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United States and Canadian Policy Processes in Law of the Sea

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I. INTRODUCTION

In the years 1958 and 1960, the United States and Canada were among 88 nations engaged in negotiations on the law of the sea. The Third United Nations Conference on the Law of the Sea began in December 1973, met again in Caracas in June-August 1974 and is to continue in 1975. The United States and Canada are among 138 nations taking part in efforts to reach agreement on an international treaty governing the use of an area comprising 70 percent of the earth's surface. In this international lawmaking exercise, the governments of Canada and the U.S. play very active roles.

The Law of the Sea Conferences—past and present—provide a convenient framework for examining changes in U.S.-Canadian relations in law of the sea. To understand the political processes involved, three perspectives are useful: (1) the state centered model, (2) the bureaucratic politics approach, and (3) the transnational systems perspective.

With the passage of Canada's Arctic Waters Pollution Bill and related legislation in 1970, law of the sea became highly politicized...
in both countries. In Ottawa the issue was cast as one of national sovereignty, whereas in Washington the issue was perceived as one of national security. The behavior of both governments in this controversy is best explained by means of the concept of government as a unitary actor.

Within the Canadian Government, law of the sea policy has been formulated and implemented through a highly centralized foreign affairs bureaucracy. This may be explained in terms of the political salience of law of the sea, of the parliamentary system, of the small size of the Canadian bureaucracy and of the preponderance of interests tending in a single direction. An appreciation of bureaucratic politics, however, is necessary to explain the diffusion of power, the conflicting interests and the resulting decision-making process behind U.S. law of the sea policy.

The existence of a variety of private and governmental interests that are not easily reconcilable by the foreign policy organs of government provides an opportunity for transnational and transgovernmental relations to flourish. Indeed, this was the case between the U.S. and Canadian governments during 1958 and 1960 in defense areas and during the period up to 1970 in resource questions. With the politicization and exacerbation of law of the sea relations in 1970, transnational contacts diminished. Since then the policies of both governments have converged in several respects. Resource considerations have been given greater weight in U.S. policies and led to acceptance of a 200-mile economic zone in 1974. In Canada, non-coastal interests in navigation and deep sea mining have been increasingly vocal. Although transnational and transgovernmental relations may therefore increase, the political salience of the issue in Canada together with Canada's centralized decision-making process, will limit the scope of such interactions.


Before considering the history of U.S.-Canadian law of the sea relations from 1958 to 1970, it is useful to review the several issue

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1. Transgovernmental relations are those between government officials not normally responsible for the conduct of foreign policy, while transnational relations may involve private actors as well. Intergovernmental relations refers to interactions between the central foreign policy-making organs of governments.
areas that are encompassed within the negotiations on law of the sea—naval and commercial mobility, jurisdiction over the petroleum resources of the continental margin, marine science research, protection of the marine environment, fisheries and the deep seabed regime. Canadian and U.S. interests and policies diverge on some of these questions and not on others. While there are periodic intergovernmental consultations, present policies appear to be formulated primarily in response to domestic interests and secondarily to prevailing views in the international negotiation rather than through close Canadian-U.S. cooperation.

The United States is a major maritime power with what it perceives to be global interests. Despite the politics of detente, the Government places high priority on its deterrence strategy and on U.S. naval mobility to facilitate that strategy. Although the U.S. lacks an extensive commercial fleet operating under its flag, it is a major trading nation and is particularly dependent—at least for the next half decade—on increasing imports of petroleum. In addition to protection of shipping lanes, naval mobility to determine local conflicts is another aspect of the perceived U.S. interest in maintaining order. The U.S. claims a three-mile territorial sea, and in the law of the sea negotiations of 1958 and 1960 as well as in the present negotiations, the Government has sought international agreement on narrow territorial sea limits. In response to resource considerations, the U.S. in 1974 indicated its willingness to accept a 200-mile economic zone as part of a law of the sea treaty.² The present official position is that the U.S. will accept a twelve-mile territorial sea if unimpeded passage through and over all international straits is guaranteed. With regard to the economic zone, the U.S. insists that there be no unjustifiable interference with the high seas rights of navigation and overflight.

Canada has neither an extensive merchant fleet nor a large navy although it is a major trading nation and 25 percent of its exports were carried in seagoing ships in 1972. At the end of the Second World War, Canada had the fourth largest merchant fleet in the world. Canada cooperated closely with the United States at the 1958 and 1960 Conferences in rallying support for agreement on narrow territorial seas. As late as 1967 Canada's reaction to an economic zone was to stress the principle of "non-interference with the freedom of the high seas, subject to the strict requirements es-

sentential for effective exploitation." In 1970, however, Canada extended her own territorial sea to twelve miles and established pollution control zones and extensive fishing zones despite U.S. protests. Furthermore, Canada has indicated her support for the regime of innocent passage in all straits thus covered by twelve-mile territorial seas, taking special pains to note that the Northwest Passage is not an international strait. The shift in Canadian attitudes toward navigation mirrors the reduction in Canada's merchant fleet and the change in defense considerations from NATO concerns to those of hemispheric defense. Now that technology has facilitated man's use of the Arctic, Canadian notions of defense have gone beyond strictly military to embrace environmental considerations. Within its economic zone as well as international straits, the Canadian Government would qualify the right of navigation by the right of the coastal State to protect its environment through a variety of mechanisms. There is less than complete unanimity on this policy and shipping interests have openly taken issue with this approach. They have argued that technology will increase Canada's shipping capacity and that the government therefore "should only claim such limited jurisdiction over what is now high seas as we are prepared to see other nations exercise."

The United States has substantial coastal as well as maritime interests—the fourth longest coastline in the world, 863,000 square nautical miles of continental margins and abundant offshore resources. Offshore reserves of petroleum are estimated at 1,400 billion barrels of oil and 3,230 trillion cubic feet of natural gas.

7. Office of the Geographer, Bureau of Intelligence and Research, U.S. Dep't of State, Limits in the Seas, No. 46 (Aug. 12, 1972). The continental margin is the submerged prolongation of continents and includes the continental shelf, slope and rise.
policy with regard to the petroleum resources of the continental margin has been characterized by the extension of national jurisdiction, with a sharp reversal in 1970 and a subsequent return to the policy of expanding jurisdiction. In the 1945 Truman Proclamation, the United States laid claim to the resources of its continental shelf. Then in 1958, the Geneva Convention on the Continental Shelf established coastal State sovereignty over seabed resources to a depth of 200 meters or beyond that point to the depth admitting of exploitability. This remained official U.S. policy until May 1970 when the United States announced support for a policy renouncing national claims to seabed resources beyond the 200 meter isobath and calling for the establishment, beyond this point, of an international regime to govern the exploitation of seabed resources. Behind this policy reversal was a bureaucratic struggle and the temporary victory of strategic over resource interests. Since 1970, the U.S. position on the intermediate zone of coastal State authority has, in response to increased concern with resource scarcities, gradually reverted to favor expanded coastal State jurisdiction. In July, 1973, the U.S. submitted draft proposals for a Coastal Seabed Economic Area, of undetermined width, in which the coastal State would enjoy exclusive rights to seabed resources. Included in this proposal were five international features: no unjustifiable interference with other uses of the area, international pollution standards, guarantee of investments, compulsory settlement of disputes, and revenue sharing. When the U.S. adopted the concept of a 200-mile economic zone in 1974, it continued to claim sovereignty over resources to the outer edge of the continental margin where it extends beyond 200 miles.

Canada has the second largest continental margin in the world, after the Soviet Union, comprising a total area of almost 2 million square miles. Resource potential off Canadian shores is estimated at 59.6 billion barrels of recoverable oil and 457.2 trillion cubic feet of recoverable gas. Canada's preoccupation with its offshore continental margin is relatively recent but is now a strongly held interest. For legal confirmation of its rights to the entire continental margin, Canada points to the 1958 Convention on the Continental Shelf (which it ratified as late as March 1970) and to the 1969 decisions of the International Court of Justice regarding the North Sea.

