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Keith F. Miller*

The Implications of *UNCLOS* for Canada's
Regulatory Jurisdiction in the Offshore—
the 200-Mile Limit and the Continental
Shelf

The author examines the current state of international law governing Canada's sovereignty and jurisdiction over the exploitation of hydrocarbons within its continental shelf. These rights are reviewed from a historical perspective through the progression of international conventions, the decisions of international tribunals and the enactment of Canadian federal laws. The article includes an examination of Canada's rights under international law respecting its 200-nautical-mile exclusive economic zone and the continental shelf beyond, as well as a review of Canada's maritime boundary disputes with adjacent coastal states.

L'auteur se penche sur l'état actuel du droit international applicable à la souveraineté du Canada et à sa compétence sur l'exploitation des hydrocarbures de son plateau continental. Ces droits sont examinés dans un contexte historique, à la lumière d'une succession de conventions internationales, des arrêts de tribunaux internationaux et de la promulgation de lois fédérales canadiennes. Cet article comporte en outre un examen des droits du Canada, en vertu du droit international, sur la zone économique exclusive de 200 milles marins et le plateau continental qui s'étend au-delà de cette limite; l'auteur étudie également les différends concernant les frontières entre le Canada et les États côtiers adjacents.

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Introduction

Canada regulates oil and gas development in the Atlantic offshore area and Beaufort Sea under an extensive body of statutes, regulations, and policies. From an international law perspective, Canada's authority to exercise such jurisdiction is dependent upon having a recognized sovereign right to regulate development activities beyond its territorial sea, within the boundaries of the continental shelf that appertains to it, and not that of an adjacent coastal nation.

The current regime of international law affecting the nature and extent of Canada's sovereignty in its offshore region is relatively new, having emerged and developed largely since the end of the Second World War. The most significant and comprehensive development in international law regarding offshore sovereignty was the adoption of the 1982 *United*

Nations Convention on the Law of the Sea (UNCLOS),¹ to which Canada is a signatory. The Convention entered into force in November 1994 and was ratified by Canada in November 2003.

The period following the end of the Second World War until the adoption of the *UNCLOS* saw the issuance of proclamations and declarations by coastal states throughout the world asserting varying and overlapping claims concerning the limits of territorial seas and fishing zones and sovereignty over the continental shelf for the purpose of conserving and exploiting its natural resources.²

The purpose of this paper is to examine the existing regime under international law that establishes and defines the respective rights of coastal states, such as Canada, over their maritime areas for the purpose of exploring and exploiting the hydrocarbon resources located within the seabed and subsoil. In providing context for the current rules, this paper reviews the historical emergence and evolution of the continental shelf regime through developments in international law and the assertion by Canada of extended maritime claims through policy, federal legislation, and executive orders. The concepts and principles of international law governing Canada's sovereignty and jurisdiction in the offshore are not specific to any particular coast—Atlantic, Pacific, or Arctic. For the most part, they have general application to all three coastal regions.

Canada shares maritime boundaries with three countries: the United States, France (involving St. Pierre and Miquelon), and Denmark (involving Greenland). Some of Canada's continental shelf boundaries have been determined with these countries either by agreement or dispute resolution procedures while some remain unresolved.³ This paper examines and discusses the issues and circumstances surrounding some of the boundary disputes and how, in some cases, boundary delimitation has been settled or determined. In addition, it explores the procedures established by and made available under the *UNCLOS* to resolve maritime boundary disputes.

1. 10 December 1982, U.N. Doc A/CONF 62/122 (entered into force 16 November 1994).

2. UN, *United Nations Convention on the Law of the Sea (a historical perspective)*, Oceans and Law of the Sea, Division for Ocean Affairs and the Law of the Sea, online: <http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm> [*UNCLOS Historical Perspective*].

3. A number of continental shelf boundaries remain undetermined between Canada and the United States. Regarding the Beaufort Sea, see Walter B. Parker & John Harlow Byrne, "Sea Changes: Perspectives on Alaska's Future Under the Pending United Nations Convention of the Law of the Sea and the Findings of the United States Oceans Commission Report" (Dec. 2004) Prepared for the Alaska State Legislature by the Institute of the North, online: <<http://www.institutenorth.org/servlet/content/reports.html>>; in the west, there are disagreements over the boundaries in the Dixon Entrance and the Strait of Juan de Fuca, both of which are discussed in detail at Tony Fogarassy, *The Alaskan Boundary Dispute: History and International Law*, online: Clark Wilson LLP <<http://www.cwilson.com/pubs/energy/alaska.pdf>>.

The issue of cooperative arrangements for the development of hydrocarbon resources that underlie both sides of a delimited boundary are discussed with reference to Canadian examples and the potential implications to the structure of regulatory regimes.

This paper begins by examining the nature of international law as context to discuss the effect of the *UNCLOS*. Part II reviews the historical development of the current continental shelf regime in international law. Part III traces the steps which ultimately resulted in the *UNCLOS*, surveys its content, and discusses the response of various States. Parts IV and V describe Canadian claims to continental shelf rights and boundary disputes with adjacent coastal States. Part VI outlines the factors used to determine boundary delimitation and Part VII describes the mechanisms contained in the *UNCLOS* for dispute resolution. Part VIII addresses issues related to transboundary development.

I. *The nature of international law*

International law has been described as

the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but states are not the only subjects of international law.

....

That part of international law that is binding on all states, as is far the greater part of customary laws, may be called *universal* international law, in contradistinction to *particular* international law, which is binding on two or a few states only. *General* international law is that which is binding upon a great many states. General international law, such as provisions of certain treaties which are widely, but not universally, binding and which establishes rules appropriate for universal application, has a tendency to become universal international law.⁴

"Sources" of international law are outlined in Article 38 of the *Statute of the International Court of Justice*⁵ (ICJ) as comprising:

1. (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international customs as evidence of a general practice accepted as law;
- (c) the principles of law recognized by civilized nations;

4. Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law*, 9th ed. (Essex, England: Longman Group UK, 1992) at 4 [*Oppenheim's International Law*].

5. *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No.7, Annex.

- (d) (subject to the provisions of Article 59) judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The statute notes that:

- 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*,⁶ if the parties agree thereto.

Of the four sources, this article will summarily discuss customs and treaties or conventions, having regard to the comprehensive and detailed examination of these subject matters in *Oppenheim's International Law*.⁷ International law can be derived from custom, which is "the oldest and the original source of international law as well as of law in general."⁸ Custom involves two elements—a settled practice that certain actions are carried out in a particular way, and under a belief that conducting the actions in such a manner is obligatory or right. Custom is distinct from mere usage in that the actions that give rise to a usage are not based on the belief of obligation.⁹ International treaties are the "second source of international law." Treaties may be more correctly viewed as a formal source of rules (rights and obligations) between states rather than of law, "which is usually taken to require a generality and automaticity of application which treaties do not typically possess."¹⁰ Treaties are based "on the customary rule of international law that treaties are binding upon the contracting parties."¹¹

II. *Emergence of the continental shelf regime in international law*

1. *The rise of continental shelf claims*

Prior to the adoption of the *Convention on the Continental Shelf*¹² in 1958, there had been no formal recognition under international law of a coastal state's sovereign rights over its continental shelf for any purpose, including the exploration and exploitation of natural resources beyond the territorial sea. In *Re the Seabed and Subsoil of the Continental Shelf*

6. To decide a case *ex aequo et bono* means that "the decision will not be based on the application of legal rules but on the basis of such other considerations as the court may in all the circumstances regard as right and proper." See *Oppenheim's International Law*, *supra* note 4 at 44 and n. 6.

7. *Supra* note 4.

8. *Ibid.* at 25.

9. *Ibid.* at 25-29.

10. *Ibid.* at 31.

11. *Ibid.*

12. 29 April 1958, 499 U.N.T.S. 311, U.N. Doc. ST/LEG/SER. E/2 at 624 (entered into force on 10 June 1966).

Offshore Newfoundland,¹³ the Supreme Court of Canada concluded that international law concerning the continental shelf is a relatively recent development.

The *Convention on the Continental Shelf* arose out of the first United Nations Conference on the Law of the Sea, initiated in February 1958.¹⁴ This Convention entered into force in 1964 following the required number of State ratifications. Canada was a party to the treaty which it ratified in 1970. There were three other conventions adopted from the 1958 Conference—the *Convention on the Territorial Sea and the Contiguous Zone*,¹⁵ the *Convention on the High Seas*,¹⁶ and the *Convention on Fishing and Conservation of the Living Resources of the High Seas*.¹⁷

Until the adoption of the *Convention on the Continental Shelf*, the concept of sovereign continental shelf rights had only been a claim asserted under numerous and diverse proclamations regarding resource and fishery zones ranging in distance up to 200 nautical miles, and had not been recognized as an international custom accepted as law.¹⁸ The principal need for a recognized international law convention respecting jurisdiction over the continental shelf arose due to the post-war development of technology capable of exploring offshore resources and in the face of the ever-increasing and conflicting claims among adjacent coastal states regarding their authority over resource development in the area of the continental shelf.

One of the initial developments in the emergence of international law involving continental shelf rights was a treaty between Venezuela and the United Kingdom, on behalf of its then-colonies Trinidad and Tobago.¹⁹ It was the first international accord regarding the division of the continental shelf and it followed Venezuela's annexation of certain parts

13. [1984] 1 S.C.R. 86 [*Hibernia Reference Case*]. At para. 72 the Court stated the following: We conclude that international law had not sufficiently developed by 1949 to confer, ipso jure, the right of the coastal State to explore and exploit the continental shelf. We think that in 1949 State practice was neither sufficiently widespread to constitute a general practice nor sufficiently consistent to constitute settled law. Furthermore, several of the early State claims exceeded that which international law subsequently recognized in the 1958 Geneva Convention. International law on the continental shelf developed rather quickly, but it had not attained concrete form by 1949.

14. There have been three United Nations Conventions on the Law of the Sea; the first in 1958, the second in 1960 which was unsuccessful, and the third that led to the 1982 *United Nations Convention on the Law of the Sea*.

15. 29 April 1958, 516 U.N.T.S. 205 (entered into force on 10 September 1964).

16. 29 April 1958, 450 U.N.T.S. 11 and 82 (entered into force on 30 September 1962).

17. 29 April 1958, 559 U.N.T.S. 285 (entered into force on 20 March 1966).

18. *UNCLOS Historical Perspective*, *supra* note 2.

19. *Treaty Relating to the Submarine Areas of the Gulf of Paria*, Venezuela and United Kingdom, 26 February 1942, 205 UNTS 121-27.

of the submarine area of the Gulf of Paria. This bilateral agreement went beyond merely asserting sovereign rights over continental shelf resources. It asserted that the United Kingdom's area of the divided Gulf became the territory of Trinidad and Tobago.

