision regard-

from many developing states. Boczek, supra note 30, at 18. For a more positive view of deep seabed mining and developing countries See D. Leipziger & J. Mudge, Seabed Mineral Resources and the Economic Interests of Developing Countries (1976). There is little debate that the LOS Convention will directly do much to narrow the gap between have and have-not states. However, in a poignantly optimistic manner Borgese indicates that the LOS Convention is a legitimate commencement to a process for ocean resource development that would undoubtedly benefit have-not states, see E. Borgese, supra note 7.

190. See Hage, supra note 12, at 3 and D. Johnston, supra note 80, at 17 regarding the seabed mining regime and the Common Heritage of Mankind. See also, Buzan, supra note 1, at 163-64.
192. Regarding Canada and the North-South Dialogue, see D. Dewitt and J. Kirton, Canada as a Principal Power, 81-82 (1983).
193. D. Johnston, supra note 80, at 65.
ing the LOS Convention must take into account diplomatic credibility and a cynicism that would arise from non-ratification of a Treaty that gives so much to Canada. A negative decision on Treaty ratification could undermine Canadian initiatives and credibility on other issues in similar fora.

Traditional Canadian policy has been to support the role and importance of the United Nations. This policy was reasserted in the 1985 External Affairs policy reappraisal. The LOS Convention is a product of the United Nations system and stands as one of its major accomplishments. The decision on ratification may speak volumes about Canada’s view of the United Nations. Moreover, the UNCLOS III process was a non-traditional approach to dealing with multilateral problems. The process was largely successful in balancing competing states’ interests and in achieving general agreement on almost all issues. Ratification can be viewed as the ultimate sign of approval for this non-traditional process which attempted to accommodate the interests of all states rather than the traditional, confrontational approach to treaty-making.

Most importantly, as a middle-power, Canada has long acknowledged the necessity of international law and international process to its well-being. As the 1985 External Affairs policy review states:

Membership in such organizations (NATO, the United Nations, the Commonwealth and la Francophonie) allows us to influence the policies of larger countries through developing positions which carry the support of all members. As well, our standing with smaller countries rises as we assist them to have their voices heard collectively and, thereby, to carry more weight.

Canada does not have the power to force its views on other states, thus Canada has to proceed multilaterally to achieve its goals. Moreover, Canada has not had significant success in undertaking unilateral action. In relations with the United States, for example, Canada has frequently sought to gather international support for its position so as to be better able to withstand United States’ pressure. Canada approached UNCLOS III with this in mind. As one commentator has stated: “In sharp contrast to the Reagan Administrar-

---

196. Canada, Department of External Affairs, supra note 194, at 25.
197. See supra text accompanying notes 66-73.
tion's attempt to achieve security from international regulation, Canada's large stake in the Law of the Sea lay precisely in achieving security via the reinforcement of international authority - first over mineral markets and second in international law." The LOS Convention is a major accomplishment of a multilateral negotiation and a Canadian ratification decision must consider whether, as a policy, Canada should continue to support multilateralism rather than unilateralism.

Conclusion

From a foreign policy perspective there is much to be gained from ratification of the LOS Convention in terms of relationships with developing countries and the North-South Dialogue. However, the most important gains will be made from support for the multilateral treaty-making process, the United Nations, and multilateral approaches to difficult issues. Non-ratification will not necessarily disrupt Canadian foreign policy or betray its commitment to multilateralism, the North-South Dialogue or the United Nations, but non-ratification is of no assistance in these matters. Canada was a leader at UNCLOS III and intensely pursued its self-interest. For Canada, to have worked so hard and benefited so much, to decide not to ratify would be inconsistent with a credible and stable foreign policy.

As a matter of bilateral relations with the United States, non-ratification is the safest policy. On balance, however, it would seem, from a foreign policy perspective, that Canada should ratify the LOS Convention.

CONCLUSIONS

Despite the earlier desires of states such as Canada to hurry the entry into force of the LOS Convention, Canada did not ratify. With urgency of ratification no longer perceived, it can be expected that Canada will continue to weigh its options before making a decision. The progress of the Preparatory Commission in devising a deep seabed mining regime acceptable to the mining states will be important in the timing of a Canadian decision. The September 5, 1986 Understanding sets the coming into force of the Treaty as the final limit on applicants for pioneer investor status. Timing may also be

198. S. Clarkson, supra note 177, at 215-16 (emphasis in original).
199. This was the strategy adopted by the middle-industrialized states immediately following the completion of the LOS Convention, Kimball, supra note 23, at 376.
affected by policies undertaken by other Western, industrialized states. Already Iceland has ratified, others like France and Japan could follow and the Federal Republic of Germany and United Kingdom may yet accede.

Given Canada's current "wait and see" policy, should the LOS Convention not receive the necessary sixty ratifications to bring it into force, Canada will likely never ratify the Treaty. The most reasonable prediction, however, is that the Treaty will come into force in the early 1990s. Therefore, at some point Canada will have to decide whether to ratify the LOS Convention. When the time comes to decide on ratification, a balancing of the important issues outlined above will be necessary. The major arguments against ratification are:

* there are no further benefits to be gained from the Treaty and much of the Treaty has or may emerge as customary international law;
* there is an unknown economic cost;
* there may be a significant political cost;
* ratification may unduly restrict future Canadian ocean policy; and
* the deep seabed regime may be unworkable.

The major arguments for ratification are:

* the Treaty provides an acceptable balance between Canada's maritime and coastal state interests;
* there is a need for stable ocean law;
* there is a need to promote respect for international law and multilateralism rather than unilateralism;
* there is a need to consolidate the international legal position of Canada's ocean laws and policy, particularly respecting the Arctic; and
* the Treaty is important to Canada's diplomatic credibility and the North-South Dialogue.

How the balance is ultimately reached will depend on whether ratification of the LOS Convention is seen primarily as:

- a foreign policy issue;
- an oceans policy issue; or
- an economic policy issue.

If the ratification of the Treaty is seen as a foreign policy issue, it is predictable that Canada will ratify since the long-term interests of diplomatic credibility, supporting multilateralism over unilateralism, and advancing the North-South Dialogue should outweigh the concern over a negative reaction by the United States to a Canadian ratification.

As an oceans policy issue, again Canada would likely ratify since the need to consolidate Canada's previous ocean policy, the stability and general acceptability of the Treaty regime, and the ability to use the LOS Convention as a platform for an integrated national ocean policy, should outweigh any possible restrictions on future Canadian ocean policy found in the Treaty and the few provisions that are unfavorable to Canadian interests.
As an *economic policy* issue, it is less likely that Canada will favor ratification because the restraining aspects of the Treaty (which may curtail future resource exploitation and management of accessible oceans resources) the uncertainty regarding the deep seabed mining regime, and the economic costs of ratification *should* outweigh any economic benefits of ratification that have not already been realized.

Therefore, for Canada, the answer to the question - Will Canada Ratify the LOS Convention? - will be answered by the policy perspective that is predominant when the question needs to be answered.