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10. Offshore drilling to the end of 1973 was insufficient to estimate reserves. Of 80 holes off the East Coast, no commercial oil or gas field was definitely confirmed. CANADA, HOUSE OF COMMONS STANDING COMMITTEE ON EXTERNAL AFFAIRS AND NATIONAL DEFENCE, MINUTES OF PROCEEDINGS AND EVIDENCE No. 27, at 39, 82 (Dec. 12, 1973).
Continental Shelf. In addition the Canadian Government has issued exploration permits in extensive offshore areas\(^{11}\) and has asserted its claim to the continental margin both in its Parliament and at the United Nations. With 320,000 square miles of margin lying beyond a 200-mile resource zone, Canada has been more active than the United States at the Law of the Sea Conference in pressing for a policy of coastal State jurisdiction to the outer edge of the continental margin where it extends beyond the zone. In the Canadian case the margin stretches to distances of more than 400 miles from shore.

Although the U.S. and Canada have both adopted the concept of a 200-mile zone and claim the margin beyond, significant differences remain over the nature of coastal State jurisdiction to be exercised in the zone—particularly in the areas of marine scientific research and pollution control. Scientific communities in both Canada and the U.S. share similar levels of expertise and interests in carrying out research unfettered by coastal State restrictions. In neither country, however, does the marine scientist enjoy a significant degree of political power to allow a major input into national ocean policy. Nevertheless, thanks to the support for unfettered navigation and scientific research by stronger actors within the U.S., United States policy has consistently favored freedom of marine science research beyond the territorial sea with prior notification to the coastal State. The Canadian position has been that much research is conducted for economic and military reasons and therefore the coastal State must have the right to control and, when necessary, prohibit research activities in the economic zone and on the continental margin. With regard to conduct of research, the U.S. and Canada support similar provisions for the coastal State right of participation, access to data and samples, and open publication of research results.

The second area of divergence with regard to the economic zone concerns the rights of coastal States to set and enforce environmental standards stricter than those internationally agreed. This particularly intractable issue was raised in 1970 with the passage of the Canadian Arctic Waters Pollution Prevention Act. Viewing

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the Act as an adverse precedent for high seas navigation, the United States strongly opposed this legislation and evolved in response a policy of exclusive international standards beyond the territorial sea under which the right to set standards for vessel source pollution would be vested in IMCO, with coastal State enforcement of these standards limited to the territorial sea, and flag State and port State enforcement of violations occurring beyond. The flag and port States would have the right to establish and enforce supplemental regulations. Emergency coastal State enforcement beyond the territorial sea would be allowed only to prevent imminent harmful damage.\textsuperscript{12} Canada, on the other hand, has linked the concept of coastal State pollution jurisdiction to resource jurisdiction. Indeed, below the $60^\circ$ latitude, pollution zones established in 1970 were those areas encompassed within "fishery closing lines."\textsuperscript{13} Within areas under coastal State economic jurisdiction (including the continental margin as well as the zone), Canada supports the right of the coastal State to adopt and enforce environmental protection standards over and above internationally agreed standards including measures relating to the prevention of accidents, safety of operations at sea, design of equipment, and operation and maintenance of vessels.\textsuperscript{14}

The area in which Canadian-American interests have been similar, albeit ruffled by bilateral disputes, is fisheries. The species inhabiting offshore waters of both nations are some of the most valuable in the world. In the past decade, coastal fisheries have been seriously depleted by the distant water fleets of Japan and Russia and strong domestic pressure has been building to extend national fishing jurisdiction. U.S. and Canadian distant water fishing interests are presently limited to tuna fleets operating out of San Diego and New Brunswick respectively. Although fishing represents a small and declining portion of GNP in both countries (one percent in Canada and less than a half percent in the U.S.), the fishing interest exercises a large influence in state or provincial governments and ultimately in the legislative branches of both federal governments due to the concentration of voting strength in several coastal regions.\textsuperscript{15}  

\textsuperscript{13} In the Arctic areas above $60^\circ$ latitude, uniform pollution zones of 100 miles were put into effect.
\textsuperscript{15} In Canada, with a population of 22 million, 80,000 people were employed in fishing operations and another 16,000 in processing in 1972.
In response to similar problems, Canada and the United States initially adopted a species approach providing for separate management schemes for coastal, anadromous and highly migratory species. Coastal species would be exclusively managed by the coastal State which would determine quotas and would enjoy a preferential share of the catch. Anadromous species, spawning in fresh water, would be reserved exclusively to the country of origin. Highly migratory species would be exempt from coastal State jurisdiction. The species approach was subsequently adapted to the concept of a 200-mile resource zone, first by Canada in 1972, and then by the U.S. in 1974. In this new policy, both countries would claim exclusive coastal State rights to fisheries within 200 miles of shore, allowing foreign nationals to fish for the unutilized portion of the stock. In addition, Canada claims preferential coastal State rights to fisheries beyond 200 miles.

A foremost consideration in U.S. and Canadian policies toward an international seabed regime beyond the limits of national jurisdiction is the domestic supply and demand for constituent metals of the manganese nodules scattered about the ocean floor. These include nickel, copper, cobalt and manganese. The United States is a net importer of each of these minerals. In 1973, the United States imported 82 percent of its manganese, 95 percent of its cobalt, 65 percent of its nickel, and 5 percent of its copper. These considerations have only recently begun to weigh heavily in the determination of U.S. seabed policy, due to intra-governmental trade-offs of resource for strategic interests and to the absence until 1973 of a strong seabed mining constituency. In August, 1970, the U.S. tabled a Draft Treaty proposing international machinery empowered to issue leases for seabed mineral exploitation on a first come first served basis. This was supplemented by proposals at Caracas. In general U.S. policy urges low royalties, work require-

16. Sedentary species are covered by the Convention on the Continental Shelf.
ments and other features designed to spur seabed mineral productions and discounts the possibility of any major economic dislocations resulting from seabed mineral production.20

Of the constituent metals of deep sea nodules, Canada is a net importer of manganese only (valued at $5 million in 1972). Canada ranks fifth in world mineral production and produces 38.1 percent of world nickel, 10.7 percent of world copper and 7.5 percent of world cobalt.21 Canadian interests in deep sea mining are twofold. As a technologically advanced country, Canadian firms will be among those mining for manganese nodules.22 As a major producer and exporter of nickel, however, Canada seeks protection against "any undesirable effects that a substantial increase in production of minerals could have on our position at home."23 In the U.N. Seabed Committee, Canada initially proposed a licensing system which included production controls, marketing and distribution mechanisms.24 Subsequently, Canada has sought an approach that would combine the Canadian with the "Enterprise System" supported by a large number of developing and mineral producing nations. In this scheme Canada has suggested a mix of licensing and direct exploration and exploitation by the Authority, when it acquires the requisite means. At the Caracas session of the Law of the Sea Conference, Canada submitted no draft proposals on deep sea mining. This may reflect a preoccupation with other areas of law of the sea or it may presage a lower Canadian profile on an international seabed regime. Newly articulated industry interests in deep seabed mining could either lead to Canadian proposals along the lines of the U.S. and other developed country proposals or to official silence while transnational industry contacts develop and exploration proceeds.


III. LOS Relations: 1958 to 1970

The past five years have witnessed a rapid development of U.S. and Canadian ocean interests and a number of shifts in their respective law of the sea policies. Reviewing governmental interactions from the First U.N. Conference on Law of the Sea highlights the discontinuity between the past five years and the previous decade. Relations between U.S. and Canadian officials in law of the sea were close in 1960, were plagued by minor irritations after 1962 and became openly hostile in 1970. Since then, there has been a gradual warming trend between the countries as U.S. policy has shifted to a greater emphasis on resource considerations and as new non-coastal interests have been heard in Ottawa. While similar interests on both sides of the border may strengthen transnational ties, distance between government representatives will doubtless be maintained. Canadian officials will, at least for the indefinite future, continue to pursue a diplomatic role at the LOS (Law of the Sea) Conference independent of the U.S. and closely linked to other middle range powers. Canadian efforts to exercise a leadership and compromiser role vis-a-vis the less developed countries will of necessity diminish.