The emergence of the current continental shelf regime was set in motion following President Truman's September 1945 proclamation on the continental shelf.²⁰ One of the preamble clauses to the Truman Proclamation articulated the foundation for the claim as advanced by the United States:

Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf of the contiguous nation is reasonable and just, since the effectiveness of measures to utilise or conserve these resources would be contingent upon cooperation and protection from shore, since the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of their nature necessary for utilisation of these resources;²¹

The Proclamation decreed that the:

... United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.²²

The doctrine articulated by the Truman Proclamation was extremely significant in several respects: (1) it recognized the continental shelf as an extension of the land mass thus being appurtenant to it; (2) the exercise of jurisdiction over the continental shelf would be for the utilization, conservation and protection of resources; (3) the boundary of the continental shelf shared with an adjacent state would be determined by the two parties in accordance with equitable principles; and (4) the exercise of jurisdiction over the continental shelf would not affect free and unimpeded navigation in the high seas of the waters above the continental shelf.

20. U.S., Presidential Proclamation No. 2667, *Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, 28 September 1945 [Truman Proclamation].

21. *Ibid.*

22. *Ibid.*

After making the Gulf of Paria treaty with Venezuela, the United Kingdom moved to extend further territorial boundaries to include the continental shelf of some of its other colonies—the Bahamas and Jamaica in 1948, British Honduras in 1950, and the Falkland Islands in 1952.²³ However, the United Kingdom's claim that the continental shelf was within its territory was not ultimately accepted as part of the continental shelf regime established under international law pursuant to the *Convention on the Continental Shelf*.

Following the Truman Proclamation, more claims were advanced by other coastal states to extend their territorial authority to include the continental shelf. In 1946 Argentina claimed its continental shelf and the epicontinental sea above it. In 1947, Chile and Peru claimed sovereign rights over a 200-nautical-mile area. Ecuador followed in 1950. This was an attempt by these countries to limit the access of distant-water fishing fleets and to control the depletion of fish stocks in their adjacent seas.²⁴

In 1953, the United States enacted the *Outer Continental Shelf Lands Act*.²⁵ Section 1332(1) of that Act provided:

It is declared to be the policy of the United States that the subsoil and sea-bed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

Section 1331(a) defines "outer Continental Shelf" to mean:

... all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and sea-bed appertain to the United States and are subject to its jurisdiction and control;

All of these events underscored the need to develop uniform and internationally accepted rules and principles to govern the rights of coastal states over the continental shelf.

23. See *Hibernia Reference Case*, *supra* note 13 at para. 16.

24. *Supra* note 2.

25. 43 U.S.C. 1331-1356 (1953).

2. *Effect of the Convention on the Continental Shelf*

Articles 1 and 2 of the *Convention on the Continental Shelf*²⁶ codified the concept and widely adopted practice of coastal States exercising sovereign rights over the exploitation of natural resources within the area of their respective continental shelves. Article 6 of the *Convention* mandates that disputes shall be determined by agreement, which is in accordance with one of the fundamental tenets of customary international law. Adjacent or opposite coastal States were required to settle continental shelf boundary disputes by agreement. Failing agreement, boundaries were to be determined using the principle of equidistance, absent special circumstances.

In the *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*,²⁷ the International Court of Justice (ICJ) expressed the view that the continental shelf rights enshrined in the *Convention on the Continental Shelf* were a reflection of the doctrine articulated in the Truman Proclamation. The Court considered the Truman Proclamation to have special significance as being the starting point of the positive law on the rights of states regarding the continental shelf. It observed:

Although [the Truman Proclamation] was not the first or the only [instrument] to have appeared, it has in the opinion of the Court a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation however, soon came to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal State as having an original, natural, and exclusive (in short vested) right to the continental shelf off its shores, came to prevail over all others, being now reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf. With regard to the delimitation of lateral boundaries

26. *Supra* note 12. Article 1 provides that:

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 2 provides that:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

27. [1969] I.C.J. Rep. 3 [*North Sea Continental Shelf Cases*].

between the continental shelves of adjacent States, a matter which had given rise to some consideration on the technical, but very little on the juristic level, the Truman Proclamation stated that such boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles". These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject. They were reflected in various other State proclamations of the period, and after, and in the later work on the subject.²⁸

3. *The nature of continental shelf rights*

The ICJ described the nature of continental shelf rights and discussed the notion of "appurtenance" in the *North Sea Continental Shelf Cases*.²⁹ Sovereign rights over the continental shelf are an extension of the sovereignty exercised over land domain. The continental shelf is a natural prolongation of the land domain into the sea. Thus, continental shelf appertains to land.

The Supreme Court of Canada held in the *Hibernia Reference Case* that continental shelf rights are not property in the ordinary sense, but rather are "sovereign rights" which "appertain to the coastal State as an extension of rights beyond where its ordinary sovereignty is exercised. In pith and substance they are an extra-territorial manifestation of, and an incident of the external sovereignty of a coastal State."³⁰ Having regard to the *Convention on the Continental Shelf*, the Supreme Court of Canada stated that a coastal State does not own a continental shelf and that the rights thereto are something less than full sovereignty. The rights are limited to the rights that international law affords the coastal State. The Court observed that:

Continental shelf rights arise as an extension of the coastal State's sovereignty, but it is an extension in the form of something less than full sovereignty. ... In the ordinary meaning of the term, the continental shelf is not part of a coastal State's territory. The coastal State cannot "own" the continental shelf as it can own its land territory. The regulation by international law of the uses to which the continental shelf may be put

28. *Ibid.* at para. 47.

29. *Ibid.* at para. 39:

The a priori argument starts from the position described in paragraph 19 [of this Judgment], according to which the right of the coast State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of appurtenance is derived the view which, as has already been indicated, the Court accepts, that the coast State's rights exist ipso facto and ab initio without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different States.

30. *Supra* note 13 at para. 18.

is simply too extensive to consider the shelf to be part of the State's territory. International law concedes dominion to the State in its land territory, subject to certain definite restrictions. By contrast, in the continental shelf the limited rights that international law accords are the sum total of the coastal State's rights.³¹

III. *The 1982 United Nations Convention on the Law Of The Sea*

1. *The significance of the UNCLOS*

Following a Second Conference held in 1960 that yielded no results, the United Nations convened its Third Conference on the Law of the Sea in New York in 1973. Nine years later, on 10 December 1982, the *UNCLOS* was adopted and entered into force on 16 November 1994.

The Third Conference resulted from a need expressed by Arvid Parvo, Malta's ambassador to the UN, for "an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction."³² This need arose due to the ever-expanding uses of the oceans for the charting of deep waters by nuclear submarines, the over-fishing of the richest waters by large fleets, and the expansion of hydrocarbon exploration deeper and deeper into the continental shelf:

In the late 1960's, oil exploration was moving further and further from land, deeper and deeper into the bedrock of continental margins. From a modest beginning in 1947 in the Gulf of Mexico, offshore oil production, still less than a million tons in 1954, had grown to close to 400 million tons. Oil drilling equipment was already going as far as 4,000 metres below the ocean surface. Offshore oil was the centre of attraction in the North Sea. Britain, Denmark and Germany were in conflict as to how to carve up the continental shelf with its rich oil resources.³³

Canada is a signatory to the *UNCLOS* which it ratified on 6 November 2003.

One of the preamble clauses to the *UNCLOS* notes that "developments since the United Nations Conferences on the Law of the Sea held at Geneva in 1958 and 1960 have accentuated the need for a new and generally acceptable Convention on the law of the sea."³⁴ Another preamble clause provides that it was a desire of the *UNCLOS* to develop principles embodied in a General Assembly resolution "that the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as

31. *Ibid.* at para. 15.

32. "A Brief Introduction to the Legal Regime for the Oceans," International Institute for Sustainable Development (16 July 2007), online: <http://www.iisd.ca/process/water_intro.htm>.

33. *UNCLOS Historical Perspective*, *supra* note 2.

34. *Supra* note 1, Preamble.

well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States.”³⁵

The *UNCLOS* represents a consolidation of pre-existing conventions on the law of the sea, widely adopted practices that had not necessarily become customary international law, and new concepts to address the expanding technical capabilities of coastal States to explore and exploit living and non-living resources on the continental shelf and in the deep sea.

From the perspective of offshore oil and gas development, the key provisions of the *UNCLOS* are:

- the establishment of a twelve-nautical-mile limit for the territorial sea and a contiguous zone having a breadth of a further twelve nautical miles;³⁶
- the establishment of a 200-nautical-mile exclusive economic zone;
- the granting of limited sovereign rights over resource exploration and exploitation on the continental shelf, including the portion of the shelf that extends beyond the limits of the exclusive economic zone;
- the creation of an international “tax” on production from the continental shelf outside the limits of the exclusive economic zone;
- the establishment of rules for determining the boundaries of the territorial sea, the exclusive economic zone, and the continental shelf;
- the establishment of clearly defined options and procedures for the settlement of disputes;
- the protection of the marine environment; and
- with respect to the exclusive economic zone and the high seas, the freedom of other states for navigation and overflight, as well as the freedom to lay submarine cables and pipelines.³⁷

Although the United States was a party to the *Convention on the Continental Shelf*, as well as the three other law of the sea conventions

35. *Ibid.*

36. While the *Convention on the Territorial Sea and the Contiguous Zone* explicitly established the territorial sea it did not prescribe the limit of its breadth. By implication, it would be no greater than twelve nautical miles, as that was the limit prescribed for the contiguous zone, as established for the first time by the *Convention on the Territorial Sea and the Contiguous Zone*.

37. *Supra* note 1, Articles 58 and 87.

made in 1958, it did not ratify the *UNCLOS* due to concerns within the administration of President Ronald Reagan regarding the deep seabed mining provisions under Part XI of the *UNCLOS*.³⁸ Primarily the concerns related to the function, authority, and governance of the International Seabed Authority (ISA). It was the view of the United States that the ISA regime failed to adequately recognize American political and economic interests. Part XI created the ISA and granted it authority over mining operations. Mining would be undertaken by a body of the ISA called the Enterprise, coastal States would be required to fund the Enterprise, and mining technology would have to be transferred to the Enterprise (albeit under fair and reasonable terms and conditions).³⁹ Further, the ISA's governance would enable amendments to be made to Part XI without the consent of the United States.⁴⁰

In his 1983 *Statement on United States Oceans Policy*,⁴¹ President Reagan announced that the United States would not sign the *UNCLOS*. However, in effect, he also declared that the United States would act in accordance with the Convention, except for Part XI.

American concerns resulted in negotiations commencing in 1990 under the administration of President George H.W. Bush concerning changes to Article XI. This led to the *1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (1994 Agreement),⁴² which was signed by the United States on 29 July 1994 under the administration of President Bill Clinton.

Ratification of the *UNCLOS* and the 1994 Agreement requires a minimum two-thirds approval by the United States Senate.⁴³ On 7 October 1994 President Clinton referred the two treaties to the Senate Committee on Foreign Relations, but they were not put to a vote in the Senate.⁴⁴

Polarized ideological debate has persisted in the United States as to whether the 1994 Agreement has resolved the earlier concerns regarding the function, authority, and governance of the ISA and whether the *UNCLOS*

38. *Supra* note 1, Articles 133-191.

39. U.S., *Fact Sheet on Deep Seabed Mining and the International Seabed Authority*, 24 March 2004 letter from Senators Richard G. Lugar and Ted Stevens to members of the United States Senate. Online: Richard G. Lugar United States Senator for Indiana <<http://lugar.senate.gov/sfre/colleague.html>>.

40. *Supra* note 1, Article 155.

41. U.S., Presidential Statement, 10 March 1983, online: <<http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm>>.

42. UN, A/RES/48/263, 17 August 1994.

43. U.S. Const., art. II, §2.

44. U.S., CRS Issue Brief For Congress, *The U.N. Law of the Sea Convention and the United States: Developments Since October 2003*, by Marjorie Ann Browne, 3 June 2005, online: <<http://www.fas.org/sgp/crs/row/RS21890.pdf>>.

is consistent with the economic, security and environmental interests of the United States. In February 2004, the Senate Committee on Foreign Relations voted in favour of the *UNCLOS*⁴⁵ and in March 2004 published a report urging other members of the Senate to support it but a full Senate vote was not taken.⁴⁶ The administration of President George W. Bush has concluded that there are important reasons for the United States to become a party to the *UNCLOS*⁴⁷ and in May 2007 a Presidential Statement was issued urging the Senate to approve it.⁴⁸ On 31 October 2007, the Senate Foreign Relations Committee voted 17-4 to send the *UNCLOS* to the full Senate for ratification.⁴⁹ Such a vote has not yet occurred.

2. *Territorial sea and contiguous zone*

Part II of the *UNCLOS*⁵⁰ lays down the principles governing the outer limit of the territorial sea and its legal status, including that of its superjacent air space and its bed and subsoil. The "sovereignty of a coastal State, including an island, extends beyond its land territory and internal waters, and in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea described as the territorial sea."⁵¹ Every coastal State has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles measured from baselines determined in accordance with *UNCLOS*.⁵² The normal baseline used for determining the breadth of the territorial sea is measured from the low-water line along the coast.⁵³ However, straight baselines, for which appropriate points along the coast are joined, may be used in "localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity."⁵⁴

45. *Ibid.*

46. U.S., The United States Mission to the European Union, *Bush Administration Urges Senate Approval of Sea Treaty*, 24 March 2004, online: <<http://useu.usmission.gov/Article.asp?ID=3515FDEB-D68D-4E8C-B9A9-43D5EABE53DB>>.

47. U.S., *Statement of John F. Turner, Assistant Secretary of State, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State*, before the Senate Environment and Public Works Committee, Washington, DC, 23 March 2004, online: <http://epw.senate.gov/hearing_statements.cfm?id=219509>.

48. U.S., Presidential Statement, *President's Statement on Advancing U.S. Interests in the World's Oceans*, President George W. Bush, 15 May 2007, online: <<http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html>>.

49. U.S., U.S. Leadership in the World and the Law of the Sea, Law of the Sea Clears Committee, online: Richard G. Lugar United States Senator for Indiana <<http://lugar.senate.gov/sfrc/sea.html>>.

50. *Supra* note 1, Articles 3-16.

51. *Ibid.*, Article 2.

52. *Ibid.*, Article 3.

53. *Ibid.*, Article 5.

54. *Ibid.*, Article 7.

Part II also establishes a zone contiguous to the territorial sea, concerning which the coastal State may exercise necessary control to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea" and "punish infringement of such laws and regulations within its territory or territorial sea."⁵⁵ In effect, the contiguous zone is a buffer area that permits coastal States to reach outside of their territorial seas to protect against or punish breaches of applicable laws within territorial waters. The contiguous zone cannot exceed twenty-four nautical miles measured from the baselines used to measure the territorial sea.⁵⁶

The internal waters of a coastal State are considered to be the waters on the landward side of the territorial sea baseline.⁵⁷

3. *Islands and archipelagic states*

Part VIII of the *UNCLOS*⁵⁸ prescribes the principles regarding the maritime areas to which an island is entitled. An island is a naturally formed area of land, which is above water at high tide. An island's territorial sea, contiguous zone, exclusive economic zone, and continental shelf are to be determined according to provisions of the *UNCLOS* applicable to other land territory. Rocks that cannot sustain human habitation or economic life are not entitled to an exclusive economic zone or continental shelf.⁵⁹

Part IV of the *UNCLOS*⁶⁰ establishes the rules for archipelagic States, which are entitled to rights for a territorial sea, contiguous zone, economic exclusive zone, and continental shelf.⁶¹ Baselines for determining the breadth of the territorial sea and the other maritime zones may be drawn using straight lines.⁶² This Part also describes the sovereignty of an archipelagic State in respect of the archipelagic waters enclosed within its baselines and the air space over archipelagic waters. It also prescribes rules regarding fishing rights, existing submarine cables, right of innocent passage, and designation of sea lanes and aircraft routes.

4. *Exclusive economic zone*

Part V of the *UNCLOS*⁶³ describes an exclusive economic zone and the specific legal regime applicable to it. It does not exceed beyond 200

55. *Ibid.*, Article 33, para. 1.

56. *Ibid.*, Article 33, para. 2.

57. *Ibid.*, Article 8.

58. *Ibid.*, Article 121.

59. *Ibid.*

60. *Ibid.*, Articles 46-54.

61. *Ibid.*, Article 48.

62. *Ibid.*, Article 47.

63. *Ibid.*, Articles 55-75.

nautical miles from the territorial sea baselines.⁶⁴ In its exclusive economic zone, a coastal State has sovereign rights to explore and exploit, conserve and manage living and non-living natural resources, as well as sovereign rights to the waters superjacent⁶⁵ to the seabed and on the seabed and its subsoil.⁶⁶ Further, a coastal State has exclusive jurisdiction over the establishment, construction, and use of artificial islands, installations, and structures, including jurisdiction with regard to customs, fiscal, health, safety, and immigration laws and regulations.⁶⁷ As well, a coastal State has jurisdiction with regard to marine scientific research and the protection and preservation of the marine environment.⁶⁸ A coastal State is required to have due regard to the rights and duties of other States when exercising its rights and performing its duties within the exclusive economic zone.⁶⁹ Other States are required to have due regard to the rights and duties of the coastal State and to comply with the laws and regulations adopted by it in accordance with the *UNCLOS*.⁷⁰

5. *Continental Shelf*

Part VI of the *UNCLOS*⁷¹ establishes the legal regime governing the continental shelf. Within the area of its continental shelf, a coastal State has exclusive sovereign rights for the purpose of exploring it and exploiting its natural resources.⁷² These exclusive rights are not contingent upon occupation or any express proclamation by the coastal State.⁷³ Coastal States have been given the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.⁷⁴ Article 60, pertaining to artificial islands, installations, and structures within the exclusive economic zone, applies *mutatis mutandis* to such facilities and structures on the continental shelf.⁷⁵

The *UNCLOS* defines the continental shelf of a coastal State as comprising the:

64. *Ibid.*, Article 57.

65. The term "superjacent waters" refers to the mass of water above the seabed, often referred to as the water column.

66. *Supra* note 1, Article 56, para. 1(a).

67. *Ibid.*, Article 56, para. 1(b)(i), Article 60.

68. *Ibid.*, Article 56, para. 1(b)(ii) and (iii).

69. *Ibid.*, Article 56, para. 2.

70. *Ibid.*, Article 58.

71. *Ibid.*, Articles 76-85.

72. *Ibid.*, Article 77, paras. 1-2.

73. *Ibid.*, Article 77, para. 3.

74. *Ibid.*, Article 81.

75. *Ibid.*, Article 80.

1. seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from the which the breadths of the territorial sea is measured where the outer edge of the continental shelf does not extend up to that distance.

3. submerged prolongation of the land mass of the coastal state, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.⁷⁶

The outer limits of the continental shelf on the seabed shall not exceed either 350 nautical miles from the territorial sea baselines or one hundred nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.⁷⁷ Use of the 2,500 metre isobath criterion could in some cases cause the outer limit to extend beyond 350 nautical miles. Submarine ridges are restricted to an outer limit of 350 nautical miles and not beyond.⁷⁸ Submarine elevations, such as plateaux, rises, caps, banks and spurs of the continental shelf are not restricted solely to the 350-nautical-mile limit.⁷⁹ The *UNCLOS* does not define either "submarine ridges" or "submarine elevations."

If a coastal State's continental shelf extends beyond the breadth of the territorial sea, it is required to delineate the outer limits of the continental shelf using straight lines not exceeding sixty nautical miles and connecting six points defined by coordinates of latitude and longitude.⁸⁰ The *UNCLOS* prescribes certain technical rules for establishing the outer edge of the continental margin.⁸¹

If a coastal State wishes to establish the outer limits of its continental shelf beyond 200 nautical miles, it is required to submit to the Commission on the Limits of the Continental Shelf the particulars of the proposed limits, along with supporting scientific and technical data within ten years of the entry into force of the *UNCLOS* for that coastal State. In the case of Canada, its submission must be filed by 6 November 2013. Annex II of the *UNCLOS* describes the function of the Commission on the Limits of the Continental Shelf. The Commission is required to make recommendations to coastal States on matters related to the establishment of the outer limits

76. *Ibid.*, Article 76, paras. 1, 3.

77. *Ibid.*, Article 76, para. 5.

78. *Ibid.*, Article 76, para. 6.

79. *Ibid.*

80. *Ibid.*, Article 76, para. 7.

81. *Ibid.*, Article 76, para. 4.

of their continental shelf. The limits of the shelf established by a coastal State shall be on the basis of those recommendations and shall be final and binding.⁸²

So far, the following countries have made continental shelf submissions to the Commission: Russia (2001), Brazil (2004), Australia (2004), Ireland (2005), New Zealand (2006), Norway (2006), France (2007), Mexico (2007), Barbados (2008), and Indonesia (2008). Joint submissions were filed by the United Kingdom, Ireland, France, and Spain in 2006 and by the United Kingdom and Northern Ireland in 2008.