The First United Nations Conference on the Law of the Sea culminated eight years of detailed preparatory work by the International Law Commission. Within the brief span of the eight-week session, the 88 participating nations were therefore able to reach agreement on four Conventions—on the Territorial Sea and the Contiguous Zone, on the High Seas, on the Continental Shelf, and on Fisheries and Conservation of Living Resources. These Conventions were not uniformly successful in resolving rapidly evolving ocean problems. While the Continental Shelf Convention put to rest, at least for the short term, the issue of coastal State control over seabed resources, agreement on the breadth of the territorial sea was not possible within the scope of the Convention on the Territorial Sea and Contiguous Zone. Due to this failure, a Second U.N. Law of the Sea Conference was convened two years later.

At both Conferences, the Canadian and American Governments, as well as the British and Australian, found their interests in har-

25. Article 24 of the Convention did provide that “the contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.”
mony and their relations cordial. The concern of NATO members in particular was with strategic mobility and access through straits in the event of a conventional Soviet attack and the need to transport troops quickly to Europe. Despite growing skepticism about a war of mobilization as opposed to one of nuclear exchange, Canada publicly supported the U.S. position on strategic needs. Indeed, through close cooperation with and influence on the United States delegation, Canadian officials maximized Canadian influence in the 1960 deliberations. Canadian and American defense establishments were in regular contact and U.S. military briefings of the Canadian delegation were not uncommon. In 1958, the United States could not be persuaded to abandon its insistence on limiting the territorial sea to three miles. In 1960, however, the Canadian delegation succeeded in persuading the United States Government that a formula of a six mile territorial sea, with a six mile contiguous zone, would not irreparably damage U.S. strategic needs. For the remainder of the Conference, the two delegations worked closely, as did the home governments, to sell the six plus six formula to the participating nations. Despite the brief period of lobbying, the formula came remarkably close to success—failing by one vote of the required two-thirds majority.

With the failure to achieve universal agreement on a territorial sea breadth, the United States reverted to its original position on a three mile territorial sea. Canada, however, had been pursuing the goal of a twelve mile fishing zone since the mid-1950's and resolved to continue its efforts to round up support for the six plus six formula. The United States indicated its interest in and willingness to consider the findings of a multilateral effort, but did not join in the worldwide canvass for support. The Australians as well as the British played an active part in educating and seeking the support of coastal nations for a six mile territorial sea. The

26. A widely accepted view among students of Canadian foreign policy is that Canada pursued an "internationalist" approach in its foreign policy prior to the Trudeau Government. Frustrated in its efforts to promote international cooperation, Canada was required during the early Trudeau years to reconsider its foreign policy and to evolve one that stressed the national interest. A more plausible thesis is one that gives equal credit to the Pearson and Diefenbaker Governments for pursuing the Canadian national interest. That the national interest in one era might best be served by active participation in international organizations and close relations with the U.S., and in another era called for unilateral and even anti-American policies, simply reflects a changing international environment.


28. Indeed, the U.S. undermined the effort, in Canadian eyes, by striking bilateral fisheries agreements with countries such as Brazil and Mexico.
Canadian pamphlet explaining the position (A Canadian Proposal) was distributed to governments around the globe. By 1962, 44 nations were willing to accept the six plus six formula provided that the U.S. and other major powers would agree. These findings were presented to the United States Government. There was no response for eight months. The reply, when it came, was negative—reflecting no doubt the U.S. preference for a universally accepted agreement as well as the abiding Defense Department concern about the dangers of a broader territorial sea.

Interpreting the U.S. response as the rejection of the multilateral approach, and having experienced the intractability of this issue universally, the Canadians resorted to a unilateral solution of their fisheries problem. On June 4, 1963 Prime Minister Pearson announced Canada's intention to draw straight baselines. Then in July, 1964, Canada passed legislation creating a nine mile fishing zone beyond Canada's three mile territorial sea and empowering the Government to draw straight baselines in place of the sinuosities of the coast as the starting point for measuring the breadth of the territorial sea and fishing zones. The area landward of these baselines would become internal waters.

The Department of State promptly protested the Canadian extension of jurisdiction, but only two years later the U.S. Congress followed suit and passed legislation for a fishing zone of nine miles. U.S. legislation, however, made no provision for replacing the contours of the coast with straight baselines and this soon became a cause of friction between the two governments. While reciprocal fishing rights were provided for nationals of both nations in exclusive fishing zones, areas of internal waters were quite different—taking on the status of full coastal State sovereignty. Canada approached the implementation of its new legislation cau-

29. Mitchell Sharp, Secretary of State for External Affairs, Canada Extends its Territorial Sea, Statement to the House of Commons on April 17, 1970.
30. "...we really are not prepared, in light of these developments, to accept the proposition that it is always desirable to proceed multilaterally instead of unilaterally.” Id. at 2.
Nations traditionally fishing the area—Great Britain, Norway, Denmark, France, Portugal, Spain and Italy—were allowed to continue fishing in the new zone while negotiations were pursued.

In the 1966 negotiations between the legal offices of the Canadian and U.S. foreign ministries, Canadian officials told their U.S. counterparts that the Government was considering straight baselines that would make the Gulf of St. Lawrence and parts of Queen Charlotte Sound internal waters. U.S. legal officials protested that some baselines exceeded those permitted by international law and moreover did not follow the general direction of the coast. Canadian officials were told that the U.S. Government would have to protest such Canadian action. To register U.S. concern, Under Secretary Rostow headed a team to Ottawa in October, 1966 and President Johnson spoke directly to Prime Minister Pearson.

Then in 1967, the Canadian Government announced the first series of straight baselines along the coast of Labrador and the southern and eastern coasts of Newfoundland. The Canadians were quick to point out the moderate nature of these claims and the fact that the baselines did not close the Gulf of St. Lawrence. The baselines finally adopted by the Canadians were indeed more moderate than those initially proposed to U.S. officials, allowing both sides a measure of success. The U.S. did, as it had warned, protest the baselines as inconsistent with international law.

Having once set out on the course of unilateral action and having witnessed U.S. emulation of some aspects of that action in 1966, the Canadian Government continued to press ahead in extending offshore jurisdiction and in April, 1969 announced its intention to draw further straight baselines along the east coast of Nova Scotia and the west coast of Vancouver Island and the Queen Charlotte Islands. In that same announcement, the Minister of Fisheries indicated the Government’s intention of closing several “gaps” along the Canadian coast that were too extensive to be covered by straight baselines. To put these areas out of reach of foreign fishing without extending Canada’s territorial sea, the concept of “fisheries closing lines” was adopted. These exclusive fishery zones upset the delicate U.S.-Canadian agreement reached in 1967, according to which Canadian fishermen had preferential rights off the Canadian coast in recognition of the coastal State’s special interest.

34. Canada Privy Council, Order Respecting Geographical Coordinates of Points from which Baselines may be determined Pursuant to the Territorial Sea and Fishing Zones Act, October 26, 1967.
In 1970, when the fisheries closing lines were used for the first time (across the Gulf of St. Lawrence, the Bay of Fundy, Queen Charlotte Sound and Dixon Entrance) they were adopted in conjunction with a series of measures aimed more or less directly at the United States. The U.S.-Canadian fishery agreement negotiated in February, 1970 anticipated the events of that year. While it continued to provide for reciprocal fishing privileges, these reciprocal rights extended to fewer stocks in fewer areas. A separate but related development in March of 1970 was consideration of a Bill (S-5) to provide statutory authority, above and beyond the 1958 Convention, to govern all aspects of oil and gas exploration and exploitation, including pollution prevention and control, on Canada's entire continental margin. The Act was designed to tie in with other offshore mining legislation and to confirm Canada's wide-shelf seabed resources position.