Canada initiated a mapping program in 2006 to identify the outer edge of the continental shelf beyond the 200-nautical-mile exclusive economic zone limit on the Nose and Tail of the Grand Banks and the Flemish Cap.⁸³ The mapping involves the collection of data for approximately 17,000 square kilometres of seabed offshore Newfoundland and Labrador.⁸⁴

Canada and Denmark initiated a joint mapping project of the Lomonosov Ridge in 2006. Russia undertook research of the Ridge in 2007. The Lomonosov Ridge is a mountain chain that runs approximately 1,500 kilometres across the Arctic Ocean between Canada's Ellesmere Island and islands off Siberia. The Ridge could be the subject of overlapping claims amongst countries that have Arctic coastlines – Russia, the United States, Canada, Denmark (Greenland), and Norway. The maximum breadth of an outer continental shelf claim for the Ridge would be 350 nautical miles if it is a submarine ridge or it could extend beyond that distance if supported by the 2,500 metre isobath criterion and it is found to be a submarine elevation.⁸⁵ One commentator has suggested that Canada could assert sovereignty over an area in the Arctic larger than Alberta, with the potential for comparable quantities of hydrocarbons.⁸⁶ The area of Canada's outer continental shelf in the Atlantic and Arctic Oceans is approximately 1,750,000 square kilometres.⁸⁷

82. *Ibid.*, Article 76, para. 8; Annex II, Articles 6-7.

83. Fisheries and Oceans Canada, News Release, *Canada's New Government Moves Forward to Establish Limits of our Continental Shelf* (20 July 2006), online: <http://www.dfo-mpo.gc.ca/media/newsrel/2006/hq-ac26_e.htm>.

84. *Ibid.*

85. Marc Benitah, "Russia's Claim in the Arctic and the Vexing Issue of Ridges in UNCLOS" American Society of International Law, ASIL Insight (November 2007), online: <http://www.asil.org/insights/2007/11/insights_071108.html> discusses the potential nature and extent of Russia's claim involving the Lomonosov Ridge.

86. Michael Byers, "Canada joins with Denmark to map depths of the Arctic" *Globe and Mail* (23 March 2006), online: <<http://www.cfis.ubc.ca/?artid=740>>.

87. *Supra* note 83.

6. *International "tax" for production beyond 200 miles*

The *UNCLOS* imposes an obligation upon coastal States to make payments or contributions in kind for the exploitation of non-living resources from the continental shelf beyond the 200-nautical-mile limit of the territorial sea.⁸⁸ Such payments are to be made on an annual basis to the International Seabed Authority, in respect of all production at a site following the first five years of production and calculated on the basis of one per cent of the value or volume of production at the site. The rate will increase by one per cent per year until the twelfth year and then remain at seven per cent per year for each year following.⁸⁹

The International Seabed Authority is required to distribute payments or contributions to disadvantaged states that are party to the *UNCLOS* on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked.⁹⁰

IV. *Canada's assertion of continental shelf rights*

During the period following the adoption of the 1958 *Convention on the Continental Shelf* until Canada ratified the *UNCLOS* in November 2003, Canada enacted various legislation, undertook certain measures and counter-measures and made certain executive orders in order to assert jurisdiction in respect of the hydrocarbon and fishery resources in the area of the continental shelf over which it claimed sovereign rights. Some of the legislation and actions taken were in direct response to measures taken by adjacent coastal States to assert authority within areas of the continental shelf claimed by Canada.

In 1964, Canada enacted the *Territorial Sea and Fishing Zones Act*⁹¹ under which it established a territorial sea of three nautical miles plus nine nautical miles for fishing. In 1966, in response to France having issued hydrocarbon exploration permits in areas adjacent to St. Pierre and Miquelon, Canada issued exploration permits adjacent to Newfoundland and Nova Scotia that overlapped part of the area for which the St. Pierre and Miquelon permits had been issued.

In 1970, Canada enacted the *Arctic Waters Pollution Prevention Act*⁹² in order to regulate navigation in an area generally extending one hundred nautical miles seaward from Canada's Arctic shores in order to protect

88. *Supra* note 1, Article 82, para. 1.

89. *Ibid.*, Article 82, para. 2.

90. *Ibid.*, Article 82, para. 4.

91. S.C. 1964-65, c. 22.

92. R.S.C. 1970 (1st Supp.), c.2.

Arctic waters against pollution. This was in direct response to the voyage of the United States oil tanker *SS Manhattan* through the Northwest Passage in 1969. Further, in 1970, Canada amended the *Territorial Sea and Fishing Zones Act*⁹³ and increased Canada's claimed territorial sea from three nautical miles to twelve. The amendment also provided cabinet with the authority to establish fishing zones, which could extend beyond the twelve-nautical-mile limit. Under that legislative authority, Canada declared a 200-nautical-mile fishing zone adjacent to the Atlantic and Pacific coasts effective 1 January 1977.

In 1982, Canada enacted the *Canada Oil and Gas Act*⁹⁴ under which it asserted jurisdiction over the continental shelf for a distance being the greater of 200 nautical miles or to the outer edge of the continental margin.⁹⁵ In the mid-1980s, the Canadian government entered into accords with Newfoundland⁹⁶ and Nova Scotia⁹⁷ regarding oil and gas resource management and revenue sharing in the offshore regions of the two provinces. The accords were implemented through mirror federal⁹⁸ and provincial legislation. The implementation legislation asserted regulatory jurisdiction over the development of oil and gas within areas of the continental shelf previously claimed by Canada.

Following the entry into force of the *UNCLOS* but prior to Canada's ratification of the treaty, Canada enacted the *Oceans Act*⁹⁹ in 1997, which mirrored the maritime limits and corresponding rights and jurisdiction prescribed by the *UNCLOS*. The *Oceans Act* created five maritime areas consistent with the areas established by the *UNCLOS* and generally having the same limits: (1) internal waters, which included all waters landward of the territorial sea baselines;¹⁰⁰ (2) the territorial sea having a breadth of twelve nautical miles seaward¹⁰¹ from the baselines;¹⁰² (3) a contiguous zone which extends a further twelve nautical miles from the limits of the territorial sea;¹⁰³ (4) an exclusive economic zone which extends from the

93. *An Act to amend the Territorial Sea and Fishing Zones Act*, R.S.C. 1970 (1st Supp.), c. 45.

94. S.C. 1980-81-82-83, c. 81.

95. *Ibid.*, s. 2(1), see the definition of "Canada Lands."

96. *Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Petroleum Resource Management and Revenue Sharing*, dated 11 February 1985, online: <http://www.cnlopb.nl.ca/publicat/reg/aa_mou.pdf>.

97. *Canada-Nova Scotia Offshore Petroleum Resources Accord*.

98. *Canada-Newfoundland Atlantic Accord Implementation Act*, R.S.C. 1987, c. 3; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, R.S.C. 1988, c. 28.

99. S.C. 1996, c. 31.

100. *Ibid.*, s. 6.

101. *Ibid.*, s. 4.

102. *Ibid.*, s. 6.

103. *Ibid.*, s. 10.

limits of the territorial sea up to 200 nautical miles from the baselines,¹⁰⁴ and (5) the continental shelf.¹⁰⁵

The *Oceans Act* formally asserted Canadian jurisdiction over the declared exclusive economic zone and continental shelf of Canada. The continental shelf was defined as "the seabed and subsoil of the submarine areas, including those of the exclusive economic zone ... that extend beyond the territorial sea of Canada throughout the natural prolongation of the land area of Canada ... to the outer edge of the continental margin, determined in the manner under international law that results in the maximum extent of the continental shelf of Canada."¹⁰⁶ The Act granted Canada "sovereign rights over the continental shelf ... for the purpose of exploring it and exploiting the mineral and other non-living resources of the seabed and subsoil of the continental shelf."¹⁰⁷

V. *Canada's maritime boundary disputes and resolutions*

1. *Maritime boundaries requiring delimitation*

As noted previously, Canada has maritime boundaries with the United States, France and Denmark. Canada's boundaries with the United States are in the Beaufort Sea off the north coast of Alaska and Yukon, in the Dixon Entrance between the southern tip of the Alaska panhandle and the Queen Charlotte Islands, in the Strait of Juan de Fuca south of Vancouver Island, and in the Gulf of Maine between the southern tip of Nova Scotia and north of Cape Cod. The boundary with France is around France's territorial islands of St. Pierre and Miquelon, while the boundary with Denmark is predominantly in the Davis Strait and Baffin Bay separating Canada's eastern Arctic from Greenland.

In 1973, Canada delimited its continental shelf boundary with Denmark concerning Greenland. Delimitation with the United States concerning the Gulf of Maine occurred in 1984 and with France in respect of St. Pierre and Miquelon in 1992.

Sovereignty in the Canadian Arctic is becoming an increasingly important subject due to issues surrounding the control of navigation through the Northwest Passage, maintaining security for the North American perimeter and the exploitation of hydrocarbons in the Beaufort Sea. Also, as noted above, Russia, the United States, Canada, Denmark (Greenland), and Norway have Arctic Ocean coastlines that could lead

104. *Ibid.*, ss. 13-14.

105. *Ibid.*, ss. 17-18.

106. *Ibid.*, s. 17(1).

107. *Ibid.*, s. 18.

to overlapping continental shelf claims concerning the Lomonosov Ridge and possibly other regions of the Arctic Ocean.

2. *Canada-Denmark treaty regarding the continental shelf*

In 1973, Canada and Denmark entered into a treaty that delimited the boundary of the continental shelf between the Canadian eastern Arctic islands and Greenland in the middle of Davis Strait, Baffin Bay and northward to the Arctic Ocean.¹⁰⁸ The purpose of the boundary delineation was to permit each country to explore and exploit natural resources on that part of its continental shelf. The boundary was established using equidistant median lines from straight baselines along the coast of the Canadian Arctic islands and of Greenland.¹⁰⁹ Along the most northerly extent in the Nares Strait and Robeson Channel, the boundary was negotiated on principles other than equidistance, likely with the concept of equity predominating.¹¹⁰

The countries have undertaken to cooperate and exchange all relevant data and measurements necessary for more precise charting and mapping and the parties have agreed that if new data indicates that the dividing line requires adjustment, such adjustment will be carried out on the basis of the same principles used in determining the dividing line.¹¹¹

No boundary has been established between the two points located on the north and south coasts of Hans Island, which is the subject of an ongoing dispute between Canada and Denmark and each country claims it as its sovereign territory. While the island is uninhabited and is only 1.3 square kilometres, it is considered to have strategic significance to Canada in its efforts to exercise sovereignty over Canadian Arctic waters.¹¹² Failure by Canada to assert authority over the island would likely be construed as a weakness in its ability to undertake measures necessary to assert and maintain sovereignty over the waters of the Northwest Passage.

3. *The Gulf of Maine dispute*

The dispute considered in *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of*

108. *Agreement between the Government of the Kingdom of Denmark and the Government of Canada relating to the Delimitation of the Continental Shelf between Greenland and Canada*, 17 December 1973, (ratified 13 March 1974) [*Canada-Denmark (Greenland) Treaty*].

109. U.S., Department of State, Bureau of Intelligence and Research, *Limits in the Seas*, No. 72 *Continental Shelf Boundary: Canada – Greenland*, (4 August 1976) at 6.

110. *Ibid.*

111. *Supra* note 108, Article 4.

112. Canada, Library of Parliament, *Canadian Arctic Sovereignty*, PRB 05-61E, by Matthew Carnaghan and Allison Goody, 26 January 2006, at 5, online: <<http://www.parl.gc.ca/information/library/PRBpubs/prb0561-e.pdf>>.

America)¹¹³ involved overlapping claims by Canada and the United States regarding the continental shelf and fisheries in the area of Georges Bank, south of Nova Scotia and North of Cape Cod. The conflict was driven by the abundance of fisheries resources and the potential for oil and gas development on the continental shelf. The dispute first developed between the countries in relation to the delimitation of the continental shelf. This arose as a result of both countries having issued geophysical exploration permits in 1964. The issuance of these permits gave rise to a long line of correspondence, assertions, denials, and refutals between the parties regarding their respective and conflicting continental shelf claims during 1965 through to 1979.¹¹⁴

Canada and the United States commenced formal negotiations on the continental shelf boundary in July 1970 that ultimately ended without resolution.¹¹⁵ In 1977, both countries established a 200-nautical-mile fishery zone off their respective shores.¹¹⁶ This action enlarged the dispute between the two countries concerning the continental shelf to include the issue of the boundary delimitation for fishery resources in the superjacent waters.

Pursuant to a treaty entered into between Canada and the United States in 1979,¹¹⁷ the parties agreed to refer the dispute to a special Chamber of the ICJ for the delimitation of a single maritime boundary for both the continental shelf and the fishery zones of the two countries. This process is notable in that it was the first time that such a single boundary determination had been submitted to an international tribunal. Also, it was the first time that the special Chamber process for the ICJ had been utilized.

Canada and the United States transmitted the *Delimitation Treaty* to the Registry of the ICJ in November 1981, and in January 1982 the Court formed the special Chamber. Following the filing of memorials, counter-memorials and replies, the Chamber convened an oral proceeding in April and May 1984. Its decision was issued on 12 October 1984.

The Court held that there was no rule of international law or any material impossibility to prevent it from drawing a single maritime

113. [1984] I.C.J. Rep. 246 [*Gulf of Maine Dispute*].

114. *Ibid.* The extensive record of communications is described at paras. 63-75.

115. *Ibid.* at para. 65.

116. *Fishery Conservation and Management Act*, Pub. L. No. 94-265, 90 Stat. 331, (codified as amended at 16 U.S.C. § 1801-1882 (13 April 1976)); *An Act to amend the Territorial Sea and Fisheries Zones Act*, *supra* note 93.

117. *Treaty between the Government of Canada and the Government of the United States of America to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area*, 29 March 1979, 10204 T.I.A.S. 6 [*Delimitation Treaty*].

boundary as requested by the parties.¹¹⁸ As directed by the parties in the *Delimitation Treaty*, the determination of the Chamber was confined to establishing the boundary from Point A, shown on Map I, to a point inside the triangle, also shown on the map that enclosed the area within which the delimitation line was to terminate. This was to avoid a sovereignty dispute regarding Machias Seal Island and North Rock in the Bay of Fundy, or having the Chamber prejudge the determination of the outer edge of the continental margin, which was something to be dealt with by the countries through negotiations in the first instance.¹¹⁹ The boundary determined by the Chamber is shown on Map I. In 1925, the parties had previously delimited the territorial sea through the islands of Passamaquoddy Bay in the Gulf of Maine part way into the Bay of Fundy.¹²⁰

4. *The St. Pierre and Miquelon dispute*

a. *Delimitation of the Canada-France maritime areas around St. Pierre and Miquelon*

The islands of St. Pierre and Miquelon are the territory of France. They have a combined area of approximately 237 square kilometres and are nearly ten nautical miles from the Burin Peninsula of Newfoundland.¹²¹ The 1783 Treaty of Versailles¹²² ceded St. Pierre and Miquelon from Great Britain to France and granted French fishermen the right to fish in waters adjacent to Canada.¹²³

Between 1966 and 1993, Canada and France became embroiled in numerous disputes concerning the maritime boundary that would demarcate hydrocarbon and fisheries resources within the area of the continental shelf between their respective coasts. As a result of the *Convention on the Continental Shelf* that recognized the sovereign and exclusive right of coastal States, including islands, to explore and exploit the natural resources over the continental shelf, France began issuing hydrocarbon exploration permits in the area of the continental shelf adjacent to St. Pierre and Miquelon in 1966. Similarly, in the same year, Canada issued exploration permits in the offshore areas adjacent to Newfoundland and Nova Scotia

118. *Supra* note 113 at para. 27.

119. Donald R. Rothwell, *Maritime Boundaries and Resource Development: Options for the Beaufort Sea* (Calgary: Canadian Institute of Resources Law, 1988) at 9.

120. *Ibid.* at 3.

121. *Court of Arbitration for the Delimitation of Maritime Areas between Canada and France: Decision in Case Concerning Delimitation of Maritime Areas (St. Pierre and Miquelon)* (1992) 31 I.L.M. 1145 at para. 22 [*St. Pierre and Miquelon Dispute*].

122. *Definitive Treaty of Peace between France, Great Britain and Spain*, 3 September 1783, Article VI.

123. *Ibid.*, Article V.

overlapping into the shelf area adjacent to St. Pierre and Miquelon.¹²⁴ In 1967, France and Canada agreed to a moratorium on exploration pending a resolution on resource ownership.¹²⁵

In 1970, the boundary dispute spread to overlapping fishery zones in the Burin Peninsula area. Canada extended its territorial sea from the previous limit of three nautical miles to twelve nautical miles¹²⁶ and France similarly extended its territorial sea to twelve nautical miles one year later. In 1977, both Canada and France extended their respective fishery jurisdiction to 200 nautical miles.¹²⁷

Negotiations on the delimitation of the areas under national jurisdiction of the two countries took place during 1978 and 1979, and again meetings were held between 1981 and 1985. In 1989, Canada and France executed an agreement that provided for the establishment of a Court of Arbitration to carry out the delimitation of a single-line boundary between the two countries of the maritime areas appertaining to France and those appertaining to Canada.¹²⁸ In 1990, the parties filed memorials and counter-memorials with the Court of Arbitration. Hearings took place from 29 July to 23 August 1991 and the Court of Arbitration issued its decision on 10 June 1992.

The Court of Arbitration awarded France a twelve-nautical-mile zone and a further twelve nautical miles for the western sector of the islands and a ten and one-half nautical mile corridor that extended 200 nautical miles from the southern sector of St. Pierre and Miquelon.¹²⁹ This boundary is illustrated on Map II. The corridor of France's exclusive economic zone, often called the "baguette," is located entirely within the area of Canada's exclusive economic zone and extends through the middle of the Laurentian Subbasin, an area identified for potential oil and gas development and the vast part of which is in Canadian jurisdiction. This is illustrated on Map III.

124. Ted. L. McDorman, "The Search for Resolution of the Canada-France Ocean Dispute Adjacent to St. Pierre and Miquelon" (1994) 17 Dal. L.J. 35 at 38-39.

125. *Ibid.* at 39.

126. *An Act to amend the Territorial Sea and Fisheries Zones Act*, *supra* note 93.

127. See *ibid.* and accompanying text. Also see *supra* note 124 at 39.

128. *Agreement Establishing a Court of Arbitration for the Purpose of Carrying out the Delimitation of Maritime Areas between France and Canada*, 30 March 1989.

129. *Supra* note 124 at 58.

b. *France's potential claim for a portion of the continental shelf*

It has been suggested that St. Pierre and Miquelon be attributed a "discontinuous juridical continental shelf."¹³⁰ Such a share of the continental shelf would in effect "leapfrog" from the St. Pierre and Miquelon "baguette" over Canada's exclusive economic zone to an area outside Canada's 200-nautical-mile limit.

According to Plentegenest, Iosipescu and Macnab the support for the proposition is that Article 76 of the *UNCLOS* "does not address specifically the issue of the disconnect between the outer continental shelf ... and the Exclusive Economic Zone of Saint-Pierre et Miquelon."¹³¹ The Court of Arbitration had been asked to consider France's claim to certain sovereign rights beyond 200 nautical miles. However, the tribunal declined to do so on the basis that such a determination was the responsibility of the Commission on the Limits of the Continental Shelf.¹³²

Plentegenest, Iosipescu and Macnab argue that "there appears to be no applicable precedent in international law concerning the admissibility of an extended continental shelf that is not directly connected to a given coastal state's EEZ, or the exercise of sovereign rights therein."¹³³ In support of their proposition for a discontinuous juridical continental shelf, the authors refer to the concept of "shared jurisdiction" and offer some examples:

Where EEZs are concerned, there are instances where the concept of shared jurisdiction has been given some credence in regions of overlapping interest. For instance, in the Jan Mayen maritime boundary case between Norway and Denmark, the International Court of Justice (ICJ) noted in 1993 that there was no reason in principle why separate boundaries could not be defined for fishing zones that applied to the water column, and for the continental shelf that applied to the seabed. In essence, it would be possible for one state to hold fisheries jurisdiction over a given area while another controlled the seabed. The ICJ made a similar observation in 1984, in the Gulf of Maine case between Canada and the USA. In actual state practice, there is at least one agreement where a coastal state (Indonesia) has agreed to share jurisdiction over its EEZ with another (Australia). It is not clear whether similar considerations would apply to sovereign rights within extended continental shelves, but in any case this question is beyond the scope of this paper.¹³⁴

130. Marc Plentegenest, Michael Iosipescu & Ron Macnab, *The French Islands of Saint-Pierre et Miquelon: A Case for the Construction of a Discontinuous Juridical Continental Shelf* (n.d.), online: <<http://www.gmat.unsw.edu.au/ablos/ABLOS03Folder/PAPER5-1.PDF>>.

131. *Ibid.* at 1.

132. *St. Pierre and Miquelon Dispute*, *supra* note 121 at para. 82.

133. *Supra* note 130 at 4.

134. *Ibid.*

The above discussion does not identify any rule or principle of international law on which France could rely to support a determination that it is entitled to a portion of the outer continental shelf over which it could exercise sovereign rights, similar to those contemplated by Article 76 of the *UNCLOS*. The concept and examples of shared jurisdiction do not seem to support a potential claim to the outer continental shelf. Sovereign continental shelf rights are exclusive and therefore do not entail the sharing of jurisdiction. Upon a boundary being delimited, there is a clear demarcation where the exclusive jurisdiction of one coastal State ends and the exclusive jurisdiction of an adjacent coastal State begins. Coastal States may choose to enter into agreements to share jurisdiction for matters such as the cooperative development of transboundary hydrocarbons; however, they have no obligation to do so. Such arrangements would be predicated upon both parties having sovereign rights, for which they can agree to enter into a compromise. It would seem that in order for France to seek a sharing of jurisdiction, it would have to first establish that it is entitled to rights that could be shared.