IV. LAW OF THE SEA BECOMES HIGH POLITICS

Although law of the sea relations between Canada and the United States had suffered minor setbacks beginning with the 1964 Canadian Territorial Sea and Fishing Zones Act, the politicization of law of the sea relations occurred in 1969 and 1970. The dynamic of action and reaction during this period is difficult to capture given the number of overall pressures at work and the variety of issues at stake. Within Canada, the Trudeau foreign policy review was beginning. Deliberations in the U.N. Seabed Committee sustained a constant pressure on both countries to formulate positions on law of the sea. And finally, there were the direct confrontations—over fisheries jurisdiction, over Canada's newly extended territorial sea boundary, and over Canada's new claim to establish pollution safety zones in the Arctic and other areas.

With the 1969 voyage of the Manhattan through the Northwest Passage, the threat to Canadian jurisdiction over its Arctic areas became explicit. While fisheries closing lines would obviously not protect that jurisdiction, the establishment of a twelve mile territorial sea, closing the Barrow Strait and Prince of Wales Strait...
would. In addition, a new type of authority was also needed, and that was sought in the establishment of pollution prevention zones of up to 100 nautical miles from land above the 60° parallel of north latitude, and elsewhere to coincide with fisheries closing lines. The decisions regarding formulation and implementation of Canadian policy were handled in the office of the Prime Minister with legal counsel supplied by the Department of External Affairs. In meetings with the Under Secretary of State and other U.S. officials, Canadian representatives pointed to public pressure for immediate Government action to protect the Arctic environment. The U.S. requested, in response, that Canada delay, forego, or submit such action to a multilateral conference. Such a unilateral claim, in the U.S. view, would stimulate others to similar actions and thereby damage prospects for international agreement safeguarding maritime mobility. For the Canadians, the issue came down to a question of national sovereignty and for the Americans a question of national security.

The public exchange between the governments on Canada's adoption of the legislation showed the extreme importance that each attached to Canada's pollution legislation. Taking issue with the "unilateral" nature of Canada's claim, the United States asserted that it "has long sought international solutions rather than national approaches to problems involving the high seas," and offered to litigate the issue in the International Court of Justice. Canada's response was unequivocal. After stating that "Canada reserves to itself the same rights as the U.S.A. has asserted to determine for itself how best to protect its vital interests," the note went on to document all the U.S. unilateral assertions of jurisdiction beyond the three mile territorial sea. Included among these references were the U.S. 1966 contiguous fishing zone, the Truman Proclamation of 1945, and nuclear testing on the high seas. Moreover, the note aired Canadian grievances over the fact that its "extensive and vigorous multilateral campaign" to secure agreement on a territorial sea breadth in the early 1960's "failed because the U.S.A. ultimately declined to participate in them."

Asserting its "overriding right of self-defense" to protect its mat-

rine environment, the Canadian Government rejected the notion of participating in any international conference on the Arctic which would deal with “questions falling wholly within Canadian domestic jurisdiction.” Canada rejected “any suggestion that the northwest Passage is . . . an international strait,” and asserted that “Canada’s sovereignty over the islands of the Arctic Archipelago is not, of course, an issue.” More importantly, however, the Trudeau government placed reservations on Canada’s acceptance of the compulsory jurisdiction of the International Court of Justice in “disputes 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.”42

Although the governmental interactions of 1970 were complex, the policy outcome was clear. The United States and Canada emerged from the year 1970 with law of the sea attitudes and policies pointing in opposite directions. All levels of the governments had been involved in the confrontation—including President Nixon and Prime Minister Trudeau43—and any retraction would thereafter prove difficult, if not impossible. The landmarks of the policy divergence included, on the Canadian side, legislation on Arctic pollution, territorial sea and fishing zones introduced in April, 1970 and, on the U.S. side, the President’s policy statement of May, 1970 and its subsequent elaboration in the August, 1970 U.S. Draft Treaty on the Seabed.

Faced with Canada’s refusal to negotiate its claims to offshore jurisdiction bilaterally or regionally or to submit them to the International Court, the single arena remaining for a U.S.-Canadian policy confrontation was the U.N. Seabed Committee. Within this forum, Canada’s jurisdictional claim was simply a variation on coastal State extensions occurring elsewhere in the world. Indeed, Canadian actions were no doubt taken with the knowledge that they might be “sold” to other U.N. members. Of all coastal State extensions, however, Canada’s was the most alarming to the United

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States Government and particularly to the Navy.44

The extent to which the availability of the United Nations Seabed Committee as a negotiating forum evoked or restrained developments in Canadian-American transnational relations in law of the sea is ambiguous. Perhaps it stimulated the proliferation of national offshore claims. Certainly it served the U.S. as a court of last resort in 1970. In so doing, of course, the U.N. Seabed Committee contributed to linking fisheries, territorial sea and straits issues with the deliberations on the ocean floor. Since 1967, negotiations relating to ocean issues had been handled on two separate tracks. While the U.N. Seabed Committee was heatedly debating the disposition of resources of the ocean floor, the maritime powers were quietly discussing with other nations the possibility of international agreement on the breadth of the territorial sea, straits, and fisheries. As in 1958 and 1960, the U.S. wanted universal agreement on the territorial sea breadth and was prepared by 1970 to openly support a twelve mile territorial sea if freedom of transit through and over all international straits were guaranteed. To diffuse coastal State opposition, the U.S. had combined this proposal with a policy of preferential fishing rights for coastal States.

As Canada's Spring, 1970 legislation made abundantly clear, limited coastal State rights to fisheries did not suffice to deflate pressure building in favor of coastal State extensions. In response to the Canadian legislation and other coastal State claims, the U.S. offered far reaching resource and revenue concessions in exchange for navigational mobility. On May 23, 1970, the President called for coastal State renunciation of claims to seabed resources beyond the depth of 200 meters and for the establishment beyond this point of an international regime to govern seabed resource exploitation.45 Beyond the 200 meter depth contour the coastal State would have limited rights to manage resource exploitation to the outer edge of the continental margin and revenues from that area would be shared with the international community.

The intent of this policy, and of its subsequent elaboration in a Draft Seabed Treaty in August, 1970, was to forestall further unilateral extensions of jurisdiction. The revenue sharing aspects were certainly calculated to garner the support of developing land-

44. The Canadian legislation “provided that naval vessels and other ships owned by foreign governments may be exempted from the application of Canadian anti-pollution regulations, if the ships in question substantially met Canadian standards.” 1970 CANADIAN YEARBOOK OF INTERNATIONAL LAW 34; United Nations Press Release, L/T/587/Rev. 1 (April 9, 1970).
45. For the background to this decision, see Hollick, Seabeds Make Strange Politics, FOREIGN POLICY, No. 9, Winter 1972-73.
locked or shelf-locked States. An unintended effect of the U.S. Draft Treaty, however, was to contribute to pressure for combining all of the law of the sea issues in a single negotiating conference. While the U.S. was concerned to restrict the negotiating trade-offs by handling seabed issues in a conference separate from one concerning the territorial sea, straits and fisheries, the U.S. Draft Treaty belied that argument. In December, 1970, the United Nations voted to convene a single conference on all-law of the sea issues in 1973. The trade-offs would henceforth be between coastal and maritime interests across the range of ocean issues.

U.S.-Canadian differences over offshore jurisdiction played a large role in defining the negotiating parameters in the 1970 Seabed Committee. The United States stressed its global maritime interests and indicated that it might mortgage offshore resources to that purpose. Canada, on the other hand, concentrated on protecting its ample submerged lands and offshore resources from “giveaways” to the international community.

Since 1970, there have been modifications in both policies. In response to strong domestic as well as international pressure, the U.S. has upgraded the priority accorded to coastal fisheries and petroleum interests. And Canada, or at least its Department of Transport, has indicated its interest in maintaining the principle of freedom of navigation to the greatest practical extent. Additionally, in response to trends in the international negotiations, Canada and the United States have tried to accommodate their positions to those favoring a 200-mile economic zone and have indicated a willingness to consider revenue sharing in areas beyond the zone. These shifts in policy since 1970 can be more fully explained by examining the processes leading to LOS decisions in both capitals.