5. *Arctic-Beaufort Sea*

There are two predominant and unresolved issues associated with sovereignty in the Arctic. The first is the delimitation of the boundary between Alaska and Canada in the Beaufort Sea for the purpose of exploration and exploitation of potential hydrocarbon resources. North of the Alaska panhandle, the land boundary between Alaska and Canada is along the 141st meridian of longitude; the boundary does not extend into the offshore area. The second involves jurisdiction and control over navigation in the Northwest Passage, which will become increasingly important if climate change results in the melting of Arctic ice and the opening up of the Northwest Passage to increased shipping activity and for longer durations during the year.

Concerning delimitation of the boundary in the Beaufort Sea, it appears to be the position of Canada that the 141st meridian land boundary should be extended into the offshore area. In 1965, Canada began to issue exploration permits in the Beaufort Sea up to and along the 141st meridian. Further, Canada's one hundred-nautical-mile pollution prevention zone established under the *Arctic Waters Pollution Prevention Act*¹³⁵ uses the 141st meridian as the western boundary. Similarly, the 141st meridian was used by Canada as the western boundary to its 200-nautical-mile fishing zone in the Arctic set pursuant to amendments to the *Territorial Sea and*

135. *Supra* note 92.

Fishing Zones Act.¹³⁶ In 1976, the United States applied the principle of equidistance to draw a line that was east of an extended 141st meridian boundary line.¹³⁷ However, as discussed below, the equidistance method has been critiqued in the *North Sea Continental Shelf Cases* for its potential failure to achieve an equitable result in delimitation. As future oil and gas development in the Beaufort Sea becomes warranted and encroaches upon the areas of potential boundary dispute, Canada and the United States will have an incentive to seek and obtain jurisdictional certainty through delimitation.

Regarding jurisdiction and control of navigation through Canadian Arctic waters, tensions between Canada and the United States arose following two voyages by the United States oil tanker *SS Manhattan* through the Northwest Passage in 1969 and 1970, followed by the voyage of the US icebreaker *CGS Polar Sea* in 1985. As noted above, the 1969 voyage of the *SS Manhattan* caused the Canadian government to enact the *Arctic Waters Pollution Prevention Act*¹³⁸ to impose the one hundred-nautical-mile pollution control zone in Arctic waters.

In 1985, Canada enclosed the waters of the Northwest Passage and archipelago using straight baselines and has asserted a claim of internal waters.¹³⁹ The United States rejected Canada's claim that Arctic waters are internal waters of Canada stating that "acceptance would jeopardize the freedom of navigation essential for United States naval activities worldwide."¹⁴⁰ The United States has asserted that the Passage constitutes an international strait.¹⁴¹ The European Union has also rejected Canada's historic waters claim.¹⁴²

Increased and prolonged accessibility of navigation through the Northwest Passage due to climate change would provide substantial benefits for commercial shipping. The passage links Europe and the Atlantic Ocean with Asia and the Pacific Ocean, and is 9,000 kilometres shorter than transiting the Panama Canal and 17,000 kilometres shorter

136. *An Act to amend the Territorial Sea and Fishing Zones Act*, *supra* note 93.

137. David L. VanderZwaag & Cynthia Lamson, "Ocean Development and Management in the Arctic: Issues in American and Canadian Relations" (1986) 39:4 *Arctic* 327 at 329, online: <<http://pubs.aiaa.ucalgary.ca/arctic/Arctic39-4-327.pdf>>.

138. *Supra* note 92.

139. *Supra* note 130 at 330.

140. *Supra* note 109 at 4.

141. *Ibid.* at 3.

142. *Ibid.*

than the Cape Horn route.¹⁴³ Conversely, increased accessibility through the Passage could also increase the risk to the North American security perimeter, a matter that would be of particular concern to the United States.¹⁴⁴

6. *West Coast of British Columbia*

In 1972, the federal government imposed a moratorium on crude oil tanker traffic through Dixon Entrance, Hecate Strait, and Queen Charlotte Sound due to environmental concerns. In the same year, the moratorium was extended to include oil and gas activities. The government of British Columbia imposed a similar moratorium.¹⁴⁵ Offshore exploration on the West Coast commenced in 1958, with fourteen offshore wells being drilled prior to the moratoria being imposed in 1972. It is estimated by the Geological Survey of Canada that the Queen Charlotte Basin could contain up to 734 billion cubic metres of natural gas and 1.56 billion cubic metres of crude oil.¹⁴⁶ Two other basins have been identified on the West Coast, the Tofino Basin and the Georgia Basin, both of which are south of the Queen Charlotte Basin.¹⁴⁷

With the decline in conventional supply of crude oil and natural gas from the Western Canadian Sedimentary Basin, there is increasing pressure to have the moratoria lifted. Environmental resistance to oil and gas development in the West Coast offshore continues to be mounted. In 2004, the federal government established a Public Review Panel to conduct public hearings to determine the views of British Columbians concerning the lifting of the federal moratorium.¹⁴⁸ The Panel was not charged with making recommendations. Following the completion of hearings, the Panel reported that seventy five percent who participated opposed the lifting of the moratorium, while twenty three percent were in favour.¹⁴⁹

Should the moratoria be lifted in the future, delimitation of the continental shelf boundary between British Columbia and Alaska will be

143. James C. Kraska, ed. *The Law of the Sea Convention and the Northwest Passage: The Conference of Defence Associations Institute*, Chapter 3, *Defence Requirements for Canada's Arctic* (2007), online: <http://www.cda-cda.ca/Vimy_Papers/Defence%20Requirements%20for%20Canada's%20Arctic%20online%20ve.pdf>.

144. *Supra* note 112 at 5.

145. Canada, Natural Resources Canada, *Report of the Public Review Panel on the Government of Canada Moratorium on Offshore Oil and Gas Activities in the Queen Charlotte Region British Columbia*, (29 October 2004) at 1-2.

146. *Evolving Offshore Oil and Gas Industry*, (Canadian Centre for Energy Information, March 2004) at 13, online: <http://www.em.gov.bc.ca/DL/offshore/Reports/OffshoreFAMar2004_low.pdf>.

147. *Ibid.* at 14.

148. *Supra* note 145 at ii.

149. *Ibid.*

required before oil and gas development could be allowed to proceed in areas that may be subject to overlapping claims of jurisdiction. Similar to the Beaufort Sea situation, it would be in the interest of both countries to obtain jurisdictional certainty through delimitation as to the precise areas over which they could regulate hydrocarbon development.

VI. *Principles and factors that influence boundary delimitation*

Article 6 of the *Convention on the Continental Shelf*¹⁵⁰ prescribes that when delimiting a boundary, the principle of equidistance is to be applied "unless another boundary line is justified by special circumstances." However, in the *North Sea Continental Shelf Cases*,¹⁵¹ the ICJ found that the equidistance method leads to inequitable results in certain geographic circumstances:

The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area is to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.¹⁵²

The Court concluded that the equidistance method was not to be regarded as a rule of law for the delimitation of continental shelf boundaries.¹⁵³ The Court went on to articulate that "international law ... permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at."¹⁵⁴

Interestingly, the equidistance principle was not carried over into the *UNCLOS* regarding delimitation of the exclusive economic zone and the continental shelf. The *UNCLOS* merely directs that the delimitation "shall be effected by agreement on the basis of international law ... in order to achieve an equitable solution."¹⁵⁵ Failing agreement, recourse may be had to third party resolution under which the tribunal would be expected to achieve an equitable solution.

150. *Supra* note 12.

151. *Supra* note 27.

152. *Ibid.* at para. 89.

153. *Ibid.* at para. 85.

154. *Ibid.* at para. 90.

155. *Supra* note 1, Articles 74, 83.

In the *North Sea Continental Shelf Cases*,¹⁵⁶ the ICJ discussed some of the factors that must be taken into account in order to achieve an equitable result in boundary delimitation—geological, geographic and the unity of the deposits across potential boundaries. Another factor identified was the element of a reasonable degree of proportionality which an equitable delimitation “ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines.”¹⁵⁷

In the Chamber's Judgment in the *Gulf of Maine Dispute*, it defined what it characterized as a “more complete and...more precise reformulation of the ‘fundamental norm’”:

What general international law prescribes in every maritime delimitation between neighbouring States could therefore be defined as follows:

(1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

(2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.¹⁵⁸

The Chamber observed that customary international law can only provide a few basic legal principles that lay down guidelines and that “it cannot also be expected to specify the equitable criteria to be applied or the practical, often technical, methods to be used.”¹⁵⁹ The Chamber also noted that there has been no codification of equitable criteria to be applied because criteria have to be adaptable to the circumstances of each case.¹⁶⁰ In the end, the equitable criteria and the practical methods applied by the Chamber to delimit the single maritime boundary in the *Gulf of Maine Dispute* were largely guided by political and coastal geography.¹⁶¹ The natural separation of ecosystems, which can guide division of the water column

156. *Supra* note 27.

157. *Ibid.* at paras. 97-98.

158. *Supra* note 113 at para. 112.

159. *Ibid.* at para. 81.

160. *Ibid.* at para. 157.

161. *Ibid.* at para. 195.

for fisheries, could not be used because it was not adaptable to a division of the continental shelf. Similarly, distinctive geological characteristics that would influence a division of the continental shelf would not be relevant to dividing the superjacent water column.¹⁶²

VII. *Dispute resolution for boundary delimitation*

The *UNCLOS* provides several options for the resolution of disputes concerning delimitation of maritime boundaries. In particular, the *UNCLOS* encourages and facilitates negotiated settlements among States Parties concerning the interpretation or application of the Convention or in respect of the forums and procedures for dispute resolution.

Delimitation of the territorial sea boundary between two opposite or adjacent coastal States is to be determined using the principle of equidistance such that neither State is to extend its territorial sea beyond an equidistant median line measured from the baselines of each State unless the States agree to the contrary. However, the equidistance principle will not be applied when boundary delimitation is necessary due to reasons of historic title or other special circumstances.¹⁶³

The delimitation of either the exclusive economic zone or the continental shelf between States with opposite or adjacent coasts is required to be "effected by agreement on the basis of international law, as referred to in Article 38 of the *Statute of the International Court of Justice*, in order to achieve an equitable solution."¹⁶⁴ In a "spirit of understanding and cooperation," negotiating parties are required to "make every reasonable effort to enter into provisional arrangements of a practical nature and, during [the] transitional period, not to jeopardize or hamper the reaching of the final agreement."¹⁶⁵

If delimitation cannot be agreed to within a reasonable time, the parties are required to resort to the procedures provided for in Part XV,¹⁶⁶ except if the parties have prescribed a process in a general, regional or bilateral agreement, the provisions of which would apply unless the parties otherwise agree.¹⁶⁷

Part XV¹⁶⁸ establishes the options and procedures for the various means of dispute resolution available under the *UNCLOS* related to its interpretation or application. Articles 279 and 280 again emphasize one

162. *Ibid.* at para. 193.