V. DECISION-MAKING PROCESSES: OTTAWA AND WASHINGTON

While Canadian and American policies in present law of the sea negotiations reflect general coastal and maritime interests of each

47. Jean Marchand, Minister of Transport, before Canada, Standing Committee on External Affairs and National Defence (House of Commons), MINUTES OF PROCEEDINGS AND EVIDENCE No. 26, at 7 (Dec. 4, 1973).
country as well as the past decade of LOS relations, they also reflect
the decision-making processes within each government in the larger
context of an international lawmakers exercise. General character-
istics of the processes have been similar on both sides of the border.
A large number of agencies are involved in the policy process be-
because law of the sea negotiations touch on a gamut of interests from
resource to national security considerations. Interagency groups
were established to deal with law of the sea and primary responsi-
bility for leadership or coordination of these diverse interests fell
initially to the legal divisions in the foreign affairs departments
of both governments. Reporting to the top officials in each govern-
ment has generally coincided with the sessions of the Seabed Com-
mittee and the Law of the Sea Conference. The guidelines which
were laid down in 1970 provided the thrust of policy to the end
of 1973, but since then new considerations have entered the policy
calculations of both governments.

The differences in the decision-making processes are more inter-
eting than the similarities and account, to some extent, for differ-
ing policy substance as well as style. Since 1970, law of the sea
policy in the United States has been the product of intensive nego-
tiations among evenly matched opposing domestic and bureaucratic
interests. Once agreed upon, portions of U.S. policy are reopened
or altered with utmost difficulty. Canadian policy, on the other
hand, has until recently reflected the overwhelming preponderance
of coastal interests. This has allowed the Canadian diplomat
greater flexibility in adapting national policy to coastal trends pre-
vailing in the international negotiations. It is too early to tell
whether navigational and mining interests will have a constraining
effect on Canada's fundamentally coastal orientation.

The initial consolidation of U.S. bureaucratic machinery for ocean
questions occurred in early 1970 as it became apparent that a wide
variety of ocean issues would be handled within the single forum
of the U.N. Seabed Committee. Three agencies—State, Defense and
Interior—were active in LOS and represented on the U.S. delegation
to the Seabed Committee. Within these agencies, separate staffs
for continental shelf and seabed issues on the one hand, and straits,
territorial seas, and fisheries on the other, were merged. A central
policy body, the Inter-Agency Law of the Sea Task Force, was of-
officially established in February, 1970 under the chairmanship of
John R. Stevenson, then Legal Advisor of the Department of State
and head of the U.S. Delegation. With Mr. Stevenson's departure
from government in 1973, John Norton Moore was appointed head
of the Interagency Task Force and head of a new law of the sea
office (D/LOS) in the Department of State. Mr. Stevenson became
Ambassador and Special Representative of the President for the Law of the Sea Conference with Mr. Moore as his deputy. The Interagency Task Force which Mr. Moore heads includes among its members representatives of all interested federal agencies and bureaus: the Departments of State, Defense, Interior, Commerce, Treasury, Justice, Transportation; the National Security Council; the National Science Foundation; the Central Intelligence Agency; the Office of Management and Budget; the U.S. Mission to the United Nations; the Environmental Protection Agency; and the Council on Environmental Quality. Except for the Office of Management and Budget, each of the agencies sent one or more representatives to the preparatory sessions of the LOS Conference. The U.S. sent a delegation of more than 100 to the Caracas session of the Conference with all of the interested agencies amply represented.

Since 1932, Canada's Interdepartmental Committee on Territorial Waters has been the expert body handling maritime issues. Agency membership has fluctuated with government reorganization depending upon the issue under consideration. With a change of Cabinet Committees under the 1970 Trudeau reorganization, the Interdepartmental Committee on Territorial Waters was reconstituted as the Interdepartmental Committee on Law of the Sea (ICLOS)—a title designed to reflect the scope of ICLOS concerns in the negotiations then underway at the U.N. The Legal Advisor to the Department of External Affairs, J. Alan Beesley, chaired ICLOS and served as head of the Canadian delegation to the U.N. Seabed Committee from 1969 through 1973. In 1973, Mr. E. G. Lee became Legal Advisor and Chairman of ICLOS while Mr. Beesley, although newly appointed Ambassador to Austria, continued as Canada's senior law of the sea negotiator and deputy head of the delegation. ICLOS includes among its members the Departments of External Affairs; National Defence; Energy, Mines and Resources; Environment; Industry, Trade and Commerce; Justice; Indian Affairs and Northern Development; Transport; and the Ministry of State for Science and Technology. Few of the ICLOS member agencies sent representatives to the U.N. Seabed Committee. Apart from External Affairs only the Department of Energy, Mines and Resources has been consistently represented on the delegation since 1968 and the Department of the Environment since its creation in 1971. A representative from the Directorate of Sovereignty and
Planning of the Department of National Defence attended a 1972 session of the U.N. Seabed Committee while another was detailed to External Affairs to serve as Secretary to the Canadian delegation and Interdepartmental Committee. Canada fielded the second largest delegation to the Caracas Conference (51) and though it included participation by new agencies, it was weighted by representatives from the Departments of the Environment (12), External Affairs (9), Energy, Mines and Resources (3), with two or fewer from six other departments or ministries.

The participation of U.S. Government departments and the relative lack of it by Canadian Government departments reflect different governmental systems as well as the relative strength of divergent domestic interests vis-a-vis each nation's foreign affairs office. Each U.S. Government agency has its own Legal Office from which representatives to the Interagency Task Force and to the U.S. Delegation may be chosen, unlike Canadian departments which, with the exception of External Affairs, do not have legal divisions. Because the law of the sea negotiations are concerned with codification of international law, U.S. agency representatives with legal expertise (as well as the technical expertise of their respective departments) are able to wield greater influence than their Canadian counterparts. They are able to participate directly in international negotiations as well as in drafting of treaty articles. The active involvement of legal offices of non-foreign affairs agencies in the U.S. has restricted the freedom of the State Department Legal Advisor's Office and of its successor D/LOS. Though it has garnered an increasingly important role since 1970, the State Department has generally acted more as a compromiser of conflicting agency interests than as a director of the policy process. The difficulties of reconciling U.S. interests accounts for the frequency

48. The small size of the Canadian delegations and their cohesiveness may be explained by what Mr. Beesley describes as "Canadian theory and practice . . . that one of the functions of a foreign service is to represent the government and the country abroad, whether in bilateral negotiations or multilateral negotiations. When the subjects are technical, requiring special expertise, then other departments are either represented or, in some cases, lead the delegation. In every case, however, every member of the delegation is considered to represent the Canadian Government as a whole, and not merely his particular ministry. Thus, External Affairs officers are accustomed to reflect a composite governmental view rather than the position the External Affairs Department may have taken in the inter-departmental discussions leading to the development of the position." Letter from Ambassador J. Alan Beesley, Canadian Embassy, Vienna, Austria, to Ann L. Hollick, October 31, 1973.

49. The Defense Department has not been represented by its Legal Office since 1972, but DOD has continued to wield a unique form of influence based on strategic rather than legal expertise.
of Interagency Task Force meetings—as often as once or twice a week.

In contrast, Canada’s Interdepartmental Committee on Law of the Sea meets about six times a year, generally before and after LOS negotiating sessions of the U.N. Except for the Department of External Affairs, agencies of the Canadian government must rely on the Department of Justice for legal counsel. In law of the sea matters, however, the Justice Department has been primarily restricted to federal-provincial jurisdictional disputes and had not been represented on the Canadian delegation until 1972. Efforts to absorb the External Affairs legal bureau into the Justice Department operations have been strongly resisted. The Bureau of Legal Affairs has given the Department of External Affairs a commanding position among ICLOS agencies, and its Legal Operations Division supplies the negotiating nucleus of the Canadian delegation. Unlike the State Department’s Office of the Legal Advisor (as well as the office presently handling LOS), Canada’s Bureau of Legal Affairs is staffed largely by foreign service officers with overseas experience. Rather than moving from private practice to government, Canadian legal officers are selected from career civil servants. An example of the coordinating role played by the relatively small group of legal and diplomatic experts in the Legal Advisor’s Office is the secondment of an official to the Department of the Environment to coordinate that agency’s activities in fisheries and the marine environment.