163. *Supra* note 1, Article 15.

164. *Ibid.* at para. 1 of Articles 74 (exclusive economic zone) and 83 (continental shelf).

165. *Ibid.* at para. 3 of Articles 74 (exclusive economic zone) and 83 (continental shelf).

166. *Ibid.* at para. 2 of Articles 74 (exclusive economic zone) and 83 (continental shelf).

167. *Ibid.*, Article 282.

168. *Ibid.*, Articles 279-99.

of the principle tenets of the *UNCLOS*—to encourage State Parties to settle disputes by peaceful means of their own choice and at any stage in a dispute or resolution process:

Article 279

Obligation to settle disputes by peaceful means

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

Article 280

Settlement of disputes by any peaceful means chosen by the parties

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this convention by any peaceful means of their own choice.

A State Party may invite the other party or parties to a dispute to submit the dispute to conciliation in accordance with the Annex V, Section 1 procedure or another conciliation procedure.¹⁶⁹

Subject to the limitations and exceptions enumerated in Section 3 of Part XV, Article 287 in Section 2¹⁷⁰ prescribes four means of settlement through third-party determination procedures: (1) the International Tribunal for the Law of the Sea established in accordance with Annex VI of the *UNCLOS*, (2) the ICJ, (3) an arbitral tribunal constituted in accordance with Annex VII of the *UNCLOS*, or (4) a special arbitral tribunal constituted in accordance with Annex VIII of the *UNCLOS* concerning the interpretation or application of the convention relating to (a) fisheries, (b) protection and preservation of the marine environment, (c) marine scientific research, or (d) navigation, including pollution from vessels and by dumping.

At the time of signing, ratifying or acceding to the *UNCLOS*, each state is free to choose by written declaration one or more of these four means for the settlement of disputes.¹⁷¹ In the event that a declaration has not been made, the default means for settlement is arbitration in accordance with Annex VII.¹⁷² When the parties to a dispute have selected the same procedure, the dispute can be submitted only to that procedure

169. *Ibid.*, Article 284.

170. *Ibid.*, Article 287, para. 1.

171. *Ibid.*, Article 287, para. 1.

172. *Ibid.*, Article 287, para. 3.

unless the parties otherwise agree.¹⁷³ Further, if the parties to a dispute have not accepted the same procedure, it can be submitted only to Annex VII arbitration unless the parties agree to the contrary.¹⁷⁴

A court or tribunal having jurisdiction under Section 2 of Part XV is required to apply the *UNCLOS* and the other rules of international law not incompatible with the Convention. However, this obligation does not prejudice the power of the court or the tribunal to decide a case *ex aequo et bono*,¹⁷⁵ if the parties to the dispute agree.¹⁷⁶ The decision of the court or tribunal is binding upon the parties to the dispute and it has no binding force except between those parties and only in respect of the particular dispute determined.¹⁷⁷

Section 3 of Part XV imposes limitations and exceptions to the applicability of the compulsory procedures prescribed by Article 287 in Section 2. In particular, Article 298 provides that a State may make a written declaration¹⁷⁸ that it does not accept any one or more of the four means for settlement provided for in Section 2 with respect to certain categories of disputes, including those related to boundary delimitations involving Articles 15 (territorial sea), 74 (exclusive economic zone) and 83 (continental shelf).

Where such an Article 298 declaration has been made, and a dispute has not been settled within a reasonable period of time, then upon the request of one of the parties, the parties must accept submission of the dispute to conciliation under Annex V, Section 2 of the *UNCLOS*.¹⁷⁹ Conciliation is conducted by a five-member Conciliation Commission that determines its own procedure, unless the parties otherwise agree.¹⁸⁰ The function of the Commission is to hear the parties, examine their claims and objectives and make proposals to the parties with a view to reaching an amicable settlement.¹⁸¹ Within twelve months of its constitution, the Commission is required to file its report, which would include, among other matters, such recommendations as the Commission may deem appropriate for an amicable settlement. The Commission's report is not binding upon the parties.¹⁸² Conciliation is terminated when a settlement has been obtained,

173. *Ibid.*, Article 287, para. 4.

174. *Ibid.*, Article 287, para. 5.

175. *Supra* note 6.

176. *Supra* note 1, Article 293.

177. *Ibid.*, Article 296.

178. The declaration may be made at the time of signing, ratifying or acceding to the *UNCLOS*.

179. *Supra* note 1, Article 298, para. 1(a)(i).

180. *Ibid.*, Annex V, Section 1, Article 3.

181. *Ibid.*, Annex V, Section 1, Article 6.

182. *Ibid.*, Annex V, Section 1, Article 7.

the parties have accepted or one party has rejected the Commission's recommendations or three months has expired from the transmittal of the report to the parties.¹⁸³

Following the presentation of the Commission's report, the parties are required to negotiate an agreement. Such agreement will be negotiated on the basis of the report. If the negotiations do not result in an agreement, the parties may submit the question in dispute for determination under one of the four means of dispute resolution provided for in Section 2, Article 287.¹⁸⁴

Canada and the coastal States with which it shares a maritime boundary, except the United States, which is not a signatory to the *UNCLOS*, have made declarations under Article 287 or 298.¹⁸⁵ Until such time as the United States ratifies the *UNCLOS*, any dispute involving the continental shelf boundary between it and Canada could be determined by agreement or third party resolution under the provisions of the 1958 *Convention on the Continental Shelf*.¹⁸⁶

VIII. *Arrangements for transboundary development*

Delimited boundaries for continental shelves will often necessitate and therefore lead to cooperative arrangements between adjacent coastal States for the development of hydrocarbon resources that extend across a boundary. This enables coastal States to obtain their equitable share of transboundary hydrocarbons, diminish the potential for disputes and conflicts regarding potential inequitable drainage and lessen the risk of causing waste of the resource. In the *North Sea Continental Shelf Cases*, the ICJ discussed transboundary resources:

...it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no farther than the North Sea, the practice of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted.¹⁸⁷

183. *Ibid.*, Annex V, Section 1, Article 8.

184. *Ibid.*, Article 298, para. 1(a)(ii).

185. The declarations are listed online: <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partII/chapterXXI/treaty6.asp#Declarations>>.

186. *Supra* note 12.

187. *Supra* note 27 at para. 97.

The Court made reference to examples of cooperative arrangements for transboundary resources, specifically the 10 March 1965 agreement between the United Kingdom and Norway, the 6 October 1965 agreement between the Netherlands and the United Kingdom, and the 14 May 1962 agreement between the Federal Republic of Germany and the Netherlands.

Cooperative development avoids the legal uncertainty under the *UNCLOS* as to whether there is recourse in the event one country unfairly drains the transboundary reserves attributable to an adjacent coastal State or conducts operations in such a manner as to compromise the optimal recovery of the resource. The *UNCLOS* does not prescribe resource conservation and equity rules such as well spacing and well density requirements. Nor does it provide potential remedies as available in some jurisdictions that can ameliorate inequitable drainage or potential waste. Such remedies include rateable take orders,¹⁸⁸ common carrier declarations,¹⁸⁹ common processor declarations,¹⁹⁰ compulsory pooling orders,¹⁹¹ and compulsory unitization orders.¹⁹² To the extent that remedies against drainage or waste might be required for transboundary resources within adjacent exclusive economic zones, support could possibly be found in Article 59 of the *UNCLOS*:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.¹⁹³

Cooperative development agreements can be as simple as permitting each country to produce its share of the allocated resources through facilities located on their side of the boundary. Alternatively, the arrangements can create more complex relationships through unitizations with an

188. *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, s. 36.

189. *Ibid.*, s. 48.

190. *Ibid.*, s. 53.

191. *Ibid.*, s. 80.

192. *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, s. 38; *Canada-Newfoundland Atlantic Accord Implementation Act*, *supra* note 98, s. 173; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, *supra* note 98, s. 178.

193. *Supra* note 1. See also Article 142, which pertains to the "Area," being the seabed, ocean floor and subsoil beyond the limits of national jurisdiction. Although not explicitly applicable to transboundary resources between adjacent coastal States, it prescribes a principle to which reference could be made in any dispute regarding drainage or waste. It provides: "Activities in the Area, with respect to resource deposits in the Area which lie across the limits of national jurisdiction, shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie."

agreed-to regulatory structure or through joint developments under the jurisdiction of the country on whose side of the boundary the development occurs. Such a regulatory structure could involve the creation of a body that exercises authority over the issuance of development permits and approvals, the operational and environmental standards to be applied, the monitoring of operations, and the enforcement of applicable standards and requirements.

Depending upon the nature of the arrangement, cooperative development of transboundary hydrocarbons can provide the opportunity to efficiently utilize capital. This is so to the extent that duplication of facilities can be avoided or economies of scale can be achieved. Also, cooperative development could lessen overall environmental impacts, and enable each party to obtain its fair share of production or revenues.

In the Canadian context, the potential for transboundary development has been addressed for the delimited boundaries with Denmark (Greenland) and France (St. Pierre and Miquelon). Article 5 of the *Canada-Denmark (Greenland) Treaty*¹⁹⁴ provides that the parties shall seek to reach agreement on the joint exploitation of transboundary petroleum structures or fields or in respect of the part of a structure or field which is located on one side of the dividing line but is exploitable, wholly or in part, from the other side.

In 2001, Natural Resources Canada, in consultation with the Department of Foreign Affairs and International Trade, established a plan to negotiate an agreement with France concerning the exploration and exploitation of transboundary petroleum fields off St. Pierre and Miquelon.¹⁹⁵ One stated objective was that such an agreement would ensure that resource revenues are fairly and equitably allocated.¹⁹⁶ The corridor of the St. Pierre and Miquelon exclusive economic zone lies within the Laurentian Subbasin, the vast part of which underlies the Canadian side of the boundary. This is illustrated in Map III.

On 17 May 2005, Canada and France executed a cooperative development agreement, the "Agreement between the Government of Canada and the Government of the French Republic related to the Exploration and Exploitation of Transboundary Hydrocarbon Fields."¹⁹⁷

194. *Supra* note 108.

195. Canada, Natural Resources Canada, *2001-2002 Estimates, Part III – Report on Plans and Priorities* (2001) at 21-22, online: <http://www.tbs-sct.gc.ca/est-pre/20012002/rNR_e.pdf>.

196. *Ibid.* at 22.

197. Canada, Foreign Affairs and International Trade Canada, News Release No. 87, *Canada and France to Work Together in Atlantic Waters* (17 May 2005), online: <http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=382568&Language=E&docnumber=87>.

The text of the agreement has not been released and it has not yet entered into force.¹⁹⁸

There is potential for the transboundary development issue to arise with respect to the delimited boundary in the Gulf of Maine, including any future seaward extension from the termination point imposed by Canada and the United States upon the Chamber in the *Gulf of Maine Dispute*. The issue can also be expected to arise following future delimitation of continental shelf boundaries for the Beaufort Sea, the Dixon entrance if the West Coast moratorium on development is lifted, and possibly the Lomonosov Ridge.