In developing and negotiating national policy on law of the sea, Canadian and American civil servants enjoy equal latitude although different constraints in relation to the elected officials of the state/provincial and federal governments. In both countries, reports to elected officials in the Executive and Legislative branches generally precede and follow sessions of the U.N. LOS negotiations. While the U.S. civil servant may spend a substantial portion of his time testifying before the many interested Congressional committees, his Canadian counterpart divides his efforts between Cabinet commit-

50. Best, supra note 41.

51. The Legal Bureau has two divisions, Legal Advisory and Legal Operations, the first responsible for general expertise in international law and the second for presenting the Canadian case at international conferences. Within the Legal Operations Division, there are four sections, one of which is law of the sea.
Canada's ICLOS reports through the Secretary of State for External Affairs to the Cabinet Committee for External Affairs and National Defence, and secondarily to the Cabinet Committee on the Environment. Due to the importance of law of the sea negotiations for a variety of interests and departments, the process of securing cabinet approval is not without its perils. As long as policy proposals reflect the prevailing views of the government and as long as agreement exists among civil servants of the several departments or a preponderance thereof, the parliamentary system offers substantial latitude to the bureaucrat. The operations of ICLOS exemplify the type of policy influence that the civil servant wields within the government. Unlike most elected officials, the civil servant specializes in a set of issues and has the time to devote to formulating and promoting policy proposals. In law of the sea, draft instructions are prepared within the Legal Affairs Bureau and then go to the full ICLOS membership for amendment and approval. The draft instructions are next sent to the Cabinet Committee on External Affairs and Defence where any problems that cannot be resolved within ICLOS are ironed out among the ministers. Due, perhaps, to the smaller size of the Canadian Government, the Legal Advisor may meet with Cabinet committee ministers on bilateral as well as multilateral LOS negotiations. Once the Committee has agreed to the instructions, full Cabinet approval is a formality.

Given the numerous responsibilities of Cabinet ministers and the ability of Canadian law of the sea diplomats to satisfy the Parliament, if not all the agencies, the broad policy guidelines set out in March, 1971, remained essentially unchanged through 1973. Those on pollution simply instructed the diplomats to protect coastal State interests. On a series of issues negotiated at the Stockholm Conference, the London Dumping Conference, the London IMCO Conference and the Seabed Committee, separate instructions were given. Prior to the New York and Caracas sessions of the Law of the Sea Conference, the full Canadian position was spelled out in a document tabled in the House of Commons on November 2, 1973. A full review of this position was conducted by the Standing Committee on External Affairs and National Defence. Were there sharp disagreement and equal political weight

52. CANADA, HOUSE OF COMMONS STANDING COMMITTEE ON EXTERNAL AFFAIRS AND NATIONAL DEFENCE, MINUTES OF PROCEEDINGS AND EVIDENCE No. 27, at 22 (Dec. 12, 1973).
among diverse Canadian interests, policy guidelines would no doubt have been modified more frequently and would have been more detailed.

Perhaps most important in understanding the Canadian policy process in LOS is the national cohesion around a coastal policy that was generated by the voyage of the Manhattan in 1969, the implicit denial of Canadian jurisdiction and the resulting Canadian legislation in Spring, 1970. Since then, the Department of Transport, the Department of National Defence and the Ministry of Science and Science Technology have experienced difficulties when their policy preferences have run counter to the coastal State orientation of Canada's law of the sea policy. They have been reminded that the 1970 legislation was the only bill to receive the unanimous support of the Parliament. Only a substantial increase in the size and prestige of Canadian merchant shipping or the revival of distant military concerns might shift the Canadian position toward greater emphasis on navigational freedoms. Such a dramatic change, however, is unlikely to occur before the Third U.N. Conference on Law of the Sea is well over. In the meantime, coastal interests will doubtless prevail.

In the United States, law of the sea policymakers are subject to a different set of pressures and constraints in formulating and negotiating policy. The decision process in development of U.S. LOS policy has been formally within the National Security Council system. Prior to each session of the U.N. negotiations, the Interagency Task Force spends several months preparing draft instructions which are then transmitted to the White House for approval. There, difficulties have arisen in pushing the instructions through White House channels that are typically engulfed with more pressing is-

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54. The Ministry of Transport has a major input in the IMCO negotiations while the Ministry of Science and Technology has reportedly made a major input in LOS. See also Statement of the Minister of Transport, Canada, House of Commons Standing Committee on External Affairs and National Defence, Minutes of Proceedings and Evidence No. 26 (Dec. 4, 1973); Canadian Chamber of Shipping “Appendix O, Minutes of Proceedings and Evidence No. 16 (May 7, 1974).
sues. As a result the instructions (in the form of National Security Decision Memoranda [NSDM's]) have at times reached the U.S. delegation several weeks after the start of a negotiating session. Delays have also been caused at an earlier stage in the policy process by disputes among the agencies comprising the Task Force. When this occurred in 1970, 1972 and 1973, the dispute was taken to the Under Secretary's Committee where compromises were sought. If the agencies in disagreement did not accept the compromise formulations, the dispute went to the White House and on occasion to the President for a decision. As a result of these divergent U.S. interests, even routine draft instructions forwarded to the White House by the Interagency Task Force for approval reflect tenuous compromises among all agencies. The resulting National Security Decision Memoranda are necessarily quite specific on matters under contention. The active participation of many U.S. agencies on the Delegation to the Conference assures that the instructions are not overstepped in the negotiating process.

Although the general American public is not as informed about national law of the sea policies as is the Canadian public, private American interests have followed the negotiations quite closely since 1970. In response to strong industry pressure, the relationship of these interests to the U.S. Government was formalized in early 1972 with the creation of an Advisory Committee on the Law of the Sea. Members from each of its eight subcommittees—petroleum, hard minerals, international law and relations, marine science, fisheries, international finance and taxation, marine environment and maritime industries—are represented on the U.S. delegation to the Seabed Committee. In addition to this formalized watchdog role and the exertion of pressure in Congress, interest groups make their wishes felt directly on government officials who tend to move into and out of private business more frequently than Canadian lawyers. Like his Canadian counterpart, the American civil servant enjoys a special expertise derived from concentrating on the technicalities of oceans policy. While that expertise bestowed a certain freedom on a small group of U.S. officials through 1970, the heightened activism and expertise of many private interests and agencies has since reduced their latitude. The effect on policy has been a trend toward a greater balance between the various U.S. coastal and maritime interests.

The diversity of U.S. interests and of lines of influence makes the negotiation of a single national policy as difficult if not more difficult than negotiating the policy internationally. Because a position may be hammered out at the last minute, the U.S. finds it difficult to coordinate with or even to give advance notice to
other governments of policies that it plans to support. A prime example of this problem in U.S.-Canadian relations was the tabling of the U.S. Draft Treaty on the Seabed Regime in August, 1970. Bitterly fought within the U.S. Government, the Draft Treaty was pressed through an interagency controversy at the last moment and was forwarded to the Canadian Government only three days before officially released. The Canadians were dismayed, particularly with the provisions for international jurisdiction over the continental shelf beyond a depth of 200 meters, and resented the lack of consultation before its presentation. The mode of presenting it to the Canadian Government, as much as its contents, did not enhance cooperative relations in law of the sea.

VI. TRANSNATIONAL SYSTEMS

Despite the difficulties posed for intergovernmental cooperation by the U.S. arriving at last minute decisions, transnational as well as transgovernmental LOS relations between the U.S. and Canada might proceed unaffected. As in 1958 or 1960, Canada's Department of National Defence might consult with the U.S. Defense Department on law of the sea matters of mutual concern. Scientists in both countries might cooperate in the conduct of offshore marine research. Or the mining companies and the relevant government departments on both sides of the border might harmonize their proposals on a regime for deep seabed mining. Such contacts have occurred but were reduced by the events of 1970 and are presently restricted to non-governmental, informal links.

The full U.S. and Canadian delegations meet bilaterally about once a year. These official intergovernmental consultations increased in number before Canada passed its 1970 legislation, stopped for a period, and have resumed since. Representatives of the foreign offices have met with officials of other agencies in negotiating fisheries questions and at the Stockholm and IMCO Conferences. In law of the sea, the pattern of informal consultation has been between representatives of the maritime powers such as the U.S., the U.S.S.R., Japan and certain European nations. For its part, the Canadian delegation maintains regular informal contact with Australia, Norway, New Zealand, Iceland and a number of other middle power coastal nations. It is to these countries, with substantial coastal interests, that Canada has turned for support since 1970.
The records of the 1968 and 1969 meetings of the U.N. Seabed Committee show a now surprising degree of coordination and even cooperation between U.S. and Canadian delegates. Representatives of both countries to the Economic and Technical Subcommittee (the predecessor of Subcommittee I of the Seabed Committee and the First Committee of the Law of the Sea Conference) shared with their British and Australian colleagues training in the disciplines of geology and geography. Within this highly politicized forum of legally trained delegates, a comfortable professional relationship developed—in the case of Canada and the U.S. between officials of the Department of Energy, Mines and Resources and of the Interior Department respectively. The major efforts of the delegates of Canada, the U.S., Britain and Australia in 1968 and 1969 were directed toward injecting hard data into the Subcommittee’s discussions. To this end, speeches were orchestrated to raise the level of understanding of geological realities, the state of mining technology, alternative types of mining systems, the concerns and benefits of marine science and the like.

The disappearance in 1970 of such coordinated efforts is traceable to a number of factors. Within the United Nations the stage of discussion and exchange of technical information was superseded in 1970 by the stage of political bargaining and definition of trade-offs. At the same time, U.S.-Canadian policies parted ways over Canadian offshore claims and the U.S. counter proposal for renouncing claims to resources of the continental margin beyond the 200 meter isobath. Although the Interior Department had lost ground within the U.S. Government, Canada’s Department of Energy, Mines and Resources played an increasing role in policy counsels. While Canada’s global naval interests were being forced to contract their concerns from NATO defense to sovereignty and domestic police functions, in Canadian eyes, “the Admirals had taken over” United States policy. With the military agency ascendant in the United States and the resource and environment agencies ascendant in Canada, earlier lines of informal communication quickly eroded.

It is instructive to note the agency representation on the U.S. and Canadian delegations as it has changed since 1968. The only Canadian departments represented in 1968 and 1969 were the De-

portments of External Affairs and Energy, Mines and Resources. During the same years, U.S. agency participation included the Departments of State, Defense and the Interior. Since 1970, the only new agency regularly participating on the Canadian delegation has been the Department of the Environment, created in 1971. As noted above, DND participation has been limited primarily to detailing an officer to the LOS Division of the Legal Bureau to serve as secretary to ICLOS and the Seabed Committee Delegation. Although they are members of ICLOS, departments with distant water interests were not represented at meetings of the Seabed Committee. The Departments of Transport and of National Defence and the Ministry of State for Science and Technology sent one representative each to the Caracas session. The contrast with the sizeable and diversified U.S. agency participation is striking. Since 1970, new members of the U.S. delegation have come from the Departments of Commerce, Treasury, Transportation, the National Science Foundation and the Environmental Protection Agency and they have been present in large numbers at the international negotiations.

The asymmetry in size and composition of the respective delegations accounts to some extent for the lack of transgovernmental interactions during meetings of the Seabed Committee. Instead, there have developed multi-nation semi-institutionalized interest group contacts within the framework of the law of the sea negotiations. The earliest group to organize were the fishery experts who in effect set the pattern of weekly luncheon meetings for subsequent groups. Participants were selected on the basis of expertise, not country representation, and varied from week to week. The next group to be created after the “Fish Hook Luncheon Club” was the “Seabed Dredge and Drill Club” in 1972. Membership included petroleum and hard minerals geologists and engineers. Similar luncheon groups have been formed more recently for naval-military interests (“The Peacekeepers Group”) and for marine science interests. The policy impact of these regularized transnational meetings is difficult to determine. Undoubtedly they provide a useful opportunity for delegates and private experts from as many as 30 countries to exchange views with at least a common basis of technical expertise. They do not, however, provide a forum for U.S.-Canadian interest group exchanges. U.S. participation at these luncheon meetings has included private industry representatives advising the
delegation while Canadian private sector representatives did not attend the international negotiations until the Caracas meeting.

The absence until recently of direct private interest participation on the Canadian delegation and the concomitant reduction of transnational links can be traced to several factors. A paramount consideration has been the politicization of law of the sea issues with the 1970 legislation. Equally important is the fact that Canada's vocal coastal interest groups have been largely satisfied with the thrust of official policy. Canadian law of the sea interests do not all point in the same direction but it has been the civil servants in the Legal Bureau of the External Affairs Department that have balanced the several considerations—not the competition of interest groups. These officials have maintained a cohesive coastal oriented policy that has in turn enhanced the ability of the Canadian delegation to play a leadership role in the international negotiations.

While U.S. private sector interests have pursued policy goals through representatives in a number of agencies (i.e., petroleum and hard minerals through the Interior and Treasury Departments, or science through the National Science Foundation and the State Department's Coordinator of Ocean Affairs) the policy process in Ottawa is so centralized that representations must be directed to the key departments of External Affairs, Environment, and Energy, Mines and Resources. Due in part to the nature of the Canadian economy, Canadian officials are able to keep private interests at arms length. Foreign ownership of major industries is substantial—i.e., 99 percent of oil refinery capacity in 1969 or 85 percent of primary smelting. Consequently, the interest of a particular industry rarely seems to be equated with the national interest. On the contrary, it is generally suspect. Whereas in the United States, companies such as Exxon, Mobil, Texaco and Shell might receive a favorable hearing within several agencies of the Government, their Canadian affiliates do not. The coincidence between the oil industry position on coastal State offshore jurisdiction and that of the Canadian Government does not extend to the industry position on security of investment, compulsory settlement of disputes and protection of the marine environment. Canadian nationalism in conjunction with the multinational connections of the oil industry has left the civil servant free to formulate a national policy independent of industry interests.

Similarly, where the Canadian Government closely regulates the  

activities of hard mineral mining industries, the United States does not. Because the Department of Energy, Mines and Resources is concerned with the effect on Canadian mineral prices and employment levels, it does not wish to encourage unregulated seabed minerals exploitation. While International Nickel Company, Noranda and other Canadian companies are as interested in nodule mining as American firms, until recently they have maintained silence on the subject and have had little say in the Canadian position on the international seabed regime. INCO has invested $12 million in ocean mining technology but reportedly “with the intent of protecting its flanks by eventually marketing cheaper land-mined metal.” Noranda has participated in a seabed research and development project “to sustain its position as one of the world’s major producers and exporters of copper.” Noranda takes issue with the official government position on the grounds that “[i]t would be short sighted to attempt to deny the development of a new source of needed resource in order to try and protect an existing resource.” American firms, on the other hand, have entered the governmental policy process more directly. While Hughes’s Summa Corporation is proceeding with its activities in disregard of international deliberations, Deep Sea Ventures and Kennecott Copper have pressed for favorable legislation in both the Congress and the Executive branch. Kennecott and Deep Sea Ventures are said to have invested about $20 million each and Summa Corporation in the vicinity of $100 million in ocean mining. In November, 1974, Deep Sea Ventures laid claim to a Pacific Ocean mining site and notified the Secretary of State accordingly. The transnational interactions of the mining companies are reportedly extensive but cannot be documented. Apparently INCO has cooperated to a limited degree in pushing ocean mining legislation but relations with U.S. companies have at times been strained.

60. According to the Wall Street Journal a U.S. corporate executive has described INCO as “the man who comes to the wife-swapping party without his wife.”
The marine science interest in narrow boundaries can be disregarded in Canada, not because of foreign domination but simply because it is weak. Government officials find the scientific establishment to be unresponsive to overriding policy concerns and must, therefore, keep a wary eye on it. In one interesting case, transnational scientific relations with the U.S. evoked a transgovernmental Canadian response and ultimately an intergovernmental protest. Upon reading the November, 1969 issue of *Geotimes,* a senior official of the Department of Energy, Mines and Resources discovered that the Glomar Challenger operating under the Deep Sea Drilling Project would be conducting two drilling operations on Canada’s continental margin, the most controversial one located 150 miles southeast of Halifax and 140 miles southwest of Sable Island.