A review of international precedents for bilateral arrangements governing cooperative development of transboundary hydrocarbons would exceed the scope of this paper. Suffice it to say that there is a multitude of precedent arrangements to help guide future cooperative development. These include the agreements referred to above as well as the Timor Sea Treaty between East Timor and Australia,¹⁹⁹ and the 2000 treaty between the United States and Mexico involving the Gulf of Mexico.²⁰⁰

Conclusion

Prior to the *UNCLOS*, certain aspects of the authority asserted by Canada over maritime areas beyond the territorial sea had not been recognized in international law either through treaty or customary international law. The *UNCLOS* has established clear rules and principles and provided jurisdictional certainty upon which coastal States may establish regulatory structures for the development of hydrocarbon resources within their continental shelves.²⁰¹ It has removed the jurisdictional uncertainty concerning the existence of rights held by coastal States to regulate oil and gas development on their continental shelves beyond the limit of the territorial sea and even beyond the 200-nautical-mile economic or resource zone claimed by many coastal States prior to the adoption of the *UNCLOS*.

198. Government of Canada, Canada Treaty Information, online: <http://www.treaty-accord.gc.ca/Details.asp?Treaty_Id=105028>.

199. *Timor Sea Treaty Between the Government of East Timor and the Government of Australia*, [2003] ATS 13, 20 May 2002 (entered into force 2 April 2003).

200. *Treaty Between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles*, 9 June 2000, S.Treaty DOC. No 106-39 (2000).

201. A reference to a coastal State's continental shelf means the seabed and subsoil within the exclusive economic zone and any portion of the continental shelf that extends beyond, but not further than 350 nautical miles or 100 nautical miles from the 2,500 metre isobath, as the case may be. See *supra* notes 76-79 and accompanying text.

The *UNCLOS* has established rules for the 200-nautical-mile exclusive economic zone. It has enlarged the potential breadth of a continental shelf and expanded upon the rights and obligations first provided for in the 1958 *Convention on the Continental Shelf*. These measures have clarified the nature and extent to which jurisdiction may be exerted over the continental shelf for the purpose of producing hydrocarbons.

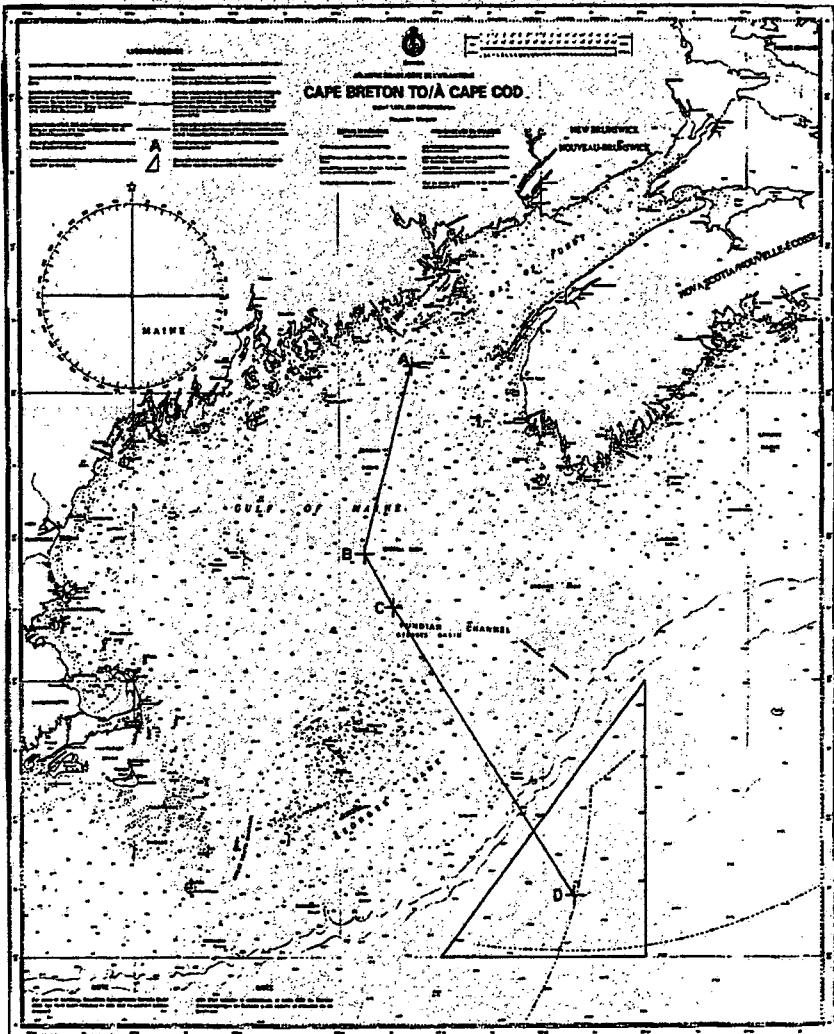
Canada has the sovereign right to establish regulatory regimes for its continental shelf respecting exploration, development, resource management and conservation, and protection of health and the environment. No other nations may explore or exploit hydrocarbons within any area of Canada's undisputed continental shelf even if such rights were not exercised by Canada.

Jurisdictional uncertainty associated with continental shelf boundary disputes can be eliminated under the *UNCLOS*. It has codified a norm of international law by directing that delimitation of boundaries should be by way of agreement to achieve an equitable solution. Failing agreement, the *UNCLOS* provides for well-defined dispute resolution mechanisms. These provisions established a foundation upon which Canada can engage in future boundary delimitation of the continental shelf in the Beaufort Sea between Yukon and Alaska, the Dixon Entrance between the Queen Charlotte Islands and the Alaska Panhandle, the Lomonosov Ridge, and the seaward extension of the boundary determined in the *Gulf of Maine Dispute*.²⁰² The results of such delimitations will enable Canada to apply the relevant regulatory regime for hydrocarbon development in these areas to the extent they have such potential and there is no moratorium on development.

Although the *UNCLOS* is silent with respect to the development of transboundary hydrocarbon resources, there is a multitude of international precedents for bilateral arrangements involving unitization, joint ventures or individual developments using agreed-to resource allocations. These arrangements can provide for development to be undertaken under the regulatory regime of one of the coastal States, by both coastal States under their respective regulatory regimes, or under a new regulatory regime specifically established to govern activities and operations within a prescribed joint development area.

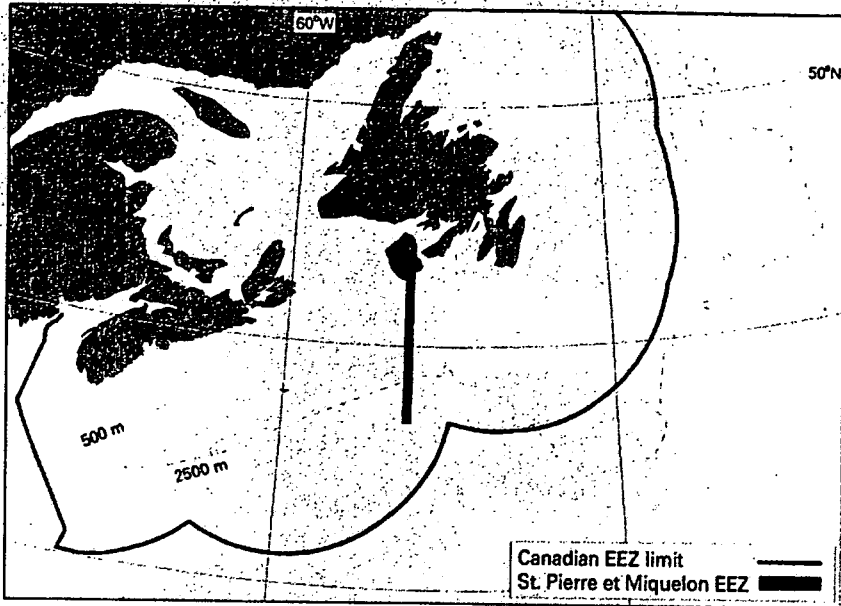
202. *Supra* note 113.

MAP I



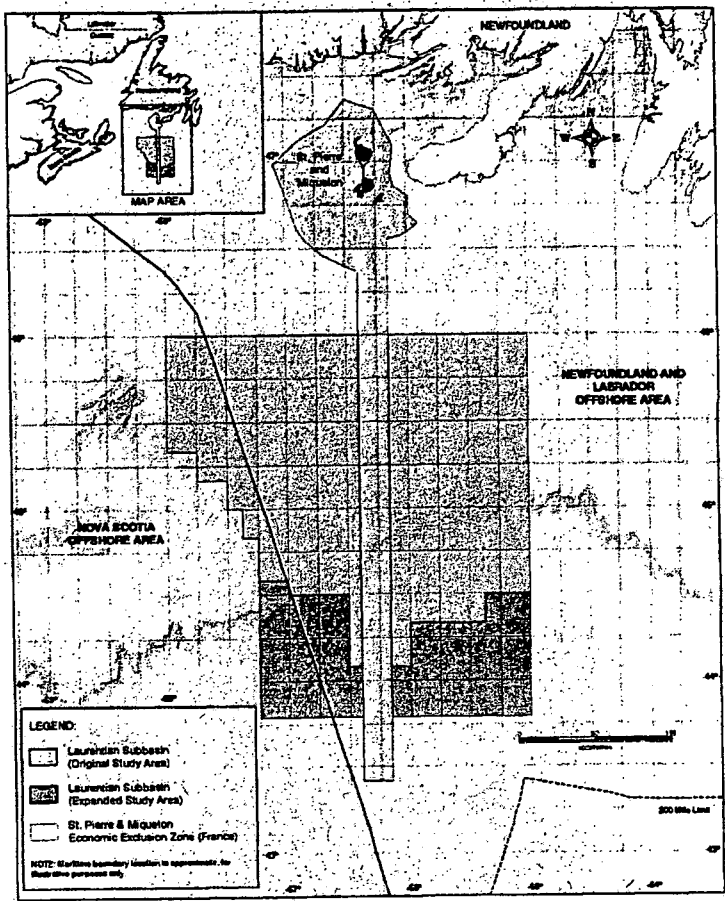
Source: *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)* [1984] I.C.J. Rep. 346 at 366.

MAP II



Source: Marc Plentegenest, Michael Iosipescu & Ron Macnab, *The French Islands of Saint-Pierre et Miquelon: A Case for the Construction of a Discontinuous Juridical Continental Shelf* (n.d.) at 7.

MAP III



Source: *Strategic Environmental Assessment - Laurentian Subbasin*, Jacques Whitford Environment Limited 2003, 14 November 2003 at 2, Figure 1.1.