Upon further inquiry it was learned that the sites had been suggested by a Canadian scientist cooperating in the Joint Oceanographic Institutions Deep Earth Sampling Program (JOIDES). Not only was the off-Halifax site selected because of the existence of oil related structures, but it had already been leased to Shell Oil. In response to this information, a representative from Canada’s Department of Energy, Mines and Resources made a statement to the U.N. Seabed Committee indicating that “a drilling programme would not be allowed to proceed on Canada’s continental margin, whether it be with scientific or commercial intent, without assurance that adequate pollution control equipment and procedures were to be utilized.”

In response to this speech and at the suggestion of the Interior Department’s representative on the U.S. delegation to the Seabed Committee, the Chief Scientist of the Deep Sea Drilling Project in NSF contacted the official from EMR. While those discussions were underway, and upon the advice of EMR, the Department of External Affairs made an official protest of the drilling to the State Department through its Ambassador in Washington.

Although the Canadian case for prohibiting the drilling rested overtly on the grounds of the Glomar Challenger’s inability to handle blowouts, the underlying issue was that of sovereignty. Denying Canada’s right to assert jurisdiction over an area as deep as 2,340 meters and over a hundred miles from shore, the State Department advised NSF not to fill out the Canadian offshore drilling notices. The issue was ultimately resolved between the EMR.

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and NSF officials by a compromise in which it was agreed that the Project would not drill off Halifax and the Canadian Government would overlook the drilling off Newfoundland. The lesson of that experience for Canadian science has clearly been that it must not swim against the tide of government policy. It, like other ocean interests, must have government sanction of its international dealings.

The fisheries policies of Canada and the United States are similar in many respects due to comparable circumstances in both countries. The fisheries offshore both nations are some of the most valuable in the world and until their depletion by distant fishing nations, supported a sizeable fishing community. Distant water fleets operate out of the U.S. and Canada, although the Canadian fleet is far smaller than that of the U.S. To provide for these domestic interests, both nations initially adopted the “species approach” within the U.N. Seabed Committee and both subsequently adapted this to the concept of a 200-mile resource zone. In the evolution of the species approach in both countries, domestic factors played a significant role. Its adaptation to a 200-mile zone concept is attributable to the pressures of the international negotiations.

Canada’s fishery policy has since 1964 been aggressive in protecting coastal fishing interests through the extension of exclusive fisheries jurisdiction. With the government’s adoption of fishery closing lines extending Canada’s fisheries jurisdiction, the highly vocal fishing industry issued a statement of support for the official negotiators. Provincial fisheries ministers and industry have appar-

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64. The Deep Sea Drilling Project has since made it official policy to avoid structures that might contain gas pockets. *Deep Sea Project, The Oil and Gas Journal*, Nov. 2, 1970, at 120–22.
66. Whereas the Fisheries Council of Canada has felt in the past that the Government of Canada did not place sufficient emphasis on fisheries matters in the development and execution of international affairs policies; and Whereas to a large extent this shortcoming is now being corrected through extensions of fisheries jurisdiction; negotiation of bilateral fisheries agreements and development of principles of international law . . . and Whereas these activities have been accompanied as they proceeded, by an increasing consultation with the Canadian fishing industry; and Whereas an impressive team of international fisheries experts and negotiators . . . has been established in the Department of External Affairs. Therefore be it resolved that the Government of Canada be urged to keep
ently continued to support the Government in its effort to achieve recognition of resource jurisdiction at least to 200 miles if not out to the edge of the continental margin.\(^6^7\) Canadian officials, therefore, encountered few difficulties when, in 1973, they accommodated the species approach to the widely supported concept of a 200-mile economic zone.\(^6^8\) The move to a 200-mile zone had the added advantage of enhancing Canadian influence with developing coastal States.

Within the United States, fisheries policy through 1971 was determined by naval interests anxious to prevent the development of a resource zone that might evolve into a zone of coastal State sovereignty. This was evident in the 1970 U.S. proposal to offer preferential fishing rights and a twelve mile territorial sea to coastal States in exchange for freedom of transit through international straits.\(^6^9\) Even when the species approach was first elaborated in 1971 by the fishing industry, it was introduced in conjunction with territorial sea and straits provisions of U.S. policy.\(^7^0\) Since then, coastal fisheries interests have grown consistently in strength. In 1972, the species concept was elaborated in the form of draft articles with a greater stress than ever before on the management and enforcement rights of the coastal State. The U.S. move in 1974 to a 200-mile exclusive economic zone with separate regimes for highly migratory and anadromous species reflected not only the growing strength of the coastal resource interests but the continued activism of other segments of the U.S. fishing industry. Congressional pressure for a unilateral extension of fisheries jurisdiction to 200 miles indicates a similar preoccupation with coastal resources.\(^7^1\)

Domestic interests and international considerations have played a greater role in the evolution of U.S. and Canadian fisheries policies than have relations between the two countries. U.S.-Canadian transgovernmental relations, however, become more significant in

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this highly respected and qualified team together . . . in order that the necessary expertise and continuity may be maintained for the critical developments which lie ahead in international fisheries and international law of the sea.


70. 10 INT'L LEGAL MATERIALS 1018 (1971).

negotiations within regional fisheries organizations (such as the International Commission for Northwest Atlantic Fisheries). Allied against the distant water fishing nations, Canadian and American officials have coordinated actions in appropriate situations. In both governments the negotiators include representatives of fisheries agencies as well as the foreign affairs ministries.

The absence of a substantial number of transnational and transgovernmental interactions in U.S.-Canadian law of the sea relations has several possible explanations. The centralization of decision-making power in Canada's foreign affairs department has been a major factor. The policy centralization was facilitated by the polarization of law of the sea issues in Canada in 1970. That such policy centralization has been viable indicates that the policies pursued are satisfactory to most of Canada's indigenous interests. Certainly, Canadian policy vis-à-vis extending fishing jurisdictions, protecting the Arctic environment, and generally standing up to the United States has struck responsive chords within the Canadian public. In the case of those few domestic interests that are not satisfied with official policy, the Canadian context of growing nationalism limits the resort to transnational relations with United States interests. Where a strong bureaucracy finds itself confronted with a substantial number of foreign owned private interests, its judicious use of nationalist sentiment can ensure that policy formulation remains in the hands of the civil servants.

VII. CONCLUSION

While U.S.-Canadian intergovernmental relations are continuing as the Third LOS Conference progresses, the future of transnational relations is less certain. The LOS policies of both countries have drawn closer since the divergence of 1970 and may come even nearer if the Conference continues over a long period of time. With national policies less sharply divided, it is possible that transnational links will be more easily established between those groups that are not entirely satisfied with the official policies of their respective governments. In the short run, however, serious obstacles exist to a reestablishment of relations as close as those of 1958 and 1960. The overall trend of Canadian nationalism and policy independence will doubtless persist. Although Canadian and U.S. policies may be increasingly similar, the differences that re-
main will be stressed by Canadian officials. While Canada's ability
to exercise a leadership role among developing nations will continue
to decline, Canada will retain its close working relations with other
middle range coastal nations. The U.S. will continue its somewhat
isolated position in the negotiations and its limited affiliation with
other developed and maritime nations.

The conclusion of the Law of the Sea Conference will eliminate
an important forum for the assertion of a distinctive Canadian
policy and set of claims. The probable Conference outcome, how-
ever, will recognize most if not all of Canada's offshore claims. And
there will continue to be other international oceans organizations
in which remaining unsatisfied claims may still be advanced. The
achievement of most of Canada's policy goals may ultimately result
in a reduction of high level government involvement in law of the
sea and in the growth of transnational and informal law of the
sea relations between the two countries.